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# THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

## INDEX TO THIS ISSUE



## PRESIDENT'S CORNER

Welcome to this issue of The Arbitrator. This is the first issue since I have had the privilege of being elected president of the SMA for the next two years. I can't begin a new administration without first thanking Austin Dooley, my immediate predecessor, who has spent the past four years dedicated to leading our organization and being our spokesperson to the global arbitral sphere.

2013/2014 looks to be an exciting year, as we celebrate our 50th Anniversary under the leadership of past president Klaus Mordhorst, chair of the Celebration Committee. Please mark Friday November 22nd to join us at our black tie gala at the New York Yacht Club in their glorious Model Room and dance to the music of the Peter Duchin Orchestra. One of the special guests to join us will be the Honorable Loretta Preska, Chief Judge of the US District Court for the Southern District of New York. See the note from Klaus later in this issue. You will have a wonderful and memorable evening.

As part of the recognition of our 50th, on the preceding day November 21 starting at 9:00 a.m. in the Great Hall of the NYC Bar Association, we are holding what I am certain will be both a vital as well as provocative seminar based on the recently issued award in the FALCON CARRIER. This will be moderated by Soren Larsen, Deputy Secretary General of BIMCO. The Panel will include the arbitrators to the Award, the Honorable Judge John Martin (panel chair), Jack Berg, and Manfred Arnold, along with industry participants providing owners' and charterers' perspective. The discussion should be quite spirited on this most vexing topic of ship vetting. The seminar will close with remarks from Clay Maitland managing partner of International Registries, Inc., followed by a lunch hosted by the SMA. Please check our website http://www.smany.org for updates or contact our office 212-344-2400 - email us at info@smany.org.

I think we have gotten off to a fast start this year thanks in no small part to two Committee Chairs, Lucienne Bulow (Rules) and Peter Wiswell (Salvage). At our first Board meeting in September modifications to the SMA Rules

were approved as well as the changes to U.S. Open Form Salvage Agreement (Marsalv). Both of these revisions have been in the works for some time, but thanks to the determined efforts of both chairs we can now say "thank you, well done!" The new documents can be found on our website or again don't hesitate to contact our office.

The following are the Board of Governors of the SMA and their Alternates:

**BOARD 2013-2014**

| *Elected 2013* | *Alternates* |
|---|---|
| Thomas Fox | Jack Ring |
| Klaus Mordhorst | Svend Hansen, Jr. |
| Robert Flynn | James Hood |
| Robert Shaw | Evangelos Venturas |
| ***Elected 2012*** | |
| Lucienne Bulow | Peter Wiswell |
| Donald Frost | Robert Meehan |
| Michael Hand | Michael Fackler |
| Bengt Nergaard | Mukul Bhushan |
| ***Appointed 2013*** | |
| Manfred Arnold | David Martowski |
| Thomas Bradshaw | Nigel Hawkins |

With the quality and experience of the Board and Committee Chairs coupled with the youthful enthusiasm of our new members I have very high expectations for the coming year.

**Jack Warfield**

THE ARBITRATOR



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## AMENDMENTS TO SMA RULES

The SMA has made some relatively minor amendments to its Arbitration Rules in three sections, effective October 23, 2013.

Section 2 of SMA Rules which relates to Consolidation, provided:

> "Unless all parties agree to a sole Arbitrator, consolidated disputes are to be heard by a maximum of three Arbitrators to be appointed as agreed by all parties or, failing such agreement, as ordered by the Court."

Although our rules provided that, failing agreement of the parties, a party could resort to the court for appointment of a panel in a consolidated proceeding, in *The Rice Company v. Precious Flowers Ltd. and The Government of Peru* (12 Civ. 0497, June 5, 2012), Judge Furman of the U.S. District Court for the Southern District of New York refused to get involved with the constitution of a panel of SMA arbitrators in a consolidated arbitration. The judge sent it back to the SMA for resolution. Section 2 has, therefore, been amended to offer a mechanism whereby such a dispute could be settled by the SMA, more precisely by the President or Vice President of the SMA.

We have also made some minor changes in Section 21 to give some more time for claimants and respondents to learn about each other's case prior to the first hearing. The claimant will have to submit a pre-hearing statement of its position and claim, not less than ten business days prior to the first hearing. The respondent should submit its preliminary statement of defense, not less than 5 business days thereafter. We also provide that a brief description of a witness's testimony be given at least one week in advance of the scheduled hearing date. A panel always has the discretion to alter time limits as provided in Section 34. We also mention that the panel retains the privilege to request supplementary briefs on issue(s) which it considers necessary or in need of clarification or further argument.

In view of the recent opening of the New York International Arbitration Center which offers state of the art technology, we decided to mention in Section 23 the possibility to use video conferencing, always subject to the Panel's discretion.

SMA Rules can be found on our website www.smany.org.

**Lucienne C. Bulow**
**Chairman, SMA By-Laws and Rules Committee**

# THE NEW YORK INTERNATIONAL ARBITRATION CENTER ("NYIAC")

**By Lucienne Carasso Bulow[1]**

For over a century, New York has served as a center for the resolution of maritime disputes by arbitration. The New York Produce Exchange Time Charter Party was first issued as early as November 6, 1913. Its revision in 1946 provided for arbitration of time charter disputes in New York as cited its Clause 17, although we are aware of cases going as far back as the 1880's. This year, the SMA is celebrating its 50th anniversary of providing service to the industry. We have been extolling the virtues of New York maritime arbitration for many years, but we now have help.

