THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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THE PRESIDENT'S CORNER

Finally summer is here and it appears with a vengeance.

At its 44th General Annual Meeting in May, the SMA membership elected David Martowski and A.J. Siciliano to the Board of Governors, two former presidents of the Society and prominent active members. Vice President Tom Fox and I are indeed pleased and welcome them back heartily. More about the annual elections later in the newsletter.

On a sadder note, we had to bid goodbye to an old friend, member, governor and past president, Don Zubrod, who passed away in May, following a battle with cancer. Don was a tireless ambassador for the SMA; he used his various prominent positions in the shipping industry to promote arbitration in New York and especially under SMA Rules, rules he had an active hand in developing. He was a mentor to many generations of our members and a constant lecturer on standards and ethics in the conduct of arbitration. Though he had recently moved to Georgia to be nearer his family, he was put to rest in Wyckoff, New Jersey, his home town, after a very special memorial service. Don's many achievements and his exemplary service to the SMA will be more properly addressed elsewhere in this issue. Don, we shall miss you.

The second quarter of the year is usually crowded with General Annual Meetings of organizations and firms with which the SMA is actively involved, and so provides for a wealth of opportunities to catch up, meet and network with people one does not otherwise have a chance to meet face to face on a more regular basis. There were the MLA Spring Meeting and its many committee sessions, the CMA Shipping Conference, the AGMs

of CMA, ASBA, NYMAR and the American Club, just to name a few. It was good to see so many of our members "cruising" this interesting and important circuit.

Looking ahead, please keep in mind the National Maritime Salvage Conference and Expo in Arlington, Virginia October 9 – 11, 2007 (at which Mr. Siciliano is one of the speakers) and it is never too early to mark your calendar for ICMA XVII in Hamburg, October 5 – 9, 2009 … and Mary's wedding in 2010 – just kidding.

Finally, we are indebted to our long time friend, Patrick Martin, for agreeing to assist us with his usual hands-on, practical legal advice on organizational matters, if and when we may need it. Thank you, Pat.

That said, I wish you all a great and enjoyable summer.

Klaus Mordhorst

CONSOLIDATED OPINION

By Chris Hewer

If one really is the loneliest number, and if a problem shared truly is a problem halved, why are there not more consolidated arbitrations? And if a bird in the hand is worth two in the bush, why do buses always come in threes? Why, moreover, does NOBODY look good in plus-fours?

That is a lot of numbers with which to begin an article. But at least we have got the preliminaries out of the way. Now we can move straight to the heart of the matter.

Some people are already asking, "What can the matter be?" Oh dear. Somebody has complained that there are not enough consolidated arbitrations to go round. If the reader does not believe this, he or she should consult his SMA Award Service, while thanking his or her lucky stars that he or she has access to such a useful, affordable archive. (If the reader does not fall into the category of either 'he' or 'she', mediation may be the best option).

At this point it is necessary to engage in some outrageous guesswork, as opposed to our normal investigative journalism. Here goes. It is probable that there have not been more consolidated arbitrations in the entire history of the SMA than could be comfortably counted on the hands of a three-person tribunal, with enough digits left over to play the piccolo. The weak point in this bold assertion is that it may be wrong, but we must press on.

We return to the question of 'Why'? A questionnaire, or possibly a survey, may be needed to provide the answer. This should take the form of a simple question-and-answer document, and should be as far removed as possible from the questionnaire which was put out a couple of years ago to decide whether or not people were happy with London maritime arbitration. This provided few answers, at great length.

Questions should include, "Are you prepared to consolidate your dispute?", and "How are things?" The questionnaire should be sent to at least seven people. More about this once the votes have been counted.

For now, let us accept that there is a reluctance to consolidate in maritime arbitration. There could be a number of reasons for this. It could be that people want their own disputes. It could be that, too often, disputes hinge on tiny scraps of incidents or dialogue or text which cannot be common to more than one case, or even on the weather. Or it could be that arbitrators don't encourage consolidation because consolidation encourages the appointment of fewer arbitrators.

All of these are plausible reasons, but will they stand up in court? And whether they will or they won't, is it a good thing? One argument says 'no'. In a world in which lawyers are becoming arbitrators, in which ship agents are becoming lawyers, in which chief engineers are becoming journalists, and in which shipbrokers are becoming despondent, it is not good news for arbitrators if there is less work to go round, particularly since there is less work to go round anyway because people are less inclined to argue in the sort of buoyant market we are enjoying in shipping right now.

Another argument says 'yes', otherwise it wouldn't be another argument.

Maritime arbitration is as old as the Phoenicians, which is only right because the

Phoenicians invented quarreling in the first place, and would rather adventure on long voyages freighting their vessels with the wares of Egypt and Assyria than engage in any sort of consolidation. And while there are still a few arbitrators with a smattering of Punic, it would be wise not to expect too much of an increase in consolidation.

THE LATEST ON THE EXXON VALDEZ

The MarExnewsletter reports the following decision in connection with punitive damages:

U.S. Court of Appeals Denies Petition for Rehearing on Punitive Damages in *Exxon Valdez* Case

The US Court of Appeals for the Ninth Circuit has denied a petition for rehearing in the lawsuit brought by fishermen who experienced losses directly as a result of the now infamous 1989 oil spill from the tanker ***Exxon Valdez***. The matter, decided with considerable dissent from the panel, also declined to rehear the matter en banc. At issue is the question of whether punitive damages of $2.5 billion is excessive in terms of the total physical damages created by the spill itself. There is little doubt that the case, amended on May 23, will be appealed to the U.S. Supreme Court.

In general terms, the Ninth Circuit declined to grant a rehearing on a decision by the federal courts in December to lop $2 billion off the $4.5 billion in punitive damages owed by Exxon Mobil Corporation for the ***Exxon Valdez*** oil spill. Exxon has since announced plans to appeal the case to the U.S. Supreme Court. The $2.5 billion still owed by Exxon Mobil would be paid to Alaskan fishermen, natives and property owners.

The decision came with vigorous dissents. In the 70 page decision, Circuit Judge Kozinski wrote, "The panel's decision exposes owners of every vessel and port facility within our maritime jurisdiction -- a staggeringly huge area -- to punitive damages solely for the actions of managerial employees. Because of the harsh nature of vicarious 6042 IN RE: THE EXXON VALDEZ liability, ship owners won't be able to protect themselves against our newfangled interpretation of maritime law through careful hiring practices. Accidents at sea happen -- ships sink, collide and run aground -- often because of serious mistakes by captain and crew, many of which could, with the benefit of hindsight, be found to have been reckless. For centuries, companies have built their seaborne businesses on the understanding that they won't be subject to punitive damages if they '[n]either directed it, nor countenanced it, nor participated in' the wrong, *The Amiable Nancy*, 16 U.S. at 559; the panel opinion has thrown this protection overboard."

Another dissenting judge opined, "I agree with Judge Kozinski that punitive damages should not have been awarded in this case. However, even if punitive damages were appropriate, I note that the ratio of punitive damages to compensatory damages is excessive." The 1989 oil spill from the ***Exxon Valdez*** still ranks as one of the worst environmental disasters in American history. In its wake, a myriad of new pollution laws, including the Oil Pollution Act of 1990 (OPA-90), were spawned.

LMAA "MUST ENCOURAGE YOUNGER LAWYERS"

The following article was contained in FAIRPLAY's Daily News of May 11, 2007:

Maritime dispute resolution will suffer unless moves are made to encourage younger lawyers into full membership of the London Maritime Arbitrators Association, says Ben Horn of law firm Faegre & Benson. Greater use must be made of engineers, stevedores, brokers and other non-lawyers, Horn urges, pointing out that the profile of LMAA's full membership shows that the issue needs to be addressed quickly. Younger lawyers are rarely considered for appointments and very few non-lawyers are appointed arbitrators, he claims. "The market must react to the growing shortage of expertise, and appoint other than LMAA full

members as arbitrators. Charter party clauses don't usually require full LMAA arbitrators." Horn believes that while LMAA procedures are rightly regarded as fair and unbiased, the delays in publication in awards and costs of the process can be alleviated by choosing the arbitrators carefully at the outset.

