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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

INDEX TO THIS ISSUE

PRESIDENT'S CORNER

Dear Readers,

I recently received a copy of an article from an ADR publication posing the question whether indeed the process saves time, money and aggravation. A part of the article dealt with costs, and noted that, under the system reviewed, the parties pay an administrative fee to the governing body for setting up of the arbitration and the selection of the arbitrators. These types of expenses are not incurred when the arbitrations are conducted under the SMA Rules or with SMA arbitrators. The SMA arbitrations proceed on an ad hoc basis without an administrative involvement or costs by the organization or its officers. One of the rare occasions is when the parties request or the Federal Court directs the SMA president to appoint an arbitrator. In my 2½ years of service as president, I have only made three such appointments.

The article also discussed finality of awards by advising readers that this was the most important difference between ADR and litigation. While all are familiar with the appeal process in court proceedings, the finality of arbitrations is an attractive feature for commercial purposes. As described on the SMA's homepage (www.smany.org) in the "Guide to Maritime Arbitration in New York" section dealing with Frequently Asked Questions, there are very few specific and narrowly defined grounds under which a court can vacate an award. They include arbitrator misconduct, corruption, partiality or exceeding their powers. Parties are not always happy with the results, but the system does work well. In fact, of the 4,100 published SMA awards, the few that have been vacated were thereafter either negotiated for a settlement or remanded for re-arbitration.

Speaking of numbers, the SMA's latest Award Service volume ended with award no. 4100, which addressed some interesting issues, such as bankruptcy, a contested contract and the release of cargo without the presentation of bills of lading. The soon-to-be-published third issue for the current volume will include 20 awards. Furthermore, awards in hand and in preparation for the next publication are now closing in on 4150 – four to go to reach that level of service to the international maritime community!

In each issue of the Award Service, you will find a list of "head notes," the major issues addressed in each award. Some of the upcoming topics for the next volume ending with award 4120 are: Port vs. Berth Charter; Vessel Overdraft; Classification Society Rules and Standards; Self-Executing Arbitrator Selection Clause; Interest on Late Payments; Arbitrators' Authority; Failure to Provide Cargo; Restraint of Princes; Lost Profits; Avoidable Consequences, Specialized Stowage and, of course, Attorney Fees and Costs. This last subject is always considered because recovering costs and fees make a win a better win and the SMA Rules encourage this remedy.

Have a great Holiday Season!

Best regards,
Austin L. Dooley, Ph.D.

RIGHTSHIP APPROVAL CLAUSES: ARE THEY THE RIGHT IDEA?

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Arbitrators and maritime counsel usually become involved in a shipping dispute only after one party's expectations are disappointed. Charterers often find out about a vessel's shortcomings when it fails to perform as anticipated, is detained in port due to deficiencies, or is rejected by a shipper. RightShip, the Australia-based ship vetting company, is attempting to bridge the information gap by supplying an ocean of data on commercial vessels and even rating vessels' suitability for a given voyage.

RightShip holds itself out as an independent ship vetting company that provides reliable and transparent ratings for virtually any commercial vessel afloat. Users log into RightShip's Ship Vetting Information System (SVIS) and enter basic information about the proposed voyage. RightShip analyzes the user's request and its own database of information on the vessel. Based on this information, RightShip provides a 1- to 5-star rating, which indicates whether the vessel is acceptable for the voyage or requires further review. Users can also view information about the vessel from RightShip's database. RightShip may even conduct physical inspections of low-scoring vessels to determine whether they can be approved.

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RightShip operates under the premise that most marine incidents are caused by relatively few vessels, and that these vessels can be identified through objective criteria. By focusing resources on questionable vessels and giving the rest a pass, RightShip says it can deliver reliable recommendations efficiently and cost-effectively.

RightShip's users are primarily charterers, but also include shippers, ship owners, insurers, regulators, terminals, and others. RightShip claims that ship owners and managers reap benefits from high ratings in the form of lower insurance costs and higher charter rates. RightShip helps shippers and charterers choose vessels with a lower risk of lost cargo and delays from casualties or detentions. Insurers, port state controls, terminals, and others can use the information to decide whether a vessel is likely to be involved in a claim or cause a delay in port.

RightShip was founded in 2001 as a joint venture between BHP Billiton and Rio Tinto Shipping and, initially, provided its vetting services for the coal and iron ore cargoes of those two companies. However, RightShip quickly saw interest from third parties including Cargill Ocean Transportation, which joined the partnership in 2006. According to RightShip, over 50% of its vetting services are now performed for parties other than the three owner-partners.

RightShip is headquartered in Melbourne, Australia and maintains offices in London and Houston.

How it works

The RightShip system starts with a database of information on virtually all commercial vessels over 500 tons – over 72,000 vessels at present. RightShip collects data from a number of "partners," including the International Association of Classification Societies, Lloyd's Register, IHS Fairplay, Lloyd's MIU, port state controls, terminals, and even ship owners. RightShip also considers other criteria, including whether the vessel has an environmentally-friendly Green Award certificate or if the owner is a member of Intertanko. In the case of older vessels and vessels of special concern, RightShip conducts physical inspections. Finally, users can provide their own criteria for acceptable vessels, such as age restrictions or limitations on past cargoes.

RightShip uses the data to score vessels on over fifty factors, such as yard, owner, operator/manager, age, casualty history, port state control history, flag, conditions of class and class changes, terminal inspections, ISPS certificate data, trading patterns, and cargo history.

To vet a vessel, the user provides the name of the vessel, the intended cargo, and the load and discharge ports. The user's criteria and RightShip's data are then passed through an algorithm to determine a gross score for the vessel. That score may be adjusted if the vessel has an environmentally friendly Green Award certificate or if the owner is a member of Intertanko.

A rating of 1- to 5-stars is assigned based on the final score, and the vessel is either instantly approved or flagged for further review. In any case, the user can review the individual risk factors underlying the rating. According to RightShip, a rating is valid only at the time it is given, and is subject to change as RightShip constantly updates the underlying data in its system.

A vessel that is rated three stars or higher is automatically RightShip "approved". For vessels with one or two stars, RightShip will conduct a more detailed review of the vessel, including a physical inspection if necessary

In addition to vetting, RightShip recently launched Environmental Ratings for vessels. The environmental rating system considers data such as pollution incidents, MARPOL deficiencies, and any environmental certifications held by the vessel. RightShip rates a vessel's environmental friendliness on a 5-star scale similar to the SVIS and also grants letter grades for greenhouse gas emissions on an A-G scale. RightShip claims it can estimate the amount of CO_2 that will be produced, and the fuel that will be consumed, during a particular voyage, and then allows users to compare these values between vessels.

Legal Considerations

Given RightShip's perceived ability to provide an objective rating for virtually any vessel, it may come as no surprise that charterers are demanding "RightShip approval clauses" in their charters. Approval clauses may require a vessel to maintain a certain number of stars or simply remain an "approved" vessel during the charter period. Perhaps equally unsurprisingly, owners are wary of approval clauses that are dependent, in part, on factors entirely outside their control.

So-called RightShip approval clauses may turn out to be as vexing to the dry bulk cargo trade as have the "approval by all majors" clauses common in tanker charters. In fact, the North of England P & I Association warned in 2009 that RightShip approval clauses "are likely to give rise to disputes that may be difficult and expensive to resolve." [North Press Release, 16 Apr. 2009]. The North ultimately warned its members to avoid such clauses entirely.

