VOLUME 41 | NUMBER 4 | NOVEMBER 2010

THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

INDEX TO THIS ISSUE

PRESIDENT'S CORNER

Dear Readers:

The long hot summer, in which temperatures reached 103°F (39°C) in July and 12 August days had maximum temperatures greater than 90°F (32°C) is over! Welcome to fall in New York City.

The SMA had its first open meeting on October 13. Luncheon Chairman Tom Fox arranged for Mr. Mark Miller to speak on the Deepwater Horizon oil spill. The title of the presentation was "DEEP WATER HORIZON – A Spill Response Contractor's Role in the Cleanup." Mark gave a great presentation. Listening to his description of the logistics and coordination necessary to carry out the cleanup, was like getting a briefing on a major military maneuver. People, boats, food, equipment and assignments had to be coordinated daily. Congratulations to Miller Services.

Armand (Jay) Paré, Esq., a partner at Nourse & Bowles, LLP spoke in November on the topic "Subpoenas in Arbitration." His presentation appears below in this issue. The full schedule of meeting dates can be found on our webpage.

Just before the summer began I was invited, as President of the SMA, by Patrick Bonner, the President of the Maritime Law Association, to their annual conference dinner at Chelsea Piers in New York City. It was truly impressive to see the large number of maritime lawyers from overseas and all parts of the United States. It was also good to see again Mr. John Tsatsas, President of the London Maritime Arbitration Association, at the MLA conference.

Not only was the summer extraordinary, but the SMA Rules Committee was as well. A number of fine point changes were made to the main rules and the rules for shortened procedures. This follows on from changes to the Salvage Rules which were made in January 2010. More details will be found in the article written by Rule Committee Chair Lucienne Bulow in this issue of the Arbitrator. The rules, with the new changes, are on the www.smany.org web page.

SMA arbitrators were also busy these past few months as the second issue of the 2009-2010 Award Service was shipped to subscribers. The volume included up to award number 4070 and the committee is now preparing the first edition of the 2010/2011 volume which will include up to award number 4085.

The SMA and members of the NY Maritime bar continue to make presentations to the industry on the advantages of NY arbitration. Bengt Nergaard, Klaus Mordhorst and I attended the International Bunker Industry Association (IBIA) conference in Stamford and gave a PowerPoint presentation on the SMA. In addition, James Textor, Esq. spoke on New York arbitration at a conference in Greece in October and Edward Keane, Esq. lectured on arbitration in NYC in Norway, Sweden and Denmark.

I hope to see you at one of our luncheon meetings.

Very truly yours,

Austin L. Dooley

DEMURRAGE DEBUNKED

By Chris Hewer

The shipping team at Moore Stephens has published the fourth in its alphabetic 'devil's dictionary' of classic and alternative definitions of shipping and accountancy terms. In the latest issue of its Bottom Line newsletter, it explains that 'D' is for demurrage, a charge payable for exceeding the time allowed for the loading or discharging of cargo from a ship. But its alternative definition is arguably more engaging.

Demurrage, it says, is formed from the combination of two separate words – 'demur' and 'rage' – and literally means to object to anger. This is quite sensible because Ralph Waldo Emerson said that, for every minute you are angry, you lose sixty seconds of laytime (or possibly happiness). Emerson was unreadable, even when he was alive, but was never late for his breakfast.

The four most common causes of demurrage are bad weather, lack of finance and an inability to count properly. 'Once on demurrage, always on demurrage' is one of the oldest sayings in shipping, especially all of them. But Lord Donaldson held in the Helle Skou that it actually means, 'Once on demurrage, not always on demurrage', and Lord Fraser of Tullybelton said, 'I agree'. The owners appealed, although not to everybody, and asked whether charterers were prepared to let bygones be bygones and, if so, when.

Despatch money, or temps gagne, is the opposite of demurrage and can be collected at both ends. For best results, travel hopefully rather than arrive.

Je reste mon attaché.

