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THE PRESIDENT'S CORNER

With another great summer now unfortunately behind us, all attention is turning to a busy fall and winter season.

To get things rolling in a really challenging way, NYMAR (New York Maritime Inc.) set the tone, conducting its second annual afternoon seminar at The Fordham University School of Law on September 20th by examining the very topical issues of "Capital Markets: Today and Tomorrow." You will find a full analysis of this stimulating and educational afternoon further on in this issue.

Tom Fox and his luncheon committee have once again done an outstanding job in arranging for a series of highly interesting topics, which are bound to draw ever-increasing attendance to our monthly luncheons at The Ketch Restaurant. Check the SMA website Calendar of Events for dates and details and make your reservations early. We are also contemplating holding our December luncheon at a prominent venue mid-town to show our appreciation to our many traveling supporters; look for further information shortly.

As in past years, I simply like to remind you that these luncheons are designed to provide important information on current topics of interest and to offer excellent opportunities for arbitrators, the users of the process and the maritime bar to come together and interact professionally as well as socially.

I look forward to catch up with many of you at any of these events.

Klaus Mordhorst

WORKING FROM HOME ISN'T WORKING

By Chris Hewer

WORKING from home is the new dress-down Friday. It is to be hoped the former will prove to be more successful than the latter.

The trouble with dressing down is trying to establish a starting point from which the downward descent begins. Law firms have been the great crusaders of dress-down Fridays, and the most spectacular failures. For most lawyers, dressing down means wearing a cravat instead of a tie, and daring to wear brown shoes.

Dressing down means different things to different people. To a judge, it means wearing anything in a colour other than black. To an arbitrator, it means chinos and a blazer (breast-pocket insignia optional). To a journalist, it means wearing shorts which leave something to the imagination.

Trouble is, whenever you dress down and have to go to a meeting, the person you are meeting can never take you seriously. You are not somebody they recognise. You are not who you are meant to be. Dressing-down was never going to work.

Working from home has evolved slowly, indeed much more slowly than the progress of technology has allowed. Ask yourself why. We have been through hot-desking, and temporary work stations. They didn't work, not least because you always found somebody else's sandwiches in what you thought was your desk drawer. Working from home is just the next step.

So what are the prospects for working from home? There are some clear advantages. You don't have to waste time travelling. You don't have to worry about dressing at all, either up or down. You don't have to tell anybody where you are going for lunch, who you are going with, or what time you will be back. You just say, "I'm going out now, and I'll be back whenever the hell I feel like it." Those are the advantages.

Here are some of the disadvantages. Whenever people say, "Oh, I bet you don't miss that three-hour journey to and from the office every day – such wasted time", you start to realise that you do miss it. You miss the opportunity to read your newspaper or your book, you miss doing the crossword, or you miss listening to your old Dylan tapes. You can still do those things at home, but not without feeling guilty.

Quite apart from the travelling, you miss the simple act of arriving at - and departing from - the office. You miss saying 'Hello' and 'Goodbye'. You miss moaning about the coffee, and the trains, and the traffic. You miss the gossip.

If you work from home, all you have to moan about is working from home.

Those who have already gone down the working-from-home route will know that it doesn't impress anybody. The first thing they say is, "Oh, so you're working out of your back bedroom". Even though you are not, even though you have a state-of-the-art office working environment in a dedicated part of your house, you are still working from home. You don't have a tea lady. You don't have fire drills. And you can smoke all day without stepping outside. Money for nothing, and your kicks for free.

But working from home does work for some people. New York maritime arbitrators are a case in point. Many of them have it off to a fine art, managing to take advantage of all the good bits, and suffering none of the bad. The trick is that they still go on trains and planes, and in cars. They still meet people, and they can still talk the leg off an iron pot and get paid for it.

And those of us who have already made the transition to working from home may yet have the last laugh. We know all the best bits, and don't reveal them in articles such as this one. So, when the rest of the world is just starting to come to terms with working from home, we will have it off pat. We will have come to appreciate the advantages of having more time for work, and more time for play, and

being our own bosses, and not being a slave to corporate protocol. Every day will be Friday, and we will dress accordingly. We might even have a small office, in town.

STANDING OF NON-SIGNATORIES TO CHARTER PARTY CONTRACT TO APPEAR AND ADVANCE CLAIMS IN ARBITRATION AGAINST THE SIGNATORY PARTY

By: Jim Textor, Esq.,
Partner Cichanowicz, Callan, Keane, Vengrow & Textor

Introduction

The issue of whether or not non-signatories to a charter party transportation contract can appear in New York arbitration proceedings to advance claims against the signatory/respondent party, is not a particularly new commercial issue. However, due to U.S. Federal Court decisions issued during the last four years, both at the Circuit and District Court levels, this issue has again become very important for arbitrators, parties which negotiate contracts with arbitration clauses especially users of SMA arbitration in New York City, and their maritime attorneys. This paper discusses recent legal decisions in which the Courts have rendered detailed opinions generally in support of maritime arbitration proceedings and specifically in support of the rights of non-signatories to the applicable contract to appear in maritime arbitration proceedings to advance claims against a signatory/respondent party.

Established SMA Precedent

Since the 1970s, SMA Panels have been asked to decide the issue of the standing of a non-signatory entity but affiliated to a signatory party, to advance commercial claims against the signatory/respondent party. Typically, the signatory party/respondent challenges the standing of the non-signatory entity to appear in the arbitration proceedings as a non-party to the charter party contract. For commercial, operational and especially tax reasons, vessel owners, operators and charterers have established affiliated shell corporate entities to appear as a named party in charter party transportation contracts as either owner or charterer even though the listed entity may not be the registered owner of the vessel or as charterer does not have title to the cargo. As I presently understand practice in London, non-signatory parties generally do not have the right to appear in London arbitration.

