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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT'S CORNER

Dear Readers,

The holiday season has passed. Members of New York's maritime community were seen buzzing around town to different parties where they exchanged business cards, networked and either commiserated on or celebrated 2009. 2010 is here. It seems like only yesterday that the Y2K question was on everyone's mind.

We saw some interesting maritime arbitration events take place in 2009 – the United States Supreme Court took up class action arbitrations, an issue that originated with a maritime arbitration, and Rule B actions were basically ended by a decision from the Second Circuit. The SMA played an active role in supporting a friend-of-the-court brief on the question of class action arbitrations. Inside this issue of *The Arbitrator*, you will find an article from Manfred Arnold after having attended the Supreme Court hearing in Washington, DC.

Looking forward to 2010:

- The SMA will participate in the Connecticut Maritime Association (www.shipping2010.com) show in March. The dates for the conference are 22, 23 and 24. SMA members will participate in a panel discussion under the title: "Know Before Fixing – Charter Party Disputes and Solutions." The panelists will address how the problems arise and how to avoid them. We anticipate a strong Q&A session with the attendees.
- The SMA Salvage Committee has revised our salvage rules, which are now accessible on the SMA website. The committee is also updating our MARSALV form which can also be found on the website in a pdf file when the committee is finished.
- In February, the Education Committee is conducting our annual Maritime Arbitration in New York course. Information on that too is available on our web page. Additional information by the committee chair can also be found in this issue (Arbitration Workshop).

- And for 2010, our Rules Committee will be reviewing the rules and making adjustments and updates as necessary. I will report on the progress as the committee's work moves ahead.

As a point of clarification, a question I recently received concerns the role of parties and counsel in an arbitration using our rules. Section 1 makes it clear that our rules apply to those who have agreed to arbitrate under the Rules of the SMA, Inc. Section 6 allows that any party to an agreement under SMA rules may initiate an arbitration and Sections 14 and 15 identify the roles of counsel or others in representing parties in arbitration proceedings.

It was with great sadness to learn of the passing of two members of the New York Maritime bar this past year, Mr. Emery W. Harper and Mr. Michael Hardison. I had the pleasure of working with Mike (a U.S. Marine) on a weather case many years ago and testifying before Emery as well. These fine gentlemen will be missed.

Austin L. Dooley

NEVER MAKE PREDICTIONS

by Chris Hewer

At the start of a new year, and particularly at the start of a new decade, it is customary for pundits to make their predictions for the twelve months which lie ahead and, in those rare cases where their predictions for the previous year have turned out to be correct, to boast about it.

Experience shows that it is unwise for anybody to make predictions, especially about the future. The only exceptions to this are economists, who even include in their frequent and shameless predictions several figures after the decimal point. Economists are mere pundits with a sense of the absurd.

The business of making predictions, from the general to the specific, is fraught with embarrassment. For example, anybody who had predicted, two years ago, that shipping would be in the mess it is in today would be a prince among seers, although they would admittedly make for very poor company at a dinner party, and a wretched companion for life. Nobody in their right mind could have predicted the extent of the fall in freight rates and the concomitant rise in operating costs which, coupled with the general worldwide economic downturn, have brought shipping to its knees.

On a more specific note, nobody could have guessed that an association of US shippers, the National Industrial Transportation League, was last year going to come out in favour of the Rotterdam Rules. This might reasonably be dubbed The Miracle Wholly or Partly on Water after the last big shock involving America and the rest of the world, which occurred in 1950 when the US football team beat England 1-0 in the World Cup in Brazil in a match that was subsequently memorialised as The Miracle on Grass.

So what, specifically, can we predict for shipping in 2010? If we look back at our twelve predictions for 2009, made in this very journal, we can see that most of them didn't come true, especially all of them. Then again, it was never likely that the London Maritime Arbitrators Association was going to issue an informative press release in March. Having said that, the LMAA did launch a new website in 2009, and it is one of the best websites of its kind around – quicksilver fast, with no silly intro or daft colours. Nobody could have predicted that, not even an economist. It is impossible to over-emphasise what an unexpected development this is, but we can try.

Shipping in 2010 is going to be a hard grind. Those with staying power, with access to money, with proper business plans and with just a little luck will survive and even prosper, and there are always likely to be opportunities for the quick-witted entrepreneur arising from the misfortunes of others. But perhaps the only thing we can predict with any certainty is that there will be more disputes in the maritime sector, and that will mean more work for

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lawyers, arbitrators, mediators and people generally who are good with words.

As a result, it will be in the best interests of arbitrators to attend to their housekeeping, and make sure that they continue to work at improving in those areas where there is a general perception that they tend to fail. In this respect, it was interesting to read last year's report by LMAA president John Tsatsas, which revealed that research had shown that delays at the interlocutory stage and in publication of awards, together with costs which are often disproportionate to the amounts claimed, continued to be the most frequently recurring sources of complaint from users of the LMAA's services. The LMAA says it is addressing these issues, and all arbitration bodies which need to do so would be well-advised to proceed accordingly.

In terms of public perception, at least, the gap between arbitration and the courts has closed in recent years. Much has been written, not always convincingly, about how proceedings before the courts have become quicker and cheaper, in some cases as a result of changes in procedural rules. Very little, if anything, has been said in similar vein about arbitration, and that should be a worry. Either there is nothing to say, or else nobody is bothering to say it in a forum visited by parties to disputes and, more importantly, by the people charged with making the appointments for dispute resolution procedures.

A few years ago, some people were looking at mediation as the biggest threat to arbitration. Today, perhaps, more people see the threat to arbitration coming from a leaner and meaner judiciary. On current evidence, there should be enough work in 2010 for every stripe of dispute resolution procedure, providing each one sticks to its knitting and does what it does best, as quickly, efficiently and inexpensively as possible.

Nobody would enjoy a world without lawyers, whatever we may think. Henry Cecil, a lawyer and judge himself, succeeded better than any other writer in demonstrating that lawyers are just ordinary - albeit often very clever - people with a flair for improvisation and a ready-made public stage on which to perform. Consider this passage from the 1961 book *Daughters-in-Law* involving the cross-examination of a witness in a dispute between neighbours by Prunella, a tyro barrister on her first day in court.

"Haven't you always quarrelled with your neighbours?" asked Prunella, dutifully.

"Never," said the plaintiff, "except with this one, and a saint would quarrel with him."

"Which saint?" asked Prunella.

"Any saint,"

"Name a few."

You don't get that sort of entertainment with arbitration, but you do get lots of other advantages which the law cannot provide. We will always have the law. What may change is the nature of the conduit through which commercial justice is dispensed, and the appetite and taste for that may in turn change according to what is happening in the world. This is not a prediction, just a closing paragraph.

Be careful what you wish for.

THE PASSING OF WINTER STORM

by Donald J. Kennedy, Esq.
Partner, Carter Ledyard & Milburn LLP

There was a sudden and significant (but not altogether unexpected) change in the law of maritime attachments on October 16, 2009, when the United States Court of Appeals for the Second Circuit in *The Shipping Corporation of India Ltd. v. Jaldhi Overseas Pte. Ltd.*, ("Jaldhi") overruled its 2002 decision in *Winter Storm Shipping Ltd. v. TPI* ("Winter Storm").

All of us in the maritime community are familiar with vessel arrests and maritime attachments, which the courts have described as an "ancient remedy". In our Admiralty Rules, we make a distinction between an "arrest" of a vessel under Rule C and the "attachment" of a defendant's property under Rule B.

One of the unique features of a Rule B attachment is that it is obtained without notice to the defendant (*ex parte*) on the basis that the defendant's property is found within the Southern District of New York but the defendant itself is not present within the district. Since there is no requirement to provide security for damages in the event the court determines the Rule B attachment should be vacated, it is a low risk and cost-effective way to obtain security for a maritime claim. The trick was you had to find the defendant's property and then serve the order of attachment on the party holding defendant's property in order to attach it.

Typically, the type of "property" subject to a Rule B maritime attachment would be freight or charter hire payment about to be made by the defendant from a bank in New York or other debt due or owed to a defendant, or other property of a defendant such as cargo, bunkers, a container or a promissory note, arbitration award in defendant's favor, or a defendant's interest in an escrow account. It all made a lot of sense.

In the Winter Storm decision in 2002, the Second Circuit expanded the options for what parties could attach, holding that an electronic funds transfer (EFTs) were "property" subject to maritime attachment. Things changed gradually at first. But by 2009, it was reported that one third of the cases filed in the Southern District of New York were Rule B cases. The Winter Storm decision is a good example of the law of unintended consequences. To put all of this in context, we have to briefly look at the international payment system.

EFTs

An electronic "funds transfer" is not a basket of dollars that passes from one bank to the other, but rather a series of transactions beginning with the originator's payment order made for the purpose of making payment to a beneficiary. (U.C.C. §4A-104 (1). When a bank receives a payment order from a customer, it can accept the order by executing a corresponding payment order to the beneficiary's bank or to an intermediary bank. If it does accept the order, it is obliged to pay the receiving bank and it is entitled to payment of the amount of the order from the sender, with payment often accomplished by a debit to the sender's account.

The intermediary bank usually has no relationship with either the originator or the beneficiary. The intermediary bank's relationships are only with and to other banks.

Just as a U.S. bank will not send a wire transfer denominated in a foreign currency, foreign banks do not send wire transfers in U.S. dollars. Therefore, intermediary banks are used for foreign currency transactions, U.S. dollar transactions clear in N.Y., yen transactions clear in Tokyo and pound sterling transactions clear in London.

For a wire transfer in U.S. dollars between a charterer in India and an owner in Kuwait, the transfer clears in New York. The leading financial institutions are members of the Clearing House and other banks hold accounts with the Clearing House banks, which may act as intermediary banks in U.S. dollar fund transfers.

Under the Uniform Commercial Code in New York, a creditor may not attach funds passing through an intermediary bank (N.Y.U.C.C. §4-A-503) and no injunction is permitted against an intermediary bank. The law was designed to prevent the interruption of a fund's transfer after it had been set in motion. After Winter Storm held that an EFT was property of a defendant subject to maritime attachment, an EFT at intermediary banks could be attached if the plaintiff had a maritime claim and the defendant was not found within the district.

As the practice developed, with the consent of the banks, plaintiff's counsel would serve process of maritime attachment and garnishment on the Clearing House banks every day by email and that would be effective for that day and the opening of business the next day. This was the fiction of continuous service.

In the beginning, most of the maritime disputes related to contract claims arising out of charter parties and an owner was chasing a charterer for an old demurrage bill or a freight payment. Then creative lawyers named additional defendants such as the charterer's parent company, or related companies on a veil piercing or alter ego theory. Suddenly, their EFTs were attached. The next development was the attempt to expand the definition of a maritime contract to include sales contracts which contained demurrage clauses. Finally, when there was no contractual relationship, the plaintiff would allege maritime torts such as conversion or tortious interference with contract as the basis for a maritime attachment.

