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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT'S MESSAGE

By: Robert G. Shaw, SMA President

Since becoming the president of the SMA in May of last year, I have been impressed by the cooperation and support among the SMA, the maritime and commercial bar, many maritime industry groups and "sister" alternative dispute resolution ("ADR") organizations. These collaborative efforts are not confined to New York or the United States and are central to the SMA's mission of educating those involved in maritime commerce and international trade about maritime law generally and, in particular, about the advantages of alternative dispute resolution. The efforts also inform businesses and their professional advisers and suppliers about the services that the SMA and its members provide. Some of these activities over the last few months are:

- In June, 2017, eighteen SMA members and five SMA Friends and Supporters during four full days completed two mediation courses – Accelerated Basic and Advanced Commercial Mediation – organized with and held at the Association of the Bar of the City of New York. Practical mediation techniques—such as organizing the discussion, generating movement, dealing with distributive/money issues, risk assessment, how to break impasses and ethical considerations—were covered through lectures, interactive exercises and mock mediations. Each participant received a completion certificate for over 30 hours of intensive training. In addition to the members taking those courses, a number of SMA members have completed mediation courses or programs given by Columbia, Harvard, Pepperdine, CEDR and others, some involving well over 50 hours or, in individual cases, many more hours of mediation training. I am grateful to SMA member Mike Fackler for his initiative and work organizing the June courses.

- In August, 2017, the SMA completed the latest issue of the Digest of SMA Awards. The Digest now comprises 4,300 digitized digested awards. The task of digesting awards is time-consuming, and we are grateful in particular to Keith Heard from the bar and Lucienne Bulow from the SMA who led this effort and completed it with the help of many volunteers.
- In September, 2017, sixteen delegates from the SMA and the US maritime bar attended the 20th International Congress of Maritime Arbitrators (ICMA XX) in Copenhagen. The U.S. contributed ten papers. Compliments of the SMA, all delegates that attended ICMA XX received a flash drive containing the entire set of the Digest of SMA Awards Nos. 1 through 4300. I thank David Martowski for his service as a member (and chair) of the organizing committee of ICMA XX and Lucienne Bulow for leading the team that arranged for the production and distribution of the flash drives. Papers presented by U.S. delegates were well received. Although outnumbered by 55 LMAA and other London delegates, the SMA's participation was notable, aided by Lucienne Bulow's Committee's distribution of the flash drives and SMA Blue Books in each delegate's bag. U.S. delegates moderated and led two of the ICMA XX panels ("Damages" and "Insurance and P&I") and presented a paper at the ICMA XX opening Plenary session.
- On October 2, 2017, the SMA presented at the Capital Link New York Maritime Forum an SMA panel ("Is arbitration your best alternative for Dispute Resolution?") which discussed the pros and cons of legal proceedings, mediation and arbitration procedures, including the power of the SMA arbitrators to order pre-award security and declaratory relief.
- Charles Anderson represented the SMA as a speaker at the Dubai Maritime Agenda held on October 10, 2017.
- In March, LeRoy Lambert and Sir Stephen Tomlinson, former High Court judge and QC, compared London and New York as arbitration venues at the Tulane Admiralty Law Institute in New Orleans.
- Recognizing the importance of mediation as one of the SMA's ADR services, the board of governors of the SMA in January this year adopted a code of ethics for its mediator members.
- Together with the New York Maritime Forum (NYMAR), the Maritime Law Association of the United States (MLA) and the Association of Ship Brokers and Agents USA (ASBA), the SMA looks forward to welcoming and extending hospitality to BIMCO's delegation, including its executive and documentary committees, to New York in May of this year. The BIMCO visit will coincide with the semi-annual conference in New York of the MLA and with a number of related maritime industry events.
- The SMA/MLA Liaison Committee of the SMA has continued its review of various matters of common interest in maritime and commercial arbitration.
- We redesigned the SMA website www.smany.org to make it easier to use and more attractive. Thanks are due to Rich Decker for his help with this initiative.

The SMA's Friends and Supporters now include more than 20 law firm/corporate and individual members. We are grateful for their support which in the last year has helped us cover expenses of our efforts to promote the SMA and its ADR services, including the production and distribution of the flash drives containing the issues of the Digest and the updating of the SMA website.

Our speakers' luncheons are open to the public and have been well attended. This January Edna Sussman, a Director on the Board of the AAA, spoke about "All Things AAA Arbitration," in February Keith Heard explained "What the SMA Digest tells us about New York Maritime Arbitration," and in March Ian Lennard of the National

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Cargo Bureau gave an overview of NCB and insights gained from its cargo surveys. In April, Blythe Daily of Holland & Knight will present: "Blockchain: Potential Impact on Shipping and Logistics." Thanks to Molly McCafferty for arranging the speakers.

I am pleased to welcome the following members to the SMA. Their professional bios appear in the members' roster on the SMA website:

Gil Landy
Trevor Lavender
Michael Ogle
Alan Colletti
Marcos Souza
Dan Schildt
Jim Jones
Jim Shirley
Joseph McNamara
Charles Timberlake

To all those who have contributed to these various programs and initiatives but whom I have not named, I express the thanks of the SMA.

AMENDMENT TO SMA RULES AS OF MARCH 14, 2018

By Lucienne C. Bulow, SMA Past President and Member, Chair – By-Laws and Rules Committee

Time and again, Federal and New York State courts have confirmed that in appropriate cases U.S. arbitrators are empowered to order pre-award security and counter-security for claims and counterclaims as an interim relief.[1] The primary purposes of such security orders are to prevent final awards from becoming meaningless and to ensure that the prevailing party can collect on the resulting award.

This power of U.S. arbitrators is unique in international arbitration practice. SMA awards ordering the posting of pre-award security have been confirmed under the broad powers given to arbitrators under Section 30 of SMA Rules which states that the Panel shall grant "any remedy or relief which it deems just and equitable."[2]

At the recommendation of the MLA-SMA Liaison Committee, on March 14, 2018, the Board of Governors amended Section 30 so as to specifically mention the posting of security. The amending language reflects case law and codifies the power the courts already have held that arbitrators possess.