(Originally published in the Maritime Advocate Online, Issue 459, October 28, 2010)

THE ARBITRATOR

THE ARBITRATOR (ISSN# 1946-1208) is issued quarterly, 4 times a year; published by The Society of Maritime Arbitrators, Inc., 30 Broad Street, 7th Floor, New York, NY 10004. The publication is posted on our website and the subscription is free. To join our mailing list please register your email address at http//www.smany.org.

SMA NEWS

Election Results

On May 11, 2010 the SMA held its 47th annual meeting and elected the following slate of new governors: Lucienne C. Bulow, Gerard T. Desmond, Donald B. Frost and Michael J. Hand.

Board of Governors

The governors for the 2010/2011 business year are:
Manfred W. Arnold
Lucienne C. Bulow
Gerard T. Desmond
Austin L. Dooley, President
Donald B. Frost
Michael Hand, Treasurer
David W. Martowski
Bengt E. Nergaard, Vice President
William Quinn
Anthony J. Siciliano
Donald J. Szostak
Soren Wolmar, Secretary

Board Meetings and Luncheon Dates

The monthly Board of Governors meetings will be held preceding the luncheons of the organization. The meetings/luncheons will be held at The Ketch, 70 Pine Street on the following dates: September 15, October 13, November 10, December 8, January 12, February 9, March 9, April 13 and Tuesday, May 10 (Annual General Meeting). All luncheons are open to all, with the exception of September 15 and May 10, which are for members only.

Committees and Chairs

THE ARBITRATOR .....TBA
Award Service ..... Allan G. Bowdery
Bylaws and Rules .....Lucienne C. Bulow
Education..... Klaus C.J. Mordhorst
Liaison ..... David M. Martowski
Luncheon ..... Thomas F. Fox
Membership..... Bengt G. Nergaard
Professional Conduct.....Svend H. Hansen
Salvage .....Peter S. Wiswell
Seminar and Conventions..... Gerard T. Desmond
Technology ..... James N. Hood
ICMA.....Manfred W. Arnold
7th Index & Digest (ad hoc) ...Lucienne C. Bulow
Small Crafts (ad hoc)..... Wesley D. Wheeler
Claims Escrow (ad hoc).....John F. Ring, Jr.

CLASS ARBITRATION IN MARITIME CASES; THE FINAL WORD

By Bengt Nergaard

In the last issue of the Arbitrator, we presented a short note to advise on the decision by the U.S. Supreme Court handed down in the Stolt-Nielsen v. AnimalFeeds et al. immediately before we went to press. We are now pleased to report more fully on the decision, which should halt speculation that class arbitration is a potential risk for a party to a shipping contract or charter party simply because it directs the parties to arbitrate in New York. Not so, said the Supreme Court in a majority decision penned by Justice Alito and joined by four other Justices with three Justices dissenting.

It will be recalled that this case boiled down to the question of whether the arbitrators had the power to compel the parties to engage in class arbitration where the arbitration clause was silent on the issue. Before the Supreme Court finally ruled, the panel appointed by the parties initially had said "yes", the district Court in New York had said "no" and the Court of Appeals had said "yes".

In its ruling, the Supreme Court stated that the test was not what the Panel had believed it to be, *viz.* what it viewed as the best rule to be applied to the situation where the arbitration clause was silent. The test in fact was for the Panel to examine the rule of law that applied, and whether that law contained a "default rule" allowing class arbitration. The Supreme Court had no difficulty finding that the Federal Arbitration Act governed the contracts, and in so doing, that the well-established principle that "arbitration is a matter of consent, not coercion" applied. In the Supreme Court's decision, it was emphasized that the differences between simple bilateral arbitration – as the parties had agreed in their charter parties – and complex class arbitration proceedings were simply too great for an arbitrator to presume that the parties' silence on the issue could implicitly amount to agreement to class arbitration. The conclusion therefore was that where there is no agreement to allow for class arbitration – as in the case of "silent" arbitration clauses – class arbitration cannot be imposed.