EXPERT DETERMINATION: A MORE EFFICIENT WAY OF RESOLVING DISPUTES[1]

By Hew R. Dundas

The origins of arbitration lie in mediaeval times where, for example, two cloth merchants in dispute over the sale and purchase of a bale of cloth would invite a mutually-respected colleague to decide the issue. Since those days, arbitration has acquired a great deal of 'baggage' particularly by way of rules and procedures with the consequence that arbitration can be (and too often is) slow and expensive. Businessmen often want (if their lawyers would allow them) a quicker, cheaper alternative. Expert Determination (ED) is one such alternative, offering a very powerful solution to the majority of commercial disputes. A major key to, and advantage of, ED is speed: determinations can be made in minutes/days/weeks as required.[2] Soccer referees and other sporting decision-makers make instant decisions all the time – this is essential for the flow of the game – and there is no difference in principle with commercial disputes. Importantly, the English law of ED is well-developed with a line of leading authorities establishing its bases and defining its limits; the law is all common law, there being no relevant statute.[3]

In ED, a third party neutral[4] selected by the parties decides the dispute, whether factual, valuation or legal; the ED-er is selected for and expected to use, his expertise and can do so in a manner denied to an arbitrator.[5] Any matter can be referred to ED whereas certain matters are not arbitrable.[6] If the parties agree on any procedure, the ED-er is obliged to follow it, otherwise he has a free hand (this is the preferable/recommended approach). An arbitrator is obliged by law to decide matters on the basis of submissions and evidence put before him, whereas the ED-er, subject to any express provisions of his remit, is entitled to carry out his own investigations, form his own opinion and come to his own conclusions regardless of any submissions or evidence[7] adduced by the parties themselves. There is no requirement for the rules of natural justice or due process to be followed in ED in order for that determination to be valid and binding between the parties.[8]

The Determination can be reasoned or unreasoned, the latter being the recommended approach to eliminate any ground of challenge,[9] a key reason for choosing ED being to extinguish grounds for challenge. The Determination is enforceable as a matter of contract, and thereby through the courts, in contrast to an arbitral award which can be enforced in the same manner as a judgment of the court;[10] while this might appear to be a major flaw in ED, the courts will, as a matter of public policy and absent exceptional circumstances, hold the parties to their contract in this regard. Determinations are impervious to challenge except on grounds of fraud (e.g. bribery of the ED-er) or, in most ED agreements, manifest error; the latter is construed very narrowly and includes any departure from the ED-er's instructions so that if the Expert values a Company's shares instead of its loan stock, or tests crude oil quality by an ASTM procedure instead of the API one specified by the parties, the determination will be set aside, otherwise the Determination is unchallengeable.[11] In a recent case, the author, acting as ED-er, was requested to answer a question the only possible answers to which were "yes" and "no";[12] the one word Determination is (absent fraud) incapable of challenge.

In conclusion, ED offers a far faster, lower-cost alternative to arbitration, offering a legally-binding decision almost impervious to challenge;

while lawyers may relish the availability of a right of challenge, in the author's extensive commercial experience,[13] users/clients do not.

ENDNOTES

[1] This article is written under English law since the law of ED is well-developed there; however, since ED is a creation of contract, the principles outlined herein should apply in other common law jurisdictions, even in civil law ones, e.g. there is a similar process in the Netherlands.

[2] The author was once asked to do one in one hour!

[3] There is a statutory process called adjudication, applicable only in the onshore construction industry, which is substantially based on ED; see Housing Grants, Construction and Regeneration Act 1996

[4] The ED-er can be an individual, a panel of three or a company (e.g. in crude oil quality disputes, a testing laboratory) or firm (share valuation and tax disputes are often referred to a CPA firm)

[5] In most circumstances in arbitration, if the arbitrator possesses expertise he has to put that before the parties for comment in the same way as if he were a tribunal-appointed expert so the advantage of the expertise is largely lost.

[6] E.g. matrimonial settlements

[7] Of course, rules of evidence, whether those applicable in litigation, in arbitration or otherwise, are wholly inapplicable.

[8] Cooke J in Bernhard Schulte Gmbh & Co KG & Ors v Nile Holdings Ltd; [2004] EWHC 977 at §95.

[9] In Halifax Life Ltd v The Equitable Life Assurance Society [2007] EWHC 503, Cresswell J held that the Court had power to direct the ED-er to state further reasons where the original ones were inadequate or unclear both by way of remedy in relation to the relevant contractual provisions and/or under the inherent jurisdiction of the Court. Further, he held that, if he was wrong as to jurisdiction, the Court had the power to request further reasons by way of the Court's case management powers.

[10] S.66 Arbitration Act 1996.

[11] It is unclear what ground of challenge lies in Halifax after the delivery of further reasons; the ED-er was asked to value certain life funds and duly did so, the subsequent argument being a challenge to quantum.

[12] The Determination would have read "Dear Sirs, [restate question] Yes. Yours faithfully"

[13] 25+ years in the oil industry.

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SMA LUNCHEON SPEECHES

Many years ago, when I was president of the SMA, one of our members said, "If you want to tell me about things of interest, write – and then I can read it when I have time." I thought it was a bit obnoxious – remember how I feel about curiosity – but on the other hand, if we can get a story across when our readers are sitting on a plane, at poolside or on the deck enjoying a libation, we accomplish what we have set out to do – to inform.

In the past, THE ARBITRATOR presented summaries of luncheon speeches. Editorial surgery to fit columns and pages is sometimes necessary, but when authors put in the time and effort, why not recognize it and accommodate the full text.

Thanks to the efforts of Tom Fox, we can now publish John Witte's February luncheon address.

In future issues, I expect to produce James Devine's presentation on "Recent Developments in Container Terminal Operations" (March 2007) and Martin Crawford-Brunt's speech, "An Overview of Recent Developments Concerning Class" (April 2007). In a recent conversation, Clay Maitland reported that "Ship Registries and What They Do" is still a work in progress.

THE AMERICAN SALVAGE ASSOCIATION'S OVERVIEW OF CURRENT ISSUES IN SALVAGE

By John A. Witte, Jr.- Vice President - American Salvage Association and Executive Vice President - Donjon Marine Co.

In this era of new advancements in technology, the value of experience is still the best resource available to any industry. With this objective in mind, the American Salvage Association (ASA) was created by nine of the leading salvors in the United States in 2001. Created in response to the need to provide an identity and assist in U.S. marine salvage and firefighting response, ASA works to professionalize and improve marine casualty response in U.S. coastal and inland waters.

Among its mission objectives, ASA tries to ensure open communication and cooperation with regulatory authorities, both state and federal, the environmental community, and shipowners and underwriters to assure effective operations in the future. By working closely together with regulatory authorities as well as owners and underwriters rather than at cross-purposes, the general public as well as marine resources, are better protected.

ASA's Mission

Among ASA's roles is to:

1. Ensure that its membership is committed to standards of readiness, conduct and performance that provide the nation an adequate salvage response.
2. Educate the general public as to the role of the marine salvor in protecting life, the environment and property from the consequences of the perils of water transportation.
3. Promote cooperation among our members to assure a most effective, successful response in major incidents.
4. Promote issues of salvage safety when working in a marine environment.
5. Promote training for today's response as well as anticipating and planning for the changes certain to evolve in the future.
6. Provide standard contracting options for salvage and wreck removal in order to eliminate negotiating delay and thereby promote prompt casualty response.
7. Promote preplanning among owners, underwriters, and regulatory agencies before the actual event.
8. Promote and encourage a regulatory framework that will result in prompt, effective response.
9. Promote communication and cooperation with all those potentially affected by the consequences of a marine casualty.
10. Promote information exchange and cooperation with other national and international trade associations and regulatory agencies for the benefit of transportation by water.

ASA: At the Forefront of the Industry's Most Critical Issues

Since its inception, ASA has focused its efforts on a number of critical marine salvage issues including OPA 90, the promulgation and implementation of the United States Coast Guard's Proposed Rule 33 CFR Part 155 Salvage and Marine Firefighting Requirements, state requirements for salvage response, Vessel Response Plans for oil, maritime security, responder immunity, environmental protection, cooperation among salvors, area contingency planning, and disaster response.

Salvage and Marine Firefighting Regulations

The Coast Guard Authorization Act of 2004 amended the requirement for vessel response plans to include all ships greater than 400 gross tons, spreading the burden of adequate salvage response among all sectors of the marine transportation industry. While there are convincing statistics showing a reduction in accidents involving tank ships and a reduction in oil spilled since the passage of the Oil Pollution Act of 1990 (OPA 90), it has been challenging to urge regulators to move forward with formal salvage regulations. The role of the marine salvor is ever-changing and ASA is at the forefront of the debate for a comprehensive approach to salvage utilization in the United States. The burden has been placed on ship-owners to name and contract with a professional salvor operating in the U. S. in order to do business in this country.

Issues related to the promulgation of these regulations are that the rule only applies to tank vessels, the rapid response times are costly (initially estimated to be $100 million in the first year), the requirement to name public fire resources, the requirement for a funding agreement, and how to define a "Resource Provider."

Response providers are defined as currently able to provide a response service, having a documented history in the business, owning response equipment, having trained employees and 24-hour capability and a history of proven response capability training, and a training program. It also calls for a history of drills and exercises, history of an approved salvage plan, membership in associations, insurance, with good capitalization, local experience and a proven logistical capability.

Professional standards and timeliness of a salvage response are critical components of the pending salvage regulations. Because these salvage regulations have emanated from OPA 90, new regulations apply to vessels carrying oil only. Some say that regulations are too complicated, restrictive, expensive and unnecessary, but it is interesting to note that the same objections were made to the initial passage of OPA 90 itself. Very few could say today that OPA 90 has not been a success in reducing marine pollution in the U. S. U. S. salvors and the ASA have endorsed the regulations, and in addition, have suggested they be extended to all significant commercial vessels that trade to the U.S. and within its harbors and rivers.

State Requirements for Salvage

ASA is also intimately involved in trying to navigate the requirements for salvage response in individual states. For example, the state of California requires a Vessel Response Plan for all ships over 300 GRT, not just tank ships. Alaska, Washington and Oregon also have pending regulations. It is interesting to note that while federal response times are performance guidelines, California state response times are performance standards.