The North's main concern was the "time limited" nature of RightShip approvals. Because RightShip ratings are based on data available at the time the vet is conducted, they are essentially a "snapshot" of the vessel's suitability for a specific voyage. Ratings can change along with the fifty or so inputs, some of which are entirely outside the ship owner's control. Thus, it may not be possible to "maintain" a RightShip rating throughout a charter period, as some approval clauses require. It may simply be a promise that even the most diligent owner cannot keep.

These concerns may be justified, considering an ordeal faced recently by the owners of the M/V ANARCHOS. As reported in *TradeWinds* (11 Feb. 2011), the owners found their RightShip rating suddenly lowered from 5 stars to 2 stars after a Belfast port state control detention concerning documentation. A 2-star rating would significantly impair the vessel's commercial options and charter rate. Here, RightShip ultimately agreed to reverse the deduction, but only after the owners offered extensive proof that the detention was unwarranted. A happy ending, perhaps; but not one that will prevail in all instances. For ship owners, a 2-star rating translates to a real loss of earnings as demand for their vessels declines.

Less than a year before the North's warning, Mr. Justice David Steel of England's Commercial Court considered whether RightShip approval could be implied in a charter party based on the NYPE form. In *Seagate Shipping Ltd. v. Glencore International AG*, (Commercial Court, 31 July 2008), the charterer argued that a clause requiring the vessel to maintain all certificates necessary to participate in trades permitted by the charter party included RightShip approval. The charterer also sought to have RightShip inspectors board the vessel pursuant to the charter party clause requiring the vessel to follow the charterer's instructions "as regards employment."

In the underlying London arbitration, the panel agreed with the charterer on both issues. The panel found that the "all certificates" clause "would have conveyed to reasonable people with all the background knowledge reasonably available" that a RightShip-approved vessel was required of the owner. The panel also found that the owner was required to permit RightShip inspectors aboard the vessel.

On appeal, Mr. Justice Steel rejected the tribunal's interpretation of the "all certificates" clause. He noted that RightShip approval was not mentioned in the charter party and that the owners had specifically rejected a RightShip approval requirement during pre-fixture negotiations. Moreover, RightShip approval differed from the types of certificates referenced in the charter party (flag, port, etc.) insofar as RightShip approval was not mandated by law.

The *Seagate Shipping* decision was not a total win for the ship owner, however. Mr. Justice Steel sided with the charterer concerning RightShip inspections. The court concluded that, as a matter of commercial reality, RightShip inspections were legitimate charterers' orders "as regards employment".

New York arbitrators or courts have not yet had occasion to rule on RightShip approval clauses, but tanker vetting clauses provide a familiar analogue. As a general rule, New York arbitrators uphold vetting clauses. [*See* David W. Martowski, *Vetting Clauses*, 26 Tul. Mar. L. J. 123 (Winter 2001)]. Tanker vetting awards may guide the resolution of RightShip approval disputes when, inevitably, they are arbitrated in New York.

The panel's award in in *M/T AMERICAN ENERGY*, S.M.A. No. 3141 (Arb. N.Y. 1995), illustrates the difficulties owners face in complying with vetting clauses. Here, the charter party required the owner to keep the vessel "in a standard acceptable to all major chemical producers and all major oil companies (e.g. BP, Shell, Exxon, etc.)" for the duration of the charter. The owner argued that the clause merely required the vessel to be in a condition that *could* pass the majors' vetting requirements, but that actual vetting was unnecessary. The panel disagreed, finding that the clause "required vetting by the majors and not simply an unspecified and unquantified standard of acceptance by those companies." Indeed, the panel dismissed as "pointless" the owner's plaint that "the vetting process is subjective and ever-changing and thus should be viewed with caution."

The panel in *M/T HAROLD K. HUDNER*, S.M.A. No. 3619 (Arb. N.Y. 2000), acknowledged that the many formulations and occasional ambiguity of vetting clauses has led to a variety of remedies for their breach. These include allowing the charterer lump-sum deductions, restitution, and placing the vessel off-hire. Here, the panel concluded that the charterers properly placed the vessel off-hire while the vessel lacked required vetting approvals, as that remedy was clearly prescribed by the charter party. On the other hand, in *M/V OPAL SUN*, S.M.A. No. 3664 (Arb. N.Y. 2001), the panel set a "vetting value" of $2,000 for each day the vessel failed to comply with a clause requiring the vessel "to hold at all times during this time charter the vetting approvals of EXXON, SHELL(PECTEN), MOBIL, TEXACO, CHEVRON, BP, PHILLIPS 66, SUN OIL and DOW Chemical."

In contrast to the holding in *AMERICAN ENERGY*, the panel in *M/V DIAMOND PARK/M/V EMERALD PARK*, S.M.A. No. 3576 (Arb. N.Y. 1999) interpreted a vetting clause to impose a hypothetical obligation only. The vetting clause provided that "the vessel will meet the screening requirements and pass the inspections of all major oil and chemical companies." The panel found that this language imposed "neither a promise nor a guarantee of 100% vetting coverage. What the clause requires is that the vessel, when put to the test, will successfully pass the vetting inspections … . If, when called upon, the vessels fail the inspections and/or vetting applications, Owners become liable for Charterers' damages." Consequently, the panel limited charterer's damages to "vetting losses" solely for the period of time the vessel was in non-compliance.

Perhaps the quantitative nature and immediate availability of RightShip approvals will remove much of the uncertainty seen in the tanker vetting cases. After all, who can argue with an algorithm that considers more than 50 input factors? However, this may be one of RightShip's vulnerabilities. How do these multiple factors reasonably translate into a five-star rating system? Which of these factors, if altered during the course of a charter's performance, may result in a reduction of a star rating and possible breach by the owner? Are the ship owner's undertakings concerning RightShip's approvals sufficiently specified so as to assure that the owner knows what is required?

Whether RightShip ultimately will drive charterers to quality vessels and operators, with the benefit of reducing claims and costs (and putting lawyers and arbitrators out of work), remains to be seen. The scope of the company's vetting activities is certainly growing. However, until a body of case law and S.M.A awards is developed, there are likely to be plenty of disputes making their way to tribunals in New York and London.

(Contributions to this article by Patrick O'Mea, Esq. and Keren Busani-Halevi of Brown Gavalas & Fromm)

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GEOGRAPHIC DEVIATION UNDER CONTRACTS OF CARRIAGE

By Jeffrey A. Weiss

The word "deviation" can have a geographical meaning, for example when the vessel departs from the usual and customary route, or makes unscheduled calls at intermediate ports to load additional cargoes, or for bunkering, etc. The term can also mean that the contract of carriage is performed by the shipowner in a manner that was not originally contemplated, such as owner's deliberate reduction of speed along the route, or when the owner performs the carriage by use of a substitute vessel, or where the cargo is wrongfully transshipped onto another vessel, or where the cargo is stowed on deck when deck stowage was not authorized nor acceptable.

Naturally, cargo interests are interested in having the cargo transported from the port of loading to the port of discharge without unreasonable delay and without being exposed to risks not otherwise expected. However, the shipowner wants the liberty to trade its vessel or vessels freely.

