

# THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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## PRESIDENT'S CORNER

On September 24, we celebrated our 45<sup>th</sup> anniversary at the Union League Club in New York, and what a party it was!

But what really gives us the right to so self-indulge in a celebration of ourselves; are we getting carried away; did we look for the approval and applause of our friends and colleagues, whom we invited to share this evening with us; was this grand-standing?

I assure you, it was never intended to be any of the above. This celebration was to recognize and honor all those who preceded us – the current generation of the SMA – in establishing and growing this great organization into what it stands for today.

From its humble though foresighted beginnings in 1963, the SMA has worked on its mission with diligence and tenacity, to grow in stature and scope, to be recognized today as one of the leading and most respected dispute resolution organizations in the world.

The SMA Rules, the Shortened Form Arbitration, the Code of Ethics, all have become models for other associations to copy or emulate, here and abroad. Our Award Service of published SMA awards, now comprising more than 4,000 reasoned decisions, is the envy of the world of maritime dispute resolution, save for some of the less enlightened places. The rigorous vetting and training process preceding acceptance into membership in the SMA is being admired and imitated by our competitors. We can be very proud of the integrity and intellectual level of our current members and we shall continue to build on this strength. 45 years is only a relative time span, one that many of us have long overtaken, but it is an achievement, when measured on what has been done with those 45 years. You be the judge.

What makes this organization so great is the dedication, the tireless dedication and the selfless sacrifice in time and personal expense of its governors, its elected officers and its membership at large. For organizations such as ours, that selfless dedication is both the life blood and soul, and

it was for that reason that we indulged in celebrating and dedicated that evening to all those who time and again step up, step forward and make us what we stand for today.

As I enter into the final homestretch of my term of office, this may well be an appropriate moment to also add my personal thanks to my co-officers and co-members of this great organization for their unflinching support and guiding wisdom over the past three and a half years. Many good and interesting projects remain on the to-do list over the next seven months or so, but the warmth and support towards the SMA and its mission, so genuinely demonstrated at our 45<sup>th</sup> birthday celebration, should make us all feel really good.

*Klaus Mordhorst*

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## LETTERS FROM THE EDGE

by Chris Hewer

SOME years ago, there was an editor of *Time* magazine who responded to every reader's letter, irrespective of its content, with the comment, 'You may well be right'. But one suspects from the tone of a letter written to the editor of *The Arbitrator* and included in this issue of the journal that Don Lundberg will not be so easily satisfied. (See *Letters to the Editor, Page 22*)

Responding to a comment in the previous issue of *The Arbitrator*, Don writes, "I think the residents of The Hague and Visby would both be surprised and somewhat

disappointed to hear that their places of residency do not exist." (This implies that there are only two residents between the two places, but we will let that pass and look instead at the facts.)

The Hague is supposedly the seat of government in the Netherlands, but not the capital. This is the first clear indication that there is something rum about the place. Next, it is sometimes referred to as 'The Hague', and sometimes as 'Den Hage'. This stinks like week-old fish. Next, not a single song has ever been written about The Hague – not even *The Hague, Den Hage* - a sure sign that it does not exist. Furthermore, The Hague is often known by the alternative name of 'The Count's Hedge', a clear reference to its mythical status. As a general rule, it is best to dismiss as bogus any place which has two names, for example Baden-Baden and, possibly, Schleswig-Holstein.

Meanwhile, there is barely the need to make a case for Visby. The clues are all there, on Wikipedia. The earliest history of Visby is uncertain. It was reshaped in the 13th century. King Eric of Pomerania was said to have lived there.

*Reshaped? King Eric?* Please be sensible. Show me a man who has been to Visby or The Hague, and I will show you a man who is tired of London.

It is not only shipping which has a penchant for picking on mythical places to sign important treaties. Not so very long ago, the citizens of Europe were asked to believe that there was such a place as *Maastricht*. Yes, commissioner, of course there is.

The place to sign treaties is at the bottom, and nowhere else.

Mr Lundberg's letter is nonetheless most welcome. Manfred Arnold commented in the previous issue of *The Arbitrator* on the reluctance of readers to correspond publicly with the editor. He is right to do so, although it should be said that editors are not the only people who can suffer from a lack of response. Some of us have attended conferences where the chairman has unsuccessfully asked for responses from the floor and has ended up asking himself questions and then dutifully answering them, and subsequently disagreeing with his answer. (*Ibid*)

Letters to the Editor are the lifeblood of any publication, and the letters page should be the first thing you turn to. It doesn't matter too much what the letters are about. It is enough that somebody has bothered to write. Take two recent letters published in the English national press.

The first notes, "My friend's mum recently pointed out that I have the same ironing board cover as her. Can anyone think of a more mundane and pointless remark to make than this?"

The second explains, "I'll never understand my neighbour. He has recently started wheel-clamping his

## THE ARBITRATOR

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THE ARBITRATOR (ISSN# pending) is issued quarterly, 4 times a year; published by The Society of Maritime Arbitrators, Inc., 30 Broad Street, 7<sup>th</sup> Floor, New York, NY 10004. The publication is posted on our website and the subscription is free. To join our mailing list please register your email address at <http://www.smany.org>.

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own caravan when he finds he has inadvertently parked it in his own drive. I wonder if he is a sadist, a masochist or both.”

A good public relations consultant will tell you that, whenever you are sufficiently angered by an editorial to be motivated to write a letter to the editor, you should go ahead and write it and then throw it into the wastepaper basket. That way, you get the thing off your chest, but don't run the risk of drawing further attention to the original piece. This is good advice but, if everybody followed it, newspapers and magazines would not be half so much fun as they can be.