Our readers will further recall that the SMA, some time ago, had included an express provision in our Rules confirming that class arbitration will only be permitted where the parties expressly have agreed to it. We are pleased that the Supreme Court has concurred.

NEW YORK MARITIME ARBITRATION SEMINAR 2011

By Klaus C.J. Mordhorst

The SMA will again hold its popular, comprehensive two–day seminar on "Maritime Arbitration in New York under SMA Rules", for the sixth consecutive year, on February 24 and 25, 2011 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 by arbitration in New York. Jeffrey Weiss, Esq., Professor of Maritime Law at New York Maritime College, with 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 Member 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 attractive Seaport District restaurants for lunches and dinners. Hotel rooms are available at a special rate 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 at 973-492-9472 or e-mail at klausm@lefflerchartering.com .

AMENDMENTS TO SMA RULES

By Lucienne C. Bulow,

Chair of the SMA Rules and By-laws Committee

The SMA has amended its Shortened Arbitration Procedure and its standard Rules effective September 15, 2010. The changes are not substantial.

The Board of Governors has approved small changes to the Shortened Arbitration Procedure that should clarify some aspects of the procedure in Rule 3 with respect to the exchange of short replies after the parties have submitted their claims, defenses and counterclaims.

In view of the fact that New York arbitrators now routinely award attorneys' fees, we have increased to $4,000 the maximum amount that can be awarded as an allowance towards legal expenses whether the prevailing party is represented by an attorney or by a commercial advocate.

In order to adequately compensate the arbitrator for the amount of time spent on a matter that can often be substantial, we have increased the maximum amounts that an arbitrator can charge to $3,500 if there is no counterclaim and to $4,500 if there is a counterclaim

The Board of Governors has also approved some slight changes to Standard Rules. We have clarified the method by which attorneys' fees or party costs can be substantiated. Section 30, entitled "Scope", has been amended by adding a sentence to the second paragraph and now reads as follows:

> *"Any attorneys' fees or party costs awarded shall be quantified in the Award. Together with reply briefs, counsel should submit an affidavit documenting case activity and enumerating hours and rates."*

Section 37, entitled "Arbitrator(s)' Fees" and Appendix C (the Escrow Terms) have been amended to reflect the fact that the SMA's escrow account is no longer held by the Chase Manhattan Bank.

AOT LTD. V. CARIBBEAN PETROLEUM CORP.

By Jack Berg

AOT Ltd. (AOT) had for many years sold cargoes of petroleum products to Caribbean Petroleum Corp. (CPC) delivered by tankers to CPC's storage facility at Bayamon, Puerto Rico. Between Feb.8, 2009 and Oct. 23, 2009, AOT delivered six cargoes to the CPC facility. On Oct. 22, 2009, while the sixth shipment was being discharged from the M/V Cape Bruny there was an explosion and fire that destroyed much of the CPC facility and the products stored therein. The fire destroyed the Cape Bruny cargo that had already been discharged and virtually all of the petroleum products previously delivered by AOT.

The six sales contracts were virtually identical and contained the following relevant clauses:

13. TITLE AND RISK

> *Title will pass from Seller to Buyer as the product passes the connection between Seller's vessel manifold flange and the flange of the receiving terminal line. Risk will always pass from the Seller to Buyer as the product passes the connection between seller's vessel manifold and the flange of the receiving terminal line.*

14. FORCE MAJEURE

c) Neither party shall be entitled to the benefit of the provisions of this article under either, or both of the following circumstances (i) to the extent the failure

to perform was caused by the sole or contributory negligence of the Party claiming excuse; or (ii) to the extent the failure to perform was cause by the Party claiming excuse having failed to remedy the condition and to resume the performance of such covenants or obligations with reasonable dispatch.

The contacts provided for arbitration in New York City pursuant to the Rules of the Society of Maritime Arbitrators Inc.

