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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT'S CORNER

Dear Reader:

In May the SMA held elections for the Board of Governors and Society officers. As to officers, I am honored to have been re-elected to serve as President for the next two years and to be working with Vice President Bengt Nergaard, Secretary Soren Wolmar, Treasurer Michael Hand and the new Board. The complete list of the current Board appears in this issue of THE ARBITRATOR.

I received a copy of an excellent brochure published by the New York State Bar Association (NYSBA), describing the benefits of naming New York as a venue for international arbitration disputes. It emphasizes many of the benefits with which the users of the SMA's services are familiar, such as:

New York Courts recognize the authority of the arbitrators. The Courts have stressed that arbitrators have authority to control the arbitration process without court interference.

New York Courts enforce agreements to arbitrate. They have the authority to compel a party to arbitrate if it refuses to live up to its obligation to do so.

New York Courts assist with the arbitration process when called upon.

Other topics addressed in the brochure were the enforcement of subpoenas, preliminary injunctions, appointment of arbitrators, predictability, application of foreign law in international arbitrations in New York, the New York Convention, the Federal Arbitration Act and grounds for vacatur. The complete brochure is available on the NYSBA web page.

I attended the 24th Annual Marine Money Week forum sponsored by Marine Money International and Dahlman Rose & Co. The event, held at the Hotel Pierre attracted over 1,000 financial experts, bankers, ship-owners, and investors from around the globe. It was truly impressive to see a standing-room-only crowd in the grand ballroom of the hotel during the discussions of capital markets, economic outlook and tanker and container markets. The lead-off speaker was Mr. Gust Biesbroeck of ABM AMRO Bank N.V., who reported on his bank's survey of worldwide ship-owners. He reported that, for about 70 percent of the companies replying, New York is currently the single largest market of choice for access to capital.

A major social event in the local maritime community calendar during the summer is the Connecticut Maritime Association's annual Lobster Festival and BBQ. As usual, it was well attended by more than 300 people from all aspects of the industry. For some reason, the only unhappy guests were the lobsters!

The SMA luncheon program will resume in early October. Please check our web page for speakers and venue. I hope to see you there and enjoy the rest of the summer.

Best regards,

Austin L. Dooley

FORCE MAJEURE CASES

By Jeffrey A. Weiss

In the days following Hurricane Katrina, well over one hundred vessels waited outside the Southwest Pass awaiting entry into the Mississippi River. Many vessels were also trapped in the river including hundreds of barges loaded with bulk cargoes recently received from ocean going bulk carriers. The port was shut down for a period of time and afterwards operated at a reduced capacity.

Many events, including those arising out of the continuing threat of terrorism, as well as natural catastrophes such as tsunamis and floods, amplify the risks associated with shipping and trade. These risks can cause extensive delays to the transportation process and oftentimes translate into major financial losses.

The recent flooding of the Mississippi River and other waterways has greatly affected U.S. coal and other exports, with facilities for loading barges and oceangoing vessels affected both up and down the river. No doubt claims are inevitable.

In light of these recent events, it is appropriate to reiterate some of the basic principles of force majeure under charter parties and other forms of contracts. In addition, three case studies will be provided.

Force Majeure

The purpose of a force majeure clause is to relieve a party from its contractual duties when its performance has been prevented by a cause beyond its control. The contract party that invokes the protection of a force majeure clause has the burden of proof. It must prove that the alleged force majeure event falls within the language of the contract's force majeure clause. Additionally, the party seeking force majeure protection must also demonstrate that it took reasonable steps to perform its contractual duties regardless of the alleged changed circumstances. Typical force majeure events include acts of God, acts of governmental authorities, civil strife, political disturbances, and war, among others. Many contracts have clauses (in addition to a broad force majeure clause) that deal specifically with other enumerated events.

The bottom line is that a shipowner, charterer, exporter, importer, etc. may seek protection under a contract's force majeure clause. The fact is that many forms of contracts commonly used within the context of international transportation and trade (charter parties, commodity sales contracts, barging contracts, shipbuilding contracts, etc.) contain force majeure provisions.

OXY TRADER

One of the first cases I recall reading that concerned a force majeure clause was Toyomenka Pacific Petroleum, Inc. v. Hess Oil Virgin Islands Corp. 782 F.2d 314 (2nd Cir. 1985).

In that case, an American buyer had agreed to purchase 25,000 – 30,000 metric tons of naphtha from an overseas seller. The seller was to ship the cargo from the port of Skidka, Algeria. The terms of sale were "Cost and Freight - Guayama, Puerto Rico" (C and F Guayama) and the shipment was to be made between Sept. 20 – 28, 1981. No other dates for delivery of the cargo were specified in the sales contract.

The agreement incorporated the International Chamber of Commerce (ICC) INCOTERM "C and F", which made the sales contract a shipment contract, that is, a contract in which the seller arranges and pays for the transportation of the cargo to the named "C and F" destination. However, under "C and F" terms, the buyer assumes risk of loss and delay to the cargo at the time of shipment, that is, from the moment the cargo crosses the vessel's rail at the port of loading.

The sales contract for the naphtha cargo contained a force majeure clause stating:

> *In the event of any strike, fire or other major event falling within the term force majeure, preventing or delaying shipment or delivery of the goods by the seller or occurring prior to shipment or delivery*

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and preventing or delaying reception of the goods by buyer, then the contract period of shipment or delivery shall be extended by 30 days on telex request made within 7 days of its occurrence. Should shipment or delivery of the goods continue to be prevented beyond 30 days, the unaffected party may cancel the unfulfilled balance of the contract. Should the contract thus be cancelled and / or performance is prevented during any extension to the shipment of delivery period neither party shall have any claim against the other".

On Sept. 16, the seller nominated the integrated tug and barge unit the OXY TRADER to carry the naphtha cargo from Algeria to Guayama. The OXY TRADER arrived at Skidka on Sept 20. The loading of the barge was uneventful and the OXY TRADER, upon completion of loading on Sept 24, embarked with her barge unit for Puerto Rico.

However, there were concerns. Prominent shipping newspapers had reported problems with a sister vessel, the OXY PRODUCER, casting doubts on the safety of integrated tug and barge units generally for purposes of deep sea transportation. In fact, newspapers had reported that the OXY PRODUCER had recently sunk and that attention was now seriously focused on the use of combination vessels for deep-sea transportation. Shortly thereafter, the Coast Guard at Gibraltar detained the OXY TRADER for an inspection. The authorities refused to allow the OXY TRADER to proceed and it became evident that the cargo would have to be transshipped onto another vessel. The cargo's arrival in Puerto Rico would be seriously delayed.

