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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

INDEX TO THIS ISSUE

PRESIDENT'S CORNER

By: Jack Warfield, SMA President

There is much going on as the first quarter of 2015 has closed out. Let me outline a few items:

Tom Bradshaw is heading up our Strategic Planning Committee which we formed at the October meeting of the Board of Governors. The purpose is to review all aspects of the SMA from membership requirements and training to the breadth of our activities. The Committee has been meeting with a variety of users and potential users of our services to hear their views on what we can do to improve our service, and also how we can expand our market. We expect to have much for our members to digest at our Annual General Meeting May.

Under the leadership of Manfred Arnold, Friends & Supporters, was launched with very positive responses from the Admiralty Bar, the P&I Clubs, as well as individuals. This is a practice our friends at the London Maritime Arbitrators Association (LMAA) have followed for many years. The funds will be used to support the SMA.

This past November the New York / London seminar on Maritime Law, Maritime Arbitration, and Vessel Finance launched the initial project of the NY Maritime Consortium. This 'virtual' organization is made up of the SMA, the MLA, ASBA, and NYMAR. The second project is well on its way. This time the format is a play on May 1st at the Scandinavia House auditorium, 58 Park Avenue 2-5 pm. Tickets will be limited. Contact c.edwards@morganmarketcomm.com if you are interested. Come join the drama - a real world, interactive, mock arbitration. This event will take the audience from a casualty, through response and preliminary investigation, followed by the convening of a New York arbitration panel and emergency dispute resolution. The audience will be given the opportunity to weigh in on the various decision points of the process and judge whether they agree with the panel's decision.

I would also like to congratulate Klaus Mordhorst for his very successful chairing of the SMA course "Maritime Arbitration in New York" this past February. He significantly expanded the size and scope of the program. As he reported to the Board at our March meeting, "This was the best one in 10 years." Next year, bigger and better!

On a more somber note, as we have all come to learn, "Life is not fair." We were reminded of this last month when one of our Board of Governors, Bob Flynn, passed away suddenly and unexpectedly – much too young and with so much more to contribute. Bob was one of the good guys – he will be missed.

Our final open luncheon of the year was Wednesday April 8th at the 3 West Club at 3 West 51st Street. We had a terrific speaker on a very timely topic. Matt Thomas, from Blank Rome's Washington office, discussed the shipping opportunities with Cuba.

TIMING IS EVERYTHING

By: Robert C. Meehan, SMA Member and Partner, Eastport Maritime

On most transactions, the most commonly asked question following price is usually the delivery date. After all, a competitive price for say a television loses its allure if you have to wait one month before it arrives. The international commodity trade is no different. The timing of any delivery plays an integral part in pricing the product and managing inventory. Furthermore, the growing practice of 'just-in-time' inventory further complicates the process, as it does not allow time enough to remedy the situation should inventories reach critical levels [high or low]. Additionally, pricing terms on commodity sales contracts generally provide for specific timing stipulations, including the load date; when the cargo arrives at destination; the date initiating pricing [for example; basing price on Platt's posted price seven days after bill of lading date], and so forth. In short, timing is everything.

The trading industry utilizes many modes of transportation as a means of delivering product to the customer, including trucking, rail, pipeline, airfreight, barges, and ocean-going vessels. Although all modes experience varying degrees of delay, shipping is, without doubt, the largest culprit. Furthermore, within the shipping industry itself, the various modes of transportation carry differing exposure to delays. The commonality with shipping is that all modes face weather and port related delays. That is where the common interest ends however, leaving each shipping segment with its own, industry specific timing challenges.

For the most part, the bulk shipping business involves one charterer, shipping one cargo encompassing the entire vessel capacity, loading and discharging at one port. Generally, delays are limited to weather and port congestion, although commercial related delays stemming from unsold cargo; storage unavailability; or letter of credit issues are not uncommon. Excepting such delays, it is not difficult to gauge a vessel's arrival date at load and/or discharge; simply plot the distance of the voyage, positioning and laden, and vessel speed, to arrive at a comfortable date. This calculation presupposes the owner provides accurate information regarding the vessel's position and condition at the time of fixing. The parcel chemical business [hereinafter parcel] on the other hand is far more complex, increasing the likelihood for extended, unforeseen delays.