A deviation may be considered a fundamental breach of a contract of carriage. Not all deviations are breaches of contract. However, an "unreasonable" deviation is a fundamental breach of contract. Thus, consequences of an unreasonable deviation may be severe. Owners may lose its protections against responsibility for cargo loss or damage that it otherwise enjoys under the contract of carriage or the maritime law. Owners may also lose the right to seek general average contributions from the charterer or cargo interests. The owners may also become responsible to the cargo interests for damages not otherwise ordinarily recoverable, such as consequential damage for loss of production or markets. Owners may even have to refund freight that would ordinarily be guaranteed and non-refundable, despite nondelivery of the cargo.

Geographic Deviation

In the absence of a specific provision in the contract of carriage, the maritime law implies a duty on the owner of a vessel to proceed without unnecessary deviation in the usual and customary course of the voyage. The ship must follow the usual or agreed route. It is not permitted to leave this route without justification. A geographic deviation is an intentional departure by the vessel from the agreed or usual route. If the deviation is unreasonable, it is a breach of contract by the shipowner for which, as described above, the consequences may be harsh.

Only unreasonable deviations are wrongful. Thus, the vessel may always deviate for the purpose of saving life at sea. However, the maritime law treats a departure from the usual and customary route to load or discharge cargo as being strong evidence of an unreasonable deviation. This was codified in the Carriage of Goods By Sea Act 1936, which states:

> *"Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach… or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable".*

Deviating to load or discharge cargo for someone else's account is *prima facie* unreasonable. Therefore, the law places a heavy burden on the shipowner to demonstrate the reasonableness of its conduct (thereby rebutting the presumption of unreasonableness).

Let's look at an old case involving the MV TAI SHAN, 1953 A.M.C.887, in which the owners were able to meet its burden and rebutted the presumption of unreasonableness. The TAI SHAN loaded cargo bound for the United States at Taku Bat off the North China Coast. After loading, and over cargo interest's objections, the owners directed the vessel to Cebu in the Philippines to load additional cargo for another account. This added an additional 4,858 miles and 46 days to the expected voyage.

The claimant's cargo was damaged by fire in the Philippines and the owners sought exoneration under the Fire Statute, which read:

> *46 U.S. Sect. 182 - Loss by Fire. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.*

The plaintiffs alleged that the owners had committed an unreasonable deviation and that they should be denied the protection of the Fire Statute.

The Court ruled that it was not an unreasonable deviation and that owners had met its heavy burden for numerous reasons including 1) the amount of cargo loaded at Taku Bat was a small percentage of the vessel's overall cargo capacity; 2) about one quarter of all vessels serving Taku Bat make additional calls in South Asia before making the Pacific crossing.

The Court explained:

> *Under all of the circumstances of this case, I find that the deviation of the TAI SHAN in proceeding to the Philippines and loading cargo there was reasonable. A substantial proportion of ships carrying cargo from Taku Bat to the United States…proceeded via the Philippines without any evidence of complaints by any interested persons. Another (shipping) line found it necessary to follow such a routing.*

Thus, all of the facts and circumstances will help determine whether a deviation occurred and whether or not that deviation was unreasonable. A tribunal may review many factors including the vessel's or company's trading patterns, past dealings between the parties, the economies of the trade, customary practices of other vessels in the trade, whether any language in the charter party expressly addresses the issue (such as a broad Liberty Clause or a permissible Port Rotation Clause) as well as any pre fixture discussions held concerning the contemplated voyage.

Deviation For Bunkers

Ships laden with cargo routinely call at intermediate ports for the purpose of loading bunkers. If it is typical for a vessel in a particular trade, or of a particular class, to call at a port for bunkering during the course of a voyage, than that port may very well be within the "usual and customary route".

For example, shipowners met their burden in the English law case involving the INDIAN CITY (Reardon Smith Line v. Black Sea and Baltic Insurance 1939 A.C. 562).

In that case the vessel loaded a cargo in Poti in the Black Sea for discharge in Baltimore. The vessel departed from the direct route and called at Constanza for bunkers, which added an additional 193 miles more than a direct route to the port of discharge. The vessel grounded at Constanza and the owners incurred general average sacrifices. The charterers refused to contribute into the general average and contended that the call at Constanza was an unreasonable deviation (thereby defeating owner's right to seek general average contributions).

The evidence revealed that this particular owner had made several previous voyages for the charterer and, on all but one, the vessel bunkered at Constanza. It was also understood that since bunkers were somewhat cheaper at Constanza (as opposed to ports more directly enroute), the owner of the vessel, as well as many other shipowners, followed the same practice. The Court held that the owners had sustained the burden of demonstrating the reasonableness of their actions.

Let's look at a case involving a deviation for bunkers by the tanker Cepheus (M.V. Cepheus Arbitration, Jack Berg, Nicholas Healy and Alan S. Loesberg, 1990 AMC 1058).

The Cepheus was a tank vessel that loaded some 210,000 barrels of gasoline at Freeport, Bahamas for discharge at Anchorage, Alaska. The vessel sailed from Freeport with 860 tons of fuel oil onboard. This was acknowledged as a sufficient quantity for the vessel to make the voyage to Anchorage with a 15 – 20% safety margin.

While proceeding to the discharge port, the Master of the vessel was advised of the vessel's next employment, which was to be the carriage of rapeseed oil from Vancouver, British Columbia to India. Owners ordered the vessel to deviate to Los Angeles for bunkers. Put simply, owners deviated the vessel to Los Angeles to take on inexpensive bunkers for the vessel's next voyage (bunkers were cheaper in Los Angeles as opposed to ports in the Northwest United States).

The vessel lost only around twelve hours while bunkering in Los Angeles. The additional bunkers increased the vessel's draft by about five inches and altered her trim from a four-foot drag to almost an even trim. Unfortunately, when the vessel subsequently arrived at Homer Pilot Station (Anchorage, Alaska) the weather had deteriorated significantly and ice conditions were encountered. While attempting a 180-degree turn towards her berth, the vessel veered off to port and ran aground on the southern edge of "No Name Point". There was significant hull damage and loss of cargo. Owner declared general average.

Many claims arose out of the grounding. Owners sought general average contributions from the charterer and cargo interests in the amount $279,000 (for expenses incurred in removing the stranded tanker from the beach, shifting her to the nearby berth, and related expenditures). The vessel suffered over $3,000,000 in hull damage and related losses which owners sought to recover from the charterers. Owners argued that the charterers had breached the charter party's safe port / safe berth warranty.

The third party cargo interests also brought a claim against the owners for a cargo loss in excess of $4,000,000.

The Arbitration Panel ruled that the vessel had committed an unreasonable deviation when she called upon Los Angeles for bunkers. The vessel had sufficient bunkers onboard to accomplish the Freeport / Anchorage voyage. The majority of the Panel stated that:

> *"…If the test of a deviation's reasonableness is to be measured by the pre-deviation circumstances, then the Cepheus's deviation into Los Angeles for non-voyage related bunkers increased the vessel's draft and modified her trim, both of which could have affected the Cepheus' maneuverability at the critical turning point. There was an enhancement of cargo exposure to loss.*
>
>> *Also the delayed arrival at Homer and later transit to the critical approach point in Anchorage Harbor exposed the vessel to fog and harbor ice which it would not have otherwise have had to contend with. The "error in navigation" which we believe caused the stranding is simply not available (to owners) to support its claim for general average or as a defense to… the cargo claim".*

Thus, Owners were deprived of Cogsa's protection under the error in navigation defense, as their right to seek general average contributions. The safe port / safe berth claim for hull damage was also denied.