The banks had multiple issues with the attachment of EFTs. They could be exposed to liability for not completing an EFT and there were administrative expenses in keeping track of the flood of Rule B attachments on a daily basis. The volume of attachments grew particularly high after the worldwide economic crisis in fall 2008, when the price of oil increased dramatically and then again in March 2009 with the worldwide economic turmoil, leading many parties to suspend performance of charter parties and COAs.

JALDHI

In Jaldhi, the Plaintiff, a company incorporated in India, chartered its vessel to the Defendant, a company incorporated in Singapore, to transport iron ore from India to China. Plaintiff delivered the vessel to defendant on March 29, 2008, in compliance with the terms of the charter. But while in port in Kolkata, India, a crane on board the vessel collapsed, killing the crane operator, halting cargo operations, and causing defendant Jaldhi to place the vessel "off hire". The two parties then had a dispute over payment for the resulting loss.

The parties had agreed that any dispute would be arbitrated in England. But following the common practice at the time, the plaintiff brought a separate action in New York to attach the defendant's funds that it believed would be passing through U.S. banks as EFTs. Following Winter Storm, the Jaldhi district court had found that the passage

of EFTs through intermediary banks in New York was sufficient to vest it with jurisdiction and order the EFTs to be attached.

In Jaldhi, the Second Circuit reconsidered and reversed Winter Storm. The Court's reasons for reversing were, in part, based on the many "unforeseen consequences" of the Winter Storm decision that it identified. First, the Court noted that incredibly high volume of Rule B attachment cases, amounting to approximately one-third of all cases filed in the Southern District of New York, was a burden on the district courts. Second, the Court noted the immense burden on New York banks, which had to hire additional staff, and suffer considerable expenses, to process the attachments. The Court noted that its holding in Winter Storm "not only introduced 'uncertainty into the international funds transfer process,' but also undermined the efficiency of New York's international funds transfer business."

The Court also reversed Winter Storm based on its legal rationale. The Court reconsidered the question "whether EFTs are indeed 'defendant's' property subject at all to attachment under the Admiralty Rules," and found that Winter Storm had incorrectly relied on a criminal forfeiture case that allowed the seizure of EFTs passing through intermediary banks in New York City, where the EFTs were used by a Colombian criminal cartel to transfer funds from accounts in Luxembourg to accounts in Panama and Colombia. In Jadhi, the Court distinguished that criminal case, because the bank in that case had only held funds traceable to an illegal activity which were subject to forfeiture under 21 U.S.C. § 881. "To be eligible for forfeiture, the EFTs needed only to be traceable to the illegal activities, and thus the court in [the forfeiture case] was required only to assess whether the EFTs in that case were in fact traceable to illegal activities," the Jadhi Court reasoned. "No further inquiry into the identity of the owner of the EFTs was necessary — indeed, that question was wholly irrelevant."

In contrast, the Jadhi Court reasoned, "For maritime attachments under Rule B, however, the question of ownership is critical." Analyzing the issue under New York State law, the Court concluded that defendants cannot be considered owners of EFTs as they pass through intermediary banks. Thus, the Court ruled: "EFTs being processed by an intermediary bank in New York are not subject to Rule B attachment."

The Jaldhi Court recognized that it was rare to reverse a decision that had only been issued seven years earlier, and subsequently affirmed as recently as last year. But the three-judge Court issuing the decision also took the highly unusual step to say that the decision had the backing of the entire panel of judges in the Second Circuit, because the Court had taken the almost unprecedented step of informally surveying the other Second Circuit judges in a "mini en banc" procedure.

Meanwhile, about a month after the Jaldhi decision, the Second Circuit in *Hawknet Ltd. v. Overseas Shipping Agencies* held that its decision in Jaldhi applies retroactively to EFTs attached before Jaldhi was decided because it was a "jurisdictional ruling."

The Hawknet court sent the case back to the District Court for further proceedings on whether the plaintiff could establish personal jurisdiction on some other grounds. That sparked a legal debate whether an EFT originally held by the bank but later deposited as funds into the registry of the court were no longer EFTs but attachable property of the defendant.

Post Jaldhi, there has been a flurry of cases on whether funds initially attached as an EFT should or are subject to attachment when the funds are deposited into a segregated account or a suspense account at the bank or deposited in the registry of the Court. Most district court cases have held they are not subject to attachment. As one judge said, "No alchemy by the bank transformed EFTs that cannot be attached into property of the defendant that can be attached." *See Argus Development* [2009 WL 4016626].

CONCLUSION

The Jaldhi decision corrected an expanding but flawed practice. The massive volume of Rule B attachments in New York proved burdensome to New York banks and the courts of the Southern District of New York. The practice was also fundamentally unfair. Defendants should not be brought into New York courts when their only connection to the district was that the overseas bank, on its own accord, routed an EFT through an intermediary bank in New York on its way to another overseas bank. With Jaldhi, maritime parties will return to the pre-Winter Storm practice, where attachments will be again based on a substantial property interest of the defendant in the district.

Postscript:

Despite the topic of "Is it dead or isn't it?" covered by Chris Carlsen of Clyde & Co and Keith Heard of Burke & Parsons at the January 20 meeting of the Admiralty Committee of the New York City Bar, it seems more is to come on the Rule B matter.

At the February 10 luncheon of the SMA, Bruce E. Clark of Sullivan & Cromwell, together with Jonathan Webb of Holman Fenwick, London, will air their views on Rule B.

The JALDHI decision (585 F.3d 58 (2d Cir. 2009)) is now on Petition for the Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

WASHINGTON INSIDER

In the January 2009 issue, I introduced an article from THE MARITIME EXECUTIVE, which provided a different take on maritime issues as authored by Larry Kiern. He recently addressed a topic a bit closer to home, offering the Insider's comments on the COSCO BUSAN (see also the October 2009 Vol. 41No. 1 issue). I once again thank Larry and Joe Keefe (Managing Editor) for permission to reprint the article below.

COSCO BUSAN

Guilty Plea Highlights Complacency and Bolsters the Case for Reform

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

On August 13, 2009, the ship manager of the *Cosco Busan,* Fleet Management Ltd. of Hong Kong, pleaded guilty in federal court in San Francisco and accepted responsibility for the costly oil spill that polluted San Francisco Bay on November 7, 2007. Details disclosed in the company's factual statement accompanying its plea agreement and the terms of the rigorous compliance program tell a cautionary tale and bolster the need for key marine safety reforms pending before Congress.

THE GUILTY PLEA

Following almost two years of legal wrangling with prosecutors, Fleet Management found itself boxed in and pleaded guilty to two felony charges for false statements and obstruction of justice and a misdemeanor charge for negligent oil pollution in violation of the Clean Water Act. The company agreed to pay $10 million in monetary penalties and to implement an "enhanced" compliance plan (ECP).

In its guilty plea, Fleet Management admitted fault because it failed to provide adequate training to the ship's new captain and crew, who under the circumstances should never have gotten the vessel underway in the dense fog in the first place. They also failed to properly monitor the pilot's navigation and misdirected him into the bridge tower. The pilot was previously sentenced to 10 months in federal prison after pleading guilty to misdemeanor charges of oil pollution causing the deaths of migratory birds. Importantly, Fleet Management also admitted to obstructing justice and lying to the Coast Guard investigators after the incident.

A CAUTIONARY TALE OF MISMANAGEMENT

The company's factual statement highlights its multiple material failures to ensure fundamental safe manning and navigation practices. Two weeks before the incident, the company changed out the entire crew without providing for a proper turnover. Only one crewman, the third officer, previously served on the vessel and worked for the company. The company provided the new crew no training on the critical navigational equipment and bridge management procedures for the vessel. Although the company initially assigned a deck superintendent with the new master and crew, he failed to verify that they were competent and skilled at operating navigational equipment and that they were complying with the company's safety management system for navigation.

On the morning of the incident, the vessel's master failed to exercise proper independent professional judgment in the interest of safety and simply deferred to the pilot's opinion that the vessel should proceed despite the dense fog. According to the master, "he was concerned that if he caused an unwarranted delay in the ship's departure and resulting expenses that he could suffer adverse personal consequences." The master also failed to ensure that there was a proper navigational passage plan, including proper briefing and discussion with the navigational team before getting underway. Once underway, the master and crew left the vessel's navigation to the pilot. They failed to perform the most basic navigational tasks, including taking fixes, monitoring the vessel's progress, and warning of hazards. Then, to make matters worse, the master and pilot failed to communicate clearly about the location of the bridge tower – the critical object to avoid — and the master directed the pilot right into it. This performance demonstrated both an astonishing level of complacency and a remarkable absence of situational awareness.

Moreover, as a practical matter the Coast Guard failed to perform its basic marine safety responsibilities. According to the National Transportation Safety Board investigation, the agency failed to provide proper medical oversight to the licensed pilot and unambiguous information to the vessel about its proximity to the bridge tower. Thus, important systemic government safeguards were absent.

The company's statement further admits that immediately after the incident its key personnel lied to the Coast Guard and obstructed justice by presenting falsified navigation charts showing fixes that were never taken. "[I]n the month following the incident while the crew remained aboard the vessel, company representatives, including two of its superintendents, the master, and other ship's officers, concealed ship records and created materially false, fictitious, and forged documents … including multiple berth to berth passage plans." No doubt this lying and obstruction of justice by the master and two company superintendents explain the heavy fine and the third-party oversight ordered in this case.

THE "ENHANCED" COMPLIANCE PLAN

As part of the plea agreement, the company consented to ECP terms aimed principally at ensuring safe navigation. First, the company must designate a "senior corporate officer" as the "Corporate Compliance Manager," charged with responsibility to "assure compliance" and "supplied with funds, support staff, and other resources … necessary to implement the ECP." Second, the company must communicate to its personnel its "commitment to navigational safety" and "transparency in audits" while taking appropriate action, including *dismissal*, against employees hindering the plan, e.g., by making false statements or creating false records. Third, the company must submit to additional audits by an independent third-party and reviewed by a court-appointed monitor, both of whom must be approved by the government and funded by the company. The third-party auditor and the court-appointed monitor must not have audited the company in the previous three years, and the ECP bars classification societies from performing these roles. These prohibitions show the government's skepticism of the company's previous audits. Fourth, the ECP mandates specific training programs aimed at key aspects of the company's operation that failed, including command orientation, safety management, and the operation of electronic navigation equipment. Finally, the ECP requires specific certification and documentation of key navigational operations, including voyage planning and master-pilot communication and planning.

In summary, the failure of our nation's marine safety system to prevent the *Cosco Busan* incident illustrates that the existing safety management regime remains inadequate when a company treats it as simply a *paper* exercise and does not *verify* real compliance. Systemic failures like this underscore the pressing need for legislative reforms, such as measures pending before the Congress, to mandate double-hulled fuel tanks, improvements to the Coast Guard's vessel traffic systems, and real medical review for fitness of Coast Guard-licensed pilots to provide additional layers of safety.

