



THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT’S CORNER

Dear Readers:

The Society has recorded award number 4111! There are actually more, but some parties elected not to publish their awards. SMA Rules Section 1 provides that parties can stipulate to withhold publication of an award.

I continue to receive phone calls from attorneys seeking advice on using the SMA process. This past month I talked to a partner at a Florida law firm who had questions about the Shortened Procedure Rules. His client had a dispute over a modest amount for which they were seeking a cost and time-efficient resolution – a perfect fit for the Shortened Procedure. The complete Shortened Procedure Rules can be found at www.smany.org.

I also received a question about the difference between a maritime arbitration under SMA rules and one administered by an institutional body of administrators. While there are many, one main difference is that the institutional arbitration requires payment of an administration fee to the administrators. Arbitrators’ fees are additional. For the administration fee, the administrators will, when requested, resolve process-related issues. These include, for example, the number of arbitrators, challenges against arbitrators and the place of arbitration. The fee is a percentage of the amount in dispute.

The SMA process is quite different. It is governed by its rules and administered by the arbitration panels, not the organization. No fee is paid to the SMA. The savings can be significant and provide for an inexpensive resolution of even modest claims without fear of an administrative fee or unnecessary additional expenses.

The SMA participated in the CMA Shipping 2011 Conference last month. There is more about the SMA sessions in this issue of THE ARBITRATOR. However, if you have not been to a CMA event – GO! There were more than 2,000 attendees at the show/conference and over 700 people in attendance at the Gala Dinner. It was a great event.

Speaking of great events, in 2013, the SMA will celebrate its 50th anniversary. Plans are in the works and news will be forthcoming.

Best regards,

*Austin L. Dooley
President of the SMA*

SMA AT THE CMA – KNOW BEFORE FIXING 2011

By Austin L. Dooley

For the second year, members of the SMA participated in a three-hour session dealing with arbitration issues and awards. Topics for discussion were selected from the Award Service of the SMA and covered issues that were contemporary, unusual and usual but with a twist. Some of the awards have not yet been published by the SMA.

The panel members discussed ten awards, the arguments raised, and the treatment of the issues in the award. An interesting aspect of the cases was the awarding of allowances for attorneys' fees and costs. The submission agreement in one dispute stipulated that the parties would bear their own legal fees and cost. In four of the awards, the panels ruled that the parties should bear their own legal fees and costs because of the circumstances and facts of the

case. In the remaining five cases, as per SMA Rule 30, the awards included an allowance for attorneys' fees and costs.

Panel members were Lucienne Bulow, Austin Dooley, Tom Fox, Donald Frost, Klaus Mordhorst, Bengt Nergaard, Jack Ring, and Soren Wolmar. Topics included piracy, speed claims, arbitration clauses, Rule B legal fees, electronic notice of arrival, force majeure, safe berth and the shortened procedure.

Manfred Arnold and David Martowski addressed the audience on the questions of precedent and the expectation of outcome in maritime arbitrations. As maritime arbitration awards are fact-centered but based upon the principles of maritime contracts, law and shipping practices, the certainty or expectation of outcome given at the start of the proceedings is often put to the test as facts become known during the hearing process. Often witnesses or documents reveal new or additional facts that were not obvious at the start of the proceedings and potentially lead to unexpected outcomes. A summary of this presentation will appear in the next issue of THE ARBITRATOR.

HAVING ARBITRATORS ORDER THE POSTING OF SECURITY AND OTHER INTERIM MEASURES: A PRACTITIONER'S PERSPECTIVE

*By Peter Skoufalos, Esq.
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I. Ordering the Posting of Security and Other Interim Measures:

Orders requiring a party to post security for an arbitrated claim are part of a general trend favoring "interim measures" in commercial arbitrations. Such interim measures—usually in the form of an interim award that does not dispose of the entire matter—have been fashioned and used with increasing frequency as resort to arbitration to resolve commercial disputes has grown.

Because of the increased use of interim measures, there is a growing movement among participants in international commercial arbitrations to develop procedures not only for awarding interim measures but, as discussed below, to provide mechanisms for enforcement of such measures.

Although the focus of this paper will be on pre-award security, panels have dealt with requests for a wide assortment of interim measures, including:

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- specific performance
- order to pay part of a claim
- preliminary injunctions (e.g. enjoining disclosure of trade secrets or termination of a contract)
- preservation of evidence
- preservation of assets to avoid dissipation
- *ex parte* applications for attachment or other security

Two related goals have been cited by the courts in recognizing arbitrators' authority to award interim measures, including orders requiring the posting of security: (1) to maintain the status quo during the pendency of the proceedings and (2) to assure that the outcome of the arbitration does not become meaningless.

II. Sources for Arbitrators' Authority:

Since arbitration is inherently a creature of private agreement, the power of arbitrators to order interim measures, including the posting of security, is based in the first instance on the parties' arbitration agreement or in the body of rules to which parties agree to be bound.

Currently, the rules of most of the large international commercial arbitration organizations provide for some form of interim relief. *See e.g., UNCITRAL Model Law* Art. 17(1) (tribunal may order "interim measure" prior to final resolution of dispute); *International Chamber of Commerce (ICC)* Art. 23(1) (tribunal may order "any interim or conservatory measure it deems appropriate."); *ICDR Rules of the American Arbitration Assn.* Art. 21(1) (on a party's request, tribunal "may take whatever interim measures it deems necessary."); *JAMS Rule 26.1* (tribunal may grant any interim relief it deems "necessary"). *See Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 *Am. Rev. Int'l Arb.* 317 (2009).

Section 30 of the Rules of the Society of Maritime Arbitrators also seemingly confers broad powers on the arbitrators to grant in their award "any remedy or relief" that they deem "equitable" or "just." However, the rule does not explicitly refer to "interim" measures; i.e. awards that do not resolve the entire dispute. *See S.M.A. Rule 30* ("The Panel, in its Award, shall grant any remedy or relief which it deems just and equitable, including, but not limited to, specific performance.").

Federal judicial review of interim arbitration awards ordering security goes back at least 30 years. *See Sperry International Trade, Inc. v. Government of Israel*, 689 F.2d 301, 306 (2d Cir. 1982), where the court confirmed the panel's interim award requiring one party to fund a joint

escrow account: "New York law gives arbitrators substantial power to fashion remedies that they believe will do justice between the parties." *Id.*

Section 8 of the Federal Arbitration Act is not an exclusive remedy when seeking security in the context of arbitration. Section 8 simply provides the claimant with the option of bringing a traditional admiralty proceeding (i.e., maritime arrest and attachment) for security "while seeking arbitration of the merits of the claim." The availability of remedies to obtain security pursuant to Section 8 will not preclude a party from seeking an interim award for security before an arbitration panel. *East Asiatic Company Ltd. v. Transamerican Steamship Corp.*, 1988 A.M.C. 1086, 1089 (S.D.N.Y. 1987).

