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# THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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## PRESIDENT'S CORNER

Readers:

As president, I find I receive some excellent questions about New York maritime arbitration practices. This August, I received a call from a law firm in Connecticut about the awarding of attorneys' fees. It was a good question because it gave me the opportunity to explain the process, as practiced by most panels, to someone who was not sure whether or not it was a feature of New York arbitration.

The associate and I talked for about ten minutes and in that time I was told that the question was really from one of the partners in the firm. We discussed Section 30 of the SMA Rules. That section *requires* arbitration panels in matters conducted under the rules to address the issue of attorneys' fees and costs, and empowers panels to award reasonable fees, costs or expenses. (The rules are available at our homepage.)

We also discussed cases where the SMA rules are not addressed in the arbitration clause. In those cases, if the parties request an award of attorneys' fees, New York panels will treat the request as if the Rules apply, unless there is some exceptional reason..

While it did not come up in the discussion, our rules also address the costs of the stenographic record (Section 15), interpreters (Section 16), and witnesses, panel-requested matters and travel and living expenses of a party-appointed arbitrator from outside the area (Section 36).

In my first *President's Corner* column in the July issue of *The Arbitrator*, I wrote about the meaning of the New York minute. I recently received an email from a party in an active arbitration who asked me, as president, to urgently write to an overseas court verifying an ongoing arbitration matter here in New York. The request was received at 1:10 in the afternoon.

Unlike arbitration administrative bodies, such as the AAA, the SMA office does not administer arbitrations. Such matters are left to the panel with the co-operation of the participating attorneys. In addition, all communications to the parties, once the panel is formed, must be via the

chairman. As the request was also sent to the panel members, it raised several questions in their minds requiring deliberation. Notwithstanding the busy schedule of each arbitrator, a ruling was issued and forwarded by the chairman at 9:15 AM the next morning.

Finally, summer vacations and holidays are over. Most people are back to work full time, but for those still looking for a vacation spot, the fall is a great time to visit New York City. There is a beautiful briskness to the air as you walk the avenues and cross-streets of Manhattan and, if the Yankees get into the World Series, you will see a lot of happy New Yorkers on every sidewalk. Of course, for the unhappy Mets fans, the winter season started sometime in July – but there is always next year. Did I tell you that the new Citifield (home of the Mets) is a beautiful ballpark?

Hope to see you at ICMA in Hamburg in October.

*Best regards,*

*Austin L. Dooley*

## ON THE WAY TO THE FORUM

*by Chris Hewer*

There is an undeniable glamour and celebrity attached to the law which is absent from arbitration. Countless books have been written about lawyers. In all of these, lawyers are variously brilliant, corrupt or funny, but always interesting. Who has ever read a book about arbitrators? (No answer necessary)

The author Jane Gardam prefaces her 2004 novel *OLD FILTH* with the inscription 'Lawyers, I suppose, were children once', which dedication is apparently to be found on a statue of a child in the Inner Temple Garden in London. The 'I suppose' is quite telling. The manner in which lawyers are popularly portrayed leads us to doubt that such people could ever have been swaddled.

*OLD FILTH* is a story about Edward Feathers, who gave up practising property law in London for a life in the Far East, where he became a barrister and judge of international repute. In time he was popularly known by the acronym 'FILTH', which signified 'Failed In London Try Hong Kong'. *OLD FILTH* is a delightful story. At heart, it is a simple tale about a man, his life and loves, his hopes and fears. The point is that it could have been written about an arbitrator. But it wasn't.

Arbitrators don't sell. They aren't glamorous. Yet the lineage is impressive. Nobody claims to know where, when or how arbitration began, which isn't very helpful. But King Solomon was an arbitrator, and they don't come much wiser than him. Alexander the Great's dad, Philip the Second, used arbitration as a means to settle territorial disputes under a peace treaty he negotiated with Greece in 337 BC, which just happens to be the year in which a plebeian was first chosen to be a praetor (or elected magistrate) in Rome. The Plebs was the general body of Roman citizens, as distinguished from slaves, or arbitrators. It was distinct from the higher order of patricians. A member of the plebs was known as a plebeian, a term which is used today to signify one who is of the middle or lower order.

Yet plebeians could become quite wealthy and influential in Roman times. And many of the great names we all remember from our studies of Ancient Rome could well have been described as 'arbitrators' rather than as emperors or scholars or statesmen or politicians. In Ancient Rome, arbitration was one of the preferred methods of settling disputes. It was a step up from fisticuffs, and saved on the laundry bills. The Forum would have been the place to be if you were an arbitrator. It still is.

In Ancient Rome, it was fashionable to make a bust of important people. And it wasn't just emperors and gladiators. Many an eminent arbitrator would have been thus immortalised. He just wouldn't have been referred to as an arbitrator.

The sculptors of the day were not above a little skulduggery and would cover the imperfections in their stone work with wax. Those above such trickery took to imprinting their work with the notation *'sine cera'* (without wax),

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from which is derived the word 'sincere' which is used today with such frequent insincerity and which forms the basis of the term, 'Yours sincerely' below which lawyers write their expensive signatures.

Arbitration was also all the rage in the Middle Ages, and is older than the common law system in England, where it was used as a common means of commercial dispute resolution long before anything had ever become *Res Judicata*, which is the sort of ancient Latin term which lawyers like to use and which in more recent times had the confused secretary of one London litigator frantically searching her office for the file on 'Ray and Judy Carter'.

In the United States, meanwhile, early Native American tribes used arbitration to settle their differences, and George Washington had an arbitration clause in his will stipulating that, if any dispute should arise over the wording of the document, a panel of three arbitrators would be constituted to render a final and binding decision to resolve the issue. No allowance was made for dissents.

Despite all this, arbitration has failed to become glamorous. Perhaps that is because, if you set out to do something more quickly and at a lower cost than that which is typically achieved by another profession, you will not become the subject of a best-seller. It would be nice to think that arbitrators will have their day. Shipping certainly has good reason to extol the virtues of its best arbitrators, but it seems unlikely that the profession will ever achieve celebrity. As for mediators, they are the new arbitrators, and they stand an excellent chance of achieving enduring obscurity.

Arbitrators have real lives. They have adventures, they have love affairs, they have an affinity with international intrigue. They are real people. If you prick them, they will bleed. In short, they and their lives have all the makings of a best seller. Yet they are remaindered before they are even published.