Deviation or Liberty Clauses

The standard GENCON 94 form of voyage charter contains the following clause:

> *Deviation Clause*
>
>> *The vessel has liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and /or assist vessels in all situations, and also to deviate for the purpose of saving life and/or property…*

Similar clauses are found in virtually all bills of lading and charter parties.

A charter party may also contain language covering deviations to take on bunkers, such as:

> *… the vessel may call for fuel at any port or ports in or out of the regular course of the voyage…*

Language like this appears to give owners very broad discretion. However, these clauses have been interpreted to give the carrier a limited right to deviate. Courts and arbitration panels will still generally look at all of the facts and circumstances when assessing the reasonableness of the shipowners actions.

As the Panel explained in the Cepheus case:

> *…Liberty Clauses do not permit an unnecessary deviation to load bunkers for an unrelated voyage and such deviations have been viewed as classic examples of unreasonable deviations... Indeed a departure for fuel for another voyage is, at least, analogous to the taking on or discharge of cargoes or passengers under COGSA and therefore, may be considered prima facie unreasonable.*

Charter party clauses that expressly cover specific events that owners may seek to undertake (such as language specifically authorizing the bunkering of non-voyage related bunkers) are recommended by P and I Clubs.

Effect on P and I Club Cover

An unreasonable deviation may very well strip the carrier of its immunities and limitations normally provided by law. The carrier may not be able to invoke the package limitation under U.S. COGSA (or similar statutory laws), may not rely upon U.S. COGSA excepted perils (error in navigation, among others) and will generally be exposed to greater risk of liability. As such, P and I Clubs advise that there is no cover for liabilities, costs, or expenses arising out of a deviation whether geographical or otherwise.

For example, a P and I Club Rule Book may state:

> *Unless and to the extent that the Directors in their discretion otherwise decide, or cover has been confirmed in writing by the managers prior to the deviation, there shall be no recovery from the Association in respect of liabilities, costs or expenses which arise out of or which are incurred as a consequence of a deviation, in the sense of a departure from the contractually agreed voyage or adventure which deprives the member of the right to rely on defenses or rights of limitation of liability which would otherwise have been available to him on the basis of the standard terms of carriage…*

P and I Clubs may provide special cover for anticipated deviations on amended terms, depending upon the information provided by the member, the flagrancy of the proposed deviation under the applicable law, and whether the risk would violate fair concepts of mutuality.

Conclusion

Deviations are the result of operational decisions. Masters, officers, and personnel in both shipowner's and charterer's offices, are reminded of the significant legal consequences that may arise.

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THINK DIFFERENT: IF A CONTAINER COULD BE THE "21ST-CENTURY TROJAN HORSE", MUST THE U.S. MANDATE 100% SCANNING OF ALL U.S. BOUND CARGO CONTAINERS?

By Christopher R. Nolan,
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Presently, the U.S. scans 100% of cargo containers bound for the U.S. that are deemed *high risk*. This is scheduled to change in July, 2012, when all U.S.-bound containers are to be scanned pursuant to a 2007 law regardless of perceived risk. Will this occur? Is it possible given today's technology and other logistical challenges? Most maritime industry insiders have long said the deadline is impossible to meet and Department of Homeland Security officials recently acknowledged as much. It now appears the U.S. Congress agrees. Notwithstanding the fact Senator Susan Collins of Maine is concerned a container may be the "21st Century Trojan Horse", her co-sponsored bill, the SAFE Port Reauthorization Act of 2011, will eliminate the mandate to screen 100% screening of all U.S. bound containers.

When reviewing the SAFE Port Reauthorization Act of 2011 bill, S. 832, it is unlikely anyone would think of Apple Computer's iconic ad campaign from the 1990's, Think Different. But with the untimely passing of visionary Steve Jobs on October 5, 2011, all things Apple are rerun by the media. And it happens to be that the Think Different campaign can be tied to today's port security debate.

The Apple ad campaign begins by stating, "[h]ere's to the crazy ones. The rebels. The troublemakers. The ones who see things differently…." In the United States in particular, September 11, 2001, forced us to "see things differently" concerning security issues. On that day, airports were the gateway regions used by terrorist to attack the United States. Seven years later, terrorists used the Port of Mumbai as a gateway region to carry out attacks in India. Fortunately, the U.S. government did not need events in Mumbai to focus its attention on increased security measures in the nation's ports.

Before September 11, the concept of a U.S. port being used as a gateway for a terror attack was mostly limited to discussions by a handful of maritime security specialist and Tom Clancy's novel and later movie, *The Sum of All Fears*. In Tom Clancy's world, you may recall a bomb was hidden within what appeared to be a cigarette vending machine which entered the U.S. by vessel in the port of Baltimore. After September 11, the U.S. began to reevaluate all potential targets within its boundaries and in particular, U.S. ports which are overflowing with foreign vessels on a daily basis. This reevaluation resulted in the U.S. Congress passing critical port security laws.

Of the laws passed, maritime attorneys are likely most familiar with the Maritime Transportation Security Act of 2002 which, among many other things, required people in and around a port, including attorneys, to obtain a Transportation Worker Identification Credential ("TWIC"). TWIC cards allow certain access to restricted areas in ports. On a larger scale, U.S. Customs also implemented two critical initiatives; the Container Security Initiative ("CSI"), and the Customs-Trade Partnership Against Terrorism ("C-TPAT").

CSI is not only a popular television program. The maritime-related CSI focused on tackling security issue overseas by identifying high risk containers both technologically with x-ray machines and with more careful human inspection by looking for signs of container seal tampering. C-TPAT put the onus on private companies in the supply chain. If companies wanted containers to move as swiftly as possible, they could enter the C-TPAT program and agree to follow certain guidelines and accept increased security measures. By submitting an application to U.S. Customs to join the program, the company subjected itself to careful scrutiny of all aspects of its supply chain. It was no longer too invasive to inquire about certain practices of business partners; companies were now required to ask delicate questions and provide the information to the federal government.

SAFE Port Act of 2006

When Congress passed the Security and Accountability for Every Port Act of 2006 (known as the SAFE Port Act), it codified the CSI and C-TPAT initiatives and added new security measures. Pub. L. No. 109-347 (2006); codified at 6 U.S.C. § 901 *et seq*. Among the SAFE PORT Act initiatives are:

- Unannounced inspections of maritime facilities (Section 103);
- Port security grants to allocate funds for port infrastructure (Section 112);
- Random Searches of Containers (Section 123); and
- Establishment of a Domestic Nuclear Detention Office (Section 501)

The Act also has other curious provisions tacked on at the end, such as requiring a study of the movement of methamphetamine chemicals in and around the U.S. (Section 707), and a controversial Internet gambling enforcement prohibition (Section 802). Ironically, these two tack-on provisions have resulted in almost as much legal analysis as the port security measures.