Arbitration has more recently become a very popular means of settling disputes in many areas. To keep up with the expanded desire for and popularity of using alternative dispute resolution proceedings for a wide variety of international commercial disputes, leaders of the New York state and city bar associations and arbitration institutions such as the American Arbitration Association have joined forces to create a well-appointed and convenient locale in which to hold arbitrations, mediations or other meetings. With funding provided by a number of New York's leading law firms, the New York International Arbitration Center (NYIAC) has recently opened, to major acclaim. NYIAC is located at 150 East 42nd Street, in a landmark structure (the former headquarters building of the Socony-Vacuum [later Mobil Corporation]) just steps away from Grand Central Terminal. Former Chief Judge of the New York State Court of Appeals (the highest appellate review court in the state) Judith Kaye, who is now of counsel to the law firm of Skadden, Arps, Slate, Meagher & Flom, serves as NYIAC's Chair.

NYIAC is an independent, nonprofit center, unaffiliated with any other organization, although it shares the floor with the International Center for Dispute Resolution of the American Arbitration Association. It is a world-class hearing space which aims to advance, strengthen and promote the conduct of international arbitration in New York and to promote New York as a pre-eminent site for the conduct of international arbitrations. The facilities are available for arbitrations administered by any institution, plus *ad hoc* arbitrations, such as SMA arbitrations, mediation proceedings, as well as a variety of conferences. Parties are free to use NYIAC for their hearings irrespective of the administering organization or specific arbitration rules such organizations impose, making NYIAC an easily accessible "neutral space" for arbitrators, mediators, and neutrals alike, to meet and resolve disputes. It provides a neutral ground where parties can come to resolve their disputes, thereby allaying any misgivings that a party could feel in having such a proceeding conducted in the offices of an opponent.. The opening of this new Center brings additional energy to the SMA's decades-long attempt to convince parties to choose New York as the arbitration site in their contracts.

The Center offers well-appointed hearing rooms, breakout rooms and other amenities to accommodate arbitrations or mediations of any size. It also has up-to-the minute technological capabilities including video and audio conferencing, simultaneous translation, large LCD monitors and projection screens and individual monitors for the arbitrators. One of its Hearing Rooms can comfortably seat up to 43 attendees. Two other large hearing rooms can seat 23 or 18 people, respectively. The Center also has more intimate meeting rooms which seat up to 10, for smaller hearings or mediations. Special rates are available when these rooms are used as breakout rooms. The daily rental rate for hearing rooms ranges from $750 to $1,500.

Maritime arbitrations have traditionally been held in the office of one or the other of the attorneys' representing the parties to the matter. Sometimes such proceedings have taken place in one of the arbitrators' offices, but there might be some cases, especially for very large proceedings involving many parties that may benefit by holding such hearings in a neutral space, such as NYIAC.

The opening of NYIAC is yet another inducement for parties to resolve their disputes in the United States, and specifically to choose New York as the seat of arbitration. Federal law in the U.S. strongly favors arbitration, upholding arbitration clauses which reflect the desire of the parties to resolve their disputes outside of the court system. New York-based federal courts have been particularly supportive in this regard. New York is home to world-class arbitrators, mediators and attorneys, who are highly experienced in resolving international and maritime disputes. Moreover, New York is at the center of the world of finance and business, making it a natural choice for business-minded parties who want to resolve their conflicts as efficiently as possible.

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1. Ms. Bulow is a past President of the Society of Maritime Arbitrators, Inc. and currently serves on its Board of Governors. She is also on the Panel of Neutrals at the International Centre for Dispute Resolution of the American Arbitration Association.

 

# TRADITIONAL TEST FOR SAFE PORT/ SAFE BERTH APPLIED BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT. "DUE DILIGENCE" NOT IMPLIED OR READ INTO THE WARRANTY. *IN RE LIMITATION PROCEEDING OF FRESCATI SHIPPING (THE ATHOS I)*, 718 F.3D 184, 2013 AMC 1521 (3D CIR. 2013)

**LeRoy Lambert***

For decades, disputes in the US concerning the warranty of a safe port/safe berth in a charter party have been handled almost exclusively by maritime arbitrators. It takes unusual facts and an extraordinary situation for such a dispute to reach the courts. However, the spill in 2004 from the *Athos I* in the Delaware River was unusual and extraordinary.

Approaching its berth at a terminal near Philadelphia in 2004, the tanker *Athos I* struck a submerged unmarked and uncharted anchor. The ship's hull was punctured, and some 263,000 barrels spilled into the Delaware River. The cleanup operations cost approximately $180 million.

The ship was operating in a tanker pool under a Baltime form. Under that charter form, the time charterer (pool operator) was obliged to exercise "due diligence to ensure that the vessel is only employed between and at safe places."

The pool operator had, however, chartered the ship out under an Asbatankvoy form which gave the voyage charterer the right to direct the ship to load and discharge at any safe place "provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat."

The voyage charterer was an affiliate of the owner of the terminal where the ship was to berth.

The courts had to decide who, as between the owner interests and the voyage charterer/terminal interests, had to bear the cost of the cleanup. The district court found that the owner interests bore the loss. The court of appeals reversed on the law and remanded for additional fact finding in the district court as to the ship's draft.

## The Proceedings

The district court ruled in favor of the voyage charterer and the terminal and dismissed the owner's claim. Among other things, it held that the voyage charterer was obliged to exercise *due diligence* only in providing a safe berth/safe port and had done so. It also held that the anchor was submerged in an area outside the control of the affiliated terminal and the geographical scope of any such duty.

On appeal, in a decision issued 16 May 2013, the United States Court of Appeals for the Third Circuit reversed the district court's decision and sent the case back to the district court for further factual findings with respect to the draft of the ship.

