VOLUME 43 | NUMBER 1 | SEPTEMBER 2012

# THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

### INDEX TO THIS ISSUE



## THE PRESIDENT'S CORNER

Dear Readers

A large contingent of SMA members, attorneys and better halves attended the International Congress of Maritime Arbitrators (ICMA) in May held in Vancouver, B.C. I congratulate the Committee on the excellent program and overall success of the week-long Congress. It was good to see old friends and colleagues from all around the globe, and make new ones. More on ICMA XVIII can be found in this issue of THE ARBITRATOR. The next Congress will be held in Shanghai in 2015.

The Vancouver Committee hosted a wonderful farewell dinner-dance on Thursday of the Congress. The band, food and beverages were great and the spectacular twilight views of the city and harbor were most enjoyable – making for a perfect evening. At the dinner, the Committee sponsored a raffle, with the proceeds going to the International Sailors' Society of Canada, a charity that helps fund port centers and related activities in Canada for international seafarers. Now some would say that the grand prize of the raffle was a perfectly fitting leather bomber jacket, won by a certain New York delegate, and enviously admired by many, but I think the high points were the dinner-dance, the opportunity to be generously charitable to a good cause and the international camaraderie of the evening.

Closer to home, on January 1, Ms. Patricia Leahy took over the SMA office responsibilities upon Sally Sielski's retirement. For those who have not yet met Patty, she comes to the SMA after 15 years in the Human Resources (HR) Department at the New York Stock Exchange (NYSE). Patty has a Bachelor of Science degree in Business Administration from Marist College. At the NYSE, she was involved in all aspects of the HR Department's responsibilities ranging from developing mentoring programs to the merger of NYSE Regulations with the Financial Industry Regulatory Authority (FINRA) and the merger with Euronext. When you meet her at one of our luncheons, be sure to ask about baseball! Welcome aboard, Patty!

Don't forget, the SMA luncheon season starts in October – second Wednesday of the month.

Best regards,

**Austin L. Dooley**

# IS THE EUROPEAN UNION THE NEW REGULATOR OF MARITIME AND ADMIRALTY LAW IN EUROPE AND ON THE INTERNATIONAL STAGE?

**by Prof. Dr. Olivier Cachard[1]**
**Honorary Dean of the Faculty of Nancy, France**
**Director of the IDIC-Institut François Gény**
**Member of the Board of the Association Française de Droit Maritime**
**Maritime Arbitrator**

## *1. Facts and Figures about the European Shipping Industry*

Although there is no unified European flag (since Member States remain sovereign), the economic importance of Maritime Europe shall not be underscored, even in the context of the rise of Asia. Nine European States stand in the top twenty-five flags of registry established in 2011 by the M.A.RA.D. When their importance in DWT is added, their coalition ranks second, just behind Panama and ahead of the coalition of the merchant fleets of China, Hong-Kong, Singapore and South-Korea. According to the global ranking of world ports established by the *American Association of Port Authorities* on the basis of the total cargo volume, seven european ports rank in the top fifty, Rotterdam standing fourth. As far as shipbuilding is concerned, in 2011, the balance is more clearly in favour of Asia that took the lead of the top three with China (delivering a total of 1177 ships with 67.2 million DWT), South-Korea (delivering a total of 531 ships and 53.6 DWT) and Japan in the third position (delivering a total of 462 ships, 32 million DWT) according to a recent study by *Clarkson Research*. Europe is still very active in niche markets such as cruise vessels, military vessels or LNG carriers. This is the reason why the *Community of European Shipyards Association* has initiated a sector specific response named «*Leadership 2015*» notably based on the improvement of shipping finance, R & D and protection of intellectual property rights. Finally, in terms of legal services, Europe benefits from its legal pluralism, with the cooperation and mutual understanding between Civil Lawyers, notably the Belgians, the French, the Dutch and the Germans on the one hand and Common Lawyers, notably the English and the Maltese on the other hand. As far as maritime arbitration is concerned, there is also a pluralism with London arbitration (and its well known characteristics such as its predominant reliance on the English case law and the lack of publication of the arbitral awards) and continental arbitration, frequently in Paris, (and its well known characteristics such as the publication of anonymised awards and thus the existence of an arbitral case law).

THE ARBITRATOR



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



## *2. The European Union after the Lisbon Treaty*

By the *Lisbon Treaty*, signed on 13rd December 2007 (and entered into force on 1st December 2009), the Sovereign States of Europe have simplified the dual organization that was combining the European Communities on the one hand and the European Union on the other hand so as to merge the institutions and rules into a single international organization, as explained, in Article 1 of the *Treaty on European Union*:

*«By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common.*
*This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.*
*The Union shall be founded on the present Treaty and on the (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community».*

The resulting institutional system remains somehow complex and shall not be summarized to a pure federal system. More appropriately, it might be described as a «*Federation of Nation States*» based altogether on co-operation and integration. This is the result of traditions, taken into account by the European Institutions, through the defense of the cultural diversity of Member States and through the principle of subsidiarity stating that the Union European should only take measures when a purpose cannot be sufficiently achieved by the Member States alone.

### *3. The Extension of the Internal Competences of the European Union*

The European Union is an autonomous legal order, that is different from and superior to the legal orders of Member States, according to the principle of primacy of EU law over national laws. Another principle is that the European Union can only act where given the power to do so - implying that national powers are the rule and the Europe Union's the exception. This has always been a basic feature of the European legal order, known as the principle of attribution of powers. Therefore, what are the powers attributed to the European Union in Maritime and Admiralty Law? Originally, there was hardly any power attributed to the ex European Communities in the field of Admiralty and Maritime Law, except the transportation policy (but in restricted terms that even seemed to exclude maritime navigation according to articles 74 and 84 of the Rome Treaty). Nevertheless, the European institutions, especially the European Council[2] and the European Court of Justice[3], gradually extended the powers of the European Communities in the maritime field. This was technically achieved by the implementation of general rules and principles to maritime activities: competition law, non-discrimination and principle of freedom of provision of services. Then the catastrophes of the wreckages of Erika and Prestige on the shores the European coasts that led to the adoption of security and environment protection rules. Today, according to the *Treaty on the functioning on the European Union*, competences in the maritime field might be divided into three categories:

1. Exclusive competence to the EU in establishing competition rules and in the conservation of marine biological resources under the common fisheries policy (Article 3 TFUE).
2. Shared competences between the EU and member States in the domain of transportation, environnement and fishing (Article 4 § 2 TFUE), noting that Member States can only act if the EU has refrained to do so.
3. Competence of the Member States, under the coordination of the EU in matters of Tourism (Article 6 TFUE)

It is therefore crystal clear that the internal competences of Member States (3) are shrinking, which will have strong consequences on external competences of the EU and Member States.

### *4. The Extension of the External Competences of the European Union*

From their very nature, maritime and admiralty law questions deserve an international regulation, for the sake of efficacy. This is why, from the origins and after the Rome Treaty, Member States that still are sovereign and that were then vested with full powers in external matters made Treaties, first through the *Comité Maritime International* in Antwerpen, then through the *IMO* for safety questions and through the *UNCTAD* or *UNCITRAL* for the regulation of contracts of carriage. Exerting the competences they then had, Member States individually negotiated and ratified international conventions. There is a significant number of Maritime Conventions that were thus ratified by most Member States of the EU. In the original Rome Treaty, there were a limited number of provisions referring to the external action by the European Community (Ex. article 228 to 231 and 238). With the Lisbon Treaty, the number of express external competences of the EU has increased with, in particular, international agreements in the area of environmental policy (Article 191 (4) TFUE), international agreements in the context of common commercial policy (Art. 207 FTUE) and even the possibility to conclude an agreement "*where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*" (Article 216 (1) TFUE). But, there has been an even more efficient basis to the extension of the external competences of the UE, that has led to a shift of balance to the detriment, if one may say so, of Member States. This shift of balance had already started long before the Lisbon Treaty when the European Court of Justice developed the doctrine of implied competences in the AETR Case and in the Opinion 1/76[4]. As there were not many provisions referring to the external action by the European Community in the original Rome Treaty, the European Court of Justice developed the doctrine of implied powers on the logical base of a necessary parallelism of internal and external competences of the EU. Roughly summarized, when an internal shared competence has "*belonged fully and definitively to the Community*", it becomes an exclusive competence of Europe, as now confirmed by Article 3 (1) (d) TFEU; then, when the internal competence is exclusively acquired, parallelism allows the European Community, now the European Union, to conclude international agreements. This means that in a near future, on the international stage, discussions in maritime law will take place with the European Union in lieu of its Member States. This perspective already creates political and legal challenges.

### *5. The Political Challenges posed by the Extension of the Competences of the European Union*

The acquisition of external competences by the European Union in the maritime field raises three political issues. A first issue is the willingness of the EU to cooperate with international organizations in order to promote and develop international rules that take into account the peculiarities and the traditions of maritime law. Evidence has already been given by the European institutions after the wreckage of Erika and Prestige: Europe finally has dropped its own project to create a complementary fund, the COPE (*Compensation for Oil Pollution in European Waters Fund*) and, instead, was proactive at the 2003 London Conference increasing the limit of the existing *I.O.P.C. Fund*. Europe has also enacted in its own regulations provisions adopted by the I.M.O., for instance provisions about double hull vessels in Regulation n EC 417/2002. The second issue, that is more challenging, is the statutory opportunity given to the European Union to become a full member of the I.M.O.: so far, only national States are eligible to become members. A similar question was raised and resolved for the *Hague Conference for Private International Law* whose statute was modified in 2006 in order to admit *Regional Economic Integration Organizations* (Art. 3). This issue is of crucial importance if we recall the principle of primacy of EU Law over national laws and even over international conventions ratified by Member States. As long as an international convention has not been ratified by the EU (the Montréal Convention was), the European Court of Justice is not bound by it and will therefore give prevalence to any secondary EU legislation over an international convention. The third issue is the global political effect of the substitution of a *Regional Economic Integration Organization* to its 27 Members States: in terms of political influence and of economic weight (especially considering the tonnage of the fleet), it is not exaggerated to say that the EU is now the major player. Therefore, in the future, will it be possible to have an international convention entering into force without the ratification or the accession of the European Union? Paradoxically, this may lead to the decline of universality in cases of conflicts between Europe and its partners.