The parcel trade, as the name implies, deals with cargo encompassing only part of a vessel, for instance one charterer shipping 5,000-Mt from the US Gulf to Asia on a vessel having the capacity for 40,000-Mt. The parcel business is essentially a liner-service for bulk commodities. Similar to the container liner-service, chemical owners also offer regular sailings on specific trade-lanes. The main differentiating factor between the two modes deals with the load and discharge port(s). Unlike container vessels that service specific, pre-arranged, load and discharge 'port(s)', for instance, Houston, Baton Rouge and Corpus to Yokohama, Ulsan and Kaohsiung, the parcel owners service specific 'region(s)', for instance US Gulf to Asia, or US Gulf to Europe. In the parcel trade, the port(s) are all encompassing within the region.

The container owners publish the arrival and departure date of each vessel at select load and discharge ports in major trade publications, such as *The Journal of Commerce*. This defined program allows for forward planning to position cargo and price the cargo based on delivery. The 'vessel' determines the scheduled load and discharge ports in the container service. In the parcel trade, however, 'cargo' determines the scheduled load and discharge ports. For instance, the vessel rotates within a scheduled 'region', to a specific port for a cargo. While many owners have contracts specifying specific load and discharge ports, most vessels need to seek completion cargo, loading and discharging at differing ports within a particular region, many times unknown by the owner [and charterer] at time of fixing a particular cargo.

Considering the part cargo nature of the parcel business, typically parcel charters include a provision afford-

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ing the owner the right to complete the vessel with other cargoes including the right to determine vessel rotation. Additionally, parcel charters usually allow the owner the option to substitute tonnage (OOS) to perform the voyage. By incorporating these provisions, it is easy to see where a vessel's timing may go awry.

Take for example, compliance with a vessel arriving within laycan, the essential provision triggering the contractual obligation between the parties. The panel in *Chemoil v. Cape Tankers*, SMA 3746 (2002) aptly defined owner's responsibility toward laycan:

> Laycan represents the vessel's scheduled arrival at the load port. At the time of concluding a fixture, the owner must have a reasonable basis for concluding that the ship could arrive within her laycan. The dates are determined after taking into account such matters as her prior commitments, her berthing prospects while meeting those commitments, her ability to perform at service speed, likely weather and sea conditions or other anticipated impediments during the performance of her prior voyage, as well as during the positioning voyage to the next load port.

One of the more interesting cases involving laycan is *The Aralda*, SMA No. 1883 (1983). The owner fixed a cargo loading ex Venezuela against an ETA of December 28 corresponding to a laycan of December 28/31. While enroute load, owner diverted the vessel to Curacao to change the title, ownership, flag, crew, and finally, the vessel's name. This added port and activity delayed the vessel's arrival at load until December 31, the canceling day. Because of the late arrival, loading completed on January 1, initiating a new [higher] price for the cargo.

The question before the arbitrators was whether the owner misrepresented the vessel's position and breached its obligation to order her, at the time of concluding the fixture, to proceed to the loading port with all convenient dispatch. The panel decided against the owner. The decision, in part relied on another, similar, decision, *Eversa S.A. Commercial v. North Shipping Company, Ltd.* [1956] 2 Lloyd's List L.R. 367, 370 (Q.B. 1956), where Mr. Justice Devlin stated inter alia; "In short, the position is this, if a shipowner wants to make the beginning of one voyage contingent upon the conclusion of the one before, he must say so in clear terms…make it plain to any reasonable charterer that the charterer was being invited to accept the risks of delay under an earlier charter-party in which that charterer was not concerned. To pass those risks on to a person who was not a party to that charter requires, in my judgment, if not express language, at least much clearer language than that which was adopted in the present case."

