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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT'S CORNER

Greetings,

The term of office for the President of the SMA is two years with a limit of two terms. Klaus Mordhorst was our president for the previous four years and it is my pleasure to serve as his successor having been elected president by the membership this past May. The SMA offers its sincerest appreciation and gratitude to Klaus for his leadership during these past four years.

By way of introduction to the readership of THE ARBITRATOR, my membership in the Society of Maritime Arbitrators, Inc. began in 1992. Over the years I served as a member of the Board of Governors, Treasurer, committee member and most recently Chair of the Education Committee. In the international arbitration forum, I was Chair of the Papers Committee for the 2004 International Congress of Maritime Arbitrators and have, during my 40 year career in the maritime industry, participated in and organized arbitration seminars, workshops and congresses in Europe, Asia and North and Central America. I believe my ongoing dialog with the large and diverse number of international owners, charterers, lawyers and arbitrators that I have worked with, will be most useful in my new position as President of the SMA in furthering maritime arbitration in New York.

Many readers have likely visited New York for business or holiday, or if not, have probably seen its many attractions in movies or television shows. I encourage you to visit our great city. To visitors, a frequently heard (but perhaps not totally appreciated) expression from a New Yorker is "In a New York minute". In translation, it means a quick and efficient manner when undertaking a task with the outcome based on skill and competence. The job will be done quickly, correctly and to the true New Yorker, with a lack of unnecessary show, extravagance or expense that would prevent a streamlining of the completion of the task.

The same is true for New York arbitration. Our membership has a diverse background in the maritime industry which has prepared them for dealing with all types of

problems and disputes "in a New York minute". The Society's rules and procedures are designed to provide high caliber service to the industry.

I look forward to the challenges of this office and hope to meet some of the readers of THE ARBITRATOR at the upcoming International Congress of Maritime Arbitrators in Hamburg. Until then,

Best regards,

Austin L. Dooley, Ph.D.

BACK TO THE FUTURE

by Chris Hewer

Comparatively little maritime arbitration arises out of disputes under the terms of marine insurance policies. Why is that? Is it because there is only one person who can gain under the terms of an insurance policy, and that is not the person who drafts the policy terms? Yes. (Those readers who would prefer a longer answer should not be reading a journal published by an arbitration society. 'Yes' is the answer.)

If you discount the premium itself (which in the marine market is so heavily discounted anyway that the cost could be met on the weekly housekeeping budget of a mother of two if she gave the family egg and chips on Wednesdays rather than a barnsley chop) only the claimant under the terms of an insurance policy stands to get any money, never mind that he or she will probably (although not necessarily) have first to prove that they have lost a comparable amount of money in order to lodge a claim.

That remains the case whatever happens in the world. Marine underwriters are programmed to chase business at uneconomic rates because they want to stop their competitors getting business which will lose them a lot of money. What does change from time to time, however, is the standard policy wording, and that has happened recently.

Not so long ago, when Elvis was still alive, there were three types of cargo insurance clause - All Risks, FPA and WA. All Risks, as the name suggests, covered all risks except those that were excluded, FPA covered total loss and not much else, and WA covered not much at all. The 'A' in FPA and WA stands for 'average', which is the sort of confusing word (meaning 'loss') which the insurance industry delights in.

'Average' just about sums up what the clauses were. But at least they were *our* clauses, and we were comfortable with them. That didn't stop people changing them, however, in favour of the Institute Cargo Clauses (ICC), the latest version of which was published just a few months ago. These replace the existing clauses, which were dreamed up in 1982. And, unsurprisingly, the overall result of the latest amendments is that "coverage reverts in certain areas to that provided by the 1963 clauses". This is good news for cargo interests, because the clauses were much more favourable to them in 1963 than they were under the 1982 amendments. But it does make you wonder.

There is a pattern emerging here. The Rotterdam Rules were brought in to replace the Hamburg Rules, which were in turn intended to replace the Hague/Visby Rules, never mind that the only person who ever considered using those was a Fourth World milquetoast. A heated debate is now under way about the Rotterdam Rules between carriers, who love them, and shippers, who hate them, with the result that Brussels has threatened to come up with its own rules. Brussels is good at threats.

The whole point about the rules is that, firstly, they take us back to pre-Hague days and, secondly, they favour Switzerland. So, for both insurance and carriage liability, the rule-makers are taking us backwards, and slowly re-instating the old legislation. This implies that there was no need to revise anything in the first place, other than to keep from the streets droves of people who were so pedantic that they would never have found employment in a civilised society.

We should accept that it is simply not possible to draw up any form of liability rules for shipping that will please

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everybody, especially since the average gestation period for any new insurance clauses or any new liability convention typically corresponds almost exactly to the time it takes for the world economy to move from boom to bust, or vice versa, during which time the views of the respective parties will have changed by roughly - and only roughly - a hundred per cent.

While those of us who enjoy this sort of thing can sit back and watch as Brussels flexes its muscles, time could usefully be spent having a closer look at the new cargo clauses. The 'Change of Voyage' provisions are a good place to start, and finish. Concern has apparently been expressed, although it is not clear by whom, that claims have successfully been defended in 'phantom ship' cases. An amendment has been introduced into the new cargo clauses to deal with this, although it is admitted that "it is questionable whether or not this provision achieves its intended purpose". It seems that, "Where the contemplated voyage commences at a warehouse or on a road vehicle, the new clause should be of some benefit to the assured. However, where the contemplated voyage commences on a vessel …and, from the beginning, the vessel intends to take the good to an alternative destination, it is at least arguable that the phantom vessel is not part of the contemplated voyage, with the result that the contemplated voyage never commenced".

In the good old days of FPA and WA, we never had phantom ships, although there was a yellow submarine which did make it to the Court of Appeal in London in 1983. The only reason to change insurance clauses is to make them clearer, since we have established that it is not possible to make them fairer for any length of time. But does having a new definition of 'Assured' (to expressly include either the person by or on whose behalf the contract of insurance was effected or an assignee") or dropping the word 'goods' in favour of the term 'subject-matter insured' make things clearer? No. (Those readers who would prefer a longer answer should not be reading a journal published by an arbitration society. 'No' is the answer.)

SMA NEWS

Election Results

On May 12, the SMA held its 46th annual meeting and elected the following slate of new officers and governors: Austin L. Dooley as President, Bengt E. Nergaard as Vice President and Messrs. Martowski, Wolmar, Szostak and Siciliano were elected for two-year terms as governors.

Board of Governors and Alternates

The officers and governors for the 2009/2010 business year will be (alternates in parentheses):

Austin L. Dooley, President
Bengt E. Nergaard, Vice President
Soren Wolmar, Secretary (R. Spaulding)
John F. Ring, Jr., Treasurer (C. Norz)

Governors (and alternates):

Manfred W. Arnold (R. Flynn)
Gerard T. Desmond (S. Hansen)
John J. Devine, Jr. (R. Umbdenstock)
Donald B. Frost (P. Kimball)
Michael Hand (M. Fackler)
David W. Martowski (N. Hawkins)
Klaus C.J. Mordhorst (ex officio)
Anthony J. Siciliano (L. Bulow)
Donald J. Szostak (A. Bowdery)

Board Meetings and Luncheon Dates

The monthly Board of Governors meeting will be held preceding the luncheons of the organization. The meetings/luncheons will be held at The Ketch, 70 Pine Street on the following dates: September 9, October 21, November 11, December 9, January 13, February 10, March 10, April 14 and Tuesday, May 11 (Annual General Meeting). All luncheons are open to all, with the exception of September 9 and May 11, which are for members only.

