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THE PRESIDENT'S CORNER

Easter has come and gone and so has Spring, even if only as a calendar date, it is barely April and events have been and are keeping up a fast pace.

The fourth annual SMA seminar on "Maritime Arbitration in New York under SMA Rules" in February had a majority of foreign attendees, including London, Nigeria, Venezuela and Mexico (we had two last minute cancellations – isn't it ever so frustrating when business gets in the way). Two days of lively, interactive sessions were again superbly chaired by Professor Weiss and the SMA's Austin Dooley, PhD.

Also in February, NYMAR put on a vivid afternoon lecture/discussion by simulating the COSCO BUSAN accident (allision with a bridge in San Francisco Bay and subsequent oil spill) as having taken place in New York harbor: How prepared would New York be? The US Coast Guard (USCG) representatives from the New York and New Jersey environmental agencies (EPA), spill responders, P&I Club, port authority, pilot association, Owner and Charterer's representatives all made this frighteningly real, but demonstrating that New York would be prepared to deal with such a mess, literally speaking. Further details on both events are provided in this issue.

Then in March the whole shipping world, at least so it seemed, came together in Stamford for CMA's Shipping 2008 Conference. And let us not forget the many visiting firemen (an expression for lawyers, barristers, arbitrators and/or other shipping dignitaries from abroad or far away) to keep our lunch tabs running.

What's ahead: first of all, we are planning a fancy birthday party for ourselves. It is the SMA's 45th anniversary and we aim to celebrate in style. The date is September 24 and the venue is the Union League Club. More details will follow. Then there is Maritime Americas Week 2008 in Miami in May (an annual event, but apparently this being the first), at which SMA members will participate in a Mock

Arbitration in conjunction with Petrospot/IBIA's Bunker Arbitration Experience, dealing with bunker related dispute issues.

We also hear that the busy people running NYMAR are working on another afternoon seminar sometime between now and June. Finally, keep planning on attending ICMA XVII in Hamburg, October 2009.

I encourage the membership to participate in these interesting events. Watch our website and stay tuned, but in the meantime enjoy the spring, if and when it actually shows up.

Klaus Mordhorst

THE HIDDEN TRUTH

by Chris Hewer

Roughly 95 per cent of people in the world claim that they have never told a lie. That figure is official: 95 per cent, mind. But it depends on your definition of a lie. Do you favour "gross falsification or misrepresentation of the facts, with constant repetition and embellishment to lend credibility?" Or do you prefer the old English maxim, "Liar, liar, pants on fire?"

American author Steven Covey once said, "When you make a mistake, admit it, correct it, and learn from it – immediately." Easier said than done.

There is a fine line between telling a lie and just giving voice to what you hope is the truth and then not knowing when to stop. Take the former manager of the England football team (nobody else has snapped him up yet), who last year stood on the touchline protecting his lovingly created hairstyle under a huge umbrella while watching his side being eliminated from the European Championships.

Real football managers don't stand under umbrellas. They wear cheesecutters, and stand out in the rain. Not surprisingly, the England manager took a lot of stick for that umbrella. He let the fuss die down for a couple of months before then ruining everything by claiming that he had only used the umbrella to keep his notebook dry. Reckon.

All sorts of people are susceptible to this foot-in-mouth syndrome. A barrister who should have known better once told an ICMA meeting that it was not a good idea for London maritime arbitrators to publish their awards because this would lead to "a proliferation of citations of authority." You try proliferating nothing. Then he compounded it by saying that publication had to be in a user-friendly format. Fat chance.

The only vaguely comparable gaffe is that committed by a soldier in the British armed forces who, some years ago, was court-martialed for coming back to barracks after lights-out, climbing in through his hut window, and falling into bed in a drunken stupor with a lit cigarette still in his mouth, thereby setting fire to the bed and to the entire hut. His subsequent plea in court was, "Not guilty, m'lud. The bed was already on fire when I got into it."

Obfuscation (let us call it that, for want of a better word, although heaven knows there must be thousands) has reached new heights of sophistication in the electronic age. At this very moment there is somebody trying to hawk an "enterprise-wide application for metadata removal and metadata management in law firms which uses sophisticated technologies to remove visible metadata and clean the hidden or difficult-to-reach file elements."

Oh, that old metadata chestnut, you are probably thinking. And you'd be right. For those who did not know, metadata is data about data. The word 'meta' comes from the Greek, where it means 'after' or 'beyond'. In epistemology, the prefix 'meta' is used to mean 'about', which just happens to be a word that causes more trouble in

shipping disputes than any other, and is by no means exclusive to the Greeks.

But enough of that. The product on offer allows law firms the luxury of not having to "worry about file formats leaving their electronic walls." That's a relief. And it has an "email integration capability to prevent the inadvertent release of confidential information." The product can "require users to clean all documents sent outside the firm as part of a non-invasive automated workflow process." Tidy.

If we are reading this right, lawyers are being offered an electronic means of, at best, keeping secrets, and, at worst, covering up their mistakes. The days of dumping a job lot of lever-arch files in the East River are clearly long gone. The environment exhales. But does it help us choose the right lawyer?

Just the other day, an American lawyer sent out a press release telling the world what to look for when hiring an attorney. Among other things, this cautioned, "It is important to meet the lawyer, if possible, in the office. The client should see where the lawyer works. Observe the feel of the office to see if it will be a good fit. There are no secrets or surprises here." And, oh yes, "Handshakes and a wink are not acceptable."

This is all good advice, even though many of us grew up believing – and still believe – that handshakes, at least, are perfectly acceptable. A wink, meanwhile, is as good as a nod to a blind horse. But as for 'no secrets and surprises', what about those deleted files? What lies behind those electronic walls? What about the non-invasive automated workflow process? What about the metadata?

Overall, if you need to choose a lawyer, you can do no better than choose a lucky one.

COGSA LIABILITY / DG HARMONY

The following case summary appeared in the Blank Rome March 2008 newsletter.

Second Circuit Decision Affects COGSA Liability for Shipment of Dangerous Cargo

On March 3, 2008, the United States Court of Appeals for the Second Circuit, in *In re M/V DG HARMONY*, 2008 U.S. App. LEXIS 4483, No. 05-6116-cv (2d Cir. March 3, 2008), issued an important decision which clarifies the standard used to determine the liability of shippers and carriers transporting hazardous cargo under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 30701 note.

Under the holding of this case, a shipper will not be held **strictly liable** for damage caused by hazardous goods if both the shipper and the carrier had pre-shipment knowledge of the dangerous nature of the cargo, even if the carrier lacked information about the precise characteristics of the cargo and its hazards. Instead, in such a case the shipper's liability will be determined on **negligence** principles. In particular, where the carrier alleges that the shipper failed adequately to warn the carrier about the characteristics of the particular shipment, the carrier must show (1) that the shipper had a duty to warn because the cargo presented dangers of which the carrier could not reasonably have been expected to be aware, (2) that the shipper failed to provide the adequate warning, and (3) that this failure caused the damage complained of.