A few days later, the buyer notified the seller that it was declaring force majeure and that it would not make payment for the naphtha under the sales contract until the force majeure abated. The buyer further advised that it was reserving its right to cancel the sales contract in accordance with the force majeure clause if delivery of the cargo did not occur within 30 days. Afterwards, the buyer advised the seller it would not take physical delivery nor pay for the cargo. The seller objected to the buyer's repudiation and despite best efforts was forced to resell the cargo to a third party at a discount. As expected, the seller sued the buyer for breach of contract seeking compensation for the losses arising out of buyer's refusal to pay for the naphtha.

This dispute was litigated in the United States federal courts. The primary question was whether the buyer committed an anticipatory breach of the sales contract when it advised the seller that it would refuse physical delivery of the cargo and not pay the purchase price. The buyer relied upon the provisions of the force majeure clause in support of its refusal to perform.

The Court ruled that the buyer's performance and obligation to pay were not excused by the force majeure clause. The Court was impressed by the fact that the sales contact was made pursuant to "C and F" terms. Under "C and F" terms, the risk of loss and delay to the cargo shifted from the seller to the buyer upon shipment at the load port. Thus, the seller made delivery of the cargo for purposes of the sales contract to the buyer the moment the naphtha crossed the vessel's rail at the port of loading. The force majeure clause in the sales contract did not alter the design of the C and F contract, nor did it require the seller, for purposes of fulfilling seller's delivery obligation under the sales contract, to deliver the cargo to the buyer's ultimate destination in Puerto Rico. The risk of loss and / or delay to the cargo shifted to the buyer when the cargo crossed the vessel's rail at the load port.

The Court commented that the buyer might have had legal rights against the OXY TRADER and her owners, for any losses arising out of the detention at Gibraltar. However, that would have been a separate issue and arose out of the contract of carriage, but, as between the seller and the buyer, and in accordance with the sales contract for the cargo, the seller had performed by delivering the cargo to the vessel.

The OXY TRADER dispute did not involve allegations of force majeure of a transportation contract. It involved a contract of sale. However, it teaches us several things.

First, buyers of cargo must realize that under many of the INCOTERMS, such as "C and F", the seller's delivery of the cargo to the buyer under the sales contract occurs at the load port (and not at the buyer's port of importation or warehouse). Thus, risk of loss or delay afterwards will be for the buyer's account.

Second, a force majeure clause will not excuse a party to a contract where performance, despite the alleged force majeure, is indeed possible. In the OXY TRADER case, the seller had already performed the sales contract by delivering the cargo to the vessel in Skidka. At that point buyer had risk of loss and delay to the goods. There was nothing preventing the buyer to perform, which at that point simply required their payment to seller. It is true that the buyer would likely suffer a financial loss as a result of late physical delivery of the cargo in Puerto Rico. However, that did not make for a force majeure and buyer was not legally able to walk away from the contract.

THE BUSTER BEAN

Force majeure clauses often set forth in detail the events that constitute force majeure under the contract. There is no standard set of events that are considered force majeure under all circumstances. Parties, when negotiating contracts, need to analyze the potential risks, and best allocate those risks by contractual language.

In addition to force majeure language that describes specific enumerated events, force majeure clauses oftentimes include general language extending to other non-specified causes, such as "any other cause beyond its control". This type of general language, which is quite common, can invite litigation or arbitration, for example in the case described below.

I was involved many years ago in an arbitration in which the defense to several large demurrage claims were asserted by virtue of the charter parties' force majeure clause.

The charterer, ALCOA, had entered into numerous charter parties on a time and voyage basis with different shipowners for the carriage of bauxite from Port Kamsar, Republic of Guinea to its smelting facility in Point Comfort Texas. Bauxite is a major ingredient in the manufacturing of alumina.

Alcoa's Point Comfort facility was at the upper end of Matagorda Bay. A narrow channel provided access to Alcoa's dock. Alcoa was responsible for dredging and maintaining the channel from Matagorda Bay to its dock. In January 1986, Alcoa decided to engage the Bean Dredging Co. as an independent contractor for purposes of dredging the channel to allow access by deeper draft ships. Bean Dredging dispatched the dredge BUSTER BEAN.

Due to a pump failure, the BUSTER BEAN exploded and sank in the channel connecting the upper part of Matagorda Bay with Alcoa's dock. Fortunately, no one was hurt. However, it took over one month to remove the wreck from the channel and restore navigation.

Ship after laden ship arrived at Matagorda Bay in the weeks following the BUSTER BEAN explosion. The channel to Alcoa's facility was blocked and all of the vessels were instructed by Alcoa to lie at a nearby anchorage until the channel was cleared and access to the berth possible. It is noteworthy that Alcoa had some vessels under time charter as well. However, rather than paying hire for these vessels during the down time, Alcoa diverted these vessels and their cargos to other discharging facilities operated by other aluminum companies. Alcoa was able to sell or swap cargos with other importers, thereby allowing prompt discharge of Alcoa's time chartered vessels.

Naturally, major disputes arose concerning the loss of time that the voyage chartered vessels incurred while waiting to berth at Point Comfort. The shipowners subsequently submitted major demurrage invoices, which Alcoa rejected.

The voyage charter parties at issue contained the following relevant clauses:

> *Article 6: Despatch shall be one half of the demurrage rate. Laytime shall not be reversible. No demurrage shall be paid if caused by events referred to in Article 9 hereof, unless the ship is already on demurrage.*
>
> > *Article 9 – Force majeure – neither party to this contract shall be liable for failure to perform hereunder due to acts of God, acts of war or of public enemies or war-like operation …or any other conditions or contingencies whatsoever beyond his control…"*

All of the parties (Alcoa and the concerned shipowners) agreed to consolidate the disputes into one single New York maritime arbitration. The major issue was whether the force majeure clause excused Alcoa from paying demurrage.

Alcoa argued that it was relieved of its liability for demurrage because the sinking of the dredge, and the delays arising out of the sinking, were unforeseen events within the meaning of the contract's force majeure clause. In essence, Alcoa argued that there was a "condition or contingencies whatsoever beyond" Alcoa's control.

Furthermore, Alcoa presented evidence that it had looked into the possibility of discharging elsewhere including the prospect of discharging the cargos into barges while the voyage chartered vessels were at the anchorage. Alcoa's investigation revealed, however, that there were insufficient barges and / or alternate berths available to work the vessels and that ultimately the best course of conduct was the one so chosen by Alcoa, that is, to have the barge raised and to clear the channel as quickly as possible so that the vessels could discharge at Alcoa's berth

The shipowners argued that since Alcoa selected Bean Dredging as it contractor, Alcoa should be responsible for its failures and that this was not an event outside of Alcoa's control within the meaning of the force majeure clause.