Maritime Security

While our country witnessed the land-side bombing of the Alfred P. Murrah Federal Building in Oklahoma City and the September 11, 2001 attacks in New York and Washington, DC, the coordinated bombings on the railroads of Spain and the maritime terror attacks of the *USS COLE* and the *MV LIMBURG* in Yemen may lead us to understand that an attack on the waterways of the United States may be the next terrorist event. And as much as the focus needs to be on the prevention of attacks, there must also be a need to focus on response should those attacks occur.

While the number of salvage cases worldwide continues to decline, this makes it more and more difficult to invest in salvage personnel and equipment to be prepared for such a terrorist attack on our waterways and ports. The salvage industry shrinks as a natural economic necessity but it must maintain a critical mass. Clearing a blocked channel of a small vessel is a matter of days, of a big vessel a matter of months, of several vessels it becomes a matter of the economic survival of the country. The ASA is heavily involved in this debate and in the issue of industry readiness.

Responder Immunity

The issue of responder immunity remains at the forefront of ASA's discussions among its members and with federal authorities. The traditional role of the professional salvor has in many cases become secondary to his role serving as the first line of defense in preventing environmental damage. However, salvors may be threatened with potential civil and criminal liabilities for environmental damage arguably caused or worsened by their efforts. Salvors' demands for some form of immunity have partially been met, but much still needs to be done to enable professional salvors to perform their jobs to the best of their abilities without the threat of civil and criminal sanctions. Those who perform casualty response should be granted responder immunity if they are to continue protecting our waterways.

Salvors and others have done well to survive an era of practically no such immunity, and have now achieved some limited immunity. At the same time, however, the sorts of liabilities imposed for environmental pollution have increased, and modern criminal sanctions deny relief to salvors by any means but legislation. Therefore, while heightened concern for the environment increases the need for all types of responders, the encouragement essential to the provision of those services has lagged behind the more aggressive increases in the types and extent of penalties being imposed in environmental damage cases.

Environmental Protection

Protection of the natural environmental is a priority issue to the American Salvage Association and its members. The ASA initiated the 4-C's Program - *Communication, Co-operation* and *Competent Completion*. Stressing the need for continued professionalism in the marine salvage industry, ASA members have agreed to increased capital expenditures, expanded training and an experienced labor pool to complement the expanding interest by the U.S. Federal Government as well as states in the field of marine casualty response.

The ASA is committed to assisting Federal legislators in the building of a strong regulatory framework for casualty response. Salvage operations will be made more efficient and effective through pre-planning and pre-contracting with responsible owners using standardized contract terms and conditions, by rigorous cross training among the triage of the federal government, states and individual companies as well as a formal educational exchange with regulatory agencies and others interested in casualty response. It is only through an effective salvage response that the marine industry can demonstrate to the American public the ever-increasing need for competent salvors in American waterways.

Salvage Cooperation and Communication

The growing complications of salvage in the United States have unintentionally driven salvors to seek opportunities to exchange information and, to the industry's surprise, even cooperate. The proposed new salvage regulations provide for an owner/operator to list multiple salvors in order to assure complete geographic coverage as well as cover the multiple tasks required of the salvor. The U.S. salvage community must assess its value as a contributor to a solution of both prevention and response. It is difficult for a single salvor to provide six-hour on-site response to all 47 Coast Guard districts. It is also difficult for some salvors to provide all the listed activities in the time frame required, especially in the unusual event that they may have multiple engagements at the same time. The ASA's active membership has worked to increase the professional nature of response, educating the public to the importance of salvage, review regulatory and governmental influence to assure continued successful response, provide training of a new salvage generation and foster the abovementioned communication and cooperation among salvors which is critical to promote effective solutions. A growing associate membership, composed of those who have an interest in and recognize the importance of salvage response, has also given additional support, advice and an outside perspective.

Area Contingency Planning

Over the last several years, ASA has worked diligently to update the salvage sections of each of the Area Contingency Plans (ACP) throughout the U.S. It is the ACP that provides the USCG Federal On-Scene Coordinator with the guidance and authority to insist on a "professional salvage response," to define what that is, and to include salvage at the discussion and planning table.

Calm in the Storm

Last September, just before the landfall of Hurricane Katrina, Captain Frank Paskewich, Commander of USCG Sector New Orleans, reached out to the ASA and requested that an association representative be in attendance at the command center to provide expert and necessary assistance with the imminent recovery efforts. The ASA representative at the Alexandria, Louisiana command center had been intimately involved in the colossal undertaking of managing rescue, recovery, re-floating and salvage efforts of unprecedented proportion associated with

the wrath of Katrina, and then Hurricane Rita. The ASA hurricane response liaison position was on station since before Hurricane Katrina made landfall and the association continued to provide this requested representation.

With respect to the "nuts and bolts" response to the storm ravished Gulf coast, it should be noted that no less than 70% of the ASA general member companies were involved in the recovery efforts. Whether working directly for vessel owners or the government through various contract vehicles, ASA member companies helped to get the job done. The tasks undertaken by our members included traditional work such as salvage, re-floating of marooned vessels, and harbor and channel clearance, but also included non-traditional responses. ASA companies facilitated the procurement of helicopters early on to assist the USCG in their Search and Rescue mission; they assisted the U.S. Army Corps of Engineers in de-watering Louisiana parishes; and they performed floating debris removal to open up vital LNG facilities. Further, then-U.S. Navy Supervisor of Salvage, Captain Jim Wilkins, in addition to providing his U.S. Navy assets, activated his ASA member contractors to provide much needed support in facilitating numerous individual vessel casualties and channel clearances where the responsible party was not identifiable or national priorities required immediate action.

With the myriad of government agencies involved in the response efforts it was a monumental undertaking to effectively manage the process and ensure that the bureaucracy didn't hinder the response at the level where the "rubber met the road."

And the Association is also involved in a number of other, equally important issues, such as:

Safety Standards

The American Salvage Association recognizes the inherent differences and unforeseen difficulties attendant to any marine casualty as compared with general marine transportation as a primary mover of loads and products. In order to ensure job safety as a primary and identified goal of any marine salvage and wreck removal operation, the ASA promotes domestic and world-wide safety standards. While fully recognizing international and existing safety standards, the ASA, nevertheless, has established its own Salvage Safety Standards, the objectives of which are to ensure safety at sea, prevention of human injury and loss of life, the avoidance of damage to the marine environment and preservation of property.

Technology and Salvage Training

Technology has been accelerating at a tremendous rate over the last several decades. Computerization, communication, on water and under-water navigation, positioning and salvage tools have an ever-increasing capability limited only by the economic restraint of return on investment. While technology as well as environmental necessity expanded the operational areas of what is now salvageable, deep water recovery, new oil extraction and pumping capacity, increased heavy lift capability, dynamic location and positioning to name a few, there is still the need for the salvor to tool up and train for these new capabilities at his expense not being able to assess a return on investment based on unknown future casualty response.

ASA has developed a successful and sought after Salvage Training Program, developing a series of training "modules" intended to teach others the rudiments of the marine salvage trade including the mathematics of salvage and the commercial aspects of the business including the contracting of our services. Each "module" is taught by an ASA member company. ASA has contracted with the USCG Strike Teams and the USCG SERT team to present these modules, and with other agencies such as California's Office of Spill Prevention and Response and the members of the Pacific States/British Columbia Oil Spill Task Force. This has given authorities new knowledge about marine salvage as a business, which allows them to make informed, and therefore better public decisions. It has allowed our membership to meet and interact with those that regulate them.

Conclusion

ASA's achievements have been many in its six-year history; most notable is the fact that it has given an identity and a recognizable face to the

American salvage industry. The ASA is, without question, the globally recognized entity that represents and speaks for and on behalf of the North American salvage community with one unified voice. ASA has become the national focal point for those reaching out to the salvage industry and has achieved untold credibility. The Association has increased its membership to 16 general members, three corporate associate members, over 40 associate members, and one affiliate member. These members make the American Salvage Association the professional and proactive organization that it is today and will continue to be in the future.

We invite you to contact us or visit us on the web at www.americansalvage.org.

"The American Salvage Association's Overview of Current Issues in Salvage." was to have been presented by Mr. Witte at the SMA's February 14, 2007 luncheon. The day was marked by a major winter storm, which prevented the appearance of the featured speaker. However, in anticipation of that possibility, his remarks were received beforehand and were delivered on his behalf by Luncheon Chairman, Tom Fox. Following the delivery of those remarks, there was a lively discussion among audience members covering many of the points made in the presentation.

On behalf of the SMA, many thanks to Mr. Witte for having taken the time to prepare a very comprehensive and informative presentation.

NATHANIEL BOWDITCH MARITIME SCHOLAR OF THE YEAR

In the April issue, I referred to the 2007 annual dinner hosted by the American Merchant Marine Museum Foundation and the Nathaniel Bowditch Award bestowed upon the Senior United States District Judge, the Hon. Charles S. Haight, Jr., a long-time friend of the SMA. I am grateful to Judge Haight for making his acceptance speech available for publication in our journal.