Of course you should be careful before you leap into print. A learned journal once published a letter from an angry reader which appeared as follows: “Sir, I am writing to protest about the infuriating habit which you have adopted of starting an article on one page and then continuing it on to another. This is a most (continued on Page 97).”

Letters to the editor often have a greater impact than articles written by contributors. With this issue of *The Arbitrator*, the Letters to the Editor page seems finally to have got off the ground. The beneficiaries of that will be the readers, and succeeding editorial teams, rather than the person who had the idea in the first place to try and motivate the readership. That must be worth a letter to the editor.

To return to the beginning, Mr Lundberg might care to look at the facts before next racing into print. Or is he himself a mere product of the imagination of the editor of this journal, created to generate some much-needed correspondence. Can there really be such a place as ‘Midland, MI 48674’?

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## SMA INKS AGREEMENT WITH WESTLAW

by **Manfred W. Arnold**  
Editor

We are pleased to announce that on June 11, 2008, the SMA and Thomson Global Resources signed an agreement, pursuant to which TGR, through Westlaw, will publish the SMA Award Service. Westlaw will also publish THE ARBITRATOR, with this issue being produced by them towards the end of October.

Thus, in the future, the SMA Award Service will be accessible through Westlaw as well as Lexis/Nexis.

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## MANIFEST DISREGARD – NO GROUND TO VACATE

by **Justin Kelly**  
ADRWorld.com

Relying on the U.S. Supreme Court's ruling in *Hall Street*, Alabama's Supreme Court recently held that manifest disregard of the law can no longer serve as a non-statutory ground for vacating an arbitration award under the Federal Arbitration Act (FAA).

Professor Richard C. Reuben of the University of Missouri School of Law said the Alabama court's decision in *Sherry Hereford v. D.R. Horton, Inc.* (No. 1070396) is the first state supreme court case to consider the manifest disregard question under the FAA and that its holding “is a correct interpretation of the *Hall Street*.”

Earlier this year, in *Hall Street Associates, L.L.C. v. Mattel, Inc.* (128 S. Ct. 1396, 2008), the U.S. Supreme court held that the grounds listed in the FAA are the exclusive grounds a court may consider when deciding whether to vacate an arbitration award. That decision called into question the continuing validity of manifest disregard of the law as a ground to vacate an award.

While some practitioners and scholars have argued that the manifest disregard standard survives *Hall Street*, either as a separate ground or as a way of interpreting FAA Section 10(a) 4, Reuben rejected that thinking as “wishful.” “My sense is that we will see more of these rulings from the lower courts in the months and years to come, and that the best avenue for relief for those who want to preserve the manifest disregard standard is to lobby Congress to codify the manifest disregard standard in an amendment to the FAA,” he concluded.

University of Kansas School of Law Professor Christopher R. Drahozal noted that *Hall Street* left open the possibility of state law grounds to vacate an award. Notably, the California Supreme Court in an Aug. 25th opinion in *Cable Connections, Inc. et al. v. DIRECTV, Inc.* (No. S147767) held that parties are authorized to contract for judicial review of arbitration awards for errors of law under the California Arbitration Act. It also found the holding in *Hall Street* that parties are not authorized by the Federal Arbitration Act to expand judicial review of arbitration awards in their contracts, did not preempt its ruling.

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The contract between Sherry Hereford, the owner, and D.R. Horton, the builder, for the purchase of a new residence, included a one-year limited warranty making

Horton responsible for repairing latent defects. The limited warranty expressly disclaimed all other remedies, including consequential damages. It also contained an arbitration clause calling for arbitration under the Federal Arbitration Act.

Horton repaired some latent defects but a dispute arose as to the adequacy of the repairs. Hereford refused to allow Horton into the house to do further repairs. She filed a claim under her homeowner's insurance policy. The insurer granted her request for remediation of the defects. After the repairs were completed, Hereford sued Horton for breach of the limited warranty.

The builder moved to compel arbitration. Before the trial court ruled, the parties voluntarily submitted the case to arbitration. In arbitration, Horton moved for summary judgment, arguing that it was not liable because the limited warranty excluded consequential damages. Hereford argued that the exclusion of consequential damages was unenforceable. The arbitrator granted Horton's motion after concluding that Hereford's claims were either covered by insurance or excluded consequential damages. Hereford moved to vacate the award but the Alabama trial court denied the motion. Hereford appealed, arguing that the arbitrator manifestly disregarded the law in entering summary judgment in Horton's favor. The Alabama Supreme Court affirmed on appeal.

The court said that before it could address Hereford's manifest disregard argument, it had to determine whether, in light of *Hall Street*, manifest disregard of the law remained a ground for vacating an arbitration award under the FAA.

The manifest disregard doctrine originated in a remark by the High Court in *Wilko v. Swan* (346 U. S. 427, 1953). Since that time, the Alabama courts and other courts have recognized the doctrine as a non-statutory ground for vacating an award. However, the court concluded that *Hall Street* rejected the notion that *Wilko* established manifest disregard as a non-statutory ground to vacate arbitration awards. *Hall Street* said that such a reading was "too much for *Wilko* to bear" and that the text of the FAA "compels a reading of the § 10 and § 11 categories [of relief] as exclusive." Thus, the court held, "Under the Supreme Court's decision in *Hall Street* ... manifest disregard of the law is no longer a proper basis under the Federal Arbitration Act for vacating, modifying, or correcting an arbitrator's award." Since the parties' dispute was governed by the FAA, the court held that Section 10 of the FAA contained the exclusive statutory grounds for vacating the award in this case. Hereford did not allege any of these grounds, so the court had no choice but to affirm the lower court's decision.

