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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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EXTRA! EXTRA!

The Supreme Court, in Stolt-Nielsen v. AnimalFeeds (08-1198), on April 27, 2010 reversed and remanded the decision below in a 5-3 vote with the opinion of Justice Alito. Justice Ginsburg dissented, joined by Justices Stevens and Breyer. Justice Sotomayor did not participate.

Holding: Class arbitration may not be imposed on parties that have not agreed to that.

Note: The July issue will carry a full report on this decision.

PRESIDENT'S CORNER

Dear Readers:

April marked the end of the Society's luncheon program for this year. Each month, from October to April, we gather at the Captain's Ketch in the Wall Street area to hear speakers on topics of importance and interest to those in the maritime arbitration community. We regularly have in attendance some out-of-towners as both attendees and speakers. At the April 14 luncheon, Mr. Laurence Marron, a London solicitor, attended and heard our speaker, Dato' Jude P Benny, a barrister at the Middle Temple, practicing admiralty law in Singapore. With interns from many countries at city maritime firms during the course of the year, it is not unusual to have a good number of international attendees at each luncheon. Our luncheon chairman, Tom Fox, has done a great job in putting it all together.

February and March was a busy period for the SMA. Robert Meehan and I spoke at the annual Groundhog Conference on International Shipping at the Maritime College at Fort Schuyler. The conference was directed mostly at undergraduates and graduate students in marine transportation and international trade, young people with the potential to be future movers and shakers in the international maritime industry. Bob gave an excellent

talk on the broker's role in staying involved in a fixture's operations, particularly when it comes to items like ETA notices. With the assistance of Chris Hewer, Bob's paper was also published in London in the February 2010 issue of MARITIME RISK IN INTERNATIONAL. I spoke on the Society's activities and rules.

Also in February, the SMA conducted its annual two-day course "Maritime Arbitration in New York." Klaus Mordhorst, the Education Committee Chair, reports on it in this issue of THE ARBITRATOR.

March was a month of great activity in New York and Connecticut, with the Connecticut Maritime Association's annual show and conference in Stamford. (Don Frost, an SMA member, reports on the show in this issue of THE ARBITRATOR.) The SMA is proud to say that this year the SMA sponsored a coffee for the attendees and we also participated as an organization with a full morning panel discussion titled: "KNOW BEFORE FIXING — Charter Party Disputes and Solutions".

We formed two panels which addressed some of the topics that arbitrators see as important in operations and chartering and which frequently lead to arbitrations. SMA awards on bulk cargo disputes, tanker disputes and contract related issues were discussed. We focused on issues which arise when operations and chartering fail to communicate. There were continuous and excellent questions from the more than 70 attendees in the room. Panel members were Manfred Arnold, Lucienne Bulow, Stephen Busch, Austin Dooley, Bob Flynn, Tom Fox, Klaus Mordhorst, Bengt Nergaard, Jack Ring and Soren Wolmar.

THE ARBITRATOR

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Our CMA participation was followed the next day by David Martowski and Bengt Nergaard at the International Bar Association's meeting in Stamford. David and Bengt provided details about the SMA to the gathering of international lawyers and solicitors.

I do not like to talk about it, but this might very well be the last issue of THE ARBITRATOR put to bed by our current editor, Manfred W. Arnold. (Unless of course, I can talk him out of stepping down.) Manfred has done an incredible job of putting together on a quarterly basis a professional-level publication that not only makes the SMA shine but also the whole of the New York maritime law and arbitration community. He has had the job for four years and has always rewarded THE ARBITRATOR's readership with articles on law, arbitration, shipping and brokering together with a mixture of industry news. Thank you, Manfred.

Best regards,

Austin L. Dooley

NEW FOR OLD

by Chris Hewer

This will shock you. This will turn you white. The English language is being murdered and it is not the fault of the Americans — at least, not entirely.

Words and phraseology change over time. They change from generation to generation. At one time, if you responded in England to the offer of a drink with the comment that you would have one of what the Beatles drank in Hamburg, you would have got a rum and coke, no questions asked. Nowadays, you would more likely get a very old-fashioned look.

That's fine, and just as it should be. If you don't make yourself clear, you deserve to be misunderstood. That applies to both speech and the printed word. Some years ago, a rather stuffy English columnist, while travelling by train in the United States, decided to treat himself to a bottle of champagne to celebrate some publishing success or other. He asked the waiter for a bottle of Dom Perignon, but was told that, in order to avoid misunderstanding, passengers had to write down their drinks orders on special slips of paper specifically provided for that purpose. He wrote out his order and handed it to the waiter, who returned a few moments later with a can of Dr Pepper and a beaker.

When the columnist complained loudly that he had ordered champagne, the waiter looked at the slip of paper and calmly replied, "If what you write looks like 'Dr Pepper', Dr Pepper is what you get."

If you can't make yourself understood, you will get nowhere. Similarly, if what you say is full of tortured idioms which are lamely justified on the basis that the English language is a living thing, you deserve to have your head boiled, or at least shaved. In such hands, the English language is dying.

This is not a reference to text-speak, although that itself is not Gr8. It is a reference to words like 'incentivise', which cropped up in a recent report of the legal proceedings in a maritime law case. The human race has existed for thousands of years without using this word. Why do we need it now? The answer is, we don't. Laugh your head off if anybody uses it when speaking to you. That will put a stop to it. The same goes for 'actioning', and thousands of others nouns-as-verbs. Expose them for the abominations they are.

While we are busy inventing horrible new words, we are in danger of losing old, beautiful words and phrases. Under the English civil law reforms, for example, we have already lost the Anton Piller order, and said goodbye to subpoenas. What do we have in their place? Search orders and witness summons. And when did you last hear anybody refer to the Inchmaree Clause? That now comes under the romantically named 'Risks' section in the book of marine insurance clauses.

We are in danger of throwing out the baby with the bathwater. This is not progress. We are inventing new words and phrases to replace existing ones, for no good reason, and we are losing the origins of words and phrases into the bargain.

The same thing is happening with countries. If you are of a certain age, Ceylon will always be Ceylon, the Gold Coast will always be the Gold Coast, Zanzibar will always be Zanzibar, and Burma will never be Myanmar, however inexpertly you pronounce it. Whither Java, Formosa and Persia?

Countries should not be allowed to change their names, even for ready money. Planets are not allowed to do so, but you can guess what would happen if they were. When they discovered a new planet in 2007 they called it 'Gliese 581 C'. This was the brainchild of scientists, who should be allowed to change their names at all times, without reference to a higher authority.

Another group of people who should never be allowed to change their names are the English law lords or, to give them their proper title, the Lords of Appeal in Ordinary. Who will ever forget the late Lord Fraser of Tullybelton, who knew a thing or two about maritime law, or indeed Baron Phillips of Worth Matravers, who today is President of the Supreme Court of the United Kingdom but who previously was Senior Lord of Appeal in Ordinary. There is nothing ordinary about such names and titles, and they should not be lost in the pursuit of a perceived need to comply, to not give offence through elitism, or to sound American.

People and things should be named for what they are, and for no other reason. There used to be a transport café on the A30 in England called Bert's Gone Mad. Legend has it that it got its name because its owner, Bert, was notoriously careful with his money, but one day astonished his regulars by treating them all to a free cup of tea. It transpired that he had just won a tidy sum of money on the football pools, but one lorry driver was so surprised to see the largesse on offer that he exclaimed, 'Blimey! Bert's gone mad'. The name stuck.

This may or may not be a true story. What is true is that Bert's Gone Mad has now been renamed Jacks Fish & Chip Shop, without an apostrophe. We don't know what happened to Bert, but we can guess. The same is in danger of happening to our language.

Dr Pepper, anyone?

MASTER YICK ON CHEERING UP

The January 7, 2010 edition (#529) of BOW WAVE contained a story which Sam Ignarski introduced as "Master Yick's Swansong." With the demise of Lloyd's Maritime Asia, the outings of Master Yick have come to end. For many years, the old Master, a Hong Kong shipowner of the old school whose origins were in Shantung, gave his cod-classical views on life, shipping, cross cultural matters and all that. The column was always accompanied by a satirical drawing from local gadfly Harry.

I thank Sam for sharing Master Yick's last episode with us, which was published in late 2009.

Yick on Cheering Up

The old Master was nothing if not stoic. He had seen his fair share of economic and social dislocation over the not particularly fun years of the 20th century. If he were around today, you might have thought that he would be one of those with a long face and somber expression, watching the freight indices head south of Hainan Island and the

banks sending back letters of credit citing the typing errors of shipping clerks. But far from it. A really poor shipping market, a strong tide out from manufacturing caused the cheerful side of his nature to emerge into the full glare of daylight. I never heard more gongs and cymbals than during the low ebbs. At home, he would conjure up dumpling evenings where little known relatives would appear and all guests would join in the mincing of ingredients and rolling out of dough. A very distant cousin who had command of the oldest stringed instrument I have ever heard would entertain with classical tunes. The Master would frequently sing out in his high falsetto voice the odd lines of song which appealed to him.

During the boom years the loudest noises in our dining room was often the ticking of the old clock the Master brought from the old ancestral in Shantung.

"Only the blind man fears the tiger not", he would say, "but still we must go back to the source". He really liked a good old back to basics time for it was at such times that he could see, better than most, the bargains that were on offer in the world. Were he around today, he would be looking at those lists the brokers circulate, naming in great detail the qualities of all those ships coming down the slipways with clouded futures. He would certainly know today that few if any of those 2009 orders have been cancelled or declined outright--hope springs eternal in the ship owner's breast. Never one for great capital outlay, he would be looking for a knock on effect further down the age curve of ships--older was usually better because it caused people to prize the familiar less and reach for the brand spanking new on offer in such abundance.

"New ships", he would say, "new wives, new friends, new styles" all are not without their complications. In an unwary man they may cause a loss of balance, a disruption of equanimity injurious to the conduct of business. "A wise man goes to the same operas, the ones he likes".

Judicious use of wine, the consolations of the female half of the human race (the old Master after all, in the old style had at least three wives who knew about each other) and song were high up on the list of the old Master's counter remedies to recession. Lots of licks of paint on ships and offices, and out on public display, the swankiest silk suits he owned and usually eschewed.

This is the purpose of recession. It takes us back to things we know and esteem the most before the glint of gold and profits takes our eyes off the simple things. Proven ships, proven friends and business partners and proven trades. And the resumption of plans and beginnings we hold closely inside, throughout our time on this earth.

Note: Now that you enjoyed the wisdom of the Old Sage — Yick, who populated Lloyd's Maritime Asia issues on a regular basis, was a fictional character created by Sam Ignarski and used as Sam's alter ego. Harry, on the other hand, is a real person, a freelance local caricaturist in Hong Kong who entertained more than just the waterfront.

SOMETIMES, THE BEST DEFENSE IS A GOOD OFFENSE

by Thomas M. Russo, Esq.
Partner, Freehill, Hogan & Mahar

The increasingly aggressive criminal prosecution by the United States of oily water separator violations should lead defense attorneys and their owner/operator clients to a reassessment of viable tactics to defend such cases. Illustrative of the United States' aggressive prosecution of these cases, Corporate owners and operators are becoming increasingly victimized by rogue employees acting against corporate environmental policy and crewmember whistleblowers who choose to notify the U.S. Coast Guard of illegal discharges as opposed to company officials. Frequently, huge fines are paid by owners and operators as a result of the actions of employees who are committing illegal acts which are against corporate policy and not known or condoned by owners and operators. Lately, more often than not, employees are being given large rewards as whistleblowers for reporting violations to the Coast Guard and not to the Company.

This state of affairs is a result of U.S. law imposing vicarious criminal liability on employers for the actions of employees. Under U.S. law, a corporate owner/operator can be held vicariously criminally liable for the actions of employees when they are acting within the scope of their employment and for the benefit of the employer even when there is no evidence of on-shore higher corporate level involvement and when the acts are against company policy. This is the predominant theory upon which otherwise innocent owner/operators are criminally prosecuted in the United States for oily water separator violations. As a result of this legal concept, after OWS violations are discovered, it becomes very difficult for an owner/operator to mount a viable defense. Frequently, the only viable option is to try and negotiate a plea with the U.S. Attorney. However, it should be noted that there may be a viable way to protect the Corporate owner/operator from vicarious criminal liability in advance, if the owner/operator can demonstrate that it

exercised due diligence to prevent such illegal conduct from happening on its vessels.

While a corporation under U.S. law can still be liable for an act committed by an employee, which is against company policy, **U.S. Courts do allow juries to consider company policy restrictions in determining whether an employee is acting within the scope of employment and for the benefit of the corporation**. For instance, a pattern jury instruction approved by the U.S. Court of Appeals for the Third Circuit outlines this possible defense:

> *"An employee was not acting within the scope of his employment if that person performed an act which his corporate employer, in good faith, had forbidden the employee to perform. A corporate defendant is not responsible for acts it tries to prevent. However, a corporate defendant, like an individual defendant, may not avoid criminal responsibility by meaningless or purely self-serving pronouncements."*[1]

It should be stressed that such due diligence cannot be just written corporate policies or fleet memos. In the past, we have found that most owners and operators involved in OWS violations cannot meet the necessary due diligence requirement to mount such a defense. Indeed, many may not be aware that such a possible defense exists. Accordingly, we would like to outline some of the measures that we, as defense attorneys, feel would be very useful in helping defend OWS cases in the future.

