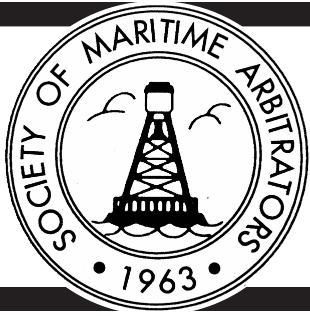

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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT'S CORNER

Dear Reader:

This is my last letter as president to THE ARBITRATOR subscribers. Amazingly, the last four years have gone by quickly. It was an honor to work with the membership and the maritime law community of New York City as SMA president.

It was a busy four years with some good times, changes, challenges and sadness mixed together. The SMA luncheon program continued to serve its main purpose of offering a monthly opportunity for those involved in maritime law and arbitrations in NYC to meet and hear a prepared discussion on topics of common interest. Tom Fox and Jack Warfield, chairs of the luncheon committee, put together a monthly assortment of topics that were well received by the arbitration community. Likewise, THE ARBITRATOR, through the diligent efforts of Manfred Arnold, Dean Tsagaris and Don Szostak, has filled a similar role as our written communication with the international community.

Sally Sielski, our Administrative Secretary and office manager of over 30 years, retired at the beginning of 2012. Sally's retirement luncheon was a wonderful event with a huge attendance. Sally is doing well and our new Administrative Secretary, Ms Patricia Leahy, has successfully settled in to her duties despite Hurricane Sandy's best efforts to derail her.

The Award Service is closing in on published award number 4200 as members continue to provide the arbitration services required by the maritime industry. Just as important to the number of awards is the fact that some of the recent awards have been on contracts and issues other than the traditional charter party dispute, for example, commodity sales contracts.

Almost from my first day in office, the SMA Board was involved in focused discussions with the MLA, ASBA, NYMAR, the New York City maritime bar and some of the major maritime organizations over the role of NYC in international maritime arbitration. We collectively discussed and voiced our views on proposed changes to BIMCO's charter party forms and arbitration clauses. The Rules committee, led by Lucienne Bulow, is maintaining that communication by meeting with New York City maritime bar members to ensure that our rules are consistent with current court rulings and practices. The Salvage committee, led by Peter Wiswell, is also updating the salvage rules through similar discussions.

The Society continues to attract new members and promote arbitration in New York. We recently gained 6 new members and have several more candidates in the membership process, which is expertly coordinated by membership chair Bengt Nergaard. Our education seminar course, offered each February and managed by Klaus Mordhorst, gained approval for CLE credit and this year had 11 people in the seminar. Likewise, the SMA has provided a panel discussion at the Connecticut Maritime Association annual trade shows for the past three years and will do so again this coming March 20th.

Sadly, the maritime law and arbitration community lost some prominent members in the last four years, most recently Michael Marks Cohen. As mentioned in the last issue of THE ARBITRATOR, you will find the article about Michael written by Jack Berg, a longtime friend of Michael's.

In closing, I thank the members of the Board for their hard work in looking after the interest of the Society and for their patience in working with me. I also thank Secretary Soren Wolmar, Treasurer Mike Hand, V.P.s Jack Warfield and Bengt Nergaard for their support and past presidents Manfred Arnold, Dave Martowski, Lucienne Bulow and Klaus Mordhorst for their guidance.

Best regards,

Austin L. Dooley

THE ARBITRATOR

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MICHAEL MARKS COHEN

The maritime arbitration community, and the SMA in particular, lost one of its best friends and its most staunch critic. Michael Marks Cohen died on December 1. His funeral was attended by a host of relatives, friends, business associates and a cross section of the maritime industry, almost everyone decked out with bright colorful ties and scarves—Michael's trademark although he didn't need them as an attention getter because he was always interesting to be with for many reasons.

Most of us are familiar with Michael's professional life, his reputation and his many accomplishments. Those of us who spent some personal time with him got to know and understand the depth of his other side. Michael's longtime law partner and Federal Judge Jack Weinstein spoke of Michael's accomplishments as a clerk to the Chief Judge of the New York Court of Appeals and of their many years of association at the Bar. His wife Bette and son Daniel spoke movingly of the warmth, affection and admiration that was a part of their everyday life.

Michael's accomplishments were many and varied. He graduated cum laude from Columbia Law School and was the Managing Editor of the Columbia Law review. He subsequently served as law clerk for Chief Judge Stanley H. Fuld, of the New York Court of Appeals, then as trial attorney in the Admiralty and Shipping Section of the U.S. Department of Justice and thereafter as the senior partner in an admiralty law firm. Somewhere in between it all, Michael served as a line officer aboard U.S. Naval vessels.

In addition to his law practice, Michael taught the admiralty law course at Columbia Law School for many years, was the Associate Editor of the American Maritime Cases, an editor of a number of volumes of Benedict on Admiralty, and a co-editor of the Index and Digest of the SMA Award Service. In addition he also served for many years as a member of the Executive Committee of the Maritime Law Association of the U.S.

Michael is recognized as one of the leading maritime practitioners by his colleagues in the United States and by admiralty lawyers throughout the world. He was especially active in promoting maritime arbitration in New York and had been intimately involved in the affairs of the SMA, and with the organization of a host of SMA conferences. Michael could always be counted on to play the devil's advocate, raising and highlighting controversial issues which always made for lively and heated exchanges.

Michael was an active and vocal participant in many ICMA conferences, and most recently at the ICMA XVII

2012 conference at Vancouver. B.C. That conference was an especially joyous occasion because, in addition to the usual festivities, we shared with Michael and Bette the celebration of the birth of their first grandson, Caleb. We toasted the newborn, the grandparents and danced the evening away. Little did we know that within a few months Michael would become very ill and pass on soon thereafter.

Michael was fun to be with. Having lunch with him was an experience. He had his own little book of obscure restaurants in the oddest parts of New York, serving the most unusual cuisine and wines. The lunches were always long, the conversation covered a multitude of professional and personal subjects, but in the end you had to be a good listener. There never was a dull moment when you were with him.

At the funeral Daniel remarked in his eulogy, "My dad was funny, smart and very kind. He had excellent comedic timing. We had a running joke in the family that some of the things said around the dinner table were so funny that comedian Woody Allen must be secretly listening in our kitchen for material – frequently after something particularly amusing was said, after catching our breaths from laughing my dad would shout at the light fixture overhead – Woody, Woody did you get that."

Bette described Michael as a Renaissance man because he had such a profound interest in so many things. He loved classical music, was a voracious reader, enjoyed travelling and visiting the most desirable and quirky restaurants. She said "He was a teacher in so many things that he did – to his students, his colleagues, his son – to me. He had an unparalleled sense of integrity and did not suffer fools easily. Don't cheat. Don't cut corners. Do the job completely and he was dogged about finishing it right."

In closing Bette said "We went to so many places all over the world, saw so many wonderful things, celebrated so many joyous times and had so much fun together. But as he himself said just last week, 'I didn't think it would end so soon.'"

So, we now say good-by to Michael Marks Cohen and wish him well and smooth sailing on his last voyage.

DID STOLT-NIELSEN SHIPWRECK CLASS ARBITRATION?

By Elizabeth Kramer, Esq. - Leonard, Street and Deinard

One of the most important arbitration cases in recent years, *Stolt-Nielsen S.A. v. AnimalFeeds International*, 130 S. Ct. 1758 (2010), came out of the maritime context but its import has been felt in almost every area of the law. Especially in the consumer context, where individual claims can involve small damage amounts, courts have struggled over the past two years with how to interpret the *Stolt-Nielsen* decision. That struggle came to a head in 2012, as the federal circuit courts developed a split on how to interpret *Stolt-Nielsen* and the Supreme Court accepted review of two cases involving class arbitration.

Review of Stolt-Nielsen

In the *Stolt-Nielsen* decision, a five justice majority of the Supreme Court held that a panel of arbitrators had "exceeded their authority" when they concluded that an arbitration could proceed on a class-wide basis. The facts were maddeningly unique, however. In the antitrust case between customers and shipping companies, the parties had stipulated that their agreement was "silent" as to the availability of class actions, meaning that no agreement had been reached. The panel of three maritime arbitrators had apparently based their conclusion that the consumers should be able to pursue their claims as a class action on their own ideas about what was good public policy, instead of applicable maritime law or New York law. The Court summarized "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached "no agreement" on that issue." *Id.* at 1775.

The very unique set of facts in *Stolt-Nielsen* has led to confusion about how to apply the decision in instances where arbitrators do rely on accepted principles of law to interpret the parties' arbitration agreement or in instances where the parties agreement does not have any explicit language about arbitration, but the parties have not stipulated that the agreement is "silent."

Circuit Split

Courts have applied *Stolt-Nielsen* in at least two ways.

The popular way to interpret *Stolt-Nielsen* is more friendly to class arbitration. It interprets the case's message as a reminder to arbitrators everywhere that their job is to enforce the contract, not to be legislators. Therefore arbitrators may authorize class arbitration as long as either the text of the arbitration agreement or other evidence shows the parties intended to allow class arbitration. That is the approach the First, Second, and Third Circuits have

taken. *Fantastic Sams Franchise Corp. v. FSRO Assoc. Ltd.*, 683 F.3d 18 (1st Cir. 2012); *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215 (3d Cir. 2012); *Jock v. Sterling Jewelers Inc.,* 646 F.3d 113 (2d Cir. 2011). This approach is also consistent with the default rule that arbitrators (not courts) interpret contracts calling for arbitration, and their interpretations are entitled to the highest level of deference.