Not only does Section 30 give wide power to arbitrators to provide interim relief in order to reach a just and equitable result, it also empowers arbitrators to award reasonable attorneys' fees and expenses or costs incurred by a party or parties in the prosecution or defense of the case. Awards of attorneys' fees to the prevailing party are routine in SMA arbitrations.

Effective March 14, 2018, the first paragraph of Section 30 entitled "Scope" reads (changes are in bold characters):

> The Panel shall grant any remedy or relief which it deems just and equitable including, but not limited to, specific performance **and the posting of security for part or all of a claim or counterclaim in an amount determined by and in a form acceptable to the Panel**. The Panel, in its Award, shall assess arbitration expenses and fees as provided in Sections 15, 36 and 37 and shall address the issue of attorneys' fees and costs incurred by the parties. The Panel is empowered to award reasonable attorneys' fees and expenses or costs incurred by a party or parties in the prosecution or defense of the case.

The SMA Rules as so amended apply to contracts entered into on or after March 14, 2018, and will be posted on the SMA Website http://www.smany.org.

1. *Sperry International Trade, Inc. v. Government of Israel*, 689 F. 2d 301 (2d Cir. 1982); *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003); *Island Creek Coal Sales Co., v. City of Gainesville*, 729 F. 2d 1046 (6th Cir. 1984); *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir. 1991); *Yasuda Fire & Marine Insurance Co. Ltd. v. Europe v. Continental Casualty Co.*, 37 F.3d 345 (7th Cir. 1994); *British Insurance Co. of Cayman v. Water Street Insurance Co.*, 93 F. Supp. 2d 506 (SDNY 2000); *Blue Sympathy Shipping Co. v. Serviocean Int'l S.A.*, 1994 AMC 2522 (SDNY 1994); *Compania Chilena de Navegacion Interoceanica, S.A. v. Norton, Lilly & Co., Inc.*, 652 F. Supp. 1512 (SDNY 1987); *East Asiatic Co., Ltd v. Transamerican Steamship Corp. (The Camara and Cinchona)*, 1988 AMC 1086 (SDNY 1987); *Konkar Maritime Enterprises, S.A. v. Compagnie Belge d'Affretement (The Konkar Pioneer)*, 668 F. Supp. 267 (SDNY 1987).

2. *Sanko Steamship, Ltd. v. Sherwin Alumina Ltd*, SMA 4135 (2011); *The Samho Dream* SMA 4154 (2011); (*The Georgia S*), SMA 4163 (2012); *The Genco Carrier*, SMA 4167 (2012); *Commodities & Minerals Enterprises v. CVG Ferrominera*, SMA 4296 (2017); *The Santa Catharina*, SMA 4303 (2017); *D/S Norden A/S v. CHS Inc.*(*The CMB Edouard*, SMA 4317 (2017); *see also* D. Martowski, *Ordering Security from a U.S. Arbitrator's Perspective* and P. Skoufalos, *Requests for Pre-Award Security and Other Interim Remedies in New York Arbitrations: A Practitioner's Perspective,* The Arbitrator, Volume 43, Number 3 (March 2013).

HOW DO YOU SPELL DECLARATORY RELIEF? SMA RULE 30

By: Chris Nolan, Partner, and Anna Thorén, International Law Clerk (Advokatfirman Vigne, Gothenburg), Holland & Knight, New York

As the 1970s slogan goes, R-O-L-A-I-D-S is how you spell relief from acid reflux. That's great for affairs of the body. But what about the sort of relief that is legal in nature, such as declaratory relief? For that, try SMA Rule 30.

At the 2017 Capital Link New York Maritime Forum, during a panel discussion an SMA arbitrator addressed the powers of SMA arbitrators including the power to provide declaratory relief. Having just researched the issue, we found it interesting that declaratory relief is addressed in published SMA awards relatively infrequently. Only a handful of awards reference declaratory relief and even fewer the power to issue such an award. And in those awards, there is no reference to an SMA Rule addressing arbitral powers. But the language used by panels tracks what we like to call the Swiss army knife rule[1] of the SMA rules.

As stated above in this newsletter, SMA Rule 30 prior to and after its amendment on March 14, 2018, empowers a panel to "grant any remedy or relief which it deems just and equitable." The Rule is broad enough to put the industry on notice that non-monetary relief can be sought under its auspices.

Other non-monetary relief rules vary as to how the relief is referenced. For example, under federal law, 28 U.S.C. § 2201, *creation of remedy*, is the declaratory relief statute despite its generic title. Section (a) provides, in relevant part, "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." The Federal Rules of Civil Procedure corollary rule, Rule 57, provides, "[t]hese rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. 2201."

In New York, as New Yorkers are wont to do, the legislators left nothing to the imagination when allowing declaratory relief. NY CPLR § 3001 provides in relevant part "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed."

In the context of SMA Awards, the award most relevant to the issue of the power of SMA arbitrators to issue declaratory relief is *The Gulf Pacific*, SMA 2854 (1991), 1991 WL 11694471. The dispute concerned the terms of a bareboat charter party between Petron Tankers Corporation of the Philippines (Owner) and Gotco, Limited, of Bermuda (Charterer). Owner argued that it had the right to terminate the charter party and sell the vessel in question. Charterer, however, not denying Owner's right to sell the vessel, argued that since it had exercised all of its option rights stipulated in the charter party, it was allowed to remain in possession of the vessel under a certain extended period. According to Charterer, any sale of the vessel during that period had to be made subject to the charter party.

Tangentially, Charterer belatedly raised the issue that the relief sought by Owner was a declaratory judgement and questioned whether it was within the Panel's power to resolve such a matter. In response, the Panel stated "[w]hile it certainly is correct that Petron has not complained of any financial loss resulting from its inability to take redelivery of the vessel on or about March 16, 1991 as originally demanded, the absence of a money damages claim does not mean there is no dispute within the scope of the arbitration clause which is ripe for decision by this Panel." (1991 WL 11694471, at *4) (emphasis added). In so finding, the Panel rejected the argument that declaratory relief was equitable in nature and somehow beyond the arbitrator's power to grant.

The Panel ultimately found that Charterer had properly exercised its option rights in the charter party extending

the charter period until March 15, 1995. Owner therefore was prevented from terminating the charter party during this period, and its right to sell the vessel was subject to the charter party.