The court also overruled its earlier adoption of manifest disregard of the law in *Birmingham News Co. v. Horn* (901 So. 2d 27 Ala. 2004).

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## RULE B PREVAILS: SECOND CIRCUIT DECIDES *CONSUB DELAWARE*

The New York admiralty bar has waited, with some trepidation, for the outcome of the appeal, which was argued in May 2008. Although the majority of judges in the Second Circuit accept that *Winter Storm* is controlling, there is one judge in particular who disagrees and draws a distinction between "originator" electronic fund transfers ("EFTs"), which he considers *attachable* property, and "beneficiary" EFTs, which he considers are not (contrary to other judges who have considered the issue). Indeed, his recent order releasing some \$3.5 million of "beneficiary" EFT is presently on appeal. Unfortunately, having anointed the *Winter Storm* decision as a "rule," *Consub Delaware* adds its own footnote one: "We do not reach today the question of whether funds involved in an EFT en route to a defendant are subject to a Rule B attachment." *Consub Delaware* clearly is a victory for the admiralty bar. To the extent that the clearing house banks have not learned to live with the "nuisance" of Rule B attachments since 2002, they will likely have to look to Congress for relief.

**Note:** For the full text of this update, contact [jharwood@blankrome.com](mailto:jharwood@blankrome.com) or [llambert@blankrome.com](mailto:llambert@blankrome.com).

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## NEW YORK ARBITRATION: DEBUNKING THE MYTHS

by Armand M. Paré, Esq.  
Partner, Nourse & Bowles, LLP

Are visits to you by your lawyers as welcome as visits by you to your dentist? If so, you are probably enjoying, as you would the invention of some magical cavity-eliminating toothpaste, the fact that New York lawyers have been chained to their desks of late obtaining and fighting Rule B attachments. With the recent decision of the Court of Appeals for the Second Circuit in *Consub Delaware v. Schahin Engenharia* affirming the right to attach wire transfers notwithstanding a party-poooper-like footnote in a prior decision questioning this right, this state of affairs

is now likely to continue for some time. I know some of you reading this may be thinking of the rule that “absence makes the heart grow fonder”. Like any rule, however, there are exceptions, and, in the minds of many others of you, dentists and lawyers may perhaps be paradigmatic exceptions to this particular rule. In all eventualities, I do not write to urge the universality of this rule nor to challenge any so-called exceptions, no matter how ungraceful. Instead, I write to advise you that, since your last visit, there are things, not unlike flossing, that should be brought to your attention. More particularly, you should be aware that there are many myths circulating around out there about New York arbitration in our absence that require a quick reality check-up.

### **The Awarding of Costs and Attorneys’ Fees in New York Arbitration**

Someone has told you that you cannot get costs and attorneys fees in New York arbitration. Please. I remember watching a debate with our late and great New York Senator and former U.N. Ambassador, Daniel Patrick Moynihan. His opponent quoted some outrageous non-fact to him. The Senator looked his challenger dead in the eye on national TV and said simply: “Who on earth told you that”? There was, of course, no answer. If anyone tells you that you cannot get costs and attorneys’ fees in New York arbitration, make sure to get his or her license and registration. This is simply not true. Many of the most often used charter forms provide for this and the courts here have enforced these. The Rules of the Society of Maritime Arbitrators, to which parties often agree, also provide for this. Both sides usually request costs and fees, and cases here say that this also grants the arbitrators authority to award these. There are now countless arbitration awards in New York providing very contented prevailing parties with full or very nearly full awards of costs and fees.

### **The Consistency of U.S. Law with English Law**

Someone has told you that English Law and American Law differ in important respects and that you are better off, no matter whether you are an owner or a charterer, with English Law. It is true that the hood ornament and grill are different on a Bentley when compared to those on a Rolls, but does anyone driving behind the wheel of either of those babies really care? There may also be some very few and far between differences in U.S. and English charter party law, but the two share a very large common ocean of similarities. I could give examples, but books

on both time and voyage charters lay out the similarities, *in seriatum*, in a way that makes the point inescapable. If we were talking about French law, I might say “Vive la difference,” but one would be hard pressed to list a handful of differences between English and American charter party law of any consequence. There is, of course, a simple reason for this. We took our charter party law, lock, stock and barrel, from England.

### **The Consistency of New York Arbitrations**

Someone has told you New York arbitrations are not consistent with one another on points of law from one arbitration to the next. Call me stupid and put me in the corner with a funny hat, but after 34 years of doing this stuff, I can’t think of a single such point except whether 6 hours should or should not count under the ASBATANKVOY when laytime has expired at the first port. The fact is that both lawyers and arbitrators in New York are extremely precedent conscious. I would bet good money that New York arbitration awards have a higher rate of consistency on points of law than decisions of any single court system anywhere. And, of course, if you don’t believe me, you can read all these decisions on line (since they are published) and write a nasty letter to the editor.

### **New York Arbitration Hearings and New York Arbitrators**

Someone has told you that arbitrators in New York are part-timers and only conduct arbitration hearings during lunch time and after hours in the evening. Are you kidding? No one has left his or her desk for lunch in New York since Gordon Gecko said “lunch is for wimps” in the movie Wall Street. Arbitrators in New York are generally full time professional arbitrators many of whom have consulting practices on the side, some following careers in the industry (and hence have very useful expertise in differing areas of the industry like steamship economics, ocean weather analysis and tail shaft alignment) or are retired or practicing attorneys with a specialization in charters. If you want to hold a series of full-day hearings in New York, you call the arbitrators and book them. It’s easier to do than getting a restaurant reservation at a lot of places.