1. Documentation of crew training re MARPOL and company pollution policy *prior* to crewmembers joining the ship.
2. MARPOL related DVD's aboard ship relating to pollution policies shown to crewmembers during meetings.
3. Affidavits signed by crewmembers prior to joining the ship acknowledging responsibility under MARPOL and their commitment to company policy, including reporting any violations to a designated shore-based person.
4. Specific posters in engine room and crew spaces noting company anti-pollution policy and confidential telephone numbers of someone in the company to call to report illegal dumping. In conjunction with this, the crew must have access to make such calls on satellite phones or cell phones when in port.
5. Documentation of disciplinary actions taken against employees who do not comply with company policy, including termination.
6. Documentation of superintendent inspections of oil record books and OWS equipment when visiting ships.
7. Establishment of a culture of environmental compliance, including prioritizing upkeep of pollution prevention equipment.

Such a pre-emptive effort demonstrating due diligence in conjunction with the above- quoted pattern jury instructions could very well result in a successful defense or at least be a strong negotiating point in coming to a favorable settlement of a case.

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1. This is to be distinguished from an argument presented to the Second Circuit Court of Appeals in *U.S. v. Ionia*, 555 F.3d 303 (2009) contending that the prosecution must prove as a separate element in its case-in-chief that the Corporation lacked effective policies and procedures to deter and detect criminal actions by its employees. The U.S. Court of Appeals rejected this as an element to be proved by the prosecution but affirmed the fact that a corporate compliance program is relevant to whether an employee was acting within the scope of his employment.

AWARD OVERTURNED FOR ARBITRATORS' FAILURE TO DISCLOSE PARTICIPATION IN PARALLEL ARBITRATION

by Raymond J. Burke, Jr., Esq.
Partner, Burke & Parsons

Anyone who has ever been involved in a petition to vacate an award knows this is not an easy task. Thus, the recent case of *Scandinavian Reinsurance Co., Ltd. v. St. Paul Fire & Marine Ins. Co.*[1] vacating a final arbitration award for failure to disclose is of particular interest. In that case, Judge Scheindlin (well known to Rule B practitioners) granted Scandinavian Reinsurance Co., Ltd.'s ("Scandinavian Re") petition to vacate a final award rendered in a reinsurance arbitration proceeding between Scandinavian Re and St. Paul Fire & Marine Insurance Co., St. Paul Reinsurance Co., Ltd., and St. Paul Re (Bermuda) Ltd. (collectively, "St. Paul") based on her finding that two of the three arbitrators chosen evinced evident partiality by failing to disclose their simultaneous service on another arbitration which involved related parties, a common witness and similar issues in dispute.

Section 10 of the Federal Arbitration Act ("FAA")[2] provides very narrow grounds upon which an arbitral award may be vacated. An award may be vacated if it was "procured by corruption, fraud, or undue means," or where the

arbitrator was partial, corrupt, engaged in misconduct, or exceeded his or her powers.[3] Courts have restricted judicial review of awards, with the Second Circuit taking the view that "[j]udicial review has been thus restricted in order to further the objective of arbitration, which is to enable parties to resolve disputes promptly and inexpensively, without resort to litigation and often without any requirement that the arbitrators state the rationale behind their decision."[4] Courts in the Second Circuit have also taken a strict approach to review based on partiality grounds and have required proof of "evident partiality," as opposed to a mere appearance of impartiality.[5] Allegations of an arbitrator's appearance of bias based on the existence of professional relationships or previous contact with members of the maritime industry are not a bases for vacating awards.[6]

In the Scandinavian Re arbitration,[7] the underlying dispute concerned issues of interpretation under the retrocessional reinsurance agreement,[8] and the arbitrators ruled in favor of St. Paul and against Scandinavian Re. Pursuant to the terms of the agreement, each party selected an arbitrator, and an umpire was selected by the two so chosen. Scandinavian Re appointed Jonathan Rosen, St. Paul appointed Peter Gentile, and Paul Dassenko was appointed as the umpire. The three arbitrators were certified by the AIDA[9] Reinsurance and Insurance Arbitration Society ("ARIAS") and, as such, were to abide by the standards established in ARIAS's Guidelines for Arbitrator Conduct ("the Guidelines").[10] In particular, the Guidelines pertaining to disclosure provide, in relevant part:

> *1. Before accepting an arbitration appointment, candidates should make a reasonable effort to identify and disclose any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family or social relationship that others could reasonably believe would be likely to affect their judgment, including any relationship with persons they are told will be potential witnesses.*
>
> …
>
> *3. The duty to disclose all past and present interests is a continuing obligation throughout the proceeding. If any previous undisclosed interests or relationships described in Comment 1 are recalled or arise during the course of the arbitration, they should be disclosed immediately to all parties and the other arbitrators.*

In his umpire's questionnaire, Dassenko made several disclosures, including his affiliation with Rosen. At a subsequent organizational meeting, Dassenko acknowledged, on behalf of all three arbitrators, that the duty to disclose was an on-going one. Additional disclosures were made by the arbitrators in the course of the arbitration. Scandinavian Re and St. Paul's preliminary and final witness lists included the name of the witness who would appear in both the Scandinavian Re Arbitration and the concurrent Platinum Bda Arbitration. During an evidentiary hearing, this common witness testified via video conference on June 23, 2009. On August 19, 2009, a final award was rendered in favor of St. Paul by the majority of the panel.[11] On October 22, 2009, Scandinavian Re discovered that Gentile and Dassenko were simultaneously serving in an arbitration between PMA Capital Insurance Co. ("PMA") and Platinum Underwriters Bermuda, Ltd. ("Platinum Bda").[12]

The Platinum Bda Arbitration involved a dispute similar to the one in the Scandinavian Re Arbitration concerning the interpretation of the parties' retrocessional reinsurance agreement. Platinum Bda had appointed Gentile, and Dassenko was selected as the umpire. In the Platinum Bda Arbitration, during an organizational meeting on September 23, 2008, Gentile and Dassenko disclosed that they were serving as arbitrators in a concurrent proceeding, but did not state the identity of the parties. Gentile, moreover, professed he had never served in an arbitration involving PMA, Platinum Bda, or Platinum Bda's predecessor, St. Paul.

At no point in the course of the Scandinavian Re proceeding did Gentile and Dassenko disclose that they had accepted appointments in the Platinum Bda Arbitration. They also failed to disclose that a common witness had testified in both arbitrations. This witness had been an employee at Scandinavian Re and had been instrumental in analyzing data submitted by St. Paul for underwriting purposes. He later left Scandinavian Re to join Platinum Bda, where he was working when he appeared as a witness in the Platinum Bda arbitration on March 31, 2009.[13] Of course, Scandinavian Re and St. Paul disputed the extent of the relationship between St. Paul and Platinum Bda, with Scandinavian Re contending that Platinum Bda was St. Paul's successor entity and St. Paul maintaining that there was no corporate interrelatedness between the two.

In determining whether to grant the petition to vacate, the court framed the issue as "whether the undisclosed relationships involved in the Platinum Bda Arbitration were material."[14] Citing to *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*,[15] the court stated that evident partiality will be found where an arbitrator fails

to disclose a known material relationship with a party. In rejecting St. Paul's argument that the conflict was "trivial" due to the lack of a financial interest in the outcome in the case and a direct relationship between the arbitrators and a party, the court held that "all of the circumstances must be considered, including the timing of the arbitrators' relationships with each other, and with witnesses to the arbitration."[16] Taking all of the factors of the case into consideration, the court found that the undisclosed information/relationships were material because Gentile and Dassenko (1) could have been privy to *ex parte* information; (2) could be influenced by credibility determinations already made in the witness' earlier testimony; (3) may have influenced one another's thinking on issues; (4) deprived Scandinavian Re's right to either have the arbitrators be recused or to adjust its arbitration strategy.[17] The matter was accordingly remanded for a new arbitration with a different panel of arbitrators.

Note: Mr. Burke gratefully acknowledges the invaluable assistance by Grace Hae Woen Bae.

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1. No. 09 Civ. 9531, 2010 WL 653481 (S.D.N.Y. Feb. 23, 2010)

2. 9 U.S.C. §§ 1-14.

3. 9 U.S.C. § 10.

4. *Office of Supply, Government of Republic of Korea v. New York Navigation Co.*, 469 F.2d 377, 379 (2d Cir. 1972). *See also UCO Terminals, Inc. v. Apex Oil Co*., 583 F. Supp. 1213 (S.D.N.Y. 1984), *aff'd*, 751 F.2d 371 (2d Cir. 1984).

5. *See National Shipping Co. v. Transamerican S.S. Corp*., 1993 AMC 684, 1992 U.S. Dist. LEXIS 18725 (S.D.N.Y. 1992); *International Produce v. A/S Rosshavet*, 638 F.2d 548 (2d Cir. 1981).

6. *Id*.

7. Demanded by St. Paul on September 26, 2007.

8. "In a retrocessional agreement, a reinsurer cedes a portion of its risk to another reinsurer … [it] is effectively reinsurance for reinsurance." *Scandinavian Re,* 2010 WL 653481 at *1, n. 2.

9. The Association Internationale de Droit des Assurances (International Association for Insurance Law)

10. The full text of the Guidelines for Arbitrator Conduct is available at www.arias-us.org.

11. The "majority" is not identified in the award.

12. Demanded on June 2, 2008 by Platinum Bda. It is also worthwhile to note that the court does not discuss the timing of Scandinavian Re's decision to petition for the vacatur of the award.

13. Hence, since the witness' testimony in the Platinum Bda Arbitration had been taken three months prior to his testimony in the Scandinavian Re Arbitration, Gentile and Dassenko had ample opportunity to disclose this fact to Scandinavian Re and St. Paul after the parties' witness lists were presented in March and June 2009.

14. *Scandinavian Re, 2*010 WL 653481, at *8.

15. 492 F.3d 132 (2d Cir. 2007).

16. *Scandinavian Re, 2*010 WL 653481, at *8.

17. *Id*. at *8-9.

NEW YORK COURT OF APPEALS ISSUES SIGNIFICANT DECISION ON PRE-JUDGMENT SECURITY ATTACHMENT OF INTANGIBLE PROPERTY UNDER CPLR

by George M. Chalos, Esq.
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In *Hotel 71 Mezz Lender LLC v. Falor*, __ N.Y. 3d, __ N.Y.S.2d__, 2010 NY Slip Op 01348 (Feb. 16, 210), the Court of Appeals issued a landmark decision in which it examined how the law fixes the situs of an intangible property interest and the ability to attach same pursuant to the CPLR. In short, the Court held that where New York had personal jurisdiction over the defendant garnishee, even though the defendant was not a domicile, an order of attachment was proper and allowed the Court to attach the defendants' intangible personal property (specifically —ownership/membership interests in various out-of-state business entities).

In the instant matter, the Plaintiff, Hotel 71 Mezz Lender LLC had provided a mezzanine loan, by agreement dated March 29, 2005, to nonparty Chicago H&S Senior Investors, LLC, for the purposes of renovating a prominent Chicago hotel. On the same day, defendants, including Guy T. Mitchell, (who do not reside in New York) executed a guaranty of payment, under which they unconditionally agreed to be jointly and severally liable for the borrower's obligations under the loan and submitted to the jurisdiction of any federal or state court in New York City. In addition to being negotiated in New York, the guaranty was to be governed and construed in accordance with the laws of New York State. Thereafter, the borrower defaulted

on the loan and filed for bankruptcy protection. Plaintiff commenced suit against the guarantors in Supreme Court, New York County to enforce the guaranty and to recover the amounts due and owing under the loan.

Plaintiff applied, pursuant to CPLR 6201, for a prejudgment order of attachment, seeking to attach defendants' property interests as security for the collection of any judgment entered against defendants. The Court granted Plaintiff's application, but stayed service until Defendants were given the opportunity to oppose the attachment order. On October 23, 2007, following oral argument regarding the order of attachment, the Supreme Court permitted the Sheriff to serve the attachment order upon Defendant Mitchell personally, as garnishee for any ownership/membership interests defendants may have had in 23 out-of-state entities. The property consisted of Defendants' interests in 22 limited liability companies formed in Delaware, Georgia, and Florida and a Florida corporation solely owned by Defendant Mitchell. The attachment served a security function only, *i.e.* to ensure there would be sufficient money to satisfy a judgment if the Plaintiff prevailed.

The Court thereafter confirmed the order of attachment, finding that the attachment was necessary in aid of security. The court also ruled that the Defendants' intangible interests were attachable property under the CPLR, and that because the interests were not evidenced by certificates, the service on Defendant Mitchell was sufficient to fix the situs of said property in New York. On February 6, 2008, the Supreme Court granted Plaintiff summary judgment on liability against six (6) of the Defendants and ordered a judgment of USD 52,404,066.54.