In *Compania Chilena de Navegacion Interoceanica, S.A. v. Norton, Lilly & Co., Inc.*, 652 F.Supp. 1512 (S.D.N.Y. 1987), the district court upheld two interim awards by a NY arbitration panel. The first award, issued after the initial hearing, ordered the defendant to pay to plaintiff a sum that the panel did not consider to be in dispute. After a second hearing, the panel ordered the defendant to post a bond as security for the balance of the claim while the panel deliberated. The claimant then sought confirmation of both the partial award and the bond order in the S.D.N.Y. and defendant sought to vacate.

Regarding the arbitrators' authority to order defendant to post a bond, the district court cited *Sperry International Trade* for the proposition that arbitrators "may grant equitable relief that a Court could not." Further, the court refused to characterize the bond order as a "provisional" remedy, as opposed to an equitable one, citing Judge Weinfeld's decision in *Southern Seas Navigation Ltd. v. Petroleos Mexicanos*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985). There, Judge Weinfeld confirmed an interim arbitration award in the form of a preliminary injunction, finding that "an arbitral award of equitable relief based upon a finding of irreparable harm" is entitled to confirmation.

In *the Matter of the Arbitration between Konkar Maritime Enterprises, S.A. v. Compagnie Belge D'Affretement*, 668 F.Supp 267 (S.D.N.Y. 1987):

In the underlying arbitration, the panel ordered the charterer to place a disputed sum into an interest-bearing escrow account pending the outcome of the arbitration. The district court confirmed the interim award noting that "[a]rbitrators have broad discretion in fashioning remedies and 'may grant equitable relief that a Court could not.'" (citing *Norton, Lilly and Sperry Int'l*). The district court concluded that "[a]s a matter of substance, the Panel's escrow account order was within its authority."

In *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir. 1991), the arbitration tribunal ordered that certain funds be placed in an escrow account as security for a possible final award. In confirming the “interim final order”, the court cited the “wide latitude” given the arbitrators by the parties’ management agreements:

The arbitrators shall interpret this Agreement as an honorable engagement and not as merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law, and they shall make their award with a view to effecting the general purpose of this Agreement in a reasonable manner rather than in accordance with a literal interpretation of the language.

The court concluded that the interim order “does not exceed the mandate given the panel by the order compelling arbitration and by the Management Agreements.”

In *British Ins. Co. v. Water St. Ins. Co.*, 93 F. Supp. 2d 506 (S.D.N.Y. 2000), a reinsurance arbitration, the plaintiff sought an interim award for security prior to the first organizational meeting of the panel. The panel granted the request and the district court confirmed, citing *Norton, Lilly*:

*“Courts in this Circuit have firmly established the principle that arbitrators operating pursuant to such provisions have the authority to order interim relief in order to prevent their final award from becoming meaningless. See Rakower, 1998 WL 432092, at *3-4 (holding that an arbitrator’s award of temporary equitable relief can be confirmed); Atlas Assurance, 1991 WL 4741, at *2 (finding arbitrators’ interim order placing disputed amount into interest-bearing escrow account is reasonable); Konkar Maritime, 668 F. Supp. at 271 (confirming order to establish a joint escrow account for distribution under the final award); Compania Chilena De Navegacion Interoceanica, S.A. v. Norton, Lilly & Co., 652 F. Supp. 1512, 1516-1517 (S.D.N.Y. 1987) (confirming an order requiring defendant to post bond); Sperry International Trade, 532 F. Supp. at 908 (finding that arbitrators did not exceed their authority in ordering joint escrow account). See also Yasuda Fire & Marine, 37 F.3d at 348.*

In *Yasuda Fire & Marine Insurance Company of Europe, Ltd. v. Continental Casualty Co.*, 37 F.3d 345 (7th Cir. 1994), the appellate court upheld an arbitration panel’s interim award of security:

In awarding security, the panel acted merely to preserve the claimant’s “stake in the controversy” and to “protect the bargain giving rise to the dispute.”

The Seventh Circuit emphasized “how important a wide range of remedies is to successful arbitration,” even if the parties did not articulate these specific remedies in their arbitration agreement.

In *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003), another reinsurance case, the court upheld an interim award of pre-hearing security in the context of the following arbitration clause:

“The arbitrators shall consider this Treaty an honourable engagement rather than merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law.” (emphasis added).

The court first looked at the arbitration clause for the source of the panel’s power to order interim relief:

“Where an arbitration clause is broad, as here, arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself.” (citations omitted).

The court went on to state that:

“It is not the role of the courts to undermine the comprehensive grant of authority to arbitrators by prohibiting an arbitral security award that ensures a meaningful final award. See Yasuda, 37 F.3d at 348 (allowing arbitrators to order pre-hearing security in the form of a letter of credit); Pac. Reins. Mgmt. Corp., 935 F.2d at 1025 (allowing arbitrators to order pre-hearing security in the form of an escrow account); Island Creek Coal Sales Co. v. City of Gainesville, Florida, 729 F.2d 1046, 1049 (6th Cir. 1984) (finding that where the contract did not preclude equitable relief, “the arbitrator may grant any remedy or relief which the arbitrator deems just and equitable and within the scope of the agreement of the parties”) (citing AAA Commercial Arbitration Rule 43).

There is little doubt that the parties expected the Panel to rule on the issue of pre-hearing security. It was listed as an agenda item for the Organizational Meeting with the Panel; it was fully briefed and was orally debated by both parties.

We can hardly conclude that the posting of pre-hearing security represented the Panels' "own brand of justice." Brooks Drug Co., 956 F.2d at 25.

In *Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926 (N.D. Cal. 2003), also a reinsurance coverage dispute, the panel ordered one party to "either make an interim cash payment or post a Letter of Credit in the amount of \$ 2,535,491." The panel later modified the interim order to establish an escrow account for that amount under the control of the panel. In upholding the interim award, the court rejected the contention that the panel had exceeded its power, finding that the parties' rights were fully protected by the escrow requirement.

III. Enforcement of Interim Awards:

Interim measures may be useful tools for the parties and arbitrators, but can they be effective without an enforcement mechanism?

Arbitrators themselves have limited enforcement powers. Indeed, commentators have noted that "[t]he frequent lack of power of arbitral tribunals to enforce interim measures of protection is currently a problem in international commercial arbitration." *12 Currents Int'l Trade L.J. 55 (Winter 2003)*. See also *Note, International Arbitration: the Need for Uniform Interim Measures of Relief*, 28 *Brooklyn J. Int'l L.* 1059 (2003) ("A major disadvantage of arbitration is the arbitral tribunal's lack of coercive power necessary to support the process.")

Can courts confirm interim awards, including awards directing the posting of security?

Generally, an "interim" or preliminary award dealing with security "is ripe for confirmation" even though the arbitrators have not yet reached a decision on the merits. *East Asiatic Company Ltd. v. Transamerican Steamship Corp.*, 1988 A.M.C. 1086, 1089 (quoting *Southern Seas Navigation of Monrovia Ltd. v. Petroleos Mexicanos*, 606 F. Supp. 692 (S.D.N.Y. 1985)).