## The Decision

The court affirmed the traditional rule here and in England that a port is safe when "the particular chartered vessel can proceed to it, use it, and depart from it without, in the absence of abnormal weather or other occurrences, being exposed to dangers which cannot be avoided by good navigation and seamanship." The court aligned itself with other circuits including the Second Circuit: "We are persuaded that the Second Circuit's longstanding formulation of the safe berth clause is the one we should follow." The court did not follow a 1990 decision by the Fifth Circuit in which that court held that a due diligence standard should be read into a charterer's warranty of a safe berth/safe port.

The court acknowledged the importance of custom and the expectations of commercial parties in a specialized field: "That some forms explicitly adopt a due diligence standard suggests that the understood default is to impose liability on the charterer without regard to the care taken."

Here, under the Baltime charter, the owner had agreed that the time charterer/pool operator need only exercise due diligence. The pool operator had, however, bargained for the full, traditional warranty in the Asbatankvoy voyage charter, and the voyage charterer had agreed to that risk. The owner, however, not the pool operator had suffered the physical damage to its ship and had incurred the cleanup costs. So, it was not enough for the court to endorse the traditional view to decide the case; it had to decide whether the owner was entitled to the benefit of the warranty which the pool operator had bargained for in the voyage charter, i.e., whether the owner was a third-party beneficiary of the warranty in the voyage charter. The district court had held that the owner was not a third-party beneficiary, finding no intent by the voyage charterer to benefit the ship owner.

After a thorough review of the caselaw, the court concluded that the voyage charter itself expressed sufficient intent: "Because the warranty [in the voyage charter] explicitly covers the safety of the vessel, it would be nonsensical to deprive the vessel's owner the benefits of this promise, as the owner is ultimately the one most interested in the vessel's status and is obligated to maintain its condition."

The voyage charterer further contended that the owner, by proceeding to a port in a range named in the charter, accepted any risks of the port as to safety. The court, however, found that while this may be true of known objects, any such acceptance of risks did not include unknown risks, such as the submerged anchor in this case.

Also, the court had to consider the liability of the terminal owner under maritime tort law. It took a practical view to defining the terminal owner's duty to provide a safe *approach* noting that "when a ship transitions from its general voyage to a final, direct path to its destination, it is on an approach." The submerged anchor was some 900 feet from the berth, in an area not under the direct control of the terminal, but between the main ship channel and the berth. The ship was 748 feet long.

In deciding the meaning of "approach," the court considered various analogies. One, which will likely stick, is to a driveway to one's home. Some are shorter, some are longer. But when one turns into one's driveway, one has, at the latest, begun the "approach" to home.

### Conclusion

It remains to be seen whether the United States Supreme Court will review the case, now or possibly after the district court's decision on remand if it finds that the vessel's draft was not an issue. There is clearly a split among the circuit courts of appeal on whether "due diligence" is to be read into the warranty. Such a split is a ground upon which the Court typically decides to take up a case.

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*President, Charles Taylor P&I Management (Americas), Inc., New York

## DIVIDED DAMAGES IN A SAFE BERTH CASE: THE WESTWOOD ANETTE, SMA 4189 (2012)

**Donald P. Murnane and Manuel A. Molina[1]**

Late last year, a panel of experienced arbitrators tackled the interplay between unsafe berth conditions and navigational errors in determining the liability for a vessel's allision with a mooring dolphin. The allision resulted in a vessel fuel tank being punctured and a release of fuel oil into the surrounding waters. *THE WESTWOOD ANETTE*, SMA 4189 (2012) (Sheinbaum, Berg, Martowski). A Panel majority apportioned fault for the spill 50/50 between the owner and charterer.

While undocking from Berth 2 at Squamish, British Columbia, on the afternoon of August 4, 2006, the WESTWOOD ANETTE drifted slightly out of position in moderate winds and lightly came to rest against a mooring dolphin fender located a short distance from the main dock face. The vessel was being navigated by an experienced compulsory pilot, assisted by two tugs supplied by the charterer. The front of the concrete mooring dolphin was fitted with two fenders each consisting of a triangular cluster of three wood timber piles set within an "H-bracket" bolted to the concrete face of the dolphin. The outer pile served as a "sacrificial rubbing pile" and two inner piles were held by a transverse rod located in slots in the one-inch thick steel side plates of the H-bracket. A rubber cylinder was located within the throat of the H-bracket plates bearing against the two inner piles. The rubber cylinder served as a shock absorber against vessel contact. The timber cluster was designed to slide inward within the H-bracket and compress against the rubber cylinder; however, when the WESTWOOD ANETTE's hull came in light contact with the timber fender, the right-angle steel corners of the H-Frame became exposed beyond the piles and pierced the ship's side. The steel corners punctured two small "fanged" holes in the vessel's starboard side bunker tank causing the spill. It was undisputed that the allision caused only cosmetic damage to the timber pile and no damage to the dolphin itself. Owner's expert calculated that, at the time of contact, the vessel was moving at an estimated lateral speed of one foot every 8 seconds.

Owner commenced arbitration against charterer to recover oil pollution and clean up costs incurred in the aftermath of the accident. Owner contended that charterer had breached the safe berth warranty contained in the parties' modified New York Produce Exchange form time charter agreement. Owner argued, *inter alia*, that the berth was unsafe because: (a) the tugs supplied by the time charterer were inadequate and underpowered to assist the vessel during her undocking maneuvers; (b) the faulty H-bracket design of the fender of the dolphin constituted a latent hazard to navigation since such a design gave no warning of the risk to the vessel and concealed the fact that the vessel's hull could be pierced in the event of light foreseeable contact. Charterer raised several defenses, including: (a) the safe berth warranty was a "limited" warranty because the parties had deleted the phrase "between safe ports/and or ports" from the Preamble of the NYPE charter party form; (b) even if the berth were unsafe, the sole proximate cause of the allision was the negligent navigation of the pilot and Master who had exclusive and ultimate responsibility for

 

determining the adequacy of the tugs supplied and who should have avoided any contact with the dolphin through proper navigation and seamanship.