AOT instituted these proceedings to recover $63,272,104.71 for product it delivered to CPC that had been destroyed for which it had not been paid, $92,280.98 for demurrage due and owing under the sales contracts and $91,593.27 for the mitigation loss on the resale of product still remaining on the Cape Bruny after the fire. CPC did not dispute the fact that the contracts contained the above cited provisions but asserted there was an understanding that while legal title would pass at the flange, AOT would retain equitable title and the obligation to insure the product until CPC actually paid for it.

The Panel's decision stated at the outset that the fundamental precept of contract interpretation is that agreements are to be construed in accord with the parties intent. and that this intent is determined by reference to the language of their agreements. The best evidence of what parties to a written agreement intend is what they say in writing. The Panel unanimously concluded that the unambiguous language of the parties' agreement provided that the risk of loss passed to CPC when the product passed the flange between the Seller's vessel manifold flange and the flange of the receiving terminal line. CPC offered no rational admissible evidence that the parties intended otherwise.

The Panel rejected CPC's force majeure defense on AOT's claim other than the one relating to the Cape Bruny., temporarily deferring its decision on this issue to permit CPC the opportunity to demonstrate its entitlement to declare force majeure.

The U.S. Chemical Safety and Hazardous Investigation Board (CSB) has not issued its final ruling with respect to the cause of the fire and explosion at CPC's terminal. However, its interim investigation details states, in part,

> *At the time of the incident a tank was being filled with gasoline from a ship docked in San Juan harbor. Investigators have determined that a likely scenario leading to the release was an accidental overfilling of the tank. Gasoline spilled from the tank without detection; as the material spilled it vaporized and spread across the facility. CSB investigators estimate that the vapor cloud spread close to a 2000 foot diameter until it reached an ignition source in the northeast section of the facility.*

The Panel noted that the doctrine of force majeure contemplates a force of nature beyond human control. CPC asked the Panel to withhold any ruling on its force majeure defense until the CSB has issued its final report. The Panel concluded there was no reason to await a further decision by the CSB. CPC, as the operator of the terminal was responsible for the unloading of the products into its shore tanks. CPC has offered no evidence of any possible cause of the casualty other than the overfilling of the tanks. Absent some explanation, the only rational conclusion is that the CPC personnel, who allowed the tanks to overflow, were negligent either in failing to use appropriate working gauges or in failing to observe the overflow of the tanks, or both — *res ipsa loquitor*.

The Panel awarded AOT a total of $63,643,201.75 as reimbursement for all its claims, including legal fees and expenses and interest at the contract specified rate.

(See SMA Partial and Final Awards [SMA 4073 and SMA 4083] dated May 6, 2010 and July 20, 2010, respectively.)

SUBPOENAS IN ARBITRATION©

Introduction

The word "subpoena" from the Latin means "under penalty." The fuller phrase, "*subpoena ad testificandum*" means "under penalty to testify." The phrase "*subpoena duces tecum*" means "under penalty to bring along," which is a reference to a witness bringing along an item, i.e., a document.

This presentation outlines the subpoena powers in arbitration pursuant to which a party to an arbitration might seek testimony or documents from a third party witness. In arbitration, this is a two-step process, with the arbitrators having the role of issuing the subpoena in the first instance but with the courts having the role of enforcing any such subpoena.

I. Subpoena Power under Section 7 of the Arbitration Act

Section 7 of the United States Arbitration Act, 9 U.S. Code §§ 1 *et seq.* ("U.S. Arbitration Act" or "Act") provides as follows:

> *The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witness before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.*