In *The Vasilios G*, SMA 2374 (1984), 1987 WL 1378175, after departing from the load port, the vessel experienced mechanical difficulties which eventually necessitated Gigimar Maritime Co. (Owner) to call for a salvage tug to assist. The vessel was towed to the port where the cargo on board was supposed to be discharged. Ironimpex Ltd. (Cargo Owner) was forced to deposit security in order to discharge the cargo. Arbitration regarding the salvage amount later occurred pursuant to the salvage agreement. Cargo Owner paid a certain amount of the salvage award granted by the arbitrator.

Cargo Owner then demanded arbitration and sought indemnity from Owner for the amounts Cargo Owner had paid related to the salvage award. Cargo Owner also sought a declaratory award stating that it did not have any obligation to contribute in any general average that might be claimed by Owner. The Panel issued a declaratory ruling stating that Owner was not entitled to demand contribution from Cargo Owner in general average. In so finding, the Panel also stated that "[a] Declaratory Judgement on the question of contribution to any future general average is within the powers of the Panel."

More recently, in *In re Bailey Shipping*, SMA 4234 (2013), 2013 WL 8597060, the panel briefly noted that when a classification society was seeking a ruling from the Panel that the classification society was not liable for a claim of negligent misrepresentation, the request was "akin to a declaratory proceeding" and the classification society was entitled to seek such relief.

In sum, SMA Panels have been granting declaratory relief for decades. This concept is neither new nor unfamiliar to SMA arbitration. Declaratory relief is perhaps an infrequently sought relief, but it as a relief that is well within the powers of SMA arbitrators as recognized in past awards and as per SMA Rule 30.

1. That is, SMA Rule 30 is Swiss army knife in nature because it can and is invoked for so many situations. From equitable relief, to declaratory relief, to the right to issue interim security awards for the amount of a claim, to name a few examples.

TROUBLED WATERS: A TWEET TO THE SUPREMES

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

[*This article originally appeared in the "New York Law Journal," Volume 257 – No. 123, June 28, 2017 and is reprinted here with permission.*]

Tweet: The test for federal maritime jurisdiction is *"very bad. Sad."*

A tort must pass two tests with difficult subparts before proceeding in federal court under admiralty jurisdiction, 28 USC §1333(1). As noted recently by Second Circuit Chief Judge Katzmann, and previously by U.S. Supreme Court Justice Thomas, nothing is more wasteful than spending so much time litigating where to litigate.

The most recent enunciation of the admiralty jurisdiction test was by the Second Circuit in *Germain v. Ficarra*, 824 F.3d 258 (2d Cir. 2016): First, the tort must occur on navigable waters ("location" test). Second, it must bear a substantial relationship to traditional maritime activity and have a potentially disruptive impact on maritime commerce ("connection" test). Easier said than done.

The multifactor approach and "an ambiguous balancing test" results in contested jurisdiction, motions, rulings, appeals and delay. This "may discourage judges from hearing disputes properly before them. Such rules waste judges' and litigants' resources better spent on the merits," in a field that had once had such a clearly applicable rule.[1] For instance, the Eastern District of New York anchored maritime jurisdiction over a car accident that occurred while defendant was driving home from a "booze cruise,"[2] while neither the District of Connecticut nor the Second Circuit found jurisdiction to exist over a fist fight on a floating dock that occurred after the parties maneuvered their vessels to a dock to carry out the brawl.[3] The Southern District of New York took on a swimmer's propeller-injury case,[4] and admiralty jurisdiction surfaced over a scuba diver's shark-bite injury.[5] Similarly, injury to a guest from a backflip off of an anchored pleasure craft on Oneida Lake did not pass muster when first analyzed by the Northern District of New York, but later passed the test in a unanimous decision of the Second Circuit.[6] An airplane crash into Lake Erie was denied entry to federal

court by the U.S. Supreme Court,[7] but a Connecticut federal court found that a helicopter crash into the Atlantic Ocean fell within its maritime jurisdiction.[8]

Course correction

Once upon a time (1813), a bright line rule existed: a tort merely had to occur or originate on a vessel in "navigable waters" (a waterway upon which a vessel can travel between states or countries).[9] This simple test avoided confusion, allowed for consistent results, and curbed inefficiency. The "situs (location) test" was easy and one of the oldest rules in maritime arsenals. But, then came plane crashes into navigable waters, and the simple test sank. The bright line rule has faded in recent years, but some notable jurists are advocating that the test revert back to its roots: all torts originating on a vessel upon navigable waters.

Wing it

The "situs" test worked well for most maritime torts. However, "the simplicity of this test was marred by modern cases that tested the boundaries of admiralty jurisdiction with ever more unusual facts."[10]

For example, in the early 1970s a plane traveling from Ohio to New York struck a flock of seagulls after takeoff. The plane crashed into navigable waters sparking a challenge for the court under the then current admiralty jurisdiction test. To address this gap, the Supreme Court expanded the test when confronted with aviation torts because a "vessel" was not involved. The new test required that the incident must bear a significant relationship or "connection" to "traditional maritime activity."[11] Thus, it appeared that this second prong was to apply only to aviation torts. Nonetheless, the plane's collision with a flock of seagulls failed to satisfy the test because that flight was exclusively overland between points in the continental United States and, thus, not a "traditional maritime activity." Then, in 1986, in *Offshore Logistics v. Tallentire*, 477 U.S. 207 (1986), the Supreme Court held that a helicopter crash in the Gulf of Mexico that occurred while transporting workers from an offshore oil platform to Louisiana satisfied the "connection test" because "that helicopter was engaged in a function traditionally performed by waterborne vessels: the ferrying of passengers from an 'island,' albeit an artificial one, to the shore." In 2006, a federal court in New York found admiralty jurisdiction when a plane crashed into a residential area in Queens less than two minutes after takeoff because it was en route from New York to the Dominican Republic – a transatlantic flight and thus a route traditionally performed by a vessel.[12] This expanded test appears to have been intended to apply to aviation torts, not to become the new rule. However, courts subsequently picked up the ball and ran with it applying the test to maritime torts as well.

