THE ARBITRATOR
SOCIETY OF MARITIME ARBITRATORS, INC.

VOLUME 39 JANUARY 2008 Number 2

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THE PRESIDENT'S CORNER

Here we are again, at the threshold of a new year and it seems natural to reflect briefly on the many exciting and important events we now leave behind with the passing of 2007 and to look at what lies ahead as we enter 2008.

Indeed, the past year has been a busy one for the SMA. February saw a sizable delegation conduct an educational seminar on maritime arbitration in Panama City, by invitation of the Panamanian Maritime Law Association, as part of the Panama Maritime (VII) event. That was followed promptly in New York by the well attended third annual SMA seminar on "Maritime Arbitration in New York under SMA Rules." This has become a popular and successful annual event with a growing number of national and international attendees. Additionally, if that was not enough for February, a strong SMA delegation headed off to Singapore for ICMA XVI. Many of our members also took part in and supported other events such as the King's Point fund-raiser in March, this year honoring the Maritime Law Association of the United States (MLA), the MLA Spring and Fall Meetings and a variety of other local and international events at which SMA delegates spoke and/or lectured, all of which were featured in greater detail in earlier editions of this newsletter.

However, what so often takes a backseat to those seminars, congresses and lectures is the recognition of those who actually make these events happen. This, therefore, may well be an appropriate place to express our heartfelt thanks to those members and friends of the SMA who time and again step up and so generously offer their talent, support and devotion to represent the SMA and invariably do so at their own time and expense. The SMA is truly blessed to have such a strong cadre of dedicated supporters among its ranks. Organizations such as ours, which rely on active volunteerism, function well only because of the tireless dedication, enthusiasm and the personal sacrifices of those who always seem to be there when needed. That applies equally to those who serve as Governors, hold offices and/or

chair the various standing committees to help make the SMA what it is and what it represents. So, let me take this opportunity to express my sincere gratitude, personally and on behalf of the Board of Governors, to all of you for making our Society shine.

As we enter the New Year with confidence and enthusiasm we again look at a rapidly growing calendar of events. To pick just a few highlights, the fourth "Maritime Arbitration in New York" seminar is presently planned for the end of February; for March, the SMA is working on an exciting lecture/dinner event; finally, it is never too early to mark your calendars and make plans for ICMA XVII, which is to be held in Hamburg, Germany in October of 2009. Much more about these and other planned events, as we proceed into this new year.

I wish you all a blessed, healthy and prosperous 2008!

Klaus Mordhorst

DON'T CONFUSE ME WITH FACTS

By Chris Hewer

It is easy to fall into the trap of believing that the new ways are not as good as the old ways. Just give it time. Before you know where you are, you will realize that some – if not all - of your best friends are living in the past, or at least wishing that they were. It just happens. People of the right kidney gravitate towards each other, for warmth.

Be careful, however. It is too easy to be sucked into believing that everything new is bad. Where would we be, for example, without the Internet? (If you answer, 'In the bar', you are a curmudgeonly fogey.)

The Internet is wonderful. The trouble is, it makes us lazy. We are best learning the hard way, ruining our eyes over a good book. It never did us any harm. For a taste of how people used to absorb information, book yourself onto a transatlantic crossing and do the ship's quiz every day using only the books in the onboard library as your source. It takes half a day to find the answers to twenty good questions, but you will never forget them.

Somehow, the things you learn from the Internet do not stay with you in the same way as the things you learn at the feet of your schoolmaster, especially since, if you made a mistake in your schoolwork, you knew you were going to get six of the best on your flanneled bottom from a size eleven slipper.

The Internet also makes it easier to perpetuate mistakes, misconceptions, and even downright lies. Was Shirley MacLaine really Warren Beatty's uncle, for example? There are simply no checks and balances as there were in the old days, when we were all comfortable in the knowledge that Colombo was the capital of Ceylon – and still is. We knew where we stood then.

Knowledge is not the same thing as wisdom, and fact-garbling comes a poor third in anybody's book. An indication of how far we have fallen came just before Christmas with the claim by academics in the UK that teenagers should be able to pass their English exams without having to read a single novel, poem or play. This would doubtless have brought a smile to the face of American scholar Moses Hadas, who once wrote to thank an author for sending him a copy of his latest book, adding "I'll waste no time reading it."

We are in danger of losing the ability to express ourselves properly, although it could be argued that, in time, nobody will be equipped with the necessary skills to know the difference anyway. Five or six years ago, a maritime lawyer decided to forsake the big-name corporate comfort of his early career to set up a new litigation practice in London. He opened his doors with the bold claim that he would undercut most of the competition by a third, adding for good measure, "My job is not to be friendly with other lawyers." One assumes that what he really meant was, "It is not my job to be friendly with other lawyers." Perhaps he was misquoted.

For all these reasons, and more, we should cherish the awards handed down by today's maritime arbitrators, and curse the benighted secrecy to which London arbitration still clings, like a drowning man. Look at the awards which the SMA has put out over the past forty-odd years. Not all of them are examples of good, clear writing, and a few of them are frankly

impossible to follow. But not one of them could have been written by somebody who had never read a novel, a poem or a play. As Philip Larkin almost said:

Maritime arbitration began
In ninety sixty-three
(which was rather late for me)
Between the end of the Chatterley ban
And the Beatle's first LP.

There is a danger that tomorrow's awards will be written by people who have garnered information - as opposed to knowledge or experience - from the Internet alone. If a little knowledge is a dangerous thing, we shall truly be living in peril. We will spend our evenings by the fireside looking over old SMA awards, wishing we had taken more trouble, when it mattered, to get them published to a broader church. And those of us who have built our lives around cherished ideals - knowing some of them not to be true - rather than around facts masquerading as truth merely by virtue of their continued electronic dissemination, will raise our cocoa to the good old days.

Next, they will be saying there is no such person as Father Christmas.

THE NATIONAL MARITIME SALVAGE CONFERENCE & EXPO

by A. J. Siciliano

After a two year delay due to hurricane Katrina, the American Salvage Association (ASA) joined with MarineLog to host the National Maritime Salvage Conference & Expo, October 9-11, 2007 at the Hyatt Regency Crystal City hotel in Arlington, Virginia. The three day conference featured an array of notable industry and U.S. Coast Guard speakers on the need for and challenges facing the U.S. marine salvage, pollution and fire-fighting communities. Dramatic photos of the havoc wrought by hurricanes Katerina and Rita underscored the skill and ability of ASA member professionals to work with government and successfully respond to events of such massive proportions. Among the highlights of the conference was the presentation by exiting ASA president George Wittich of that Association's Rapid Response Award to U.S. Congressman Elijah E. Cummings (D-MD), Chairman of the U.S. Coast Guard and Maritime Transportation Subcommittee, for his outstanding efforts to strengthen the U.S. Coast Guard and make the U.S. maritime industry safer and more environmentally viable. George was succeeded by Donjon Marine's, John Witte. SMA's Tony Siciliano followed Hans van Rooij, President of the International Salvage Union, and Capt. Richard Hooper, Supervisor of Salvage, USN, to the luncheon speaker's podium. Other speakers from the New York community included John Kimball, Blank Rome LLP, Jim Shirley, Holland & Knight and J. Arnold Witte, Chairman of The American Club.

The elected leadership of ASA now consists of John Witte (Donjon Marine), President, Mauricio Garrido, (Titan Marine, a Crowley Company), Vice President, and Tim Beaver (Global Diving & Salvage), Secretary/Treasurer. They are assisted by an Executive Committee composed of James Calhoun (Bisso Marine), Paul Hankins (Donjon-Smit), Charles Usher, Marine Pollution Control and Ken Edgar (Marine Response Consultant).