### *6. The Legal Challenges posed by the Extension of the Competences of the European Union*

The *Erika case* illustrated the complexities of the situation of Member States when there is a conflict between the provisions of secondary European legislation, i.e. a directive, and an international convention that was ratified by Member States but not by the Union. From the point of view of the European legal order, the primacy of European law leads to the full implementation of directives, under the threat of an infringement proceeding by the European Commission against the defaulting Member States. But simultaneously, both from the international and constitutional points of view, a State is bound by its commitments when it has ratified an international treaty. A State cannot escape *Pacta sunt servanda* on the grounds that it is required to do so by its national law or by EU Law: it is thus taken into an inescapable contradiction. In the *Erika case*, the conflict arose between the *Convention on Civil Liability for Oil Pollution Damages* and the *Directive n 75/442 EC on waste* if the heavy fuel that had spread was to be considered as a waste. Indeed, under the Convention, that was ratified by France and by 24 Member States of the EU (but not by the EU), civil liability is channeled and limited (except as otherwise provided by the Convention itself). But in the meantime, article 15 of the *Directive n 75/442 EC* endorses the principle that the polluters pay and that all costs of restoration have to be paid for. In its decision 188/07[5], the ECJ tried to find a conciliatory interpretive ruling that "*if it happens that the cost of disposing of the waste produced by an accidental spillage of hydrocarbons at sea is not borne by the International Oil Pollution Compensation Fund, or cannot be borne because the ceiling for compensation for that accident has been reached, and that, in accordance with the limitations and/or exemptions of liability laid down, the national law of a Member State, including the law derived from international agreements, prevents that cost from being borne by the shipowner and/or the charterer, even though they are to be regarded as 'holders' within the meaning of Article 1(c) of Directive 75/442, as amended by Decision 96/350, such a national law will then, in order to ensure that Ar-*

*ticle 15 of that directive is correctly transposed, have to make provision for that cost to be borne by the producer of the product from which the waste thus spread came. In accordance with the 'polluter pays' principle, however, such a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur"*. But even when the European Union is directly bound by an international convention, such as the U.N.C.L.O.S., there are remaining issues. In the *Intertanko* case[6], it was alleged that two provisions of the Directive 2005/35/EC on ship-source pollution were contrary to the M.A.R.P.O.L. Convention and to the U.N.C.L.O.S. Convention. First, as the EC had not ratified M.A.R.P.O.L. Convention, the ECJ declined to control the conformity of the directive to a convention that is not a part of the European legal order. Second, as the EC had ratified the U.N.C.L.O.S. Convention, the ECJ went further and checked whether a private party was allowed to avail itself of the provision of the Convention. The ECJ concluded that "*In those circumstances, it must be found that UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State"*. It therefore refused to control the conformity of the directive to the U.N.C.L.O.S. Convention!

### 7. What is to come next?

The debated issue of the next months lies in the articulation of the regime governing international jurisdiction (the revision of the *Regulation EC 44/2001*, former *Brussels Convention on jurisdiction and enforcement*) and the regime governing international arbitration. In theory, these are two separate issues, jurisdiction being governed in Europe by *Regulation EC 44/2001* and international arbitration being governed by the New-York Convention of 1958. Still, there is a precise but significant zone of conflict around the validity of the arbitration clause. The question is then to know, according to the *Competence-Competence principle*, who has chronological priority to decide whether the arbitration clause is valid or not[7]. This is known in the US Doctrine as "The 'Gateway' Problem in International Commercial Arbitration"[8]. If one considers that according to the binding effect of contract, arbitrators have to decide first on the validity of the arbitration clause, the gateway issues stand outside of the scope of the revision of Regulation 44/2001. If one now considers that State Courts may be seized of the validity of an arbitration clause, it does not consequently mean that the regime of the enforcement of the resulting state court judgments should be governed in Europe by EC Law and Regulation 44/2001. Indeed, these judgments related to the effect of arbitration clauses are closely related to the New York Convention, whose operation should not be disturbed by EC Law. Our conclusion is that the European Union should be associated more and more to the formation of international rules in the process of law-making but should not try to neutralize, overpass or distort them once they have entered into force.

---

1. Email: olivier.cachard@lexmaritima.net, website: www.lexmaritima.net

2. Council Regulation (EEC) n 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries; Council Regulation (EEC) n 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport; Council Regulation (EEC) No 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport ; Council Regulation (EEC) n 4058/86 of 22 December 1986 concerning coordinated action to safeguard free access to cargoes in ocean trades.

3. For example, ECJ, 4 april 1974, Case n C-167/73 *Commission c. République Française*.

4. On these two cases, P. Eeckhout, *EU External Relations Law*, Oxford EU Law Library, 2nd edition, 2011.

5. ECJ, Case n C-188/07, 24 june 2008, *Commune de Mesquer*, our comment «Un demandeur peut-il obtenir du droit communautaire ce que le droit maritime lui interdit de demander?» in *Le Droit maritime français*, 2008, p. 712 f.

6. ECJ, Case n C-308/06, ECJ, Grand Chamber, 3rd june 2008, *Intertanko*, *Europe* n 8, August 2008, comm. 253, D. Simon

7. O. Cachard, «De Bruxelles à New-York: L'arbitrage commercial international est-il soluble dans le Règlement CE 44/2001 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale?», in *Liber Amicorum Bernard* Gross, Nancy, PUF, 2010; more generally, O. Cachard, *Droit du commerce international,* 2nd ed., Paris, LGDJ, 2011.

8. G. A. Bermann, «The "Gateway" Problem in International Commercial Arbitration», *Yale Journal of International Arbitration,* vol. 37 1., 2012, p. 1-49.

## PRESENTATION OF EVIDENCE UNDER SMA RULES

**By Dr. Austin L. Dooley, President of the SMA**

When discussing New York arbitration with people working in different sectors of the maritime industry, questions on the matter of evidence frequently come up. SMA's Rules Sections 23 and 24 explain the requirements for the presentation of evidence. The fundamental principle in these two sections is that the panel will be the judge of the relevancy and materiality of the evidence offered.

In more detail, Section 23 provides that parties may offer such evidence as they deem necessary for the panel to gain an understanding and make a determination of the dispute. The parties shall also produce any additional evidence requested by the arbitrators and the panel has the power to direct that depositions be taken from witnesses who cannot testify in person. Of course, all evidence submitted to the panel, as well as all written communications between any party and the panel, after it has been constituted, shall be submitted to all parties.

Also, all evidence shall be taken in the presence of the panel and of all the parties, except in the case of depositions or where any of the parties might be absent without reasonable cause, in default, or has waived its right to be present. Care should be taken to distribute all evidence to all interested parties, particularly in cases being considered on documents alone, or where submission by mail or other forms has been agreed. In cases where witnesses are not available in New York, video-conferencing has been used to hear testimony.

In the absence of oral testimony or depositions, the panel may also receive evidence by affidavits (Section 24). The panel shall give such affidavits the appropriate weight after considering any objections made by opponents. The panel also has the power to subpoena witnesses or additional documents as they see necessary. A sample subpoena is shown in Appendix B of our new rule book (the rules can be found on our webpage www.smany.org).

## SMA NEWS

### Election Results

On May 8, 2012 the SMA held its 49th annual meeting and elected the following slate of new governors: Lucienne C. Bulow, Donald B. Frost, Michael J. Hand and Bengt E. Nergaard. Manfred W. Arnold and Thomas J. Bradshaw were appointed by the President to serve one-year terms.

### Board of Governors

The governors and alternates for the 2012/2013 business year are:

Manfred W. Arnold (Robert J. Flynn)
Thomas J. Bradshaw (Svend H. Hansen, Jr.)
Lucienne C. Bulow (Thomas J. Fox)
Austin L. Dooley, President
Donald B. Frost (Robert C. Meehan)
Michael Hand , Treasurer (Michael D. Fackler)
David W. Martowski (Nigel J. Hawkins)
Klaus C.J. Mordhorst (James N. Hood)
Bengt E. Nergaard (Peter Wiswell)
Donald J. Szostak (Allan G. Bowdery)
James J. Warfield, Vice President
Soren Wolmar, Secretary (Robert J. Spaulding, Jr.)

### Board Meetings and Luncheon Dates

Board of Governors meetings will be held preceding the monthly luncheons of the organization. The meetings/luncheons will be held at The Ketch, 70 Pine Street on the following dates: September 12 (Members only), October 10, November 14, December 12, January 9, February 13, March 13, April 10 and Tuesday, May 14 (Annual General Meeting). All luncheons are open to all, with the exception of September 12 and May 14, which are for members only.