Throughout the next decade, district courts began applying the "connection" test to all water based torts, including those that originated on a vessel. In doing so, courts struggled with what constituted a "traditional maritime activity"— which were then limited to strictly "commercial" shipping. This misapprehension resulted in a decision initially denying jurisdiction in a collision between two pleasure craft. The decision, however, was reversed by the U.S. Supreme Court in 1982, which recognized that the "primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce… this interest can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct."[13] Under this rationale, the collision between the two pleasure craft fell within maritime jurisdiction as navigation (and sometimes collision) on U.S. navigable waters was clearly related to traditional maritime activity.

In *Sisson v. Ruby*, 497 U.S. 358 (1990), the Supreme Court held that a fire onboard a pleasure craft docked at a marina satisfied the "connection" test. Here, however, the Court expanded the test even further, holding that the "connection" prong actually had two sub-parts and required that the (1) activity giving rise to the incident have a substantial relationship to traditional maritime activity and (2) the incident must have a potentially disruptive impact on maritime commerce. The waters were further muddied when the "activity" was to be evaluated from its "general character," and the "incident" was to be examined from "*an intermediate level of possible generality.*" What exactly that means is anyone's guess. And therein lies the problem.

Tweet: The test is leaking. Time for a sea-change?

In *Sisson*, Justice Scalia teed up the debate by taking issue with this laborious way of reaching a result, suggesting instead in a concurring opinion that all maritime torts which occur on a vessel in navigable waters fall within maritime jurisdiction. The majority acknowledged but

rejected Scalia's argument, finding that it would allow too much discretion and uncertainty which courts were attempting to avoid by adopting a more defined rule. However, the exact opposite has occurred. Under today's multifactor approach, the test can be evaluated differently by parties and judges.

In 1995, Justice Thomas, joined by Scalia, broached the issue again in a significant concurrence in *Grubart v. Great Lakes Dredge and Dock Co.,* 513 U.S. 527 (1995). There, the majority held that the Chicago flood, caused by a spud barge puncturing a pipe while drilling in a river, fell within the scope of admiralty jurisdiction. Noting that the Court was now addressing admiralty jurisdiction for the third time in little over a decade, the concurrence by Thomas and Scalia lamented the test as too complicated and not easily applied. In place, they sounded the general alarm again for a bright line rule to be adopted, to wit, "whether the tort occurred on a vessel in navigable waters." Thomas noted that traditional types of maritime torts worked well with the simple situs test, stating that the test was *"once as clear as the 9th and 10th verses of Genesis." Grubart* at 549.

As previously mentioned, in 2016 the Second Circuit squared off with jurisdiction in *In re Germain*, 824 F.3d 258 (2d Cir. 2016), holding that a backflip off a boat anchored in Lake Oneida into navigable waters fell within the scope of maritime jurisdiction. In a thorough and thoughtful analysis (even noted as such by the Second Circuit[14]), the district court applying the multifactor test defined the incident as "injury to a recreational passenger who jumped from a recreational vessel in a shallow recreational bay of navigable waters" and found that this did not have a potential impact on maritime commerce. On appeal, the Second Circuit reached a different conclusion. Chief Judge Justice Katzmann began the opinion by correctly stating "In broad strokes, this case concerns a tort involving a vessel on navigable waters." Under the simple situs test, the inquiry could have ended there. However, per Supreme Court precedent, the Second Circuit was obligated to dive into a 20-page discussion on the "connection" test.

Thus, in yet another thorough decision on jurisdiction, in *Germain* Judges Katzmann, Sack, and Lohier defined the incident as one involving "injury to a passenger who jumped from a vessel on open navigable waters" and this had a potential impact on maritime commerce. Based on this, admiralty jurisdiction was sustained. This decision has been cited to and relied upon throughout the country due to its comprehensive and historical analysis of admiralty jurisdiction.

Notably, the Second Circuit in *Germain* took a jab at the challenging test and advocated the need for a bright line rule. The Court acknowledged the inefficiency of litigating the issue of jurisdiction to the extent the modern day test has caused and welcomed a generally applicable rule that extends admiralty jurisdiction to all torts originating on a vessel in navigable waters. The Court concluded its decision by stating "however persuaded we might be by Justice Thomas's concurrence, a majority of the *Grubart* Court was not so persuaded, and it is the majority's opinion that we must follow. We therefore decline Germain's invitation to adopt a simpler rule, and we instead apply the test set forth by the *Grubart* majority."

Conclusion

The current admiralty jurisdiction test has caused confusion, expense and inconsistent results. It is time to bring back the "bright line" rule, and apply maritime jurisdiction to all torts that originate on a vessel in navigable waters. Ultimately, it is up to the Supreme Court to make the test *"see-worthy*."

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1. *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) (J. Thomas concurrence).

2. *Bay Casino, LLC v. M/V Royal Empress*, 199 F.R.D. 464 (E.D.N.Y. 1999).

3. *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F. 3d 239 (2d Cir. 2014). (The author represented the vessel owner in this case).

4. *Roane v. Greenwich Swim Comm.,* 330 F. Supp. 2d 306 (S.D.N.Y. 2004).

5. *Specker v. Kazma*, 2016 U.S. Dist. LEXIS 95516 (S.D. Cal. 2016).

6. *In re Germain*, 824 F.3d 258 (2d Cir. 2016). (The author represented the vessel owner in this case).

7. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

8. *Sikorsky Aircraft Corp. v. Lloyds TSB Gen. Leasing (No. 20) Ltd.*, 774 F. Supp. 2d 431 (2011).

9. *Thomas v. Lane*, 23 F. Cas. 957 (CC Me. 1813) (J. Story).

10. *Grubart*, 513 U.S. 527 (1995) (J. Thomas concurrence).

11. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972)

12. *In re Air Crash at Belle Harbor*, 2006 A.M.C. 1340 (S.D.N.Y. 2006).

13. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982).

14. *In re Germain*, 91 F. Supp. 3d 309 (N.D.N.Y. 2015); 842 F. 3d 258 at 265 (2d Cir. 2016).