In *Home Ins. Co. v. RHA/Pennsylvania Nursing Homes*, 127 F. Supp. 2d 482 (S.D.N.Y. 2001), the defendant opposed confirmation of an interim award entitling the plaintiff to immediate possession of a disputed sum during the pendency of the arbitration. The district court granted confirmation, noting that the award, though not dispositive of the ultimate merits, was neither "tentative" nor "inconclusive" and entirely "separable" from the main dispute:

Indeed, if petitioner cannot confirm the February 28 award now, it never will be able to enforce the arbitrators' determination that it is entitled to the money now, not after the conclusion of

the hearings on the merits of the entire dispute between the parties."

See also *Metallgesellschaft A.G. v. M/V CAPETAN CONSTANCE*, 790 F.2d 280, 282 (2d Cir. 1986) (separable arbitration awards should be confirmed even if the petition to confirm is filed before all substantive arbitration proceedings between the parties have been concluded).

To some degree, there is substantial self-enforcement of interim awards. Parties often voluntarily comply because (i) they do not want to be viewed as obstructionist by the panel; (ii) they want to be viewed favorably by the panel on the substantive issues; (iii) they are concerned with having the panel draw negative inferences against them on the substantive issues; and (iv) they want to avoid the costs of enforcement proceedings.

IV. Practice Considerations:

A. The practitioner should be alert to the full panoply of interim measures that may be available in a given case and not necessarily limit his/her options to security. Arbitrators may be more willing to order one interim measure over another.

B. The practitioner's approach will obviously differ depending on whether he/she is seeking or opposing interim measures. In either case, the practitioner will be looking to guide the panel's discretion in favor of their particular position.

C. Whenever a request for interim measures is sought, the panel will want to assure that it is not seen as prejudging the matter.

D. In seeking an interim award, practitioners should stress the importance of maintaining the status quo and the possibility that, without an interim measure, there may be a change of circumstances that may render the proceedings meaningless. In some instances, obtaining interim relief may be a matter of urgency, as when aggravating circumstances exist or to prevent the imminent dissipation of property.

E. Practitioners should also be prepared to make a showing, as when seeking a preliminary injunction, that their clients have a strong likelihood of success on the merits.

F. A practitioner opposing a request for interim measures, including a request for security, can seek to demonstrate that the interim award is onerous and, if imposed, would be tantamount to depriving a party of the financial means of proving its claim or defense. Alternatively, the practitioner can seek to demonstrate that interim security measures are unnecessary because of the client's financial standing. The practitioner should be prepared to back this assertion with financial statements.

V. Impact of *Animal Feed Int'l Corp.* on Arbitrators' Authority to Order Interim Measures:

In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010), the U.S. Supreme Court found that an arbitral panel had exceeded its authority in permitting class arbitration where the parties' arbitration agreement was otherwise silent on the issue. Concluding that the FAA itself did not authorize class arbitrations, the Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." (emphasis in the original)

At issue in *Animal Feeds* was §10(4)(a) of the FAA pursuant to which a district court may, upon the application of any party to the arbitration, vacate any award "where the arbitrators exceeded their power." The Court emphasized that the "central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced to their terms'." 130 S.Ct. at 1773. (citations omitted). "Mere silence" in the parties' arbitration agreement did not constitute consent nor could consent be inferred "solely from the parties' agreement to arbitrate."

In *Yasuda Fire & Marine Insurance Company of Europe, Ltd. v. Continental Casualty Co.*, the Seventh Circuit framed the issue of the arbitrators' authority to order interim measures as depending on whether the parties precluded the remedy in their agreement: "[T]he arbitration panel would exceed its authority if it provided an award which the agreement explicitly excluded as a option." 37 F.3d at 352. *Animal Feeds* may require instead that the panel first determine if the proposed interim measures are expressly authorized in the parties' agreement before granting such measures.

ORDERING SECURITY FROM AN ARBITRATOR'S PERSPECTIVE

By David Martowski

While we know from Peter Skoufalos' excellent paper that arbitrators are clearly empowered to order the posting of security, what criteria do they consider in doing so?

In preparing this article I have reviewed thirty SMA awards, some of which involved charter parties and contracts that incorporated the SMA Rules while others did not. Although each of the thirty disputes is unique and case-specific, if you are interested in a purely statistical analysis (and I would caution against this approach) 21

of the 30 or 70% ordered the posting of security. I have also noted other references that you might find helpful on the subject¹.

I have sifted through these awards and thought it would be useful to focus on six core points:

- the overall objectives of ordering security;
- the three issues most carefully scrutinized which are the Claim(s); Opposing Party's Conduct; and Opposing Party's Financial Condition;
- requests for Counter Security; and
- the form of the Order in the event the application is granted.

Overall Objectives – In reviewing the awards I have noted repeated language to the effect that:

- "arbitration should not be merely an academic exercise"
- "ordering security in appropriate cases is intended to ultimately prevent a Pyrrhic victory"
- the goal is to preserve the "status quo" (defined in one award as a "party's fiscal status and responsibility"); and
- a fundamental interest in "doing justice and equity between the parties in a commercially reasonable manner".

There is no magic formula and each application is considered against the dispute's particular facts and circumstances. You will also note the repeated sentiment expressed that arbitrators should not order security with impunity.

The Claims – Arbitrators carefully consider the nature of the claim, the nature of the defense and the content of the record. Is the claim

- frivolous or specious?
- undisputed?
- quantifiable?
- Is there an alleged fundamental breach which goes to the heart of the contract?
- Is it a contingent claim? You will not be surprised to hear that in one case the request for security was held to be premature since the claim was for cargo indemnity yet the claim had not been paid in the first instance and the matter was on appeal.

- Has the moving party introduced sufficient evidence to establish a high likelihood it will prevail on the merits and there is no other means to obtain security?

Opposing Party's Conduct – Arbitrators have taken a dim view of a party's

- failure to respond to a demand for arbitration;
- failure to keep in force a bank guarantee required under the charter party; and
- continuing breach of the charter party or contract.

Opposing Party's Financial Condition – The Key Queries are: Is the need for security real? Is there a substantial risk of an inability to locate sufficient assets to satisfy claims? For instance, the arbitrators will carefully consider:

- The opposing party's doubtful financial condition as to creditworthiness or physical assets; and
- The opposing party's failure to post security as previously agreed; or if the entity has been sold.

However, in one case, despite the vessel having been sold, the panel nevertheless held that there was no compelling reason to order security. In another case there was no showing that the financial condition of the opposing party changed materially from the time of the fixture to the commencement of arbitration proceedings.

Requests for Counter Security – These requests are becoming more common.

- The same considerations apply – To restore the *status quo* and ensure an even playing field. To ensure that at the time of the final award, funds will be available to satisfy the claims of the prevailing party.
- Arbitrators will note on occasion that “What is sauce for the goose is sauce for the gander”.
- Requests for counter security frequently arise after an owner's P&I Club has posted a Letter of Undertaking and the owner now seeks counter security from the charterer. The view is often expressed that it is only fair and equitable for the owner to also obtain security for its counter claims.