Over at least the last thirty years, SMA Panels have acknowledged the affiliated corporate relationships of commercial shipping interests especially merchant trading interests, to allow these entities as non-signatories to a charter party contract to appear in the New York maritime arbitration proceedings and to advance claims against the signatory/respondent. A few of the vintage SMA Awards are as follows:

Amerada Hess Shipping v. Skip. Nordheim, SMA 958 (1975)
Allied Chemical, SMA 1168 (1977)
Compagnie Nationale v. Coscol Petroleum, SMA 1576 (1981)
Trader Export v. Transport Insurance, SMA 1643 (1982)
Alpine Shipping/Marc Rich v. Clark Oil, SMA 1885 (1983)
Solidarity Carriers v. Amerada Hess, SMA 2138 (1985)

In Koch Shipping v. Mobil Shipping, SMA 3615 (2002), Koch Supply & Trading Co. and Koch Refining Co., as trader/cargo consignee and cargo receiver/refiner, respectively, but non-signatories to a voyage charter party between Mobil Shipping as Owner and Koch Shipping as Voyage Charterer, advanced a cargo contamination claim against Mobil Shipping as the Registered Owner of the Vessel. Mobil Shipping agreed that Koch Supply, as holder of the bill of lading had standing to advance its cargo claim, but not Koch Refining as a non-signatory to the charter party. As the attorney representing Koch, I argued that all three Koch entities were affiliated corporate entities under the corporate umbrella of the parent entity, Koch Industries, Inc. In its ruling granting standing to Koch Refining to advance its

cargo claim as a non-signatory entity against Mobil Shipping, the Panel stated as follows:

> Koch acknowledges Koch Refining is not a party to the charter party, but maintains it may advance its claims as a subsidiary and affiliated company connected with the other Koch entities in this proceeding. Koch contends the first challenge to Koch Refining having standing to assert its claim was raised in MOSAT's (Mobil) closing brief. Koch asserts the challenge should have been raised by interim application, but was not.
>
> The Panel unanimously disagrees with MOSAT's position. There is ample authority permitting corporate affiliates of its shipping affiliate/voyage charterer to advance claims against vessel owners, notwithstanding the affiliated entity is not named in the charter party. The charter party is applicable to Koch Refining as an affiliated entity to Koch Shipping, and all parties are governed by COGSA law.

Not mentioned in the above passage, but argued by Koch was the fact that the tanker voyage charter party was on the well-known ASBATANKVOY form containing broad arbitration clause terms, i.e., "any and all disputes of whatsoever nature".

The above-cited vintage SMA awards and referenced passage in the Koch Shipping SMA Award represent the consensus commercial and legal positions in New York maritime arbitration proceedings when a non-signatory seeks to advance claims and the signatory party respondent allows the Panel to decide (rather than a Judge) whether or not the non-signatory party has standing.

Further, the SMA Awards are somewhat in charterers' favor especially for voyage charter party contracts involving charterers which are large integrated oil companies and/or merchant traders which have many affiliated but separate shipping and cargo trading interests, i.e., Phibro Energy/Scanport Shipping. However, as there now has been significant time charter activity with disponent owners trading vessels in the voyage freight and trip time markets reserving indemnity rights against the Registered Owner under the head charter party, and Owners have established affiliated entities to trade both traditional freight and freight derivative "paper" contracts, the SMA Awards could certainly be interpreted to allow Owner-affiliated non-signatory entities to appear in New York arbitration proceedings to advance claims against the signatory Voyage Charterer.

U.S. Federal Court Decisions

Notwithstanding what is certainly well-established SMA Award precedent to allow proper non-signatory corporate affiliates to appear in New York maritime arbitration proceedings, there are a few recent Federal Court decisions which have discussed this issue. The first situation generally involves an ongoing arbitration where the signatory respondent party refuses to allow the Panel to decide the issue whether the non-signatory claimant has standing to appear and to advance its claims. The second situation involves an arbitration where the signatory party generally allows the Panel to decide the issue, the Panel issues an interim ruling allowing the non-signatory entity to proceed and the signatory/respondent then files a motion to vacate in Federal Court to challenge the Partial Final Award. These two situations are commercially very similar but legally quite different.

In September 2003, the Second Circuit Court of Appeals in Astra Oil Co. v. Rover Navigation, 344 F. 3d 276, issued the first U.S. maritime decision at the Circuit Court level to discuss the concept of "reverse estoppel" allowing a non-signatory to a tanker voyage charter party to appear in an ongoing SMA arbitration in New York City to advance a late delivery cargo claim against the signatory/respondent vessel owner. Rover as Owner and AOT as the Voyage Charterer, entered into a tanker charter party on the ASBATANKVOY form with a New York arbitration clause. AOT is affiliated to Astra Oil Company which is an oil trader. Astra owned the cargo. The individual who fixed the vessel for AOT is an oil trader employed at Astra which sold the

cargo on a C&F basis to a third party oil company for delivery at a declared port in the U.S. Due to a series of vessel breakdowns while en route to the United States, the vessel discharged the cargo about three weeks late, in which case Astra was in breach of its sales contract to the third party buyer/receiver. Security was exchanged between the parties in normal form for the Owner's General Average Claim against cargo (as posted by Astra) and the Astra claim against Rover for the Vessel's unseaworthy condition resulting in the vessel's late arrival at the declared U.S. discharge port. In timely fashion, AOT Trading and Astra Oil Company commenced New York arbitration against Rover for the Astra late delivery commercial damages. On the eve of the first hearing, attorneys for Rover challenged the standing of Astra as the non-signatory to the charter party to appear in the arbitration. Attorneys for Astra (me) then wrote to the Panel requesting that the Panel make an interim ruling that Astra has the right to appear in the arbitration proceedings as an affiliated company to AOT. In addition to the fact that the tanker voyage charter party contract had a very broad arbitration clause, I cited the Panel to many of the above-referenced SMA Awards in which the Panel accepted the standing of the non-signatory but affiliated company to appear in the arbitration proceedings. As attorneys for Rover refused to allow the Panel to render an interim ruling and reserved Owner's right to seek judicial intervention for a ruling from a Court, the Panel decided that it did not have jurisdiction to decide the application of Astra as a non-signatory to appear in the arbitration proceedings.

In response to the Astra Petition to Compel, requesting that Astra be allowed to appear in the ongoing arbitration proceedings, the District Court denied the Petition. Astra then took an appeal to the Second Circuit which ruled in favor of Astra. In its ruling, the Second Circuit referred to existing Second Circuit case law for non-maritime commercial disputes regarding the rights of a signatory to advance claims against a non-signatory in arbitration. Based on existing Second Circuit case law, there are five (5) general principals under which a signatory may compel a non-signatory to participate in arbitration, as follows:

1. Incorporation by Reference
2. Assumption
3. Agency
4. Veil- Piercing/Alter Ego
5. Estoppel

For the Astra Petition to Compel and for reversal of the District Court decision, the undersigned argued and the Second Circuit agreed that the estoppel argument would be applicable to the Astra Petition to Compel Rover, as the signatory, to allow Astra to participate in the arbitration proceeding for the late delivery claim. Therefore, as Astra as the non-signatory, moved to compel arbitration, they in effect advanced a "Reverse Estoppel" argument which the Circuit Court accepted. In the alternative, Astra advanced the incorporation by reference argument as Astra had title to and was the holder in due course of the vessel bill of lading. As the Circuit Court accepted the estoppel argument, the Second Circuit Court was not required to evaluate the alternative argument for incorporation by reference. However, based on well-accepted District Court case law, especially involving the rights of insurance subrogated cargo interest non-signatories to the charter party, as holder of the vessel bill of lading, these entities have rights in arbitration against the signatory vessel owner under the applicable charter party contract especially if the clause is a broad arbitration clause.

