THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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THE PRESIDENT'S CORNER

The fall months were highlighted by two important events which served, in one instance, to enhance our amicable relations with the Maritime Bar of Panama, and in the other, to aid in the promotion of NYMAR as the marketing mouthpiece for everything maritime that New York and its tri-state cluster have to offer.

The guest speaker at our October luncheon, Tomás Ávila, is the president of the Panamanian Maritime Bar Association and is the driving force in Panama's effort to establish a center for mediation and arbitration of maritime disputes. His visit followed several months of consultations and discussions and his talk explained their ambitions and reflected on our cooperation with them in those efforts. The SMA has again been invited to take an active role in the bi-annual seminar/exhibition Panama Maritime VII, to be held February 4 to 7, 2007.

NYMAR's (New York Maritime) ambitions of establishing itself as the marketing organization for the maritime interests of New York and its tri-state area took a big step forward when it staged a stimulating seminar at the Fordham Law auditorium, which drew a crowd of approximately 150 attendees from a diverse spectrum of finance, law, banking, ship-owning, industrial corporations, importers, exporters, port and terminal operations, shipbrokerage and dispute resolution. The SMA has been an early member of this effort and took an active part in organizing this event. It is hoped that this successful event will go a long way toward increasing the diversified membership needed to support this essential effort.

We all look forward to an active winter session. Don't forget to take advantage of the early-bird fees for ICMA XVI in Singapore (February 26/2 March, 2007) by registering before November 30th. The SMA plans to again conduct its popular two-day seminar on Arbitration in New York, either in January or February 2007 and I have been invited to make a presentation at the next meeting of the "NY Group of P&I Correspondents and Representatives" sometime early next year.

I look forward to seeing many of you at any of our forthcoming events.

Klaus Mordhorst

APPEARANCES COUNT

[In the following I am pleased to publish another contribution from Chris Hewer. In the July issue I explained why he wrote then, but just in case you are wondering why an Englishman now seems to have a by-line in our newsletter, the answer is quite simple – I asked him, he agreed, I enjoy his writing and so do others. I do hope that Chris will be kind enough to continue doing so. -M.A.]

An English high court judge was once asked what formula he used to decide the level of salvage awards. He explained, "I lean back in my favourite leather batwing armchair at my club, with a glass of Napoleon brandy and a Havana cigar. I sip my brandy, I draw on the finest Cuban tobacco, and I blow smoke-rings up towards the ceiling.

"I do this for quite a while. Then I have another brandy, and I continue to blow smoke-rings. By the time I have poured a third brandy, a figure starts to appear through the smoke on the ceiling. After a fourth brandy, the figure becomes clear, and I insert it into a beautifully written and faultlessly reasoned award."

Maritime arbitrators tend to be more scientific about their awards. But is enough care and attention paid to the manner in which those awards are written, and the way in which they are presented?

New York wears its heart on its sleeve with its award service, and it is possible to access awards from Europe and from the Far East, for example. The French are even making efforts to publish awards in English, which really puts the English to shame.

The next question is, does it really matter how the awards are reasoned and presented? There is a huge variation in the readability of awards, even within arbitration centres. Expensive arguments are never easy to explain. But they are more easily understood if they are written in plain language, properly punctuated, with lots of paragraphs, generous margins, and plenty of white space between lines of text.

Awards should be as succinct as possible. Long words should not be used where short ones will do, and technical terms that a lay audience will not understand should be avoided. As far as possible, arbitrators should write something that their wives or husbands will understand, without losing their credibility with their specialist audience. Arbitrators, unlike lawyers and journalists, are not paid by the word, so there is no more excuse for verbosity than there is for showboating.

Publication is a powerful discipline. There is not a person alive who has not taken more care with a piece of writing that he or she knows may be widely read, than with a document that will have a very privileged readership. Enlightened arbitration centres make their awards available for wider circulation. In this way, other parts of the world get to know what is happening in New York, for example. Shipping is an international industry, and sitting on your groceries is no way to influence the choice of arbitration clause in a charter party.

New York has it right on publication. It should continue to publish readable and well-presented awards. It should work, also, to make contact with editors and commentators who are read by shipowners and charterers. And it should continue to successfully avoid the accusations of aloofness which have been levelled against maritime arbitrators in others parts of the world.

The story is told of a very pompous actor who received rave awards for what was deemed a faultless performance in a London play. After seven consecutive days of wonderful reviews in the national newspapers, one exasperated critic went to see the play for himself. His review in the paper the following morning consisted of one line of copy - "This actor is much too tall."

Arbitrators everywhere, of whatever professional and physical stature, could do worse than heed those words.

COURT DECISIONS

Rule B Attachments

Rule B Attachments and the resultant court proceedings are the talk-of-the-town at the moment. In the July issue, on page 9, David Martowski

referenced the *Winter Storm* decision in his report on the Cambridge Academy of Transport's Seminar on Charter Party Disputes. From the following you will see that *Winter Storm* is still alive and that it has been joined by some further decisions and appeals proceeding.

It might be in order to briefly comment on Rule B and its genesis as reflected in the *Aqua Stoli* Second Circuit decision.

Maritime attachment is a feature of admiralty jurisprudence that antedates both the congressional grant of admiralty jurisdiction to the federal district courts and the promulgation of the first Supreme Court Admiralty Rules in 1844 (*Aurora Maritime Co. v. Abdullah Mohamed Fahem* 1996 AMC 1755, 1758, 85 F.3d 44, 47 – 2 Cir. 1996). In fact, "the use of the process of attachment in civil causes of maritime jurisdiction by courts of admiralty … has prevailed during a period extending as far back as the authentic history of those tribunals can be traced." (*Atkins v. The Disintegrating Co.*, 85 U.S. – 18 Wall. – 272, 303 – 1874). The power to grant attachments in admiralty is an inherent component of the admiralty jurisdiction given to the federal courts under Article III of the Constitution. (U.S. Const. art III, par 2). The power's historical purpose has been two-fold; first, to gain jurisdiction over an absent defendant; and second, to assure satisfaction of a judgment. (*Swift & Co. Packers v. Compania Colombiana del Caribe*, 339 U.S. 684, 693, 1950 AMC 1089, 1096 – 1950).