The Panel unanimously rejected the charterer's argument concerning a "limited" warranty, ruling that Clause 6 of the NYPE form, which contains the words "safely lie, always afloat," constitute an express warranty of safe port and safe berth. The Panel split, however, on the issues of whether the berth was unsafe and whether the sole proximate cause of the allision was the negligent navigation of the vessel.

In rejecting the argument that the pilot and Master had exclusive responsibility for determining the adequacy of the tugs' horsepower, the Panel majority concluded that, under Clause 2 (which obligated charterer to pay for all port charges and pilotage) and Clause 6, the charterer had a "non-delegable" duty to provide adequate tug assistance for the vessel's departure from Berth 2. The Panel majority found that the tug complement provided to the vessel for her undocking maneuvers was woefully inadequate and was a contributing cause of the allision. Although the majority was quick to point out that the pilot and the Master also bore some responsibility for properly evaluating the tugs' adequacy, it nevertheless ruled that the "inadequacy of the tug package … and the failure of [the charterer] to provide adequate tugs for the departure of the Vessel rendered the berth and the port unsafe."

The majority similarly found that the H-bracket design of the dolphin's fender rendered the berth unsafe, especially given the inadequacy of the tug complement. The majority determined that the timber arrangement, which allowed the H-bracket sharp corners to come into contact with the vessel on light "barely touching" contact, was a hazardous condition. In addition, the majority also found that the fender's faulty design was a latent or hidden danger that was not known or reasonably apparent to the vessel's navigators. Accordingly, the majority ruled that the "unsafe design and condition, and latent or hidden danger of the fenders constituted a breach of [charterer's] safe port, safe berth warranties, and was a contributing cause of the holing of the [vessel], and the resulting pollution."

As to navigation, the majority found the pilot had failed to properly execute the standard unberthing maneuvers and that such navigational errors contributed 50% fault to the allision. In so doing, the majority expressly declined to apply what it characterized as "*The Eastern City* exculpatory rationale," an English law doctrine that exonerates a charterer from liability if a casualty could have been avoided by the exercise of good navigation and seamanship. Acknowledging that *The Eastern City* rationale was a general rule of proximate causation, the majority emphasized the rule "should not be applied without regard to the particular facts and circumstances of a given situation." For the Panel majority there were two "extremely unusual" facts that prevented the rule's application, namely, (a) the latent or hidden danger of the steel H-frame fender design which was not known or reasonably apparent to the vessel's navigators, and (b) the grossly underpowered tugs that allowed the vessel to be in an area where she was most vulnerable to damage from the latent, hazardous danger posed by the steel corners of the H-bracket, which inadequacy prevented the pilot and Master from controlling the vessel to avoid even light contact with the fender.

The *WESTWOOD ANETTE* award illustrates that arbitrators in New York apply *The Eastern City* rule on a case-by-case, fact-intensive analysis, and, in appropriate situations, may apply a comparative fault analysis to apportion liability where unsafe berth conditions and navigational errors each contribute in proximately causing an accident.

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1. Partners, Freehill Hogan & Mahar, New York.

## SUPERSTORM SANDY RESURFACES IN COURT

**By James E. Mercante***

Superstorm Sandy is now flooding the courts. Lawsuits have been filed across the tri-state area by parties looking to recover for storm-related destruction to their property. Many lawsuits are by vessel owners—or against vessel owners, marinas and yacht clubs. The suits seek damages arising from the unprecedented storm surge that swept thousands of boats from their berths and from storage ashore.

The first known reported decision in New York concerning Superstorm Sandy is not a marine case (despite the proximity of the loss to navigable waters). But the analysis applied by Judge Philip S. Straniere in Pietrangelo v. S&E Customize It Auto is relevant and informative. The complaint was filed in Richmond County Civil Court by the owner of a motor vehicle damaged by rising flood waters while stored inside a repair shop adjacent to the Kill Van Kull waterway on Staten Island.[1] The decision is unusually comprehensive for a small claims dispute and see-worthy for its broader implications. Straniere even engaged in self-described "intellectual speculation" as to whether human activities could have contributed to

 

changes in the atmosphere (i.e., global warming) "leading to altered patterns of more extreme weather" that made 'Sandy' into a 'superstorm.'[2]

## Bailment Meets Nature

A few days before the arrival of Sandy, plaintiff left his vehicle at the defendant's shop for repairs. As the sea water rose to unexpected high levels during the storm, the facility flooded and the vehicle took on enough water to be declared a total loss. The auto insurer indemnified the owner of the car less the deductible. Not to be short-changed, the car owner sought to recover his out-of-pocket $1,000 deductible and filed suit against the repair shop.

Delivery of the vehicle to the garage for repairs created a "mutual benefit bailment" requiring the bailee (repair shop) to exercise that degree of care which a reasonably careful person in possession of similar goods would exercise under the same circumstances, an ordinary negligence standard.[3] A rebuttable presumption of negligence arises when a bailee returns property in damaged condition or not at all.[4] However, the "act of Nature" (which the court assumed to be 'the politically correct modern equivalent of the common law for act of God'), refers to a natural occurrence over which humans have no control and were not involved in creating the occurrence.[5]

The court observed that Superstorm Sandy "caused the loss of life, resulted in billions of dollars of property damage, and caused the disruption of countless people's lives." The existence of such occurrences, Straniere noted, makes it "impossible for a human to be negligent and responsible for losses incurred."[6] Thus, the destruction (no matter what category the storm was when it made landfall) rose to the level of supporting an "act of Nature" defense.[7]

## Insurance Obligation?

The vehicle owner also alleged that the facility should have obtained flood insurance to pay for losses to property in its care. In New York, there is no duty for a bailee to procure insurance for goods in its care and custody. However, such a duty may be created by mutual agreement between the parties; a statute requiring such insurance; a showing of custom and usage in the industry; or by course of prior dealings between the parties.[8] But, none of these existed and therefore the repair facility had no liability for not obtaining insurance for the vehicle in its possession.