COAST GUARD WADES INTO THE BALLAST WATER DEBATE

As if there weren't already enough ballast water regulations in the United States, the U.S. Coast Guard has belatedly reentered the regulatory quagmire. This year, as a result of the regulatory actions of key maritime states (California, New York and Michigan), allowed by the Clean Water Act, the Coast Guard's longstanding ballast water exchange regime fails to provide uniformity.

Faced with its own irrelevancy on such a key issue and the arrival of the environmentally proactive Obama Administration, the Coast Guard has issued a new proposed rule, which would adopt the short-term standards set by the International Maritime Organization (IMO) and employ ambitious technology-forcing standards long advocated by environmentalists to stimulate the development of new ballast water treatment systems.

As recently as December 2008, the EPA emphatically rejected ballast water treatment systems in promulgating its Vessel General Permit (VGP) under the Clean Water Act. Following an exhaustive review of all the public comments, EPA concluded that "treatment technologies that effectively reduce viable living organisms in a manner that is safe, reliable, and demonstrated to work onboard vessels are not yet commercially available." Recounting its review of multiple scientific studies, EPA emphasized that "[b]ased on an evaluation of such studies, requiring a numeric effluent limit for the discharge of living organisms is not practicable, achievable, or available at this time."

Nevertheless, the Coast Guard charted a different course. It emphasized that ballast water treatment technology has been approved by the IMO and other governments that achieves the *de facto* short-term IMO standard, which it believes constitutes a significant improvement over the

existing ballast water exchange regime. Thus, the Coast Guard's notice differs from the EPA's conclusion and is surely the result of a change in executive branch leadership, not science. What will prove challenging, even for the Obama Administration, is the Coast Guard's proposal to adopt a "phase-two standard … that is potentially 1,000 times more stringent."

The Coast Guard notice acknowledges that its proposed phase-two standard mirrors the U.S.'s position before the IMO and "the more stringent standard established by several states" under the Clean Water Act. Therefore, having adopted the technology-forcing strategy, the outcome will ultimately turn on what is both technologically achievable and practical. Consequently, much of the Coast Guard's notice focuses not only on technology but also on the scientific bases and standards for measurement of the standard.

Simply put, the proposed rule would set a deadline for vessels built before 2012 to meet the existing IMO standard by 2014-2016 depending on ballast water capacity. The Coast Guard would mandate phase-two compliance by a vessel's first drydocking in 2016 unless a vessel has complied with phase one, in which case it would have five years to bring its system up to phase-two compliance.

Whether or not the more demanding phase-two standard will apply turns on the Coast Guard's practicality review scheduled for 2013. The importance of this review cannot be overstated, especially considering the industry's sad experience with the flawed and impractical oily water-separator technology imposed by the MARPOL Annex I regime.

The Obama Administration should coordinate this process by formally involving both the Coast Guard and the EPA so that the maritime industry does not face differing answers from each agency. It makes little sense for the Coast Guard to conduct this exercise only to have the EPA use its Clean Water Act authority to promulgate different standards. Moreover, if the Obama Administration could provide a unified position on the implementation of technology-forcing standards by 2013 based on systems that are practical, then key states that have unilaterally pressed for tougher standards might accede to the federal position. The result would be to restore greater uniformity to ballast water regulation in the United States.

OUTLOOK

Considering the new political reality in Washington, D.C., the maritime industry must redouble its efforts to verify compliance with safety and environmental standards. Otherwise, more embarrassing incidents may follow, thereby further damaging the industry's reputation, even if the criticism is unwarranted. Additionally, the industry should engage proactively to constructively shape new regulatory programs, like ballast water treatment, so that those systems are practical and compliance can be readily achieved. Needless to say, practical solutions remain essential to compliance.

Note: This article appeared in THE MARITIME EXECUTIVE Sept/Oct 2009.

Postscript:

The November/December 2009 issue of THE MARITIME EXECUTIVE contains a Washington Insider article by Larry Kiern entitled "Congress, Executive Branch and Courts Navigate the Rocks and Shoals of Key Maritime Issues," stating that, "On October 23, 2009, the House of Representatives again passed the authorizing legislation for the U.S. Coast Guard by an overwhelming vote of 385 to 11. Key provisions of H.R.3619 remain from the version passed by the House during the 110th Congress, including important new protections from crime for passengers on cruise ships, fishing vessel safety enhancements, reform of the Coast Guard marine safety program, and a mandate for double-hull-equivalent protection for vessel bunker tanks to avoid oil spills like the *Cosco Busan* incident in San Francisco.

Anyone wishing to read more, please go to ***www.maritime-executive.com***.

COURT UPDATES

Stolt/Animalfeeds. In recent issues of this publication, we have chronicled the progress of this case through the court system. On December 9, 2009, the case was argued before the Supreme Court. It was the only case scheduled for the day and the matter was heard by eight justices (Justice Sotomayor was not attending). I was surprised by the fact that the courtroom was filled to near capacity from the outset and remained so for the full hour of arguments. I was also surprised by the spirited arguments and the very active involvement by the justices, especially Chief Justice Roberts. For those interested in the details, the transcript can be accessed at:

www.supremecourtus.gov/oral_arguments/argument_transcripts/08-1198.pdf.

Andorra Services, Inc. v. M/T EOS. We previously reported that oral argument had been scheduled for November 2009 before the Third Circuit. On November 2, 2009, the US Court of Appeals for the Third Circuit advised the parties that the oral argument was canceled and the matter previously briefed would be considered by Judges Rendell, Barry and Chagares. On December 10, 2009, the lower court's decision was confirmed. Because of the significance of this case and the decision, a full review of the decision follows below.

FORCE MAJEURE – CANCELLATION – MITIGATION UNDER THE AMERICANIZED WELSH COAL CHARTER PARTY

by Patrick V. Martin, Esq.
Counsel to the Society of Maritime Arbitrators, Inc.

This arbitration concerned disputes which arose when a pier at the load port reported a structural failure which prevented the charterer from loading the intended coal cargo. The terminal, and then the charterer, declared *force majeure.* The charterer offered the owner another cargo at a reduced rate, which the owner refused. The owner then fixed the vessel at a further reduction in rate. The panel held that the charterer's declaration of *force majeure* was in breach of the charter and that the owner properly mitigated its damages.

On December 17, 2007, Integrity, charterer, fixed with Norden, disponent owner, a "TBN" to carry 63,000 m.t. tons of coal from Baltimore to Immingham or Rotterdam with laycan February 1/15 2008. Norden nominated the GERTRUDE SALAMAN to perform the voyage.

On January 3, 2008, the CNX Marine Terminal in Baltimore reported a structural deficiency in Pier 2 of the terminal, resulting in the suspension of all cargo operations from that terminal. On January 4, 2008, Integrity was informed by CNX of that fact and later that week was informed that repairs would take up to four weeks and, accordingly, CNX had declared f*orce majeure*. As a consequence, Integrity declared *force majeure* to Norden as the cargo could not be available during the agreed laydays.

Most of the cargo was at the pier ready to be loaded with the rest in rail cars ready to move to the terminal. However, because of blending requirements and the closure of the loading pier, the complete cargo could not be ready and loaded at that pier during the laydays.

The charterer offered a different cargo to Norden at a reduced rate, as the market was declining. The owner refused and refixed with another charterer at a further reduced rate and sought damages in the amount of $889,812 based on the difference in rates between the initial fixture of December 17 and the final fixture.

The sections of the Fixture Recap (December18, 2007) and the Charter Party clauses (Pro-forma dated July 25, 2007) relevant to the disputes here are excerpted as follows:

Fixture Recap:

63-70,000 MT Min/Max coal
1 SB Baltimore/1 SB HIT Immingham or Rotterdam

1-15 Feb
USD 41.00 PMT FIOST bss Rdam
USD 42.00 PMT FIOST bss I'ham basis
13.5 M AD
Owise as per Navios/Integrity Amwelsh 79 C/P dated 25 July 2007 with logical amendments

Charter Party:

Clause 1… . *proceed to CNX Marine Terminal, Baltimore, Maryland; and there load … a full and complete cargo of coal in bulk, stowage factor about 42 cubic feet per metric ton …*

Clause 4… . *In the event of any stoppage or stoppages, arising from any of these causes continuing for the period of six running days from the time of the vessel's being ready to load, this Charter shall become null and void; …*

The panel first considered which was the governing contract and decided that the wording of the recap prevailed over the wording of the pro-forma charter, which was apparently prepared after the event. It then held that the recap was not a charter for a "stemmed" cargo unlike the pro-forma. Under the recap the charterer was bound to provide a cargo at any safe accessible berth for the vessel in the port of Baltimore. It failed to do so and thus was in breach for wrongful cancellation.

The panel then turned to the issue of damages. Even though it may have been more prudent for the owner to accept Intergity's offer of another cargo, it was under no obligation to do so. The panel found that Norden acted reasonably at fixing another cargo at the then market rate and awarded full damages. It also awarded attorney's fees to Norden in the amount of $94,266.

NORDEN A/S and INTEGRITY COAL SALES; SMA Award 4036 (2009)

A NEW CHARTER PARTY FOR THE CHEMICAL, SPECIAL PRODUCTS AND PARCEL TANKER INDUSTRY

by Soren Wolmar

The Association of Ship Brokers & Agents (U.S.A.), Inc. (ASBA) has recently released ASBACHEMVOY. This document is a modified version of ASBATANKVOY.

The ASBATANKVOY is the most used tanker charter party in the world. Its success is based on the fact that it is perceived by industry as balanced in the distribution of rights and obligations between owners and charterers and only few changes have been made to it over the years. All its clauses are well interpreted through numerous arbitration awards and court rulings in both London and New York, and the industry is comfortable with them. Although this charter party was designed for chartering of vessels for full cargoes of oil and petroleum products, it is also widely used in the chemical, vegoil and parcel tanker trade. It does contain several clauses that pertain only to the oil trade, and when used for chemicals, vegoils and other special products, those clauses are often left untouched. They are irrelevant to the chemical trade and, most important, potentially counter productive to the goal of having a clear agreement. A number of rider clauses relevant to the chemical trade are typically added.

The Charter Party and Documentary Committee of ASBA decided to create the ASBACHEMVOY as a charter party specifically designed for the Chemical, Special Products and Parcel Tanker Industry. The goal was to preserve this balance and not to interfere with economical aspects, which may be subject to market negotiations. It was also the Committee's intention to leave intact all the well-established clauses relevant to the tanker trade in general, whether trading with oil or chemicals.

Clauses relevant only to the oil and full cargo trade were removed. Clauses most commonly used as rider clauses in the chemical and special product trade were added. These clauses are uncontroversial and do not tilt the balance of the charter party in favor of the charterer or the owner. They are simply necessary for the performance the voyage. For the purpose of easy reference, the same clause numbers and general structure of the charter party were maintained as far as possible.