Maritime attachments arose because it is frequently, but not always, more difficult to find property of parties to a maritime dispute than of parties to a traditional civil action. Maritime parties are peripatetic, and their assets are often transitory. (*Louisville Underwriters*, 134 U.S. 488, 493 – 1890) Thus, the traditional policy underlying maritime attachment has been to permit the attachments of assets wherever they can be found and not to require the plaintiff to scour the globe to find a proper forum for suit or property of the defendant sufficient to satisfy a judgment. (*Amoco Overseas Oil Co. v. Compagnie Nationale de Navigation*, 1979 AMC 1829, 1838, 605 F.2d 648, 655 – 2 Cir. 1979)

The Second Circuit Limits District Courts' Authority to Vacate Rule B Attachments

By David Martowski

This brief note does not do justice to the Second Circuit's July decision in *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*[1] that upheld a shipowner's attachment of electronic fund transfers ("EFTs") passing through New York City banks.

Briefs of *amicus curiae* clearly reflected that the international banking community does not share the enthusiasm of some New York maritime law firms for the recent flurry of maritime attachments.

In this case, the Liberian Owner commenced London arbitration when its Australian Charterer rejected tender of the AQUA STOLI on grounds of alleged unseaworthiness. The Owner obtained an *ex parte* order of attachment in accordance with Rule B(1)(b) of the Admiralty Rules, served various New York City financial institutions and attached EFTs that were being remitted to or from Charterer.

The Charterer successfully contested the attachment under Local Admiralty Rule E(4)(f). While the district court recognized the transient nature of vessels and shipping assets, it noted that Charterer had been in existence for more than eighty years with revenues exceeding $800M. Owner failed to demonstrate that the attachment was reasonably calculated to serve the historical purposes of obtaining jurisdiction over the defendant or securing a potential judgment and was not simply a tactical device to harass an adversary. The district court, applying a "needs-plus-balancing test", held that Charterer had carried its reciprocal burden of showing prejudice that substantially outweighed any benefit to Owner. It stated:

> Here, even plaintiff argues that the only benefit is to secure any future plaintiff's judgment against a highly improbable event, such as defendant's going into bankruptcy. By contrast, the attachment order imposes a highly probable and immediate burden on defendant, and potential disruption to the financial markets themselves,

> because of the uncertainty wrought by the erratic attachment of EFTs. In a world where transactions are expected to be consummated instantly and with certainty, the attachment of EFTs may cause a defendant and its business partners to unwittingly breach contracts and incur damages, legal and reputational, that far outstrip the sums to be attached. While such attachments may sometimes be appropriate, they should be permitted as a matter of necessity, not of right.[2]

The Owner appealed and leading U.S. financial institutions represented by The Clearing House Association L.L.C.[3] and the Federal Reserve Bank of New York[4] filed briefs of *amicus curiae* supporting Charterer's vacation of the attachment.

The banks presented detailed statistics arguably supporting their position that maritime attachment was causing disruption and administrative burdens for major financial institutions, as well as undermining confidence in the international banking system.[5] They re-emphasized that the Rule B order in this case was not reasonably calculated to serve at least one of the two historical purposes of maritime attachment and launched a full-scale attack on the Second Circuit's underlying decision in *Winter Storm Shipping, Ltd. v. Thai Petrochemical Industry Public Company Limited et al*,[6] arguing that it was in error and should be revisited and reversed.

Readers will recall that *Winter Storm* held that "when an individual or company transfers funds by means of an EFT, those funds may be subjected to maritime attachment in the hands of an intermediary bank without violating constitutional due process, whether or not the initiator of the transfer knew which intermediary bank would be used to effect it"[7] and that federal admiralty law regarded the Charterer's bank account as "property" subject to Rule B attachment.

The *Winter Storm* Court, relying on *United States v. Daccarett*[8] (holding that a drug cartel's EFT bank credit at an intermediary bank was a seizable *res* pursuant to Admiralty Rules incorporated by reference in the U.S. forfeiture statute), went on to state:

> It is of no moment that Daccarett was a drug case and this is an admiralty case, or that the civil forfeiture statute and the Admiralty Rules differ in their description of the circumstances justifying process against property, or that in Daccarett the government used Admiralty Rule C to arrest the funds while *Winter Storm* used Rule B to attach them. These are distinctions without a difference because they do not bear upon the decisive question presented, namely, whether EFT funds in the hands of an intermediary bank are subject to interdiction by legal process. Daccarett's holding that such funds are subject to Admiralty Rule C arrest furnishes authority for the conclusion that they are equally subject to Admiralty Rule B attachment.[9]

The Court concluded that since federal admiralty law applied, it was unnecessary to look to New York law (U.C.C. sec. 4A-503) as Charterer had contended.

The Clearing House and Federal Reserve Bank argued that *Winter Storm* was in error because it relied on a drug forfeiture case where property was not an issue, to define the property interests in the amount of a funds transfer. Contrary to *Winter Storm*, "property" is not defined in Admiralty Rule B(1) and there is no relevant applicable federal maritime law. New York's UCC sec. 4A-503 expressly does not allow for attachment of funds at an intermediary bank and therefore controls. *Winter Storm* inspired a consistent pattern of abuse of the maritime attachment process that flooded intermediary banks with *ex parte* orders designed to interrupt the international funds-transfer system and has been expanded into a "virtual vacuum cleaner for wire transfers through New York banks."[10]

The Second Circuit disagreed. In an opinion that traced the centuries-old history of maritime attachment in the Southern and Eastern Districts, the Court held that once a plaintiff has carried its burden

of establishing that its attachment satisfies the requirements of Rule B, a district court may vacate an attachment on certain very limited grounds where the defendant shows at a Rule E hearing that 1) the defendant is subject to suit in a convenient adjacent jurisdiction; 2) the plaintiff could obtain *in personam* jurisdiction over the defendant in the district where the plaintiff is located; or 3) the plaintiff has already obtained sufficient security for a judgment.

