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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT'S CORNER

As we prepare to make our annual transition into a new year all of us in the maritime industry have but one wish, that 2009 may restore some sanity or at least some level of predictability to our entire industry. The shipping business is traditionally one of ups and downs, but the extremes we experienced in 2008 only make us prematurely old and gray.

The Society has had an interesting and eventful year and 2009 promises to be equally exciting. Early highlights are the seminar on arbitration planned for early spring in Connecticut and ICMA XVII (International Congress of Maritime Arbitrators) in Hamburg during the second week of October.

The SMA's Board of Governors joins me in hoping all of you had an enjoyable Christmas and, more than anything, wishing you a healthy, happy and prosperous New Year.

Klaus Mordhorst

MARITIME ALMANAC 2009

Chris Hewer looks ahead to what are likely to be the highlights of the next twelve months.

January: The London Maritime Arbitrators Association announces that, henceforth and forthwith and notwithstanding what has gone before, all awards issued by the LMAA will be published in journals read by ordinary shipping people. It says anybody put off by arbitrating in London as a result of this decision can eat crow. Meanwhile, the pilot of a 747 reports a near-miss over London with a farrow of airborne pigs. The *Hebei Two* are released by South Korea.

February: The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea is scrapped because it is no better than it should be and

because it has a silly name. Plans are immediately launched for a new convention which is identical to the 1924 Hague Rules in every respect with the single exception that the Article 3 reference to the carrier being "bound before and at the beginning of the voyage to exercise due diligence" is shortened on the grounds of health and safety issues to the carrier being "bound before and at the beginning of the voyage to exercise." Plans to shorten the clause still further, to "Carriers shall be bound before and at the beginning of the voyage" fail, after a recount. Carriers appeal, but to very few.

March: London maritime arbitrators, still acting strangely after agreeing to publish their awards, go mad at their annual dinner at the Carpenters Hall. An extra bottle of wine is ordered for the top table, and the idea of a press release is discussed, albeit half-heartedly.

April: The United States ratifies Hammurabi's Code of Laws (circa 1780 B C), which stipulates that "if a shipbuilder build a boat for some one, and do not make it tight, if during that same year that boat is sent away and suffers injury, the shipbuilder shall take the boat apart and put it together tight at his own expense. The tight boat he shall give to the boat owner." A spokesman for MARAD says, "The US has always believed in taking a lead when ratifying international conventions."

May: A maritime lawyer writes an article which does not contain a single footnote. This is claimed to be a first for the legal profession. The lawyer himself modestly claims that he was just feeling 'feckless' after his wife had divorced him for unreasonable verbosity[1]**.** Subsequent claims by a number of bar associations that they plan to start cracking down on redundant adverbs are refuted as historically, circumstantially, causatively and categorically unfounded.

June: Law firms everywhere announce that they no longer require all correspondence to be sent and received in triplicate - by post, fax and email.

A spokesperson for the IBA, or possibly the ABI, says, "We realise that most people these days have both letterboxes and fax machines. So we are dropping the requirement to send correspondence by email, as most lawyers do not have email, and those that *do* have no idea how to use it. As for attaching a document, you may as well ask the cat."

July: Claimants are increasingly spurning mediation, which is under fire for being too expensive and too protracted, in favour of the new Lite Courts, which hand down decisions quickly and without any regard for the law. All users of the Lite Court are entitled to a free lunch of cod and pineapple. Terms and conditions apply.

August: A momentous month. Baseball's World Series is renamed The American Series after complaints from the world, and American football is renamed American rugby after complaints from podiatrists. Following complaints from tautologists, Constant & Constant changes its name to Ampersand after a planned merger with Eversheds to create the new multinational firm of Ever Constant fails to get off the ground.

September: Shipbrokers admit that freight futures have no future, citing the credit crunch. The bans on fox-hunting, horsehair wigs in court, and smoking in public are lifted in England, where children are once more allowed to play conkers and be slightly chubby.

October: A leading arbitrator causes uproar at the ICMA meeting in Hamburg when he dismisses the Hamburg Rules as an allegory on the banks of the Nile. "Nobody wants them," he claims. "They are over-hyped, over-priced, over-rated and over there." *(points in the general direction of the Third World*.)

November: A sole arbitrator in Paris includes a dissenting opinion in his own award, claiming he was in two minds about offering an opinion at all. Benin ratifies the Athens convention on passenger liability. The EU competition directorate launches a dawn raid on its own premises and closes itself down.

December: The term 'stuffing' is banned from use in the container industry on the ground that it is unfair to turkeys. Somalian pirates start their own shipping company.

THE ARBITRATOR

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Scientists discover that there is nothing new to discover. The earth exhales.

1. Arbuthnot v Fassbender, ibid

WASHINGTON INSIDER

I thought it would be an interesting change to start off the 2009 issue with an analysis of the potential impact of the presidential election results upon the U.S. maritime industry. I thank Larry Kiern and Joe Keefe (*The Maritime Executive*) for permission to reprint the following article.

NATIONAL ELECTION RESULTS FORECAST ACTION FOR MARITIME POLICY

by Lawrence I. Kiern, Esq.
Partner, Winston & Strawn LLP

Election Results Signal Change

Elections matter. And this one illustrates that principle in an especially historic fashion. Whatever your views about the wisdom of the choices the American people have made, the fact is that elections remain America's formal constitutional mechanism to make the choices.

In the wake of the election results, divergent views about their meaning are being vocally expressed across the land. Commentators characteristically overstate the brilliance of the winners and exaggerate the missteps of the losers. A presidential election that experts predicted a year ago as most likely featuring Rudy Giuliani and Hillary Clinton as their respective party's nominees unfolded dramatically differently. A severe financial crisis that emerged in mid-September may have proven the decisive factor in what had been a much tighter race up to that point. Of course, the potential consequences for national economic and security policies dominate the headlines.

The election of the presidential candidate of the Democratic Party, Barack Obama, and the substantial enlargement of that party's congressional majority suggest that the stage is set for action, whether you like it or not. Simply put, just as certain GOP candidates warned during the election, one-party rule has its consequences. Some will judge the results positive while others will not.

Those who supported the defeated candidates will see their influence over the executive and legislative branches of the federal government diminished. With these branches of government more aligned by party affiliation, there is certainly greater likelihood for action on key issues. Additionally, with the start of a new legislative calendar, the ability of opponents of legislation to simply run out the clock, as they effectively did during 2008, is significantly diminished. The national legislative game clock has been restarted and the atmosphere has shifted to action over inaction.

History also teaches that a major challenge facing the new president-elect and the new congressional majority-elect will be not to overreach their electoral mandate. For example, in 1992 the Democratic Party's candidate, Bill Clinton, won the presidency and the party enlarged its governing majority in the House of Representatives to 258 and its majority in the Senate to 57, similar to the 2008 results. And while this led to impressive legislative achievements early on, the opposition successfully painted the majority as overreaching by criticizing proposals like "don't ask don't tell," stricter gun controls, higher taxes and universal health care. The majority's proposals encountered effective criticism and, coupled with scandal, soon sowed the seeds of its ensuing defeat. The result was the Republican Revolution of 1994.

It remains to be seen if the new leadership of our national government will heed this history lesson. To succeed for more than just two years, the new president and the new congressional leadership must balance the goals of achieving their agenda with accomplishing change that is sustainable. In essence, they must be mindful that, having won this election, the race for the next one has also just begun. This will require achieving a delicate political balance. As the legislative majority's caucus enlarges, so do the challenges presented to holding it together in the form of a governing majority. Even with its enlarged majority, the congressional Democratic Party is comprised of members reflecting politically diverse constituencies, some more progressive and some more conservative. Additionally, regional and interest-based differences abound in the caucus. And while the new president may have exhibited a progressive voting record in the Senate, he will have to hold his diverse party together to get things done. In an interview with Charlie Gibson of ABC News just before the election, then-candidate Barrack Obama acknowledged that he would have to govern from the "center."

Moreover, if the new administration really understands how to govern it will stay focused on solving the problems about which the electorate cares the most and not allow itself to be distracted by sideshows. At the same time, opponents of the new administration and the new congressional majority's leadership will work mightily to defend their interests and, if necessary, they will distract and derail the new administration from enacting new policies and legislative programs they oppose. This includes seizing on missteps and highlighting the mistakes the new leadership will inevitably make. Such is the way of national politics in America. But, despite the likely controversies, for about 18 months the new president and the congressional leadership will have an unusual opportunity to enact their agenda.

The Impact On The Maritime Industry

The consequences of the election will also likely extend to the maritime industry. However, they will do so in an indirect way. Maritime-specific policy matters have not figured prominently in the new president's agenda or that of the congressional leadership, which has instead focused on broader national economic and security issues.

The new public mood and the apparent willingness of the new administration to (1) cut taxes for the middle class while restoring higher taxes for those with higher incomes and (2) increase "common sense" regulation suggest that these kinds of changes will apply with equal force to the maritime industry. Additionally, the philosophy of the new administration appears likely to support proposals that require the industry to take additional steps to improve safety and reduce marine pollution.

The election results will also likely embolden advocates of stronger environmental protection measures to press their agenda more vigorously. For example, even with the passage of domestic legislation implementing MARPOL Annex VI during the 110th Congress, the State of California continues to press its right to require more ambitious air emission controls by regulating marine fuels.

