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THE PRESIDENT'S CORNER

As we embark on this New Year, the Society's Board of Governors joins me in wishing all of you the very best for a healthy, happy and prosperous 2007.

November was sadly overshadowed by the loss of one of our most revered members, Lloyd Nelson. Remembered as one of the giants among U.S. maritime arbitrators and a pillar of integrity, he

also was a very kind and wise man and a friend to many. He will be sorely missed.

As we look ahead, the first quarter of this New Year is already packed with challenging events. By invitation of the Panamanian Maritime Law Association, the SMA and members of the New York Maritime Bar are fielding a formidable delegation, to present a one day seminar and mock-arbitration, highlighting New York Maritime Arbitration under SMA Rules, as an official part of **Panama Maritime VII**, a bi-annual event. This conference is scheduled for February 4 to 7 and further details may be found on the Society's website. The end of February will see SMA members partaking in **ICMA XVI** to be held in Singapore from February 26 to March 3. Again, all details regarding the program, travel arrangements and associated events may be obtained through a link on the SMA website.

Then, there is the third annual two-day in-depth seminar on "**Maritime Arbitration in New York**", to be held at the popular Best Western Hotel at the South Street Seaport in New York, on February 8 and 9. (See the SMA website for details and sign-ups). This seminar, conducted by Professor Weiss and SMA member Austin Dooley, Ph.D. has become one of our most popular and sought-after annual events. So, if you want to attend, make your reservation early as the venue is charming but the space is limited.

We are working on plans for a full day seminar in New York in fall, so stay tuned.

In the meantime, our monthly luncheons with featured speakers on topical subjects continue to generate such an enthusiastic support that we may soon be pressed to look for larger quarters. Thanks for your continued support.

Klaus Mordhorst

A DISCRIMINATING VIEW

By Chris Hewer

We live in politically correct times. The only way to be certain of not upsetting somebody is to stay indoors with the curtains drawn and the wireless on for company. Even this might not work. There are people who will argue with a wireless. One of the bitterest disputes on record is that between a 55-year-old man from Burton-on-Trent and a crystal set.

Even staying indoors doesn't mean you're safe. In England this month a married couple were investigated by their local council because their next-door neighbours complained that cigarette smoke was pervading their living room, through the adjoining wall. If you can't smoke cigarettes in your own home, smoke kippers. Then the neighbours really *will* have something to complain about.

It is hard to think of a single example of political correctness which has its roots in common sense and which has made life better in any way. Take gender – please. Some years ago, the colleagues of a New Zealand lawyer named Guy Chapman suggested that, in order not to offend his colleagues, he should change his name to Person Personperson. Strange, but apocryphal.

Will future generations look back on the early years of this century as the age of madness? Changing the words of nursery rhymes, being afraid to ask people their age, height, or weight, agonising over the right titular prefix, and generally being afraid of one's own shadow, is no way to live. Maritime arbitrators may think themselves above such things, but they are not.

A famous arbitrator (an old, fat, bald man with one tooth and an ugly dog) once described arbitration as “an alternative to a lawsuit.” He might also have said that it is the distillation of knowledge. And what is knowledge but wisdom born of experience, which is really what you want from an arbitrator.

Consider how Cedric Barclay, arguably the maritime arbitrator who has come closest to being described as ‘glamorous’, would have felt about today's political correctness. Would he have been comfortable saying, as he did, that there are no slim

arbitrators, or admitting that, “Although we admit forty-year-olds to the LMAA, this is solely for the purpose of training them”? One likes to think that he would.

But Cedric would surely have thought twice before saying, as he did in one learned paper, “There are very few women barristers. This is not due to lack of ability but to the disadvantage of being a woman at all. Female counsel do their best to make themselves look ugly by wearing ill-fitting black costumes and piling their hair into a bun. This is to help the arbitrator believe that there is no attempt to sway him by a pretty woman. Remember, though, that the misogynist arbitrator resents hearing argument from a woman, argument which he has not thought of himself and which he cannot silence by occasional swearing. Nonetheless it is said that a young, pretty counsel can ensure the success of her party by skilful use of her legs.”

There are a number of effective ways of dealing with discrimination. All of them involve humour, and none involves hasty legislation. Cedric Barclay once said, “Be selective in choosing an arbitrator. Do not call on a hairdresser for disputes in stellar navigation.” He was not sued by a single hairdresser. But how long will it be before arbitrators who refer to ships as ‘she’ will be struck off the SMA roster. (Arbitrators who refer to ships as ‘he’ cannot be sent for an eye-test soon enough).

Come to think of it, why are there not more women in the SMA, or just more women, generally. They're so much nicer than men, or would be if we were allowed to say so.

The author is 58, and should know better.

NEWBUILDINGS:

Views of a Naval Architect

By SMA Member. Wesley D. Wheeler, mse

The growth of ships has been exponential in size and sophistication while routes have expanded together with trade patterns. The types of vessels have changed and with them have evolved more comprehensive, tighter worldwide regulations based on more sophisticated science, knowledge, experience

and a realization of the importance of the environment. Kindly note that about 95% of all USA imports arrive by ship! Some noteworthy examples follow.

Shipbuilding has quietly shifted from the USA (except for military and “Jones Act” ships) first to our former enemies of Germany, Italy and Japan in WWII, thence to newcomers in Poland, former Yugoslavia, Taiwan, Korea, China and now Romania, Bulgaria, Vietnam and The Philippines, amongst others. This due to the dramatic wage differential between the former and latter. Steel fabrication has dropped from over 50 man-hours per ton to under 10! Designs may now be created on laptops and flashed across the globe in seconds! As the world’s commerce increases the demand for newbuildings increases until deliveries are now quoted in 2010!