The most notable provisions, however, concern the domestic radiation detection (Section 121) and imaging and screening and scanning of cargo containers (Section 232). The latter provisions ensured that 100% of "high risk" containers are scanned by "nonintrusive imaging equipment and radiation detection equipment." (Section 232(a)-(b)). The Secretary of Homeland Security is required to submit a report to congressional committees every six months concerning the effectiveness of the screening equipment based on six enumerated criteria. Of course, one would expect that all containers deemed "high risk" would be screened in some fashion (and they already were thanks to the CSI initiative). The real difficulty for the maritime industry was contained in the former provision; the goal of 100% screening of U.S. bound containers by the end of 2007. Section 121(a) provides:

> *Subject to section 1318 of title 19, United States Code, not later than December 31, 2007, all containers entering the United States through the 22 ports through which the greatest volume of containers enter the United States by vessel shall be scanned for radiation. To the extent practicable, the Secretary shall deploy next generation radiation detection technology.*

Almost immediately, the 100% screening expectation was loathed by the maritime industry as impossible to implement with the current technology, too expensive, and would cause inordinate delays up and down the security chain. A year later, Congress implicitly agreed that December, 2007 was too ambitious and the Section was amended. The Implementing Recommendations of the 9/11 Commission Act of 2007, amended the SAFE Port Act by extending the 100% screening deadline from December 31, 2007 to July 1, 2012. Pub. L. No. 110-53, Section 1701, codified at 6 U.S.C. § 101 *et seq*. Moreover, if the Secretary of Homeland Security stated to Congress an earlier deadline could reasonably be set, it would be. Or the Secretary may request extensions in two-year increments. Suffice to say, an earlier deadline was never set.

The balance between increased security and commercial practicalities has been difficult to achieve since the passing of the SAFE Port Act. For example, on December 14, 2007, U.S. Customs published a Notice of Proposed Rulemaking which would "require both importers and carriers to submit additional information pertaining to cargo before the cargo is brought into the United States by vessel." 42 Cust. B. & Dec. 4 (Customs), 2007 WL 4754810. The Notice contains many comments by commercial interests over specific requirements, especially with respect to the costs expected to be incurred in procuring and submitting the additional information for vetting. In almost all cases, U.S. Customs disagreed with the comments proffered and ensured the industry that it has consulted with the maritime community and organizations (as required under the SAFE Port Act), when developing its proposal and made the proposals as cost efficient as possible. *Id*.

At bottom, there are some security measures which are vital enough that the U.S. will push for the requirements and offer incentives to offset the administrative infrastructure necessary for maritime companies to comply with the law. However, there are other instances where cost is not necessarily the issue – 100% screening of containers may be one of them. U.S. officials recognize during the last few years that the technology is simply not in place to complete the screening of all U.S.-bound containers overseas no matter how much money is spent. Incidentally, the European Commission is only now assessing a 100% screening target and is not expected to call for such an implementation anytime soon. With the to July 1, 2012 deadline in the 9/11 Act, now in place, members of Congress are presently seeking to eliminate the 100% screening provision altogether.

SAFE Port Reauthorization Act of 2011

Last year, U.S. Senators Patty Murray (Washington), and Susan Collins (Maine), both representing important gateway port regions on the West and East Coast, respectively, introduced a bill which among other things revised the 100 % screening date. Though that bill died in committee, on April 14, 2011, the Senators introduced a new bill, S. 832, entitled the SAFE Port Reauthorization Act of 2011. It is expected the new bill has a better chance at passing because the July 1, 2012, deadline is inching closer. The bill was referred to the Committee on Homeland Security and Governmental Affairs and remains in committee.

Leaving nothing to chance, Senator Collins delivered an impassioned speech from the Senate floor on April 14 which put in stark terms the importance of the port security measures. She reminded her colleagues they need to, to borrow Apple's phraseology, "think different" when it comes to container security at ports. Containers do not merely deliver U.S. consumers' precious TVs and iPods — they could be rigged to carry hidden weapons of mass destruction:

> *The scope of what we need to protect is broad. America has 361 seaports – each vital links in our nation's transportation network. Our seaports move more than 95 percent of overseas trade. In 2010, United States ports logged 57,600 ports-of-call by foreign-flagged cargo vessels, bringing 11 million shipping containers to our shores.*
>
> • • • • •
>
> *Maritime shipping containers are a special source of concern. A single obscure container, hidden among a ship's cargo of several hundred containers, could be used to conceal a dirty bomb. In other words, a container could be turned into a 21st-Century Trojan horse. The shipping container's security vulnerabilities are so well known that it has also been called "the poor man's missile," because for only a few thousand dollars, a terrorist could ship a weapon or explosive across the Atlantic or the Pacific to a U.S. port.*

Senator Collins notes the proposed bill will reauthorize CSI and C-TPAT, bolster other aspects of the original Act, and most notably, completely "eliminate" the 100% screening deadline. She argues that with the current technology, the requirement is "misguided and provides a false sense of security." Senator Collins explained:

> *This legislation also addresses the difficulties in administering the mandate of x-raying and scanning for radiation all cargo containers overseas that are destined for the United States by July 2012. Until x-ray scanning technology is proven effective at detecting radiological material and not disruptive of trade, requiring the x-raying of all U.S. bound cargo, regardless of its risk, at every foreign port, is misguided and provides a false sense of security. It would also impose onerous restrictions on the flow of commerce, costing billions with little additional security benefit.*
>
> *Under the original provisions of the SAFE Port Act, all cargo designated as high-risk at foreign ports is already scanned for radiation and x-rayed. In addition, cargo entering the U.S. at all major seaports is scanned for radiation. These security measures currently in place are part of a layered, risk-based method to ensure cargo entering the U.S. is safe.*
>
> *This legislation would eliminate the deadline for 100% x-raying of containers if the Secretary of Homeland Security certifies the effectiveness of individual security measures of that layered security approach. This is a more reasonable method to secure our cargo until a new method of x-raying containers is proven effective and feasible.*

Though most of the attention surrounding the bill has focused on the elimination of the 100% screening of U.S.-bound containers, there are other key proposals which the maritime industry had sought or which were expected to be included based on experiences with the 2006 Act:

- Unannounced inspections of a C-TPAT partner's security measures based on previously identified deficiencies (Section 3);
- Congressional oversight of arrangements between the U.S. and foreign governments for increased security measures in exchange for certain benefits (Section 4);
- Individuals and authorized officials who in good faith report suspicious activity in and around a port may be immune from civil liability (Section 6); and
- Requiring quicker determinations of port security grant application extensions (Section 7)

The elimination of the 100% screening requirement is addressed in the bill as permissive so long as the 100% screening of high risk cargo containers inbound to the U.S. is proceeding properly. (Section 5).

Conclusion

Most of the SAFE Port Reauthorization Act of 2011 provisions are not controversial. Having found the original Act to be most effective, it is a simple reauthorization of proven security measures and appropriation of suitable funding for the measures. The interesting choice the Senators have made is to reject fully the concept of setting a goal for 100% screening of all containers. Though proven to be unrealistic, the target dates set by the 2006 Act and the 9/11 Act spurred technology companies and start-up initiatives using venture capital money to invest in screening technology that could meet the mandated demand. By removing a target date altogether, it eases pressures and raises the concern of negatively impacting the security technology race for developing what Senator Collins has called, “new method of x-raying containers [that] is proven effective and feasible.”

Without the U.S. government stick of mandated screening by a date certain with the concomitant carrot of government monies to purchase the technology, will someone in the maritime technology industry be motivated to “see things differently” and continue the massive time and fiscal expenditures associated with technology needed to achieve 100% screening? The answer is likely yes because of the growing need for heightened port security measures in all regions of the world. PwC recently published a white paper entitled *Transportation & Logistics 2030, volume 4: Securing the Supply Chain*. It provides a comprehensive review of current security measures and risk assessments in the decades to come which can impact the cargo chain. In particular, it highlights the importance of 39 “major gateway regions which account for 90 percent of world trade” with the most important gateway system in North America being the Los Angeles/Long Beach port system.[2]

Citing a Congressional Research Service report, PwC notes that a nuclear bomb being set off in a gateway region or harbor could result in “$50 to 500 billion in direct property damage, $100 to 200 billion losses due to trade disruptions and additional $300 billion to $1.2 trillion in indirect costs.” With the amount of money at stake, let alone the potential loss of life, risks such as this should provide enough internal motivation to spur x-ray technologies. However, it would not be surprising if a new target date for 100% screening of all U.S. bound containers finds its way into the final version of the SAFE Port Reauthorization Act voted on by Congress.