The following text will show where the two charter parties differ:

Part I

A.:
1. Following Deadweight: "tons(2240lbs.) changed to "metric tons"
2. Following Capacity for cargo: "tons(2240 lbs.) changed to "metric tons"
3. Following Coated: [ ] yes [ ] no - Added: "Stainless Steel [ ] yes [ ] no"
4. Following Coiled: [ ] yes [ ] no - "Last two cargoes" changed to "Last three cargoes"
5. Below "Now:" - Added: "ETA at Discharging Port(s)"
E.: Added: full or part cargo (strike one out)
F. Freight Rate: "per ton(of 2240 lbs. each)" changed to "per metric ton"
L.: TOVALOP (no longer in existence), replaced with: Pollution Insurance: Owner warrants vessel has pollution insurance coverage customary for the trade set forth in this Charter Party and for carriage of Charterer's cargo as well as for all other cargo carried on the voyage and will be so maintained throughout the duration of this charter.

Part II

1. Warranty - Voyage - Cargo:
The reference to Clause 4 is changed to "stipulated in Part I C".
After full cargo added: "or part cargo as the case may be".
"petroleum and/or its" is deleted and added after products is: "as described in Part I E".
Added in 3rd to last line after Discharging Port(s): "or proceed as allowed in Clause 4".
4. Naming Loading and Discharge Ports is deleted and substituted with:

4. COMPLETION/ROTATION CLAUSE

When the cargo in Part I E. is described as a part cargo, the Owner has the

option of loading cargo(es) at the same or other loading port(s) for discharge at the same or other discharge port(s) for other Charterer(s). The vessel's rotation of loading and discharging port(s) is at Owner's option.

9. SAFE BERTH - SHIFTING:
The reference to Clause 15 deleted.
13 (a) CARGO EXCLUDED VAPOR PRESSURE and (b) is deleted and substituted with:

13. CARGO DESCRIPTION and VESSEL COMPLIANCE

The Owner is familiar with the characteristics of the cargo as described in Part I E., its handling and safety requirements and the Vessel is classified and the crew is certified for the carriage of same and comply with all international and national conventions, laws, rules and regulation relevant to the carriage of the cargo and the voyage set forth in Part I. This includes, but is not limited to, the Codes issued by the International Maritime Organization (IMO) as they stand at the time of this voyage and as relevant to cargo(s) carried and the voyage performed under this Charter. Upon Owner's request, Charterer will supply Owner with the Material Safety Data Sheet and/or other relevant cargo specifications.

TWO OR MORE PORTS COUNTING AS ONE is deleted and substituted with:

15. NITROGEN and CARGO INHIBITOR

If required for the safety or the integrity of the cargo and/or the vessel, the Owner shall exercise due diligence to maintain the tanks under positive nitrogen pressure throughout the voyage, the Charterer having supplied the initially necessary nitrogen at the load port. If required for the safety or the integrity of the cargo and/or the vessel, the Charterer shall properly inhibit the cargo for the voyage set forth in Part I and shall inform the vessel of quantity and type of the inhibitor, duration of effectiveness, temperature limits and time of adding inhibitor. Emergency instructions shall be given to the vessel together with extra inhibitor to be used in accordance with the instructions upon discovery of cargo polymerizing.

16. GENERAL CARGO
At the end of the clause "Clause I" is deleted and substituted with "in this Charter"
18. CLEANING
The clause is renamed to **CLEANING and SEGREGATION**
Second sentence is deleted and substituted with:

When the cargo in Part I E. is described as a part cargo or consists of more than one quality of products, the owner shall keep each of Charterer's products completely segregated from each other and from all other cargo carried onboard the vessel.

20. ISSUANCE AND TERMS OF BILLS OF LADING
(b) (iii) GENERAL AVERAGE – "York/Antwerp Rules 1950" changed to "York/Antwerp Rules 1994"
26. OIL POLLUTION CLAUSE is deleted and substituted with:

26. POLLUTION CLAUSE

The Owner and the Charterer agree to comply with the International Convention for the Prevention of Pollution (MARPOL) issued by the International Maritime Organization (IMO) as it stands at the time of this voyage and as relevant to cargo(s) carried and the voyage performed under this Charter.

ASBACHEMVOY is designed to have broad references to statutory rules such as IMO and MARPOL as the specifics of those are changed from time to time.

ASBACHEMVOY will not eliminate the need for rider clauses as the requirements of the chemical trade are quite

diversified, but it does incorporate the most commonly used terms.

Copies of ASBACHEMVOY can be obtained by contacting Jeanne L. Cardona, Executive Director of Association of Ship Brokers & Agents (U.S.A.), Inc., 510 Sylvan Avenue, Suite 20l, Englewood Cliffs, NJ 07632, TEL: (201) 569-2882 • FAX: (201) 569-9082, Email: asba@asba.org • Website: www.asba.org The electronic version of ASBACHEMVOY will be available on ASBA's Charter Party Editor.

The Charter Party and Documentary Committee members include Nigel J. Hawkins (Chair), Gerard T. Desmond, Soren Wolmar, all SMA members, as well as Patrick V. Martin (Legal Counsel) who is also legal advisor to the SMA.

We believe ASBACHEMVOY will prove useful for the growing chemical and special product tanker industry.

CHEERS – A TIDBIT OF NAVAL HISTORY?

Not necessarily prompted by the good wines and bubbly the family enjoyed during the festive year-end celebrations, I remembered a story relating to imbibing and seafaring. Some of you might remember it or even have told it to me.

We are all familiar with expressions for things that go together like bacon & eggs, horse & carriage, tattoos & sailors or gin & tonic. Sailors and drinking would have quite fit into those phrases in the past – but obviously not any longer because of casualties, oil spills and/or jail terms.

In years gone by, I think it started in 1655, English sailors first received their daily rum rations. Since the drink did not go bad, but rather improved, and when mixed with water, lemon juice and sugar was helpful in battling scurvy, other seafaring nations also adopted the custom.

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It is said that the USS Constitution (Old Ironsides), as a combat vessel, would normally take on 48,600 gallons of fresh water for her crew of 475 officers and men. This would be sufficient to last six months of sustained operations at sea. She was not equipped with evaporators to generate her own fresh water.

According to her log, on July 27, 1798, Old Ironside sailed from Boston with a full complement of crew, 48,600 gallons of fresh water, 7,400 cannon shot, 11,600 pounds of black powder and 79,400 gallons of rum. Her mission was to destroy and harass English shipping.

On sailing from Jamaica on October 6, she had taken on 826 pounds of flour and 68,300 gallons of rum. She then headed for the Azores, arriving there on November 12. She was provisioned with 550 pounds of beef and 64,300 gallons of Portuguese wine.

On November 18, she set sail for England. In the ensuing days, she defeated five British men-of-war and captured and scuttled 12 English merchant ships, salvaging only the rum aboard each of the prizes. By January 26, 1799, her powder and shot were exhausted. Nevertheless, although unarmed, she made a night raid up the Firth of Clyde in Scotland. Her landing party captured a whisky distillery and transferred 40,000 gallons of single malt Scotch aboard by dawn. Then she headed home.

The Constitution arrived in Boston on February 20, 1799, with no cannon shot, no food, no powder, no rum, no wine, no whisky, and 38,600 gallons of water.

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I do not vouch for the accuracy of the story nor do I recount it for any reason other than providing some new-year levity.

SMA DIGEST 6.1

Digest 6.1 covering SMA arbitration awards 3106 through 4000 is now available. Orders can be placed via the SMA website (www.smany.org).

The digest has been produced on a CD-ROM which contains digests of all prior awards in addition to the current release; i.e., awards 1 through 4000. The CD is available to Award Service subscribers and SMA members for shipping and handling charges only; for all others, the price is $100 plus shipping and handling.

The printed volume for awards 3106 through 4000 is available at $150 per copy plus shipping and handling.

Shipping and handling is $15 within USA/Canada and $25 to other destinations.

THE 2010 TANKER MARKET

by Robert J. Flynn

This article could be summarized as, "Dual pressures continue – lack of oil to transport, which still exceeds

demand and increasing vessel supply – oil issue augmented by burgeoning inventories on land and sea. Also let us not forget changing trade patterns as recession produces changing demand in key nations."

Approximately a year after what has been classified as the beginning of the Great Recession (the fall of Lehman), there are signs of recovery in many of the key regions of the world, the so-called green shoots, that were alluded to earlier in the year in an attempt to ease the morose view of many, are now becoming visible (there are also several noteworthy regions/nations where the recovery has been listless to imaginary). The question that only time will tell is how sturdy these saplings are. In the tanker industry and those it services, the easing of the excesses of the prior years appears to be trailing the global economy. The excesses begin with the crude and product inventories that have resulted from supply continuing to generally exceed demand most months this year despite significant cutbacks by OPEC. Likewise, the realignment of the make-up of products demanded from a barrel of crude have contributed to the inventory problems as well. Demand has recouped perhaps half of the decline in consumption from the first half of the year, but this has not been enough. Then there is the wave of vessels on order, the final tally, which while unknown due to cancellations and renegotiations, will still provide supply pressure on the market especially when combined with the eventual discharge of the approximate 125 vessels that are currently being utilized for floating storage. Despite the preceding, there is reason to view that the end of 2010 will show a brighter light than what was experienced at the end of 2009. Data indicates that the world economy is growing again, albeit unevenly, and there is reason to think that some of the excesses, which remain in the oil supply/demand/inventory environment, should be absorbed sufficiently during the new year to result in improving revenue for the tanker industry during the latter portion of 2010.

Supply/Demand Balance

Prior to October 2009, the supply cuts by OPEC appeared to result in an environment that was at least treading water. Analysis by the Energy Intelligence Group (EIG) indicated that for the first two quarters of the year, supply exceeded demand by 100k bpd and was essentially flat in the third quarter. During October, the combination of eroding OPEC compliance and additional non-OPEC production resulted in excess supply of approximately 1 mm bpd. Preliminary review of November data indicates that this surplus grew to 2 mm bpd for the most recent month.[1] Increased non-OPEC supply is expected to continue this trend into the first quarter 2010, although not necessarily to the same degree as the last two months before continued improving demand and field maintenance results in a more favorable environment. However, a caveat to this view that can currently be recognized is peace in Nigeria. Estimates of lost Nigerian production topped 1 mm bpd by the middle of 2009[2] due to activity by the MEND militia. The prospect of peace has fueled speculation of much of the lost capacity being returned; if/when this occurs, the supply/demand balance will likely be skewed further, albeit in the short term, the VL and Suez sectors would benefit from the increased crude supply.

