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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT'S CORNER

By: Jack Warfield, SMA President

A Happy 2017 to all.

I am pleased to report that there are a number of new and positive initiatives underway that I believe will have a meaningful impact on the future of the SMA. As part of the incubation process for these programs we established three new Ad Hoc Committees; ASBA / BIMCO / SMF Liaison, Insurance, and Mediation.

- A/B/S Liaison Committee is being chaired by Nigel Hawkins, the objective being to continue and expand our relationship with these organizations. Most recently New York has benefited by being named as the default arbitration venue in the NYPE 2015.
- The Insurance Committee's Chair is Michael Northmore. He has a very strong committee of former and current insurance professionals. With this critical mass the objective is to identify areas and individuals in the field to approach regarding incorporating the SMA into their dispute resolution clauses for arbitration and/or mediation.
- The Mediation Committee is being chaired by Michael Fackler. There is a two-pronged approach being used here. The first is to get our membership up to speed, insuring they have received the proper training, and second, to make the maritime universe and related industries aware of our expansion and development of our dispute resolution capabilities.

On a different topic, this coming September 25-29 the Danish Institute of Arbitration will host the biennial gathering of the International Congress of Maritime Arbitrators (ICMA XX) in Copenhagen. Our own David Martowski is the Chair of the 4 person (Copenhagen, Hong Kong, Lon-

don, New York) ICMA Steering Committee. This is a truly outstanding event taking place in an excellent venue – we encourage a large turnout from the U.S. as this is almost in our backyard! The SMA will be a sponsor for ICMA XX.

The SMA's annual "Maritime Arbitration under SMA Rules" will be held February 23-24 at the 3 West Club (3 West 51st Street). This program just keeps getting better. The seminar is being chaired this year by Past President, Austin Dooley assisted by long time chair Klaus Mordhorst. Jeffrey Weiss, Professor of Maritime Law at the New York Maritime College, will again be the lead instructor.

This course will be especially valuable to business professionals who are users of the arbitration process for issues arising under their company's contracts and charter parties. Attendees from shipowners, charterers, vessel operators, ship brokers, insurers to commodity traders should find the course an efficient way to gain an understanding of the current practices in New York maritime arbitration proceedings. For attorneys this program will qualify for up to 12 CLE credits. There is a 10% discount for Friends & Supporters.

On a final and sad note, I am sorry to advise you of the death of Alexis Nichols. A long-time member and past president of the SMA, among many other things, Alexis led a delegation of SMA and MLA members to China making an indelible business and social mark. Alexis will be sorely missed.

Jack

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BEYOND CHARTERER'S CONTROL

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

Other than "subjects are lifted," one of the more commonly cited three word phrases in the shipping business is "beyond charterer's control." At first glance, the focus of this phrase seems quite apparent, but, in practice, the phrase is ambiguous, subject to differing interpretations.

Most, if not all, charterparty boilerplate terms include "beyond charterer's control" wording. Examples are the last sentence of clause 6 of the ASBATANKVOY [ASBA] "… for any reason over which charterer has no control…" and clause 17 of the BPVOY4 "Any delay arising…shall count as one-half laytime…provided always that the cause of the delay was not within the reasonable control of Charterers or Owners…." Other charter party forms expand the reach of interpretation of "beyond charterer's control" by including the word "whatsoever" thereby leaving one with the impression the exceptions are all-encompassing. For instance, clause 4 of the AMWELSH 79 "any time lost… or any cause whatsoever beyond the control of the charterer… not to be computed as part of the loading time." Additionally, most charterparties have rider clauses to personalize the contract to reflect specific requirements of the charterer, voyage, or cargo in question. These rider clauses serve to expand the reach of excepted events deemed beyond the charterer's control. Although most charterparties vary, the commonality with all is that the terms of the charterparty are interrelated, and therefore one should not consider any particular clause in isolation and should ensure that a provision of any one clause does not overlap the provisions of another.

Undoubtedly, one of the most cited cases supporting charterparty clause co-dependency would have to be the House of Lords decision in *The Laura Prima*.[1] This decision dealt with the relationship between two ASBA clauses, notably *beyond charterer's control* wording in the last sentence of clause 6 and *reachable on arrival* wording in clause 9 (emphasis added):

> Clause 6 NOTICE OF READINESS: ...However, where delay is caused to vessel getting into berth and after giving notice of readiness for any reason over which Charterer has no control, such delay shall not count as used laytime.

. . .

> Clause 9 SAFE BERTHING – SHIFTING: The vessel shall load …. any safe place or wharf, or alongside vessels …. reachable on her arrival, which shall be designated and procured by the Charterer ….

