THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

VOLUME 38 APRIL 2007 Number 3

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THE PRESIDENT'S CORNER

A flurry of local and international events kept many SMA members busy and challenged during this first quarter of the year. Don Frost lectured at the annual Merchant Marine Academy conference at Fort Schuyler in January; the SMA's Austin Dooley conducted the third annual two-day seminar on Maritime Arbitration in New York to an enthusiastic group of students; in February a formidable delegation gave a well-received, in-depth lecture and panel discussion and staged a lively mock arbitration at the Panama Maritime VII conference in Panama City at the invitation of the Panamanian Maritime Law Association. Then it was off to Singapore for ICMA XVI, which proved to be an intellectually stimulating and rewarding experience; and finally, at the end of March, several members represented the SMA in supporting the Merchant Marine Academy Museum's annual event, this year honoring the Maritime Law Association of the United States and bestowing the prestigious Nathaniel Bowditch Maritime Scholar of the Year Award upon the Hon. Judge Charles S. Haight, Jr., a perennial supporter and friend of the maritime community

For more detailed reports on these various events, refer to the following pages. In the meantime, the monthly luncheons enjoy a growing popularity and audience. Please check with Sally at the office or on the website at www.smany.org for these and other upcoming events.

Have a great spring,

Klaus Mordhorst

SPEAKING THE LANGUAGE

by Chris Hewer

(I was asked whether I wanted to say something by way of an introduction to Chris' article. Relying on Robert Benchley: "Drawing on my fine command of the English language, I said nothing." - MWA)

American humorist Robert Benchley once said that examining words was one of the easiest methods of acquiring insanity. He wrote, "Just examine a word you have written, and then call up Dr Jessup and tell him to come and get you. Tell him to wear just what he has on. Let us take a simple world like 'delve'. Write it out on paper, and then look at it steadily for half a minute. You can't believe there is such a word. On the other hand, you know that there is. You know that people have been using the word 'delve' for centuries, and that if it looks strange to you, you probably look strange to it. The longer you look at it the more you are convinced you have got it all wrong. Not only all wrong, but fantastically wrong. You have established a record for bad spelling."

One wonders what Benchley would have made of the maritime lexicon, which in truth hasn't changed very much in the 62 years since his death. Take a word like 'demurrage', for instance. Please. Can there really be such a word? And don't mention 'deadfreight', which even the American spell-checker doesn't recognise.

We can't all be linguists, speaking across nations. But neither must we be afraid of language. It is as well to remember that Indonesian is simply English with every second word repeated unless it ends in a vowel, Spanish is English spoken backwards with all verbs omitted and replaced by umlauts (pronounced 'filibuster'), and Dutch is best spoken in a voice heavy with ironing.

We must each write and speak for our own public. That is why and how the marine industry's own, special language has developed over the years. Ask the man in the street to construe a workaday charter party form, and he would be calling for Dr Jessup himself.

Some people, especially all of them, believe that the maritime lexicon was written and developed by lawyers, so that they could decide what it meant, when it suited them. This is nonsense. Lawyers are not that clever. The maritime language has developed through the thoughts and exigencies of generations of seafarers, and any attempt to interfere with it is not likely to succeed.

Some years ago, somebody invented a language called Seaspeak which, at the time, was hailed as the new sliced bread. But it has seemingly disappeared without a trace, witness one online source which diplomatically describes the Seaspeak manual as a 'hard-to-find title'. The only known review of the manual says, "I have read this book, I think."

The admirable objective behind Seaspeak was to make language simpler for the industry's international workforce, but its failure to catch on may lie in the pursuit of too much simplification. For example, Clause 4 of the Asbatankvoy charter, which reads, "The Charterer shall name the loading port or ports at least twenty-four (24) hours prior to the Vessel's readiness to sail from the last previous port of discharge, or from bunkering port for the voyage, or upon signing this Charter if the Vessel has already sailed," is rendered in Seaspeak simply as, 'Whatever'.

This is not to say that Seaspeak is dead. But it is, at best, resting. Shipping, like other industries, should stick to its knitting. It has its own language, and its own lawyers and arbitrators to sort out what it means, if anything. Similarly, people should stick to their own industries.

It was always a bad idea for P&I clubs to insure architects, and an even worse idea for anybody

to allow European dentists to become shipowners. At the height of the latter craze, a root canal specialist in Odense, boasting to a charterer sitting in his surgery that he was part-owner of a fleet of twenty tankers, was mortified to be told, "That's a lot of bottoms."

SMA LUNCHEON SPEECHES

In the first quarter of 2007, we had three interesting luncheon topics: on January 10, Bill Honan and Chris Nolan spoke on "Non-Discovery E-Mail Issues;" on February 14, John Witte was to speak on "The American Salvage Association's Overview of Current Issues in Salvage" (unfortunately, extreme weather conditions prevented his appearance and Tom Fox presented the paper); and on March 14, James J. Devine addressed "Recent Developments in Container Terminal Operations." The January 10th presentation is reproduced below. The others, including G. Maitland's "Ship Registries and What They Do," will appear in subsequent issues of this newsletter.

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E-COMMERCE AND E-DISCOVERY: A Brief Primer For Maritime Arbitrators, Practitioners, And The Industry

by Christopher R. Nolan and William J. Honan

Email usage has grown exponentially. It is estimated that over sixty billion emails were sent during 2006. With Blackberry's and other hand-held communication devices becoming commonplace, the number of emails sent and received will continue to increase rapidly. Unsurprisingly, emails play a critical role in the maritime industry. Negotiations ranging from the chartering of vessels to the sale of goods are conducted by email. With email being an effective, quick, and inexpensive means of communication, it has become the primary operational tool for vessel nominations, schedule changes, ETA's, NOR's and similar notices. Usually, the usage of emails in these situations does not pose a problem. The same cannot be said for email usage in non-operational matters where there can be a significant adverse consequence if an email is mis-sent or otherwise not received, inadvertently deleted or blocked by a computer's spam filter.