Oil Demand

The view has changed drastically from mid-year due to a combination of revised analysis and actual improving demand figures. At the end of June the year-to-date demand (as assessed by EIG) was down 3.2 mm bpd globally and the International Energy Agency (IEA) mid-year Medium Term Outlook, published in early July, projected that global oil demand would not surpass 2008 totals until 2012. However, by October, the EIG assessment of global demand had reduced the decline by over 55% to 1.4 mm bpd (their preliminary November analysis indicates this fell to 1.3 mm bpd) and the monthly IEA report in November was now projecting 2010 demand to be within 100k bpd of their 2008 measurement. The majority of the decline in demand comes from seven key regions/countries (U.S., the 4 major economies of Europe, Japan, South Korea, China, India and Brazil); they represented about 70% of the assessed decline in June and 80% in October. However, the trajectory of recovery demand will likely flatten going forward, as the easy part of demand recovery is slowing down – much of the future increase in demand will be new growth rather than recovery.

- The year-on-year assessed oil demand of the "7" has increased by 1.1 mm bpd since June and 70% of this recovery is in "Other"/Industrial demand, which has benefited from government stimulus efforts.

The decline in other demand has fallen from 40% of the total for the "7" in June to 9% in October – the U.S. and China being the principal vehicles of the increase.

- The areas of lingering decline are distillate and jet fuel/kerosene demand – the decline of distillate demand for the "7" was about 900k bpd in June (40% of the group decline) and was about 750k bpd in

October, or about 65% of the group's decline. The jet totals were about 325k, or 15%, in June and 225k, or 20%, in October. Again, the vehicles for the decline are the U.S. and China.

The causes for the U.S. and Chinese decline, however, are different. The U.S. decline is related to trade and commerce (i.e. truck and rail traffic) while China's decline relates to building of inventory as the Olympics approached during 2008 and for back-up power generation capability. As they improve their power generating capabilities going forward, it is unlikely to be required for the same reasons it was in the past.

The r^2 for U.S. distillate demand and intermodal rail traffic is 0.826 from 1995 to YTD 2009 data, with similar results when analyzed quarterly

There is a rationale to think that the U.S. distillate demand will begin to slowly recover going forward as weekly intermodal traffic has been steadily increasing all year – from an average weekly movement of 150k units during the first quarter to 170k for the fourth quarter through November, contradicting seasonality, which usually has resulted in the second and third quarters having the greater volume during the past four years. The reason to think this will be a slow process is that October/November 2009 intermodal traffic has still averaged about 6,750 fewer units than during 2008 – the only week above 2008 levels was the week prior to Thanksgiving. Current activity is less than it was for the same period from 2005 to 2008, but it is improving, and the recent economic data provides a rationale for this to continue – data for the balance of the year will be very critical in determining the economic climate of the U.S.

Both the economic and oil demand recovery have been centered on developing countries, excluding China and India, non-OECD demand has risen nearly 400k bpd YTD October vs. a near-2.3 mm bpd decline in the developed world.

Economic Growth

China and India, which contain over a third of the world population, may be the fastest growing of the major economies, but represented only about 9% of the worlds GDP in 2008.[3] So while third quarter growth of 7.9% for India and a projected 10.5%[4] for China are hefty numbers, it is worth noting that basis size of their GDP and the implied pro-rata impact on global growth, a 1% growth from the U.S. is the equivalent of a little more than 3% growth for China and about 12% for India. If the EU is used as the benchmark (world largest economic region), a 1% increase becomes equivalent to better than 4% basis China and over 15% basis India. The larger economies of the world continue to lag, with the third quarter growth for the Euro region's 16 nations being assessed at 0.4% and expectations that Japan's revised third quarter growth will be about 2.5% following two quarters of double digit declines (and an earlier third quarter assessment of 4.8%). The U.S. third quarter growth is being estimated at 2.7% following the first revision to the original analysis. Additional pertinent data includes

- South Korean exports rose for the first time in 13 months during November.
- Despite positive GDP for the third quarter, Japan is not in a true expansion mode, as businesses cut spending during the quarter by over 25% compared with the 2008 level – the largest drop in the 54 years this has been tracked.
- In Europe, concern over Eastern European debt, which was high during the first quarter of 2009, is again becoming a discussion point, but export growth picked up in the third quarter – nearly 3% over second quarter levels.
- Exports are the driver of the larger European economies, but the degree of growth will likely be hampered by the strong Euro, except for certain high-end German products, which seem to be somewhat unaffected as long as we are not in an economic free-fall.
- U.S manufacturing increased for the fourth consecutive month in November.

Vessel Supply

Vessel supply remains an onerous issue that one can argue the market has been shielded from to varying degrees during the year by vessels engaged in floating storage. During the first half of 2009, this was felt on the crude side with approximately 70-80 mm bbls in storage mid-year, mostly on VLCCs during the mid part of the year. Some estimates indicate that this has been cut nearly in half as of late, but product storage has soared to about 100 mm bbls in recent months with the Aframax sector being the largest provider of tonnage. Eventually, this will be reduced sharply, but in the short to medium term floating storage may be competitive with on-land storage even if incentive from pricing along the futures-curve should fade due to low freight costs.

The larger issue though is traditional supply growth from newbuildings, and this is no easier to project than it

was earlier this year. In theory, all sectors, with the possible exception of the Panamax size, face exceptional amounts of tonnage on order. But the combination of issues for some yards in delivering vessels on time with limited capital/debt access, due to decreased vessel valuation and reduced credit, will result in delivered vessels differing from what was ordered over the next couple of years. The only readily available news on this front occurs when members of the small percentage of the publicly-held owning community announce a change to its orderbook as Frontline recently did. The other instances are either totally private between the yard and owner or shared with a broker who may have been involved in the transaction. On paper, we have the following: In percentage terms, the VL and Suez orderbooks are the most formidable – mid 30's in pct terms for the 2009/2011 period, but they also have the greatest potential to have more cargo to transport during this period. The Aframax percentage is not that scary, but nearly 250 new tankers delivering during the 2009/2011 period would be a lot of tankers looking for work. Only the Panamax sector does not appear to have an overly large burden entering the market. The MRs have the largest issue; in the 40k+ dwt area, about 45% of the total number of product carriers and IMO tankers are scheduled to deliver and another 15% of this total delivered last year. In addition to delivery issues, these concerns may also be tempered by the single hull phase-out the beginning of 2010, but the market action has already tempered what effect this could have through reduced usage, and waivers will likely soften the remaining impact.

Summary

In general, the global economic situation appears much better than it did a year ago; despite certain weak links, economic growth is returning, although the financial road ahead remains a minefield with a geographically diverse array of explosions able to go off at any time, such as the recent issues in Dubai. Oil demand can be expected to continue to recover as long as economic growth continues – on a nominal basis, critical demand areas will be China, India, the U.S., Europe and the emerging countries of Asia. China and India comprise nearly half of the non-OECD increase in demand. Conversely it will be important that the recent declines in consumption in Europe and the U.S. start to flatten if not de-facto start increasing especially as we enter the new year and the point of comparison is a much lower base. The declines in U.S and European demand have accounted for approximately 70% of OECD decline. Additionally, continued (perhaps increased) restraint on the part of OPEC will be key in allowing the global inventories to be reduced, paving the road for an eventual orderly increase in production on their part – potentially during the second half of 2010, which would benefit tanker earnings, particularly in the VL and Suez sectors. If restraint is not exercised, it will take much longer for a supply/demand balance to return and in turn any sort of stable tanker market recovery. Beyond the eventual increase in OPEC production and the obvious benefit it provides for the long-haul sectors, the changing regions of percentile oil demand growth indicate that in the future we can expect evolving trade patterns. This is nowhere more evident than in the clean trade – declining U.S. and European demand and reduced refining capacity combined with increased capacity in the East from China (1.7 mm bpd new capacity 2007-2009) and India will constrict MR demand while providing additional sources of utilization for Aframax and Panamax tonnage. It is estimated that these two nations will add another 2.6 mm bpd of refining capacity nations by 2012,[5] which will more than compensate for expected reductions in China from the closing of the smaller "teapot" refineries in the coming years.

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

1. Energy Intelligence Group analysis – Energy Intelligence Briefing December 3, 2009 and PIW December 7, 2009
2. JP Morgan Oil and Gas Monthly July 2009
3. Based on IMF data of 179 nations
4. As per Bloomberg article December 1, "Chinese Manufacturing Accelerates as Asia Leads Global Rebound"
5. LCM Research, December 2, 2009 "China Syndrome"

THE EOS – CONFIRMED AND AFFIRMED

by Patrick V. Martin, Esq.
Counsel to the Society of Maritime Arbitrators, Inc.

Prior issues of THE ARBITRATOR (See Vol. 40 No. 2 and Vol. 41 No. 1, Andora Services, Inc. and Chemoil Corp. v. Venfleet Ltd.) discussed the arbitration proceedings and the award. This article will focus on the subsequent attempts by the losing party to vacate the award.

The disputes in this arbitration arose from water in a cargo of fuel oil, which was found at discharge. The essential issue was whether the water was in the cargo at the time of loading or whether leaking heating coils in the ship's tanks introduced water into the cargo after loading. The sole arbitrator found that both causes were present, but that the major cause was the water in the cargo at the time of loading. The issues were strenuously contested in the arbitration and in the prior and subsequent court proceedings.

The Charter Party Disputes

Under a Charter Party dated December 19, 2005 on the Shellvoy 5 form, the EOS performed a voyage from Amuay Bay to New York with a cargo of 549,087 bbls of fuel oil. During the voyage, the vessel's heating coils leaked and introduced fresh water into the fuel oil. The cargo had reportedly been purchased with a maximum Sediment & Water (S&W) content of 1%. The supplier's load port certificate of analysis showed S&W of 0.7%. Upon arrival at New York, the cargo inspectors found the S&W to be 1.8%. After an initial partial discharge and considerable subsequent testing and retesting, the Charterer ordered the vessel from the berth to anchorage. The vessel remained at anchorage for 18 days before it reberthed and completed discharge.

Disputes arose, and the parties, after protracted legal proceedings in which the vessel was arrested and the freight withheld, agreed to submit them to Jack Berg as sole arbitrator. In a subsequent court proceeding, the judge commented that Mr. Berg was "A very prominent admiralty arbitrator."

Charterer asserted a claim for US$471,435.81, primarily for blending stock (required to reduce the S&W content to acceptable limits) and related tankage costs. Owner counterclaimed for demurrage, interest on unpaid freight and operational expenses, totaling US$1,117,842.90.

The arbitrator concluded that, based on the credible evidence, the load port certificate was not reliable and in fact the cargo on loading likely had a water content between 1.4 and 1.5% and that the leaky coils added about 0.3%. "[T]he overwhelming bulk of the problem" was the excess water existing in the cargo at loading for which the Owner was not responsible. Charterer's claim was denied.

The arbitrator then considered the Owner's demurrage and expenses claim of US$1,117,842.90, of which US$324,438.88 was for loading and discharging operations and US$822,066.65 was for time spent at the anchorage. The arbitrator had no difficulty awarding the former.

Each side claimed legal expenses in excess of $600,000. Neither side asserted that the other side's legal fees were excessive. With very little discussion, the arbitrator awarded the Owner, as the prevailing party $550,000 as being reasonable in the circumstances. The size of each party's claimed legal expenses, when compared with the principal amounts involved, is indicative of how contentious the proceedings were.