How do requests for security work in the real world? Let me give you an example of a pending dispute between

an Owner and Charterer under a continuing long term contract that is now in the final briefing stages. Charterer claimed entitlement to certain sums during the life of the contract. Owner disagreed. Rather than terminate the contract, the parties agreed that Owner would fund an escrow account on a continuing basis until the issue was decided. Arbitration was demanded, the level of the Owner's escrow deposits was within the range of \$2-3 Million, and at a preliminary hearing, Owner submitted a counter claim and requested counter security. The panel unanimously found that the Owner was entitled to counter security in an amount to be determined, emphasizing that this was a preliminary ruling out of a sense of even-handed fairness to both parties' positions and not meant to address the merits of the Owner's counter claim. Owner was directed to substantiate its counter claim to a level acceptable to the panel within 20 days. Owner did so and the panel directed Charterer to fund an interest-bearing escrow account within 20 days in the amount of \$675,000 reflecting Owner's counter claims, plus an allowance for attorneys' fees and anticipated interest and costs. Charterer promptly complied.

The Order

If the moving party's application is successful, the Order usually takes the form of a Partial Final Award or an Interim Ruling, which is

- not a determination on the merits and without prejudice to the opposing party's defenses;
- in a reasonable amount – certain but subject to subsequent adjustment upwards or downwards if circumstances warrant; and
- orders posting of security in a form acceptable to the requesting party.

In cases in which the request for security has been denied, the panel will often state that the moving party is free to renew its application in the event of changing circumstances.

Where the dispute is ripe for decision, the panel may decline to order security preferring to move the matter forward to final award on an expedited basis.

United States arbitrators' power to order security is unique in international maritime arbitral practice which is not exercised with impunity but rather only after careful consideration of the facts and circumstances of each dispute.

1. Arnold, Manfred W., *Arbitrators' Powers to Order Security*, *The Maritime Advocate*, Issue 12, pp. 13-15 (2000); Keane, Edward A., *Rule B to Reason's Rule? Pre-Judgment Security in U.S. Maritime Arbitrations Post Jaldhi*; *The Arbitrator*, Vol. 41, No. 3, pp. 14-19 (April, 2010) (See SMA website at www.smany.org); Vayda, John P., *Arbitrators have the Power*, XI International Congress of Maritime Arbitrators (Hong Kong, May 17, 1994). Also see *Agrowest, S.A. et al v. Maersk Sealand*, SMA 4033 (2009) (ordering the posting of counter security in a service contract dispute).

LEGAL LESSONS LEARNED THE LAST TIME THE SUEZ CANAL CLOSED

By Douglas Burnett and Michael Hartman of
Squire Sanders & Dempsey (US) LLP

Recent political developments and instability in North Africa and the Middle East could affect the Suez Canal and have far-reaching implications for the global shipping industry. It is a good time to refresh memories about what happened to contracts the last time the canal closed.

One of the most important shipping passages in the world, the Suez Canal provides a crucial shortcut from the Mediterranean Sea to the Red Sea and Indian Ocean. Opened to shipping traffic in 1869, the canal provides a vital service to global trade by allowing commercial ships to avoid longer and costlier voyages around Africa. Today, around 8 percent^[1] of global seaborne trade moves through the canal, which includes 3 percent^[2] of the gross domestic product of the United States.

The recent political developments and instability in North Africa and the Middle East has brought renewed attention to the 120-mile waterway. The Suez Canal is no stranger to political turmoil, having been closed twice for extended periods in the last century due to hostilities in the region. First, from October 1956 to April 1957 the Suez Canal was blocked to shipping following the invasion of the Eastern Sinai by Israel, and later by the French and British occupation of the canal. The second period the Suez Canal was closed to shipping was from June 1967 to June 1975, due to the Israeli-Egyptian War. The result was a severe disruption to commercial shipping. As would be expected, the closings resulted in extensive charter party litigation. Much of the litigation dealt directly with the issue of allocation of additional costs involved in making the longer, more costly voyage around Africa's Cape of Good Hope.^[3] Given the current

high cost of bunker (fuel) oil and the spreading reach of pirates, the additional costs associated with a voyage around the Cape are very high.

Were the Suez Canal to close again, even for a short period of time, its impact would be far ranging and felt throughout the entire global shipping industry. A survey of the key cases and arbitrations resulting from past Suez Canal closings reveals that certain legal issues likely would arise if the Suez Canal were closed again.

Effect on Maritime Contracts

A central concern would be the frustration of existing shipping and charter party contracts, and whether a closure of the Suez Canal would indeed render those contracts unable to be performed. The basic principles of frustration of maritime contracts were set forth in *Transatlantic Financing Corp. v. United States*,^[4] which has been applied by US courts in shipping disputes that involved a closure of the Suez Canal. US and UK courts have routinely held that where vessels were not trapped, but were merely required to seek an alternate route around the Suez Canal, the charter party was not frustrated and the shipowner was required to perform the contract.^[5] Generally, the closing of the Suez Canal in 1956 was held not to be sufficient reason to frustrate a charter party for vessels that had to take the longer, more costly voyage around the Cape of Good Hope.

UK courts apply an even stricter standard than US courts. In *Ocean Tramp Tankers Corp. v. V/O Sovfracht*, the Court of Appeal failed to find frustration when the canal closing forced the vessel around the Cape of Good Hope on a voyage from the Black Sea to India.^[6] Similarly, in *Tsakiroglou & Co. v. Noble & Thorl, G.m.b.H.*, the House of Lords found no frustration even though the canal closure caused costs to double.^[7] UK cases tend to focus on whether the canal closure would render performance under the charter party "fundamentally" or "radically" different, while US cases and arbitrations focus more on whether the canal closure made performance "extremely and unreasonably" more expensive.^[8]

Case law indicates, that if a canal closure were to occur, shipowners could be required to perform existing contracts, and might not be entitled to additional freight or hire in making a deviation around the Cape of Good Hope.^[9] In some case, courts have found that the parties were relieved of their duties under the charter party because of a broadly worded war clause or exceptions clause contained in the agreement.^[10] However, the current situation in Egypt does not presently involve hostilities with other nations, a key factor in past closings of the canal. As such, breakdown clauses,

exceptions clauses, and war clauses in charter parties would likely not relieve performance under the charter. Of course, a final determination would depend upon the specific events giving rise to a closure, along with the precise charter party and language used in the agreements. But the real lesson for owners and charterers is now is the to review clauses that allocate risks for a canal closure.

Increased Exposure to Piracy

Another issue to be considered in the event of a Suez Canal closure is piracy. The marine insurance market already charges increased premiums for travel through the Gulf of Aden and the Suez Canal.^[1] A canal closure would force ships to transit the vastly larger and less protected waters of the Indian Ocean off the East Coast of Africa and likely increase exposure to piracy. Shipowners could be forced to pay even higher marine insurance premiums, as well as face increased security costs.

In summary, a closure of the Suez Canal could have far-reaching and costly implications for the global shipping industry.

^[1] See <http://www.bloomberg.com/news/2011-01-31/egypt-s-suez-canal-carrying-8-of-world-trade-remains-open-amid-violence.html>.

^[2] See <http://www.businessinsider.com/suez-choke-hold-on-world-shipping-2011-2>.

^[3] Braden Vandeventer, *Admiralty Law Institute: Symposium on Charter Parties: Analysis of Basic Provisions of Voyage and Time Charter Parties*, 49 Tul. L. Rev. 806 (May 1975).