In evaluating the Astra arguments, especially as the District Court rejected the Astra Petition to Compel, the Second Circuit observed that the Vessel Owner breached certain duties under the charter party which as a matter of law are applicable to Astra as the consignee. Specifically, as the Vessel had a series of engine breakdowns and deck cracks resulting in a Detention Order by the USCG, Astra had an argument for Vessel breach of charter party warranties of seaworthiness and speed. The Circuit Court further observed that there was undisputed evidence of a close corporate and operational relationship between Astra and AOT (commercial

witness affidavits), the Astra claims were based directly under the charter party entered into by the Owner as signatory, and the Vessel Owner treated Astra as a party to the charter party by accepting voyage orders from Astra. Also, the Circuit Court observed that the Registered Owner accepted General Average security (average bond) from Astra to release the cargo from arrest by the Vessel interest. In short, based on prior Circuit case law, the Second Circuit factually determined that there was a very close relationship between AOT and Astra. The Astra late delivery claim was based on the charter party and the Vessel Owner allegedly breached charter party warranties and duties owed to Astra as a matter of law. The Circuit Court therefore made a factual determination that the Astra late delivery claim was "intimately founded in and intertwined with the underlying contract obligations." The intertwined reference is a legal term, but is based on evaluation of fact.

On August 4, 2006, an SMA Panel majority in Stolt-Nielsen Transportation Group v. Halcot Navigation Ltd, SMA No. 3934 (2006) issued a Partial Final Award in favor of Stolt as the Time Charterer against Halcot as the Registered Owner of the Vessel. Specifically, the Registered Owner challenged the standing of Anthony Radcliffe Steamship Company, Ltd., as non-signatory to the time charter party contract, to appear in the ongoing arbitration proceedings to advance an indemnity claim under a sub-voyage charter party, in which Radcliffe appeared as the Disponent Owner. Radcliffe argued and the majority ruled that Radcliffe and Stolt-Nielsen Transportation Group are affiliate corporate entities of the Stolt-Nielsen group of companies.

Unlike the Astra arbitration proceeding in which attorneys for the Registered Owner refused to allow the Panel to issue an interim ruling regarding the standing of Astra as the non-signatory, Halcot, as the signatory Registered Owner, requested the Panel to render an interim ruling regarding Owner's objection to the standing of Radcliffe. Both parties presented extensive submissions to the Panel, including exhibits and briefs. Citing the Second Circuit Astra Oil Decision regarding the rights of a non-signatory to appear in an ongoing arbitration proceeding and other prior non-maritime Circuit Court authorities, the majority of the Panel issued a Partial Final Award in favor of Stolt-Nielsen. As part of its ruling, the majority determined that Stolt-Nielsen Transportation Group has various affiliated commercial shipping entities, including Radcliffe, which is/was a U.K.-based company established to seek the benefit of certain tax laws not available to non-U.K. entities. Further, the Panel observed that the subject time charter party arbitration clause was very broad in nature (same terms as ASBATANKVOY), in which case the Panel determined that the Stolt/Radcliffe indemnity claim would satisfy the language of the applicable arbitration clause.

The Vessel Owner interests attempted to distinguish the Second Circuit ruling in Astra. Specifically, the Vessel Owner argued that the Second Circuit in Astra issued a very fixed formula for determining "intertwined" facts and relationships between the signatory and the non-signatory. Instead, for the estoppel basis for relief, the majority of the Panel interpreted Astra together with a pre-existing non-maritime Second Circuit case law noting that the non-signatory seeking to compel arbitration with the signatory need only demonstrate a (1) close corporate and operational relationship between the affiliated signatory and the non-signatory, and (2) that the non-signatory's claim is "intertwined" with the underlying and controlling contract to which the objecting signatory is a party.

In response to a motion by Halcot to vacate the Partial Final Award in favor of Stolt, on June 11, 2007, the U.S. District Court for the Southern District of New York issued a Decision and Order denying the Halcot motion to vacate and granting the Stolt cross-motion to confirm the majority Partial Final Award.

As part of its ruling, the District Court noted that unlike the Astra/Rover matter in which the non-signatory/respondent owner challenged the power of the Panel to issue an interim award, Halcot, as opposing signatory, allowed the Panel to decide the issue. Therefore, the District Court ruled as a matter of law that Halcot waived its right for judicial review. Further, as a matter of law, the District Court ruled

that the Panel did not exceed their powers. Citing Astra, the District Court ruled that (1) there was a close corporate and operational relationship between Stolt and Anthony Radcliffe, and (2) the indemnity claim brought under the voyage charter party is "in essence a sub-contract under the Time Charter, and the claim arises out of Halcot's alleged failure to comply with the terms of the Time Charter." Finally, the District Court ruled that had Halcot refused to allow the Panel to decide the issue independently, as was the situation in Astra, the Court would have granted the relief sought by Anthony Radcliffe arguably based on the Second Circuit Astra Decision.

Conclusions

When SMA arbitrators evaluate claims advanced by a non-signatory to a charter party contract against the signatory respondent, there are certain core issues which I believe the Panels should consider, as follows:

1. Are the arbitration clause terms broad or narrow? All the recent legal decisions and SMA awards involved ASBATANKVOY-type "broad" arbitration clause terms. If the clause is either narrow or restrictive to only the two signatory parties to the contract, the Panel and the Court may not allow non-signatories to appear.
2. Does the charter party contain a corporate affiliation rider clause allowing affiliated non-signatory corporate entities to the signatory to appear either through the signatory or appear as a non-signatory? In the petroleum trade especially for spot voyage charter party contracts by merchant traders and U.S.-based refiners, as the voyage charterer is typically a stand-alone shipping entity which never has title to the cargo, it is quite common that the charter party contains an affiliation rider clause allowing non-signatories but affiliated entities to the charterer, to advance cargo claims against the signatory vessel owner. If there is a challenge by the signatory respondent vessel owner to the affiliated non-signatory, i.e. refinery's right to advance a cargo claim, it is my opinion that the Panel would certainly have the jurisdiction in the first instance to evaluate the cargo claim.
3. From a procedural perspective, if the signatory to the charter party as the respondent challenges both the standing of the non-signatory to advance its claim and the jurisdiction of the Panel to decide the issue, the arbitration should be stayed pending a ruling by the Court. However, if the signatory respondent stipulates/allows the Panel to decide the issue, the parties are deemed to have waived their respective legal remedies to vacate the Partial Final Award.
4. From a substantive perspective, as per Astra and subsequent legal decisions, when evaluating the non-signatory request and signatory respondent opposition, the legal standard is the "intertwined" concept between the relationship among the parties and the issues/claims advanced by the non-signatory relative to the contract agreements. However, this evaluation is fact sensitive in which case the Panel must evaluate the relationship between the parties including their respective duties and obligations and whether or not the non-signatory claim is brought under the contract entered into by the signatory. Estoppel is in fact not a remedy which exists at law, but rather a remedy which exists as a matter of equity. Further, when evaluating equitable remedies especially in maritime matters, the Courts have much more discretion and

latitude (than at law) to achieve the correct result. Therefore, SMA arbitrators certainly have broad equitable powers when evaluating the evidence to reach a correct decision.