Fact and Procedural History

On November 9, 1998, the M/V DG HARMONY caught fire off the coast of Brazil as a result of an explosion in its third hold. The fire burned for three weeks, ren-

dering the vessel and its cargo a constructive total loss. On board the vessel were ten containers, each packed with 16,000 kilograms of calcium hypochlorite (hydrated) ("calhypo") which was manufactured and shipped by PPG Industries, Inc. ("PPG"). Calhypo is an industrial bactericide which is likely to combust when it reaches its critical ambient temperature ("CAT"), a figure which is dependent on the manner in which the calhypo is stored and is inversely proportional to the quantum of calhypo in a given sample. Calhypo is listed in the International Maritime Dangerous Goods Code ("IMDG Code"), which recommends that calhypo not be exposed to a heat source in excess of 55° C for longer than a 24-hour period. PPG provided the carrier with documentation identifying the cargo by its IMDG Code, declaring the containers had been packed in accordance with the requirements of the IMDG Code, cautioning that the containers should be stored in a cool, dry well-ventilated place away from sources of radiant heat. PPG also warned the carrier that the cargo would become unstable above a certain temperature, but it omitted specific information about what effect the packaging of the containers might have on the calhypo's CAT. PPG's containers were stowed in the vessel's third hold. Three of the containers were placed adjacent to the heated port side bunker tank with two of these containers also sitting directly atop the bunker tank. The fire aboard the M/V DG HARMONY was caused when PPG's calhypo exploded.

Litigation ensued in the United States District Court for the Southern District of New York. All claims were resolved except the claims of the ship-owning and cargo interests against PPG. The ship-owning and cargo interests alleged that PPG was liable for the constructive total loss of the vessel based upon theories of general negligence, negligent failure to warn and strict liability. After a bench trial, the district court found PPG solely liable based upon the theories of strict liability and negligent failure to warn. PPG appealed to the Second Circuit.

The Second Circuit's Decision on Appeal

The Second Circuit reversed the judgment of the district court that PPG was strictly liable pursuant to COGSA § 4(6), which provides that the shipper of flammable, explosive, or dangerous cargo "shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment." The district court's finding of strict liability was based on the Second Circuit's holding in *Senator Linie GMBH & Co. KG v. Sunway Line, Inc.*, 291 F.3d 145 (2d Cir. 2002), where a shipper was held strictly liable for damage caused by the spontaneous combustion of hazardous goods being shipped from Korea to the United States. The *DG Harmony* Court emphasized that the application of the *Senator Linie* decision was limited to the situation ***where neither the shipper nor the carrier*** knew of the dangerous nature of the cargo.

Here, however, both the shipper and carrier knew that calhypo was dangerous. Relying on its prior decision in *Contship Containerlines, Ltd. V. PPG Indus., Inc.*, 442 F.3d 74 (2d Cir. 2006), *cert. denied*, 127 S.Ct. 565 (2006), the Second Circuit held that a shipper cannot be held strictly liable for damage caused during the shipment of hazardous cargo in circumstances where the carrier was generally aware that the cargo's dangerous nature requires careful handling or stowage, as the carrier was in this case, ***and*** it nevertheless exposes the cargo to conditions which could trigger a known danger, as the carrier did in this case. In such a case, liability must be determined under negligence principles and not strict liability principles.

The Second Circuit then turned to the district court's holding that PPG was liable because it failed to adequately warn of the dangers posed in shipping the calhypo. The court affirmed the district court's finding that PPG had a duty to warn and that PPG breached this duty by failing to adequately warn the carrier of the potential dangers posed by the specific manner in which PPG had packed the containers containing the calhypo, and it further affirmed the finding that the calhypo caused the explosion resulting in the constructive total loss of the vessel. The court nevertheless vacated the district court's judgment based upon its failure to address whether the carrier would have stowed the cargo differently if PPG had provided an adequate warning and remanded the case to the district court with instructions to make findings on the issue of whether an adequate warning would have affected how the carrier stowed the calhypo.

Conclusion

Where the carrier is generally aware of the hazardous nature of cargo, even if it is not aware of the precise nature of the risk, and the carrier nevertheless exposes it to potentially dangerous conditions, it will not be able to rely on the strict liability provisions of COGSA but will be required to show that the shipper acted negligently with respect to the cargo and/or its obligation to warn the carrier of the specific nature of the cargo's risks.

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THE CITY OF NEW YORK, AS OWNER AND OPERATOR OF THE ANDREW J. BARBERI

On February 15, 2008, the New York Law Journal published the following article by Mark Fass (mfass@alm.com), covering the decision on a salvage claim by Henry Marine Service against the City of New York, as Owner and Operator of the ferry ANDREW J. BARBERI.

The owners and a crew member of the Dorothy J, a tugboat that came to the aid of the Andrew J. Barberi ferry after it crashed into the Staten Island Ferry Terminal, are entitled under maritime law to a "salvage award" for the crew's efforts in the immediate aftermath of the crash, a Brooklyn federal judge has ruled.

However, the claimants are not entitled to an award for later keeping the Barberi stable within its ferry slip, the judge added, as the company was required to do so under the terms of a pre-existing contract with the city.

Eastern District Judge Edward R. Korman found in *In the Matter of the Complaint of the City of New York*, 03-cv-6049, that the tugboat's actions in the half hour following the crash satisfied the three elements of a "salvage service" under common law: there was "marine peril," the service was voluntary and the operation was a success. The judge granted summary judgment in favor of Henry Marine Service, which owns the Dorothy J, and its mate, Robert Seckers.

The Barberi collided into a concrete maintenance pier on the afternoon of Oct. 15, 2003, killing 11 people and injuring more than 70. One person was decapitated, another lost both of his legs.

At the time of the crash, the Dorothy J was docked at a nearby pier, awaiting orders regarding an oil barge.

Mr. Seckers quickly maneuvered his boat into action. Initially, he attempted to secure a line to the damaged end of the ferry in order to prevent it from drifting towards the Verrazano Bridge. When that plan failed, the tugboat's engineer boarded the Barberi to fasten a line. The Dorothy J then pushed

the ferry back to the passenger slip, where emergency workers were waiting. Members of the tug boat crew also attempted to calm ferry passengers, coaxing them from jumping into the water, and provided the larger ship with its first aid kit.

With the tugboat's help, the ferry returned to the landing within half an hour.

The city then ordered the Dorothy J, under the terms of its contract, to spend the next few days "pushing" the Barberi to keep it stable in its slip.

The following March, Henry Marine filed a salvage claim against the city, seeking $6 million for its work between the Wednesday of the accident and the following Saturday.

Mr. Seckers, the ship's mate, submitted his own salvage claim, as well as a separate tort claim, seeking $2 million.

Henry Marine and Mr. Seckers both moved for summary judgment on the issue of whether their actions constituted a cognizable marine salvage claim. The city cross-moved for summary judgment.

Yesterday afternoon, Judge Korman ruled largely in favor of the shipping company, finding that the aid offered in the "immediate aftermath of the collision" though not after the city ordered the tugboat to keep the Barberi in its slip, entitled the claimants to a salvage award.

The decision offered an extensive history of salvage law - the "right to be rewarded for saving a ship or its property from peril" - which "pre-dates the Christian era by 900 years."

As both sides agree that the Dorothy J's efforts were successful, the city only contested the first two elements of a marine salvage claim: that the ship was in peril and that the service was voluntarily rendered. The court found for the claimants on both counts.

"Many of the passengers and crew have described the horrifying and chaotic scene aboard the Barberi after the crash . . . There is also evidence that the City was concerned that the Barberi was in danger of sinking even after the Dorothy J pushed it back into the ferry slip, and, for this reason, directed the Dorothy J. to continue pushing on the Barberi instead of attaching lines or cables to her," he wrote.

Judge Korman also found the services to have been volunteered, as they did not fall within Henry Marine's pre-existing contract with the city for tugboat services.

The judge concluded, "Under these circumstances, Henry Marine and Seckers are entitled to a salvage award for the prompt and spontaneous efforts to aid the Barberi in the immediate aftermath of the collision."

He also ruled that the two claimants, Henry Marine and Mr. Seckers, were entitled to a single award. How such an award would be divided, the judge added, was not a subject of the present motion and cross-motion.