By a 3 to 1 decision, the Appellate Division overturned the Supreme Court and held, "an attachment of a debt or other intangible property can only be effected as against the debtor or obligor by service upon him or her when he or she is domiciled within the state." Citing *National Broadway Bank v. Sampson*, 179 NY 213 (1904). Accordingly, because Mitchell was only temporarily in New York when he was served the order of attachment, and not a domicile of New York, his presence was insufficient to support the attachment. The Appellate Division granted Plaintiff leave to appeal the decision and the Court of Appeals reversed by a unanimous decision.[1]

The Court of Appeals held that the "domicile" requirement of *Sampson* was overturned by the U.S. Supreme Court just one year later in *Harris v. Balk*, 198 U.S. 215 (1905). Moreover, the Court of Appeals noted that *Sampson* was decided more than fifty (50) years prior to the creation of the CPLR, and accordingly, it should not have been relied upon in interpreting what constitutes a proper attachment. The Court held that the ownership/membership interests in the LLCs were clearly "assignable and transferrable" and accordingly, the interests are "property" for the purposes of CPLR 6202. Additionally, the Court analyzed the technical issue of whether the Defendant's intangible ownership/membership interests have a New York situs. The Court outlined that there is no controlling provision in the CPLR to determine the situs of intangible property for attachment purposes. *ABKCO Indus. V. Apple Films*, 39 NY2d 670 (1976).

The Court of Appeals further held that a Defendant's debt to a judgment creditor is present wherever the debtor is present. In reaching this result, the Court relied on the main proposition from *Harris* which survives to this day, quoting, "The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes." *Harris*, 198 U.S. at 222-223. Accordingly, the precedent from *Harris* gives the debts owed by Defendant Mitchell a New York situs because of the court's personal jurisdiction over the Defendants.

This case is distinguishable from the Court of Appeals decision from last year in *Koehler v. Bank of Bermuda*, 12 NY 3d 533 (2009). In *Koehler*, the Court held that a New York court with jurisdiction over a bank garnishee could order the bank to turn over stock certificates located outside of the state. In that case, there was a three (3) judge dissent, primarily concerned over the ability to enforce a judgment based solely upon the Court's jurisdiction over a garnishee. In this case, there was seemingly no such issue for the *Koehler* dissenters as the Defendants voluntarily submitted to the personal jurisdiction of the New York court by executing the personal guaranty.

For more information, please feel free to contact us at: info@chaloslaw.com.

1. The Opinion was authored by Judge Jones and Judges Ciparick, Graffeo, Read, Smith, and Pigott concurred. Chief Judge Lippman did not take part in the decision.

WRITTEN WITNESS STATEMENTS A PRACTICAL BRIDGE OF THE CULTURAL DIVIDE

by John A. Wolf
Chairman of Ober|Kaler

Kelly M. Preteroti
Associate at Ober|Kaler

How to use written witness statements effectively in international arbitration.

Much has been written about the struggle arbitrators and parties face in blending civil and common law traditions in international arbitrations. This article focuses on a highly valuable procedure used in high stakes international arbitration proceedings to present fact and expert testimony to the arbitral tribunal. That procedure, known as written witness statements, takes the best from the common law and civil law systems in order to allow parties from different cultural and legal backgrounds to present evidence fairly to international arbitral tribunals. Among their many benefits, written witness statements prompt advocates to prepare their cases well in advance of the arbitration hearings, making them better prepared overall.

This article explains how written witness statements originated and describes how to use them. It concludes with suggestions for procedures to use written witness statements effectively in international arbitration disputes.

Civil and Common Law Differences in Presenting Evidence

"It is the arbitral tribunal's duty to ensure that evidence is taken in an efficient and economical manner, while also ensuring, 'equality of arms' between parties from vastly different legal traditions."[1] The benefit of efficiency while blending the traditions of both common law and civil law procedures explains why written witness statements have become favored tools of evidence presentation in international arbitration. To understand why written statements meld these two traditions, it is necessary to understand the different methods common law and civil law practitioners have used to present evidence to the finder of fact.

The Common Law Practice

One word best describes the common law practice of presenting evidence — confrontational. The common law advocate views the opponent as an adversary, someone with whom to do battle. The battle takes the form of a face-to-face confrontation to test the opponent's presentation through cross-examination of its witnesses. It is the witness's testimony that tells the story. The witness's demeanor and response to questioning allows the tribunal to determine the credibility of the witness. By painting the facts presented by the opponent's witness in a negative light, the common law advocate puts the witness's credibility in issue.

The right of confrontation has long been a bedrock principle in common law litigation. As a result, written witness statements are generally considered inadmissible hearsay.[2]

The Civil Law Practice

Quite the opposite situation exists in civil law practice for both civil litigation and arbitration. Historically, witnesses played a much lesser role in civil court proceedings and arbitration. In civil litigation witnesses were not used very often to present evidence to the court. Similarly, in civil law arbitration witnesses were often called to testify only when no written evidence was available.[3] This practice came about because documents were believed to be more reliable than witnesses and questioning witnesses in a confrontational setting was not viewed as adding anything to the documents already before the fact finder.[4]

The non-confrontational nature of civil law tradition explains why civil law jurisdictions have frowned upon direct cross-examination of witnesses, which the common law tradition deemed indispensable to finding the truth.[5]

Indeed, civil law arbitration advocates often did not have the opportunity to question their own witness, or even determine exactly the questions to ask because the tribunal is charged with investigating the facts and it asks the questions.[6] Advocates could submit to the tribunal questions they would like to see put to the witnesses, but in the end, the tribunal decided what questions would be asked. This virtually eliminated the element of confrontation.

With such vastly different methods of eliciting facts and convincing the fact finder of the truth of the party's argument, advocates from common law and civil law jurisdictions obviously were at odds when both were involved in the same dispute. Significant progress was made in bridging the cultural divide with regard to evidence presentation with the compromise development of written witness statements, which are used subject to the right of cross-examination.

Written witness statements replace direct oral testimony of the parties' witnesses. This allows the civil law practitioner to rely on documentary evidence to present the facts of the case. But each party has the right to live cross-examination of their opponent's witnesses. For this reason, witnesses must be present at the hearing for their witness statements to be received by the tribunal. The right of cross-examination of witnesses reflects the common law tradition of "testing" the witness's version of the facts and the witness's credibility through cross-examination.

Arbitration Procedures Authorize Witness Statements

Arbitrators have extensive power to craft the procedures that will be used in international arbitration so that the process will be comfortable for both common law and civil law practitioners. The arbitrators' role in crafting these procedures takes place after the parties have decided whether they wish to have their arbitration administered under the rules of an arbitral institution, like the International Centre for Dispute Resolution (ICDR) or the International Chamber of Commerce (ICC), or whether they wish to arbitrate under the rules of the United Nations Commission on International Trade Law (UNCITRAL) or under self-created rules in a self-administered (so-called ad hoc) arbitration.

The use of written witness statements as a substitute for the direct testimony of both fact and expert witnesses is widely permitted by most rules used in international dispute resolution. For instance, the UNCITRAL Arbitration Rules and the ICDR International Arbitration Rules state, "Evidence of witnesses may also be presented in the form of written witness statements signed by them."[7] Similarly, the ICC International Arbitration Rules provide, "The Arbitral Tribunal may decide the case solely on the documents submitted by the parties unless any of the parties request a hearing."[8]

The International Bar Association's (IBA) Rules on the Taking of Evidence in International Commercial Arbitration specifically provide for written witness statements as a means to harmonize the way in which evidence is presented to tribunals when parties from different legal traditions are involved in the same case. These rules state, "The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties a written statement by each witness on whose testimony it relies…."[9]

Institutional arbitration rules as well as the IBA Rules exemplify the recognition that written witness statements have received their place in the arbitral tribunal's arsenal of case management tools.

Next, we turn to the practical use of written witness statements for both fact and expert witnesses.

Fact Witness Statements

Written witness statements are prepared by the advocates after the arbitral tribunal issues the order authorizing that procedure for those witnesses on whom the parties intend to rely at the hearing.[10] The process of drafting the written witness statements uncovers the facts the witness is able to provide and that is what allows each party to determine which witnesses to use.[11] After the initial drafts of fact witness statements have been completed, the advocates for both sides have the salutary opportunity to review the presentation of their case on paper, a process that can expose gaps in the evidence.

Fact witness statements are usually required to be exchanged between the parties and submitted to the tribunal as early as reasonably possible, typically as soon as it is clear to both parties what the issues are and what facts need to be proved.[12]

It has been said that witness statements are not "an additional opportunity for the parties to submit new factual allegations or to modify their prayers for relief, even if the witness statement is signed by a party representative."[13] Nor are they a place to make legal arguments. This notion can be difficult for the common law practitioner to accept because lawyers from this tradition are used to arguing their case at every juncture. In international arbitration, the common law practitioners must avoid the instinctive urge to use witness statements to brief the case or make closing arguments.

Similarly, fact witness statements should not be treated by advocates as motions containing alleged facts and legal arguments. They are a "means of adducing evidence."[14]

When drafting statements for fact witnesses, counsel for both parties must be mindful of the tribunal's instructions and use the governing procedural rules to determine what information is required. For example, the IBA Rules say that each witness statement should contain the witness's name, relationship to the party for whom the statement will be submitted, the witness's background and qualifications, the facts that support the witness's testimony, an affirmation of truth of the statement and the witness's signature.[15]

Although confirmation of a witness statement is generally required, it is possible for both sides to agree that confirmation of the witness statement, through a brief direct examination of the proponent witness where the witness confirms the truth of the statement accompanied by an opportunity for cross-examination of the witness, is not necessary. However, the advocate for the proponent of the witness should not lightly agree to this, the reason being the tribunal could decide to give the witness statement less weight. Without confirmation by the witness of their written statement and the opportunity for opposing counsel to cross-examine the witness, the tribunal may dismiss the testimony because it was not given an opportunity to assess the credibility of the witness.

Expert Witness Statements

Expert reports—the expert's version of the written witness statement—can be exchanged simultaneously or consecutively and the scope or content of these reports can be limited by agreement of the parties or by the arbitral tribunal in the terms of reference or in a procedural order.[16]

As in the case of fact witness statements, the IBA Rules detail the information that must be contained in expert reports.[17] In addition to the information required from a fact witness, an expert report must also contain the witness's expert opinions and conclusions. This includes a description of how the expert arrived at his conclusions.[18]

The exchange of expert reports allows experts to read each other's opinions and determine whether they agree on certain issues or at least identify the issues that they do not agree on and the reasons for disagreement. [19] One practitioner has praised the use of these reports for such purposes, explaining:

> *This procedure removes the unfair element of surprise or deliberate ambush at the main hearing: it allows expert witnesses to meet and exchange views before the hearing… and since hearing time is money, it saves both time and money by having everyone read these materials in advance of the main hearing without the need for direct testimony recited aloud.*[20]

In addition, exchanging expert reports can promote settlement discussions, with the parties refining issues that are not in dispute.

Benefits and Drawbacks to Written Witness Statements

The benefits of written witness statements are obvious. Written witness statements and expert reports force the parties to understand the pertinent issues at a relatively early stage in the arbitration. It has been said that "the written witness statement allows much of the factual brushwood to be cleared from the arbitral stage, leaving only the critically important issues to be addressed orally at the main hearing…."[21] This naturally promotes efficiency. Efficiency is also achieved by eliminating the need for direct oral testimony, with the exception of a brief confirmation of the statement by the witness before cross-examination begins. Furthermore, the witness statement procedure gives advance notice of the opposing witnesses' testimony and thereby assists counsel in preparing for the hearing on the merits.

Written witness statements have also been criticized on several grounds. A common criticism is that these statements are not equivalent to live direct testimony and cannot help the tribunal assess credibility. Another criticism is that witness statements are not what they purport to be—statements by witnesses—because they are drafted by lawyers. As one commentator noted, "Written witness statements can bear little relation to the independent recollection of the factual witness, with draft after draft being crafted by the party's lawyer or the party itself, with the witness's written evidence becoming nothing more than a special pleading, usually expressed at considerable length."[22] Furthermore, because they are often prepared by lawyers, they come at considerable expense.

These perceived shortcomings could be remedied by the tribunal invoking its power to control the use of witness statements. For example, if there is a concern that the arbitrators will not have a sufficient opportunity to assess the credibility of a particular witness, the arbitrator could order a brief direct examination. If there is a concern that witness statements will be over-lawyered, the tribunal could make clear that little weight will be given to witness statements engineered by counsel.[23] Counsel would be unlikely to disregard this warning, which could lead to having his witness's testimony disregarded. If the tribunal is firm in this instruction and steadfast in enforcing it, the witness statement procedure is quite worthwhile.

Crafting the Tribunal's Order

The tribunal's power to order the witness statement procedure is derived from the parties' agreement to arbitrate, the rules the parties select to govern the arbitration, and acceptance of the panel. Accordingly, the parties' views and suggestions regarding the manner and use of witness statements should be given due regard by the tribunal. Thus, seeking the parties' agreement to the use of written statements is recommended as opposed to imposing the procedure on the parties in an order.