### **New York Arbitration is Too Expensive**

Someone has told you that New York arbitration is too expensive. Hello. We don’t have a separate solicitor and barrister system. We, for the most part, don’t even have

appeals, and hence an award by arbitrators with their expertise is pretty darn final. The rates for maritime lawyers in New York are cheaper, in dollar digits, than the rates for solicitors around the world in Pound Sterling digits. And the dollar...why do you think everyone brings empty suitcases here? I know, I had you at “hello”.

**Booking Your Next Visit**

And so, patient reader, it’s up to you. You can delay booking your next visit here because someone told you our dentists don’t use Novocain and our laws are wacky. These myths are simply untrue and uninformed; belief in these will only result in your getting a really big cleaning elsewhere.

**PATIENCE IS THE ART OF HOPING**

**By Manfred W. Arnold**  
**Editor**

I always hoped that my recruiting efforts for contributors from within the SMA membership would bear success. Today I am pleased to announce that two relatively new members have drawn on their extensive business experiences and prepared articles for this issue and indicated that they may continue to do so in the months to come. I should like to thank Robert J. Flynn, president of Mallory Jones Lynch Flynn & Associates and Robert C. Meehan, partner of Eastport Maritime USA LLC. My sincere thanks to both of you.

Bob Meehan’s paper and the references to SMA awards reminded me of the Award Service (and the hope by the Treasurer for more subscribers).

Someone once told me that when he applied for membership in the SMA and was asked why, his answer was, “I want to learn from the mistakes which other people have made.” This leads me to a blatant sales pitch –

With more than 4,000 awards published by the SMA, subscribing to the service and reading the awards may be a helpful tool to learn from the mistakes made in the past. A minor investment in time and money may pay off by having happier clients/principals.

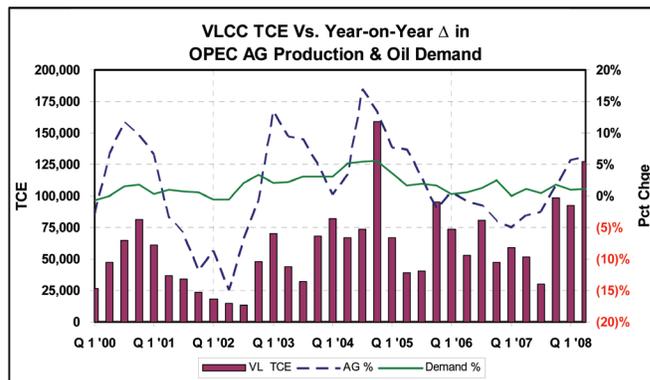
**TANKER MARKET DRIVERS AND WHAT TO WATCH IN THE COMING MONTHS**

by Robert J. Flynn

The tanker industry is part of the oil services industry – if there is more oil produced, there is more oil to be serviced. This simple homily has become a quick and dirty attempt to explain what for most market observers was an unanticipated surge in earnings for the tanker market during the first seven months of 2008. Its premise is not incorrect – it’s just not that simple, but simplicity is what the market generally prefers to hear.

The 2008 tanker market has been a story of increasing oil supply (tanker demand) and decreasing tanker supply. The latter from conversions into dry vessels and floating production units as well as increasing market discrimination against non-double-hulled tonnage (Non-D/D) following the December 2007 oil spill in Korea. To a limited degree 2010 has come two years early from a tanker supply point of view.

**Oil Supply and Tanker Rates:**



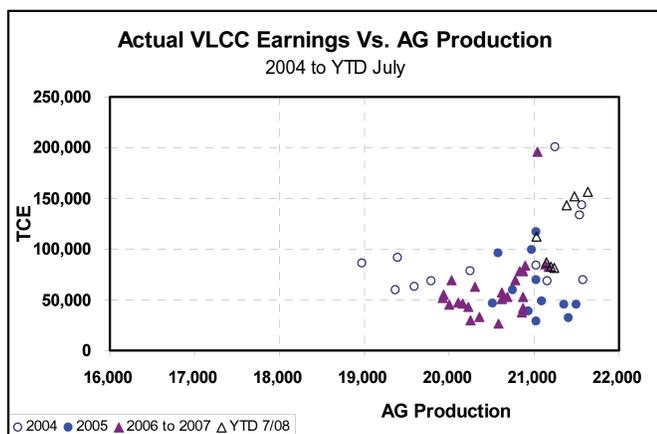
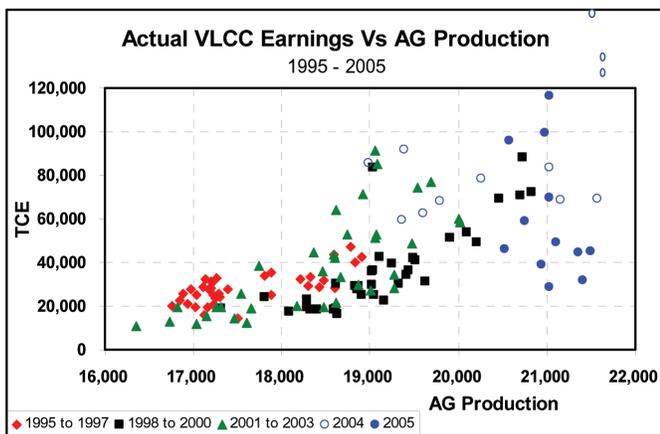
This graph shows the relationship between OPEC’s production levels from the Arabian Gulf (AG), changes in oil demand growth and the average earnings for very large crude carriers (VLCCs) during this century. The volatile nature of VLCC earnings (both the rises and falls) have found a kinship with the volatile nature of production

levels emanating from OPEC vs. the more slowly evolving changes of global oil demand growth. The changes in production levels have directionally matched the variance in VLCC and other sector earnings, but the relationship has not been constant. The graphs below show the generally increasing production levels since the mid 1990's through the present. Additionally one can visualize the steeper slope of a hypothetical "best-fit lines" for each of the period represented as time has passed. The implication is that vessel earnings, particularly in the VLCC sector have become more sensitive to production changes. There are two graphs used to show this process strictly for presentation purposes as the time charter equivalents (TCEs) earned have climbed dramatically since the end of 2007.