The judge did not determine the size of the award. Although Henry Marine asked for $6 million, Judge Korman said at a March 2007 hearing that he believed that the company perhaps deserved a "bonus" of "not more than five figures" (NYLJ, March 29, 2007).

Even though the judge limited the award to the Dorothy J's first 30 minutes of work, the attorney for the tugboat's owners, James E. Mercante of Rubin, Fiorella & Friedman, called the decision a "big win."

"The time on the scene is not one of the elements of the salvage award. The elements are the value of the vessel rescued, the degree of peril it was in, the value of the equipment that the salvor put at risk, the lives saved and the skill employed by the salvors," Mr. Mercante said.

"We made a motion for summary judgment to get a ruling that Henry Marine's service was salvage under admiralty law and

not towing, and Judge Korman agreed. [We got] exactly what we were asking for."

The size of the award will be determined at a later proceeding, which was not specified in the judge's decision.

James E. Ryan of Dougherty, Ryan, Giuffra, Zambito & Hession represented Mr. Seckers.

Lawrence S. Kahn, chief litigating assistant for the city's Law Department, who was involved in the case, said, "We're reviewing the decision."

For anyone interested in accessing the Court's decision, please contact jmercante@rubinfiorella.com.

THE APPLICATION OF THE COGSA TIME BAR IN NEW YORK ARBITRATION

by Manuel R. Llorca
Partner, Llorca & Hahn

There have been a handful of arbitration decisions or dissents over the years which have held (or implied) that the Carriage of Goods by Sea Act ("COGSA") one-year time bar provision is not, or should not be, applicable in an arbitration scenario, even where COGSA was incorporated by the parties into the contract of carriage. See, for example, *In the Matter of the Arbitration between Elektra Shipping Co. Ltd. and Union Oil Trading* (SMA #941, 1974), and *In the Matter of the Arbitration between Vincent J. Shannon and Rice Growers Assoc. of Calif.* (SMA #1830, 1983). The awards or dissents in question generally rely upon the holding of the Second Circuit Court of Appeals in the case of *Son Shipping Co. v De Fosse & Tanghe,* 199 F.2d 687 (2d Cir. 1952). *Son Shipping* contained language to the effect that since the COGSA time bar provision referred to the bringing of "suit" within one year, it does not encompass "arbitrations." The court stated:

> It is true that the [arbitration] demand was not made within the one year limitation upon suits, contained in § 1303(6) of the above Act [the COGSA time-bar provision], but there is, nevertheless, no time bar because arbitration is not within the term 'suit' as used in that statute.

Despite the *Son Shipping* holding and the few awards which rely upon it, however, the great weight of arbitration precedent (persuasive albeit non-binding) indicates that the COGSA time bar routinely has been applied in charter party arbitrations involving cargo loss or damage, where COGSA is properly incorporated in the charter party or bill of lading governing the contract of carriage. See *The S.S. Borgfjell* (SMA #1144, 1977); *The S.S. Prairie Grove* (SMA #1020, 1976); *The M/V Wind Endeavor* (SMA #1533, 1981); *The M/T King Cadmus* (SMA #1881, 1983); and *The Ocean* (SMA #2576, 1989). Case law since *Son Shipping*, as discussed below, supports these awards.

In this writer's opinion, the status of this issue is well illuminated by the decision of the Second Circuit Court of Appeals in *Office of Supply, Government of the Republic of South Korea v New York Navigation Co., Inc.*, 469 F.2d 377 (2d Cir. 1972). The court there stated:

> …we fail to find … manifest disregard of the law on the arbitrators' part in concluding that OSROK's claim was time-barred by the

one-year provision of COGSA, which was incorporated by reference in the agreement of the parties and quoted in full on the reverse side of the bill of lading. It was not unreasonable for the arbitrators to conclude that its effect in the present case was to extinguish OSROK's claim. See, e.g., *VM Inc. v St. Paul Fire & Marine Ins. Co.,* 156 F. Supp. 879 (S.D.N.Y. 1957), rev'd on other grounds, *St. Paul Fire & Marine Ins. Co. v United States Lines Co.,* 258 F.2d 374 (2d Cir. 1958), cert. denied, 359 U.S. 910, 79 S. Ct. 587, 3L.Ed. 2d 574 (1959). Such an expressed contractual time-bar must be distinguished from laches, which is essentially a principle of equity. *Czaplicki v Hoegh Silvercloud*, 351 U.S. 525, 533, 76 S.Ct. 946, 100 L.Ed. 1387 (1956).

Our decision is not inconsistent with *Son Shipping Co. v DeFosse & Tanghe*, 199 F.2d 687 (2d Cir. 1952), so heavily relied upon by appellant, which held that COGSA's one-year time-bar did not preclude the carrier from invoking arbitration. Having agreed upon arbitration as the procedure for resolution of their differences the parties should not be enjoined from utilizing that procedure, even though the demand for arbitration may be late, since the arbitrators may find upon the record before them in an appropriate case that the one-year time-bar does not govern the particular dispute, either because it was not incorporated in the bill of lading through the charter party or contract of affreightment, or because the provision was later waived or modified by the parties, or for some other reason. In short, where parties have agreed to settle differences by arbitration, they should not be denied access to that forum, regardless of COGSA's one-year time-bar, provided they invoke arbitration within a reasonable time after their differences have arisen. *Son Shipping Co., supra* at 689. Thereafter it is for the arbitrators, not the court, to decide whether a claim is time-barred by their agreement.

This decision clearly moves away from the problematic language in *Son Shipping* which holds that COGSA, referring to "suits" in its time-bar provision, does not thereby encompass "arbitrations." While choosing not to explicitly overturn *Son Shipping*, the Second Circuit chose not to cleave tightly to that precedent on this issue, since it held that arbitrators could indeed apply the COGSA time bar in the case before it, even though that time-bar provision of COGSA still referred to "suits." The court chose to read *Son Shipping* narrowly, deciding that the important lesson *Son Shipping* teaches is that arbitration may be *invoked* despite the passage of the COGSA one-year time-bar period, but that once invoked the arbitrators are free to apply the COGSA limitation unless they find that

there is an independent reason why it should not apply (waiver; modification of the COGSA provisions incorporated by reference; estoppel; etc.).

Thereafter, a number of arbitration panels explicitly chose to reject the notion that COGSA's "suit" language did not encompass arbitrations as included fora, and implicitly or explicitly followed the reasoning of the Second Circuit's *Office of Supply* case instead. See, e.g., *SS ELEKTRA*, SMA #941 (1974) (quoting from *Office of Supply); SS PRAIRIE GROVE*, SMA #1020 (1976); *SS BJORGFJELL*, SMA #1144 (1977) (criticizing *Son Shipping*); *MV WIND ENDEAVOR*, SMA #1533 (1981) (We are of the opinion that the time-bar provisions of COGSA must find application to this particular cargo case. We cannot deny Unimarine its right and immunities under COGSA through the U.S. Clause Paramount without trespassing on established law and custom of the industry, both in the U.S.A. and also under English law.); *MT KING CADMUS,* SMA #1881 (1983) (citing *Son Shipping* and *Office of Supply*); and the *OCEAN*, SMA #2576 (1989) ("In general, when COGSA is incorporated into a contract, courts and arbitrators bind the cargo claimants to bringing action within 12 months of delivery (or 12 months of scheduled delivery in case the cargo was never delivered).").