Under the Act, all that is required is that a majority of the arbitrators sign a subpoena. Rule 45 of the Federal Rules of Civil Procedure ("FRCP"), which is incorporated by reference into § 7 of the Act, provides that a subpoena may be quashed if it "fails to allow a reasonable time for compliance." FRCP Rule 45(c)(3)(A)(1). No specific time limit is provided. Of possible interest, Rule 3106(b) of the New York Civil Procedure Law and Rules ("CPLR") provides that service of a subpoena on a third party must be affected 20 days in advance. Other limitations on the scope of a subpoena under FRCP Rule 45 include restrictions on disclosure of privileged matters and subjecting any person to "undue burden." FRCP Rule 45(c)(3)(A). The case law indicates that disputes over whether a subpoena for a particular person or thing is proper or not is, at least in the first instance, for the arbitrators to decide. C. Wilner, Domke on Commercial Arbitration (3d Ed. 2010) § 29.12. Under CPLR § 2304 a request to withdraw or modify a subpoena "shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the Supreme Court." It appears that any error by the arbitrators in not issuing a subpoena may be measured by the standard set forth in § 10 of the Act for a refusal of arbitrators "to hear evidence pertinent and material to the controversy." Domke, supra at § 29.12.

The typical manner in which arbitrators are asked to issue a subpoena is by request made by one of the attorneys who will typically prepare a written subpoena for a named witness or entity and provide a list of documents. As indicated, the goal of a subpoena is to obtain testimony and/or documents from a *third party*. Frequently, a third party will want to receive a subpoena before testifying or providing documents and, in such cases, the third party will not likely challenge any technical defects in the subpoena. Sometimes, however, a third party will want to resist testifying or providing documents and, in such a case, it is important to understand the technical limitations of a subpoena and how to possibly avoid these.

II. Two Limitations in New York on Subpoena Power of Arbitrators under § 7

There are two important potential limitations on the subpoena powers of arbitrators under the U.S. Arbitration Act as interpreted by the courts in New York.

1. The Technical Requirement for the Presence of a Third Party Witness at a Hearing

There has been a debate in the case law as to whether arbitrators have the power to issue a subpoena for documents alone without the presence of a third party witness being required to produce the documents at a hearing. The Eighth Circuit, for example, has ruled that arbitrators have the power to issue a subpoena for documents alone without a hearing. In In re Arbitration Between Security Life Ins. Co. of Am., 228 F.3d 865 (8th Cir. 2000), the court ruled:

> *We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to a hearing*
>
> 228 F.3d at 870-71

See also American Federation of TV and Radio Artists v. WJBK-TV, 164 F.3d 1004 (6th Cir. 1999); Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F. Supp. 1241 (S.D. Fla. 1985).

Other courts have disagreed with this, including, most notably, the Court of Appeals for the Second Circuit in New York. In Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 2008 App. LEXIS

24977 (2d Cir. 2008) that court took a more narrow view of § 7 of the U.S. Arbitration Act. It found that at the time § 7 was drafted, it contained language similar to that in FRCP Rule 45 which addresses the subpoena power of courts in the federal system. At that time, FRCP Rule 45 allowed a subpoena to "command each *person* to whom it is directed to attend and give testimony" *and* the subpoena "*may also* command" the person to whom it is directed to produce documents and tangible things." (emphasis added). According to the Second Circuit, no court suggested that this version of Rule 45 sanctioned a subpoena for records *alone* without an accompanying witness until Rule 45 was changed in 1991 to specifically allow for the issuance of a document subpoena alone. The court further reasoned that since there had been no corresponding change to § 7 of the U.S. Arbitration Act, arbitrators have no power under § 7 to issue subpoenas for documents alone without a witness producing these at a hearing. The court, however, seemed to recognize the wastefulness of this and went on to note that a third party witness may *waive* the need for a hearing or the arbitrators (or one of them) might schedule a hearing and immediately adjourn it after the third party witness attends with the requested documents. The court said:

> *As then-Judge Chertoff noted in his concurring opinion in Hay Group, the inconvenience of making a personal appearance may cause the testifying witness to "deliver the documents and waive presence." 360 F.3d at 413 (Chertoff, Jr., concurring). Arbitrators also "have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings."*
>
> 549 F.3d at 218