The parcel chemical trade necessitates that the shipowner make the beginning of one voyage contingent upon the one before: however, an owner is not always able to do so in clear terms. Absent any egregious act or delay, surprisingly few cases in the parcel trade deal with the charterer cancelling a fixture due to a missed laycan stemming from the owner intentionally misrepresenting the vessel schedule and/or timing. Parcel fixtures typically conclude 30 days in advance and provide for owner's option of rotation and completion. As a result at fixing the schedule may be unknown to the owner thus weakening the charterer's position in support of any such claim of intentional misrepresentation. Additionally, when dealing with a missed laycan, due to the nature of the parcel trade, the opportunity for the charterer securing alternate tonnage, for part cargo, loading prompt, is remote. Generally, the outcome is for the charterer to extend the laycan, sometimes against consideration by the owner; say granting an 'all-fast laytime provision' or renegotiating the freight rate, to name a few. Lastly, the 'OOS' provision may restrict a charterer attempting to seek an alternative because the owner may present a substitute vessel within laycan. These circumstances, specific to the parcel trade, limit an owners' ability to accurately forecast the arrival of the vessel because at times the ETA presented is nothing more than an educated guess. It is for this reason, that owners typically qualify any ETA with the added provisions that any ETA is basis 'all going well' (AGW), weather permitting (WP), and/or subject to change.

Once loaded, a parcel owner seeks completion cargoes at same or other ports enroute, increasing the charterers' risk of delayed arrival at discharge. A typical rotation/completion clause reads, "Owner shall have the option of loading other cargo(es) at same or other loading ports for discharge at same or other discharge ports for own or other account, rotation of loading and discharging at Owner's option. Such completion cargo shall be loaded and discharged from/to ports in normal geographical rotation." The general premise of the rotation clause is to afford the owner the opportunity to complete its vessel by calling other ports within the contracted 'region'. In practice however, disputes often arise on the course chosen by the owner, citing the rotation is actually 'deviation', thus outside the negotiated region.

Take the case of *The Stolt Osprey*, SMA 2591 (1989). This charter involved a part cargo of petroleum products from Dalian to San Francisco. The charter included the provision, allowing owner the option to rotate and complete with other cargoes. The charterer claimed owner breached the charter by diverting the vessel from the direct route between Dalian and San Francisco to a route via the Philippines for additional cargoes. The charterer contended this deviation extended the voyage by 13 days, and not disclosed in the charter negotiations, delayed delivery of their cargo into the next month. The panel majority denied the charterer's claim for deviation, finding the owners sufficiently disclosed the broad rotation clause to charterer. The majority also held the charterer did not promise to deliver the cargo prior to the start of the next month.[1]

The Santa Maria I, SMA 3055 (1994) offers another example of late delivery resulting from vessel rotation. The parties chartered the vessel to carry a part cargo of maize from the Mississippi River to Beirut, Lebanon. The maize represented about 60 percent of the vessel's carrying capacity. During negotiations, the charterer learned the vessel would seek completion cargo and considering this operation would delay the arrival into Beirut, the charterer insisted that the owner disclose the cargo details, including load and discharge ports. The owner agreed, and included in the fixture recap, that the vessel had fixed a completion cargo of 3,200 MT creosoted poles from Mobile to Limassol, Cyprus. After loading in the US Gulf, the vessel encountered delays during the voyage, delaying the arrival into Beirut by about one month, forcing the charterer to purchase 5,000-MT maize for prompt delivery Beirut, in partial mitigation of the late arrival. During the proceedings, the charterer discovered that owner fixed another cargo destined for Genoa, delaying the arrival into Beirut. It was the charterer's position that the owner breached its obligation to limit the completion cargo to the Mobile creosoted poles, previously disclosed. The owner's position was, as the Genoa cargo fixed before the Beirut cargo, the owner was under no obligation to publicize this cargo, to highlight only 'completion' cargo, or the creosote poles to Cyprus.

The majority found the evidence fully supported the charterer's position and concluded that owner had misrepresented the voyage itinerary and the nature and number of completion cargoes that the *Santa Maria I* was to carry. The majority went on to say, "It is our belief the fixture would never have come about if Charterer was informed the vessel would lift cargoes in addition to the creosote poles referred by Owner as the "completion cargo."

The dissenting opinion rejected the charterer's claim of misrepresentation and held that the real cause for the dispute was that the charter party did not reflect what the parties agreed:

"In retrospect (and with the benefit of hindsight), matters would certainly have been greatly simplified and delays averted if the Owner had laid out the whole program at the onset and specified the ports together with the addition completion cargos … . If indeed, time was of the essence as contended by the Charterer, then it should not have relied upon the understanding of what it perceived its position to be, but the Charterer should have insisted on arrival dates to be part of the charter party; clearly the burden of compliance would then unequivocally have been placed upon the Owner."