One area of particular concern in the maritime industry involves notice provisions in non-operational provisions, such as, anti-technicality clauses or default clauses. Traditionally, maritime contracts permit notices by mail, telefax, overnight courier or email. Sending notices by email can be risky. To avoid the possibility that the intended recipient does not receive an email due to computer problems or having been on vacation in an inopportune time, there are a few possibilities one should consider. The easiest, of course, would be to not include email as an approved method for notice purposes. This remedy though may not be realistic in the electronic age and may be too restrictive when other possibilities provide reasonable safeguards. For example, the parties can agree that notices are to be received by two individuals (with in-house counsel being the logical second candidate), or all notices must be sent by two means of communications. This ensures that the speedy email communication is backed-up by a traditional, reliable method. The least risky and the most efficient way of dealing with this problem is to create two different notice provisions, one for operational matters (for which emails post little risk) and a second for non-operational matters (for which emails may not be appropriate).

When parties choose to litigate maritime disputes, emails also can play a role. In commencing an arbitration, the parties can agree to commencement by email in the contract though the usual practice is to incorporate by reference certain rules which provide for email commencement. For example, if the rules of the Society of Maritime Arbitrators are incorporated into an agreement, section six requires only "written notice" for commencement purposes. Hence, an email notice would qualify. However, the same cannot be said for the rules of the American Arbitration Association as Rule R-39 may require agreement of

the parties for the commencement of an arbitration by email.

Contracts that are agreed electronically and are governed by local state or federal law generally are enforceable. The Electronics Signature in Global and National Commerce Act (or "E-Sign"), 15 U.S.C. § 7001 et seq., is applicable when federal law is applicable while the Uniform Electronics Transitions Act (or "UETA") is applicable in most states (currently forty-six but notably not including New York). Under both laws, electronic signatures are valid, an electronic contract is enforceable, a law requiring a "writing" is satisfied by an electronic record and any signature requirement will be met with an electronic signature.

Effective December 1, 2006, the Federal Rules for Civil Procedure were amended to provide for discovery of evidence stored electronically. Those amendments require the following: (1) early attention to the computer systems of its client and preservation actions taken (Rule 26(f)); (2) the assertion of privilege for inadvertently-disclosed emails (Rule 26(b)(5)); (3) the determination of whether electronically stored information is reasonably accessible (Rule 26(b)(2)(B)); (4) the specific recognition of electronic discovery with respect to interrogatories, requests for documents and subpoenas (Rules 33, 34 and 45, respectively); and (5) a safe-harbor provision protection against sanctions for electronic discovery lost during the routine operation of an electronic information system (Rule 37).

One amendment that is particularly important concerns the Rule 26(f) discovery conference requirement. In the past, lawyers would meet shortly before the conference with the Judge to discuss documents to be produced, the number of depositions needed and similar discovery issues. The interaction between counsel and the client in preparation for this meeting was minimal. Now, attorneys are required to have a working knowledge of its client's computer systems, document retention policies and the kinds of data in the company's possession so that counsel can agree on the scope of electronic discovery and present their joint plans for court approval. With maritime arbitrations, counsel should be aware of areas where critical electronically stored information may be located in anticipation of detailed discovery requests.

This additional flow of electronic discovery may have unintended consequences such as the inadvertent production of privileged materials. If privileged materials were inadvertently produced, the producing party can attempt to cure this error by relying on Federal Rule 26(b)(5)(B). Under that new Rule, once the producing party provides notice to the receiving party that privileged materials were inadvertently provided, the receiving party is required to return, sequester or destroy the materials. Sequestration would be necessary if the receiving party believes that the electronic materials are not privileged, as claimed, and the parties seek a decision by the Court as to the proper invocation of the claimed privilege. With arbitrations, the Rule provides persuasive authority as to how arbitrators should consider the matter if the parties cannot come to an agreement and the electronically stored information is relevant to the dispute.

The Rule 37 safe harbor provision is equally important. With no "bright line" maritime statute of limitations, it is possible for electronically stored information to be relevant in a litigation or arbitration long after most parties would have thought they needed to be preserved. To protect the routine and good-faith destruction of business-related emails and electronic information, Rule 37 provides that a party would not be sanctioned for those acts if the party were to be following its normal retention policies and could show that there was no reasonable possibility that the information would be relevant to a dispute at the time that the information was destroyed. If it is apparent in an arbitration that certain electronic materials should have been available for discovery, the arbitrator may seek additional information concerning when the information was destroyed. Thereafter, the arbitrator may determine if there was any reasonable possibility the party should have known the electronic materials would have been relevant to future legal disputes.

In this electronic age, emails and electronically stored information will have a significant impact on the maritime industry and

maritime litigation. Practitioners, arbitrators and the industry should pay careful attention to issues concerning email usage in negotiations, notice provisions and the exchange of e-contracts. Further, the pervasiveness of electronically stored information will affect the way companies conduct business in particular in connection with preserving and storing data for future commercial use or potential litigation. With electronic information vital for evidentiary purposes, it is critical to understand the new legal landscape and to prepare accordingly.

(William J. Honan is a partner with the law firm Holland & Knight LLP and is the head of its maritime practice group. Christopher R. Nolan is a senior associate with Holland & Knight LLP and is a member of its maritime practice group.)

BOOK REVIEW

A Shipwreck Story is a "Hubris Machine"

by Captain Edward Lundquist, U.S. Navy (Ret)

There are many who go down to the shore and smell the sea. Then there are seafarers who spend days, maybe weeks or months at sea, and when they finally approach the coast smell the same thing, only for them that smell is the land.

So it is with ***"The Tragic History of the Sea - Shipwrecks from the Bible to Titanic."*** It is not so much a compendium of stories about ships that were lost at sea, but of ships that found land, and under the most unfortunate circumstances, because most of these tales take place when a ship runs aground.

A shipwreck story is a "hubris machine," says Anthony Brandt, who edited this book. "So many of these ship-wrecks come out of someone's carelessness or over confidence," Brandt says. "Like the old saying, pride goeth before a fall. The captain says, 'bah, there's no land for 300 miles'; then they run into a continent and 200 people die."

This is a book about shipwrecks and tragedies of the sea. For those who have been to sea, no explanation of the hazards of the sea is necessary. For those who have not, a full explanation is not possible. Even in the loneliest oceans a seafarer can find trouble. "They run aground, but they also run into storms, icebergs, rogue waves, whales, and other hazards. I suppose running aground is the most common cause of shipwreck," Brandt says.