Committees and Chairs

THE ARBITRATOR	— *M.W. Arnold*
Award Service	— *A.G. Bowdery*
Bylaws and Rules	— *L.C. Bulow*
Education	— *K.C.J. Mordhorst*
Liaison	— *D.M. Martowski*
Luncheon	— *T.F Fox*
Membership	— *B.G. Nergaard*
Professional Conduct	— *S.H. Hansen*
Salvage	— *P.S. Wiswell*
Seminar and Conventions	— *K.C.J. Mordhorst*
Technology	— *J.N. Hood*
ICMA	— *M.W. Arnold*
7th Index & Digest (ad hoc)	— *D.W. Martowski*
Small Crafts (ad hoc)	— *W.D. Wheeler*
Claims Escrow (ad hoc)	— *K.C.J. Mordhorst*

BITING THE HAND THAT TRIES TO SAVE YOU!

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

No doubt all mariners took notice when the fishing boat capsized a couple of months ago in the Gulf of Mexico with four fishing buddies on board. They were all in top physical shape, either former or present players in the National Football League. But they were no match for the high rolling waves that swamped the boat and swept them away. A search and rescue was initiated by the United States Coast Guard and about 36 hours later, only one out of four was found clinging to the overturned hull. The other men were never located despite massive Coast Guard patrols, both marine and aviation.

The Coast Guard is often the first to be notified when a marine casualty occurs by Mayday, cell phone or otherwise. I had my own situation this past summer when one of three treble hooks of a swimming plug embedded deep into my son Dylan's bicep with a bluefish flopping around on one of the other hooks. Every whip of the tail caused the sharp hooks to protrude deeper into his skin. Damn bluefish! Fortunately, we were close to the Short Beach Coast Guard Station at Jones Inlet and motored over there for a quick extraction. The Coasties answered my VHF call and were running down to the dock as I landed my boat minutes later. The men in blue responded fast and admirably with concern, a first aid kit, and large set of pliers. But, to my amazement, the big hulk of a petty officer, who looked like he could be an NFL player himself, would not cut the hook with the pliers. Told me it was for "liability reasons" and not within their mandate to do that kind of thing. I thought he was kidding until he handed me the pliers and told me to "*have at it sir…I am not authorized to do this*". I cut the hook and the Coastie cleaned and dressed the wound. We were thankful and my son was impressed with them. I sent them a thank you note.

On the way home….with the bluefish Dylan wanted to repay by cooking its goose and eating it for lunch , Dylan asked, "*why wouldn't the Coast Guard cut the hook?*" Of course, he asked the right guy, being that I had once been a U.S. Department of Justice attorney for the civil division, admiralty and aviation branch, where our clients were the federal agencies of the United States, including the U.S. Navy, Army Corps of Engineer, Federal Aviation Administration, and the Coast Guard. But its not easy to explain to a 14-year old the answer to a question that many have asked over the years, and a federal judge recently answered or I should say reiterated. Simply stated, the Coast Guard was right, he could not cut the hook for liability purposes. The Coast Guard has often responded to a casualty, whether it be a salvage job, tow, search and rescue or first aid, and when it goes bad, they get sued. Can be summed up in 5 words….*No Good Deed Goes Unpunished!*

Coast Guard to the Rescue

A recent federal court decision from the Virgin Islands (St. Croix) sums it up further in a fact pattern similar to the Gulf of Mexico tragedy. In the Virgin Islands case, however, everyone survived, but the Coast Guard got sued anyway. In *Azille v. United States of America*, decided November 13, 2008, three fisherman sued the United States for damages arising out of the Coast Guard's allegedly negligent search efforts after plaintiff Azille's boat took on water and capsized off the Virgin Islands one April morning. The three departed St. Croix en route to St. Thomas to sell a large catch of fish. They were aboard a 26-foot boat called "*A Light in the Dark*." During the trip, the container holding the one-and-a-half tons of fish shifted, causing the boat to take on water at an alarming rate. Unable to access his VHF radio, one of the fishermen called his daughter by cell phone and gave an approximate position off Buck Island in close proximity to St. Thomas. The girl then called the Coast Guard and relayed the information and the cell phone number. The Coast Guard promptly launched a rescue boat to search for plaintiffs and called Azille to confirm his position. The men were unable to provide a latitude and longitude but estimated by "seaman's eye" that they were four to five miles south of Buck Island. The Coast Guard advised the men to start throwing the catch overboard, but apparently not willing to so readily depart with their profits, the plaintiffs, according to the judge's decision, delayed in doing so and the vessel thereafter capsized. Prior to capsizing, the men had fired all their flares and then the cell phone stopped working. Once in the water, the men had no access to any signaling or communications devices.

The Coast Guard soon arrived at the reported position and found nothing. A second Coast Guard boat and a search and rescue helicopter joined the search, reporting to the area where a white flare had been spotted to the east. Two other Coast Guard helicopters joined the efforts in the afternoon and one of them deployed a datum buoy to measure the force and direction of the current. Despite the extensive search for hours, the Coast Guard came up dry. A private sailing vessel found all three men in the water

the next morning a mile off Culebra, Puerto Rico, about 27 miles to the west of the accident site.

The Coast Guard spent over eighteen hours searching for the three men, covering an area of about 192 nautical miles. But, the unsatisfied plaintiffs sued to recover for their injuries claiming that the Coast Guard was negligent in its efforts to find them. Specifically, they claimed the Coasties directed the helicopter in the opposite direction (east) from where plaintiffs were drifting (west).

Suing the King

So, the question, which has been answered by courts before, is: *Can a person sue the Sovereign*? The answer is yes, but it must be on the Sovereign's own terms.

It is well settled that the United States has "*sovereign immunity*" except where it consents to be sued. In a maritime action, that consent comes from the *Suits in Admiralty Act* (SIAA). In the SIAA, sovereign immunity is expressly waived where a civil action in admiralty could have been brought against a private person. 46 U.S.C. Section 30903. However, there is a catch. The federal courts have implied an exception to the SIAA - known as the "discretionary function" exception. According to the U.S. Supreme Court, the purpose of the exception to maritime suits against the government (which results in the retention of sovereign immunity), is to "prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic and political policy." A discretionary act is one that involves choice or judgment. Courts have applied a two-part test to determine if the exception governs the conduct being challenged. *First*, a court considers whether the government conduct or action is "a matter of choice," that is, a matter of discretion. *Second*, a court must determine whether the judgment or decision at issue "is the kind that the discretionary function was designed to shield." The federal court in the Virgin Islands said that the conduct in question was the general decision to search for the plaintiffs and the judgments made regarding how to conduct the search, i.e. to send the helicopters in the direction of where they thought a flare was spotted which was opposite the direction of the current flow.