The second way to interpret *Stolt-Nielsen* is as a federal presumption against class arbitration, much like the one against arbitrating arbitrability. Courts will not assume that parties intend to arbitrate issues relating to the validity and scope of the arbitration provision itself without "clear and unmistakable" evidence of that intent. *See Rent-a-Center West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 n.1 (2010). Similarly, some courts (and litigants) read *Stolt-Nielsen* as essentially requiring clear and unmistakable evidence of the parties' intent to allow class arbitration before an arbitrator may authorize that procedure. In 2012, the Fifth Circuit found that an arbitrator exceeded his authority by concluding that a common arbitration provision showed an intent to allow class arbitration. *Reed v. Florida Metropolitan Univ., Inc.*, 681 F.3d 630 (5th Cir. 2012) (vacating arbitrator's order allowing class arbitration, based on a provision that said ""any dispute arising from [the agreement]…shall be resolved by binding arbitration.")

Where Do We Go Now?

The Supreme Court will likely clarify its position on when class arbitrations are allowed in two cases it will hear in early 2013. Here is a preview of these two class arbitration cases.

OXFORD HEALTH PLANS, LLC V. SUTTER, 675 F.3d 215 (3d Cir. 2012)

In *Sutter*, the Third Circuit affirmed an arbitrator's decision to allow doctors' claims against a health plan to proceed on a class basis. The arbitrator had analyzed the text of the broad arbitration agreement at issue, which lacked any explicit language about whether class actions were authorized, and concluded the parties intended to allow class arbitration. The Third Circuit said this did not amount to "exceed[ing] [his] powers" within the meaning of Section 10(a)(4) of the Federal Arbitration Act (as the defendant argued). The Third Circuit refused to vacate the award largely because the arbitrator made a rational attempt to interpret the parties' arbitration agreement and that attempt is entitled to great deference by the courts.

The health plan argued for review of this case based on the difference in how the circuit courts have interpreted *Stolt-Nielsen* (with some seeming to require explicit consent within the arbitration clause for any collective action to proceed in arbitration, but the majority noting that as long as the arbitration clause does not prohibit class arbitration, the arbitrator should use general contract interpretation principles to discern the parties' intent regarding class actions). It noted that "at least seven cases on this issue have reached the courts of appeals in just the last two years."

The parties' framing of the "question presented" reflect the different legal lenses through which the Supreme Court could view this case. The Petitioner framed the question presented as: "Whether a contract provision requiring arbitration rather than litigation of any dispute, without more, can be a sufficient 'contractual basis [to] support a finding that the parties agreed to authorize class-action arbitration,'" quoting from Stolt-Nielsen. The Respondent framed the question as one primarily about deference to arbitrators, following the Third Circuit's lead: "Did the arbitrator exceed his powers under the [FAA] when he interpreted the atypical terms of the agreement in this case to authorize the arbitration of class claims?"

If this case were simply about the appropriate deference that courts should grant arbitrators, the Supreme Court probably would not have granted review. In my mind then, the relevant issue is how does the Supreme Court plan to clarify its ruling in *Stolt-Nielsen*? Three possible options include:

> 1. Holding that Stolt-Nielsen was unique, because the parties had stipulated that the arbitration provision was "silent" regarding class arbitration and the arbitrators applied their own policy judgments. The point is that arbitrators should try and determine the parties' intent; this outcome would affirm the approach of the First, Second and Third Circuits ;
>
> 2. Holding that broad arbitration clauses, like the one at issue in Sutter, cannot reasonably be interpreted to authorize class arbitration; or
>
> 3. Holding that as a matter of substantive federal law, class arbitration is precluded unless the arbitration clause explicitly allows it.

It would be more difficult for the Supreme Court to reach the last two conclusions in that last than the first one, because contract interpretation is a matter of state law and the deference granted to an arbitrator's decision on the merits is so great. The Supreme Court will hear argument

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in *Sutter* on March 25, 2013, so we can expect a decision in early summer.

AMERICAN EXPRESS CO. V. ITALIAN COLORS RESTAURANT, 667 F.3d 204 (2d Cir. 2012) (a/k/a "Amex III")

This case is called "Amex III" because the Second Circuit has issued three opinions in the dispute—two after remand from the Supreme Court. The Second Circuit never changed its holding; it concluded that the parties' clause prohibiting class arbitration was unenforceable. The Second Circuit held that antitrust claims like those of these plaintiffs are so expensive to prosecute that it would never be rational for any individual claimant to bring them, therefore denying class actions would effectively preclude the plaintiffs from vindicating their rights under antitrust laws. The Second Circuit grounded its decision in *Green Tree Financial Corp-Ala. v. Randolph*, 531 U.S. 79 (2000), and the strong expert testimony the plaintiffs presented with respect to the viability of individual suits.

In my view, the real issue in *Amex III* is whether the Supreme Court will acknowledge <u>any</u> expense-based exception to its arbitration precedent. It could conceivably say that: 1) economic realities of litigation are never a sufficient reason to invalidate an arbitration agreement (if Congress wants to preclude arbitration, it can do that in the statutes); or 2) more narrowly, it could say that there is no federal substantive rule that arbitration can only proceed if it is economically viable, and leave any review of state-based arguments for another time. In either case, this decision is likely to be reversed. The Supreme Court will hear argument in *Amex III* on February 27, with an opinion likely in late spring or early summer.

Prediction

Given the Supreme Court's recent case law (especially *Concepcion* and *Stolt-Nielsen*), it is likely that the Supreme Court's decisions in *Sutter* and *Amex III* will further restrict the instances in which courts and arbitrators may authorize class arbitration without the parties' express consent. If that happens and Congress does not act to resurrect the possibility of class arbitrations, then our justice system will be writing off a significant amount of smaller cases that cannot effectively be arbitrated on an individual basis.

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SECOND CIRCUIT HOLDS VESSEL LIABLE *IN REM* FOR DAMAGE TO CARGO UNDER THE GENERAL MARITIME LAW

By: Michelle Otero Valdés, Esq.,
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Chalos & Co, P.C.

On December 6, 2012, the United States Court of Appeals for the Second Circuit issued its decision in *MAN Ferrostaal, Inc*., v. *M/V AKILI*, *et al*., holding that a vessel is liable *in rem* for damage to its cargo under maritime common law principles.[1] The M/V AKILI, its owner, Akela Navigation Co. ("Akela"), and manager, Almi Marine Management ("Almi"), appealed the District Court's decision arguing that the court erred in holding: 1) the M/V AKILI liable *in rem* for damage to a cargo of "thin-walled" steel pipes shipped aboard the vessel; and 2) the Carriage of Goods by Sea Act ("COGSA") applied to the vessel as a "carrier" under that act. MAN Ferrostaal ("Ferrostaal") cross-appealed the District Court's finding that Akela and Almi were not liable *in personam* for damage to Ferrostaal's cargo under a bailment theory. Although the Second Circuit's analysis of the issues differed from that of the District Court, the Second Circuit ultimately affirmed the District Court's ruling, holding the M/V AKILI liable *in rem* for damage to cargo shipped onboard.

<u>Facts of the Underlying Dispute and the U.S. District Court Decision</u>

In this case, a series of charters and sub-charters of M/V AKILI were executed before the steel cargo was loaded onboard. On June 19, 2006, Akela time-chartered M/V AKILI to Seyang Shipping Ltd ("Seyang"). This original Time Charter Party permitted the charterer to further sub-charter the vessel and specified that all bills of lading issued under the charter would incorporate "the General Clause Paramount or U.S. or Canadian Clause Paramount whichever applicable as attached." The USA Clause Paramount is a clause designating COGSA[2] as the controlling law with respect to the rights and liabilities of parties to a bill of lading. Thereafter, Seyang sub-chartered M/V AKILI to Defendant, S.M. China Co., Ltd. ("S.M. China"), for a voyage from Shanghai to Houston and then to New Orleans.

Prior to chartering M/V AKILI, S.M. China executed a part-cargo charter with Ferrostaal for the carriage of 9,960 thin-walled steel pipes from Shanghai to New Orleans on a vessel "to be named." This part-cargo charter also contained a "Clause Paramount," which stated in part that "any claims for loss or damage to cargo shall be governed by the Hague-Visby rules as if comprehensively applicable by law." The Hague-Visby rules (also known as the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading) are, in all pertinent respects, literally identical to the rules established by COGSA. This is no coincidence as the convention requires signatory countries, such as the United States, to pass legislation embodying these rules. Upon the vessel's arrival in New Orleans, it was discovered that the steel pipes had been improperly stowed at the bottom of M/V AKILI's cargo hold and damaged when a separate heavier pipe cargo was placed on top.

On July 9, 2007, Ferrostaal filed an action *in rem* against M/V AKILI and *in personam* against Akela, Almi, and S.M. China in the United States District Court for the Southern District of New York. On February 9, 2009, Ferrostaal made an emergency motion to sever the *in rem* action and transfer it to the United States District Court for the Eastern District of Louisiana as M/V AKILI was expected to call a Louisiana port and the vessel represented the basis for *in rem* jurisdiction. In order to avoid the vessel's arrest, Akela's insurers posted a Letter of Undertaking. Pursuant to a Stipulation and Consent Order, the parties agreed *in rem* jurisdiction was appropriate and the *in rem* action was transferred back to the Southern District of New York. Both the *in rem* claim against M/V AKILI and the *in personam* claims against Akela, Almi and S.M. China, were tried on the merits and disposed by a single opinion and order. After a bench trial, District Judge Cote used a combination of the general maritime law and COGSA to find M/V AKILI liable *in rem*, holding that because M/V AKILI set sail with the cargo, it was deemed to have ratified the bill of lading, and therefore is liable *in rem* as a COGSA carrier.