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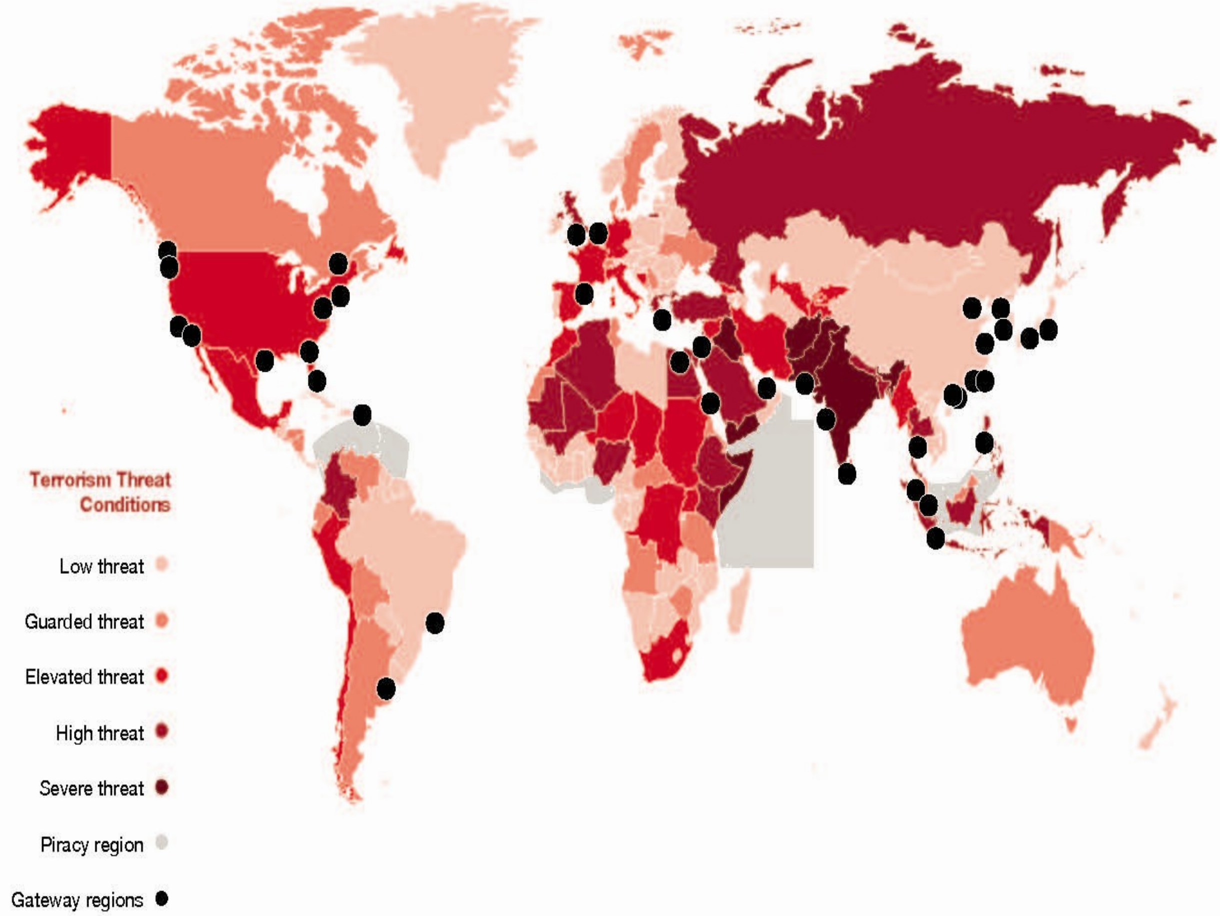
2. The PwC/AON figure annexed herein highlights the “Supply Chain Security Map – Global Gateway Regions.” *(see graphic on the top of page 12)*

Figure 3: Supply chain security map – Global gateway regions



Source: Aon's 2010 Terrorism Threat Map, The Geography of transport systems[15,33]

RECENT CIRCUIT COURT DECISIONS HIGHLIGHT IMPORTANCE OF SCOPE OF ARBITRATION CLAUSES

By Gregori D. Mavronicolas and Peter C. Dee of Mavronicolas Mueller & Dee LLP

The U.S. Court of Appeals for the Ninth Circuit recently issued a decision narrowly interpreting an arbitration clause contained in a salvage contract in *Cape Flattery Ltd v. Titan Maritime, LLC,* No. 09-15682*, 2011* U.S. App. LEXIS 15360 (9th Cir. July 26, 2011). In *Cape Flattery*, a shipowner contracted with a salvage company to remove a stranded vessel from a reef. When removing the vessel the salvor allegedly damaged the reef. The U.S. government sought damages under federal law from the shipowner, who then filed suit in federal court in Hawaii seeking indemnity from the salvor for the damages sought by the government.

The salvor filed a motion to compel arbitration based on the following clause in the salvage contract:

> *Any dispute arising under this Agreement shall be settled by arbitration in London, England, in accordance with the English Arbitration Act 1996 and any amendments thereto, English law and practice to apply.*

The District Court denied the motion, holding that, under federal arbitrability law, the scope of the arbitration clause did not cover the shipowner's claim for indemnity. The salvor appealed to the Ninth Circuit on two grounds: (1) that the District Court erred in deciding that federal law, instead of English law, applies to the issue arbitrability, and (2) in the District Court's application of federal arbitrability law.

The Ninth Circuit affirmed, finding that the agreement was ambiguous as to whether English law applies to determine whether a given dispute is arbitrable in the first place. Faced with such ambiguity, it concluded that federal law applies to determine arbitrability. Applying federal arbitrability law, it then concluded that the shipowner's indemnity claim was not arbitrable. The Court noted that since the agreement provided for arbitration of "[a]ny dispute arising under this Agreement," its interpretation of the phrase "arising under" was controlled by its prior decisions in *Mediterranean Enterprises, Inc. v. Ssangyong Construction Co.*, 708 F.2d 1458 (9th Cir. 1983) (arbitration provision covering disputes "arising under" the subject agreement covers only those disputes "relating to the interpretation and performance of the contract itself") and *Tracer Research Corp. v. National Environmental Services Co*., 42 F.3d 1292 (9th Cir. 1994) (holding that when a tort claim constitutes an "independent wrong from any breach" of the contract, such claim "does not require interpretation of the contract and is not arbitrable" under arbitration provision limited to claims "arising under" the contract). Based on this precedent, the Ninth Circuit held that the phrase "arising under" in the arbitration agreement should be interpreted narrowly. As such, and because the indemnification dispute did not turn on an interpretation of any clause in the salvage contract nor on the salvor's performance under the contract, the Court held that the dispute was not arbitrable.