However, the banking community's briefs of *amicus curiae* did not fall on completely deaf ears. The Court noted their arguments that *Winter Storm* causes undue disruption to financial markets and stated:

> The correctness of our decision in *Winter Storm* seems open to question, especially its reliance on Daccarett * * * to hold that EFTs are property of the beneficiary or sender of an EFT. Because Daccarett was a forfeiture case, its holding that EFTs are attachable assets does not answer the more salient question of whose assets they are while in transit. In the absence of a federal rule, we would normally look to state law, which in this case would be the New York codification of the Uniform Commercial Code, NY UCC Law sec. 4A-502-504. Under state law, the EFT could not be attached because EFTs are property of neither the sender nor the beneficiary while present in an intermediary bank. * * *.[11]

Bruce Clark of Sullivan & Cromwell, Counsel of Record for The Clearing House Association, adds, "The Second Circuit took an important step in *Aqua Stoli* by recognizing that the legal analysis in *Winter Storm* is open to question. But orders of maritime attachment still are being entered in the Southern District, the harm to the international payments system continues, and the legal issues presented by *Winter Storm* must be finally resolved."

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1. 460 F.3d 434 (2d Cir. 2006).
2. *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 384 F. Supp. 2d 726, 730 (SDNY 2005).
3. An association consisting of the Bank of America, Bank of New York, Citibank, Deutsche Bank, HSBC, JP Morgan Chase, La Salle, UBS AG, Wachovia and Wells Fargo Banks. The Clearing House operates the CHIPS funds-transfers system that serves 47 US and foreign banks and processes daily over 285,000 payment orders with an aggregate total value of $1.4 Trillion. Brief of *Amicus Curiae*, en. 2 & pp. 3-4.
4. Twelve Federal Reserve Banks constitute the US central bank and operate/regulate the payments systems. They own/operate the Fedwire funds transfer system which involves over 7,000 financial institutions and on an average day in 2004 processed 495,000 transfers with an average daily value of $1.8 Trillion. Brief of *Amicus Curiae*, pp. 1-3.
5. In January, 2004 HSBC received 65 attachment orders that grew to 797 received in December, 2005. In February, 2006 Citibank received 70 active writs seeking to attach $195 Million. Brief of *Amicus Curiae*, pp. 2-6.
6. 310 F.3d 263 (2d Cir. 2002), *cert. denied*, 539 U.S. 927 (2003).
7. *Id.* @ 273.
8. 6 F.3d 37 (2d Cir. 1993).
9. *Supra*. @ 278.
10. Brief of *Amicus Curiae*, p. 5 & 14.
11. *Supra*. @ en. 6.

On October 18, 2006 the Hon. Charles S. Haight, Jr., Senior United States District Judge for the Southern District of New York, addressed the Admiralty Committee of the Association of the Bar of the City of New York. Judge Haight sat by designation and authored the opinion pursuant to which the lower court's decision was vacated and remanded to the lower court with instructions to reinstate the maritime attachment obtained by *Winter*

Storm. Before a full house, Judge Haight commented on the *Winter Storm* decision by the Second Circuit contrasting it with the findings in the *Aqua Stoli* (see Mr. Martowski's article above).

To a layperson, such as your editor, looking at the legal arguments surrounding the correctness of the Rule B attachments, Judge Haight's reference to "the interplay between a centuries-old admiralty law procedure and present day banking technology" explains part of the existing dilemma. I might have described it rather as a "collision course" because of the divergence from past procedures. In days gone by, the attachment of property was an explicit and physical event. A warrant for arrest *in rem* was obtained, the Marshal was dispatched and the vessel's steering wheel was chained or the cargo was seized. If the defendant was not found in the district, then its property could be attached.

With the EFTs you are dealing in fractions of time periods, I cannot really relate to the term nano-second, when a transfer moves in and out of the bank where it is to be attached. In footnote 7 to the *Winter Storm* decision the court wrote that when the plaintiff served its first process of attachment, the bank did not hold any of the defendant's funds but nevertheless a bank officer placed a "stop order" on funds belonging to the defendant and thereby, earlier "transiting" funds were being held in the bank when claimant's later processes of attachment were served. The explanatory comment also refers to Professor Jarvis' discussion of the *Reibor* case (759 F.2d 262 – 2d Cir. 1985) when he stated that "since the plaintiff normally will not know when the funds will reach the bank, and since the bank may have instructions from the defendant to move the funds to another bank as soon as they arrive, the plaintiff in such a case has no choice but to have process served on the bank in a continuous manner."

With more Rule B cases being argued in lower courts as well as the Court of Appeals it remains to be seen what the law of the land is.

SERVICE CONTRACT DISPUTES' FORA - ARBITRATION OR FMC - WHO HAS THE LAST WORD?

[Thanks to Keith Heard, Esq., Partner at the New York law firm of Burke & Parsons, for this contribution.]

The Federal Maritime Commission ("FMC") has ruled that an SMA award determining claims under a Service Contract did not prevent an NVOCC from pursuing claims before the FMC for an ocean carrier's alleged violations of the Shipping Act.

In SMA No. 3698 (2001), sole arbitrator Lucienne Bulow ruled that the ocean carrier, Aliança Navegação e Logística, Ltda., breached the Service Contract in several respects, resulting in $381,000 in damages to the NVOCC, Anchor Shipping Co. Specifically, the arbitrator ruled that Anchor was entitled to recover freight rate differentials (from having to ship goods at higher rates with carriers other than Aliança), lost profits, reimbursement of expenses and legal fees.

Less than eight months later, Anchor filed a Complaint with the FMC, seeking $1,000,000 in reparations, alleging that Aliança violated numerous sections of the Shipping Act. Interestingly, the FMC specifically found that "[t]he majority of Anchor's allegations directly relate to the breach of contract claim." *Anchor Shipping Co. v. Aliança Navegação e Logística, Ltda.*, 2006 A.M.C. 1271, 1274 (F.M.C. 2006).