Classification Societies (who review plans and construction) have now formed a group called “IACS” (International Association of Classification Societies) by the 10 leaders plus one associate which covers about 90% of world cargo carrying tonnage to integrate their disparate rules and have already issued The Common Structural Rules for Tankers and Bulk Carriers.

Regulations have been internationalized through the United Nations in the body of IMO (Intergovernmental Maritime Organization) and slowly the regulations regarding the issuance of ships’ trading certificates (such as Load Lines, Safety Construction, Safety Radio and Telephony, Sanitary, etc.) are being harmonized and put into effect by the flag state signatories. Even so we must remain very vigilant with ship owners, operators and crews as we still have disasters such as the “Prestige” which was denied port of refuge in Spain, forced out to sea in a storm and sank releasing vast quantities of oil.

Paxships (Passenger vessels) have been gradually increasing in size beyond that of the “Titanic” with more than double the number of passengers and crew. A recent trend has been the use of Azipods in lieu of usual shafts, propellers and rudders. This utilizes diesel-electric and gas turbine-electric power and they look like outboard motors

(although one of the four on the “QM2” weighs 250 tons!).

Boxships (Containerships) Originated by Malcolm MacLean carrying a few trailers on a tanker deck from the US Gulf to the NE in the fifties, this form of transport of goods has become the norm with universal size containers and ships specially fitted to transport them. The size increase has gone from a few hundred TEU’s (twenty foot equivalent units) to the current 9,000 and projected 13,000+ requiring ships of about 1,500 ft. x 200 ft. with enormous diesel engines (probably twin screw).

Tankers have also experienced rapid size growth from the 18,000 deadweight T2’s of WWII to over 500,000 tons of cargo. The tremendous danger here is the possibility of a cargo spill from collision, allision, or sinking. This is further exacerbated by the recent requirement for tankers (and barges) to have double hulls. While intrinsically safe from grounding or minor collision/allision, a very real potential exists for the inner tanks to crack and leak into the void space to the outer hull whereby the vapor could explode (as has happened).

LNG (Liquified Natural Gas) originated with the 500+/- cubic meter “Methane Pioneer” in the fifties by a JV between Continental Oil Co., USA and The North Thames Gas Board, UK whereby scrubbed natural gas is cooled to minus 273 degrees Fahrenheit and pumped into very special ships with either aluminum, stainless steel or Invar tanks fully insulated from the hull. By 2006, 203 ships had been built and only ten scrapped illustrating the meticulous care and safe operation required. Because of its abundance and relatively secure sources there are about 140 currently on order of up to 214,000 cubic meters.

Bulkers (Bulk Carriers) have been with us since the sailing era, but from the postwar conversions of about 25,000 deadweight to over ten times this size today the problems associated with double hulls in ore-oil, or ore/bulk/oil carriers as in tankers exists together with tanktop (bottom of hold) damage from bulldozers and leaking hatch covers cause continuing problems, not to mention the tremendous hull stresses caused by dense cargos (ships have cracked at the loading terminal).

Others (RO/RO, Ferries, Heavy Lift, etc.)

continue to evolve and new ones come along with their idiosyncratic difficulties, such as ships to carry suspension bridge sections, rock carriers for island, or jetty building, car carriers to carry up to 4000 automobiles, chemical carriers like drugstores with their multi tanks and pumps.

Awareness of the vessel's design, history and operation will give the observer the proper tools to execute his/her task

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A BOOK REVIEW

By SMA Member David B. Letteney

DANGEROUS WATERS***Modern Piracy And Terror On The High Seas***

By John S. Burnett

Plume Publishing, 2003, 328 pages (soft cover edition)

During my seagoing days in the 1950's as second mate on a cargo ship, I made several trips through the Malacca Straits and South China Sea. My overriding recollection of the Straits is the perfume of tropical flowers and wood smoke as we got closer to the Indonesian and Malaysian coasts. In recent years, though, the area has been the subject of numerous press and magazine articles, books and at least two television documentaries, all concentrating on the rise of piracy throughout the world. In the '50's, there were occasional reports and rumors of pirate attacks but they were invariably attacks on coastal traders or other pirates. None that I ever heard of involved armed takeovers of large ships.

Dangerous Waters was inspired by the author's experience when his small sloop was boarded by three pirates a few miles east of Singapore...a frightening experience which he survived in part because he spoke Indonesian and was familiar with the culture. As an experienced journalist and author, he decided that, after further investigation, he had the basis for a book on the subject of pirates, piracy and what shipowners and governments are doing to counter the attacks.

The author was able to arrange for a trip on the fictitiously named VLCC Montrose where he was able to observe the security precautions (or lack thereof) taken as the ship proceeded into the Straits on the way to a Singapore refinery. There seemed to be a sense that a ship this large was invulnerable even though, fully loaded, she had only 14 feet of freeboard at the stern, the preferred point of attack by pirates. The security arrangements consisted of tying two human-looking dummies to the rail and running two fire hoses over the stern, safeguards easily thwarted as pirates overtake the ship through the radar shadow of the smoke stack. This seemed to be a fairly common set of preventive measures taken by ships transiting the Straits. Indeed, judging by the author's comments, there seems to be a sense of complacency and invincibility among many captains and owners even though it would be relatively easy for determined terrorists to take over a VLCC and run it aground or cause a collision with another vessel at one of the narrower points, thus causing havoc with the world's commerce. A terrorist takeover of one of the many cruise ships passing by would also be disastrous.

Not all owners and masters are indifferent to the threat. Some will hire companies like Maritime and Security Consultants in London which provides professional pirate fighters, former Special Air Services and Special Forces personnel. The book recounts how a small team from MUSC was assigned to a cable layer operating off Nigeria when pirates attempted to board and were repulsed without loss of life.