SALVAGE AND THE SOCIETY OF MARITIME ARBITRATORS

by A. J. Siciliano

The role of the SMA in salvage disputes can be traced to two events; the changed policy of U.S. Coast Guard to avoid responding to non-life threatening maritime incidents where reliable private responders are available, and the 1992 *Brier* decision [*Brier v. Northstar Marine Inc. et al*,1993 AMC 1194 (DN.J. 1992)]. That case involved the stranding of a U.S. owned 53' motor yacht which was refloated in a New Jersey inlet by a U.S. salvor under a Standard Lloyd's Open Form "No Cure, No Pay" salvage agreement (LOF), which called for disputes to be resolved by arbitration in London. The yacht owner's insurer declined to pay the salvor's demand for $38,250.00 and brought suit in a New Jersey Federal

District Court to have the LOF set aside on grounds that it was a contract of adhesion procured through misrepresentation on the part of the salvor. The salvor, in turn, moved for a stay of the court proceedings in favor of arbitration in London, as required by the explicit terms of the LOF.

The court made short work of and dismissed both arguments put forward by the yacht's insurer.

However, the court considered itself bound by Section 202 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) which in pertinent part reads:

> *. . . an agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad or has some other reasonable relation with one or more foreign states.*
> . . .

Finding no foreign nexus, the presiding magistrate ruled there was no basis to compel an unwilling U.S. citizen to arbitrate in London or enforce the resulting award. Accordingly, the court denied the salvor's motion but retained jurisdiction to hear and decide the merits of the case. Shortly thereafter the parties settled the matter.

The Brier decision was followed by *Reinholtz v. Retriever Marine Towing & Salvage, 1993 WL 414719* (*S.D. Fla 1993*) which also declined to enforce the London arbitration provision of the LOF. Although the court in *Jones v. SeaTow Services, Freeport, NY Inc., 828F.Suppl. 1002 (EDNY 1993*) criticized both *Brie*r and *Reinholtz*, the effect of those two earlier decisions was the need for a U.S. alternative to the LOF to service the recreational yacht as well as the commercial U.S. "brown water", coastal and other Jones Act trades.

Members of the MLA Salvage Committee and its sub-committee for Recreational Boating joined with members of SMA to draft a set of salvage arbitral rules for use by the recreational boating public, its underwriters, and the groups of professional salvors upon whom both had come to rely. The result was the December 1994 edition of SMA's *Rules for Recreational and Small Vessel Salvage Arbitration,* followed in March of 1996 by the new *U.S. Open Form Salvage Agreement* (Codename: MARSALV); Revised 1999.

I would like to stress that MARSALV was specially designed to accommodate traditional "No Cure, No Pay" salvage agreements, "No Cure, No Pay, Fixed Sum" agreements, "Per Diem/Hourly" or "Other" such agreements as the parties may find suitable. It is important to note that MARSALV expressly empowers the arbitrator to award attorney fees and costs. The form also incorporates the full text of Articles 13 and 14 of the 1989 International Convention on Salvage, which have been adopted into U.S. law.

Article 13 establishes the criteria (including the six *Blackwall, 77 U.S. 1, 1869* considerations) to be used by arbitrators in fixing the salvor's reward as follows:

> Article 13
>
> 1. The reward shall be fixed with a view to encouraging salvage operations taking into account the following criteria without regard to the order in which they are presented below:
>
> (a) the salved value of the vessel and other property;
>
> (b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;
>
> (c) the measure of success obtained by the salvor;
>
> (d) the nature and degree of danger;
>
> (e) the skill and efforts of the salvors in salving the vessel, other property and life;
>
> (f) the time used and expenses and losses incurred by the salvors;

(g) the risk of liability and other risks run by the salvors or their equipment;

(h) the promptness of the services rendered;

(i) the availability and use of vessels or other equipment intended for salvage operations;

(j) the state of readiness and efficiency of the salvor's equipment and the value thereof;

2. Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salved values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares. Nothing in this article shall prevent any right of defence.

3. The rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salved value of the vessel and other property.

Article 14, or Special Compensation provision, is intended to encourage salvors to undertake low value, potentially high risk and expensive salvage operations where the vessel, its fuel or cargo pose a substantial danger to the environment. Provided the salvor fails to earn a reward for property salved under Article 13 equal to his out-of pocket expenses and provided further that he succeeds in preventing or at least minimizing environmental damage, Article 14 allows that salvor to recover up to 100% of his out-of-pocket expenses from the vessel owner.

Article 14

Special Compensation

1. If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.

2. If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to 30% of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph 1, may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor.

3. Salvor's expenses for the purpose of paragraphs 1 and 2 means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in article 13, paragraph 1(h), (i) and (j).

4. The total special compensation under this article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under article 13.

5. If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any special compensation due under this article.
6. Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.

Awards issued pursuant to Article 13 are payable by all of the salved interests in proportion to the respective values saved, whereas those for Special Compensation under Article 14 are payable entirely by the vessel owner and its P&I Club.

Special Compensation P&I Clause (SCOPIC)

Although when introduced, the concept of Special Compensation was well received, its practical and legal application soon proved problematic giving rise to unforeseen tensions between and among the parties which Article 14 was intended to benefit. Those difficulties prompted the property insurers of hull and cargo to join with vessel P&I liability underwriters and the international salvage community to adopt and incorporate SCOPIC into the 2000 version of Lloyd's Open Form. A full discussion of SCOPIC is beyond the scope of this short paper. Suffice it to say that SCOPIC seeks to re-establish the enviable aims of Article 14 by eliminating interpretive uncertainties, specifying the amounts payable to a salvor for its personnel, tugs, pumps and other equipment, and creating a non-adversarial scheme among insurers for posting salvage security.

If the parties so desire, the current MARSALV can be adapted to include a SCOPIC clause for the salvage of commercial vessels.

SMA Awards

Perhaps nothing distinguishes the SMA from other arbitral forums more than the requirement for its members to only render fully reasoned awards which are then made available to the industry through subscription to the SMA Awards Service and/or the Lexis/Nexus information retrieval service. Since its founding in 1963, the SMA has published more than 3,950 such awards including four under Titan Maritime's "Day Rate" Salvage Agreements. But the majority of the 41 salvage awards issued to date by SMA members (including four appeals) concern recreational yachts and small craft responders such as Sea Tow. More often than not, the first of such cases were brought under the responder's "in house" form of salvage contract. But since its introduction, nearly all recreational boat salvage awards rendered by SMA members have involved the MARSALV form. The issues most often put to arbitration include whether a marine peril has been shown, whether the service should be treated as salvage or towage, whether the yacht owner's membership in the responder's prepaid towage program trumps the claim for salvage, whether the yacht was "hard" or only "soft" aground, whether the salvor was guilty of negligence or other misconduct, and the validity of the MARSALV Agreement which often involve allegations of exaggeration and/or misrepresentation by the responder. Of course, there are many fact based and even some self-serving and imaginative variations to these familiar themes, but the arbitrator's task is to sort through the arguments and evaluate the evidence to arrive at a fair and impartial decision.

The arbitrator's approach to a salvage demand differs from that of an ordinary contract dispute, which usually begins with the question of whether one contract partner has breached an obligation owed to the other. In a salvage scenario there is no threshold question of fault, but only whether a volunteer salvor has succeeded in rescuing property from a marine peril. If the imperiled property has been saved, then the salvor is presumptively entitled to a reward and the arbitral contest focuses on what amount of reward is appropriate to the particular circumstance. An exception applies when the salvor has performed its services so negligently that the yacht suffers otherwise avoidable damages. In one such circumstance, [**BAM BAM**, SMA 3793] an SMA arbitrator reduced the salvor's reward by an amount equal to the cost required to repair damage attributed to the salvor's negligence. In another case, [**NAUTILUS**, SMA 3517] the damage caused by the negligent salvor so exceeded the amount found due

him, that the net result was a substantial positive award for the yacht owner and his underwriter.