Aliança moved to dismiss the Complaint, contending that the issues had already been decided in arbitration. Aliança pointed out that the arbitrator found that Aliança violated certain sections of the Shipping Act and referred to section 8(c) of the Act for the authority to apply a certain measure of damages. Finally, Aliança argued that the Shipping Act barred the dispute from coming before the FMC because the Service Contract provided that disputes arising thereunder would be submitted to arbitration. In response, Anchor contended that only the FMC had the authority to address and find Shipping Act violations and award reparations or assess penalties.

An FMC Administrative Law Judge ("ALJ") granted Aliança's motion and dismissed the Complaint. The ALJ determined that entertaining

Anchor's Complaint would undermine "both the strong policy encouraging use of arbitration instead of expensive litigation, and the policy of respecting the integrity of the parties' own contracts where they promised to arbitrate." *Anchor Shipping Co. v. Aliança Navegação e Logística, Ltda*., 29 S.R.R. 1047, 1055 (ALJ 2002).

The ALJ rejected concerns that (a) the FMC would shirk its responsibility to administer the Shipping Act if it deferred to the arbitration award and (b) the FMC or future parties would be bound by the award in other proceedings. With respect to the first point, the ALJ noted that the FMC would not be deferring to a court or a judicial forum but would instead be deferring simply to the parties' own agreement to participate in binding arbitration. With respect to the second point, the ALJ considered that arbitration should be encouraged as an alternative to litigation and concluded that "a decision emerging from binding arbitration has no precedential value in future proceedings." 2006 A.M.C. at 1277.

On appeal to the full FMC, the commissioners ruled that the ALJ's decision not to exercise jurisdiction over Anchor's Complaint was "incorrect".

The FMC determined that the threshold issue was "whether a party to a service contract who participated in arbitration and either could have or did raise all relevant Shipping Act claims in that proceeding, should now be barred from bringing a complaint before the Commission that pertains to the same service contract." *Id*. at 1280.

Reviewing relevant case law, the FMC noted that the D.C. Circuit Court of Appeals had held several times that a mandatory arbitration clause did not negate a federal agency's independent regulatory duty. The FMC held that its public duty to ensure that parties implement agreements that have been approved by and filed with the agency outweighed the parties' private right to have their disputes resolved through arbitration. Accordingly, the FMC concluded that "the ALJ erred in deferring to the parties' arrangement to arbitrate disputes arising from the service contract." *Id*. at 1282.

The FMC noted that, under its ruling in *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635 (F.M.C. 1999), it would normally conclude that "allegations comprising contract law claims should be dismissed unless the party alleging the violations successfully rebuts the presumption that the claim is no more than a simple breach of contract claim." 2006 A.M.C. at 1283. However, where the alleged violation raised issues beyond contractual obligations, the FMC would employ a rebuttable presumption that "the matter is appropriately before the agency." *Id*. at 1283-84.

Applying the *Cargo One* test, the ALJ determined that the presumption that some of the claims are inherently Shipping Act matters that should be heard by the FMC had been rebutted because Anchor had won a sizable award in arbitration on its breach of contract and Shipping Act claims and Aliança had paid it.

The FMC concluded that "[t]hese facts alone are not sufficient to rebut any presumption as to the specific allegations raised by Anchor's complaint. As a result, the Commission will have to remand this matter to an ALJ to determine which allegations involve elements peculiar to the Shipping Act." *Id*. at 1284. Essentially, the FMC's ruling turned on the fact that Anchor's Complaint contained "allegations specific to the Shipping Act such as: unfair or unjustly discriminatory practices, undue or unreasonable preferences, and undue or unreasonable prejudice or disadvantage." *Id*. Summing up its decision , the FMC wrote that:

> Arbitration is binding on the parties as to breach of contract claims,but it cannot prohibit the Commission from exercising its statutory obligations. The Commission's obligation to ensure the legality of service contracts is of paramount importance. Because alleged Shipping Act violations are intertwined with breach of contract issues in the present case, such matters must be resolved before the Commission.

Id. at 1285.

The FMC remanded the case to the ALJ to address "only those allegations involving Shipping

Act violations", while "any disputes previously addressed by the Arbitrator that are based on common law breach of contract claims shall remain binding upon the parties." *Id*. at 1286.

In a concurring opinion, FMC Chairman Blust and Commissioner Dye made additional points. They declared that under Section 11 of the Shipping Act, the FMC did not have discretion whether to hear filed Complaints but was *required* to do so unless the parties reached a settlement. They also thought the ALJ had fundamentally misapplied the FMC's ruling in *Cargo One v. COSCO* since, as they read that decision, Anchor's assertion of violations "that are particular to the Shipping Act" required that the matter "move forward to the discovery phase", regardless of whether there had been a prior arbitration award between the parties. 2006 A.M.C. at 1288.

On a separate point, the authors of the concurrence maintained that there are limits on the extent to which the FMC (and the parties) are bound by an arbitration award under a service contract. They wrote that while "[p]rivate arbitration remains appropriate for construing a service contract's terms", it is not appropriate for determining "the legality of the service contract itself" or whether a party thereto had violated the Shipping Act. Thus, in their view, any private arbitration decision finding a Shipping Act violation "would not be immune from subsequent [FMC] review." *Id*.

PEOPLE & PLACES

Lawyers on the move:

* MLA President Lizabeth L. Burrell has joined Curtis Mallet-Prevost Colt & Mosle.
* Robert J. Gruendel has joined DLA Piper US LLP.
* Healy & Baillie went midtown as of October 1 and joined forces with Blank Rome LLP in the Chrysler Building.
* William N. France, former partner of Healy & Baillie, has decided to pursue a commercial career. He can be reached at 212/860-2481 or poetadmiral@earthlink.net.
* Michael G. Chalos has terminated the partnership with the Fowler Rodriguez firm and will now practice under the banner of Chalos, O'Connor & Duffy.

- ICMA XVI Singapore – For those who plan to go, please remember that November 30, 2006 is the deadline for early registration (and the savings).

For those who will need more arbitration speeches in their diet, please note that the Chartered Institute of Arbitrators, Malaysia Branch, is planning to organize a one-day seminar on maritime arbitration in Kuala Lumpur on March 3, 2007, immediately following ICMA XVI in Singapore.

