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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT'S CORNER

Dear Members, Friends and Supporters,

After more than 30 years of service, Ms Sally Sielski, the Society's Administrative Assistant, has retired. In January, the New York maritime community, with great representation from the Bar, came out for her retirement luncheon. With speeches, flowers and gifts, we celebrated her contributions to the SMA and the New York community over the many years she diligently managed our office administration, including the marketing of the Award Service, communications and several office moves. We wish the best to Sally and her family. She has a standing invitation to our luncheons and events. She sent a very nice thank you note, which is included in this newsletter.

The third and final volume of the last year's Award Service was recently published and included awards up to #4140. We are now preparing for the printing of the first volume of the next series, which will include awards #4141 to #4160; we are also preparing our most recent Digest for publication.

After ably serving as Vice President of the Society for the past three years, Bengt Nergaard has stepped down from this position. The good news is that he will continue as Membership Chair and has taken on new responsibilities as a member of the Award Service Committee and the chore of editing the head notes. The Board of Governors designated Jack Warfield to serve for the remainder of the Vice President's term. Jack has been a member of the Society for nearly 20 years, having held top positions in the tanker industry for many years and now working for a major financial management firm.

For the third year in a row, the SMA gave a panel presentation at the Connecticut Maritime Association event in March. It was another tremendous success, with maritime professionals from around the world in attendance. There is an article in this copy of the "The Arbitrator" about the panel discussion.

I had a conversation with one of the other speakers at the CMA event about the SMA rule in the event of a vacancy on a sitting panel. We discussed how the costs of an arbitration can drastically increase without a clearly defined procedure for filling the vacancy. Section 13 of the SMA Rules was written to prevent that from occurring. The section also allows for the smooth continuation of the proceedings after the vacancy is filled. The first part of Section 13 covers the situation of a party-appointed arbitrator. The Rule provides that the party making the appointment shall promptly name a replacement. It goes on to state that the previously-selected Chairman will continue to serve in that capacity unless the two party-appointed Arbitrators choose a replacement

Chairman before the hearings have commenced or, if the arbitration is conducted on documents alone, before the first submissions or documents are received by the Panel. The second part of the section applies if the office of Chairman becomes vacant. In that case, the two party-appointed Arbitrators shall appoint a replacement Chairman. The third part of Section 13 specifies that following the replacement, the arbitration shall resume on the existing record, unless the Panel directs or the parties agree otherwise. If a vacancy develops, instead of delays which will increase the cost and expense of an arbitration, the SMA Rules allow for a quick and simple continuation of the matter.

The International Congress of Maritime Arbitrators, ICMA XVIII, will be held in Vancouver in May. The SMA's David Martowski is the chairman of the Topics and Agenda Committee, ably supported by Michael Marks Cohen and LeRoy Lambert of the MLA as well as a select group of international participants. David has indicated that there will be a great number of excellent papers for this event. Maritime arbitrators from around the world will be participating and I hope to see you there.

The Fifth edition of the SMA bluebook, "Maritime Arbitration in New York" is expected to be available in time for distribution at ICMA. The booklet's foreword is authored by Loretta A. Preska, Chief Judge, U.S. District Court for the Southern District of New York. Also available at the Vancouver conference will be the latest Index and Digest of the Award Service – Digest 7.0 – ably produced and edited by Michael Marks Cohen, Tom Hawley and Lucienne Bulow. Watch for both of these newly revised publications.

Austin L. Dooley
President

THE ARBITRATOR

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KNOW BEFORE FIXING - 2012 ARBITRATION OF CHARTER PARTY DISPUTES

By Austin L. Dooley

Members of the Society of Maritime Arbitrators participated in a panel discussion at the CMA show in Stamford Connecticut on March 21. Speakers were Lucienne Bulow, Klaus Mordhorst, Jack Warfield, Bengt Nergaard, Soren Wolmar and Tom Fox. Austin Dooley was the moderator.

Klaus and Jack discussed SMA Award 4114. This case involved the vessel SERIFOPOULOUS and a dispute regarding a failure to provide cargo. The presentation also included a discussion of the problems that arise when, as in this case, one party does not participate in the proceedings.

Bengt discussed SMA Award 4116, the HENRY OLDENDORF. Issues in dispute were whether the orders for a final voyage were legitimate or not and the subsequent withdrawal of the vessel. Another factor in the dispute was a dry-docking by owners which caused charterers difficulty in keeping a COA obligation. To solve the COA problem, charterers had to extend the period charter at $52,000 per day, an increase of five times the original hire rate.

In keeping with topics of current market concern, Tom and Soren discussed SMA Award 4117, the OVERSEAS DONNA. In this case, the parties had a dispute over a ship sales contract during the period of an extreme market downturn and the rescission of the sales contract.

For subscribers to the Award Service, the three awards can be found in the final volume of last year's award service publication. They are also available on Westlaw and LexisNexis.

Finally, Lucienne reported on her research on the elapsed time for the issuance of an award once hearings have closed. She reported that in her review of 165 decisions in the SMA Award Service, 11% were issued within 10 days of the closing of proceedings, 30% in less than 20 days, 36% in less than 30 days, 57% within 60 days, and about 90% in less than 120 days. SMA Arbitration Rules (Section 28) recommends that awards should be issued within 120 days. Out of the 13 awards which were issued in more than 120 days after the closing of proceedings, 6 had non-SMA members on the panel. Among them were cases where the charter parties or contracts did not specify SMA Rules. At the Paris ICMA in 1996, Lucienne gave a similar paper based on her experience while working at a large grain company and having arbitrations conducted in other venues. The re-

cent data showed that SMA performances were significantly faster than the findings shown in her earlier paper.

2011 A YEAR OF SHIP FINANCE IN REVIEW: FEAR AND GREED GIVE WAY TO LOWER RISK AND LOWER YIELD TRANSACTIONS, BUT VOLUME AND ASIAN SOURCED DEALS AND POLISHED CORPORATES THRIVE

By George Weltman and Jim Lawrence, Marine Money International

2011 was a really tough year in shipping. The crisis in Greece turned out to be a symptom of a larger Euro contagion with the banks and capital markets feeling the fallout. The shipping markets, particularly tankers, continued to struggle as the excess tonnage ordered during the latest binge found its way onto the water, despite a purported lack of funding capacity.

Nevertheless, the shipping industry proved its resilience. It borrowed when and where it could and somehow found brief windows of opportunity in the capital markets. It reworked loan agreements and sought waivers to position itself for the hopefully brighter future. And then throughout 2011, there were opportunities amidst crisis.

The Editors of Marine Money International were surprised not only by the numbers but the range and quality of deals from 2011. The number of times the window to the capital markets opened were few and the durations short. Just looking at the equity markets as an indicator, there were just two shipping IPOs and eight follow-ons, which fall short of the comparable numbers of four and nineteen done in 2010. The performance of the industry's shares provides a partial explanation but bankers were still able to execute deals in this environment in spite of recent share performance.