Some of the accounts are old, more like legends handed down over generations. I asked Tony Brandt if these stories are to be read as something between fact and fiction, or enjoyed for the fantastic nature of these tales?

"Actually all the stories we printed are nonfiction accounts taken from a considerable variety of sources. The Bible story about St. Paul may be fiction, but it's printed as fact so I took it at face value. And I mention an ancient Egyptian source in my introduction that is obviously fantasy, as serpents aren't covered in lapis lazuli and they don't talk. The selections themselves all come from reasonably authoritative accounts, no doubt with some embellishment, but not admittedly so," Brandt says.

Brandt decided not to include fictional accounts. He didn't need to. He wanted the reader to understand that what actually happens at sea is often as extraordinary and involving as any fictional story. Brandt says, "As for corroborating the stories, that's a modern idea that doesn't enter into it. In the case of the Titanic, for example, hearings were held to try to get the straight story of what happened. Lots of people had different experiences and different opinions and out of that various people have constructed narrative accounts. But you can't always corroborate experience. It's like the old eyewitness thing in court; different people see the same thing differently."

The Titanic is one of the most notorious sinkings. The 882 ft. White Star liner on her maiden voyage for the London - New York trade, was a good example of the hubris Brandt refers to. The builders and owners said Titanic was unsinkable. The Captain's adherence to this belief held fast even as she was taking on water after being holed by an iceberg on April 14, 1912.

"The Cotton Mather account, to be sure, is not of this 'factual' nature. You have to believe in ghost ships to believe that story actually happened," Brandt

says of Mather's tale about sightings of a phantom ship.

Many of the stories in Brandt's book have one peril heaped upon another. So I asked him which tale had the most misfortune. "That's hard to say," he said. "I suppose the story 1 found the most relentless in terms of bad luck was the last voyage of Sir Thomas Cavendish, known as '*The Navigator*.' Their misfortunes just never seemed to stop."

Cavendish met his end in 1592, but sailing around the world was tough business in those days, and not all that the stories might have the folks back home believe. Sure, the stories said Cavendish's ships were gilded with gold. But in 1587, while at war with Spain, Cavendish came ashore at a Spanish settlement in the Pacific (now part of Chile) with the name of Rey Don Felipe and renamed it Port Famine, a name that would be sure to spur development. His foes would include the Spanish and the Portuguese, but his biggest adversary was the elements. His 1591 expedition resulted in the small flotilla becoming scattered in a storm and seeking refuge in and around the Strait of Magellan for the better part of a year. Cavendish might well be best forgotten as the third circumnavigator of the world.

"*From God's Protecting Providence, ... Evidenced in the Remarkable Deliverance of Divers Persons from the Devouring Waves of the Sea ... and Also from the More Cruelly Devouring Jaws of the Inhumane Cannibals of Florida*," a tale written in 1710 by Jonathan Dickinson about his 1696-97 voyage that ended up aground in Florida, is another example of "as bad as it is, it gets worse."

Christopher Columbus made several journeys to the new world, with varying degrees of success. Columbus suffered his share of timbers that rotted, water shortages, food that spoiled, natives that turned unfriendly, masts that broke and crews that narrowly survived wrecks. Brandt points out that Columbus lost a total of nine ships in his four voyages to the New World.

I asked Brandt how many shipwreck tales didn't make it into his anthology, and what quality did they lack that caused him to not publish them?

"There are thousands of shipwreck stories," he answered. "I made the selection based on what interested me most. I also wanted to get as many shipwreck stories that are thought to be classics in this genre as I could into the book. Length was a factor in the choices I made as well. And I wanted some historical range, because the genre is very old and it was important to make that clear. Many stories, some of them quite interesting, didn't make it into the book."

While there are common threads in all of the accounts, each offers a unique and compelling insight in life -- and death -- at sea.

"Men have been sailing for thousands of years now, and foundering, and those who survive have stories to tell, all of which are oddly the same. The same things always happen," Brandt writes. "Men break on the rocks, drown, starve, while a few live to tell the tale. And never are we not interested."

We can't not want to hear about these stories. As Brandt says, "Life in crisis, at its extreme, is always fascinating."

Captain Edward Lundquist, U.S. Navy (Ret.), is a senior science advisor for Alion Science and Technology in Washington, D.C. He supports the U.S. Navy's Surface Warfare Directorate and is a frequent contributor to Maritime Reporter & Engineering News & MarineNews. This book review originally appeared in the February 2007 edition of MarineNews.

*The book, "**The Tragic History of the Sea - Shipwrecks from the Bible to Titanic**" is edited by Anthony Brandt and published by National Geographic Books, Washington, DC* - ISBN 0-7922-5908-4

SMA EDUCATION COMMITTEE

by Austin L. Dooley, PhD

This past February the SMA's Education Committee conducted its third annual course on "Maritime Arbitration in New York." Attendees traveled from as far as Texas, Key Largo, Virginia Beach and Washington, D.C. to attend the two day course and consisted of those involved in ship operations, chartering and brokering as well as federal government and private practice attorneys.

The Society re-initiated the course as an update of the successful program it once offered at the World Trade Institute. The objective of the program is to bring forward an education course so that those involved in arbitration matters have the opportunity to gain a better understanding of the process as conducted here in New York. The course is taught by Professor Jeffrey Weiss of the Maritime College who received a series of outstanding compliments from the attendees on his teaching skills.

Day one topics included a full discussion of the rules and the process of commencing an arbitration, arbitrator ethics, the hearing, and evidentiary considerations. On day two, attendees were briefed on the type of awards, interim and final, discovery, security, time bar and confirmation and *vacatur* of awards. The wrap up of the course consisted of an exercise in which attendees were tasked with the roles of claimants, respondents, and arbitrators. On this, one member of the course wrote, "I found the most valuable aspect of the seminar was the final simulated run-through of an arbitration proceeding which pulled together the rules, principles and procedures one would be exposed to in an actual arbitration."