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Admiral Stewart, Captain Leback, Members of the Museum, President Burrell, Colleagues of the Maritime Law Association, Ladies and Gentlemen:

I appear before you as a highly gratified but somewhat surprised recipient of the Nathaniel Bowditch Maritime Scholar of the Year Award.

Lawyers and what they do are called many names. But in common parlance, lawyers are rarely called scholars, and what they do is rarely called scholarship.

At least, not in the sense of the Oxford English Dictionary's definitions of those words. According to the OED, "Scholarship" means "The attainments of a scholar; learning, erudition; also, the collective achievements of scholars; the sphere of polite learning."

Anyone who has been in a trial courtroom, as litigant, juror, witness or spectator, and seen two trial lawyers going at each other, verbally and histrionically, hammer and tongs, tooth and nail, would not suppose that he has found himself in the company of erudite scholars, engaged in the sphere of polite learning.

And lawyers are not always popular. Surely one of the most often quoted lines in Shakespeare is this: "The first thing we do, let's kill all the lawyers."

Lawyers themselves are perfectly capable of criticizing their profession. Whitney North Seymour, a great New York lawyer, once said: "A lawyer is professionally trained to think up three problems for every solution."

So how is one to justify the selection of a trial lawyer, or a trial judge, who is only the same creature in different garb, as the recipient of an award for maritime scholarship? Particularly since Nathaniel Bowditch himself was a world-famous mathematician, scholar of ocean navigation and linguist, held chairs at Harvard, West Point, and the University of Virginia, was elected to the American Academy of Arts and Sciences and the American Philosophical Society, and was named a fellow of the Royal Societies of London and Edinburgh; and since the prior recipients of this award number among their ranks distinguished maritime writers, scholars,
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historians, and founders and curators of maritime museums?

I will contend this evening that the selection of a maritime lawyer or admiralty judge to receive the Bowditch Award can be justified. Indeed, I must attempt to do so, since my only other honorable course would be to decline the award, and I don't want to do that.

I begin by taking a closer look at the much-quoted line from Shakespeare. The line is from Act 4, Scene 2 of "Henry VI" Part II. "Let's kill all the lawyers" is spoken by a character known only as Dick the Butcher to Jack Cade, who responds, "That I mean to do." The objective of Cade, a revolutionary, is to be declared king and then do away entirely with the rule of law. Shakespeare deals with Cade six scenes later when a law-abiding squire kills Cade, presents his head to the king, and is awarded a knightship for his service.

We may suppose then that Dick the Butcher's suggested slaughter of the entire legal profession does not represent Shakespeare's personal view of how to achieve a perfect society.

That conclusion is reinforced by the words Shakespeare gives to Ulysses in Act 1, Scene 3 of "Troilus and Cressida." Keep in mind that to Elizabethan ears, the word "degree" meant the rule of law. Ulysses says:

> *Take but degree away, untune that string,*
> *And, hark, what discord follows! each thing meets*
> *In mere oppugnancy:*
> . . . .
> *Force should be right; or rather, right and wrong, —*
> *Between whose endless jar justice resides, —*
> *Should lose her names, and so should justice, too.*
> *Then everything includes itself in power,*
> *Power into will, will into appetite;*
> *And appetite, an universal wolf,*
> *So doubly seconded with will and power,*
> *Must make perforce a universal prey,*
> *And last eat up himself.*

A more recent, and to my mind equally eloquent, dramatic exposition of the rule of law is found in Robert Bolt's "A Man for All Seasons," his play about Thomas More.

More, still the chancellor of England during the reign of Henry VIII, is increasingly oppressed by his ecclesiastical and political enemies; but he insists upon extending to those enemies the benefit of the rule of law, albeit at the risk of his own life. This distresses his son-in-law, William Roper, a young lawyer. Roper, who loves and is frightened for his father-in-law, and driven by that fear and love into irritation, says to More:

So now you'd give the devil benefit of law!

and More says:

Yes. What would you do? Cut a great road through the law to get after the devil?

and Roper answers:

I'd cut down every law in England to do that!

and More replies:

> *Oh? And when the last law was down, and the devil turned round on you – where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast – man's laws, not god's – and if you cut them down – and you're just the man to do it – do you really think you can stand upright in the wind that would blow then? Yes, I'd give the devil benefit of law, for my own safety's sake.*

Unhappily, More's invocation of the rule of law did not save him from being beheaded at the king's command. But the vital importance of the rule of law to a free and stable society is universally recognized.

Lawyers and judges exist to fashion and preserve the rule of law. It is how we earn our daily bread. Everyone knows that. But it is not generally known that in the discharge of their professional responsibilities, lawyers and judges frequently engage in forms of scholarship which fit within the Oxford English Dictionary definitions, and would be

recognized as scholarship by Nathaniel Bowditch himself.

I suggest that in the practice of law, we can identify three forms of scholarship: the scholarship of advocacy; the scholarship of counseling; and the scholarship of judging.

To illustrate the scholarship of advocacy, I will first take you back in time. It is the evening of May 28, 1914. The Canadian Pacific Railway passenger liner EMPRESS OF IRELAND departs her berth in Quebec on a trans-Atlantic voyage to Liverpool. At 0103 hours on May 29, the EMPRESS stops off Father Point in the St. Lawrence River to discharge her pilot, and then resumes her outbound course. The fully laden Norwegian collier STORSTAD is inward bound in the river. The night is dark. The vessels are on meeting courses. They encounter intermittent patches of fog. Those on watch on each vessel observe the navigation lights of the other. The EMPRESS and the STORSTAD execute helm and engine orders which result in what collision lawyers call a dance of death. The bow of the STORSTAD strikes the starboard side of the EMPRESS. The EMPRESS capsizes and sinks in only 14 minutes.

Fast forward in time to the evening of July 25, 1956. The Italian Lines passenger ship ANDREA DORIA is approaching the area of the Nantucket light vessel on the last stage of her westbound trans-Atlantic voyage from Milan to New York. The Swedish-American Line passenger ship STOCKHOLM is proceeding in the same area on her eastbound trans-Atlantic voyage. The night is dark. The vessels are on meeting courses. They encounter intermittent patches of fog. Those on watch on each vessel observe the navigation lights of the other and, previously, their radar contacts. The ANDREA DORIA and the STOCKHOLM execute helm and engine orders which result in a dance of death. The bow of the STOCKHOLM strikes the starboard side of the ANDREA DORIA. The next day the ANDREA DORIA capsizes and sinks.

Now, what do these fateful maritime collisions have to do with the scholarship of advocacy?

During the governmental inquiry into the collision between the EMPRESS OF IRELAND and the STORSTAD, led by that formidable English admiralty judge Lord Mersey, who also led the inquiry into the sinkings of the TITANIC two years earlier and the LUSITANIA in the year following, the chief counsel for the STORSTAD and her owners was my grandfather, Charles S. Haight.

During the public pre-trial depositions supervised by special masters in the lawsuits in this city arising out of the collision of the ANDREA DORIA and the STOCKHOLM, the chief counsel for the STOCKHOLM and her owners was my father, also named Charles S. Haight.

Scholarship lay at the heart of their advocacy because neither my grandfather nor my father had graduated from the Merchant Marine Academy as a deck officer nor commanded the navigation of any vessel larger than a rowboat – and yet my grandfather was entirely competent to subject Captain Kendall, the master of the EMPRESS, to a thorough and searching cross-examination about that vessel's navigation prior to the collision with the STORSTAD; and similarly, my father, equally uncertified as a deck officer, was entirely competent to subject Captain Calamari, the master of the ANDREA DORIA, to a thorough and searching cross-examination about that vessel's pre-collision navigation. These ancestors of mine, in order to protect their clients' interests, had to become experts in the rules of the nautical road, ship handling, the manners in which vessels respond to helm and engine orders at various speeds, the ranges and visibility of navigation lights in clear weather and in fog, the proper sounding of whistle signals and, in my father's case, the capabilities and limitations of sea-going radar.

The acquisition of this knowledge and these skills required the exercise of scholarship: the scholarship of advocacy. Every trial lawyer, in order to represent the client adequately, must become an expert in whatever the technical aspects of the case may be, even if nothing in the lawyer's prior education or experience qualified him or her in that field.

I will give you a personal, and far more humble and less dramatic example, of the scholarship of advocacy. My first job after graduating from law school was as a very junior trial attorney with the admiralty and shipping section of the United States Department of Justice in Washington. Our clients included the Navy and the Coast Guard and the vessels those services operated. A flotilla of Navy destroyers, proceeding down the Chesapeake Bay bound for sea, negligently departed from the buoyed channel and came too close to the land lying to starboard. The destroyers, with their shallow drafts, did not run aground, but their thrashing propellers passed directly over the beds of oysters belonging to a Chesapeake Bay oyster farmer. The farmer sued the Navy, alleging that the turbulence of the water caused by the destroyers so disturbed his oysters that they were unable to do what oysters do to create little oysters, with the result that his next year's crop was lost. At the trial, we could not defend the navigation of the Navy destroyers, but to defend against the claim that the destroyer's passage caused any damage to the oyster farmer, we needed to become, and in fact did become, experts in the sex life of the oyster. Nothing in my course of study as an English major in college or my three years in law school had prepared me for that study, and so I contend that the specialized knowledge I acquired, and which I am happy to say persuaded the trial judge, was the result of dedicated scholarship.

