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THE PRESIDENT'S CORNER

This being the first issue of our newsletter for the new business year, I want to briefly update you on recent events.

First, I should like to congratulate and welcome Gerard Desmond, John Devine, Don Frost and Bengt Nergaard as the newly elected governors of the SMA's Board. We are pleased to have you on board and look forward to working with you. You will find more details about the 45th Annual General Meeting, election results and committee chairs appointments at p. 3.

For some time, now we have been examining the overall role of ADR and particularly the state of maritime arbitration in the dispute resolution of domestic and international commercial and shipping ventures. It is a known fact that the worldwide volume of arbitration cases has decreased over the more recent years. Since most of our arbitration awards are published in the Award Service, this phenomena is, of course, of particular concern to the SMA, as the decreased number of arbitration awards factually evidences this trend. These issues have been discussed at the Board level as well as with the whole membership at our monthly luncheon meetings. Also, the MLA/SMA Liaison Committee has been holding in-depth and frank discussions with prominent users of the arbitral system, domestic and international companies, including owners, charterers, shippers, P&I Clubs and members of their FD&D sections. Likewise, individual SMA members have been meeting with users and practitioners, providing supplementary feedback to the Board. All of this is part of the ongoing process of self-analysis and our efforts to make New York a user-friendly and attractive center for dispute resolution (at the moment we might get some unexpected help from the weak dollar to provide for lower costs and fees).

At our April 2008 luncheon, before a standing-room-only crowd, Peter Skoufalos, partner at Brown Gavalas & Fromm, gave a stimulating and provocative talk on the subject of "Re-visiting the New York-London Divide: A few thoughts on narrowing the gap." Peter's speech addressed many of these very same issues and posed new challenges and the ensuing Q&A session generated a spirited discussion which nearly matched his lengthy speech. Thank you Peter for your constructive talk and your continued support of the SMA.

Let me also briefly mention that on September 24, 2008, the SMA will celebrate its 45th anniversary at the Union League Club. I invite all our loyal readers to join us on that day in our celebration.

Before concluding, I wish to briefly address one more matter, namely an exchange prompted by a speech given by Bruce Harris, one of London's leading arbitrators, in March 2008 at Tulane as part of the William Tetley Maritime Law Lecture. The paper was entitled "Maritime Arbitration in the U.S. and the U.K. – Past, Present and Future." Bruce's speech, quoted in part by the Maritime Advocate (on line), was in itself a thoughtful and well-presented dissertation on the history and current state of maritime arbitration in general and more specifically with respect to the practice in London and New York. It proffered several keen observations, correctly analyzed current trends and proposed some useful suggestions. However, certain statements, in my view, required comments from New York which went out over my signature but were the result of joint efforts with the major contributions provided by Keith Heard of Burke & Parsons.

Today's state of maritime arbitration and, of course, its future is obviously very much on everybody's mind – here, in London and elsewhere. Let us keep this dialogue alive and focused to the benefit of the industry we serve.

For now, let me wish all of you a most enjoyable summer.

Klaus Mordhorst

ROTTERDAM RULES, OK?
by Chris Hewer

It has taken twelve years (thirteen, if you are a baker) for a new draft liability convention on the international carriage of goods by sea to emerge from wherever it has been hiding in the great commercial maw of the United Nations which swallows up everything which sounds important but is not going to save the world and then spits it back out when everybody is least expecting it and has moved on to something more interesting anyway. (This is a very long sentence, although not by UN convention standards).

So, has it been worth the wait? 'No' would be the simple and honest answer, but that would leave an awful lot of space to fill. We have 700 words yet in which to say 'No'. There's no rush. Come to think of it, we can take as long as the UN took. We are not being paid by the word. We are not being paid at all.

If shipping was a society girl, it would have greeted the new convention with a cry of, "Is this what I shaved my legs for?" But let us be fair. Let us look at what has emerged from the UN deliberations. What we have is The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. You wouldn't read about it. It would be hard to believe if it were not in *Lloyd's List*, so it must be true.

Mercifully, the convention is likely to become known as the Rotterdam Rules, because Rotterdam is the place where, like the King of Spain's beard, the rules will

apparently be singed (or possibly signed) next year. This is good news, in that it carries on the tradition established by the Hamburg Rules of naming the convention after a place that people have actually heard of, and which furthermore exists – unlike The Hague, or Visby. Unfortunately, it also carries on the tradition of producing a convention which is designed to please everybody but actually pleases nobody.

Replacing the wretched Hamburg Rules with something that works is a good idea. Replacing them with something which, as some critics have suggested, takes us back to pre-Hague Rules days is not such a good idea, other than for lawyers and arbitrators. And why the twelve-year wait? In man-years, this is comparable to the gestation period of the frilled shark which, at three and a half years, boasts the longest gestation of any vertebrate, although nobody has dared to check if this is true, or merely an old wives' tale. The truth is that the drafters took twelve years because they didn't have time to write a shorter document. The spiny dogfish, meanwhile, has no gestation period at all – quite a trick.

Despite this, there are those who think things are moving too quickly. After all, Australia has only comparatively recently got round to ratifying the Hague-Visby Rules, the French did it some time ago but still call them the Brussels Rules (inbound, but not outbound), and American lawyers are not yet finished finding new wrinkles in the Harter Act.

We should find a middle course. Let us start by throwing away the Hamburg Rules. Despite having a sensible name, they do not work. Now the serious stuff can start. Let us go back to Hague-Visby, and start with the preamble. Here the architects claim that the rules do not pretend to offer an exhaustive system of provisions, which is just as well because nobody would have believed them if they had. Then let us assemble a team of sensible people who understand shipping and transport, and set them to work like a lodge of beavers to produce, within a sensible period of time, a set of rules which have some element of fairness for everybody involved in the maritime adventure, whether on land or at sea.

It cannot be so difficult. To come up with something which, if some critics are to be believed, is a sop to the feelings of landlocked nations and countries with small fleets, is not the stuff of which empires are built. European shippers have already appealed, although not to everybody.

We have had enough rotten international carriage legislation to last a lifetime. We do not need any more. Perhaps it is the will that is lacking, rather than the intelligence.

SMA ELECTIONS

At the 45th Annual Meeting of the SMA on May 13, 2008, the following were elected for two-year terms as Governors of the association: Gerard T. Desmond, John J. Devine, Donald B. Frost and Bengt E. Nergaard.

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

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

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

Standing Committees

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

Ad Hoc Committees

Index and Digest - D.W. Martowski
Small Crafts - W.D. Wheeler
Strategic Planning - T.F. Fox
ICMA – M.W. Arnold

MEDIATION MAY NOT BE COMPELLED UNDER THE FEDERAL ARBITRATION ACT

by Justin Kelly
ADRWorld.com

A federal appeals court has ruled in a case of first impression that an agreement to mediate disputes is not enforceable under the Federal Arbitration Act (FAA).

The U.S. Court of Appeals for the Eleventh Circuit reasoned in Advanced Bodycare Solutions, LLC v. Thione International, Inc. (No. 07-12309), decided April 21, that the FAA does not apply because mediation does not result in an enforceable award.

Professor Richard C. Reuben of the University of Missouri School of Law said the ruling preserves the important distinction between consensual processes, like mediation, and adjudicatory processes, like arbitration, for purposes of the FAA. He also noted the court's discussion of the role of the third party neutral in dispute resolution. He said that in adjudicatory processes like arbitration, the third party neutral makes the decision about the dispute between the parties, while in consensual processes; the neutral helps the parties make the decision themselves. "In some respects, this is the most fundamental distinction between dispute resolution processes, and the court's decision here wisely turns on that distinction," he added.

Professor Chris Drahozal of the University of Kansas School of Law noted that there may be other bases for enforcing mediation agreements, as the court pointed out, but the FAA is not one of them. He said while there has been "a lot of litigation over what arbitration is, with courts taking various approaches, that under any of those standards, as the court holds, mediation is not arbitration."

Case History

The case arose out of a licensing agreement between licensor Thione International and licensee Advanced Bodycare. The agreement contained a provision stating that disputes would be resolved through either mediation or non-binding arbitration if the parties were unable to reach a negotiated settlement. If both processes failed, the parties could litigate in court. Advanced Bodycare obtained replacements for some defective products it received from Thione. However, when it discovered that the number of replacements did not equal the number of defective products, it filed a lawsuit. Thione moved to compel arbitration under the FAA. The district court denied Thione's motion and the Eleventh Circuit affirmed, finding that this was an agreement to mediate and is not enforceable under the FAA.