A passive tool available to shipowners is a satellite tracking device similar to "Lo-Jack" for cars. It automatically broadcasts a ship's position. In fact, the usefulness of the device was demonstrated during a conference on piracy prevention measures. A small coastal tanker equipped with the device was hijacked during the conference and attendees were able to watch its progress for several days until it was recaptured by the Indonesian navy.

The International Maritime Bureau, an affiliate of the International Chamber of Commerce, maintains an office in Kuala Lumpur, Malaysia in order to track piracy attacks and report them to the

world. Their website contains maps of pirate attacks throughout the world for each year since 2001. While the Straits of Malacca experience the most attacks, they are also common in East and West Africa and the Caribbean.

The book reads like a crime novel. It is highly recommended for those who are interested in the subject of piracy and attempts to control it.

PEOPLE AND PLACES

NYMAR, the New York maritime promotional organization, has a website that includes a Calendar of Events, which can be viewed at:

www.nymar.org/Pages/CALENDAR.htm

Notices of SMA luncheons and other events of interest to those in shipping and maritime dispute resolution are posted on the Calendar. You are encouraged to visit the NYMAR Calendar of Events to keep track of these events. In addition, if you learn of relevant conferences, seminars or other events that do not appear on the Calendar, please forward the details to Bill Honan at whonan@hklaw.com or Keith Heard at heard@burkeparsons.com

SMA ARBITRATION COURSE

February 8 & 9, 2007

The SMA offers a two day program to help promote and further the fair, just, ethical and cost efficient resolution of charter party and other maritime contract disputes via arbitration in New York. Jeffrey Weiss, Esq, Professor of Maritime Law at New York Maritime College, who has over 20 years of college and graduate level teaching experience, will be the lead instructor. Course contents will include:

- * Arbitration Overview, Commencing the Arbitration, the Federal Arbitration Act and SMA Rules

- * The Arbitration Award: Interim Awards; Final Awards; Majority Decision; Dissenting Opinions
- * Confirmation, Vacatur and Enforcement of Award; Panel Members and Ethical Considerations
- * Discovery in Aid of Arbitration; Hearing Procedures; Security in Aid of an Award
- * Evidentiary Considerations in Arbitration, the Federal Rules of Evidence and Related Issues
- * Time Bar, Defaults and Consolidation of Arbitrations

Full details regarding cost and registration can be accessed on the SMA website at

www.smany.org/sma/course/course.html

SMA LUNCHEON SPEECHES

A couple of introductory comments on the most recent speeches:

At the November 8 luncheon, The Hon. William G. Bassler, U.S. District Court Judge (Ret.), whose speech is reproduced below, spoke about "The Importance of Predictability in Maritime Disputes" in response to Michael Marks Cohen's April 19, 2006 speech on "Are New York Maritime Arbitrators Bound by the Decisions in Other Cases of the Federal Judges in the Southern District of New York?"

On December 13, Guy E.C. Maitland, Managing Partner of International Registries Inc., spoke on the topic "Ship Registries and What They Do." His presentation was a synopsis of a work in progress. Clay has assured me that this opus will be made available to *THE ARBITRATOR* in full for publication in the months to come.

The January 10 luncheon speech by William J. Honan, III, partner, and Christopher R. Nolan, from the law firm of Holland & Knight, on "Issues Concerning E-Commerce Including E-Discovery," will appear in the next issue.

**THE IMPORTANCE OF PREDICTABILITY
IN MARITIME DISPUTES -
WHY THE SAME WORDS SHOULD
HAVE THE SAME MEANING**

*Remarks of Hon. William G. Bassler, U. S. D. J.
(Ret.) at the New York Society of Maritime Arbitrators'
luncheon, Nov. 8, 2006*

I am very happy to have been invited by Tom Fox to speak before this luncheon of the New York Society of Marine Arbitrators. The members of this Society and the lawyers of the admiralty bar of this City have an unequalled reputation for excellence and integrity. I am flattered by the invitation.

When Tom Fox suggested that the topic - a response to the remarks of Michael Marks Cohen at the April 19, 2006 meeting - I might have been too quick to agree. I wasn't aware of Mr. Cohen's formidable reputation for scholarship - and controversy. Someone even suggested that I avoid this polarizing issue; I think he was speaking about the topic, not Mr. Cohen. I was advised to avoid anything that would indicate a direction that I might take as an arbitrator on this issue. But I didn't think you wanted to hear about the conflict between English admiralty jurisprudence and the common law at the time of the American revolution. If you do, you can always invite me back to another luncheon. Mr. Cohen's remarks, published in the July 2006 edition of *THE ARBITRATOR*, are interesting, challenging, and certainly merit discussing.

Mr. Cohen's position, in his own words, is that "Maritime arbitrators have nothing at all to fear from rejecting as unpersuasive opinions in admiralty cases by Southern District Court judges. Moreover, while not as clear, maritime arbitrators, if they act professionally, probably can avoid even some Second Circuit opinions as well."

Mr. Cohen's thesis finds its genesis in the critique of Judge Haight's decision in *Orient Shipping Rotterdam v. Hugo New & Sons*, 918 F. Supp. 806 (S.D.N.Y.1996), and affirmed in an unpublished opinion. 104 F. 3d 356 (2d Cir. 1996). In that case the *Mastrogiorgis B* was chartered to deliver scrap from New York to Bombay but was

delayed in off loading it. The delay, as Judge Haight found, was due to port congestion occasioned by the lingering effect upon the port of a transporter's strike. The plaintiff owner of the vessel sued for demurrage. The liability of the defendant charterer turned upon the proper construction of the exception clause. In addition to the usual language relieving the charterer for demurrage due to war, blockade, acts of God, strikes etc, the clause contained the language "or by other cause or causes whatsoever, whether or not of a nature or kind as enumerated above, which shall be beyond the Charterers/Receiver's control . . ." Finding that the exception clause was drafted in the "broadest possible language" and that the congestion was beyond the Charterer's control, Judge Haight held that the exception clause relieved the defendant from liability resulting from port congestion.