### Committees and Chairs

| | |
|---|---|
| THE ARBITRATOR | TBN |
| Award Service | Bengt E. Nergaard |
| Bylaws and Rules | Lucienne C. Bulow |
| Education | Klaus C.J. Mordhorst |
| ICMA | Manfred W. Arnold |
| Liaison | Manfred W. Arnold |
| Luncheon | James J. Warfield |
| Membership | Bengt G. Nergaard |
| Professional Conduct | Svend H. Hansen |
| Salvage | Peter S. Wiswell |
| Seminar and Conventions | Klaus C.J. Mordhorst |
| Technology | Donald J. Szostak |

8th Index & Digest
(ad hoc) ...........................Lucienne C. Bulow
Friends & Supporters
(ad hoc) ...........................Manfred W. Arnold
Claims Escrow (ad hoc)............John F. Ring, Jr.

---

## *MERCANTE'S SEA TRIALS*
## I JUMP — THEREFORE I SUE

One recent case falls into a category similar to the children's book - *A Series of Unfortunate Events*. Or, more aptly described as a series of stupid events. Nonetheless, the injured party commenced a lawsuit and after many strike-outs, finally scored with a jury.

### *Might as well jump!*

The owner of an 18-foot ski boat and three guests went out for a day of wake-boarding on a lake. The boat was powered by a 135 horsepower stern drive engine (inboard/outboard) manufactured by a reputable boat and marine engine manufacturer. The stern drive, equipped with propeller, was hydraulically lowered into and raised out of the water for use. While underway, one of the two tow ropes unhooked from the boat and fell into the water. Then, one of the guests decided to jump in the lake behind the boat to retrieve the rope. He did so apparently without notifying the driver. Then, the driver put the boat in reverse and backed up over his guest. Then, the spinning propeller shredded the guest's leg which ultimately had to amputated at the hip joint. A series of stupid events, yes, but this would not be a *SEA TRIALS column* without a lawsuit. The guest sued both the manufacturer of the engine and the vessel, alleging that the boat was defectively designed because of its use of an 'unguarded' propeller.

### *Third time's a charm*

The case proceeded to a jury trial *three* times in federal court. The first two juries could not reach a verdict so those trials ended with no runs, no hits, and probably a few errors. Not to be deterred, the plaintiff took one more at-bat and the third jury concluded that there was indeed a design defect in the vessel and engine by virtue of the unguarded, exposed propeller. The jury awarded damages to the plaintiff. The engine manufacturer decided to appeal from the jury's award of damages to the ill-advised diver.

To recover on a design defect claim, a plaintiff must typically prove three elements, namely, that (i) the product was defectively designed so as to render it unreasonably dangerous, (ii) a safer alternative design existed, and (iii) the defect was a leading cause of the injury for which the plaintiff seeks to recover. Simply put, the main question in a design defect case is whether there was a reasonable alternative design that at a reasonable cost would have reduced the risk of harm.

### *Not very 'appealing'*

The Court of Appeals heard oral arguments and carefully reviewed the evidence and the elements of a design defect theory of liability. The court determined that each of the criteria was adequately presented at trial and with sufficient and credible evidence. The first question was whether the outdrive was defectively designed so as to render it unreasonably dangerous. In this regard, the injured plaintiff had presented evidence at trial of the number and severity of reported propeller injuries, and had submitted a proposed alternative design that would not adversely impact the engine's utility. Expert witnesses testified at trial that the proposed alternative was actually a safer overall design, not excessively expensive and would eliminate propeller injuries. Another witness, a vessel owner, testified that he considered an exposed propeller to be dangerous, and that he would have purchased a propeller guard had one been available. With the totality of this testimony, the court found on appeal that enough evidence had been submitted at trial to prove the design was defective.

The next element of proof was whether a safer alternative design existed. Here, in response to the engine manufacturer's contrary contentions, the appellate court determined that an injured plaintiff is not required to *build* and to *test* a prototype of the alternative design to show 'technological feasibility,' but is merely required to prove that the alternative design was "capable of being developed." (Citation omitted). At trial, the plaintiff's team also presented testimony of an inventor and builder of an alternative design to safeguard a spinning propeller. That expert testified that the cost of building a propeller guard with a shield was just $150 for each item, plus an additional $100 if the vessel owner chose to weld the guard and shield onto the boat, for a total of just $400. The appellate court found this trial testimony to be sufficient evidence of economic feasibility of an alternative design. The Court of Appeals did not struggle with the notion that the exposed and unguarded propeller was a contributory cause of the injury.

The appellate court then considered the engine manufacturer's argument that an improper instruction was given to the jury by the trial judge prior to the jury beginning deliberations. Once again, the Appellate Court found no merit to the 'defective' jury instruction argument and determined that the jury was *clearly* and *correctly* instructed that a design defect is one that makes a product unreasonably dangerous based on the utility of the product and the risk involved. The court would not overturn the jury's ruling on the basis of an alleged improper jury instruction, and presumed that the jury did indeed follow the judge's instruction carefully. Moreover, even had the instruction been an erroneous one, the Appellate Court found that the challenged jury instruction would not have affected the outcome of the case and noted that "perfection is not required as long as the instructions were generally correct and any error was harmless."

Thus, after three jury trials and an appeal, the guest who jumped overboard from a moving boat and was run over was able to recover against the engine and boat manufacturer for his injuries.

### *Liability in the making*

While this decision may seem surprising to some, this had been brewing since a 2002 United States Supreme Court decision in *Sprietsma v. Mercury Marine*, where, in a propeller fatality case, the United States Supreme Court held that (1) despite the engine manufacturer's arguments, the Federal Boat Safety Act (FBSA) did not preempt common law claims arising out of a failure to install propeller guards over a boat's propeller, and (2) the Coast Guard's decision not to adopt any federal regulation requiring propeller guards did not preempt a personal injury claim resulting from an exposed propeller. In *Sprietsma*, the Supreme Court remanded the case back to the trial court for further proceedings consistent with its opinion on the so-called 'preemption' argument. Not surprisingly, that case was never heard from or reported again, so the defendants undoubtedly settled the case feeling that the axe was about to fall with regard to the lack of propeller guards.

Interestingly, as a result of numerous propeller injuries, a 'propeller guard sub-committee' had been established by the Coast Guard who, at some point, recommended in favor of "educational and awareness campaigns" and publishing a series of articles aimed at avoiding boat-propeller accidents which was to include warning signs and propeller guards.

### *Conclusion*

As result of the United States Supreme Court's earlier decision and the recent ruling reported herein, one should not be surprised to see boats on the market and in the water with warning signs at the stern, and/or equipped with propeller guards — just in case one of your guests decides to jump overboard while you are underway.

*JAMES E. MERCANTE, admiralty partner with Rubin, Fiorella & Friedman LLP, and Commissioner on the Board of Commissioners of Pilots of the State of New York.*

*E-mail address: jmercante@rubinfiorella.com.*
*The author thanks New York Law School student intern, Alison Meigh, for her excellent contribution in the legal research and editing of this article.* *The information in this article must not be construed as legal advice and laws may vary from jurisdiction to jurisdiction.*

## ICMA XVIII – VANCOUVER, B.C. 2012

**By Dr. Austin L. Dooley**

If you have not been to Vancouver – go. This was the second occasion for ICMA delegates to enjoy the uniquely beautiful Canadian city of VBC. The congress provided for a professional dialog on international arbitration issues and an understanding of the evolving processes in all the forums represented by the delegates. Additionally, all of this was conducted with a most enjoyable social program.

A key feature of ICMA is the Cedric Barclay Memorial Lecture. At each Congress a prominent member of the international maritime law and arbitration community is invited to give a lecture on a major issue. This year noted Italian attorney Dr. Francesco Berlingieri of Genoa discussed "MARITIME ARBITRATION AND ARREST OF SHIPS" via a live video feed from Italy.

The full 774 page collection of papers are available from the Vancouver committee. In 2004, at the London ICMA, the papers were released on a CD-ROM for the first time, but here the full collection is on an even less bulky USB drive in pdf searchable format.

While much was discussed by the delegates from the many forums represented, the New York contingent made a positive contribution to the agenda with a total of nine papers. They were:

- OVERVIEW OF SIGNIFICANT RECENT DEVELOPMENTS IN NEW YORK ARBITRATION, 2009-2012. John D. Kimball
- REQUESTS FOR PRE-AWARD SECURITY AND OTHER INTERIM REMEDIES IN NEW YORK MARITIME ARBITRATIONS: A PRACTIONER'S PERSPECTIVE. Peter Skoufalos and LeRoy Lambert
- ORDERING SECURITY FROM A U.S. MARITIME ARBITRATOR'S PERSPECTIVE. David Martowski
- CONSEQUENTIAL DAMAGES: THE FOLLOW-ON CHARTER - HEDGING LOSSES AND GAINS. Jack Berg
- ASSESSING DAMAGES IN MARITIME ARBITRATIONS UNDER THE RULE IN HADLEY V. BAXENDALE. Anthony J. Pruzinsky and Patrick V. Martin
- THIRD PARTY SHIPMANAGEMENT. John P. Vayda and Corey R. Greenwald
- SHIPBUILDING DISPUTES: SELECTING AND TAILORING ARBITRATION TO SUIT. Francis X. Nolan III
- OVERCOMING THE PITFALLS OF INTERNATIONAL SALES OF BULK LIQUIDS ON MODIFIED CIF TERMS. Michael Marks-Cohen
- TIME AND EXPENSE IN NEW YORK SMA ARBITRATION. Dr. Lucienne Bulow

Each of the above papers addressed specific issues in detail and generated strong dialog between the authors and the delegates during the question and answer periods in each session. The review of New York awards by John Kimball was one of the kick off papers on Monday morning. The paper provided a review of arbitration issues decided upon in the published SMA awards from July 2009 through January 2012. Amongst the issues reviewed in John's paper were force majeure, a parties obligation to provide cargo responsibility for cargo contamination, piracy, restraint of princes, complications dealing with port/berth conditions, and charterer's liability for cancellation of subsequent charter. In this issue of THE ARBITRATOR, we've reprinted Jack Berg's and Lucienne Bulow's papers and will do so with others in future issues. All of the SMA awards addressing these issues reviewed by John are available in the online service provided by Westlaw and Lexis-Nexis.