The commonality in the above cases is neither charter-party fully reflected the charterer's timing requirements. During negotiations, parties, in their zeal to conclude a fixture, can easily lose sight of these pitfalls, and on occasion, quite unwittingly find themselves at risk. Had the charterer voiced its timing needs before actually fixing, the owner may have more fully elaborated on the vessel's program, allowing the parties the opportunity of possibly not concluding the fixture, or perhaps structuring their sales price differently.

Further complicating an owner's option to rotate and complete are those occasions where the owner performs cargo operations for the subsequent voyage, before completing the initial one. For instance, discharging and loading at one port, and then continuing with the discharge program at other ports. Such operations serve to place the added risk for delay on a charterer, for a voyage to which it is not a party. Furthermore, there are instances when, during the course of a voyage, the owner performs a separate and distinct voyage, enroute. For instance, on a US Gulf to Asia voyage, the owner books cargo from West Coast Central America, for discharge on the US West Coast. Many view such an interim voyage as misrepresentative, straining an owner's argument that such a voyage falls within the scope of the rotation/completion clause. The nature of the parcel trade, with its inherent optionality, tends to burden an owner's ability to accurately forecast and/or maintain arrival dates. It would therefore be well advised for the parties entering into a contract, to disclose and formalize any time commitment, constraints or expectations into the charter party at the onset in order to remove any ambiguity with respect to their obligations and expectations.

1. See A.L. Dooley, Geographic Deviation – An Examination of the New York Perspective, ICMA Hamburg 1989.

DEATH BEFORE DISHONOR: GO DOWN WITH THE SHIP?[1]

By: James E. Mercante, Partner, Rubin Fiorella & Friedman LLP, New York

It has long been the lore of the sea that the 'captain goes down with the ship.' But, is there any 'law' behind that lore?

Interesting how maritime disasters precipitate protocols of sea etiquette such as the 'captain goes down with the ship' and 'women and children first.' However, there is no law requiring such chivalry. Going down with the ship is one of the memorable images from the movie *Titanic*. Captain Edward Smith remained stoic on the bridge of the 'unsinkable' luxury liner as the last lifeboat departed and his ship slipped below the icy waters off the coast of Newfoundland.

Woman and Children First!

The 'women and children first' idea surfaced when the British ship *HMS Birkenhead* began to sink in 1852. In the ultimate act of a self-sacrifice, the captain and officers allowed all women and children to board the lifeboats first and safely abandon the ship. Captain Smith of the *Titanic* followed that same protocol directing that his officers ensure that all women and children first take to the lifeboats.

Contrast that with the recent outrage expressed by the world community when Captain Francesco Schettino of the *Costa Concordia* reportedly fell into a lifeboat abandoning more than 4,000 passenger and crew prematurely while refusing a Coast Guard order to return to the ship. The *Costa Concordia* crashed into a reef off the Italian coast with 32 people perishing. Then, on the 102nd anniversary of the *Titanic* sinking in April, 2014, the South Korean ferry disaster occurred. Captain Lee Joon-Seok of the ferry *Sewol* escaped to a rescue boat in his underwear (not identifying himself as the captain), while leaving behind all passengers and crew aboard the sinking vessel resulting in over 300 lives lost. Both captains were arrested and charged with various crimes associated with their self-serving and potentially criminal behavior that resulted in loss of life.

The potential sanctions against a master who prematurely evacuates a sinking ship that results in loss of life are enormous. Captain Schettino faced several criminal charges in Italy including abandoning incapacitated passengers; manslaughter; three counts of causing a shipwreck owing to imprudence and negligence resulting in deaths; abandoning people unable to fend for themselves; and not having been the last to leave a shipwreck. Captain Lee Joon-Seok of the *Sewol* will undoubtedly face a similar fate.[2]

Unlike the captain's creed of yesteryear portraying 'death before dishonor,' present day cowardice at sea whif's of 'every man for himself.'