- On Friday, October 13, International Maritime Conciliation and Mediation held its inaugural business meeting and dinner in London. The group was founded by José M Alcántara. From New York, Raymond J. Burke, Michael J. Ryan and SMA member James N. Hood attended.

- On October 26, a conference was held at Fordham University for the promotion of New York as a maritime center. New York Maritime Inc. (NYMAR) was founded by members of the New York bar for the specific purpose of enlisting "players" in the tri-state area to ultimately promote and re-affirm New York as a center for international business and to advertise why people like to do business in New York and what it has to offer.

NYMAR solicited the collaboration of the SMA for the October 26 conference on "New York Maritime Matters: the Future of New York's Maritime Cluster in a Global Economy." The target audience was potential new members for NYMAR, it was not to fill the hall with SMA members or law firm associates, as their focus should already be on

promoting New York for the legal and arbitration business.

A formidable roster of speakers was assembled: Professor Joseph C. Sweeney (Fordham University School of Law) giving the welcome and introduction; Mary Helen Carlson (office of the Legal Advisor, U.S. Department of State) on "New York as a Legal Gateway;" The Hon. Charles S. Haight (Senior Judge of the Southern District Court of New York) on "The Silver Oar and the Southern District;" James M. Craig (President, The American Institute of Marine Underwriters) on "Meeting the Challenge of Marine Insurance;" Joseph E.M. Hughes (Chairman and CEO, Shipowners Claims Bureau, Inc / The American Club) on "P&I: The New York Perspective;" William Ellis (Assistant Director, Port Commerce Department, The Port Authority of New York and New Jersey) on "The Port: Maintaining Primacy amid Constant Change;" Robert J. Flynn, President, Mallory Jones Lynch Flynn & Assoc., Inc.) on "Shipbroking in the 21st Century;" James Lawrence (Chairman, Marine Money International) and Peter S. Shearf (Managing Director, AMA Capital Partners, LLC) on "New York: The Public and Private Face of the Financial Market."

The flyer defined the purpose of the event to bring together recognized leaders from various sectors of the New York Maritime Cluster, including law, finance, government, insurance and banking, to discuss the valuable relationship – past, present and future – between the New York community and the maritime industry.

The official program concluded with a spirited question and answer session, followed by a wine and cheese reception. The event was attended by close to 150 industry representatives.

MARITIME ARBITRATION, MEDIATION AND CONCILIATION IN PANAMA

Tomás M. Ávila M., partner in the law firm of Bufete Illueca and president of the Panama Maritime Law Association, addressed the October 11 SMA luncheon on the topic of "An Overview of the Upcoming Maritime Conciliation, Mediation and Arbitration Center of Panama."

The connections between the Panama Maritime Law Association and the SMA go back quite a few years. In the mid '90s, past SMA president David Martowski was invited to join the International Advisory Board of Panama Maritime, which, at the time, included an array of prominent shipping people such as Robert Ho, Chris Horrocks, Bill O'Neal, Professor Robert Force, just to name a few. Through David's contact, the SMA, in conjunction with the New York bar, sent a contingent to a conference in Panama. The New York delegation orchestrated mock arbitrations, the first one addressed cargo claims while the second covered the topic of security. Panamanian hospitality and great golf were reportedly enjoyed by all!

In April of this year, Tomás Ávila indicated an interest to speak to the SMA membership on the ADR developments in Panama and their plans to develop an international panel of arbitrators. In a continued attempt to provide topical and interesting luncheon speakers the SMA invited Mr. Ávila to speak.

Plans are under way for the next Panama Maritime Conference scheduled for February 4-7, 2007. The SMA and New York bar have agreed to participate in the proceedings with another mock arbitration.

David Martowski hosted a reception for Mr. and Mrs. Ávila, attended by members of the SMA and the New York bar.

Mr. Ávila presented the following luncheon speech:

An Overview of the Upcoming Maritime Conciliation, Mediation and Arbitration Center of Panama

The use of alternative dispute resolution to solve controversies arising from international commercial and maritime business has proven to be, throughout the years, an efficient way to handle these affairs, aside from assisting in the administration of

justice in expeditious solutions, as evidenced by the number of commercial arbitration centers operating around the globe, some of which are specialized in maritime business.

Nevertheless, unlike London, New York, Paris or Singapore, the general use of commercial arbitration in Spanish-speaking countries is not frequent, notwithstanding the fact that the institution of alternate dispute resolution has been present in our legislation for quite a while now. Actually, some of our legislation has adopted the UNCITRAL Model Law for International Commercial Arbitration.

However, save for CEAMAR, which is the Maritime Arbitration Permanent Center of the Iberia-American Maritime Law Institute, there are no arbitration centers in the Latin American countries, nor in Spain, specializing in resolution of maritime disputes. Hence, by default, Latin Americans submit their cases, out of our cultural environment, to arbitration in London or New York, by submission to the arbitration clauses normally included as standard clauses in maritime contracts, for example arbitration through The London Maritime Arbitrators Association by mandate of BIMCO standard clauses.

CEAMAR has not been particularly active and is virtually unknown. The Iberia-American Maritime Law Institute, from which CEAMAR was originated, has been recently promoting the use of this arbitration center through a series of seminars which were held in the capital cities of Central America, Panama, Mexico and the Dominican Republic. It has also come to our attention that in Spain the Spanish Maritime Law Association has been promoting the creation of an international commercial and maritime arbitration tribunal in the city of Valencia – according to them this is to follow the tradition of the Consolat del Mar, a tribunal which was seated in Valencia from the twelfth to the eighteenth century which solved commercial and maritime matters.