Additionally, considering their victory in the courts, environmental advocates of stricter regulation of ballast-water discharges will likely press their position vigorously before the new administration. While the Bush Administration's EPA proceeded reluctantly with new ballast-water regulations only after being ordered by the courts, the new administration is more likely to adopt a proactive approach that will require additional safeguards. If the new administration adopts such an approach, it seems there will be little need for further legislation on the subject as the authority under the Clean Water Act may prove sufficient to impose stricter requirements.

When one considers the maritime legislative proposals that languished in the 110th Congress, it seems likely that they will form the foundation for the maritime legislative agenda in the 111th Congress. For example, the House of Representatives supported measures to reform the Coast Guard's marine safety program, the licensing of mariners, and fishing vessel safety. Additional oil spills and the continuing loss of fishing vessels and the lives of their crews at sea suggest that the reasons behind these measures will continue to persuade members of Congress to act.

110th Congress Promoted Significant Maritime Improvements

Most of the maritime legislative agenda foundered during the 110th Congress. But that does not mean that the Congress accomplished little.

To the contrary, congressional scrutiny of the Coast Guard's marine safety program, led by Chairman James Oberstar (D-MN) of the House Transportation and Infrastructure Committee, undoubtedly produced positive results. As an initial step, the Commandant of the Coast Guard swiftly acknowledged the service's shortcomings and proposed a serious reform plan. The Bush Administration budget request proposed additional resources and the Congress appropriated substantial additional funds. As a result, on October 24, 2008, the Coast Guard announced that it would add 500 new marine inspectors, investigators and other personnel. These additional resources, coupled with the Coast Guard's marine safety reform plan, should substantially improve the service's capability in this important area.

Additionally, some measures of interest were enacted into law during the waning days of the 110th Congress. As reported previously in this column, Congress and President Bush enacted into law implementing legislation for MARPOL VI and exemptions from the permitting requirements of the Clean Water Act for recreational boaters and certain small commercial vessels. These narrowly crafted measures were portrayed by their supporters as essential and enjoyed widespread bipartisan support, which allowed their passage when other measures remained stymied.

The Coast Guard also persuaded Congress to enact specific legislation outlawing the use of submarines by drug smugglers. In the last few years, the Coast Guard has reported the increased use of submarines and semi-submersibles to smuggle illegal drugs from South America into the United States. So far this year the Coast Guard

reports it has spotted 60 such vessels and estimates that about 30 percent of Colombia's cocaine is smuggled into the United States using these vessels. In connection with a recent federal court proceeding in Tampa, smugglers told federal agents that their 50 to 60-foot-long submarine carried six to eight tons of cocaine from Colombia's Pacific Coast for transfer to a Mexican fishing vessel. While the Coast Guard has been successful in interdicting many of these shipments, it also sought an express legislative enactment outlawing the use of submersibles. Congress passed the measure and President Bush signed it into law on October 13, 2008.

Congress also enacted into law the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (the "DOD Act"), which President Bush signed into law. In the absence of a Coast Guard Authorization Act in 2008, this measure included significant maritime provisions, some of which are highlighted in brief.

The DOD Act effectively provides the Department of Transportation ("DOT") enhanced powers in several key respects. First, it provides new authorities to enforce cargo preference laws and clarifies the scope of these laws. The legislation seeks to resolve disputes that have arisen about the application of cargo preference requirements. Second, the DOD Act provides that DOT must make an affirmative determination that U.S.-flag vessels are not available before the executive branch can waive the Jones Act for national security reasons. President Bush twice waived the Jones Act in the aftermath of Hurricanes Katrina and Rita in 2005. These waivers raised questions about DOT's authority, and the legislation seeks to clarify the process by requiring a DOT determination for all waivers "of the non-availability of qualified United States flag capacity to meet national defense requirements."

Additionally, as a practical matter the DOD Act likely ends the controversial practice of exporting vessels owned by the U.S. government for scrapping abroad. The law now requires that there must be a "compelling need for dismantling." Additionally, exporting is allowed only if there is no available U.S. scrap yard capacity, and foreign scrapping must be conducted in accordance with U.S. standards. It appears these conditions may prove insurmountable, effectively bringing the practice to an end.

Outlook

These very limited enactments at the close of the 110th Congress illustrate how difficult the legislative process proved in the past election year when, as a practical matter, very little moved through the U.S. Senate. Now that the election is one for the history books, the stage is set for more ambitious policy changes. These broader changes will no doubt affect the maritime industry along with the rest of the nation. For the good of the country, let's hope they work and that the unintended consequences that will result don't eclipse the accomplishments.

NOTE: This article appeared in *The Maritime Executive* Nov/Dec 2008 edition at pp. 10/12.

HATFIELDS V. MCCOYS?

On occasion, I hear the comment, "That's interesting, but it does not apply to us." Many things do not apply to us as arbitrators or the SMA, but nevertheless they might be of interest and broaden our horizons. Even if it is not exactly on point, there may be an issue discussed from which we can learn.

As far as the arbitrators are concerned, Haig Oghigian's article is easy to take since he critiques the lawyers. On the other hand, Jerry McAlinn's article might strike a chord with some. One reader of the article commented, "This piece is of interest but to be clear, are you suggesting that New York arbitrators are insensitive or prone to misbehavior?" Someone responded that, "These are common failings of arbitrators and some examples have been observed in New York from time to time as well as elsewhere. It's always a good thing for professionals to be reminded of pitfalls."

Carl Jung stated in *Contributions to Analytical Psychology*, "The shoe that fits one person pinches another," but the more popular saying is no doubt the reference to Cinderella, "If the shoe fits, wear it."

Enjoy the articles.

EIGHT WAYS TO IRRITATE AN ARBITRATOR

by Haig Oghigian, FCIArb.
Partner, Baker & McKenzie GJBJ, Tokyo, Japan

1. Come To The Hearing Unprepared

The golden rule is to be prepared. Preparation is the most important factor affecting the outcome of a case. Know your file, the facts, the law, your strategy - and maybe most important of all, where to find things. It's obvious counsel haven't prepared when they spend a lot of time

looking for documents and going through their notes. Really good counsel are prepared. They don't waste their client's time or money.

2. Carry On A Debate Directly With Opposing Counsel

The role of a lawyer is to bring information to the Tribunal not to try to debate with opposing counsel. Forgetting that the arbitrators are there is a bad move. It is not appropriate for counsel to break into conversation. The worst situation is two aggressive lawyers who dislike each other for whatever reason, and have decided to use the proceedings as a way to settle the score.

3. Argue With An Arbitrator After A Ruling

You win some, you lose some. Counsel should accept a ruling with good grace and carry on. This means accepting a decision during a hearing and not trying to re-try a decision after it has been made. The matter is closed. Move on.

4. Badger A Witness

It's acceptable, of course, to make a fair attack on the credibility of a witness; it is offensive, to badger or berate a witness. The media perpetuate the image of lawyers who seem to be successful by being belligerent and bullying.

5. Bluff

Here's a good career-limiting move: give the Tribunal incomplete information about the evidence. Believe it or not, some counsel panic under pressure and fudge the facts. It might seem obvious that this really isn't a great idea. Arbitrators prefer counsel who are straightforward about the facts and don't try to twist them to suit their purpose. Arbitrators want all the relevant information, not just the best cases from one point of view. Honesty remains the best policy.

6. Come Up With As Many Arguments As Possible, Regardless Of Their Worth

Arbitrators value counsel who are brief and to the point. They don't want to hear arguments on six different points when only two have merit. I believe that lawyers are becoming too careful, leaving no stone unturned. But the downside of that approach is that when some of the arguments are clearly borderline, the arbitrators may start to question the worth of all the arguments put forward. Far better to face boldly the difficulties in the case. There's no point in burying your problem and hoping that no one will notice. The most effective counsel come up with an answer to a problem, rather than trying to avoid it.

7. Contact An Arbitrator About A Case In Progress

Follow the rules: don't communicate with an arbitrator while a case is underway.

Another complaint is correspondence sent to an arbitrator that has not been copied to opposing counsel.

8. Show Disrespect To The Process

In many ways, this category covers all the points already listed. If you want to really test an arbitrator's patience:

- Whisper with colleagues or witnesses when other people are speaking.
- Make faces or gestures in reaction to testimony or counsel's questions.
- Remain seated while you're speaking.
- Interrupt people.
- Offer no explanation for being late.
- Never extend a professional courtesy.
- Never apologize.
- Treat staff rudely.

To conclude, arbitrators try hard to overlook personal quirks and nervous habits, unless they interfere with the orderly running of the process. They do care, however, about counsel who are rude to staff or disrespectful of the process and particularly counsel who stretch the truth and play games.

Note: This article previously appeared in Mealey's International Arbitration Report, Volume 22, Issue #9 – September 2007.

SEVEN WAYS TO IRRITATE COUNSEL IN AN ARBITRATION

by Gerald Paul McAlinn
Professor of Law, Keio Law School, Tokyo, Japan

My good friend and colleague, Haig Oghigian, recently wrote a thought-provoking commentary in Mealey's International Arbitration Report entitled "Eight Ways to Irritate an Arbitrator." It is recommended reading for all lawyers who practice regularly, or even occasionally, at the arbitration bar. Having served as an arbitrator in multiple arbitration cases (including a recently concluded one where I was honored to serve on a panel chaired by Haig), I thought it might be equally instructive to turn his harsh light on the other side of the table.