^[4] 363 F.2d 312, 315 (D.C. Cir. 1966).

^[5] *Glidden Co. v. Hellenic Lines*, 275 F.2d 253, 257 (2d Cir. 1960); *The Eugenia*, [1964] 2 Q.B. 226, 240-41; *The Captain George K.*, [1970] 2 Lloyd's Rep. 21, 32-33; *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 319-20 (D.C. Cir. 1966); *American Trading & Prod. Corp. v. Shell Int'l Marine*, 453 F.2d 939, 942-44 (2d Cir. 1972).

^[6] [1963] 2 Lloyd's List L.R. 381 (C.A.).

^[7] [1961] 1 Lloyd's List L.R. 329 (H.L.).

^[8] See generally *American Trading & Prod. Corp. v. Shell Int'l Marine*, 453 F.2d 939, 942-44 (2d Cir. 1972) (Voyage charter case, where it was held that a 31-percent increase in cost to the vessel due to the closing of the Suez Canal did not satisfy the requirements of commercial impracticality, i.e., "that performance is rendered impossible if it can only be accomplished with extreme and unreasonable difficulty, expense, injury or loss."); *In the Matter of Travel Sales Int'l, Inc.*, 1977 A.M.C. 81 (N.Y. Arb. 1976); *In the Matter of M. Golodetz & Co. (M/V*

Olympic Pearl), SMA No. 1017 (1976) and footnote 5 *supra*. See also Nicholas Healy, *Admiralty Law Institute: Symposium on Charter Parties: Termination of Charter Parties*, 49 Tul. L. Rev. 845 (May 1975).

^[9] *Id.*

^[10] *Navios Corp. v. The Ulysess II*, 161 F. Supp. 932 (D. Md. 1958), *aff'd*, 260 F.2d 959 (4th Cir. 1958) (The hostilities which broke out between Egypt, the UK and France, resulting in the seizure of the Suez Canal were held to be "war" allowing the ship owner to cancel.).

^[11] John W. Miller, *Piracy Causes Changes in Routes, Insurance*, Wall St. J., Apr. 9, 2009, at A10.

“SIMPLY PUT, THE BARGE DID NOT DO IT” THE HURRICANE KATRINA COURT’S RELIANCE ON EXPERT TESTIMONY AND ITS BROADER IMPLICATIONS FOR MARINE CASUALTIES

By Francesca Morris
Partner, Holland & Knight LLP

Hurricane Katrina struck New Orleans on Monday, August 29, 2005. The levee that protected the Lower Ninth Ward failed during the hurricane and, as a result, the Mississippi River flooded that district. *New York Marine & Gen. Ins. Co. v. Lafarge North America, Inc.*, 599 F. 3d 102, 107 (2d Cir. 2010). Hundreds of barges and vessels broke loose during the hurricane. *Id.* One of those vessels was Barge ING 4727 (the “Barge”), which broke loose from its mooring in the industrial canal, known as the Inner Harbor Navigation Canal (“IHNC”), that runs between the Mississippi River and Lake Pontchartrain. *In re Katrina Canal Breaches Consolidated Litigation*, Civ. Action No. 05-4182, at 3 (January 20, 2011) (“Canal Breach Opinion”). During the storm, the Barge crossed the floodwall from the canal into New Orleans’ Lower Ninth Ward and by the end of the storm was resting on a house.¹ *New York Marine*, 599 F. 3d at 107. The Lower Ninth Ward of New Orleans is located on an old cypress swamp and had been subject to flooding since the early 1800s. Canal Breach Opinion at 4.

A September 9, 2005, *Wall Street Journal* article asked the question, “Still Unknown: Did A Barge Breach the Levee?” *New York Marine*, 599 F.3d at 107. In the article, the Army Corps of Engineers was quoted as posing

the theory that Barge ING 4727 might have “smashed through” the levee. *Id.* Furthermore, the article identified the Barge’s owner, Ingram Barge Company (“Ingram”), and its operator Lafarge North America, Inc. (“Lafarge”), and quoted Ingram as commenting that it had been Lafarge’s responsibility to secure the vessel ahead of the storm. *Id.*

Hurricane Katrina produced a great deal of litigation, including a limitation of liability action by Ingram and actions against Lafarge. See *In re Matter of the Complaint of Ingram Barge Company*, No. 05-4419, 2008 WL 906303 (E.D. La. Mar. 14, 2007), *aff’d*, 351 Fed. Appx. 842 (5th Cir. 2009). In the actions against Lafarge the plaintiffs claimed that Lafarge had inappropriately moored Barge ING 4727; and that because of Lafarge’s failures, the Barge was a substantial cause of two breaches of the canal, known as the north breach and the south breach, which had led to the flooding of the Lower Ninth Ward. Canal Breach Opinion at 1.

Judge Stanwood R. Duval, Jr., of the Eastern District of Louisiana, held a 13-day bench trial concerning the negligence claims against Lafarge and released a 42-page opinion on January 20, 2011. *Id.* That opinion, which was appealed on February 12, 2011, found that the Barge did not cause the breaches in the levee but instead crossed over the floodwall after the wall had already failed. Citing ongoing litigation, the court declined to find a cause for either the northern or southern breaches of the floodwall but did find that neither was caused by the Barge. *Id.* at 24-26.

The September 2005 comment from the Army Corps of Engineers that raised the question of whether the Barge had caused the flooding of the Lower Ninth Ward exemplifies the unsupported assumptions and speculation that were circulating after the hurricane and which Lafarge had to overcome in the trial. Lafarge’s success in convincing Judge Duval of its defense appears to be based on the ability of its experts to explain that the physical evidence actually supported Lafarge’s argument that the Barge did not cause a breach of the floodwall. As the experts explained, the trajectory of the wind in the storm made the claim impossible and the physical evidence showed that the Barge remained moored until after the catastrophic breaches. The decision is remarkable because of the extent of the judge’s reliance on and citation to the experts’ testimony to support his conclusions and to support his rejection of eyewitness testimony. Although judges frequently rely on experts in reaching a decision, it is not common to see experts cited so extensively in an opinion.

In reaching the decision, the court heard from, and Lafarge overcame, the testimony of eyewitnesses who claimed to have seen the Barge loose in the canal before

the storm and to have witnessed the Barge breaching the wall. In addition, the plaintiffs sought the application of two legal presumptions against Lafarge, *The Pennsylvania Rule* and *The Louisiana Rule*. *Id.* at 1-2 (citing *The Pennsylvania*, 86 U.S. 125 (1873); *The Louisiana*, 70 U.S. 164 (1865)).² Under *The Pennsylvania Rule*, which imposes a presumption of causation when

a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, ... the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.

The Pennsylvania, 86 U.S. at 136; see Canal Breach Opinion at 40-41. The “*Louisiana Rule* imposes a presumption of fault on a vessel that breaks free from its moorings and drifts into a stationary object.” *Id.* at 1-2.

Legal presumptions such as *The Pennsylvania* and *The Louisiana Rules* apply where the evidence cannot rebut the presumption. In the Canal Breach Opinion, the experts provided the court with a rebuttal. Without the experts to piece together what the evidence showed it is likely that the assumptions of the Army Corp of Engineers that were reported in the *Wall Street Journal* would have prevailed in the courtroom.