In Rem Jurisdiction vs. In Personam Jurisdiction

A U.S. federal district court has authority to adjudicate a case based on its power over either the person (*in personam* jurisdiction) or specific property (*in rem* jurisdiction) located within the Court's jurisdiction.

An *in rem* lawsuit is a legal action directed against the property itself as the offender, regardless of whom the owner is or who else might have an interest in it. The most frequent circumstance in which *in rem* jurisdiction is asserted is a suit brought in admiralty against a vessel to satisfy debts arising from the operation or use of the vessel. In a maritime tort action, a vessel may be sued *in rem*, irrespective of whether the defendant owner is liable *in personam*. However, an *in rem* action may lie only where the defendant vessel is amenable to seizure or arrest within the jurisdiction. *See Universal Oil Ltd., v. Allfirst Bank,* 419 F.3d 83, 101 (2nd Cir. 2005). Said differently, *in rem* jurisdiction may only be obtained if the vessel is within the Court's jurisdiction at the time the lawsuit is commenced or is expected to be within the district during the pendency of the action. *See Fed. R. Civ. P. Supp. R. C(2)*. Accordingly, the failure to arrest the vessel within the district in which the *in rem* lawsuit was commenced may result in a dismissal of the *in rem* action for lack of jurisdiction. *See Nursan Metalurji Endustrisi A.S. v. M/V "Torm Gertrud"*, 2009 U.S. Dist. LEXIS 75805 at *13-14 (S.D.N.Y. 2009) (Defendant vessel was not arrested or otherwise found within the judicial district and the procedural requirements for an *in rem* action under maritime law were not present).

In *MAN Ferrostaal, Inc*., v. *M/V AKILI*, *et al*., Ferrostaal filed an action *in rem* against M/V AKILI, which was not within the district at the time the lawsuit was commenced, but alleged that it was expected to be within the jurisdiction of the Southern District of New York during the pendency of the case. In February 2009, Ferrostaal received information that M/V AKILI was expected to call a Louisiana port within the Eastern District of Louisiana. The Plaintiff immediately moved to sever the *in rem* claim and transfer the case to the Eastern District of Louisiana in order to properly arrest M/V AKILI in accordance with *Fed. R. Civ. P. Supp. R. C.* However, because the Defendant vessel agreed to submit itself to the jurisdiction of the Southern District of New York, the *in rem* claim was tried on the merits without the vessel's arrest as required by the Supplemental Rules for Admiralty or Maritime Claims of the Federal Rules of Civil Procedure.

In an admiralty action, the district court must determine *in personam* (personal) jurisdiction under the laws of the forum state, in this case, New York. The Plaintiff bears the burden of establishing that the Court has jurisdiction over the defendant when responding to a Motion to Dismiss for Lack of Personal Jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). *See Nursan Metalurji Endustrisi A.S.,* 2009 U.S. Dist. LEXIS 75805 at *3. In New York, *in personam* jurisdiction is established under the New York Civil Practice Laws and Rules ("CPLR").

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Section 301 of the CPLR authorizes general personal jurisdiction over a foreign corporation on any cause of action if the defendant is "doing business" in New York so as to warrant a finding of its "presence" in New York. *See* N.Y. C.P.L.R. § 301. A corporation is found to be doing business in New York if it is engaged in continuous, permanent and substantial activity within the state. Where the focus is on the defendant's general or systematic presence within the state, the Court will examine the contacts with the forum state over a period that is reasonable under the circumstances, up to and including the date the suit was filed. *See Nursan Metalurji Endustrisi A.S.,* 2009 U.S. Dist. LEXIS 75805 at * 4. Traditional indications of personal jurisdiction in New York courts include "(1) whether the company has an office in the state; (2) whether it has any bank account or other property in the state; (3) whether it has a phone listing in the state; (4) whether it does public relations or solicits business within the state; and (5) whether it has individuals located in the state to promote its interests." *Wiwa v. Royal Dutch Petroleum Co.,* 226 F.3d 88, 98 (2nd Cir. 2000).

In addition, CPLR § 302, New York State's Long-Arm jurisdiction statute, allows a court to exercise personal jurisdiction over a non-domiciliary, provided that the cause of action arises from any of the acts enumerated therein. *See* CPLR § 302(a)(1)-(4). Specifically, the Court may exercise personal jurisdiction over a non-domiciliary who "transacts" business within the state, CPLR § 302(a)(1); who commits a tortious act in the state, CPLR § 302(a)(2); who causes damage to persons or property within the state, CPLR § 302 (a)(3); or who owns, uses, or possesses real property within New York, CPLR § 302(a)(4). In order to maintain a suit under CPLR § 302, there must be some connection between the business transacted or the damage sustained, and the cause of action sued upon. *Beacon Enterprises, Inc., v. Menzies*, 715 F.2d 757, 764 (2d Cir. 1983).

In *MAN Ferrostaal, Inc*., v. *M/V AKILI,* Ferrostaal brought an *in personam* action against both Akela and Almi, as owner and manager of the M/V AKILI, respectively. On January 23, 2009, Defendants Akela and Almi filed a motion to dismiss for lack of personal jurisdiction, claiming that neither party was subject to personal jurisdiction under either § 301 or § 302 of the CPLR. Ultimately, the issue of personal jurisdiction was stayed by the District Court pending trial on the issues of the Defendants' *in rem* and *in personam* liability.

Explanation of COGSA and its Predecessor, the Harter Act

In 1893, Congress enacted The Harter Act[3] in an effort to regulate, among other things, a shipper's contractual limitation of liability in international trade. The Harter Act applies to a carrier engaged in the carriage of goods to or from any port in the United States. 46 U.S.C. § 30702. The statute forbids carriers from "inserting in a bill of lading or shipping document a provision avoiding its liability for loss or damage arising from negligence or fault in loading, stowage, custody, care, or proper delivery. Any such provision is void." 46 U.S.C. § 30704. The Harter Act has the effect of preserving the common law duty of a carrier to exercise due care in all handling of cargo, even when there are contrary contractual provisions designed to avoid carrier liability.

In 1936, Congress superseded parts of the Harter Act by passing the Carriage of Goods by Sea Act. COGSA, by its terms, applies to the international shipment of goods to or from ports of the United States "…from the time when the goods are loaded on to the time when they are discharged from the ship." *See* 46 U.S.C. § 30701, n. § 1(e). Although COGSA "sharply curtailed the applicability of the Harter Act," the Harter Act still governs where COGSA does not. *Allied Chemical International Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476, 482 (2nd Cir. 1985). Specifically, the Harter Act governs during the period prior to loading and after discharge of the cargo from a vessel until proper delivery is made. *See Fed. Ins. Co. v. Great White Fleet (US) Ltd.*, 2008 U.S. Dist. LEXIS 58461 at *28 (S.D.N.Y 2008).

COGSA, like the Harter Act, requires ocean carriers to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." 46 U.S.C. § 30701, n. § 3(2). COGSA forbids carriers from contracting out of these obligations. *Id*., n. § 3(8); *see also, Sogem-Afrimet. Inc. v. M/V Ikan Selayang*, 951 F. Supp. 429, 442-443 (S.D.N.Y. 1996), *aff'd* 122 F.3d 1057 (2nd. Cir. 1997) ("COGSA does not permit the carrier to divest itself of the duty to insure the proper stowage of the cargo."). COGSA defines a "carrier" to mean "the owner, manager, charterer, agent, or master of a vessel" including "the owner or the charterer who enters into a contract of carriage with a shipper." 46 U.S.C. § 30701, n. § 1(a). Under COGSA, the bill of lading is prima facie evidence of receipt by the carrier of the goods as described. A plaintiff establishes prima facie liability by proving receipt of the goods by the ship in good order and delivery of the goods at the destination

in a damaged condition. *See Demsey & Assoc., Inc. v. S.S. Sea Star*, 461 F.2d 1009, 1014 (2nd Cir. 1972)

Second Circuit's Decision and Its Implications

On appeal, the Appellants, M/V AKILI, Akela and Almi, argued that an *in rem* proceeding rendering the vessel liable for damage to the pipe cargo was unavailable because a vessel is not a "carrier" within the meaning of COGSA, 46 U.S.C. § 30701. In reaching its decision, the Second Circuit found that a vessel's *in rem* liability for damage to cargo exists under maritime common law (otherwise known as the general maritime law), not COGSA, for a violation of a carrier's contractual or statutory obligations.

The Second Circuit determined that COGSA assumes the existence of the *in rem* proceeding rather than creates it. 46 U.S.C. § 30701, Note § 3 which is the heart of the Act, sets out the duties applicable only to carriers but is entitled "Responsibilities and Liabilities of Carrier and Ship." (emphasis added). The Second Circuit reasoned that the very title of Section 3 assumes that the general maritime law supplies *in rem* liability coextensive with carrier liability.[4]

Well before the enactment of COGSA and its predecessor, the Harter Act, the general maritime law held ships liable *in rem* for cargo damage due to improper stowage. *See The Water Witch*, 66 U.S. 494, 500 (1862) ("The ship having received the cargo and carried it…is estopped to deny her liability to deliver in like good order as received…"); *Demsey*, 461 F.2d at 1014 ("Every claim for cargo damage creates a maritime lien against the ship which may be enforced by a libel *in rem*."), *abrogated on other grounds by Seguros Illimani S.A., v. M/V POPI P,* 929 F.2d 89 (2nd Cir. 1991); *Pioneer Import Corp., v. Lafcomo,* 49 F.Supp. 559, 561-62 (S.D.N.Y. 1943), *aff'd* 138 F.2d 907 (2nd Cir. 1943) ("A lien arises against the ship for damage to cargo caused by improper stowage.")