Before turning to my list, I recognize experienced arbitration lawyers may well remark that there are surely more than seven ways an arbitrator can irritate counsel. This point is duly noted for the record. In my judgment,

however, it would not be prudent for many reasons to list more than seven in this essay.

1. Come To The Hearing Unprepared

The golden rule of being prepared applies with equal or greater force to arbitrators. Parties to arbitration have paid substantial institutional fees for the right to have their dispute resolved by knowledgeable, experienced and informed professionals. Counsel will have spent many hours preparing their cases and formulating strategies with their clients. The arguments necessary to resolve matters fairly are often complex and sophisticated. They cannot be fully appreciated or grasped "on the fly." The main function of the hearing is to focus the attention of the arbitrators on critical factual and legal points in dispute, not to waste time having to educate the arbitrators about things that already appear in the written submissions.

2. Carry On A Debate Directly With The Other Arbitrators

Some interchange among arbitrators during hearings is necessary and can be productive. It should go without saying, however, that arbitrators should not engage in prolonged repartee or idle chit chat among themselves while counsel is speaking or witnesses are testifying. Arbitrators are free to disagree among themselves and there is no obligation to reach unanimous decisions on rulings or even the final award. But, if the arbitrators are going to disagree as to a particular point and it is important to the forward movement of the proceedings, they should adjourn to a private room and discuss the issue internally. They should not debate openly among themselves during the proceedings, or otherwise disrupt counsel or witnesses. This is especially important for tribunals where two of the arbitrators are party nominated. Having accepted such an appointment, a party nominated arbitrator undertakes a duty of independence and is not a "second" advocate in the hearings for the party that nominated the arbitrator.

3. Badger A Witness Or Counsel

This irritant follows closely from what was said in the previous paragraph. Counsel has been engaged to present the case for his or her client and to expose the weaknesses in the case of the other side. The role of the arbitrators is to listen and to ask questions when there is a genuine need to clarify evidence or to understand legal arguments. At the risk of being overly blunt, arbitrators should come to the hearing to listen, not to talk. An arbitrator may, on occasion, feel a measure of disdain for the testimony of a witness, or the skill of counsel. Nevertheless, everyone involved in the process is entitled to be treated with dignity and respect at all times. Utterances from tribunal members such as "You must be joking" or "That is the most ridiculous thing I have ever heard" or "Are you seriously asking us to believe …" or "You cannot really be arguing that …" have no place in arbitral proceedings.

4. Contact Counsel Or A Party About A Case In Progress

Believe it or not, it sometimes happens that a party nominated arbitrator will initiate contact with counsel for the party that nominated the arbitrator. Anecdotal stories abound from arbitrators who have experienced instances where tribunals have discussed various shortcomings during end of the day internal deliberations only to have counsel start the next day as if he or she were responding to a question or concern from the tribunal. Coincidence? Possibly, but the suspicion is, of course, that one of the arbitrators leaked information about the internal deliberations to counsel. The integrity of the arbitral process demands that arbitrators avoid all *ex parte* communications with the parties and counsel, which means in no uncertain terms *never* initiating it.

5. It's Great To Be The Judge

Many lawyers have a secret longing to cap their distinguished careers with a judicial appointment. How wonderful to be addressed as "Your Honor" or as "My Lord" while presiding at trial and striding the halls of justice! But, even the most respected judges must submit to appellate review. Likewise, the calls of sports umpires and referees are subjected to the scrutiny of "instant replay." Arbitrators, on the other hand, are granted broad and virtually unfettered discretion to find facts and apply the law as they see it. There is no meaningful appellate process, apart from enforcement challenges, to rein in egregious errors or abuses. The power to tell other lawyers what you what them to do and by when can be heady stuff. A good arbitrator resists the dark side of this authority. A corollary to this point is what might be called the "King Solomon Syndrome." Arbitrators with this syndrome have a tendency to pressure parties to "split the baby" in order to force a settlement. Amicable settlement of disputes is admirable when the parties want it, but the parties have bargained for, and are entitled to, a decision without undue pressure to compromise.

6. The Smartest Person In The Room

Many an arbitrator has had to resist the urge to jump over the table to cross-examine a witness or to make an obviously effective argument when counsel seems to be bumbling. While the objective of the proceedings is to achieve a just result, it is for counsel to decide how best to present

the case for the client. Counsel must be given leeway to draw out facts and to make arguments in accordance with a pre-determined strategy. It is not for the arbitrators to disrupt this process by assuming they are smarter than the lawyers and know the real issues in the case from the outset. It is wise to remember that counsel will have spent vastly more time understanding what happened between the principals and in researching the applicable law.

7. Show Disrespect For The Process

Arbitrators have a duty to maintain a judicial demeanor and to preserve the dignity of the arbitral proceedings at all times. Clients are usually present for all or most of the hearings in court, they are easily reminded of the high purpose they are about by the trappings of the courtroom. Arbitral hearings are, in contrast, frequently conducted in conference rooms, which can make proceedings appear to the principals as being little different from business meetings or negotiations. Glancing through tour books, or pecking feverishly at one's Blackberry, during hearings is a sure way to leave the participants wondering why they chose arbitration in the first place.

In conclusion, arbitrators can greatly enhance the legitimacy of the arbitral process by ensuring the parties have a fair, unbiased, and equal chance to present their cases, and by giving counsel and witnesses their full attention. When arbitrators act in an honest, principled, even-handed and transparent manner, parties and their lawyers are more likely to leave the process with a feeling that they got a fair shake.

Notes: Professor McAlinn would like to acknowledge the contributions of Yu-Jin Tay, Counsel, Asia International Arbitration Group, Shearman & Sterling, Singapore.

This article previously appeared in *Mealey's International Arbitration Report*, Volume 23, Issue #10 – October 2008.

PRESENTATION TO THE INTERNATIONAL GROUP OF DEFENCE CLUBS

by Keith W. Heard, Esq.
Partner, Burke & Parsons

As part of the continuing effort to promote maritime arbitration in New York, three members of our community delivered a formal presentation on SMA arbitration to a gathering of Freight, Defence and Demurrage Clubs in the International Group in London on the afternoon of Thursday, October 23, 2008.

SMA president Klaus Mordhorst, immediate past president David Martowski and attorney Keith Heard of the law firm of Burke & Parsons spoke to a group of over 25 Defence Club representatives at the offices of Tindall Riley & Co., managers of the Britannia P&I Club, on St. Thomas Street, south of the River Thames. The meeting was arranged and hosted by Tindall Riley partner Robert Hough, who did an excellent job and is well-deserving of the gratitude of all who attended and participated in the event.

Mr. Mordhorst opened the presentation by briefly recounting the history of the SMA and then describing the varied backgrounds and qualifications of the current SMA members, prior promotional efforts in various locations away from New York and the functions of "The Arbitrator" and the Award Service, which has no analogue in London, where maritime arbitration awards are not published.

Mr. Martowski, who was well-known to many in the audience as a result of his years of service with Thomas R. Miller & Sons, addressed the topics of confidentiality of awards (upon request of the parties), emergency hearings, interlocutory orders, current trends, discovery, consolidation of related proceedings and the awarding of legal fees to prevailing parties. There was particular interest among members of the audience in the last two topics he discussed.

Mr. Heard, who serves as chairman of the U.S. Maritime Law Association's Committee on Arbitration and ADR, spoke about arbitrators' reliance on legal and arbitral precedents, the narrowing of differences between New York and London over the legal effect of "subject details" in fixture negotiations, the limited grounds available for vacating awards under the Federal Arbitration Act, recent developments in U.S. law concerning the continued validity of the "manifest disregard" doctrine and, finally, the very positive judicial attitude toward maritime arbitration in the U.S.

After the formal presentations, the speakers fielded a number of interesting questions from the audience. In fact, time ran out before the questions did.

On the social side, the event was preceded by a reception at which the speakers had an opportunity to meet the audience and closed with a lively drinks reception at which the audience followed up on their questions and explored other topics of interest with the speakers.

The audience included managers from the American Club's London office and from A. Bilbrough (the London Club), Britannia, Gard, North of England, Steamship

Mutual, Shipowners' Protection Club, the UK Club and West of England. David Martin-Clark, a well-known London arbitrator and mediator known to many members of the SMA, was also in attendance. The SMA wishes to express its thanks to Mr. Hough and Tindall Riley for their cooperation, assistance and warm hospitality and to all members of the audience for their patience and interest.

RULE B: EXPANDED SCOPE OF MARITIME CONTRACT JURISDICTION —VESSEL SALES CONTRACTS

by James H. Hohenstein, Esq.
Michael J. Frevola, Esq.
Francesca Morris, Esq.
Partners in the Holland & Knight LLP Maritime Group

Overview: Rule B Jurisdiction

A fundamental requirement in asserting a Rule B maritime attachment action is that the underlying claim is within the federal court's maritime jurisdiction.[1] This principle makes perfect sense, as the very purpose of maritime attachments are rooted in the unique and mobile nature of maritime commerce.[2]

Vessel Sales Contracts

For decades, it has been a basic principle of U.S. admiralty law that contracts for the sale of a vessel are not within the maritime jurisdiction.[3] While the principle has been criticized,[4] nonetheless it is still considered black letter law.