## CONSEQUENTIAL DAMAGES THE FOLLOW-ON CHARTER HEDGING LOSSES AND GAINS

**Jack Berg**
**Society of Maritime Arbitrators New York, USA**

Simply stated, damages are compensation due to a party as a consequence of a loss or expense caused by a breach of contract. The law on direct and indirect damages can be traced to the seminal case of Hadley v. Baxendale (1854) 9 Exch. 341 which remains the focal point under both English and American law in determining the quantum of damages that may be recovered in a breach of charter contract. Briefly, Hadley involved the delayed delivery of a broken mill shaft which was to serve as a pattern for a new one that was to be machined. As a result, there was a prolonged delay in restarting the mill's operation. The mill owner's claim for loss of profits was denied. Here, the court defined the types of damages that may be due for the breach of a contract. The two types, or limbs as they have become known, are:

- Loss that would be incurred in the usual course of things, and
- Loss outside the usual course of things that the parties contemplated might occur if a breach occurred.

The first type referred to is understood to be direct damages. The second category has become known as indirect or consequential damages. The distinction between the two types is not always clear, and courts often differ on what they consider consequential as opposed to direct damages.

This paper addresses two aspects of consequential damages, namely, issues relating to the loss of a follow-on charter and the treatment of hedging losses/gains as elements of damages. These issues arise from time to time in charter party disputes and commodity sales contracts when markets experience wild fluctuations.

### A. THE FOLLOW-ON CHARTER

**In Transfield Shipping Inc. v. Mercator Shipping Inc., The Achilleas, [2008] UKHL 48**, the time chartered vessel Achilleas was redelivered late as a result of delays encountered on its last voyage, which was a legitimate voyage under the charter. Since the vessel was redelivered beyond the laycan of the follow-on charter, owner had to renegotiate a substantially lower rate of hire with the new charterer. Owner's claim for damages was based upon the difference between the rates of the initial follow-on fixture and the renegotiated rate for the entire period of that charter.

The issue in question was whether the owner's claim for damages was too remote and therefore not recoverable. The arbitration tribunal majority held that the loss on the follow-on charter was recoverable under the rule of Hadley as arising naturally from the breach of contract which should have been anticipated by charterer when it redelivered the vessel late. The Commercial Court and Court of Appeal affirmed the tribunal's decision. The House of Lords reversed, holding that owner was not entitled to recover the difference between the original and renegotiated rates. Owner's damages were accordingly limited to the generally accepted difference between the charter rate and the market rate for the overlap period.

The House of Lords approached the question of remoteness of damages in two ways, and the paths have been described as the orthodox approach and the broader approach. The orthodox approach considered whether at the time of making the contract the parties would have foreseen in the ordinary course of events that an overlap of nine days would have caused the magnitude of the loss being claimed. Two of the Lords decided the case on the orthodox approach, two decided on the broader approach and one concluded on the basis of both.

In accepting the orthodox approach Lord Rodger considered the issue to be whether the parties would have contemplated, at the time of contracting, that an overlap of nine days would have resulted in the kind of loss claimed. He thought not, and stated:

> *Returning to the present case, I am satisfied that, when they entered into the addendum in September 2003, neither party would reasonably have contemplated that an overrun of nine days would 'in the ordinary course of things' cause the owners the kind of loss for which they claim damages. That loss was not the 'ordinary consequence' of a breach of that kind. It occurred in this case only because of the extremely volatile market conditions which produced both the owners' initial (particularly lucrative) transaction with a third party, and the subsequent pressure on the owners to accept a lower rate for that fixture. Back in September 2003 this loss could not have been reasonably foreseen as being likely to arise out of the delay in question. It was accordingly, too remote to give rise to a claim for damages for breach of contract.*

Lord Hoffman considered that the orthodox approach, which while it would apply to the majority of cases, would be insufficient if surrounding circumstances or market practice and understanding indicated that a party would not have reasonably been expected to assume responsibility for such losses. He stated:

> *The case therefore raises a fundamental point of principle in the law of contractual damages: is the rule that a party may recover losses which were foreseeable ('not unlikely') an external rule of law, imposed upon the parties to every contract in default of express provision to the contrary, or is it a prima facie assumption about what the parties may be taken to have intended, no doubt applicable in the great majority of cases but capable of rebuttal in cases in which the contest, surrounding circumstances or general understanding in the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses.*
>
> * * * * *
>
> *If, therefore, one considers what these parties, contracting against the background of market expectations found by the arbitrators, would reasonably have considered the extent of the liability they were undertaking, I think it is clear that they would have considered losses arising from the loss of the following fixture a type or kind of loss for which the charterer was not assuming responsibility. Such a risk would be completely unquantifiable, because although the parties would regard it as likely that the owners would at some time during the currency of the charter enter into a forward fixture, they would have no idea when that would be done or what its length or other terms would be.*

In analyzing the underlying circumstances, the court considered the resulting liability for the loss of the fixture to be unquantifiable, unpredictable, uncontrollable or disproportionate. It was the unpredictable and unquantifiable element of the follow-on fixture here that made potential liability disproportionate and commercially unacceptable.

Interestingly, Lord Hoffman further noted:

> *There is no case in which the question now in issue has been raised. But that in itself may be significant. This cannot have been the first time*

> *that freight rates have been volatile. There must have been previous cases in which late redelivery caused the loss of a profitable following fixture. But there is no reported case in which such a claim has been made.*

**Sylvia Shipping Co., v. Ltd. v Progress Bulk Carriers, Ltd., [2010] EWHC 542 (Comm)**, involved charterer's claim for loss of profit on a canceled sub-charter. The arbitration tribunal concluded that the owner breached its maintenance obligation under the charter party in failing to maintain the readiness of the cargo hold for a wheat cargo. As a result, the sub-charterer canceled the sub-charter. Charterer's claim for loss of profit expected to be earned on the sub-charter was granted by the tribunal

The issue on appeal was whether the damages being claimed were too remote. Owner's appeal relied on the House of Lord's decision in the Achilleas. The appeal was dismissed and the court stated, in part:

> *In my judgment, the decision in The Achilleas results in an amalgam of the orthodox and the broader approach. The orthodox approach remains the general test of remoteness applicable in the majority of cases. However, there may be 'unusual' cases, such as The Achilleas itself, in which the context, surrounding circumstances or general understanding in the relevant market make it necessary specifically to consider whether there has been an assumption of responsibility. This is most likely to be in those relatively rare cases where the application of the general test leads or may lead to an unquantifiable, unpredictable, uncontrollable or disproportionate liability or where there is clear evidence that such a liability would be contrary to market understanding and expectations.*

The court concluded there were important differences between the claims in this case and those in The Achilleas. The court continued:

> *Unlike in The Achilleas, there is no finding of a general market understanding or expectation that damages for delay during the currency of a time charter party are limited to the difference between charter and market rates during the period of delay. On the contrary, … the general understanding is that damages can be recovered for loss of a fixture in such circumstances. Moreover, the measure of damages recoverable for a lost voyage fixture is a well recognized measure of damages in charter party cases.*
>
> *Similarly, unlike in The Achilleas, this is not a case in which it can be said that the resulting liability is likely to be unquantifiable, unpredictable, uncontrollable or disproportionate. Where a follow on fixture is made at the end of a charter it could be for any period. It is entirely possible that it could be a long term charter lasting years even though the charter breached is for a relatively short term. It is the unpredictable and unquantifiable element introduced by the various possible lengths of follow on charter that makes the potential liability disproportionate and commercially unacceptable. By contrast, loss of a sub-charter during the currency of a time charter can never be for a longer period than the time charter itself. Further, very often, as here, it will be for the loss of the specific voyage for which the vessel was fixed. Loss of a voyage fixture within the course of a charter party will result in a loss within reasonable confines. It is possible that market movements may mean it is a large loss, but it will be a loss based on a trading voyage.*

There was no suggestion by the court nor was there a finding by the tribunal that the sub-charter was anything other than a contract reasonably fixed at a market rate. The circumstances that made Achilleas an unusual case were held to be inapplicable here.

The dispute on the **MT Seadancer SMA 4131 (June 2011)** arose under an ASBATANKVOY charter between the owner and Koch Shipping, as charterer. The initial claims for demurrage and detention at the discharge port in the sum of $827,116 were paid. The sole issue remaining before the panel was owner's loss of earnings claim for $2,025,639 due to the loss of its follow-on charter with TOTAL. At the heart of the shipowner's claim is the contention that Koch misled it about the vessel's availability after discharge and that Owner relied on this misinformation to fix the vessel's next voyage. It was further alleged Koch purposely detained the vessel as floating storage for its cargo. The TOTAL follow-on charter provided for Worldscale 250 and demurrage of US$ 100,000. The prevailing freight rates had more than doubled and the demurrage rates had almost tripled from the level the Seadancer was fixed by Koch.