If there was a regulation that mandated the Coast Guard's response to a distress call, then the government's action would not be one involving discretion and it would be actionable. The court reviewed Coast Guard regulations and found that they were under no obligation to attempt a search and rescue of the plaintiffs at all. See 14 U.S.C. Section 88. This no doubt comes as a big surprise to many mariners.

The court went on to say that the Coast Guard's decision about where and how to search for plaintiffs involved elements of choice on such things as which and how many aircraft and vessels to use and how long to search. Indeed, the court determined that all the decisions involved judgment calls, i.e. the area to be searched based on the reported position, information from the datum marker buoy, wind and sea and current conditions, and the white flare sighting. These were "discretionary judgments" according to the court. The judge found support in the U.S. National Search and Rescue Supplement (NSS) and a Coast Guard Addendum to the NSS, both of which provide guidance to the Coast Guard in its search and rescue efforts. These documents refer to Search and Rescue as being "both an art and a science relying greatly on the creativity and experience of the personnel involved" and that Coast Guard personnel are "expected to exercise broad discretion and to exercise sound judgment in performing the functions discussed." And, lastly, the Addendum to the NSS states that the guideline creates no duties, standard of care, or obligations to the public and should not be relied upon as a representation by the Coast Guard as to the manner or proper performance in any particular case."

The Coasties' own guidelines certainly make what they do sound "discretionary" and these guidelines may simply be designed for legal protection. Nonetheless, this carried the day in the eyes of the federal judge who concluded that the Coast Guard's decision to search for the plaintiffs and its judgments about how to conduct the search were indeed discretionary acts. Thus, this case, and others before it, held that the Coast Guard's decision to engage in search and rescue, and its decisions regarding how to proceed in that rescue, are susceptible to policy analysis and therefore are protected by the discretionary function exception to the Suits in Admiralty Act. The court cited another case that suggested that such decisions by the government are "*quintessential examples of the kind of judicial second-guessing and intervention in policymaking decisions that the discretionary function exception was designed to prevent*." As a result, the three men could not recover against the United States for their injuries and the lawsuit was dismissed.

Accordingly, sovereign immunity remains alive and well and so did the three fisherman. The Coast Guard did not sink the boat and apparently did all that they could possibly do under the circumstances; similar to the treble hook in Dylan's bicep, where they would not extract it for fear of a lawsuit and liability. With lawsuits like the Virgin Island case, can you blame the Coasties being gun shy?

Conclusion

Mariners do not want the Coast Guard to shy away from helping those in need and, safe to say, we do not want the standard response to become the equivalent of "N*o, you cut the hook.*" Better than the five words mentioned earlier, we would rather be able to rely on these: "*A Friend in Need is A Friend Indeed*".

THE 2009 TANKER MARKET "TWIN PRESSURES — LACK OF CARGOES AND INCREASED TONNAGE"

by Robert J. Flynn
President, Jones Lynch Flynn & Associates

The tanker industry like other facets of the shipping industry faces a two-headed monster. There is the "front head" or the immediate problem of reduced demand due to a lack of cargo being produced and then the problem that is waiting just over the next hill revolving around the potential supply onslaught from the newbuildings that are scheduled for delivery over the next couple of years.

The Demand Issue

The lack of tanker demand has grown since the vaporization of oil demand that began last year with the onset of the financial crisis in September 2009, resulting in less crude being produced and less product being refined.

- Despite a fairly rapid reaction by OPEC, supply has continued to be far in excess of demand and the developed world is approaching the nowhere to put it issue for crude oil and certain refined products as well.
- Things could actually be worse. The reaction to sharp contango pricing on the various financial exchanges around the world provided an incentive for floating storage which provided a shield to tanker earnings early this year when VLCCs were taken on charter for this purpose. It did not lead to increased supply problems in the Spring as feared due to the fact that much of this crude was subsequently transferred to other vessels when the original charter periods expired. However, the crude floating storage remains a bit of a supply time bomb as these vessels will likely at some point discharge and re-enter the "job-market" in a disorderly fashion.
- The lack of demand, rising inventory levels and collapsing distillate prices has led to a similar situation for market participants in the refined products arena as there was for those in the crude market earlier this year. The drop in prompt distillate prices has provided the foundation for a sudden and sharp contango to form providing the financial incentive for floating storage that for now exists for diesel and jet – by some estimates as many as 60 vessels from MR through VLCC actively in storage or in the process of being secured.

The primary source of the reduced demand in the world has been reduced industrial output and a sharp reduction in world trade. We use seven regions/nations as a benchmark to understand what is developing in terms of world consumption, enabling us to have a logical rationale for short-term prognostication on the demand side of the tanker equation; i.e., the U.S., European "4"[1], Japan, Korea, China, India and Brazil. Together they comprise both a geographic and developed/developing world mosaic. Combined they represented about 55% of the global demand for oil during 2008 and this year they are the source of about 70% of the decline in consumption for the first third of the year. Two-thirds of the decline of the "7" is industrial/other demand or from a drop in distillate usage. These two components, for the U.S. and Japan, are the largest contributors to this drop as the two nations have experienced steep drops in both categories such that they have combined for a near 1.5 mm bpd fall in global demand. The Chinese drop in distillate demand has also been significant as they continue to work off their Pre-Olympic inventory; however, China's other/industrial demand has been one of the few bright spots for this category as their command economy approach to the world effectively has said "produce it and it will be purchased/consumed". The drop in distillate/gasoil consumption can be tied to a reduction in rail and truck traffic globally. This product is used universally to transport trailers of finished products carried/imported on containerships that are currently laid-up in Singapore as well as what is produced indigenously around the world.

In order to alleviate pressure on tanker earnings that has arisen from a lack of demand (due to reduced crude/refined product production), inventories will have to fall sharply for there to be an official increase in production from OPEC. There is a surplus in the developed world of about 500 mm barrels – this is basis the approximate 62-63 days of land based OECD inventories[2] being about ten days over the normal 52-53 days level and then the 100+ mm barrels of crude and products in floating storage. If the sole remedy is through production cutbacks and

demand recovery, it will be a long drawn out process. In the alternative, if the financial markets provide a pricing incentive to reduce stock levels, this correction will occur much more rapidly. Backwardated pricing along the front six months or so of the crude oil futures curve could provide this incentive. This is usually associated with a perceived premium for prompt crude – this occurs when production is unable to meet demand and this is viewed as a temporary phenomenon and that crude prices will be unable to maintain the lofty levels of the moment. Ironically, this may have developed during May when crude prices rose by about 30% and have continued their upturn during the first week of June. The reason for the price rise is subject to debate, but a coherent rationale could be a counter-seasonal drop in U.S. gasoline stocks during what is traditionally a time of inventory building as the peak driving season approaches. The reason for the drop was due to pressures on the refining industry – refinery utilization has been down all year due to low demand for refined products as the industry is concerned about having excess product flood the market which would harm operating margins for an extended period[3]. The price of WTI has risen close to $70, which, over the last year and a half, had become a contango/backwardation divisor – above $70 and the market is backwardated, below $70 and the front end of the curve is in contango. We will have to see what happens this time if this price level is maintained.