TO RECUSE OR NOT TO RECUSE? THAT IS THE QUESTION

By: Michael Marks Cohen, Esq.
of Counsel to Nicoletti Hornig & Sweeney

***ASM Shipping v. Harris,* [2007] EWHC 1513 (Eng. Comm. Ct. 6/28/07).**

A barrister, who was the chair of a maritime arbitration tribunal, was asked by owner to recuse himself because a broker would testify, and the broker had also given similar testimony in an earlier unrelated matter between different parties in which the chair had represented one of the parties. Owner was concerned that after hearing the broker testify again the chair might conclude that the witness had engaged in a pattern of misbehavior. The chair consulted with the two party appointed arbitrators and declined to recuse himself.

Owner applied to the court to remove the chair. The two party appointed arbitrators acknowledged that, although recusal was a decision for the chair to make by himself, they agreed with him there was no need to step down. Nonetheless the court decided there was "apparent bias" because a fair minded observer would conclude there was a real possibility that the chair could be biased.

The two party appointed arbitrators proposed to appoint another barrister as a substitute chair. Owner requested a retired judge instead, naming several who would be acceptable. Charterer did not object to either the barrister or any of the retired judges. The two party appointed arbitrators said that, in the absence of agreement between the parties, they regarded the appointment of the third arbitrator as solely within their discretion and they preferred the barrister.

Owner then asked the two party appointed arbitrators to recuse themselves. They refused. Owner applied to the court to remove them on the grounds that (1) when they heard the broker testify, their evaluations of his testimony would be tainted by their conversations with the prior chair; (2) they were wrong to have agreed with the decision of the prior chair not to recuse himself; and (3) they should have appointed a retired judge as the new chair.

The court declined to find apparent bias in the refusal of the two party appointed arbitrators to appoint a retired judge as the third arbitrator. Similarly the court did not foresee that the arbitrators would be biased in evaluating the testimony of the broker because of any prior discussions they may have had with the former chair. In the previous court proceedings the former chair had denied that he had in the earlier unrelated case formed any adverse impressions about the broker. Moreover, the court noted that before owner applied to the court for removal of the two party appointed arbitrators, it had continued to take part in the arbitral proceedings for more than a year after they told the court that they

> agreed with the former chair about his refusal to recuse himself. The delay constituted a waiver of any right owner may have had to object to their continuing to serve as arbitrators.

I have three comments: first, if recusal is a personal decision, I think arbitrators should be very cautious about giving public support to a colleague who declines to recuse himself. Advice is one thing. An effort to persuade a third party (like a court) is something else.

Second, although the party appointed arbitrators were technically correct that unless parties agree, the decision about who to appoint as a third arbitrator is theirs alone to make, I think it was particularly insensitive of them not to select a chair from among the retired judges.

Third, the court obviously did not feel that it would be unjust for the two party appointed arbitrators to continue to serve. Had the judge felt otherwise, I am confident he would have removed them. A party cannot waive the right to a fair hearing.

NEW STANDARDS FOR ARBITRATOR BIAS

By: Martin Flumenbaum and Brad S. Karp

(Martin Flumenbaum and Brad S. Karp are members of Paul, Weiss, Rifkind, Wharton & Garrison LLP. They specialize in complex commercial litigation and white collar criminal defense matters. Lisa L. Ruesch, a litigation associate at the Firm, assisted in the preparation of this column. It is reprinted with permission from the "July 25, 2007" edition of the "New York Law Journal." ©2007 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited.)

In this month's column, we report on *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*,[1] a decision issued earlier this month in which the United States Court of Appeals for the Second Circuit establishes a new standard for determining arbitrator bias and provides guidance on an arbitrator's expanded obligations when faced with a potential conflict of interest.

In its unanimous decision, written by Judge Barrington D. Parker and joined by Judges John M. Walker, Jr. and Chester J. Straub, the Second Circuit held that when an arbitrator has reason to believe that there might exist a "nontrivial conflict of interest" with one of the parties to the arbitration, the arbitrator must investigate the conflict or disclose both the reason for believing a conflict of interest might exist and the arbitrator's intention not to investigate.[2]

Background and Procedural History

In 1992, Applied Industrial Metals Corp. ("AIMCOR") and Ovalar Makine Ticaret Ve Sanayi, A.S. ("Ovalar") formed a joint venture for the purchase, transportation, and distribution of petroleum coke. The parties agreed to settle all disputes by arbitration and executed an arbitration agreement providing that "all arbitrators are to disclose any circumstances which could impair their ability to render an unbiased award" and that "[n]o person shall serve as an arbitrator who has or has had a financial or personal interest in the outcome.[3]

In 1997, the parties decided to pursue arbitration to resolve a dispute over the distribution of the joint venture's profits. Pursuant to the terms of the arbitration agreement, each party selected one arbitrator, who together chose Charles Fabrikant—the Chairman, President, and CEO of Seacor Holdings, a multi-billion dollar company—as the third arbitrator and chairperson of the panel.[4]

On September 3, 2003, the arbitrators learned that AIMCOR was sold to Oxbow Industries and that the transaction might be "relevant to the disclosure issue." In a disclosure statement written three weeks later, Fabrikant stated he did not have a relationship with any of the parties to the proceeding or their affiliates, but that he would reserve the right to amend his disclosure "should future circumstances warrant it."[5]

On April 16, 2005, after the start of the arbitration hearings, Fabrikant informed the parties that within the past two days he had learned that SCF, a division of Seacor, was negotiating a contract with "Ox-Bow of Palm Beach" regarding "a contract for

the carriage of coke," but that he did not participate, and had no plans to participate, in any negotiations, or to become involved in the operations of SCF. Fabrikant further stated that he did not believe this development impaired his ability to decide the case on the merits. Five months later, the arbitration panel decided by a vote of 2 to 1—with Fabrikant casting the decisive vote—that Ovalar and its chairman Ural Ataman were liable to AIMCOR for breach of contract.[6]