The court acknowledged that the FAA does not define what FAA arbitration is and courts have struggled to define what types of dispute resolution processes are enforceable under it. Some courts, the Eleventh Circuit observed, have found that mediation contracts are covered under the FAA.

However, it was clear to this panel of the Eleventh Circuit that one requirement of FAA arbitration is that a third-party neutral will render an award that sets out "the rights and duties of the parties."

Accordingly, the court ruled, "If a dispute resolution procedure does not produce some type of award that can be meaningfully confirmed, modified, or vacated by a court upon proper motion, it is not arbitration within the scope of the FAA."

This bright line rule makes sense, the court said, because it furthers the FAA's purposes to relieve pressure on the courts and provide parties with a less expensive, timelier method for resolving disputes. Turning to the Thione-Advanced Bodycare agreement, the court noted that it reserved the parties' right to pursue litigation if mediation failed and thus might increase, not decrease, the time and expense of resolving the dispute.

Applying these principles, the court found that this agreement to mediate was not within the scope of the FAA. For this reason, FAA remedies cannot be invoked to compel mediation, the court said.

The court further ruled that ADR clauses giving parties a choice between arbitration and mediation are also not FAA arbitration and, thus, are not enforceable under the FAA.

The court added that this ruling was not meant to suggest that mediation agreements are "per se unenforceable." Rather, it said, mediation agreements may be enforced under basic contract principles or according to the court's inherent authority.

The court reserved for another day the question of whether non-binding arbitration is arbitration for the purposes of the FAA.

Reuben commented on this reserved question, saying that the history of the FAA, while sparse, indicates that Congress envisioned arbitration under the Act to be a final and binding process.

SEA TRIALS – INSURANCE COVERAGE SHOT DOWN

by James E. Mercante
Partner, Rubin, Fiorella & Friedman LLP

The following article appeared in BOATING WORLD (May 2008).

This is not a feel good story, but it involves admiralty insurance law worth its weight in buckshot.

A young women moved in with her boyfriend named "Alan" aboard his vessel – inaptly named *Tranquility*. While *Tranquility* was in its berth in Newport Harbor, the gal was shot and killed aboard the vessel. The facts remained murky till the end, but the allegation was, like the game of Clue, it was the boyfriend, in the cabin, with the gun.

The woman's mother filed a complaint against Alan seeking to recover damages for the wrongful death of her daughter as well as his alleged intentional and negligent infliction of emotional distress on the mother.

The marine insurance company that insured Alan's yacht, Reliance Insurance Company, provided him with a defense against the civil lawsuit, but did so pursuant to what is called a "reservation of rights".

By this process, an insurance company provides a defense to a civil lawsuit while at the same time reserving the right to continue the investigation into whether coverage exists. If it is subsequently determined that coverage does not exist, the insurance company may then elect to withdraw the reservation of rights and deny coverage.

Here, after they concluded the investigation, Reliance determined that there was no coverage under the yacht policy for the shooting. The insurance company contended that it had no obligation either to defend or to indemnify the vessel owner in the wrongful death suit for damages because the claim did not arise out of the "*ownership, operation or maintenance"* of the insured vessel. *Reliance Insurance Company* v. Colin Alan et al. 222 Cal. App. 3d.702.

An insurance policy is a contract between an insured and an insurer. Therefore, a dispute involving the insurance contract is resolved by the courts similarly to any breach of contract action. The insurance policy must phrase exceptions and exclusions to coverage in "clear unmistakable language". When the terms are plain and unambiguous, the court is bound to enforce the language and policy as written. Here, the controlling provision of the yacht policy stated in pertinent part as follows:

> **Perils Insured Against**: We will pay sums with you or covered person under this policy becomes legally obligated to pay as a result of the *ownership, operation, or maintenance* of your insured property because of:
>
> A. Property damage
> B. Personal injury

Thus, to come within the scope of coverage under the yacht policy, the vessel owner's liability must have arisen out of the "ownership, operation or maintenance" of the insured vessel.

A marine protection and indemnity insurance policy ("P&I") affords coverage of a limited nature. The coverage is not as broad as a land based comprehensive general liability ("CGL") insurance policy. As seen in the above quoted provision, one important feature of the P&I policy is that it only covers liabilities incurred "as owners of the [insured] vessel". It is not general liability coverage and therefore if the vessel owner's conduct that results in injury involves some non-vessel-related operation, even when it occurs aboard the vessel, the loss may not be covered by insurance depending on the terms of the policy. The reason for this is that the owner's liability does not occur as a *vessel owner* in the traditional sense of ownership, operation or maintenance of the vessel.

The limited nature of a P&I policy has been explained by a federal judge as a policy that does not cover all types of a vessel owner's liability, but extends only to the liabilities specifically enumerated in the insuring agreement. Federal admiralty courts have also noted that for coverage to apply, the vessel itself must afford something more than a mere "condition" or "location" for the accident. In other words there must be at least some *causal* and *operational* relation between the vessel and the resulting injury. Where injury is done through non-vessel *operations*, for the coverage to apply, the vessel must serve as more than simply the locale of the injury. Thus, for example, a fight on board a vessel will likely result in no coverage for the vessel owner not to mention a shooting as occurred in this case.

Where the conduct of the insured vessel owner is the cause of an injury in a non-vessel related act, even when occurring aboard the vessel, the loss is not typically

covered by the standard yacht policy. This does not mean the vessel has to be underway or in operation for coverage to apply. For example, in one case an injury occurred while the vessel owner was helping a guest off the boat and coverage was found to exist under the yacht policy because the parties were involved in activities necessary to properly leave the yacht at the end of a trip.

In the Reliance Insurance case, the vessel owner fought hard for coverage stating that the shooting occurred on board his boat while it was being "used". However the yacht policy issued by Reliance only afforded coverage arising out of the "operation, ownership and maintenance" of the vessel, but did not include coverage for liability arising out of the "use" of the vessel for a non-vessel related activity. Moreover, there was no causal "operational" relationship between the vessel and the shooting death of his guest. Here, the court determined that at the time of the fatal shooting, the vessel was moored in her berth and, therefore, served merely as the *locale of the shooting* and there was *no causal relationship* between the boat and the shooting which would trigger coverage under the marine protection and indemnity *policy*.

As a result, the court determined that the marine insurer had no duty to defend or indemnify the vessel owner against the underlying wrongful death action.

Conclusion

Boat owners should be aware that marine protection and indemnity coverage provided in yacht policies is of limited nature. It will not cover everything that occurs aboard the vessel particularly when an incident is unrelated to vessel ownership, operation or maintenance. Boat owners should review their protection and indemnity coverage to determine the expanse or narrowness of its protection. Not doing so may be fatal when coverage is really needed.

THE STATE OF RULE B MARITIME ATTACHMENT IN NEW YORK – MAY 2008 UPDATE

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Background

It is by now well known in the maritime industry that United States law, in particular "Rule B,"[1] permits a maritime claimant to obtain pre-judgment security for a claim to be pursued anywhere in the world, as long as the claim is "maritime" in nature. It is also common knowledge that the recent trend since the 2002 *Winter Storm*[2] decision in New York, maritime creditors have been able to attach U.S. Dollar denominated electronic funds transfers ("wire transfers") being routed through New York "intermediary" banks. The ease with which a Rule B attachment order can be obtained, as well as its ex parte nature and relatively modest cost, have led to a steady rise in the number of Rule B cases filed since the *Winter Storm* decision.

The increase in successful Rule B attachments has led to the early settlement of many maritime claims that otherwise might never have been resolved. On a related point, many claims that might never have been pursued in the first place have been successfully taken to arbitration or litigation simply because a successful Rule B attachment has provided pre-award or pre-judgment security for such claims, thus justifying the expenditure of the time and resources required to see such claims through to conclusion.

The meteoric rise in the number of successful Rule B attachments in New York has not, however, been greeted with

universal approval. Leading up to the 2006 New York Second Circuit Court of Appeals ("Second Circuit") decision in *Aqua Stoli*,[3] there had been in the several years following *Winter Storm* a surge of challenges by Rule B target defendants on a variety of legal theories. *Aqua Stoli* eliminated many of the grounds upon which challenges to Rule B attachments can be made and, thus, lent order to what had become a chaotic situation of successful attachment followed by immediate and costly challenge, often times on flimsy legal grounds. However, the *Aqua Stoli* court also injected a level of uncertainty into Rule B practice by questioning, in a footnote, the "correctness" of its decision in *Winter Storm*. *Aqua Stoli,* 460 F.3d at 446 n.6.