Sealed Offer of Settlement

SMA's standard arbitration rules as well as those pertaining to recreational and small vessel salvage and the companion MARSALV form allow for an award of legal fees and costs to the "prevailing" party. In most, but not all cases, the "prevailing" party is the one which receives a positive money award. I have already mentioned that a successful salvor is presumed to be entitled to an appropriate reward for his services. In practice, this means that, in the majority of salvage awards, the salvor can expect to receive a reasonable, if not generous, allowance toward its legal costs. However, in those cases where the salvage claim has been denied or the salvor found guilty of actionable misconduct or negligence, the salvor is exposed to pay not only its legal costs but those of its successful or "prevailing" opponent.

Although used sparingly in contract disputes and only once in a salvage arbitration before SMA arbitrators, the procedural tool of a *Sealed Offer of Settlement* is available to those salved interests and salvors who accept that they have some liability to the other, but have been unable to agree upon the amount payable. The *Sealed Offer of Settlement* is the arbitral counterpart to Rule 68 of the Federal Rules of Civil Procedure which encourages settlements by exposing the claimant to pay defendant's legal costs for its refusal to accept defendant's reasonable offer of settlement. Procedurally, the offeror (usually the defendant) alerts the arbitrator that he has served a bona-fide settlement offer upon his opponent which has either been rejected or simply not accepted. Neither the terms nor the amount of the offer are then disclosed. Instead, the entire offer together with proof of its timely delivery to claimant are placed in a sealed envelope and only made available to the arbitrator after the parties are notified that a decision has been reached. If the amount of the arbitrator's award does not exceed or "bust" the *Sealed Offer of Settlement*, then not only will the claimant be denied its legal fees from the date acceptance was required under the terms of the "sealed offer", but the claimant will be required to pay the defendant's legal costs from that date through to the close of proceedings.

Challenging an Award

A party dissatisfied with the arbitrator's ruling has recourse to SMA or the courts. If the award was rendered by a single arbitrator pursuant to SMA's *Rules for Recreational and Small Vessel Salvage Arbitration*, the dissatisfied party can have that award reviewed by an appeal arbitrator. But rather than a *de novo* review, the authority of the appeal arbitrator is limited to only reversing or amending findings of "clear error" made by the original arbitrator. As previously mentioned, thus far, there have only been four such appeals [**JOAN'S ARK**, SMA 3434, **OVATION**, SMA 3805, **MY WAY**, SMA 3858 and **BLUE BY YOU**, SMA 3969], none of which proved successful.

Pursuant to MARSALV, a commercial salvage dispute would be arbitrated under SMA's full Maritime Arbitration Rules. There a dissatisfied party may petition the appropriate Federal District Court to vacate the award. Although Section 10 of the U.S. Federal Arbitration Act (U.S.C. Title 9) limits the grounds for vacatur to matters of arbitrator misconduct, the dissenting opinion of Supreme Court Justice Frankfurter in *Wilko v.Swan*, 346 U.S. 427(1953) gave berth to the judicial caveat of "manifest disregard" of the law by arbitrators. Subsequent U.S. District Court and Circuit Court of Appeals decisions draw a distinction between mere errors of interpretation and a conscious decision by arbitrators to ignore or refuse to follow a point of law which is well understood by them. Although no maritime arbitration award has as yet been vacated on grounds of "manifest disregard", the dissatisfied insurers of the yacht **BIG DADDY** (SMA 3773) did petition a Florida Federal District Court to set aside the arbitrator's award on other grounds. In addition to insisting that the yacht owner was fraudulently induced into signing the MARSALV Agreement, the petitioners argued that the agreement including its arbitration clause was unenforceable because it lacked the contemporaneous consideration required by Florida State contract law. Specifically, when

signed, the salvage services had already been performed. Similar arguments of technically deficient or "stale" consideration have been presented to but dismissed by SMA arbitrators on grounds that the yacht owner's delayed signature was not only appropriate to the salvage circumstances, but a ratification of what had already been agreed or implicitly understood by him. Unlike the **BIG DADDY**, none of those other arbitral decisions were subjected to a court challenge.

The challenge to the **BIG DADDY** failed. After carefully examining the arguments presented, the Court concluded that the MARSALV Agreement was enforceable and granted the salvor's cross-motion for Summary Judgment to confirm the award. In doing so, the Court took note that the question of whether the MARSALV Agreement signed by the yacht owner was enforceable had already been put to and decided by the arbitrator. Furthermore, not only did the yacht interests not come forward with new evidence to support their position, but they were forced to admit "...that at no time did Defendant (salvor) make any statements directly addressing the nature of the document being offered for signature or the terms contained therein." Moreover, the salvor's statement "don't worry, your insurance company will pay" was proven to be correct.

Unfortunately, the Court did not address the issue of stale consideration under Florida law in a salvage setting. Instead, the Court's decision focused on the agreed facts which did not support a finding of fraudulent inducement such as would void the contract. I am confident that if the issue of stale consideration is put to and decided by the arbitrator, the courts will not disturb the result. I am also heartened, that absent a finding of fraud in the inducement, the tendency of the courts is to defer questions regarding the validity of the contract and its arbitration clause to the arbitrators. Any other approach would almost certainly dampen a responder's willingness to undertake time-sensitive operations until all the legal niceties have been observed. That, in turn, could have serious and even grave consequences for salved interests, their underwriters and even the public interest.

I want to again stress that the same rationale which the court used in the *Brier* and *Reinholtz* decisions apply with equal force to commercial vessels engaged in the U.S. coastal and other Jones Act trades. Simply stated, as counsel for at least one American salvor has recently confirmed, unless there is some genuine foreign nexus to the LOF salvage contract, it is unlikely that U.S. courts will force an unwilling U.S. citizen to arbitrate abroad or enforce the resulting award. The U.S. Open Form Salvage Agreement was specially crafted to address those salvage situations, carried out in U.S. waters, between and among U.S. salvors and U.S.salved interests. I urge all ASA salvors and their legal advisors to become more familiar with the MARSALV Form and the important advantages it offers for salvage in the U.S. domestic trades.

WHEN IN DOUBT, ASK OFAC

Although restrictions by the US government prohibit certain transactions with both countries, have you ever wondered why you can't drink Cuban rum or smoke Cuban cigars but you can eat Iranian pistachios or caviar? Or have you considered that when you finished your dinner in London with a glass of Havana Barrel Proof and a Monte Christo cigar, you are in fact committing an illegal act.

After I heard Baruch Weiss speak about his personal experiences in the Office of Foreign Assets Control, I thought it would be an interesting topic for our readers.

I thank Baruch and Laura Farhang for sharing the following contribution with THE ARBITRATOR.

U.S. SANCTIONS AND EMBARGOES: WHAT EVERY OWNER/CHARTERER SHOULD KNOW

By Baruch Weiss and Laura C. Farhang*

In today's climate of increased security concerns and tighter international trade requirements, shippers must be more vigilant than ever in keeping track of the complex web of U.S. laws affecting

international commerce. One of the most important—and confusing—areas of law relate to U.S. economic sanctions administered by the Department of Treasury's Office of Foreign Assets Control ("OFAC").

A misinterpretation of the rules—or a simple lack of attention—can cause serious problems in the long run. Even if a shipping company does not do business with embargoed entities, and does not ship to embargoed or sanctioned destinations, it is relatively easy for a vessel to run into an OFAC problem. For example, a vessel traveling in the Caribbean that stops at a Cuban port for minor repairs cannot enter a U.S. port for 180 days. Carrying cargo for an entity or person that is subject to a blocking order could lead to fines. And, even if a ship is carrying cargo between two destinations that are not subject to sanctions, ship owners and operators could face penalties if they did not perform appropriate screening and the cargo ultimately ends up in an embargoed destination.

What Does OFAC Do?

OFAC administers and enforces economic sanctions against countries and individuals, such as terrorists, proliferators of weapons of mass destruction (WMD), state sponsors of terror, narcotics traffickers, and other threats to national security as designated by the President. OFAC administers approximately 30 economic sanctions programs. Each sanctions program is uniquely tailored to specific foreign policy goals, and resulting trade restrictions can be comprehensive or selective.