(Dr. Dooley is a member of the SMA and the Chair of its Education Committee)

COURT DECISIONS

EN BANC FIFTH CIRCUIT CONSIDERS EXTENT OF ARBITRATOR'S DISCLOSURE

by Keith W. Heard, Esq.
(Partner, Burke & Parsons)

In Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968), the Supreme Court considered what an arbitrator must disclose about past dealings and relationships to avoid disqualification for partiality. A clear-cut ruling by the Court should have cleared the air on this issue. However, there has been some controversy among the circuit courts of appeal over whether Justice Black's opinion or Justice White's concurring opinion best represents the ruling of the Supreme Court.

Recently, the issue of the proper extent of an arbitrator's disclosure and the proper interpretation of Commonwealth Coatings came before the Fifth Circuit Court of Appeals *en banc* in Positive Software Solutions, Inc. v. New Century Mortgage Corp., 476 F.3d 278 (5th Cir. 2007), a case in which an arbitration award was initially vacated because the sole arbitrator failed to disclose his prior – allegedly limited – contact with an attorney for the prevailing party.

In January 2001, New Century licensed an automated software support program from Positive Software. Two years later Positive Software alleged that New Century copied the program in violation of the parties' agreement and applicable copyright law. Positive's allegations of breach of contract, misappropriation of intellectual property, copyright infringement and other claims wound up in arbitration in a proceeding administered by the American Arbitration Association ("AAA"). The parties selected attorney Peter Shurn to arbitrate the case and he agreed, after telling the AAA he had nothing to disclose regarding past relationships with either party or their attorneys.

Positive Software lost the arbitration and was ordered by the arbitrator to pay $1.5 million in legal fees. However, upon conducting a detailed investigation into Mr. Shurn's background, Positive learned that Shurn and his former law firm had represented the same party (Intel Corporation) as New Century's counsel, Susman Godfrey L.L.P., in patent litigation between Intel and Cyrix Corporation. Moreover, Ophelia Camiña, one of Susman Godfrey's attorneys in the New Century arbitration, had also been involved in the Intel litigation.

However, the contact between Shurn and Camiña may have been minimal. The Intel litigation involved six different lawsuits in the early 1990's. Intel was represented by seven law firms and at least thirty-four lawyers. Camiña worked on three of the cases and Shurn, along with twelve other attorneys from his firm, worked on two of those three.

The Court of Appeals described the situation as follows: "Although their names appeared together on pleadings, Shurn and Camiña never attended or participated in any meetings, telephone calls, hearings, depositions, or trials together." Id. at 280. A request by Positive Software for more discovery of the relationship between the arbitrator and the Susman Godfrey law firm was apparently rejected by the District Court on the grounds that the record already established a failure to disclose a relationship that required *vacatur*.

The District Court granted Positive Software's motion to vacate the arbitration, finding that Shurn's failure to disclose "a significant prior relationship with New Century's counsel" created an appearance of partiality requiring vacatur. Positive Software Solutions, Inc. v. New Century Mortgage Corp., 337 F.Supp.2d 862, 865 (N.D.Tex. 2004). New Century appealed and a three-judge panel of the Fifth Circuit affirmed the vacatur on the ground that the prior relationship "might have conveyed an impression of possible partiality to a reasonable person." 436 F.3d 495, 504 (5th Cir. 2006). However, as the Fifth Circuit *en banc* pointed out, "neither the district court nor the appellate court found that Shurn was actually biased toward New Century." 476 F.3d at 280.

Reviewing the three-judge panel's decision, the *en banc* court noted that the Federal Arbitration Act "seems to require upholding arbitral awards unless bias was clearly evident in the decision makers." Id. at 281. However, the panel ruled that an arbitrator "displays evident partiality by the very failure to disclose facts that might create a reasonable impression of the arbitrator's partiality." 436 F.3d at 502. This approach seems to be supported by Justice Black's decision in Commonwealth Coatings but perhaps not by Justice White's concurring decision. Justice White wrote that arbitrators are not automatically disqualified by a business relationship with the parties in a case if the parties "are aware of the facts but the relationship is trivial." 393 U.S. at 150. For reasons of textual analysis, the *en banc* court concluded that Justice White's concurrence, rather than Justice Black's opinion, "becomes the Court's effective *ratio decidendi*." 476 F.3d at 282.

Reviewing decisions from other circuits interpreting the prevailing opinions in Commonwealth Coatings, the Fifth Circuit noted that nearly all circuits "agree that nondisclosure alone does not require vacatur of an arbitral award for evident partiality. An arbitrator's failure to disclose must involve a significant compromising connection to the parties." Id. at 282-83. The one exception among other circuits was the Ninth, which, in Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994), has interpreted Commonwealth Coatings "as the [Fifth Circuit] panel majority did, to de-emphasize Justice White's narrowing language." 476 F.3d at 283. However, the *en banc* Fifth Circuit refused to follow Schmitz, describing it as "an outlier" and factually distinguishable in any event. Id.

Lining up with the vast majority of other circuits, the *en banc* Fifth concluded that "the resulting standard" under its preferred interpretation of Commonwealth Coatings "is that in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding." Id.

Turning to the facts before it, the *en banc* Fifth ruled that "the outcome of this case is clear. Shurn's failure to disclose a trivial former business relationship does not require vacatur of the award." Id. The Court pointed out that, although Shurn and New Century's lawyer Camiña signed the same ten pleadings in the earlier Intel patent litigation, "they never met or spoke to each other before the arbitration. They were two of thirty-four lawyers, and from two of seven firms, that represented Intel during the lawsuit, which ended at least seven years before the instant arbitration." Id. at 284.

Emphasizing what it regarded as the trivial nature of the contact, the Court noted that, according to its research, no prior case had "come close" to vacating an award for nondisclosure of "such a slender connection" between the arbitrator and a party's counsel. In fact, courts had refused vacatur "where the undisclosed connections are much stronger." Id.

Considering the policy implications, the Court expressed concern that awarding vacatur based on the

"tangential, limited, and stale contacts" between the arbitrator and New Century's lawyer "would seriously jeopardize the finality of arbitration." Specifically, the Court worried that "losing parties would have an incentive to conduct intensive, after-the-fact investigations to discover the most trivial of relationships, most of which they likely would not have objected to if disclosure had been made." The Court was also concerned that "expensive satellite litigation over nondisclosure of an arbitrator's 'complete and unexpurgated business biography' would proliferate." Id. at 285.