U.S. Law

There is no statute or regulation in the United States that requires the ship's master to actually go down with the ship. However, the Merchant Marine Officers' Handbook lists five duties of the captain in a marine casualty: 1) last man to leave the vessel, 2) use all reasonable efforts to save everything possible including diligence to aid in salvage and to save the cargo and the vessel, 3) make provisions for return of the crew, 4) communicate promptly with owners and underwriters, and 5) remain in charge until lawfully suspended.[3]

A captain that fails to remain in charge and provide for orderly evacuation will undoubtedly face both civil and criminal exposure for loss of life and property. A United States statute, 18 U.S.C. §1115, Misconduct or Neglect of Ship Officers, can be a lynchpin for a prosecution in such a situation. This statute is rarely used and has not been applied yet to a runaway captain. The statute casts a wide net stating in part, that every captain, engineer and pilot employed on a vessel, by whose misconduct, negligence or inattention to duty on such vessel, the life of any person is destroyed...shall be fined under his title or imprisoned not more than ten years, or both." The statute applies only to commercial shipping, not pleasure craft.[4] But, under its broad language that criminalizes negligence and misconduct that results in loss of life, the likes of Captains Schettino and Lee-Joon-Seok would certainly sink under the weight of this statutory violation.

A captain's duty stems also from admiralty law requiring the captain to exercise reasonable care for the safety of his or her passengers. When there are fare-paying passengers (such as aboard a cruise ship or ferry), the vessel owner and captain may have a 'heightened' standard of care applied.[5] Indeed, at the very least, it is expected that the captain (the most experienced and knowledgeable ship's officer) will remain in command to orchestrate an orderly evacuation and ensure that all abandon ship duties of the crew are complied with.

Thus, it is not true that once the order to 'abandon ship' is given, that the captain is also free to head for the hills. Indeed, a Hungarian member of the band (who died) was seen in video footage leading the evacuation.[6]

The International Convention for the Safety of Life at Sea (SOLAS) subscribed to by most seafaring nations after the 1912 *Titanic* sinking, codifies safety requirements for ship's including the number of lifeboats needed. SOLAS also codifies a captain's responsibility for the vessel and all people on board stipulating that the Master "proceed with all speed" to help any person in distress.[7] It does not mention when the captain is to leave the ship.

Marine salvage laws also form a basis for a master to remain with the ship in an emergency. In marine salvage law, when a vessel is in peril and abandoned, any 'good samaritan' vessel can attempt to save or 'salvage' the disabled vessel, return her to shore and seek a high "reward" for saving the property. Such an award or 'reward' is computed based upon a percentage of the post-casualty value of the vessel saved. The theory being that the salvor 'saves' the marine insurance company from paying out a total loss had the vessel sunk. However, if the captain remains with the ship, then the terms of and payment for any such salvage operation can be reasonably negotiated and even assisted by the captain.

The duty to remain with the ship is even greater for military personnel and codified in Military Law. United States Navy Regulations state that in the case of the loss of a ship, a commanding officer shall remain by her so long as necessary and if it becomes necessary to abandon the ship, the commanding officer should be the last person to leave.[8] Similarly, United States Coast Guard Regulations require that in the event of a shipwreck or other serious disaster, the Commanding Officer shall "when it becomes necessary to abandon ship, be the last person to leave and take all possible precautions to protect the survivors and such government property as has been saved."[9]

Conclusion

To be sure, no law requires a captain to actually sink with the ship. It is a moral code and ultimate act of self-sacrifice. We have all seen the *Titanic* ending to that movie with Captain Smith stoically sinking beneath the surface. Hopefully, there will be no movie of Captain Schettino falling into a lifeboat or the South Korean captain slinking off the ship in his underwear. These are certainly no "Kings of the World."

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1. This article originally appeared in *The New York Law Journal*, May 15, 2014.

2. [Editors' Note: On February 11, 2015, Captain Schettino was convicted and sentenced to 16 years in prison; he is appealing. In November 2014, Captain Lee was convicted of gross negligence and dereliction of duty and sentenced to 36 years in prison. The prosecution is seeking the death penalty on appeal.]

3. Turpin and MacEwen, *Merchant Marine Officers' Handbook* §§18-20 (Cornell Maritime Press, 1979).

4. *U.S. v. Cyril E. LaBrecque*, 419 F. Supp. 430 (D.N.J. 1976)(holding that captain of a noncommercial pleasure vessel could not be held criminally responsible under this penal statute).

5. In re Complaint of Jules S. Cornfield, as of owner of the vessel CARA ANNE, 365 F. Supp.2d 271, 282 (E.D.N.Y. 2004), citing Monteleone v. Bahama Cruise Line, Inc., 838 F.2d 63, 64-65 (2d Cir. 1988) and Rainey v. Paquet Cruises, 709 F.2d 169, 170 (2d Cir. 1983).