Currently, U.S. restrictions prohibit certain transactions with Burma (Myanmar), Cuba, Iran, North Korea, Sudan, and Syria, as well as thousands of specially designated nationals ("SDNs"), terrorists ("SDGTs"), narcotics traffickers ("SDNTKs"), and weapons proliferators, lists of which are periodically updated and printed in the Federal Register.

Who must comply with U.S. sanctions laws?

U.S. sanctions laws apply to any U.S. citizen or permanent resident, anyone located within the United States, all companies organized in the United States, domestic affiliates of foreign companies located in the United States, any vessel located in U.S. waters, and any U.S. registered vessel wherever located.

Regardless of location, all shipping companies are potentially affected by OFAC regulations. Shipowners, P&I Clubs, brokerage houses and other maritime entities organized under the laws of a foreign country but having a subsidiary or branch office in the United States must comply with U.S. trade restrictions on all transactions emanating from its U.S. office and ensure that no U.S. person facilitates business transactions in embargoed countries.

What specific OFAC restrictions potentially apply to vessels?

Some sanctions programs, in particular those affecting Cuba and North Korea, have specific restrictions for vessels subject to U.S. law. In the case of Cuba, no vessel carrying goods or passengers to or from Cuba (with the exception of Cuban nationals traveling on a non-immigrant visa or other authorization from the State Department) or carrying goods in which Cuba or a Cuban national has any interest may enter a U.S. port. If a vessel subject to U.S. law were to enter a port or place in Cuba to engage in the trade of goods or services, it would be prohibited from loading or unloading any freight at any place in the U.S. for 180 days. With respect to North Korea, the OFAC regulations prohibit any U.S. person or company from owning, leasing, operating, or insuring any vessel flagged by North Korea.

In addition to the specific provisions applying to Cuba and North Korea, there are a number of general restrictions that apply to most U.S. sanctions programs. Absent an OFAC license, vessels subject to U.S. law generally cannot:

* Ship goods or technology produced in a country subject to trade sanctions;
* Ship goods to or from countries or targets subject to trade sanctions;

* Export U.S.-origin vessels to countries subject to trade sanctions;
* Ship goods or technology in which a target government, and SDN, or a Cuban national has an interest
* Purchase services or bunker ports located within the territory of a country subject to trade sanctions;
* Transship through the United States cargo from or destined for countries or targets subject to trade sanctions;
* Ship aboard vessels owned or controlled by sanctioned countries or targets.

In addition, shippers and freight forwarders must be aware that individual vessels can be blocked if they are owned or operated by an entity or person subject to a blocking order. Hundreds of specially designated vessels are included in the SDN lists as having ties to targeted governments or individuals. As such, no U.S. shipping company or freight forwarder, or shipping company or freight forwarder subject to U.S. law, may charter, book cargo on, or otherwise deal with SDN vessels. SDN vessels themselves are blocked if they enter a U.S. jurisdiction. In addition, banks must reject/block any funds transfer referencing a blocked vessel and must notify OFAC that funds have been returned to remitter due to the possible involvement of an SDN vessel in the underlying transaction.

Enforcement and penalties for sanctions violations

OFAC works closely with other U.S. agencies in combating terrorism and fighting financial crimes. Toward that end, OFAC collaborates on enforcement matters with the Departments of State, Commerce, Homeland Security, Defense and Justice, including the Federal Bureau of Investigation and the Drug Enforcement Administration; the bank regulatory agencies; and other law enforcement and intelligence agencies. In cases in which blocked property enters a U.S. port, Customs and Border Protection executes detentions and seizures. In addition, the FBI assists OFAC in targeting domestic violations of sanctions

At the same time that enforcement efforts have stepped up, potential penalties for OFAC violations have increased. In October 2007, the International Emergency Economic Powers Act ("IEEPA") was amended to raise criminal penalties to up to $1,000,000 in fines per violation, in addition to up to 20 years in prison and to raise civil fines up to $250,000 or twice the value of the transaction at issue, whichever is greater. The increased penalty level means it will become more common for sanctions violations to lead to penalties in the millions.

What can ship owners and operators do to avoid OFAC violations?

In light of the risks facing ship owners and operators who violate OFAC, and the complexity of OFAC regulations, shippers would be well advised to institute a comprehensive sanctions compliance program. Though necessarily tailored to an individual company's needs, common elements of an effective compliance program include:

§ Procedures for conducting due diligence on suppliers and customers;

§ Procedures to ensure that end-destination and end-user information is obtained from customers to minimize the risk that goods might be diverted to an embargoed destination or end up in the hands of an SND;

§ A process by which companies keep current on ever-changing U.S. sanctions rules;

§ Awareness and compliance training for employees;

§ Procedures for stopping problematic transactions when it appears a violation could occur; and

§ Protocols for auditing the system and revising it as needed.

While it has never been more difficult to understand and comply with U.S. sanctions laws, the

emphasis on national security and enforcement make it imperative that ship owners and operators avoid violations as much as possible. Keeping abreast of developments in U.S. sanctions laws and maintaining an effective compliance program will go a long way toward ensuring that shipping companies avoid restrictions and fines that result from OFAC violations.

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TREASURE SALVAGE - FINDERS KEEPERS?

By Thomas H. Belknap, Jr., Partner at Blank Rome LLP

"*Finders keepers, losers weepers.*" The refrain is familiar enough to anyone who spent any time on the playground as a child, but few might suspect that this trite phrase essentially states the central rule of the maritime law of "finds." And it might be even more surprising to learn that, in this modern world, the question of how the doctrine of "finds" should interplay with the ancient law of salvage has been one of the more significant subjects of recent court decisions in this field in recent years. And one need look no further than the recent headlines of a new half-billion dollar wreck discovery to realize that it is likely that these cases will continue to proliferate in the courts in the coming years.

Technology has been principally responsible for this development. Over the past thirty years or so, humanity's ability to undertake successful wreck exploration and recovery operations deep on the ocean floor has improved exponentially, with the result that many ancient and historic shipwrecks that were unknown or inaccessible for many generations have recently become ripe for discovery and exploration. Perhaps there is no better known example than the fabled R.M.S. TITANIC, the British ocean liner which met her demise on her maiden voyage across the North Atlantic in 1912 when she struck an iceberg and sank in about 12,500 feet of water, killing 1,523 of her 2,228 passengers and crew. The wreck lay undisturbed on the seabed until 1985, when a joint French-American expedition discovered it about 400 miles south of Newfoundland. Within two years, salvors had recovered more than 1,800 artifacts, and thousands more have been recovered over the last twenty or so years.

In 1993, a salvage company named R.M.S. TITANIC, Inc. ("RMST") acquired the rights of the venture which first discovered the wreck, and in August of that same year RMST brought several artifacts from the wreck into the Federal District Court for the Eastern District of Virginia and commenced an *in rem* action seeking to be named exclusive salvor-in-possession. Substantial litigation ensued as various parties challenged RMST's court-appointed role as exclusive salvor-in-possession and as RMST sought to "convert" its role to "finder" so that it could assert ownership in the artifacts. This case has come before the United States Court of Appeals for the Fourth Circuit on three separate occasions, most recently in January 2006. [R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 435 F.3d 521 (4th Cir. 2006)] In that decision, the Fourth Circuit focused on the thorny question of where to draw the line between the law of finds and the law of salvage when historic shipwrecks are concerned. The court pointed out that the general maritime law has traditionally favored the presumption that when property is lost at sea, title remains with the true owner regardless of how much time has passed. Thus, the law of salvage, which rests on the underlying principle that the action is undertaken with the ultimate aim of restoring the property to its rightful owner, is traditionally favored over the law of finds, which effectively equates possession with ownership.

But what of the long lost shipwreck, where the owner may long ago have disappeared or abandoned any interest in recovering the property? And what about the public's interest in whatever archaeological

or historical importance the wreck might have? Neither the salvage law nor the law of finds is directly suited for such a case. Indeed, each of these doctrines is specifically focused on encouraging the recovery of property from the sea—for the rightful owner in the case of salvage, and for the finder himself in the case of finds—and neither purports to look after the other unique interests which are present in the case of an ancient or historical shipwreck.