Once there is agreement on the witness statement procedure, the tribunal can craft a procedural order. There is no single model for this order but there are some things that the order should include. As a starting point, it should reflect the fact that the parties have agreed to the witness statement procedure.

The rules to be followed by counsel should reflect the expectations of the arbitral tribunal. For example, if the arbitral tribunal expects a witness statement from each witness summoned by the parties the order should say so. The reason for this is that it encourages the parties to think

carefully about the witnesses they intend to use. The order should also make clear that each witness statement must be signed by the witness. This encourages more accurate statements since a witness is unlikely to agree to sign a statement that contains incorrect information.

If the tribunal does not want over-lawyered witness statements, the order should convey the expectation that the statement should be made by the witness, not counsel. It should also make clear the repercussions for not following this direction, for example, that the statement would be given little or no weight.

The order should set out when witness statements and rebuttal statements (if any) are to be exchanged and submitted to the tribunal. This should be coordinated with the discovery schedule.

The order should also make clear that the parties must summon their own witnesses and that the tribunal will only give weight to witness statements that are confirmed by the witness at the hearing as being true and accurate and subject to cross-examination, absent exceptional circumstances or agreement of the parties. To further the goal of efficient management, the order could state how long the advocates will have for cross-examination (say 15-30 minutes per witness), which in any case should be limited to matters raised in the witness statement. It could also state that brief re-direct examination will be allowed, limited to matters raised on cross-examination.

The order should make clear to the parties that the tribunal may question the witness at any time. It should also state that the tribunal has the power to refuse to hear a witness (or receive a witness statement from that witness) if it deems the facts to which the witness will testify repetitive, cumulative, or irrelevant. It also has the authority to limit a party's questioning of a witness, as well as its ability to re-call a witness, subject to the party's right to a fair hearing.

Conclusion

Witness statements provide a fair and efficient compromise to the conflicting cultural practices that arise in an international arbitration. When used as intended, they are also quite helpful in preparing for arbitration, especially for cross-examination, and they eliminate the possibility of unfair surprise at the hearing. In the end, whether witness statements are used effectively in an international arbitration depends on the tribunal and its ability to implement the use of this procedure to the benefit of all parties involved.

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1. Antonias Dimolitsa, "Giving Evidence: Some Reflections on Oral Evidence and on the Obligations and Rights of the Witnesses," in Arbitration and Oral Evidence 11, 12 (Laurent Levy and V.V. Veeder eds., 2005).

2. Javier H. Rubinstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions," 5 Chi. J. Int'l. L. 303, 308 (2004).

3. Hans van Houtte, "Counsel-Witness Relations and Professional Misconduct in Civil Law Systems," in Arbitration and Oral Evidence, supra n. 1, at 105, 106.

4. Julian D.M. Lew & Laurence Shore, "International Commercial Arbitration: Harmonizing Cultural Differences," 54(3) Disp. Resol. J. 32 (Aug. 1999).

5. Rubinstein, supra, n. 2, at 308.

6. Id.

7. UNCITRAL Arbitration Rules, G.A. Res. 31/98, U.N. GAOR, 31st Sess., Supp. No. 17, ch. V, § C, U.N. Doc. A/31/17 (1976) (the UNCITRAL Rules), art. 25.5, available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html; International Dispute Resolution Procedures (May 1, 2006) (ICDR Rules), R-3 art. 20.5, available at www.adr.org/sp.asp? id=28144.

8. International Chamber of Commerce Rules of Arbitration (Jan. 1, 1998) (ICC Rules), art. 20.6, available at www.iccwbo.org/court/english/arbitration/rules.asp.

9. International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration (June 1, 1999) (IBA Rules), art. 4.4, available at www.ibanet.orgimages/downloads/IBA%20rules%20on%20the%20taking%20of%20Evidence.pdf.

10. Id.

11. Anne Véronique Schlaepfer, "Witness Statements," in Arbitration and Oral Evidence, supra n. 1, at 65, 67.

12. Id. at 66.

13. Id. at 67.

14. Id.

15. IBA Rule 4.5 states: "Each Witness Statement shall contain: (a) the full name and address of the witness, his or her present and past relationship (if any) with any of the parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant and material to the dispute or to the contents of the statement; (b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute; (c) an affirmation of the truth of the statement; and (d) the signature of the witness and its date and place."

16. Richard H. Kreindler, "Benefiting from Oral Testimony of Expert Witnesses: Traditional and Emerging Techniques," in Arbitration and Oral Evidence, supra n. 1, at 87, 96.

17. IBA Rule 5.2 states, "The Expert Report shall contain: (a) the full name and address of the Party-Appointed Expert, his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience; (b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions; (c) his or her expert opinions or conclusions, including a description of the method, evidence and information used in arriving at the conclusions; (d) an affirmation of the truth of the Expert Report; and (e) the signature of the Party-Appointed Expert and its date and place."

18. Id.

19. V.V. Veeder, "Introduction," in Arbitration and Oral Evidence, supra n. 16, at 7, 8.

20. V.V. Veeder, "The 2001 Goff Lecture," 18(4) Arbitration Int'l," 431-51 (2001), reprinted in "The Lawyer's Duty to Arbitrate in Good Faith," in Arbitration and Oral Evidence, supra n. 1, at 115, 126; see also IBA Rule 5.3 which states, "The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on those issues as to which they had differences of opinion in their Expert Reports, and they shall record in writing any such issues on which they reach agreement."

21. Veeder, supra, n. 19, at 8.

22. Id. at 7.

23. David E. Wagoner, "Managing International Arbitration: A Shared Responsibility of the Parties, the Tribunal, and the Arbitral Institution," 54(2) Disp. Resol. J. 15 (May 1999).

Note: This article was first published in the "Dispute Resolution Journal" back in 2007.

Editorial Note: The use of written witness statements in lieu of direct testimony is not uncommon in New York maritime arbitration. Based upon my personal experiences with this procedure, I found it to be highly effective when complicated technical or chemical testimony is being offered. The possibility to read and digest the testimony enables the arbitrator not only to understand the substance of the offered material, but also to prepare questions on issues which may require clarification or need to be amplified. It ensures that the arbitrators are fully familiar with the substance of the case and the specifics to which the witnesses will testify. It also streamlines the proceedings with respect to cross-examination, as counsel will have the opportunity to prepare the majority of questions prior to hearings.

WITNESS WHO LIES IN ARBITRATION IS IMMUNE FROM BEING SUED FOR DAMAGES

by Manfred W. Arnold

When going through "my" ARBITRATOR file of things to do, research or solicit articles, I came across some notes on an immunity case.

The following commentary appeared in the Summer 2008 edition of De Orchis' "Client Alert."

> *A witness in an arbitration gave testimony under oath. His testimony about one of the parties was false. Could he be sued for damages by that party in a civil suit? Apparently not, according to the Second Circuit Court of Appeals.*
>
> > *The Court ruled that a person testifying in an arbitral hearing performs substantially the same function as a witness in a judicial proceeding, and he is protected with nearly identical procedural safeguards: absolute immunity to subsequent prosecution in a civil suit for damages.*
> >
> > *Immunity is based upon common law and the Court's desire to prevent a witness from editing his testimony by self-censorship for fear of later facing liability for damages.*
> >
> > *The Court of Appeals observed that the "truth seeking" function f arbitration is the same as in a judicial process, and therefore a witness who gives false testimony during an arbitration proceeding deserves the same absolute immunity as witnesses who testify in court. He can be prosecuted for perjury but not sued for damages. Rolon v. Henneman (2d Cir., Feb. 25, 2008.*

On its face, I found the result surprising and decided to look at the decision written by then Judge Sotomayor.

The case involved a claim by a police officer that a fellow officer falsely accused him of misconduct and caused him to suffer humiliation and economic loss. The Federal Court, Southern District of New York, ruled in the

defendant's favor, to which Rolon appealed. Citing from the Court of Appeals decision:

> *The appeal principally concerned whether the chief, as a witness testifying at police disciplinary hearings, was absolutely immune from civil liability for offering allegedly perjurious testimony as those hearings. The chief was absolutely immune from civil suit. Because the nature of the arbitration was materially indistinguishable to that of formal judicial proceedings, and because the chief performed the same function as his judicial witness counterpart, absolute immunity attached to the chief as a testifying witness at the arbitration hearings. The arbitral proceeding encompassed an adequate number of safeguards so as to ensure that its function and the function of the witnesses sufficiently mirrored the judicial process. The employee failed to state a constitutionally cognizable deprivation of liberty or property rights as a result of the officer's alleged false accusations. The employee failed to state a legally sufficient claim against the officer for his alleged remarks that led to the preferment of the disciplinary charges because the employee demonstrated no rules or understandings that proved he had a legitimate claim to over time.*

The Court of Appeals addressed the concept of absolute immunity extended by the Supreme Court to police officers testifying at judicial proceedings on the grounds that this type of immunity existed at common law for citizen witnesses. It reasoned that without such immunity, a witness's apprehension of subsequent damages liability might induce self-censorship, either by making witnesses reluctant to come forward in the first place or by distorting their testimony. Such self-censorship may deprive the finder of fact of candid, objective and undistorted evidence (citations omitted).

I guess the court saw distinctions which the layperson may not be so easily able to distinguish, but what sense can one make from the statement that "… a witness who gives false testimony during an arbitration proceeding deserves the same absolute immunity as witnesses who testify in court." Why should there be protection for someone who gives false testimony? And why should anyone who causes monetary damages because of his false testimony not be liable for damages in kind?

I had a look at *Black's Law Dictionary* and one of the entries under Perjury provided the following:

> *A person is guilty of perjury if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true. Model Penal Code, § 241.1. See also 18 U.S.C.A. §§1621, 1623.*

Since I was reading up on the P for Perjury (sounds like a Sue Grafton title), I figured I might as well see what Black had to say about Penalty.

> *An elastic term with many different shades of meaning; it involves idea of punishment, corporeal or pecuniary, or civil or criminal, although its meaning is generally confined to pecuniary punishment. Allied v. Graves, 261 N.C. 31, 134 S.E. 2d 186, 192.*

and

> *A penalty is a sum of money which the law exacts payment of by way of punishment for doing some act which is prohibited or for not doing some act which is required to be done. Hidden Hollow Ranch v. Collins, 146 Mont. 321, 406 P.2d 365, 368. A statutory liability imposed on wrongdoer in amount which is not limited to damages suffered by party wronged. Missouri-Kansas-Texas R. Co. v. Standard Industries, Inc., 192 Kan. 381, 388 P.2d 632, 634.*

Since I still do not have the answer and I hate to leave things unfinished, I wonder whether one or two of the readers can put a final chapter on this issue (and also give the next editor a head start).

Thank you.

RULE B TO REASON'S RULE? PRE-JUDGMENT SECURITY IN U.S. MARITIME ARBITRATIONS POST *JALDHI*

by Edward A. Keane, Esq.
Partner, Mahoney & Keane

Everyone has his day and some days last longer than others". —Sir Winston Churchill

Preface

In 280 B.C. and the year following, King Pyrrhus of Epirus won major battles at Heraclea and Asculum against the fledgling Roman army during what would become known as the Pyrrhic War. After the latter encounter, Pyrrhus is reported to have dryly observed, "Another such victory and I come back to Epirus alone". That assessment proved prescient; the victories' fruits were ephemeral and Rome prevailed in the war. The King, perhaps droll enough to appreciate the humor, did eke out a lasting victory of sorts, as he has become something of an immortal by bequeathing us "Pyrrhic victory" to describe such empty successes. But, notwithstanding the good King, it is an appellation with which association is universally sought to be avoided. To those involved in commercial arbitrations, that, most commonly, has meant achieving a favorable, but uncollectible, Award.

"Nothing recedes like success". — Walter Winchell

I. Rule B

The recent rise of Rule B attachments aimed at electronic fund transfers (EFTs) is stark evidence of the continuing imperative to skirt Pyrrhus' fate. As most will know, in 2002, the Federal court in New York ruled in *Winter Storm* that,[1] in certain circumstances, electronic funds could be attached in aid of securing a potential judgment in litigation or, more commonly, arbitration. Unfortunately (or otherwise), that new tool for pre-judgment security was recently diagnosed by the Second Circuit Court of Appeals in *The Shipping Corporation of India v. Jaldhi*[2] as carrying a previously undetected malignant cancer (now ruled fatal by the U.S. Supreme Court's denial of Certiorari).[3] The Second Circuit opined that Rule B's burgeoning popularity among those seeking not to "come back to Epirus alone" threatened to overcome the workings of the Court itself. By their reckoning, fully one-third of the recent SDNY Federal court filings were Rule B matters. Indeed, the largely British invasion, lead by solicitors seeking to secure their anticipated wins in London arbitrations, was, the Court cautioned, shaking the very commercial viability of New York and this country's currency.[4] The obituary of EFT attachments was written when the number of parties seeking to obtain security for judgments they hoped to obtain became fatally unmanageable. Thus, like a rowdy rock group with too many fans to be policed, the new weapon of mass appeal was summarily banned from playing any further in the U.S. arenas.[5] But the undeniable appetite of the world of commercial combatants, locked in often long and costly arbitrations abroad, for a tool to obtain pre-judgment security had been made tangible. If you build it, they will come.