In rem vessel liability is derived from a pre-COGSA maritime law doctrine known as "implied ratification," which finds that once cargo is aboard a vessel, the vessel is deemed to have impliedly ratified the underlying contract of affreightment and is answerable for nonperformance. The "implied ratification" doctrine gives rise directly to *in rem* liability. The "implied ratification" doctrine is directly traceable to pre-COGSA general maritime law precedent and does not render a vessel a carrier under COGSA.

The Second Circuit held that once M/V AKILI set sail with the steel pipes cargo onboard, the vessel impliedly ratified the contract of affreightment between S.M. China and Ferrostaal. The fact that a vessel is operated under charter does not absolve it of *in rem* liability. Even if a charterer enters into a contract of affreightment unauthorized by the vessel owner, the vessel remains liable *in rem* for non-performance even if the vessel owner is absolved of *in personam* liability. *See Demsey*, 461 F.2d at 1014-15. Accordingly, the Court found M/V AKILI liable *in rem* to Ferrostaal for damage sustained to the cargo as a result of improper stowage.

In addition, the Second Circuit also affirmed the District Court's decision to dismiss Ferrostaal's *in personam* claims against Akela and Almi. In order to recover for damage to cargo under a bailment theory, there must be a bailment relationship between the claimant and the ship owner or manager. The Court found that neither Akela nor Almi authorized S.M. China to issue bills of lading on their behalf. In addition, Ferrostaal could not have believed such authorization existed when the bill of lading named only S.M. China as carrier. S.M. China remained responsible for delivery of the goods and maintained exclusive control and custody over the cargo through the agents it hired. Accordingly, both Akela and Almi were not liable *in personam* for the cargo damage under a bailment theory.

Conclusion

The Second Circuit's decision in *MAN Ferrostaal, Inc*., v. *M/V AKILI*, *et al.,* reaffirmed a longstanding maritime principle: that a vessel is liable *in rem* for damage sustained to cargo shipped onboard. Even if a vessel is not a "carrier" within the meaning of COGSA, the general maritime law of the United States renders vessels liable *in rem* for a carrier's violations of its obligations. While COGSA, if applicable, may alter a carrier's obligations, the *in rem* action against the vessel for damage to cargo is a powerful remedy that is a creature of maritime common law.

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1. The United States Court of Appeals for the Second Circuit, which has appellate jurisdiction over cases originating from, *inter alia* the Southern District of New York, is considered one of the most important federal courts of appeals for admiralty cases.

2. The Carriage of Goods By Sea Act, originally published at 46 USC Appx. §§ 1300-1315 was not re-codified when the Appendix to Title 46 of the United States Code was removed in 2006. COGSA was not amended or repealed but is now published in the United States Code at 46 U.S.C. § 30701, as part of the historical and revision notes to the re-codification of the Harter Act.

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3. In 2006, Congress re-codified the Harter Act (previously published at 46 U.S.C. §§ 190-196) at 46 U.S.C. §§ 30701-30707.

4. The portion of Section 3 that applies directly to ships is Paragraph 8, which prevents parties from contracting around the ship's coextensive liability for loss or damage to cargo. 46 U.S.C. § 30701 Note § 3(8)

ORDERING SECURITY FROM A U.S. MARITIME ARBITRATOR'S PERSPECTIVE

By David W. Martowski
Member and Ex-President of the SMA

Nothing is more frustrating than for a prevailing party to discover after lengthy and costly arbitration proceedings that there are no funds to satisfy an award in its favor.

We know from Peter Skoufalos' paper that U.S. arbitrators are clearly empowered to order the posting of security. What criteria do they consider in doing so?

I have reviewed 40 SMA awards through March, 2012 which addressed requests for security. Some involved charter parties and contracts that incorporated the SMA Rules while others did not. All are annotated in Appendix A. Although each of these disputes is unique and case-specific, if you are interested in a purely statistical analysis (and I would caution against this approach) 28 or 70% ordered the posting of security. Just as interesting is the panels' cautious reasoning expressed in those awards denying security.

The core considerations weighed by U.S. maritime arbitrators in deciding whether the ordering of security is appropriate, are:

- The overall objective
- The claim presented
- The opposing party's conduct, and
- The opposing party's financial condition

The Overall Objective – The awards reviewed reflect repeated references to the effect that:

> *"Arbitration should not be merely an academic exercise."*
>
> *"Ordering security in appropriate cases is intended to ultimately prevent a "Pyrrhic Victory."*
>
> *The goal is to preserve the status quo (defined in one award as a "party's fiscal status and responsibility"). ; and*
>
> *A fundamental interest in "doing justice and equity between the parties in a commercially reasonable manner".*

There is no magic formula and each application is considered against that dispute's unique facts and circumstances. The sentiment is also repeatedly stated that arbitrators should not order security with impunity.

The Claim Presented – Careful consideration is given to the nature of the claim, the defense and the content of the record. For instance, is the claim:

- Frivolous or specious?
- Undisputed?
- Quantifiable?
- Is there an alleged fundamental breach which goes to the heart of the contract?
- Is it a contingent claim? You will not be surprised that in one case the request for security was held to be premature since the claim was for cargo indemnity that had not been paid in the first instance and the matter was still on appeal.
- Has the moving party introduced sufficient evidence to establish a likelihood of success on the merits?
- Is there no other means to obtain security?

The Opposing Party's Conduct - Arbitrators have taken a dim view of a party's

- Failure to respond to a demand for arbitration
- Failure to keep in force a bank guarantee required under the charter party; and
- A continuing breach of the charter party or contract.

The Opposing Party's Financial Condition – The key questions most frequently asked are: Is the need for security real? Is there a substantial risk of an inability to locate sufficient assets to satisfy claims? For instance, careful consideration will be given to:

- The opposing party's doubtful financial condition as to creditworthiness and/or physical assets;
- The opposing party's failure to post security as previously agreed; and
- Whether the entity has been restructured and assets have been transferred and/or sold.

It is worth noting that in one case, despite the vessel having been sold, the panel nevertheless held that there was no compelling reason to order security. In another

case there was no showing that the financial condition of the opposing party changed materially from the time of fixture to the commencement of arbitration proceedings.

Counter Security - Requests for counter security are becoming more common.

- The same objective applies – To restore the status quo and ensure a level playing field so that at the time of the final award sufficient funds will be available to satisfy the prevailing party's claims.
- Arbitrators have emphasized that "What is sauce for the goose is sauce for the gander".
- These requests frequently arise after an owner's P&I Club has posted a Letter of Undertaking and the owner now seeks counter security from the charterer. The view is often expressed that it is only fair and equitable for the owner to also obtain security for its counter claim.

Four recent examples illustrate how applications for security work in practice.

a) Sanko Steamship, Ltd. v Sherwin Alumina Ltd. [1]- Sherwin sought to recover claims for dockage and port security fees under a long term arrangement. Rather than terminate the contract, the parties agreed that Sanko would fund an escrow account on a continuing basis until the issue was decided. When Sherwin demanded arbitration, Sanko's escrow deposits were in the range of $2-3M. Once the arbitration commenced, Sanko counter-claimed for hold-cleaning expenses and applied for security. The panel unanimously held it was so entitled in an amount to be determined. It emphasized that this was a preliminary ruling out of a sense of even-handed fairness to both parties and not meant to address the merits of Sanko's claims. Sanko was directed to substantiate its claims within 20 days and did so. The panel thereafter unanimously directed Sherwin to deposit $675,000 into an interest-bearing escrow account within 20 days to secure Sanko's claims plus an allowance for attorneys' fees and anticipated interest and costs. Sherwin promptly complied.

b) The SAMHO DREAM [2] - The Vessel was seized by Somali pirates and released after War Risk Underwriters paid a $9M ransom. Owner initiated arbitration seeking to recover the ransom plus other claims totaling approximately $11.8M. Charterer counterclaimed for hire and other claims totaling $14M. After several evidentiary hearings, Owner unfortunately suffered serious financial losses. Charterer applied for security for its counterclaims in the amount of $14.2M, introducing evidence of outstanding mortgages on the Vessel, the precarious state of Owner's finances, and Charterer's inability to arrest the Vessel at her anchorage off Dubai under the laws of the UAE.

The panel noted as a preliminary matter that Rule 30 of the SMA Rules is sufficiently broad to empower the ordering of security and that this well-established New York practice is supported by many SMA awards and the Second Circuit Court of Appeals. It went on to state:

> *The panel has seriously considered the question of whether there would be a source of funds to satisfy KSI's [Charterer] claim should it prevail on the merits. Obviously, if there is no other source of security available to KSI, any monetary award to KSI would be nothing more than a pyrrhic victory. Such an end result would not, in our view, be commercially acceptable.*
>
> * * * * *
>
> *Based on the evidence before us, it is the panel's conclusion that the only avenue of funds for KSI, should it be successful on the merits, would be the security KSI seeks in this arbitration. KSI's motion must be considered with this prospect in mind.*

The panel considered the fundamental breach alleged by Charterer and concluded from the documentary evidence and testimony that there was a likelihood that Charterer would prevail on the merits, emphasizing that, "Obviously, the standard we follow for the purpose of this motion is significantly different from the one we will apply when the evidentiary proceedings resume and the arbitration moves forward to a conclusion and Final Award." It added, "Admittedly, the amount of security we have ordered here is substantially larger than amounts ordered to be posted in other SMA arbitrations. However, we should emphasize that the issues in this proceeding are of significant importance and the damages being asserted by both parties are indeed substantial." The panel also noted that the Charterer had posted security for the Owner's general average claim and offered to voluntarily post security for Owner's claims in this proceeding. While Owner had not responded to this offer, the panel indicated willingness to entertain its motion in this respect once Owner had posted security. In conclusion, the panel unanimously ordered Owner to post $14.2M within 45 days in a form reasonably acceptable to Charterer.