The Fourth Circuit expressly endorsed the application of traditional salvage law over the law of finds to cases involving historically or culturally significant wrecks and held that, in a case where no person has made a claim of ownership of the wreck, a court may appoint a plaintiff as salvor-in-possession and may protect the wreck site through injunctive relief, installing the salvor as exclusive trustee so long as the salvor continues the salvage operation, and entering orders concerning the title and use of the property retrieved as will promote the historical, archaeological, and cultural purposes of the salvage operation.

The Fourth Circuit's desire in the TITANIC case to bring historic shipwreck recovery within the bounds of the law of salvage is understandable. First, of course, its rejection of the law of finds discourages the secretive and often destructive work of the would-be finder who would claim a discovered shipwreck all for himself. By allowing a "salvor" to obtain injunctive protection from the court, a more orderly and controlled process of wreck exploration and recovery is encouraged, for the benefit of all. Second, and perhaps less obviously, by invoking the well accepted principles of the general maritime law of salvage instead of, for instance, creating or recognizing a new body of law relating solely to such wrecks, the court implicitly acknowledged the limited nature of its jurisdiction over a wreck in international waters. Surely, the greater the court's deviation from established principles of the general maritime law, the greater the possibility that other nations would decline to accept its application in respect of historical wrecks in international waters and to recognize exercises of "constructive *in rem* jurisdiction" over such wrecks by U.S. courts.

Clearly, this issue will remain pertinent for many years, as technology and public interest continue to drive more ambitious wreck discoveries and difficult explorations. And so long as these explorations continue to flourish, the courts will continue to be faced with difficult issues of jurisdiction and property interests. Whether the Fourth Circuit's explicit expansion of the salvage law to cases of ancient and abandoned shipwrecks will prevail, however, remains to be seen.

This article is an abridged version of an article published in the June 2007 edition of the Maritime Reporter And Engineering News (www.marinelink.com). Thomas H. Belknap, Jr., Partner at Blank Rome LLP, concentrates his practice in shipping and maritime related matters, including marine casualty, salvage, marine insurance, cargo and charter party disputes. He can be contacted at tbelknap@blankrome.com.

MORE ON THE EXXON VALDEZ

The July 2007 ARBITRATOR issue reported on the Ninth Circuit's decision to deny a rehearing on punitive damages on the EXXON VALDEZ case. On October 29, 2007, the U.S. Supreme Court accepted *cert* in the case of Banker v. Exxon Shipping Co. to review certain specific issues. On the same day, Charles M. Davis, Esq. circulated an article, authored by him, on "The Evolution of Punitive Damages in Maritime Law: From the AMIABLE NANCY to the EXXON VALDEZ." Granted, arbitration awards do not constitute binding precedent and certainly not admiralty law, but I felt obliged to point out to Mr. Davis that over the last 25 years, the SMA has published 17 awards dealing with punitive damages, including the TRIUMPH, for which *cert* was denied. [Note: TRIUMPH, SMA Award 2642, conf. 924 F.2d 467 (2d Cir. 1991)]

I thank John P. Vayda, partner of Nourse & Bowles, for contributing the following article.

IS EXXON VALDEZ A TRIUMPH?

On October 29, 2007, the United States Supreme Court agreed to accept an appeal from Exxon to review the Court of Appeals for the Ninth Circuit's opinions assessing punitive damages in the amount of $2.5 billion against Exxon as a result of the EXXON VALDEZ grounding. In 1991, the Supreme Court refused to accept an appeal by owners of the TRIUMPH to review a decision of the Court of Appeals for the Second Circuit confirming an award by New York arbitrators assessing treble damages, which some critics believe were akin to punitive damages.

A question has been raised whether there is anything

A. inconsistent in the Supreme Court's two decisions or

B. to suggest that the present members of the Supreme Court would accept the TRIUMPH appeal if it was filed today.

It is my opinion that the answer to both of these questions is "no." Some background is needed to understand my conclusion. The Supreme Court agreed to hear EXXON VALDEZ arguments on just the following three specific questions:

7. May punitive damages be imposed under maritime law against a shipowner (as the Ninth Circuit held, contrary to decisions of the First, Fifth, Sixth, and Seventh Circuits) for the conduct of a ship's master at sea, absent a finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner?

In 1818, the Supreme Court in The Amiable Nancy, 16 U.S. 546 (1818) held that punitive damages may not be imposed against the owner of a vessel for tortious acts of the master and crew unless the owner "directed," "countenanced," or "participated in" the wrong. Virtually all federal courts regularly apply that principle and refuse vicarious punitive damages in maritime cases. However, the Ninth Circuit, which decided the EXXON VALDEZ, had held in 1985 that an owner can be held vicariously liable for the acts of "managerial" employees, Protectus Alpha Navigation Co. v. Northern Pacific Grain Growers, 767 F.2d 1379, 1386 (9th Cir. 1979). No other Circuit followed Protectus and the Fifth Circuit and the First Circuit expressly rejected it. Nevertheless, the Ninth Circuit, in EXXON VALDEZ, declared itself "bound by Protectus" and thus confirmed the Ninth Circuit's conflict with at least four Circuits on this point. This split amongst the Circuits is one basis for the Supreme Court's review.

8. When Congress has specified the criminal and civil penalties for maritime conduct in a controlling statute, here the Clean Water Act, but has not provided for punitive damages, may judge-made federal maritime law (as the Ninth Circuit held, contrary to decisions of the First, Second, Fifth, and Sixth Circuits) expand the penalties Congress provided by adding a punitive damages remedy?

Exxon argued in its Petition for *certiorari* that there is an unbroken line of Supreme Court cases stating that when Congress has spoken to an issue of federal tort law, the statute determines the scope of the available remedies to the preclusion of judge-made federal common law, Mobil Oil Co. v. Higginbotham, 436 U.S. 618 (1978). Exxon also argued that the Clean Water Act specifically addressed the punishment and deterrence for oil spills by enacting both criminal and civil penalties on top of clean up and natural resource damage assessments. As such, judges may not create punitive damage remedies which are not included within the Clean Water Act.

9. Is this $2.5 billion punitive damages award, which is larger than the total of all punitive damages awards affirmed

by all federal appellate courts in our history, within the limits allowed by (1) federal maritime law or (2) if maritime law could permit such an award, constitutional due process?

Exxon argued that the Ninth Circuit did not consider how the substantive maritime law should affect the permissible size of any punitive damage award. Instead the Circuit Court affirmatively declined to articulate maritime – law rules that should govern punitive damages and to set the punitive damage award (assuming any were justifiable) on that basis. The Ninth Circuit held that the only applicable limit on the size of an award was the constitutional limit.

Exxon argued that that Ninth Circuit position violated prior Supreme Court precedent holding that common law judicial review decides the punitive damage awards as a vital part of the traditional justification for allowing juries to make such awards and that it cannot be omitted consistent with procedural due process. Other policies which Exxon advocated were that maritime commerce entails risks not found on land, maritime law and commerce demand "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states" and that none of these policies support enormous punitive damage awards. Instead, such awards, arguably, penalize maritime commerce rather than protect it, expand rather than limit liability, are unpredictable and inconsistent, have nothing to do with compensation for actual injury and impede rather than promote settlement of judicial economy. The Ninth Circuit's failure to address any of those issues was argued to be a critical reason for the Supreme Court to accept the case for review.

The Supreme Court's grant of *certiorari* was a one-line statement. Accordingly, it is impossible to know on which basis the request was granted or to foretell the result. That will have to wait until the Supreme Court issues its decision, likely in late 2008.

The questions which the owners of the TRIUMPH asked the Supreme Court to review were based solely on the powers of arbitrators. The questions presented did not implicate circumstances in which or criteria under which punitive damages should be awarded. Specifically, the questions presented to the Supreme Court in the TRIUMPH were:

1. Where a vessel owner agreed to arbitrate only those disputes "arising out of" a voyage charter party covering the carriage of a single cargo of crude oil to the United States, whether the arbitrators exceeded their powers by awarding damages for a claim based on events and disputes arising out of voyages not covered by the charter?