The delays at Corpus Christi while Koch was attempting to market the unsold cargo amounted to 11 days for which Koch paid demurrage and detention damages at the market rate. The panel majority was hard pressed to find that Koch's actions at discharge warranted further charges. The language of the voyage orders which the owner allegedly relied on were not final, and stated in part:

> *The Intended port(s) indicated in these orders, in and of themselves, are not a declaration of port option. Charterer reserves the right to change and or modify the port(s) in accordance with the applicable C/P.*

> In denying the owner's claim, the panel stated:

> *We now address the question of whether, under U.S. law, a charterer who wrongfully and purposely detains a vessel may be held accountable for the monetary losses that result when an owner is compelled to cancel a follow-on charter. Without question, the express terms of the charter provide for arbitration in New York and the application of U.S. law. Therefore, the relevant law to be considered with respect to the loss of profits claim is U.S. law and SMA precedent. However, we should note it is accepted that in maritime matters, conformity with English law is a desired objective rather than an exception. The U.S. court of Appeals for the Second Circuit has taken the position that:*

>> ***[i]n matters of commercial law our decisions should conform to English decisions, in the absence of some rule of public policy which would forbid. Senator Linie GMBH & Co. KG v Sunway Line, Inc., 291 F 3d 145, 170 (2d Cir. 2002),***
>>
>> and
>>
>> ***[T]oday we reaffirm our earlier decisions in recognizing the importance of international uniformity in the laws governing the maritime trade. Id***

Koch's position with regard to the owner's loss of profit claim on the follow-on charter relies on the principles set forth in Hadley and the more recent English House of Lord's decision in Achilleas.

The panel majority concluded that despite owner's arguments to the contrary, Koch could not have foreseen at the time it concluded its charter that the owner would have fixed the vessel on a follow-on charter approximately a week before the Seadancer's arrival at the discharge port and before a firm discharge schedule had been prepared. The Achilleas decision makes a point that extreme rate volatility, as was the case here, is an unusual occurrence and may be considered as not within the contemplation of the parties at the time of contracting.

The panel majority rejected owner's argument that Koch's alleged purposeful detention of the vessel placed its loss of profit claim outside the ambit of Hadley and Achilleas. The arbitrators concluded owner was adequately compensated under the charter for the 11 day period at Corpus Christi and Galveston by Koch's payment of demurrage and detention in the range of $90,000-100,000 per day.

The panel majority cited with approval a Second Circuit Court of Appeals decision which expressed the view that in matters of commercial law, U.S. decisions should be consistent with English decisions unless they are contrary to public policy and the importance of uniformity in the application of international maritime law.

Interestingly, in 1977 England's Court of Appeal in deciding the question of an "arrived ship" in the Maratha Envoy, [1977] 1 Lloyd's Rep. 217 cited a New York arbitration decision in Polyfreedom, SMA 926 (1975) with approval. Lord Denning, one of England's most prominent jurists addressed the question of uniformity, stating:

> *As the commercial men in the United States pay us the compliment of relying on our decisions, so should we return the compliment. The merchants and shipping men on both sides of the Atlantic use the same standard forms of contract, and the same words and phrases. These should be interpreted in the same way in whichever place they come up for decision. No matter whether in London or New York, the result should be the same. The Courts in this country have in the past done much to form and develop it. Let us not fail in our time. So on this point let us follow the lead given by New York.*

The Seadancer is consistent with the principles set forth in Hadley and Achilleas.

The dissenting arbitrator concluded that the shipowner was entitled to the profits it would have earned on the follow-on charter because Koch purposely and impermissibly delayed the discharge at Corpus Christi thus causing the vessel to miss its laycan for the follow-on charter.

Does the Achilleas materially change the Hadley standard for assessing damages for the loss of a follow-on charter? The orthodox view expressed by two of the Lords in the Achilleas and by the court in Sylvia remains the general test for remoteness. However, the broader approach expressed by two of the Lords in Achilleas may be appropriate in those exceptional and relatively rare cases where the general test may lead to "unquantifiable, unpredictable, uncontrollable or disproportionate liability" or where the extent of liability is excessive and contrary to what the commercial trade would understand and/or expect. Extreme market volatility, the nature and extent of the breach in question and the terms of the follow-on charter are likely factors.

## SUMMARIZING THIS ISSUE

The Achilleas does not create a fundamental or groundbreaking change in the law of consequential damages. Rather than introducing a new test as to the law of remoteness of damages, the Achilleas standard is more likely confined to exceptional circumstances i.e. where market conditions, prevailing custom or practice dictate.

## B. HEDGING GAINS AND LOSSES

The concept of hedging commodities can be traced back hundreds of years to records of rice contract trades in Japan and flower contract trades in the Netherlands. Presently, futures contracts are routinely traded to hedge a variety of commodities such as petroleum, minerals, agricultural products as well as freight, currency and interest rates. Hedging materially reduces the risk a trader may experience when buying or selling in a volatile market.

Putting aside pure speculative trading, commodity derivatives are generally tied to a physical cash position. The trader will invariably match his physical market risk exposure at the outset and then enter into a corresponding derivative transaction, such as an option, future etc. The derivative will serve as a hedge against the movement of the market price, thereby stabilizing the anticipated profit of the physical transaction.

**Glencore Energy UK Ltd. v. Transworld Oil Ltd. [2010] EWHC 141,** concerned an FOB sale of Nigerian crude by Transworld, as seller and Glencore, as buyer. While the tanker was waiting to berth, the crew of the assisting tug experienced a kidnapping event. Although this issue was quickly resolved, the tanker departed without its cargo. The parties attempted to make alternate arrangements for the shipment to go forward but were unsuccessful. The court held Transworld in breach of the contract by failing to deliver the cargo as per the contract. The court accepted Glencore's damage claim as being correctly calculated at $11,112,626. However, the court noted that Glencore was bound to mitigate its loss and did so by closing out its hedges. This reduced its loss to $8,665,496. Glencore argued that the hedges were independent transactions entered into prior to Transworld's breach and that Transworld should not be entitled to the benefit of Glencore's profit on the hedges. In addressing this question, the court stated:

> *So far as the law is concerned, in the context of contracts for the sale of oil, it has been said that: If a seller repudiates a contract before the time for performance arrives the buyer on existing authority is entitled to accept that anticipatory repudiation, treat the contract as at an end and claim damages. The basic measure of damages is such sum as will put the buyer in the same position as if the seller had duly performed the contract. The prima facie measure is, therefore, the difference between the contract price and the market price at the time of contractual performance. The seller is, however, only liable for such part of the buyer's loss as is properly to be regarded as caused by the seller's breach. If the buyer fails to take reasonable steps to mitigate his loss consequent on the seller's breach, he is debarred from claiming any part of the damage which is due to his neglect to take such steps. The seller's breach is not causative of that additional loss and therefore not recoverable.' (citation omitted) Applying that approach, it is, in my view, plain on the evidence in this case that, having accepted Transworld's breach as bringing the contract to an end, Glencore not only did but was required to mitigate its loss by closing out its hedges. To have allowed them to run on would have been to speculate in the movement of the price of oil, which Glencore has asserted is no part of its business for present purposes. By doing so, in the words of its own expert, it established its loss. I agee with Transworld that the position as regards the hedges is not res inter alios acta, nor is it equivalent to insurance. Hedging is on the evidence an integral part of the business by which Glencore entered into this contract for the purchase of oil, and since closing out on early termination established a lower loss than would otherwise have been incurred, that has to be taken into account when determining recoverable loss. To put it another way, if the seller had duly performed the contract Glencore would have closed out its hedges at the then current prices,*

*and there is no reason to put it in a better position in the case of non-performance.*

**In Prestige Marine Services Pte Ltd v Marubeni International Petroleum (S) Pte Ltd. [2011] SGHC 270** the High Court in Singapore addressed an appeal to set aside an arbitration award on various points of law. The appeal involved four points of law. The point of interest for the purpose of this paper is the court's treatment of the hedges as an element of damages.

The dispute involved the breach of a contract for the sale and delivery of 120,000 tons of fuel oil. Buyer failed to lift the full quantity and seller was awarded $19 million in damages. Buyer argued that the substantial profit seller made on its hedges should be taken into account to reduce the damages. Seller alleged the hedge transactions had nothing to do with its losses arising out of the buyer's failure to lift the cargo.

The arbitrator found, and the court agreed, that there was no causative link between the breach of contract and the alleged hedge profit. In essence, the arbitrator and the court concluded the hedge transactions were speculative positions. The court stated:

*A seller who wishes to speculate on the price of goods, as Marubeni did in its paper transactions, is not in a position to foist his speculation losses onto the buyer. The arbitrator rightly noted that Marubeni alone bore the risk of the paper transactions. Had it made a huge loss … … . it could not have held Prestige responsible for the loss. Similarly, Marubeni need not account to Prestige for any profit made in the paper transactions.*

**In Choil Trading v. Sahara Energy Resources Ltd. [2010] EWHC 374 (Comm)**, Choil was the seller of a 30,000 MT cargo of naptha to Sahara for loading out of Port Harcourt, Nigeria. The dispute between the parties related to a significant defect in the quality of the product supplied by the shore facility. The cargo contained an abnormally high quantity of MTBE. Sahara had resold the naphtha cargo to a third party but the product was subsequently rejected by its buyer because of the MTBE content. Thereafter, Sahara wrongfully rejected Choil's tender of the cargo.