The Federal courts in New York, after *Office of Supply*, have routinely "punted" time-bar issues to the arbitrators, and it is clear that a panel's decision to recognize the parties' intent to agree to the COGSA one-year time bar, manifested by incorporating COGSA into a charter party and/or bill of lading, will not be disturbed or treated as a "manifest disregard of the law." See *In the Matter of the Arbitration between World Carrier Corp. and Metal Transport Corp.*, 1979 U.S. Dist LEXIS 7846 (S.D.N.Y. 1979); *Mitsubishi Corp. v. MV OINOUSSIAN*, 1994 U.S. Dist. LEXIS 2625 (S.D.N.Y. 1994); *B.S. Sun Shipping Monrovia v. Citgo et al.*, 509 F. Supp. 2d 334 (S.D.N.Y. 2007).

It is hoped that this brief exposition will assist in filtering the slightly muddied waters surrounding the COGSA time bar and its application within the context of arbitration proceedings.

A COMMERCIAL MAN

by Mary Thomson
Kennedys, Hong Kong

This article discusses Hong Kong, English and US case law on the satisfaction of contractual requirements that an arbitrator should be a "commercial man."

Introduction

Who qualifies as a "commercial man" when appointing an arbitrator?

It is not uncommon, particularly in standard form contracts in certain trades, to provide that an arbitrator must be a "commercial man" - an expression that covers both men and women. What does it take to be a "commercial man?" Can a lawyer qualify as one, for instance?

The narrow view would suggest that lawyers cannot qualify. The original intention behind the qualification was to exclude them from arbitral panels because they were thought to be less practical, more pedantic and more concerned with legal principles than with helping parties to resolve their disputes in a timely and efficient manner. Consequently, the preference has been to empanel experienced business people instead, as they are likely to be more familiar with the trade than the average lawyer and to have a greater knowledge of the background to (and the customs adopted in) the particular industry.

Such a narrow approach is, however,

now unwarranted. Should otherwise knowledgeable commercial men be excluded from arbitral panels merely because they once practised as lawyers or are still currently in practice?

Hong Kong and English case law

Courts are rarely asked to resolve the issue of whether an arbitrator qualifies as a commercial man. The reality is that such challenges are commonly made at the commencement of the arbitration proceeding and the challenged arbitrator then usually resigns the appointment. Typically, the cases that do proceed to litigation are those where parties challenge the arbitral award at the enforcement stage.

The only Hong Kong case to have considered the issue is Vincor Shipping Co Ltd V Transatlantic Schiffahrtskontor GmbH.[1] In this case, the court relied on two English cases. The first was Rahcassi Shipping Co SA v Blue Star Line Ltd [1967] 2 Lloyd's Rep 261. The court in that case declined to lay down any general principles about who qualifies as a commercial man, but stressed that the term should be given a sensible and practical construction. The court made it clear that the phrase "commercial man" is not so vague as to render the arbitration provision invalid. The term is specifically designed to be general, so that a wide field of people with commercial experience can be included.

In the second English case, Pando Compania Naviera SA v Filmo SAS, [2] the court held that a retired practising solicitor who later became a full-time arbitrator – and who acted as director of several shipping companies – was a commercial man as envisaged by the court in Rahcassi. In confirming the Rahcassi construction of the term "commercial man," the court in Pando said that "like an elephant, they are more easily recognised than defined." What is important is the commercial experience of such individuals. The mere fact that a challenged arbitrator previously practised as a lawyer cannot in itself disqualify him as a commercial man, so long as he has subsequently qualified as a commercial man.

In view of these two English authorities, the Hong Kong court in Vincor Shipping found that a retired solicitor who had been a full-time employee of a correspondent of a mutual insurance association did possess practical commercial experience in the commercial shipping industry and therefore qualified as a commercial man.

United States case law

Can a lawyer who is still in practice qualify as a commercial man? The issue has not been reviewed by any English or Hong Kong courts, but has been considered in the United States.

The first important case was a decision of the Court of Appeals for the Second Circuit, WK Webster & Co v American President Lines Ltd.[3] In this case, the arbitrator had practised as an admiralty lawyer early in his career. He then worked as a manager for several companies involved in maritime cargo claims and insurance. He was a consultant with a law firm at the time that he was appointed as an arbitrator, and, prior to the making of the arbitral award, he had become a partner of that firm. American President Lines sought to vacate the award, alleging that the arbitrator was not a commercial man.

The Court of Appeals rejected this argument, holding that the arbitrator in question possessed substantial practical experience of the commercial workings of the maritime industry. Adopting the English decision in Pando, the court ruled that the arbitrator's experience must be taken as a whole – that is to say, both experience acquired as a maritime lawyer and experience gained during his non-legal career should be taken into account. The fact that the arbitrator was a practising lawyer at the time of the arbitration could not disqualify him from

being a commercial man.

A more recent authority, which relies on both the Webster and Pando decisions, is US Ship Management Inc v Maersk Line Ltd.[4] This case centred on several arbitrations between Maersk Line Ltd (Maersk) and US Shipping Management Inc (USSM), in which Maersk had appointed one Emery W Harper as arbitrator. The arbitration panel made an award in favour of Maersk. USSM challenged the decision, arguing that Mr Harper was not qualified to serve as an arbitrator because he failed to meet the contractual requirement that each arbitrator be a "commercial person knowledgeable in the operation and chartering of container vessels and the operation of scheduled container services."

Mr Harper had been a maritime lawyer for more than 30 years. During that time, he not only acquired a formidable amount of knowledge about the container vessel industry, but also had spent many after-work hours participating in discussions with container service companies and executives of his clients. After he ceased practice as a lawyer, Mr Harper established his own consultancy firm, which managed maritime commercial ventures. His work consisted of legal and non-legal matters, including the development of business opportunities.

The US District Court for the Southern District of New York ruled that Mr Harper did indeed qualify as a commercial man. The Court of Appeals for the Second Circuit agreed.

In the light of the Webster and US Ship Management decisions, therefore, it is clear that practising lawyers can qualify as commercial men, provided that they possess substantial (and relevant) practical commercial knowledge and experience.

Will the Hong Kong courts follow suit?

While the US decisions discussed above have undoubtedly relied upon English authority in reaching their findings, there is no certainty that Hong Kong or English counts will, in turn, rely on them. Whilst US precedents have no binding effect in those jurisdictions, they are persuasive and there is a reasonable chance that the Webster and US Ship Management decisions will be followed in similar cases. There are no obvious policy reasons why courts in either jurisdiction should take a different approach and, as mentioned previously, both US decisions are in line with prior English authorities.

Relevant time for qualification

On a final note, the relevant time for assessing whether someone qualifies as a commercial man is the date of their appointment. This is made clear by the English decision in Pan Atlantic Group Inc v Hassneh Insurance Co of Israel Ltd.[5] Technically speaking, the case was concerned with a different qualification requirement - namely, that the arbitrator must be a "disinterested executive official of insurance or reinsurance companies." However, as a matter of construction, the decision equally applies to arbitration clauses requiring arbitrators to be commercial men. The practical effect of the Pan Atlantic decision is that an appointed arbitrator will qualify as a commercial man if, at the date of appointment, he possesses the necessary substantial commercial and practical experience.

Summary

In view of the English and US authorities, it is submitted that the position may be summarised as follows.

- A lawyer will not qualify as a commercial man if he has only a general familiarity with the industry, acquired solely through practising law, but no practical commercial experience gained from working in the sector itself.
- A lawyer who has substantial commercial experience, which has been

acquired after retiring from legal practice, will qualify as a commercial man.

- A lawyer will also qualify as a commercial man if he has acquired substantial commercial experience before becoming a full-time practising lawyer.

The focus is not, therefore, on whether an individual is (or was) a practising lawyer but, rather, is on:

- whether the individual is (at the time of his appointment) in fact familiar with the customs and practices of the trade; and
- whether that familiarity derives from substantial, practical and non-legal experience gained through the conduct of commerce rather than the practice of law alone.

Moreover, a person retains the status of a commercial man, whether or not they have retired from commerce or are still engaged in it.