The *Laura Prima* arrived at her loading place in Libya and tendered notice of readiness but was unable to proceed to her loading berth due to berth occupancy. This remained the situation for almost two weeks. The charterer relied on clause 6 to prevent the running of laytime, arguing that the berthing delays were beyond charterer's control. The shipowner countered this argument by pointing out that the charterer was in breach of clause 9 as charterer had not procured a berth that was reachable on arrival for the vessel. The House of Lords held that clause 9 prevailed. If the vessel was unable to proceed to the berth on arrival then charterer was in breach of its obligations under the charterparty and thus could not rely on the "beyond charterer's control" exception to laytime in clause 6.

In *The Law of Admiralty*,[2] Gilmore and Black state:

> Delay in loading or unloading is often occasioned by circumstances beyond the control of the Charterer; inability to get a berth to which to order the ship is an illustration. When such a case comes to court, it is necessary to decide whether, given the actual terms of the charter, the Charterer is to be excused. These tend to be the most significant financially of the demurrage cases, for some delays imposed by outside circumstances may be of quite long duration. The general rule is that the Charterer having undertaken absolutely to see the ship loaded in a stated time assumes the risk of all casualties preventing this and the obligation of paying demurrage if anything goes wrong.

New York arbitrators review each case on its own merits, specific to the events of each particular dispute. *The Mountain Blossom*[3] is a good example. In that case, the vessel, fixed under an ASBA form charterparty, arrived at the load port and anchored due to berth unavailability. While waiting to berth, the Port Authorities closed the port due to fog. The charterer sought protection under ASBA clause 6, arguing the port closure was an event beyond its control. The sole arbitrator, paraphrasing an interpretation in an earlier award,[4] commented "The meaning of the last sentence of clause 6 must be found in the words 'getting into berth.' The sentence applies to a delay to the vessel when getting into her designated berth, not when waiting for a berth to be ready" (emphasis added). The arbitrator found for the Charterer stating "There is no question that the closure of the port by an accepted authority regardless of cause is an event over which Charterer has no control. All the authorities citied by both parties agree that this is the proper construction of the last sentence of clause 6." The arbitrator ruled laytime did not count for the period of the delay.

Weather condition[s] delaying berthing is a common argument charterers present as an occurrence beyond their control. The ASBA charterparty, however, does not specifically address weather, only "storm." One popular rider clause addressing this shortcoming is the Conoco Weather clause which broadens the scope of the "storm" provision to "weather conditions." The clause simply states that delays in berthing for loading and discharging and any delays after berthing which are due to weather conditions shall count as one half laytime or, if on demurrage, at one-half the demurrage rate. *The Poitou*[5] is an example of this clause trumping a "beyond charterer's control" argument.

On an ASBA II form the *Poitou* charter provided for the carriage of Nigerian crude oil for discharging at Genoa. Noteworthy is that the ASBA II form contains "whatsoever"wording. The vessel arrived at the port of Genoa, anchored due to berth occupancy, and tendered her NOR. Similar to the facts in *The Mountain Blossom*, while waiting to berth, the port authorities closed the port due to bad weather, delaying berthing in excess of 13 days. Unlike the charter in *The Mountain Blossom*, however, this charter party also incorporated the Conoco Weather clause. Citing the clause, charterer argued the time lost waiting berthing should count as one-half time or, alternatively, that if the panel determined the Conoco Weather clause to be inapplicable, then charterer should have protection under the last sentence of clause 6 because no time should count during this period as the port closure was beyond charterer's control. The Panel found for the charterer citing the applicability of the Conoco Weather clause. In this instance, although the Port Closure was an event beyond charterer's control, the Conoco Weather clause represented an overriding condition in the charter party, reducing protection to fifty percent. Had the *Mountain Blossom* charter

included the Conoco Weather clause, the outcome would likely have been the same as that in *The Poitou*.

Terminal breakdown[s] or repairs also are occurrences commonly cited as "beyond charterer's control." The *An An*[6] is an example of berthing delays caused by terminal equipment failure at the discharge port. There, the charter party provided for the vessel to load a full-cargo of sugar at Mozambique for carriage to one/two safe ports in the US Gulf or US East Coast; charterer declared Baltimore as the sole discharge port. Upon arrival, inoperable cranes delayed berthing for over one month. Charterer claimed the delay was beyond its control. Rejecting charterer's argument, the sole arbitrator pointed out that it was charterer which nominated Baltimore as the discharge port even though charterer had other options and that charterer knew, *or should have known*, that the Baltimore terminal had completely shut down because both of its cranes were out of commission.