Owner's counsel withdrew its representation, Owner was unable to fund the $14.2M ordered and Charterer moved to dismiss its claims. Owner's counsel reappeared in

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the proceedings and opposed dismissal. Charterer's motion was denied and shortly thereafter, unwilling to bear further substantial legal expense without any real possibility of satisfying a favorable award, Charterer requested a stay of proceedings sine die until Owner and/or its underwriter posted security. Owner and its war risk underwriter, wishing to continue defending Charterer's counterclaims and, only if successful, pursue its claims, opposed the motion. The panel unanimously granted Charterer's request for a stay "out of a sense of fairness and commercial good sense". It remained constituted and was prepared to decide all claims as promptly as possible should Owner or its underwriters choose to secure Charterer's counterclaims as previously directed.

Owner petitioned the U.S. District Court for the Southern District of New York to (1) compel Charterer to continue to arbitrate its counterclaims; or, alternatively, (2) vacate the Panel's ruling staying the proceedings sine die, contending that it "resulted in the Panel improperly refusing to hear evidence pertinent and material to the arbitration." [3]Owner's petition has not been decided as of this writing.

c) The GEORGIA S[4] - Owner chartered the Vessel for one voyage from Mexico to China. Charterer failed to provide a cargo at loading port and Owner demanded arbitration. Charterer refused to respond, contending that a binding fixture was never finalized, and Owner moved to compel arbitration. The Court held that a fixture had been concluded and ordered the parties to proceed to arbitration.[5] Owner, citing Charterer's refusal to arbitrate, its continuing recalcitrance and concern with respect to the financial condition of Charterer as well as its parent[6], requested the panel to summarily order it to post security in the amount of $1M for breach of charter so that a favorable award would not be merely an academic exercise. The Charterer neither disputed its failure to provide a cargo nor opposed the panel's right to order security, but rather requested the panel to stay the proceedings, schedule discovery and subpoena Owner's documents, and deny Owner's request. Charterer also advised that it was unable to deposit funds as security for arbitration fees and requested an additional 90 days in which to do so. Emphasizing that it was likely that Owner may prevail on the merits and that the only source of funds would be the security requested, the panel unanimously concluded that Owner had presented a prima facie case of contract repudiation and ordered Charterer to post $850,000 within 30 days in a form reasonably acceptable to Owner.

d) The GENCON CARRIER [7] - Owner demanded arbitration of its claims for severe allision damage and sought pre-award security for the cost of repairs, expressing its concerns that Charter had mutated its corporate identity several times after the incident and that any award in its favor would be a Pyrrhic victory. Charterer opposed the application, contending that the transfer of assets and business between various owning, chartering and operating entities emanated from the desire to inject new capital into the company and denied these transactions were prompted to cause any siphoning-off of cash or transferring of assets to evade Charterer's liabilities. The panel noted that although the parties had discussed settlement of Owner's claims over more than a three-year period, they remained unresolved. It shared Owner's concerns, stating "given the circumstances in this particular case where there seems to be a change in the financial structure and corporate entity of the named Charterer", and unanimously directed Charterer to post security in the amount of $725,000 within 30 days in a manner acceptable to Owner.

The Order of Security usually takes the form of a Partial Final Award or an Interim Ruling which is:

- not a determination on the merits and entirely without prejudice to the opposing party's defenses;
- in a reasonable amount – certain but subject to subsequent adjustment upwards or downwards if circumstance warrant; and
- ordered posted by a date certain in a form reasonably acceptable to the requesting party.

When security has been denied, panels will often state that the moving party is free to renew its application in the event of changing circumstances. When the dispute is ripe for decision, panels may prefer to decline to award security and move the matter forward to final award on an expedited basis.

Conclusion

United States arbitrators' power to order security in appropriate circumstances, while unique in international maritime arbitral practice, is not exercised with impunity but rather only after careful consideration of the facts, circumstances and merits of each dispute.

1. SMA 4135 (2011).
2. SMA 4154 (2011).
3. 12 Civ. 0375 (AJN).

4. SMA 4163 (2012).

5. 11 Civ. 2499 (DLC)(S.D.N.Y.)

6. Introducing evidence that the SEC issued a Notice Delisting the Charterer's parent company.

7. SMA 4167 (2012).

REQUESTS FOR PRE-AWARD SECURITY AND OTHER INTERIM REMEDIES IN NEW YORK MARITIME ARBITRATIONS: A PRACTIONER'S PERSPECTIVE

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Lawyers and their clients enter arbitration with the hope that, if they win their case, the losing party has the means to satisfy an award for damages. Unfortunately, security is not always available to the claimant (especially with the demise of Rule B attachment of electronic funds transfers) and, now more than ever, an arbitration proceeding may outlast the most stable company. Thus, claimants are often left weighing the cost of pursuing the arbitration against the possibility that the losing party will become insolvent and judgment-proof.

Some relief, however, is available to maritime claimants in the U.S., where courts regularly sustain arbitrators' authority to order security and other interim remedies. Awards by arbitrators that direct a party to post security in a pending arbitration are part of a general trend favoring interim measures in commercial arbitrations. Often in the form of an interim or partial final award, directives by arbitrators to post security are being seen with increasing frequency.

Pre-award security, which is the focus of this paper, is just one of a wide assortment of interim measures available to U.S. arbitration panels. Others include:

- specific performance
- orders to pay part of a claim pending a final award
- preliminary injunctions (e.g., enjoining disclosure of trade secrets or termination of a contract)
- orders directing the preservation of evidence
- orders directing preservation of assets to avoid dissipation

Two related formulations have been given by the courts in recognizing arbitrators' authority to award interim relief, including interim security orders. Both have equitable underpinnings:

(1) to maintain the status quo during the pendency of the arbitration proceedings; and,

(2) to assure that the outcome of the arbitration does not become meaningless.

I. Sources for Arbitrators' Authority:

A. Parties' Arbitration Clause or Governing Rules:

The U.S. Supreme Court identified the "contractual rights and expectations of the parties" as paramount when enforcing an agreement to arbitrate or when construing an arbitration clause. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010). Arbitrators' power to order interim measures, including the posting of security, is, therefore, based in the first instance on the parties' arbitration agreement or the arbitration rules governing the dispute.

The rules of most large international commercial arbitration organizations provide for some form of interim relief. *See, e.g.*, *UNCITRAL Model Law* Art. 17(1) (tribunal may order "interim measure" prior to final resolution of dispute); *International Chamber of Commerce (ICC)* Art. 23(1) (tribunal may order "any interim or conservatory measure it deems appropriate"); *ICDR Rules of the American Arbitration Ass'n* Art. 21(1) (on a party's request, tribunal "may take whatever interim measures it deems necessary"); *JAMS Rule* 26.1 (tribunal may grant "necessary" interim relief). *See Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 Am. Rev. Int'l Arb. 317 (2009).

Section 30 of the Rules of the Society of Maritime Arbitrators (S.M.A.) confers broad powers on S.M.A. arbitrators to grant equitable or just remedies or relief. However, the rule does not explicitly refer to security or any other particular interim measure. *See S.M.A. Rule* 30 ("The Panel, in its Award, shall grant any remedy or relief which it deems just and equitable, including, but not limited to, specific performance.").

Recently, one New York panel held that its "authority to address the issue of security is derived from … Section 30 of the SMA Rules." The panel concluded that, "Section 30 is sufficiently broad with respect to the arbitrators' right to grant relief in a wide range of areas" including "[c]ertainly the power to order the posting of security." *SH Tanker Ltd. v. Koch Shipping, Inc.*, S.M.A. No. 4154 (Arb. N.Y. 2011).[1]

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The panel's subsequent decision to stay the proceedings until security was posted is now under review by a federal court in New York, which may also consider the scope of Section 30 in the specific context of pre-award security.

The "honourable engagement" language seen in reinsurance disputes is frequently cited as authority for arbitrators' power to award security or other interim remedies in those cases. For example, in *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003), the federal appeals court upheld an interim award of pre-hearing security in the context of the following arbitration clause:

> *The arbitrators shall consider this Treaty an honourable engagement rather than merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law. (emphasis added).*

The court concluded that "[w]here an arbitration clause is broad, as here, arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself." The court declined to "undermine the comprehensive grant of authority" given to the arbitrators by stepping in and prohibiting an arbitral security award that ensures a meaningful final award. A similar conclusion has been reached by several other courts. *See Yasuda Fire & Marine Ins. Co. of Europe, Ltd. v. Continental Cas. Co.*, 37 F.3d 345 (7th Cir. 1994) (upholding arbitrators' power to order pre-hearing security in the form of a letter of credit); *Island Creek Coal Sales Co. v. City of Gainesville, Florida*, 729 F.2d 1046 (6th Cir. 1984) (finding that where the contract did not preclude equitable relief, "the arbitrator may grant any remedy or relief which the arbitrator deems just and equitable and within the scope of the agreement of the parties") (citing *AAA Commercial Arbitration Rule* 43).

In *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir. 1991), the arbitration tribunal ordered that certain funds be placed in an escrow account as security for a possible final award. In confirming the "interim final order," the federal appeals court cited the "wide latitude" given the arbitrators by the parties' management agreements:

> *The arbitrators shall interpret this Agreement as an honorable engagement and not as merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law, and they shall make their award with a view to effecting the general purpose of this Agreement in a reasonable manner rather than in accordance with a literal interpretation of the language.*

The court concluded that the interim order "does not exceed the mandate given the panel by the order compelling arbitration and by the Management Agreements."