Kalafrana Shipping Ltd.

In a decision issued last week, a judge of the U.S. District Court for the Southern District of New York, the Honorable Shira A. Scheindlin, has held that a contract for the sale of a vessel is within the maritime jurisdiction and thus supports the maintenance of a Rule B attachment action.[5]

In Kalafrana, an aspect of the sales agreement concerned repairs to the vessel. A dispute over the repairs led to a London arbitration and award. The New York Rule B action was based on the award. While Judge Scheindlin certainly recognized and acknowledged the traditional precedent, the Court held that more recent U.S. Supreme Court and New York appellate decisions supported the "demise" of the traditional rule.[6]

Commentary

This decision is extraordinary in that it weakens a bedrock principle in New York admiralty jurisdiction (always a leading light in U.S. maritime jurisprudence). The ruling is likely to have an immediate and wide-reaching impact on New York Rule B actions.

Whether or not Kalafrana itself is appealed, the issue will undoubtedly come up in other cases which will be subject to appellate review.

Kalafrana also placed emphasis on the fact that the dispute involved a "launched ship that has been plying the seas for some time" – particularly repairs to the vessel being made under the sales contract.[7] While the decision is broad enough at least to enable other parties to argue, in good faith, that a straightforward ship sales contract is within the maritime jurisdiction, the fact that the vessel was already in operation is a key point to consider. Because newbuilding vessels are sometimes sold before even leaving the shipyard, the traditional rule is still significant.

As the other judges of New York federal courts are not bound by Kalafrana[8] this issue portends further extensive litigation.

Finally, whatever one's opinion concerning the rationale of the traditional view, it is worth noting that Kalafrana is consistent with general principles of international maritime law.[9]

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1. See Winter Storm Shipping, Ltd. v. TPI, 310 F.3d 263, 268 (2d Cir. 2002) (to warrant the issuance of a maritime attachment, "the plaintiff's claim must be one which will support a finding of admiralty jurisdiction under 28 U.S.C. §1333") (citations omitted).

2. "Maritime attachments arose because it is frequently, but not always, more difficult to find property of parties to a maritime dispute than of parties to a traditional civil action. Maritime parties are peripatetic and their assets are often transitory." *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd*., 460 F.3d 434, 443 (2d Cir. 2006) (citation omitted).

3. See, e.g., *The Ada*, 250 F. 194 (2d Cir. 1918); *International Shipping Co., S.A. v. Hydra Offshore, Inc.,* 675 *F.Supp*. 146, 150 (S.D.N.Y. 1987), *aff'd*, 875 F.2d 388 (2d Cir. 1989); *Economu v. Bates*, 222 *F.Supp*. 988, 991 (S.D.N.Y. 1963).

4. "[T]he petrified rule that ship-sale contracts are not within the admiralty jurisdiction … 'arose as an analogy to a case which is inconsistent with the basic principles governing the admiralty

jurisdiction of United States courts.'" *Jack Neilson, Inc. v. Tug Peggy*, 428 F.2d 54, 58 (5th Cir. 1970) (quoting Note, Admiralty and Ship-Sale Contracts, 6 Stan. L. Rev. 540, 540 (1954)).

5. *Kalafrana Shipping Ltd. v. Sea Gull Shipping Co. Ltd*., a/k/a Sea Gull Shipping Co. SARL, 08 Civ. 5299 (SAS) (S.D.N.Y. Oct. 2, 2008) ("Opinion").

6. *Id*. at 11 (citing *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd*., 543 U.S. 14 (2004) and *Folksamerica Reinsurance Co. v. Clean Water of New York*, Inc., 413 F.3d 307 (2d Cir. 2005)). Neither *Kirby* (the scope of maritime contract jurisdiction regarding bills of lading) nor *Folksamerica* (the scope of maritime insurance contracts) dealt with contracts for the sale of a vessel. However, in Kalafrana Judge Scheindlin concluded that "Given their broad language, *Kirby* and *Folksamerica* support the demise of the holding in The Ada." Opinion at 11.

7. Opinion at 11. Certainly, claims relating to ship repairs are part of the traditional maritime jurisdiction. See *Flota Maritime Browning de Cuba, Sociadad v. Snobl*, 363 F.2d 733, 736 (4th Cir. 1966).

8. For example, on August 25, 2008, another judge of the Southern District, the Honorable Jed S. Rakoff, issued a memorandum order vacating a maritime attachment and dismissing the complaint on the basis that the action was founded on a vessel sale contract. *Vrita Marine Co. Ltd. v. Seagulf Trading, LLC*, 08 Civ. 5614 (JSR) (S.D.NY. Aug. 25, 2008).

9. See International Convention on Arrest of Ships, 1999, Article 1(1)(v) (any dispute arising out of a contract for the sale of a ship is a "maritime claim"). While the 1999 convention is not yet in force, its definitions arguably reflect the evolving state of international maritime law. As of July 26, 2008, seven nations have consented to the 1999 Convention. Ten signatories are required for it to enter into force. http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&id=335&chapter=12&lang=en. Moreover, the contents of this Maritime Alert are not intended to be, and should not be construed as, legal advice. The assistance of attorneys should be sought with regard to any specific circumstances for which legal advice is required.

THE EOS

by Jack Berg

During December 2005, Petroleos de Venezuela (PDVSA) sold a cargo of 500,000 bbls. of fuel oil FOB Amuay Bay. This cargo quantity was subsequently resold through a chain of buyers, the last purchaser being Chemoil Corp. (Chemoil). The cargo specification most relevant to the issues in this proceeding provided for a maximum S&W of 1.0%. Quality was to be determined by a load port independent inspector based upon a representative shore tank composite sample taken prior to loading. The EOS was chartered by Chemoil's affiliated company from Venfleet Ltd. (Venfleet) on a Shellvoy 5 form to lift the cargo which was intended to be delivered into Chemoil's tankage in Bayonne for subsequent sale as bunker grade fuel after required blending. The vessel was to maintain loaded temperature up to 135º F.

The cargo loaded to the EOS was drawn from open pit tank 801 and loaded through pipeline flow meters. Fuel oil quality at Amuay Bay is determined by ship composite samples drawn by PDVSA personnel after the vessel has loaded which are subsequently tested in the PDVSA's laboratory.. The PDVSA Report of Quality at loading indicated S&W of 0.7%. The Saybolt pre-discharge cargo analysis sample upon delivery at Bayonne noted the water content to be 1.8%. A portion of the cargo was discharged and the vessel was sent offshore awaiting discharge instructions for the balance. Chemoil asserted it could not handle or store the high moisture cargo at that time. The vessel was subsequently brought alongside 18 days later when she completed discharge.

The vessel acknowledged its heating coils leaked during the course of the voyage and that it had introduced some water into the cargo. The amount was a source of controversy.

During January 2006, Chemoil commenced legal proceedings in the USDC for the District of New Jersey to obtain security for its alleged cargo contamination claim. Venfleet sought counter-security for unpaid freight and demurrage. After extensive motion practice, two court hearings and oral argument, the parties agreed that the issues before the Court should be disposed of in arbitration. The parties agreed to Jack Berg as sole arbitrator and the Court stayed all proceedings pending completion of the arbitration.

The arbitration proceeded shortly thereafter with the introduction into evidence of all court documents, the deposition testimony of the Master and senior vessel officers and the testimony of a number of fact and expert witnesses. There was extensive discovery and document production. Counsel exchanged Main Post Hearing and Reply Briefs.

Chemoil's claim was for $471,435 representing damages for cargo contamination and other expenses allegedly resulting from the EOS' unseaworthiness and other multiple faults. Venfleet's counterclaim was for $1,190,112 for demurrage and other expenses. Both parties claimed interest, counsel fees and reimbursement of costs.

Chemoil contended it presented a *prima facie* case by proving the vessel received the fuel oil in good condition

and outturned it in damaged condition at discharge. In addition, Chemoil argued the vessel was unseaworthy at the commencement of the voyage and that Venfleet failed to exercise due diligence to make it fit to lift a heated fuel oil cargo. It was Chemoil's position that it was not responsible for demurrage at the load and discharge ports because the relevant delays were caused by vessel fault and its inherent unseaworthiness.

It was Venfleet's position that the cargo loaded at Amuay Bay had a water content of 1.4%-1.5% instead of the .7% indicated by the load port inspector. Venfleet conceded the cargo heating coils leaked during the voyage but maintained the leakage contributed little moisture to the cargo enroute. Venfleet alleged Chemoil purposely and intentionally kept the vessel off the berth for 18 days, utilizing it as floating storage to take advantage of a sharply rising product market.

The threshold questions the arbitrator considered especially relevant to the issues in dispute were as follows:

- What was the fuel oil quality at loading and more specifically what was its water content?
- How much water did the vessel actually inject into the cargo through leaking heating coils?
- Did Chemoil sustain any damages as a result of the leaking heating coils?
- Should Chemoil bear liability for the EOS' demurrage at the load and discharge ports?