Subsequent Court Proceedings

- The Federal Arbitration Act – It is extremely difficult to vacate an arbitration award under the Federal Arbitration Act as the courts strongly presume that the award is valid. In this case, the Charterer tried to have the award vacated pursuant to Section 10, (a) (2) "evident partiality" and (a) (4) "the arbitrator exceeded his authority."
- District Court – The Charterer sought to vacate the award on various grounds. It argued that the arbitrator was biased and showed evident partiality because he refused to grant an extension of time of a hearing so that the Charterer's expert could evaluate newly discovered evidence. The court rejected this argument, as the arbitrator had found that the Charterer could have had access to the documents during the subject voyage. The Charterer also argued that the arbitrator had no contractual basis to award interest or attorney's fees and, therefore, exceeded his authority. However, the court disagreed and determined that since both sides had sought interest and fees in their respective submissions, this was sufficient grounds for the arbitrator to award them. Lastly, the Charterer contended that the arbitrator had no authority to enter an award against Chemoil as Andorra was the named Charterer. The court said that the fallacy in this argument was that neither Andorra nor Chemoil made this submission either in the initial court proceedings, where they were both named plaintiffs, nor in the arbitration where they were both named charterers. Therefore, the arbitrator was correct to hold them both liable for Owner's damages.

The award was confirmed in all respects. The case is reported at 2008 WL 4960449 (Dist Ct NJ, 2008) and 2008 AMC 2805.

- Circuit Court – Charterer once again argued that the award should be vacated because the arbitrator was guilty of evident bias for refusal to adjourn a hearing and

failing to ensure that relevant evidence was disclosed in a timely manner. The court rejected these arguments, as the arbitrator had exercised his discretion and chose to find some evidence more credible than others. "There is no evidence to suggest that the arbitrator's refusal to delay the proceedings and order the production of this evidence was motivated by bias, nor is there any indication that it resulted in a fundamentally unfair proceeding," The court rejected Charterer's argument that the award must be vacated because the "arbitrator manifestly disregarded the law" in considering "unauthenticated" evidence by stating that the arbitrator had simply "… made a factual determination that the weight of evidence supported one theory of water content over another, and carefully explained his reasoning." (emphasis supplied) Finally, the Charterer sought to have the court modify the award under Section 11 (a) – (c) on the basis that the arbitrator had no authority to award interest and attorney's fees. For basically the same reasons set forth by the district court, the circuit court rejected this argument. The court stated that the arbitrator had discretion in the calculation of the interest rate and carefully explained his reason for using the prime rate and not the statutory rate.

The circuit court affirmed the district court which had confirmed the award in all respects. The case is reported at 2009 WL 4691635 (3rd Circuit, 2009) with the notation "NOT PRECEDENTIAL."

Comments

This case illustrates the difficulties in trying to vacate an award on the basis that the arbitrators erred on procedural grounds, such as a refusal to adjourn a hearing or to hear evidence. This is especially true where you have a veteran arbitrator who has written a reasoned award. "The scope of review is so narrow that unless 'dishonesty is alleged, an arbitrator's improvident, even silly, fact finding does not provide a basis' to set aside an award."

This casts a heavy burden on the party seeking to vacate to establish in the court that by a preponderance of evidence there was "fundamental unfairness" in the arbitration proceeding. "… The challenging party must show [that] a reasonable person would have to conclude that the arbitrator was partial to the other party to the arbitration."

FORCE MAJEURE CLAUSES AND THE RIGHT TO CANCEL

by David W. Martowski

The recent award in *Agrifos Fertilizer, Inc. v. Transammonia, Inc*. addressed the issue of whether a buyer had the right to cancel a sales contract under a *force majeure* clause arising from damage to its fertilizer plant caused by Hurricane Ike on September 13, 2008.

Agrifos is a privately owned producer of phosphate fertilizers located in Pasadena, Texas, and manufactures sulfuric and phosphoric acid, granular fertilizer, monoammonium phosphate (MAP) and diammonium phosphate (DAP). Agrifos is both a manufacturer and purchaser of sulfuric acid, as it cannot rely solely on its own sulfuric acid production to satisfy all of its manufacturing requirements and supply obligations, and regularly contracted with Transammonia and other suppliers to acquire sulfuric acid in bulk. Transammonia is an international merchandising and trading company headquartered in New York which markets, trades, distributes and transports fertilizer materials, liquefied petroleum gas, petrochemicals, methanol, crude oil and oil products.

Background

In July, 2008, Transammonia sold two parcels of sulfuric acid to Agrifos: one parcel to be shipped from Sweden on the BOW HERON at $490 per ton CFR, and the second parcel to be shipped from India on the HOLMEN at $265 per ton CFR. Both were for delivery to Agrifos' Pasadena plant in October 2008.

On September 13, Hurricane Ike struck the Texas coast with wind gusts reported at upwards of 95 knots and tide surges of roughly 10 to 15 feet, damaging Agrifos' plant and disrupting its operations.

On September 17, the BOW HERON gave an ETA of September 29 for loading at Ronnskar, Sweden, and an ETA (basis Beaumont, Texas, one of her US Gulf discharging ports) of October 21-23. On September 17, the HOLMEN was waiting to load her cargo at Dahej, India and was scheduled to berth for loading the next day, with an expected ETA at Pasadena of October 25.

On September 18, Agrifos declared *force majeure* and canceled the BOW HERON cargo pursuant to Section 11 of the CFR Contract, citing the impact of Hurricane Ike in the greater Houston area, causing physical and flooding damage to its warehouses, inventory and electrical systems. Agrifos did not give any notice or declaration of *force majeure* or cancellation with respect to the HOLMEN cargo, citing the fact that delivery had already taken place at her loading port under the sales contract.

On September 19, Transammonia responded that Agrifos' notice was not timely; there was no true event of *force Majeure*, and, in any event, Agrifos would not be entitled under Clause 11 to cancel the contract. While sympathizing with the damage suffered by Agrifos' facility, Transammonia stated that its purported cancellation constituted a repudiation of the contract and urged Agrifos to promptly revoke that repudiation and confirm that it would receive and pay for the cargo.

The HOLMEN loaded at Dahej on September 17/18 and departed. The BOW HERON loaded at Ronnskar on September 29/30 and departed.

Agrifos declined to withdraw its cancellation and Transammonia explored the possibility of selling or storing the BOW HERON's cargo with a number of potential receivers in North America, including discussions with Norfalco LLC for discharge at Belledune, New Brunswick. Transammonia instructed the BOW HERON to standby and remain drifting between October 13-16 at her deviation point at sea for Belledune, New Brunswick and the US Gulf to await further instructions. Transammonia's efforts proved unsuccessful and, on October 9, Agrifos demanded an expedited arbitration hearing, ultimately contending that it had no storage capacity to receive its portion of the BOW HERON's cargo at Pasadena after accepting and discharging/receiving its portion of the HOLMEN's cargo.

Discussions followed and, on October 16, the parties entered into an agreement (without prejudice to their rights in arbitration) whereby Agrifos agreed to accept the cargo onboard the BOW HERON and further agreed to pay a provisional price of $250 per metric ton, or a total of about $2.5 million. Transammonia also agreed to pay, in the first instance (without prejudice to seeking indemnity for same), demurrage incurred on the second of the two vessels to arrive at Pasadena (which turned out to be the BOW HERON – the opposite of what was earlier anticipated). The parties ultimately memorialized these terms in a "Without Prejudice Agreement" signed on January 14, 2009.

The HOLMEN arrived at Pasadena on October 29 and completed discharging on November 19 (with Agrifos paying demurrage for the HOLMEN). The BOW HERON arrived at Pasadena on November 15 and completed discharging on December 30. [1]

Agrifos filed insurance claims exceeding $50 million for damage to its finished goods inventory, property damage and business interruption arising from Hurricane Ike.

The parties were unable to resolve their differences and proceeded to arbitration. Several interlocutory rulings with respect to discovery requests were followed by evidentiary hearings that included the testimony of fact and expert witnesses as well as the introduction of voluminous documentary evidence. Oral argument was heard on July 14; the proceedings were formally closed on August 5; and the award was rendered on November 12, 2009.

The parties' positions centered on Clause 11 of the "Transammonia General Terms and Conditions (CFR and CIF Sales)" annexed to the CFR Contract, providing in pertinent part:

11. **Force Majeure**

(a) No failure or omission to carry out or to observe any of the terms, provisions or conditions of this agreement shall give rise to any claim by one party hereto against the other, or be deemed to be a breach of this agreement if the same shall be caused by, or arise out of, war, hostilities, sabotage, blockade, revolution, or disorder; expropriation or nationalization; cutoff of gas supplies to facilities for the production of ammonia; disruption of rail or pipeline transportation of product to the loadport, and consequent delays; breakdown or damage to storage, pipeline or loading **or unloading** facilities, prevention of loading **or unloading** by terminal or port authorities; embargoes or export restrictions, acts of God, explosion, fire, frost. earthquake, storm, lightning, tide, tidal wave or perils of the sea; accidents of navigation or breakdown of or injury to vessels; accidents to or closing of harbors, docks, straits, canals or other assistances to or adjuncts of shipping or navigation; strikes, lockouts or other labor disturbances; or any other events, matter, or thing whatever occurring, of the same class or kind as those above set forth, which shall not be reasonably within the control of the party affected thereby and which by due diligence such party is unable to

prevent or overcome (herein called "force majeure"). When the term "party" as used in this paragraph 11 applies to the Seller, it shall also include the Seller's suppliers of product if identified by Seller to Buyer in accordance with Clause 11(c). [NOTE: The highlighted phrase "or unloading" was a handwritten insert amendment to the contract.]

* * * *

(d) If force majeure affects the Seller, the Seller may, at its option, exercised by notice to the Buyer within a reasonable time, either: (i) cancel from this contract any quantities which have not been delivered due to force majeure, without affecting the balance of this contract, or (ii) deliver such quantities in one or more lots, after the Seller deems the effect of force majeure to have ended, on the same terms as set forth in this contract. If, by reason of force majeure, there is a curtailment of or interference with the availability of any product from the source of supply nominated by the Seller for a specific shipment, Seller will be free to withhold, reduce or suspend deliveries hereunder to such extent as Sellers consider reasonable and equitable in all the circumstances and Sellers will not be required to acquire by purchase or otherwise additional quantities from other suppliers.

* * * *

(f) Notwithstanding the foregoing provisions of this clause, the Buyer shall not be relieved of any obligation to make payment for product that has been delivered in accordance with Clause 3 or to pay demurrage or detention with respect to vessels chartered and/or loaded before the notification of the force majeure under this clause for a contractual shipment.

(g) The foregoing provisions of this Clause 11 shall have no application to the running of laytime or the Buyer's liability for demurrage, which are governed exclusively by Clause 7 and the provisions incorporated therein.