Mr. Cohen also took exception to Judge Cederbaum's decision in *Toyomenka Pacific Petroleum Inc. V. Hess Oil Virgin Islands Corp.*, 771 F. Supp.63 (S.D.N.Y. 1991) in which the court held that the *force majeure* clause in an oil sales contract excused the buyer from paying demurrage where the delivering vessel was delayed by port congestion caused by a hurricane. Mr. Cohen asks, "What are maritime arbitrators to do with such cases, which fly in the face of settled principles that demurrage is a self contained code and discharge port congestion is virtually always a risk assumed by Charterers under charter parties and by buyers under sales contracts?" The question that I ask is what should arbitrators do when faced with the interpretation of contractual provisions that are materially the same as previously litigated cases?

Mr. Cohen makes the point that an arbitrator need not give Judge Haight's decision any greater deference than arbitration awards by earlier panels. It is argued that the decision is not binding precedent under the doctrine of *stare decisis*; that it ignored the fact that port congestion is almost always a risk assumed by Charterers; and that the decision rests upon obsolete law. So Mr. Cohen contends that even if the decision had been affirmed in a published decision, it could be ignored with impunity. In my opinion, and I recognize that as a retired federal judge such opinion is not even entitled to deference, Mr.

Cohen's analysis of Judge Haight's decision can be viewed in an entirely different light. It is true that a district court opinion is not binding on an arbitrator, and that a state court can, without fear of reversal by the Second Circuit, choose not to follow a Second Circuit decision. A Circuit decision, even one explicating federal maritime law isn't binding precedent on a state court under the doctrine of *stare decisis* since the courts are not in the same jurisdictional hierarchy.

Did Judge Haight ignore, in effect, the commercial expectations of the parties in allocating the risk of port congestion from Charterers to Owners? Judge Haight was faced with a dispute in which at least one party in fact contended that the risk was placed on the Charterer by the language of the charter party itself. Ordinary contract principles governed the interpretation of the charter party. The language of the exceptions clause relieved the Charterer for delay "by other cause or causes whatsoever, whether or not of a nature or kind as enumerated above, which shall be beyond the Charters/Receiver's control . . ." Why wouldn't this language encompass the delay caused by the port congestion? To conclude otherwise would have required the Court to ignore the language of the charter party, which it wasn't free to do. As the Second Circuit noted on appeal, "As a straightforward matter of contract construction . . . this broad provision was a clear expression of the parties' intent to shift the risk of delay from the charterer to the owner."

Mr. Cohen invites arbitrators to reject this decision, even if it had been affirmed because arbitrators are entitled on the basis of their knowledge of the industry to find as a fact that the parties did not intend such a vaguely worded clause to have the dire consequence of shifting the risk of port congestion from Charters to Owners. That would be true if the clause were vaguely worded, but it wasn't. Two courts didn't think the clause was vaguely worded and interestingly, the parties never argued that it was so ambiguous as to allow extrinsic evidence of intent.

Moreover, Judge Haight's decision is not new law. It was grounded on Second Circuit

precedent : *Steamship Rutherglen Co.Ltd. v.. Howard Houlder & Partners, Inc.*, 203 F. 848 (2dCir. 1913). The *Rutherglen* court held that the defendant charterer could not be held for demurrage. In its alternative ground for decision the court turned to the language of the exception clause which read "or any causes beyond the personal control of the said charterers not to be computed as part of said lay days." This, the Second Circuit said, was an independent category and because of the breadth of the clause excused delay owing to the Charterer's inability to obtain a berth.

Mr. Cohen is of the opinion that arbitrators could ignore Judge Haight's decision because the precedent relied on is old and obsolete. Of course, on a personal note, I take exception to equating age with obsolescence. But in any event the principle that grounds the decision may be old, but it certainly is not obsolete. As Judge Haight noted in quoting from the opinion of Judge Augustus Hand in *Steamship Co. Of 1912 v. C.H. Pearson & Son. Hardwood co, Inc.*, 30 F.2d 770, 773 (2d Cir. 1929), "After all, the primary question is: What did the parties contract to do?"

The decision of August Hand in *Steamship Co. Of 1912*, supra is also instructive. In that case it was argued that the clause "as fast as steamer can load" incorporates "the custom of the port." The court rejected this argument for several reasons: (1) if the parties wanted the contract to include the words "custom of the port" into the charter party it was certainly easy enough for them to do so. (2) referencing prior cases the court said, "this court. . . is committed to the doctrine that the rate at which the ship can take is the measure of proper dispatch in such a clause as the one here."

So, aside from the analysis of Judge Haight's decision, what is important for us is that, precedent or not, the decision of the district court was affirmed in the Second Court's own words, "primarily on two cases," *The Nordhvalen*, 1923 A.M.C. 398 (S.D.N.Y. 1923) and the case relied on by Judge Haight, *Steamship Rutherglen Co. Ltd. V. Howard holder & Partners, Inc.*, 203 Fed. 848 (2d. Cir. 1913). The Second Circuit opinion affirming Judge Haight explicitly noted that the *Rutherglen* charter party had

an exception provision much like the clause in Judge Haight's case. So it is clear to me that the Second Circuit is applying as precedent the interpretation given in prior cases to clauses in dispute that are similarly worded.

Often a charter party provides merely that the arbitration will be conducted under the law of the United States. Mr. Cohen suggests that where there is Circuit law conflicting with the Second Circuit an arbitrator, unlike a district court in the Second Circuit, may be free under those circumstances to select which Circuit decision to follow. The Second Circuit seems to take a different view of the matter. (See *New York Telephone Co. V. Communications Workers Local 1100, AFL-CIO District One*, 256 F.3d 89 (2d Cir. 2001)). But, in any event, that was not the situation we have here. There was no competing precedent. Accepted rules of contract law govern the interpretation of charter parties. The arbitrator is no more free than is a judge to rewrite the charter party and to include terms that were not agreed to.