After the liability determination of the bifurcated proceedings, Ovalar discovered a previously existing and inadequately disclosed commercial relationship between SCF and Oxbow, AIMCOR's parent company: since 2004 SCF had been transporting coke for Oxbow, generating $275,000 in revenue. On November 21, 2005, Ovalar asked Fabrikant to withdraw, but Fabrikant declined to do so, arguing that he had insulated himself from the SCF-Oxbow relationship by telling SCF's president that he did not want to know anything about its business with Oxbow. Because he had erected a "Chinese Wall," Fabrikant explained that he saw no reason to withdraw. In February 2006, Olavar and Ataman moved to vacate the arbitration award based on Fabrikant's failure to recuse himself under Section 10(a)(2) of the Federal Arbitration Act, which permits federal district courts to vacate an arbitration award "where there was evident partiality…in the arbitrators."[7]

Judge Robert P. Patterson, Jr. of the Southern District of New York granted Olavar and Ataman's motion to vacate, finding that the disclosure requirements of the arbitration agreement, Fabrikant's unamended statement that no conflict existed, and his later disclosure that discussions between the companies from which he was insulated, gave rise to a reasonable expectation that Fabrikant would inform the parties of a contractual relationship between Seacor and Oxbow. Judge Patterson ruled that an arbitrator has a continuous obligation to avoid "partiality or the appearance of partiality" that was not excused by Fabrikant's failure to investigate the conflict and his purported lack of knowledge of the conflict.[8]

Second Circuit Decision

The Second Circuit affirmed the district court judgment. The Court relied on two precedents addressing evident partiality under the Federal Arbitration Act. In *Commonwealth Coatings Corp. v. Continental Casualty Co*., the Supreme Court, in a plurality opinion written by Justice Black, ruled that arbitrators must disclose "any rulings that might create an impression of possible bias,"[9] the same standard applied by a court evaluating the impartiality of an Article III judge. Justice White disagreed with this approach in a concurring opinion, concluding that this standard was unnecessarily strict, but agreed with the plurality opinion's view that an arbitrator who has a substantial interest in a firm that has done more than trivial business with a party has a duty to disclose this fact.[10]

The Second Circuit's decision in *Morelite Construction Corp. v. New York City District Council Carpenter Benefit Funds* adopted Justice White's view that arbitrators are not subject to the same impartiality standards as Article III judges and held that evident partiality exists where a "reasonable person" considering all of the circumstances "would have to conclude" that an arbitrator was partial to one party. The Court explained that an arbitrator who knows of a material relationship with a party and fails to disclose it meets the "evident partiality" standard of *Morelite*.[11]

Because the district court here applied an "appearance of partiality" standard—a standard that is too low under *Morelite*—it did not make findings regarding the nature and timing of Fabrikant's knowledge of the SCF-Oxbow relationship. The Second Circuit, accordingly, could not apply its reasonable person standard and noted that in the absence of any other issues to resolve, it would remand to the district court for the development of the issue. The Second Circuit explained, however, that its analysis does not end there; although actual knowledge of a conflict "can be dispositive of the evident partiality test, the absence of actual knowledge is not."[12]

The scope of an arbitrator's duty to disclose or investigate potential conflicts of interest was, in fact, a question left open in *Morelite* that the *Applied*

Industrial Materials Court answers. Relying on Justice White's concurring opinion in *Commonwealth Coatings*, stating that an arbitrator's business relationship with a party does not automatically disqualify an arbitrator, provided the parties are aware of the relationship in advance or, if the parties are unaware of the relationship, the relationship is trivial, the Second Circuit held that "where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, [the arbitrator] must (1) investigate the conflict (which may reveal information that must be disclosed under *Commonwealth Coatings*) or (2) disclose [the arbitrator's] reasons for believing there might be a conflict and [the arbitrator's] intention not to investigate." The Second Circuit contrasted its rule with the standard adopted in the Fourth Circuit—which has held that an aggrieved party may use an arbitrator's failure to investigate a conflict to demonstrate evident partiality—and the Eleventh Circuit—which has ruled that evident partiality only exists where an arbitrator knows of a potential conflict but fails to disclose it.[13] The Second Circuit emphasized that its ruling does not create a "freestanding duty to investigate." The critical factor is whether the arbitrator knows of a potential conflict; if so, a failure to investigate or disclose the intention not to investigate is indicative of evident partiality.[14]

Turning to the facts, the Second Circuit observed that it must determine whether a reasonable person – considering Fabrikant's decision not to investigate and his concomitant failure to inform the parties that he had erected a "Chinese Wall" – would conclude that evident partiality existed. The Court first noted that Fabrikant assured the parties he would fulfill his ongoing obligation to ensure that neither he nor Seacor had an interest in the outcome of the arbitration. It then observed that once Fabrikant learned of the negotiations between SCF and Oxbow, he was aware of a potential conflict and "the calculus changed." If Fabrikant had then investigated further, he would have discovered that a nontrivial relationship existed, triggering his duty under *Commonwealth* to disclose that relationship. The Court stressed that a reasonable observer would be "given pause" by the fact that Fabrikant's response to his ongoing duty was to disclose only the negotiations. The Court held that Fabrikant's failure to investigate or disclose that he would not investigate would lead a reasonable person to conclude that evident partiality existed.[15]

Conclusion

The Second Circuit in *Applied Industrial Materials* underscores the policy benefits of early disclosure of potential conflicts of interest. First, disclosure encourages parties to address arbitrator conflicts early in the process. Second, disclosure limits the availability of collateral attacks on arbitration awards, echoing Justice White's observation that it is preferable for an arbitrator to disclose any conflict at the outset of an arbitration rather than have the conflict revealed after the arbitration, when a disgruntled party can exploit it to invalidate an award.

The Court counseled arbitrators to provide greater disclosure, noting that it would have been preferable for Fabrikant to consult the parties before erecting the "Chinese Wall." At the same time, the Court observed that its new disclosure standard "is not an onerous one," which would require an arbitrator to provide a complete and expurgated business biography.

Given the differing standards developed by the Second, Fourth and Eleventh Circuits, the issue of arbitrator bias is one that may well wind up on the Supreme Court's docket.

ENDNOTES

[1] ----F.3d---, 2007 WL 1964955 (2d Cir. July 9, 2007).
[2] *Id*. at 4.
[3] *Id*. at 1.
[4] *Id.*
[5] *Id*.
[6] *Id.* at 2.
[7] *Id.*
[8] *Id.* at 2-3.
[9] 393 U.S. 145, 149 (1968).
[10] *Id.* at 151-152.

[11] 748 F.2d 79, 84 (2d Cir. 1984).
[12] *Id.* at 4.
[13] *Id.* (citing *ANR Coal Co. v. Cogentrix of N.C.*, 173 F.3d 493, 500 n.4 (4th Cir. 1999) and *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs. Inc.*, 146 F.3d 1309, 1312-13 (11th Cir. 1998)).
[14] *Id.* at 5.
[15] *Id.*

SMA LUNCHEON SPEECHES

RECENT DEVELOPMENTS IN CONTAINER TERMINAL OPERATION

Precis of Luncheon Remarks of March 14, 2007 - Prepared by Tom Fox

In an address entitled "Recent Developments in Container Terminal Operations", James J., Devine, President and CEO of New York Container Terminal, delivered an informative and entertaining update on container terminal activity in the Port of New York/New Jersey. As the presentation was largely made in PowerPoint format, his major points are summarized below.