On a personal level I have been contacted by persons related to both projects. They oppose each other's initiative for one single reason – both CEAMAR, which is seated in Buenos Aires, and the Spanish MLA, have one thing in mind; monopolizing the ADR business. They have both expressed that we (Latin America, and in particular Panama) should not be aspiring to open up individual Maritime ADR centers, but that we should unite to make one center for Spain and Latin America, an affirmation which in my personal perception is both selfish and disappointing. As we speak, both initiatives are running separate and without intention of reconciling among themselves. During the first week of November the Spanish MLA will be meeting in Valencia to discuss this and other issues, and to possibly launch their Arbitration Tribunal and to ask that all Latin American countries join them to 'fight the English' and to not set up 'little arbitration centers', whereas the Iberia-American Maritime Law Institute will be meeting in Punta Cana and Santo Domingo during the second week of the same month to, among other things, urge for the use of CEAMAR and to invite all countries to literally suspend all ideas to set up maritime arbitration centers in each country and to join forces to get CEAMAR operational and widely used.

Panama cannot afford the time to see if either initiative will work, as we are living in exciting times with regards to the maritime industry and our participation is constantly growing.

We are growing towards the goal which many of us have dreamed about for years: a *par excellence* maritime nation.

With this in mind, the different sectors, both public and private, have identified the need to further enhance the maritime sector to increase the competitiveness of Panama in this growing industry.

When Panama assumed jurisdiction over the Canal Zone and the District Court of the United States of America ceased to have a seat in our country our legislators, upon an initiative of both the public and private sector, enacted Law Nº 8 of 1982 whereby the Maritime Courts of the Republic of Panama are created and the procedural rules are set. This specialized jurisdiction was assigned exclusively to know matters arising from acts related to maritime trade, transportation and traffic occurring within the Republic of Panama, its territorial and navigational waters, rivers, lakes and in the waters of the Panama

Canal. In addition, the Maritime Courts can acquire jurisdiction when the vessel is located within jurisdictional waters regardless of the applicable law to the relevant claim. The Maritime Jurisdiction was conceived as a specialized branch of the judiciary to ensure that it provides efficient and timely justice as per the old saying 'a stopped boat does not pay load.' Nevertheless, the truth is that over the years the time frame in which judicial cases known by these courts are resolved have reached such high levels that Panama is no longer a competitive jurisdiction for ship arrest and resolution of maritime conflicts.

In this respect, the Panama Maritime Law Association and the Panama Chamber of Shipping identified the need to enhance our jurisdiction to avoid that we lose all competitive edge with regards to dispute resolution arising from maritime cases. Hence, both organizations have agreed with the Panama Maritime Authority the relevant studies for the creation of the Maritime Conciliation, Mediation and Arbitration Center of Panama (CECOMAP).

On an international level, it is known that London and New York are the *par excellence* centers in which maritime cases are solved through arbitration. In our opinion these services may be well rendered in an alternate center within the same cultural environment and logistical advantages to the Latin Americans, which are our intermediate objectives, as explained later. This center could be located in Panama.

As a consequence, we have set out to develop a plan for the creation of our center investing hundreds of billable hours with a clear goal to create a center in which the maritime cases may be resolved by the use of alternate methods which have already proved their efficiency and effectiveness internationally.

Our prime objective would be for the center to act as a collaborator of the administration of justice taking into consideration the apparent maritime policy of our Government that promotes competitive maritime and related services. We hope that while the number of cases is shifted to the Center, the Maritime Courts will be able to handle their cases with more efficiency, thus reducing the cost of ships arrests and the total costs of the judicial processes in general.

The impact which we expect to cause with this project would be:

1. For Panama to become an international alternate dispute resolution center for maritime cases.
2. Reduce the cost of the process.
3. Increase the quality and efficiency of the legal maritime services.
4 Develop potential markets for arbitration, mediation and conciliation.
5. Develop the academic offer related to maritime law; and,
6. Increase the efficiency of the maritime courts.

Our volunteers are working under the sponsorship of the Compite Panama Program funded by the Inter American Development Bank and are currently in the process of contracting a local consultant who, together with the working group, will be in charge of the following:

Designing the operational scheme of the center.

Establishing the profile and list of arbitrators, mediators and conciliators.

Setting out competitive fees. In this respect, we will be carrying out comparative studies with local and international centers so as to ensure that we will be able to compete with other relevant international centers. We are also looking into competitive considerations, such as whether we should fix the fees of the arbitrators on an hourly rate, as in London, or offer fixed fees depending on the amount of the claim, as in Singapore.

Determining the infrastructure, equipment and human resources needed for the center.

Establishing academic training for the human resource; and

Elaborating a plan to promote the center in Panama and internationally.

We will also be contracting the services of an international consultant who will basically review the aforesaid actions, especially the procedural rules that would be proposed by the working group. These procedural rules, which to the extent allowed by our

laws will be based on the SMA rules, as kindly offered by your group, will also be compared to those of other international centers such as London and Singapore to determine the advantages, disadvantages and common aspects thus to incorporate the best features of these regulations into a strong legal body which we hope will be the base for the preferred alternate dispute resolution center in this side of the world.

We are aware that the center must first build up its prestige within the local maritime community in order to then attract international causes. To begin with, Panama is one of the few countries in the region that has an organized and functioning maritime jurisdiction which will allow the local and international community to have an option of a specialized center to resolve maritime disputes. Our problem is basically that the Maritime Courts are not responding as expeditiously as this dynamic industry requires, hence the local community will welcome this option.

As I said before, these are exciting times with regards to the maritime industry in Panama. The port operators are currently investing in port expansions of approximately two billion dollars with an increase in movement of 3.7 million TEU for the year 2008 and this is without including the Mega Port Project to be publicly contracted shortly. Evidently, we are looking at a possible increasing traffic and calling of vessels into our territorial waters with the expansion of the Panama Canal, hence a possible increase of maritime disputes. We think this alternative will be successful.

Even our Government is opening up to this possibility. The recently enacted Law No. 15 of May 22, 2006, allows the Government entities, and specifically, the Panama Canal Authority to include arbitration clauses in their contracts, something which was not contemplated before. This is certainly a plus for our center. Other pointers for our center will be:

* UNCITRAL Model Law was used for the enactment of our general arbitration law, Law Decree No. 5 of 1999.
* Panama is a signatory to the New York Convention of 1958 and the Panama Convention of 1975.
* Qualified and highly prepared professionals.
* Excellent facilities.