Similarly, in *The Martha A*,[7] the charterer claimed that berthing delays owing to the port authority having closed the berth at the discharge port for scheduled maintenance were beyond its control. The vessel fixed a part cargo of three chemical parcels under the ASBA form for transport from Antwerp to Tampa and Houston. At the time of fixing, the ETA Tampa for the M/T Martha A was December 27/30. The vessel encountered weather delays crossing the Atlantic, as well as delays at a prior discharge port (New York). The combination of these delays resulted in a revised ETA Tampa of January 7, coinciding with a pre-announced closure of the berth by the Tampa Port Authority. The panel stated: "Charterer's reliance on clause 6 is misplaced. This is not a case where a properly nominated berth suddenly became unavailable for reasons of unforeseen circumstances. . . . On the contrary, charterer advised owner as early as December 27 of the planned shutdown." The panel held that charterer knew the vessel's arrival date conflicted with the planned berth shutdown but did not attempt to seek alternative discharge arrangements.

In the words of an article by a learned colleague,[8] "Those conversant with charter party forms will recognize the phrase 'or any cause whatsoever' as being part of an exceptions clause. Those unfamiliar may wonder why anyone in their right mind would agree or accept such a condition." The answer is simple: negotiating terms is all about managing risk. During any charterparty or contract negotiation, the parties address compliance with various clauses and their inherent obligations and responsibilities. Understanding any associated risk by accepting, or deleting, a particular clause, effectively chancing that the occurrence will not be applicable, is all part of the compromise. In the end, the charterparty is the culmination of these prior negotiations, highlighting the terms and conditions for which the parties bargained. Nevertheless, but for those instances where one party is not paying attention, exposing themselves to the "devil is in the details," most parties accept their responsibility for the various charter party provisions.

"Beyond charterer's control" wording is not a blank check allowing one to escape responsibility. "The charterer, in order to gain the protection of an exception, must prove not only the existence of the excepted cause, but also that he could not by reasonable exertion or precautions have prevented the operation of the cause. He is not entitled to fold his arms and do nothing."[9] When commercial people enter into transactions, a general understanding of legal principles, while helpful, should not be the guiding light toward concluding the deal. Instead, the reasonable expectations of the parties for performance should be the primary influence. "The law has nothing to do with the actual state of the parties minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct."[10]

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1. *Nereide SpA di Navigazione v. Bulk Oil International Ltd (The Laura Prima)* [1982] 1 Lloyd's Rep 1.
2. G. Gilmore and C. Black, The Law of Admiralty, at 275 (2nd ed. 1975).
3. *M/T Mountain Blossom*, SMA 3067 (1994) (van Gelder).
4. *M/T Messiniaki Fontis*, SMA 1630 (1982) (Bauer, Arnold, Berg).
5. *M/T Poitou*, SMA 2898 (1992) (Berg, Zubrod, Fox).
6. *M/V An An*, SMA 3792 (2003) (Nichols).
7. *M/T Martha A*, SMA 3861 (2004) (Arnold, Siciliano, Notias).
8. Manfred Arnold, "…Or Any Cause Whatsoever," *The Maritime Advocate* (July 2002).
9. Scrutton on Charterparties, at 14-037 (22nd ed. 2001).
10. O.W. Holmes, The Common Law, Lecture IX (1881)

COLLISIONS, ECDIS AND "ALL AVAILABLE MEANS"

By: Maurice Thompson (Melbourne), Andrew Gray (Singapore), Partners, and Joel Cockerell (Perth), Associate/Mariner, Clyde & Co.

On 16 December 2015, at 20:14 local time, the *Thorco Cloud* and the *Stolt Commitment* collided in the Singapore Strait resulting in the deaths of six seafarers. This article discusses how the Electronic Chart Display Information System (ECDIS) and traditional navigation skills should be used to reduce the risk of such incidents occurring in the future.

Currently, 51% of the Safety of Life at Sea (SOLAS) fleet uses Electronic Navigation Charts (ENCs). With the staged introduction over the next two years of the mandatory carriage of ECDIS for the remaining class of vessels – as well as the requirement to comply with the Manila amendments to the The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) code – it is timely to review the role of ECDIS in collision avoidance, with the hope of reversing the worrying trend where vessels that are currently fitted with ECDIS are not utilising it as the "primary means of navigation" or to its full capacity.

Seafarers shall use "all available means" appropriate in the prevailing circumstances and conditions in maintaining a proper look out and determining if a risk of collision exists (see Rule 5 and 7 of the International Regulations for the Prevention of Collisions at Sea (COLREGS)). "All available means" clearly includes technology such as ECDIS installed on vessels designed to aid navigation and/or plot the position, speed and direction of potential collision risks.

It is clear to those who have utilised ECDIS as the primary means of navigation that ECDIS offers substantial benefits which cannot be replicated on a paper chart. These benefits revolve around increased situational awareness of the ship and its operating environment. This increased situational awareness allows the operator to have a real time picture of those vessels presenting a risk of collision (including verification of that data through Automatic Identification System (AIS), Automatic Radar Plotting Aid (ARPA) and Radar Image Overlay (RIO)) with reference to the potential navigational situation that both (or more vessels) may be facing. This provides the operator, navigator, master or marine pilot with the opportunity to make more informed decisions in circumstances where a risk of collision exists. While these features are in part achievable on a paper chart, the real time display and ability to interrogate and interact with an ECDIS cannot be replicated on a paper chart.