As a student of local maritime history and an alumnus of Sea Land, he opened his remarks with a reference to the colonial history of the port. The Great Dock was constructed in 1674 by Edmond Andros, the Royal Governor of the Colony of New York, and was the antecedent of the modern port. Jim recounted the changes in vessels and maritime technology over the years as the Port of New York/New Jersey has since evolved into the major container port on the East Coast of the U.S.

Jim's main focus was on New York Container Terminal, which is located at Howland Hook (just north of the Goethals Bridge on the Arthur Kill) in Staten Island, NY. The terminal, originally opened in 1972, is now a thriving facility with more than 3,000 feet of berthing space, nine cranes (including four new ones) and a total area of almost 200 acres. NYCT's current annual run rate is more than 300,000 units. The terminal has completed its berth expansion and the access channel has been dredged to 41 feet. With a new lease, available container storage has been increased by more than 16 acres. Part of the terminal's expansion effort has included the preservation of environmentally sensitive areas.

NYCT has recently acquired a refurbished railroad locomotive that would allow the terminal to operate on-dock rail service and thereby control its own switching without relying on other railroads for service. That service is due to become operational in June 2007. With the reactivation of both the Staten Island Rail Road and the adjacent railroad bridge, rail service across the Arthur Kill to connect with Class 1 carriers Conrail, Norfolk Southern and CSX will allow NYCT to operate an intermodal yard. (Note - direct rail service has since been reactivated).

NYCT currently employs radiation detectors for screening containers and is also working with the Department of Homeland Security to transition toward full detection of weapons of mass destruction.

For the SMA, many thanks to Jim.

RECENT DEVELOPMENTS CONCERNING CLASS

Precis of luncheon remarks of April 18, 2007 - Prepared by Tom Fox

Martin Crawford-Brunt, District Manager, Atlantic – Det Norske Veritas (DNV), delivered a comprehensive report entitled "Recent Developments Concerning Class". As the presentation was largely made in PowerPoint format, his major points are summarized below.

The presentation covered three main points: Common Structural Rules (CSR), Harmonization, Corporate Social Responsibility (the other CSR) and Current and Future Issues on the Regulatory Agenda.

Common Structural Rules (CSR), Harmonization

DNV is one of 11 classification societies that comprise the *International Association of Classification Societies* (IACS) and the harmonization of their individual rules presents a challenge to IACS. CSR will require the introduction of two new rule books – CSR for Tank Vessels and

CSR for Bulk Carriers. Each IACS member society must thereby deal not only with those news rules but also with own rules. Moreover, those societies must develop software giving exactly the same results; draft common replies to questions and agree on rules changes.

Short-term harmonization issues that were identified as barriers to adoption have been concluded while long-term and full harmonization is still required for several others.

The IACS Council has formed groups for the handling of CSR and has assembled project teams to deal with each set of CSR Rules. Test cases and methods to be used in the Direct Strength Assessment (DSA) of CSR Bulk Fatigue have been established. IACS has also set up a Questions and Comments link -

http://www.iacs.org.uk/csr/QA_CI.html

for more information about CSR.

Finally, the expected timeframes for the intermediate steps leading to the harmonization of IACS's Common Structural Rules and their entry into full force are in place. Full implementation is expected sometime during 2011.

Corporate Social Responsibility (the other CSR)

The World Business Council for Sustainable Development (WBCSD) has defined Corporate Social Responsibility as the commitment of business to contribute to sustainable economic development, working with employees, families, the local community and society at large to improve their quality of life. CSR covers economic performance, environmental performance and social performance.

Corporate Responsibility is not protectionism, counter-productive recruitment and employment practices or an alternative to collective bargaining agreements. CSR is a tool to attract and retain skilled seafarers and officers to the industry.

It is also a voluntary approach that offers a competitive advantage in shipping. Moreover, clients in the oil and gas industry demand and promote CSR in their supply chains. As part of competitive positioning, brand sensitive clients increasingly regard transportation not only as an integral part of the supply chain, but one to be managed for reputational risks. In that regard, shipping companies may choose to join existing non-shipping initiatives that have greater visibility.

The choice is to be proactive or reactive. Indeed, the worst case alternative to voluntary efforts is increased regulation. The Tanker Management and Self-Assessment (TMSA) initiative already incorporates recruitment and management of crews, accountability, safety and environmental management. For major oil companies, TMSA forms the cornerstone of their Corporate Responsibility transportation supply chain management.

Several major oil companies are piloting a global database of supplier's CSR policies. Although that database will remain on a self-assessment basis, it is expected that the information will be audited. No supplier will be black-listed for not completing surveys and the initial exercise will be "educational" in nature and reflects the industry's "softly, softly" approach. While initially focused on upstream and offshore operations, the scope is expected to expand.

Current and Future Issues on the Regulatory Agenda

Shipping is faced with the new reality of public and media expectations. While there are international, regional and national rules and requirements to be dealt with, the demands of industry stakeholders (charterers, ship owners, investors, insurers, banks and partners) for quality, reliability and reputation are also of concern. The market calls for a more proactive and transparent approach.

The International Maritime Organization (IMO) regulatory agenda includes goal based standards, ballast water management, ship recycling and air emissions.

The main IACS agenda involves the European Union 3rd Maritime Safety Package, the EU Green Paper, goal based standards, CSR's and performance standards for protective coatings.

The EU has undertaken a strong political drive to avoid oil pollution in its waters and has increased its focus on the competitiveness of European industry. Moreover, there is a general belief that IMO works too slowly and that many new regulatory

initiatives must be developed and implemented unilaterally. Early influence on new regulations is required and local lobbying is important. Finally, the European Maritime Safety Agency will play an increasingly stronger role as the EU technical arm.

Looking Forward

* The maritime industry will face many more increasingly detailed regulations covering more areas.
* Environmental regulations will be in focus in the immediate future and there will be a shift from local to global regulations (from NOx/SOx to CO2 and particulate matter).
* There will increased focus on liability for all partners within the maritime industry.
* Corporate Social Responsibility.

Thanks to Martin Crawford-Brunt for a most informative session.

HAM AND EGGS

Served by Don Szostak

An inmate filed a request in the United States District Court for the District of New Hampshire seeking an order barring the state prison kitchen staff from serving him eggs. The request had a hard boiled egg attached. The normally staid and serious minded US District Court Judge James R. Muirhead penned the following order:

No fan I am
Of the egg at hand.
Just like no ham
On the kosher plan.