Our intermediate goal is to attract the Latin American market and in the long run be considered as an alternative to the well-known centers on an international level. In order to achieve this, the center will have independent administrative personnel, duly qualified in this area which will remain at all times impartial and helpful. We will not allow that any business with the center to be perceived otherwise.

So, you should expect from CECOMAP:

(1) Quick turnaround time for the awards;

(2) Confidentiality;

(3) Parties may choose the applicable law and the language of the arbitration;

(4) International Panel of Arbitrators, as we will not operate with a closed list for national arbitrators only; and,

(5) Impartiality and independence.

Finally, Panama is conveniently located in the middle of the Western Hemisphere and has excellent hotel and communication facilities, is easily accessible from major cities in the U.S. and all capital cities in Latin America, in addition to excellent golf facilities for your leisure time, so it should not be that difficult to conclude that it is a good place to hold an arbitration.

We are aiming to have the development studies and consultancies completed within the next few months and hope to be able to announce the opening of the CECOMAP during the Panama Maritime VIII World Conference & Exhibition to be held from February 4 to 7, 2007 in Panama City.

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MORE ON OCEAN ROGUES

By Austin L. Dooley, Ph.D.

Recently, an article appeared in the New York Times reporting on rogue waves. The reporter related many of the well-known incidents of vessel encounters with high waves and also the ongoing research in the field.

Sea stories abound with reports of enormous waves and extreme ship response to such events. On joining the Puerto Rico Maritime Shipping Authority vessel SS SAN JUAN as second mate in the summer of 1977, I was told about a near disaster when a rogue wave, on a perfectly clear day, appeared at the bow while the vessel was on its New York to San Juan run. The master, the AB on my watch and others onboard, recounted how the chronometers flipped in their cases when the bow went into the trough ahead of the crest, became submerged as the wave broke and moved aft causing the bow to slowly disappear into the water before reemerging as the vessel was lifted upward by the crest. The stories indicated all returned to normal after the wave passed.

The generally accepted definition of a rogue wave is one with a height greater than at least twice the average height of the highest one-third waves present in the seaway and that appears suddenly. The reference to the average height of the highest one-third waves is a reference to the significant wave height. Significant wave height is a common indicator of the overall sea state. The term is based upon the concept that a mariner would qualify the important (significant) existing wave conditions with a similar value obtained by a visual average of the higher and well-formed waves present. In addition to its total height, Dr. Gunther Clauss of the Technical University in Berlin, Germany, writing for 2004 Offshore Technology Conference, includes the ratio of the crest height to total height and expects ratio values of 0.6 or greater.

Douglas Faulkner, a naval architect who testified in the Derbyshire hearing, wrote in his introduction to the Rogue Waves 2000 Workshop in Brest, France, that mariners use terms such as “Holes in the Sea,” “Rogue Waves,” “Freak Waves” or “Walls of Water.” Other terms are also used. “Episodic Waves,” which was put forward by W. Buckley, also a naval architect, is one used to describe the elevated and steep wave events of limited duration. Another is “Extreme Storm Waves (ESW) ,” and was offered by climatologist and former National Climate Data Center researcher J.W. Nickerson, to describe those which appear within a developed storm sea.

Various factors in combination with nature’s forces explain the formation of the waves. In addition to the energy imparted to the ocean by atmospheric severe wind events, these factors include bathymetry induced refraction, reflection and diffraction, geologic or tectonic activity and non-linear wave-wave dynamics.

Geologic and tectonic activity such as earthquakes along a fault line or landslides on the coast may produce tsunamis such as the 2004 Indian Ocean event. The potential for devastation on land and coastal areas are enormous and, as the world has seen, not to be minimized, but reports from ships in mid-ocean during the Indian Ocean event indicated no POSEIDON like consequences. In fact, satellite measurements made over the Indian Ocean and the spreading tsunami made between 2 and 8 hours after the earthquake and analyzed by the National Oceanographic and Atmospheric Administration (NOAA), showed mid-ocean crest to trough heights of between about 0.6 and 1.4 meters with the width of the crest ridge extending more than a degree of latitude.

One source of rogue waves is swell. These are waves which spread outward and away from a storm center arriving at a distant location not affected by the originating storm. As the swell leaves the generating or fetch area, it travels across the ocean like ripples in a pond. On entering shallow water, the lower portion of the wave interacts with the bottom resulting in increased wave height, decreased wavelength and breaking surf. Some notorious shoal areas are Nantucket Shoals, Cape Horn, Cape of Good Hope and areas along the Indian Ocean coast of Indonesia and Australia. One localized study of the Norwegian coast found 24 areas, which, due to refraction or diffraction, could be considered dangerous.

Swell occasionally develop as an issue in maritime arbitrations or court cases. Violent motion caused by swell arriving on the western side of continents when a vessel is alongside the dock often results in delays and, if the issue is not properly understood, may result in arbitration. In the case of the M/V NEW CARISSA, a vessel grounding on the Coos Bay coast of Oregon in 2002, arriving swell played a key role in causing the vessel to go aground.

High swell are most common and well known to those living in the dangerous world of big-wave surfing, surfers who travel the world to catch the largest possible swells. The PBS special report, "Conditions Black," told how surfers eagerly anticipated riding 40 foot waves reaching the north coast of Oahu after North Pacific winter storms. Equally, if not more impressive, are the reports of conditions on Cortes Bank, a seamount about 100 miles southwest of San Diego. The Bank rises very close to the surface and it is where North Pacific swell are speculated to produce the mythical 100 foot wave in a relatively calm ocean. (Video clips of Cortes Bank 40 foot waves can be found on the internet.) A surfing contest has offered a group of big-wave surfers a prize of $60,000 for riding the biggest wave of the year at any surf break in the world. There is an extra $1,000 a foot for waves over 60 feet, and a grand prize of $250,000 for a documented ride of the first 100-foot wave.