If the arbitrators did not exceed their authority,

2. Whether the Second Circuit erred in holding that the arbitrators could award treble damages under the Racketeering Influenced and Corrupt Organizations Act based on a "pattern" consisting of just one "racketeering act?"

Since the questions presented were so entirely different in the two cases, I do not believe that the Supreme Court's acceptance of *certiorari* of the EXXON VALDEZ decision provides any insight as to how it might rule if the TRIUMPH issues ever again reached the Supreme Court. However, it is noteworthy that when the Second Circuit recently revisited the principles which it articulated in the TRIUMPH and from which the Petition for *Certiorari* sought appeal, it actually <u>expanded</u> the breadth of its TRIUMPH decision. Specifically, in the TRIUMPH the Second Circuit held that arbitrators had the power to look at facts which arose outside the contract which was the subject to the arbitration so long as it did not determine the liability of a person not party to the contract. However, the Second Circuit seemingly expanded that rule when it recently recharacterized its decision in TRIUMPH as "we determined that the

Panel can consider any conduct that bears on damages." JLM Industries Inc. v. Stolt – Nielsen, S.A., 387 F.3d 163, 174 (2d Cir. 2004)

In short, the EXXON VALDEZ's grant of *certiorari* does not provide any suggestion that the arbitrators' award of RICO damages in the TRIUMPH is in imminent danger of reversal. To the contrary, the Second Circuit has recently reiterated the power of arbitrators to issue such an award in appropriate circumstances.

EXPANDED JUDICIAL REVIEW

by Keith W. Heard

Partner, Burke & Parsons

The Supreme Court is currently considering one of the most significant issues in the law relating to arbitration to come along in years. In Hall Street Associates, L.L.C. v. Mattel, Inc., 196 Fed.Appx. 476 (9th Cir. 2006), *cert*. granted, 127 S.Ct. 2875, 167 L.Ed.2d 1151 (2007), the Court must resolve a deep "split in the circuits" over whether private parties may expand, through contractual language, the scope of judicial review of an arbitral award. (I described this split and the principal cases that comprise it in an article that appeared in the November 2005 edition of THE ARBITRATOR.)

Currently, the First, Third, Fourth, Fifth and Sixth Circuits have ruled that such private party agreements are legally enforceable whereas the Ninth and Tenth Circuits have ruled to the contrary and there is *dicta* in Seventh and Eighth Circuit decisions indicating that those courts would likely side with the Ninth and Tenth against expanded review. The Supreme Court must now sever the Gordian knot and tell us who is right.

Although the legal issue presented to the Court in Hall Street is reasonably straightforward, the procedural history of the case is not. The underlying dispute concerns liability for contaminated well water at a toy manufacturing facility owned by Hall Street Associates ("HSA") and leased by Mattel (and previously by a company it acquired). The lease did not contain an arbitration clause so the case initially went to trial in federal district court in Oregon on an issue regarding Mattel's right to terminate the contract.

After the district court ruled in Mattel's favor on that issue, and after an unsuccessful attempt to settle the case through mediation, the parties obtained the Court's approval of an agreement to arbitrate the remaining issues, with the agreement allowing for *de novo* judicial review of the arbitrator's legal rulings. According to HSA's Petition for *Certiorari* to the Supreme Court, "this agreement for expanded judicial review was central to the parties' agreement to arbitrate their dispute, . . . which was not subject to a preexisting agreement to arbitrate and which could have been properly litigated in federal court in the first instance."

The agreement to arbitrate stated that the district court could "vacate, modify or correct any award: (i) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." Relying on the Ninth Circuit's decision in LaPine Technology v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997), which upheld expanded judicial review of arbitration awards, the district court approved the parties' agreement and the dispute proceeded to arbitration.

In January of 2002, the arbitrator issued his Findings of Fact and Conclusions of Law. The key issue in the arbitration was whether Mattel was required to indemnify HSA with respect to all claims and lawsuits by any parties relating to the condition of the property. It was undisputed that well water on the property, which employees had used for many years for drinking and washing up, was contaminated by trichloroethylene ("TCE") in concentrations well in excess of federal limits. Mattel and its predecessor tenants had failed to test the well water for contaminants, which, according to HSA, they were required to do pursuant to Oregon's Drinking Water Quality Act, a state statute.

The lease contained a broad indemnity clause benefitting the property owner but there was an

exception to it if Mattel was in compliance with "applicable environmental laws" and had not directly or indirectly contributed to the presence or use of hazardous materials on the property. Although Mattel admittedly violated the Drinking Water Quality Act by not testing the well water for many years, the arbitrator ruled that this did not constitute a violation of "applicable environmental laws" regarding TCE. Based on this questionable conclusion, the arbitrator determined that Mattel was protected by the exception to the lease's indemnification provision.

HSA moved to vacate the arbitrator's award, seeking *de novo* review of its conclusion that Mattel's violation of the Drinking Water Quality Act was not a violation of an "applicable environmental law" within the meaning of that phrase in the lease.

In April 2002, the District Court granted HSA's motion to vacate the award and remanded the case to the arbitrator for further consideration. Specifically, the District Court ruled that the arbitrator's conclusion that the Oregon Drinking Water Quality Act was not an "applicable environmental law" under the lease was erroneous.

On remand, the arbitrator issued an amended decision, based on the Court's ruling that the state statute was an applicable environmental law which Mattel had violated. As a result, the exception to the indemnity clause did not apply. The arbitrator awarded HSA a recovery of over $580,000 and declaratory relief against Mattel for all future costs that HSA might be required to pay relating to environmental cleanup of the property.

Both sides sought review of the arbitrator's amended award but it was upheld by the Court and judgment was entered.

Mattel appealed to the Ninth Circuit on the basis of a change in the governing law in that circuit. As previously mentioned, in LaPine Technology v. Kyocera Corp., the Ninth Circuit had ruled in 1997 that contractually-created expanded review of arbitration awards was permissible. LaPine went from the Ninth Circuit back to the District Court and then back to the arbitrators, who ruled a second time that Kyocera owed LaPine over $240 million. After the second award was confirmed, Kyocera appealed again to the Ninth Circuit.

When a three-judge panel affirmed the District Court's confirmation of the award Kyocera sought and obtained *en banc* consideration. Sitting as a full court, in 2003 the Ninth Circuit overturned the prior ruling in LaPine and ruled that expanded review of arbitration awards, based on an agreement by the parties, was prohibited. Kyocera Corp. v. Prudential-Bache Trade Services, Inc.**,** 341 F.3d 987 (9th Cir. 2003), *cert*. dismissed, 124 S. Ct. 980 (U.S. 2004). The Court wrote as follows:

> *Because the Constitution reserves to Congress the power to determine the standards by which federal courts render decisions, and because Congress has specified the exclusive standard by which federal courts may review an arbitrator's decision, we hold that private parties may not contractually impose their own standard on the courts.*
>
> *341 F.3d at 994.*

With the 2003 decision in Kyocera v. Prudential-Bache (which is simply LaPine under a new name), at least two circuits, the Ninth and Tenth, had concluded that expanded review was prohibited while other circuits had ruled that expanded review was permissible. Nevertheless, the Supreme Court was unable to resolve the circuit split -- despite an application for writ of *certiorari* by Kyocera -- because of a resolution between the parties.

This brings us back to Hall Street Associates v. Mattel and Mattel's appeal to the Ninth Circuit, where, as we have just seen, the law had changed between 1997 and 2003.

In November 2004, the Ninth Circuit reversed the District Court's *vacatur* of the arbitrator's initial award, on the basis of the *en banc* decision in Kyocera v. Prudential-Bache. The Court of Appeals ruled that, under Kyocera, "the terms of an arbitration agreement controlling the mode of judicial review are unenforceable and severable." 113 Fed.Appx. 272, 273 (2004).