The fact that the primary method for resolving maritime disputes has changed from litigation to arbitration doesn't undermine the legal principle enunciated in those Second Circuit cases. And we know that is how the Second Circuit looks at it. The Second Circuit cases support the conclusion that the doctrine of *stare decisis* applies to the interpretation of clauses of charter parties.

This is a good place to stop and remind ourselves what that doctrine is all about. In its full form it reads; *stare decisis and quieta non movere*. It is the policy to stand by precedent; to stand by or adhere to decisions and not disturb that which is settled. Its essence is that a holding of the case has the force of law and the decision constitutes the rule in subsequent cases containing material facts similar to or identical with those in the case.

The values that the doctrine seeks to protect (see Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 Va. L. Rev. 201,235-37 (1965)) have particular importance in commercial disputes. The doctrine supports:

(1) Stability. It is commercially desirable that contractual relationships should have a reasonable degree of continuity and cohesion.

(2) Protection of reliance. Businesses that have entered into charter parties with the background of a particular maritime jurisprudence should have that reliance protected.

(3) Efficiency in the resolution of disputes. If every clause case coming before the courts or the arbitrators is to be interpreted as an original proposition, the work load is unnecessarily increased..

(4) Equality. Commercial enterprises similarly situated should be equally treated. It is a fundamental ethical requirement that like cases should receive like treatment. Some relevant differentiating factor should be the ground of discriminating between one litigant and another and not the luck of the draw as to whether the case is litigated before an arbitrator or a judge or one arbitrator rather than another.

(5) And finally there is the image of justice. It is important to the resolution of disputes not only that the judge or arbitrator provide equal treatment to persons similarly situated, but that there also be the appearance that that is being done.

These values are just as important in an arbitral system as they are in a judicial system. Just because courts are generally bound by an arbitral award (see *Wallace v. Buttar*, 378 F.3d 182 (2d Cir. 2004) shouldn't be a license to arbitrators to ignore the law or disregard the contract in favor of the arbitrator's own brand of maritime justice. As the dissent in *Interocean Shipping Co and Nippon Yusen Kaisha*, 1974 A.M.C. 2161 , 2173 observed "[i]f arbitrators do not follow jurisprudence they foster the establishment of two bodies of authorities - judicial precedents on one hand and arbitral precedents on the other."

If different arbitrators take different views as to the meaning of the same or similar clauses in standard contracts, the values I previously mentioned are disserved. Moreover the most important value that the doctrine of *stare decisis* supports would be seriously undermined - the importance of predictability in our arbitration system. By adhering to judicial precedents, many disputes will be resolved without the necessity of arbitration. Because New

York is a world arbitration center, the global shipping industry is best served, in my opinion, by the certainty of law and the certainty that the same words mean the same thing, regardless of whether the charter party is arbitrated or litigated in the Second Circuit. Where parties to an international maritime transaction choose New York to arbitrate and the law of the United States, why should it not be presumed that, unless otherwise stated, they are contracting against the backdrop of the precedents of the Second Circuit that have interpreted similar clauses in the agreement they have signed? Why shouldn't that be the default position? After all if the parties want to avoid that result it is easy enough to specify what Circuit precedent should apply. In Judge Haight's case the parties could easily have avoided the effect of the broadly worded exceptions clause by stating in the charter party that any delay from port congestion was the responsibility of the charterer. Adherence to the doctrine of *stare decisis* not only contributes to predictability but also to more careful drafting of charter parties.

Specifically allocating the risk of port congestion seems to me a far more preferable approach than to leaving it up to each arbitrator to import into the contract an allocation of risk that isn't supported by the language of the charter party.

Let me conclude with the words from a paper given by Miltiadis Coccalis before the Congress of Maritime Arbitrators in Athens in 1974 cited in the dissent in *Interocean Shipping Company*: "Systems of arbitration that leave the arbitrators to decide without respect to established principles of law and which leave arbitrators the liberty to reverse last week's finding are anathema to our trade. They add perils of arbitration to perils of the sea."

COURT DECISIONS

FEDERAL CIRCUIT PROVIDES ARBITRABILITY GUIDELINES

By Keith Heard, Esq., Partner, Burke & Parsons

Section 3 of the Federal Arbitration Act ("FAA") provides for a stay of legal proceedings whenever the issues in a case are within the scope of

an arbitration agreement. Pursuant to the statutory language, if a District Court is "satisfied" that the issues involved in a lawsuit are arbitrable, then it must stay the trial of the action. The general rule under federal arbitration law is that the courts decide issues of arbitrability – i.e., whether a dispute is subject to arbitration or must be resolved in court. However, parties can agree, either in express contractual language or by incorporating appropriate terms of an arbitral body, that the issue of arbitrability is to be decided by the arbitrators. When the situation is not clear-cut, the courts must decide whether they or the arbitrators are to rule on issues of arbitrability.

Qualcomm Incorporated v. Nokia Corporation, 466 F.3d 1366 (Fed. Cir. 2006), is a recent case in which this issue arose. In 2001, the parties entered into a "Subscriber Unit and Infrastructure Equipment License Agreement" in which Qualcomm granted Nokia a non-exclusive license to some of Qualcomm's patents, enabling Nokia to manufacture and sell products that incorporated the Code Division Multiple Access ("CDMA") standard for telecommunications equipment. The contract, which was governed by California law, contained an arbitration clause that incorporated the rules of the American Arbitration Association ("AAA"). The relevant AAA rules provided that the arbitration tribunal "shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

In November 2005, Qualcomm sued Nokia in federal court in California, asserting that Nokia had infringed twelve of Qualcomm's patents. The following month, Nokia commenced arbitration against Qualcomm, asking the arbitrator to rule on two issues allegedly relevant to Qualcomm's patent infringement claims. The first issue involved an estoppel defense based on an allegation that Qualcomm engaged in misleading conduct. The second issue involved a license defense in which Nokia sought a declaration that it had a valid and enforceable license to manufacture or deal in products that incorporated CDMA technology and that Qualcomm's claims of infringement against those products should be barred by the parties' 2001 agreement.