To fill the gap, offerings in other areas multiplied. What is today's private equity investment was yesterday's M&A transaction as financial buyers utilized the capacity that strategic buyers lacked. Unlike last year, Marine Money could have devoted the entire magazine issue to the deals Private Equity did in 2011, including, the acquisitions of a fleet, a container leasing company and a ship management company as well as the establishment of a shipping investment platform. Then there were investments in ports, a tank farm and an Emissionhaus among others.

Then too as Petrobras grows, so do the project financings and even the offshore industry has matured with the continued sale of project risk to public markets in the form of project bonds. Targeting the offshore sector is a safe bet these days, given the price of oil, and delivering a well-structured project financing product to take advantage of Petrobras' credit, in 2011 made sense.

In order to see the flavor of the change, one only needs to look at 2011's list of winners of the Deal of the Year Awards, which follows. The expansion of the table compared to prior years is clearly evident. And, it is not growth for the sake of inclusivity. The Asian market matured. Whereas in the past, the Asian finance transactions were in a few of the key financial products, this year there were Asian winners in nearly every category.

Equally dramatic, instead of one off deals, there was a multiplicity of worthy transactions involving single companies. Serial issuers, or those companies in financial positions of strength were able to flex their muscles and complete multiple transactions. Look for instance at Teekay, which moved beyond simple organic growth tapping into new acquisitions from a restructuring or a cast-off, as one business became non-core to another. Teekay completed seven transactions including five equity placements, three public and two private, and two acquisitions and those were only the major deals. Then there was the innovative Seaspan which also completed a series of financial transactions placing it in the enviable position that it could look at new deals and not just scurry around begging for capital to keep its head afloat

Success was not just for the strong balance sheet owners in 2011. As banks left the ship finance field in droves licking their losses, some like Citi and J.P. Morgan achieved success for themselves and their clients through good risk management, judicious use of their balance sheet and good capital markets execution. A new name in shipping like the venerable Standard Chartered, transportation specialists like DVB, newly recapitalized ABN Amro and old stalwarts DNB and Nordea stood tall as some of the few who were open to lend.

In short, the ship finance transaction landscape evolved with the times in 2011. While the canon of deals was larger, there was a tectonic shift in the landscape. Fear and greed gave way to lower risk and lower yield transactions. It was the year of the blue chip deal, both in terms of companies and financiers. Yet there are no dominant players even among the biggest players. Clearly, those that have both a lending and investment banking business are advantaged and on the shipowning side those with strong(er) balance sheets or fresh equity will avail themselves of the opportunities the current market offers. For the rest 2012 will be a year of restructuring, again.

2011 DEAL OF THE YEAR AWARDS

TRANSACTION	WINNER
Dealmaker of the Year - Teekay's Peter Evensen & Friends	
Teekay Tankers' Equity Follow-on	**Joint Bookrunning Managers:** Morgan Stanley, Deutsche Bank, J.P. Morgan. **Senior Co-Manager:** Credit Suisse. **Junior Co-Managers:** BNP PARIBAS, Scotia
Teekay LNG's Equity Follow-on - Angola LNG	**Joint Bookrunning Managers:** UBS, Barclays, J.P. Morgan. **Co-Managers:** Goldman Sachs, Raymond James, ABN AMRO, Credit Agricole, ING, Sunrise
Teekay Offshore's Direct Equity Placement - BG shuttle tankers	No advisors
TK's acquisition of 3 FPSOs and equity investment in Sevan Marine	**Sell Side Advisors:** DNB, Pareto, Alix Partners, ABG Sundal Collier. **Bond Advisor:** AMA
Teekay LNG and Marubeni acquisition of Maersk's LNG carriers	**Sell Side Advisor:** Deutsche Bank. **Buy Side Advisors:** DNB, Citi, ABN AMRO.
Teekay LNG's Equity Follow-on to fund Maersk LNG J/V	**Joint Bookrunning Managers:** Citi, Deutsche Bank, J.P. Morgan, Morgan Stanley. **Senior Co-Managers:** DNB, ABN AMRO. **Junior Co-Manager:** Credit Agricole
Teekay Offshore's Equity Private Placement to acquire the Piranema	No advisors
Bank Debt	
West – HNA's Sr. Secured Financing to acquire GESeaCo	**Joint Lead Arrangers and Bookrunners:** Deutsche Bank (Sole Structuring Agent), ING
East – FSL Trust Management Pte Ltd's Facility	**Mandated Lead Arrangers & Bookrunners:** ABN Amro, OCBC. **Mandated Lead Arrangers:** BTMU, UniCredit, SMBC, KDB, ITF, KfW IPEX-Bank
Export Credit	
West – Hapag-Lloyd's ECA	**Initial Joint Bookrunners and Mandated Lead Arrangers:** Citi, Deutsche Bank, HSBC, KfW IPEX-Bank, UniCredit. **ECA:** K-Sure
East – Hanjin Shipping's ECA	**Mandated Lead Arrangers:** BNP PARIBAS, SMBC. **Intermediary Lender:** KDB. **ECA:** JBIC/NEXI
Public Debt	
Europe – Stolt Nielsen's NOK FRN	**Joint Lead Managers:** DNB, Nordea, Swedbank First Securities
East – MOL's domestic bond, NYK's domestic bond, Hanjin's convertible bond	J.P. Morgan
Public Equity - IPO	
West – Golar Energy Partners	**Joint Bookrunning Managers:** Citi, BofAML Morgan Stanley. **Co-Structuring Agents:** Citi, Evercore. **Co-Managers:** Raymond James, RBC, Wells Fargo, BNP PARIBAS, DNB, Evercore

TRANSACTION	WINNER
East – Bumi Armada	**Joint Global Coordinators and Bookrunners:** CIMB, Maybank, Credit Suisse. **Joint Bookrunners:** RHB, CLSA, UBS. **Joint Managing Underwriter:** Aminvestment. **Lead Managers:** Deutsche Bank, OCBC
Public Equity - Follow-on	
Scorpio Tankers Two Offerings	**Sole Bookrunning Manager:** Morgan Stanley. **Co-Managers:** Dahlman Rose, Evercore, Fearnley Fonds
M&A	
OMERS' Acquisition of V.Group	**Sell Side Advisor:** Lazard. **Buy Side Advisor:** RBC. **V. Group:** Kinmont. **Bookrunners & Mandated Lead Arrangers:** RBC, Citi, HSBC. **Mandated Lead Arranger:** CIBC. **ECA:** Export Development Canada.
Leasing	
West – CMA CGM Sale Leaseback	AMA, Credit Agricole,Ship Finance
East – KAMCO Ship Fund	KAMCO, DVB
Securitization	
Cronos Containers Program I Ltd	**Joint Bookrunners:** Credit Suisse (Sole Structuring Agent), BNP PARIBAS, Deutsche Bank. **Co-Managers:** ING, ABN AMRO, DVB, Keybanc
Project Finance	
West (Tie) – Carolina Marine	**Joint Lead Arrangers:** Itau BBA (Global Coordinator), Societe Generale, Santander, ING, WestLB, Standard Chartered
Embraport - Combined Credit Facility	**Lead Structuring Bank:** IDB. **Mandated Sole B Loan Arranger:** WestLB. **Mandated B Loan Arrangers:** Caixa, Santander, HSBC. **Lead Structuring Bank (Brazilian Facility):** CEF/BNDES
East – PNG & Gorgon LNG Project	CEXIM, ICBC, BOTM, Mizuho, SMBC
Structured Finance	
SCF/Glencore JV Facility	**Sole Bookrunner & Senior Mandated Lead Arranger:** Citi. **Mandated Lead Arrangers:** Deutsche Bank, Natixis, SMBC
Private Equity	
Diamond S Purchase of 30 MR Product Tankers from Cido	**Sell Side Advisor:** Clarkson Capital Markets/Clarkson S&P. **Mandated Lead Arrangers and Bookrunners:** Nordea (Agent), DNB. **Mandated Lead Arrangers:** Deutsche Bank, SEB. **Co-Arrangers:** Citibank, HSBC, ITF. **Investors:** First Reserve, WL Ross, China Investment, Fairfax Financial, Morgan Creek, PPM America.