* * * *

(i) Should an event of force majeure occur after the fixture of a performing vessel but prior to loading of the vessel from the nominated load port, the Seller shall be entitled to cancel the Charter Party of the nominated performing vessel, and any damages or other costs of doing so shall be borne by the Buyer. * * * .

Clause 12 (Main Shipping Routes Closure) was also cited in part by the Panel:

Should any major shipping route such as but not limited to * * * be closed or declared an excluded zone by the vessel's insurance underwriters and such closure or exclusion interferes with the delivery or transportation of the product under this Contract, then the Seller shall have the following options:

(a) The Seller may cancel the sale of the product by notice to the Buyer, and upon such cancellation, the Seller shall have no further liability to the Buyer.

* * * *

The Parties' Contentions

Agrifos contended, *inter alia*, that the damage to its Pasadena plant caused by Hurricane Ike constituted a bona fide *force majeure* event under the Contract; and it validly canceled the Contract, which was the most effective and required method of mitigating damages under the Contract. Plant operations at the time of the arrival and discharging of both the HOLMEN and BOW HERON were significantly limited by reason of Hurricane Ike and certainly had not returned to normal. As a result, no amounts were due and owing to Transammonia for demurrage, cargo, or incidental expenses/damages with respect to the BOW HERON.

Transammonia contended, *inter alia*, that although there was flooding and damage to some of Agrifos' facilities as a result of Ike, Agrifos' sulfuric acid discharge and storage facilities were not damaged, nor was there major mechanical damage to its fertilizer manufacturing plant. Yet, on September 18, 2008, long before any performance on Agrifos' part was due, and even though Agrifos then expected to and did restart its operating units in early October, Agrifos not only declared *force majeur* under the BOW HERON Contract, but unilaterally cancelled that contract without any right to do so. Agrifos' cancellation breached its obligations and constituted an anticipatory repudiation of the Contract. Agrifos did not exercise due diligence prior to the BOW HERON's arrival to take measures to prevent and overcome the effects of Hurricane Ike. Therefore, Transammonia was entitled to recover the full amount of the Contract, including the unpaid balance of the Contract price for Agrifos' cargo carried by the BOW HERON; demurrage paid to the BOW HERON; the incidental damages incurred by Transammonia (waiting time at the above deviation point) attempting to mitigate Agrifos' anticipatory repudiation and breach of contract, plus interest at the 12% per annum Contract rate, attorneys' and arbitrators' fees and costs.

Discussion and Decision

A great deal of testimony and documentary evidence was presented on whether a *force majeure* event or its effects existed at Agrifos' Pasadena plant and/or excused performance at the times in question, and whether Agrifos exercised due diligence to prevent or overcome the event or its effects. The Panel first focused on the question of whether Clause 11 of the Contract provided Agrifos with the right to cancel the Contract on the grounds of *force majeure*. It unanimously found that it did not, stating in pertinent parts:

> *Cancellation of a contract is an extreme measure - for there is no more serious a step a contracting party might take, and our courts have rightfully placed the burden on the party cancelling a contract to prove by a preponderance of evidence that it was entitled to do so.*
>
> *In this case Agrifos has the burden of proving that it was entitled to cancel the Contract for the BOW HERON's cargo on September 18th within the terms of Clause 11. Agrifos contends that a declaration of force majeure due to events beyond a party's control excuses non-performance and that it was permitted to cancel the contract unless the contract provided otherwise. In doing so, it primarily relies on Harriscom Svenska, AB v. Harris Corporation et al. [2], PT Kaltim Prima Coal v. AES Barbers Point, Inc. [3] , Toyomenka Pacific Petroleum, Inc. v. Hess Oil Virgin Islands Corp. [4]; Gulf Oil Corp. v. Federal Energy Regulatory Commission. [5]; and N.Y.U.C.C. Sec. 2-615. We find Agrifos' reliance misplaced since while these decisions do indeed deal with force majeure situations and/or the interpretation of force majeure clauses, none grant the extreme remedy of cancellation to a party who is able to simply prove a force majeure event without more; and none of these cases support such a right for Agrifos under the Contract and force majeure provisions and facts herein. N.Y. U.C.C. Section 2-615(a) applies only to delay in delivery or non-delivery in whole or in part by a Seller, and as a commentator has observed, "The purpose of Section 2-615 was to provide a statutory basis for a claim of relief from burdensome contracts * ** where the parties had not thought to provide their own force majeure clause". [6]*
>
> *What is crystal clear from the authorities cited by both parties is that each dispute must turn on the parties' express contractual undertakings – or lack thereof – read against the surrounding facts and circumstances. This brings us to Clause 11 of the Contract.*
>
> *The language and specific obligations of Clause 11, and the time frame for the performance of these obligations compel us to find that the Contract did not provide Agrifos with the right to cancel the Contract as it did. Firstly, the language does not contain an express right to cancel. We disagree with Agrifos' contention that the opening language of Clause 11(a) is tantamount to providing an express right of cancellation. Secondly, Clause 11(a) continues by obligating the allegedly affected party to act (after the occurrence and impact of a force majeure event and its effects) to control, prevent or overcome same. Thirdly, Clause 11(b) obligates both parties to act down the time line to use their best efforts to minimize and mitigate any possible resulting waiting time (presumably relating to vessels and/or performance) and/or damages and/or costs. Fourthly, the express "Seller may … cancel from this contract" language of 11(d); "shall be entitled to cancel" language of 11(i); and "(t)he Seller may cancel" language of 12(a) shows that when the Contract intends to grant a right of cancellation to a party, it clearly says so.*

The Panel unanimously found that Agrifos was not entitled to cancel the Contract and that its actions in doing so were wrongful. Transammonia was not obligated, as a matter of contract or otherwise, to accept Agrifos' notice of cancellation or cancel the Contract, and its refusal to do so, and the loading of the BOW HERON, did not constitute any breach of contract. Transammonia's attempts to find a buyer prior to the "without prejudice" agreement of October 16, 2008 were held to have been reasonable and in accordance with its mitigation obligations under Clause 11.

Due Diligence

The Panel also noted that much of the evidence presented went to the question of whether Agrifos exercised due diligence to make room at its Pasadena facility to receive the BOW HERON's cargo, which was understandable, given the terms of Clause 11(a) and the law in the area relating to burdens.

Citing *Gulf Oil Corp. v. Federal Energy Regulatory Commission*, 706 F.2d 444 (3d Cir. 1983), in which the contract and *force majeure* provision included:

> *… said term (force majeure) shall not mean or include any cause which by the exercise of due diligence the party claiming force majeure is able to overcome … (448)*

the Court stated:

> *Specifically, we conclude that in order to use force majeure events to excuse nonperformance, Gulf must show that it tried to overcome the results of the events' occurrences by doing everything within its control to prevent or minimize the event's occurrence and its effects. (454)*

[and]

> *We think that Gulf must show that it exercised due diligence to overcome the effects of the specific force majeure events. Gulf must show that it tried to limit the problem and was not able and that it did everything in its control to prevent or minimize its happening. (455)*

Noting that it was Agrifos' burden to prove by a preponderance of the evidence that it exercised due diligence to make room for the BOW HERON cargo to be received when the Vessel arrived, the Panel stated:

> *In other words, Agrifos had to prove that it did "everything in its control to prevent or to minimize the events' occurrence and its effects" (Gulf Oil) i.e., to make ready, increase and utilize sulfuric acid storage space at its facility, and to prevent and overcome the amount and buildup of sulfuric acid in its tanks. We find that Agrifos failed to sustain this burden.*
>
> *The record does establish that Hurricane Ike did cause major damage to portions of Agrifos' facility and property, and that its efforts to get its plant back into operation, much to its credit, were huge (even "Herculean" and "heroic" as stated by Transammonia), and were largely successful. However, the record also establishes that it was clear very early that there was no significant problem with its berthing facility; its sulfuric acid discharge and storage facilities were undamaged; and there was not major mechanical damage to its fertilizer or sulfuric acid production plants.*
>
> *Moreover, the record supports, and we find, that Agrifos did not focus on trying to make space available for the HOLMEN or BOW HERON cargoes to any significant extent. It gave little if any thought, and made little if any effort, to make ready, increase and utilize sulfuric acid storage space at its facility, and to prevent or overcome the amount and buildup of sulfuric acid in its tanks. Agrifos' answer that it felt the best way to reduce sulfuric acid inventory was to get the plants up to functioning at normal capacity, falls very short of (a) justifying its lack of focus and action; (b) satisfying its due diligence obligation and burden with respect to the specific contract before us; and (c) justifying the contractual relief Agrifos would have us award to it.*
>
> * * * * *
>
> *All things considered, as aforesaid, Agrifos did not sustain its due diligence burden; it failed to demonstrate and prove that it is entitled to be excused for nonperformance under Clause 11(a); and Agrifos is obligated to pay the remaining amount of $2,392,950 for the BOW HERON cargo * * *.*

Having decided that Agrifos was not entitled to cancel the Contract under Clause 11, the Panel unanimously awarded Transammonia a total of $4,068,288.61, consisting of the unpaid balance of the contract, outstanding demurrage, incidental damages, an allowance for attorneys' fees and costs, and reimbursement of arbitration fees and costs, plus interest.

This brief case note cannot possibly do justice to the exceptionally fine briefs which set forth the parties' contentions, arguments and supporting authorities. Those interested in more detail are strongly urged to read the full award which may be found at *Agrifos Fertilizer, Inc. v Transammonia, Inc*., S.M.A. 4049 (2009).

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1. The demurrage rate on the HOLMEN was $23,000 per day. The rate on the BOW HERON was $28,000 per day.

2. 3 F.3d 576 (2d Cir. 1993).

3. 180 F.Supp. 2d 475 (S.D.N.Y. 2001).

4. 771 F.Supp. 63 (S.D.N.Y. 1991),

5. 706 F.2d 444 (3d Cir. 1983).

6. P.J.M. Declerq, "Modern Analysis of the Legal Effect of Force Majeur Clauses in Situations of Commercial Impracticability", 15. J.L. & Com. 213, 224 (1995).

ICMA NEWS

ICMA XVIII will be held in Vancouver (B.C.)
May 13-18, 2012.

General Update

- Efforts are nearing completion for an ICMA website under the stewardship of Dr. Christoph Hasche; visit www.icmaweb.com.
- Bruce Harris has been instrumental in creating the new logo for ICMA, which has been incorporated into the website.
- The current members of the ICMA Steering Committee are: Bruce Harris (London), F. Strube (Bremen), D. Raibl (Vancouver) and M.W. Arnold, Chair (New York)

ICMA XVII – a Hamburg success story

by Klaus C.J. Mordhorst

In spite of the obvious economical obstacles, which beset the entire maritime industry last year, our friends in Hamburg managed to pull off a most interesting, memorable and successful ICMA XVII in October. It attracted some 172 attendees from 25 countries (Germany, as the host country, had the strongest delegation with 46, London with 30, the USA with 16, China with 14, Nigeria with 12, as well as delegations from Singapore, Russia, France, Denmark, India, Norway, Greece, Spain, Italy and many more).