Yet, the popularity of Rule B notwithstanding, it was not without an equal number of critics and the flaws in its administration were surely also part of its demise. Many argued forcefully that the abuses of Rule B far outweighed its benefits, and when its death was announced, there were many not joining in the funeral procession, at least not in a somber or sober state. In the view of the revelers, the Rule metastasized, not because EFTs should not be attachable, as much as the policing of the attachment of such assets was abdicated by the Rule itself and its subsequent judicial construction. The bar to attach another's funds, in many cases millions of dollars on the thinnest of allegations, was set too low, with the courts powerless to raise it, even when the need to do so was palpable. The courts, under their construction of the Rule, were prohibited from weighing factors, such as the likelihood of success of the attaching party, the need for security, the overall equities or much beyond the fundamental question of whether a cognizable claim had been properly alleged or pled. The underlying merits of the dispute were expressly out of bounds of any meaningful consideration, provided only a *prima facie* cause of action in admiralty had been asserted. Significantly, the attaching party was not required to "provide evidence showing that it has a claim against defendant to carry its burden under Supplemental Rule E (4) (f)". *Stolthaven Houston, Inc. v. Rachel B, et al.* 2008 AMC 2067, 2071. No evidence concerning the merits had to be established.[6] For those whose ox was gored by the liberality of the use of Rule B to attach EFTs, that was a far more compelling reason to applaud its demise than its unwieldy popularity.

Of course, many a party that prevailed on its claim, but would have been left with an unsatisfied judgment, except for the use of Rule B to snare EFTs on the wing in cyberspace, weighed in on the other side of the equation. But whatever side of the issue, the provocateur is now dead, leaving a rather large hole where Rule B's EFT attachments formerly offered an avenue to avoid a Pyrrhic Award.

"Change is inevitable - except from a vending machine". Robert C. Gallagher

II. Security in U.S. Arbitrations

Whether loving or reviling Rule B EFT attachments, most players engaged in maritime commerce appear to favor some effective device for pre-judgment security,

provided it can be administered in a more discriminating fashion than the binary method (i.e. is the defendant present in the District, yes or no; is a cognizable cause of action pled, yes or no; etc.) in which Rule B has been administered.

The remaining devices for such relief, however, are limited. In litigation, pre-judgment security outside of maritime claims is largely unavailable and what few remedies exist are narrowly circumscribed. In maritime matters, an *in rem* arrest of a vessel or *quasi in-rem* attachment of tangible assets under the Rule B may be achieved, but first the vessel must be found or, in the case of other assets, found in a venue where the defendant is not. Otherwise, a number of problems, some as above discussed, make *in rem* or *quasi-in-rem* remedies, outside of EFTs, less than a fully satisfying solution to the need for a properly chaperoned tool for pre-judgment security.

In foreign arbitrations (popular venues such as London and Singapore), pre-judgment security devices in aid of an award on the merits are largely unknown.

Against that dearth of solutions, the Society of Maritime Arbitrators (SMA) specifically, and more broadly U.S. arbitration, offers what may be the best surviving venue for a party seeking to avoid obtaining an unsatisfiable judgment, while also avoiding becoming the victim of an unreasoned or abusive pre-judgment security demand or attachment of assets by the opposing side.

It is now well established that under U.S. law, arbitrators have inherent authority and broad equitable power to order the posting of security. See, *Compania Chilena de Navegacion Inter Oceanica, S.A. v. Norton Lilly & Co.*, 652 F. Supp. 1512 (S.D.N.Y. 1987); See also, *Sperry Int'l Trade v. Government of Israel*, 689 F.2d 301, 306 (2d Cir. 1982) ("[Arbitrators] have power to fashion relief that a court might not properly grant."); *Konkar Maritime Enter., S.A. v. Compagnie Belge d'Affretement*, 668 F. Supp. 267 (S.D.N.Y. 1987); *Mustafa Nevzat*, SMA 3784 (2003) ("[I]t is clear that the Panel has the broad discretionary power and authority to require Charterer to post the security requested by Owner.") (citing *Marianic K*, SMA 3168 (1995)). It is equally apparent that arbitrators will exercise that power where they are convinced of the legitimacy of doing so on the specific facts offered in support of an application for security. However, the analysis used in deciding the question of whether security is warranted is patently at odds with the limited inquiry engaged in by the Federal courts in the context of reviewing a Rule B attachment. Yet, while the standard of review in order to achieve an order of security in arbitrations is far more rigorous and searching, at the same time the need to first find and attach assets before pre-judgment security can be obtained is not found in U.S. arbitrations. Those twin distinctions provide cogency to the assessment that U.S. arbitrations provide a better solution to the demonstrated need for pre-judgment security in aid of arbitrations than the blunt tool that is Rule B.

The distinction between the two methods of satisfying the need for a pre-judgment security remedy is made apparent by contrasting a few exemplars of the treatment provided pre-award security requests by the SMA with the limited review the courts provide under Rule B, as discussed above. However, a concise statement of the factors looked to by most arbitrators can be gleaned from a recent presentation by David Martowski of the SMA, who outlined issues to be considered as follows:

> *Factors considered include the merits of the claim — Is it likely to succeed? Is it undisputed [freight, hire, demurrage]? Has the respondent improperly withheld or deducted funds? Is the Respondent not doing business in the U.S. and may avoid paying an adverse award? Does Respondent have a poor credit history?*

That list is in sharp contrast to the issues which are open to a judge to consider in issuing a Rule B order of attachment and underscores the qualitative distinction between the two forums discussed. As indicated, a brief review of SMA decisions concerning the issuance or denial of an order of security demonstrates the distinction is employed, not just spoken. A relatively early award to address the issue denied security stating:

> *… ordering security for claims is an act which arbitrators should approach cautiously. In our view, the mere request for security by one party should not be granted without careful consideration of the particular circumstances, including other remedies available to the petitioner. In this particular case, the panel declined to grant owners' request. Instead, the panel opted to complete and issue its award in an expeditious fashion, which we consider to be more in line with the scope and purpose of arbitration.*
>
> *The Lacerta, SMA Award 3515 (1999)*

That treatment is commonplace. See, "Arbitrators' Powers to Order Security," Manfred Arnold, *The Maritime Advocate*, August 2000, Issue 12. But where there is a demonstrated need, relief is not withheld. In the *M/T Liberty Bell Venture*, SMA 3147 (1992), after hearing argument and

reviewing written submissions, the Panel ordered $450,000 to be placed into an escrow account to secure the Owner's claim. Similarly, more recently, in a decision referred to favorably by several subsequent Panels, it was explained:

> *The Panel rejects the notion that a party must show a high likelihood of success as a prerequisite to obtaining an award for pre-award security from an arbitration panel. It is only one of many considerations that may be relevant in any given case, but it could carry great weight, depending upon the circumstances. For example, if a claim is viewed by a panel as patently frivolous or very weak at any stage of the proceeding, it would be clear that security should not be required at that stage. On the other hand, and obviously, if the nature of the claims, nature of the defenses raised, and the content of the record is such that the panel is satisfied that it can make a reasonable evaluation that there is a high likelihood of success on the part of the claimant requesting security, this could be strong incentive for a panel awarding security for the claimant at that stage. Similarly, the Panel rejects any notion that a panel should or can only entertain a motion for security after it is in a position to determine and/or has determined whether there is a high likelihood of success on the part of the claimant…. the Panel is unanimously of the view that the Charterer should be required to provide the security requested by Owner, based upon the following equitable considerations.*
>
> *The instant arbitration proceeding was commenced approximately two years ago. The parties have already incurred very substantial costs in resolving their dispute, and will no doubt incur substantial additional costs before the matter is decided and concluded. If the matter is decided in favor of Owner, and Owner does not have security for its claim, based upon the collective commercial and legal experience of the Panel, there is a high likelihood that the above collection fears of Owner may become reality. There will then be very substantial additional expenses incurred in prosecuting or defending collection efforts, and very long further delays before the dispute comes to rest. Moreover, there will be a very real possibility of Owner recovering nothing, and the entire arbitration process effectively amounting to an academic exercise at best, and a commercially futile farce and financial disaster at worst, rather than the efficient, economic, fast and fair way to reach a correct resolution of a commercial dispute that commercial arbitration is intended to provide. It makes sense and appears fair and equitable to this Panel, that this possibility should be avoided….*
>
> *M/V Mustafa Nevzat, SMA 3784 (2003)*

Moreover, where one party has provided security, for example, by issuing a P & I Club letter of guarantee to avoid vessel arrest, the SMA panels have not hesitated to direct the other to post countersecurity without regard to its purported need. See, e.g., *Agrowest, S.A. v. Maersk Sealand*, SMA. 4633 (2009) ("What is sauce for the goose is sauce for the gander … The granting of security has nothing to do with who will be the ultimate winner or loser in this arbitration, but rather it does represent fairness and equity, and it ensures that until the final decision is made and an award has been issued, both parties to this arbitration enjoy an even playing field."); *Nicaragua Line Co. v. Ariane Shipping Corp.,* SMA 3733 (2002); *Meezan Shipping and Trading, Inc. v. Rafaeil Shipping, Ltd.*, SMA 3490 (1998); *E.N.E. Ionion of Athens v. Marine Trading Ltd.*, SMA 3415 (1998). It may be observed that the heightened possibility of counter-security being ordered is a deterrent to weak claims for security being presented in the first instance.

Thus, the present employment of the extraordinary power granted arbitrators in the U.S. has a two-fold advantage over Rule B. It has been exercised with more concern to the overall equities and nuances of a matter than the courts could employ in exercising their oversight of Rule B. Yet, arbitrators are not hampered, were they to find a cognizable need for such security, by the somewhat peculiar constraints of Rule B. Those constraints did little to protect against its abuses, but often limited its use, however much it might have been justified in a particular setting. In U.S arbitration, if the need is established, the arbitrator(s) can order the appropriate relief. Furthermore, they can do so without the odd limits that hamper the otherwise free-wheeling Rule B. Those Rule B curtailments, crafted out of jurisdictional concerns inapposite in the context of an arbitration or the counter-productive need to first attach assets of the very party that presents a legitimate risk of being, or making itself judgment proof, should an Award issue against it, simply do not infringe on the arbitral power to order security.

"Fewer things are harder to put up with than the annoyance of a good example." Mark Twain

III. Conclusion

The demise of Rule B attachments of EFTs in the U.S. Federal courts was likely a necessary step to achieve more evolved legal procedures and substantive laws to govern the obtaining of pre-judgment security in maritime matters. Perhaps, Mark Twain aside, the failure of Rule B will prove the rise of reason in pre-judgment security matters in Federal court practice, if the courts and legislators take their next compass reading from U.S. maritime arbitrations. However, for those who submit their disputes to U.S. arbitration it would appear there is no need to wait; the evolutionary step from Rule B to "Reason's Rule" has already been taken.

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1. Winter Storm v. TPI, 310 F. 3d. 263,278 (Second Cir. 2002)

2. The Shipping Corporation of India v. Jaldhi Overseas Pte Ltd. 585 F 3d. 58 (2d Cir. 2009).

3. Id, Cert. denied, March 22, 2010.

4. In an irony of sorts, Rule B EFT attachments were largely unavailable to parties who had agreed to arbitrate in New York. Thus, whatever one's views on the device as applied to EFTs, it was one that penalized those who wanted to use it in the very venue that administered it for the rest of the world.

5. Our decision in Winter Storm produced a substantial body of critical commentary. Indeed, within four years of our decision, we ourselves had begun to question the correctness of Winter Storm, see Aqua Stoli, 2006 AMC at 1885, 460 F.3d at 445 n.6 ("The correctness of our decision in Winter Storm seems open to question...."), as have, more recently, some judges of the United States District Court for the Southern District of New York, see e.g., Hannah Bros. v. OSK Mktg. & Commc'ns, Inc., 609 F. Supp. 2d. 343, 352 n.3 (S.D.N.Y. 2009) ("The discussion above also underscores a point that has become conventional wisdom in this district — that Winter Storm and Aqua Stoli may merit reconsideration...." (emphasis added)). Various commentators and courts have suggested that Winter Storm directly led to strains on federal courts and international banks operating within our Circuit. See, e.g., Permanent Editorial Bd. for the Uniform Commercial Code, PEB Commentary No. 16: §4A-502(d) and 4A-503, at 5 n.4 July 1, 2009) ("PEB Commentary") ("[T]he Winter Storm approach is proving to be practically unworkable."). And some have even suggested that Winter Storm has threatened the usefulness of the dollar in international transactions. See generally id. ("[T]his explosion of writs creates an additional threat to the U.S. dollar as the world's primary reserve currency and New York's standing as a center of international banking and finance."); see also Lawrence W. Newman & David Zaslowsky, Is There Finally a Backlash Against Rule B Attachments?, 241 N.Y. L.J. 3 (2009) ("[W]hen lawyers are advising their clients that the best way to avoid Rule B attachments is to conduct maritime and perhaps other transactions in a currency other than U.S. dollars, there are emerging risks of a significant reduction in the use of the dollar as the dominant currency of international commerce.").