Before the Hurricane

Lafarge’s cement terminal is on the west bank of the canal. Canal Breach Opinion at 6. The eastern bank of the canal is the western border of the Lower Ninth Ward. *Id.* at 4. In other words, the Barge was in the terminal on the other side of the canal from the Lower Ninth Ward. Before the workers left the terminal, Barge ING 4727, which was unloaded, was tethered to a loaded barge and the loaded barge was tied to the dock. *Id.* at 9, 11. The unloaded Barge ING 4727 was about eight feet higher in the water than the loaded barge.³ *Id.* at 9.

The court examined the testimony regarding the movements, unloading and mooring of the Barge prior to the storm. *Id.* at 7-11. The court held that Lafarge was deficient in its mooring of Barge ING 4727 because of the height differential between it and the loaded barge to which it was tethered and in the way that Barge ING 4727 was moored. *Id.* In reaching this conclusion, the judge relied on expert testimony regarding proper mooring procedures. *Id.*

There was contradictory evidence from eyewitnesses regarding whether the Barge broke loose prior to the hurricane with two witnesses testifying that, while they were

evacuating before the storm, they saw a loose barge toward the south end of the canal. *Id.* at 12. There was also contrary testimony from the canal's lockmaster and a tug captain that they saw no loose barge in the canal before the hurricane. *Id.* at 13-14. The court credited the mariners and held that the Barge did not break loose before the onslaught of Hurricane Katrina. *Id.*

The Experts

Both the plaintiffs and Lafarge had filed motions to limit or preclude the testimony of opposing experts. *In re Katrina Canal Breaches Consolidated Litigation*, Civ. Action No. 05-4182, 2010 WL 199843, at *1 (E.D. La. Jan. 6, 2010). Most of the motions were denied. *Id.* at *2. However, Lafarge's meteorologist had included in his expert report comments regarding the movement of the Barge which were stricken because "he ha[d] not been tendered as an expert in the movement of a barge and such opinions have nothing to do with his expertise as a meteorologist." *Id.* Similarly, the plaintiffs' expert metallurgist had a portion of his expert report stricken in which he commented that certain evidence confirmed the plausibility of a witness's testimony. *Id.* The judge determined that the expert's testimony, in that regard, did not aid the trier of fact and that the court could make its own inferences. *Id.*

The plaintiffs also sought to exclude testimony of Lafarge's expert naval architect and marine engineer because he had relied on the report of another non-testifying expert witness. *Id.* at *3. The court struck as inadmissible the non-testifying expert's report but allowed the testifying expert to render opinions based on the inadmissible report. *Id.* Such testimony was permitted as

the type of evidence contemplated under Rule 703 which states "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted."

Id. (quoting Fed. R. Evid. 703). The motion practice prior to the trial underscores the importance of the experts' reports and testimony and that this fact was recognized by the judge and the parties.

The Hurricane

An important issue in the litigation was the time at which the Barge broke free from its mooring because Lafarge claimed it did not break free until after the floodwall protecting the Lower Ninth Ward had been breached. The

plaintiffs argued, and presented testimony to show, that the Barge had broken free before the storm and that as a result of a combination of tidal movements, including a 20-foot wave and other weather conditions, the Barge had moved from the southern to the northern end of the canal and hit the floodwall to cause the north breach. Canal Breach Opinion at 2. According to the plaintiffs, after the north breach the Barge bounced off the floodwall as it moved south along the canal and caused the south breach, following which the Barge left the canal and moved into the Lower Ninth Ward. *Id.*

In analyzing this issue, the court examined the fundamental characteristics of a hurricane, particularly the direction of the wind, which was relevant to the direction in which the Barge moved after it broke free. As the judge explained, because of the canal's lock, any current in the canal was very weak and the Barge would have been driven by the wind rather than the current. *Id.* at 27.

The court relied on Lafarge's meteorologist for its findings regarding "wind and water" movement during Hurricane Katrina. *Id.* at 15-16. The court tracked the direction and speed of the wind as it passed the canal and Barge ING 4727 tethered there and relied on a weather hindcast by Oceanweather, Inc. that had been used by Lafarge's expert.⁴ *Id.* at 16. Based on this evidence, the court held that although winds are calm at the axis of a hurricane's rotation, in the northwest quadrant of the eye winds blow north, north east before the eye passes over. *Id.* at 15. Thus, according to the opinion, the track of Katrina "resulted in the eye of the hurricane being to the southeast of the IHNC at 7:00 a.m. on Monday morning and placed the IHNC in the northwestern quadrant of the storm." *Id.* at 15-16 (citing Lafarge's meteorologist's expert report). Based on this evidence the court found "beyond peradventure" that from 4:00 to 7:45 a.m. the winds blew at the canal in a northeasterly direction. *Id.* at 17. This meant that during this time the Barge was pushed toward the west and away from the east bank, where the breach occurred. *Id.*

In order to explain and support the plaintiffs' theory of events, the plaintiffs' expert theorized that thunderstorm systems embedded in the hurricane drove the Barge along the canal against the prevailing wind to cause the north breach. *Id.* at 18. The court found that testimony and theory unconvincing and rejected the plaintiffs' theory that there were mesocyclones in the area. *Id.* at 18-19.⁵ Instead, relying on Lafarge's experts, the court held that the "anomalous" tidal wave and weather that would have been required to drive the Barge to breach the wall under the hurricane conditions "did not occur." *Id.* at 17.

In coming to this conclusion, the judge again credited the testimony of the lockmaster and the tug Captain, whose testimony supported the plaintiffs' experts' conclusions regarding the direction of the wind. *Id.* at 20. Thus, the judge brought together the experts' and the eyewitnesses' testimony to come to a conclusion that took account of all of the evidence.

The court turned to Lafarge's expert naval architect and marine engineer to establish the time at which the Barge broke free from its mooring. The judge's opinion noted the lack of damage to a gantry that protruded out over the water by the Lafarge terminal and by which the Barge was moored. *Id.* at 27-28. The expert witness was able to explain that, with the Barge unloaded and riding high in the water, the gantry would have been damaged if the Barge had left its mooring before 8:00 a.m. because of the direction of the wind before that time and the level of the water. *Id.* at 28. However, the more westerly wind after 9:00 a.m. would have moved the Barge to the east of the canal without damaging the gantry. *Id.* at 28. Thus, the court accepted that the Barge did not break from its mooring until after 9:00 a.m. *Id.*

The Timing of the North and South Breaches

The chief operator of the pumping station at the foot of the floodwall toward the north end of the canal testified that he saw water splashing over the wall at 3:00 or 4:00 a.m. on Monday morning. *Id.* at 22. He further stated that he heard a large boom around 6:00 a.m. and saw sections of the floodwall fall. *Id.* A call logged around that time to cut power to the pumping station, to avoid electrocuting the workers inside, confirmed the time of the call, and, thus, the time of the wall's failure. *Id.*

The pumping station operator also testified that he saw the tip of a barge over the wall, which the court did not credit. *Id.* The court instead relied on Lafarge's expert's explanation that the empty Barge would have loomed 14 feet over the wall, making it impossible to see only the tip, and suggesting that what the operator saw was part of the floodwall itself collapsing. *Id.* at 21-23. This expert testimony appears to be particularly important because it provided an explanation of what the witness actually saw, as well as a clear explanation of why it was not the Barge. The expert's explanation provided the judge with an authority on which he could rely in reaching his decision. Without that explanation this would likely have been an argument that Lafarge's defense counsel would have had to make based on the dimensions of the Barge and that would, surely, have been less persuasive.