Not that it took me that long. If you were wondering how much there is to learn about the sex life of the oyster, the answer is, not much.

Now I turn to the scholarship of counseling.

Every lawyer's license to practice recites that he or she is an attorney and counselor-at-law. If the trial attorney is the law's equivalent of a surgeon or an emergency room trauma specialist, then the counselor is the equivalent of a physician practicing preventive medicine. They do this by giving their clients legal advice.

During the past decades, a special class of counselors has emerged: the wise, experienced, well-connected, politically astute Washington lawyer, who never runs for office but during his career gives unpublicized counsel to presidents of the United States. These formidable counselors are known as the "wise men." Robert Strauss, Clark Clifford, Leonard Garment – these are names that come readily to mind. There is a story about one of these wise men, perhaps apocryphal, which goes like this. The wise man is sitting in his corner Washington office, gazing out upon the dome of the Capitol and the pillars of the Supreme Court. The telephone rings. It is a client, the CEO of a major American corporation. The client wants the wise man's advice as to whether or not his corporation should enter into a complex multibillion dollar transaction implicating a fistful of statutes, a basketful of agency regulations, and a thicket of legal questions. When the CEO finally finishes his recitation, the wise man says into the telephone, "Don't do it," hangs up the phone and sends the client a bill for $50,000. The next day the CEO telephones again, expresses his appreciation for the wise man's counsel, but says that the Board of Directors really needs some reasons why the corporation should not proceed with the transaction, which by that time had generated considerable preliminary expenses. "Why," the CEO says to the wise man, "shouldn't the company enter into this transaction?" The wise man replies, "Because I said so," hangs up the phone, and sends another bill for $50,000.

As those in this room know, maritime lawyers do not act this way, but those who engage in maritime commerce do well to seek the guidance of legal counsel. If you are lending or borrowing money to build a ship, you must be made aware of the intricacies of the ship mortgage act. If you are an owner or operator of tankers, you must be counseled with respect to the several oil pollution statutes and their intricate array of regulations. If your shipping company does not succeed, or you are the creditor of another company in financial distress, you need good counsel with respect to work-out strategies and, perhaps, the bankruptcy laws. If your company has entered into a long-term contract of affreightment and charter party and the other company – be it shipowner or charterer – suddenly defaults, you need expert counsel with respect to remedies that may be available under the arbitration or general laws of several jurisdictions.

These are only samples of the services which counselors well versed in maritime law may render to their clients. I am sure you can think of others. But my point is that in order to counsel you properly, the maritime lawyer must engage in constant, continuing, ongoing scholarship. It is the only way to keep abreast of changing statues, regulations, court decision, and developments both in the domestic laws of the United States and international maritime law, which exercises a dramatic influence upon maritime commerce.

A striking testament to the importance of a lawyer's role as counselor is found in the criminal law. In order to obtain a conviction on a criminal charge, it is frequently necessary for the prosecution to prove that the defendant acted with a willful and unlawful intent. This is a necessary element, for example, in cases charging fraud or other white-collar crimes. In such cases, the defense of advice of counsel has been recognized. The Supreme Court has described that defense in these words:

If a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do, and if he fully and honestly lays the facts before his counsel and in good faith honestly follows that advice, relying upon it and believing it to be correct, and only intends that his acts shall be legal, he could not be convicted of a crime which involves willful and unlawful intent even if the legal advice that he received was erroneous.

This is striking evidence of the value the law places upon the scholarship of counseling. A lawyer may give wrong advice to a client, and innocent investors may lose their money, but no fraud, and hence no crime, has been committed because the client relied in good faith upon the advice of counsel. The lay client avoids a criminal charge because, of the two, only the lawyer is regarded as a scholar of the law.

I turn now to the scholarship of judging.

In making their decisions, judges do not look only to the prior cases in their jurisdictions. At times, judges base their most important decisions on research that takes them far back into legal history, or even beyond the bounds of the law entirely. It is fair to call this scholarship. Three Supreme Court decisions give examples. The first is a maritime case.

Until 1975, under American law, if both vessels in a collision were to any degree at fault, the damages were divided equally: 50/50. In the rest of the western world, ever since an international convention in 1910, collision liability was based on proportional fault. The Congress had no interest in ratifying that convention. America's isolationist position on this important question was widely criticized. In 1975, the Supreme Court decided the Reliable Transfer case and brought the United States into the twentieth century of proportional fault in maritime collision law. Justice Stewart wrote in his opinion that, "The precise origins of the divided damages rule are shrouded in the mists of history," and took his research back to the Laws of Oleron, promulgated in Europe in A.D. 1150. This is an exercise of judicial scholarship.

But the two best known and farthest reaching Supreme Court decisions of the twentieth century are Brown versus the Board of Education, which held that racial segregation in public schools was unconstitutional, and Roe versus Wade, which held that a woman had a constitutional right to an abortion. These cases furnish dramatic examples of the scholarship of judging.

In Brown, the court disapproved Plessy versus Ferguson, the pre-Civil War decision upholding separate but equal facilities in public transportation. Chief Justice Warren's opinion for a unanimous court held that separate educational facilities are inherently unequal, thus violating the equal protection clause of the Constitution, and buttressed that holding by saying, "Whatever may have been the extent of psychological knowledge at the time of Plessy versus Ferguson, this finding is amply supported by modern authority." What modern authority did the opinion cite? Not cases – not statutes – the usual grist for the judicial mill. No, the authority the Court cited consisted of the works of six social scientists and psychologists, among them Kenneth Clark and Gunnar Myrdal.

In Roe versus Wade, Justice Blackmun's opinion for the majority casts a broad scholastic net, far beyond legal precedent. For example, his opinion

says, "We have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries." The opinion also considers, among any other sources, the writings of St. Augustine.

Brown versus Board of Education and Roe versus Wade were controversial decisions and, to some degree, remain so today, particularly Roe versus Wade. It is striking that the principal criticism of both cases has been that the justices indulged in an excess of extra-legal scholarship.

It is not my place to say whether that criticism is well founded.

My point this evening is that lawyers and judges, including maritime lawyers and admiralty judges, engage in the scholarship of advocacy, counseling, and judging – scholarship of a degree and to an extent that, I submit, justifies bestowing the Nathaniel Bowditch Award upon one of their number, and which I will accept in a representational capacity and on their behalf.

I conclude by saying that I am persuaded, and hope you are persuaded, that lawyers and judges of good will, who serve and uphold the rule of law, man that fragile, sometimes dangerous barricade which safeguards the nation's freedoms from tyranny on the one hand and anarchy on the other. This great academy and its museum, by the tributes you pay tonight, encourage us in that effort.

Members of the American Merchant Marine Museum:

I will with a glad heart accept the Nathaniel Bowditch Award – and, for what I am about to receive, I am truly grateful.

THE AGENT'S ACTUAL AND APPARENT AUTHORITY (AND LACK THEREOF)

By Patrick V. Martin, SMA Counsel

Every so often, arbitrators need to be aware of the underlying principles of agency which they take for granted in their every day commercial activities. One of the best summaries of the agent's authority is:

> As between principal and agent, the limit of the agents' authority to bind the principal is governed by the agent's actual authority. As between the principal and third persons, the limit of an agent's authority is governed by his apparent authority. Apparent authority is a judicially created concept of estoppel which operates in favor of a third party seeking to bind a principal for the unauthorized act of an apparent agent. [*Independent Fire Insurance Co. V. Lea*, 775 F.Supp.921 (E.D. La. 1991)]

As can be seen, the agent's authority is composed of various parts.

Actual Authority

The agent's actual authority is divided into two sections. First is the express authority given to him by his principal. Second is the implied authority which is necessary to carry out the express authority.

a. Express Authority

An agent has no authority except that which the principal gives to him. The grant of authority can take many forms. It can be general or specific or something in between. A principal can make an agent a general agent at a particular port and let the trade know that by an appropriate notice in a trade paper or by letting the agent advertise that fact. This is often done in the liner trades. That general grant of authority has of course practical limitations. The agent is only authorized to conduct those transactions that are customary and usual in that trade and for the particular purposes of the grant. The agent could enter and clear the ship, book cargoes, hire stevedores and similar cargo related activity. Depending on the circumstances, the agent may have authority to stem bunkers and purchase provisions. The agent probably would not have authority to sell the ship, hire and fire crew members, buy hull insurance, or borrow money for the principal's account. These and other types of activity would be considered management functions. In the normal course, an agent would have to

receive specific authority which often would take the form of a formal power of attorney.

> An agent may be given only specific authority to enter and clear a ship and perhaps arrange for cargo operations. In such instances, persons dealing with such an agent would have to be careful in ascertaining the agent's authority to bind the principal beyond that for which he had specific authority.
>
> b. Implied Authority
>
> When the agent is given express authority to accomplish some purpose of the principal, there is a related implied authority that goes along with it. For example, a ship owner employs an agent to enter and clear a ship. Implicit in this grant of authority would be that the agent can incur the usual expenses in doing so. Not included, for instance, would be the authority to book cargo or stem bunkers.