Summing up, the Court ruled that "the draconian remedy of vacatur is only warranted upon nondisclosure that involves a significant compromising relationship." The Court found that the case before it did not "come close" to meeting that standard. Id. at 286.

Five out of sixteen judges dissented (in two separate opinions). In his provocative dissent, Judge Reavley, who wrote the opinion that the *en banc* court was reversing, declared that "the desire to protect the finality of arbitration awards and avoid a return to extended court expense and delay . . . does not justify evading the law of the Supreme Court by misstating it or by avoiding it by *bleaching the evidence* of possible partiality [emphasis added]." Id. at 288. In his view, the opinions written by Justices Black and White in Commonwealth Coatings were clear, were "easily reconciled" and were binding on the Fifth Circuit, which was not at liberty to "overrule a decision of the Supreme Court." Id. at 286. "It is quite pellucid," he wrote, "that six Justices of the Court agreed that, despite the fairness and impartiality of the arbitrator, failure to disclose 'any dealings that might create an impression of possible bias' justifies vacatur of the award." Id. at 287. Judge Reavley accused the *en banc* majority of substituting "actual bias or the reasonable impression of bias, or concrete impression of bias" for the Supreme Court's ruling in an effort to protect arbitrators and their awards in a case where, on the facts as he summarized them, that seemed inappropriate.

Judge Wiener concurred with Judge Reavley's dissenting opinion. He urged that, since arbitration has fewer procedural safeguards than judicial proceedings and severely limited appellate review, it is crucially important that the integrity of the system be upheld by ensuring that arbitrators provide full and complete disclosure. "For the system to enjoy credibility," he wrote, "each potential arbitrator absolutely must disclose every relationship with the parties and counsel, no matter how minimal or insignificant the aspiring arbitrator might deem it to be. For it is not the prerogative of the candidate to pick and choose, but the prerogative of the parties alone to decide such significance. And that cannot be done with any degree of comfort absent full disclosure." Id. at 294.

Although the arbitration award in this case was ultimately upheld, it took several years, three court rulings and substantial legal fees for that result to occur. It would have been far better – as a matter of practice and policy – had the arbitrator disclosed his prior involvement with the law firm representing New Century at the very start of the proceedings. The parties could then have questioned him thoroughly and made a more informed decision about whether they should object to his service in the matter. His failure to do so entangled the parties in protracted litigation that could have been avoided, reinforcing the importance of full and complete disclosure.

SUPPLEMENTAL JUDGMENT

Summary of the January 11, 2007 Decision by the UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT LOUIS ROSEN ASSOCIATES, LTD.,
v.
WILLIAM WEBB

by Patrick V. Martin, Esq.

This case involves the power of the District Court to "do the right thing" and issue a supplemental judgment to give full effect to an arbitrator's award. The appellate court's opinion revolved around two federal procedural rules involving judgments. Rule 59(e) provides that any motion to amend a judgment

must be made within ten days of its entry. Rule 60(a) permits the court at any time to correct clerical mistakes in a judgment arising from oversight or omission.

William Webb ("Webb") was a television director. He entered into a contract with Robert Louis Rosen ("RLR"), an entertainment agency, in 1986 pursuant to which RLR was entitled to a 10% of all sums earned by Webb from third parties. This contract lapsed in the early nineties but was subsequently renewed and then canceled. Disputes arose concerning amounts due RLR under the contract. A sole arbitrator was appointed who issued a final award[1] on July 31, 2003. The award ordered:

1. Webb shall pay RLR $355,084 as damages through May 31, 2003

2. RLR is due additional sums for years 2005 and 2006 based on the contract terms; i.e. 10% of Webb's payments from third parties

3. Interest on the above at 6%.

RLR petitioned the Southern District of New York for an order confirming the award. On November 24, 2003 the court granted the motion and a judgment was entered stating; "…petitioner's motion to confirm the arbitration award is granted, the award of $355,084 is confirmed .." The judgment said nothing about the future sums that the arbitrator awarded but obviously could not be quantified at that time.

After considerable effort, RLR collected the $355,084 plus interest on February 5, 2005 and Webb filed a draft Satisfaction of Judgment with the SDNY. That prompted RLR to move for an additional money judgment of $106,441 for 10 % of the sums earned by Webb subsequent to the arbitrator's award. Webb did not contest the calculations but contested the court's authority to issue any supplemental award. This became an important point because a court has no authority to go beyond the award and calculate damages in the first instance.[2]

In June 2005, the District Court entered a supplemental judgment awarding the $106,441. Webb appealed. He argued that the supplemental judgment was time-barred under Rule 59 because the motion was not made within ten days of the entry of the original judgment

The second circuit took a different view. The District Court "confirmed the award" which they understood to mean the entire award including that provision of the award pertaining to future payments. "As the original judgment did not accurately reflect the District Court's intent, it was susceptible to correction under Rule 60…" Since the parties agreed on the calculations, the issue of whether or not the court went beyond its authority in entering a judgment for a sum certain did not arise. Therefore, the District Court's order entering the supplemental judgment was affirmed.

COMMENT:

RLR's legal travails started with the award, which the arbitrator maladroitly stated was "final" even though there were substantial potential claims left open to calculate. This was compounded by the District Court in issuing a judgment which did not take explicitly into account the probability that RLR would be entitled to future sums.

In a maritime arbitration, these issues would have been discussed and resolved at a very early stage in the proceedings.

But at the end of the day the courts "did the right thing", although the reasoning was a bit of a stretch. It would have been a very interesting discussion if Webb had not agreed on the calculation of the supplemental damages. The District Court would not have the power to quantify disputed damages. The arbitrator may well have become *functus officio.* Query, in such circumstances, would RJR have had to commence a new arbitration? In the alternative, could the court enter an order directing the arbitrator to calculate the then future damages based on the new facts which became known with the passage of time? Going further should the District Court have affirmed the entire award when obviously a part thereof was not definite and final? Such inquiries are beyond the scope of this summary.