B. Arbitrators' Equitable Powers:

In the U.S., federal judicial review of interim awards ordering security goes back at least 30 years. *See Sperry Int'l Trade, Inc. v. Israel,* 689 F.2d 301 (2d Cir. 1982). In *Sperry*, a non-maritime case, the New York federal appeals court approved the panel's interim award requiring one party to fund a joint escrow account: "New York law gives arbitrators substantial power to fashion remedies that they believe will do justice between the parties." *Id. Sperry* has remained good authority for not disturbing arbitrators' awards of security when they are based on equitable factors and the relief is not otherwise precluded by the parties' agreement.

Sperry was cited approvingly in *Compania Chilena de Navegacion Interoceanica, S.A. v. Norton, Lilly & Co., Inc.*, 652 F. Supp. 1512 (S.D.N.Y. 1987), a maritime dispute in which the federal district court was asked to confirm two interim awards issued by a New York arbitration panel. The first award (issued after the initial hearing) ordered the defendant to pay a sum that the panel concluded was not in dispute. After a second hearing, the panel ordered the defendant to post a bond as security for the balance of the claim while the panel deliberated. The claimant then sought confirmation of both the partial award and the bond order in the federal court and the defendant sought to vacate both awards. In confirming the interim awards, the district court reiterated the familiar formulation that arbitrators "may grant equitable relief that a Court could not."

In *East Asiatic Co., Ltd. v. Transamerican Steamship Corp.*, 1988 A.M.C. 1086 (S.D.N.Y. 1987), a New York federal court rejected a challenge to two interim security awards, finding that the arbitrators had not "exceeded their authority." The absence of express language authorizing security awards or a formal submission of the issue to the panel was not a bar to the relief granted by the panel. Quoting *Sperry*, the court recognized that arbitrators have "substantial power to fashion remedies that they believe will do justice between the parties." The court went on to confirm the panel's two interim awards requiring the respondent to fund interest-bearing escrow accounts as security.

Similarly, in *Konkar Maritime Enterprises, S.A. v. Compagnie Belge D'Affretement*, 668 F. Supp. 267 (S.D.N.Y. 1987), the district court rejected a challenge to

a panel's interim award requiring the respondent to fund a joint escrow account (to be released only under the panel's direction) in the full amount of the principal claim. Citing arbitrators' "broad discretion in fashioning remedies" and in granting equitable relief, the court concluded that "[a]s a matter of substance, the Panel's escrow account order was within its authority."

In *British Insurance Co. v. Water Street Insurance Co.*, 93 F. Supp. 2d 506 (S.D.N.Y. 2000), a reinsurance arbitration, the panel granted the claimant's request for an interim award for security prior to the first organizational meeting of the panel. The district court confirmed, noting that "[c]ourts in this Circuit have firmly established the principle that arbitrators operating pursuant to such provisions have the authority to order interim relief in order to prevent their final award from becoming meaningless." *Id.* at 516 (citing cases); see also *Yonir Techs., Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp. 2d 195 (S.D.N.Y. 2002) (panel's interim directives to parties regarding joint escrow account were appropriate "temporary measures designed to ensure that the ultimate award of the arbitration panel is not rendered meaningless through dissipation of its assets").

In *Yasuda Fire & Marine Insurance Co. of Europe, Ltd. v. Continental Casualty Co.*, cited above, the federal appeals court upheld an arbitration panel's interim award of security based on equitable factors. The court observed that the panel acted merely to preserve the claimant's "stake in the controversy" and to "protect the bargain giving rise to the dispute." The appellate court emphasized the importance of having "a wide range of remedies" for a successful arbitration, even if the parties did not articulate specific remedies in their arbitration agreement.

In *Certain Underwriters at Lloyd's, London v. Argonaut Insurance Co.*, 264 F. Supp. 2d 926 (N.D. Cal. 2003), a reinsurance dispute, the panel ordered one party to establish an escrow account in the amount of $ 2,535,491 under the control of the panel. In upholding the interim award, the court rejected the contention that the panel had exceeded its power, finding that the parties' rights were fully protected by the escrow requirement.

Finally, mention should be made of Section 8 of the U.S. Federal Arbitration Act, which permits a party to obtain security through traditional maritime arrest and Rule B attachment even "while seeking arbitration of the merits of the claim." However, Section 8 is not the exclusive security remedy of a maritime claimant, and the availability of Section 8 remedies will not preclude a party from also seeking an interim security award from an arbitration panel. *East Asiatic Co., Ltd. v. Transamerican Steamship Corp.*

II. Enforcement of Interim Awards:

A. Judicial Confirmation of Interim Awards Ordering Security:

Interim measures may be useful tools for the parties and arbitrators, but can they be effective without an enforcement mechanism?

Arbitrators themselves have limited enforcement powers. Commentators have noted with some concern that "[t]he frequent lack of power of arbitral tribunals to enforce interim measures of protection is currently a problem in international commercial arbitration." *12 Currents Int'l Trade L.J. 55 (Winter 2003); see also International Arbitration: the Need for Uniform Interim Measures of Relief*, 28 Brooklyn J. Int'l L. 1059 (2003) ("A major disadvantage of arbitration is the arbitral tribunal's lack of coercive power necessary to support the process.")

Can courts confirm interim awards, including awards directing the posting of security? Are interim awards ordering security and other provisional remedies final for purposes of confirmation under the U.S. Federal Arbitration Act?

Generally, an "interim" or preliminary award dealing with security "is ripe for confirmation" even though the arbitrators have not yet reached a decision on the merits. *E. Asiatic Co., Ltd. v. Transam. S.S. Corp.* (quoting *S. Seas Navigation of Monrovia Ltd. v. Petroleos Mexicanos of Mexico City*, 606 F. Supp. 692 (S.D.N.Y. 1985)).

In *Home Insurance Co. v. RHA/Pennsylvania Nursing Homes*, 127 F. Supp. 2d 482 (S.D.N.Y. 2001), the defendant opposed confirmation of an interim award entitling the plaintiff to immediate possession of a disputed sum during the pendency of the arbitration. The district court confirmed the interim award, noting that although the award was not dispositive of the ultimate merits, it was neither "tentative" nor "inconclusive" and entirely "separable" from the main dispute:

> *Indeed, if petitioner cannot confirm the February 28 award now, it never will be able to enforce the arbitrators' determination that it is entitled to the money now, not after the conclusion of the hearings on the merits of the entire dispute between the parties.*

The district court in *Yonir Technologies, Inc. v. Duration Systems (1992) Ltd.*, discussed above, held that the panel's five interim directives in an ongoing arbitration are final and subject to confirmation. *See also Metallgesellschaft A.G. v. M/V CAPETAN CONSTANTE*, 790 F.2d

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280 (2d Cir. 1986) (separable arbitration awards should be confirmed even if the petition to confirm is filed before all substantive arbitration proceedings between the parties have been concluded).

B. Other Enforcement Considerations:

Compliance with security awards does not always require a trip to the court house to obtain an order of confirmation. There is a large degree of self-enforcement at work here. Parties often comply voluntarily because:

(i) they do not want to be viewed as obstructionist by the panel;
(ii) they want to be viewed favorably by the panel on the substantive issues;
(iii) they are concerned with having the panel draw negative inferences against them on the substantive issues for failure to comply with an interim security award; and
(iv) they want to avoid the costs of enforcement proceedings.

Other tools are available to nudge voluntary compliance with interim security awards. In the recent *SH Tanker Ltd. v. Koch Shipping, Inc.* arbitration, discussed above, the arbitrators, on charterer's application, unanimously agreed to stay the proceedings, *sine die*, and declined to hear the claimant's case-in-chief until it posted security for the respondent's counterclaim. The panel's stay order is currently under judicial review.

III. Practice Considerations:

A. The practitioner should be alert to the full panoply of interim measures available in a given case and not necessarily limit his/her options to pre-award security. Arbitrators may be more willing to order one interim measure over another.

B. The practitioner's approach will obviously differ depending on whether they are seeking or opposing interim measures. In either case, the practitioner will be looking to guide the panel's discretion in favor of their particular position.

C. The assertion of a counterclaim, coupled with a request for counter-security, can be an effective "defensive" tool for a party faced with a request to post security. Unless the counterclaim is patently frivolous, the panel will want to place the parties on an equal footing as regards security and a party demanding security may itself be compelled to post counter-security

D. Whenever a request for interim measures is sought, the panel will want to assure that it is not seen as pre-judging the matter. Nevertheless, some panels will require the party seeking security to demonstrate a strong likelihood of success on the merits.

E. In seeking an interim award, practitioners should stress the importance of maintaining the status quo and the possibility that, without an interim measure, there may be a change of circumstances that will render the proceedings meaningless. In some instances, obtaining interim relief may be a matter of urgency, as when aggravating circumstances exist or to prevent the imminent dissipation of property.

F. A practitioner opposing a request for interim measures, including a request for security, can seek to demonstrate that the interim award is onerous and, if imposed, would be tantamount to depriving a party of the financial means of proving its claim or defense. Alternatively, the practitioner can seek to demonstrate that interim security measures are unnecessary because of the client's financial condition. The practitioner should be prepared to back this assertion with financial statements and other documentation if necessary.

IV. Impact of *AnimalFeeds International Corp.* on Arbitrators' Authority to Order Interim Measures:

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the U.S. Supreme Court found that an arbitral panel exceeded its authority in permitting class arbitration where the parties' arbitration agreement was otherwise silent on the issue. Concluding that the Federal Arbitration Act itself did not authorize class arbitrations, the Court held that "a party may not be compelled under the Act to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." (emphasis in original).

At issue in *AnimalFeeds* was Section 10(a)(4) of the Federal Arbitration Act, pursuant to which a district court may, upon the application of any party to the arbitration, vacate any award "where the arbitrators exceeded their power." The Court emphasized that the "central or 'primary' purpose of the Act is to ensure that 'private agreements to arbitrate are enforced to their terms.'" 130 S.Ct. at 1773 (citations omitted). "Mere silence" in the parties' arbitration agreement did not constitute consent nor could consent be inferred "solely from the parties' agreement to arbitrate."