The unforeseen consequences of Winter Storm have been significant. According to amicus curiae The Clearing House Association L.L.C. — whose members are ABN AMRO Bank N.V.; Bank of America, National Association; The Bank of New York Mellon; Citibank, National Association; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; UBS AG; U.S. Bank, National Association; and Wells Fargo Bank, National Association — from October 1, 2008 to January 31, 2009 alone "maritime plaintiffs filed 962 lawsuits seeking to attach a total of $1.35 billion. These lawsuits constituted 33% of all lawsuits filed in the Southern District, and the resulting maritime writs only add to the burden of 800 to 900writs already served daily on the District's banks." Amicus Br. 3-4.Judge Scheindlin recently outlined the effect of Winter Storm on international banks located in New York:

This Court was recently informed that, currently, leading New York banks receive numerous new attachment orders and over 700 supplemental services of existing orders each day. This is confirmed by the striking surge in maritime attachment requests in this district, which now comprise approximately one third of all cases filed in the Southern District of New York. As a consequence, New York banks have hired additional staff, and suffer considerable expenses, to process the attachments. The sheer volume ... leads to many false "hits" of funds subject to attachment, which has allegedly introduced significant uncertainty into the international funds transfer process. Cala Rosa Marine Co. Ltd. v. Sucres et Deneres Group, 2009 AMC 410, 417-19, 613 F. Supp. 2d 426, 431-32 n.7 (S.D.N.Y. 2009) (citation omitted).

Our holding in Winter Storm not only introduced "uncertainty into the international funds transfer process," id., but also undermined the efficiency of New York's international funds transfer business. As the Federal Reserve Bank of New York noted in its amicus curiae brief in support of the motion for rehearing en banc by the defendant in Winter Storm, "efficiency is fostered by protecting the intermediary banks; justice is fostered by expressly telling litigants where the process should be served.... [Winter Storm] disrupt[ed] this balance and threaten[ed] the efficiency of funds transfer systems, perhaps including Fedwire." Amicus Br. of Federal Reserve Bank of New York 9, Winter Storm, 2002 AMC 2705, 310 F.3d 263 (No. 02-7078). Undermining the efficiency and certainty of fund transfers in New York could, if left uncorrected, discourage dollar-denominated transactions and damage New York's standing as an international financial center. See, e.g., PEB Commentary 6 n.4 ("Winter Storm and its progeny have had a far greater, and damaging, potential impact on U.S. and foreign banks located in New York than might have been anticipated."); Newman & Zaslowsky, 241 N.Y. L.J. at 3.

6. A district court should issue the special remedy of a maritime attachment where a plaintiff, in addition to meeting the filing and service requirements of Supplemental Rules B and E to the Federal Rules of Civil Procedure, can show the following:

1) it has a valid prima facie admiralty claim against the defendant;
2) the defendant cannot be found within the district;
3) the defendant's property may be found within the district; and
4) there is no statutory or maritime law bar to the attachment. Aqua Stoli Shipping Ltd. v. Gardner Smith Ptv Ltd., 2006 AMC 1872, 1873, 460 F.3d 434, 435 (2d Cir. 2006).

To avoid abuse of this maritime remedy, Supplemental Rule E(4)(f) provides any person claiming an interest in the attached property with "a prompt hearing at which the plaintiff shall be required to show why ... attachment should not be vacated or other relief granted consistent with these rules." Fed. R. Civ. P. Supp. R. E (4) (f). At the conclusion of a Rule E (4) (f) hearing, "a district court must vacate an attachment if the plaintiff fails to sustain its burden of showing that he has satisfied the requirements of Rules B and E." Aqua Stoli, 2006 AMC at 1885, 460 F.3d at 445.

Importantly, "Rule E (4) (f) clearly places the burden on the plaintiff to show that an attachment was properly ordered and complied with in the requirements of Rules B and E." 2006 AMC at 1885, 460 F.3d at 445 n.5. In determining whether or not the plaintiff has sustained its burden, the majority of courts interpreting Aqua Stoli in this district apply a prima facie pleading standard. Ronda Ship Mgmt. Inc. v. Doha Asian Games Organising Comm., 511 F. Supp.2d 399, 403 (S.D.N.Y. 2007) ("The majority of courts in this district have understood Aqua Stoli to require the application of the prima facie standard when considering the adequacy of a claim in a maritime vacatur motion."); OGI Oceangate Trans. Co. v. RP Logistics Pvt. Ltd., No. 06 Civ. 9441, 2007 WL 1834711, at *4 (S.D.N.Y. June 26, 2007). A plaintiff is "not required to provide evidence showing that it has a claim against defendant to carry its burden under Supplemental Rule E (4) (f)," and its complaint may suffice. Tide Line, Inc. v. Eastrade Commodities, Inc., 2007 AMC 252, 258-59, 2006 U.S. Dist. LEXIS 95870, at *16-17 (S.D.N.Y. 2006). But a plaintiff must state a "valid prima facie admiralty claim" to support a Rule B attachment. Sonito Shipping Co. v. Sun United Maritime Ltd., 2007 AMC 1018, 1022, 478 F. Supp.2d 532, 536 (S.D.N.Y. 2007). Id. At 2071

THE AUTHORITY OF THE ARBITRATORS TO INTERPRET THE RULES UNDER WHICH THE ARBITRATION IS CONDUCTED

by Alfred J. Kuffler, Esq. and Lathrop B. Nelson, III, Esq.
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In its January 14, 2010 decision, *T.Co Metals LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329 (2d Cir. 2010), a three-judge panel of the Second Circuit ruled unanimously that the sole arbitrator in the underlying arbitration was acting within the scope of his authority under the American Arbitration Association's International Centre for Dispute Resolution ("ICDR") rules when he corrected certain "clerical" errors in calculation of damages due Dempsey Pipe & Supply, Inc. ("Dempsey"). In the briefing before the Court of Appeals, neither party found any case authority directly addressing the arbitrator's authority to interpret the ICDR rules. Thus, the case now provides guidance to parties and arbitrators in this area.

In addition, the ruling may be viewed as a further step in establishing the finality of an arbitrator's decision. It may also have implications in circumstances where the parties have not accepted the SMA rules and are proceeding without any written rules to govern the conduct of the arbitration.

Decision

The arbitration began as a claim by Dempsey against T.Co. Metals LLC ("T.Co") for failure to supply pipe conforming to contract specifications. The contracts called for disputes to be resolved under the International Dispute Resolution Procedures of the ICDR.

On April 20, 2007, the arbitrator issued the original decision and award. However, ICDR Rule 30(1) gives the parties thirty days after the issuance of an award to petition the arbitrator to "correct any clerical, typographical, or computation errors." T.Co presented a petition for correction of "clerical" or "computational" errors within the specified time. Ultimately, the arbitrator, over Dempsey's objection, accepted certain of T.Co's contentions as errors falling within the ambit of the rule and reduced the award to Dempsey by about $80,000.

In the process of correcting his errors, the arbitrator explained his views concerning his authority to make the adjustment, stating:

While the consequences of these four corrections is not a mere computational issue and necessarily involves the same appreciation of evidence before the arbitrator on the issue of value as was conducted pre-award, the arbitrator believes that he has the power under Article 30 of the ICDR International Rules to reach conclusions derived from correction of clerical errors. Article 30 of the ICDR Rules does not say that errors subject to correction must be set out in an awards conclusion. It is, therefore, to be understood that an arbitrator is empowered to change conclusions based upon clerical errors in the body of an award even where such correction process entails an exercise of judgment beyond rate computation.

The arbitrator then entered an amended decision and award from which both parties filed motions to modify in the district court. T.Co claimed manifest disregard of the law with respect to the overall calculation of damages.[1] Dempsey sought reinstatement of the original award. The district court found that having rendered the original award, the arbitrator was *functus officio*, had exceeded his powers in violation of Section 10 (a)(4) of the Federal Arbitration Act, and, therefore, was powerless to correct his mistakes even where he recognized that he erred. The appeal followed.

Dempsey's fundamental grounds for opposing the appeal rested on the *functus officio* doctrine. The Circuit made short work of this defense, holding that the parties could, as they did here, provide the means for the arbitrator to reconsider his handiwork.

The court then continued the analysis, examining "whether the arbitrator acted within his authority" under ICDR Rule 30(1). Deciding first that the question was whether the parties intended the court or the arbitrator to decide the question, the court held that because both parties had submitted requests to the arbitrator for reconsideration, the parties clearly intended that the arbitrator interpret Rule 30(1). Moreover, the court noted that ICDR Rule 36 provides that "the tribunal shall interpret [the] … Rules." As an aside, in terms of "intent," this provision alone should have been sufficient to carry the day.

The court then concluded that deference is due the arbitrator's interpretation of the rule. That deference is broad indeed: the court held that the only question was whether the arbitrator had the "power" to make the determination; if so, the court would not look to see if he had correctly interpreted the rule.

Significance of the Decision

This appellate decision represents the first judicial exploration concerning the parameters of the arbitrator's authority to interpret the rules under which he is functioning. The holding that the court will only examine an arbitrator's "power" to amend an award adds considerable support to the view that arbitration, as the means the parties have voluntary chosen for resolution of their dispute, should be final and binding, and subject only to a very limited judicial review.

But, beyond the foregoing, the decision also gives guidance to both arbitrators and counsel involved in the arbitral process.

For the arbitrator who must resolve a dispute as to the interpretation of rules, the decision suggests strongly that the arbitrator should include an explicit explanation as to the basis for his actions. In fact, such a statement may actually be regarded as an interpretation of the underlying contractual provisions that must necessarily be interpreted by the arbitrator in preparing a reasoned award.

For practitioners, the decision is a clear cautionary note that the scope of judicial review covering procedural issues will be quite limited indeed.

However, with respect to the SMA rules, inclusion of those rules in the arbitration agreement depends on the agreement of the parties. A further concern arises in the absence of explicit rules governing the proceeding. The powers of the arbitrator are those inherent in the law, an uncertain regime at best and one where the outer limits of the arbitrator's powers are not readily ascertainable by the arbitrator or the parties. Although the SMA has a long history of conducting proceedings without the benefit of written rules, if a dispute arises concerning procedural aspects of the arbitration, an arbitrator's rulings in such circumstances are not necessarily protected by the interpretative shield of the rules which the Second Circuit afforded the arbitrator in *T.Co Metals*. The parties and the arbitrator in such a case may find that the arbitrator's conduct reviewed directly under the Federal Arbitration Act, with the court having, perhaps, much broader scope to second-guess the arbitrator.[2]

The SMA rules contain the very provisions the Circuit Court analyzed in the *T.Co Metals* decision. The SMA's preamble confers on arbitrators the authority to interpret the rules and SMA Rule 30 gives any arbitration panel "jurisdiction to modify the Award for sole purpose of correcting obvious clerical and/or arithmetical errors." Thus, if the SMA rules apply, there should be no question about the arbitrators' authority to correct an award (at least, as

in *T.Co Metals*, the calculation of the damages portion of an award).

"Functus officio" can be a harsh doctrine indeed if its application means, as Dempsey argued in *T.Co Metals*, that the arbitrator, in striving to produce a just result, discovers he has made an error, but has no means of correcting his mistake. Thus, safety valves in the rules, such as that upheld in *T.Co Metals*, have much to recommend them, and contribute to the attractiveness of arbitration as an alternative means of dispute resolution.

The decision certainly gives all concerned reasons to consider implications deriving from a decision not to proceed under SMA rules, or for that matter, in the absence of any written rules. Likewise, the SMA may wish to take up the question whether appointment of an SMA member automatically carries with it use of the SMA rules.

Note: Full disclosure — the authors were counsel to T.Co Metals.

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1. The manifest disregard argument had to do with the calculation of Dempsey's damages under New York's version of the Uniform Commercial Code. The Circuit restated its three-prong test for manifest disregard, that is, the law must be clear; it must be brought to the arbitrator's attention, and the arbitrator must ignore it. T.Co found itself impaled on the first prong. In this regard, the decision is unremarkable.

2. Interestingly, the court in *T.Co Metals* reiterated that an arbitrator has the inherent power to reconsider at least errors apparent on the face of the award, citing *Hyle v. Doctors Associates Inc.*, 198 F.3d 368 (2d Cir. 1999).

HAVE DIRECT ACTIONS MET THEIR WATERLOO?

by Sandra R.M. Gluck, Esq.
President, Gard (North America) Inc.

On March 18, 2010, in *Todd v. Steamship Mutual Underwriting Association (Bermuda) Ltd.*, the Fifth Circuit Court of Appeals overturned more than two decades of precedent by ruling that a marine insurer may invoke a policy arbitration provision in a suit brought against it under Louisiana's "direct action" statute. The Court based its ruling on the U.S. Supreme Court's decision in *Arthur Anderson LLP v. Carlisle*, 129 S. Ct. (2009), which held that a non-party may enforce an arbitration agreement if State contract law so permits (using principles such as third-party beneficiary, incorporation by reference, waiver and estoppel, and piercing the corporate veil/alter ego).