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[1] HCCL 99/1986, 9 January 1987, unreported.
[2] [1975] QB 742.
[3] 1994 US App LEXIS 20244.
[4] 2002 US App LEXIS 24053.
[5] [1992] 2 Lloyd's Rep 120

Note: This article appeared in the Asian Dispute Review, October 2007 at pp.123-124. *The author also practices as an arbitrator and is an accredited mediator. She can be reached at m.thomson@kennedys.com.hk.*

CLEAN SHIPS

by Bill Rooney

Managing Director
Hanjin Shipping

It's almost as if in today's world of intense competition, microscopic public scrutiny and pervasive government involvement at multiple levels that many people believe ocean carriers can stride the earth like 19th century robber barons abusing employees, customers and the environment.

Well, we can't and we don't.

Environmentally cleaner ocean-going cargo vessels are a critically important topic for the people of the United States and the world.

A word of warning….while I have many years of experience in the ocean transportation business, I am neither an environmental scientist nor an expert. I am a simple transportation executive charged with moving goods from point A to point B. But I am also someone who cares deeply about the future of my company, the industry and the environment. I have two children, and like all parents, I would like to do my part to ensure that my children and grandchildren have clean air and water in the future in addition to a productive and sustainable economy.

Also, as we discuss this critical issue I believe it is important to keep in mind a sticky, inconvenient topic that seldom gets any air time in the debate. In his second best seller entitled "Collapse," Jared Diamond raises the issue of choices societies have to make and how these choices can lead to sustainable prosperity or to societal collapse. Without getting too dramatic, these are the real choices we face. Can we find a way to support sustainable economic growth or not? Can we find a way to continue growth and improvement in economic activity and quality of life while protecting the environment or are we at the point of a Hobson's choice that no one wants to make between economic growth and a clean environment? I think we still have real choices.

I'd like to focus on four questions. The answers to these questions are fundamental to reaching a successful conclusion to the

debate and a cleaner environment. The 4 questions are:

1. Do ocean carriers want a clean and healthy environment and are they willing to play a productive role in achieving these goals?
2. Do ocean carriers support environmental regulation?
3. What data supports the discussion and debate surrounding the environmental impact of transportation activity and, more importantly, what high-potential remedies does the data point to?
4. Have ocean carriers taken any steps to help protect the environment?

Question 1: Do ocean carriers want a clean and healthy environment and are they willing to play a productive role in achieving these goals?

What **is** the ocean carrier position on the environment? Do carriers have horns and hooves?

The last time I checked I didn't have horns and hooves.

Ocean carriers want and need to be good global corporate citizens. Part of being good corporate citizens is being aware of the environmental issues we face, establishing corporate standards and policies that are enforced and abiding by established environmental regulations.

Most, if not all, leading containerized ocean carriers hold these views. We understand that we are part of the problem. However, we are also part of the solution. We are an active part of the solution now and we intend to continue to be part of the solution. We strongly believe that industry, government and communities can work together and contribute to a cleaner environment while continuing to meet our customers' and the nation's transportation needs.

Question 2: Do ocean carriers support environmental regulation?

In five words….yes, of course we do.

We understand the need for environmental regulations and support regulation. However, we do have a problem when regulations are set by multiple, overlapping jurisdictions making compliance much more onerous and problematic without achieving the best or desired result. Some current proposals in southern California are like each county in California requiring a different type of automobile fuel and all cars having to be equipped with multiple technologies including several fuel tanks and computer technology to manage the combustion of various fuels. In addition, the car and driver would have to be alert enough to know when they crossed a city boundary and what regulations applied in the jurisdiction they just entered.

Most large containerized ocean carriers call in many different countries, ports and facilities around the globe. And these carriers' fleets of vessels will be shifted around the globe in different rotations to meet changing market requirements. Having each of these countries, let alone multiple jurisdictions within each country, set individual and inconsistent environmental regulations would amount to a bewildering patchwork quilt of regulations that would not only be economically and probably technically disastrous, but also would not meet stated environmental objectives.

The tried and true approaches of setting emission standards and then allowing the manufacturers adequate time to develop the most cost-effective technologies need to be applied to the international movement of cargo.

The more recent approach to environmental regulation of transportation activity of selecting specific technologies and

imposing these requirements on the end-user of the technology is unlikely to be successful in meeting the stated goals of regulators or the population in general.

We need to re-think ocean transportation environmental regulation and establish regulations on the following basis:

- We need globally accepted standards established via the US EPA consistent with the Clean Air Act and through the International Maritime Organization.
- We need to focus on standards and results and not on specific technologies that may not be suitable for the various types of vessels and operations that exist worldwide.
- The timing of implementation of regulations for a global industry where assets are shifted frequently needs adequate advance notice to ensure compliance.
- We need to base regulations and standards on facts and data and not on political expediency.
- We need regulations and standards that are developed via an open and frank dialog among industry participants, governmental agencies and recognized interest groups. We need to talk to each other rather than to shout past one another.
- Finally, we need an atmosphere where new technologies and best practices to reduce emissions are encouraged – unlike some of the current proposals that are driven by specific or even pet technologies.

Question 3: What data supports the discussion and debate surrounding the environmental impact of transportation activity and more importantly what high-potential remedies does the data point to?

Protecting the environment is a critically important issue for all of us not just as private citizens but also as employees of private companies and of governments. It is not only important to Americans, but to all the inhabitants of this finite third rock from the sun.

Simply put, fact- and data-based deliberation is an absolute requirement for cleaning up the environment and protecting public health at the same time we keep our country, society and economy functioning the way we want them to.

Unfortunately, given the nature of politics, sometimes facts and data are in very short supply in the environmental debate.

Before I go any further and before I hear the inevitable shouts that carriers are using the age-old technique of attacking the data when you have no sound arguments of your own, I want to add that every carrier I know accepts that transportation activity, like most other economic activity, has an impact on the environment. We also accept that the impact needs to be addressed.

The problem we have is that the issue cannot be successfully addressed without sound data. Data matters primarily because it will more fully spell out the problems we have and define the types of regulations and solutions that will really address the issue. Deliberations driven by headline grabbing sound bites, politically correct bromides or statements calculated to shamelessly secure a win in the next step up the political food chain will not solve the problem.

Trying to address this issue without solid data is a little like trying to find out what is going on in the world by reading tabloid headlines. If you want to know where Elvis was last sighted, how Britney is doing or how the latest miracle diet works, you should read the *National Enquirer* or

the *Star*. But if you really want to know about things that materially affect your life, you need to search out other sources.

The same thing holds true when it comes to the port environmental debate. If you want to be entertained or shocked, read the industry equivalent to the super market tabloids. If we want to solve the problem, then it's time for us to obtain and use real data.

Sound data and thoughtful consideration and deliberation of various interests and points of view will bring us to effective regulations and solutions.

On the U.S. west coast, ocean carriers are working to develop actual emissions data for both auxiliary and main engines through a cooperative monitoring program working with various governmental agencies. The intent of this program is to develop hard data to be made available to the general public, allowing people and organizations to make better decisions on how to reduce emissions. Our industry has supported other programs such as comparative emissions testing of diesel and LNG cargo handling equipment – again, to provide organizations and policy makers with more data with which to make informed, not political, decisions.

We also support additional monitoring and development of accurate emissions inventories. As an industry, we have supported the development of emissions inventories in the Pacific Northwest and in California. For example, the updated 2005 emissions inventory in the ports of Los Angeles and Long Beach showed approximately a 50 percent decrease in cargo handling emissions from 2001/2002 levels – all achieved through cooperation and incentives between the ports and their tenants.