TRANSACTION	WINNER
Restructuring	
Frontline	Nordea, Ship Finance
Innovation	
West - Seaspan & Friends – 9.5% Cumulative Redeemable Perpetual Preferred	**Sole Bookrunning Manager and Structuring Agent:** BofAML. **Co-Managers:** Citi, Credit Suisse, Dahlman Rose, BNP PARIBAS, DNB, Jefferies
Greater China Intermodal Investments LLC	**Financial Advisor:** Deutsche Bank.
Subsidiary Non-recourse Loan	**Lenders:** ICBC, BTMU
Subsidiary Loan to Lease	**Lender:** BofAML
East – Zhejiang Materials Industry Corp sale and leaseback	Bank of Communications
Wild Card	
OSG Forward Start Facility	**Bookrunners and Mandated Lead Arrangers:** DNB (Agent), Swedbank, Citibank. **Mandated Lead Arrangers:** ING, HSBC. **Co-Arrangers:** Credit Agricole, Morgan Stanley
Euronav Forward Start Facility	**Lead Arranger and Bookrunners:** Nordea (Agent), DNB. **Lead Arrangers:** ABN AMRO, Fortis, Credit Agricole, Danish Ship Finance, Danske Bank, ING, SEB. **Co-Arrangers:** ITF, ScotiaBank.
Editor's Choice	
West – The Short Saga of Saga Tankers	
East – Fairstar Heavy Transport Pre- and Post-delivery Financing	**Pre-Delivery Original Lender:** Bank of China. **Post-Delivery Mandated Lead Arrangers:** DNB, ING, HSH Nordbank

NAVIGATING THE LEGAL PITFALLS OF INTERNATIONAL COMMERCIAL ARBITRATION

By Peter D. Clark
Clark, Atcheson & Reisert
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CMA Shipping 2012 Presentation on March 21, 2012 (Abstract)

The aim of this presentation is to provide an overview of the general principals associated with international commercial arbitration. It will then focus on some of the pitfalls to avoid when drafting an arbitration clause in an international contract.

International commercial arbitration has become the principal method of resolving disputes in international trade and commerce. It developed as a compromise between various common law and civil law traditions. It is a creature of contract wherein the parties retain the services of a private arbitration panel to resolve their international disputes rather than going through court proceedings. It is a hybrid and only works because it is held in place by a complex system of laws. These laws may include international treaties, as well as the national laws of many countries.

Even a simple international arbitration may require reference to many different systems of law.

- The law governing the parties' capacity to enter into an arbitration agreement
- The law governing the arbitration agreement
- The law governing the arbitration proceeding itself
- The law which the arbitration panel must apply to the substantive matters in dispute
- The law governing recognition and enforcement of the award.

The parties are free to agree on the procedure to be followed by the arbitration panel in conducting the arbitration, as long as the laws are legitimate, do not go against public policy and treat the parties equally. Special emphasis is placed on the arbitration laws of the country which is the seat of the arbitration and the laws of the country or countries in which recognition and enforcement of the arbitration award is sought.

The main reason for choosing arbitration over litigation for resolving international disputes is there are no treaties or national laws that compel domestic courts to enforce foreign *court judgments*. The same is not true for international arbitration awards. The New York Convention requires signatory countries to recognize and enforce arbitration agreements. It also requires signatory countries to stay the litigation of disputes in their courts when the dispute is subject to an arbitration agreement.

The New York Convention provides a uniform legal system for the enforcement and recognition of foreign arbitration agreements and awards in 142 contracting States out of 193 States that are recognized by the United Nations. This makes international arbitration awards fairly easy to enforce throughout the world. The formalities required for recognition and enforcement are simple. The party seeking recognition and enforcement is only required to present to the court in the enforcing State an original arbitration award and an original arbitration agreement or certified copies of same.

International arbitration concerns itself only with disputes that are international and commercial in character. The New York Convention applies to the enforcement of awards not considered domestic in the State where the recognition and enforcement is sought. The nationalities of the parties and their place of residence or business may also factor into determining if an arbitration is to be given international status.

The New York Convention does not attempt to define "commercial." Instead, the Convention provides that the State may declare that it will apply the Convention only to disputes arising out of legal relationships which are considered commercial under the national law of the State.

Sovereign States may agree to enforce foreign arbitration awards and agreements in a variety of ways. Multilateral agreements are the preferred method. It is essential for a party to an international contract to be in a position to utilize an international convention providing for the mandatory enforcement of arbitration awards in a State in which the other contracting party has assets.

The most important convention is the New York Convention. This five page document is regarded by many as a major factor in the development of arbitration as the main means of resolving international trade disputes. The New York Convention defines the specific grounds upon which recognition and enforcement of an arbitration award may be refused by a State court. These grounds are:

1. Lack of a valid arbitration agreement;
2. Denial of an opportunity to be heard;
3. An excessive exercise of jurisdiction by an arbitrator in deciding matters beyond the scope of the arbitration agreement;
4. Not following the procedural rules chosen by the parties in their arbitration agreement;
5. Invalid arbitration award in the country where rendered.

Two additional defenses can be raised by the court on its own initiative.

1. The subject matter is not arbitrable; and
2. Enforcement would violate the forum state's public policy.

The New York Convention applies only to awards that are foreign awards made in a territory of a State other than the State where recognition and enforcement is sought. It also applies to international awards not considered domestic.

To qualify for New York Convention coverage, there must be a written agreement creating a commercial relationship that contains an agreement to arbitrate in a signatory State. Therefore, it is most important for the international contract to provide for the arbitration to be held in a State that is a signatory of the New York Convention.

TYPES OF INTERNATIONAL ARBITRATIONS

When drafting an international contract, the parties must consider a number of issues when negotiating the arbitration clause. The first issue to consider is whether an arbitration will be administered by an organization established for that purpose or will the arbitration be ad hoc – that is, self-administered.