"REACHABLE ON ARRIVAL"

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

One benefit as a practicing shipbroker in the chemical/parcel trade is experiencing first hand when agreements go awry, the likely culprit being differing interpretations of charter party terms and obligations. Understanding the commercial consequences of the various charter party clauses, including the parties intent when negotiating, is but one essential function of the shipbroker. In practice, we quickly realize one should not consider clauses in isolation and should ensure a provision of any one clause does not overlap the provisions of another. Understanding this interrelationship is only part of the process when negotiating charter parties. Properly communicating the intentions of the parties follows, fully resonating only after receiving a call from one party passionately supporting its position. What happens when a voyage falls shy of expectations and interpretations counter to the parties' intent, or generally accepted industry practice, cause exasperation? We are experiencing a growing tendency in the marketplace with parties uniquely interpreting, some say misinterpreting, certain words and phrases, challenging intention and performance expectations. One such example is the "reachable on arrival" wording in clause 9 of the ASBATANKVOY Charter Party [ASBA]. The argument, most prevalent in demurrage claims, is that if the charterer failed to provide a berth reachable on arrival then the charterer breached the charter party and, therefore, cannot seek protection under other charter party clauses. The interpreters cite the decision in *The Laura Prima*[1] in support of their position. What exactly does a berth "reachable on arrival" mean? According to the decision in *The Laura Prima*, "reachable on arrival" means "unoccupied" on arrival.

The House of Lords decision dealt with the relationship between two ASBA clauses, notably; "reachable on arrival" wording in clause 9; and "beyond charterers control" wording in the last sentence of clause 6 and highlighted as follows:

> 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 … .

and

> 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 charterers has no control, such delay shall not count as used laytime.

The vessel 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 sought reliance on clause 6 to prevent the running of laytime, noting that the berthing was beyond their control. The shipowner countered by pointing out that the charterer was in breach of clause 9, as the charterer had not procured a berth that was reachable on arrival for the vessel. The House of Lords held that clause 9 prevailed, stating, in part: "*if the vessel was unable to proceed to the berth on arrival, charterers were in breach of their obligations under the charterparty and thus could not rely on the 'beyond charterers control' exception to laytime in clause 6*."

Lord Roskill stated, in part:

> "Reachable on arrival" is a well-known phrase and means precisely what it says. If a berth cannot be reached on arrival, the warranty is broken unless there is some relevant protecting exception … The berth is required to have two characteristics: it has to be safe and it has also to be reachable on arrival.

The Webster Dictionary definition of "reachable" is "within easy reach, accessible," and defines "available" as "present or ready for immediate use." Although similar, from a logical perspective, many consider the meaning as quite different. The industry interpretation most associated with "reachable on arrival" deals with the charterer's undertaking to provide an "accessible" berth, free of any

encumbrances disallowing safe passage. This interpretation defines the wording as a safe berth clause, and not a berth availability one. One could further this point by highlighting that clause 9 is titled "Safe Berthing."

The *Laura Prima* decision alters the meaning of "reachable" to "available," serving to distort charterers' obligation. This interpretation also renders other charter party Clauses redundant while some say in conflict with Lord Roskill's decision where he stated "*unless there is some relevant protecting exception.*" For instance, ASBA clause 6, does provide for a protecting exception as the clause provides for the possibility of berth occupancy in its 'berth or no berth' wording making Charterer responsible for delays due to berth occupancy/port congestion.

Clause 6 - NOTICE OF READINESS. Upon arrival at customary anchorage at each port of loading or discharge, the Master …shall give the Charterer or his agent notice… that the Vessel is ready to load or discharge cargo, berth or no berth, and laytime, as hereinafter provided, shall commence upon the expiration of six (6) hours after receipt of such notice, or upon the Vessel's arrival in berth … whichever first occurs … .

Additionally, most charter parties have rider Clauses that provide for the possibility of berthing delays. Notable clauses include the Conoco Weather clause, Pro-Rata Waiting, clauses addressing pilot delays, no nighttime navigation, force majeure and so forth. If the parties intended that an unoccupied berth be a charter party condition, why negotiate these exceptions in the first place? Many times, arbitration is the last resort to resolve disagreements. New York arbitration – this writer has concluded – neither is reliant on nor necessarily subscribes to the *Laura Prima* decision. When rendering decisions, while for sake of continuity mindful of earlier awards both in the U.S. and abroad, New York Arbitrators review each case on its own merits, specific to the events of each particular dispute. *The M/T Mountain Blossom*[2] is a good example of an award in direct contrast to the *Laura Prima* decision. In this instance, the "beyond charterer's control" wording in clause 6 prevailed over berth occupancy.

The vessel, fixed under the ASBA charter party, 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, urging that the port closure was an event beyond charterer's control. The sole arbitrator, paraphrasing an interpretation in an earlier award,[3] 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". [italics added]. The sole 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 no laytime to count for the period of the delay.

The Eagle[4] is another example. The charter dealt with loading a cargo in Houston for discharging in Port Kaiser, against a laycan of December 13/15. The vessel anchored, awaiting berth, subsequently berthing on December 19. Although the dispute involved questions regarding the validity of the NOR, the relevant issue here is owner's claim for damages by reason of charterer's breach in failing to provide a berth "reachable on arrival." The arbitrators were unanimous in their decision that owner's argument, based on the "reachable on arrival" concept, was not persuasive, and owner's claim for damages therefore failed: "We do not consider the absence of a berth reachable on arrival as a breach of charter, as the charter party provides a remedy for such a situation in the form of laytime [or demurrage] if, after tendering a proper Notice of Readiness, no berth is available for the vessel upon her arrival at the port." The concurring opinion of one arbitrator went on to say "Clause 6 and 9 must be read together so that if charterer failed to provide a berth reachable on arrival, the vessel must tender its NOR at the customary anchorage in accordance with clause 6, and laytime commences six hours thereafter."

Dealing with todays' highly congested ports, the writer would seriously doubt whether any charterer, or owner, when concluding a charter, does so with the understanding it has obligated itself to providing an available berth upon the vessels arrival at load and discharge. For instance, in the chemical/parcel trade vessels call multiple load and discharge ports/berths, where many times, when fixing a parcel, the owner does not know the final schedule of the vessels. Many of the terminals are publicly owned and handle multiple vessels on any given day. Berthing priority generally is on a first-come, first-served basis, although certain terminals may prioritize. In practice, therefore, treating "reachable on arrival" as "available on arrival" is

flawed and not within the contemplation of the parties at fixing, or, for that matter, within the charter party clauses serving to memorialize those intentions. In the end, all that the parties bargain for is reasonable expectations of performance.