6. *See Csepi et al. v. Carnival PLC*, 12 Civ. 03948 (RJS), S.D.N.Y (voluntarily dismissed, Sept. 20, 2012.).

7. SOLAS, Chapter V, Regulation 33.

8. United States Navy Regulations, Chapter 8, §0852, Loss of a Ship (The Commanding Officer, 1990).

9. United States Coast Guard Regulations, COMDTINEST M5000.3B, §4-2-8, Destruction of Vessel (1992).

PRECLUSIVE EFFECT OF A PRIOR ARBITRATION AWARD: WHO DECIDES?

By. Larry P. Schiffer, Partner, Squire Patton Boggs, New York

What happens when one party loses an arbitration and then commences a second arbitration against the same counterparty over similar issues? Can the party that won the arbitration and then had the award confirmed in federal court obtain an injunction precluding the first party from moving forward with the second arbitration? Apparently not.

In a recent Second Circuit decision, the court determined that the district court correctly denied an application to enjoin an arbitration based on the argument that the prior federal judgment confirming the first arbitration award precludes the second arbitration. *Citigroup, Inc. v. Abu Dhabi Investment Auth.*, No. 13-4825-cv (2d Cir. Jan. 14, 2015). While this is not an insurance or reinsurance decision, it is

a fairly important decision concerning the preclusive effect of a federal judgment confirming an arbitration award.

In the good old days when a party won an arbitration the losing party would act accordingly and comply with the arbitration award. While running to court to obtain a federal judgment confirming an arbitration award was certainly a conservative belt and suspenders (or belt and braces for those of you across the pond) practice, it was not generally done or believed to be necessary.

Today, the knee-jerk reaction of many who win an arbitration is to obtain that federal judgment as soon as possible just in case enforcement of the arbitration award (and now the judgment) becomes necessary. Strategically, confirming an arbitration award was thought to give the winning party some leverage should a future dispute arise. That presumed leverage was using the federal judgment confirming the arbitration award to defeat a second arbitration based on concepts of issue or case preclusion (the old res judicata or collateral estoppel). In other words, enforcing a court judgment sounded better than enforcing an arbitration award.

Multiple cases have held that in most circumstances, and certainly under the Federal Arbitration Act, the issue of whether a prior arbitration award will have a preclusive effect in a subsequent arbitration is for the second arbitration panel to decide. But what about the preclusive effect of the federal judgment confirming that prior arbitration award?

The Second Circuit Court of Appeals has now made it clear (at least in the Second Circuit) that the arbitrators in the second arbitration remain the proper party to determine the preclusive effect of that prior arbitration award, including the preclusive effect of the federal judgment confirming that arbitration award. A federal district court, said the circuit court, cannot enjoin the second arbitration under the guise of enforcing the court's judgment.

The court's rationale for this principle is straightforward. When a prior federal judgment merely confirms an arbitration award through a limited procedure that does not involve consideration of the merits of the underlying claim, no injunction may be issued to enjoin the subsequent arbitration. The Second Circuit rejected the notion of creating a hierarchy of judgments confirming arbitration awards between state confirmations and federal confirmations. Because the district court did not review the merits of the substantive claims or the context in which the underlying claims arose, the circuit court found that the district court was not the best interpreter of what was decided in the arbitration.

In other words, the mere act of confirming an arbitration award without ruling on and examining the merits of the underlying dispute and the arbitrators' award cannot convert the judgment into one that requires injunctive protection in order to preserve and enforce the judgment. The claim that the second arbitration was an assault on the federal judgment was rejected by the court. Tension between the competing concerns of the FAA's national policy favoring arbitration and the integrity of federal judgments was, in this case, resolved in favor of the FAA.

From this decision we find that it is the arbitrators that are to resolve the claim-preclusive effect on an arbitration award whether confirmed by a state or federal court and including the claim-preclusive effect of a federal judgment confirming an arbitration award. That is not to say that an injunction may never be issued to protect a federal judgment arising from an arbitration, but on the facts here–which are typically the facts when a petition to confirm a reinsurance arbitration is filed–no injunction will lie and the second arbitration panel is left to address the question of preclusion.