Perhaps arbitrators would not be happy with greater celebrity. And how would you go about achieving it, in any case? What would you put on the dust-jacket of a novel about arbitrators? Three men sitting in a room in Smithfield, or Connecticut? No wigs, no gavels, no pack-drill – no sales.

Arbitrators seeking celebrity are likely to be disappointed, but should be well-prepared for any eventuality. The ICMA meeting in Hamburg in October is one place where arbitrators can enjoy celebrity, albeit that of their peers. It is enough. And you would be well-advised to get there early, because the locals are likely to have put their towels on the best seats.

## NYMAR INTERVIEW

On July 15, 2009, "New York Notes," NYMAR's online newsletter, published the following interview with SMA president Austin Dooley.

**1. While your business revolves around the weather, how are you applying this to the business of arbitration?**

My business is providing expert opinion, specialized that it is, to owners, charterers, clubs and law firms in the maritime industry. Besides the many arbitrations I've participated in as a panel member, I have provided expert opinion to owners and charterers here in the United States as well as in maritime arbitrations in London and Canada. The experience has enabled me to gain a close-up understanding of the expectations of the users of arbitration services. I know this will serve me well as the Board of Governors and Officers of the SMA go about our business.

**2. How has this aspect changed over the years?**

As in all business matters today, streamlining is paramount. I see that in my business. Unnecessary, expensive and out-of-date practices do not survive. For example, today, New York maritime arbitrations have extensive email electronic correspondence between the parties and panel – it is only the exception that does not. The savings in time and cost to the users and arbitrators are great. The net result is a better, faster, and less expensive process.

**3. You are the newly elected President of the Society of Maritime Arbitrators. What is your vision for the next two years of the SMA?**

My term of office is two years. My predecessors and the Board of Governors have done great work in keeping the Society's rules and practices up to date and it is my desire to continue to work along those lines. We have a dynamic board and membership and during my term I see only a strengthening of the SMA's position as a leading organization in international maritime arbitration practices. We have for years conducted our luncheon speaker program where we have heard from prominent experts on such topics as arbitration appeal practices, allocation of fees, and even issues in London arbitration. This, of course, will continue and, in fact, we are going to develop programs within the Society to further disseminate the latest thinking on legal, arbitration and shipping issues to the membership. We are planning on conducting a series of themed seminars for the membership and users to accomplish this goal. The first one is under discussion for Connecticut in the fall. Additionally, I plan to conduct more mock arbitrations in order to sharpen the skills of the membership. Think of

 

it as batting practice (even Jeter and Wright take batting practice).

**4. What do you feel are the greatest challenges facing the SMA?**

The SMA's challenge is to work with the whole of the NYMAR community to develop within the maritime industry a fuller appreciate of "**New York Maritime, Inc"** (As a graduate of Fort Schuyler, I already have a deep appreciation for New York Maritime College). Our collective NYMAR challenge is to ensure that international companies continue to see New York as a shipping center with expertise to meet their needs in all sectors of the industry. The challenge to me and the Board of Governors is to continue to inform people about the SMA, its rules and benefits. For example, there are some that still do not realize that in our rules, New York panels can award attorneys' fees. The allowance depends on the merits and facts of the case. Additionally, here in the U.S., reasons for vacating an award are very limited. On the other hand, many think that in London, you can easily appeal decisions, whereas the 1996 English Arbitration Act has made it very difficult to appeal an award.

Locally, we have to work within our own house to be sure arbitrations continue to move forward in a timely manner – almost all do so. Remember, the SMA is not an arbitration administration such as the AAA. There is no such thing as an administrative fee based upon the size of the claim. In New York arbitrations, matters are administered by the attorneys and the panel collectively. This has great benefit in keeping administrative expense to an absolute minimum, but it sometimes introduces issues of timeliness, which only the presidential bully pulpit can address, when it comes to administration.

**5. If you were to give a "State of the SMA" address today, what would you say?**

The state of the SMA is strong and vibrant. We have an active and involved membership with expertise from across the industry. As a constituent of the international maritime industry and a 45 year old institution, we are a solid resource for the resolution of shipping disputes. In matters of maritime arbitration, the SMA offers rules for expert dispute resolution services conducted within a community of eminent maritime attorneys and arbitrators all ultimately accountable to what is considered to be the most influential American maritime court, the United States District Court for the Southern District of New York. For shipowners or charterers, it doesn't get any better than that.

**6. Two months ago in this column, we reprinted an article from ten years ago about arbitration in New York. You responded with some updates, but promised a fuller listing this month. What are some of the significant differences in today's arbitration practices?**

I've mentioned some of them already but the short list is: Full time arbitrators, awarding of legal fees, and modernization of the process via electronic communications. We have a membership with a fuller scope of shipping industry backgrounds and in addition, our awards are available electronically to anyone with Internet access.

**7. What do you believe are some of the greatest misperceptions about arbitration in New York?**

Here is my list:

**Misperception:** The publishing of awards is mandatory. Wrong! We encourage the publishing of the decisions of our members but it is not mandatory. Parties have the right to keep a decision private and confidential.

**Misperception:** Reluctance to award attorneys' fees. Wrong! It is the norm.

**Misperception:** Drawn out stop and go proceedings. Wrong! The days of "stop and go" proceedings are certainly a thing of the past. Currently in New York, most arbitration hearings are booked for a full block of consecutive hearing dates. Our members make themselves available to suit the needs of the parties. This reduces time and expense to the parties.

**Misperception:** No arbitrators with legal backgrounds. Wrong! When the issues being decided are more "legalistic" than commercial, we have many people in our membership with legal education and skills for the parties to consider. For example, as president, I recently had to appoint an arbitrator under a container service contract calling for someone with a background in shipping law and container claims. No problem, done.

**8. Have Rule B attachments been a factor in the arbitration world? How big?**

Rule B has not had much direct impact on the SMA activities as it is a matter for the courts. Certainly, as an invaluable tool to secure claims pending in arbitrations, it serves a purpose. As it establishes security for a claim, it is likely to encourage parties to proceed to arbitration once the claimant has been successful in the courts.