The shipowners also argued that Alcoa was negligent in selecting the Bean Dredging Co., for not inspecting the equipment used, and for failing to supervise properly the ongoing dredging operations.

In addition, the shipowners argued that Alcoa had failed to make reasonable efforts to make sure the channel was cleared as quickly as possible.

The arbitration panel ruled that the sinking of the BUSTER BEAN and the consequent delays and losses were covered by the force majeure clause and that Alcoa would not have to pay demurrage. The Arbitration Panel ruled, by a 2 to 1 decision, that the BUSTER BEAN incident was a peril within the meaning of the charter parties' Force Majeure Clause. It was an event beyond Alcoa's control and Alcoa did not act negligently or commercially irresponsibly in awarding Bean Dredging Co. the contract to dredge the channel or in arranging for the removal of the sunken dredge.

Furthermore, there was no evidence that Alcoa had acted imprudently in selecting Bean Dredging. Alcoa had also made reasonable efforts to insure a prompt, safe, and environmentally consistent removal of the sunken dredge and clearing of the channel. Furthermore, Alcoa's diverting its time charter ships was something that any prudent charterer would have done under these dire circumstances.

A well-drafted force majeure clause can exonerate a party — even extensive delays caused by human negligence. However, a key point to remember is that the party that declares force majeure needs to sustain the burden of proving that the event is covered by the contract's terms and that it acted reasonably in dealing with the unforeseen event.

The full text of the case, including the dissenting opinion, by one member can be found at SMA 2871.

MV C DUKE

Years later I worked on a case that was arbitrated in New York involving the charter party for the MV C DUKE (SMA3990).

The vessel was voyage chartered to a cement company under an amended GENCON form, for the purposes of carrying a cargo of dry white cement from Turkey to New Orleans. The charter party provided for a discharge rate at New Orleans of 6,000 metric tons per day and for a demurrage rate of $12,000. per day. The charter party also contained a force majeure clause stating:

> *Neither party shall be liable for loss to the other party hereto in the case the party concerned is unable to fulfill the whole or part of its obligation hereunder or is prevented or delayed in fulfilling such obligations owing to act of God or any other reason beyond the control of the parry concerned…*

The Force Majeure Clause further provided examples of such Acts of God or reasons beyond control of the parties to include:

> *Fire, storm, flood, frost or snow, bad weather… partial or total stoppage on rivers, canals or railway, earthquake, epidemics… tumult, civil commotions… any sort of slowdown or stoppage of labor or any cause…unprecedented stoppages on production, miners, workmen, lightermen, barges, tugboatmen or other unforeseen reason which would affect the working , carriage, delivery, shipment, transfer or discharge of the cargo."*

The dry white cement cargo was ultimately destined for the voyage charterer's customer in Houston, Texas. The Houston customer could only accommodate barges at its facility. Thus, it was the voyage charterer's intention to arrange for the discharge of the dry white cement cargo carried by the C DUKE into barges at the port of New Orleans and to further arrange for the towing of the barges to its customer's Houston facility.

Shortly after the C DUKE loaded her cargo in Turkey, a category 5 hurricane, Katrina, struck New Orleans. The storm caused unprecedented wind and storm damage in the city and port of New Orleans. The City was flooded a few hours later when the levees broke. The City and port were shut down. Thousands died.

Almost immediately after the hurricane, barge companies in and around New Orleans began giving force majeure notices to its customers advising that due to the devastation they might not be able to fulfill barging agreements. Many barges had been destroyed and those that remained were in heavy demand.

The voyage charterers of the C. DUKE subsequently declared force majeure and advised the vessel's disponent owners that they would not be responsible for any consequences arising out of the hurricane including expected loss of time and / or demurrage. The C DUKE was enroute to New Orleans when her disponent owners received the force majeure notice.

The voyage charterers recognized that to invoke force majeure it had to take reasonable efforts to avoid the consequences of the alleged force majeure event. Thus, they investigated the possibility of diverting the C DUKE elsewhere but were apparently unwilling to provide alternate discharge port instructions for the vessel.

The C DUKE subsequently arrived at New Orleans a few weeks later. Traffic on the Mississippi River was at a much-reduced capacity. However, the river was not closed and vessels were being worked albeit slowly.

Then, shortly after C DUKE's arrival at New Orleans, hurricane Rita delivered a second punch to the U.S. Gulf Coast. Rita set off one of the largest peacetime evacuations in history as people from both New Orleans and Houston fled inland. The port of New Orleans suffered further delays.

It took several weeks for some sense of order to be restored and for the C DUKE to complete the discharge of her white cement cargo at New Orleans. The question, however, remained; who would be responsible for the time lost to the C DUKE as a result of the hurricane related delays.

The vessel's disponent owners invoiced the voyage charterers for demurrage, which voyage charters rejected. The matter was referred to New York maritime arbitration in accordance with the charter party's arbitration clause.

The arbitration panel unanimously concluded that the charterers were not protected by the force majeure clause and demurrage was payable for the time lost at New Orleans. The Panel concluded that the force majeure declared by charterers was no longer relevant when the vessel had arrived at New Orleans. The evidence showed that vessels were being worked in the river when the C DUKE arrived at New Orleans. It was true that barge availability was limited. However, it was not impossible to discharge. The arbitrators were also not impressed with charterer's efforts to search for alternate discharging facilities. The Panel noted that there were other facilities in and near the U.S. Gulf unaffected by the hurricanes that were capable of receiving the C Duke's cargo into barges. There was nothing in the evidence that indicated that charterer's made inquiries regarding the discharge of cargo at these unaffected facilities. Thus, it appeared quite likely that the voyage charterers had sufficient time to arrange for an alternate discharging facility – even though from voyage charterer's perspective this might provide more costly than the originally intended New Orleans's discharge. Charterer's had to pay the demurrage in full, plus interest and costs.

CONCLUSIONS

Here are some of the conclusions we can draw from the above cases.

First, a party may invoke a force majeure clause if an enumerated event that is not within that party's control prevents or greatly hinders performance of a contractual obligation. Not all force majeure clauses cover the same events.

Second, the party that seeks protection has the burden of proof and must demonstrate that the alleged force majeure event is covered by the contract. That party should gather up all the information available that will support its contract position.

Third, the party seeking force majeure exoneration must demonstrate that it acted reasonably overall, including efforts to eliminate or minimize the consequences of the alleged force majeure event. The party invoking force majeure should also give notice as soon as possible to the other party of its intention to rely upon the force majeure clause.