In contrast, the courts hearing challenges to interim security awards have asked whether such awards are precluded by the parties' agreement, not whether the agreement expressly authorizes the issuance of such awards. For example, the court in *Yasuda Fire & Marine Insurance Co. of Europe, Ltd. v. Continental Casualty Co.* held: "the

arbitration panel would exceed its authority if it provided an award which the agreement explicitly excluded as an option." 37 F.3d *at* 352; *see also Home Ins. Co. v. Banco de Seguros del Estado (Uruguay)*, 1999 U.S. Dist. LEXIS 22478 ("panel has inherent power to require a party to post security so long as the arbitration agreement between the parties *does not preclude* such a remedy" (emphasis added)).

As yet, we are not aware of a party relying on *Animal-Feeds* to argue that the panel must first determine if the proposed interim measures are expressly authorized in the parties' agreement before such measures can be granted.

(Contributions to this article by Patrick O'Mea, Esq. of Brown Gavalas & Fromm)

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1. Although the decision in *NYKCool A.B. v. Kelso Enterprises Ltd.*, 2011 A.M.C. 271 (S.D.N.Y. 2010), did not involve pre-award security, the district court cited Section 30 of the S.M.A. Rules as the basis for the panel's authority to impose joint and several liability on several of the parties. "Under the broad authority granted by the rules of the [S.M.A.], the arbitrators had the power to fashion 'any remedy or relief which [they] deem [] just and equitable.'" (quoting Section 30).

MARITIME OR NOT?

Thomas H. Belnap, Jr., Partner Blank Rome LLP

Here is a multiple choice question: which of the following contracts is considered to be a "maritime contract" under U.S. law? (a) a shipbuilding contract (b) a ship-sale contract (c) a ship-repair contract and/or (d) a ship mortgage.

You will be forgiven if you simply tried to apply logic in answering this question and guessed that all four are maritime contracts. If you know your maritime law, however, then you should have answered that "c" and "d" are maritime contracts whereas "a" and "b" are not. Or, at least, that is the current state of the law.

Why might this matter? In the first place, it may impact whether a claim can be brought in the Federal courts or whether it must be asserted in state court. Federal courts possess only "limited" jurisdiction, meaning they can only hear cases which are within the scope of their Constitutionally defined jurisdiction. If the dispute involves a maritime contract, a claim may be brought in the Federal court under its "admiralty and maritime" jurisdiction. If it is a non-maritime contract, however, then it may only be brought in the Federal court if the "diversity" rules are met, meaning that the claim must exceed a certain amount and be between citizens of different states. Importantly, claims between non-U.S. citizens do not meet the diversity requirement, whereas the court's admiralty jurisdiction has no similar "citizenship" limitations.

A second important issue is that the maritime law has relatively permissive rules allowing for pre-judgment attachment of assets in support of a "maritime claim" which are not available to claimants on non-maritime claims. This right is principally defined by Rule B of the Federal Rules of Civil Procedure, Supplemental Rules for Admiralty or Maritime Claims. Under that rule, a party may obtain an attachment of the defendant's property located in a district where the defendant is not otherwise "found" merely by asserting a "prima facie" maritime claim. This is a low pleading threshold, and Rule B can be a very powerful tool – particularly useful in an industry where the business is international and assets are transitory.

A third and related issue is whether maritime liens can arise out of a breach of a contract. Such liens can create powerful priority and enforcement rights both as against the vessel owner and third-party claimants who may be seeking to enforce their own claims against the same assets. No maritime lien can arise from the breach of a non-maritime contract.

How did this happen? How is it that a contract to build or sell a ship is not a maritime contract whereas a contract to repair or mortgage a ship is a maritime contract? The answer goes back at least as far as 1857, when the United States Supreme Court decided *People's Ferry Company of Boston v. Beers*[1] and said this about a shipbuilding contract: "So far from the contract being purely maritime, and touching the rights and duties appertaining to navigation, (on the ocean or elsewhere,) it was a contract made on land, to be performed on land."[2] In 1918, the Court of Appeals for the Second Circuit (encompassing New York, Connecticut and Vermont) held in *The ADA*[3] that a ship sale contract was not a maritime contract. The court cited no authority for the rule nor articulated any rational for the holding; nevertheless, the holding stuck and has been widely followed, in the Second Circuit and elsewhere.

For whatever their original merit, commentators have long criticized these rulings as defying logic and as being inconsistent with international practice. As the eminent admiralty author Charles L. Black, Jr. wrote in *Admiralty Jurisdiction: Critique and Suggestions*,[4] regarding the determination of what contracts are maritime: "The attempt to project some 'principle' is best left alone. There is about as much 'principle' as there is in a list of irregular verbs." Others have described the analysis as "inconsistent even in its artificiality,"[5] as "produc[ing] bizarre results, outcomes that warp the fabric of admiralty jurisdiction,"[6] or, more to the point, as simply "unfortunate."[7]

More recent decisions from the Supreme Court have raised some hope among scholars that these rulings are susceptible to being overruled. In *Exxon Corp v. Central Gulf Lines, Inc.*,[8] the Supreme Court reversed a longstanding bright line rule that agency contracts could never be maritime contracts. That court ruled that "the 'nature and subject-matter' of the contract at issue should be the crucial consideration in assessing admiralty jurisdiction."[9] And in *Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd.*,[10] the Supreme Court held that a multi-modal bill of lading involving ocean carriage was a maritime contract governed by the Carriage of Goods by Sea Act even as to damage occurring on the over-land legs of the voyage. According to the *Kirby* court, the inquiry was whether the contract had reference to maritime service or maritime transaction – in sum, was it sufficiently "salty" in nature to involve the court's maritime jurisdiction.

In 2008, a United States District judge in New York felt sufficiently emboldened by these rulings to conclude that *Exxon* and *Kirby* "support the demise of the holding in The ADA" and ruled that a ship sale contract was a maritime contract and, consequently, that a claim thereunder would support a maritime pre-judgment attachment.[11] That court wrote "a contract for the purchase of a launched ship … has a distinctly 'salty flavor,' for the sole purpose of a ship is to sail" and "[maritime] commerce requires a vessel, sailors, and ship fuel, and there is simply no justification for including contracts for the latter two requirements in admiralty jurisdiction while excluding contracts for the former."[12]

Other judges in the Southern District of New York declined to follow the new course charted by *Kalafrana*, however, finding instead that nothing in *Kirby* and *Exxon* supported the ruling that *The ADA* had been reversed *sub silentio*.[13] And in December 2009, in *Primera Maritime Ltd. v. Comet Fin. Inc.*,[14] the Second Circuit thwarted a similar assault on the ship-construction contract rule, though perhaps not without providing a glimmer of hope for those aspiring someday to change the rule: "[Plaintiff] is correct to point out that the conceptual approach taken in [*Exxon* and *Kirby*] suggests that modern principles disfavor *per se* admiralty rules based on the site of the contract's formation or performance." Still, the Second Circuit concluded that its hands were tied: "Until the Supreme Court declares that contracts for ship construction are maritime in nature, disputes arising from such contract will not give rise to the federal courts' admiralty jurisdiction."

Conclusion

It is probably just a matter of time before the right case gets before the Supreme Court which will allow it to reassess these jurisdictional questions in light of modern developments. And one might surmise that if the Supreme Court is willing to take a critical look at its earlier rulings it would be hard pressed to defend them in light of its rulings in *Exxon* and *Kirby* and in light of the widespread criticism of the current doctrine. Of course, as we learned just recently with regard to its ruling on the heath care legislation, the Supreme Court is full of surprises. So, we will have to wait and see what happens.

This article which originally appeared in and is being reprinted with permission of Maritime Reporter, was the subject presented at the February 2013 SMA luncheon. Thomas H. Belknap, Jr. is a partner at Blank Rome LLP in New York. He can be contacted at tbelknap@blankrome.com.

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1. 61 U.S. 393 (1857).

2. *Id*. at 402.

3. 250 F. 194 (2d Cir. 1918).

4. 50 COLUM. L. REV. 259, 264 (1950)

5. Gilmore & Black, THE LAW OF ADMIRALTY (2d Ed. 1975), p. 26, n. 28.

6. David J. Bederman, The Future of Maritime Law in the Federal Maritime Courts: A Faculty Colloquium: Admiralty Jurisdiction, 31 J. MAR. L. AND COM. 189, 204 (2000).

7. 1 Benedict on Admiralty § 185 at 12-26.

8. 500 U.S. 603 (1991).

9. *Id*. at 611.

10. 543 U.S. 14 (2004).

11. Kalafrana Shipping Ltd. v. Sea Gull Shipping Co. Ltd., 591 F. Supp. 2d 505 (S.D.N.Y. 2008).

12. *Id*. at 509.

13. *See e.g.,* Polestar Mar. Ltd. v. Nanjing Ocean Shipping Co., 631 F. Supp. 2d 304 (S.D.N.Y. 2009).

14. 355 Fed. Appx. 477, 2009 U.S. App. LEXIS 26331 (2d Cir. 2009).

ADMIRALTY LAW: MISCHIEVOUS SEAMEN SOMETIMES GET NO TREAT

By James E. Mercante, Esq.

Seamen have traditionally been regarded as 'wards' of the admiralty court and often treated with the tenderness of a guardian.[1] As a 'protected' class, seamen have been afforded remedies in the most bizarre circumstances, from jumping out a brothel window ashore, to taking a fall while cavorting in a shoreside dance hall. A seaman who was accidentally shot by another seaman aboard ship, however, did not fare so well.