Institutional Arbitration

An institutional arbitration is one in which the parties consent to resolve their dispute before a panel of arbitrators from one of the major arbitration institutions, under the specific rules of that institution. It should be emphasized that the cost associated with an institutional arbitration is usually high. Because of the cost factor, parties contemplating institutional arbitration should familiarize themselves

with the fee structure of the institution under consideration. For example, under the ICC Rules, the parties pay a fixed fee in advance for the costs of the arbitration. This fee is assessed on an *ad valorem* basis; the larger the claim and counterclaim, the higher the fee.

Ad Hoc Arbitration

An ad hoc arbitration is one which resolves a dispute without the oversight of an institution and without designating any reference to a particular set of institutional rules. The parties are free to develop their own rules. One of the main advantages of an ad hoc arbitration is that the parties avoid the high costs charged in an institutional arbitration. Additionally, the parties may agree that the arbitration will be conducted according to an established set of rules such as the SMA Rules. This also saves the parties the cost of drafting their own rules.

The main disadvantage of an ad hoc arbitration is it only works if there is complete cooperation between the parties. Once a dispute arises, this seldom occurs.

VALIDITY OF THE ARBITRATION AGREEMENT

A. Formal Requirement

Under the New York Convention, the only formal requirement is that the arbitration agreement must be reduced to a writing.

B. Capacity of The Parties

A lack of capacity of a party to arbitrate will be fatal to the enforcement of an arbitration award. This will happen when one of the parties to the arbitration agreement lacks the capacity, under the law of its domicile, to participate in an arbitration. For a natural person, capacity may depend on nationality, or place of residence, or the place of entering into the arbitration agreement. With regard to a legal entity, such as a corporation, the law applicable to its capacity will be the law of its domicile.

LAW APPLICABLE TO THE ARBITRATION AGREEMENT

The New York Convention provides for the refusal to enforce an award if the arbitration agreement is not valid under the law selected by the parties, or under the law of the country where the award was made.

ARBITRABILITY

The concept of arbitrability involves determining which types of disputes may be resolved by arbitration and which must be determined by courts. Traditionally, certain types of disputes were considered not capable of settlement by arbitration. Some of the categories included criminal law and matrimonial status.

The New York Convention reserves to each signatory State the right to refuse enforcement of an award where the subject matter of the dispute is not capable of resolution by arbitration under the law governing the arbitration agreement, the law of the place of the arbitration; and the law of the place of enforcement.

LAW APPLICABLE TO SUBSTANTIVE ISSUES

The main contract will usually have a separate provision stating that the law of a specific State shall govern the substantive law of the contract. This is called the "choice of law clause." It is generally desirable to specify in the main contract the substantive law that will govern the parties' dispute. If the parties fail to choose the substantive law for their contract, the choice will be made for them by the arbitration panel.

THE LAW GOVERNING THE ARBITRATION PROCEDURE

Selecting the seat of an arbitration is extremely important. The proper selection of the seat is critical, not only because of the practical advantage, but also because when an arbitration is conducted in a particular State, the procedural laws of that State may affect the rights of the parties. The mandatory laws of the place of arbitration trump the rules that the parties may have chosen to govern the proceedings if there is a conflict.

DISCOVERY AND EVIDENCE IN INTERNATIONAL ARBITRTATION

Dealing with discovery issues can be difficult when parties to international contracts are from different countries with different legal customs.

A. Civil Law Arbitration Procedures

Many civil law countries do not provide for any, or very limited discovery in litigation. The same is true for arbitration proceedings. As a result, arbitration panels in these countries often refuse to entertain broad discovery requests. Civil law arbitration proceedings are distinguished from

those in common law by a major emphasis on documentary evidence. Oral cross-examination is seldom used. Civil law arbitrators lack power to compel non-party witnesses to appear before them. The panel, however, may suggest to a party to produce a witness or document under its control. Failure to comply with the request can lead to an adverse inference against that party.

B. Common Law Arbitration Procedures

Most of the attendees of this session are from the United States and are familiar with common law court and arbitration proceedings. Documentary evidence is considered secondary to live testimony that has been subject to cross-examination. The broad discovery procedures followed in the common law system often shock civil law lawyers who are use to little or no discovery.

C. Institutional Discovery Rules

Generally, the procedural rules of the major international arbitration institutions provide only vague guidelines for discovery. For example, the ICC Rules fail to address discovery beyond requiring that the parties produce the documents upon which they intend to rely on in support of their claims or defenses.

THE INTERNATIONAL BAR ASSOCIATION RULES ON THE TAKING OF EVIDENCE

These Rules are intended to provide an efficient and fair process for the taking of evidence in international arbitrations, particularly in those cases between parties from different legal systems. They are designed to supplement the institutional and ad hoc rules. They work on the principle that each party is entitled to know in advance of any hearing, the evidence on which the other party is relying on.

The IBA Rules provide for limited disclosure which is closer to that found in civil law countries. Here is how it works:

1. A party can request, in writing, identified documents, giving a description of why the documents are relevant and material to the outcome of the case.
2. The party receiving the written request shall produce all the documents not objected to.
3. If the party objects to requested documents, the party must state its objections in writing.
4. The Panel will then rule on the request.

THE FEDERAL ARBITRATION ACT

Congress enacted the FAA in 1925 to provide for the enforcement of domestic arbitration agreements. The FAA provisions that deal with U.S. domestic arbitration are Sec. 1-16. The UN adopted the New York Convention in 1958. The U.S. Congress adopted the New York Convention in 1970 by amendment as Chapter 2 of the FAA in Sec 201-208. Chapter 2 of the FAA applies the New York Convention to arbitration agreements and awards that relate to commercial disputes that are not considered domestic.

The main conflict between the domestic and international FAA is found in their statutes of limitation. The three-year statute of limitation of the international FAA trumps the one-year limit in the domestic FAA. Another potential conflict may occur in the area of subject matter jurisdiction. The domestic FAA requires the parties to establish an independent basis for federal jurisdiction, such as admiralty jurisdiction, diversity of citizenship or a federal question. However, the international FAA created its own independent federal subject matter jurisdiction.

UNCITRAL'S ROLE IN INTERNATINAL ARBITRATION

UNCITRAL was established by the UN in 1966 in order to help unify the laws of international trade. With respect to international commercial arbitration UNCITRAL accomplished this by promoting uniform practices and procedures and by creating model laws and rules for international arbitration. Unlike institutional organizations, such as the ICC, UNCITRAL does not itself administer arbitration proceedings. One of UNCITRAL'S main objectives is to promote the New York Convention as a means of resolving international commercial disputes.

PITFALLS TO AVOID WHEN DRAFTING ARBITRATION CLAUSES IN INTERNATIONAL COMMERCIAL CONTRACTS

It is impossible to draft contract terms that will guard against every adverse contingency that may occur in the performance of international commercial contracts. However, with a little foresight it is possible to eliminate some of the most common mistakes made by parties when negotiating arbitration provisions in these contracts.