There is never a guarantee that a court or arbitration panel will rule that there is protection under the force majeure protection. Sometimes, the parties themselves will agree to release one another in the light of an unforeseen event. However, understanding the concepts behind force majeure will enable participants in shipping and trade to deal more effectively with force majeure type events.

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SEARCHING FOR VALUE IN SHIPPING COMPANIES.

By Paul Slater,Chairman & Chief Executive
First International Corp.

Ever since the eighties when privately owned shipping companies came to Wall Street searching for Other People's Money (OPM) to expand their businesses, investors have struggled to understand the business models and place values on the companies.

The original institutional investors have mostly left and been replaced by Hedge Funds, Wealth Funds and Stock Traders who like the apparent volatility of the shipping markets which supposedly creates a cyclical business. This enables analysts and traders to pour over shipping freight reports and indexes searching for information to confirm or otherwise where the particular company is in the cycle.

The only problem is that while shipping markets are directly affected by the fluctuating demand for shipping services they are dominated by the supply of the ships themselves. This supply is not only the ships in the water but the enormous ability of the shipbuilders in Asia to supply new ships very quickly and in large quantities.

This latter point is dramatically evidenced by the huge expansion of the Korean and Chinese shipyards that statistically could replace the existing world fleet every seven years. Or put another way, increase shipping capacity by 15% every year given the fact that the average operating life of a ship is 25 years.

Despite the fact that nearly every sector of shipping is suffering from an excess of ships and stagnant demand for their services, the latest report I have shows that some 3,000 new bulk carriers, representing 46% of the present fleet, will deliver in the next 2 years. 700 new tankers and 600 new container ships will deliver over the same period, and yet the average age of the current fleets are 11yrs for dry-bulk, 8yrs for tankers and 8yrs for container ships, the youngest world fleet in decades.

Accounting for the business.

Ship operating expenses, including insurance, occur continuously whether the ship is chartered or not, as do general and administrative costs. These together with interest and principal payments on debt are mostly predetermined and all combine to form the cash expenses of the business, with the variables of repairs and dry-docking costs added in periodically.

On the other side of the ledger however income is only derived from operating the ships under the terms of their various charters and even with time charters this income is rarely received for the full year as off-hire days are needed to be taken into account.

Ships trading in the spot markets are exposed to much longer periods of off-hire which can amount to as much as 100 days a year. This is particularly relevant in poor markets with ships competing for fewer cargoes, or as we are now seeing, too many newly delivered ships entering markets which are already over-supplied.

Thus valuing a shipping company must be based on its revenues and expenses that can be projected forward. The capital costs of the ships are only important in establishing the debt service and only relevant twice in a ship's life. The day it is purchased and the day it is sold.

Charterers care less what an owner paid for his ship as they are only renting the use of it.

Unlike most other industries shipping has a highly liquid market for its fixed assets, the ships, which fluctuates constantly on pure supply and demand factors, facilitated by a highly efficient ship-broking industry. This can include everything from buying and selling newbuilding contracts to selling the ships for scrap.

So how does all this help in valuing shipping companies?

Firstly most private shipowners are interested in their cash flow, which can include the proceeds of selling a ship, and their balance sheets are only relevant when dealing with their bankers.

For public companies it is different. The investment banks and the investors they sell shares or bonds to are fixated on Balance Sheets, Net Asset Values and EBITDA and pay little attention to the Revenue Statements and do not have any forward projections to assist them.

The analysts, who mostly work for banks with a vested interest in the companies they cover, react to general information about matters they think will affect the particular company or the results of another company that may have a totally different fleet make-up or management style. These reports are fed into investors or published and used by the short-term traders that dominate these companies's shareholder mix today. Thus shipping share prices constantly move up and down which is what the traders like and the long-term investors detest.

World events such as hurricanes and revolutions are thrown into the analysts' mix and serve only to create more volatility. This means that the market values of most public shipping companies bear little relation to their true value but instead are determined by trading volumes of the company's shares at any given moment in a trading day.

It is almost impossible to differentiate between a good and a bad company or to look at potential values in the longer term, and the balance sheets are no help as Net Asset Value bears little relation to the true market value of the assets.

We have seen very few corporate takeovers in shipping, the last notable one being the sale of OMI to TK and Torm at close to the top of the market. With ship values where they are today, why buy an overpriced company when you can buy the same assets cheaper?

What needs to happen to help the valuation process and attract new investors?

I have argued before that the auditors need to insist on marking the ships to market as they are so easily traded and their depreciated book values have little bearing on their market values. This could be done by way of notes to the accounts.

Additionally notes should reflect the charters of the ships and, where relevant, highlight large exposures to named charterers. In today's freight markets most of the public companies would show a negative NAV if the ships' market values were used, as their debts would exceed the asset values, making the equity worthless.

The Hamburg attempts to create a new method of valuing ships is simply about creating the pretence that the equity in the KG companies has some value when in reality today it has none. It is interesting to note that a similar method is used by auditors to determine whether there has been any permanent impairment in a ship's book value and therefore whether an additional write down is necessary.

Most experienced shipping bankers follow ship market values closely and also analyze the revenue streams and operating expenses with the benefit of access to all the chartering information. Investors have no access to such information but should require companies to follow Genco's example and file all the charter details; rates, periods and charterers names on a quarterly basis.

Shipping is not a cyclical business, its ups and downs are more driven by the activities of owners and not charterers and it is the supply of ships that cause the swings not the changes in demand for their services. The deep decline in freight rates from the dizzy heights of five years ago means many shipping companies are today running at daily losses once operating expenses, overheads and debt service are taken into account. Worse, the values of ships have tumbled and yet still aren't accurately reflected in most corporate balance sheets.

How did we get here?

The original rush by shipowners to the public markets came at the end of the nineties fueled by China's rapidly growing appetite for cargoes of all types to fuel their manufacturing industries. Wall Street rose to the occasion, despite having been burned by shipping junk bonds a few years earlier. A rash of IPOs was successfully launched. Share prices of these new companies rose rapidly as the freight markets soared on a dearth of available tonnage to meet China's new appetite for raw materials.

The dry cargo companies reaped this upswing best, despite historically being seen as a little dull. Building and operating a dry-bulk ship was easier than a tanker and there were plenty of charterers both primary and intermediate ready to take on the new vessels.

The public markets responded with secondary offerings and other new companies in tankers, containers, gas ships and even tween-deckers emerged into the public arena.

Banks encouraged owners to go public and supported them with increasing amounts of debt and funded large orders for new ships. Established public companies rode the euphoria, enlarging their fleets and building large corporate structures.