The *Consub* Appeal

Since *Aqua Stoli*, disgruntled Rule B defendants have raised challenges to attachments by citing to the *Aqua Stoli* footnote and arguing either that *Winter Storm* held incorrectly that electronic funds transfers do not constitute "property" capable of attachment, or that under the Uniform Commercial Code ("UCC") such transfers do not constitute property of the defendant while in the hands of New York intermediary banks.[4] Universally, the lower courts have upheld Rule B attachments, despite the *Aqua Stoli* footnote. However, several cases have wound their way to the Second Circuit, most notably *Consub Delaware LLC. v. Schahin Engenharia Limitada*, where the defendant challenged an EFT attachment based on the argument that the defendant did not have a property interest in the EFT while it was in the hands of a New York "intermediary" bank. When we provided our last "Rule B Update" the *Consub* case was in the briefing stage. In mid-May 2008, however, the appeal was argued before the Second Circuit. While the Court reserved decision,[5] there were several telltale indications during the argument as to how the Second Circuit may rule.

First, in addressing the UCC "property" argument, the Second Circuit indicated the belief that the question of whether an EFT is attachable "property" was settled by *Winter Storm* and subsequent cases and that the UCC amounted to a "legal fiction." Second, the Court also gave strong indications that it was not prepared to outright overturn or reverse the *Winter Storm* decision, as the defendant had requested. Third, the three judges sitting on the panel appeared to be grappling with the question of whether funds being paid *to* a Rule B defendant constituted property in which such a defendant could be said to have a legal "interest," as contrasted with funds being paid *by* such defendant. Nonetheless, that issue more technically relates to the *nature* of the attachable property interest, and does not go to the more fundamental question posed by the appeal, *i.e.* whether *Winter Storm* was correctly decided, as posited by the *Aqua Stoli* Court. Finally, the Court concluded by expressing the belief that the *Consub* appeal would not be the last time the Court was asked to address Rule B attachments.[6]

Reading these tea leaves, the consensus among the New York maritime bar that watched the argument is that the *Consub* Court will affirm the decision of the lower court upholding the attachment. Conservatively speaking, it therefore appears that the Court will uphold *Winter Storm* and Rule B attachment of EFTs will continue into the future, although certain subtle questions may remain to be decided, most specifically whether a Rule B attachment order should be effective to attach EFT payments both *to* and *from* a target defendant. Ultimately, it is hoped that the *Consub* Court will resolve these questions as well.

We will issue our next Rule B Update when the Court issues its decision in the *Consub* case.

The Advent of "Secret" Rule B Attachments

The growing popularity of Rule B attachments has not gone unnoticed in the press. In fact, the maritime periodical Tradewinds has devoted a section of its weekly newspaper to reporting on new Rule B filings in New York. Because all cases filed with the courts are publicly available on the court's electronic docketing system, it is a simple matter for Tradewinds to monitor the court docket for new maritime attachment cases and to then report on them, whether the plaintiff's attorney consents or not. As the saying goes, "no publicity is bad publicity," but in this case, when Tradewinds reports on a new Rule B application *before* the attachment has effectively secured the claim, the publicity thwarts the *ex parte* nature of the attachment order because it provides notice to the world (including the target defendant) and enables the target defendant to circumvent the attachment by taking care to avoid having its funds paid via New York correspondent banks.

In response to Tradewinds' insistence on reporting on all new Rule B filings, Lennon, Murphy & Lennon commenced filing new Rule B applications "under seal," which has the effect of precluding public access to the Rule B filing (i.e. the filing does not appear on the court docket).[7] Although the court has discretion whether to grant a request to file a case under seal, Judges in New York court have been receptive to the sealing applications given the *ex parte* nature of the proceeding and Tradewinds' reporting policy. Not surprisingly, Tradewinds was quick to label our practice of filing cases under seal as "secret lawsuits." Regardless, as another saying goes, "you reap what you sow."

Viable Defensive Measures to Prevent Rule B Attachments?

Registering the Company in New York

A small number of foreign companies have sought to insulate themselves against Rule B attachments in New York by registering with the New York Secretary of State, Division of Corporations, to do business in New York and appointing an agent to receive service of legal process. In the Rule B context, the purpose of such a registration is to create a "presence" in New York so as to eliminate one of the fundamental prerequisites for issuance of a Rule B attachment order, specifically that the defendant "not be found" in New York. There are potential tax implications from such a registration, and registering also subjects the company to general jurisdiction in New York for any and all claims against the company. Whatever the price, the key nonetheless is whether registration insulates the company from Rule B attachments (or at least provides a viable ground for having the attachment vacated).

In the Fall of 2007, in the case of *Centauri Shipping Ltd. v. Western Bulk Carriers KS*[8] ("WBC"), the court vacated a Rule B attachment order issued against WBC on the basis that WBC was "found," in New York for Rule B purposes since several years prior to the issuance of the attachment order it had validly registered to conduct business in New York and appointed an agent to receive service of legal process in New York.

The court rejected arguments advanced by the plaintiff that WBC's registration was ineffective because it had neither an actual office nor any employees in New York, ruling instead that the "key inquiry is whether the defendant is amenable

to suit within the district." In finding that WBC's registration in New York conferred personal jurisdiction over WBC in New York, the court held that there was no need for a Rule B attachment to obtain jurisdiction over WBC, which is, after all, the underlying primary purpose of Rule B attachment (although in modern practice most parties invoke Rule B to obtain security rather than to obtain personal jurisdiction over the defendant).

Although a company should consider all tax and jurisdictional issues before registering to do business in New York, given that doing so may provide an absolute shield against Rule B attachments serious consideration should be given if the company suspects that it may be the target of a Rule B attachment. The potential insulation against Rule B attachments would seem, in most circumstances, to outweigh the costs of registration. In addition to WBC, we have registered a growing number of clients in New York. Compared with the costs of defending a Rule B attachment, the registration costs, which run about $4,500, appear to be a wise investment.

General Agents

Another possible avenue for safeguarding against Rule B attachments is the use of an affiliate company as a general agent in New York or an adjacent district to New York, such as New Jersey or Connecticut. In *Ivan Visin Shipping Ltd. v. Onego Shipping & Chartering B.V.*, 2008 U.S. Dist. LEXIS 25028 (S.D.N.Y. Mar. 31, 2008),[9] the court vacated a Rule B attachment on the basis that the foreign defendant's separately incorporated affiliate company served as its "general agent" in New Jersey. The court found that the appointment of the general agent subjected the foreign defendant to personal jurisdiction in New Jersey (and arguably New York) and that the foreign defendant could therefore be "found" for Rule B purposes, thus negating the need to use Rule B to obtain jurisdiction over the foreign defendant (*see discussion of the Centauri v. Western Bulk Carriers case, above*).

Unlike registration in New York, appointing a general agent in New York or an adjacent district would not provide the company with a shield, arguably precluding a claimant from obtaining a Rule B attachment order. Rather, it would serve as a basis for vacatur of the attachment once in place. Given that appointment of a general agent is less costly and does not require any formal registration process, for certain companies it presents a viable and easy alternative to *defending* against Rule B attachments.

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1 Supplemental Admiralty Rule B.

2 The writer was counsel for the prevailing party.

3 The writer also served as counsel for the prevailing party in *Aqua Stoli*.

4 Principally, such challenges have been based on Article 4A of the Uniform Commercial Code which provides in a Official Comment that EFTs in the hands of an intermediary bank do not constitute a "property interest" . . . . N.Y. U.C.C. § 4-A-502 cmt. 4.

5 A formal ruling is not expected until late 2008 or early 2009.

6 There are those among the New York maritime bar that believe the Court may conduct a rehearing of the appeal *en banc*, i.e. before the entire panel of judges sitting on the Court, not just the three judge panel that heard argument on the original appeal.

7 Once the attachment becomes effective, in other words once security is obtained, the sealing order is lifted and public access to the case filing is reinstated.

8 The writer acted as counsel for WBC.

9 The *Onego* decision has not been reviewed by the Second Circuit, nor so

far has it been followed by any other judge.

JURISDICTION AND FISTICUFFS
by Paul S. Edelman and James E. Mercante

This article was previously published in the New York Law Journal. Mr. Edelman is a member of the New York firm of Kreindler & Kreindler. Mr. Mercante is a partner in the New York firm of Rubin Fiorella & Friedman.