This kind of success story, when coupled with solid data, can help set the right priorities to achieve the greatest positive environmental impact.

Question 4: Have ocean carriers taken any steps to help protect the environment?

Contrary to popular belief and as shocking as it may seem to some, carriers do not have their heads in the sand and have actually done quite a bit already voluntarily to address environmental issues. For example, numerous carriers have done things like the following:

- Carriers generally have a clearly stated environmental policy which supports a cleaner environment and directs management to take action in this regard.
- Most vessel new builds have AMP (Alternative Marine Power) capability.
- Most carriers have converted to slide valve engine technology.
- Many carriers now use RT-Flex engines in all new builds.
- Almost all carriers comply with the Port of Long Beach's voluntary speed reduction program.
- Most carriers have implemented electronic injection technology to limit PM emissions.

Also many carriers have:

- Moved to larger ships which pollute less per unit of cargo moved,
- Minimized the time that vessels spend at berth,
- Sponsored legislation for the ratification of IMO MARPOL Annex VI and the creation of a North American Sulfur Emission Control Area (SECA),
- Moved to new, less polluting injection technology,
- Moved to shaft generators,
- Moved to new technology, less polluting engines and cleaner fuels.

The carrier industry is in the thick of things moving toward a more environmen-

tally friendly way of doing business….but more needs to be done.

Closing

In conclusion, I would like to address a comment directly to any regulators that happen to be reading this article. As a company that operates vessels all over the world, I would urge you, when you are working in pursuit of laws and regulations that will lead to reduced emissions from vessels and a clearer environment, to be guided by the following: consistency, uniformity and effectiveness based on sound science.

HALL STREET ASSOCIATES v MATTEL (Expanded Scope of Judicial Review)

Several issues back, Keith Heard reported on the district court decision in Hall v. Mattel. The issue addressed was whether private parties may expand, through contractual language, the scope of judicial review of the arbitration award. In the January 2008 issue, Keith reported on the arguments presented to the Supreme Court at the November 7, 2007 proceeding.

On March 25, 2008, the Supreme Court, in a 6-3 decision, held that an arbitration agreement cannot expand the scope of federal district review beyond that allowed in the Federal Arbitration Act (FAA). Under Sections 10 and 11 of the FAA, the district court's review of an arbitration award is very limited; here, in a rental contract, the parties had agreed to a much broader scope of review ("erroneous" ruling). The Supreme Court said that was an impermissible end-run around the FAA. With this holding, the Court decides nothing about other possible avenues for judicial enforcement of awards. Accordingly, this case must be remanded for consideration of independent issues. Because the arbitration agreement was entered into during litigation, was submitted to the district court as a request to deviate from the standard sequence of litigation procedure and was adopted by the court as an order, there is some question whether it should be treated as an exercise of the district court's authority to manage its cases under Federal Rule of Civil Procedure 16. This court ordered supplemental briefing on the issue, but the parties' supplemental arguments implicate issues that have not been considered previously in this litigation and could not be well addressed for the first time here. Thus, the court expresses no opinion on these matters beyond leaving them open for Hall Street to press on demand. (196 Fed. Appx 476, vacated and remanded}

NOTE: The foregoing is based on the syllabus prepared for decision of March 25, 2008 [No. 06-989].

I expect to produce a more scholarly treatise of this important decision in the summer issue of THE ARBITRATOR.

SMA LUNCHEON SPEECHES

Luncheon Committee Chairman Tom Fox continues to produce an entertaining mix of luncheon speakers for the current season. To recap:

- In October 2007, we heard from Tom Belknap, Partner, Blank Rome, on "Treasure Salvage – Finders Keepers?" (as reported in our January 2008 issue at p. 11).
- In November, SMA member Captain Victor Goldberg spoke on "Articulated Tug Barges and Their Role in U.S. Coastwise Petroleum Transportation."
- The December speaker was Tom Russo, Partner, Freehill Hogan & Mahar, whose topic was "Crime and the Sea."

- Our January 2008 speaker was Matt McCleery, President of Marine Money International, with a presentation on "Recent Developments in Ship Finance."
- Steven Candito, president of National Response Corporation, spoke to us at the February luncheon about "Oil Spill Response Update: The Ramification of Recent Spills and Related Regulator Changes." A summary of his presentation appears below.
- In March, Steven R. Blust, president of the Institute of International Container Lessors, gave us "An Overview of the Institute of International Container Lessors."
- The last of the open luncheons will be held on April 16, 2008 at 12.15 hours at The Ketch Restaurant; the speaker will be Peter Skoufalos, Partner, Brown Gavalos & Fromm, with the topic "Re-visiting the New York-London Arbitration Divide: A few thoughts on narrowing the gap."

The SMA is most thankful and indebted to those who volunteer to speak and those who are gently persuaded by Tom Fox to do so. Taking time out to prepare and present a paper is a commitment and an obvious expression of support of the SMA.

Considering the efforts by the presenters, I felt that full publication of their papers in THE ARBITRATOR would give them greater and deserved exposure and recognition beyond the applause and the SMA watch at the luncheons themselves. Some of the speakers have prepared summaries for this newsletter, others have provided a text which could readily be adapted for publication, and others, unfortunately, have remained silent. In the end, the SMA, THE ARBITRATOR and the attendees of the SMA luncheons are appreciative and thankful to everyone who has appeared before us. But I can't help but needle my long-time friend Clay Maitland that I am still hopeful of publishing his luncheon speech on "Ship Registries and What They Do."

OIL SPILL RESPONSE UPDATE: THE RAMIFICATIONS OF RECENT SPILLS AND RELATED REGULATORY CHANGES

by Steven Candito, President
National Response Corporation

A number of recent oil spills, particularly in the US, have led to reactionary legislative changes. This presentation reviewed four notable recent events and analyzed the subsequent legislative changes. A lively discussion ensued with participation by numerous attendees.

First Event: 2003 barge grounding in Buzzards Bay, MA, 98,000 gallons of #6 Fuel Oil spilled. Oil Spill Response: Costs totaled $36 Million, approximately $367 per gallon; at its peak, 700 personnel were involved in the clean up. Legislative Response: The State of Massachusetts enacted the Massachusetts Oil Spill Act, which became law on August 4, 2004. Among other provisions it required up to a $1 billion Massachusetts State Certificate of Financial Responsibility ("COFR"), double hulls on certain vessel classes, mandatory state pilots, tug escorts, vessel routing requirements and oil spill response and prevention fees. These state regulations were viewed to be in conflict with similar United States federal regulations and thus were challenged by the US Coast Guard (USCG) and the Department of Justice as unconstitutional. In a related move, the USCG passed its own navigation regulations for the region which became effective on November 28, 2007. The legal challenges between the state and federal government continue with the federal gov-

ernment due to file responding legal papers in mid February, 2008.

Second Event: 2004 Seattle barge spill. A tank overflow during loading operations spilled 4,800 gallons of heavy fuel oil. Oil Spill Response: Cost was $4.5 million, approximately $938 per gallon ($571 higher than the Buzzard Bay spill); resources used included 250 personnel, 17,000' of boom, 14 skimmers and 24 boats. Legislative Response: Washington State passed a number of new regulations focused on pre-booming vessels transferring cargo even before a spill occurs. These regulations are being phased in: the first phase (low rate transfers) in February 2007; the second phase (high rate transfers) in October 2007; and the final phase (dispersants & In Situ Burn) in April 2008. Further, Washington State recently proposed a regulation that would effectively make the pre-booming requirement a non-delegable duty, preventing vessel owners from contracting the pre-booming service to a third party. This proposal will likely be withdrawn. These regulations have raised a number of safety concerns such as whether vessels transferring more flammable cargo (e.g. gasoline) should still be pre-boomed and whether pre-booming must take place if weather and/or sea conditions make it unsafe for personnel working in the small craft utilized for the pre-booming operations.