IN MEMORIAM: BOB FLYNN

By: Michael Fackler, SMA Member and CEO, European Maritime Company LLC

On Friday, February 20, 2015, the shipping world learned of the loss of Robert John Flynn as the result of a sudden heart attack early that morning. The day before, Bob had attended a lunch to celebrate the birthday of fellow SMA member and former CEO of Teekay Shipping, Jim Hood, and was reportedly in excellent spirits. His death came truly out of the blue and he will be greatly missed by many. Bob was a wonderful human being and shipbroker extraordinaire, president of MJLF & Associates, Chairman of the Coast Guard Foundation, and SMA Governor.

Born and raised in Bridgeport, a town he always supported, Bob graduated in the class of 1974 from the Coast Guard Academy and shortly after commissioning served as commanding officer of the cutter *Cape Strait*. His exemplary performance and commendation letter to that effect foretold Bob's future outstanding performance in his chosen profession, shipbroking. After doing spot tanker chartering at the start of his career at what was then Mallory Jones Lynch & Associates, Bob came into his own when he joined the Projects Group, regularly booking longterm deals other brokers never knew existed and doing fleet sales. His imagination and persistence in creating deals was legendary, and he had a very fine sense for what it took to close. He rarely missed, especially the big ones.

I first met Bob when I shared office space with MJL (as it then was) in 1986, and worked closely with him in the S&P/Projects Group when I joined the firm in early 1991 after the move from New York to Stamford, and we stayed in touch after I left in 1999. He had left the firm shortly after I got there in 1991 to work for one of his clients, MOC/OSG, to develop new business, hoping it would broaden his experience to work for a large shipowner, but less than a year later realized that job was not for him. Frustrated and a bit despondent, he sat one evening in a Stamford bar and was courted by MJL and all of its competitors. Sam Jones and Charles Mallory did their best to get him to return, and when I was going to see Bob at the bar, Sam told me, "push him hard to come back." I stressed to Bob how much he was wanted back, and he said he was strongly tempted, but only if they added "Flynn" to the name partners. He knew his worth and was going to insist on having it recognized. He got what he wanted.

Bob Flynn was in every way a "bon vivant." The phrase is usually defined as "a person who enjoys the good things in life, especially good food and drink; a man about town." All of these things were true of Bob. He loved good restaurants and fine wines, custom-made clothes and expensive cars, always dressed impeccably for the occasion and enjoyed creating a "sense of arrival" at the social gatherings he loved. But for Bob the expression must be extended to include one who lived a "good life" in many other ways: he was a devoted father to his only child, Christine, who is expecting her first child in July; a good husband to his wife Rosanne from their marriage in 1974 to her own untimely death in 2011; a good son and brother to his mother and four brothers; a good leader of one of the premier shipbrokerage firms; a loyal and tireless supporter of the Coast Guard; a great friend to so many people in so many places all over the world. His funeral on February 26th filled to overflowing St. Thomas More Church in Darien, CT, some of whom came from as far away as Sweden and California; dozens more sent moving notes of condolence. The scene outside the church after the formal service brought tears to many eyes as, amid a gently falling snow, a Coast Guard honor guard presented full military honors to a man who richly deserved it.

I was lucky to call him "friend" and to get to know a man I truly admired for his devotion to family and friends, his hard work, his creativity, his intelligence, his wide range of interests and strong moral sense. We had a number of things in common, one of which was a love of opera, and together attended at least one or two performances per year at the Metropolitan Opera. I always enjoyed our "opera evenings" which began with a good meal, interesting conversation and, depending on the opera, at least a few drinks "to get us through the boring parts." We were behind schedule this year and, to my great regret, we will now never get together there again.

We have lost a great man, and it is truly sad to say "goodbye."

RECENT LONDON CASES OF NOTE

By: LeRoy Lambert, President Charles Taylor P&I Management (Americas), Inc.

Maritime law has always aspired to uniformity of law and result across countries so that merchants everywhere (and their insurers) can evaluate risk and predict outcomes. Accordingly, it is useful to review cases from other jurisdictions from time to time. In this issue, the focus is on London.

In *The Bulk Uruguay* [2014] EWHC 855 (Comm), the court reaffirmed that an anticipatory breach justifies cancellation of a charter only in those cases where the breach causes the most serious of consequences. The case is of particular interest to intermediate charterers.