## COSCO BUSAN – RISK RE-EXAMINATION

*by Geoffrey W. Gill, Esq.*
*Countryman & McDaniel*

The recent sentencing of COSCO BUSAN's pilot, John Cota, to ten months imprisonment has refocused attention upon several facets of what the COSCO BUSAN allision may portend for the maritime industry - particularly the respective responsibilities between pilot and ship's master. There seems to be the suggestion that the "game has changed" as regards the formalization of that relation. I submit that the nuances and practicalities of the situation significantly undermine any attempt to regulate by statute or judicial decree that relation - notwithstanding the desirability of a black & white demarcation of responsibility.

I begin by acknowledging my prejudice against the media, politicians and others unfamiliar with the realities of the contemporary commercial maritime world imposing their regulatory will upon an industry already awash in regulations.

At first blush, the pilot-master relation historically has recognized that in pilotage waters, the pilot controls the vessel by conning her navigation, with the master having the duty to intervene as necessary (other than in the Panama Canal) due to his (her) overriding responsibility for the vessel, her personnel and goods on board.

In a perfect world, this demarcation makes sense, the only iffy part (and it's a mighty big "IF") being: when does the duty to intervene kick in? – how dangerous may or should the situation be allowed to become before the master must intervene. But as we know, today's commercial maritime world is far from a perfect world.

Perhaps the first "speed bump" is the ambiguity over who determines whether the vessel will even get underway. In years passed, commercial pressures were less intense and a weather/visibility delayed sailing more economically justified when weighed against the risk of accident. Today's reality suggests the pilot, less subject to the ship owning company's economic induced pressures, should be an arbiter of whether the vessel gets underway. In fact, COSCO BUSAN's master apparently deferred to Captain Cota's judgment as the master asked him "...can go?" But Captain Cota passed the decision back to the master by saying "single up, if you want." This exchange begs the question whether a controlling authority, such as VTS or the Coast Guard, should make the decision.

And here may be introduced the role between a controlling or advisory authority such as VTS and the bridge team aboard the vessel. This appears an open issue as at the NTSB hearing, COSCO BUSAN's manager's question of whether VTS can be expected to direct a vessel from danger was characterized as "leading and argumentative," and went unanswered.

Another under appreciated issue is "power distance" that has been shown to influence the way different nationality groups will, or may be reluctant to, challenge questionable orders. Studies, particularly in the aviation domain, validated by numerous maritime casualty reports, have shown that many third world nationals hesitate or decline to questions practices, procedures, or performance by Western nationals. By example, I discussed this phenomenon with a major Asian vessel owner's port captain, who was sufficiently interested to recommend that I address this issue within the fleet, but he was chastised because his recommendation had not passed through the fleet training department. Ironically, this conversation occurred only two months before the COSCO BUSAN allision.

More to the point, there appears to have been recognition of "power distance" on COSCO BUSAN's bridge as the vessel data recorder recorded a crew member commenting "...American ships under such conditions, they would not be underway" as a vessel departed her berth.

The rationale underlying the pilot-master relation is the master's trust in the pilot's competence, which the master is unlikely to have sufficient opportunity independently to verify. Similarly, the pilot should be able to trust the competence of the master and the vessel's bridge team to complement his or her local knowledge. As all humans are capable of error, the pilot should welcome a proactive bridge team. One can too easily imagine an in extremis situation in which trust is absent and countermanding orders create a CAINE mutiny – "Mr. Keith, you're the OOD here, what the hell should I do?" – situation. The trust factor highlights the importance of the pilot-master exchange, when initial influential impressions will be formed.

While the COSCO BUSAN incident invites comment in many areas, a final observation is appropriate to the increasing criminalization of simple negligent acts or omissions, which should be judged less by their consequences than by their culpability. One can only wonder how many competent experienced senior officers are thereby deterred from staying at sea, so opening the door for less experienced personnel and so increasing the risk factor.

The COSCO BUSAN incident has the potential for robust review of many import issues. One can only hope that the right questions will be knowledgeably asked in the right way to elicit realistic objective and appropriate answers.

 

# NOBLE AMERICAS CORP. V. CITGO PETROLEIUM CORP.

## (PRODUCT SPECIFICATIONS - EXPRESS WARRANTIES - QUESTIONS OF WAIVER)

*by Jack Berg*

## INTRODUCTION

This dispute arises out of a May 25, 2005 petroleum sales contract whereby CITGO Petroleum Corp. (CITGO) sold to Noble Americas Corp. (Noble) 225,000 to 260,000 bbls. of a product described as No. 2 diesel oil with certain specifications for delivery FOB to the vessel ST. MARCO at CITGO's Lake Charles refinery between May 29-31, 2005.

The vessel loaded without incident on June 3 and proceeded to Panama for discharge to Noble's customers. By June 12, some nine days after delivery, the color quality of the diesel fuel was so degraded that Noble's receivers rejected the cargo. ASTM color is a primary indicator of fuel stability and rapid color change is indicative of latent chemical instability. Noble's claim in this arbitration is for $831,016 in damages related to CITGO's breach of an express contractual warranty of product quality.

## THE CONTRACT

The sales contract was prepared by Noble and contained the following clauses relevant to the issues in this dispute:

Product Description:
No. 2 Diesel meeting the following specifications

There were many specifications of which only one is relevant, and that is:

ASTM color: 1.5 or less

The contract also incorporated Noble's General Terms and Conditions which provided in Section 13 a general disclaimer of warranties as follows:

13) *Warranties:*

> *Except for the warranty of title, no conditions or warranties, express or implied, of merchantability, fitness or suitability of the Product for any particular purpose or otherwise, are made by the seller other than the Product conforms, within any tolerances, stated to the description stated herein.*

The contract provided for the application of the laws of the State of New York, which includes the Uniform Commercial Code (UCC), and for the arbitration of any controversy or claims in New York City.

## BACKGROUND FACTS

An analysis of the product loaded to the vessel from the two CITGO shore tanks showed color within contract specification of 1.5. Noble had previously resold the cargo to five receivers in Panama guaranteeing a maximum color of 2.0. A summary of the color changes in the cargo from the time of delivery to the vessel at Lake Charles through early June showed a deterioration in color from 1.5 to 2.5 and later in the month to 3.0-3.5. Later in October, the color had further deteriorated to 3.5-4.0. Noble's buyers rejected the product, therefore, Noble was forced to mitigate its damages as best it could.

## THE CONTENTIONS

Noble asserted CITGO breached its express warranty of quality by delivering fuel possessing an inherent and latent chemical instability which resulted in an atypical and highly accelerated color deterioration following delivery.