The judge sua sponte raised a thought-provoking argument, to wit, whether the claimant could establish that he was the third-party beneficiary of any insurance requirements under the repair shop's lease with its landlord. For example, if the lease required tenant (repair shop) to obtain insurance for property in its possession, the vehicle owner could potentially benefit by same if the tenant could somehow be considered the third-party beneficiary of such insurance requirement.[9] No evidence existed to support this argument, and the court concluded that defendant's failure to have casualty or flood insurance for third-parties was not negligence.[10]

## Act of God Defense

Back to admiralty. The act of God defense has been invoked in maritime cases involving hurricanes and other heavy weather occurrences since wind met sail. Courts have frequently considered the "act of God defense" in deciding marine casualty cases.[11] The burden of proof of exercising reasonable precautions rests on the party asserting it, but not if the force of nature is of 'catastrophic' proportions, sufficient to overcome all reasonable preparations.[12]

The term has been defined in general maritime law as a disturbance of such unanticipated force and severity as would fairly preclude charging a party with responsibility occasioned by that party's failure to guard against it in the protection of property committed to its custody.[13]

Many lawsuits have been filed for damage to property caused by vessels that broke free from their docks or floated away from shore due to Sandy's hurricane-force winds and unprecedented tidal surge. When only a mooring is provided by a marina or yacht club, or the vessel owner otherwise has full access to the vessel, the relationship between the marina and the vessel owner is typically that of a lessor and lessee, not bailment.[14] However, if a bailment is created, then the marina (or yacht club) will owe a duty of ordinary care to the boat owner, and there will be a rebuttable presumption of fault in case of loss or damage to the boat subject to the act of God defense. A bailment can be created when a vessel is held for repairs or long-term storage.[15] But, when the vessel is berthed at a marina or yacht club for regular access by the vessel owner, and the marina does not have exclusive control over the boat, then a bailment is not created and the presumption of fault is not triggered.[16]

While initially there may be a "presumption of fault" operating against the vessel that causes damage, the vessel owner (yacht club or marina) will invoke the "act of God" defense and attempt to show that (i) the damage was solely caused by an extreme force of nature, and (ii) that the vessel owner (yacht club or marina) had acted reasonably under the circumstances. This defense applies as forcefully in the recreational boating context as it does in commercial ma-

 

rine setting involving tugs, barges and ships. For example, a vessel owner was found not liable when its vessel broke free of a mooring during a hurricane because the damage was caused "solely by the extraordinary, unforeseeable, and catastrophic character of Hurricane Betsy, an Act of God."[17] It was found to be a storm of such magnitude as to overcome all reasonable precautions, a classic case of an act of God defense.[18]

A sampling of act of God defense cases, 'successful' and 'unsuccessful,' are discussed in a law review article by the author titled "Hurricanes and Act of God: When the Best Defense Is a Good Offense."[19]

## Conclusion

The first reported ruling on Superstorm Sandy damage offers a road map of how a court will evaluate the politically correct "act of Nature" defense in cases resulting from damage caused by the "Storm of the Century." It remains to be seen if Superstorm Sandy, also known as 'Frankenstorm,' will fall into the category where courts will infer (as Judge Straniere did) that no reasonable preparations would have prevented damage.

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*Partner, Rubin Fiorella & Friedman LLP, New York

1. Pietrangelo v. S&E Customize It Auto, 39 Misc.3d 1239(A), 2013 N.Y. Slip Op. 50933(U), *1 (Civ. Ct., Richmond County 2013).

2. Id. *4.

3. Id. *2.

4. ICC Metals v. Municipal Warehouse, 50 N.Y.2d 657 (1980).

5. Pietrangelo *4.

6. Id. *4.

7. Id. *4.

8. Lehman v. Fischzang, 52 Misc.2d 80 (1966).

9. Pietrangelo, id. *3.

10. Id. *3.

11. See, e.g., Gibbs v. Hawaiian Eugenia, 966 F.2d 101, 103-04; 1993 AMC 43 (2d. Cir. 1992).

12. Mercante, James E., "Hurricanes and Act of God: When the Best Defense Is a Good Offense," 18 U.S.F. Mar. L.J. 1, 38-39 (2005-2006).

13. Id.; Compania de Vapores Insco S.A. v. Missouri Pac. R.R., 232 F2d 657, 660 (5th Cir. 1956).

14. Security National Ins. v. Sequoyah Marina, 246 F.2d 830, 1958 AMC 143 (10th Cir. 1957).

15. Stegelman v. Miami Beach Boat Slips, 213 F.2d 561 (5th Cir. 1954).

16. Royal Ins. v. Marina Industries, 34 Mass.App.Ct. 349 (1993).

17. Dammers & Van der Heide Shipping & Trading v. S.S. JOSEPH LYKES, 300 F.Supp. 358 (E.D. La. 1969), aff'd, 425 F.2d 991, 996 (5th Cir. 1970).

18. Id. 300 F.Supp. 358 at 366.

19. Mercante, James E., "Hurricanes and Act of God: When the Best Defense Is a Good Offense," 18 U.S.F. March L.J. 1, 38-39 (2005-2006).