In *Volcafe v. CSAV* [2015] EWHC 516 (Comm), the court considered claims for damage to coffee beans due to condensation. The court held that the carrier had not demonstrated that its use of Kraft paper to protect the cargo from condensation was a "sound system," given that the condensation and damage was conceded and the coffee was in good order at the time of loading. The court ruled that it was not enough to say the damage was "unavoidable."

In *Spar Shipping v. Grand China Logistics* [2015] EWHC 718 (Comm), the court (Mr. Justice Popplewell) distanced itself from the decision in *The Astra*, [2013] EWHC 865 (Comm) (Mr. Justice Flaux) and held that failure to pay hire is an innominate term, not a condition.

In *The Eleni P* [2014] EWHC 4202 (Comm), the court considered two arbitration provisions which could not be reconciled. The court had to decide the parties' "objective intention." Reviewing all the circumstance, the court concluded that that parties intended to adopt the BIMCO arbitration clause with three arbitrators rather than the clause calling for two party-appointed arbitrators and an umpire.

In *The Global Santosh*, [2013] EWHC 30 (Comm), the ship was arrested by a sub-charterer and cargo interests. Cargill was the time charterer and withheld hire up the chain. The court of appeal held that the ship remained on hire because the subcharterer /cargo interests were "agents" of Cargill within the meaning of the relevant clause.

EDITORS NOTES:

ICMA Hong Kong – May 10-15, 2015

A final reminder that the ICMA conference is in Hong Kong May 10-15, 2015. There is still time to register, http://www.icma2015hongkong.org/registration_land.php. In excess of 220 delegates have registered and some 130 papers have been received.

Friends and Supporters

The Friends and Supporters program is off to a great start. The following firms have contributed or made a firm commitment to contribute $1250 as corporate members:

- American Club/Shipowners Claims Bureau
- Blank Rome
- Fairfield Chemical
- Freehill Hogan & Mahar
- Gard
- Standard Club/Charles Taylor
- UK P&I Club/Thomas Miller
- UK Defence Club/Thomas Miller

In addition, numerous individuals have contributed $300. The SMA is grateful for the support received and looks forward to adding to the list by the next issue. These tax deductible contributions are placed into a dedicated account, the control of which will be with the president of the SMA (or any other designated member of the Board of Governors) and a member of the Friends and Supporters group. Corporate membership is $1250 and individual membership is $300. Please send your check to the SMA office, with the notation "Friends and Supporters."

New Members

The SMA is delighted to announce three new members:

Charles Anderson is Senior Vice-President and head of Skuld's New York office since 1998. Prior to joining Skuld, Charles was a partner at the law firm of Haight Gardner and later Holland & Knight. He graduated from Columbia College in 1969, and served on active duty with the US Navy from 1969 to 1972 and in the Naval Reserve, retiring with the rank of Commander. He received an M.A. from Princeton University in 1974 and a J.D. from Columbia Law School in 1980. His many publications include co-authorship of *Shipping and the Environment*, 2d edition 2009, a leading treatise on marine environmental law. Charles is also a Titulary Member of the Comité Maritime International and an adjunct professor at Columbia Law School, where he teaches admiralty law, as well as a frequent speaker at industry conferences.

Gunther Keitel is head of Keitel Associates LLC after a distinguished career in diverse aspects of shipping, including positions at Great American Lines, Fairfield Maxwell Services, Reefer Express Lines, TTT Ship Agencies, and Grace Lines/Prudential Lines. A graduate of Kings Point, Gunther also has an MBA in marketing from NYU and served as a Captain in the US Navy Reserve.

Molly McCafferty is the Manager of Claims and Legal Affairs at Clipper Bulk USA in Stamford. She received her BA from Tulane University in 1980 and J.D. in 1993 from the University of Miami. After working as a lawyer in Miami, she joined the P&I world at Thomas Miller (Miami) in 1997 before moving north and joining Clipper in 2003. She has shared generously her time and talent for the benefit of a number of industry organizations, including the CMA and the CMA Education Foundation.

Congratulations and welcome Charlie, Gunther and Molly!

Thanks!

A special thanks to those who responded to our call for papers and articles of interest. *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 need your continued support! 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. Thank you.

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