CITGO's primary contention was that Clause 13 provided a complete defense to the claim because there was no continuing express or implied warranty after the cargo was loaded on board the vessel. The only express warranty CITGO alleges it gave was that the color specification would be met at the time title and risk passed at the load port. In this respect, CITGO argued that every test performed on the product when it was delivered to the vessel showed it met or exceeded contract specifications. CITGO further alleged Noble's acceptance of the goods at Lake Charles waived the express warranty.

## DECISION

The panel concluded that the contract's technical specifications of goods sold constitute "descriptions" and clearly create an express warranty. CITGO did not contest that the contract contained a technical specification that the fuel would meet a maximum ASTM D 1500 color score of 1.5, therefore, CITGO expressly warranted the fuel would be in conformity with that specification.

The joint testing of all the retained samples in the presence of the representatives of all interested parties

 

conclusively established that CITGO was the sole source of the color instability.

The panel further concluded that CITGO's principal defense to the express warranty by specification completely misconstrues the general waiver warranty in Clause 13 of the contract. Clause 13 appears to exclude any claim based on a breach of the express and implied warranties. However, while the language is very broad, it must yield to the specific wording of the contract.

As a matter of law, the panel concluded that neither party may waive or disclaim an express warranty by specification. The conclusion is fully in accord with UCC § 2-313, comment 4 stating "a clause disclaiming 'all warranties express or implied', cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under § 2-316." Wilson Trading Corp v. Ferguson, 23 N.Y. 2d 398 (1968), involved a contract containing both an express warranty from the seller to supply yarn of a merchantable shade, and a general disclaimer of all express warranties. The New York Court of Appeals recognized that the disclaimer and the express warranty by description contained in the contract could not be reconciled, and held as a matter of law that an express warranty by description must prevail over any purported limitation or waiver of that express warranty.

The product description set forth in the Noble contract is No. 2 diesel fuel meeting certain specifications, including color. There are two parts to the contract warranty. The first is that the product is diesel fuel and the second is that the fuel must meet certain precise chemical specifications. Based on the credible evidence, the panel concluded the product was not No. 2 diesel oil because it was unstable and susceptible to a rapid and unusual build-up of sludge and sediment as manifested by the substantial change in color. It could not be marketed in Panama as No. 2 diesel oil. The defect in the product here was clearly latent and could not be detected by any normal analysis at the time and place of delivery.

In addressing CITGO's argument that Noble's acceptance of the cargo at Lake Charles waived the express warranty, the panel relied on UCC § 2-607(2) which expressly provides that the acceptance of goods delivered does not impair the buyer's right to recover damages for non-conformity provided the buyers provided notice of the breach within a reasonable time after discovery. It was undisputed that Noble gave prompt notice of the defects as they became known. The evidence clearly established that Noble had no reasonable means of determining the existence of the latent defects at the time and place of contract delivery. CITGO maintained that the sale contract's general terms provided that loadport testing would be final and binding on the parties. However, such a provision cannot be applicable to latent defects that were not readily discoverable upon testing at the time of delivery at the CITGO terminal in Lake Charles.

The panel awarded Noble damages of $831,016, consisting of its settlement loss with receivers, additional transportation costs, demurrage and testing costs. It was the panel's conclusion that Noble acted reasonably in mitigating its damages. See SMA 4038 (2009) and AMC July 2009, No. 7.

## BE CLEAR AND SPECIFIC

*by M.E. De Orchis, Esq.*
*Senior Partner, De Orchis & Partners LLP*

Arbitration agreements sometimes stipulate that each party will bear the cost of its own arbitrator and attorneys' fees and share equally the cost of the third arbitrator. Others simply stipulate that each side will bear its own attorneys' fees and the arbitrators' fees will be equally divided. Are such contracts always binding on arbitrators? Apparently not.

The Circuit Court of Appeals in New York recently ruled that a broad arbitration clause which provided that "any disputes or differences that could not be agreed by the parties shall be decided by arbitration" confers "inherent authority" on arbitrators to sanction a party that participates in the arbitration "in bad faith," and that such a sanction may include an award for attorneys' fees or arbitrators' fees. But what about the parties' stipulation regarding attorneys' fees and arbitration costs?

The Second Circuit ruled that an agreement that each party bears its own legal fees was not an adoption of the well-known "American Rule" that each litigant bears his own legal costs, and the parties' agreement to limit the arbitrator's power to impose attorneys' fees was binding on the arbitration panel only in the context of good faith dealings. The broad arbitrators clause needed to be clear and unambiguous to limit inherent powers of the arbitrators even in bad faith situations. *Relia Star Life Ins. Co. of N.Y. v. EMC Nat'l Life Co.* (2d Cir. April 9, 2009).

 

## 'DOCUMENTED VESSEL' - *WHAT THE HECK IS THAT?*

*by James E. Mercante, Esq., Partner*
*and Richard Gonzalez, Esq.*
*Rubin, Fiorella & Friedman, LLP*

Pleasure boaters (sail or motor) often hear the term "documented vessel." But, in an informal poll on the waterfront, nine out of ten boaters surveyed had no clue what this means.

Then, after receiving a recent query about documentation from insurance broker to the marine stars, Arthur Buhr III of Total Dollar Insurance, I knew it was high time for a ***Sea Trials*** article.

Vessel documentation is a form of "national registration" administered by the U.S. Coast Guard. Documentation provides evidence of U.S. nationality for international purposes, facilitates commerce between states, and allows your vessel to engage in certain restricted operations such as coastwise trade and fisheries. Documenting a vessel results in the issuance of a "Certificate of Documentation." The regulations concerning documentation are codified in the Code of Federal Regulations, Title 46, Part 67 (Shipping).

A Certificate of Documentation ("COD") may be endorsed for fishery, coastwise, registry, or even recreation. Any documented vessel can be used for recreational purposes, regardless of its endorsement. But a documented vessel with only a recreational endorsement may not be used for any other purpose. COD's are valid for only one year and are renewed annually (free of charge). Once a vessel is documented, the COD can only be removed by written request of the vessel owner or authorized agent. The COD must be returned to the U.S. Coast Guard at that time.

Any vessel that measures *at least* five net tons in size, and is completely owned by a U.S. citizen (or corporation), may be ***voluntarily*** documented. This includes small privately- owned pleasure crafts weighing in at least five net tons. Thus, a smaller power or sail boat can *not* be documented. However, if a vessel meets the minimum tonnage requirement and is used in commercial fishing upon any navigable waters of the U.S. or in the Exclusive Economic Zone (EEZ), or used in coastwise trade, then it is ***required*** to be documented.