Areas of swell interaction with strong ocean current systems also produce rogue wave activity. The more famous of these are the Gulf Stream, the Agulhas Current and the Kuroshio Current. The Times story included a description of the M/V WILSTAR incident in the Agulhas. However, here in the northern hemisphere, we have Gulf Stream North Wall events that portent danger to both large and small vessels. Under the right meteorological conditions, waves in the core of the Stream are enhanced due to current interaction. As a consequence, the National Weather Service Ocean Prediction Center (OPC) includes North Wall warnings in its forecasts. The NTSB report on the Norwegian Dawn indicates the vessel was heading northerly very near the axis of the Gulf Stream.

Extreme Storm Waves (ESW) situations are probably the most reported events. They result from hurricanes, meteorological bombs, polar front lows, gradient or katabatic wind type events, downbursts and similar wind events. Nickerson's study of ESW conditions reported that most rogue wave reports usually include some discussion of a steep-sided deep trough ahead and/or behind the freak wave. The trough and crest combination produces a wall of water like appearance. The wave is usually level crested for some distance to either side of the crest summit and the ESW deep trough is often reported as a "hole in the sea."

The Times article mentions the Draupner Jacket New Year's Wave when, during a storm in the North Sea on January 1, 1995, an ESW hit the Draupner Jacket offshore oil platform. The wave record, made by a wave measuring device onboard the rig, showed a maximum wave (Hmax 25.63m) to significant wave height (Hs 11.92m), ratio of 2.15 and a crest ratio of 0.72.

A particular form of ESW, wherein a group of large waves travel at an angle to the prevailing conditions, is the "Three Sisters." Nickerson writing in the Mariner's Weather Log (1986), described an event in which the United States Coast Guard Icebreaker Polar Sea encountered a "Three Sisters" event in the Pacific. Reports of Three Sisters events suggest "wave groupiness" or conditions in which larger waves travel together. The European Space Agency reported finding numerous examples of large wave groupiness in the MaxWave project mentioned in the Times article.

Groupiness is not explained by the linear theory of wave formation. Consequently, researchers have explored non-linear wave interactions. Kristian B. Dysth and colleagues at the University of Bergen, Norway, described research in which non-linear differential equations produce solutions found to provide a candidate explanation of freak waves. Dysth explains that the solution is called a "breather" and starts out as a small amplitude periodic wave train, which with time, begins to focus wave energy into a narrow part of the train by breathing it in from the surrounding waves. This results in an isolated increase in amplitude in a small part of the train. The

larger waves grow at the expense of the other waves in the train. Research is still ongoing as this explanation of freak waves does not explain situations in which waves with different lengths or directions are present, much as is found in the real world.

So, would a "breather" type wave explain the SS SAN JUAN event? The description of the wave by the crew related to me almost 30 years ago is remarkably similar to the results from mathematical calculations described in today's literature. The crew did not report a severe wind event and I did not get the impression that the vessel was in the Gulf Stream at the time. Considering the route, the vessel would have crossed the axis almost perpendicular to the core and spent a minimum time in the Stream. On the contrary, my impression is that the extraordinarily high wave rose up and above the good weather day waves and was totally unexpected, which fits the "rogue wave" definition and that of a breather type scenario.

THE ARBITRATOR ONLINE

From time to time we receive inquiries about past issues of THE ARBITRATOR. We are pleased to note that issues as far back as October, 1999 are readily available on the SMA website. Go to http://www.smany.org and click on the Publications link to the left.

Current and recent past issues are presented as individual files. A consolidated file, indexed by article title, is available for issues from October, 1999 through April, 2006, and is archived in Adobe PDF format.

There are three ways to access past articles of THE ARBITRATOR:

1) If you know the title of the article, simply find and click on it in the index provided.

2) If you are seeking a specific issue of THE ARBITRATOR, click on the Bookmarks tab to the left and then click on the issue you are seeking.

3) You can do an Adobe word search of key words which are likely to appear in the article you are looking for.

If you need assistance using these search methods, please email us at arbitrator@smany.org specifying the nature of your problem.

SOME PERSONAL NOTES . . .

I plan to keep this column as part of THE ARBITRATOR as it will give me an opportunity to be irreverent, critical, to vent or maybe even to inject some levity.

In response to my comments in the last issue, I had two reactions:

One reader must watch and enjoy the BBC series "Are You Being Served?" from which I borrowed the "I am unanimous in that" quotation by Mrs. Slocum. The show gets many of its laughs from double entendres relating to her cat. I guess our reader wanted a few cat jokes. Since humor or the art of joke telling is not one of my strong points, as even my friends tell me, I'll take a pass on that request. One of the better-known German humorists is Wilhelm Busch, who our member Stephen Busch counts as one of his ancestors, and whose wealth of stories and poems were translated into English by our late member Hans Proeller.

Michael Marks Cohen wrote:

"Re your remark in the last Arbitrator about being at risk when writing articles for publication, that someone might cite it against you – i.e. quote your article to rebut an inconsistent position you might take in a future matter.

"It should not be a big worry. When it happened to me many years ago, I told the Court 'I was younger when I wrote the paper and I'm much older and wiser now!'

"Professor Louis Loss dealt with the problem even more effectively. He was a leading authority about corporate law. One day when he was participating in oral argument before the Supreme Court of the United States, his opponent pointed out that Loss was advocating a position which was directly contrary to what he had written in a law review article. One of the Justices leaned over and

asked him about the inconsistency. Loss responded at once, 'I think better when I am getting paid!'"

Therefore, take comfort and write away. I am waiting for your contributions, and so are your fellow readers.

IN MEMORIAM . . . IRENE BOGUSZEWSKI

Just in case you wonder who Irene Boguszewski was, she was not an official member of the SMA but she was Sally's sister. Many of our members may remember her from the days when she assisted Sally at SMA events or with backroom office work, and this goes as far back as ICMA V in 1981 in New York. I met one of her daughters at the wake, and she had also helped out the SMA, as did Sally's nephews Joe and Rob. They had pitched in when we moved offices from 61 Broadway to 14 Wall Street and then again to 30 Broad Street. The whole family has been supporting members of the SMA. Thanks, Irene . . . we'll all miss you.

For THE ARBITRATOR

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