In addition to demanding arbitration, Nokia filed a motion to stay the Qualcomm lawsuit pursuant to section 3 of the FAA. In March of last year, the District Court in California denied the motion to stay on the basis that Nokia's alleged defenses involved CDMA products and the lawsuit involved products which did not rely on that technology. Accordingly, the District Court concluded that it was "not satisfied under 9 U.S.C. § 3 that the issues involved in the instant case are referable to arbitration."

In response to an order by the District Court that plaintiff provide a more definite statement of its claims, Qualcomm amended the Complaint to confirm that the lawsuit did not involve any Nokia products licensed under the 2001 Agreement. The situation remained complicated, however, because another paragraph in the Amended Complaint contained allegations relating to standards promulgated by the "3rd Generation Partnership Project", which promulgates standards for a type of telecommunications technology that Nokia believed was licensed to it under the 2001 Agreement. According to Nokia, because one paragraph of the Amended Complaint seemed to draw in products covered by the 2001 Agreement while another paragraph excluded products licensed under the Agreement, there was a dispute as to which Nokia products were licensed thereunder. Nokia appealed the District Court's ruling that the issues presented in the lawsuit were not properly subject to arbitration.

The Federal Circuit Court of Appeals, sitting in Washington, D.C., noted that the case highlighted the tension between the District Court's need to be "satisfied" as to the arbitrability of an issue before ordering a stay and the parties' agreement that any arbitration under their 2001 contract would proceed under AAA rules that reserved issues of arbitrability to the arbitrators. The Court of Appeals was concerned that the District Court should follow an inquiry under section 3 of the FAA that did not encroach on the arbitrators' prerogatives under the AAA rules.

The Court of Appeals concluded that the proper inquiry to be employed by a District Court presented with an arbitrability issue is as follows:

We conclude that in order to be "satisfied" of the arbitrability of an issue pursuant to section 3 of the FAA, the district court should first inquire as to who has the primary power to decide arbitrability under the parties' agreement. If the court concludes that the parties did not clearly and unmistakably intend to delegate arbitrability decisions to an arbitrator, the general rule that the "question of arbitrability . . . is ... for judicial determination" applies and the court should undertake a full arbitrability inquiry in order to be "satisfied" that the issue involved is referable to arbitration. * * * If, however, the court concludes that the parties to the agreement did clearly and unmistakably intend to delegate the power to decide arbitrability to an arbitrator, then the court should perform a second, more limited inquiry to determine whether the assertion of arbitrability is "wholly groundless." * * * If the court finds that the assertion of arbitrability is not "wholly groundless," then it should stay the trial of the action pending a ruling on arbitrability by an arbitrator. If the district court finds that the assertion of arbitrability is "wholly groundless," then it may conclude that it is not "satisfied" under section 3, and deny the moving party's request for a stay.

Turning to the facts before it, the Court of Appeals noted that the parties' incorporation of the AAA rules in their 2001 agreement "clearly and unmistakably shows the parties' intent to delegate the issue of determining arbitrability to an arbitrator." (The Second Circuit reached a similar conclusion about the effect of incorporating AAA rules in *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205 (2d Cir.2005).) The next step in the required analysis was to determine whether Nokia's assertions of

arbitrability were “wholly groundless”, which would foreclose referring that issue to the arbitrators. Qualcomm argued that was, in fact, the case since its First Amended Complaint expressly excluded “any Nokia product that is licensed under” the 2001 Agreement.

The problem for the Court of Appeals was that the District Court had not engaged in a “wholly groundless” inquiry. It had instead simply considered whether the defenses Nokia sought to raise presented arbitrable issues, effectively usurping the arbitrators’ role. Accordingly, the Court of Appeals reversed the lower court’s ruling and remanded the case so that the latter could undertake a “wholly groundless” inquiry. In performing that, the District Court was to look to “the scope of the arbitration clause and the precise issues that the moving party asserts are subject to arbitration.” However, since “any inquiry beyond a ‘wholly groundless’ test would invade the province of the arbitrator . . . the district court need not, and should not, determine whether Nokia’s defenses are in fact arbitrable.” Finally, the Court of Appeals instructed that “[i]f the assertion of arbitrability is not ‘wholly groundless,’ the district court should conclude that it is ‘satisfied’ pursuant to section 3 of the FAA.”

As originally drafted, the FAA left it to the courts to decide whether an issue presented in a lawsuit fell within the scope of an arbitration clause. However, the situation became more complicated when contractual parties, by language or incorporation, entrusted that decision to arbitrators. The courts cannot willy-nilly refer all allegedly arbitrable issues to arbitration since that would result in an abdication of their duty under section 3 of the FAA. However, at the same time, they cannot delve deeply into the issue of arbitrability if the parties have contractually assigned that task to arbitrators. The result is a situation where lines must be drawn to clarify what the District Courts can and cannot, should and should not do. That is what the Federal Circuit did in *Qualcomm v. Nokia*.

COSTS AND FEES

ARE ATTORNEYS’ FEES AND COSTS RECOVERABLE IN NEW YORK? – WHEN IN DOUBT ASK

By Manfred Arnold

(The opinions expressed in this article are those of the author and not necessarily reflective of the SMA’s position.)