The following are some of the most common pitfalls to avoid:

1. The most serious mistake made by parties in negotiating and drafting arbitration clauses in international commercial contracts is to give insufficient thought as to how future disputes will be resolved. Most parties are overly optimistic and assume there will be no disputes in the performance of the contract. This is a fallacy and a major pitfall in contract negotiations.
2. Do not wait until the last minute to negotiate the arbitration clause as if it was an afterthought. Rest assured, if a dispute arises, the arbitration clause will be the first clause that the parties focus on. Each sentence will be scrutinized. One small error can ruin an otherwise well drafted international contract.
3. Before agreeing upon the location for an arbitration, always choose a county that is a signatory of the New York Convention. This will improve the chances of obtaining recognition and enforcement of the award in other Convention countries.
4. Before entering into an international contract with a foreign party, it is prudent to investigate if that party has assets in countries that subscribe to the New York Convention. This will improve one's chances for enforcing an award against foreign assets.
5. If a party to an international arbitration agreement brings suit in the US, be aware that the defendant may rely on the international FAA as a defense to stay the action pending arbitration. If the suit is brought in state court, the defendant may remove it to federal court.
6. US courts may order arbitration anywhere in the world, provided the arbitration seat is a country that is a signatory to the New York Convention.
7. It is not advisable to list excessively specific qualifications for arbitrator appointments in the arbitration clause. To do so may limit the pool of suitable arbitrator candidates who meet the specifications.
8. Never name an individual as an arbitrator appointing authority. Always select an office or title.
9. International commercial arbitration is a private process. However, it is not a confidential process. In many jurisdictions parties are under no duty to keep the content of the arbitration proceedings confidential.
10. The domestic FAA contains no provision requiring the parties or the arbitrators to treat arbitration proceedings as confidential. Parties concerned about confidentiality should address the issue in their arbitration clause.
11. Be aware that an arbitration award that is refused enforcement for public policy reasons in one jurisdiction may be enforceable in another jurisdiction not subject to the same public policy considerations.
12. Be aware that an arbitration award may be set aside or refused recognition if the composition of the arbitration panel or the arbitration procedure was not in accordance with the provisions of the arbitration agreement.
13. Lastly, be mindful that international commercial arbitration is a hybrid. It only works because it is held in place by a complex system of multilateral treaties and the national laws of many countries. While it is possible to master the particulars of a handful of multinational treaties, it is impossible to know the laws of over 193 countries. Always seek legal advice from local practitioners on national laws. Failure to do so could result in an unenforceable arbitration clause and an invalid arbitration award.

There are another 70 plus pitfalls in the material that is being sent to you. Please look them over. You might find the material useful when drafting arbitration clauses for international commercial contracts in the future.

EVALUATING CREDIT RISK

By Dean Tsagaris SMA Arbitrator

The current global credit crisis and depressed shipping industry conditions has lead to many layoffs, cancelled contracts, bankruptcies etc. In a phrase "Credit Risk. Unrest"

How do we deal with this? It is easy to draw the line saying we will only deal with First Class Companies. The question then arises, "Who is first class?" Since we do not keep the accounting books of our counter parties and physical trading is not done over an exchange as Derivatives (FFAs), each entity must put together its own vetting system. These vetting systems may consist of the following;

1. Subscribing to a credit service, which for a nominal fee will supply the latest credit rating of the entity being investigated. This could prove to be invaluable and certainly worth the nominal fee. There are several companies that supply such a service. (We must caution however, that some reports supplied may be outdated and it may take time for the service to compile an updated report, if they are able to do so at all).
2. Analyze your portfolio of charterers and/or owners. Create an internal ranking system based on criteria essential to your prioritized needs that will minimize risk both monetarily and physically.
3. Prior to fixing have a clear understanding of the chartering chain and which companies are in the chain. The chain is only as good as its weakest link. Protective

wording to this regard in the mainterms is a prudent step, if achievable. During the boom of 2007 many charters were flipped on a back-to-back basis. In many cases 5-7 times before culminating on a voyage charter. After the crash of 2008 the results were "charter chain chaos," which many companies are still recovering from.

4. When markets are severely depressed Owners generally prefer to keep their vessels on a short leash by not fixing the vessels for long periods. They therefore find themselves taking on more risk by fixing more voyage charterers. Carefully study all aspects of such charters, as the risk/ reward may not prove to be as advantageous as may appear in the initial monetary eye.
5. Credit Risk Insurance is a tool that has been helpful. This tool however, is not an inexpensive hedge, should you be lucky enough to get underwritten. Consider the underwriters that had underwritten some of the high profile bankruptcies over the last 1-2 years. Underwriting capacity is a material aspect of this coverage to consider, as is an understanding of the entities attached to these risks being presented to the Underwriters by their clients.

No doubt this audience can respect the difficult times upon the industry as a whole and all prudent steps are to be taken to safeguard against credit risk. We all agree that one's true colors are not shown until their back is against a wall. The unfortunate reality is we do not know whose back is against the wall.

SAILING THE SEAS OF UNCERTAINTY: THE FIGHT FOR DUE PROCESS FOR Ship Owners and Seafarers in U.S. MARPOL Related Detentions

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Introduction

It is well known throughout the maritime industry that the United States aggressively pursues a program of boarding and inspecting foreign flag-state vessels calling in U.S. ports for possible violations of MARPOL 73/78, as codifed in the U.S. Code as the Act for the Prevention of Pollution from Ships ("APPS"), 33 U.S.C. § 1901 *et seq*. (*i.e.* – the U.S. adaptation of MARPOL). This initiative has elicited hundreds of millions of dollars in fines from Owners and Operators who have either pled guilty or who have been convicted of MARPOL violations. When the U.S. Coast Guard detains a foreign flagged vessel alleged to have committed a MARPOL violation, the effects of the detention on the Owner and Operator can be economically devastating, as well as personally overwhelming for the crew. The government's tactics in these types of cases annually leads to dozens, if not hundreds, of foreign seafarers being required to spend months and even years functionally detained in the United States without due process (and at the full cost and expense to the Owner and Operator) as potential "material witnesses" to or "targets of" the investigations into alleged violations.

What many do not realize is that once an investigation is initiated, the U.S. Coast Guard, through power purportedly conferred under 33 U.S.C. § 1908(e), asserts its broad agency discretion to demand security from the Owner and Operator to stand in the place of the vessel in order to satisfy potential criminal fines and civil penalties for alleged MARPOL violations. Pursuant to 33 U.S.C. § 1908(e), the U.S. Coast Guard requests the U.S. Customs & Border Protection Agency ("CBP") to withhold the vessel's customs departure clearance until the security demanded is "agreed". Absent the full acquiescence and acceptance by the Owner and Operator to the demands of the U.S. authorities for security, the subject vessel will not be permitted to depart the United States. Specifically, § 1908(e) states:

> *Ship clearance or permits; refusal or revocation; bond or other surety*
>
> *If any ship subject to the MARPOL Protocol, Annex IV to the Antarctic Protocol, or this chapter, its owner, operator, or person in charge is liable for a fine or civil penalty under this section, or if reasonable cause exists to believe that the ship, its owner, operator, or person in charge may be subject to a fine or civil penalty under this section, the Secretary of the Treasury, upon the request of the Secretary, shall refuse or revoke the clearance required by section 91 of title 46, Appendix. Clearance may be granted upon the* ***filing of a bond or other surety satisfactory to the Secretary****.*

Id. (emphasis added).