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1. *Nereide SpA di Navigazione v. Bulk Oil International Ltd [The Laura Prima]* [1981] 2 Lloyd's Rep 24 [CA].

2. *The Mountain Blossom*, SMA 3067 (1994) (van Gelder).

3. *The Messiniaki Fontis*, SMA 1630 (1982) (Bauer, Arnold, Berg).

4. *The Eagle*, SMA 3070 (1994) (Berg, Siciliano, Arnold).

NAVIGATING THE PITFALLS OF MARITIME MEDIATIONS

By: Peter D. Clark, Partner, Clark, Atcheson & Reisert, New York

[*This article originally appeared in the Fall 2017 Newsletter of the Tort Trial and Insurance Practice Committee of the American Bar Association and is reprinted here with permission.*[1]]

Introduction

The shipping industry in the United States often involves the performance of complex maritime contracts. It is not uncommon for the parties to these contracts to engage in disputes when one of these contracts is breached by one of the contracting parties. When this happens, there are four primary methods for resolving these disputes: direct negotiation, litigation, arbitration, or mediation.

Background

This article will first briefly examine the particulars of the primary methods for resolving maritime contract disputes. The article will then conclude by focusing on some of the pitfalls that parties should avoid when attempting to resolve a maritime contract dispute.

There are many ways of resolving a maritime contract dispute (or any contract dispute). The simplest, cheapest and quickest method is by direct negotiation. The parties themselves are in the best position to know the strengths and weaknesses of their respective positions. However, the negotiation process is not always simple. Negotiations require a certain detachment and objectivity from the disputants, as well as a willingness to compromise their positions. It is not often that the parties to the dispute possess these attributes. If direct negotiations fail, the intervention of a disinterested third-party may be advisable. Given that most maritime contracts contain arbitration clauses, it is not surprising that maritime arbitrators are often appointed by the parties to arbitrate these contract disputes and to issue final and enforceable arbitration awards that will end the disputes.

The advantages of arbitration over court litigation are many. Arbitration is a private procedure that is usually confidential. Arbitration also affords the parties the opportunity to have a say in the person or persons who will decide the dispute, which is not possible in litigation. One or more arbitrators may be chosen by the parties for their skill and expertise in maritime matters such as navigation, maritime law, naval architecture, marine engineering, shipbuilding, marine insurance, chartering, or some other relevant discipline.

In order for the parties to utilize the arbitration process to resolve their dispute, the maritime contract must contain an enforceable arbitration clause. Of course, the parties can always mutually agree to arbitrate the dispute *ad hoc* without an arbitration clause. However, the parties' positions often polarize when this situation occurs, and nothing is resolved.

An alternative to arbitration is mediation, which is also a private and confidential process.

A disinterested third-party mediator is selected by the parties to help them reach a negotiated settlement. The mediator will meet with each party separately and listen to their respective viewpoints and grievances. The mediator will then make sure that each party understands the other's viewpoints. The mediator will also attempt to bring the parties together to facilitate a compromised settlement.

Mediation differs from arbitration in that it does not result in a binding or enforceable award. The mediator cannot compel the parties to reach a settlement. If the parties are seeking a decision on the merits to establish a legal precedent, then mediation is not the proper procedure for them to follow.

Unlike court proceedings or arbitration procedures, mediation, because it is consensual, does not always lead to a dispute resolution. If it fails, the parties will have to fall back on court proceedings or arbitration to resolve their dispute on the merits.

Some mediations may take place concurrently with an arbitration or court proceeding. If this happens, the arbitration or court proceedings may, or may not, be stayed until the mediation has been brought to a conclusion. Generally, there is no prohibition against commencing an arbitration or court proceeding before the termination of a mediation. However, some court rules require the parties to refrain from doing so except to preserve their rights to other relief that they deem necessary to protect their interests, such as arresting a ship for security or defending against a pending time-bar or laches situation.

The recognition that mediation is a faster, cheaper and more efficient process than litigation and arbitration for resolving disputes explains its explosive growth. Well over 95% of all cases filed in court each year are resolved before trial. In view of this, the motivating factor behind the expanded use of mediation is the realization that a neutral mediator can initiate the negotiation process sooner and thereby accelerate a resolution of the dispute. As a result, mediation is increasingly utilized in lieu of litigation and arbitration.

While mediation is not a panacea or substitute for litigation, it can facilitate more efficient case management and streamline discovery. Most of the discovery necessary for the mediator to be effective is provided by the parties' confidential mediation statements and by the factual recitations of the parties during the mediation. Third-party witness testimony is seldom utilized. Furthermore, as an added benefit, mediation may provide insight as to how the parties might conduct themselves on a witness stand if the mediation fails and the matter proceeds to trial.

Pitfalls to avoid in maritime mediations

It is impossible to guard against every adverse contingency that may occur when a party mediates a maritime contract dispute in the United States. However, with foresight, it is possible to avoid some of the most common mistakes. The following non-exhaustive list of common pitfalls is based on my experience as a mediator and on the writings of well-known commentators on the subject of mediation. Avoiding these pitfalls can make the difference between a productive and unproductive mediation.

1. A mediator, unlike a judge, has no power to issue a ruling or to compel the parties to accept a resolution of a dispute. Be aware that any resolution reached in mediation must be agreed to by the parties. The ultimate authority to settle a dispute rests with them.
2. It is important for the parties to realize that not every breakdown in settlement negotiations represents a failure. It may be sensible and rational to walk away from a proposed settlement and to proceed to trial. Determining whether to settle is rational is not the mediator's call.
3. When deciding whether to accept a proposed settlement, the parties must place an expected value on the case, as they would in court. A rational party should settle only if he/she can obtain at least what he/she could have obtained by proceeding to trial. This evaluation process is often referred to as the best alternative to a negotiated agreement or "BATNA."
4. There is no established role for a mediator in the process. However, most mediators believe their role is to solve problems, settle lawsuits, resolve disputes and narrow the issues in controversy.
5. Contracting parties can agree to mediate future disputes long before any disagreement has occurred. Be aware that such mediation clauses usually preclude the parties from resorting to litigation or arbitration until mediation has been attempted.
6. In his opening remarks, the mediator must explain to the parties what is meant by "confidentiality of the mediation process" and "confidentiality within the process." The meanings are very different. The former means that the statements made during mediations should have some expectation of privacy against being disclosed to the world. The latter refers to information revealed during caucuses.
7. During settlement negotiations, a mediator must inquire about any missing persons who must be satisfied with a proposed settlement. Missing persons can have a profound impact on the acceptability of a proposed settlement.
8. The mediator should not get bogged down in an adversarial evidence proceeding. Therefore, a party to the mediation should not ask the mediator to review

extensive documentation. The mediator should explain that this is not a trial and then encourage both parties to present only the evidence they deem most important and to summarize the remainder.