An owner of a documented vessel is obligated to comply with the laws of any state in which they operate. In fact, some states still require documented vessels to be state registered and to display state licenses (such as a commercial fishing or lobster license) in a conspicuous place on board. A documented vessel (unlike a state-registered vessel) does not display state registration numbers on the port and starboard sides of the hull. A documented vessel is required to display its name and hailing port (city and state) on the hull. A commercial vessel must display this information on the stern, whereas a recreational craft may do so on the sides or stern. For example, a vessel meeting this requirement that I have seen carries the name "MAN OVERBROAD" on the stern and the hailing port "Point Lookout, New York." Once a vessel's name is established and recorded, it cannot be changed without submitting an application, paying a fee, and receiving the approval from the Director, U.S. Coast Guard National Vessel Documentation Center. And, names can be duplicated. So, that means "MAN OVERBROAD II" is not off limits.

Vessels that are *exempt* from documentation include those that do not operate in navigable waters of the U.S., or in fisheries in the EEZ, and certain non-self propelled vessels that are used in coastwise trade within harbors, rivers, lakes, or in internal waters or canal of any state.

Some "preferred mortgage" lenders require that a vessel over five net tons be *voluntarily* documented as a condition of the mortgage lien. This is not a legal requirement, but a condition of the lender. A "preferred mortgage" is a mortgage that is given the status of a "maritime lien." Sometimes "maritime liens" have priority over other claims in a maritime dispute or litigation. The U.S. Coast Guard will collect the lien information and record it in the COD file of the vessel. This provides protection to the lender because the COD cannot be transferred to a new owner without a bill of sale, or other acceptable evidence showing transfer of the vessel, and satisfaction of the lien. This is a useful tool for lenders to protect their assets, especially when it involves a vessel required to be documented. Not even the U.S. Coast Guard can make changes to the vessel ownership, its name, and/or hailing port without the consent of a lienholder identified on the COD. Indeed, a vessel cannot be removed from documentation with an outstanding mortgage.

In summary, certain vessels are *required* by the U.S. Coast Guard to be documented, and others may be documented on a *voluntary* basis. There are perceived advantages and disadvantages, some real, some imagined.

There are some perceived disadvantages of documenting a vessel: (i) documenting a vessel opens the owner/corporation to oversight by the federal agencies and, naturally, each documentation transaction creates more paper trails; (ii) the documented vessel might still be required to be "registered" in the state where it operates. For example,

 

in New York, a pleasure craft owner that documents his/her vessel with the U.S. Coast Guard, is still required to register the vessel with the State, but is not required to display registration numbers on the hull; and, (iii) selling/transferring a documented vessel might be difficult and time consuming in certain circumstances when liens are recorded.

Advantages of documentation include: (i) Documentation creates a nationally recognized record of the vessel, allowing for easier state and international travel; (ii) Documentation allows the vessel to engage in coastwise trade and fisheries if a proper endorsement is obtained; (iii) If a documented vessel is stolen from one state, and transported to another state, documentation will make it easier to identify, recover and deliver the vessel to its rightful owner. This is because not all state police agencies can easily check other "state" boating registries, but they can check federal documentation records and accept these as valid/official; (iv) Documented vessels usually have less contacts with state law enforcement entities. In this regard, the view is that a documented vessel is owned and maintained by professionals, giving the perception that it likely meets all safety requirements. Thus, law enforcement officials might "skip" boarding a documented vessel, and focus their enforcement activities on (smaller) state registered vessels. This becomes especially relevant, when a (recreational) documented vessel crosses state lines. Law enforcement officials will likely consider a documented pleasure craft as being in compliance with federal laws, and not bother the vessel owner. Indeed, state law enforcement officials can often be confused as to what boating laws apply to documented vessels.

Therefore, when you see a vessel name and hailing port on the stern (and no registration numbers on the hull), now you know why, and that this owner answers to a higher (federal) authority!

## UPDATES

**Stolt-Nielsen S.A. et al. v. AnimalFeeds International Corp.**

We reported on this case in our April 2006 issue. Through a number of appeals, the case has not reached the US Supreme Court, which is quite unusual for a maritime case. The background and current status is summarized as follows by Justin Kelly of ADRWorld.

*The U.S. Supreme Court has agreed to consider whether imposing class arbitration on parites where the arbitration clause is silent on that issue is consistent with the Federal Arbitration Act.*

*In granting the petition for a writ of certiorari in Stolt-Nielsen S.A., et al. v. AnimalFeeds International Corp. (No. 08-1198, cert, granted June 15, 2009), the High Court acknowledged that the same issue arose in Green Tree Financial Corp. v. Bazzle, (539 U.S. 444, 2003), but it did not address that issue because a plurality of the Court determined that the arbitrator first had to decide whether the arbitration clause was actually silent on the issue of class arbitration.*

### *Case Details*

*AnimalFeeds filed a class action lawsuit in the U.S. District Court for the Eastern District of Pennsylvania alleging that Stolt-Nielsen engaged in a conspiracy to restrain competition in the parcel tanker shipping market in violation of federal antitrust laws. The case was consolidated with other similar cases in the District of Connecticut.*

*Stolt-Nielsen moved to compel arbitration, but the district court denied the motion. The Second Circuit reversed the district court's order denying the motion to compel arbitration. Thereafter, the parties agreed to arbitrate in accordance with the American Arbitration Association Supplementary Rules for Class Arbitration. One of these rules permits the arbitrators to determine whether the case may proceed on a class basis.*

*In the arbitration, Stolt-Nielsen argued that because the arbitration clause was silent on the issue of class arbitration, classwide arbitration was precluded. It also argued that parties to maritime contracts have no expectation that their claims will be heard as a class.*

*The arbitrators ruled that the arbitration agreement, notwithstanding the silence about class arbitration, permitted arbitration on a collective basis. Stolt-Nielsen petitioned the district court to vacate the award.*

 

*The district court grated the motion to vacate, concluding that the arbitrators manifestly disregarded the law because they did not "make any meaningful choice-of-law analysis."*

*The Second Circuit reversed, holding that the district court improperly vacated the award since there was not showing that manifest disregard of the law standard had been met.*