What is properly encompassed by the term "surety" under the statute is a novel and developing area of the law. As the U.S. authorities have prosecuted more and more of these types of cases, the onerous terms and non-negotiable requirements of the so-called "Agreement on

Security" imposed upon foreign Owners and Operators by the U.S. Coast Guard have become more extreme. Chief among the demands is the requirement for the Owner and Operator to facilitate the removal of several licensed and unlicensed crewmembers (most times including the entire engine room department and the Master of the vessel), from their shipboard home and to arrange for the crewmembers to remain within the federal district for an unlimited and unspecified amount of time without the triggering of the individual's due process rights. Indeed, the government lawyers regularly argue that the crewmembers are actually present in the United States 'voluntarily'.

- **Port State Control Inspections, Whistleblowers, and U.S. MARPOL Investigations**

The U.S. Coast Guard conducts regular Port State Control inspections of foreign flagged vessels calling United States' ports in accordance with IMO Port State Control Procedures and the International Ship & Port Facility Security (ISPS) Code. The U.S. Coast Guard is empowered to verify that foreign vessels operating within jurisdictional waters are in compliance with international conventions and treaties, and to take certain action to bring a vessel into compliance if it is not. *See* Art. 5(2) of MARPOL; *U.S. v. Royal Caribbean Cruises*, *Ltd.*, 11 F.Supp.2d 1358, 1367 (S.D.Fla. 1998) ("…MARPOL authorizes, *inter alia*, a port state to inspect a ship to verify a discharge in violation of MARPOL …"); *see also* 14 U.S.C. § 89(a) (Coast Guard general law enforcement authority).

Even with the authority conferred on the U.S. Coast Guard through various statutes and regulations to inspect vessels for MARPOL compliance, most of the criminal prosecutions under APPS in the United States are initiated as a result of a "tip" provided to the U.S. Coast Guard by whistleblowers. In this regard, APPS contains a clause which grants the Court the discretionary authority to issue a monetary award for up to one half (1/2) of any criminal fine imposed on the Owner or Operator to those individuals who provide information that leads to a conviction under the Act. 33 U.S.C. § 1908(a); *see also* 33 C.F.R. § 151.04(c) (regulations implementing APPS). It is often the case that once a whistleblower comes forward with an allegation of the Vessel's non-compliance with MARPOL, the U.S. Coast Guard investigators and inspectors earnestly and aggressively search the engine room and the Vessel in general for any corroborative evidence in support of the whistleblower accusations.

Once the U.S. Coast Guard initiates an investigation, the Captain of the Port ordinarily will issue a letter informing the vessel that CBP has withheld the customs departure clearance at the request of the U.S. Coast Guard. To have the customs departure clearance reinstated, the U.S. Coast Guard requires the Owner and Operator to post "surety satisfactory to the Secretary" to obtain the release of the vessel.

- **"Surety Satisfactory to the Secretary" Under 33 U.S.C. 1908(e)**

Previously, the U.S. Coast Guard had no consistent policy on when to ask for security, or the amount sought or the form for the posting of such security. For example, on the East Coast, U.S. Coast Guard sectors would generally ask for a surety bond to secure any potential criminal fines. There was rarely a request for a P&I Club issued LOU to secure potential civil penalties. On the West Coast, the U.S. Coast Guard would generally accept P&I Club issued Letters of Undertaking for potential criminal fines and civil penalties. The type of surety required to obtain the return of the vessel's departure clearance was generally negotiable both in form and quantum.

Now, in any circumstance where the U.S. Coast Guard has (or plans) to initiate a criminal investigation, there is a strict, *pro-forma* "Agreement on Security" that must be agreed to by the Owner and Operator in order to have the vessel's departure clearance reinstated by CBP. The terms and conditions contained in the "Agreement on Security" are no longer set by the Sector, District, or Area Commanders, but instead are mandated and disseminated by the Commandant's Office at Coast Guard Headquarters in Washington, D.C. Any attempts to negotiate any of the terms and/or to revise or amend the form with the exception as to the quantity of the bond and sometimes the per diem allowance for crewmembers is rejected out-of-hand on the basis that it will not be accepted up the chain of command.

In our view, the top-down uniformity is further evidenced by the identical and increasingly onerous terms of every proposed "Agreement on Security" presented by the Coast Guard District Legal Offices throughout the country. These non-negotiable conditions require significant concessions of rights and defenses available to an accused Owner and Operator and impose stringent requirements including, *inter alia*, that Owner and Operator:

1. provide for the indefinite detention of foreign seafarers identified by the USCG without implication of the individual's 'due process' rights;

2. bear all costs for such unspecified and unlimited detentions;
3. pay the total wages, lodging costs, transportation costs, medical care costs, and a per diem for each of the detained crewmembers during the indefinite detention period;
4. confiscate these foreign citizens' passports so they could not leave the United States;
5. encourage these crewmembers, including those who may be the subjects and/or targets of criminal investigation, to cooperate with the government;
6. maintain employment, indefinitely, of all detained crewmembers;
7. stipulate to the authenticity of documents and items seized from the vessel by the United States;
8. pay to repatriate the foreign citizens once they are released from their detention;
9. agree to serve Grand Jury and/or trial subpoenas on foreign citizen employees of the Owner and/or Operator who are not United States citizens and who reside outside of the United States;
10. facilitate the introduction of evidence against the Owner and/or Operator at a future criminal trial, in return for releasing property that is owned by the Owner and Operator;
11. waive jurisdictional defenses; and,
12. enter an appearance in any criminal or civil penalty actions brought against the Owner and/or Operator.

In addition, the U.S. Coast Guard further insists upon the inclusion of a provision that would cause the Owner and Operator to forfeit any security posted, if the government unilaterally declared the Owner and Operator to be in breach of any of the terms of the "Agreement on Security." All of these terms and clauses are included not due to any express law or regulation, but are based upon the U.S. Coast Guard's purported authority granted by 18 U.S.C. § 1908(e). Despite the fact that there is no statutory or legal authority for the U.S. Coast Guard or the Secretary to demand an Owner or Operator of a foreign flagged vessel to waive its own constitutionally protected rights (or the rights of its employees), fund the government's criminal investigation against the Owner and Operator, pay for the cost of detaining, housing, transporting witnesses, material or otherwise (for an indefinite period of time), or to agree to other fundamentally unfair and objectionable terms as a condition of releasing a vessel and reinstating departure clearance under APPS 33 U.S.C. § 1908(e); the government, acting through the U.S. Coast Guard insists on these terms as an exercise of its agency authority.