A fistfight aboard a vessel in navigable waters can spark federal admiralty jurisdiction. So can "national contacts". This article will discuss jurisdiction and an update on the never ending saga of the *Exxon Valdez* oil spill.

Onboard Altercation

Admiralty jurisdiction is limited. In Gruver v. Lesman Fisheries, Inc., the question of admiralty jurisdiction arose in the context of a fight, or perhaps a mugging, aboard a commercial fishing vessel.[1]

Gruver worked as a deckhand for Lesman Fisheries aboard the shrimp and crab boat *F/V Sunset Charge*. He quit and joined the crew of a competing fishing vessel, *F/V Adventurous.* At the time Gruver resigned, he was owed some seaman's wages, but not according to Lesman Fisheries. This prompted Gruver to angrily confront Mr. Lesman on the dock to demand his unpaid wages. Gruver also left a threatening message on Lesman's voice mail. In the message, Gruver demanded the money and warned that he would hurt Lesman and damage the *F/V Sunset Charge* if he was not paid. Gruver received a payment the next day, but the amount was insufficient for Gruver's appetite. He again called Lesman, threatening him and his property if the full amount of wages owed to him was not paid. This sounded fishy to Lesman so he boarded *F/V Adventurous* to greet Gruver on the pretense that he was there to give Gruver a check for the remainder of his wages. To help deliver the hefty check, Lesman brought his 380-pound nephew. Naturally, the stories diverge at this point, with Lesman claiming that Gruver attacked him and his heavyweight sidekick, and Gruver stating that he was asleep in his bunk when the two intruders beat him severely, attempting to break his legs and vowing to kill him for leaving the threatening messages. Gruver was hospitalized for several days with broken ribs and a punctured lung.

In the rematch, Gruver filed suit for damages against Lesman in federal district court, invoking admiralty and maritime jurisdiction. The complaint alleged negligence, unpaid wages and assault. Lesman countered with a motion to dismiss the entire case for lack of subject matter (admiralty) jurisdiction. The federal district court agreed and dismissed the complaint, holding that Gruver failed to establish grounds for federal admiralty jurisdiction.[2] Not to be deterred, Gruver appealed the decision to the United States Court of Appeals and the Ninth Circuit accepted the review as a basis to delve deeply into the historic principles of admiralty jurisdiction.

Admiralty Jurisdiction

Federal district courts have original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction." 28 U.S.C. § 1331(1). At one time, if an incident occurred on "*navigable waters"*, that was a sufficient nexus to trigger admiralty jurisdiction. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.[3] The test was refined over time to require not only a location upon navigable waters, but also a solid "*connection"* to things traditionally maritime. The "*location"* test was easily satisfied in the Gruver case

because the altercation did occur aboard a vessel on navigable waters.

The "*connection*" test required a bit more analysis. The Court of Appeals explained that the connection test has two prongs, each of which must be met before admiralty jurisdiction will attach. *First*, a court must assess the general features of the *type of incident* involved to determine whether the incident has a "potentially disruptive impact" on maritime commerce. Sisson v. Ruby, 497 U.S. 358, 363 (1990). The *second* prong of the test requires the court to examine whether the general character of the "*activity giving rise to the incident* shows a substantial relationship to *traditional maritime activity*."[4]

In this case, neither the "location" test nor the first prong of the "connection" test (*potentially disruptive impact on maritime commerce*) was contested. The location test was satisfied because the alleged assault took place aboard the *F/V Adventurous* while the vessel was floating on navigable waters. The parties agreed that with respect to the first prong of the connection test that the *type of incident* could have had the potential to disrupt maritime activity. For example, a seaman's injury can have a "disruptive impact" on maritime commerce by (i) stalling or delaying the primary activity of the vessel, i.e. fishing; or (ii) rendering a crew member unable to perform his fishing duties.[5] Interestingly, the disruptive impact does not have to actually occur, the fact that it *could have* had a disruptive impact, even hypothetically, is enough to satisfy the admiralty courts that this prong of the test has been met.

Thus, the only dispute in the case was over the second prong of the "connection" test for admiralty jurisdiction; whether the "*general character of the activity*" that gave rise to the incident has a "substantial relationship to *traditional maritime activity*." This was not an easy question due to the unusual facts. Was the "activity" the assault (not maritime) or the seaman's wage dispute (maritime)? The altercation did not comport with the typical maritime tort scenario "where tortfeasors are vessel owners engaging in some sort of maritime activity and where the vessel itself is directly implicated in the incident."[6] The district court defined the activity as the vessel owner's failure to pay wages and concluded that this did not have a substantial enough relationship to "*traditional maritime activity*" to trigger the second prong of the connection test.

The United States Supreme Court has held that to warrant federal maritime jurisdiction, a tortfeasor's actions must be so closely related to an activity traditionally subject to admiralty law that the reasons for applying special admiralty rules are present.[7] With this in mind, the Circuit Court in Gruver had to evaluate what constituted the "activity giving rise to the incident" and whether it was traditionally "admiralty." Here, the Court of Appeals disagreed with the district court and found that admiralty jurisdiction existed because the failure to pay "seaman's wages" had a sufficient connection to traditional maritime activity.

Seaman Wage Fight Passes Muster

The court did not find that a fight on a vessel will always trigger admiralty jurisdiction. Since this fight was over a claim of unpaid seaman's wages, however, the link to maritime commerce was established. Paying seamen for their work at sea has a substantial relationship to traditional maritime activities.

Accordingly, because both the "*location*" and "*connection*" tests were satisfied, there was admiralty jurisdiction. Few practitioners would expect a fight to be worthy of admiralty jurisdiction. The Judge's scorecard was unanimous and a

surprising reaffirmation of the long reach of admiralty jurisdiction.

"National Jurisdiction" in Shipping

A foreign vessel owner which makes many voyages to ports in the United States but may not "do business" in any one port, is subject to "national jurisdiction" under Rule 4(2)(k) of the Federal Rules of Civil Procedure . In a recent decision where a ship called on many U.S. ports, the Second Circuit held that there would be no jurisdiction over the vessel *owner* where the ship's *charterer*, not the owner, directed where the ship was to go. Porina v. Marward Shipping Co., ____F.3d ___, (2nd Cir. 4/1/08). The case distinguished a Sixth Circuit case where the owner specially outfitted its vessel for service in the Great Lakes and jurisdiction was upheld. See Fortis Corporate Ins. v. Viken Ship Mgt., 450 F. 3d 214 (6th Cir. 2006). In Fortis, the court held that personal jurisdiction was proper under Rule 4 (2)(k) over the Norwegian owner of a chartered vessel on a claim for cargo damaged on Lake Erie and delivered to Toledo, Ohio. But the defendants in the case had manifested their intent to service and to profit from the United States in particular, by confirming in the charter agreement that "'the vessel is suitable for Toledo,'" and by outfitting and rigging the ship for the fresh water of the Great Lakes. Id. at 221. These facts were deemed sufficient to show that the Fortis defendants, unlike Marward Shipping, had purposefully availed themselves of the benefits of doing business in the forum.

Similarly, a district court presumably would have upheld national jurisdiction against a charterer to whom the owner ceded wide control. Mutualidad Seguros v. M.V. Liber, 1998 U.S. Dist. Lexis 23105 (S.D.N.Y. 1998).

Editor's Note: This paper, when originally published, was entitled "Jurisdiction, Fisticuffs and Oil Spills." The oil spill segment referenced the Supreme Court pleadings pending at that time, which has now been decided. I apologize to the authors for editing out their segment on the EXXON VALDEZ. For the latest on the EXXON VALDEZ, please refer to the article which follows.

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1 489 F.3d 978 (9th Cir. 2007).

2 2005 WL 2090666.

3 Jerome B. Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534, 115 S.Ct. 1043 (1998).

4 Gruver, 498 F.3d at 983, citing Jerome B. Grubart, 513 U.S. 527, 534 (1995).

5 Id. at 983.

6 Id. at 983, citing Foremost Ins. Co. v. Richardson, 457 U.S. 668, 675, 102 S.Ct. 2654 (1982).

7 Jerome B. Grubart, 513 U.S. at 539.

EXXON VALDEZ CASE DECIDED WITH SUPREME COURT REDUCING PUNITIVE DAMAGES

by John D. Kimball
Partner, Blank Rome, New York

On June 25, 2008, in Exxon Shipping Co. v. Baker, the Supreme Court of the United States, in a 5-3 decision, greatly reduced punitive damages awarded in the Exxon Valdez oil spill case from $2.5 billion to $507.5 million. This is the first time the Supreme Court has ruled on the appropriate measure of punitive damages in a maritime oil spill case. The Court stated that, as a matter of maritime law, punitive

damages should not exceed the amount awarded in compensatory damages. The Court did not decide whether the 1:1 ratio is required as a matter of constitutional due process.