Another scenario for backwardation that is counter to the normal rationale could develop as well. This is a scenario that we have been monitoring – one in which the state of demand is projected to deteriorate further in the near-term causing the subsequent months price of crude to decline. This could occur as we enter the first couple weeks of July and the market focus turns to declining demand expectations, particularly for motor fuels. We thought this scenario could have developed earlier, but it has not. There is likely a limited timeframe for this as, once the demand information for August comes out, the world will likely start seeing significant increases when comparisons are made to China's 2008 demand levels. Chinese demand was heavily driven by the April to July pre-Olympic build. The year-on-year demand comparisons for much of the rest of the world will also start to improve once the calendar moves into September and October as well.

The Supply Issue

The major impact of this issue is yet to be felt. Only a fraction of the 2009 orderbook has been delivered thus far and there is a time lag as to when newbuildings are "in the market"; there is the transit time from the delivery yard to the markets in which they will operate. In addition, the floating storage has essentially shielded the market from the 2008 deliveries of the VL sector. In terms of the upcoming supply pressure the Aframax, Suezmax and VLCC sectors all have the potential for this to rise significantly in the coming 24 months or so. The orderbook, 2009 through 2011 on paper is about 45% for the VLCC and Suezmax sectors and over a third with regards to the Aframax sector – in numbers this translates to about 225 VL's and about 245 Aframax on order (the Afra fleet is larger so that the percentage is smaller) and about 175 for the Suezmax fleet. In addition, the Aframax sector had close to 125 vessel deliveries in the last two years (about 75% more than the VLs and 3 times that of the Suezmax sector). The issue going forward is what will be actually delivered due to a variety of factors associated with the financial crisis. There is much speculation, but most information is yet to be learned. Thus far there are reports indicating that through May there have been nine VL cancellations, 28 Suez cancellations and no Aframax cancellations. The orderbook for the Panamax tanker fleet is slightly under a third and mostly coated for refined products as much of this sector will be utilized differently in the future from its fuel oil past. On the other hand, the orderbook for the MR sector, depending on how one categorizes it, can be viewed as quite onerous; the one mitigating factor is that it is also highly susceptible to cancellations during the next couple of years as some of the yards involved "are new to the business". In addition, there is a diversity of the ordering community such that access to capital in the current environment could be quite challenging for some. The orderbook just for those MR vessels (at least 40,000 dwt) is over 80% during the three-year period we have described. The larger dwt portion of the MR sector is also a relatively new phenomenon – half the 45-50k dwt fleet has been delivered in the last five years and more than 85% of those vessels between 50 and 55k are also five years old or less. There is likely to be only marginal relief from the January 2010 IMO phase-out of single hull tankers as the market has already trumped the regulatory side of things by marginalizing the utilization of these vessels in most sectors.

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

1. Germany, France the UK and Italy

2. This number is basis all crude and refined product stocks divided by the daily average consumption

3. The rise in the price of crude could be a microscopic example of what happens to prices when production is removed – the seeds of hyperinflation, but controlled in this case

VACATUR – LET ME COUNT THE WAYS

by Donald J. Szostak

On March 28, 2009 National Public Radio (NPR), in its Week End Edition, presented a report entitled, "Did Builder's Clout Trap Couple in Dream Home?"[1] The report concerned an arbitration matter overturned by the Texas Supreme Court in a narrow 5 to 4 decision.[2]

The Culls and Perry Homes entered into a contract, with an AAA arbitration clause, wherein Perry agreed to build the Culls' dream house. The resulting construction proved faulty and the Culls filed a lawsuit. Perry moved to compel arbitration to which the Culls objected, filing a seventy-nine page brief in response.

The trial court denied Perry's motion, and the Culls proceeded in extensive discovery that, presumably, would have been unavailable in arbitration. After filing several motions to compel discovery and the taking of numerous depositions, interrogatories, and requests for production of documents, the Culls, on the eve of trial, chose to invoke the arbitration clause of their contract - the same provision they had argued against when the builder tried to invoke it. The trial court granted the Culls' motion and ordered arbitration in compliance with the terms of the construction contract.

After the arbitrator ruled in the Culls' favor, Perry appealed arguing that the Culls had waived their right to arbitration. The trial and the appeals courts again ruled in the Culls' favor sending the matter to the Texas Supreme Court for adjudication. The Supreme Court ruled unanimously that a party, by its conduct, could waive its right to arbitration. Focusing on the facts in this matter the Court remanded this case back to the trial court, narrowly deciding that the Culls had indeed waived their right to arbitration by their conduct of engaging extensively in the litigation process prior to agreeing to arbitration.

It is commonly understood that, while the parties may opt out of the FAA's *vacatur* standards, generally the FAA provides the sole basis for judicial review as augmented by applicable arbitration rules. The usual requirements for *vacatur* are a showing of misconduct, partiality or fraud, vagueness and/or a showing that enforcement would be contrary to public policy and, arguably, manifest disregard of the law.

In Cull v. Perry none of the usual *vacatur* requirements appears to have been met other than, perhaps, the manifest disregard standard – aided and abetted by the trial court's having ordered arbitration. The ultimate controversy might have been avoided by a timelier appeal of the trial court's arbitration order. The Culls are now free to appeal to the US Supreme Court or let Perry have his second bite at the apple in the trial court.

1. http://www.npr.org/templates/story/story.php?storyId=102453061

2. Cull v. Perry Homes - www.supreme.courts.state.tx.us/historical/050208.asp

FINDERS KEEPERS?

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

We learned as kids the adage "*Finders Keepers, Losers Weepers*". And of course on land, that was correct. But at sea, admiralty law applies and nothing is as it seems. In admiralty, when something is found, we talk in terms of *salvage*, *arrest*, *abandonment*, *finds*, and *in rem* procedures.

Who has rights?

The law of admiralty is often ancient, sometimes unsettled and at times even in conflict depending on the jurisdiction. That's why at the first hint of salty dispute, people head to a maritime lawyer.

One local marine company discovered an abandoned barge full of scrap metal that had sunk over 20 years ago in the waters of Long Island Sound and knew that it would have good value these days and was worth the effort of salvaging. But, the company also realized that the difficulty was not in raising the cargo to the surface but securing sole possession and rights to sell the cargo as well as fending off rival 'treasure hunters'. It could be assumed that after 20 years the scrap metal was abandoned by its owner, but what about the rights, if any, of the marine insurance company that paid the owner for the loss? What rights do the boundary states of New York and Connecticut, or the U.S. Coast Guard have? Admiralty law provides procedural methods of dealing with these issues in a federal court

sitting in admiralty. However, the procedures can vary if the shipwreck or cargo is of cultural, historical, social, or archaeological significance. But, with a 20 year old cargo of scrap metal, cultural, social, or historic significance was not a concern in the recent federal case of *Weeks Marine, Inc v. Cargo of Scrap Metal Laden Aboard Sunken Barge Cape Race*.