*Stolt-Nielsen filed a petition for a writ of certiorari, asking the High Court to decide whether class arbitration could be compelled under an arbitration agreement that says nothing about class treatment.*

### *Clarity on Class Arbitration Under FAA Needed*

*In its petition for a writ of certiorari, Stolt-Nielsen argued that the contract with AnimalFeeds was a standard form contract used since the 1950s, and that it has never been interpreted to permit class arbitration.*

*It observed that prior to the Supreme Court's ruling in Bazzle, the Third, Seventh and Eight Circuits held that class arbitration is not permitted in the face of an arbitration clause that is silent on the issue of collective arbitration, while the California and South Carolina Supreme Courts have reached the opposite conclusion when the FAA applies.*

*After Bazzle, the Second and Ninth Circuits and the Illinois Supreme Court ruled that class arbitration is permitted when the arbitration clause is silent and is not inconsistent with the FAA. The Seventh Circuit ruled that Bazzle did not decide the issue of class arbitration because the High Court never got to that issue.*

*Stolt-Nielsen argued that confusion reigns over the issue and that the High Court should provide clarity for the federal courts.*

Stolt's Supreme Court brief was filed on August 28 2009, followed by an *amicus curiae* brief authored by William J. Honan of Holland & Knight as Counsel of Record. The brief contains the collective supporting positions of ASBA, BIMCO, Bergen Shipowners Association, Chamber of Shipping of America, International Association of Independent Tanker Owners, Japan Shipping Exchange, Norwegian Shipowners Association, SMA and Teekay Corporation.

AnimalFeeds has until October 20, 2009 to file its merit brief.

**John A. Feeney et al. v. Dell, Inc.,** although not previously reported or referenced in THE ARBITRATOR, is included at this time because of its theorem – class action. The case (SJC-10259), decided on July 2, 2009, is a non-maritime case. The following article was prepared by Justin Kelly of ADRWorld.

*The Massachusetts Supreme Judicial Court has ruled that a class action waiver in an arbitration agreement is unenforceable because it deprives parties of their statutory right to bring class action in the state.*

*John A. Feeney et al. v. Dell, Inc. (No. SJC-10259, July 2, 2009) arose out of the plaintiffs' purchase of computers and service contracts from Dell. The contracts contained an arbitration clause as well as a provision prohibiting class actions.*

*The plaintiffs filed a putative class action lawsuit against Dell, which responded by filing a motion to compel arbitration. The trial court granted Dell's motion and that motion was affirmed on appeal.*

*The plaintiffs filed an arbitration claim under protest. They also asked the arbitrator to certify the case as class arbitration. The arbitrator, citing the prohibition against class actions, denied the plaintiffs' request and ultimately issued an award in favor of Dell.*

*The plaintiffs moved to vacate the arbitration award and sought reconsideration of the propriety of the order compelling arbitration. Their motions were denied. The trial court confirmed the award and dismissed the case with prejudice. The plaintiffs sought to have these matters reviewed by the Massachusetts Supreme Court, which agreed to hear the case. It reversed all the earlier rulings.*

 

***Class Actions and Public Policy***

*On appeal, the plaintiffs argued that the class action waiver in the arbitration agreement violates Massachusetts General Law Chapter 93A, Sec. 9(2), which authorizes consumers to bring class action lawsuits for "[u]nfair methods of competition and unfair or deceptive acts."*

*The court noted that Chapter 93A expresses the public policy of Massachusetts in favor of class actions. The legislative history indicates that class actions were needed to address small-dollar claims that might not otherwise be brought due to cost. The Massachusetts attorney general submitted an amicus curiae brief in this case, arguing that class action waivers violate the public policy of the state.*

*Turning to the case at hand, the court ruled that class action waiver was directly contrary to public policy and should not be enforced.*

*First it found that the waiver undermined the purpose of the policy of allowing consumers to bring class actions in low-value cases.*

*Second, it undermined the state's interest in deterring wrongdoing. Third, it negatively affected the rights of unnamed class members. This was the case, the court reasoned, because the right to bring a class action is not simply an individual's right but rather a right that is designed to protect the public as a whole.*

*The court observed that enforcing a class action waiver would allow companies doing business in the state to insulate themselves from liability for small-value consumer claims. This could leave countless customers without an effective means of vindicating their statutory rights, the court said, a result clearly "at odds with" state public policy.*

**Andorra Services, Inc. v. M/T EOS**, previously reported in Vol. 40 No. 2 January 2009 at p. 10 with a commentary on the court confirmation at p. 13 and subsequently in Vol. 40 No. 3 April 2009. Oral argument in this matter has now been scheduled for the second week of November 2009 before the Third Circuit.

**Rotterdam Rules.** The Rules were signed on September 23, 2009, in, where else, Rotterdam.

## THE SKILLAGALEE

*by David W. Martowski*

The SKILLAGALEE was a fifteen-year old J/80 yacht with the following specifications: fiberglass monohull manufactured by TPI Composites, Inc.; LOA of 26.25 feet; Beam of 8.25 feet; Draft of 4.90 feet; displacement of 2,900 lbs.; lead bulbous keel of 1,400 lbs.; Certified for Design Category B of the EU Recreational Craft Directive for waves up to 13 feet with winds of up to 41 knots. The yacht became a constructive total loss when her keel separated from her hull during a regatta on Noyak Bay, Long Island on May 31, 2008. She was knocked down several times in 2-3 foot seas and winds estimated at 25-30 knots. Owners arranged to have her sunken hull towed and hauled in order to prevent a hazard to navigation and reduce the possibility of pollution. Her keel was not salvaged and remains on the bay bottom in fifteen feet of water.

Hull underwriters' surveyor conducted a non-joint survey of the hull on June 6, 2008 and concluded that the casualty was caused by "delamination due to fatigue"; declared the yacht a constructive total loss; and agreed that the salvage and towing expense was fair and reasonable. Underwriters denied the claim and Owners appointed a surveyor who conducted a non-joint survey on November 8, 2008, concluding that her loss was not caused by neglect or long-term delamination, but rather to "a catastrophic fiberglass failure due to rapid athwart ship pressure from 2 high speed jibes that accidentally occurred in heavy wind". Underwriters again declined coverage and the parties proceeded to arbitration. Both agreed on David Martowski as the sole arbitrator. At his suggestion, both parties appointed Joseph Winer as technical expert to independently review the evidence and render an impartial opinion as to the cause of the casualty. Owners requested a hearing, and in view of the modest amount in dispute, arbitrator and expert agreed to cap their fees and make every effort to enable the parties to present their positions, yet contain costs of the proceeding.