Because the Court was equally divided on the issue, it did not decide whether maritime law allows corporate liability for punitive damages, otherwise known as derivative liability, for the acts of Captain Hazelwood. As a result, no national precedent was set on the point and the ruling of the 9th Circuit Court to allow punitive damages will stand, leaving the possibility of a different outcome in future cases.

The Supreme Court also held that the absence of any reference to punitive damages in the Clean Water Act does not preclude awarding punitive damages in maritime oil spill cases. The case was brought before the enactment of the Oil Pollution Act of 1990 and therefore it remains to be determined whether the outcome would be the same under cases brought under OPA.

Note: This summary was first published in the Blank Rome Maritime Update of July 2, 2008.

ENFORCEMENT OF PARTIAL FINAL AWARDS

In the Matter of the Arbitration between Flour Daniel Intercontinental Inc. and General Electric 2007 U.S. Dist. Ct. Lexis 17588 (S.D.N.Y. March 12, 2007)

The following summary was published in Newsletter 26 of the MLA Committee on Maritime Arbitration and ADR (authored by Armand M. Paré, Jr. with contributions from Michael Marks Cohen, Donald J. Kennedy, David A. Nourse, Keith W. Heard and Allen H. Black).

The court was confronted with whether to confirm an interim award of an arbitration panel. The interim award had resolved some issues but not others and, with respect to some issues, had decided liability but not damages. The respondent urged, inter alia, that there was no reason to confirm the award at that time, especially in view of considerations of judicial economy and, in all events, the court had discretion not to do so. The court rejected the idea that it had a choice not to confirm the award. It then outlined the tests for enforcing interim awards. The court found it important that "the arbitrators have expressly confirmed that the award was intended to be final with respect to those claims fully adjudicated." It also noted that a "separate and independent claim" may be confirmed "even though it does not dispose of all claims that were submitted to arbitration." Such a claim, however, must be "independent and separate from the remaining issues before the arbitrators and [can] be finally determined without reference to those legally irrelevant issues." Further, to be confirmable, the interim award should resolve issues "definitively enough so that the rights and obligations of the two parties do not stand in need of further adjudication." The court further observed that an award which resolved liability only but not damages with respect to a particular issue was not confirmable. The court specifically found it could not confirm a "finding of no evidence justifying the 'piercing of the corporate veil'," apparently because a final determination on this was still to be made. Since the award in that case was some 312 pages in length, the court directed that the parties submit proposed and counter-proposed orders of what issues were final resolutions of severable claims.

PREJUDGMENT SECURITY IN INTERNATIONAL DISPUTES SUBJECT TO ARBITRATION

LeRoy Lambert and Thomas H. Belknap, Jr.
Partners, Blank Rome LLP, New York

When it comes to the right to obtain prejudgment security, maritime contracts led the way on the arbitration front. The Federal Arbitration Act ("FAA"), originally enacted in 1947, is found at 9 U.S.C. §§ 1-16. The maritime bar was already at work preserving a maritime plaintiff's rights to the traditional maritime remedies of prejudgment arrest and attachment. Section 8 of the FAA provides:

> *If the basis of jurisdiction be a cause of action otherwise justifiable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.*

This section thus preserved to maritime claimants the express right to commence a lawsuit seeking prejudgment security by, for instance, arresting a vessel or attaching assets of the defendant, notwithstanding that the parties had agreed to arbitrate the merits of their disputes.

Land-bound lawyers were not as vigilant. In 1970 Congress enacted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, into the positive law of this country. The text is found in Chapter 2 of Title 9 of the U.S. Code along with §§ 201-208 of enforcement provisions (the "Convention"). Most international agreements containing arbitration clauses are subject to the Convention. Neither the text of the Convention nor §§ 201-208 of Title 9 contain provisions preserving or excluding a claimant's right to prejudgment remedies which they would otherwise have if the dispute were being resolved in court.[1]

In 1982, the New York Court of Appeals decided *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 456 N.Y.S.2d 728 (1982). The Court held that the Convention precluded the use of attachments in disputes which were subject to the Convention. In so holding, the Court relied on *McCreary Tire & Rubber Co. v. CEAT,* 501 F.2d 1032 (3d Cir. 1974).

The New York Legislature amended CPLR Article 75 in 1985 to provide that provisional remedies such as an attachment were available for disputes subject to arbitration upon a showing that any award rendered "may be rendered ineffectual without such provisional relief." CPLR § 7502(c). The Second Department, however, was not impressed and held in *Drexel Burnham Lambert, Inc. v. Heinz Ruebsamen,* 531 N.Y.S.2d 547 (2d Dep't 1988), that this amendment did not change the holding in *Cooper* and applied only to arbitration in New York which were not subject to the Convention.

Finally, in 2005, the New York Legislature amended Section 7502(c). It now states that attachment is available "whether or not [the arbitration] is subject to [the Convention]."

This appears to be the rule in Connecticut as well. In *Bahrain Telecommunications Co. v. Discovertel, Inc.*, 476 F. Supp. 2d 176

(D.Ct. 2007), Judge Kravitz thoroughly reviewed the jurisprudence and the commentaries on this issue and concluded: "Accordingly the Court holds that the Convention does not deprive the Court of jurisdiction to issue *pendente lite* orders, such as a prejudgment attachment, in connection with a pending international arbitration." *Id.* at 182. The court's analysis in the arbitration context is governed by Chapter 909 of Title 52 (Arbitration Proceedings) and specifically by Conn. Gen. Stat. § 52-422. Interpreting § 52-422, Judge Bryant subsequently held in *Metal Management, Inc. v. Schiavone,* 514 F. Supp. 2d 227 (D. Ct. 2007), that allowing a prejudgment attachment in a dispute subject to arbitration was "necessary" in the circumstances of that case.

Arbitrators also have the power to direct one party, or both parties, to post security pending the outcome of the disputes on the merits. In *Sperry International Trade Inc. v. Government of Israel*, 689 F.2d 301 (2d Cir. 1982), the Second Circuit affirmed the arbitrators' order requiring the proceeds of a disputed $15 million letter of credit to be placed in escrow, noting that arbitrators "have power to fashion relief that a court might not properly grant." *Id*. at 306. In *Compania Chilena de Navigacion Interociania v. Norton Lilly & Co.,* 652 F. Supp. 1512, 1987 AMC 1565 (S.D.N.Y. 1987), the court held that maritime arbitrators did not exceed their legal authority by ordering respondent to post a $123,000 bond.

The rules under which the arbitration is proceeding may also give the arbitrators the right to grant such relief. *See Bahrain Telecommunications, supra*, 476 F. Supp. at 186-87. SMA Rule 30, for instance, authorizes the Panel to grant "any remedy or relief which it deems just and equitable," and Rule 37 expressly authorizes the Panel to direct the parties to post security for its estimated fees and expenses. *See e.g., Arbitration Between Transportes Ferreos De Venezuela, C.A., Transferven Ltd, Segmar, Ltd., and C.V.G. Ferrominera Orinoco, C.A.*, SMA No. 3954 (Partial Final Award Oct. 31, 2005)(Arnold, Hansen, Stoltz)("SMA Rule 30, incorporated into the Submission Agreement, provides that the panel may 'grant any remedy or relief ... including, but not limited to, specific performance.' The courts have uniformly upheld the right of arbitrators to order security or specific performance.").

Ultimately, in most cases the decision whether to direct a party to post security falls to the discretion of the Panel, and security is not automatically granted. In *COSMAR*, SMA No. 3944 (October 24, 2006)(Fox, Nichols, Arnold), for instance, concerning a dispute between owners and charterers over the interpretation of the phrase "weather working days," Owners requested that Charterers be directed to post pre-award security. The panel refused, stating, "It is our opinion that arbitrators should not order security with impunity. We accept that special circumstances should exist, such as a particular clause in the charter party or particular considerations which request the placing of security to maintain the *status quo*. The *status quo* reference addresses the fiscal status and responsibility of a party and not the pro/con decisions rendered by arbitrators in New York." And in *M/V ISLA MONTAGUE*, SMA No. 3882 (May 11, 2005)(Martowski, Siciliano, Nergaard), concerning a dispute over unpaid/withheld hire under a charter party, the Panel declined to award Charterer counter-security, despite its acknowledgement that it had the power to fashion pre-judgment equitable remedies, because Charterer's claims were anticipatory.