Tug Takes a Scrap

In 1984, the Tug Celtic sank in the Long Island Sound while towing the barge *Cape Race* laden with a cargo of scrap metal. The location of the sunken barge is marked on navigation charts in 70 feet of water, yet no one has attempted to salvage the cargo. Weeks Marine, a professional salvage company commenced an admiralty action naming the cargo of scrap metal as the defendant. Yes, you heard right, the scrap metal cargo was the named defendant, not the tug company, cargo owner or marine insurance company. This form of "*in rem*" action against a vessel or cargo is common in admiralty law where, for example, the party suing is seeking to enforce a maritime lien against the 'thing' for services rendered such as supplying fuel oil or other services to a vessel, or, as in this case, requesting either to be awarded salvage rights or a salvage award. Even in admiralty personal injury or cargo damage cases, it is not uncommon for the vessel to be 'personified' and sued as the offending 'thing'. In admiralty law, things such as vessels and cargo can be 'arrested' until a dispute is resolved.

Here, Weeks Marine commenced suit in federal court seeking i) to arrest the underwater cargo, ii) to obtain a court Order to Show Cause why Weeks should not obtain exclusive rights to salvage the cargo, and iii) to have a temporary restraining order (TRO) or preliminary injunction issued to prevent rival salvors from interfering with Weeks' operations.

Injunctive Relief

The Court first took up the issue of the request for 'injunctive' relief. Admiralty recognizes the right of a first salvor to exclude others from participating in salvage operations, so long as the original salvor appears ready, willing, and able to complete the salvage project. Weeks was the first salvor of the cargo and therefore admiralty law would support Weeks' entitlement to exclusive salvage rights. But, injunctive relief is a remedy against a person or entity (known as an "*in personam*" action), while Weeks Marine had only invoked '*in rem*' jurisdiction against the cargo. According to the court, an *in rem* action is meaningless because things or property cannot be enjoined to do anything. In addition, to be entitled to injunctive relief, a plaintiff must first prove 1) that it is likely to suffer irreparable harm if the injunction is not issued; and 2) that it has a likelihood of success on the merits. The federal judge reviewed the record and felt that the 'irreparable harm' test was not satisfied particularly because the location of the scrap metal had been known for over 20 years and no rival salvor had yet attempted salvage at the site. Nor did it appear that any other salvors were waiting in the wings, or intended to interfere with the operation of bringing up scrap. Thus, the request for injunctive relief was denied. The judge suggested that Weeks could return to court and bring an *in personam* action seeking to enjoin rivals.

Salvage

Next up was the claim under the ancient maritime laws of "salvage". The federal judge properly noted that once a salvor saves property from marine peril, he or she obtains a maritime lien against the property saved. This "lien" is enforced by an admiralty *in rem* action against the property in federal court. There, the ultimate goal is to obtain a salvage award based on the value of the property salvaged. This was a potentially viable option for Weeks because it did file an *in rem* complaint against the scrap metal. However, for a salvage award to apply, some or all of the property has to be salvaged before an award may be considered. This is because "success" in whole or in part is one of the three main elements of a salvage claim. A salvor has a maritime lien on some or all of the property "saved" which allows the salvor to then bring a suit *in rem* against the vessel or cargo or both.

There is in admiralty a 'Law of Finds' pursuant to which a party may seek full 'title' to property. This procedure is accomplished by an *in personam* action against a company or entity that may be a rival in claiming title to or ownership in the vessel or cargo or both. The trouble with this is that for old shipwrecks that appear to have been abandoned decades or even hundreds of years ago, who knows who owns it, or if anyone still cares. But when there is value in the shipwreck or cargo still aboard, no matter how old, someone will no doubt be asserting title or rights whether it be a state, nation or successor company to the owner or the marine insurance company.

In the final analysis, the federal judge noted that admiralty law may well give the plaintiff exclusive rights to salvage the cargo aboard the Cape Race. But, the judge determined that it was premature to issue an injunction against others, because some cargo had to be first brought to the surface to show success in whole or in part before

the court would consider exclusivity of rights to further salvage operations or a salvage award. However, in certain circumstances disturbing a shipwreck and excavating her cargo has its own potential ramifications and permission from authorities may have to be obtained, particularly if the wreck and cargo is of historical, cultural, social, or archaeological significance. Of course, it is hard to conceive that a 20-year-old cargo of scrap metal would fall into the 'historic' or 'cultural' category such that any particular attention is being paid to it or that any special permission or permit would be required.

Postscript

Weeks Marine has since recovered 1,400 tons of the scrap metal cargo with no interference from rival salvors. So, another law we learned as kids applies, that "*possession is nine-tenths of the law*!"

NEW YORK COURT OF APPEALS ISSUES LANDMARK DECISION ON JUDGMENT ENFORCEMENT

by James H. Hohenstein, Esq. and
Michael J. Frevola, Esq., Partners, Holland & Knight

The New York Court of Appeals has just issued a decision which has the potential to be a landmark case for judgment enforcement against adversaries worldwide. The cite for the decision, issued on Thursday, June 4, 2009, encaptioned *Koehler v. The Bank of Bermuda Limited* is 2009 WL 1543698 (N.Y.) 2009 N.Y. Slip Op. 04297.

The New York Court of Appeals is the court of final review in the New York State court system and over issues of New York law. No further appeals lie from such a decision unless the matter can be reviewed by the Supreme Court of the United States under federal constitution grounds. Except in that limited circumstance, a New York Court of Appeals decision is the final word on New York law.

Position of the New York Court of Appeals in *Koehler*

After fighting their dispute in the federal court system, the litigants in *Koehler* have taken the case to the United States Court of Appeals for the Second Circuit (the regional federal appeals court that includes New York). During the appeal, the Second Circuit issued a "certified question" to the New York Court of Appeals. A certified question essentially is a request to the highest court in New York for an advisory opinion on an issue of New York law that appears unsettled or an issue of first impression. The question asked was whether, under New York judgment enforcement law, a court located in New York could order a garnishee bank located in New York to turn over property of a judgment debtor to a judgment creditor, even when the property is located outside of New York. The New York Court of Appeals held that the answer under New York law is "yes."

Ramifications of the Decision

The ramifications of this decision potentially are staggering. Under this holding, if a client has an unsatisfied arbitration award or judgment, under certain circumstances (discussed below), it can seek to enforce that award/judgment in New York by obtaining a turnover order against the judgment debtor's bank. The turnover procedure is a relatively simple process in the litigation, albeit the garnishee bank would be able to raise any defense it has (e.g., a right to set off). The bank will be under court order to turn over the funds of that customer even if the customer's bank account is at an overseas location of the bank. Furthermore, there is no maritime claim requirement to this rule. Therefore, all suitable judgments/awards are open to enforcement (*e.g.*, sales contracts considered non-maritime, ordinary commercial disputes, etc.).