Hence, while in this circuit it is technically required that the third party witness be subpoenaed to attend at a hearing when documents are sought, it is acknowledged that the witness may waive this or that the arbitrators may hold an extremely brief hearing to simply receive documents from the witness. Cases from other jurisdictions which require the presence of a witness at a hearing to subpoena documents in an arbitration are Hay Group., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004); Empire Financial Group. Inc., 2010 U.S. Dist. LEXIS 18782 (N.D. Tex. March 3, 2010) and Gloria Ware v. C.D. Peacock, Inc., 2010 U.S. Dist. LEXIS 44737 (N.D. Ill. May 7, 2010). The Court of Appeals for the Fourth Circuit has ruled that arbitrators may issue subpoenas for documents alone, without a witness or hearing, when there is a special need for the documents. Comsat Corp. v. Nat'l Sci. Found., 190 F.3d 269 (4th Cir. 1999).

It should also be pointed out that the hearing at which a subpoena is returnable for testimony and documents from a third party may be scheduled solely for that purpose. In Stolt-Nielsen S.A. v. Celanese AG, 430 F.3d 567 (2d Cir. 2005) the Court of Appeals for the Second Circuit rejected the argument that a subpoena is only returnable at a hearing addressed to the "merits" of the controversy in a case.

2. Requirement that the Third Party Be Subject to Service of Process Within the District or Within 100 Miles

Another issue which has troubled the courts is whether an arbitrator's subpoena may be served outside the district of the enforcing court. In In the Matter of Arbitration between Security Life Ins. Co., supra, the court ruled that the geographic scope for an arbitration subpoena for documents is essentially nationwide "because the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel." 228 F.3d at 872 (the court did not consider the 100 mile rule with respect to subpoenaing a witness for testimony).

The Court of Appeals for the Second Circuit, however, limited service under § 7 of the Act in Dynegy Midstream Services, LP v. Trammochen, 451 F.3d 89 (2d Cir. 2006). In that case, the court ruled that, because of the various references to FRCP Rule 45 in § 7 of the Act, enforcement under § 7 must be geographically limited as it is in Rule 45. More specifically, the court ruled that the third party must be subject to jurisdiction and served with a subpoena within the district, or within 100 miles (or within the state if allowed by a state statute or court rule). The Court of Appeals in Dynegy reversed the decision of the lower court which had enforced a subpoena served on a third party in Houston, Texas. The Court of Appeals reasoned that the third party was not subject to jurisdiction in New York and therefore refused to enforce the subpoena.

That rationale, however, opens the door to arguably wide enforcement of an arbitrator's subpoena where the third party *is* subject to jurisdiction in the district where the subpoena is served. One may, for example, seek the testimony of a corporate entity and not just an individual and that corporate entity may have a broad jurisdictional footprint. See 9 Moore's Federal Practice Third Edition (2010) §§ 45.21[1] and 45.03[4]. But see FRCP Rule 45(c)(3)(A)(ii) for possible limitations. Take, for example, telephone records held by Sprint at some remote location. Sprint is, presumably, subject to nationwide jurisdiction.

One might therefore conclude that the telephone records of Sprint, wherever they may be located, could be subpoenaed by arbitrators in New York if the subpoena is served on Sprint in New York. Such a subpoena should therefore be enforceable by a federal court in New York.

III. Possible Widening of Subpoena Powers in Arbitration

1. The Uniform Arbitration Act

The Uniform Arbitration Act has been adopted in several states, including New Jersey, Pennsylvania, Massachusetts and the District of Columbia. That act allows a court in an adopting state to assist in the enforcement of an arbitrator's subpoena issued in an arbitration held *in another* state. Section 17(g) of the Uniform Arbitration Act provides:

> *The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another State upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious and cost effective. A subpoena or discovery-related order issued by an arbitrator in another State must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon [motion] to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.*
>
> (emphasis added)