A few years ago, David Martowski and I made a presentation to the Managers of the Defence Clubs with approximately 25 representatives in attendance. One of the topics we dealt with was the awarding of costs and fees. I understand that there are still one or two Doubting Thomases who question that New York arbitrators have adopted this practice and that prevailing parties can recover costs and fees.

What I do not understand is why people raise arguments when they do not know or are not certain about the facts relating to the argument. Are they not revealing their own ignorance? Or is it that they wish an argument irrespective of the merits? Disagreeing or questioning should be made on known facts and inherent knowledge, not just because it is different from your own experience or expectation. And when in doubt, one can always ask.

There is no question that London arbitrators, unlike their New York colleagues, have applied this equitable remedy for quite a while, but things have changed rapidly.

I have always been in favor of awarding costs and fees, albeit in a discretionary manner, and expressed my views in a 1988 paper (“Awarding Fees of Arbitrators/ Attorneys and Costs”) presented in Shanghai, Beijing, Guangzhou and Hong Kong. In the same year, the Liaison Committee of the MLA/SMA prepared a report on the awarding of attorneys’ fees.

The impediment for New York arbitrators has been the “American Rule.” In an article for the BIMCO issue 3, 1992, I wrote:

It has been my view, shared by many others, that changes must be made for the overall benefit of the process. For example, the awarding of

attorneys' fees is a topic which is presently being discussed in New York in response to questions raised by users of the system. Those readers familiar with the English procedure might not readily understand the dilemma New York arbitrators find themselves in with respect to the awarding of attorneys' fees. Historically, under the American Rule, except where otherwise and specifically contracted for, the parties to an arbitration have to bear their own legal fees, regardless of the outcome. The basis for this rule is the tenet that a losing party should not be penalized for the right to sue or to defend a claim. Therefore, only in cases where the arbitration clause provides for the awarding of legal fees or where the parties consent in the submission agreement may the arbitrators apply this remedy.

Clearly, it is a strange state of affairs indeed, defying logic and common sense, that arbitrators by law are empowered to award RICO and punitive damages, placing the injured party into a relatively better position than it had been in before, but they lack the statutory power to grant attorney's fees to the prevailing party (which would be compensatory in nature rather than punitive).

The current rules of the SMA (4th edition of September 2003) provide in Section 30 that, . . . *the panel, in its Award, shall assess arbitration expenses and fees as provided in Sections 15, 36 and 37 and shall address the issue of attorneys' fees and costs incurred by the parties. The Panel is empowered to award reasonable attorneys' fees and expenses or costs incurred by a party or parties in the prosecution or*

defense of the case. Any attorneys' fees or party costs awarded shall be quantified in the Award.

The references to the various sections of the rules are as follows:

15. Stenographic Record

Unless otherwise agreed by the parties, a stenographic record of all hearings shall be arranged. The parties shall initially share the cost of the record, subject to final apportionment by the Arbitrator(s).

36. Expenses

The expenses of witnesses shall be paid by the party producing or requiring the production of such witnesses subject to allocation by the Panel in its final Award.

37. Arbitrator(s)' Fees.

(The assessment and/or allocation of arbitrators' fees and expenses has never been an issue.)

A review of the published SMA awards will show that arbitrators indeed have addressed the issue of attorneys' fees and costs and have dealt with it in their awards ranging from token allowances in unopposed arbitrations to amounts in high six figures. To highlight the current state, I should like to briefly discuss two fairly recent arbitration awards, the **ST. MICHAELIS** (SMA Award 3941) and the **COMMUTER** (SMA Award 3949), both of which only dealt with the recovery of attorneys' fees and costs.

ST. MICHAELIS – This dispute arose under a voyage charter which entailed blending operations at the discharging port. Cargo receivers advised the vessel that the cargo was off spec. The arbitration was commenced by Charterers in order to protect the time bar for a potential “contingent” claim against Owners. It appears that the receivers at some point had demanded arbitration against Charterers (which would not have been before a New York panel) for an

unspecified and undocumented claim of approximately \$2 million. After considerable effort, Owners were able to arrange for a joint analysis of the relevant cargo samples. The results established that there was no possibility that the alleged contamination could have occurred on board the vessel. Thus Charterers withdrew their contingent claim.

Pursuant to Clause 24 of the ASBATANKVOY, Owners were seeking recovery of their legal and other costs relating to their successful defense against Charterers' contingent claim.

Early on, Owners and their P&I Club had suggested a prompt joint analysis of the relevant samples from both the load and discharging ports. Neither Charterers nor receivers agreed to comply or cooperate with this request. When Charterers appointed an arbitrator, Owners did likewise and the panel was completed. Charterers suggested that this particular arbitration be held in abeyance awaiting the outcome of the arbitration between Charterers and the receivers. This was not acceptable to Owners who pressed for discovery of relevant documents and prompt analysis of the cargo samples.

Owners filed an application for the issuance of subpoenas and documents. The application was accompanied by a 33-page attorney's affidavit and 59 exhibits. The documents set forth Owners' efforts to clarify and resolve the matter. The subpoenas were granted and the cargo samples were tested. The result was that there appeared to be no factual basis to support receivers' or Charterers' claim against the Owners. When Charterers failed to respond to Owners' request to withdraw the contingent claim, Owners demanded a hearing. Only then did Charterers agree to drop their claim. The parties briefed the issue of fees and costs and the panel resolved the matter in Owners' favor by granting recovery of costs and fees. The panel's fees were assessed in full against Charterers.