In order to mitigate its damages, Choil advised it would resell the cargo and that it intended to hold Sahara liable for damages. Choil eventually sold the cargo to Blue Ocean at a substantially higher cash price despite the fact it was contaminated. Therefore, Choil was not able to establish a monetary loss on the resale. However, Choil argued it was entitled to collect the substantial losses it incurred in hedging the product. The court agreed and stated it did not regard hedging losses as consequential, indirect or special within the exclusionary wording of Clause 13, which stated in relevant part:

*Neither party shall be liable for any consequential, indirect or special losses or special damages of any kind arising out of or in any way connected with the performance of or failure to perform the agreement.*

In addressing the merits of Choil's claim for hedging losses, the court stated:

*Trading companies such as Choil habitually hedge in order not to be caught with open positions in a volatile market. Choil was required to do so by its trade finance bank. When Petrogal [Sahara's buyer] rejected the naptha as a result of MTBE contamination Choil was left with a long open position on naptha. The evidence of Ms Driay shows Sahara was well aware of the likelihood of Choil hedging, and the reasonableness of its doing so. It would have done the same.*

*In my judgment Choil is prima facie entitled to recover $2,285,428.15 as representing losses attributable to a reasonable attempt at mitigation. There is, in principle 'no sensible or commercial reason why the court should not take into account the cost of the hedging instruments' Addax Ltd. v. Arcadia Petroleum [2000] 1 Lloyd's Rep. 496. In that case Morison J would, if he had been concerned with the claimant's position with their suppliers, have taken into account the hedging costs. In the present case the effect of Choil being left long in naptha was to expose it to the risk of severe losses if the market dropped. It was reasonable for it to protect itself against those losses if the market dropped. It was reasonable for it to protect itself against those losses by hedging in the way it did.*

*I do not regard the damages so far discussed as consequential, indirect or special. Such a limitation covers damages within the second limb of Hadley v Baxendale (citation omitted). The damages in issue constitute the difference between the sound arrived and damaged values of the goods as*

> *well as the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty together with the reasonable cost of mitigation. In Addax Morrison J held that a limitation of consequential damages would not apply to hedging costs which were part and parcel of the claimant's positions with its suppliers (if that had been the relevant inquiry). It seems to me that a similar result should apply here where the hedging in question was part and parcel of the claimant's dealings in respect of the cargo unexpectedly left on its hands. Further in the trade in which both parties operated hedging was an every day occurrence. Anyone in Choil's position would have been expected to hedge, as Ms Driay made clear. (Her only criticism was that Choil had not hedged early enough). It did not require any special knowledge to realize that hedging was what Choil was likely to do. It was regarded as a normal and necessary part of the trade*

In the New York arbitration between **Seaemblem Marine Ltd. v. Jahre Services A/S v. Arochem International Inc., M/T Boni, SMA 3052 (March 7, 1994)**, the panel was presented with the question of whether the owner and operator of the Boni bore responsibility for the consequences of the fire aboard the vessel charterer's ensuing damages. Briefly, the Boni loaded two parcel grades of crude oil in Malaysia and Indonesia for discharge in the Caribbean. Shortly after sailing, the vessel suffered an engine room fire and was quickly abandoned by the crew. The fire was subsequently extinguished by the salvors and the vessel was towed to port. However, the vessel was severely damaged and could not proceed further. A portion of the cargo was sold to a third party and directly loaded to the buyer's vessel. The balance was transferred to another vessel for on-carriage to Arochem's facility in Puerto Rico.

The panel unanimously concluded that the fire was caused by the "actual fault or privity" or "design or neglect" of the owner. The arbitrators found ample evidence to conclude the vessel was poorly maintained and commenced the ill fated voyage in an unseaworthy condition which was known or should have been known by the owner or its managing agent.

Charterer's claims totaled $9,133,192, made up principally of salvage costs, hedge losses and product yield losses. Arochem's salvage claim was granted in full. The panel then proceeded to address the hedge claim and the crude refining yield loss.

Arochem's alleged hedges produced a small gain on the product sold in Singapore but resulted in a large loss on the product that was delayed arriving in Puerto Rico, the net hedge loss being $2,315,418. In addressing the hedge loss claim, the panel stated:

> *We now address Arochem's claim. The general rule for an award of damages in a breach of contract action is to assess against the party in breach all damages resulting from the breach which could have reasonably been contemplated by the parties at the time the contract was executed. Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1854) Damages should return the innocent party to the position it would have occupied had the contract not been breached, subject to the foreseeability standard referred to above.*
>
> * * * * *
>
> *It is generally recognized that the hedging of petroleum products and other commodities is a desirable and essential method of minimizing price fluctuations and exposure to loss. All of the experts before this panel testified on this point and there was no disagreement. Indeed, one may logically conclude that it is foolhardy and speculative not to do so. Seaemblem and Jahre knew Arochem operated a refinery in Puerto Rico and that it was also a sometime trader in the spot markets. Jahre's principal business is in the tanker lighterage trade and as such has close contact with a variety of petroleum operating companies. Seaemblem operates tankers and is presumed to have some understanding of the basic elements of the petroleum trade. After all, the very political and economic pressures impacting oil prices also affect tanker rates. We accept in this day and age that most companies are aware of the need and advantage of hedging products to assure price stability and a low risk profile.*
>
> * * * * *
>
> *The principal question we must now address is whether the transactions which form the basis of Arochem's equity loss claim are hedging losses on the Boni transaction or speculative position taking. Jahre's expert witness explained hedging in its simplest form:*

> ***A hedge is placed by either party going long or short on the American Mercantile at a fixed month or fixed commodity at a fixed price by either buying in or selling out a relevant number of contracts to your open position in the wet oil, therefore performing the hedge. If you are long, for example, a cargo of 250,000 barrels of gasoline, then you go short, a relevant number of wet contracts per thousand barrel contracts on the New York Mercantile on the month you anticipated that cargo be delivered or the month you take a position so you lock in your prices.***
>
> ***We have carefully reviewed the alleged hedging transactions and conclude they are not in accord with Arochem's own stated procedure, nor are they placed in accordance with accepted industry standards. Hedges are never an absolute protection against the risks of market fluctuations, but if placed properly, and in a manner similar to the procedure which Arochem's witness described, they offer a large measure of price protection. They were not so placed here.***

Arochem's hedge claim was denied.

Arochem's crude yield loss claim was predicated on the proposition that the replacement cargo for the crude carried on the Boni, an Algerian condensate, was an inferior feedstock for its Puerto Rican refinery which was designed to primarily produce naptha, jet fuel and lighter crude oils. Arochem argued that the nature of the feedstock was of utmost importance for the efficient operation of its refinery.

The panel acknowledged that the equity loss claim was "special damages", consequential in nature and not reasonably foreseeable. In denying the claim, the panel stated:

> *We will now address Arochem's Arun product yield loss and accept as a premise Arochem's portrayal of Seaemblem and Jahre as sophisticated business operators who must be held to a knowledge of the ordinary business practices on the industry in which they operate. Assuming for the time being that Arochem's yield calculations are correct, although serious questions have been raised on this score, the more pertinent issue is whether two knowledgeable carriers should be presumed to understand the inner working of a refinery and the special requirements and limitations of its machinery and equipment.*
>
> *The parties stipulated that Arochem never disclosed to Seaemblen or Jahre the crude oil yield analysis for Tapis or Arun crudes, or that the refinery was more akin to a petrochemical plant than to a typical refinery producing gasoline. For Arochem to prevail on its yield clam, the type of loss must have been reasonably foreseeable at the time of contracting. We have great difficulty with the proposition that an ocean carrier should be sufficiently expert and able to understand refinery operations, which would include some knowledge of the most efficient and desirable feedstock charges.*

In **Trafigura Beheer BV and another v. Mediterranean Shipping Company SA, [2007] EWCA Civ 794**, Trafigura shipped 18 containers of copper cathodes on board the vessel MSC Amsterdam at Durban for shipment to Shanghai. The cargo was discharged to a container terminal in Shanghai where fraudulent delivery orders based upon fraudulent bills of lading prevented Trafigura from obtaining its cargo.

Trafigura commenced proceedings against the shipowner for conversion claiming damages based on the value of the cargo as well as for hedging losses incurred as a result of the delay in delivery. The court held the shipowner liable and thereafter focused on the extent of Trafigura's losses. The court awarded Trafigura damages based upon the value of the copper on the date of judgment and recognized that it was common practice for commodity traders to hedge their sale and purchase deals. Nevertheless, the court concluded that most carriers would have insufficient knowledge to have foreseen such hedging losses. Evidence presented to the court led the judge to conclude that container carriers were not primarily interested in the contents of the containers except where there was concern that the contents might be dangerous. Trafigura's claim for loss on the hedges was denied.

The court in **Addax v. Arcadia [2000] 1 Lloyd's Rep. 493** suggested that hedging losses incurred in commodity sales contracts will generally not be denied because they are too remote. Furthermore, it added that there was no sensible or commercial reason why a court should not take into account the costs of the hedging instruments. The court stated:

> *[t]he costs of hedging devices are an integral part of the calculation of the net position, and if the net position is a directly relevant loss, so must the hedging costs be so regarded. To extract the costs of the hedging devices is wrong in principle and has no commercial merit … It was I think wholly foreseeable that if the claimants took a position which was otherwise than back-to-back with their contract with the defendants, they could cover their position with one of a multitude of hedging transactions available. While the contract instrument used may well vary from trade to trade (or possibly trader to trader), the defendants must have foreseen the need for the claimants to get cover*

Proving a causal link between a breach of contract and a hedging loss is essentially a factual question. More specifically, is a particular loss under a derivative contract caused by a breach of a different contract by another party? Proving the causal relationship between a loss under a derivative contract and a breach of contract regarding the physical position is essential. The hedge should be clearly identifiable as relating to the physical position. A party seeking recovery for hedging losses will have to show that the hedge position was in fact related to a specific cargo and not just a part of a larger company market position.

In **Astra Energy Canada, Inc. Inc. v. Glencore Ltd., SMA 4109 (December 2010)** Astra sold two cargoes of "Normal Export Quality" Edmonton Mixed Sweet Crude Oil (MSW) to Glencore to be delivered FOB vessel Vancouver, BC. Glencore objected to the cargoes alleging the crude oil was contaminated with exceedingly high levels of hydrogen sulfide (H2S).