The hull policy covered losses for "accidental, direct physical loss" and those caused by a "latent defect in the hull or machinery" expressly defined as "a hidden flaw in the material existing at the time of manufacture of the covered yacht". The policy expressly excluded "Wear and

 

tear; gradual deterioration; weathering; bubbling; osmosis; blistering; delamination of fiberglass or plywood; corrosion; rusting; electrolysis; mold; rot; inherent vice; vermin; insects or marine life"; "failure to maintain the covered yacht in good condition and repair" and "error in or improper design".

A hearing was held in New York City on May 28, 2009, at which the parties and their surveyors testified and submitted voluminous documentation. Both parties also submitted yachting news reports regarding the total loss on March 28, 2009 of the HEAT WAVE, a fifteen-year-old J/80 yacht, after her keel was sheared off of the keel sump while racing off San Francisco Bay in 12-14 foot waves in winds of close to 40 knots. The SKILLAGALEE (Hull No. 21) and the HEAT WAVE (Hull No. 45) were two of 1,150 J/80s produced during 1993-1996, using the then innovative SCRIMP® (Seemann Composite Resin Infusion Molding Process) patented in 1990. This process replaced the hand lay-up open molding system and was designed to increase hull integrity while creating a safer working environment. The loss of these two yachts was the only known J/80 casualties due to the separation of their keels from their hulls. Both parties also submitted J/Boats "Best Practices Guidelines" published shortly after the loss of the HEAT WAVE, alerting J/80 owners to both casualties and compiling a best practices inspection, maintenance and user guide for J/80 owners, specifically encouraging them in great detail "how to" inspect their keel arrangements, and so forth.

Mr. Winer submitted his report to the arbitrator on August 27, 2009, concluding that Owners had exercised comprehensive inspections and maintenance procedures in keeping with the requirements for maintaining the yacht in good condition and repair, and emphasizing that they had complied with J/Boats' post-casualty warnings and recommendations well prior to the SKILLAGALEES' loss. Mr. Winer also reviewed the history of the SCRIMP® process and concluded that the 1993 newly developed process of laminate construction may have resulted in manufacturing process flaws, as opposed to material flaws, in its early application that could have been the cause or contributing cause of the separation of the keel from the hull of the SKILLAGALEE. He concluded that both parties had not established a sufficient foundation for proving that her loss was caused or contributed to by a latent defect "in material" or delamination, as they contended, nor for proving the other express policy exclusions of "wear and tear" or "error in or improper design". The proceeding was formally closed on August 28th and the Final Award issued on September 2, 2009.

The arbitrator, after considering the evidence, testimony, Mr. Winer's report, and basic tenets of marine insurance law regarding the parties' burdens of proof and applicable case law, found that the loss of the SKILLAGALEE was not due to a latent defect, delamination, wear and tear, or error in or improper design. While underwriters had not raised "inherent vice", this exclusion was also discussed. "Inherent vice" is a common exclusion in cargo insurance policies and has been widely litigated in claims for cargo loss and damage. While rarely applied to a "vessel", there is precedent for doing so. However, while Mr. Winer concluded that the SCRIMP® manufacturing process of the J/80s in its infancy may *possibly* have been defective in some respect and *may* have caused or contributed to the loss, the arbitrator found that the loss was "accidental" within the meaning of the policy and that the predominant or efficient proximate cause was a classic "fortuitous" event. Owners were awarded the insured value of the hull, salvage and towing expenses, plus interest from the date of the underwriters' final declination.

The arbitrator emphasized that his findings and conclusions were restricted to this dispute and drew no conclusions whatsoever with respect to the loss of the HEAT WAVE, while noting that the keel failure of two out of 1,150 J/80s produced during 1993-1996 was, by any standard, a spectacular success rate for their builder.

*In the Matter of the Arbitration between Thomas C. Samuels and Nancy L. Steelman, as Owners of the SKILLAGALEE, and International Marine Underwriters and The Northern Assurance Company of America.;* SMA No. 4041.

## A BITTER SWEET ENDING

*by Peter J. Zambito*
*Partner, Dougherty Ryan Giuffra Zambito & Hession*

This proceeding began when St. Paul Fire & Marine Insurance Co. (hereinafter "St. Paul") brought suit in the United States District Court for the Southern District of New York against the PARASKEVI II, her Owners, Addistart Compania Naviera S.A. (hereinafter "Owners"), and Sunlight Compania Naviera S.A. (hereinafter "Sunlight"). TBS Latin America Liner, Ltd. (hereinafter "TBS") was impleaded by Owners and/or Sunrise.

TBS reportedly raised arbitration as a defense to the suit, among other defenses.

An arbitration between these parties, in rem and in personam, ensued, in which proceeding The Rice Corporation (hereinafter "TRC"), which voyage-chartered the vessel from TBS for the carriage of 63,000 bags of sugar on FIOS terms, participated.

It was never made totally clear what involvement Sunlight had with the sugar cargo in question, and it did not participate in nor was it a party to the arbitration proceeding.

The bagged sugar was loaded to Nos. 1, 3 and 4 lower holds at Santos, Brazil for carriage to Matarani, Peru. A Supercargo hired by TBS supervised the loading, stowing and securing of the bagged sugar and was reportedly in attendance during the entire operation.

In addition, TBS had a surveyor in attendance at Santos who remarked that the "loading, stowage and lashing," as supervised by the Master, Chief Officer and Supercargo, were carried out "to their entire satisfaction."

Based upon the evidence submitted, the Panel found that the cargo was in apparent good order upon completion of loading and stowing at Santos.

In a remarkable voyage, consisting of fifty-four (54) days, the vessel called at six (6) intermediate ports before arriving at Matarani. Nos. 1, 3 and 4 lower holds were worked at these intermediate ports Rain was experienced at two (2) of the intermediate ports, during which, loading operations were reportedly suspended, and steel and tin coils were discharged from No. 1 LH and steel coils from No. 4 LH at another intermediate port under stevedoring conditions described as "very bad."

At a further intermediate port, the Master sent a "Damages Report," stating that forklift trucks reportedly leaked oil into the lower holds and 'tweendecks.