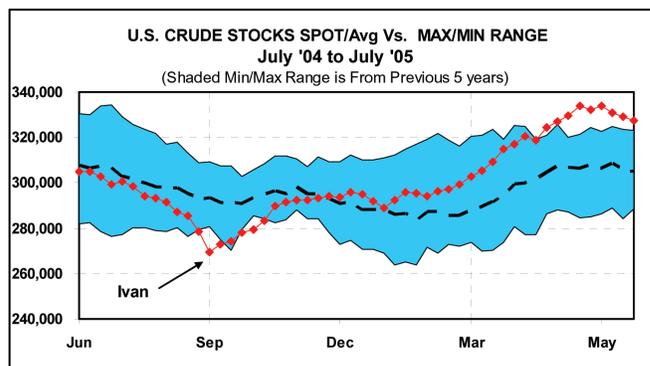
- 1995 to 1997  $r^2 = 51\%$
- 1998 to 2000  $r^2 = 64\%$
- 2001 to 2003  $r^2 = 54\%$
- 2004 to 2005  $r^2 = 1\%$
- 2006 to 2007  $r^2 = 21\%$
- 2006 to YTD 7/08  $r^2 = 47\%$

**Issues Beyond Oil Supply:**

The 2004/2005 period was a transition period for the oil and tanker markets – the stuff that eats up predictive models that are derived from historical relationships. It began with surging and demand growth and efforts by OPEC to keep up by increasing oil supply rapidly during 2004. However, 2004 ended with a logistical quagmire named Ivan that resulted in a shortage of AG VLCC tonnage during the 4<sup>th</sup> quarter '04 and an excess of tonnage during the 1<sup>st</sup> quarter of '05 – commonly referred to as a dislocation of tankers. The 4%+ growth in oil demand during 2004 that had tanker charterers scrambling for tonnage faded, such that by the 2<sup>nd</sup> half of 2005 demand growth had fallen to just over 1%. A major reason for this was that China began to reel in demand growth after the 1<sup>st</sup> quarter of '05 (Chinese demand growth falling to about 150,000 bbls per day for the last three quarters of '05 vs. over 900,000 bbls for the full year 2004). The impact would have been harsher, but crude inventories rose as contango pricing (a financial market term used when discussing futures markets – it refers to future prices being higher than current or closer to present prices) on the front end of the futures curve encouraged both crude storage and production by producers. However, stocks eventually rose to a point where oil simply was less dear easing transportation desires – see chart of U.S crude stocks July '04 to July '05.



The relationship has held statistically except for the 2004/2005 period, when the  $r^2$  virtually disappeared falling to 1%. The table shows the  $r^2$  was strong prior to the '04/'05 period and has gradually regained its strength since 2006. (Note:  $r^2$  is a correlation coefficient, a statistical term used to measure the linear relationship between variable and resultant.)



This tanker rate dichotomy from 2004 to 2005 as the data points on the prior graph implies resulted in this

## 2008 Market Drivers:

This year's market has been the beneficiary of increased crude production from the AG (OPEC) and the Eastern Mediterranean (Baku Tblisi Ceyhan Pipeline which carries Azerbaijani crude to the Meditterean), periodically Saudi Arabia has selectively created an "effective contango" pricing to certain regions since December 2007 and 2010 coming two years early from a tanker supply point of view – a perfect storm for tanker owners. The combination of a full one million barrels per day transiting the BTC and the seasonal Bosphorus delays fourth quarter into first quarter of the next year has the potential to provide striking strength for the Aframax and Suezmax sectors in the near term if regional political stability can be maintained.

In an effort to alleviate pricing pressure Saudi has three times provided sharply discounted pricing for U.S. destinations – December '07, May '08 and June '08 have experienced respectively \$4.00+, \$2.00+ and about \$1.25 discounts to the price of her crude grades vs. the prior months prices. Increased import levels followed these price discounts starting six to seven weeks after the discount went into effect. There have been similar pricing schemes at different times for European and Asian markets

The VLCC and to a lesser extent the Suezmax sector have had the supply of vessels reduced from conversions into dry and offshore units. This combined with the December 2007 oil spill in Korea from a single hull VLCC has resulted in Non-D/D utilization of fixtures significantly falling vs. 2007 measured through July of this year.

## What to Watch For In the Coming Months:

The issues that bear watching at this point for the balance of the year and into 2009 include:

- Post Olympic development in China – will a return to Pre-Olympic industrialization spur oil imports/tanker rates or will imports be dampened by inventories built prior to the Olympics
- The price of crude as set in the near term on the various commodity exchanges (which have recently dropped as sharply it rose this spring) and the subsequent interplay between prices and global demand growth as we enter 2009.
  - Recent reduction of Non-OECD oil price subsidies – their impact on oil demand and then pricing followed by production levels from OPEC
  - Virtually all the growth in oil demand for the two years prior to 2008 can be attributed to the growth in consumption of China, India and

OPEC – the smaller increases and decreases in consumption in rest of the world have essentially netted out.

- Increasing dislocation of product sources from areas of demand – long haul refined product movements, for example Europe to North America gasoline followed by North American diesel exports to Europe and elsewhere increasing utilization of smaller segments.