If the arbitrators make an order directing a party to post security and the party does not

comply, the creditor may have the order confirmed by the district court. If the party still does not comply, then, at least according to one decision, the court may find the party in contempt, and "a mere plea of financial inability will not shelter it." It must prove its compliance with the order is "factually impossible." *Blue Sympathy Shipping Co. v. Serviocean Int'l S.A.*, 1994 A.M.C. 2522 (S.D.N.Y. 1994).

Conclusion

In sum, there are many opportunities for a party to obtain prejudgment security for maritime claims which are subject to arbitration in New York. Such security can be a valuable tool which can give a party comfort that going forward with its claim will not end up being an empty gesture.

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1 Some Central and South American nations were reluctant to ratify the Convention. This led to the Inter-American Convention on International Commercial Arbitration, the text of which is found in Chapter 3 of Title 9 along with §§ 301-307 of enforcement provisions (the "Inter-American Convention"). Relatively few cases have arisen under the Inter-American Convention.

HALL STREET v. MATTEL

In the April 2008 issue, at p. 16, I produced a brief summary of the Supreme Court decision with the promise of a more scholarly treatise on this important decision to follow. Something unprecedented happened, at least for this publication – I received two contributions.

The first one is by **Michael Marks Cohen**, a frequent contributor to THE ARBITRATOR.

The decision last March of the Supreme Court in *Hall v. Mattell* is worth noting by the maritime arbitration community for several reasons.

The case arose out of an indemnity suit by a landlord against a tenant for cleanup of environmental damage to a factory site. The lease did not contain an arbitration clause. But during the litigation the parties agreed to entry of a court order which not only submitted the dispute to arbitration, but also provided that the court could vacate the award if the facts found by the arbitrator were not supported by substantial evidence, or if the arbitrator reached erroneous conclusions of law. Absent those special provisions, ordinarily court review would have been limited just to whether the arbitrators had given the parties a fair hearing.

An award was eventually entered in favor of the tenant. The court reviewed it on the merits and sent it back. A new award was entered in favor of the landlord. The court confirmed it. On appeal the tenant successfully argued that the provision for judicial review on the merits was unenforceable. The landlord then took the matter to the Supreme Court.

Regulars at SMA events will recall that the issue of expanded judicial review was addressed at a luncheon some time ago by Keith Heard who expressed doubt about its enforceability.

The Supreme Court vindicated his skepticism, but only in part. The Court ruled that expanded judicial review could not be obtained in a summary proceeding under the Federal Arbitration Act ("FAA"). But it left open the opportunity to achieve it in another type of proceeding, as for example an ordinary suit at common law to enforce a contract. Indeed, the Court remanded the case to the lower courts to determine whether the particular agreement there, embodied in a court order, was sufficient to create expanded judicial review

as an exercise in the trial court's control of pretrial procedure.

Commentators about the case have, for the most part, regarded it as foreclosing judicial review of awards on the merits, or at best expressed confusion about the mechanics for achieving such review outside the FAA.

I do not favor expanded judicial review of arbitral awards on the merits because it eliminates finality which is one of the main advantages of arbitration. But if a party were insistent about the need for expanded judicial review, I am confident it could be obtained under a well drafted clause providing for the arbitrator to make detailed findings of fact as well as conclusions of law. The clause would go on to provide that the findings of fact would be treated as an arbitration award subject to confirmation under the FAA. If the findings of fact were confirmed, then unless the losing party timely contested the conclusions of law, the court would treat them, together with the confirmed findings of fact, as a settlement on which judgment by consent would be entered. If the conclusions of law were contested, the court would treat them, together with the confirmed findings of fact, as constituting a motion for summary judgment on stipulated facts, which would enable the court to reach its own conclusions of law on the merits.

A second, perhaps even more significant part of the Supreme Court's decision was to cast doubt on the existence of "manifest disregard of the law" as a separate ground for vacating an award, as opposed to simply a shorthand way to describe an award by arbitrators who were guilty of misconduct or had exceeded their powers, both statutory grounds in the FAA for vacating an award. In the end, this uncertainty may well affect many more post-award cases than expanded judicial review which I anticipate -- and hope -- will be only a very rare occurrence.

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The second article was prepared by **M.E. De Orchis,** De Orchis & Partners, LLP.

SUPREME COURT RULES AN ARBITRATION AWARD BASED ON ERRORS OF LAW CANNOT BE APPEALED TO A FEDERAL COURT UNDER THE FAA

(But "Manifest Disregard" Is Not Just an Error of Law)

The choice of arbitration as an alternative to litigation is popular in the maritime field, especially when it comes to charter parties. It is an expedient and easier way to resolve disputes. It avoids legal formalities, and experienced arbitrators can usually be relied upon to resolve disputes equitably and according to maritime law. But not always. Sometimes an arbitrator strays off course and an award is issued that is in manifest disregard of well-known principles of maritime law that owners and charterers rely upon in conducting their businesses. To avoid the risk of a possible irrational outcome, prudent parties usually provide in their charter party's arbitration clause that awards may be judicially reviewed pursuant to the Federal Arbitration Act (FAA) or where the arbitrator's conclusions of law are manifestly erroneous. However a recent decision of the Supreme Court of the United States may give pause to parties contemplating including arbitration clauses in maritime contracts. The Court ruled that parties seeking expedited judicial review under the FAA to vacate or modify an award may not supplement the seven

specific grounds for appeal listed in Sections 10 and 11 of the Act.

In *Hall Street Associates, LLC v. Mattel, Inc.*, March 25, 2008, the Supreme Court ruled, 6 to 3, that while the FAA, 9 U.S.C.S. § 1 *et seq.*, allowed parties to tailor many features of an arbitration contract, the Act's grounds for seeking judicial review to vacate or modify an award are those specifically listed in § 10 and § 11, and they may not be expanded, in a private contract providing for arbitration, to include legal error. The Court held that the grounds listed in the FAA, Sections 10 and 11, are "exclusive" bases for expedited judicial review.

Under the terms of § 9, a court must confirm an arbitration award unless it is vacated or modified as set forth in § 10 and § 11.

Section 10(a) provides only four grounds for *vacating* an award:

> *(1) Where the award was procured by corruption, fraud, or undue means.*
>
> *(2) Where there was evident partiality or corruption in the arbitrators, or either of them.*
>
> *(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.*
>
> *(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.*

Section 11 provides only three grounds for *modifying* or *correcting* an award:

> *(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.*
>
> *(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.*
>
> *(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.*

The Court noted that all of these seven grounds address "egregious" departures from the parties' agreed upon arbitration, and those statutory grounds could not be expanded or viewed to include just any legal error. "Fraud and mistake of law are not cut from the same cloth."

The Court did caution that it did not purport to say that the specified grounds of § 10 and § 11 "exclude more searching review based on authority outside the statute as well." It added that, "The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable."

The trouble is that the *Hall Street* case was not a maritime case, and maritime parties may find little comfort in the alternatives suggested by the high court for avoiding § 10 and § 11 of the FAA. The

reason is that the Act also contains § 2 captioned **Validity, irrevocability, and enforcement of agreements to arbitrate**, which appears to be aimed in part directly at a maritime contract. The section reads as follows:

> *A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy arising out of such contract or transaction…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*

The purpose of the Supreme Court decision was to end the split between the Circuits on the single issue of whether the grounds listed on § 10 and § 11 of the FAA could be expanded by private contracts. The court ruled that the grounds specified in §§ 10 and 11 were "exclusive grounds" because the text of the FAA "is at odds with enforcing a contract to expand judicial review." The Court noted that under FAA § 9, a court "must" confirm an arbitration award "unless" it is vacated or modified "as prescribed" in § 10 and § 11.

Hall Street, the petitioner, made the argument, however, that the Supreme Court itself had set the standard for "manifest disregard" becoming an added ground when the Court said, in *Wilko v. Swan,* 346 U.S. 427, 436 – 437 (1953), that "the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation."

Moreover, Hall Street pointed out that several federal circuit courts had adopted "manifest disregard of the law" as an added ground, relying on the *Wilko* case. The Supreme Court conceded that the language used in *Wilko* could be seen as "arguably favoring Hall Street's position" but "arguable is as far as it goes." The Court viewed Hall Street's supposed addition to § 10 "as the camel's nose: if judges can add grounds to vacate (or modify), so can contracting parties." The Court observed that the phrase "manifest disregard" may just have been "shorthand" for § 10(a)(3) or § 10(a)(4), the sections relating to "misconduct" of arbitrators or where arbitrators "exceeded their powers."