Todd involved an injured seaman who recovered a judgment against his employer for injuries he sustained aboard the M/V AMERICAN QUEEN. The employer, Delta Queen Steamboat Company, had filed for bankruptcy protection and the judgment was not satisfied. As a result, the seaman sued the vessel owner's insurer, Steamship Mutual, in State court under Louisiana's "direct action" statute. That statute allows an injured individual to sue an insurer whose insured is insolvent "… regardless of any provision in the [insurance] policy forbidding an immediate direct action."

Steamship Mutual removed the case to federal district court, and sought an order to compel the seaman to arbitrate his claim under the arbitration clause of the policy. The policy was governed by English law and provided for London arbitration of differences or disputes "between a Member and the Club" concerning "the insurance afforded by the Club under these Rules, or any amount due from the Club to the Member… ." Relying on well-established precedent, the district court denied Steamship Mutual's motion without even writing an opinion because, according to the court, the law was so clear that to write an opinion would be "wasting trees."

The U.S. Supreme Court's decision in *Arthur Anderson LLP* v. *Carlisle* was handed down after the district court made its decision and before the appeal was decided. The Court of Appeals held that *Arthur Anderson* invalidated the precedents upon which the district court had relied, and that Steamship Mutual's motion to compel arbitration could not be denied on the basis that the injured seaman was not a party to the insurance policy (and its arbitration provision).

Importantly, the Court of Appeals did **not** rule that the seaman in *Todd* was required to arbitrate, only that his status as a non-signatory to the insurance policy did not preclude an argument that he **could** be required to arbitrate. The ultimate question of whether the injured seaman **was** required to arbitrate was sent back to the district court with "suggestions" from the Court of Appeals as to what issues the district court should consider on remand. These issues include: (1) what law should be applied to determine whether the injured seaman is bound by the policy's arbitration provision; (2) whether the causes of action asserted in the "direct action" case fall within the scope of the arbitration clause; (3) whether requiring a "direct action" plaintiff to arbitrate under the policy's arbitration provision would conflict with the "regardless of any provision … forbidding an immediate direct action" language in Louisiana's "direct action" statute and (4) if so, whether

such a conflict should be resolved in favor of compelling arbitration because Federal law (the Federal Arbitration Act and/or the New York Convention) pre-empts State law on this issue. Given the complexity of these issues, the only outcome that can be predicted with certainty is that the district court will now be required to waste a lot of trees!

SEIZED: A SEA CAPTAIN'S ADVENTURES BATTLING SCOUNDRELS AND PIRATES WHILE RECOVERING STOLEN SHIPS IN THE WORLD'S MOST TROUBLED WATERS

by Max Hardberger

This is the type of book that many of us who have spent all their lives in shipping think about. Just remember when telling sea stories someone would ask, "Why don't you write a book about it?" We would think about our experiences, talk about them and then leave it for another day. We don't know which of Max Hardberger's past lives made him do it — the airplane pilot, the lawyer, the high school teacher, the adventurer, the wheeler/dealer or the ship's master. Granted, our stories could be colorful and entertaining, but would not reach the daredevil situations experienced and described by this author. He tackled the job with an abundance of entertaining material and enthusiasm. The uniqueness of his takes is no doubt the fact that he is one of the very few who specialized in the "repo" business. Quoting from the book's cover promo,

> *In "Seized," he takes us on a real-life journey into the mysterious world of freighters and shipping, where fortunes are made and lost by the whims of the waves. Desperate owners hire Hardberger to "extract" — or steal back — ships that have been illegitimately seized by putting together a mission-impossible team to sail them into international waters under cover of darkness. It's a high-stakes assignment — if Max or his crew is caught, the risk is imprisonment or death.*
>
> *Max's tales take readers behind the scenes of the multibillion-dollar maritime industry, as he recounts his efforts to retrieve freights and other vessels from New Orleans to the Caribbean; from East Germany to Vladivostok, Russia; and from Greece to Guatemala. He resorts to using everything from disco dancing to prostitutes to distract the shipyard guards, from bribes to voodoo doctors to divert attention and buy the time he needs to sail a ship out of a foreign port without clearance. "Seized" is narrative adventure nonfiction at its best.*

The good thing for most of the readers of the book will be that they will not see themselves mentioned, as Max only wrote about scoundrels, pirates and other unsavory characters.

If Captain Hardberger's schedule permits, we hope to see him at one of our lunches in the fall. I enticed him with an attentive and diversified audience, food and drink, willing buyers for an autographed copy of his book and, of course, the SMA logo watch.

In the words of the author, "this work is essentially true to my life, and to the stories of the many men and women who, for better or worse, came and went during those turbulent days." Watch out, Clive Cussler!

Seized is published by Broadway Books, a Division of Random House, Inc., New York, 294 pp ISBN 978 0767931380, $25 Hardcover. For more information, visit www.maxhardberger.com.

SHIPPING 2010

by Donald B. Frost
Editor, Connecticut Maritime Arbitration Publication

Over 2300 shipping professionals from more than a score of nations representing every community that makes up our complex industry attended the Connecticut Maritime Association, Inc. (CMA) annual Conference and Trade Show at the Hilton Stamford Connecticut Hotel, March 22-24. Those attending cumulatively own, manage or operate more than 5,000 ships. The event is similar to those held in Greece and Norway, in that its structure and organization encourages interaction among all attendees regardless of managerial levels or professional disciplines.

The conference started Monday afternoon with a video-recorded special message from Efthimios Mitropoulos, Secretary General of the UN's International Maritime Organization. After which, many global maritime leaders spoke of big-picture issues that are challenging the shipping industry.

The head of Germanischer Lloyd and Chairman of the International Association of Classification Societies, reviewed technical hurdles for new ships in light of envi-

ronmental demands. Captain Bob Johnson, Senior Vice President at OSG and Vice Chair of INTERTANKO, made an impassioned appeal to the industry to get involved in the international politics that threaten our industry. Nicolas Pappadakis, Chairman of INTERCARGO addressed crew issues. Spryros Polemis, Chairman of the International Chamber of Shipping, spoke about the industry's relationships with governments, regulators and politicians. Roberto Giorgio, head of V-Ships and Chairman of INTERMANAGER, discussed ship safety in a down market.

Tuesday started with a session on new "green recycling" (scrapping) regulations and technologies, followed by three different sessions on markets — a global macro view of the materials and commodities driving demand for shipping, the influence of China and the other BRIC nations, and the over-supply of ships. These sessions were the inspiration for the Conference's sub-title, "FOG." The speakers were economists, commodities analysts, ship owners/operators, finance experts or ship/cargo brokers.

Concurrent sessions gave attendees the option to attend those presentations for relevant information or to satisfy their interests. Again, in the concurrent concept and the third market discussions, was a session on P&I issues, vessel air emissions, Coast Guard views on compliance, MARPOL violations and views from the Euro Zone. At the end of the day, more than 120 students from maritime schools attended a Job Fair organized by the CMA.

Wednesday's early general session featured the Commandant [only one commandant in the Coast Guard] from the US Coast Guard and a live transatlantic video hookup with the Maritime Environmental Protection Committee (MEPC) of the IMO in London. The audience was briefed on the latest environmental challenges and obligations of ship owners post the Copenhagen Global Climate Change Conference in December 2009. The balance of the day was mostly devoted to legal issues, including the SMA's session, "Know Before Fixing," which featured ten senior SMA arbitrators and proved to be a big success. It was great to see that despite the competition of the concurrent sessions, the "SMA show" drew and maintained a full house. In fact, because of the degree of interaction by presenters and audience, a few attendees were deprived of the extra cup of coffee and the early lunch break.

The Gala Dinner honoring the 2010 Commodore Philippe-Louis Dreyfus of Louis Dreyfus Armateurs Group drew more than 700 people. Richard duMoulin (Intrepid Shipping) hosted a very entertaining roast. Just seeing Morten Arntzen (OSG), Marc Saverys (BOCIMAR), Roberto Giorgio and Nicky Pappadakis dancing on the dais was worth the price of admission.

LMAA 50TH ANNIVERSARY

On March 18, the LMAA celebrated its 50th anniversary and some of us, from the New York community, decided to join their festivities. David Martowski and I traveled to London; we knew we would see Ray Burke and Bette and Michael Marks Cohen. There was a chance that Bengt Nergaard would be there, and indeed he was. At the dinner, I saw Evanthia Coffee and Claudia Botero-Gotz and, according to the guest list, Martin Casey was there as well.

The event started on the 17th with a reception at the Mansion House, followed by a well-attended conference on the 18th at Guildhall addressing issues of concern for the well-being and future of arbitration as observed by the services providers and the users of the system. The paper by Catherine Bacon of Cargill Inc. (as a user of the system) was an "I dare you" to the LMAA, but, at the same time, could well serve as a wake-up call for every other organization involved in the sponsorship and practice of maritime arbitration because of its poignant observations.

The afternoon session focused on "Current Legal Issues ("Arbitrators' Powers to Order Interim Measures," "Significant Developments in Shipbuilding Disputes within London Arbitration" and Security for and Enforcement of Arbitration Awards) and a panel discussion dealing with "The Way Forward." Irrespective of one's own views, the conference provided challenging topics and discussions and a sufficient incentive to those who missed the sessions to reach out and obtain copies of the papers presented to stay in touch with what is happening in London.

The festivities culminated with the gala dinner at Guildhall attended by more than 650 celebrants.

Let me conclude this brief report on this milestone event with a tribute to an old friend by quoting LMAA president John Tsatsas:

> *I wish to take the opportunity to acknowledge and record the tremendous contribution Bruce Harris has made to the success of this occasion. As Chairman of the organizing committee he has worked tirelessly for the past 2 years to put together and achieve what is by all accounts a memorable and multi-faceted celebration that does the LMAA proud. On behalf of all our members and everyone who has attended our 50th Birthday, thank you.*

Well done … and here's to the next 50.

MARITIME ARBITRATION IN NEW YORK

by Klaus C.J. Mordhorst

SMA Education Chair

This sixth consecutive annual SMA Educational Seminar took place at the charming Seaport Westin Hotel in downtown Manhattan on February 25 and 26, 2010 with a record attendance.

Despite what may have been the worst blizzard conditions in many years, the 13 participants showed up on time, some of whom even became snow-bound and had to stay over in the city on Thursday night.

The instructor, Prof. Weiss, ran his usual tight schedule, covering all the aspects of Maritime Arbitration in New York in accordance with SMA Rules. His relaxed presentation had everybody's full attention and provided for a stimulating and interactive participation, especially, as in this case, when the participants came from such diverse maritime backgrounds. The numerous post-seminar compliments speak for themselves and should encourage us to continue this well-received annual event.

This year the participants included claims manager, P&I Club representatives, law professors, law school graduates, key management professionals of both tanker and dry-cargo companies, chartering and agency companies, some of them traveling from as far away as Equador, Costa Rica, Italy, Venezuela as well as Florida and the tri-state area.

Thanks to the faculty and the people who made it all happen. A special thanks to all those who attended and made it such an educational, enjoyable event and who became friends during those two days in the deep snows of Manhattan.

THE SMA'S 2009-2010 LUNCHEON PROGRAM

by Thomas F. Fox

Luncheon Chairman

A major part of the SMA's mission is to promote maritime education. Along with periodic seminars and workshops, the monthly luncheon program is a leading vehicle in achieving that goal.

While the Annual Meeting in May and the September luncheon are for members only, the open luncheon season extends monthly from October through April. Luncheons usually take place on Wednesdays at a convenient restaurant venue in the Wall Street area of Lower Manhattan, although the location and format may change occasionally. Approximately 40 to 50 attendees turn out each month.

Luncheon speakers are drawn from the maritime community at large and include maritime lawyers, financiers, shipowners and operators, commodity traders, ship brokers, salvage and oil spill response experts, P&I clubs, hull and cargo underwriters, classification societies, flag state registries as well as terminal operators and harbor pilots. Occasionally, local representatives of the Coast Guard and other federal agencies appear as speakers. From time to time, SMA members make presentations on relevant issues.

The 2009-2010 season opened on October 21, 2009 with *"Arming Merchant Ships and Crews and the Piracy Menace"*, a joint presentation by Douglas R. Burnett, Esq., Partner at Squire Sanders & Dempsey, and Lizabeth L. Burrell, Esq., Counsel at Curtis Mallet-Prevost, Colt and Mosle and Past President of the Maritime Law Association. Doug Burnett generally took the position advanced by the U.S. government and others that merchant ships and crews should have the option of arming. Liz Burrell generally opposed that notion and advanced the position of Intertanko and others that merchant ships should not be armed. The opposing positions prompted much reaction from the audience, particularly those who had been seafarers.

November 11, 2009 saw another joint presentation by Richard E. Fredricks, Director of the American Salvage Association, and Captain James T. Shirley, Esq., Principal of JTS Marine LLC and former Partner at Holland & Knight. *"An Update on Salvage and Marine Firefighting in the United States"* provided a two-prong approach to those issues. Dick Fredricks dealt with the background of and an update on the newly issued USCG salvage and marine firefighting requirements. Jim Shirley addressed the USCG's contract and funding agreement requirements with particular focus on the London Open Form as well as on the SMA's U.S. Open Form contract (MARSALV).