# THE NEW YORK PRODUCE EXCHANGE

**By Lucienne Carasso Bulow, Ph.D.[1]**

Since 1643, when three vessels arrived at New Amsterdam from the West Indies to take on cargoes of wheat, "the commerce of America began," writes E.R. Carhart who was President of the New York Produce Exchange in 1911.[2] With its magnificent natural harbor, New York became the gateway of American commerce. Located at the mouth of the navigable Hudson River and its strategic proximity to Long Island Sound through the East River, New York was the geographic center of the thirteen colonies. Exports to Great Britain soon expanded, consisting of wheat, "Indian corn," oats, rye, peas, barley, buckwheat, livestock, timber, lumber, flour, pork, fish, tobacco, milled goods as well as other commodities. As the *de facto* financial center of the country, New York had the resources and essential risk-takers to market such products far better and more cheaply than any of its domestic rivals. In 1658, the first depot in New Amsterdam was located on the present site of Bowling Green. The completion of the Erie Canal in 1825 increased New York's stature as the commercial capital of the country. The development of Clipper ship service on a regularized schedule between New York and Europe helped satisfy the ever-growing demand for American foodstuffs. Goods and commodities coming from other parts of the country had to be transported, financed, inspected and stored in the great number of available warehouses in New York. Trading of products, bearing different delivery dates, were bought and sold until their ultimate delivery to the buyers. All these activities required the parallel development of commodity exchanges which would act as central marketplaces, where the latest information of commercial interest could be gathered and disseminated, and accurate and timely

prices set. Trades would be regulated by clearing-houses of commerce. Such exchanges also led to additional liquidity and capital to come into the marketplace to the benefit of all stakeholders.

Several exchanges were formed and located along Broad Street and South Street. Eventually these became part of the Merchants' Exchange, an emerging general commercial center that embraced all branches of trade. A building for the Merchants' Exchange was erected in 1825 at 55 Wall Street. It fell victim to the Great Fire of 1835 but was rebuilt and enlarged in 1842 in Greek Revival style by architect Isaiah Rogers. The new building had a classical front of eighteen Ionic columns of Quincy granite, each thirty-eight feet high and four-and-a-half-feet in diameter. The Merchants' Exchange failed in 1862, and the building was ultimately purchased by the U.S. government to house the U.S. Customs Service.[3] A new corporation, known as the "New York Produce Exchange Company," was formed for the purpose of erecting a suitable building to house this entity on the block bounded by Water, Pearl, Whitehall and Moore Streets.[4]

A second body, known as the "New York Commercial Association," a real exchange, was organized. On April 19, 1862, the New York Legislature granted it a broad and comprehensive charter "to provide trading rules and regulations and to provide a suitable space for a Produce Exchange in the City of New York." The 1862 Rules of the Association provided for arbitration by its Arbitration Committee. On February 13, 1868, the New York Legislature changed the name of the New York Commercial Association to "The New York Produce Exchange" (NYPE). Like its predecessor, the newly named Exchange established rules for the development of the highest standards of business practice and promulgated rules governing the trading of a single package to whole cargoes of wheat, corn, beef, pork, lard and flour seeds. Rules regulating transactions in oil (vegetable oils, animal oils, mineral oils, cottonseed oil, olive oil) were adopted in 1877 and those for lighterage and trading in butter, cheese and hops followed between 1876 and 1901. In 1878, rules regulating the buying and selling of petroleum products, including crude, refined products and naphtha, were promulgated. The exchanges served to gather daily information concerning crops, the stocks of stored merchandise and commodities, the current world prices for all sorts of produce as well as the steamship trade.

The Exchange continued to grow rapidly in prestige and importance and, by 1878, its membership numbered 2,468.[5] By 1881, its membership had grown so much that the NYPE erected a stately building at 2 Broadway on Bowling Green,[6] returning to the place where trade had started centuries earlier. The Exchange began trading on

its huge new trading floor on May 6, 1884, It had become a great marketplace. The main purpose of its Charter was

> … to provide and regulate a suitable room or rooms for a Produce Exchange in the City of New York, to inculcate just and equitable principles in trade, to establish and maintain uniformity in commercial usages; to acquire, preserve and disseminate valuable business information, to adjust controversies and misunderstandings between persons engaged in business… .[7]

The Exchange's Arbitration Committee played an important role. As described by Mr. Carhart:

> … this committee has large powers in all matters submitted to it. It has the power to subpoena witnesses within certain districts, and all its decisions have the same force and power as a decision of the supreme court[8], and upon proper filing and proving the clerk of the supreme court will issue a judgment thereon. The Arbitration Committee has always been held in high regard by the business world. It has been extensively used, and by its splendid service has done much to advertise and popularize arbitration as a means for the settlement of business differences.[9]

The Exchange also had a Complaint Committee to which trade differences not submitted by agreement to the specialized trade committees or to the Arbitration Committee could be brought as a complaint.

The trade committees of the NYPE created general agreements with regard to warehousemen, railroad lines, steamship companies and other maritime interests covering

the general needs of the trade. These agreements were put into forms of contracts, bills of lading and charter parties. Members could also trade in futures, which allowed them to hedge their financial risks trading in various products/commodities.