- **Challenges to U.S. Coast Guard's Requirements Pursuant to APPS 3 U.S.C. § 1908(e)**

Challenging the terms imposed by the U.S. Coast Guard and the required concessions that Owners and Operators are being forced to make in order to obtain their vessel's departure clearance, is a developing and, as of now, is a highly uncertain area of the law. Recently, numerous complaints and petitions have been lodged against the U.S. Coast Guard's practices in various district courts around the country both on behalf of Owners and Operators and foreign seafarers. The first decision an Owner and/or Operator must take is whether to acquiesce and sign the "Agreement on Security" under duress (and to seek challenge the terms at a later date); or to refuse to tamper with the rights of the crew members and seek to have the District Court review the U.S. Coast Guard's demands on an emergency basis.

Below are a summary of several recent cases of interest from around the country in which foreign Owners and Operators have sought the intervention and review of the U.S. Coast Guard's practice of the form of "surety" being required by the U.S. Coast Guard to obtain the reinstatement of a vessel departure clearance.

- ***Watervale Marine Co., Ltd., et al v. United States Department of Homeland Security,* 1:12-cv-105-RJL (D.D.C.)**

In *Watervale Marine Co*., four (4) vessel Owners and four (4) Operators who were required to sign the pro forma "Agreement on Security" to obtain, *inter alia,* the restoration of the vessel's customs departure clearance have sued the Department of Homeland Security and the U.S. Coast Guard in the U.S. District Court for the District of Columbia. In that matter, Plaintiffs assert various causes of action, including *inter alia*, that: 1) the US Coast Guard has exceeded its authority in its demands imposed upon Plaintiffs in the Security Agreements); 2) that the Administrative Appeals Process to challenge the unauthorized security demands of the U.S. Coast Guard is futile as the "Security Agreements" are directly from Coast Guard Headquarters (*i.e*. – the same office that sets the policies and terms in the demanded "Agreements" in the first place); and 3) the Administrative Procedures Act entitles Plaintiffs' to relief. The Plaintiffs have sought for the Court to vacate

the Security Agreements and to enjoin the Coast Guard from demanding anything more than a surety bond or other financial surety for the granting of a departure clearance for any vessel subject to APPS investigations. That case is currently pending before Judge Richard J. Leon.

- ***Giuseppe Bottiglieri Shipping Co. S.p.A. v. United States*, 2012 U.S. Dist. LEXIS 20770 (S.D. Ala. 2012)**

In *Giuseppe Bottiglieri*, the Owner of the M/V BOTTIGLIERI CHALLENGER sought the Court's intervention and judicial resolution of its dispute with the U.S. Coast Guard over the onerous terms in the proposed "Agreement on Security." In granting the government's motion to dismiss the Emergency Petition, the Court declined to review the U.S. Coast Guard's final agency action under the Administrative Procedures Act, as the Court did not believe there was any standard against which to determine whether the U.S. Coast Guard had exceeded its authority under 33 U.S.C. § 1908. Specifically, Chief Judge Steele stated:

> *From the text of § 1908(e), a reviewing court would have no meaningful standard at all against which to judge whether the Coast Guard's exercise of its discretion was appropriate or not. Congress did not require the Coast Guard to accept a bond or other surety in any case. It did not grant an absolute right to a vessel owner to obtain departure clearance. It did not outline (even in the broadest brushstrokes) the parameters for what form or amount a bond or other surety should take. It did not impose a reasonableness limitation on the bond or other surety fixed by the Coast Guard. It did not even specify what a "bond or other surety" is, or clearly bar the Coast Guard from including non-financial terms in § 1908(e) surety agreements. A court could not possibly evaluate what is or is not actually "satisfactory" to the Coast Guard, save perhaps by cross-examining the Commandant of the Coast Guard about his own subjective beliefs and perceptions.*

Id. at *19.

Judge Steele's Order and Judgment dismissing the Emergency Petition for lack of subject matter jurisdiction is currently being appealed to the Eleventh Circuit Court of Appeals.

- ***Lantra Shipping Ltd. et al. v. United States of America*, H-11-cv-4637, (S.D. Tex.)**

In *Lantra Shipping*, the Owner and Operator of the M/T MEDIATOR filed an Emergency Petition in the Southern District of Texas seeking the Court's intervention to set security for the release of the vessel from the U.S. Coast Guard imposed CBP withdrawal of custom's departure clearance. Following a review of lengthy briefing filed by the parties and oral argument at the hearing over the U.S. Coast Guard's mandated "Agreement on Security" terms and conditions, Judge Gilmore found she had jurisdiction to decide the matter and aptly summarized the government's position on foreign seafarers as follows: "They're stuck like chuck. They got to be here until we say they get to leave. ***They're enemy combatants, throwing waste in the waterway. So, we can keep them as long as we want to***." Judge Gilmore continued, "Yikes. Is that really what we do?" Transcript p. 36, ll. 20 – p. 37, ll. 2 (Jan. 5, 2012) (*emphasis added*). Although ultimately Judge Gilmore did not issue a written decision in this case (as the Owner and Operator finalized an Agreement on Security with the U.S. Coast Guard); Judge Gilmore explained the Court would likely exercise subject matter jurisdiction over the emergency petition due to the undue hardship that would be caused to the foreign seafarers in delaying the determination of the review of the agency action by requiring the Owner and Operator to go through the U.S. Coast Guard's four (4) level agency appeal process. Judge Gilmore stated at the January 5, 2012 hearing:

> *And the issue that is really the most troubling to me here, that makes me inclined to lean towards examining it as a hardship issue is the fact that all these people are being detained indefinitely. And that is the thing that is really the most troubling to me of this entire deal, not the money so much, but just the indefinite detention of people, just saying, 'You're stuck here, and we don't have to tell you when you're going to let go.'* ***And that's the thing that makes me feel like stepping over the appeal requirement and finding that there is a hardship that would make — that would justify an exception to the exhaustion requirement****. Why are [the Coast Guard] just holding these people indefinitely and telling them that they don't get to find out at any point in time when they get to leave and go home?"*

See Transcript pg. 20 ll.10-25, Jan. 5, 2012. (*emphasis added*).

- **Seafarers' Challenges to being "Functionally Detained"**

Although seafarers are significantly impacted by the terms and conditions forced upon Owners and Operators by the U.S. Coast Guard's required "Agreement on Security," the government does not allow the involvement of these individuals to negotiate the length of time or the conditions under which they are required to remain in the United States during a pending investigation and/or prosecution. In most of these cases, the crewmembers are stuck in a roadside motel, in a country where they do not speak the language, and required to remain in the federal district for an indefinite and unlimited time. Moreover, when a seafarer seeks to exercise a right to his passport and to depart the jurisdiction, not only do the government authorities vehemently oppose such a departure, but actively and regularly represent to the district courts that the crewmembers are within the jurisdiction "voluntarily," as a result of the "Agreement on Security" imposed upon the seafarer's employers.