COMMUTER – This arbitration was commenced by Owners to recover withheld time-charter hire resulting from delays caused by cargo contamination. The panel dealt with the hire issue, but kept the matter open for Charterers to address the

cargo case. At the time, both parties requested an award of costs and fees. The panel deferred this point to its final award. When Charterers advised that they were no longer interested in pursuing the counterclaim, Owners requested an award for costs and fees, including a re-allocation of the panel's fees which previously had been assessed on a 50/50 basis. Charterers opposed the request. The panel granted an allowance towards counsel's costs and fees, awarded Owners the 50% of the arbitrators' fees previously paid for in the partial final award and assessed the panel's fees for the final award in full against Charterers

In order to make it abundantly clear that SMA arbitrators have the power to award fees and costs and determine the quantum, it might be appropriate for panels to explain why they made the decision not to award costs and fees.

SOME PERSONAL NOTES

Curiosity

People refer to "idle curiosity" or "curiosity killed the cat" – I prefer to think more in terms of Eleanor Roosevelt's statement that "Life was meant to be lived, and curiosity must be kept alive." Or Samuel Johnson's pronouncement that "Curiosity is one of the permanent and certain characteristics of a vigorous mind."

It was in 1963, a week after I arrived in the US, when I had my first meal (and drinks) at the Downtown Athletic Club. In the lobby, I saw the smallish bronze statue of a football player. I asked my boss about it, and he explained that John Heisman, after a playing and coaching career, served as Athletic Director of the DAC. Sometime after his death, the Club renamed the existing college football award the Heisman Trophy. With us was the late Tom Howarth (of the late firm of Haight Gardner Poor & Havens), who provided more information on the award and the game, as I knew very little about the game. Tom had

played on the Princeton team with Dick Kazmaier, winner of the 1951 Heisman Trophy.

What brought me to write this item was an article in the December 8, 2006 sports section of The New York Times and the quotation from the 1965 trophy winner, Mike Garrett, who had stated, “The award is wonderful but who’s Heisman?” If you are one of a select group in the running for the most important college football award, would you not want to know what you are competing for? Granted, prior to Garrett, no one at USC had won the trophy, but 30 from other schools had, including quite a number of future football greats and Hall of Famers. As an aside, following Garrett, USC had six more Heisman Trophy winners.

To be fair, I should state that, after a successful pro career of eight years, he earned a law degree in 1986 and is now the athletic director for USC.

The reason I wanted to comment on this perceived lack of curiosity is the observation that some people will lose out on information or opportunities for lack of self-initiative. I once asked someone of he were planning to attend a certain speech. His response was that it would not favorably impact on his business results and, therefore, he did not want to expend time and money for it. Maybe not, but at the event, he could have networked with colleagues or he could have learned something new.

If all of us lost the sense of curiosity, we would be marching in place. Our horizons would remain the same, our perspectives would not change and we would not learn anything new.

Let’s be curious!

(Maybe someone is curious enough to want to know why I wrote this.)

Feedback

I am pleased to report that in response to the last issue of *THE ARBITRATOR*, three complimentary comments were received (just in case anybody is curious – no negatives).

IN MEMORIAM . . . Lloyd Charles Nelson

On November 8, 2006, the SMA lost one of its leading and certainly one of its longest-serving arbitrators, Lloyd C. Nelson. I am grateful to my good friend and former partner Chris Hewer who wrote and published the following remembrance in *THE MARITIME ADVOCATE*:

“SAD news reaches us from the US, where Lloyd Nelson has passed away, at the age of 81. Lloyd was a giant among US maritime arbitrators, having started his career in the mid-50s with an appointment to a million-dollar charter party cancellation dispute on a vessel called the “Ocean Rose”. At the time, it was the largest award ever issued in New York. Thereafter, Lloyd remained in continual demand as an arbitrator, right up until his untimely passing.

Lloyd was his own man. Although he initially refused to join the Society of Maritime Arbitrators in New York when it was founded in 1963 – on the grounds that he feared it might be an organization that was going to try to tell people how to think – Lloyd joined the SMA two years later and subsequently became a director. He turned down the presidency, however, arguing, ‘I have a full-time job already.’

Lloyd was the longest-serving New York maritime arbitrator, and was once referred to by an English barrister as ‘My Lord’. He was a mentor to a number of New York’s current maritime arbitrators, appointing them as panel chairmen for the first time. Past SMA president Manfred Arnold says of Lloyd, ‘He was my rabbi, my mentor, a great colleague, a friend and one of the smartest arbitrators New York ever had.’

Your editor interviewed Lloyd Nelson in 1997, during the US MLA fall meeting in Desert Springs. He was fresh from his triumph, on troublesome knees, as part of the US team which had defeated the rest of the world in the mini-Ryder Cup which is played out at these gatherings. He explained, ‘There’s never a case you can’t lose. And I don’t want to be involved in a case I can’t win.’

A fitting epitaph for one of New York’s finest.”

Lloyd went the way he lived his life . . . quietly. Despite his imposing figure, his business success and his international reputation, he never used one of them to make his point.

I feel that I knew him all my life, but that, of course, is not possible because when I met him in the late sixties, Lloyd had already been doing arbitrations for close to 15 years, was running a large fleet of vessels (and, no doubt, already played better golf than I ever will). In 1973, Lloyd was one of the arbitrators who appointed me as a chairman for my first arbitration. The **ILKON TAK** was the beginning of my arbitration career during which I spent many, many hours as a panel member with Lloyd. He was always supportive and even kind when critical. I remember one case where I had been appointed as chair involving a vessel belonging to one of Lloyd's principals. The award went against them; when Lloyd received the award, he called and said, "That award was very nicely written, but I still disagree with your findings."

Somebody once said that the advantage of getting older is that you will have old friends; on the other hand, the older you get the more of your old friends you will lose. Let's hold on to friends we have, old and new.

The Chinese have an expression – "old friend" – it means more than the plain words or having known a person for a number of years. It means a person who understands you, a person who will go out of his way for you without the expectation of a reward and without reservation.

Rest in peace, old friend.

For THE ARBITRATOR

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