One might therefore possibly use this act, in a state other than New York to seek to enforce an arbitrator's subpoena issued in New York but served in another state. While this may raise issues of federal preemption, the test for whether the U.S. Arbitration Act preempts state law is whether the state law "looms as an obstacle to the achievement of the full purpose and ends which Congress itself set out to accomplish." KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Framohising Corp., 184 F.3d 42, 49 (1st Cir. 1999). As also stated in KKW Enterprises, "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements with which the parties had entered." 184 F.3d at 49. It is unclear whether application of the Uniform Arbitration Act would be preempted from assisting in the enforcement of an arbitration subpoena either for documents or for testimony in a given case where the U.S. Arbitration Act applies. (The U.S. Arbitration Act applies where maritime transactions or commerce between the states or U.S. foreign commerce is involved).

2. New York State Arbitration Provisions

Article 75 of the CPLR also contains provisions relevant to issuing arbitration subpoenas. CPLR Rule 7505, for instance, provides:

> *An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas… .*

In other words, the attorneys themselves may issue a subpoena under the New York state rules. CPLR Article 23 provides further detail concerning how to enforce subpoenas under New York state law. Again, it is unclear whether application of CPLR 7505 or any New York state arbitration subpoena rule would necessarily be preempted in a case subject to the U.S. Arbitration Act.

3. Changing the Place of the Hearing under the U.S. Arbitration Act

Section 7 of the U.S. Arbitration Act provides:

> *… if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of said person or persons … or punish said person or person… .*
>
> (emphasis added)

This shows that the court with enforcement power under § 7 of the Act is that federal court where the arbitrators are "sitting". What if the parties both agree that a hearing should take place outside of New York, say in San Francisco, where a marine accident occurred? May the arbitrators not then hold a hearing in San Francisco and issue a subpoena in San Francisco for the pilot? And if the pilot did not attend, does the federal court in San Francisco not have the power to compel the pilot's attendance at a hearing where the arbitrators are "sitting"?

Finally, what if the SMA added a new second sentence to its present Rule 7[1] to state: "Notwithstanding the agree-

ment of the parties to arbitrate in New York, if the parties agree to application of the SMA Rules, they also agree that the arbitrators, for good cause shown, may order that a hearing take place outside New York." Would that not effectively give SMA arbitrators nationwide subpoena powers?

 This paper was prepared in connection with a presentation made by Mr. Paré to the Society of Maritime Arbitrators, Inc. ("SMA") on November 10, 2010.

1. The first sentence of SMA Rule 7 now reads: "The arbitration is to be held in the City of New York at a location chosen by the Panel, unless otherwise agreed by the parties."

RESPONSIBILITY FOR COURT REPORTER'S FEES

By Patrick V. Martin, Esq., Counsel to the SMA

Although neither the SMA nor arbitrators are directly concerned with the issue of payment of a reporter's fees, an interesting case arose out of an arbitration conducted in accordance with the SMA Rules.

In the usual course of events, an attorney ordering a transcript from a court reporter or having a reporter attend at a hearing is acting as agent for a disclosed principal, i.e., one of the parties to the dispute. Under the law, an agent is not responsible for the debts of the disclosed principal. Thus, the attorney is not responsible for the reporter's fees where the principal has not paid them.

New York has modified this provision of the law by enacting the following statute in the General Business Law :

> *"Notwithstanding any provision of the law to the contrary, when an attorney of record orders … that a stenographic transcript be made… it shall be the responsibility of such attorney to pay for the services and costs of such record…"*

The owner in the arbitration failed to pay the reporter and apparently went out of business. The reporter therefore sued the owner's attorney. Although not all the details of the suit are known, it appears the attorney defended on two grounds. The first was that he had not ordered the reporter and in fact had specifically disclaimed that he had done so. The second was that Section 25 of the SMA Rules does not apply to attorneys. The Section states:

> *"Unless otherwise agreed by the parties, a stenographic record of all hearings shall be arranged. The parties shall initially share the cost of the record, subject to final apportionment by the arbitrator(s)."*

To prove the latter defense, the attorney subpoenaed the president of the SMA, who, dutifully appeared at the trial. The purpose of his appearance was to verify the SMA Rules and to testify that the word "parties" does not include attorneys of record. Faced with the president's appearance, the reporter conceded the point and the president was released from the subpoena. The attorney prevailed at the trial and the case was dismissed. He subsequently stated that he proved that he had not ordered the transcript but obtained a copy from opposing counsel and thus was outside the purview of the statute

PIRACY—WHAT IS IT?