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## LAYCAN—(To Cancel or Not to Cancel – That is the Question)

by Robert C. Meehan

A commodity transaction involves a number of underlying contracts; opening financing and/or a letter of credit with a bank, establishing a purchase agreement with a supplier, entering into a sales agreement with a buyer, arranging for cargo insurance, entering into contracts with terminals and/or in-land transportation, arranging for surveyors and lastly, to bring it all together, entering into a shipping contract, namely the charter party. Some cynics have said that the least enforceable contract out of all those established is the shipping contract mostly due to the "laycan" provision. Generally, this term is referred to as the laydays, stating the first and last day during which the vessel can tender under the shipping contract. The last day is defined as the canceling day. This belief stems from the stipulation that in the event the vessel misses her canceling date the charterer has two options, extend, or cancel. It is not the intention of this paper to broach the subject of what constitutes an 'arrived ship' and all the ramifications that accompany this obligation but rather to discuss in broad terms the meaning and more importantly the intention of the laycan obligation.

The origin of the vessel laycan was to establish a time-frame when a vessel was to arrive enabling the charterer to ready the cargo at load. From the onset both parties have differing needs. The charterer would prefer the narrowest range of dates to arrange cargo availability in order to minimize storage cost, finance charges and so forth. The owner, on the other hand, prefers the widest possible range to factor in the probable delays vessels may encounter. Once the parties reach an agreement, it is incumbent they to adhere to their obligation; for example, not diverting the vessel on interim business en route hoping for no delays; presenting misleading ETAs for load to cite but two examples. By treating the laycan in this manner, the

obligation to arrive within the agreed timeframe becomes more a hedge towards future employment than an obligation to arrive. The interim cargo opportunity becomes more clouded in the parcel tanker trade where at fixing, both parties are aware the owner may have other load and/or discharge obligations before the vessel can tender for the new cargo.

Laycan, aptly defined in *Cape Tankers Inc v. Chemoil Corp.* (SMA 3746), represents the vessel's scheduled arrival at the load port. At the time of concluding a fixture, the owner must have a reasonable basis for concluding that the ship could arrive within her laycan. The dates are determined after taking into account such matters as her prior commitments, her berthing prospects while meeting those commitments, her ability to perform at service speed, likely weather and sea conditions or other anticipated impediments during the performance of her prior voyage, as well as during the positioning voyage to the next load port.

When presented with the vessel itinerary, the charterer in turn will act in reliance with this information by including the vessel laycan and ETA for the loadport in his various other contracts. For example, a Letter of Credit expressly provides that the latest date of the shipment is the canceling date. On those occasions when the vessel misses the canceling date the charterer is potentially in breach of his obligations to his other contractual parties even though a vessel's late arrival does not necessarily prove that the owner has breached his obligation. Absent any reason where the charterer would derive benefit by canceling, more often than not the charterer will choose the path of least resistance and extend. This decision is due to the fact the charterer generally has no alternative in the form of a readily available substitute vessel and must, therefore, extend in order to satisfy his contractual obligation to others by loading and delivering the cargo.

What happens when parties exchange information on the vessel's itinerary and ETA but the actual voyage does not turn out as planned? Take for example the case of the *AMALIA DEL BENE* (SMA 3533). On December 22, with laydays of January 3/14 accompanied with a vessel ETA load of January 13/14. The charterer (Yukong) expressed concern that the late ETA could result in the vessel missing the canceling date. On December 27, Goldbeam, as owner, maintained that the ETA load of January 13/14 was realistic by informing Yukong about the vessel's prior voyage. Based on this advice, Yukong accepted the ship and in turn nominated the vessel to a sub-charterer on back-to-back terms. On December 30, or five days after sailing from the loadport, Goldbeam informed Yukong that

due to an overload condition, the vessel was too deep to berth at Point Comfort requiring lighterage at another port, thus delaying her arrival. The *AMALIA DEL BENE* was not able to meet the canceling date of January 14 forcing Yukong to charter in another vessel at a higher rate to meet the obligations to shippers and receivers of the cargo.

Yukon claimed that Goldbeam breached the contract by intentionally misrepresenting the itinerary of the *AMALIA DEL BENE* and the resultant ETA at the loadport. Considering that the vessel sailed two days prior to the firm nomination date, Yukong argued that Goldbeam intentionally and knowingly misrepresented the ETA and that it knew or should have known that the vessel was overloaded and therefore unable to make her canceling date.

The sole arbitrator found in favor of Yukong, and held:

*As the party under obligation to provide accurate information to another, to Yukong in this instance, it is liable in damages for negligent misrepresentation if it failed to exercise due care in determining that the information it provided was in fact accurate. This, Goldbeam failed to do.*

Another example is the *LEPANTO GLORY* (SMA 3492). In this case, Glencore chartered the vessel for a full cargo of steel scrap from Amsterdam to Pohang. The laydays were August 1/10 with an ETA at the loadport of August 1/5. During the negotiations, owners informed Glencore that the vessel would have to dry dock prior to the voyage and included it in the fixture recap as follows:

*Laycan August 1/10 – full itinerary for C/P vessel will complete discharge at Rotterdam about July 18 – then dry dock and expect ready under this C/P August 1/5 AGW*

While in dry dock, the classification society determined that the vessel required considerable steel work, which caused the owner to send the vessel to another yard. As a result of this reschedule and additional work, vessel's readiness under the Glencore charter was delayed until August 29. Charterers decided to maintain the charter citing the freight market had escalated rapidly and that reasonable mitigation required charterer to maintain the charter party. Furthermore, charterer sought damages for additional barging cost at load and late delivery charges at the discharge port.