These tools are invaluable for operators in situations where a risk of collision is developing or exists. If utilised correctly, ECDIS allows the give-way vessel to take early and substantial action to keep well clear and avoid other close-quarters situations developing. Utilising ECDIS correctly and to its full extent requires operators to have undertaken appropriate type-specific training, reinforced with at-sea familiarisation as required by the International Safety Management Code, or simulator training under the supervisions of appropriately qualified personnel.[11]

Not only should utilising ECDIS correctly reduce the risk of collisions occurring, it may also reduce the extent of liability that is incurred by ship owners and charterers where a collisions cannot be avoided. The words of Hewson J in *The Vechtstroom* [1964] 1 Lloyd's Rep. 118 are relevant here:

> A vessel which deliberately disregards such an aid when available is exposing not only herself, but other shipping to undue risks, that is, risks which with seamanlike prudence could, and should, be eliminated. As I see it, there is a duty upon shipping to use such aids when readily available - and when I say 'readily available' I am not saying instantly available - and if they elect to disregard such aids they do so at their own risk.

However, "all available means" does not mean relying solely on ECDIS when making collision avoidance and navigational decisions. The operator must continue to validate those inputs, including by looking out the bridge window and monitoring the bearing movements of approaching vessels, to ensure that a full appraisal of the situation and risk of collision is made. Good visual lookouts are necessary, notwithstanding the assistance of other navigational aids, as such aids can take time to calculate (or in the case of AIS, transmit) information and therefore provide information that is in some cases, to an appreciable extent, historic.

This is particularly important in close-quarters situations and heavy traffic areas as operators (particularly new

operators) can be drawn into an ECDIS display and lose situational awareness (the exact thing ECDIS was designed to overcome). There is also a danger that some operators unquestioningly trust what is displayed on ECDIS, which may give them a false sense of security. While ECDIS is a valuable navigation aid, an unwelcome side effect is that some watchkeepers will favour track maintenance at the cost of complying with COLREGS.

Traditional navigational skills must not be forgotten or lost in the age of ECDIS. While ECDIS, as an aid to navigation, far surpasses the traditional paper chart, we must understand its limitations and ensure we use "all available means" in maintaining a proper look out and determining if a risk of collision exists.

1. A vessel was recently detained in the Port of Brisbane, Australia, after transiting the Great Barrier Reef for significant deficiencies identified with the crews knowledge and ability to use the ECDIS system on-board (despite all crew having conducted relevant type specific training).

INSUFFICIENT NOTICE OF ARBITRATION: TENTH CIRCUIT DISMISSES ACTION TO CONFIRM AN ARBITRATION AWARD WHERE PLAINTIFF SERVED THE NOTICE OF ARBITRATION IN CHINESE INSTEAD OF ENGLISH[1]

By: David Zaslowsky and Grant Hanessian (New York), Partners, and Jonathan Rosamond (Dallas), Associate, Baker & McKenzie

In *CEEG (Shanghai) Solar Sci. & Tech. Co. v. LUMOS LLC, n/k/a LUMOS Solar LLC*, 829 F.3d 1201 (10th Cir. 2016), Plaintiff, a Chinese based producer of solar energy products, contracted with Defendant, a Colorado based solar architecture firm, for the sale of solar energy products. After receiving certain shipments, Defendant filed a warranty claim alleging defects in the products and refused to pay for those defective products. Despite about two years of negotiations, the parties were never able to settle the dispute. Throughout the negotiations, the parties had communicated exclusively in English. Nevertheless, Plaintiff served Defendant with notice of arbitration proceedings in Chinese.

Consequently, Defendant did not immediately realize what the notice was and only discovered through later communications with Plaintiff in English that arbitration proceedings were pending before the China International Economic and Trade Arbitration Commission ("CIETAC"), pursuant to the parties' contractual agreement. This delay resulted in Defendant's not participating in the panel-selection process. Ultimately, the CIETAC panel entered an award in favor of Plaintiff and ordered Defendant to pay the outstanding balance for the allegedly defective products, as well as interest, costs, and attorneys' fees.

Plaintiff then moved for confirmation of the award in the U.S. District Court for the District of Colorado pursuant to the Federal Arbitration Act (the "FAA") and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). In response, Defendant moved to dismiss the enforcement action, arguing that the notice of the arbitration proceedings was insufficient and violated the due process exception to enforcement under the New York Convention. The district court agreed, finding that the Chinese-language notice was not reasonably calculated to apprise Defendant of the arbitration proceedings. The court based its ruling on the fact that all interactions between the parties prior to the issuance of the notice were in English, the English-language version of both relevant contracts at issue were controlling, and the master agreement's choice of language provision in favor of English governed the arbitration. Thus, the district court dismissed the enforcement action.