Chemoil argued that the PDVSA loaded quality determination of 0.7% water content, also indicated on the bill of lading, established its *prima facie* case that the cargo was loaded to the vessel in good condition. The arbitrator concluded otherwise based upon the weight of substantial collateral evidence indicating the loaded water content of the fuel oil at Amuay Bay was most likely within the range of 1.4 to 1.5%. The arbitrator's finding of fact was based upon:

- A clean bill of lading is not *prima facie* evidence of fuel oil quality. The vessel was not obliged to test for cargo specifications nor to detect any possible defect that was not apparent and observable. While an independent inspector's Certificate of Quality may be *prima facie* evidence of cargo quality under a purchase and sale contract it does not have the same import when applied to a shipper/shipowner relationship.
- The documents and testimony confirmed that the entire EOS cargo was drawn from open pit 801, which had an average moisture content of 1.4%. A PDVSA vessel that loaded from tank 801 just prior to the EOS reported a loaded water content of 1.3%.
- If the 0.7% moisture content Chemoil urged was correct, the vessel would have had to inject in excess of 6,000 bbls of fresh water into the cargo from the heating coils. This was impossible considering the amount of fresh water the vessel had on hand and the amount it could have produced with its evaporators.
- The chain of sales agreements provided for quality to be determined by a composite of shore specifications as measured in the shore tanks to be loaded. Clearly this was not done. Nor were the load port samples retained after the dispute arose as Chemoil promised the Court.
- The ullage to ullage reconciliation as well as the shore tank to shore tank comparison clearly established that the additional water presumably added by the vessel through its leaking heating coils was less than 0.4% — clearly in line with the arbitrator's finding that the loaded quality moisture was in the vicinity of 1.4-1.5%.

Chemoil argued that when a cargo loss is the result of a validly excepted cause and the vessel's failure to exercise proper care, the vessel is fully responsible for the entire loss unless it can separate the loss resulting from each cause, citing *Schnell v. Vallescura,* 293 U.S. 296 (1934):

> *…the carrier must bear the entire loss where it appears that the injury to cargo is due either to sea peril or negligent stowage, or both, and he fails to show what damage is attributable to sea peril.*

The arbitrator concluded that the *Vallescura Rule*, if applicable here at all, does not modify or change the claimant's obligation to first establish the good order and condition of the cargo when loaded. The fuel oil loaded to the Eos was not in good order and condition when loaded.

It was Chemoil's obligation to promptly discharge the Eos on its arrival alongside. It delayed discharge for an inordinate period of time, allegedly because of the high water content of the product. However, the evidence established to the arbitrator's satisfaction that the high water content was inherent to the cargo when loaded. The vessel's leaking heating coils contributed very little to the problem. The delay was not the result of Venfleet's fault, therefore, the demurrage was due and owing.

In summary, the arbitrator denied Chemoil's claim in its entirety and awarded Venfleet damages of $1,986,882, which included $572,000 towards reimbursement of Venfleet's counsel fees and costs (SMA 4002).

MANIFEST DISREGARD AFTER "HALL STREET"

by Keith W. Heard
Partner, Burke & Parsons

Rulings in two recent federal court cases dealing with maritime arbitration awards illustrate the difficulty lower courts now face in determining whether manifest disregard of the law is still a basis for vacating an award, in the wake of the U.S. Supreme Court's decision in March of 2008 in *Hall Street Associates, LLC v. Mattel, Inc.,* 552 U.S. __, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008).

In *Hall Street*, the issue before the Court was whether private parties can by agreement validly expand the scope of judicial review of arbitration awards. In the course of answering that question in the negative, the Court considered an argument by petitioner, Hall Street, that the scope of review could be extended beyond the grounds enumerated in the Federal Arbitration Act ("FAA") because the Supreme Court itself had done so in accepting manifest disregard of the law as an additional "judge-made" basis for vacating an award. If judges could expand the scope of judicial review of awards, then *ipso facto* private parties, whose agreement gave rise to the arbitration in the first instance, could do so.

The Supreme Court, in a decision authored by Justice Souter, dealt with this argument in what many consider a less than satisfactory way. Indeed, the Court's discussion of manifest disregard in *Hall Street* seems to raise as many questions as it answers. After quoting from its earlier opinion in *Wilko v. Swan*, 346 U.S. 427 (1953), the Court wrote as follows:

> *Hall Street reads this statement [from Wilko] as recognizing "manifest disregard of the law" as a further ground for vacatur on top of those listed in § 10 [of the FAA], and some Circuits have read it that way. * * * Hall Street sees this supposed addition to § 10 as the camel's nose: if judges can add grounds to vacate (or modify), so can contracting parties.*
>
> *But this is too much for Wilko to bear. Quite apart from its leap from a supposed judicial expansion by interpretation to a private expansion by contract, Hall Street overlooks the fact that the statement it relies on expressly rejects just what Hall Street asks for here, general review for an arbitrator's legal errors. Then there is the vagueness of Wilko's phrasing. Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. * * * Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers." * * * We, when speaking as a Court, have merely taken the Wilko language as we found it, without embellishment, see First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995), and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges. 128 S.Ct. at 1403-04.*

For some attorneys, it is difficult to read the Court's ambiguous language as sounding the death knell for "manifest disregard" — especially when the Court writes that "maybe" manifest disregard was meant to be one thing but "maybe" it was meant to be something else. What are we to make of such questioning, uncertain language? It seems that all the Court really said was that Hall Street's argument in favor of expanded review, based on the manifest disregard doctrine, must fail. However, that is far from saying that "manifest disregard" itself is now defunct as a basis for seeking vacatur of an arbitration award.

Not surprisingly, the courts that have considered the status of "manifest disregard" since the Supreme Court's decision in *Hall Street* have disagreed as to the continued vitality of the doctrine. Some Courts have concluded that *Hall Street* did indeed put an end to manifest disregard while other courts have ruled the other way. *Compare Robert Lewis Rosen Assoc. Ltd. v. Webb*, No. 07 Civ. 11403, 2008 WL 2662015 (S.D.N.Y. July 7, 2008), and *Prime Therapeutics LLC v. Omnicare Inc.*, 555 F.Supp.2d 993 (D.Minn. 2008), *with Mastec North America Inc. v. MSE Power Systems, Inc.*, No. 08 Civ. 168, 2008 WL 2704912 (N.D.N.Y. July 8, 2008), and *Eastern Seaboard Concrete Const. Co., Inc. v. Gray Const. Inc.*, No. 08-37-P-S, 2008 WL 1803781 (D.Me. April 18, 2008).

Recently, the issue has come up in cases dealing with challenges to maritime arbitration awards. In *Stolt-Nielsen SA v. AnimalFeeds Intern. Corp.*, 548 F.3d 85 (2d Cir. 2008), a case involving an attempt to vacate an award determining that the arbitration clauses in the ASBATANKVOY and VEGOILVOY forms permitted class action arbitration, the Court of Appeals concluded that manifest disregard

was still a viable doctrine, despite what the Supreme Court said in *Hall Street*. The Second Circuit noted the broad, accommodating nature of the language in *Hall Street* and wrote as follows:

> *The Hall Street Court held that the FAA sets forth the "exclusive" grounds for vacating an arbitration award. * * * But the Hall Street Court also speculated that "the term 'manifest disregard' … merely referred to the § 10 grounds collectively, rather than adding to them" – or as "shorthand for § 10(a)(3) or § 10(a)(4)." * * * It did not, we think, abrogate the "manifest disregard" doctrine altogether. 548 F.3d at 94-95.*

Indeed, the Second Circuit believed it would be outside the scope of an arbitration clause for arbitrators to act in manifest disregard of the law or that, if they did so, they would have "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made", in violation of 9 U.S.C. § 10(a)(4). In other words, there are strong arguments for preserving the doctrine of manifest disregard.

However, in *Andorra Services, Inc. v. M/T EOS*, No. 06-373, 2008 WL 4960449 (D.N.J. Nov. 19, 2008), another recent assault on a maritime arbitration award, the Court limited "its review to the statutory grounds set forth in §§ 10 and 11 of the FAA", without any reference whatsoever to the concept of manifest disregard. In that case, a sole arbitrator rejected charterer's claim for cargo contamination and awarded owner demurrage for the time spent waiting for cargo interests to decide what to do with the cargo at the discharge port.

When charterer moved to vacate the award, the district judge acknowledged that prior decisions of the Third Circuit Court of Appeals, whose rulings bind district courts in New Jersey, upheld application of the concept of manifest disregard when determining whether an arbitration award should be vacated. However, the district court concluded that "[s]ince the Supreme Court has recently held that FAA §§ 9-11 provide the 'exclusive grounds for expedited vacatur and modification,' *Hall,* 128 S.Ct. at 1403, the Court limits its review to those statutory grounds. To the extent that Chemoil argues that the award should be vacated upon grounds approved by the Third Circuit prior to *Hall,* the Court declines to entertain same." 2008 WL 4960449.

The Court reviewed charterer's challenges based on evident partiality of the sole arbitrator and on exceeding the scope of his authority in awarding interest and attorneys' fees but rejected all of them. The Court concluded that, "[b]ased upon the well reasoned opinion of the Arbitrator and *the recent Supreme Court's decision further narrowing the scope of review*, the motion to confirm is granted, and the motion to vacate is denied." It is understood that the District Court's decision not to vacate the award is being appealed to the Third Circuit Court of Appeals in Philadelphia.