9. Generally speaking, witness sworn testimony should not be permitted at the mediation. In most situations it should be sufficient for the mediator to explain his reasons and then ask the parties to summarize what they would expect the witnesses to say.
10. When drafting *ad hoc* mediation rules, the parties should consider adopting a well-established set of mediation rules, such as those of the Society of Maritime Arbitrators, the American Bar Association, the London Maritime Arbitrators Association or those of the Chartered Institute of Arbitrators. It is extremely difficult and time consuming to draft individual mediation rules.
11. If a maritime contract contains a multi-tier alternate dispute resolution clause that requires the parties to engage in mediation as a condition precedent to arbitration, that condition must be satisfied before commencing an arbitration or litigation proceedings.
12. A party in a mediation should be careful not to be strung along by negotiations because as time passes, it becomes more difficult to effectively prosecute a claim. Witnesses might disappear, and supporting documents may no longer exist.
13. If parties are seeking a decision on the merits for their dispute, then mediation is not the appropriate procedure for them.
14. Parties may try mediation in the first instance. If it fails, they may then resort to litigation or arbitration. However, this adds another tier to the process of resolving the dispute. This will also add additional expense and delay for the parties.
15. A mediator should not change his/her role in a dispute and then act as an arbitrator in the same dispute. This is because he/she may have acquired confidential information as the mediator during caucusing.
16. Some disputes should not be compromised by mediation. For example, the interpretation of a contract term in a bill of lading may affect hundreds of similar contracts. What is needed is a decision, not a mediation compromise in this situation.
17. A party to a mediation may find it more beneficial to delay and not agree on anything. This is particularly so if business relationships have broken down and there is no possibility of them being renewed.
18. Mediation does not decide the merits of a dispute, nor can the mediator force the parties to settle. The parties are only required to mediate in good faith.
19. An appropriate mediator must be chosen by the parties to resolve the dispute. A mediator's subject matter knowledge, experience, skill and approach to the dispute can have a significant impact on the outcome of the mediation. Choosing the right mediator for a particular dispute is critical.
20. Both parties must make a commitment to resolve the dispute. If a party informs the mediator that he/she has no intention to settle the case, the mediator must immediately attempt to obtain a commitment from the recalcitrant party to put forth a good faith effort to settle the matter.
21. Some states require all parties in court cases to first participate in mediation before going to trial. This can drastically reduce the party's commitment to the mediation process. The mediator should work with the parties to dispel any feelings of coercion and to obtain a commitment from the parties to put forth a good faith effort to settle the matter.
22. If the parties and their attorneys fail to adequately prepare for the mediation, it will slow down the mediation. The mediator must urge the parties and their counsel to prepare thoroughly so that they may contribute to the mediation process.
23. If the party's mediation statement does not contain vital information that explains the party's position, it will not assist the mediator. The mediator must insist on a complete and timely mediation statement.
24. If the parties fail to anticipate a potential impasse, the mediator should discuss ways to address impasse before it happens and how it should be handled if it arises.
25. A court-ordered settlement conference that is scheduled after a mediation session is set can lead to a mediation failure. If this happens, the parties might not have a sense of urgency. Parties can avoid this pitfall by properly evaluating their best alternative to a negotiated agreement (BATNA). If the case is properly

evaluated, the parties can make an all-out good faith effort to settle the matter as soon as possible.

26. The mediation may be premature if there are outstanding discovery issues. Without critical information, a party lacks the ability to consider his/her BATNA. The mediator should urge the parties to exchange vital information as early as possible and then settle as soon as possible.
27. If a previous settlement offer exceeds the present mediation offer, this will have an adverse effect on settlement possibilities.
28. Parties should not increase their demand while sitting at the mediation table. This can be interpreted as bad faith and will hinder any possibility of settlement. The mediator should immediately inquire into the basis of the change. If the new demand is valid, the mediator should move forward and attempt to dispel any accusations of bad faith.
29. In multiple defendant situations, the defendants should have an agreement with respect to contributions between themselves. The mediator should meet with the defendants to work out a contribution agreement for settlement purposes before the mediation.
30. In situations where there are potential subrogation issues, the plaintiff and the insurance carrier should come to some agreement with any subrogation interests. The mediator can help facilitate discussions on subrogation.
31. If there are insufficient settlement funds at the mediation, the settlement authority issue should be addressed as soon as possible, preferably before the mediation begins.
32. If a party's ultimate decision maker cannot attend the mediation, the mediator should inquire into the possibility of preauthorization to settle, or having the decision maker available on phone standby.
33. At the conclusion of the mediation, the mediator and all concerned should always document the settlement before leaving the mediation to avoid "buyer's remorse." It is one of the most important steps in the mediation process.
34. Mediation can provide parties in a contract dispute with a win-win situation, as opposed to litigation which usually produces a winner and a loser. Consequently, mediation is often more successful in maintaining good relationships between disputing parties.
35. Parties to a mediation should always be aware that a case may not settle. If it appears that the case is not likely to settle, it would not be in a party's best interest to disclose to the other party trial evidence or trial strategies during settlement negotiations.
36. Mediation requires full cooperation of the parties when attempting to achieve a settlement. The mediation process will break down if one of the parties withdraws its cooperation since no party can be compelled to sign a settlement agreement.
37. A mediation settlement agreement will be binding on the parties. However, the parties should be aware that unlike an arbitration award, the settlement agreement is not subject to direct enforcement by a court.
38. In "mediation-arbitration," or "med-arb," the parties initially attempt to resolve their dispute through mediation. If no agreement is reached, the parties will then refer the dispute to binding arbitration. Be aware that the mediator and arbitrator should not be the same person in the same dispute. This could have a chilling effect on the mediation. The parties may be less open with the mediator during private caucusing because they know that the mediator may turn into an arbitrator who will make a binding decision on the case at the arbitration.
39. Because mediation can lead to early settlements, the parties should always consider including a mediation clause in their contracts at the time it is being negotiated. Attempting to add a mediation clause to a contract after it has been executed is almost impossible.
40. Parties who are offered attractive settlement proposals often refuse them because they focus on costs already incurred that are not recoverable. The mediator must encourage the parties to accept the fact that lost costs are just that. They are gone.
41. Lastly, be mindful that a mediation is never won or lost. When it is concluded, the mediation will be either successful or not. If it is successful, both parties will be winners. Parties have little or nothing to lose by mediating their disputes in an expeditious manner.