Plaintiff appealed that decision to the Tenth Circuit Court of Appeals, claiming that the notice was, in fact, adequate and that Defendant failed to meet its "heavy burden" of proving that one of the defenses specified in the New York Convention applied. Noting that the appeal turned on the issue of adequacy of notice, the appellate court emphasized that "[n]otice must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"

Agreeing with the lower court's rationale and ruling, the appellate court also found that the Chinese-language notice was not reasonably calculated to apprise Defendant of the proceedings. The appellate court further stressed that hindering the right to participate in the panel-selection

process is not a minor procedural misstep, but is itself evidence of substantial prejudice. Accordingly, the Tenth Circuit affirmed the district court's dismissal, stating that Defendant "met its heavy burden of demonstrating that insufficient notice caused prejudice by rendering [Defendant] unable to participate in appointing the arbitration panel, rendering the remaining proceedings invalid under the New York Convention."

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1. This article originally appeared in International Litigation & Arbitration Newsletter, Volume 15, Issue 6, http://bakerxchange.com/rv/ff002ad704fac5ccf89f0cad514a889a62d44e73/p=8961971, and is reprinted here with permission.

THE DUAL THREATS OF "WRONGFUL ARREST" AND "COUNTER-SECURITY" IN U.S. MARITIME ACTIONS: PRACTICAL CONSIDERATIONS FOR THE FOREIGN LITIGANT[1]

By: Jeremy A. Herschaft (Houston), Partner, and Lauren B. Wilgus (New York), Associate, Blank Rome

Restraining maritime property *ex parte* within the district of a United States federal court represents a challenging and "high stakes" area of admiralty practice for the American maritime litigator. Given the significance of this unique type of litigation and its inevitable impact on maritime commerce, two preliminary questions are almost always asked by foreign colleagues at the outset of conflict. First, once an arrest or attachment occurs, can the defendant respond with a wrongful arrest or attachment claim against the initiating plaintiff? Second, what is "counter-security," and is it available in the United States to the defendant whose property has just been attached or seized? Both of these important questions will be addressed below.

The Opening Salvo: U.S. Maritime Attachment

("Rule B") and Arrest ("Rule C") Actions

One of the principal advantages of U.S. admiralty jurisdiction is the opportunity to utilize the distinctive U.S. maritime procedural devices of the "Rule B" attachment and "Rule C" arrest procedures. Rules B and C are the principal ways to restrain maritime property in the United States and, in turn, later serve as the basis for a potential wrongful arrest/attachment claim and counter-security demand. A brief explanation of each procedure is outlined below.

Rule B codifies the U.S. maritime **attachment** practice and allows the plaintiff to assert jurisdiction over property of a defendant who "cannot be found within the district" of a particular federal court by attaching her property that *is* coincidentally located in the district. Such property can be tangible (often a ship or cargo) or intangible (perhaps funds in a bank account). There are generally three reasons to attach property via Rule B: 1) to acquire jurisdiction in respect of claims against an absent defendant; 2) to obtain security for a claim; and 3) to seize property in connection with the enforcement of a foreign judgment. Ultimately, any Rule B judgment is limited to the value of the attached property, unless the defendant appears in the action.

In order to secure a writ of maritime attachment under Rule B, four prerequisites must be met: (1) the plaintiff must have a maritime *in personam*[2] claim against the defendant; (2) the defendant cannot be found within the district in which the action is commenced; (3) property belonging to the defendant is present or will soon be present in the district; and (4) there must be no statutory or general maritime law prohibition to the attachment. If satisfied, the plaintiff will file a verified *ex parte* complaint with the court to attach the property at issue. In the event the court grants the *ex parte* attachment, the plaintiff will be required at the outset to post funds on deposit with the U.S. Marshal to cover their costs in effectuating the attachment and maintaining the property thereafter.[3]

Rule C codifies the U.S. maritime **arrest** practice and can only be used by a plaintiff who has a maritime lien on a defendant's maritime property. There are many types of claims that give rise to maritime liens under U.S. law, and thus many causes of action that trigger the availability of the Rule C *in rem* arrest action. Like Rule B, the property must be within the district of the federal court at the time of the Rule C arrest.

The process for asserting the Rule C action is very similar to the Rule B description outlined above—the plaintiff will submit a verified *ex parte* complaint to the court in the district where the property is located, and

will otherwise be required to post funds to cover the U.S. Marshal's costs for arresting the property and maintaining custody of same thereafter. At the conclusion of the trial, the seized property may ultimately be sold at auction to satisfy the lien.