"You say potato and I say potahto." Some courts have read *Hall Street* as killing off the concept of manifest disregard while other courts, reaching the opposite conclusion, have continued to apply the doctrine. Who is right and who is wrong? In truth, we will not know until the Supreme Court rules again and we may not have long to wait.

In *Improv West Associates v. Comedy Club, Inc.,* 129 S.Ct. 45 (U.S. 2008), decided on October 6, 2008, the Supreme Court vacated a ruling by the Ninth Circuit Court of Appeals and remanded the case "for further consideration in light of *Hall Street."* The Ninth Circuit had ruled that an arbitrator acted in manifest disregard of California state law in upholding the validity of a covenant not to compete that the Court considered to be unreasonably broad, in terms of its geographic scope. Thus, the Ninth Circuit's decision relied clearly and unmistakably on the concept of manifest disregard in vacating a portion of an arbitrator's award (unlike the Second Circuit's ruling in *AnimalFeeds*, where the award was deemed to pass muster under a manifest disregard analysis).

The Supreme Court ruled that the Ninth Circuit must reconsider its ruling in *Improv West* in light of the high court's decision in *Hall Street.* The Ninth Circuit's next ruling on the award may well prompt the losing party – whoever it is – to petition for a writ of certiorari, returning the case to the Supreme Court and requiring it to state more precisely whether manifest disregard continues to have life or whether, as some believe, it died on the pages of the Court's ruling in *Hall Street*.

PROLOGUE TO THE 2009 TANKER MARKET – WHAT A DIFFERENCE A YEAR MAKES

by Robert J. Flynn
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To say that the picture for the 2009 tanker market does not look robust can be classified as a huge understatement. The following discussion will not do anything to significantly dispel this perception. However, it will show

how quickly perception and expectation have changed recently and has repeatedly changed in rapid fashion during recent market history. This is not meant to imply that tanker owners can expect a return to the recent market strength in the near-term, but that perhaps none of us should be so quick to draw a straight line from the present at any time.

Year-end 2007 – Increased oil supply, a reduction in tanker tonnage (caused in part by conversions into dry bulk vessels and increased non-double-hull discrimination) and advantageous oil pricing provides incentive to purchase and transport crude

Year-end 2008 – Reduced oil supply, a tanker orderbook implying fleet growth, a financial crisis that freezes commerce and access to capital, and an oil demand which may contract in 2009

OPEC announced production quota contraction starting in November 2008 of 1.5 million barrels per day (mm bpd) and will likely announce a further cut prior to year-end or just after the new year of perhaps an additional 1 mm bpd.

- This is in contrast with the situation of a year ago – with the beginning of 2008 approaching, OPEC announced a quota increase of 500,000 bpd starting November 2007. This then morphed into further production increases official and unofficial during 2008.
- In addition, the completion and ramping up of throughput through the Baku – Tbilisi – Ceyhan (BTC) pipeline increased tanker demand coming from non-OPEC crude production. By the summer of 2008, the pipeline was carrying over 900,000 bpd.

Oil prices have fallen over a $100 per barrel since an intra-day high of over $147 per bbl for West Texas Intermediate (WTI) on July 11th as sub $47 per bbl closing prices were achieved in the early days of December.

- In November and December 2007, crude prices averaged in the low to mid $90's as quantified by WTI; this was about five months into what would prove to be a year-long surge that began in earnest in July 2007 and ran until July of 2008.

Oil demand has eroded in recent months – Organization for Economic Cooperation and Development (OECD) demand has shrunk nearly 2.4 mm bpd (based on the analysis from the Energy Intelligence Group) during the August to October 2008 period, 2.5 times the shrinkage during the first half of the year.

- A year ago, one of the reasons cited for the run-up in oil prices was the perception that demand would outpace supply during the next decade.

A U.S. banking crisis that grew out of mortgage-related securities has developed into a global liquidity crisis, which has vaporized much of the trade finance that fuels the world economy.

- A year ago, China was entering the final months of preparation for its performance on the world stage via the Olympic games, and development projects were competing to acquire funding to expand global refining capacity (i.e. AG and India) as well as new sources of crude (i.e. deepwater Brazil).

The tanker and oil markets, in the approximate ten years since the Asian crisis, have had a series of periods where they have swung wildly both positively and negatively to market stimuli. It is interesting to note that these "over-reactions" have not lasted longer than three to four quarters before the "rule of law" returned, as demonstrated by the brief history below.

- The Asian Crisis eventually begat the OPEC cuts and tanker downturn in the second through fourth quarters of 1999.
- This was followed by a surge from the second quarter in 2000 through the first quarter of 2001, and then a slow decline that led to a 2002 collapse in rates following another OPEC production cut.
- An ending of the 2002 OPEC cuts resulted in the 2003/2004 market rebound which did not appear to get overheated until the fourth quarter of 2004.
- The December 2004 OPEC cuts and the effects of Hurricane Ivan did not result in a market collapse, but perception was much harsher than reality following an October to December 2004 that was largely unrivaled until May to July of 2008.
- Two years of hurricanes impacting the U.S. Gulf in 2004 and 2005 led to counter-seasonal strength in mid 2006 and an OPEC cut in October 2006.
- The OPEC cuts led to a mediocre 2007 and a very dismal period from June through October 2008, but the confluence of events at the end of 2007 led to 2008 as discussed earlier.

The preceding is not meant to imply that there will be a market recovery three to four quarters out, but that one shouldn't be surprised if it occurs. In the quick synopsis above, the tanker market was reacting largely to issues that impacted oil prices and, therefore, production levels. The issues in the present situation are well beyond the local environment. That being said, the tanker market thus far has not been impacted in nearly as severe a fashion as the dry bulk or container segments.

If one were to utilize the fall of Lehman Brothers as a point of demarcation beginning the current financial crisis and then compare earnings of 2008 to the same period in 2007 and in 2006, we would get the following by sector:

VLCC:	110%+ above 2007 and 25% above 2006 earnings
Suez:	100% over 2007 and 20% above 2006 earnings
Aframax:	40% over 2007 and 5% above 2006 earnings
Panamax:	130% above 2007 and 80% above 2006 earnings
Handy (MR):	75%+ above 2007 and 30%+ above 2006 earnings

There are definitely issues in the tanker sector and the picture of the environment is very different than a year ago, but in the two-and-a-half-month period since the fall of Lehman, the year-on-year comparisons to the last two years have been positive. Admittedly, the superiority of current returns, based on this type of comparison, will begin to erode in the not-too-distant future. There have been systemic developments that have shielded earnings from the drop in freight paid per voyage, specifically the collapse in bunker prices have reduced voyage costs significantly. An example of this is the near-$350-per-ton decrease from September to November 2008 in AG bunker prices which has provided a near $35,000-per-day savings in the voyage costs for VLCC owners. However, there is an obvious limit to how far bunker costs can fall.

If one wants to keep it simple, the issues that should be monitored going forward into 2009 are:

- Crude supply – not only the volume, but the OPEC vs non-OPEC mix as this will increase/decrease demand for different tanker sectors
- Oil demand status
- Vessel supply growth
- Capital liquidity in the global markets

The November 1, 2008, reduction in OPEC quotas was meant in part to balance a projected growth in non-OPEC production of about the same amount during the fourth quarter. (The non-OPEC supply excludes estimates for natural gas liquids, biofuels and refinery processing gains according to the November 3rd issue of the Petroleum Intelligence Weekly.) The impact of the cuts will be most severe on the VLCC sector – an estimated loss of 12 cargoes per month from the AG. In the case of the mid-size crude tanker sectors, the approximate 750,000 bpd loss of OPEC production could be countered by a similar increase from four non-OPEC producers (UK, Norway, Azerbaijan and Kazakhstan). However, this will not be the last OPEC cut. It appears to be almost a *fait accompli* that there will be a further 1 mm bpd cut announced in mid-December. Reduced crude supply will have an impact on tanker demand, particularly in the middle part of 2009 – one cannot transport what has not been produced. The April to September period of 2009 will likely be particularly weak but, as the brief historical summary noted, over the last approximate ten-year period the market has not usually required OPEC cuts beyond 12 months to return to a more balanced environment.

U.S. demand crumbled in 2008, but in the developed world, signs are that European oil demand appears most vulnerable to further sharp drops in 2009. The non-OECD has provided the global growth since 2006; China, India and OPEC being the major contributors. The ability of the Chinese stimulus plan to maintain Chinese oil demand growth will heavily influence the oil demand tally for the next year. However, projections for the 2009 demand, based upon the global demand projections from JP Morgan, Merrill Lynch and Petroleum Industry Research Associates, indicate that the amount of crude requiring tanker transport will not significantly differ from 2008 – global demand is still projected to exceed 85 mm bpd for 2009. The "perception" of the supply/demand balance will dictate pricing, which will determine OPEC's production decisions. Additionally, the effective supply of vessels will be impacted by how oil is priced by the financial exchanges around the world. Futures pricing will impact the incentive to transport oil/vessel utilization and the amount of storage kept at sea (i.e., in places such as the U.S. Gulf).