Third Event: 2005 tanker spill on the Delaware River. While proceeding from an approved anchorage to the oil refinery, the vessel struck an unchartered submerged object and punctured a hole in her cargo tanks, spilling 265,000 gallons of crude oil. Oil Spill Response: Cost (not including third party claims or natural resource damages) $165 Million, approximately $623 per gallon (less than either of the much smaller Buzzard's Bay and Seattle spills); required resources included 1,700 personnel, two Oil Spill Response Vessels (OSRVs), 191 smaller vessels, 20 oil skimmers and 110,000' of boom. Legislative Response: The federal government enacted the Delaware River Protection Act by July 2006. The provisions of the Act included: raising the federal COFR limits for single hull tank vessels from $1,200 to $3,000 per gross registered ton (GRT) and nontank vessels from $600 to $950 per GRT, while providing a financial incentive to use double hulls by only raising their COFR limits from $1,200 to $1,900 per GRT; the creation of a Delaware River and Bay advisory committee tasked with making recommendations on spill prevention and response; requirements to promptly notify the USCG of any object lost overboard that could cause an obstruction to a channel; as well as funding for the USCG and the National Oceanic and Atmospheric Administration (NOAA) to develop technology to recover sunken oil.

Final Event: November 2007 nontank vessel spill in San Francisco Bay in which a container vessel struck the Oakland Bay Bridge spilling 54,000 gallons of bunker fuel. Oil Spill Response: At the time of writing, this response is ongoing with clean up costs at $61 million, or $1,130 per gallon (among our four examples, the most expensive clean up on a per gallon basis); resources utilized included 1,400 personnel, 41 boats, 38,200' of boom and seven oil skimmers that totaled 75,000 barrels per day oil removal capacity. Legislative Response: Historically, California has some of the most stringent oil spill response regulations in the country with shoreline protection requirements that are in addition to the federal oil spill containment and recovery regulations. The two primary response organizations operating in California concluded that it was not cost effective to meet these new shoreline protection requirements independently. As a result, California's Office of Spill Prevention and Response admitted: "The unintended consequences from passing the new regulations is that as of Sept. 1, 2007, plan

holders currently do not have adequate shoreline protection coverage for covered vessels entering non-High Volume ports. Therefore, marine commerce trading in the harbors of Humboldt Bay, Monterey Bay, Port Hueneme, and San Diego may be in violation of the current regulations." Subsequently, a commercial arrangement was reached where nontank vessels that had access to both of the primary response organizations (NRC and MSRC) via their Protection & Indemnity Clubs could satisfy the regulation by citing both organizations in their response plans.

Extreme media attention and political fallout from the San Francisco Bay spill, have given rise to additional regulatory proposals: on the federal side there is a proposal to require double hulls for nontank vessels, to further increase COFR limits, and to improve the Vessel Traffic System (VTS) with mandatory routing procedures; while California State legislators are calling to increase the response resource requirements for nontank vessels to meet those for tank vessels.

Pending Non-event Driven Legislation: The USCG has pending a number of spill response requirements that were initiated many years ago. Delays in finalization of these regulations resulted from the refocusing of the USCG on homeland security issues post 911, thus, diminishing their ability to address environmental protection matters. The pending regulations include: dispersant requirements which could be issued at any time; salvage & fire fighting regulations which are not expected before spring 2008; and federal nontank vessel requirements which were passed into law on August 8, 2005, but are still awaiting specific regulations. The USCG had previously advised that nontank vessel regulations were a lower priority than either dispersants or salvage and fire fighting requirements; however, the nontank vessel regulations may now take on a higher priority in light of the San Francisco Bay spill.

Conclusion: The presentation concluded with a robust interchange of opinions on various matters including: 1) whether the regulatory changes are truly beneficial, 2) whether the safety of human life should be paramount to environmental protection and 3) whether there is ever a limit on expectations, especially when politics are involved. For more information, please feel free to contact Steven Candito at 631 224 9141 Ext. 110 or via email at scandito@nrcc.com.

2008 SMA EDUCATION COMMITTEE SEMINAR "MARITIME ARBITRATION IN NEW YORK"

by Austin L. Dooley, PhD

In February 2008, the SMA Education Committee conducted the fourth session of its educational seminar program "Maritime Arbitration in New York."

This year's program was particularly invigorating as maritime industry professionals came from far and near to attend. Attendees traveled to New York from Venezuela, Nigeria (via London), Washington DC, Mexico City, Philadelphia and Westchester County (New York), representing the operations, chartering, governmental and legal segments of the maritime industry.

Topics covered the full range of issues important to an understanding of the arbitration process in New York. While emphasis was placed on the practices of New York panels, the international aspects of commercial maritime arbitrations were also discussed. The SMA is particularly fortunate to have State University of New York Maritime College at Fort Schuyler Professor Jeffery Weiss as the instructor for this program.

The two-day course is offered as part of the SMA's mission to educate the general public and members of the maritime industry about procedures for alternate dispute resolution (ADR) in the maritime industry, to educate the general public and members of the maritime industry about substantive maritime law and to encourage the use of ADR for the resolution of commercial disputes arising in the maritime industry. Individuals or organizations interested in arranging for attendance at the course should contact the SMA Education Committee Chair, Dr. Austin L. Dooley at dseawx@ix.netcom.com.

PUBLISH WE DO!

For years, the SMA and its supporters have praised and advocated the publications of their awards in New York. By the time this article is published, the SMA's library of awards will have exceeded 4,000.

When the SMA started, the award publication consisted of photocopies of the actual award with handwritten running numbers and headnotes. Since they were not edited, they also included all the beauty marks or warts. Fifteen years ago, we changed the award service, reformatting the awards into a standard program and also going digital. However, what has remained unchanged is the fact that the SMA awards reflect the names of the parties, counsel and the arbitrators.

In contrast, other arbitration centers have emphasized the confidentiality aspect of arbitration and the parties' entitlement to privacy. On the other hand, more recently, arbitration awards have been published in those centers with "sanitized" versions, redacting the identity of the principals, the vessel's name and also, on occasion, the arbitrators' names.

In a recent meeting with visitors from overseas, the publication issue was raised with much of the usual pro and con arguments. It was surprising that the majority view was that the publication of SMA awards was absolute and mandatory. In reality, nothing is farther from the truth. The parties have the option to have their awards treated with confidentiality. The booklet, "Maritime Arbitration in New York," which provides an introduction to arbitration, the SMA Rules and the Federal Arbitration Act, states at p. 3 under the heading "Publications:"

> *. . . Awards are published in New York as a matter of course unless, at any time before the issuance of the award, both parties request that the award not be published.*

Since arbitration is essentially a creature of contract, it follows that the decision of whether or not to publish an award rests with the parties to the contract. It is also for this reason that the non-publication needs the request by both parties.

As a concluding observation, based upon practical experiences, quite a few of the SMA arbitrators have issued awards which, at the request of the parties, were not included in the award service. I do not know the overall numbers of unpublished awards, but according to my own statistics, out of over 850 awards in which I participated, approximately 25 were not published within the SMA award service.

M.W. Arnold

(MORE ON) SMA AWARDS

Here is the latest – Michael Marks Cohen has brought to my attention the case of Waterfront Shipping Co. Ltd. v. Trafigura AG (Engl. Commercial Court October 31, 2007) before The Hon. Mrs. Justice Gloster, DBE. The case involves the application by the defendant, Trafigura, for a summary judgment denying a demurrage claim as time-barred under the terms of the charter party, particularly due to the Owners' failure to produce "supporting documentation" within 90 days of discharge of the cargo. In her decision, Justice Gloster stated, ". . . I am supported in this conclusion by certain arbitral decisions; see, for example, The DEVINE STAR SMA 2883 (July 16, 1992)"

I think it is of interest that Justice Gloster, as she stated, could have relied on English precedent and English tests, but nevertheless thought it to be appropriate to reference the SMA award.