Editorial Comment –They might well deserve further discussion and might give rise to an article on that particular subject.

1. It is suggested that most maritime arbitrators would have issued a Partial Final Award in similar circumstances which would have alleviated the subsequent legal struggle over which federal Rule should apply.

2. Apparently, neither party applied to the sole arbitrator for a further award calculating the damages. Perhaps, they believed that after issuance of his "final award", he became *functus officio.*

REMOTENESS OF LOSS

The "Achilleas" [2006] EWHC 3030 (Comm), [2007] 1 Lloyd's Rep 17 –

Recovery of damages for loss of profit on the following charter due to late redelivery under the preceding time charter may not be such a remote possibility

By Jim Leighton, BSc (Hons), LLM (Maritime Law), Claims Consultant, International Contributor to DMC's CaseNotes.
With thanks to David Martin-Clark, Barrister at Law, Arbitrator, Mediator, Insurance and Shipping Consultant, Editor of DMC's CaseNotes @ www.onlinedmc.co.uk.

The Judgment

The claim arose because the charterer, Transfield, was late redelivering the vessel in accordance with the redelivery dates it provided in the contractually required consecutive notices of redelivery under its time charter with the shipowner, Mercator ("the Transfield charter"). The Transfield charter was for "about 5-7 months at charterer's option".

Once the firm redelivery notices began, the shipowner agreed a time charter with Cargill ("the Cargill charter"). This was for a period of "about 4-6 months at charterer's option". It was to commence no later than 7 days after the vessel's then expected latest date of redelivery. The late redelivery delayed the vessel beyond the cancellation date in the Cargill charter. The shipowner was forced to renegotiate the delivery date and hire rate with Cargill on a falling market.

The shipowner claimed damages from the charterer at the daily rate of US$8,000 over the used period of the Cargill charter on the basis of the difference between the daily rate of US$39,500 originally agreed and the renegotiated daily rate of US$31,500 ("loss of profit"). This amounted to US$1,364,584.37. The shipowner alternatively claimed damages of US$158,301.17 on the basis of the difference between the prevailing market rate of hire and the Transfield charter rate during the period from the expected latest date of redelivery in the notices until the actual date of redelivery ("loss of use").

The parties agreed that the original and subsequent Cargill charter rates were market rates. The charterer did not suggest that the Cargill charter was in any way unusual or peculiar in its terms or period nor that the shipowner had allowed an unusually short gap between the date for redelivery and the delivery cancellation date.

The majority arbitrators (David Farringdon and Bruce Buchan) made an award in the shipowner's favour for the loss of profit. The minority arbitrator (Christopher Moss) accepted the charterer's contention that the proper measure of damages was for the loss of use.

The majority arbitrators had found on the facts that:

1. To the knowledge of the charterer it was recognised and accepted as a hazard of late redelivery that the vessel would miss her cancellation date for the next fixture;

2. This was not something that was very unusual but was the kind of result which the parties would have had in mind;

3. Rapid variations in market rates in either direction were market knowledge; and

4. The loss of profit suffered by the shipowner was within the contemplation of the parties as a not unlikely result of the breach.

The Commercial Court judge (Justice Christopher Clarke) upheld the majority arbitrators' award.

The Comment

The judgment has caused alarm in some quarters. It should not have come as a major surprise to those familiar with the development of English law over many decades on remoteness of loss in contract. The leading cases suggest a revisionist approach: seeking clarity and simplification, not further qualification.

English law no longer makes a clear distinction between the first and second limb of the test for remoteness originally expounded in Hadley v Baxendale (1854) 9 Exch 24: the test being for losses "such as may fairly and reasonably be considered either (a) arising naturally i.e. according to the usual course of things from such breach of contract itself or (b) such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract as the probable result of it". The limbs are now considered part of a composite whole, which the present case reflects: "what may be regarded as arising naturally from the breach may itself be dependent on what is known to the parties at the time of the contract as a possible result of the breach". Consequently those in the same or allied industries (like shipowners and international commodity traders) are more likely to be presumed to have a wider shared common knowledge of normal industry practices, trends and market behaviours and their natural consequences following breach of contract even if beyond the comprehension of an outsider.

But there are still two major issues to decide: (1) whether the knowledge relevant to the kind of loss suffered could reasonably be attributed to the mind of the contract-breaker at the time of entering the contract; and (2) whether the kind of loss was a not unlikely consequence of the breach ("not unlikely" being "considerably less than an even chance but nevertheless not very unusual and easily foreseeable"). Any circumstance that does not fall within (1) and (2) is labelled as unusual, special or peculiar and would need to be brought to the attention of the defendant by the claimant at the time of entering the contract in circumstances where it was clear that the defendant was to bear that irregular risk for that kind of loss following a breach of contract if it is to be recoverable.

This is not to suggest that recovery of loss of profit for late redelivery is to become a certainty for redelivery disputes. The agreed facts and the clear findings of fact made the present case appear straightforward. The likelihood of the type and duration of a following charter, whether the other terms of the following charter were unusual, whether the original contract rate and the renegotiated rate were market rates, whether the period of time between redelivery and the following delivery were too fine are all clear grounds for factual distinction.

The case is presently awaiting hearing in the Court of Appeal in late May 2007. Comments since made by counsel for the charterer, Dominic Kendrick QC, provide further food for thought. By analysis Mr Kendrick has two core contentions:

The judgment failed to appreciate the merit and commercial certainty of the loss of use measure – this measure has been consistently referred to in cases and textbooks which has effectively created a legitimate expectation that it will be applied to late redelivery disputes (unless that measure was clearly wrong); and

Each fact that led to the finding may on its own have been a not unlikely circumstance but the totality of eventualities that needed to coincide at the same time made the resulting loss a negligible possibility (unless the shipowner had before entering the contract made the charterer aware of this remote possibility and the charterer knew that he was to bear that risk).