In *Koehler*, the judgment debtor was not present or located in New York but the underlying judgment had been obtained as a default judgment in Maryland. As such, the judgment from another state of the United States was entitled to "full faith and credit" (a U.S. constitutional precept) by the New York courts. In other words, there did not need to be personal jurisdiction on this judgment debtor in New York as the judgment was a U.S. domestic judgment. Given that circumstance, where there was jurisdiction over the garnishee bank in New York and the bank was a subsidiary of and agent for its foreign parent, the turnover order reached the assets overseas. Thus, where a judgment debtor has no presence in New York, this remedy arguably will not be available but if the judgment debtor is subject to jurisdiction elsewhere in the U.S. or if an arbitration award is otherwise convertible to a U.S. judgment (such as when the arbitration is conducted in New York), an avenue for applying *Koehler* perhaps is available.

On the other hand, there is no question that companies which are present in New York, e.g., by being registered in New York, are fully subject to New York jurisdiction. As such, when a New York judgment is obtained against such an entity (such as by bringing a foreign judgment to New

York for recognition), under existing law that judgment debtor will be required to bring out-of-state assets to New York to satisfy the judgment. Moreover, under *Koehler*, garnishees (such as the branch bank of foreign bank) could also be compelled to bring assets from overseas locations to satisfy a New York judgment.

It is also important to note the dissent to the majority opinion. The dissent raises the many issues implicated by the decision – competing priorities and competing jurisdictions and courts. The dissent raises a legitimate constitutional issue concerning the sweep and purported scope of the decision, and this case, in the further federal proceedings or its progeny, will no doubt be subject to vigorous challenges. It is likely that the losing party in *Koehler* will seek relief before the U.S. Supreme Court (assuming the Second Circuit finds in favor of the judgment creditor in this case).

Nevertheless, if and until that happens and the federal courts alter the ruling, suitable judgment creditors have an excellent opportunity to take advantage of this ruling. It is important to remember that disregarding a New York court order can lead to sanctions and seeking a blocking order in a foreign court where the property is located would not solve the issue of being held in contempt in New York.

MORE ON THE ROTTERDAM RULES

Sam Ignarski, editor of BowWave, was kind enough to provide the following two articles, which appeared in that on-line's 500th edition.

THE COMING OF THE ROTTERDAM RULES

by Sam Ignarski, Editor, BowWave

When, this coming September, the newly drafted Rotterdam Rules are opened so that State parties can accede to them by ratification, a remarkable transformation is promised for the settled community which takes an interest in the carriage of goods and the liability of carriers. After some 50 years of progress, the peculiar requirements of multi-modal transport will be taken into account and the mosaic of rules governing liability will be organized into an organic whole. After decades of port to port liabilities, alternative regimes for other modes of carriage and separate rules for forwarders and NVOCs, some unity is promised.

A sociologist of law and transport would say that the practice of transport has long outstripped the regimes of law which governs it. All-in tariffs, door-to-door tariffs, carriers' bills of lading setting out the regime of liability all have been realized from the planners' idea to the reality of international shipping. There was even a time in the 1980s when the big container lines offered full value bills of lading, obviating the historic need for shippers to buy separate cargo insurance. And when in doubt, the drafters of modern carriage documents and conditions will grope their way to the standards of fault and liability of the Hague Visby Rules, the great pre-containerized convention, even if they are mere NVOCs or inland waterway carriers or logistics contractors. There is a force in the unitization of cargo which more or less presses on all the parties and carriers concerned. Whether they want to or not, the standards of liability they are subject to tend towards the same standards.

The same sociologist, when asked what a modern container related carriage of goods by all modes convention might contain if it were to adequately reflect modern industrial and transport conditions, he might specify that the convention favour the leviathans on land, sea and air. The massive liner shipping companies of today, their equivalents in the terminal companies and their opposite numbers in the great houses of forwarding and logistics might want features which enshrine the fact that a few hundred companies dominate the global market as shippers, forwarders, stevedores, shipping lines and buyers.

And we know that for volume contracts, an alternative approach is allowed under the new rules. And certainly the sectional interests represented by a trade body like CLECAT, that is to say European forwarders, logistics companies and customs brokers, are not exactly welcoming the new rules with open arms. Forwarding thrives in complicated conditions—when the Single European Act did away with border formalities in Europe, thousands of border forwarders in Europe bit the dust. It is instructive to look at the individual objections CLECAT has listed to the new liability conditions:

- The RR are far too complex (much longer and richer in exceptions than any other existing transport convention) to be readily understandable for users and third parties, including brokers and insurers.
- The limitations to liability seem to work in one direction only, without offering shippers or freight forwarders any mitigation;
- Multipurpose cargo terminals engaged as distribution centres in logistics operations would strongly oppose a

sort of maritime law injection into their business, which presumably will be governed by more sophisticated liability regimes that may be incompatible with the rules;

- In those states, where stevedoring and warehousing enterprises are owned by the governments, the RR will not be ratified without exceptions, in order to avoid an escalation of liability insurance premiums;
- The Convention is only a partial network system whereas freight forwarders always sought a full network system. This means that only mandatory conventions override (such as CMR), but private conditions do not. Private conditions are however very frequent and have served the industry without complaint for decades. Eventually the confusion created by conflicting conventions and/or private contractual rules may escalate into mind-fraying litigations in conflicting jurisdictions;
- The ship-owner can probably contract out under the volume contract exemption most of the time, whilst the forwarders are far less likely to be able to do so and could get into a situation where they are sued much more frequently than the ship-owner because it has contracted out of the liability regime. At best this would lead to higher liability premiums, but it might well lead to insurers being unable to accept the contract. This would leave both freight forwarders and their customers without protection, sometimes unwittingly.
- The carriers have been burdened with the cumbersome requirement to issue negotiable transport documents (or electronic equivalents), nevertheless they retain the right to deliver the goods without obtaining the negotiable transport document in return (Art. 47.2).

The old assumption that the maritime part of transport was the most perilous part of any carriage has been largely overtaken in the modern world. The reason why there are so few average adjusters around in the world, when compared to former times, is because the incidents of maritime casualty are fewer and fewer in nature. Yet the maritime world, because of history and because of the needs of traders, bankers and the various parts of the chain of transport, has tended to legislate in a contractual sort of way for the other, non-maritime, parts of the intermodal chain. Under the Himalaya clause, people working for the ship have tended to shelter under the liability defences of the ship, people like stevedores and consolidators. When cargo is delivered damaged on outturn, it is often to the shipping lines that claimants turn and to their P&I insurers.

Will the new Rules threaten any of this well worn institutional provision of insurance? It is certainly thinkable that the non-ship players caught by the Rules may well have to pay more for their insurance. Many stevedores and freight companies have grown used to paying thin rates to eager cash flow underwriters and decamping when claims records turn ugly. The larger they are the more this has proved likely. But is the new regime under the Rules a body of regulation favouring the biggies? Yes.

Note: This article first appeared in Lloyd's List on June 4, 2009.

The second article also appeared in BowWave and was provided by Donald L. O'Hare, Vice President of the World Shipping Council, which appears to have been authored by the U.S. National Industrial Transportation League (NITL).

NITL PAPER BEGS TO DIFFER

On May 22, 2009, the NITL released a comprehensive response to a recent paper published by the European Shippers' Council (ESC) which criticized a new international maritime cargo liability convention known as the "Rotterdam Rules," and advocated its rejection.