In a change of pace, the December 9, 2009 luncheon took place without a speaker and was an opportunity for pre-holiday fellowship. Based on the positive reaction of the attendees, that format may become an annual December event.

January 13, 2010 featured Dagmar Schmidt Etkin, PhD, Principal of Environmental Research Consulting. Dr.

Etkin presented *"Environmental Salvage: State-of-the-Art Tools for Measuring Benefits"*. Her talk dealt with the ways that the costs and benefits of environmental salvage operations can be quantified, with potential implications for maritime arbitration. An interesting area of her discussion concerned salvage operations to recover oil seeping from long-sunken vessels.

In a twist of meteorological irony, *"The Wake of WINTER STORM"*, scheduled for February 10, 2010, was canceled due to a major immobilizing snowstorm. The presentation was to have been made jointly by London Solicitor Jonathan Webb, Esq., Partner at Holman Fenwick & Willan, and Bruce E. Clark, Esq., Partner at Sullivan & Cromwell. The WINTER STORM decision by the Second Circuit effectively ended Rule B — authorized attachments of electronic fund transfers in New York. As that decision will no doubt have enduring consequences, an updated presentation may be deferred to the 2010-2011 season, subject to the speakers' availabilities.

The March 10, 2010 luncheon had James M. Textor, Esq., Partner at Cichanowicz, Callan, Keane, Vengrow & Textor presenting *"The EOS Award and the Affirming Third Circuit Decision"* (SMA #4002), which concerned a tanker that had loaded heavy fuel oil from open oil storage pits at Maracaibo, Venezuela for discharge in New York harbor and was later found to contain an excessive amount of fresh water in the cargo tanks. Jim successfully argued for upholding the award before the Third Circuit. The award was an interesting exercise in maritime forensics by sole arbitrator Jack Berg.

The April 14, 2010 luncheon featured Dato' Jude Benny, Esq., Managing Partner of Joseph Tan Jude Benny LLP, Singapore Advocates and Solicitors. Dato' Benny presented *"Maritime Arbitrations: The New Paradigm"*. The talk was well received by the New York arbitration community, albeit, with somewhat raised eyebrows among London attendees.

The SMA thanks all of the speakers and attendees who helped to make the 2009 — 2010 luncheon season successful. Although dates for 2010-2011 have not yet been promulgated, please visit the Society's website www.smany.org for information concerning those dates and for other interesting information about the SMA.

We are always on the lookout for luncheon speakers with interesting topics. Should you be interested in becoming a speaker or suggesting a topic for inclusion in our luncheon calendar as well as in receiving monthly email announcements about luncheons, please contact me at tomfoxsmsc@optonline.net.

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Note: If plans come together, we might have Captain Max Hardberger as a speaker in the fall schedule.

SOME PERSONAL NOTES

In Retrospect

Orleans Parish Civil District Court Judge Michael Bagneris did his best to disprove the Charles Dickens statement that "the law is a ass, a idiot."

When someone sent me a court order back in January, I could not believe what I was reading — I thought it was a joke, one of those stories which fill cyberspace. But indeed, Judge Bagneris was pragmatic, paid homage to sports fans and New Orleans and had compassion for the prospective jurors.

On January 27, 2010, the judge, in the case of Dano Paul Becnel v. Northrup Grumman Ship Systems, Inc., et al ordered:

> *This matter is presently set for a jury trial on Monday, February 1, 2010.*
>
> *Considering the historic victory of the New Orleans Saints, the Court finds that the trial will not be able to proceed as originally scheduled. The Court takes judicial notice that Saintsmania permeates the City of New Orleans. Many prospective jurors for the Parish of Orleans, several attorneys involved in this litigation and Court personnel plan on traveling to the promise land — the Superbowl in Miami, Florida. The Court recognizes that this pilgrimage enhances the chances of the Who Dat Nation to acquire the long sought after Holy Grail- the Vince Lombardi trophy.*
>
> *THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the jury trial scheduled for Monday, February 1, 2010 is continued to Tuesday, February 9, 2010 at 8:30 a.m.*
>
> *IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the parties are to appear in Division "H" on February 1, 2010 for a settlement conference at 10 a.m. in lieu of trial.*

I liked the idea that the judge kept the court calendar moving and possibly achieve a settlement, and I had hoped to report on the outcome. So far I have not heard; I tried *The Times-Picayune*, which had reported the event, but with no success. I now have an inquiry pending with Judge Bagneris and I hope for a better result. More to come (hopefully).

Post Script to "Award Overturned for Arbitrators' Failure to Disclose Participation in Parallel Arbitration" (at p. 5)

When reviewing some past court decisions, I came across the case *Sathianathan v. Smith Barney, Inc.* (2009 U.S. Dist., Lexis 20354). This is the latest decision in a long and convoluted case. The plaintiff, a financial consultant, in pro se proceedings against his former employer, attempted to have a March 22, 2004 arbitration award vacated. The plaintiff invoked a litany of arguments, including disclosure deficiencies, all of which were rejected. In it decision, the court held, under the Federal Arbitration Act, that an arbitrator is not required to disclose prior arbitrations in which the same counsel or party appeared before him.

Thank You!

After four years as editor, I thought that writing and editing the last issue would be easy, a relief, something akin to the "get-out-of-jail-free" card in Monopoly — but it really was not.

Yes, I hated to have to impose, and on occasion have to twist an arm or two to get timely contributions, but all-in-all it was a great experience because of the loyal support of many who helped to make THE ARBITRATOR what it is today. I must, however, single out my old friend **Chris Hewer** for his clever and always attention-getting contributions to eighteen continuous editions of the publication. I also appreciated his guidance to one whose first language was not English. Aside from his having been a mentor, he has also been a continued supporter of the SMA (with the exception of his complaints about the blue paper we used when publishing THE ARBITRATOR in hard copy). And I cannot forget **Don Szostak**, who put up with me for four years, who, most of all, made sure that I did not appear to be mired in the 19th century as a follower of Ned Ludd.

There were still matters I had wanted to cover and write about. I wanted to introduce a section under the caption "Did You Know?" I thought that it might have been of interest, for example, to share with the readers vignettes about Jack Berg's brother and his Nobel Prize; about the Martowskis (on Jeanne's side) being related to the famous photographer Margaret Bourke-White, who collaborated with Erskine Caldwell on several books … . and also married him; and that David Martowski, "in another life," served on President Lyndon Johnson's Secret Service detail in 1965; or that Jim Mercante's father, the late Arthur Mercante (who passed away on April 10) was a famous boxing referee who officiated in more than 140 championship fights, including the Ali-Frazier fight of the century in 1971. Who knows what interesting tidbits we could have learned about the SMA membership and the New York admiralty bar. — I was intrigued by the remark, attributed to George Santayana and used by an erudite lawyer in a brief that "Those who cannot remember the past are condemned to repeat it". I wanted to find somebody to write on the question of arbitrator jurisdiction and authority (Kompetenz/Kompetenz) as well as some others topics which might yet find their way into future issues of THE ARBITRATOR.

Good Bye!

When I thought about this last issue, the expression "swan song" came to mind, but then on second thought, I figured it really did not make much sense — a swan does not sing, in fact it is usually mute. Since I have never been known to be mute, I will say good bye, thank you and much success to the next editor.

IN MEMORIAM

It is with great sadness that we report the passing of Robert Stanley Kleppe, Henk van Hemmen and Henry E. Engelbrecht.

***Robert Stanley Kleppe**, an SMA member since 1995, peacefully died at home, surrounded by his three daughters, on January 25, 2010.*

Stan was an honors graduate of Bucknell University in 1952; he received his MS from Brooklyn Polytechnic Institute in 1955.

Stan began his business career with Esso in 1952 and retired after 34 years, as director and executive vice president of Esso Inter-Americas, in charge of their tanker operation and worldwide tanker construction. In 1989, he joined Asea Brown Bovery as vice president and general director of project management. From 1991 to 1997, Stan was a consultant to ABB Lummus Crest.

As a member of the SMA, Stan served on the Board of Governors as well as chair of the Membership and Ethic Committees. It is telling that his biography in the SMA roster was one of the shortest. It just was not his style to gild the lily. Stan was private person, and since it was not his nature to make himself the topic of conversation, one knew little about his private life. I learned recently that Stan had a vast book collection, was a collector of fine arts and he created models planes in his hobby workshop — some 30 meticulously crafted fighter replicas on display. Maybe a surprise to many, but his daughter explained that he was an engineer after all. In the years during which I arbitrated with Stan and served on committees with him, I found him at all times to be a man of great integrity and insight and a true gentleman.

***Henk van Hemmen** passed away unexpectedly on March 3. At the March 12 memorial service, it was standing room only. This indeed was a celebration of Henk's life — particularly as presented by his two sons, Pim and Rik, and his daughter-in-law, Jeanne Marie, recollections of shared events, of joy and some not-so-upbeat family issues, but all presented with unabashed love and pride. The story about his other daughter-in-law, Anna, and the lasagna episode was pure Henk. For the first family dinner at Pim and Anna's house, Anna prepared lasagna and Henk praised it as the best lasagna he ever had. Over the years, Anna included the dish when dinners were served at their house. Then one day the entire family went out to eat, lasagna was on the menu and somebody suggested that Henk might wish to order it. He stated that he hated lasagna. Anna was perplexed, but he explained that her lasagna was just the best he had ever tasted!*

Many great things have been written about Henk and his professional accomplishments. He had a reputation of being hands-on and would prefer to prepare sketches over participating in lengthy discourses. I remember an arbitration involving a leaky stern tube and questions by the panel of Henk as the witness concerning the stern tube packing. True to his tenet, the next day, he brought in samples of lignum vitae, a self-lubricating hardwood used for that purpose. In 1982, when I worked for a shipowner, one of our vessels grounded in laden condition on the River Plate and sustained major damage to her main-engine bedplate. The goal, more in the form of wishful thinking, was to somehow perform temporary repairs, be able to deliver the grain in Europe and then perform the permanent repairs. Based upon his reputation in the industry, we decided that Henk might be the one to get the job done, and indeed, he did. Henk's creative and practical recommendation minimized a potential economic disaster.

Henk liked people, particularly happy people, and he was in his element when he and his bride of 55 years reigned over the annual Christmas party at the New York Yacht Club. And there was a side of Henk which ignored billable hours and focused on things he liked to do. He loved to share and surprise you. When I needed cradles for my bottle ships, he volunteered to create them in his workshop. One day, I complimented him on his drawings in the company's newsletter and his response was, "Would you like one?" The answer "yes" was easy, but "of what" took some time. After some reminiscing, we realized that we both at one time had been passengers on the EARNLAW, a 1912-built quaint steamer in service on Lake Wakatipu on the South Island of New Zealand,

and that's how I became a proud owner of an original van Hemmen. But all the fond remembrances and droll stories cannot replace the man.

We will all miss you both … Rest in peace.

Captain Henry E. Engelbrecht *of Bedminster, NJ, a Past President of the Society of Maritime Arbitrators, passed away on March 25, 2010 at age 85. He is survived by his wife, Evelyn, his daughter Eve Schoenbrunn, his brother George, three grandchildren and several nieces and nephews.*

Born and raised in Williamstown, NJ into a seafaring family, he made his first trip to sea at the age 4 with his father, Captain Emil Engelbrecht, on a coastwise tanker passage to Albany, NY. At the age of 15, he began serving as a company cadet aboard the tanker Seakay between school terms. During World War II, Henry, his father and brothers George, Joseph and Eugene, all served in the U. S. Merchant Marine and, at different times, he served with two of his brothers aboard the same vessel.

Having sailed with several companies through the grade of Chief Mate during the war, he advanced to Master at age 21 and sailed in that capacity with Mathiasen Tankers and the Circle Shipping Company of Paragon Oil. He married Evelyn Grim in 1954 and shortly thereafter accepted a position as Port Captain in New York.

He was later associated with North Atlantic Marine as Port Captain and in 1961 he joined the United Tanker Group as Vice President — Operations. In 1977, he acquired Lexington Marine Services, which operated sulphur carriers, product and chemical tankers and bulk carriers.

A longtime Member and active arbitrator, Captain Engelbrecht served on the Board of Governors and as the 13th President of the SMA from 1993 to 1995. In 1994 he was elected the 21st Chairman of the National Cargo Bureau. A Regular Member of the Marine Society of the City of New York since 1992, he later served as its Treasurer. He was also a member of the Council of American Master Mariners, the Connecticut Maritime Association, the Maritime Law Association (non lawyer) and other maritime organizations.

Well known to his fellow arbitrators as a man of tenacious opinions, he was famous at SMA luncheons for his lengthy comments and questions at the conclusion of the speaker's remarks. (It was my pleasure to have served with him on several arbitration panels.)

Donations in his memory may be made to the Dennis A. Roland Chapter of the American Merchant Marine Veterans, PO Box 306, Midland Park, NJ 07432. Please specify the South Jersey Chapter.

(Written by Thomas F. Fox with special thanks to Captain James J. McNamara, President of the National Cargo Bureau, for sharing his remembrances of Captain Engelbrecht.)

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