The judge completely discounted the factual testimony of another eyewitness who claimed to have seen the Barge bumping down the floodwall between 5:00 and 6:00 a.m. He did so without impugning the witness's veracity putting errors down to confusion in difficult circumstances. *Id.* at 23. There were, however, other eyewitnesses whose testimony regarding timing did not match with the physical evidence, whom the judge also tended to discount because of previous contradictory statements regarding the Barge. *Id.* at 22-23, 31.

As explained above, the judge held that the Barge did not leave the Lafarge Terminal until after 9:00 a.m., which was several hours after the north breach had occurred. Thus, the court held that the Barge never allided against the floodwall in the area of the north breach. *Id.* at 25.

The evidence showed that the Barge did come into contact with the floodwall in the area of the south breach. *Id.* at 25. According to the judge, the relevant evidence was damage to the floodwall's concrete cap, scrape markings across the bottom of the Barge and that the Barge was found after the hurricane in the Lower Ninth Ward. *Id.* The judge held that the Barge did not cause the south breach, based on evidence that showed that the Barge did not break free until after 9:00 a.m. and the 911 call log that showed calls regarding the south breach of the floodwall at approximately 7:00 to 8:00 a.m. *Id.* at 26-30.

In contrast to the testimony of Lafarge's experts, on whom the judge relied to establish the timing of events, the plaintiffs' experts could not explain how the wind propelled the Barge to cause the breach, the trajectory or speed of the Barge, the force on the Barge or its momentum on contact. *Id.* Thus, although the plaintiffs argued that the Barge breached the wall at 6:30 a.m., their evidence could not place the Barge at the wall at that time.

The judge supported his conclusions that the Barge entered the Lower Ninth Ward after the floodwall collapsed by discussing where the Barge came to rest. The judge stated, "the most telling physical evidence that this Barge floated into the Lower Ninth Ward at a time when the water was already at a catastrophic level are photographs that show unequivocally that the Barge floated over a bus on its path and over telephone lines upon which the vessel settled when the water subsided." *Id.* at 35. Lafarge's experts explained that the water level had risen over the bus and the wires when the Barge moved across the Lower Ninth Ward, because otherwise the bus would have been damaged and the Barge would not have been on top of the telephone wires. *Id.* at 35-36. The judge commented that the plaintiffs provided no explanation for this evidence. *Id.* at 36. Lafarge's explanation, accepted by the judge, meant

that the Barge did not move with the initial inundation of the Lower Ninth Ward and, therefore, did not cause that inundation. *Id.*

The Legal Presumptions

The evidence presented by Lafarge's experts was sufficient to overcome the presumptions of both *The Pennsylvania Rule* and *The Louisiana Rule*.

The court did not apply the presumption of *The Louisiana Rule* because, according to the court, presumptions become "superfluous" when evidence is presented "to dispel the mysteries that gave rise to the presumption." *Id.* at 39 (citing *In re Mid-South Towing Co.*, 418 F.3d 526, 531 (5th Cir. 2005)). Generally, the presumption of *The Louisiana Rule* can be rebutted in three ways, by the defendant showing "(1) that the allision was the fault of the stationary object; (2) that the moving vessel acted with reasonable care; or (3) that the allision was an unavoidable [accident]." *Id.* at 39 (quoting *Combo Maritime, Inc. v. U.S. United Bulk Terminal, L.L.C.*, 615 F.3d 599, 605 (5th Cir. 2010)). When *The Louisiana Rule* applies, the drifting vessel has the burden of disproving the presumption by a preponderance of the evidence. *Simmons v. Berglin*, No. 10-30433, 2010 WL 4561402, *3 (5th Cir. Nov. 10, 2010). It is important to note that the court held that Lafarge had rebutted the presumption of causation of *The Louisiana Rule* despite finding that the mooring was deficient. Canal Breach Opinion at 11. Judge Duval held that there was no presumption regarding the north breach of the floodwall because the Barge never allided against the floodwall in that location. *Id.* at 40. In addition, Lafarge had rebutted the presumption regarding the south breach because that breach was not caused by the Barge. *Id.* Rather, the Barge passed over the floodwall after the wall had been breached. *Id.*

Although not cited by the lower court, this aspect of its opinion is in agreement with a recent unpublished opinion of the Fifth Circuit in another Hurricane Katrina case. *Simmons*, 2010 WL 4561402. There, the Court of Appeals affirmed summary judgment in favor of a sailboat owner whose vessel had come loose from its moorings during the hurricane and washed ashore, damaging plaintiffs' property. *Id.* at *1. The Fifth Circuit agreed that the defendant, Berglin, took all reasonable precautions to moor her sailboat but

[d]espite these reasonable precautions, the hurricane's unheard-of storm surge destroyed Berglin's dock and the docks around it, collapsed the buildings next to the docks, bent Berglin's aft

pilings by forty-five degrees, and ripped all but one of the sailing boats in the vicinity from their moorings, including the TRUST ME II. The one sailboat in the vicinity that was not sent adrift was Beber's sailboat, which was cut in half and sunk along with the dock that it was tied to. Given the unexpected strength of Hurricane Katrina, and because it destroyed TRUST ME II's own dock, we find not only that Berglin and her agents were reasonable in preparing for the storm, but also that no reasonable juror could say that Berglin's actions or omissions, even if negligent, had any effect on whether the TRUST ME II broke free from its moorings.

Id. at *4. In *Simmons*, the satisfactory mooring could not withstand the onslaught of Hurricane Katrina. In the Canal Breach Opinion, the Barge's mooring was unsatisfactory but it did not cause the Barge to come free and breach the floodwall.

In analyzing the application of *The Pennsylvania Rule*, the judge intentionally did not rule on whether Lafarge had violated a statute because the Barge "was not only not a contributory cause of the accident but it simply was not a cause of the breaching and catastrophic flooding that damaged plaintiffs." Canal Breach Opinion at 41. Therefore, whether Lafarge had breached a statute was not relevant. Lafarge had shown, as required to rebut *The Pennsylvania Rule*, that any inadequacies in the moorings not only were not a cause of the breaches of the floodwall but that they "could not have been." *The Pennsylvania*, 86 U.S. at 136. As Judge Duval concluded, "Simply put, the Barge did not do it." Canal Breach Opinion at 41.