Apparent Authority

This aspect of authority focuses on the third party who is dealing with the agent. It is based on the concept of estoppel. In essence in situations where there is apparent authority, the principal cannot deny that the agent had the necessary authority to bind the principal. Its purpose is to protect innocent third parties who dealt with the agent in good faith. It is what the third party reasonably believes the authority of the agent to be. This scope of this authority is established in various ways, but only by the actions of the principal.

A principal's assent to the agent's apparent authority occurs when the principal knows what the agent is doing and does not stop it and continues to permit the agent to assume the exercise of authority he does not have.

In addition, the third party must have reasonable grounds to believe and did believe that the agent possessed such authority.

Lastly, the third party must act on the basis of his belief and change his position in reliance on the agent's apparent authority.

When a court must make a determination as to whether the agent was clothed with sufficient authority to bind the principal, the court will look solely to the actions of the principal.

An illustrative example is a situation where a ship owner has a long established relationship with an agent who has been appointed a general agent at a particular port. The principal and agent have a falling out and the principal revokes all the authority that the agent had at the particular port. While the ship owner is looking around for another agent, the fired agent continues to act as if nothing had happened and continues, for example, to book cargoes for the owner's vessels. The agent had absolutely no actual authority to do this. However, the owner had failed to let the trade know that the agent had no authority to conduct any business on its behalf. A court would likely find that the unauthorized acts of the agent would bind the principal. As a matter of public policy, the court would determine that the innocent third party, relying on the well known prior authority of the agent, should be protected on the grounds of estoppel. The ship owner had the opportunity to prevent the agent from acting by simply placing notices in trade publications and failed to do so.

Of course, the agent acting without any authority would be liable to the principal for any losses the principal sustained.

A variation on this theme is where the principal has given the agent general authority to act on its behalf but has limited that authority with specific secret instructions. For instance, an agent may have general authority to book cargoes. However, the principal tells him not to book cargoes from a specific shipper because of rumors that the shipper may be going bankrupt. Despite these instructions, the agent books cargoes from the shipper. The owner would be bound by the agent's contract but could recover over from the agent for any losses sustained.

Duty of Third Party

The duty of the third party is to make reasonable efforts to ascertain the authority of the agent. The third party usually relies on the agent's word. However, this is not enough in a legal setting. An agent cannot prove his own authority. He needs to have something from the principal defining the extent

of his authority. From the prior discussion, it can be seen that this authority can be actual or apparent.

When an agent purports to bind a principal and there is no actual or apparent authority, there is no contract between the principal and third party. However, the third party may have a cause of action against the agent for breach of the implied warranty of authority.

Conclusion

The above can be used as guidelines when looking into the actual and apparent authority of managing agents, commercial managers, technical mangers, general port agents, owner's port agent and the like.

For example, there was a COA of five years to carry crude oil from the PG to Europe. Toward the end of the COA, disputes arose and the COA was "cancelled". The Charterer asserted a major claim against the Owner. The Owner, a major fleet owner, was described in the charter as "Heathrow, as agents for vessels TBN". The TBN's were not otherwise identified in the COA. Who was responsible for the Charterer's alleged losses, Heathrow, the unnamed TBN owners, any vessel in the fleet, all or any of them? After commencement of arbitration proceedings, the matter was settled over drinks and dinner.

WILL THE "WINTER STORM" CONTINUE TO RAGE?

By Keith Heard, Esq.

Looking at nearly twenty-seven years of practicing maritime law in New York, I cannot think of another decision by the Second Circuit Court of Appeals that has affected the day-to-day practice of maritime law in this city more than *Winter Storm Shipping Ltd. v. TPI*, 310 F.3d 263 (2d. Cir. 2002).

(The Supreme Court's decision in *Vimar Seguros y Reaseguros S.A. v. M/V SKY REEFER*, 515 U.S. 528 (1995), has probably had a greater overall effect on the practice of maritime law in New York and elsewhere around the country but *SKY REEFER* went to the Supreme Court from the First Circuit Court of Appeals in Boston, not from the Second Circuit.)

As most everyone knows by now, in *Winter Storm*, the Second Circuit ruled that process of maritime attachment and garnishment issued pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims, annexed to the Federal Rules of Civil Procedure, can be used to seize and detain Electronic Funds Transfers ("EFT's") passing through the banking system.

In the case itself, the plaintiff shipowner obtained security for a charter party dispute to be arbitrated in London by attaching at an intermediary bank in New York an EFT en route from a bank in Thailand to the Royal Bank of Scotland in London. Defendant TPI then moved in the district court to vacate the attachment. Judge Shira Scheindlin of the Southern District of New York held that an EFT intercepted at an intermediary bank is not "property" that can be attached under Rule B. The basis for her conclusion was that § 4-A-503 of the Uniform Commercial Code ("UCC"), as adopted in New York, prevents an EFT from being restrained at an intermediary bank, although such a restraint could occur when the funds are in the hands of the originator, the originator's bank or the beneficiary's bank.

On appeal, the Court of Appeals reversed, holding that "EFT funds in the hands of an intermediary bank may be attached pursuant to Admiralty Rule B(1)(a)." *Id.* at 278. In so ruling the Court concluded that the District Court's reliance on UCC section 4-A-503 was inappropriate "because Admiralty Rule B preempts U.C.C. § 4-A-503." *Id.* at 279. As a result of the Second Circuit's ruling, the District Court's judgment was vacated and Winter Storm Shipping's attachment was restored.

Since the Court of Appeals' decision in *Winter Storm*, the use of Rule B to attach EFT's passing through intermediary banks in New York has grown dramatically. Claims to be arbitrated in New York, London and Singapore have been secured in this way. Typical situations frequently involve the attachment of funds being routed to or from companies that charter ships, incur routine obligations for freight, deadfreight or demurrage and then ignore

subsequent demands to arbitrate. To the extent the use of Rule B attachments of EFT's causes dodgy and delinquent creditors to "face the music", as it were, it has proven to be an effective and salutary tool for maritime creditors and their underwriters, often cutting short the need for protracted proceedings on relatively straightforward claims. However, other Rule B cases are more complex and derive from more complicated underlying disputes.

In any event, the volume of Rule B attachments being sought in the Southern District of New York has attracted the attention and drawn the ire of the garnishee banks and allied organizations, such as The Clearing House Association LLC. Last year, in *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434 (2d Cir. 2006), the Clearing House as well as the Federal Reserve Bank of New York submitted briefs *amicus curiae* in which they asked the Court of Appeals to overturn its ruling in *Winter Storm*.

Aqua Stoli involved a motion to vacate an attachment, not because of a fundamental challenge to the use of Rule B to intercept EFT's, but because the defendant, a large Australian enterprise, argued that plaintiff "Aqua Stoli had no need for the attachment because [defendant] Gardner Smith was a substantial on-going business of sufficient assets outside the district to satisfy any potential judgment." *Id.* at 437. The District Court, per Judge Jed Rakoff, accepted this argument, determining that plaintiff "had not shown a need for security because Gardner Smith is a large, financially secure company." *Id.* at 439. "Alternatively, the district court concluded that Gardner Smith established that the attachment's burden [in terms of restricting the flow of funds to and from Gardner Smith] outweighed any benefit to Aqua Stoli." *Id.*

The Court of Appeals did not follow the route mapped out by the banking interests to overturn *Winter Storm*. However, the Court did toss out a tantalizing nugget of hope to the banks in the form of what is commonly referred to as "footnote six" of the *Aqua Stoli* decision, *id.* at 445 fn. 6, where the Court wrote as follows:

> The correctness of our decision in *Winter Storm* seems open to question, especially its reliance on *Daccarett*, 6 F.3d at 55, 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, N.Y. U.C.C. Law §§ 4-A-502 to 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. *Id.* §§ 4-A-502 cmt. 4, 4-A-504 cmt. 1.

Last Fall, Judge Rakoff, author of the lower court decision in *Aqua Stoli*, relied in part on "footnote six" to limit application of *Winter Storm* to cases involving transfers initiated by the defendant debtor. *Seamar Shipping Ltd. v. Kremikovtzi Trade Ltd.*, 461 F.Supp.2d 722 (S.D.N.Y. 2006), involved a demurrage claim, which was subject to London arbitration, against companies involved with a Bulgarian steel mill that had been purchased by one of the Mittal brothers of India. Plaintiff *Seamar* succeeded in attaching certain funds that were present in the Southern District of New York pursuant to successful attachments obtained by other creditors of the defendants in prior cases. Thus, the case did not involve an interruption of an EFT as it passed through the banking system in New York. The money was already under attachment in other cases pending in the Southern District.

Intervenor GSHL Bulgaria S.A. moved to vacate the attachment, arguing that the funds belonged to it and not to the defendants. In addition, GSHL argued that "the funds were not the property of either party while in transit and thus were not subject to attachment under Admiralty Rule B(1)(a)." *Id.* at 223. The District Court granted the motion to vacate on the basis of the latter argument.