The recovery of damages for loss of profit is *prima facie* a real possibility in commercial disputes. The redeeming feature of the loss of profit measure is that it more accurately reflects the aim of damages for breach of contract: to put the innocent party as closely as money can do so in the position he ought to have been in had the contract been properly performed. By contrast the loss of use measure *prima facie* puts the innocent party in the position he would have been in if the contract had been for a longer period. On the right facts this will amount to vast under-compensation despite an obvious and real potential when entering the contract for loss of profit on a

following charter. Even if quantification of loss of profit is more complex the courts do not appear dissuaded if this more accurately reflects the real loss caused, provided this does not artificially over-compensate the claimant. As a result, applying loss of use to the exclusion of loss of profit would have been a manifest error in the present case because of the clear findings of fact.

The second argument may be mathematically justifiable but it appears to add further qualification to the standard remoteness test. It is "hardly ever possible in this matter to assess probabilities with any degree of mathematical accuracy" and there is "no need to contemplate the precise concatenation of circumstances" that brought about the loss. In any case the critical elements are not numerous: rapid fluctuations in market hire rates, the potential for late redelivery and these combining to impact on the profit of a likely following charter. The second argument also ignores that the court can reasonably justify a presumption that commercial parties have a relatively wide foresight of potential outcomes because the ability to manage a wide range of risks when making commercial decisions is the hallmark of professional market operators.

Until the Court of Appeal decision it may be anyone's best guess. In the meantime it will be interesting to hear the thoughts of maritime arbitrators and to see the resulting rider clauses that will inevitably be bartered over to exclude this contentious liability.

PANAMA MARITIME VIII

by Ron F. Rosner

Following an invitation from the guest speaker at our October luncheon, Tomás Ávila, president of the Panamanian Maritime Bar Association, an invitation was extended to the SMA to attend the bi-annual seminar/exhibition, February 4 - 7, 2007 in Panama City. In the interest of cooperation with Panama's efforts to establish a center for mediation and arbitration of maritime disputes, the SMA delegation was requested to describe how members of the SMA are selected and to discuss the operation of arbitration under SMA rules.

The SMA delegation was made up of our current president Klaus Mordhorst, past presidents David Martowski and Manfred Arnold, along with Jack Ring, Bill Peters, Ron Carroll and Ron Rosner. Also participating were the New York admiralty attorneys Peter Skoufalos and Don Murnane.

Most of the plenary sessions of Panama Maritime VIII were taken up with enlightening and interesting discussions of the plans for the expansion of the Panama Canal.

The final day of Panama Maritime VIII was designated as "SMA Day". Mr. Mordhorst presented a welcome speech and acted as moderator. Mr. Martowski presented a detailed explanation of the SMA system. It was followed by a panel discussion led by David Martowski on current litigation and arbitration topics in New York. The panel consisted of Messrs. Arnold, Mordhorst, Murnane and Skoufalos. The afternoon was dedicated to a mock arbitration with the participation of Messrs. Skoufalos and Murname as counsel assisted by Panamanian attorneys before a panel chaired by Manfred Arnold with Jack Ring and Bill Peters. Klaus Mordhorst served as moderator and Ron Rosner as the sole witness. At the end of the mock arbitration, the audience was divided into groups and invited to discuss and also to decide the issue. This has been a successful tool for audience involvement and assisted in a better understanding of the arbitration process.

The questions from the audience following both the morning and afternoon sessions were extensive and underlined the considerable extent to which the SMA system, especially the use of non-lawyer arbitrators and very restricted grounds for appeal, differs from Panamanian concepts and their perceptions of the arbitration process.

Throughout the visit, the SMA delegation carried on discussions with the Panamanians regarding their proposal that the SMA provide a number of panels to help clear the extensive backlog of cases currently pending before the overloaded

Panamanian courts. Discussions on this matter are ongoing.

As part of this visit, the SMA delegation enjoyed the hospitality and various social events of Panama Maritime VIII, which included a trophy-winning "performance" by Messrs. Arnold and Martowski at the golf outing. A special treat was an evening visit and splendid cocktail reception at the Miraflores Lock to witness the passage of a seemingly unending parade of vessels of all types, and also the dinner reception at the Union Club.

(Mr. Rosner is a member of the SMA)

ICMA XVI – SINGAPORE
February 26 - March 2, 2007

by Manfred W. Arnold

I wanted to start this report with statistics, but since Rex Stout (in Death of a Doxy) stated that "there are two kinds of statistics, the kind you look up and the kind you make up." I'll forego that attempt. Instead I will supply some numbers and you can formulate your own statistics.

There were 166 delegates from 24 countries registered for the Congress. The breakdown per country was: Singapore – 51; UK – 23; China – 14; USA – 14; Germany – 13; Nigeria – 7; Hong Kong – 6; France – 6; Australia – 5; India – 5; Japan – 5; Denmark – 3; Italy – 2; Korea – 2; and one each from Canada, Egypt, Greece, Indonesia, Malaysia, Netherlands, New Zealand, Norway, Russia and the United Arab Emirates. There were 58 papers submitted, including five from New York: maritime arbitrators (2) and admiralty attorneys (3). There were 24 accompanying persons registered with 7 from the USA, 5 from the UK, 2 each from Italy and Japan and one each from China, Denmark, France, Germany, Greece, Hong Kong, Nigeria and Norway.

The Congress was opened with the keynote address by the Chief Justice of Singapore, the Hon. Justice Chan Sek Keong, followed by plenary session 1 – Maritime Arbitration – Keeping Abreast of Developments, in which John Kimball covered New York arbitration decisions and developments for the period 2004-2006.

On day 2, Professor Tommy Koh, Singapore Ambassador-at-Large presented the 7th Cedric Barclay Lecture.

Because of the number of papers submitted and time allotted to the speakers, concurrent plenary sessions were necessary. Fortunately, the immediate proximity of the conference rooms made it relatively simple to audit speeches in different sessions.

As to the social programs:

The Welcome Reception was held on Monday evening at 6:00 at the Altivo Bar, Mount Faber Park (reached by cable car), which, aside from sumptuous food and drink, offered a fine view over the city, the harbor and Sentosa Island.

Wednesday featured golf for some and a city tour, including visits to Little India, Chinatown. The day concluded with dinner at the Jumbo restaurant in the East Coast Park. On Thursday, the accompanying women followed the Peranankan Trail.