Out of the public eye the large private companies also climbed on the bandwagon by ordering new ships in batches with options, some from yards that did not yet exist. By the end of 2006 the industry had the largest order book in its history and all to deliver by the end of the decade.

The public markets provided billions of dollars of new money for the industry and loosened the banks purse strings to add billions more to both the private and public company's spending capabilities. Private placements of equity also emerged with hedge funds and some private equity funds joining the game and funding shipping ventures around the world without the onus of having to report publicly. Some investment banks even bought their own fleets as hedges against their commodity trading. Today some 70 VLCCs, fully loaded with crude oil, are being held off the market by traders.

Ship prices rose dramatically on the back of huge orders and reached a point in 2008 that could only be supported if the extraordinary freight rates of the previous couple of years were sustained throughout the ships' lives. It was a classic bubble that no one wanted to recognize and like all bubbles it collapsed faster than it inflated.

China's slow down, charterers' reaction to excessive freight rates and finally the global recession and the collapse of the global banking system all contributed to the crash of the shipping markets.

Nowhere was this more obvious than in the publicly quoted shipping companies whose market values disintegrated. The private companies faced all the same issues but they were mostly hidden from the eyes of the public.

OSG had dreamed of being the first to boast of a $100 shipping share in mid-2007 when its shares peaked at $90, only to be overtaken by upstart Dryships whose shares peaked at $123 in late 2007. Since then OSG's market value has declined by 70% to $2 billion and Dryships by 66% to $1.8bn.

Most of the public dry and wet bulk companies have seen their market values crash and some have reached such low levels that they are no longer covered by analysts. Even at these low levels many are still overvalued with huge debts and will struggle to survive if markets remain as they are and their cash runs out. Many of the medium sized companies are seriously undercapitalized and are unable to attract further equity capital unless it is provided by the original sponsors or management. They are equally unable to raise any more debt even from the junk-bond markets. They have no growth potential and will struggle to survive as their cash reserves drain away with charter income barely covering expenses and funds being borrowed to pay dividends. The expenses of quarterly filing and meeting Sarbanes Oxley requirements are a constant drain of cash and some public shipping companies should seriously consider delisting.

Transparency

"More information is needed to properly assess shipping risks"

Shipping has become more of a privately owned industry ever since the demise of the big liner companies in the seventies. More of it has moved offshore for tax reasons and to avoid the manning costs and restrictions imposed by the traditional shipping nations. Despite the entry into the public share markets the majority of ships still remain in private hands and the details of their trading and finances are a closely guarded secret.

One famous shipowner once said to me "My accounts are a matter between my conscience and my bank". The same man also said "Ships move more money than cargo".

Faced with this how does an investor assess the risks of buying shares or debt in a publicly traded shipping company, particularly as many of them are an extension of private family controlled companies which may conflict or combine with the public companies trading?

Information is the fountain of knowledge but incomplete or erroneous information can be highly misleading. The decision as to what is relevant information and what needs by regulation to be disclosed is often a matter of legal advice which generally errs on the side of disclosing as little as possible thus extending the habits of the private companies.

In times of strong markets the lack of disclosed information is often ignored as the profits roll in. This can also be said about operating practices that have major conflicts of interest with the related private companies. When markets are weak and profits disappear the need for better information becomes more important.

So it is today on a number of issues that are becoming increasingly more scrutinized and give rise to demands for greater transparency.

Firstly there is the issue of accounting for charter contracts of more than one year as proposed by the International Accounting Standards Board and making no differentiation between a Finance Lease (Bareboat Charter) and an Operating Lease (Time Charter). This has led to huge objections being raised by some in the industry who think that shipping should be a special case and not have to conform like other industries.

Secondly we have the issue of disclosing charter commitments whose size and concentration are material to assessing a company's exposure to markets. The current case of Korea Line filing for bankruptcy as it seeks to get out of most of the charters for some 150 ships that it entered into, highlights the need for fuller disclosure of charter commitments from both parties.

Given the collapse of many dry cargo charterers a couple of years ago, investors are right to be concerned. It is essential that all charter contracts of a material nature covering say more than 5% of the company's gross income be disclosed along with those for long periods of time such as 5 years? The euphemism "first class charterer" or the allusion to unnamed "guarantors or charter insurers" without providing any of the details of the insurer or the amount that has been covered is simply not good enough. We only have to look at the fallout of the AIG credit default deals to understand how important this information is.

Thirdly we have the issue of conflicts of interest and fees and commissions being paid to companies related to some shareholders but not others. One leading shipbroker has already spoken out against the practice of "address commissions", to which I add, disclose the address and the recipient's relationship to anyone in the management or any shareholder of the company.

It is essential that all payments made to companies related in any way to shareholders or management be fully disclosed in detail. These payments may in some cases constitute a significant leak of cash from the company and need to be accounted for.

The conflicts of interest issue also arises when ships are bought or sold between public companies and private ones that are related to some shareholders without independent valuations being obtained. Most of this information is known or should be known by the company's bankers but other debt providers and shareholders should have the same level of information.

What to do?

The challenge for all shipowners today is how to exit from uneconomic businesses and reduce their exposure to further losses until the markets show permanent signs of recovery. Management and the banks need to be reminded that when they are dealing with Public companies the issues of fiscal responsibility, asset transfers without shareholder approval and payments to related parties all loom large. Shareholder lawsuits are beginning to emerge and the auditors will increase their concerns over the financial statements that they sign off on.

Changing management and dismantling outdated strategies along with drastically reducing overheads are the medicines for recovery. Selling ships that are draining cash flow and focusing on maintaining and operating reduced numbers of ships is vital for survival. This may not appeal to the companies that pay large management fees and commissions to their private sponsors but leaving those funds in the company would certainly improve the picture. The fact that many of these companies are managed by the original sponsors is the main reason why there have been no significant management changes and the shareholders seem reluctant to force any.

In other industries facing such a destruction of values, there would have been takeovers, mergers and wholesale management changes. For the reason expressed above and the banks' reluctance to force change, this has not happened yet in shipping despite an underlying fear that there is worse to come.

Freight markets will not return to the dizzy heights of five years ago and the values of most of the new ships that have delivered since then will have to be sharply written down, which will further reduce equity values. The present markets will continue to remain soft through 2011 and 12 as more and more new tonnage gets delivered.

If the Chinese continue to keep freight rates down by subsidizing their shipbuilding with generous bank finance for owners who build ships in China, then any recovery will be even further away. Companies need to plan for a long haul in the doldrums and act accordingly.

(Mr. Slater presented this topic at the April 13, 2011 SMA luncheon.)