Assessing the development of fleet supply is not simply a tallying of the orderbook from various industry publications. As a result of new and unproven "Greenfield" shipyards and the financial crisis, there are significant delays in vessels scheduled to be delivered this year. Some of the delays come from the issues associated with doing things for the first time – for example, there is a "Greenfield" Chinese yard with nearly 30 Suezmax tankers scheduled for delivery during the balance of 2008 and 2009. There are also issues involving the amount of capital available to owners who are finding the expected available leverage being reduced sharply. This last point is likely to cause a willingness to delay deliveries on both the yard and owner side. Neither party wants to see the fall in vessel values become readily transparent – once the information is public/accepted it must be dealt with. There is a certain amount of obfuscation that can be employed in the hope that the

market can work its way up from current levels. This is the chicken or egg problem that the financial crisis provides in the longer-term picture of capital investment – debt provided tends to be a basic asset value, but asset value is reliant upon how much debt vs. equity can be used as this determines the capital cost of the asset. This is akin to the current home values – it is the mortgage payment which influences the price one is willing to pay for a home.

NOTE: Mr. Flynn acknowledges the valuable assistance of Jerry Lichtblau in the research and preparation of this December 2008 paper.

A CASE NOTE: *LIFE SETTLEMENTS CORPORATION, D/B/A PEACHTREE LIFE SETTLEMENTS V. SYNDICATE 102 AT LLOYD'S*

by Susan Lee, Esq.
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The Second Circuit recently *held* that arbitrators have no authority, under Section 7 of the Federal Arbitration Act, 9 U.S.C. §7, to compel pre-hearing document discovery from an entity not party to an arbitration proceeding, even though that entity is party to the underlying arbitration agreement, *Life Settlements Corporation, d/b/a Peachtree Life Settlements v. Syndicate 102 at Lloyd's of London*, 2008 U.S. App. LEXIS 24977, (2d Cir. Nov. 25, 2008). In holding so, the Second Circuit addressed a question that has split the circuits and *reversed* Judge Owen of the Southern District of New York's decision which enforced an arbitral subpoena against a non-party under Section 7 of the FAA.

Life Settlements Corporation concerned an insurance coverage dispute arising out of a policy which contained a mandatory arbitration clause:

> *All disputes and differences arising under or in connection with this Insurance shall be referred to arbitration under the American Arbitration Rules….*
>
> *The Arbitration Tribunal may in its sole discretion make such orders and directions as it considers to be necessary for the final determination of the matters in dispute….The Arbitration Tribunal shall have the widest discretion permitted under the law governing the arbitral procedure when making such orders or directions.*

The policy was signed by three parties, namely the underwriter, the assured and the originator/servicer. Only two parties to the agreement, the underwriter and assured, became parties to an arbitration proceeding.

During the arbitration, the underwriter requested discovery from the assured and non-party originator/servicer. With respect to the non-party request, the assured responded that it neither controlled nor could compel the non-party to produce any of the requested documents. After the underwriter failed in joining the non-party in the arbitration, the arbitral panel issued a formal subpoena against the non-party requiring it to produce the requested documents.

The non-party moved to quash the subpoena in federal district court, in part on the ground that the arbitrators had no power to compel such pre-hearing discovery from a non-party. In denying the motion, Judge Owen held, there was "no reason to disturb the arbitration panel's issuance of such a subpoena to an entity that, while not a party to the specific arbitration at issue, is a party to the arbitration agreement."

On appeal, the Second Circuit considered the scope of an arbitration panel's power to compel discovery and concluded that such power was strictly limited to the plain language of the FAA. Section 7 of the FAA provides that arbitrators "may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case." Accordingly, under Section 7's "straightforward" and "unambiguous" language, the Second Circuit held that documents are discoverable in arbitration only when brought before arbitrators by a testifying witness during a preliminary or merits hearing.

The Second Circuit made clear that its ruling in *Life Settlements Corporation* is bright-lined by refusing to carve a discovery exception for non-parties that are closely related to an arbitrating party and non-parties that are signatories to the underlying arbitration agreement. However, the Court specifically advised that its holding does not affect the rights of parties to otherwise agree in writing or the ability of arbitrators to otherwise enforce their discovery orders (e.g. through drawing a negative inference). Therefore, despite the Second Circuit's recent decision, arbitrators remain empowered in a variety of ways to compel discovery from non-parties, so long as it is in accord with the plain language of Section 7 of the FAA.

SORRY…WRONG CAPTAIN!

by James E. Mercante, Esq.
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A good captain can be hard to come by. Qualified and quality-licensed mariners are in demand for all types of vessels including merchant ships, fishing vessels and even yachts.

Marine insurance underwriters like to know the credentials of the captain who will be in command before deciding whether or not to accept, for example, a commercial fishing vessel or yacht as an insured risk. Some marine insurers even require that the captain they approve (and whose name may be written into the policy) must be in charge when a loss occurs for insurance protection to apply. One fishing vessel owner recently found this out the hard way.

Vessel Sinks

A fishing vessel grounded and sank off Montauk, New York. The insurance policy included a commercial fishing vessel endorsement with a "captain warranty". This warranty provided that:

> *The Assured shall disclose the name(s) of all captain(s) which are operating the boat(s) as of the effective date of this policy and these captain(s) shall be named hereunder as follows:*
>
> *In the event that the Assured hires additional or replacement full-time captains...underwriters will require that the Assured provide the Company with information concerning their experience, qualifications and general reputation within the industry as soon as possible. The Assured agrees to exercise due diligence in the hiring or replacing of captains.*

Who Are You?

When the vessel sank, Captain X was not onboard. A new captain was at the helm, one whose experience and qualifications had not been disclosed to the insurance company as required by the "captain warranty." As a result, the insurer denied coverage for the loss and then filed an action in federal court seeking a declaration that this breach of warranty forfeited coverage. *Northern Assurance Company of America v. Adam Rathbum* (D.Conn July 2008).

As a rule, warranties in maritime insurance contracts must be strictly complied with. In many states, a breach of warranty will result in no coverage even if the breach had nothing to do with the loss. As stated by one federal appeals court … in marine insurance, there is historically no requirement that the breach of warranty relate to the loss, "so that any breach bars recovery even though a loss would have happened had the warranty been carried out to the letter." For this reason, boaters should be aware of and comply with all warranties stated in your marine insurance policy.

The rule of strict compliance with warranties in a marine insurance contract stems from the recognition that "it is peculiarly difficult for marine insurers to assess their risk, such that insurers must rely on the representations and warranties made by insureds regarding their vessels' condition and usage."

Policy Breaches

In the *Northern Assurance* case, there was no dispute that the vessel owner did not disclose any information about the new captain who was in charge of the vessel at the time of the accident. The new captain had been hired five months beforehand so there was plenty of time to notify the underwriters. More than likely, the vessel owner simply didn't read the insurance contract and was unaware of the "captain warranty" or just forgot about it! Either way, it was a costly error for the vessel owner who lost his vessel and then had no insurance to cover the loss.

The court agreed that the captain warranty was breached and in a written decision denied recovery to the vessel owner. The court also considered the change of captain a change of management of the vessel and cited another provision of the policy that voided coverage if the management of the vessel changed. This clause said "this insurance shall be void … if there be any change of management or charter of the vessel, without the previous consent in writing of this Company."

Even the bank that loaned money to the vessel owner was stung by the ruling. The bank named as "loss payee" in the policy was unable to recover its loan due to the breach of contract. This was because the loss payee's rights "were no better than those acquired under the policy by the insured."

Conclusion

The two breaches of contract terms resulted in no insurance coverage for the vessel owner's loss. Although, bear in mind that one breach of a marine insurance policy

term, condition or warranty is usually enough to break the chain of coverage. How to avoid this? Get a copy of your policy now and read it...good time of year for that. If you don't have a copy, and many boaters don't, call your broker and get it.

SMA LUNCHEON – ROTTERDAM RULES

At the December 10 luncheon, Chester Hooper, partner at Holland & Knight, reported on the Rotterdam Rules promulgated by UNCITRAL and now adopted by the United Nations General Assembly. In the April 2009 issue, I expect to publish a commentary by Chet, who was instrumental in this endeavor.

Dennis Bryant's Holland & Knight newsletter of December 12 carried the following announcement.

> *The United National General Assembly issued a news release stating, among other things, that it adopted the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (otherwise known as the Rotterdam Rules). A ceremony for the opening of the Convention for signature is to be held in Rotterdam, the Netherlands, on 21-23 September 2009. While many individuals contributed to this landmark project, I would be remiss if I did not point out that Chet Hooper of our New York office and a former President of the Maritime Law Association of the United States was one of the leading developers and proponents of the new rules from their very inception more than 10 years ago through the final meeting of the Working Group of the United Nations Commission on International Trade Law (UNCITRAL) this last summer.*

Details on the General Assembly Sessions can be accessed via www.UN.org/News/Press/docs/2008/ga10798.doc.htm.