In sharp contrast, the League strongly supports ratification of the Rotterdam Rules both in the U.S. and globally. The paper specifically states that the new convention takes into account present day ocean shipping arrangements and commercial practices and would replace the outmoded, decades old patch-work of liability regimes currently applied by trading nations. The League said the new Rules carefully balance the legitimate commercial interests of all affected parties, and reflect a package of reforms that will result in significant benefits for everyone connected with the maritime movement of goods including shippers, carriers, and other freight stakeholders.

The League's response is a comprehensive, point-by-point rebuttal of the assertions presented by the ESC. In its paper, the League counters the European shippers' group's views as it impacts:

- conflict with other conventions;
- charges that the Rules would create unequal obligations;
- volume contracts and derogations;
- claims for compensation; and;
- shippers' obligations.

The League demonstrates in its paper that the Rotterdam Rules will result in clear benefits to the shipper community including:

- Eliminating the nautical defense which currently permits carriers to escape fault and liability based on negligent handling of the vessel;

- Expanding the carriers' due diligence for the entire voyage by sea, not just at the beginning of the sailing;
- Increasing the liability protections afforded to shippers at levels higher than under existing maritime cargo liability regimes, including Hague, Hague-Visby, and Hamburg Rules;
- Eliminating limits of liability if the contracting carriers or maritime performing party engages in reckless or intentional acts;
- Including liability protection for shippers arising from economic losses incurred as a result of deliveries delayed beyond an agreed upon time in the amount of two and one-half times freight;
- Allowing shippers and carriers to contract for customized liability arrangements that reflect the shippers' individual business requirements;
- Permitting countries to opt-in to applying new rules governing jurisdiction and arbitration which would allow the claimant to select the place of adjudication of cargo claims in certain cases, based on a list of potential locations which bear some relationship to the involved contract of carriage;
- Extending the statute of limitations applicable to civil claims from one to two years; and,

  Recognizing the increasing use of electronic commerce for shipping transactions.

Taken as a whole, these benefits to the shipping community directly contradict the ESC's contentions that shippers would be better served by the status quo and that the new convention would place shippers in a worse position than that of the pre-1924 environment when the Hague Rules were first adopted. The Hague Rules is presently codified into U.S. Law and is known as the Carriage of Goods by Sea Act (COGSA).

Finally the League paper tackles the ESC's desire for development of a European multimodal convention by stating it would "be a giant step backwards, and would undermine the international community's attempt to update cargo liability rules applicable to sea carriage and increase efficiencies and harmony through the widespread adoption of a uniform regime. The Rotterdam Rules provide a readily obtainable opportunity to achieve these important objectives."

Note: For a full copy of the paper, go to: http://www.nitl.org/nitlresponsepaper.pdf

PROVING A LETTER WAS NOT RECEIVED CAN BE DIFFICULT!

by M.E. DeOrchis, Esq.
Partners, DeOrchis & Partners, LLP

Next to "the check is in the mail," the other refrain often heard from debtors trying to postpone payment is "the bill was never received." Whether a letter was actually mailed or not received may become a difficult legal issue in litigation. Proving that a letter was actually mailed is not easy, but proving it was not received can be even more difficult. Knowing what evidence will be needed in court is important.

For example, the date when a declination letter from a rail carrier is received by a claimant is important because it starts the clock ticking on the time to sue specified in the rail carrier's contract of carriage. But what if the claimant furnishes affidavits from its employees that the notice of declination was never received?

In a case decided by a federal court in New York, defendant rail carrier produced a letter of declination dated July 29, 2003. The contract relied upon by the railroad was an agreement it had made with the ocean carrier to perform the land segment of an intermodal shipment.

"Himalaya Clause"

The ocean carrier had contracted for the through shipment with the claimant and had issued a bill of lading to the shipper that contained the usual "Himalaya clause" extending all the bill of lading's rights and defenses to its subcontractors, which in this case, was the defendant rail carrier.

The ocean carrier's bill of lading also contained a clause providing that if the cargo was damaged while in the custody of a subcontracting land carrier, the ocean carriers' liability would be governed by "the transport document(s) of the carrier by land…."

The railroad declined the claim on the basis of the standing agreement it had with the ocean carrier, which provided a one-year limitation to sue.

The declination letter was dated July 29, 2003, and the claimant did not sue the railroad until December 20, 2004. But, the claimant maintained that the letter had never been received.

Battle of Affidavits

On a motion for summary judgment, the rail carrier produced affidavits from three employees establishing the office procedures followed by the rail carrier, in the regular course of business, for mailing letters. It produced an Electronic Log indicating that the claim was denied on July 29, 2003, and an affidavit from the employee who wrote the letter and placed it in an outbox, properly addressed. Another employee described how the letter was collected from the outbox, and step-by-step, how it was placed, with postage applied, in the area designated for pickup by the U.S. Postal Service. Evidence was also provided that the letter was never returned as undeliverable. Under New York law, this was enough to raise a "presumption that the letter was mailed or delivered."

Though the Plaintiff provided affidavits of several employees describing how the company processed its incoming mail and attesting that the declination letter was never received or processed by the system, the Court ruled that this was not enough to overcome Defendant's proof that raised "a presumption of receipt."

The Court said, "These affidavits detail the process of receiving mail, but the Plaintiff provides no proof that there was a breach of procedure or carelessness on the part of the sender as the standard requires."

The standard referred to was set in an earlier Second Circuit decision, *Meckel v. Continental Resources Co.*, 758 F.2d 811, 817 (2d Cir. 1985), and requires some evidence that "the regular office procedure was not followed or was carelessly executed" by Defendant. According to the Court, "This standard has been widely followed within the Second Circuit." *See, BASF Corp. v. Norfolk Southern Railway*, 2008 U.S. Dist. LEXIS 19918 (S.D.N.Y. 2008); *see also, In re Yoder Co*., 758 F.2d 1114, 1118 (6th Cir. 1985).

PUBLICATIONS

LeRoy Lambert, successful co-author of Voyage Charters, his just added another title to his list of accomplishments. LeRoy, partner at Blank Rome LLP New York, contributed a chapter in The Evolving Law and Practice of Voyage Charterparties edited by Professor D. Rhidian Thomas and published by Informa (ISBN 978-1-84311-808.4 . 2009 / £250).

It is the latest book in Informa's series Maritime and Transportation Law [series] and focuses on the complex issues arising out of voyage charter party contracts, bills of lading and international sale contracts.

LeRoy's contribution, in Chapter 13 pages 281-288, represents "Comparative observations in United States law and practice relating to voyage charters." He focuses on several topics which often have been considered watershed issues between London and New York; e.g. sub details, brokers' commission claims, safe ports and berths and awarding of attorneys' fees and costs. As a practical matter, over the more recent years, English arbitration as well as court decisions have been cited in New York proceedings and vice versa. This is also reflected as part of LeRoy's conclusion when he states that "English and United States law share much more than this chapter's focus on the differences might suggest."

Stating the obvious, law books and treatises are invaluable tools, but, as a personal observation, I have enjoyed using books covering comparative law as they help make issues clearer and, more importantly, also provide different perspectives which ultimately could lead to different conclusions.