The following informative article appeared in the November 10, 2010 edition of Bryant's Maritime Consulting Newsletter located on the Web at http://brymar-consulting.com. Check it out now!

COURT – PIRACY DOES NOT HAVE TO BE SUCCESSFUL TO BE PROSECUTED

The US District Court for the Eastern District of Virginia denied a motion submitted by defendant Somalis seeking dismissal of one count of a multi-count indictment relating to their April 1, 2010 assault upon the USS Nicholas, a Navy frigate. Defendants contended that, because they never boarded or stole anything from the frigate, they could not have committed the crime of piracy, which carries a mandatory sentence of life imprisonment. After conducting an extensive review of the international law of piracy, the court concluded that the crime of general piracy only requires: (1) an act or acts of voluntary participation in the operation of a ship, (2) with knowledge of the facts making it a pirate ship and/or (1) an act or acts of inciting or of intentionally facilitating, (2) any illegal act of violence or detention, or any act of depredation committed for private ends on the high seas by the crew of a pirate ship directed against another ship or against persons or property on board such ship. United States v. Hasan, No. 2:10cr56 (E.D. Va., October 29, 2010). Note: This decision was brought to my attention by my good friend John Cartner of Cartner & Fisk LLC. This ruling should be compared

with the decision in United States v. Said, No. 2:10cr57 (E.D. Va., August 17, 2010) where another judge on similar facts found that attempted piracy could not be prosecuted under the piracy statute.

NEW IRON ORE FINES WARNING

Reinforcing a number of earlier warnings from P&I clubs on the issue, the American Club has drawn attention to a newly updated Indian government M Notice highlighting the dangers associated with cargoes of iron ore fines emanating from the country's ports.

The Merchant Shipping Notice No. 9 of 2010 concerns the "Safe loading, stowage, carriage and discharging of iron ore fines on ships from Indian ports" in "fair and foul season". In a member alert, the American Club's managers, Shipowners Claims Bureau Inc., says the notice sets out the applicable international conventions and the enabling legislation to incorporate them into Indian law, and should be read in conjunction with M Notices Nos. 31 and 34 of 2009, which were issued after two serious casualties in July and September that year. The first was the Asian Forest, which was followed by many near misses involving ships carrying this cargo from Indian ports in August.

Another serious incident the next month concerned the Black Rose. Neither vessel was entered in the American Club. Both ships were lost, leaving behind more than 1,400 tons of entrapped bunker oil. The ships encountered heavy listing due to shifting of cargo on account of liquefaction. Subsequent investigations showed improper cargo information, excessive moisture content in the cargo, liquefaction, and refusal of entry by port authorities. Although the new M Notice is of an advisory nature only, the club notes, the conventions and law referred to should be binding upon all stakeholders involved in the export of iron ore fines.

The notice includes a new requirement that port authorities should provide assistance to prevent a casualty after the shipment of such a cargo and provide a safe and sheltered place to enable ships to take corrective measures.

(This notice originally appeared in the 1 November 2010 issue of London Matters)

THE ARBITRATOR

Donald J., Szostak, Editor *pro tem*
djszostak@hotmail.com

Society of Maritime Arbitrators, Inc.
30 Broad Street, 7th Floor
New York, NY 10004-2402
(212) 344-2400 • Fax: (212) 344-2402

E-mail: info@smany.org
Website: http://www.smany.org