I count on Michael, and, in fact, all of you faithful readers of this periodical, to continue watching out for further SMA references and help make this a permanent feature of **THE ARBITRATOR**. Thank you.

BOOK REVIEW

by M.W. Arnold

ARBITRATION LAW HANDBOOK

Edited by Ben Horn and Roger Hopkins of Faegre & Benson LLP published by INFORMA, London 2007 1016 pages, soft cover, £210

This new publication certainly fills a void in the current arbitration libraries. It not only identifies arbitral institutes and associations in over 20 countries, but it also provides a general overview as well as the laws in force, procedural rules and applicable statutes and conventions. As such, it is a unique and ready reference tool for the busy practitioner who needs immediate access to basic data, but, at the same time, through Section A, provides in-depth information on the important agreements relating to international commercial arbitration. When I checked with the publishers on the price tag, I was initially slightly shocked thinking about the good old days, but when you stop to think about having to do research at today's billing rates, the first case may already easily cover the cost of the book. I think it is this point which validates the work by Messrs. Horn and Hopkins as an efficient and compelling tool for the international lawyer and others involved in the arbitral process.

On a somewhat more parochial note, but without effect upon the overall benefits of the handbook, there are a couple of points which may be considered in a future re-issue of this text.

More specifically, the coverage of the USA consists of the standard overview section; part Y.1, the Federal Arbitration Act; Y.2, American Arbitration Association; and Y.3, Maritime Arbitration Rules. The Y.3 caption does not identify the rules as being those of the Society of Maritime Arbitrators, as was done for the other maritime arbitration groups. I also noticed the absence of the SMA name in the preface of this book (at p. ix), which is surprising, as the LMAA and the SMA have traditionally been recognized as the premier maritime arbitration organizations.

If you should vacillate on whether or not to buy, err on the side of buying – if it does not provide immediate success, it certainly will prove educational.

PEOPLE AND PLACES

New Members

Robert John Flynn, Michael J. Hand and Peter S. Wiswell have become full members of our association. For their biog-

raphies and contacts, please access the SMA website (www.smany.org).

On the Move

Christopher Mansuy, formerly with De Orchis & Partners, has joined the firm of Mahoney & Keane. Chris can be reached at cmansuy@mahoneykeane.com.

New York University Announces Lloyd C. Nelson Professorship in International Law

New York University School of Law has established the Lloyd C. Nelson Professorship in International Law. The goal of the professorship is to promote international arbitration and recognize the important role of arbitration in dispute resolution. The professorship was established to honor Lloyd for his many decades of work as an arbitrator and the enormous contribution he has made to arbitration. Lloyd was an officer and member of the Society of Maritime Arbitrators from its earliest days.

There will be an inaugural event to celebrate the founding of the professorship which presently is scheduled for October 7, 2008 at New York University Law School. The event will feature the first Lloyd C. Nelson Lecture on International Law to be given by the professor who has the honor of being awarded this professorship. New York University expects to announce the first Lloyd C. Nelson Professor in the spring or summer of 2008.

Please save the date of **October 7, 2008** and plan to attend the inaugural Lloyd C. Nelson Lecture in honor of Lloyd's memory. We will keep you posted with further details as they become available. You can also contact jimball@blankrome.com.

What if . . . the COSCO BUSAN Happened in New York??
Are we prepared?

On February 27, 2008, the North American Marine Environment Protection Association (NAMEPA), in conjunction with the New York Maritime Inc. (NYMAR) and the North American Maritime Ministry arranged for a Response Simulation Program at the Harvard Club. The purpose of the program was to learn about the state of readiness by the Coast Guard, state and local governments and the private sector in the event a casualty similar to that with the COSCO BUSAN in San Francisco would occur in New York harbor. The session was led by Captain Robert O'Brien, Commander, Coast Guard Section New York and Captain of the Port of NY/NJ, and was ably assisted by members of his command (CDR Brian Willis, LCDR Ernie Morton, CDR Gregory Hitchin). Dennis Farrar, representing the New York State Department of Environmental Conservation, Gary Pearson, New Jersey State Department of Environmental Protection, Captain Mike Grodeska and Sven Van Batavvis of Miller Environmental, Ed Levine of the National Oceanic and Atmospheric Administration and Mark Hanafee of APM/Maersk. Greg Linsin of Blank Rome LLP commented on the legal implications resulting from a spill. The SRO crowd of approximately 120 attendees provided for a lively question and answer session.

It certainly was an informative and topical seminar which demonstrated the state of *semper paratus* of all entities involved.

The program was followed by a reception sponsored by Blank Rome Maritime, Gallagher Marine Systems, Inc. and SIGCO. The SMA members who attended were L. Bulow, T. Fox, D. Martowski, K. Mordhorst, P. Wiswell and this editor.

If anyone should be interested in contacting the organizing and supporting organizations, their respective websites are: www.namepa.net, www.nymar.org and www.namma.org.

SOME PERSONAL NOTES

The Maritime Advocate

As many of the readers know, for more than nine years, I was a part owner and contributing editor to THE MARITIME ADVOCATE. When we decided to cease publishing the magazine in 2007, the ownership changed, but the name continued on the internet, and my good friend Chris Hewer continues as the editor. At this time, my involvement in THE MARITIME ADVOCATE online is limited to being an occasional contributor. I fondly remember those years gone by and appreciate the long memories of "our" early readers. I am also very grateful to Chris for being a regular contributor to this publication.

THE MARITIME ADVOCATE online is now published by After Office Hours Ltd. If you want to stay in touch with Chris, you can reach him at editor@avoarchive.com or visit the website www.avoarchive.com.

Identity Crisis?

Some of you may recall watching Sesame Street with your children or grandchildren and hearing Kermit the Frog sing "It's not easy being green." It's not easy being a quarterly either.

When I start preparing for a new issue, I usually have some topics which are not "date stamped," such as the "Time Bar" article or the "Commercial Man" piece, because they address subjects of continued interest, even though they have been addressed previously. Bill Rooney's splendid article about the environment and industry is important, but its impact would not be diminished if I had published it in the next issue. On the other hand, the coverage of the DG HARMONY decision in this issue has been overtaken by the reports in daily or weekly publications and, as such, it's yesterday's news. Similarly, the announcement of new SMA members – by now they probably have already done a few arbitrations and are old hands at the trade.

What I am trying to say is that this cannot be a **newsletter** and have a quarterly publication schedule. So, if you read an article that you have seen before – you can skip to the next one. And if you are really frustrated or annoyed, write to the editor. I'd just like to hear from you.

In Memoriam

Neil J. Carry, a long-time member of the Society of Maritime Arbitrators and friend and colleague of many in the maritime industry, passed away in Stamford, CT on January 27, 2008 at age 85.

Neil graduated from Kings Point in 1944. Later on he served as president and CEO of Pan Ocean Anco Tanker Service. He was also a founding member of the Connecticut Maritime Association and a past Commodore of the Rudder Club of New York.

Tom Fox, a close friend of Neil's, has prepared a touching account – "A Remembrance" – which he plans to share with all their friends. Thank you, Tom.

Klaus Mordhorst signed the Neil J. Carey guest book: "Another wonderful, wise and witty man of the sea has left the bridge for good. We shall miss you, dear Neil."

For THE ARBITRATOR

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