This egg will rot
I kid you not.
And stink it can
This egg at hand.

There will be no eggs at court
To prove a clog in your aort.
There will be no eggs accepted.
Objections all will be rejected.

From this day forth
This court will ban
hard boiled eggs of any brand.
And if you should not understand
The meaning of the ban at hand
Then you should contact either Dan,
the Deputy Clerk, or my clerk Jan.

I do not like eggs in the file.
I do not like them in any style.
I will not take them fried or boiled.
I will not take them poached or broiled.
I will not take them soft or scrambled
Despite an argument well rambled.

No fan I am
Of the egg at hand.
Destroy that egg!
Today! Today!
Today I say! Without delay!

SO ORDERED *(with apologies to Dr. Seuss).*

The order in its entirety is appended to this issue of THE ARBITRATOR and may be viewed by clicking here.

MORE ON EXPERT DETERMINATION

In the last issue, we presented Hew Dundas' paper on "Expert Determination." Our member Jim Hood wrote to me about a paper presented by the Hon. Michael McHugh AC, in Sydney (Australia) on April 30, 2007 to the Chartered Institute of Arbitrators. If any of our readers should be interested in the speech, please feel free to contact Jim (jhood12@attglobal.net) or me for the 29-page document.

SMA AWARDS

Michael Marks Cohen brought to our attention the ASIA STAR decision of March 27, 2007 in the Singapore Court of Appeals (cite as [2007] SGCA 17), setting aside the earlier decision by the trial judge. The matter concerned the cleanliness and

suitability of tanks to receive and carry a cargo of "refined bleached and deodorized palm oil." In reaching its decision, the Court of Appeals relied i.a. on the FICUS (SMA Award 2473, 1988) and the MAASKANT (SMA Award 2688, 1990) finding them "persuasive and of assistance."

If memory serves correctly, the first New York arbitration award cited in a different jurisdiction was the POLYFREEDOM (SMA Award 926, 1975). In the MARATHA ENVOY ([1977] 1 LLR 217), Lord Denning M.R. wrote for the Court of Appeals, "No matter whether in London or New York, the result should be the same. The courts of this country have in the past done much to form it and develop it. Let us not fail in our time. So on this point let us follow the lead given by New York." Stephenson L.J. stated, "That is what a majority of American arbitrators have said in the POLYFREEDOM . . . and I should like to say so too."

For details on the SMA Award Service, visit our website www.smany.org.

BOOK REVIEW

by M.W. Arnold

Confidentiality in Arbitration: How Far Does It Extend

by Quentin Loh Sze On SC and Edwin Lee Peng Khoon, Academy Publishing, 2007, 115 pages

This is the fourth book in the Monograph Series produced by Academy Publishing, a division of the Singapore Academy of Law.

When I saw the announcement for this title, I was looking forward to reviewing it for this SMA publication, the membership as well as the general public. Publications on comparative law present laudable efforts, as they provide readers with an educational tool to appreciate the particular subject as well as those concurring or differing views from other jurisdictions.

I was also intrigued by the foreword authored by the Rt. Hon. Lord Justice Mustill of Pately Bridge. It referenced an existing dilemma, stating, ". . . the courts have been unable to agree on so much as the bare outlines of a coherent doctrine. Whether confidentiality and privacy are the same concepts, or dissimilar but limited, or wholly dissociated" which led him to conclude that, "A methodical exploration of the whole filed is therefore long overdue, which makes the publication of Quentin Loh's and Edwin Lee's monograph particularly welcome."

I am certain that the legal scholars, colleagues and lawyers practicing in the field of international and institutionally administered arbitration appreciate the nuances highlighted in this publication, particularly when covering nearly a dozen jurisdictions in their comparative study. On the other hand, what I find lacking is the window into the commercial arbitration conducted by commercial men. Let me refer to a passage in the preface where the authors state, "International arbitration is fascinating. One of counsel's chief duties is to know the judges in his jurisdiction, their thinking, legal philosophy and approaches." I agree that international arbitration is fascinating, but I disagree with the second part of the quote. Should not the first concern for counsel be how to best protect his client's position or win the arbitration? Why concern yourself at the start of a proceeding with judges and their proclivities? Not every decision rendered is automatically subject to judicial review. Maybe that question is too practical and commercial. I am also disappointed by the authors' statement in Chapter 6 (The US Position) that, "The authors have to state that they are not familiar enough nor really qualified to authoritatively comment on the American position in relation to arbitration confidentiality. However, for balance and comparison, we thought it fit to make reference to American decisions as well."

One must acknowledge the value of the authors' work and their efforts to provide for a long-overdue "methodical exploration of the whole field," which makes this publication particularly welcome.

I do hope, however, that the authors, when preparing the second edition, will take into account and pay greater attention to the commercial aspect of international arbitration and seek assistance, where needed, to even more fully cover their worthy study on the comparative law on confidentiality.

PEOPLE AND PLACES

NYMAR SEMINAR

New York Maritime Matters: Capital Markets: Today and Tomorrow

. . . as reported by our member David W. Martowski

On September 20, New York Maritime Inc. (NYMAR) sponsored[1] a forum designed to review and discuss (i) how shipping may be affected by the volatility in financial markets and (ii) how needed improvements in port infrastructure can be financed. This second annual event held at Fordham University School of Law was well attended by over 100 luminaries from all sectors of the tri-state maritime community.

The first panel discussion was moderated by Peter S. Shaerf, Managing Director of AMA Capital Partners, and included panelists Sophocles Zoullas, CEO of Eagle Bulk Shipping Inc.; Jeffrey Pribor, CFO of General Maritime Corporation; Omar Nokta, Analyst from Dahlman Rose; and Justine Fisher, Analyst from Goldman Sachs. This broad commentary focused on the state of the tanker and dry bulk markets, primarily driven by globalization and characterized by increasing safety and regulatory scrutiny, consolidation, and savvy informed investors interested not only in high yields but also in quality and long-term growth.

The second panel discussion was moderated by Jim Dolphin, Managing Director of AMA Capital Partners, and included panelists Julie Nelson, Deputy Administrator of MARAD; Richard Larrabee, Director of Port Commerce, The Port Authority of NY/NJ; and Brian Moon, Managing Director of Deutsche Bank. This presentation described the booming trade volume currently enjoyed by United States ports against the constant challenge of adequately financing the modernization of aging port, rail and road infrastructures against a backdrop of increasing environmental and security concerns.

A wine and cheese reception capped this event of insider views into the financial markets and ports infrastructure of the vibrant industry we serve.

This short piece cannot adequately summarize the all-star panelists' expertise or do justice to the content, depth and insight of this two-hour discussion and the lively question and answer session that followed.