U.S. PROPOSES TO INCREASE AVERAGE WEIGHT OF PASSENGER IN SHIP REGULATIONS

Having enjoyed the holiday season with its parties, food and good cheer, and having avoided the bathroom scale, it made me think about an article I had read in the Fall 2008 issue of the De Orchis firm's CLIENT ALERT (p. 4):

> *Americans have gotten fatter over the years, and now the average person weighs significantly more than the average weight for passengers assumed in the current regulations relating to ship stability. The number of passengers a given vessel can carry depends, among other things, on the assumed average weight of each passenger. So, a proposal has been made to increase the average weight in the regulations from 160 to 185 pounds. According to a notice published in 73 F. Reg. 49243, comments on the proposal must be submitted by November 18 2008, before Americans get any fatter.*

Dennis Bryant of Holland & Knight reports in his December 8, 2008 online newsletter that the US Coast Guard is extending (through February 6, 2009) the period in which to submit comments on its proposed changes to regulations governing the stability of passenger vessels and the maximum number of passengers that may safely be permitted on board a vessel. This will allow interested parties time to consider the document *Pontoon Vessel Passenger Crowding Stability Criteria Study*, which was cited in the proposal. *73 Fed. Reg. 74426*

ICMA XVII HAMBURG

With the next International Maritime Arbitration Congress drawing closer, here are some significant dates for your 2009 diaries; please note the amended deadlines for papers.

March 15	Deadline for paper outlines
June 15	Deadline for final papers
October 4	Golf tournament
October 5	Opening ceremony Cedric Barclay Lecture
October 7	Excursion day (Berlin)
October 8	Dinner dance
October 9	Conclusion of Congress

For further information, please visit www.icma2009.com, which will provide full details on the topics, schedules and more.

LETTERS TO THE EDITOR

(with an introduction by M.W. Arnold)

An old friend of mine told the following "dispute resolution" joke: There was an order of monks who were bound by a vow of silence. Every five years at the Easter celebration, one monk, designated by the abbot, could speak. One year, one monk said, "I hate spinach – we have too much spinach." Five years later, another monk rose and said, "I love spinach, let's have more of it." At the next occasion, the abbot announced that it was his turn to speak, and he said, "Let's stop bickering about spinach."

If that one can get a chuckle, I should not worry about the delay in publishing letters commenting on articles in prior issues because of our quarterly format. The following letter was written in response to Chris Hewer's article "Letters from the Edge" (THE ARBITRATOR, Vol 40 October 2008 No. 1 at pp. 3-4 – subsequently released as item 8 in issue 367 of the Maritime Advocate on Line):

Dear Chris

I have just read with delight your usual delicious *sensa fuma* in your item 8 in Issue 367 of Maritime Advocate. Of course I am as aware as you are (minus tongue kept firmly in cheek rather than in check!!) that all these places do exist. I am also at least one of your many thousands of readers who did indeed confirm that Midland Maryland also exists, as does Dow Chemicals there!!

Since Germany sensibly does not recognise the Hamburg Rules, will Holland / The Netherlands / De Nederlande ratify these new Rotterdam Rules? Perhaps it is even more relevant to ask, given your earlier comments, whether a triple named country exists, in your opinion?

I hereby accept your challenge: I have been to both The Hague and Den Haag and I am certainly never tired of London. I have even flown over Visby several times and it always looks to be in pretty good shape to me, perhaps we should all thank King Eric? Or perhaps due deference should be paid to his very efficient and much more powerful wife, Queen Philippa of England (daughter of our King Henry IV), proving yet again that England ruled many countries and many waves. (See http://www.nationmaster.com/encyclopedia/Philippa-of-England)

By the way, it seems that the "reshaping" refers to Visby's Cathedral, not to the fortress known as Wisborg, nor to the whole city of Visby. ("In the 12th century, Visby Cathedral, dedicated to Saint Mary, was constructed. It was reshaped in the 13th century to its current appearance.")

On a more serious note, I have also read your article in the SMA July issue. Yet again, you make excellent reference to the tardiness (on one Tuesday every February, would that be known as "Tardi Gras"?) of some nations, including our US cousins, being even slower than the UN Convention creators.....

So when will these new Rotterdam Rules be available and be official? To whom will they apply? This is also a serious question, as all my current lecture notes on Hague-Visby Rules may have to be re-written....

Kind regards, as ever

Jeffrey

Jeffrey Blum
Director, Interlink International Trading (UK) Ltd
Director, Maritime Education & Training Ltd

SOME PERSONAL NOTES

I have used this column to mention items which I think might be of interest to some or do not meet the criteria for a full-fledged article.

In the past, one or two readers have asked why I was giving space in the SMA quarterly to events or facts dealing with other arbitration organizations. To live in isolation might provide for comfort in certain areas, however, it ignores the possibilities to learn, compare and improve (see also my comments under "Hatfields v. McCoys?" in this issue).

Let me start with a few international notes:

CMAC's Golden Anniversary

On the occasion of the China Maritime Arbitration Commission's 50th anniversary to be celebrated on January 22, 2009, the SMA president has sent a congratulatory letter which was also signed by the past SMA presidents who are still active.

LMAA Events

For those of our readers who are interested in what is going on with LMAA's social calendar, please note that the Annual Dinner is scheduled for March 18, 2009. For long-range planning purposes, the LMAA will celebrate their 50th anniversary in March 2010 with a reception at the Mansion House on the 17th (similar to the one arranged during ICMA XV), followed by a one-day conference on the 18th, followed by a gala dinner at the Guildhall.

Dr. Mohamed Aboul-Enein

It is with great sadness that I have to report the recent passing of Dr. Mohamed Aboul-Enein. Following his attendance at the IFCAI Council Meeting in New York on November 13, he traveled to Maryland to visit with his son. On November 15, he died as a result of injuries sustained in a tragic multiple-car accident in Gaithersburg.

After an illustrious career in the Egyptian judiciary, Dr. Aboul-Enein became the Director of the Cairo Regional Centre for International Commercial Arbitration. He was a highly respected and frequent speaker at worldwide arbitration conferences, as well as a host for international conferences in Egypt. He will be remembered by his colleagues, friends and acquaintances.

"May God rest his soul in peace."

Feedback

The older I get the more I seem to take solace in the saying "Good things come to those who wait."

For some time I had lamented about the lack of feedback to the contents of this publication, be it positive or negative. Well, over the last several months, comments have come in – mostly favorable and complimentary. Where I struck out was the formatting of the last issue (see below). But then, there are not too many perfect hitters in baseball either.

Thanks for responding.

One v. Two – Two Wins

Over the years, the SMA has been accused of not being "hip" – a good friend lamented the drab appearance of the hard copy of THE ARBITRATOR with its blue on blue printing as well as its general layout – others wanted us to change the logo, jettison the fairway buoy in favor of sleeker maritime symbols – and most recently, I had the bright idea to abandon the two-column format of the publication. I thought that, when reading the publication on the computer screen, because of the necessary up-and-down scrolling, the two-column format was difficult to deal with. Many readers did not like it. Not one to give up easily, I contacted some friends who, because of their professional experiences (an editor, a printer and a layout specialist), were able to show me the error of my ways. And here we are, we tried it, we listened and we are back to the old format.

For the year's end, I should like to share with you an exchange I recently had with an old and sage friend. We spoke about deadlines, commitments and procrastination. We remembered the admonition of not leaving for tomorrow what we can do today. But just think of how wicked it feels to do something enjoyable even if non-productive and creating havoc with one's schedule. Remember, you know you are getting old when it takes too much effort to procrastinate. It is easier in fiction than in real life – only Robinson Crusoe had everything done by Friday.

Let me conclude this column with my best wishes to all our readers for a healthy, peaceful and prosperous New Year.

IN MEMORIAM

R. Glenn Bauer

On October 17, 2008, we lost a friend, a supporter, a co-arbitrator, a scholar and a teacher. Glen was 83, and for 60 years happily married to Rosemary.

Writing an obituary is not an easy task, especially when it concerns a friend. Former colleagues have spoken and written eloquently about Glenn's service to the admiralty bar, his contributions to his chosen field and recounted his many achievements. Extensive as it was, it nevertheless was only a part of Glenn's persona.

Glenn loved to sail. With his dry and sometimes wicked humor, he had named his boat COGSA, a topic he knew well and had written about frequently. Glenn was the quintessential Renaissance man with profound knowledge in many fields, with a never-ending appetite to learn more. After his retirement, Rosemary and he regularly audited varied lectures at Princeton. He loved the arts and literature, music was a household staple at the Bauer's. It would not be unusual for him to break out in song when sitting in the yard or even in the car when commuting. Glenn was a musician in the Yale band and the Michigan marching band during his college years, and later on a member of the local church choir. He also enjoyed traveling – especially by sea, with a slightly adventurous bent. I recall his stories about their trip to Antarctica a couple of years ago, and then last year's travel to the Arctic Circle to experience the midsummer celebration.

He was a gentleman, he was a good listener, a man of principles, erudite, modest, willing to share – and, according to his daughter Carla, he loved black licorice and his gin and tonic.

His memorial service was held at St. Paul's Episcopal Church in Westfield, with a near-capacity attendance of family, friends and colleagues – an expression of love, admiration and great respect.

Let me borrow a phrase used by one of his colleagues. Our fondest thoughts and vivid memories of this kind and gentle man will remain with us for decades to come.

Rest in peace, old friend.

THE ARBITRATOR

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