The Ninth Circuit remanded Hall Street to the District Court with instructions to confirm the award unless the District Court determined that it should be vacated under section 10 of the Federal Arbitration Act, or modified or corrected on the basis of section 11.

On remand, the District Court held that grounds for vacating the award did in fact exist under section 10 of the Arbitration Act. Specifically, the Court held that the arbitrator exceeded his powers because the award was based on what it called an "implausible interpretation of the contract." Therefore, the District Court again vacated the award, granted HSA additional attorneys' fees and again entered judgment in its favor.

For the second time in the case, Mattel appealed to the Ninth Circuit. In August of 2006, a three-judge appellate panel reversed, holding that "implausibility is not a valid ground for voiding an arbitration award under either sections 10 or 11 of the Arbitration Act." Hall Street Associates, L.L.C. v. Mattel Inc., 196 Fed.Appx. 476, 477 (9th Cir. 2006). The 2-to-1 panel majority recognized that the award contained "possible errors of law" but observed that "those errors are not a sufficient basis for a federal court to overrule an arbitration award." *Id.* The majority remanded the case to the District Court with instructions to declare Mattel the prevailing party. *Id*. at 478.

One appellate judge dissented on the grounds that the award was "completely irrational." *Id*. She would have either upheld the District Court's *vacatur* order or remanded for reconsideration of the award under that standard.

HSA's application for *en banc* review of the panel's decision by the full Ninth Circuit was denied.

HSA then filed a petition for issuance of a writ of *certiorari* and that was granted by the Supreme Court on this issue: "Did the Ninth Circuit err when it held that the Federal Arbitration Act precludes a federal court from enforcing the parties' clearly expressed agreement providing for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA?"

The parties submitted briefs on this issue earlier this year and briefs were submitted by the following *amicus curiae*: CTIA-The Wireless Association, the Pacific Legal Foundation, the New England Legal Foundation/National Foundation of Independent Business Legal Foundation, the American Arbitration Association ("AAA") and the United States Council for International Business. The Wireless Association, the Pacific Legal Foundation and the New England Legal Foundation/National Foundation of Independent Business Legal Foundation support expanded review of awards while the AAA and the Council for International Business do not. All of the briefs are available on-line at www.abanet.org/publiced/preview/briefs/nov07.shtml#hall

In its brief, HSA contended that "[t]he FAA does not prevent enforcement of an arbitration provision clearly and unambiguously stipulating to judicial review of an arbitration award for legal error because such a provision furthers the goals and policies of the FAA and is consistent with the court's normal judicial functions." Quoting language in Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stamford Junior Univ., 489 U.S. 468, 479 (1989), HSA pointed out that the Supreme Court had previously stated that the primary purpose of the FAA is to ensure that "private agreements to arbitrate are enforced according to their terms." Indeed, the circuit courts that have enforced expanded review provisions have relied on this language in support of their decisions, although the language is arguably limited to what happens during an arbitration as opposed to what happens afterwards in a judicial review proceeding.

In a particularly interesting point, HSA argued that the Supreme Court itself had implicitly recognized that sections 10 and 11 of the FAA do not prescribe the exclusive grounds for *vacatur* or modification of arbitration awards because the Court "has approved other judicially-created exceptions to confirmation of arbitration awards", such as manifest disregard of the law.

Addressing the concern that allowing expanded review may create a basis for more award review cases to be filed in federal court, HSA noted that this was not a factor in the present case, which had initially been filed in Court due to the absence of an arbitration agreement in the lease, and might not be much of a factor in future cases since the FAA was not a jurisdictional statute, with the result that any case filed in federal court under the FAA must have an independent basis of subject matter jurisdiction.

Finally, HSA offered the view that allowing parties to contract for judicial review of awards for legal error was consistent with and indeed served to promote "the policies of the FAA favoring arbitration and the enforcement of arbitration agreements according to their terms." In particular, HSA contended that "[a]llowing parties the freedom to stipulate to judicial review for legal error promotes arbitration by appealing to parties who otherwise would be reluctant to arbitrate for fear of a legally erroneous award without a chance for meaningful review." Indeed, it is generally thought that this is why expanded review provisions have come into vogue over the past fifteen years, as the size of claims and disputes submitted to arbitration has grown significantly.

In its brief, Mattel focused on the language of section 9 of the FAA to the effect that a court "must grant" an application to confirm an arbitration award unless "the award is vacated, modified, or corrected as prescribed in sections 10 and 11." Mattel contended that "section 9 is not a default standard . . . , subject to the parties' alteration. The text of Section 9 makes clear that it is a mandate for confirmation of the award subject only to Sections 10 and 11."

Mattel also relied on section 2 of the FAA, writing as follows:

> Section 2 makes the FAA applicable to agreements to 'settle' a controversy 'by arbitration.' But if the parties to an arbitration agreement can agree that a court will refuse to confirm an arbitration award if the award contains an error of law or lacks substantial evidence supporting facts, then arbitration becomes only a prelude to judicial review and there is no agreement that the arbitration will 'settle' the controversy.

In one of its most interesting arguments, Mattel pointed out that when Congress passed the FAA, it faced a choice between following the "Illinois model", whose state arbitration statute provided for broader judicial review of awards, or the "New York model", whose statute provided for narrow review. The fact that the FAA is based on the New York model reflected a "deliberate choice" by Congress "to reject the alternative approach of some of the contemporaneous arbitration laws that permitted *vacatur* of arbitration awards for legal error."

Mattel countered HSA's reliance on the Court's decision in Volt Info. Sciences by arguing that the case dealt with "whether or when an arbitration will proceed before an arbitrator" and "the scope of the parties' authority to dictate an arbitrator's tasks and methods", not the ability of private parties to dictate the grounds on which a court decides whether to confirm or vacate an award.

Mattel further argued that HSA's view "that parties to an arbitration agreement can redefine the federal cause of action under Section 9 for confirmation of an arbitration award to include whatever supplemental elements they like . . . is contrary to well-settled law that courts are not bound by the parties' stipulations as to what federal law is."

Finally, Mattel argued that allowing expanded review would be "contrary to the core purposes of the FAA and would create havoc for arbitrators and courts alike." According to Mattel, expanded review "would almost certainly mean that arbitrations would become like court proceedings, with adoption of explicit limits on the scope of the record, rulings on evidentiary objections, and formal findings" which "would seriously undermine the time and cost savings that arbitration is supposed to yield." Mattel contended that parties could achieve a result similar to expanded review, without the problems that it allegedly entails, by opting for "appellate arbitration . . . under whatever standards the parties wish."

This interesting case was argued to the Supreme Court on November 7, 2007 and a transcript of the argument is available on the Court's website at:

www.supremecourtus.gov/oral_arguments/argument_transcripts/06-989.pdf.

It is often risky to hazard a guess as to how a Court will rule on the basis of oral argument but, reviewing the transcript in this case, one has the impression that at least five of the nine justices favored HSA's position that expanded review based on party agreement is not barred by the FAA and should be permissible.

If the Court does in fact rule that way, the door will be open for broader judicial review of maritime arbitration awards -- if the parties provide for that in their agreements. On the other hand, the traditional arbitration clauses used in charter parties and other maritime contracts are likely to remain unaltered if the parties favor finality over further review.

(MORE ON) SMA AWARDS

With the continued help from Michael Marks Cohen, I just learned about the English Commercial Court decision in Golden Fleece Maritime and Pontian Shipping v. ST Shipping & Transport, [2007] EWHG 1890 (Comm) before The Hon. Mr. Justice Cooke. The dispute dealt with whether Owners or Charterers should bear the commercial risk of a change in international regulations, preventing the vessel under long term charter from carrying certain cargoes. Owners had cited the STOLT LION (SMA 1188) in support of their position, whereas Charterers relied on the ULTRAMAR award (SMA 1555).