Returning Fire: The Defendant's Potential Claim for "Wrongful" Arrest/Attachment

A claim for wrongful arrest or attachment was succinctly outlined almost 80 years ago in the landmark Fifth Circuit Court of Appeals decision of *Frontera Fruit Co., v. Dowling.*[4] In that case, the plaintiff acted on the advice of counsel and arrested a vessel based upon an alleged maritime lien. The suit was dismissed for various reasons, and the party later arrested the vessel for a second time (again upon the advice of counsel) where it was subsequently determined that the plaintiff did not have a maritime lien on the ship. The defendant vessel interests sued the arresting plaintiff for wrongful arrest.

Upon review of the case, the Fifth Circuit held "the gravamen of the right to recover damages for wrongful seizure or detention of vessels is the **bad faith, malice,** or **gross negligence** of the offending party."[5] The court said the rationale for awarding damages in such cases was "analogous to those in cases of **malicious prosecution.**" Indeed, the *Frontera* court recognized that even though the plaintiff counsel's advice had proven to be erroneous, the arrest action itself was not asserted against the defendant in bad faith and that "the advice of competent counsel, honestly sought and acted upon in good faith is alone a **complete defense** to an action for malicious prosecution."[6] Thus, the bar for asserting a successful wrongful arrest claim was set very high by the *Frontera* court—a defendant's commercial annoyance with the arrest or sincere frustration *ex post facto* that its asset has been seized will not rise to the level of "wrongful" without corollary evidence of **bad faith, malice,** or **gross negligence** on the part of the arresting party.[7] In sum, a plaintiff does not wrongfully restrain maritime property by asserting a *bona fide* claim "to protect its interest."[8]

Numerous courts, including courts in the Second and Fifth Circuits, have interpreted and applied the *Frontera* rationale, and the current state of U.S. maritime law provides for a claim of wrongful arrest/attachment in only limited instances upon the heightened showing of bad faith, malice, or gross negligence, with corresponding damages, which may include a claim for attorneys' fees.[9] The burden of proof in asserting a wrongful arrest claim lies with the party alleging the wrongful arrest.[10] If proven, a wrongful arrest or attachment will be vacated by the court and provable damages may be awarded to the defendant whose property has been wrongfully restrained. Courts will specifically infer bad faith where there is a total lack of probable cause for a plaintiff's arrest, although the"probable cause" standard itself has not been defined with perfect clarity.[11] As such, legitimate disputes between the parties about the underlying maritime claim will probably not be enough to pass over the heightened "wrongful" arrest threshold.

The Parting Shot: "Counter-Security" in the U.S. Maritime Litigation

The word "counter-security" has different meanings throughout the maritime legal world, which may cause confusion to foreign counsel and clients when appreciating the *U.S.* meaning of that term in the context of a maritime arrest/attachment. In some foreign jurisdictions, counter-security is understood to mean a deposit of funds that the plaintiff must provide to the court *before* the arrest occurs to cover potential liabilities for a wrongful arrest. However, U.S. courts do **not** require the arresting plaintiff to post pre-attachment or arrest funds to cover against a potential future wrongful arrest/attachment claim. All that is required of the U.S. plaintiff at the start of the Rule B or Rule C action is to provide the U.S. Marshal with funds to cover the administrative costs of the arrest or attachment until such time as a substitute custodian can be appointed or the matter is resolved.

Where the defendant has a **separate, but related** cause of action against the arresting plaintiff, for example, where a defendant claims that the *plaintiff herself* breached a maritime contract that forms the underlying basis of the dispute and arrest, the defendant may assert a "counterclaim" against the plaintiff. Under Supplemental Admiralty Rule E(7), if a defendant asserts a counterclaim against a plaintiff arising out of the same "transaction or occurrence" as the original claim, the plaintiff **must** give "counter-security" for the damages demanded in the defendant's counterclaim unless the court, for cause shown, directs otherwise. Courts, however, have generally held that a claim for wrongful arrest does not arise out of the same "transaction or occurrence"as the original claim and, therefore, countersecurity is not required. In sum, this

procedural illustration demonstrates that the U.S. version of counter-security is unique; it speaks to the defendant's separate counterclaim against the plaintiff and is posted by the plaintiff (if at all) *after* the arrest/attachment occurs in response to the defendant's counterclaim.

Conclusion

Whether you act on behalf of the sword or stand in defense via the shield, it is important to appreciate how maritime wrongful arrest and attachment actions and "counter-security" are specifically addressed in U.S. maritime courts. A working knowledge of both concepts will assist the client and foreign lawyer alike when they find themselves (and their or their adversary's valuable maritime property) in troubled American waters.