Rules regulating the maritime trade, which concerned sailing ships, were adopted in 1880. Rules for the steamship trade followed in 1886. The NYPE also had a Maritime Exchange,[10] the rules of which provided for private arbitration dealing with NOR, laydays, demurrage and other relevant subjects. Clause 17 of The New York Produce Exchange Approved Grain Charter Party of 1897, amended January 1, 1899, provided that "this Charter Party is subject to the rules of the New York Produce Exchange and that all disputes arising at the port of loading shall be subject to arbitration at New York as therein provided."[11]

On November 6, 1913, the New York Produce Exchange issued an approved Time Charter "Produce Government Form"[12] which was amended on October 20, 1921 and later in 1931 as well as 1946.[13] The 1913 version contained some familiar language:

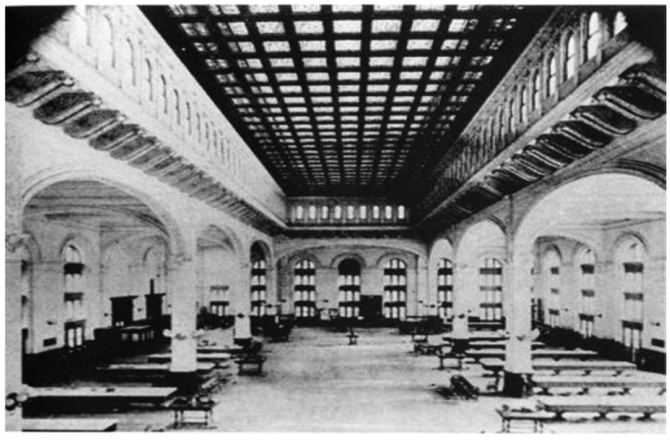
> That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court.[14]

The Welsh Form Coal Charter Party of 1914 likewise contained a New York arbitration clause[15] which read:

> If any dispute or difference should arise under this clause, same to be referred to three parties in the City of New York, one to be appointed by each of the parties hereto, the third by the two so chosen and their decision, or any two of them shall be final and binding, and this agreement may, for enforcing the same, be made a rule of the Court.[16]

However, prior to 1920, arbitration awards could not be legally enforced, because neither New York State nor the U.S. Federal Government had adopted an arbitration statute. The New York State Arbitration Act was adopted in 1920 followed by the U.S. Federal Arbitration Act which was enacted in 1925. That Federal statute has allowed arbitral decisions made under maritime agreements to arbitrate to be enforceable nationwide. The Act, codified as U.S. Code Title 9 in 1947, has since been amended on seven different occasions and is the controlling law governing those SMA arbitrations that are not expressly subject to the laws of a foreign jurisdiction. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and the Inter-American Convention on International Commercial Arbitration of 1975 which make part of U.S. Code Title 9, allow the worldwide enforcement of SMA awards.

The New York Produce Exchange eventually discontinued its trading operations, and its landmark building was demolished in 1957. The professional and ethical standards established by its Arbitration Committee were picked up and continue to be carried forward by the SMA since its founding in 1963.



The Trading Room of the Produce Exchange

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1. Mrs. Bulow is a Past President of the Society of Maritime Arbitrators, Inc. (SMA).

2. E.R. Carhart, "The New York Produce Exchange." *Annals of the American Academy of Political and Social Science, 1911,* Volume 38, No. 2, pp.206-221, Sage Publications, Inc. September 1911, p. 206.

3. After the Customs House Service moved in 1907 to its new building on Bowling Green, which was designed by architect Cass Gilbert, the Merchants' Exchange building was purchased by the National City Bank. The interior and a second floor were later added in a remodeling overseen by architects McKim, Mead and White.

4. This was apparently the site of the old Custom House Bridge Market. The building was completed in 1861.

5. Carhart, p. 214.

6. It was an enormous red terra-cotta-and-brick Romanesque Revival building which was 120 feet high with a tower rising to a height of 225 feet. It had a stained glass skylight overhead which covered an area equal to one-fifth of an acre. The New York Produce Exchange building at 2 Broadway was

torn down in 1957. According to the *AIA Guide to New York City* by Norval White & Elliot Willensky, Fourth Edition, NY: Three Rivers, 2000, the Produce Exchange Building, whose architect was George B. Post, *was one of the city's greatest architectural losses in the post-World War II years.* p. 12

7. Report of the New York Produce Exchange from July 1, 1886 to July 1, 1887: Charter, By Laws by the Exchange and a List of its Members. New York: Press of De Leeuw, Oppenheimer & Myers, 108 & 110 Duane St., 1887, p. 111.

8. The State Supreme Court is the lowest court in the New York State court system.

9. Carhart, p. 220.

10. This was according to an article published in *The New York Times* on September 22, 1901.

11. Wharton Poor*, American Law of Charter Parties and Ocean Bills of Lading*, Second Edition, Albany: Matthew Bender & Company, 1930, Appendix D1.

12. In subsequent revisions, the title was amended to "Government Form."

13. In the revisions of the New York Produce Exchange Time Charter which were made in 1981 and , the arbitration clause was substantially changed to give the option of London arbitration.

*14. Poor on Charter Parties*, Appendix C1. The arbitration clause in the 1913 Time Charter Party is Clause 18. In the 1921, 1931 and 1946, the arbitration clause is Clause 17. Interestingly enough, in future revisions and certainly in the 1946 revision, the words "the arbitrators shall be commercial men" was added.

15. Although not a New York Produce Exchange Charter Party, the Coal Welsh Form C/P of 1914 (the antecedent to the Americanized Welsh Coal Charter "Amwelsh") showed a consistent approach by the merchants and shipping people of the time regarding arbitration in New York.

16. Poor on Charter Parties, Appendix E

## IN MEMORIAM

Sadly, Jeremy Harwood and George Chandler, two stalwarts of the maritime bar and arbitration community passed away since our last edition. We mourn their passing and celebrate their lives and careers.

## REMEMBRANCE OF JEREMY J.O. HARWOOD

*[abridged version of remarks at memorial service on August 7, 2013]*

**By John D. Kimball***

The first part of Jeremy's legal career was with Healy & Baillie, a relatively small maritime law firm, where he initially worked as an associate. Jeremy quickly rose to become a partner in Healy & Baillie and remained there until Oct 1, 2006, when he joined Blank Rome along with many other HB partners.