As most readers know, the SMA publishes its awards in full text and distributes them to subscribers, while also making them available in a legal database on the Internet. In other words, access to an SMA award is not contingent upon it becoming the subject of court review to put it in the public domain.

In both the Singapore and London court proceedings, the cited SMA awards were treated as persuasive precedents notwithstanding the absence of judicial review of their merits by a U.S. Court. Clearly, although maritime arbitration awards, like District Court opinions, are not binding except upon the parties to the proceedings, they can be useful in giving guidance to the shipping industry for resolving disputes. It is especially satisfying to see New York SMA awards being cited with approval by foreign courts.

PEOPLE AND PLACES

LLB – "What's your line?"

When I read an article by Jodie O'Keefe in Fairplay International Shipping Weekly (November 1, 2007 issue), I learned a few things about Liz Burrell which I did not know and certainly are worthwhile sharing with the readership. Richard Clayton, Fairplay's editor, was kind enough to let me pick and choose from the interview, which was entitled "Setting the bar high." The article addresses i.a. the punitive damage aspect of the continued EXXON VALDEZ litigation and the need for uniformity. She stated that keeping the courts onside is the prime project for the president of the US Maritime Law Association; a task which, under the US system with its various circuits, can be complicated.

I have known Liz for many years, going back to her early days at the venerable law firm of Burlingham Underwood & Lord. I always knew that she was smart, charming, hardworking and well liked, and that to date she was the only female lawyer rising through the ranks to the top spot of president of the Maritime Law Association of the United States, a position she has held since 2006. But the article also contained Liz Burrell's bio, the professional side of which, no doubt, many of you are familiar.

FAMILY:

Husband, Geoffrey J. Ginos, is also a maritime lawyer; daughter Alexis Carinna Burrell Cataldo, 21; stepson, Julian James Ginos, 22.

CAREER:

- Counsel, Curtis, Mallet-Provost, Colt & Mosle LLP (2006-present)

- Counsel, Levy Phillips & Konigsberg LLP (2002-2006)

- Partner, Burlingham Underwood LLP (1989-2002

- Associate, Burlingham Underwood LLP (1980-1988)

EDUCATION:

- JD, New York University School of Law, 1980

- M Phil., with distinction, Columbia University, 1976

- MA, with honors, Columbia University, 1974

- BA, cum laude, Swarthmore College, 1973

RECOGNITION:

Listed as one of "the world's leading lawyers" in Chambers Global (2000-2001, 2001-2002, 2002-2003, 2006, 2007); listed in New York Magazine's "best lawyers in New York" and New York Super Lawyers (2005, 2006, 2007)

INTERESTS:

Skiing, dog, 12-string guitar and family (her husband "deserves immense credit for being a strong enough man not only to tolerate but to be so sincerely and constantly supportive to a wife in the same profession).

The more unusual aspects were reflected in a section titled "Unlikely tangents run in the family."

Lizabeth Burrell's route to worldwide legal prominence reads quite like a 1940s Hollywood movie script. When her grandfather died during the height of the Great Depression, Burrell's mother took her saxophone and clarinet and played jazz to make ends meet and provide for her family. That's when she was spotted by a New York modeling agency, which put quite a bit more bread on the family table as the Face of Revlon cosmetics. From there, she went to Broadway to perform before finally changing careers entirely. Burrell's mother became a court reporter to put herself through law school. In those days, there was much resistance to women joining the profession, Burrell tells Fairplay, and her mother qualified only because of a system of blind grading. "By the mid-40s she was a lawyer," Burrell adds, "so I had an example before me." With that example, it seems not at all unusual that Burrell herself also took a few detours to the land of law. She has been a musician, English literature teacher and a scuba diver. Then she earned her law degree at New York University School of Law (and there was no looking back).

In case anyone still wonders about my title for this article, Liz's love and pursuit of the law may have been established when her lawyer parents named her Lizabeth Lorie Burrell – making her initials LLB (*legum baccalaureus*). Of course, the "What's your line" is partially borrowed from the old TV show.

On the Move

*** SKULD**

Skuld's long-term exclusive correspondent in the United States, Anchor Marine Claims Services Inc., is now a full member of the Skuld family under the name Skuld North America Inc. Its New York office staff, still under the leadership of Charles B. Anderson, will continue to provide claims services, but will work even closer with the club's other offices in Oslo, Bergen, Copenhagen, Hamburg, Piraeus, Moscow, Singapore and Hong Kong. Skuld's commitment continues the club's strategy of being close to members by providing full service in local time zones. The launch party on October 17 brought together many Skuld members, friends and important contacts. A large number of honored guests had traveled far to be present at the event.

CEO, Douglas Jacobsohn, said the following about the new initiative:

> We have received very impressive feedback about the fantastic team in New York – named the number one team when it comes to

professional P&I handling in the city. This is important for the future, not only in relation to the American market, but also when Skuld North America takes action for other members trading in US waters.

Address/Contact:

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*** GARD**

Hugh A. Forde joined Gard (North America) Inc. on October 8, 2007 and will be active in the FD&D as well as the P&I Department. He can be reached at (212) 425-5750 (ext. 109) or hugh.forde@gard.no.

* SMA member Charles L. Measter has a new address:

2430 Bent Twig

Seabrook Island, SC 29455

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Email: cmeaster@comcast.net

SOME PERSONAL NOTES

How Efficient Is It?

I know of this character, let's call him Arnie Rooney, who has an opinion on most things and no qualms about sharing them with you. Here's what he came up with the other day.

Although I appreciate computers and the Internet scene and many of the benefits they have given us, there are times when I wish for the good old days. Where is my quill and ink well and where are the days of secretaries, steno pads and typewriters?

Granted, in the "olden days," one had to do a lot of blotting and rewriting, as arbitration awards were written with carbon copies. When wholesale changes needed to be made, the secretaries had to deal with it and did so quite efficiently. There is absolutely no question that the computers and email correspondence have greatly facilitated the process, but in the course of it, many may have lost their secretaries and for some it shows because their typing skills, grammar, punctuation and sentence structure are still trying to catch up. The reliance on the spell-check is a rather "iffy" proposition because in itself it is not perfect. For example, the computer would not pick up "it bares upon the facts" or "you are familiar with the seen." Unnecessarily, bad habits have crept into the 'modern" correspondence process. To save time (and how much faster does one have to be?) previous letters are used for addresses and subjects and many times the old dates remain in the "re-issue." It is not crucial, but it certainly is unprofessional and confusing.

But what I find most irritating is the indiscriminate use of the reply key. When I print out my messages, I want to see the latest message and not a sequence of previous exchanges three or four pages long. One possibly can deal with it when it is a dialogue because you simply await the end of the discussion and then have a complete record of the "conversation." On the other hand, when you have exchanges with several individuals on the same topic, you have a substantial overlap and duplication. Since the computer remembers email addresses, how difficult would it be to have single-message transmissions? Maybe I am the only one who finds this aggravating.

I miss the efficiency and presence of secretaries. It certainly was more pleasant to speak to them and leave a message for the boss than having to deal with computerized telephone systems which asks whether I want to continue in English or Spanish, whether I know my party's extension or whether I want the operator.

Having said all this, technology and progress are good – they're really great – but would it not be

nice if we could pick and choose what we like about progress? I will put it on my wish list for Santa.

In a recent edition of the local Westfield paper's editorial page, a reader complained about the indiscriminate use of the phrase "happy holidays," which she claimed was non-specific and, therefore, useless. At first I thought that the woman had made a good point – we are all products of our upbringing. If you were accustomed to the greeting "Merry Christmas," why not continue using it? But on the other hand, in the ecumenical spirit, one should be more considerate and accept that this generic greeting is not meant to offend anyone's religious beliefs, but, particularly during the month of December, expresses the spirit and joy of the season.

Since it's January now, we have the rest of the year to ruminate. What is left for THE ARBITRATOR is to thank all the contributors during 2007 and to wish all its readers a healthy, prosperous and peaceful New Year.

For THE ARBITRATOR

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