ALTER EGO ALLEGATIONS AND LIABILITY: RECENT DECISIONS & RISKS FOR THE SHIPPING INDUSTRY

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Introduction

It has been nearly eighteen (18) months since the Second Circuit Court of Appeals issued its decision in *The Shipping Corporation of India v. Jaldhi Overseas Pte Ltd.*, and turned the legal side of the international shipping community upside down. At the time that *Jaldhi* was decided, the Southern District of New York was a hotbed for the Rule B attachment of electronic fund transfers ("EFTs") as they passed through intermediary and/or Clearinghouse banks located in New York City. As the Second Circuit noted in *Jaldhi*, the Clearing House Association L.L.C. reported in its amicus brief that from October 1, 2008 to January 31, 2009 alone, "maritime plaintiffs filed 962 lawsuits seeking to attach a total of $1.35 billion. These lawsuits constituted 33% of all lawsuits filed in the Southern District . . . " 585 F.3d 58, 62 (2d Cir. 2009). The effects of *Jaldhi* and *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87 (2d Cir. 2009) (holding that *Jaldhi* applied retroactively) were felt throughout the world as attachment orders were vacated and the very same judges were forced to "about face" and order the release of attached EFTs without regard to equity or the stage at which the underlying arbitration or litigation taking place abroad had progressed. Less than one (1) year after the shipping market crash, shipping companies, marine insurers, and foreign solicitors throughout the world found themselves without security, entangled in lengthy and costly arbitration or litigation with (often times) a non-viable counterparty, or otherwise with an uncollectible judgment.

As the shipping community struggled with the unexpected change in U.S. maritime law jurisprudence brought on by the *Jaldhi* decision, a new twist on Rule B emerged. While *Jaldhi* stopped the attachment of EFTs under Rule B, it did <u>not</u> eliminate or modify the rights and remedies available under traditional maritime attachment principals. Said another way, Rule B remained (and remains) very much alive and well with regard to "old fashioned attachment" of a party's tangible or intangible property (*i.e.* – bunkers, vessels, freight, bank accounts, etc.) within a U.S. judicial district, provided that the other requirements of Rule B have been met[1] and that the defendant cannot be "found" in the district where the attachment is sought. However, despite the continued availability of the Rule B attachment and Rule C arrest remedies, many claimants, judgment holders and other creditors still found themselves unable to recover amounts due and owing from their contractual counterparties who had not voluntarily posted security; were no longer viable; and/or otherwise had dissipated their assets. As a result, parties began to seek security and/or enforcement of uncollected arbitration awards and judgments from other parties as purported "alter-egos" of the defaulting party.

It is important to note that unlike many other jurisdictions, U.S. law does not allow for arrest of "sister ships" (*i.e.* – vessels owned by the same company). Some countries, such as France and South Africa, extend the right to arrest to associated ships as well (*i.e.* – vessels beneficially owned by the same company as the vessel on which debts and/or claims have arisen). U.S. law requires substantive allegations of an alter-ego relationship to be addressed by the Court before a party may pursue the arrest of sister ship or associated ship.

Imposing Alter-Ego Liability

It is well-established in U.S. law that in order to "pierce the corporate veil" and impose liability upon a party on an "alter-ego" theory, one party must have used the other party to perpetuate a fraud or have so dominated and disregarded the other party's corporate form that the other party primarily transacted the alleged alter-ego's business rather than its own. In determining whether such domination and control over the other party exists, Federal Courts throughout the country have established advisory guidelines as to when an alter-ego relationship may be found. The leading case from the Second Circuit Court of Appeals is *MAG Portfolio Consultant, GMBH v. Merlin Biomed Group, LLC*, which identified ten (10) factors to be considered in imposing alter-ego liability:

> *(1) disregard of corporate formalities; (2) inadequate capitalization; (3) intermingling of funds; (4) overlap in ownership, officers, directors, and personnel; (5) common office space, address and telephone numbers of corporate entities; (6) the degree of discretion shown by the allegedly dominated corporation; (7) whether the dealings between the entities are at arms length; (8) whether the corporations are treated as independent profit centers; (9) payment or guarantee of the corporation's debts by the dominating entity, and (10) intermingling of property between the entities.*

268 F.3d 58, 63 (2d Cir. 2001) (citing *Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1053 (2d Cir. 1997)). By contrast, some courts within the Fifth Circuit have applied a fifteen (15) factor test, looking at factors such as:

> *(1) common or overlapping stock ownership between the parent and the subsidiary; (2) common or overlapping directors and officers; (3) use of same corporate office; (4) inadequate capitalization of the subsidiary; (5) financing of the subsidiary corporation by the parent; (6) whether the parent existed solely as a holding company for its subsidiaries; (7) the parent's use of the subsidiary's property and assets as its own; (8) the nature of intercorporate loan transactions; (9) incorporation of the subsidiary being caused by the parent; (10) whether the parent and the subsidiary file consolidated income tax returns; (11) decision-making for the subsidiary made by the parent and its principals; (12) whether the directors of the subsidiary act independently in the interest of the subsidiary or in the interest of the parent; (13) the making of contracts between the parent and the subsidiary that are more favorable to the parent; (14) observance of formal legal requirements; (15) the existence of fraud, wrongdoing or injustice to third parties.*

Sabine Towing & Transportation Co., Inc. v. Merit Ventures, Inc., 575 F. Supp. 1442, 1446-48 (E.D. Tex. 1983). More recently, the Fifth Circuit Court of Appeals established twelve (12) non-exhaustive factors to be weighed by its Courts, many of which overlap with the factors set forth in *Sabine Towing*:

> *(1) the parent and subsidiary have common stock ownership; (2) the parent and subsidiary have common directors or officers; (3) the parent and subsidiary have common business departments; (4) the parent and subsidiary file consolidated financial statements; (5) the parent finances the subsidiary; (6) the parent caused the incorporation of the subsidiary; (7) the subsidiary operated with grossly inadequate capital; (8) the parent pays salaries and other expenses of the subsidiary; (9) the subsidiary receives no business except that given by the parent; (10) the parent uses the subsidiary's property as its own; (11) the daily operations of the two corporations are not kept separate; (12) the subsidiary does not observe corporate formalities.*

Oxford Capital Corp. v. U.S.A., 211 F.3d 280, 284 (5th Cir. 2000) (*citing Century Hotels v. United States*, 952 F.2d 107, 110 (5th Cir. 1992)). *See also Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347, 360 (5th Cir. 2003) (Additional factors include "(1) whether the directors of the 'subsidiary' act in the primary and independent interest of the 'parent'; (2) whether others pay or guarantee debts of the dominated corporation; and (3) whether the alleged dominator deals with the dominated corporation at arm's length.") (*citing Markow v. Alcock*, 356 F.2d 194, 197-98 (5th Cir. 1966);

Similarly, the First Circuit Court of Appeals, while not establishing a distinct set of factors to be considered, has ruled that alter-ego liability may be found "when these is evidence of a confused intermingling between corporate entities or where one corporation actively and directly participates in the activities of the second corporation, apparently exercising pervasive control." *Hiller Cranberry Prods. v. Koplovsky*, 165 F.3d 1, 10 (1st Cir. 1999) (*citing Dale v. H.B. Smith Co., Inc.*, 910 F. Supp. 14, 18 (D. Mass. 1995)). Although the factors to be considered vary from Circuit to Circuit, all courts agree that no one (1) factor is determinative and that many of the above-referenced factors relate to routine business practices. Rather, the courts will look to the totality of the circumstances and, upon balancing the relevant factors, will decide whether (or not) to impose alter-ego liability.