In the course of its analysis, the District Court observed that "[t]he Second Circuit has not spoken with one voice . . . on whether an EFT in the hands of an intermediary bank can be said to be a 'defendant's' property, when the defendant is either the originator

or the intended beneficiary of the EFT." *Id.* at 224. Focusing on footnote six of *Aqua Stoli*, Judge Rakoff concluded that the language therein "raises a serious question of whether *Winter Storm's* implicit holding that EFT's may be considered to be a defendant's property while in transit remains good law." *Id.*

However, since the District Court did not have the power to disregard the Second Circuit's ruling in *Winter Storm*, Judge Rakoff focused on a more narrow issue: "whether an EFT can be attached under Rule B(1)(a) where the defendant is the intended *beneficiary* of the EFT, rather than the originator." *Id.* at 225. The Court noted that in *Winter Storm*, the defendant was the originator of the EFT. Since *Aqua Stoli* "called *Winter Storm* into serious doubt," Judge Rakoff concluded that "it would be illogical to construe other statements in *Aqua Stoli* to broaden *Winter Storm." Id.* Since he viewed *Aqua Stoli* as requiring that a narrow construction be placed on *Winter Storm*, he concluded that application of *Winter Storm* must be limited to situations when the defendant is the originator of the EFT. In the *Seamar* case, defendant Kremikovtzi was "the purported beneficiary" of the transfer.

Concluding that there was no federal rule governing whether an EFT is the property of an intended beneficiary while in transit, Judge Rakoff looked to state law for guidance. New York UCC § 4-A-503 provided that "until the funds transfer is completed . . . the beneficiary has not property interest in the funds transfer" that a creditor can reach. Since, according to the Court, Kremikovtzi was the intended beneficiary, rather than the originator of the funds, it "had no property interest in the attached EFT, as Admiralty Rule B(1)(a) requires." *Id.* at 226. Accordingly, the District Court granted GSHL's motion to vacate the attachment.

Seamar appealed the District Court's ruling but the Second Circuit stayed the appeal, pending disposition of the appeal in *Vamvaship Maritime v. Shivnath Rai Harnarin*, 2006 WL 1030227, 2006 A.M.C. 1169 (S.D.N.Y. 2006), another Rule B case. In *Vamvaship,* the plaintiff shipowner prevailed at arbitration in London of a charter party dispute with defendant Shivnath and then sought a Rule B attachment in New York to collect on the award. The attachment succeeded in intercepting a payment being made to Shivnath by Little Rose Trading LLC, who moved to vacate. Little Rose argued that the attachment should be vacated because the New York bank where funds were attached acted as an "originating" rather than an "intermediary" bank, Shivnath had no property interest in the attached funds, and equity favored Little Rose. However, Judge Harold Baer of the Southern District rejected all of these arguments and denied the motion to vacate.

Little Rose appealed the denial of its motion and, in the early stages of the appeal, the Second Circuit decided *Aqua Stoli*. Little Rose took note of footnote six and submitted new forms to the Court of Appeals, raising in its appeal the issue of whether *Winter Storm* should be overturned. As in *Aqua Stoli,* the Clearing House and the Federal Reserve Bank of New York filed *amicus* briefs but a new *amicus* player also joined the fray. In February the Maritime Law Association of the United States filed an *amicus* brief, urging the Court of Appeals to apply federal maritime law, rather than state law, to the traditional maritime remedy of attachment. This is, of course, at odds with the position urged by the banks, who advocate application of state law, as Judge Rakoff did when vacating the attachment in *Seamar*.

Oral argument was scheduled to take place in *Vamvaship* on March 29th of this year when, in an unexpected development, the appeal was withdrawn as moot. Apparently Vamvaship found other funds belonging to the defendant Shivnath and, as a result, could release its attachment of the Little Rose EFT. When the attachment was voluntarily released, Little Rose achieved the result it had been seeking in the appellate process. Accordingly, it spared the Court of Appeals a needless endeavor and agreed to a voluntary dismissal of the appeal.

However, this development was not well-received by the *amicus curiae* banking interests. In a letter dated March 16, 2007, they asked the Court of Appeals to hear and decide the appeal *in any event* on the basis that it presented "a matter of continuing and substantial public interest." The Second Circuit

denied the banks' request, thereby ending the appeal in *Vamvaship.*

Meanwhile, more motions to vacate Rule B attachments were being made in other cases in the Southern District. In *Consub Delaware LLC v. Schahin Engenharia Ltda.*, 476 F.Supp.2d 305 (S.D.N.Y. 2007), plaintiff Consub sought security for a large claim arising from the alleged brief of a Submarine Telecommunications Cable Maintenance and Related Services Agreement. Last December defendant Schahin initiated a wire transfer for over $4.2 million that was attached at Standard Chartered Bank in New York. Schahin then moved to vacate the attachment.

For its first argument, Schahin contended the EFT that had been seized was not its property and, therefore, could not be seized under the attachment order plaintiff had obtained from the Court. Essentially, Schahin argued that the Second Circuit's decision in *Aqua Stoli* "has undercut *Winter Storm's* holding." *Id.* at 310. However, Judge Scheindlin observed that while "the Second Circuit – in dicta – questioned the correctness of the *Winter Storm* [decision], it did not overrule *Winter Storm."* *Id.* at 311. Accordingly, she concluded that "*Winter Storm* remains good law and is binding on this Court." *Id.* She therefore refused to consider Schahin's argument that New York state law (i.e., the UCC) prevented and required vacatur of the attachment.

For its second argument, Schahin contended that the attachment order should be vacated on the basis that the English forum selection clauses in the governing contract and a related Novation Agreement granted "exclusive jurisdiction" to English courts, "thereby precluding Rule B attachments in the United States." *Id.* Following the Ninth Circuit's ruling in *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982), Judge Scheindlin rejected this argument as well, allowing the attachment to stand.

Although Judge Scheindlin ruled against Schahin on the merits of its arguments, she granted Schahin's motion for leave to file an interlocutory appeal under 28 U.S.C. § 1292(b). Of particular note was Judge Scheindlin's discussion of whether the issue presented by the case involved a "substantial ground for difference of opinion." *Id.* On that aspect of the test under § 1292(b), she wrote as follows:

> There is certainly "substantial ground for a difference of opinion" as to the issue of whether EFTs are property subject to attachment because there are conflicting Second Circuit statements on this very issue. Indeed, the Second Circuit in *Aqua Stoli* essentially invited parties to challenge the underpinnings of its prior holding in *Winter Storm* when it stated that "[t]he correctness of our decision in *Winter Storm* seems open to question." The only way that question could ever be raised would be on interlocutory appeal because under the current state of the law, district courts are bound to apply *Winter Storm* to attachments of EFTs.

476 F.Supp.2d at 313.

Accordingly, the District Court's decision denying Schahin's motion to vacate the attachment obtained by Consub Delaware was appealed to the Second Circuit. With the *Vamvaship* appeal having been terminated, the Court of Appeals lifted its stay in *Seamar* and ordered that the appeal in that case be heard "in tandem" with the one in *Consub Delaware*. Under the Scheduling Order currently in effect, appellants' briefs in the two cases are due on July 20th and appellees' briefs are due on August 20th, with the case to be "ready" for oral argument during the week of September 23rd. Presumably, as in *Aqua Stoli* and *Vamvaship*, briefs will also be filed by *amicus curiae* such as the banking interests and the U.S. MLA. What happens after that is anyone's guess but, if footnote six in the *Aqua Stoli* decision is a good indication, the practice of using Rule B to attach EFT's may not be around this time next year.

SMA ELECTIONS

At the 44th Annual Meeting of the SMA on May 8, 2007, the following were elected for two-year terms: President - Klaus C.J. Mordhorst; Vice President - Thomas F. Fox; Directors - David W.

Martowski, John F. Ring, A.J. Siciliano and Donald J. Szostak.

The Directors and Board of Governors for the next year will be as follows, with alternates in parentheses:

K.C.J. Mordhorst, President
T.F. Fox, Vice President (G. Desmond)
S. Wolmar, Secretary (R. Spaulding)
J.F. Ring, Jr., Treasurer (C. Norz)
M.W. Arnold (J. Hood)
H.E. Engelbrecht (D. Frost)
S.H. Hansen, Jr. (N. Hawkins)
R.S. Kleppe (G. Spitz)
D.W. Martowski (G. Hearn)
A.J. Siciliano (M. van Gelder)
D.J. Szostak (A. Bowdery)
R.P. Umbdenstock (B. Nergaard)

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

Standing Committees

THE ARBITRATOR	M.W. Arnold
Award Service	A. Bowdery
Bylaws and Rules	L.C. Bulow
Education	A.L. Dooley
Professional Conduct	R.S. Kleppe
Liaison	M.W. Arnold
Luncheon	T.F. Fox
Membership	M.A. van Gelder
Salvage	R.P. Umbdenstock
Seminars and Conventions	K.C.J. Mordhorst
Technology	D.J. Szostak

Ad Hoc Committees

Index and Digest	D.W. Martowski
Small Crafts	W.D. Wheeler
Strategic Planning	T.F. Fox

The Board meetings are scheduled for September 19, 2007; October 17, 2007; November 14, 2007; December 12, 2007; January 16, 2008; February 13, 2008; March 12, 2008; April 16, 2008.

The luncheon dates are the same as above; the September lunch is for members only as is the Annual General Meeting of the SMA which will be held on May 13, 2008. Please check the Calendar on the SMA website at www.smany.org for possible changes and for information regarding speakers and topics.