On Thursday night, the delegates convened for the Gala Dinner Dance with great food, wine and music. If one of the future ICMA organizers should ever decide to establish a ballroom dancing trophy, then Elayne and Roger Moisey should have first dibs to it.

Doing everything in style, Singapore donated a traveling golf trophy for the coming ICMAs. The weather did not quite cooperate and curtailed the play on the beautiful Laguna course. Ultimately, the trophy was won by the team of Lawrence Boo (chair of the Host Committee) and the Hon. Eduardo Real (Panama's ambassador to Singapore) – not for the best score, but for perseverance and battling the elements for 15 holes.

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The speeches by Chief Justice Chan and Professor Koh can be downloaded by accessing www.icma2007.com; other Congress material is available from www.icma2007.com/sale.htm. On behalf of the Steering Committee, I would like to take this opportunity to express our thanks to all

contributors and delegates for making ICMA XVI a successful and memorable Congress.

(Mr. Measter is a Member of the SMA)

KUALA LUMPUR SEMINAR

Charles L. Measter JD

On March 3, 2007, Manfred Arnold and I participated in a Maritime Arbitration Seminar sponsored jointly by the Kuala Lumpur Regional Center for Arbitration, The Chartered Institute of Arbitrators and The Malaysian Institute of Arbitrators. It was an all-day seminar in which Manfred delivered a paper on "Consolidation, Vouching In and the Rights of Non-Signatories" and I delivered a paper on "Current Issues Affecting the Development of Maritime Law – An American Perspective." Among others, Bruce Harris from London spoke on "The English Courts' Approach Towards Maritime Arbitration: Supportive or Interventionist" and Philip Yang from Hong Kong discussed "A Thorough Case Study on a Maritime Dispute in Arbitration." Additionally, there were several local speakers who covered topics such as the "Malaysian Arbitration Act of 2005" and "The Enforcement of Maritime Arbitration Awards in Malaysia."

This was all followed by a lively session of questions and answers. Although Malaysia is a common law country and their maritime law and procedures mirror the English model, there was a surprising amount of interest in what is happening in the United States and in our maritime arbitration procedures. There was particular interest in the SMA library of cases.

Although arbitrations in Malaysia will, in all likelihood, handle local maritime matters, the country is a large producer of natural gas and fertilizers. It is possible that there may be some arbitrations pertaining to this sector. It is worth nothing that while the seminar participants were eager to obtain source material on arbitration for their center, they were also eager for an ongoing dialogue.

PEOPLE AND PLACES

ICMA XVII – The next International Congress of Maritime Arbitrators will be held in Hamburg (Germany) October 5-9, 2009. The venue will be the Grant Elysee Hotel. The preliminary plans include a golf outing on Sunday, October 4. The social events will include a day trip for delegates and accompanying persons to Berlin. The organizers will also suggest pre- and/or post-congress tours. The organizers have created a website –www.ICMA2009.com. Just in case the website with its color scheme and logo looks familiar, the GMAA has decided to create continuity and has adopted these details from the Singapore event.

BUNKER ARBITRATION SEMINAR – Considering that Petrospot Limited called upon the SMA and NYMAR to assist them for the first Bunker Arbitration Seminar, which was held in New York, it is only appropriate to report on their current progress. After additional successful mock arbitration seminars in Panama and Hamburg, they are now focusing on their fourth event on May 9, 2007 in Athens. The event again will be led by Chris Fisher, managing director of Bunker Claims International. For further details, see www.bunkerspot.com/events/athens.

THE MARINE SOCIETY OF THE CITY OF NEW YORK will hold its 237th Annual Dinner on April 23, 2007 honoring Charles G. Raymond, Chairman of Horizon Lines, Inc. For further details, contact marinesociety.captains@verizon.net.

THE AMERICAN MERCHANT MARINE MUSEUM FOUNDATION held its annual dinner on March 28, 2007 at The Union League Club. This year's honoree was The Maritime Law Association of the United States with the keynote address delivered by The Honorable Charles S. Haight, Jr., Senior United States District Judge, Southern District of New York, recipient of the Nathaniel Bowditch Maritime Scholar Award. The following SMA members attended the event in support of the MLA and Judge Haight as well as the organizers: John F. Ring, Thomas F. Fox, Lucienne C. Bulow, Svend H.

Hansen, Nigel J. Hawkins, David W. Martowski, Klaus C.J. Mordhorst, Robert J. Spaulding Jr., James J. Warfield, Soren Wolmar and Manfred W. Arnold. Judge Haight has agreed to make his speech available to THE ARBITRATOR for publication, hopefully in the next issue (July).

SOME PERSONAL NOTES

WHERE ARE YOU?

A few weeks ago, an admiralty attorney called and asked about an SMA member. When I told him that the fellow had passed away a couple of years ago, there was dead silence – was it shock or possibly embarrassment for not knowing?

It is, however, a reflection of what has happened to the shipping community. The exodus from the city to the suburbs, the demise of the shipping clubs as well as changing business patterns have substantially reduced the personal contacts. It brings to mind what people used to say about the venerable Whitehall Club – if you had lunch there two days in a row and did not see someone you wanted to see or expected to be there, then the explanation was that he was either traveling or was no longer with us.

I do not know how to resolve the dilemma, but we might start by attending the SMA luncheons and other industry functions more frequently.

Any thoughts or comments?

FEEDBACK

Positive feedbacks keep coming in; for instance, a West Coast attorney wrote, "Thanks. A great issue. I could smell the brine blowing off the tops of the columns."

Keep them coming as it helps in persuading reluctant authors/contributors, and shows that somebody reads it.

IN MEMORIAM

William V. Packard

Bill, of course, was not a member of the SMA, but he was a member of the international arbitration fraternity, practicing in London as a member of the LMAA. Bill would have fit in nicely with the SMA because of his strictly commercial background. I referred to him once as a man without airs and with a vast pool of commercial knowledge. For those who never met Bill, they might recognize his name as the author of nine commercial text books, starting with Time Chartering in 1980. Chris Hewer, when at "Fairplay," published Bill's books; he knew him well and described him as "a no-nonsense sort of chap, with a proper sense of fairness, which he puts to good use as a maritime arbitrator." He will be missed by many; may he rest in peace.

For THE ARBITRATOR

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