The scope of an arbitration clause may also be a factor where multiple agreements potentially cover the same claim, each with their own forum/arbitration provision. In *Kelso Enterprises Ltd. v. A.P. Moller-Maersk A/S, et al.*, 375 Fed. Appx. 48, 2010 WL 1660040, 2010 A.M.C. 1506 (2d. Cir., 2010), the Second Circuit examined the scope of an arbitration provision contained in a service contract between a shipper and carrier.* The parties' underlying cargo dispute was also governed by the carrier's standard form bill of lading, which contained a forum clause different from the arbitration clause in the service contract. The Second Circuit affirmed in a summary order, holding that the service contract contained a broad arbitration clause in that it covered all disputes "arising under or related to" the service contract. The Second Circuit also affirmed that language in the service contract attempting to resolve conflicts between it and the bill of lading was ambiguous, and therefore the claim was arbitrable:

> *We agree with the district court that Clause 7 of the service contract, which governs conflicts between the service contract and the bill of lading, is ambiguous on its face. The second sentence of the clause states that the arbitration provision, found in the service contract, cannot be overridden by the bill of lading, while the third sentence of the clause requires that "in the event any provision in [Maersk's] bill of lading which limits or governs its liability for damages to persons or property (including cargo) ... is ... in conflict with the Contract, the bill of lading shall prevail."*
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> *Given the ambiguity in Clause 7, we rely, as the district court did, on the presumption of arbitrability. "[T]he existence of a broad agreement to arbitrate creates a presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute." Bank Julius Baer & Co. v. Waxfield Ltd., 424 F.3d 278, 284 (2d Cir.2005) (quoting WorldCrisa Corp. v. Armstrong, 129 F.3d 71, 72 (2d Cir.1997) (internal quotation marks omitted)) (alteration in original).*

Thus, although the parties attempted to specify how a conflict between the governing documents would be resolved, that very language resulted in time-consuming litigation prior to any consideration of the merits of the dispute.

In another recent summary order, the Second Circuit in *Tradecomet.com LLC v. Google, Inc.*, 2011 WL 3100388, provided elucidation for when an arbitration provision might apply retroactively to claims or conduct arising prior the effective date of the agreement containing the arbitration provision. The Court noted that even a broad arbitration clause, such as one covering claims "arising out of or relating to" the subject agreement, does not necessarily apply retroactively: "Courts construing arbitration clauses have refused to subject claims to arbitration where the claims arise from or relate to conduct occurring prior to the effective date of the agreement, *and* where the clause is limited to claims under '*this* Agreement.'" However, where an arbitration clause goes further, for example, by also covering "other services provided by" a party, the arbitration clause might apply retroactively. In the case at hand, "the plain language" of the arbitration agreement applied to claims "arising out of or relating to this agreement *or the Google Program(s)*." The term "Google Programs" was defined by the parties to include the claims at issue in the case, and thus the Second Circuit affirmed the district court's finding that the arbitration clause applied retroactively to cover those issues.

Cape Flattery and the other noted cases underscore that a prudent attorney should closely review the language of arbitration clauses in contracts, particularly as to scope. This is even more important when dealing with contracts pertaining to work or services, or where the parties have a pre-existing or dynamic relationship. Drafting attorneys should also have a clear understanding of the law that will be applied in determining the arbitrability of disputes, as circuit courts may differ in their particular interpretation of commonly used language.

*In full disclosure, one of the authors was a counsel to Kelso Enterprises Ltd. in that case.

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FAILURE TO DISCLOSE…WHAT?

By Mike Ryan, Esq., Of Counsel Hill Betts & Nash LLP

It can be taken as common ground that the bases for vacating an arbitration award under the Federal Arbitration Act (FAA) are limited and a party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high.

Section 10 of the FAA lists grounds for vacating an award, including "evident partiality or corruption in the arbitrators" and "other misbehavior by which the rights of any party have been prejudiced". (9 US C. Section 10(a)(2)(3)).

In the recent case of *STMicroelectronics v. Credit Suisse Securities (USA) LLC*, 648 F. 3d 68, the Second Circuit had the opportunity to consider a motion to vacate an award based upon the alleged failure of the arbitrator to fully disclose his serving as a "claimant-side expert witness"

ST, a manufacture of semi-conductors, was required by its business to have a large amount of cash or cash equivalents on hand to meets its needs. Until early 2006, ST invested this cash only in money market deposits and floating rate notes, investments chosen for their safety and liquidity. In April 2006, CS approached ST offering another type of investment called "auction rate securities" which it promised would meet the specifications of ST while maintaining an attractive yield advantage over other short-term vehicles. The auction rates securities are debts instruments whose interest rates are reset by auctions at periodic intervals. CS explicitly proposed, and ST explicitly accepted, investing only in ARS that were backed by Federally guaranteed student loans.

In spite of this, almost immediately CS began buying other types of ARS for the account. While these securities carried a higher yield, they had no government backing. By the end of that year, the account contained no government-backed ARS and after January of 2007, none of CS's purchases for the account involved student loans at all, guaranteed or not. To cover their tracks, the CS brokers responsible for the account sent deliberately false e-mail confirmations to ST in which they replaced words in the names of securities that identified them with more neutral terms like "funding" and often flatly inaccurate terms like "Student Loan".

In July of 2007, an ST employee noticed that CS had purchased securities that deviated from instructions given by ST. CS was asked to "stick to the mandate to buy only Student Loan [ARS]." CS continued to buy ARS based on un guaranteed obligations. They continued to send e-mail confirmations hiding the true nature of those investments. This was done in the face of ST's increasingly vehement instructions not to buy non-government-backed ARS and to sell the ARS it already owned. [For these actions and others, the two CS brokers responsible for ST's account were later convicted, one by plea and one by jury verdict, of securities fraud and related conspiracy charges.]

In August of 2007, the ARS market began to fall apart. By September of 2007, all of ST's ARS (worth over $400 million) had failed at auction.

In February of 2008, ST filed an arbitration claim against CS with the Financial Industry Regulatory Authority (FINRA), which operates "the largest securities dispute resolution form in the world" and which counted CS among its member institutions. CS raised claims of securities fraud, intentional misrepresentation, fraudulent concealment, breach of contract, etc.

Rules of FINRA provided that the parties would have three arbitrators, two "public arbitrators" who must be unattached to the securities industry and one "non-public arbitrator" chosen for industry experience and knowledge. FINRA provided the parties with lists of possible arbitrators along with standard disclosure reports for each. The parties were unable to select a full panel on the first try and requested another slate of candidates who possessed more experience dealing with the types of claims involved. On the second try, the parties successfully selected a panel and proceeded to arbitration.

Midway through the hearings, CS sought to remove the "non-public arbitrator", alleging that he had served as an expert witness primarily for customers arbitrating against financial firms, but that he had painted a more balanced picture of his experience on his disclosure report and that he had failed to disclosure prior expert testimony on certain issues relevant to ST's case. The arbitrator, with support from the chair of the panel, refused to step down, noting that he had worked more often on the side of the financial industry than CS had suggested and declared that there was no doubt in his mind that he could render a fair and unbiased opinion. CS next petitioned FINRA to remove him, but FINRA's Director of Arbitration denied this request.

The arbitration panel ultimately ruled unanimously in favor of ST. ST petitioned to confirm the award and CS opposed the petition to sought to vacate the award on the basis of the arbitrator's purportedly misleading or insufficient disclosure and also because of the arbitrators' alleged "manifest disregard of the law." The District Court rejected CS's arguments and confirmed the award. CS appealed.

As to the "disclosure" aspect, the Circuit Court of Appeals noted that CS shifted from its "evident partially" argument and instead relied on the catch-all for "other misbehavior by which the rights of any party have been prejudiced." CS did not cite any cases, nor was the Circuit Court aware of any that have addressed claims of insufficient disclosure under the "other misbehavior" prong.