SMA SHORTENED ARBITRATION PROCEDURE

The Board of Governors announced that effective May 1, 2007, the maximum allowable award towards legal expenses has been increased to $3,500 (paragraph 7) and the fee and expenses of the arbitrator have been increased to $2,000 if there is no counterclaim, plus an additional $1,000 in the event of a counterclaim (paragraph 9).

PEOPLE AND PLACES

The law firm of Tisdale & Lennon has evolved into separate entities:

Thomas L. Tisdale, Esq.
Tisdale Law Offices
10 Spruce Street
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Office Fax: (203) 254-1641
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Patrick F. Lennon, Esq.
Lennon, Murphy & Lennon, LLC
The GrayBar Building
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Office Fax: (212) 490-6070

and

Tide Mill Landing
2425 Post Road
Southport, CT 06890

Office Telephone: (203) 256-8600
Office Fax: (203) 256-8615
Email Address: pfl@lenmur.com

Another change of address notice was received from:

Charles B. Anderson
Anchor Marine Claims Services Inc.
317 Madison Avenue
Suite 708
New York, NY 10017-5262
Phone (212) 758-9200, fax (212) 758-9935
and email addresses remain unchanged.

Our SMA colleagues and members of the admiralty bar are invited to take advantage of this column and announce contact changes, special events or other matters of interest to the readership. Please submit details to the editor.

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The Cambridge Academy of Transport's Seminar on Charter Party Disputes

London June 13-15, 2007

by

David W. Martowski

On June 14th I again participated in a joint presentation with Cambridge Academy of Transport (CAT) Seminar Moderator David Martin-Clark in a comparison of several differences between London and New York maritime arbitration.

Readers will recall that CAT was established in 1985 and under the direction of Dr. John Doviak offers twenty intensive management courses to the international shipping industry at the University of Cambridge, London and other overseas fora. This year's program was attended by shipping executives from Saudi Arabia, Kuwait, Germany, Argentina, Spain and Brazil.

The presentation followed last year's format – a summary of the LMAA and SMA Rules, an overview of the US judicial system, publication and confidentiality, awarding of attorneys' fees and costs, arbitrators' powers to order security, attachment pursuant to Rule B(1) of the Admiralty Rules, consolidation, participation of non-signatories to the arbitration agreement, "sub details" and class action arbitrations.

Rule B attachments continue to generate a great deal of discussion depending on whether one stands in the shoes of a claimant, respondent or intermediary bank. The Second Circuit Court of Appeals decisions in *Winter Storm Shipping Ltd. v. TPI*, 310 F.3d 263 (2002); *cert denied*, 539 U.S. 927 (2003) and *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434 (2006) were summarized in detail. These issues will be reviewed by the Second Circuit Court of Appeals in the Fall and perhaps eventually by the US Supreme Court.

Interest was also expressed in the decision in *Stolt-Nielsen et al v. Animalfeeds International Corp*. et al, 435 F.Supp. 2d 382 (S.D.N.Y. 2006) that vacated an arbitration panel's decision permitting class arbitration under the Asbatankvoy and Vegoilvoy arbitration clause, which will also be heard on appeal in the Fall.

This was an educational and thoroughly enjoyable experience.

SOME PERSONAL NOTES

Luncheon Speakers

Some of the previous luncheon chairs have commented on how difficult their task is. If no one shows up at the luncheon, it is the chairman's fault; if there is a full house, it is the quality of the speaker. Even though Tom Fox is doing a great job, it would make his life easier if the bar or his SMA colleagues would suggest or introduce potential speakers who would fill the hall.

Just think about the quid pro quo – you do a good thing, you provide your colleagues with an interesting speaker and the SMA will also benefit from having an SRO attendance.

Give it a try.

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Simple Interest Made Simpler

For those who have had questions in the past about calculating interest, SMA member Don Szostak has come up with the solution. Don has posted a program on the SMA website (on a trial basis) which takes the worries out of the calculation process. No longer do you have to concern yourselves with when the prime changed or whether the interest period included a leap year.

I have tried the program, it works and I thank Don for coming up with it. If I recall correctly, there was a commercial with the slogan "Try it, you might like it."

To try it, if your email application supports it, simply click here on **INTEREST CALCULATOR**. Otherwise, log on to the SMA website at www.smany.org and click on the "SMA MARITIME ARBITRATION COURSE" link. Next click on the "Test Interest Calculation" link. This will bring you to the discussion about all you need to know regarding the "INTEREST CALCULATOR."

We are interested in feedback regarding this addition to the SMA website. Is it useful? Should we make it permanent and more easily accessible? Give us your ideas.

In Vino Veritas

This is not going to be an article about the search for truth, neither is it about arbitration – it's about a social event. Nothing happened that is of any relevance to arbitration, but then again many things in life are not – and are still of interest and enjoyment. If I had to look for a nexus, three SMA members attended and the party was given by a prominent law firm with an admiralty section.

My reason for wanting to share this with you is that it was a most pleasant event, with a theme so unlike many other social functions we all have attended over the years and thus worth mentioning.

It was a wine tasting hosted by DLA Piper's Finance Group for their clients and friends. The event took place on May 23rd at Nicole's in New York and was attended by approx. 100 guests.

The tasting was ably arranged and conducted by the venerable wine merchant, Morrell. Six tasting stations had been set up featuring the wines of : Italy – Alsace, Austria and Germany – France – Spain and Portugal – America – and down under, Australia and New Zealand. The twenty-four wines were expertly paired with the national or regional foods. The wine selections were wide-ranging and appealing. For those interested, my favorite three wines were the Washington State Andrew Will Ciel du Cheval 2004 (served from a magnum), the 2001 Brunello di Montalcino Fanti and the Ch. La Mission Haut Brion of 1999.

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Maybe for the next SMA Anniversary celebration we can try a wine tasting.

IN MEMORIAM

Donald E. Zubrod

(by A.J. Siciliano)

After celebrating his 83rd birthday two weeks earlier, former president of the SMA, Donald E. Zubrod lost a mercifully short bout with cancer and passed away on May 5, 2007. His family arranged for Don's remains to be flown from Atlanta, Georgia to Wyckoff, New Jersey for internment. On May 10, 2007, a few of Don's friends and colleagues joined his son John, daughter Donna and their families to attend a memorial service at St. Nicholas Greek Orthodox Church, a church which Don himself helped to establish. After the service, Don was laid to rest alongside his wife, Isabelle, with a U.S. Coast Guard color guard in respectful attendance.

Not many knew that Don grew-up in the shadow of Brooklyn's famed Ebbetts Field or that he began his shipping career as an office clerk for Waterman Steamship. At the tender age of 17, Don shipped out on the Waterman - operated SS ROGER B. TANEY, a Liberty Ship, which on February 7, 1943 was torpedoed and sunk in the South Atlantic by a German U-Boat. Although three men perished, Don and 53 others were able to reach two lifeboats, which then drifted off in different directions. The occupants of the other lifeboat were picked-up after 21 days. But Don and his 27 surviving shipmates spent forty-
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two days in their lifeboat on meager rations before being rescued off Santos by a Brazilian coaster. Curiously some months later, that same coaster was itself torpedoed and sank with Don's lifeboat from the ROGER B. TANEY still aboard. Decades later, Don was able to reach out to the skipper of the sub who sank his and 31 other ships. Joined by the special bond between those who faced life threatening situations at sea, the two former adversaries developed a warm friendship.

Following his repatriation and subsequent hospitalization, the War Shipping Administration (WSA) called upon Don to recount his harrowing experience in a tour of the Midwest. Don also shared his experiences with New Yorkers when he appeared on radio with Red Barber, the legendary announcer for the much maligned but always beloved, Brooklyn Dodgers baseball team.

Don returned to the Merchant Marine and sailed as a purser through much of 1947. At that time, he came ashore and took a job in New York with a ship chandler. It was there he met Mr. Anthony Manthos, a Greek shipowner who had acquired one of the many surplus Liberty Ships made available by the U.S. Government. Don spent the next 44 years in the employ of the Manthos family and in doing so compiled an extraordinary record of achievement, culminating in the conversion of an ore carrier and its subsequent operation as a deep sea drill ship.

It was my privilege to work under Don at Admanthos Shipping Agency Inc. for three very happy years. I came to know him as a gifted man of high integrity with an unusual talent to quickly get to the heart of a problem. Those traits carried over into his parallel life as a respected maritime arbitrator and distinguished member of the BIMCO Documentary Committee.

Don joined the SMA in 1970 and twice served as its president. His many contributions to the Society and the international industry it serves are far too numerous to describe here. Suffice it to say, that whenever the Society called, Don was there to answer the need. When diabetes induced macular degeneration took his sight away, Don was forced to move from Wyckoff to be nearer family in the Atlanta area and to step away from his role as one of SMA's most able and highly-regarded arbitrators. It was not a decision that Don took easily. Nevertheless, wishing to leave something of himself for his children and grandchildren, Don spent his last months gathering personal memorabilia of his enviable career and recounting his life experiences to a biographer of the contributions and sacrifices made by those who so valiantly served this nation as wartime merchant mariners. A truly fitting remembrance for, truly, a special man.

Godspeed dear friend …

For THE ARBITRATOR

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