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1. The version of this article published here does not include the extensive footnotes which were included in the

version which appeared in the Fall 2017 Newsletter of the Tort Trial and Insurance Practice Committee. The reader may refer back to the original article for the detailed citations as well as to the sources of the citations which were to Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell (2nd ed. 1991); Phillip Cooper, *International Arbitration: A Handbook*, MPG Books Ltd. (3rd Ed. 2004); Douglas N. Frenkel & James H. Stark, *The Practice of Mediation* (Aspen Publishers, 2008); The Honorable Harold Baer, Jr., *Business and Commercial Litigation in Federal Courts* §42.2 (Robert L. Haig ed.); Nigel Black et. al., *Redfern and Hunter on International Arbitration*, Oxford University Press (5th Ed. 2009); Jack G. Marcil et. al., "*Avoiding Pitfalls: Common Reasons for Mediation Failure and Solutions for Success,*" 84:861 N.D. L. Rev. 861 (2008).

THE ATHOS I: SAFE BERTH AT LAST OR ONE MORE VOYAGE?

By LeRoy Lambert, SMA Member, New York

As this issue was going to press, the United States Court of Appeals for the Third Circuit issued its decision in *In re Petition of Frescati Shipping Company (The Athos I)*.[1] In 2013, the court held that the charterer breached the charter party warranty of a safe berth when the ship struck a partially submerged, unmarked anchor. The court also held that the wharfinger could be held liable in tort for breaching its duty of care to provide a safe "approach" to the berth.[2] The court, however, remanded to the district court to determine the ship's draft and the duty of care owed by the wharfinger. On remand, the district court determined that the draft of the ship was within the warranty and that the wharfinger breached its duty of care. On appeal from the second district court decision, the Third Circuit affirmed the finding that the safe berth warranty was breached and the ship was not negligently navigated. As to the wharfinger, it held that it need not decide whether the district court determined and applied the correct duty of care as the wharfinger and voyage charterer were the same and the owner was making a full recovery from the voyage charterer.

It remains to be seen whether the decision is a final and safe berth for the holding or whether the case will make a final voyage to the Supreme Court of the United States. Updates will be provided in future issues.

1. *In re Petition of Frescati Shipping (The Athos I)*, slip opinion (3d Cir. 29 March 2018).

2. *In re Limitation Proceeding of Frescati Shipping (The Athos I)*, 718 F.3d 184, 2013 AMC 1521 (3d Cir. 2013); LeRoy Lambert, "*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*," The Arbitrator, Vol. 44, No. 1 (November 2013).

NOTES ON DECISIONS FROM ACROSS THE POND

By: LeRoy Lambert, SMA Member, New York

In *Allianz Insurance PLC v. Tonicstar Ltd*, [2018] EWCA 434, the Court of Appeal in London, reversing the High Court, held that a leading QC in the insurance/reinsurance field was qualified as an arbitrator within the meaning of a clause which provided: "Unless the parties otherwise agree, the arbitration tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance."

In the September 2017 issue of The Arbitrator, Mike Ryan reported on the decision of the High Court in *Vinnlustodin HF v. Sea Tank Shipping* AS *(The Aqasia)* [2016] EWHC 2514.[1] The court had to interpret the text in the original Hague Rules limiting a carrier's liability to £100 per "package or unit" with respect to a bulk cargo. The court held that "unit" did not apply to bulk cargoes. That decision has now been affirmed by the Court of Appeal in *The Aqasia* [2018] EWCA Civ 276. The issue arises only under the text of the Hague Rules; Hague-Visby provides for limitation "per package or unit or per kilogram of gross weight." US COGSA changed the wording of the Hague Rules to allow the carrier to limit liability to $500 per package or "for goods not shipped in packages, per customary freight unit."

In *Transgrain Shipping (Singapore) Ltd v. Yangtze Navigation (Hong Kong) Co. (Yantze Xing Hua)* [2017] EWCA 2017, the Court of Appeal in London interpreted the meaning of "act" in clause 8(d) of the 1996 New York Produce Exchange Form Inter-Club Agreement and held it meant any act, culpable or not.

1. M. Ryan, "*English Court Says Hague Rules (Unit) Does Not Include Bulk Cargo,*" The Arbitrator, Vol. 47, Issue No. 2 (2017).

LOOSE ENDS

ICMA XXI in Rio

David Martowski, Permanent Member of the Steering Committee for the 21st International Congress of Maritime Arbitrators, reports that the date of ICMA XXI in Rio has been changed from November 2019 to 8-13 March 2020.

Barecon 2017

BIMCO has issued Barecon 2017, formally revising and updating Barecon 2001. Clyde & Co. has provided a helpful comparison at https://www.clydeco.com/insight/article/whats-new-barecon-2017.

Friends and Supporters

Charles Anderson (Chair), Dick Corwin, LeRoy Lambert, and Peter Wiswell continue to lead this program. For New York to remain competitive and grow, we need all stakeholders to commit to assist the SMA to market and promote the advantages of arbitrating in New York under SMA Rules. We are grateful for the new and renewed support shown by our Friends and Supporters in recent months. Disputes are out there which SMA arbitrators can resolve correctly, expeditiously, and at reasonable cost compared to other venues and organizations. Let's keep it going!

Thanks!

We are happy to welcome Raj Jadhav as a co-editor. Thanks to those who responded to our call for articles of interest, and (as always) to Tony Siciliano in this regard. *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 or RDJ@masesq.com. Thank you.

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