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1. This article originally appeared in *Mainbrace*, http://www.blankrome.com/siteFiles/Publications/Mainbrace_Jan_2017.pdf, and is reprinted here with permission.

2. *In personam* refers to a court's power to adjudicate matters directed against a party, as distinguished from *in rem* proceedings over disputed property.

3. The initial amount that is required to cover the U.S. Marshal's costs for a Rule B action in the Southern District of Texas is $10,000, which must be replenished in equal increments depending on the length of the action as funds are drawn down by the Marshal — all unused funds are eventually returned to the arresting party. The $10,000 deposit is also required for a Rule C arrest, discussed below. In the Southern District of New York, the U.S. Marshal requires an initial deposit of $2,000 for Rule B attachments and Rule C arrests. This initial fee covers the U.S. Marshal's fee for the day and the fee for liability insurance, which must be replenished as the funds are drawn down. In addition, if the arresting/attaching party does not appoint a substitute custodian, the U.S. Marshal requires an additional deposit of $6,000 per week.

4. 91 F. 2d 293, 297 (5th Cir. 1937); see Result Shipping Co. v. Ferruzzi Trading USA, Inc., 56 F.3d 394, 402 n.5 (2d Cir. 1995) (citing Frontera Fruit Co., v. Dowling with approval); see also Sea Trade Mar. Corp. v. Coutsodontis, 2011 U.S. Dist. LEXIS 80668 (S.D.N.Y. July 25, 2011).

5. Emphasis supplied.

6. *Id.; see Sea Trade Mar. Corp.,* 2011 U.S. Dist. LEXIS 80668 at *29 citing *Markowski v. S.E.C.,* 34 F.3d 99, 105 (2d Cir. 1994)("To invoke an advice of counsel defense in the Second Circuit, a party must 'show that he made a complete disclosure to counsel, sought advice as to the legality of his conduct, received advice that his conduct was legal, and relied on that advice in good faith.'").

7. *See, e.g., Parsons, Inc. v. Wales Shipping Co.,* 1986 U.S. Dist. LEXIS 20710, 1986 WL 10282, at *3 (S.D.N.Y. Sept. 9, 1986) (dismissing a counterclaim for wrongful attachment due to counterclaimant's failure to demonstrate bad faith).

8. *Cardinal Shipping Corp., v. M/S Seisho Maru,* 744 F. 2d 461, 475 (5th Cir. 1984); *see also Yachts for All Seasons, Inc. v. La Morte,* 1988 U.S. Dist. LEXIS 15399 (E.D.N.Y. Dec. 30, 1988) (In order to collect attorneys' fees, the party must prove that the seizing party acted in bad faith, with malice or with a wanton disregard." citing Cardinal Shipping Corp., 744 F.2d 461 at 474).

9. *Cardinal Shipping Corp.,* 744 F.2d at 474; *see Allied Mar., Inc. v. Rice Corp.,* 2004 U.S. Dist. LEXIS 20353 (S.D.N.Y. 2004) (court denied request for attorney's fees because there has been no showing that plaintiff acted in "bad faith").

10. Id.; see Result Shipping Co. v. Ferruzzi Trading USA, Inc., 56 F.3d 394, 402 n.5 (2d Cir. 1995).

11. *See El Paso Prod. Gov., Inc. v. Smith,* 2009 WL 2990494 (E.D. La. Apr. 30, 2009).

BOOK REVIEW: THE ROLE OF ARBITRATION IN SHIPPING LAW, EDITED BY MIRIAM GOLDBY AND LOUKAS MISTELIS (OXFORD UNIVERSITY PRESS, 2016)

By: LeRoy Lambert, SMA Member

The book consists of twenty chapters divided into three parts:

Part I: How Practices Become Norms: The Continued Development of Shipping Law

Part II: The Impact of Reduced Recourse to the Courts and the Rise of Arbitration in the World of Shipping

Part III: The Role of Arbitrators in the Development of Shipping Law

The twenty chapters are in fact twenty separate articles written by leading practitioners and professors from around the world. Several articles deal with the "development" of shipping "law" when fewer and fewer cases are decided

by courts and more and more are decided by commercial arbitrators and/or are not published. Examples include, *Reflections: Maritime arbitration in London: publication of awards, appeals, and the development of English commercial law*, by Ian Gaunt; *The Role of Arbitrators and the Possibility of a Genuine Arbitral Case Law: The continental perspective*, by Olivier Cachard; *Reflections: The role of arbitrators and the possibility of arbitral case law,* by Tomotaka Fujita.