- ***In re Mercator Lines Limited (Singapore) Pte. Ltd.*, 1:11-mc-0024 (S.D. Ala. 2011)**

Captain Prastana Taohim, the Master of the M/V GAURAV PREM and citizen of Thailand, was indefinitely detained pursuant to an Agreement on Security between the U.S. Coast Guard and the Owner and Operator[1] of the vessel. Shortly after being forced by the government to leave his shipboard home and remain in a hotel in Mobile, Alabama, he filed an Emergency Petition to be released and in the alternative to have his deposition taken pursuant to Fed. R. Crim. Pr. 15.

Captain Taohim sought to avoid remaining in the Southern District of Alabama for an indefinite period of time pursuant to the third-party agreement thrust upon him. Although the government fully controlled and dictated Captain Taohim's presence within the Southern District of Alabama, the government in opposing the petition asserted that Captain Taohim was in Mobile, Alabama *voluntarily* and as such did not qualify for the relief contemplated by Fed. R. Crim. 15 and/or 18 U.S.C. § 3144, which provides for a detained material witness to have his deposition taken and to be released from detention. Following review of the arguments, Magistrate Cassady found that conditions imposed upon Captain Taohim amounted to being "functionally detained" within the Southern District of Alabama, under 18 U.S.C. § 3144.

In support, Magistrate Cassady cited the following circumstances surrounding Captain Taohim's presence in the jurisdiction:

> *His passport has been taken pursuant to an indefinite agreement reached between the government and owner and operator of the vessel to which petitioner is not a signatory, he is holed up in a hotel without his consent and without the ability to leave the country or indeed much ability to leave the confines surrounding the hotel since he is without transportation and he is being kept from his home and family in Bangkok, Thailand and in a country where he speaks (and understands) very little of the language and has no social connections apart from the other members of the crew held in like circumstances.*

See In re Mercator, 1:11-mc-0024 (S.D. Ala.), Doc. #24, Order, p. 19.

Magistrate Cassady issued an Order requiring Captain Taohim's deposition to be taken pursuant to Fed. R. Crim. P. 15 in order to allow his release from the jurisdiction. On appeal, District Judge Granade affirmed Magistrate Cassady's decision. *Id*., at Doc. #40.

- ***In re Grand Jury Proceedings re: Investigation of Blow Wind Shipping, S.A. et al*, 10-mj-57-P-JHR (D. Me. 2010)**

Magistrate Rich's decision in the matter *In re Grand Jury Proceedings*, also rejected the government's argument that a seafarer who is not permitted to leave the jurisdiction pursuant to an "Agreement on Security" does not qualify as a "detained" witness under 18 U.S.C. § 3144 because they are not incarcerated. Magistrate Judge Rich held:

> *This contention, carried to its logical extreme, would permit the government to prevent foreign nationals from leaving this country indefinitely …This could mean, in practical terms, that such material witnesses could be kept away from their homes, in a foreign country where they do not speak the language and have no social connections and no way to engage in the line of work in which they are experienced, or indeed any remunerative work, for periods of well over a year. The argument, carried to its logical extreme, also means that a material witness who is jailed would be able to seek discharge through deposition, while a material witness subject to a warrant, yet able*

to stay in a motel and walk to a grocery store or recreation, would not have that option.

Id. at p. 3-4.

In support, Magistrate Rich relied on other similar decisions from district courts in California and New Jersey. *See United States v. Maniatis*, 2007 U.S. Dist. LEXIS 47543 (E.D. Cal. 2007) and *United States v. Dalnave Navigation*, 2009 U.S. Dist. LEXIS 21765, at *2 (D.N.J. Mar. 18, 2009)(material witnesses lodged at hotel with no passports, little or no transportation, little knowledge of English, limited knowledge of customs and mores of this county, and desiring to return home to their families are functionally detained for purposes of § 3144 and Rule 15)).

Conclusion

For an Owner and Operator, dealing with an investigation by U.S. authorities into a possible MARPOL violation can be an extremely difficult ordeal riddled with many difficult questions to be answered and decisions to be taken with no clear answer readily at hand. Given the evolving nature of the case law interpreting the relevant statutes and regulations at issue, the ultimate decision in any particular case is often based upon the individual Judge's 'gut instincts.' In order to navigate through the uncharted waters of amorphous agency action, there must be a better judicial understanding of the rights and remedies available at each step in the inextricably intertwined agency investigation and criminal prosecution.

For more information on the United States government's prosecution of suspected MARPOL violations or 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. The Owner/Operator of the M/V GAURAV PREM are two (2) of the Plaintiffs in the *Watervale* case. *See p. 6*.

TIMES ARE TOUGH, REVISIT YOUR PROFORMA CHARTER PARTY

By Dean Tsagaris SMA Arbitrator

When fishing one casts a line, reels it in and, if the bottom is smooth, the line is retrieved and cast again until a fish is caught.

Shipping markets are down and many are predicting a drag along the bottom. However, the current struggling economic markets and political unrest have caused unwanted bumps and snags in our industry which, if not handled properly, may result in costly remedies, or worse, cutting of lines.

The more we look at current events the more one can see unrest on many different levels. For this reason it is prudent that chartering managers revisit their proforma charter parties and in particular, those often neglected clauses which may be tested in these difficult times. Naturally, Owners would like to restrict the vessel commercially to avert or minimize risk while Charterers require greater flexibility, which translates into increased risk. Let the terms and condition trading begin!

While charter parties should be reviewed completely and an understanding of how they "dove tail" with existing insurance coverage, or supplemental insurances being considered, we point out some clauses, which should be visited:

Trade Exclusions, War Risk; Piracy; Boycott; Capture, seizure, arrest; War Cancellation; Off Hire; Extra Insurance; Requisition; Double Banking; ITF; ISPS; General Average; Arbitration; Trade Exclusions; Letter of Indemnity, Etc.

The Arab Spring has seen North African countries undergoing power change and frankly, no one knows which parties will prevail as governing authorities. This of course includes the Suez Canal. East Africa, as we all know, continues to deal with piracy and let's not forget about Syria, Iraq, Iran, Yemen, Pakistan and North Korea, all of which are delicate politically.

Preparing for the drag along the bottom may avert or minimize trouble during this difficult downturn. Hence, make sure a seasoned chartering man thoroughly digests the intent of each clause of your charter parties and relates these clauses to the difficult times in which the industry and the world as a whole are experiencing.

THANKS FOR THE MEMORIES

By Mrs. Sally Sielski

I so much appreciated the warm reception I received from the members of the SMA, the New York admiralty bar and the shipping community at The Ketch Restaurant on January 11. Thank you for this festive and special moment.

I would also like to express my gratitude to all of you who have done something special. I was happy that some of my family was able to share the day and see their favorite aunt honored. The past 32+ years flew by – isn't there a saying about "time flies by when you're having fun?" I will miss it, but I feel so proud that I had the opportunity and enjoyed working for and with all of you.

Thanks for the memories.

Sally

THE ARBITRATOR

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