The event was well organized, and a most efficient and helpful support staff kept everything moving along briskly. Much of the credit is also due the Steering and the Topics Committees who put together a program that addressed contemporary issues of interest, updated common topics and introduced a new segment which allowed the "users of the arbitral system" – the owners, charterers, regulatory institutions – to present their praises and concerns.

Hamburg is a great place to visit at any time and for any reason (yes, yes I am naturally a bit prejudiced), but the organizers of the GMAA (German Maritime Arbitration Association) more than proved that point too. The venue hotel was brand new, with great meeting facilities, great views and superb food, and a top-notch bar on the top floor with a fantastic view of Hamburg. The social events were well chosen and executed: the reception at the Rathaus (City Hall), the Wednesday excursion to Berlin with a city tour by boat – how much more maritime can you get – the dinner dance at the Suellberg in Blankenese, the excursions for the accompanying persons to Bremen and around Hamburg were all simply wonderful. The golf aficionados had a chance to test their skills at the beautiful and challenging course at Gut Kaden.

All in all, this was a well planned and enjoyable Congress, a wonderful occasion to meet up again with the usual ICMA supporters, to meet new friends and freshen up on what's new and important in the maritime arbitration world.

On a parochial note, the US delegates (in alphabetical order) were: M.W. Arnold, L.C. Bulow, M.M. Cohen, A.L. Dooley, J. Kimball, D.W. Martowski, K.C.J. Mordhorst, B. Nergaard, A.M. Paré, A.J. Pruzinsky, J. Ring, M. Ryan, R. Ryniker, W. Seele, D.J. Szostak, J. Vayda.

NEW YORK MARITIME ARBITRATION WORKSHOP

The SMA will again conduct its popular, comprehensive two-day seminar on "Maritime Arbitration in New York under SMA Rules" – for the fifth consecutive year – on February 25 and 26, 2010 at the Best Western Seaport Hotel, 33 Peck Slip, New York, NY 10038 (in the historic South Street Seaport District in Downtown Manhattan). This course is offered to help further and promote the fair, just, ethical and cost-efficient resolution of charter party and other maritime contract disputes via arbitration in New York. Jeffrey Weiss, Esq., Professor of Maritime Law at New York Maritime College, who has over 20 years of college and graduate-level teaching experience, will again be the lead instructor.

The subjects to be covered will include: Arbitration Overview, Commencing the Arbitration, the Federal Arbitration Act and SMA Rules; the Arbitration Award: Interim Awards, Final Awards, Majority Decisions, Dissenting Opinions; Confirmation, Vacatur and Enforcement of Awards; Panel Members and Ethical Considerations; Discovery in Aid of Arbitration; Hearing Procedures; Security in Aid of an Award; Evidentiary Considerations in Arbitration, the Federal Rules of Evidence and Related Issues; Time Bar, Defaults and Consolidation of Arbitrations.

For further details and registration, please see the SMA website at www.smany.org. The registration fee includes

continental breakfast, morning and afternoon coffee each day. There are numerous Seaport District restaurants for lunches and dinners. Hotel rooms are available at reasonable prices at the Best Western Seaport Hotel (call the front desk at 212.766 6600; fax 212.766 6615) and mention the SMA. For any other course or registration questions, call Klaus C.J. Mordhorst (973.492.9472); email: klausm@lefflerchartering.com).

SMA SALVAGE ARBITRATION RULES

The Board of Governors ratified the revised Salvage Arbitration Rules, which are accessible on the SMA website (www.smany.org).

The rules will also be part of the 2010 revision to BENEDICT ON ADMIRALTY, Volume 3A, "The Law of Salvage" (published by Matthew Bender). The volume is co-authored by John Kimball and Thomas H. Belknap of Blank Rome LLP.

CHINA MARITIME DIRECTORY 2009/2010

This publication has been described as delivering the much-needed quality data on the Chinese maritime industry. For marketers or researchers targeting China's markets, trying to find reliable, current data has always been a troublesome task, with very little information in English being available to them. What this directory aims to do is plug this gap, offering a real choice to those looking for such information.

The 558-page directory provides a comprehensive listing of over 6,000 maritime organizations and companies throughout China, including shipbuilding and ship repair, marine equipment and materials, shipping and logistics, shipowners, surveys of ships for trading and intermediary service, research and design institutes, education and training associations, news and publishers, maritime law institutions, administrations, etc. Each entry contains the company's trade name, address, phone and fax numbers, email & URL, and description of their business scope. It also contains company name indexes in English or Chinese.

Further information on ordering is available from Business Data International Inc., info@businessdataintl.com or fax +1 (514) 227-5424, www.businessdataintl.com

FEEDBACK

On occasion, I have mentioned notes or calls received from readers of this quarterly. I was never quite comfortable in doing so, but since ultimately this publication is the result of a collective effort by the SMA and industry interests, here are some of the written comments.

In response to the July 2009 edition:

The latest edition of your editor's favorite [quarterly] read has recently appeared. The Arbitrator, published in support of the ways of New York Arbitration has, over the years, gained attention for its attention to maritime details, dry wit and good writing. Hardest of all, its editor, Manfred W. Arnold, has managed to discourage New Yorker style prolixity as far as article length is concerned. The publication gives an object lesson to other associations on how to make the object of their endeavours that much more interesting. The table of contents gives a good idea of the breadth on offer.

One reader, probably aware of my penchant for signed first editions, asked (jokingly) whether other contributors and I could autograph the issue.

Critiquing the October 2009 issue, a reader wrote:

I read it all the time but for some reason that I can not explain, I enjoyed this issue more than others. I do know that my satisfaction went beyond your personal notes regarding age — an increasing awareness. Thank you.

Sam Ignarski and Humphrey Hill of THE MARITIME ADVOCATE, for some time, have been quite complimentary about THE ARBITRATOR. Their comments on the October issue were:

Out now is the October edition of The Arbitrator, the publication of the Society of Maritime Arbitrators, Inc. in New York. As usual, the publication is a nice mixture of reporting and opinion with an unusually droll sense of humour. There is a good column by Chris Hewer on the low glamour which surrounds arbitrators, a good review of the Cosco Busan case by Geoffrey W. Gill of Countryman & McDaniel and an interesting [total loss] yacht arbitration described by David Martowski. It makes you wonder why the other centres of marine arbitration in the world cannot promote themselves in the engaging way managed by the SMA.

Please keep the comments coming, whether critical or complimentary.

LETTERS TO THE EDITOR

I had another missive from my old friend Arnie Rooney.

Initials and Acronyms – Lingua Redux

People have nicknames, usually something shorter than their real names, but then why is John called Jack? The dictionary states that Jack is short for Jacob. Where then does Jake fit in? I know a fellow by the name of James, but he is called Jack; on the other hand, his initial is J., and maybe that explains it – he could have been J.J. Maybe it's one way of keeping others curious. On the other hand, the grandson of a friend of mine is named J.J. and he told me that it stands for Just Jack. These "initial names" are not just for the males of the species. When B.J., C.J. or T.J. meets a girl named M.J., you know that her second name is Jane and not John, Joseph or Jeremiah.

What then brought me to the subject of acronyms were the letters ICMA in an article I read, but that was not the ICMA we just attended in Hamburg – this was the International Christian Maritime Association. Curiosity then led me to check the internet, and I found that there were approximately 185,000 ICMA entries. The ICMA 2009 Hamburg website was listed in the 24th spot, in between the Indiana Concrete Masonry Association and the International/City/County Management Association. But then there were the International Card Manufacturers Association, the International Computer Music Association, the International Center of Medieval Art, and so on (I did not want to fall into my own trap of using "etc.")

After having procrastinated sufficiently, I returned to my review of an arbitration file and came across a number of abbreviations, and I remembered others: WIBON (whether in berth or not) – MOLOO (more or less in owner's option) – DHDLTSBENDS (dispatch half demurrage laytimes saved both ends) – AGW WP UCE (all going well, weather permitting, unforeseen circumstances excepted) –DANRVAOCLONL (discountless and non returnable, vessel and or cargo lost or not lost). Sometimes I wonder what is the greater bore – to figure out all the initials or having to write the full text. When, after the file review, I put some reference books back on the shelves, I noticed a small volume titled "Shipping Terms and Abbreviations" published by Cornell Maritime Press in 1963. If someone wrote a book about it more than 45 years ago, I guess I did not stumble on anything new. In fact, 1963 was the year I came to this country to work and learn the language. Now I have to forget the language and learn abbreviations. I think I better stop while I am ahead, or at least not too far behind.

The next challenge will be texting, which I will save for a snowy day. I wonder whether there is a spell-check for texting. Ta-ta.

SOME PERSONAL NOTES

Errata

Proof that the readers of THE ARBITRATOR look not only for substance but also for form was the note that I received referring to a misspelled word in the last issue – Croyden. I apologize to the citizens of that lovely town, Croydon, and to my pen pal, wherever she is now.

In with the New, Out with the Old

It is probably something quite a few people may have toasted when the New Year rolled around. For me, the year-end holidays usually produce mixed emotions. Yes, I do look forward to all the new things and experiences which the New Year might bring, but, at the same time, I think back on the years gone by. Not necessarily in the sense that things were always better just different and, to a degree, worthwhile remembering.

I dislike the fact that Christmas music starts the day after Thanksgiving – how can the red-nosed Rudolph run for nearly thirty days? I remember that, as children, we had to sing carols in the days leading up to Christmas and before we could open the gifts (really tough for me because I could not, and cannot, carry a tune). We kept up the tradition with our own children and now the grandchildren. The grandchildren are also in awe when they see the live Christmas tree with the live candles and decorations collected over the years, including ornaments hand-made by the children over several generations. It is great to see the smiles of happiness in the glow of the candles, to enjoy the smell of fresh pine and savor the Christmas food. At such moments, it seems time stands still. Unfortunately, these precious moments become rarer because our world has changed – it moves faster and commerce focuses on the next marketing event to sell gifts and cards.

Cynics have said that some holidays were created for the card manufacturers, but cards for Christmas go back a long time and some people even collect Victorian-age examples. I love Christmas cards and in my past (the artistic period), I even created my own cards. Cards are an integral and important part of this particular holiday. I appreciate all the cards received for Christmas and I apologize to all who sent them and to whom I did not respond in kind. But if we send cards for business reasons, I think that overall it would be more beneficial in the spirit of the season to save the cost of cards and postage (as some firms do) and make a donation to a charity. And the same goes for the Internet with its Season's Greetings. Some of them are adorable and elaborate, but they still lack the same as an artificial Christmas tree lacks in comparison with a freshly cut blue spruce. They are not the real thing.

THE ARBITRATOR wishes all readers the best for 2010, and may the New Year bring you everything that you hope for and deserve.

THE ARBITRATOR

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