LETTERS TO THE EDITOR

Some time back, I discussed the duties of an editor with a good friend and counsel. He said that the responsibility for producing publications which nobody reads lies entirely with the editor. Likewise, the responsibility for producing publications which people read and enjoy lies entirely with the editor.

The volume of feedback is a barometer for a numbers of things – it shows that people read the publication or don't.

In days past, I complained that no one lauded or critiqued. The last issue, however, received the most and also the most diverse comments. I do thank all of you who have written and I should also like to take this opportunity to thank all contributors because they provide the life blood for this publication.

I would like to single out one note – it came from a Federal judge who wrote, "I have downloaded and read the April 2009 issue of THE ARBITRATOR. It is first class: informative and witty, a combination not always achieved by legal and technical publications. Congratulations …"

SOME PERSONAL NOTES

Obituaries

As the readers of THE ARBITRATOR know, on occasion I write obituaries. For reasons not quite clear, I also read obits, and on occasion I even clip one and place it in a book that the deceased may have written. Maybe writing an obituary is the last opportunity to express one's sentiments and admiration for the departed, and reading them may be a chance to learn more about extraordinary people whom you had met but wished you had known better.

When I heard of the death of Nicholas J. Healy, I wondered how to approach writing an obituary about a man who had lived nearly 100 years and touched so many in his rich life. It would be a most daunting task. After listening to the reflections on his father's life at the funeral mass at St. Joseph's on May 26, I realized that Nick Jr. would be the best person I know to do justice to the life and accomplishments of this good and noble man. I am thankful that he agreed (see p. 16).

There is one little but very telling episode I should like to share with the readers. Quite a number of years ago at an SMA luncheon, a young, successful lawyer commented that being a lawyer was about winning, winning at all costs for the benefit of one's client. To this Nick had a very pointed and brief response, "Speak for yourself, young man."

"Dressed for What?"

A recent copy of The New York Times carried an article entitled "Legal Tempest Over What (Not) to Wear to Court" by John Schwartz. I put the article aside for later reading while musing that it might be something akin to an episode in the movie "My Cousin Vinny." For those readers who are not familiar with that 1992 move which, by the way, in August 2008 was rated by The American Bar Association Journal as number 3 in the category "The 25 Greatest Legal Movies" (behind "To Kill a Mockingbird" and "12 Angry Men"), here is the relevant point. Two young boys from New York get arrested and are accused of murder in rural Alabama. Cousin Vinny from Brooklyn drives down to represent them and appears in court without a tie and in a leather jacket. The judge reprimands him and directs him to dress appropriately. Vinny buys the only available suit in his size – powder blue. He accidentally drops the suit and dirties it. The only other garment available is a burgundy, long tailed polyester suit which he then wears through his bumbling but ultimately successful defense of the boys.

Getting back to the article – the sartorial discussion was part of a general exchange of views among judges and lawyers during the Seventh Circuit's Bar Association meeting and addressed the appropriateness of short skirts and loud ties (neither one were found in favor). In the article, Judge Michael P. McCuskey, Chief Judge of the Federal District Court for the District of Illinois, acknowledged that the panel discussion did end up in a spirited conversation but thought that the problem starts in law school and should be dealt with there.

Do clothes man the man (or woman)? This Latin proverb says so, but then I disagree because what did the Romans know about a proper dress code when everyone wore a toga in their time? Clothes do not make a person good or smart; clothes create an image – just like an attractive dust jacket might sell a book.

I am in full support that anyone who has business in a courtroom should preserve the proper etiquette in deference to the judges and the system, but why should a tie with a design of smiley faces be offensive or inappropriate as Judge Goldgar (judge in the US Bankruptcy Court for the Northern District of Illinois) stated. Should well-mannered conduct and well-reasoned arguments be outweighed by an ill-chosen necktie? It hardly makes sense. The real issue is decorum, which has been defined as dignified propriety of behavior, speech, dress, etc. or the observance or requirement of polite society.

I also beg to differ with the statement that "the problem starts in law school and should have been dealt with there." Why should a law professor be expected to dilute his teaching time and impact by having to also deal with "Emily Post" or "Miss Manners?"

When in doubt, one could err on the side of George Will. I understand that he, when asked about a standard for dress code, responded, "This is not complicated. For men, sartorial good taste can be reduced to one rule: If Fred Astaire would not have worn it, don't wear it. For women, substitute Grace Kelly." But I don't think that's the real answer because then our lives would be a continuous movie set.

IN MEMORIAM

Nicholas John Healy

This May marked the passing of Nicholas Healy, whom many would consider one of the finest admiralty lawyers in the country, if not the world.

I had the unique advantage of knowing him in every aspect of his life: as his son, as a student (in his admiralty law class), as a law partner, and as a client (when I worked at Lamorte, Burns).

His range of admiralty expertise was legendary. He was an accomplished legal scholar, editing and co-authoring many of the leading maritime case books and texts, and editing many journals in the field. He was a professor of maritime law at New York University School of Law for nearly 40 years, and lectured throughout the world, from New York to London, and from New Orleans to Shanghai.

Unlike many scholars, Nicholas Healy was also a highly experienced and effective practitioner. He began in the admiralty law field shortly after graduating from Harvard Law School in 1934. During World War II he first served in the Navy, reaching the grade of lieutenant, but later was assigned to the Justice Department to handle the growing volume of cases involving U. S. ships or cargoes. After the war, he founded the firm which, after several changes, became Healy & Baillie, one of the most respected admiralty law firms in the country.

Even within the maritime practice, his range of expertise was extraordinary. From collisions to oil pollution, from ship fires to salvage and general average, he rendered opinions, arbitrated claims, tried cases, and prosecuted appeals, not infrequently all the way to the U. S. Supreme Court. For decades he was the principal U. S. maritime expert to whom the British P&I Clubs turned, but his clients were as diverse as Aristotle Onassis and Lloyds of London.

His active career spanned nearly 70 years. As late as 2000, at the age of 90, he was retained as an expert witness in a salvage case involving the wreckage of the Titanic. And even after he was impaired by a stroke at age 92, he was still working with Professor Joseph Sweeney on a second edition of their co-authored book on marine collisions.

He was President of the Maritime Law Association from 1964 to 1966 and Vice President of the Comite Maritime International. But for those who worked most closely with him, his most distinguished trait was his integrity. Every client, every law partner, every employee – indeed every opponent – could testify to his honesty, his generosity, his faithfulness. Never did ambition or desire for personal gain impair his judgment or his fair and courteous treatment of others.

Although he achieved preeminence as a maritime lawyer, his greatest joy was his family. His marriage lasted 66 years, until the death of my mother at 92. He had six children and another six sons-in-law and daughters-in-law; 21 grandchildren and 22 great-grandchildren. He was the beloved patriarch of the family. All six children were at his bedside in Bandy, Ireland during his final illness, and all 62 of his descendants (including spouses) were at his funeral in New York City.

His willingness to help all he met was extraordinary. I met few people who knew him who did not believe they were better for having known him. Throughout his life, he set an example of dedication to the law, integrity, kindness to all, especially strangers, and love of family.

THE ARBITRATOR

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