The seafaring life is not easy. Seamen spend weeks or months at sea and sometimes have only hours ashore to enjoy some of life's simple pleasures that may otherwise be unavailable aboard ship. The seaman's proclivities ashore are well documented by even the most unlikely of sources... state and federal judges. Courts historically have used such terms as "poor and friendless" and apt to acquire "habits of gross indulgence, carelessness and improvidence"[2] to describe seamen and not condemn behavior that might not be acceptable in other walks of life. Even the standard for shipowner liability still remains a "featherweight" test. Thus, courts have allowed recovery against a shipowner under the Jones Act[3] for even the slightest negligence or for breaching the general maritime law duty to provide a seaworthy vessel.

Shipboard life today, however, leads one to question whether the 'protection' of seamen is necessary in a high-tech world where ships are no longer made of wood and powered by sails; shipboard equipment and accommodations are greatly advanced; voyages are shorter, and ships contain most of the creature comforts of home.

Nevertheless, there is no 'accident-free' ship and seamen still get injured. An injured seaman also has the right to recover 'maintenance' and 'cure' expenses under maritime law from the shipowner employer.

Maintenance and Cure

"Maintenance" is the right of a seaman to food and lodging if he or she falls ill or becomes injured while in the service of the ship or while subject to the call of duty. "Cure" is the right of the seaman to have his or her medical expenses covered.[4] The reasoning for a 'maintenance' remedy is that while a seaman is gainfully employed, eating and sleeping aboard a vessel, he or she will not incur any expenses for food and lodging and therefore, if required to leave the ship as a result of injury, the seaman's expenses of food and lodging while convalescing ashore should be reimbursed by the employer. The shipowner's obligation to reimburse maintenance and cure expenses is based on the employment relationship and is without regard to fault.[5]

Under the general maritime law, an action for maintenance and cure may even be maintained if the injury or illness occurs while on shore leave...and that's where peculiar circumstances have resulted in some interesting court decisions. As mentioned, to be eligible for this remedy, the seaman must be "in the service of the ship at the time of the illness or injury" or otherwise subject to the call of duty pursuant to the United States Supreme Court's decision in *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724. According to this 1943 decision, 'shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion.'

The dynamic combination of seamen being treated as '*wards*' of the court and the somewhat flexible '*in the service of the ship*' standard have coupled to allow a seaman to recover maintenance expenses in some rather odd circumstances. In 1951, the U.S. Supreme Court allowed 'maintenance' to a seaman found to be in the service of the ship while ashore drinking alcohol when he leaned out and fell from an unprotected dance hall balcony.[6] In 1948, a New York court afforded recovery to a seaman found to be in the service of the ship while on shore leave in Yugoslavia visiting a prostitute. He was locked in the prostitute's room when he changed his mind about why he was there and refused to pay her fee. He was injured when he jumped from her window to escape.[7] The seaman recovered maintenance and cure despite the shipowner's argument that he was not entitled to sue because of his 'immoral intent.' The judge disagreed and found that courts (at that time) had been liberal in their attitude towards seamen who received injuries on shore leave through their 'notorious penchants' so long as it did not stem from intoxication or deliberate acts of indiscretion.[8]

Jones Act

Similarly, a seaman's employer will be held vicariously liable under the Jones Act when a co-worker injures another seaman but only when the fellow seaman was acting in

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the course of employment at the time of the accident. In this regard, the Supreme Court has held that the '*course of employment*' as it is used in the Jones Act is equivalent in meaning to the '*service of the ship*,' as it has been defined in seamen's actions for maintenance and cure.[9]

An incident held to be outside the course of a seaman's employment (and thus derivative liability of the vessel owner did not attach) occurred when the ship's chief cook had a violent altercation with another seaman who continually showed up late for meals. This culminated in the cook, after being insulted by the seaman's profane language, slashing several of the seaman's fingers off with a large butcher knife. There, the court found that the chef was motivated by anger and revenge rather than for reasons related to her employment.[110]

Your Fired!!

And, in an admiralty decision this year, *Beech v. Hercules Drilling Co., LLC,* a seaman violated company policy by bringing a firearm aboard the vessel, then accidentally firing the gun in the break room while watching television, killing a fellow seaman. The Fifth Circuit reversed the district court's decision against the shipowner finding that a seaman leaving his duty station to retrieve a loaded firearm and showing it off when he was supposed to be working 'took him outside the course and scope of his employment.'[111]

The result in *Beech* would likely be the same in the Second Circuit which requires that *both* the injured employee and the employee whose conduct caused the injury be within the scope of employment. Other court's deny recovery when an employee acts 'entirely upon his own impulse, for his own amusement, and for no purpose of or benefit to the employer.'[112] Indeed, the Second Circuit clarified long ago that the mere fact that two seaman are in the course of their employment in terms of time and place, is not sufficient; the shipowner is not liable unless the particular act performed negligently was also in the scope of employment of the negligent employee. That was the holding in *Trost v. American Hawaiian S.S. Company*, 324 F.2d 225 (1963) where the ship's purser blindly followed the captain returning to the ship from a shoreside café and fell into an open trap door that the captain neglected to warn him about. While the two employees were in the course of their employment returning to the ship, in terms of time and place, it was not an element of the captain's employment to be "on guard for the errant footsteps of his purser" or to act as a "nautical seeing-eye dog." *Id.* at 227. Thus, derivative liability was not imposed on the shipowner.

Conclusion

People say that there is 'something sexy' about the life of a seaman, but from these and many similar cases, there can be something very scary about it, too...just ask any commercial vessel owner.

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James E. Mercante, a former seaman, heads the admiralty practice at Rubin, Fiorella & Friedman and is a Commissioner on the Board of Commissioners of Pilots of the State of New York.

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1. Koistinen v. American Export Lines, Inc., 83 N.Y.S.2d 297, 301 (1948).
2. G. Gilmore, C. Black, THE LAW OF ADMIRALTY, § 6-6 (2d Ed. 1975).
3. Jones Act, 46 U.S.C. §30104.
4. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938).
5. *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138 (1928).
6. *Warren v. United States*, 340 U.S. 523 (1951).
7. *Koistinen*, *supra*, 83 N.Y.S.2d 297 (1948).
8. *Id.* at 301.
9. Braen v. Pfeifer Transportation Co., 361 U.S. 129, 133-134 (1959).
10. 0. *Stoot v. D&D Catering Serv., Inc.*, 807 F.2d 1197 (5th Cir. 1987).
11. 1. ___ F.3d ___, 212 WL 3324283 (5th Cir. 2012).
12. 2. *Hoyt . Thompson*, 174 F.2d 284, 285 (7th Cir. 1949).

BOOK REVIEW: THE RELUCTANT PIRATE – BY JOHN GUY

Reviewed by: Donald J. Szostak

THE ARBITRATOR does, from time to time, review books that we perceive might be of interest to our limited readership. Most of those reviews cover technical and/or legal books peculiar to the maritime business, specializing as we do in the arcane field of maritime arbitration. It is rare that a novel gets published covering the intriguing aspects of our shipping industry with a tale that is current, entertaining and instructive. John Guy has produced just such a book in **THE RELUCTANT PIRATE.**

I believe the character Henry Simcox opined in the BBC drama TV series "Paradise Postponed", aired more than a few years ago, "The writer doesn't make up the stories. He merely reports things as they are. It is the reader that imagines the reality." This fictional tale is peopled with contemporary multi-national bankers, lawyers, ship owners, ship and insurance brokers, crewmembers and thieves of various stripes. Anyone involved in today's maritime business will find great entertainment in their common purpose and can expect to take away a reality akin to the commercial activity they bring to it.

The book is strictly available in e-book format on Amazon.com for Kindle. The digital dust jacket describes John's first, but marvelous, attempt as a novelist:

Insider novel lifts lid on piracy

My first novel, ***The Reluctant Pirate****, is now available on Amazon for Kindle. It's a fast-moving book and easy to read with a great twist in the end.*

About the book

Brought up in Cardiff in a Somali family, Abdi goes to Somalia for an arranged marriage. He finds that the father of his bride is a local pirate leader. The pirates are having a tough time and he is forced to join in a pirate attack. The attack is bungled but in the end they capture a Greek-owned tanker with a multi-national crew. They make a large ransom demand.

The shipowner is a high-profile businessman with conflicting interests. He wrangles with the insurers over money and how to free the ship while the pirates struggle to protect the ship in lawless Somalia. Abdi is attracted to his arranged bride but contrasts her with the young female Norwegian second officer on the ship. His bride is submissive and will tie Abdi to his family and the past. The ship's officer shows him another kind of woman, young and free.

She is desperate to escape. She uses Abdi to help her get away, leading to unexpected consequences. Their plight highlights Abdi's conflicts between family and upbringing and the hypocrisies and hidden agendas which drive modern piracy.

As noted, the book is available only on Kindle. If you do not have a Kindle, you may download a free Kindle app from Amazon. This will enable you to read Kindle e-books on all PC, Mac, Android and tablet devices, including iPhones and iPads.

The author, John Guy, served on merchant ships and warships for sixteen years before becoming a ship inspector and then a journalist. He advises global shipping industry companies and organizations on media and crisis management.

John tells me he had a lot of fun writing the book and is now starting a second one. It will be about all the greed and corruption that follows the money which flows into a coastal community when there is a big oil spill from a tanker offshore. It will feature ambulance-chasing lawyers and … but let's not let our gait outrun our quill. Buy and read **THE RELUCTANT PIRATE**. You'll be glad you did.

Buy **The Reluctant Pirate** by John Guy on Amazon or for more information go to www.thereluctantpirate.com

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