Judge Duval's opinion is long and detailed. That level of detail was necessitated by the scrutiny that the opinion will undergo on appeal and the importance of the decision. Hurricane Katrina was a horrendous storm. The suffering of the Lower Ninth Ward's inhabitants and the collapse of the floodwalls have been extensively reported. Lafarge was confronted with compelling eyewitness testimony that described the Barge being seen in the canal free of its moorings before the hurricane, bouncing along the canal wall during the hurricane, and breaking through the floodwall as the Barge passed into the Lower Ninth Ward. Lafarge's experts were able to use the weather, engineering and the evidence to explain that none of these events happened the way that eyewitnesses described them. These experts overcame powerful presumption in maritime law, and in doing so may have shown that such presumptions are no longer necessary. The legal presumptions of *The Pennsylvania Rule* and *The Louisiana Rule* assume that the evidence is not available and the presumptions are overcome by a preponderance of

the evidence. As forensic reconstruction of allisions and collisions becomes more sophisticated, as it was in this trial, there is less of a need to rely on such presumptions.

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1. Reportedly, Hurricane Rita, which made landfall on September 23, 2005, relooded the area where the Barge was resting and the Barge moved. Between February and March 2006, Titan Maritime cut and removed the Barge from the area. http://en.wikipedia.org/wiki/ING_4727

2. For a discussion by the author of the application of *The Pennsylvania Rule* by U.S. courts see Francesca Morris, *The Pennsylvania Rule: No longer the Rule?*, 32 Tul. Mar. L.J. 131 (Dec. 2007).

3. The Barge's dimensions were important to the court's holding regarding the Barge's movements in the hurricane. Relying on Lafarge's expert naval architect and marine engineer, the court held:

The ING 4727 is a typical hopper barge with a 12-foot deep hull, and is 35 feet wide, 200 feet long, and constructed of steel. It has a coaming that surrounds the cargo opening that is five feet high. On top are fiberglass dome shaped portable covers to keep cargo dry. When such a barge is loaded it has a 10-foot draft, which would mean that the 12-foot hull would have 2 feet of freeboard. When such a barge is empty, her "light draft" is 1 feet 4 1/2 inches, creating a large, approximately 13-14 foot "sail" or "windage" area extending above the water including the combing [sic.] and fiberglass dome.

Id. at 7.

4. Oceanweather, Inc. provides an explanation of the "Hindcast Approach" on its website. <http://www.oceanweather.com/research/HindcastApproach.html>

5. Even one of plaintiffs' experts had said that the Barge's movement from south to north to cause the north breach was a remote possibility for which he had no evidence. *Id.* at 19.

ANTI PIRACY WORKSHOP

With piracy being front and center in the news, the Royal Institution of Naval Architects (RINA) reported the following in the March 2011 issue of RINA NEWS:

At an informal Piracy Workshop conducted at the IMO and attended by the Institution, reference was made to the design, use and effective success rate of Citadels as a means of defence off the Somali coast / in the Indian Ocean. Citadels had been used successfully in 12 attempted hijackings in the Indian Ocean.

As to general guidance on the design of a Citadel, EUNAVFOR (European Naval Force) stated that a Citadel should:

- Provide security from armed attack, fire, smoke and other threats;
- Provide a secure space for all crew members and any security/other personnel onboard;
- Have adequate supplies and sanitation facilities for a minimum of three days;
- Have long range communication capability; and
- Ideally have some ability to control the manoeuvring of the vessel, although this latter facility may not be readily available.

It was of course well recognised that the above would be difficult to achieve fully on existing ships and also may not be widely supported for all new ships.

Discussion covered the design and construction of ship bridges and other vulnerable parts of the accommodation block for new ships and the possible retrofit of alternative materials and/or the relocation of critical equipment in order to provide better protection. Also discussed were designs to "harden" ships against pirate attacks, such as avoidance of sunken poop decks, inboard location and design of guardrails, means of closing accommodation accesses, stairways, etc.

OPINION: DANGERS OF INSTANT MESSAGING

By Dean Tsagaris, SMA Arbitrator

Few of us remain who remember reading telex tape to save time responding to urgent matters, rather than waiting to run a tape through the telex to obtain a three way carbon printout of the anxiously awaited message. To the new age shipping professional this may seem as archaic as a world with corded telephones.

After passing through the fading facsimile technology, we enter the quieter world of Email and Instant Messaging (IM). The sounds emanating from trading floors are those created by traders feverishly tapping their keyboards. Convenience, and efficiency is rapidly replacing the sometimes-poetic vulgarities articulated when trading main terms on the telephone in a fast moving market.

With the convenience of instant messaging come various legal issues that all shipping professionals must consider. We will not address the ramifications of common workplace legal issues such as vulgarity, harassment, hacking, viruses etc., rather we will address the loose trading or business tendencies resulting from this most convenient communications tool, which if not correctly utilized may lead to a host of unwanted trouble.

Archival and security devices must be implemented in all companies conducting business over the IM. Sensitive and or privileged messages should be protected against. It is recommended that all IM messages be archived and logged. Too often we see employees trading on an instant message account that they have created themselves. While trading at home, bridging time zone differences, an employee may not have the means of archiving their transactions, yet they are in a position to bind their employer to a piece of business without any recording abilities. Programs such as

Citrix enable the home user to log on to an office server and allow for the archiving of all messages. A set up such as this may be costly to initiate, however, is well worth the while in preventing legal disputes.

This is of particular interest when trading charter parties. We have seen long period charter deals conducted with nothing more than a recap in a physical file. Two parties, plus a broker, whose native tongue may not be English, may conduct trades in English. Should a dispute arise over the meaning of a charter party clause, are we able to determine a meeting of the minds if there is nothing archived? Brokers in particular must implement an archival program, as they are the first line of arbiters in a dispute.

We are now able to IM (and for that matter email) on our Mobile Phones. The hazards of this convenience are all too obvious. Generally, for example, while on the run might we forget to preface our remarks with the words "without prejudice" later finding out we have given up our rights. While exiting a subway is it possible to counter details neglecting the words accept/except. There have been cases within our industry over just such simple oversight.

The U.S. Securities and Exchange Commission by way of the Sarbanes-Oxley Act regulate publically traded companies, in the United States. Instant messages are treated as emails and must be archived as they create a written business record, same as emails. These companies no doubt cover themselves by logging IMs and Emails. However, should the counter party to a U.S. publically traded company not be logging their IM it is recommended that they do.

Employees must be educated on the legal issues surrounding loose trading policies as it pertains this rapidly growing communication tool. All those using this tool note the many loopholes created by convenience, so user beware.

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IN MEMORIAM—DAVID B. LETTENY

David B. Letteny passed away on January 23, 2011. He was a long-time member of the SMA serving as Treasurer, Award Service Chairman and elected Board Member. He graduated from the Maine Maritime Academy in 1953 with a Bachelor of Marine Science. His seagoing career was on cargo and passenger ships and also in the United States Navy from 1954 to 1956. Dave graduated from the Wharton School of Finance and Commerce with an MBA in Transportation and Public Utilities.

Shoreside he worked for Grace Lines and Farrell Lines in New York in container operations and planning. At Farrell Lines he was Vice President of Intermodal Operations. He was also Chairman of the Trans Atlantic American Flag Liner Conference and Executive Secretary of the Steamship Operators Intermodal Committee. After retiring in 1999, he wrote a monthly column on Intermodalism for WWS/Worldwide Shipping magazine. He will be missed.

THE ARBITRATOR

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