The issues before the panel were (a) what did the contract description "Normal Export Quality" MSW mean and (b) did the intended cargoes meet this descriptive quality?

The first cargo loaded to the Alpine Penelope was objected to by Glencore because of the H2S problem but the cargo could not be off-loaded at Vancouver because tankage was unavailable. Thereafter, Glencore sailed the vessel to Long Beach, treated the cargo with a scavenger, transshipped it to the US Gulf where it was eventually sold at a higher price than its cost but at less than its intended resale. Glencore's claim included a loss of profit on its intended resale, various expense items, as well as a substantial sum for losses on its hedges.

Glencore refused to accept the second cargo so Astra loaded the MSW to the FR8 Pride and subsequently resold it to ExxonMobil, also at higher net price than its sale to Glencore. Astra's hedge loss was in excess of $4 million. Astra's position on Glencore's claim for damages was that hedge losses were consequential and expressly excluded under contract provision Section 17.2 which states in part:

> *In no event shall either party be liable for loss of profits or special, indirect, exemplary or punitive, or consequential damages … … .*

In arguing that point as it did, Astra effectively also took the position that its hedge losses were consequential and not recoverable. The panel accepted Astra's position.

Interestingly, Glencore's presentation of its hedge losses indicated quite clearly that the hedge positions it took were not specific to the trades in question. They reflected overall company positions and the testimony confirmed this was so. While the panel never had to address Glencore's claim for damages and its hedge losses because it concluded Glencore breached the contract, it is probable that the panel would not have awarded damages for hedge losses that were not directly identified and tied to the contract in question.

On the other hand, Astra's hedge presentation was specific to the cargo in question but its argument was that the hedge loss was consequential and, therefore, excluded by the contract. This position is in sharp contrast to the courts' treatment of hedge losses as described in the English decisions in Choil, Addax and Glencore described above.

## SUMMARIZING THE HEDGING ISSUE

Are hedging losses too remote? That depends in a large part on the nature and practice of the trade. The test is whether the loss being claimed is one that arises naturally and in the ordinary course of events and was within the reasonable contemplation of the parties when the contract was made. Commodity traders customarily hedge their physical commitments, therefore it would be difficult for others in the field or in related industries to argue that claims for hedge losses are too remote.

A court or arbitration panel, when considering a claim for hedging losses, will look to the nature of the trade and the parties experience in that trade, whether it is for hedges of petroleum products, metals, currency, freight, etc. A question that often arises is whether the alleged hedge is in reality a hedge or a speculative position in the market. A party seeking recovery for a hedge loss must establish that the hedge position in question is related to the specific cargo in question and not part of an overall hedging position.

There must be a causal link between a breach of the contract and a particular loss under the hedge. Proving the causal connection between a hedge loss and a breach related to the physical position will be difficult if the hedge cannot be clearly identified as relating to the physical contract.

Claims for hedging losses under sales contacts will generally not fail because they are too remote. Hedging losses being claimed against shipowners are not nearly as certain. Shipowners generally argue that hedging losses alleged by charterers are too remote and the objection that they raise is that they are not conversant with commodity trading and therefore do not possess the level of knowledge and experience to intelligently address the issue. The court in Addax addressed this argument, noting that although a shipowner may not know the different hedging instruments employed by the different trades, it should understand in a general sense that commodity traders utilize hedging transactions to protect themselves against market fluctuations.

*This paper was originally presented by Mr. Berg at ICMA XVIII in Vancouver, BC in May, 2012.*

## TIME AND EXPENSE IN NEW YORK SMA ARBITRATION

**Lucienne Carasso Bulow**
**New York Arbitrator, Mediator and Claims Consultant**

### Introduction

Parties who agree to arbitration clauses in their charter parties do so because they hope to receive a fair hearing and to obtain a quick and inexpensive means of resolving their disputes. Users of arbitration, especially Claimants, want to submit their disputes to experienced commercial arbitrators who will provide them with a fair and impartial decision and will do so in a reasonable amount of time… without costing them an excessive amount of money. They do not wish to dwell on disputes which keep them away from their business and which they consider to be a waste of time or money. Since revising SMA rules in 1994, SMA arbitrators have been mindful of these goals. Rule 28 of SMA rules established a 120-day limit for issuance of awards following the closing of proceedings. They also provide for the awarding of attorneys fees, which means that a successful party will incur relatively low expenses in order to obtain a favorable decision. At the end of the day, some successful parties hardly pay anything to obtain a favorable award because New York arbitrators routinely award attorneys fees and the expense of arbitrators' fees to the prevailing party.

While arbitration panels can try to administer an arbitration efficiently, there is a limit to what they can do. They can complete a panel by speedily appointing a third person as chair of the panel. In New York, where arbitrators must make disclosures, they can quickly send in their disclosures so that the panel can be promptly accepted by the parties. They can advise the parties that the panel is ready to proceed; they can try to organize the arbitration so it runs efficiently; they can give deadlines. If a claimant is not in a hurry, as often seems to be the case, there is not much that arbitrators can do to expedite matters. Ultimately, the rhythm of the arbitration is governed by the parties. The true measure of whether arbitrators are being efficient is to gauge how quickly their decision is rendered after the last briefs have been submitted or the proceedings have been closed.

For this study, I have reviewed about 170 consecutive, recent awards rendered by SMA members and published by the SMA Award Service,[1] whether they are full-blown arbitrations or short-deadline proceedings, in order to gauge whether New York arbitration is successfully providing the required service. My task was somewhat complicated by the fact that the ASBATANKVOY arbitration clause and other arbitration clauses, pursuant to which many New York arbitrations occur, do not require that the arbitration proceed under SMA Rules. In addition, some arbitrators are not SMA members and about one third of the arbitration awards published by the SMA Award Service do not mention when the last submissions were received or when the proceedings were closed.

In 1996, at the Twelfth ICMA which was held in Paris, I presented a paper entitled *A User's Experience of London and New York Maritime Arbitration*. This paper was subsequently published in the *European Transport Law Journal*, Vol. XXXIII, No. 3, 1998. In that study, I compared my experience as a user of London and New York arbitration. At the time, I was heavily involved in London arbitration, handling a number of cases for my employer. I had noted that New York arbitration had become much more efficient since the adoption of SMA rules which had been amended in 1994 to provide a mechanism to appoint a second arbitrator if a respondent did not willingly appoint his own arbitrator. I also concluded that the expense of arbitration in New York was much lower than in London when hearings were involved and about the same when no hearings were involved. I had concluded that in cases on documents, in London, it took an average of 1 year 7 months and 18 days (596 days)[2], after the proceedings were closed while in New York, it took an average of 1 month and 25 days (55 days)[3] to receive a reasoned decision. I found that obtaining an arbitration award in London in a case with a 2-day hearing took an average of 2 to 6 years. In New York, it took as little as 24 hours up to 100 days for cases which required one to four hearings. Under Short Deadline Procedures, it took an average of 77 days to get a decision in London, as compared to an average of 21 days under the Shortened Arbitration Procedure in New York. In its revised rules for larger and more complicated arbitrations, SMA had maintained the 120-day rule by which panels are encouraged to issue their decision within 120 days of the closing of the hearing.

## The Study

In the present study of time and expense, I will limit myself to New York arbitration and pay special attention to SMA awards #4001 to 4170 published by the SMA Award Service.

Pertinent sections of the SMA Arbitration Rules are:

### Section 28: Time

> *The Panel has the collective duty to issue awards not later than 120 days after the final evidence or brief has been received and the parties have been notified that the proceedings have been closed. Failure of the Panel to abide by this provision shall not be grounds for challenge of the Award.*

### Section 30: Scope

> *The Panel, in its Award, shall grant any remedy or relief which it deems just and equitable, including but not limited to, specific performance. The Panel, in its Award, shall assess arbitration expenses and fees as provided in Sections 15, 36, and 37 and shall address the issue of attorneys' fees and costs incurred by the parties. The Panel is empowered to award reasonable attorneys' fees and expenses or costs incurred by a party or parties in the prosecution or defense of the case.*
>
> *Together with their reply briefs, counsel should submit an affidavit describing the case activity and accounting for the hours and rates charged. Any attorneys' fees or party costs awarded shall be quantified in the Award.*

### Section 34: Time Periods

*The parties may modify any period of time by mutual agreement or consent of the Panel. The Panel may extend or shorten any period of time established by the Rules upon a showing of good cause and notify the parties accordingly.*

Under the Shortened Arbitration Procedure, the decision is supposed to be issued within 30 days of the closing of the proceedings.

It is all well and good to have rules, but the real test is whether they result in relatively speedy decisions and whether panels actually award attorneys' fees and the cost of the arbitration.

## A. Time

The total time from the commencement of the arbitration to the issuance of the decision depends on many factors which are not within the control of the arbitrators. No matter how much arbitrators wish to be efficient and bring their dispute to resolution, such a wish is often thwarted by the parties and their attorneys. Usually, the respondent's representative causes some delays but surprisingly, the claimant often causes delays as well. When both parties agree to extensions, the panel usually has no choice but to accede to their wishes. Requests for discovery and long arguments about the relevance of some document often delay the proceedings and increase the ultimate cost of the arbitration. Once all witnesses have testified and all arguments and documents have been submitted, that is the time which is within the arbitrator's control. Of course, there are instances of personal health, family responsibilities, travel which might interfere with the timely issuance of the award.

I, therefore, have concentrated on the time between the closing of proceedings and the issuance of the award, which is the time more-or-less in the arbitrators' control. To gauge how much time has elapsed, one is somewhat limited because, although some arbitrators do provide the date of the closing of proceedings in their decision, others do not. But enough of them provide this information to allow me to make some observations.