The Court expressed concern that allowing private parties to expand the statutory grounds by contract would open the door to a flood of appeals and render informal arbitration merely a prelude to "time consuming judicial review process."

An important point of the *Hall Street* decision is that the Supreme Court seemed to be distinguishing the freedom judges have to add other grounds such as "manifest disregard" to the FAA in "managing their cases" from the ability of private parties to expand those grounds by contract.

The Supreme Court remanded the case to the Ninth Circuit to resolve this unusual issue. The Court took its restrictive view of the FAA even though Hall Street and its *amici* warned that "parties will flee arbitration" if expanded review is not open to them.

Indeed, there are so many decisions in the Second Circuit applying the judicially created test of "Manifest Disregard" that the additional ground may be considered the common law of the Second Circuit. However, the Second Circuit rarely has vacated an arbitration award on the grounds of "Manifest Disregard." *See*, for example, *N.Y. Telephone Co. v. Communication Workers of America, Local 1100*, 256 F. 3rd ___ 9 (2d Cir. 2001) where the court held that arbitrators had manifestly disregarded the law by "explicably rejecting" binding

Second Circuit precedent in favor of more recent decisions of other circuits.

The Court suggested that there were other ways besides the FAA to review arbitration awards, and pointed to state statutes and common law. Forty-nine states have adopted arbitration statutes but they are all similar to the FAA, and besides those other ways would not be available under FAA § 2 where the contract is maritime or involves interstate commerce. It remains to be seen whether "manifest disregard of the law" will remain a viable ground for judicial review or error of law because the phrase has become the "common law" of the maritime courts that have adopted it since the *Wilko* decision of 1953. "Manifest Disregard of the law" was one of the issues decided just last May 21, 2008 (two months after *Hall Street*) by the Southern District of New York in *Interdigital Communications v. Samsung*.

Conclusion

The Supreme Court was right in ruling that "manifest disregard" mentioned in *Wilko* did not just refer to a simple error of law by an arbitrator. In fact, to prove "manifest disregard," a party must show (1) that the arbitrator knew what the law was, but (2) that he chose to disregard it. Thus, it is not just a matter of legal error, but involves intent to disregard, or to deliberately ignore. That is why the Supreme Court said the phrase "manifest disregard" may just have been shorthand for "misconduct" or "misbehavior" of arbitrators referred to in § 10(a)(3), or for arbitrators "exceeding their powers" under § 10(a)(4) by refusing to apply what they know to be the law.

Proving that arbitrators were aware of the law they disregarded may not be so difficult if the party furnished them with a proper legal brief or Memorandum of Law.

One thing is clear from the *Hall Street* decision, the courts favor arbitration because it obviously relieves their heavy case load. Allowing judicial review of every arbitration award where some simple error of law occurs would defeat the whole purpose of binding arbitration. As most arbitrators are not lawyers, the parties who choose them rely more on their integrity and common sense of justice. But when an award comes down, the parties expect it to be in accordance at least with well-known principles of maritime law.

However, there is another way, not mentioned by the Court, to avoid the costs and difficulties of arbitration appeals that turn into what the Supreme Court described as "cumbersome and time-consuming judicial review process." Maritime parties might consider providing for review of an arbitration award within the arbitration process itself.

SMA LUNCHEON SPEECHES

In the last issue (pp. 16/17), we provided a recap of the 2007/2008 luncheon speeches. The last presentation of the year was made on April 16, 2008 by Peter Skoufalos, partner, Brown Gavalos & Fromm, before a full house. The topic was "Re-visiting the New York-London Arbitration Divide: A Few Thoughts on Narrowing the Gap." It was a most enlightening and constructive presentation, which prompted a lively question and answer session.

A copy of the paper is available from the SMA office. For further details, see also the President's Corner in this issue.

THE SMA WORKSHOP
William Leung, Esq.

It was in the year of October 2002 when an article written by me titled "*Misdelivery of Cargo in the Absence of Original Bills of Lading and Exemption Clauses*" discussing legal issues involving bills of lading was published by the SMA (see The Arbitrator October 2002 at p.6). This was my first contact with the SMA. I understand that most of the maritime arbitrations in the world are decided in London and also in New York.

Towards the end of the year of 2005 as my involvement in arbitration as a legal practitioner in Hong Kong gained pace, the idea of getting to understand more about maritime arbitration in New York naturally came to my mind. This coincided with a newsletter from the SMA informing me that the next SMA Maritime Arbitration course which would be held in New York on 9th and 10th February 2006 conducted by Professor Jeffrey Weiss (Professor of Maritime Law at Fort Schuyler New York Maritime College) ably assisted by Dr. Austin Dooley of the SMA. Also, various very experienced US maritime arbitrations including Messrs. Manfred Arnold and Klaus Mordhorst would be present during the course. It was a freezing cold winter in New York City in the evening of 8th February 2006 when I arrived at the Best Western Seaport Hotel. It was a nice cozy hotel along the quay side of New York City. Materials were distributed to me. Professor Weiss carefully explained the course materials and drew on his own practical experience and those of the attending SMA members. Soon I got a better understanding about New York maritime arbitrations. Most of the concepts and terminology were very similar to the English system. I realized that their systems are based upon the common law which applied in England and its American colonies. There are, however, also various differences between London and New York maritime arbitration procedures which Professor Weiss and Mr. Arnold have so kindly brought to my attention including the publication of reasoned award (including dissents), power to order security, the so-called "Rule B attachment" and consolidation, all of which are available in New York maritime arbitrations but not available in London.

Thanks to Professor Weiss and Mr. Arnold. I have thoroughly enjoyed the course organized by the SMA and it will certainly be useful to my further career in the field of arbitration in general and maritime arbitration in particular.

NOTE FROM THE EDITOR:

Indeed it is gratifying to see the growing interest generated by the annual workshop with attendance well beyond the "SMA recruits" and from cities and countries other than the tri-state area. The SMA thanks William for this article and acknowledges with gratitude the contributions by Jeffrey Weiss and Austin Dooley.

I understand that Mr. Leung was recently named to the CMAC panel of arbitrators. Also, the Journal of Maritime Law & Commerce published an article by him ("Misdelivery of Cargo without Production of Original Bill of Lading: Applicability of the Mandatory Legal Regime of Hague-Visby and the One Year Time Bar") in Vol. 39, No. 2, April 2008. William has also promised to author an article comparing CMAC and SMA arbitration procedures.

PEOPLE & PLACES

MLA Arbitration & ADR Committee

During MLA Week, the Arbitration & ADR Committee conducted a successful seminar on "Keys to Successful Mediation Advocacy." The panelists were Sandra R.M. Gluck, Patrick V. Martin, David W. Martowski, Robert J. Ryniker with Robert S. Glenn acting as moderator. This session, being the last under A.M. Paré's chairmanship, once again was conducted before a full house. Thanks, Jay, for a great run!

I am certain that anyone who wishes to have more details or personal comments on the participants' views is welcome to contact them directly.

"The Bunker Arbitration Experience"

In 2005, Petrospot ran its seminar in New York which included a mock arbitration on bunker problems; members of the New York admiralty bar presented the case and a panel of three SMA members decided the matter. Similar subsequent events took place in Panama, Hamburg, Athens and Amsterdam. This year's bunker arbitration was part of Maritime Week Americas (May 19-23, 2008) in Miami. The promotional material included a quote from a Quinn Oil representative from Panama stating:

> *"The Bunker Arbitration Experience in New York was excellent! I seriously recommend The Bunker Arbitration Experience to everyone involved, from newcomers to senior managers.*

Thank you. We are glad that we at the SMA played a role in getting the program off to a good start. The next event is scheduled for September 8-12, 2008, Petrospot's Oxford Bunker Course. For further details, visit www.petrospot.com/events/oxford.

We wish Petrospot continued success with these educational sessions.

MLA Appointments

Keith W. Heard is now chairing the Arbitration and ADR Committee with Sandra R.M. Gluck as vice chair. Our best wishes to Keith and Sandra on these new assignments. LeRoy Lambert will continue as co-chair of the MLA/SMA Liaison Committee.

SMA Board of Governors Meetings and Luncheon Dates

The SMA Board meetings commence at 11.00 hours and, when applicable, precede the luncheons.