Jeremy was widely recognized as an outstanding maritime lawyer. In recent years, Jeremy was best known for his work in maritime bankruptcy, a field in which he was a renowned expert. Jeremy's work in this area began in the early days of his career at Healy & Baillie, when he assisted in two major cases involving the bankruptcies of US Lines and Lykes Lines. We were confronted in those cases with the task of handling tens of thousands of asbestos claims, many of which were outright frauds. Jeremy took to this with great tenacity, like a dog chasing a bone. Jeremy made enormous contributions to the successful handling of what was clearly a very complex problem. By the time of his death, Jeremy was handling several of the most important maritime bankruptcy cases and was a leading light in this area of practice.

For several years, Jeremy was listed in the highly respected International Who's Who in the Law as one of the ten most highly regarded individuals in shipping law worldwide. In 2012, a leading shipping publication rated Jeremy as one of Shipping's 100 most influential people.

What was it about Jeremy that made him so successful as a maritime lawyer?

First, as all of us know, Jeremy could be an incredibly charming and engaging person. When Jeremy arrived anywhere, his arrival was something more: it was an entrance –an appearance – whatever the occasion, it was no longer ordinary. When Jeremy was in the room, you knew he was there. Jeremy always was a standout at cocktail parties and social events, where he had an amazing ability to work the crowd.

 

Jeremy was successful also because he worked very hard to develop a vast knowledge of maritime law. Jeremy knew the facts of his cases inside/out and also was a true expert in maritime law, a field mined with all sorts of arcane legal doctrines which he savored and mastered. The more arcane, the more interesting it was to Jeremy.

Third, he had a quick mind and the ability to get to the heart of the problem very directly. He was creative and saw lines of attack or defense which others did not immediately see.

Most important, if you were Jeremy's client, you know he would be loyal, zealous and tenacious in representing you. How strongly can I put it. Jeremy was an admirer of Winston Churchill, and I think that one of Churchill's most famous speeches describes very well the approach Jeremy took in representing his clients. Obviously, in my plain American accent, I cannot convey this as well as Jeremy could have done. Churchill was speaking to the students at his alma mater, the Harrow School, in 1941, in the early part of WW 2, and he said:

> Never give in, never give in, never, never, never, never – in nothing, great or small, large or petty – never give in, except to convictions of honour and good sense!

I can think of many cases and occasions when Jeremy lived and breathed this approach and his clients benefitted from his doing so. We will honor Jeremy by trying to live by these famous words.

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*Partner, Blank Rome LLP, New York

## GEORGE F. CHANDLER III

George F. Chandler III, 72, passed away on May 23, 2013, in Houston, Texas. Born and raised in Winthrop, Mass., George moved from the Boston area to Maplewood, N.J., in 1975, and to Houston in 1996. A descendant of Nova Scotia shipbuilders, it is no surprise that George had a great passion for ships and the sea. He was a great-great-grandson of master shipbuilder Donald MacKay, who is best known for building the fastest clipper ships ever built, in his East Boston Shipyards. After completing high school in 1958, George went to Virginia Polytechnic Institute on a scholarship from the Boston Naval Yard. He graduated in 1963 with a co-op degree in architecture and marine engineering, and was then commissioned by the U.S. Navy, eventually serving as a naval adviser in Vietnam in 1966 to 1967. George graduated from Suffolk University Law School in 1972 and joined the maritime law practice of Bigham Englar Jones & Houston in New York. He joined Hill Rivkins LLP in 1978. In 1996, he moved to Houston as the managing partner of Hill Rivkins' Houston office. George specialized in maritime and commercial litigation. He was admitted to the state and federal courts of New York, New Jersey, Massachusetts and Texas, as well as various federal appellate courts, including the United States Supreme Court, to which he was admitted in 1977. He was designated by the U.S. State Department to serve as the US Representative to the UN Commission on International Trade Law (UNCITRAL) for eCommerce from 1992 to 1994, and as adviser until 2002. George was involved in many professional organizations, including the Maritime Law Association; he was a titular member of the Comite Maritime International, the ABA, and the New York City Bar Association. George's love of the sea and ships continued into his retirement with cruises all over the world on both passenger and merchant vessels and his appreciation of lighthouses and puffins.

## THE SMA AT 50!

**Klaus C.J. Mordhorst**

As mentioned at the beginning of this issue of The Arbitrator by President Warfield, the SMA commemorates its 50th Anniversary with a festive black-tie Dinner Dance on Friday November 22, 2013, at the spectacular Model Room of the New York Yacht Club at 37 West 44th Street in New York.

A cocktail reception at 6:30 PM in the Grill Room will be followed by an elegant Dinner in the legendary Model Room. The Peter Duchin Orchestra will provide the entertainment. All are welcome and we hope to see you there to celebrate this memorable anniversary with us.

The Dinner Dance will be preceded on Thursday, November 21 at 9:00 AM, by a timely and provocative seminar on the very current subject of ship vetting.

The subject, "FAIR AND BALANCED SHIP VETTING : A FACT, GOAL OR ILLUSION," will be presented and discussed by an international panel of prominent maritime professionals. The seminar will take place at the Great Hall of the Association of the Bar of the City of New York, at 42 West 44th Street, New York (directly across the street from the New York Yacht Club), followed by a luncheon at the New York Yacht Club. This Seminar is bound to attract large interest and it would be advisable to make reservations early.

Full details for both events are posted on the SMA website at www.smany.org or you may contact Patricia Leahy at the SMA office at 212.344 2400.

## EDITORS NOTE

This is the debut issue of The Arbitrator under new editors. The Arbitrator has a long history of providing timely and relevant articles and information to the maritime arbitration community in New York and around the world. We look forward to continuing that tradition. To do so, however, requires your support and input. If you have articles and ideas to contribute to future editions, please let us know. Also, we welcome your feedback on each and every issue. Please do not hesitate to contact us, rshaw@mystrasventures.com or leroy.lambert@ctplc.com, and thank you for your support.



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