Owner agreed that the vessel failed to arrive within her laycan, but argued that the delay was beyond its control. Owner also pointed out that charterer was fully aware of

the dry docking requirement prior to the next voyage. Lastly, owner relied on ‘Wilford, Coghlin and Kimball, Time Charters (3<sup>rd</sup> ed. 1989):

*In general, a late tender by the Owner will give the Charterer the option to cancel, but will not create a right to recover damages from the Owner... A right to recover damages exists if the Owner has materially misrepresented the vessels position or her readiness for delivery in the charter.*

Charterer argued, also under reliance on Time Charters, that a charterer has the right to recover damages where the vessel’s position or expected readiness had been misrepresented:

*... a breach of the obligation to proceed with “reasonable dispatch” such as making an unreasonable intermediate voyage or repairing the vessel to suit the Owners convenience would expose Owner to damages as well as cancellation.*

The panel concluded there was a material misrepresentation by owner of a reasonably expected readiness date and affirmed charterer’s right to damages.

The preceding examples are rather straightforward. Both involve defined positioning voyages which make it relatively easy to monitor the schedule and resultant timing. But what about those charter parties in the “parcel trade” which only cover part of the vessel’s space. In these instances, the charterer does not have the benefit of determining the vessel schedule both before and after load. For example, before the vessel arrives at “your loadport,” the vessel will most likely have multiple intermediate discharge and/or loadports to call. Furthermore, in some cases the owner may not have confirmation of prior port(s) at the time of fixing. The ability to determine whether the owner has intentionally misrepresented the vessel position and/or time becomes more complicated in these instances.

Surprisingly few cases address the owner missing the canceling date by intentionally misrepresenting the vessel schedule and/or timing in multiple load/discharge charters. The closest example would be the SANTA MARIA I (SMA 3055). Although this case refers to late arrival at discharge, the decision could easily apply to loading-laycan issues as well.

Lorico chartered the vessel to carry a part cargo of maize from the Mississippi River to Beirut, Lebanon. The maize cargo represented about 60 percent of the vessel’s carrying capacity. During charter negotiations, Lorico learned the vessel would seek completion cargo and since this operation would delay the arrival into Beirut, Lorico

insisted that owner disclose the details of the completion cargo, including load and discharge ports. Owner stated, and included in the fixture recap, that the vessel had been fixed a completion cargo of 3,200 MT creosoted poles from Mobile to Limassol, Cyprus. After loading in the US Gulf, the vessel encountered delays during the voyage to the extent that the vessel arrived in Beirut about 60 days after loading in the Mississippi River, representing a delay of about one month. Lorico was forced to purchase 5,000 MT maize for prompt delivery Beirut to meet its obligation in partial mitigation toward the late arrival of the SANTA MARIA I.

During the proceedings, charterer emphasized that owner also fixed a cargo of fiberboard and steel pipes from Houston to Genoa. This parcel was the culprit, causing the vessel delay in vessel’s arrival at Beirut. Charterer claimed owner had breached the charter by misrepresenting the extent of the intended completion cargoes, the vessel’s itinerary, and its expected arrival date at Beirut. Charterer, amongst other issues, sought reimbursement for the cost of the 5,000 parcel, which it bought in mitigation.

Charterer had contended at fixing, it was their understanding the vessel would load their cargo, and then proceed to Mobile to load the creosoted poles, thereafter discharge first at Limassol, and then discharge its cargo at Beirut. Charterer maintained the Houston fiberboard parcel was booked prior to their fixture yet no mention was made of this parcel during the negotiations.

It was charterer’s position that owner breached its obligation to limit the completion cargo to the Mobile creosoted poles, previously disclosed. Charterer argued that owner was obligated to proceed to Beirut to discharge the maize cargo with *reasonable dispatch* without *unjustified departure* from a usual and reasonable route, which it failed to do.

Owner acknowledged that the fixture recap and charter party referred to creosoted poles as completion cargo, but maintained that was intended to describe only one of the completion cargos and not others which the owner had a right to lift.

The majority found the evidence fully supported charterer’s position and concluded that owner had misrepresented the voyage itinerary and the nature and number of completion cargos that the SANTA MARIA 1 was to carry. The majority went on to say,

*It is our belief the fixture would never have come about if Lorico was informed the vessel would lift cargoes in addition to the creosote poles referred by Black Swan as the “completion cargo.”*

The dissenting opinion rejected charterer's claim of misrepresentation and held that the real cause for the dispute was the fact that the charter party did not adequately reflect what each side wanted or perceived to have agreed to; the dissent stated:

*In retrospect (and with the benefit of hindsight), matters would certainly have been greatly simplified and delays averted if Black Swan had laid out the whole program at the onset and specified the ports together with the addition completion cargos ... . If indeed time was of the essence as contended by the Charterer, then it should not have relied upon the understanding of what it perceived its position to be, but Lorico should have insisted on arrival dates to be part of the charter party; clearly the burden of compliance would then unequivocally have been placed upon the Owner.*

During negotiations, parties, in their zeal to conclude a fixture, can easily lose sight of these pitfalls and, on occasion, quite unwittingly find themselves at risk. Had Lorico voiced its needs before actually fixing, owner may have more fully elaborated on the vessel's program, and the parties possibly may not have concluded the fixture.

This view is supported by the earlier referenced AMALIA DEL BENE. Yukong had accepted the vessel nomination 22 days in advance of the laycan, even though the ETA load was on the canceling date, on a vessel booked on an interim, albeit positioning voyage. One could surmise that Yukong, anxious to do the deal, was willing to take the risk that the vessel would arrive in time, which in theory, factoring speed, distance, and load and discharge rate, was conceivable, all going well.