The September 10, 2008 and May 12, 2008 (AGM) are for members only. The dates for the open luncheons are October 15, 2008; November 12, 2008; December 10, 2008; January 14, 2009; February 11, 2009; March 11, 2009; April 15, 2009.

The meetings/luncheons will be held at The Ketch on Pearl Street. Please check the Calendar on the SMA website at www.smany.org for possible changes and information on speakers and topics.

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

SMA Board member David Martowski reports as follows:

As previously stated, CAT, under the direction of Dr. John Doviak, offers extensive management courses to the international shipping community at the

University of Cambridge, London and other overseas fora.

This year's Charter Party Seminar held in London on June 16-18 was attended by shipping executives from the United Arab Emirates, Saudi Arabia, Morocco, Iran, Spain, Chile and the Netherlands.

In previous years, Seminar Moderator, David Martin-Clark, and I had made joint presentations which highlighted the differences and similarities between London and New York maritime arbitration. This year's format had changed, and my presentation focused on an overview of the U.S. judicial system, the history of New York maritime arbitration beginning with the 1826 award involving the frigates LIBERATOR and HOPE, enactment of the Federal Arbitration Act, the birth of the SMA, highlights of the SMA Rules, and an overview of New York maritime arbitral practice and procedure.

Rule B attachments continue to dominate the headlines and I took the attendees through attachment requirements and procedure, the issues presented in the leading cases, the position of the intermediary banks, and defensive measures employed to avoid attachment. I also summarized the arguments made on May 15th before the Second Circuit in *Consub Delaware LLC v. Schahin Engenharia Limitada* and the likelihood of Rule B attachments eventually being reviewed by the U.S. Supreme Court.

The dollar's decline did not detract one bit from London's perpetual sparkle.

Lloyd C. Nelson Professorship of International Law

Just a reminder – the lecture is set for October 7, 2008 at 17.00 hours at the New York University Law School, 40 Washington Square South, Vanderbilt Hall. The lecture will be presented by Professor Robert L. Howse, who is the first Lloyd C. Nelson Professor of International Law at NYU.

Professor Howse, a member of the faculty of the University of Michigan Law School, has a resume which probably would require a special edition of THE ARBITRATOR. He received his B.A. in philosophy and political science with high distinction, as well as an LL.B. with honors, from the University of Toronto. He also holds an LL.M. from Harvard Law. He has been visiting professor at numerous international law schools. He is the author, co-author or editor of six books and is a highly recognized authority on international economic law.

SOME PERSONAL NOTES

To Edit or Not, That is the Question

If you search the internet for information on editors, you may, like me, come across a U.S. Department of Labor website which states:

> *Editors review, rewrite, and edit the work of writers. They also may do original writing. An editor's responsibilities vary with the employer and type and level of editorial position held. Editorial duties may include planning the content of books, technical journals, trade magazines, and other general-interest publications. Editors also review story ideas proposed . . . and . . . then decide what material will appeal to readers.*

I don't know why I expected to find something really helpful. In the end, I concluded that perhaps the best qualities for being an editor are to be well-informed about your subject, to be honest, to be fair, and to maintain a sense of humor. That way, you are best prepared to deal with the sometimes bruised egos of your contributors, and to make the right decision about a piece of copy which you might not agree with, but which you feel ought to be made available to your readers to make their own judgment.

Of course, the nature of the publication which one is reviewing has an impact upon the degree of editing. If you are at the top of the masthead on a journal paid for by subscription and advertising, you might look at the economics and consider whether you really want to accept articles which could have a detrimental effect upon circulation and/or the advertisers. Similarly, you might want to stay away from self-serving or outspoken editorial.

None of this, of course, applies to THE ARBITRATOR, which is meant to inform and educate SMA members and its general readership. It was conceived as a journal to publish industry news and opinion and to keep the readership informed about developments at the SMA and in the world of arbitration generally. And that is what we try to do.

For example, if someone wrote to me, as the editor, with a critique of an award which I had authored, it would be totally inappropriate to edit or censor such a submission. On the other hand, if a submission is made which is critical of the SMA, and the criticism is not constructive, I might elect to exercise my editorial prerogative. Similarly, I would not approve of THE ARBITRATOR being used as a means to criticize or attack others, including competing arbitration centers, or as a vehicle for the hubris of individual arbitrators.

In the end, I suppose the truth is that editing is something that cannot be taught. The fact that you can write does not necessarily mean that you can edit, any more than it means you can be a good public speaker. Oscar Wilde once said, "I was working on the proof of one of my poems all the morning and took out a comma. In the afternoon I put it back again." Now that's what I *call* editing.

Letters to the Editor?

Most publications have a section for "Letters to the Editor" – THE ARBITRATOR does not have this category because I don't hear from you. Therefore, I decided to adopt the popular tune title, "I'm gonna sit right down and write myself a letter and made believe it came from you."

Dear Editor,

Mary Thomson's article, "A Commercial Man" [April 2008 issue at p. 9] addresses the interesting issue of the relevant time for the arbitrator's qualification.

She wrote, ". . . 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. 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 Pan Atlantic case was decided in 1992.

I then came across this recent California Appeals Court decision (Jakks Pacific v. Superior Court of Los Angeles County, February 28, 2008, No. B201466) by Justin Kelly reported in ADRWorld, where it was held that under the State's arbitration statute, arbitrators are only required to disclose possible conflicts of interest that might impair their ability to be impartial upon notification of their selection by the parties or appointment by a court, not when they are nominated for service.

Jakks Pacific and THQ, Inc., partners in a limited liability company that builds and sells video games, periodically renegotiated their agreement. When they were unable to reach an agreement on their latest three-year agreement, THQ filed a petition to compel arbitration under the terms of the parties' arbitration agreement.

This agreement called for both parties to nominate one unaffiliated individual with experience in the electronic game industry and for the two nominated arbitrators to select a similarly qualified person to chair the panel. When this process did not work, THQ and Jakks agreed to have the trial court appoint an arbitrator from lists supplied by them. THQ proposed four people and Jakks proposed five. From these, the trial court nominated five candidates, four from THQ's list and one from Jakks's list.

About three weeks later, Jakks filed a notice demanding that the five nominated arbitrators disclose possible conflicts of interest pursuant to California Code of Civil Procedure Section 1281.9. Jakks attached its nominee's disclosures to this notice. THQ objected to Jakks's notice on the ground that disclosure is required at the time of the arbitrator's selection or appointment, not earlier. Jakks responded by filing a notice of disqualification of the nominees who did not make disclosures.

Agreeing with THQ that no disclosure were yet required, the trial court struck Jakks's notice of disqualification, appointed one of THQ's nominees and ordered him to make the required disclosures. Jakks sought the intervention of the appeals court by filing a writ of mandate. California's Second Appellate District affirmed the trial court's judgment.

Disclose Upon Selection

The appeals court held that arbitrator disclosure obligations under California Code of Civil Procedure Section 1281.9 are triggered when an arbitrator is notified that he is selected by the parties or appointed by the court to serve as a neutral arbitrator.

Section 1281.9(a) provides that "when a person is to serve as a neutral arbitrator, the proposed neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial."

The court said Jakks was wrong in arguing that the statute requires disclosure at the time of nomination. The disclosure requirement is not triggered until the arbitrator "is to serve" as the neutral under the statutory scheme.

Turning to the legislative history, the court noted that the phrase "is to serve" was added in 1997 and at that time the Senate Judiciary Committee explained that the amendment retained the mandate for "the appointed neutral arbitrator" to disclose information that

might cause his or her impartiality to be questioned.

The court concluded that Jakks's interpretation of Section 1281.9 contemplates a degree of familiarity between the arbitrator candidate and his proponent that is antithetical to the goal of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Standards) to encourage broad public confidence in the integrity and fairness of the process.

The court also opined that Jakks's proposed interpretation makes much more work for everyone involved without any apparent benefit, since it requires four proposed arbitrators to waste a substantial amount of time preparing disclosures when only one arbitrator will be selected.

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Why can't everyone be on the

same page?

Signed *Naïve and Puzzled*

Maybe someone will write to Naïve and Puzzled, and we will indeed have a Letters to the Editor section.

In Memoriam

Word just reached us that our former member Jan E. Jakubowski passed away on June 26, 2008. Jan was a graduate of the U.S. Merchant Marine Academy. After sea service, he joined Continental Grain from where he retired as Senior Vice President and President of Stellar Chartering and Brokerage Inc. after 31 years of service.

Rest in Peace

For THE ARBITRATOR

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