Having reviewed the awards which indicate when the proceedings were closed, I have found that 32% were issued within 20 days of the closing of proceedings. In fact, 13%

of the awards were issued within 10 days of the closing of proceedings. The results are as follows:

39 % of the awards were issued within 30 days,

58% within 60 days,

80% within 100 days,

87% within 120 days.

Only 13% took more than 120 days. Out of these 13 awards, 6 of them included panels containing one or two non-SMA members. Non-SMA members do not necessarily try to observe the 120-day rule, and this is evident by the fact that they tended to be a disproportionate number of the participants in awards which took longer to issue than 120 days.

### B. Expenses

In order to control the cost of arbitration, like other arbitration organizations, the SMA offers a procedure for small, simple cases.[4]

#### 1. Shortened Arbitration Procedure

For smaller claims before a sole arbitrator on documents only, the SMA Shortened Arbitration Procedure is very often used. Under this Procedure, there is a limit of four items in dispute which should not total the figure agreed in the contract which is most often $25,000 or $50,000. Cases which involve much higher amounts are sometimes conducted under the Shortened Arbitration Procedure (with agreement of the arbitrator) if they are relatively simple or are limited to one or two issues. This procedure requires that parties exchange their submissions within a short period of time. The arbitrator issues a fully reasoned decision within 30 days of closing of proceedings.

In such cases, if the parties cannot agree on a sole arbitrator, the President of the SMA will appoint the sole arbitrator. There is no fee for this service. The Shortened Procedure provides that arbitrator's fee is not to exceed $3,500 unless there is a counterclaim. If there is a counterclaim, the fee shall not exceed $4,500. As to legal expenses or time and expense incurred by the parties if the case is handled by a commercial person, the maximum awarded is $4,000. In my survey, I found that 18 were Shortened Procedures before a sole arbitrator. In several of these arbitrations, the fee of the arbitrator was less than $2,000. The sole arbitrator regularly awarded the cost of the arbitration to the prevailing party. Legal expenses were also routinely awarded to the prevailing party except in circumstances where the arbitrator thought that both parties had a valid argument.

In several shortened procedures, the arbitrator issued his award within 5 days of the last submission. Some smaller cases involved the salvage of smaller vessels under the SMA Salvage Rules. Some Partial Final Awards awarding security for the claim were issued within less than 6 days of the last submission. Many Partial Final or Final Awards, adjudicating complicated claims were issued within 30 days after receipt of Reply Briefs.

#### 2. Standard SMA Arbitration

The expense of an arbitration is clearly linked to the time spent by the arbitrators and the amount of work expended by the parties' lawyers. In order to control expenses, arbitrators can try to limit discovery; they can offer hearing dates which are fairly close. They can try to streamline the proceedings, bifurcate issues and deal with threshold issues in Partial Final Awards which sometimes causes the parties to dispose of the whole case. SMA arbitrators try to move the case along by giving deadlines and sending reminders to the parties. Some might argue that arbitrators should not interfere with the delays created by the parties and should not be pro-active in pursuing the case. This can be the subject of heated philosophical debate, but ultimately, it seems reasonable to think that once a panel is constituted, the duty of responsible arbitrators is to bring the case to speedy resolution.

As arbitrators charge on the basis of the time they spent on a case, the longer a case takes, the more rulings about discovery or other interlocutory issues, the more expensive a case gets. In order to control expenses, arbitrators can impose a limit on the length of submissions or on the number of words to be used in the final briefs. With respect to the amount of arbitrators' fees, it is very hard to draw any conclusions. They are definitely linked to the time spent on the case by the arbitrator. The more rulings and correspondence the arbitrators must make, the higher will the fee be. In New York, no fee is required to reserve dates in advance for hearings as takes place in London, but if the parties cancel the hearings less than two or three weeks in advance of the first scheduled hearing date, some arbitrators may charge a cancellation fee.

Contrary to the usual American rule whereby each party pays for its own costs, SMA rules adopted in 1994 the award of reasonable legal fees to the prevailing party. SMA arbitrators also have the power to award the cost of the arbitration to the prevailing party. This means that a claimant who is justified in its claim can be almost entirely reimbursed for his expenses in bringing the claim to arbitration.

 

As mentioned, Section 30 of the SMA Arbitration Rules provides that in its Award, the Panel shall assess arbitration expenses and fees and that any attorneys' fees or party costs awarded shall be quantified in the Award. To allow the proper evaluation of these expenses at the time of final adjudication of the case, the Rules provide that together with their reply briefs, counsel should submit an affidavit describing the case activity and accounting for the hours and rates charged. This avoids delays in the completion of an arbitration which would occur if the panel would adjudicate the disputes but have to wait for counsel to submit their fees and probably argue about them, leading to a second award.

For the past 18 years, with great frequency, SMA arbitrators have been awarding to the prevailing party an allowance toward legal expenses and have been awarding the costs of the arbitration as explained by David Martowski in the excellent paper he delivered in Hamburg which was entitled *Awarding Attorneys' Fees and Costs in New York Maritime Arbitration*. This means that the clear winner of an arbitration can ultimately pay almost no expenses in bringing the case to arbitration. Unlike in London, where the prevailing party is awarded "recoverable costs" (which usually amounts to a portion of the cost of the arbitration), in New York, a party can be awarded almost 100% of his expenses in some very clear cut cases such as a "no-show" with no merit whatsoever to his defense. More often, a clearly prevailing party is awarded 80 to 90% of its costs.

In fact, the awarding of attorneys' fees and of arbitrators' fees has become so prevalent in New York arbitration, that in the recent awards which I surveyed, I found that legal fees were awarded to the prevailing party in almost 90% of the cases. In some cases where there is no award of attorneys' fees, the arbitration clause clearly provided that each party should pay its own expenses or that the award is a Partial Final Award, which defers the awarding of attorneys and arbitrators' fees until the Final Award. In the few cases where the arbitrators decided that each party should pay for its own expenses, the arbitrators found that both parties had merit to their positions. In one case of which I am aware, the panel thought that the prevailing party had not always acted properly, especially in the conservation of evidence. The arbitrators did not award him his legal expenses.

For larger and more complicated cases, three arbitrators usually hear the case. In my review of recent SMA cases, I have found several New York maritime arbitrations, which were complex and involved several parties with claims and counterclaims of many millions of dollars. In these arbitrations, the arbitrators heard numerous witnesses during numerous days of hearings. Unlike in the past, New York arbitrators now hear cases all day on consecutive days. One arbitration had 48 hearings (not consecutive, of course), but before the award was going to be issued, the parties settled. In another arbitration, there were 17 hearings. Two others had 13 hearings, and others had 10 hearings. Aside from Charter Party disputes, several involved commodity contracts or the sale of vessels. Several other large cases were heard on documents only.

To mention a few cases, in Award #4059 re. *Totalmar Navigation Corp. v. ATN Industries, Inc.*, a consolidated case involving 5 vessels and claims and counterclaims totaling over $2 million, the panel heard a number of witnesses during 4 days of hearing and received in evidence extensive exhibits, legal and arbitral authorities as well as main, post hearing and reply briefs. The award was issued within 99 days of the closing of proceedings.

Another case, Award #4117 between *Accord Ltd. with SBM Production Contractors, Inc. and Essential Shipping Company Limited with Sun Enterprises Limited* involved over $127 million and concerned the sale of the M/T OVERSEAS DONNA, a 285,000 MT deadweight Crude oil Tanker, under a Memorandum of Agreement on an amended Norwegian Sale Form 1993. Although the Panel was constituted at the time of closing and could have held immediate expedited hearings, the parties did not request emergency hearings. Eight hearings were subsequently held during which several fact and expert witnesses were heard. The parties submitted main briefs, reply briefs and a great number of exhibits. For a variety of reasons, the arbitrators took a little longer to issue the award in this arbitration. It took them almost 10 months to issue their award.

In Award #4121, the *Schuyler Line v. International Petrochemical Sales* case which involved over $21 million with respect to the performance of a COA by several vessels, the panel encountered some delay because the respondent changed counsel after two hearings. The claim consisted of damages in the performance of a COA involving several vessels. The Panel heard 10 witnesses in 13 hearings, received a number of exhibits and exchanges of briefs and issued its award within 54 days of the closing of the proceedings. All in all, it took a year to finish the case once the Respondent, which was South American, had replaced its counsel, and he was able to familiarize himself with the case.

## Conclusion

From my study of SMA awards, I can conclude with some confidence that in the vast majority of SMA arbitrations, the parties receive the service required of the arbitrators and that New York arbitration is definitely a forum where parties can obtain a fair and impartial decision from experienced commercial arbitrators who are familiar with the issues and the legal ramifications which arise in maritime disputes. SMA arbitrators work very hard to issue their awards in a timely fashion. The expense of New York maritime arbitration proceedings [arbitral and legal] is competitive with all other arbitral forums.

*This paper was originally presented by Ms. Bulow at ICMA XVIII in Vancouver, BC in May, 2012.*

---

1. As David W. Martowski mentioned in his paper "*Awarding Attorneys' Fees and Costs in New York Maritime Arbitration*" which he presented at the ICMA in Hamburg, some awards remain confidential and are not published at the parties' request.

2. Cases in London took from 111 days to 3 years.

3. Cases in New York took from 14 days to 115 days.

4. Likewise, the SMA offers a Salvage Arbitration Rules which limit a sole arbitrator's fee to $2,000. In a tripartite proceeding, the fee for each arbitrator shall not exceed $1,500 except that the chairman is entitled to an additional compensation of $500. In all cases, the arbitrator(s) may charge $100 for reimbursement of the expenses of the arbitration.

THE ARBITRATOR

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

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

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