As our readers well know, NYMAR is dedicated to the promotion of the New York area as the foremost place to engage in the maritime business. Visit its website at www.nymar.org and become a member today!

[1] Co-sponsors included Fordham University School of Law, The Maritime Association of the Port of NY/NJ, The Society of Maritime Arbitrators, Inc., The New York Shipping Association, Inc., The Connecticut Maritime Association, Inc. and AMA Capital Partners.

MLA FALL MEETING

The meeting will take place at the Sanibel Harbour Resort & Spa, Fort Myers, Florida, October 24-28, 2007. Aside from the tempting social activities, there will be sailing, tennis and golfing and, of course, a meeting of the Arbitration and ADR Committee chaired by Jay Paré. For further details, please visit www.mlaus.org.

ICMA XVII

Although it is still two years away (October 2009), the organizers have been quite active and invite your visit to www.icma2009.com.

Patrick O'Donovan from London has taken over as chair of the ICMA Steering Committee.

David Martin-Clark has been selected as chairman of the Topics Committee. Anyone who

plans to attend ICMA XVII and is interested in contributing to the committee may wish to contact Mr. Clark at davidmartinclark@aol.com.

SOME PERSONAL NOTES

A Washington Outsider - The Hon. Michael B. Mukasey

I am not planning to add a political column to this newsletter – so don't worry.

On September 17 when President Bush announced Michael Mukasey as candidate for Attorney General to succeed Alberto Gonzales, he was described by some of the pundits as a Washington outsider. I thought it might be of interest to the general readership to cover some of his background and activities in New York as a lawyer and Chief Judge in the Southern District of New York. No doubt a great number of the MLA members will recall stories of their appearances before Judge Mukasey.

Judge Mukasey graduated from Columbia University in 1963 and Yale Law School in 1967. After serving for four years as Assistant United States Attorney in the Federal prosecutor's office, he joined the law firm of Paterson Belknap Webb & Tyler in New York City. In 1987, he was appointed to the Federal bench by President Reagan. He served as Chief Judge from March 2000 to July 2006, when he retired from the bench and returned to private practice with the firm he started with in 1976.

In his 19 years on the bench in the Southern District of New York, he was involved in 1,641 decisions, which also include cases where he sat on the Second Circuit by designation. Judge Mukasey sat in judgment in a number of high-profile cases dealing i.a. with terrorism. Closer to home, Judge Mukasey also decided 24 maritime and arbitration matters.

The one I remember most vividly is Sun Refining & Marketing Co. v. Statheros Shipping Corp. [761 F.Supp. 293, 1991 WL 53866, 1991 AMC 1874, SDNY April 8, 1991] and Judge Mukasey's decision to vacate the award (SMA Award 2714) because of the panel chairman's perceived partiality. The two party-appointed arbitrators disagreed and the chair's vote was the swing vote. The matter was re-heard and decided in 1992 (SMA Award 2901). Having been a member of both panels, I certainly cannot disagree with the judge's decision to vacate the first award, as it was a decision reached on the existence of the appearance of bias and did not require showing proof of actual bias. Sun objected at the start of the first hearing to the chairman serving, however, the chair declined to recuse himself. In retrospect, Judge Mukasey's decision served to preserve the integrity of the arbitration process and set a standard for challenges to arbitrators for the appearance of bias.

It was quite coincidental that while writing this item, I, as a member of the MLA Arbitration & ADR Committee, received an email from a Palm Beach lawyer, stating:

> Dear Colleagues: Those of you who are interested in the new Attorney General's thoughts on arbitration generally may find Michael Mukasey's decision, rendered when he was a USDJ, on a specific arbitration matter good reading. It is a very strong decision, upholding an award against numerous attacks on its validity, and providing sanctions against the Respondent for attempting to use the Court to delay payment. The full cite is Matter of U.S. Offshore, Inc. (Seabulk Offshore, Ltd.), 753 F.Supp. 86, SDNY, 1990. Well, since you asked, I represented the Petitioner.

I guess this comment validates my writing about the next Attorney General who was not an outsider in New York.

(Note: I am grateful to Tom Hawley of Burke & Parsons for the research on the details of Judge Mukasey's service on the Federal bench.)

Thank You, Don

Halfway through my second year as editor of THE ARBITRATOR, I should like to give well-deserved recognition to Don Szostak, the foundation of the committee. Even though I can create copy or

coerce contributions, I am totally dependent on Don for the logistics and execution. Thank you, Don.

Contributions

In the past, I have invited contributions from the membership to introduce themselves, address issues of personal interest or submit a third-party article. David Letteney responded and so did Wes Wheeler. Our president writes his quarterly column, David Martowski and others write about events they attend, but where is the rest of the SMA membership? I appreciate that some people don't like to write or take positions, but is that not what arbitrators should do?

Just think of the alternative – if nothing else works, you may be stuck with matters that interest me!

Busy People

For all the busy people and those plagued by deadlines, let me leave you with a quotation from Robert Benchley:

"Anyone can do any amount of work provided it isn't the work he is supposed to be doing at the moment."

In Memoriam

Sydney Cook, a former member of our society (1984-1990), passed away on May 12, 2007 at the age of 88 . . . rest in peace.

For THE ARBITRATOR

Manfred W. Arnold
arnoldwestmarine@comcast.net

Society Of Maritime Arbitrators, Inc.
30 Broad Street, 7th Floor
New York, NY 10004-2402
(212) 344-2400 • FAX: (212) 344-2402

E-mail: info@smany.org
Website: http://www.smany.org

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Charles Jay Wolff

v. Civil No. 06-cv-321-PB

New Hampshire Department of Corrections, et al.

O R D E R

Plaintiff has filed a hard-boiled egg as part of his preliminary injunction request.

Discussion

No fan I am
Of the egg at hand.
Just like no ham
On the kosher plan.

This egg will rot
I kid you not.
And stink it can
This egg at hand.

There will be no eggs at court
To prove a clog in your aort.
There will be no eggs accepted.
Objections all will be rejected.

From this day forth
This court will ban
hard-boiled eggs of any brand.
And if you should not understand
The meaning of the ban at hand
Then you should contact either Dan,
the Deputy Clerk, or my clerk Jan.

I do not like eggs in the file.
I do not like them in any style.
I will not take them fried or boiled.
I will not take them poached or broiled.
I will not take them soft or scrambled
Despite an argument well-rambled.

No fan I am
Of the egg at hand.
Destroy that egg!
Today! Today!
Today I say! Without delay!

SO ORDERED (with apologies to Dr. Seuss).

James R. Muirhead
United States Magistrate Judge

Date: September 18, 2007

cc: Charles Jay Wolff, pro se
Andrew Livernois, Esq.