The Court noted that the decisions with respect to "evident partially" addressed "non-disclosure only of facts bearing on partiality - namely, a relationship with a party, a lawyer, or other arbitrator." The contention of CS was that the arbitrator failed to disclose (and, in fact, affirmatively misrepresented) facts bearing not on partially but on an alleged <u>predisposition.</u> No one alleged that the arbitrator concealed any relationship with one of the parties, whether finically, familial, or otherwise.

The argument was that his experience as an expert for claimants either colored his outlook in their favor or demonstrated that his outlook was already so colored and that, either way, CS was entitled to know about that experience before selecting him as an arbitrator. The Court rejected this claim saying that there was little factual support for it. The Court commented that the "Arbitrator Disclosure Report" described a twenty-two year career in finance and stated that he worked as an expert in consultant for "both sides" and provided two specific examples of such work.

CS argued that its investigation showed that the arbitrator had testified only once or twice for financial institutions, but mostly for claimants, categorizing his experience "one-sided". The Court noted that CS largely ignored the explanation given by the arbitrator. Given the "very high" showing necessary to vacate an award, the Court expected CS to present more evidence and noted that CS never asked the arbitrator for an accounting of his experience, either before or during the arbitration or during the District Court's proceedings. It stated that the arbitrator included exactly the sort of statement provided for FINRA's own explication of its rule and noted that FINRA's Director of Arbitration found no reasons to remove the arbitrator from the panel after reviewing the allegations of CS.

The Court considered CS's arguments suffered from evidentiary deficiencies and went on to note "more fundamentally, the major premise of Credit Suisse's attack on Duval's non disclosure of his prior testimony fails. There is no contention here that Duval had any prior knowledge of, or misconception about, the facts of this case. Credit Suisse's argument, rather, is that his testimony suggests he had pre-existing views about potentially relevant propositions of *law*. However, "[a] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law." *Repub. Party of Minn. v. White*, 536 U.S. 765, 777, 122 (2002). This is all the more true for arbitrators, "[t]he most sought-after" of whom "are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose." (Cited omitted). Arbitrator Duval played that very role on this panel, as the "non-public arbitrator" specifically chosen for his industry connection."

The Court went on to note it would be strange if such an arbitrator were forced to search the record of all prior testimony for any statement, however tangential, that might relate to any of the many legal issues that could arise in any case. "A party might like to know that information when shopping for arbitrators, but its absence cannot form a ground for vacating an arbitral award. The rule for which Credit Suisse contends finds no support in the text of the FAA or the case law, and we reject it."

The Court then went on to consider the claim of manifest disregard. Noting that any review is "highly deferential" to the arbitrators on this ground and relief on this claim is "rare". It went on to state that it did not need to decide whether manifest disregard survives either as an independent ground for review or as a judicial gloss on the enumerated grounds for vacature, (referring to *Stolt-Nielson*, 130 S.Ct. at 17668 n.3). Even assuming the survival of the standard, CS failed to meet it by a "long shot".

[For a good example of a successful failure to disclosure claim, see Karlseng v. Cooke 2011 WL 2536504, where the Texas Fifth Court of Appeals vacated a $22 million arbitration award for the sole arbitrator's failure to disclose personal contacts with the lawyer of a party in the case. The Court noted periodic socializing between the attorney and the sole arbitrator (a former Federal Magistrate) and "substantial evidence of personal, social, and professional relationship" that had existed for years between the two before the arbitration began.]

As stated by the Court in *STMicroelectronic*, CS's contention was not based upon any relationship with the party, lawyer or arbitrator, but rather an alleged "predisposition" generated from the arbitrator's past experience. It found insufficient evidence to support that claim.

Given the basic facts of the underlying dispute (as well as a unanimous decision), perhaps the comment of the District Court is more than appropo: "Credit Suisse has grasped unsuccessfully at straws to avoid payment of the Arbitration Award and its Motion to Vacate the Award is DENIED."

IN MEMORIAM

It is with great sadness to report that two long-standing members of the SMA have recently passed away. They will be missed.

Rodney Maynard Elden
September 10, 1920 – September 19, 2011

Rodney Maynard Elden died on September 19, 2011 in Oak Bluffs, Martha's Vineyard, Massachusetts at the age of 91. The cause of death was mesothelioma.

He was born in Los Angeles, California on September 10, 1920 and graduated from the California Maritime Academy with a Bachelor of Science in Marine and Electrical Engineering in 1941. Rod married Marion Viola Miller in 1943 and had three children. As a high school junior, he went to sea as a fireman on the light cruiser CINCINNATI. On December 7, 1941 he was in Manila aboard the US Lines AMERICAN PACKER. He spent three years as Chief Engineer in oil tanker convoys to England and the South Pacific.

After the war he joined Joshua Hendy Corp. and Hendy International Co. where he was port engineer, superintendent, operations manager, and Vice President. He retired from there in 1967 to open his consulting business, Rodney Elden Associates in New York City where he was a management consultant on a wide variety of shipping matters.

He published *Ship Management: A Study in Definition and Measurement* in 1962. Among the key findings were:

> Maintenance is by far the most controllable expense in the operation of ships and its magnitude remains camouflaged to a large degree because of the absence of functional cost breakdown in current industry accounting practices.
>
> "Automation by Gadgetry" will possibly introduce more problems than it solves and quicker and better results will be obtained by investment in better ships having a lower "built-in maintenance load."

He joined the Society of Maritime Arbitrators in 1987.

Survivors include his younger brother, Gordon, of Los Angeles, Calif.; his daughters and sons-in-law, Irene Ziebarth and Douglas West of Newport Beach, Calif. and Oak Bluffs, Mass., and Suzanne and Ed Juline of Huntington Beach, Calif., and his son, Douglass Elden of Newport Beach, Calif.; his four grandchildren, Robert Ziebarth of Fullerton, Calif., Ed Juline of Guadalajara, Mexico, Tiffany Lauchlan of Phoenix, Ariz., and Brett Jackson of Hartford, Conn.; and one great-grandson, Alexander Juline of Guadalajara, Mexico.

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Capt. Gerald Joseph Ross
June 8, 1931 – August 13, 2011

Captain Gerald Joseph Ross, 80, died August 13, 2011 at Gilchrist Hospice Care, Towson, MD surrounded by his 2 daughters, Stacey Starkman of Flemington, NJ and Allison Schulte of Trappe, MD. He is survived by his sister, Andrea Ross of Fayetteville, AR. He is predeceased by his loving wife, Glennys who passed away in 1999.

"Captain" received his first BS degree from the US Merchant Marine Academy in 1952. He received his second BS degree in History from Towson University in 2007 and was completing his graduate studies in Humanities at Towson at the time of his death. He held a Masters Ocean unlimited license with the US Coast Guard and was a member of both the Society of Maritime Arbitrators and the Marine Society of New York.

Captain Ross's extensive career in the maritime industry spanned many decades including: 3rd mate to master on tanker vessels, port captain/owners representative, independent surveyor to all major sugar houses in the northeast, company principal and officer for discharge of grain and petroleum both off shore and in port, and maritime arbitrator.

"Captain" was known for his great sense of humor, his love of his studies, Indian food, scotch and soda, his smokes, and the game show Jeopardy. His family and friends miss him dearly.

THE ARBITRATOR

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