Of particular interest and pride for the New York and US arbitral community is the article by John Kimball, *The Importance of Commercial Knowledge in Maritime Arbitration: Observations from New York*. After listing some risks others have noted about commercial arbitration, Mr. Kimball writes:

> When these factors are taken into account, does maritime arbitration make sense and, if so, why?
>
> I think the answer clearly is "yes." My own view is the factors I just mentioned weigh strongly in favour of using arbitration as a method to resolve maritime disputes. A key reason is the commercial experience and knowledge of the arbitration panel. It makes a huge difference to the dispute resolution process when you are sitting down with arbitrators who know the industry and understand the commercial context of the claims they are asked to resolve. To my mind, this is a key reason to use arbitration.

MONTHLY LUNCHEONS: A GREAT CHANCE TO MEET AND LEARN!

By: Molly McCafferty, SMA Member

We have been honored to have great speakers and presentations this year. We look forward to seeing you in February, March, and April:

October:	John Keough, Clyde & Co., "The OW Bunker Litigation: Legal Developments and the Potential Impact on Owners, Charterers, and New York Arbitration
November:	Honorable Frederic Smallkin (ret), JAMS, "Mediation Advocacy Techniques in Maritime Disputes"
January:	Pamela Milgrim, Skuld North America, "Enforcement of Arbitration Agreements in Crew Contracts"
February 8:	Joan Bondareff and Scott Hatch, Blank Rome (DC), "Status of Maritime and Transportation Programs in the Trump Administration"
March 8:	TBA
April 12:	Patrick Lennon, Lennon, Murphy & Phillips, "Discovery in Aid of Foreign Arbitral Proceedings under 28 USC Section 1782"

EDITORS' NOTES

This issue welcomes Dick Corwin as co-editor. Thanks to Robert Shaw for his leadership and work the past three years. Dick and I look forward to working with the SMA, the maritime bar, and the industry on future issues.

Capital Link Maritime Forum

Your co-editors were privileged to join David Martowski, Molly McCafferty, and Jan-Willem van den Dijssel of Cargill Americas on a panel at the Capital Link Maritime Forum at the Metropolitan Club on 13 September 2016. The panel topic was, "Maritime Arbitration: Global Trends & Developments – New York as Maritime Arbitration Center. The SMA was a sponsor.

GAFTA Makes Changes to its Arbitration Rules

Effective 1 September 2016, GAFTA made changes to its arbitration rules, http://www.gafta.com/news/gafta-arbitration-rules-125. The changes include:

- The time limit in respect of a dispute relating to quality and condition has been increased from 21 days to 1 year (Rule 2.2);
- If a Claimant does not pay a deposit within 60 days of being called for, the arbitration application will be deemed to have been waived (Rule 4.1);

- Arbitrators have been given greater flexibility to consolidate cases; and
- The arbitration panel is enitled to charge a fee, based on a sliding scale, when a hearing is cancelled or postponed at short notice (Rule 16).

Friends and Supporters

January 2017 marks the second anniversary of The Friends and Supporters program. Charles Anderson (Chair), Dick Corwin, LeRoy Lambert, and Peter Wiswell are leading this program. Our competitors in London and Singapore have similar programs. For New York to remain competitive and grow, we need all stakeholders to commit financially to assist the SMA to market and promote the advantages of arbitrating in New York under SMA Rules.

Examples from the past two years include:

- Presentation at the ASBA Cargo Conference
- Along with the NY Maritime Consortium a seminar at the Harvard Club "New York & London – Perception and Reality Today"
- SMA Presentation at the Washington State Bar conference on "Current Issues in Maritime Law"
- Presentation at the ASBA Annual Tanker Luncheon in Houston
- Presentation in London to the managers of the leading FD&D associations
- Participating in London at event organized by BIMCO arbitral associations in London and Singapore in a mock arbitration involving an unsafe port claim
- Mock arbitration, with the participation of the MLA and NYMAR at the CMA in Stamford and in Manhattan, involving an explosion of a cargo on a tanker in New York harbor

To thank those who have supported the program and encourage new supporters, there will be a cocktail reception on Thursday, 23 February, from 5:30 to 7:30 pm, at the offices of Skuld North America, 757 Third Avenue, 25th Floor, New York, NY 10017. Please RSVP to Christine Alicea by February 06, 2017, by phone, (212) 935-7121, or by e-mail: christine.alicea@skuld.com. We will provide a complete list of the events and sponsorships which the program has helped fund.

The SMA is grateful for the support received and looks forward to adding to the list. These tax-deductible contributions are placed into a dedicated account for the marketing and promotion of New York arbitration. The suggested levels are $1,000 for corporate supporters and $300 for individuals. Please send your check to the SMA office at One Penn Plaza, New York, NY 10036 with the notation "Friends and Supporters."

Thanks!

Thanks to those who responded to our call for articles of interest, and a special thanks (yet again!) to Tony Siciliano who referred us to several. *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, leroy.lambert@ctplc.com or dick.corwin@icloud.com. Thank you.

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