It is, of course, the Plaintiff's burden to establish that it has a *prima facie* maritime claim against the Defendant(s), whether based on an alter-ego theory or otherwise, in seeking to sustain a Rule B attachment. However, even in cases where this burden cannot ultimately be met, recent cases show that seeking to vacate the Rule B attachment of a vessel or other property that was attached on the basis of alter-ego allegations can – and often is – a lengthy and costly process.

Recent Cases and Decisions

In the past twelve (12) months, a number of high profile Rule B attachments of vessels and/or other tangible property have taken place throughout the country based upon the Plaintiff's (express or implied) allegations of alter-ego liability.

***Flame S.A. v. M/V LYNX*, 1:10-cv-00278-RC (E.D. Tex.)** *In the LYNX case, the Plaintiff pursued a Rule B attachment of the M/T LYNX on an alter-ego basis, seeking to enforce a foreign judgment it had obtained concerning the alleged default of a Forward Freight Swap Agreement ("FFA").[2] The Judge sustained the attachment of the M/T LYNX in Beaumont, Texas at the initial Rule E(4)(f) hearing, finding that sufficient evidence had been presented that the debtor company was the alter-ego of the vessel's registered owner. Following expedited discovery, a series of hearings, and a final evidentiary hearing in which the defendant vessel owning company presented live testimony, the Judge reversed his preliminary decision. In his thirty-one (31) page decision, the Judge balanced the evidence for every one of the twelve (12) Oxford Capital factors and found that there was insufficient evidence to establish by a preponderance of the evidence that the two (2) companies were alter-egos. The M/T LYNX was released in early August, after being detained for nearly five (5) months.*

***N.E. Vernicos-Argonaftis Salvage & Towing Consortium v. Ocean Tankers Holdings Public Company Limited*, 1:10-cv-00441-ML-LDA (D. R.I.)** *This action was commenced in October 2010 against, inter alia, Ocean Tankers and twenty-one (21) other companies and individuals within the Ocean Tankers group of companies, seeking the Rule B attachment of the M/T STAVRODROMI. A variety of claims were alleged by the Plaintiff and other intervening parties against the shipowner, on an alter-ego basis, including claims of unpaid hire, unpaid tug/tow services, and non-payment for other maritime necessaries. The Magistrate Judge sustained the attachment at the initial Rule E(4)(f) hearing, finding that various facts were indicia of an alter-ego relationship, such as overlapping ownership, directors, and officers; a common business address; and the fact that the corporate fleet name "Ocean Tankers" appeared emblazoned in large letters on the side of the vessel. The M/T STAVRODROMI remains under attachment in Rhode Island. A motion is currently pending for the interlocutory sale of the vessel.*

***Star Reefers Pool Inc. v. Kalistad Limited*, 1:11-cv-10136-GAO (D. Mass.)** *The Plaintiff in Star Reefers sought an Order of Attachment and Warrant of Arrest in January 2011 for its alleged breach of charter claims. Plaintiff sought the attachment and arrest of ninety-six (96) reefer containers, which had been held by the Plaintiff without a court order since late 2010. Although the Plaintiff did not articulate any alter-ego allegations within its Complaint, the lessee of the containers appeared in the action and moved to vacate the attachment and arrest on the basis that the containers were owned and leased by third-parties (i.e. – GESeaCo) with no connection to the charter party dispute referenced in the Plaintiff's Complaint. The motion to vacate remains sub judice and the reefer containers remain under attachment/arrest in New Bedford, Massachusetts pending the Judge's ruling.*

> ***Naftomar Shipping & Trading Co Ltd. v. KMA International S.A.*, 6:11-CV-00002 (S.D. Tex.)**. *In January 2011, the Plaintiffs in Naftomar sought and obtained the Rule B attachment of the M/V PRETTY LADY in Victoria, Texas, alleging non-performance claims under a charter party by the vessel owner's purported alter-ego. After denying the shipowner's motion to vacate the attachment on the grounds that an alter-ego relationship did not exist, the Judge ordered limited discovery to take place. Depositions were taken and the shipowner filed a supplemental motion to vacate the attachment of the vessel. The Court denied the supplemental motion to vacate, but ordered that an expedited trial would be held on the merits of Plaintiffs' alter-ego allegations once the parties completed discovery on the issue. In finding that the Plaintiffs had presented reasonable grounds to believe the companies were alter-egos, the Court looked to the Oxford Capital factors and found that the vessel owner's common offices, addresses, and telephone numbers from those of the primary defendant; common directors; and grossly inadequate capitalization were all indicia of an alter-ego relationship. The M/V PRETTY LADY remains under attachment.*

Although each of the above cases involved different facts and different Courts, they all illustrate the potential dangers that companies may face when there is the appearance of a non-arms length relationship with another company. There appears to be a trend wherein District and Magistrate Judges are issuing orders of attachment and allowing vessels and other property to be detained for months based upon the minimal – and, often times, unsubstantiated – assertions contained in a maritime plaintiff's verified complaint. This is especially common in jurisdictions outside of the Southern District of New York, where Rule B attachment and Rule C arrest actions are far less frequent and the judges are less familiar with the requirements to obtain and sustain an attachment based upon alter-ego allegations.

Countersecurity

Although a Rule B attachment of a vessel or other property will often pose a financial hardship to the defendant, Courts routinely will award countersecurity to parties who have had their assets attached. Supplemental Admiralty Rule E permits a defendant who asserts a counterclaim arising from the same transaction or occurrence that is the subject of the original action to obtain security for damages demanded in the counterclaim. The Court has broad discretion in determining whether, and in what amount, countersecurity should be posted. While any request for countersecurity must be based on something more than a claim for wrongful attachment, the court's review of the merits of the counterclaim is limited to screening out "totally frivolous" claims by the counterclaimant. In addition, frequently, the amount of countersecurity ordered is not limited to the amount of security provided by the defendant to secure the plaintiff's claim.