Respondents offered no testimony relative to handling at intermediate ports.

On arrival at Matarani, damage to approximately eighty-eight (88) percent of the cargo was observed in stow and upon completion of discharge by a Lloyd's surveyor hired by St. Paul.

In effect, St. Paul and the Lloyd's surveyor gave the consignee CIMECO, St. Paul's assured, owned by Louisa Nelly Cuadros, carte blanche in arranging salvage of the bagged sugar, without supervision, and paid a net of $833,559.10 according to claimant's counsel.

CIMECO's alleged evidence of salvage was unsupported by credible evidence, suspect, contradictory and unworthy of belief.

When claimant rested, respondents, Owners and TBS, moved for summary judgment on the issues of both liability and damages. At this juncture, respondents had not yet put in their case.

The Panel's decision denying summary judgment on the issue of liability and granting summary judgment on the issue of damages ensued, a somewhat unique resolution which turned on burden of proof.

In such connection, Section 5 of the parties Submission Agreement, the proceeding was to be conducted in accordance with the SMA Rules. Owners' counsel relied, in part, upon Section 21 thereof, which read as follows:

> *Arbitrators shall apply burden of proof and if by majority vote, the Panel concludes that the Claimant has not made its case, no further evidence need be taken from the respondent, unless the respondent is asserting a counter claim. (emphasis added)*

As to liability, the Panel applied the standard for summary judgment under the Fed.R.Civ.P., pursuant to which the moving party had the burden of proof to establish that no genuine issue of material fact existed.

That burden was, in the opinion of a unanimous Panel, not carried.

It is important to note that under said standards, all reasonable inferences must be drawn in favor of the non-moving party, here the claimant.

As no credible evidence was offered by respondents to establish that handling at intermediate ports could not have caused or contributed to the damage to the bagged sugar or, if it did, to separate such damage with specificity from that which would be attributable to claimant, the Panel drew all reasonable inferences in claimant's favor and found that genuine issues of fact existed which bound it to deny summary judgment on the issue of liability, citing Schell v. VALLESCURA, 293 U.S. 296 (1934) and Vana Trading Co. v. S.S. METTE SKOU, 556 F.2d 100 (2d Cir. 1977).

As an aside, despite the unusual geographic route followed, an unreasonable deviation was not claimed to have occurred. Notwithstanding, summary judgment was denied as to liability, so the same result was reached

The issue of damages was quite a different story!

Ms. Cuadros of CIMECO refused to appear before the Panel despite the offer of an all- expense paid trip, thereby requiring counsel to travel to Peru to obtain her testimony, which was incredulous, to wit:

1. Authority to salvage the cargo was given to Cuadros by St. Paul on October 24, 2001. As of October 25, 2001, Cuadros testified that she made no effort to sell the sugar cargo, but on the very next day, October 26,

 

2001, allegedly sold it for $200,000 to Ms. Rufina Apaza.

2. Cuadros' mother's maiden name was "Apaza."
3. Rufina Apaza, the salvage buyer, maintained a kiosk next to that of Cuadros.
4. Under the laws of Peru, the sum of $450,000 in Peruvian taxes was owing on the sugar cargo, and Cuadros testified that Rufina Apaza assumed responsibility for its payment.
5. Cuadros submitted invoices for warehousing allegedly incurred subsequent to the salvage sale and as to which St. Paul's surveyor testified made no sense.
6. Cuadros submitted invoices for trucking charges to a company owned by her father, and trucking would have been incurred in any event.
7. Cuadros submitted invoices for the rental of sewing machines allegedly supplied by Rufina Apaza.
8. An Affidavit was offered and suggested that "approximately" $200,000 was deposited in Cuadros' bank account on October 31, 2001. No evidence thereof was offered, only bold statements.

The above, among other factors, was unanimously found by the Panel to be wholly unbelievable and totally unacceptable, thereby resulting in granting the motion for summary judgment on the issue of damages. (See SMA Award 4034 [2009])

## PEOPLE AND PLACES

Just in case you have not heard it yet … .

LeRoy Lambert, formerly partner at BlankRome LLP can now be reached at:

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## SOME PERSONAL NOTES

My computer and I are not on the best of terms or, as it's better described, we are having a love/hate relationship. It is great to have access through the internet to so many things and information and to get them so quickly and not have to wait for the mail person who, on occasion, seems to be reluctant to deliver in rain or snow. The flip side is that the internet, *deus ex machina*, gives you more than you want – the internet spam and all the other stuff that I have not asked for or did not expect.

When I grew up, you had friends who were local and you had pen pals who were acquaintances and lived in foreign countries. I remember that in my teens I had a pen pal in Croyden, England. Her letters were on blue stationery and she would tell me about life in England. The mail came with collectable stamps and her handwriting was much better than mine. How things have changed – and I don't mean my handwriting. Now, without much effort other than a click of a few buttons, one generates a mass mailing of something sent to you unsolicited. Don't misunderstand, at my age I'm glad that there still are people around who remember me, and some of the messages are indeed interesting and worthwhile reading. The other day someone sent me a list of "Sound Advice" items. Clearly, no pen pal would have put pen to paper and mailed you a letter sharing advice, such as, "If you tell the truth, you don't have to remember anything" – "Generally speaking, you are not learning much when you are talking" – "Never test the depth of the water with both feet" – and for all the young ones still on the career path, "Don't pretend to be irreplaceable. If you cannot be replaced, you cannot be promoted."

I am not necessarily complaining about the content, but about the indiscriminate manner in which it is disseminated. With that being said, I'll heed the advice never to miss a good chance to shut up!

• • • • •

ICMA XVII starts in Hamburg on October 4 with a golf tournament at Gut Kaden, followed in the evening with a reception at the Empire Riverside Hotel (the conference center) hosted by some of Hamburg's leading law firms.

The Congress starts on Monday morning and runs through Friday noon. The social events are a welcome reception hosted by the Senate of the Free and Hanseatic City of Hamburg (at the Town Hall), a full-day excursion to Berlin and a gala dinner dance at the Süllberg. At the business meeting on Friday, the Steering Committee will announce the venue for the next Congress, ICMA XVIII.

Many of the regulars fondly remember the delightful ICMA IX, hosted by Hamburg in 1989, and look forward to another successful and memorable event.

***Hummel, Hummel ……***

THE ARBITRATOR

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