Conclusion

There is nothing wrong with companies having common officers and/or directors, provided that certain corporate formalities are observed. In fact, it is well established that there is a strong presumption in favor of corporate separateness. *American Renaissance Lines, Inc. v. Saxis Steamship Co.*, 502 F.2d 674, 677 (2d Cir. 1974); *see also, International Marine Consultants, Inc. v. Karavias*, 1985 U.S. Dist. LEXIS 19272, at *14 (S.D.N.Y. 1985); *Freeman v. Complex Computing Company Inc.*, 119 F. 3d 1044, 1052 (2d Cir. 1997) ("The presumption of corporate independence and limited shareholder liability serves to encourage business development."). Ultimately, it is the Plaintiff's burden to overcome this presumption and to establish with specific factual allegations that the relevant factors weigh in favor of piercing the corporate veil.

Notwithstanding, it is important for corporations to be mindful of the factors considered by U.S. Courts in imposing alter-ego liability, particularly when they are part of a large group of companies. As noted above, many of these factors are indicative of routine business practices and, in the absence of fraud, are insufficient to overcome the presumption of corporate separateness. However, companies and the individuals who run such companies must be aware of the importance of carefully following corporate formalities to maintain each entity's separate and distinct corporate identity, such as maintain separate books and bank accounts. Overlapping officers and directors should take caution to truly "wear separate hats" when acting on behalf of the different companies, by using different letterhead and e-mail signatures for each company, and all corporate representatives should take heed to keep the companies' documents in good order.

For more information about corporate veil piercing and/or how the relevant U.S. law applies to any specific set of facts or circumstances, please feel free to contact

CHALOS & CO, P.C. – INTERNATIONAL LAW FIRM at: info@chaloslaw.com.

1. As the Second Circuit Court of Appeals confirmed in *Aquas Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434, 445 (2d Cir. 2006), a Rule B order of attachment must be issued where: (1) Plaintiff has a valid *prima facie* admiralty claim against the defendant; (2) the defendant cannot be found within the district; (3) the defendant's property may be found within the district; and (4) there is no statutory or maritime law bar to the attachment.

2. The Plaintiff in *the LYNX* brought several additional Rule B attachment actions in other jurisdictions against other alleged alter-egos of the judgment debtor, seeking to attach other vessels in the Southern District of Texas, California and Louisiana. All of the attachments were ultimately vacated.

WHAT HAPPENED TO THE COCKTAIL NAPKIN?

By: Dean Tsagaris, SMA Arbitrator

As a young man looking to establish my roots in the shipping industry in the early 1980s, I recall many elder statesmen within the industry "looking after the boy". This meant more than the education one received during office hours. It meant learning how to get deals done without the formal posturing that accompanies office politics and protocol. It meant creating ideas and closing deals in principle on cocktail napkins and hand shakes.

The memories of lunches and afternoon drinks at the traditional New York shipping fraternity houses such as Harry's On The Square and The Whitehall Club are fading fast as the new generation of New York shipping executives usher in exciting new concepts in a geographically fragmented arena. The modern era shipping community of New York now consists of nests, such as Stamford, Connecticut and Secaucus, New Jersey. These nests are unified by the advancements of communication rather than the fraternity houses of old. Piraeus and London, both hornets nests of shipping, seem to be suspended in time. They still enjoy the ambiance of creative brainstorming at the taverna over wine from the barrel or a couple of pints at the pub, but are the deals really being done at these establishments?

Following the recovery from the market collapse of the mid 1980s, the industry saw investments from capital institutions increase, high yield bond issues made a brief appearance in the 1990s and enter the IPOs and hedge funds with the new millennium. The common denominator of these lending instruments to the modern ship owner is "other people's money" and a lot of it. Large lending institutions and public offerings bring with them big sums of money and an abundance of regulations requiring transparency. Ease of communication facilitates transparency allowing for regulatory terms and conditions to be met in a timely manner. This is in contrast to the days of old when ship owners risked their own money on their creative ideas supported by long-standing relationships and friendships that were sent to fruition with a conventional mortgage.

In a word, TRUST, the cornerstone of business transactions. We would all like to be more trusting, however, the obstacle of "other people's money" and the regulations and transparency caveats that come with it make this a difficult hurdle.

Dignity takes a lifetime to acquire and seconds to lose. The dignity of Enron was rightly destroyed instantly by their deplorable conduct. With it, trust, so essential to business, may have been compromised forever. This trust was symbolically replaced with expanded nondisclosure agreements, and for those in the public sector literally replaced with the Sarbane Oxley Act.

By no means do we suggest being cynical on all business transactions. The industry does have "shake-on-it" deals by those few who are able to do so. What we do suggest is that we all do our small part to meaningfully restore functional trust by "bringing to the party" two things we are all inherently endowed with, our word and courage.

Some of you may call this a dream, and it may very well be one. Yet, as this initial reaction occupies the minds of readers, the thought "that would be nice" will no doubt pass the same readers' minds, particularly when deals are denied. Behind it all, we need to see more courageous leaders discuss and create deals, the seeds of which take root on a dampened cocktail napkin of trust.

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SMA NEWS

Election Results

On May 10, 2011 the SMA held its 48th annual meeting and elected the following slate of new governors: David W. Martowski, Klaus C.J. Mordhorst, Donald J. Szostak and Soren Wolmar.

Board of Governors

The governors for the 2011/2012 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
Klaus C.J. Mordhorst
Bengt E. Nergaard, Vice President
Donald J. Szostak
James J. Warfield
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 14 (Members only), October 12, November 9, December 14, January 11, February 8, March 14, April 11 and Tuesday, May 8 (Annual General Meeting). All luncheons are open to all, with the exception of September 14 and May 8, which are for members only.

Committees and Chairs

THE ARBITRATOR .... Dean Tsagaris
Award Service .... Allan G. Bowdery
Bylaws and Rules .... Donald J. Szostak
Education......................... Klaus C.J. Mordhorst
Liaison ....Manfred W. Arnold
Luncheon .... Thomas F. Fox
Membership......................... Bengt G. Nergaard
Professional Conduct............. Svend H. Hansen
Salvage .... Peter S. Wiswell
Seminar and
Conventions..................... Klaus C.J. Mordhorst
Technology .... Donald J. Szostak
ICMA..................................Manfred W. Arnold
7th Index & Digest
(ad hoc)................................Lucienne C. Bulow
Marketing (ad hoc) ....Gerard T. Desmond
Claims Escrow (ad hoc)............ John F. Ring, Jr.

THE ARBITRATOR

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