*... it bears pointing out that, by and large, the marketplace will reward Owners who are willing to represent a certain "ready to load" date in the contract (e.g., by a better freight rate that competing Owners may obtain who prefer to "play it safe" and merely negotiate laydays without representing any "ready to load" date).*

Good faith plays a dominant role in negotiating contracts. Before one concludes the shipping contract, transparency in the voyage itinerary both before and after loading will most likely shift the responsibility of delay upon the Charterer. This should serve to avoid a misunderstanding between the parties in the event the venture does not go according to plan. Prior knowledge of the vessel

position and itinerary at time of fixing is tantamount to a successful, drama-free voyage. That aside, it is prudent for the buyer of space (booking part cargoes) to understand what in fact he is purchasing. Because of the nature of the business in the parcel or even part-cargo trade, vessels are more often late than not. The parties should disclose and formalize any time commitment, constraints or expectations into the charter party in order to remove any ambiguity with respect to their obligations and expectations.

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## PENALTY FOR DELAY OF CLAIM

by James E. Mercante, Esq.  
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Marine insurance contracts on yachts and other pleasure craft contain terms requiring a claim to be filed with the insurance company in a timely manner. As one vessel owner recently learned, failure to comply can result in no insurance coverage.

Nationwide Mutual Fire Insurance Company ("Nationwide") issued a marine insurance contract to cover a 1998 Eliminator 25-ft. powerboat. The Eliminator was damaged in an accident while underway on a lake. The vessel owner and insurer subsequently found themselves engaged in a dispute over the meaning of the "notice" provision in the policy. The provision in the Nationwide policy provides in Section 1 - Conditions, in Item 2(a), that in case of a loss, you must give notice to us or our agent, and in case of theft also to the police as soon as possible.

Nationwide interpreted this provision to mean that the insured/vessel owner must notify the insurance company of any damage to the boat or other occurrence "as soon as possible" after the accident. But, the vessel owner read it differently - arguing that he was only obligated to give notice *as soon as possible* to the police in case of "theft", and that the provision was silent as to when notice was required in case of a "loss". Thus, the insured argued that the policy was ambiguous and should be construed in his favor and against the company (Nationwide) that drafted the terms. The dispute wound up in court.

### The Accident

The owner of the Eliminator was operating his boat on a lake when, according to him, a 4- to 5-ft. *rogue wave* struck and launched the boat "probably 4 to 6 feet out of the water" ejecting him into the lake. When he got back

on board, the owner noticed the boat had suffered “stress cracks” in the cockpit fiberglass and he had to turn the ignition key several times before the engine would turn over. He made it back to his boathouse and hauled it out of the water on his boat lift. While he knew that some repair work would be required to fix the stress cracks and the engine damage, he thought the cost of repairs would be minimal. Therefore, the insured decided not to file a claim with Nationwide because he wanted to “keep his insurance premium from going up”. The boat remained unrepaired and undisturbed on the boat lift for the next five months.

The owner then brought the boat to a marine service company to be winterized and there the boat stayed for nearly two years while the owner tried to save enough money to fix the problems himself. As it turned out, the boat required extensive repairs to the engine, stress cracks and a “softball-sized hole” in the hull. Thus, nearly three years elapsed after the *rogue wave* hit before the owner filed a claim with Nationwide seeking insurance coverage for the damage. Nationwide denied the claim due to breach of the notice provision. The owner countered with a lawsuit against Nationwide asserting causes of action including breach of contract, breach of the duty to settle a covered claim and breach of a fiduciary relationship. *Digh v. Nationwide Mut. Fire Ins. Company*.

### The Court Fight

Nationwide responded with a quick motion for *summary judgment* believing that the court could easily decide the coverage dispute because the claim had been filed so long after the incident occurred. The trial court accepted the insurer’s argument and ruled in favor of Nationwide on summary judgment. The insured then appealed the decision to a higher court.

A marine insurance policy is like any contract between two parties. The appeals court noted that it must construe the maritime contract just as it is written and not attempt to rewrite it to make a new contract for the parties. The court was required to construe the terms of the policy according to the plain, ordinary and accepted meaning of the language used. An ambiguity in an insurance contract is typically construed against the company that drafted the policy terms. This applies only if the suggested alternative interpretation is fair and reasonable and not simply a warped reading of the policy. The court noted that as a general proposition, if no time for the performance of an obligation is agreed upon by the parties to a contract, then the act must be performed within a reasonable time.

### Notice Not Reasonable

When an insured has a claim against its insurance company, the policy’s notice provision governs the timing of when the claim must be filed. However, even if the provision is ambiguous, notice must be given as soon as practicable. The insured cannot sit on a claim and do nothing as an insurance company has rights to investigate a claim and inordinate delay can impact its investigation.

Here, the Appellate Court first had to determine whether or not there had been an unreasonable delay in notifying the insurer. Since the accident happened nearly three years before the claim was filed with the insurance company, the Appellate Court found that it was beyond dispute that the delay was significant and unreasonable.

The next step for the Appellate Court was to determine whether or not the insured acted in good faith in delaying giving notice for so long. The court noted that the vessel owner conceded that he was aware of the loss on the same day it occurred and that he admitted the only reason for delaying notice was to prevent his insurance premiums from increasing. As a result, the Appellate Court determined that even though the notice provision may have been capable of two different interpretations, the vessel owner was aware of the loss yet purposefully and knowingly delayed giving notice to Nationwide. Therefore, the vessel owner’s delay was found not to be in good faith. The court ruled that the insurance company had no duty to cover the loss to the boat and affirmed the trial court’s entry of summary judgment in its favor.

### Conclusion

You have heard the phrase *Timing is Everything...* and now you know it applies in marine insurance as well.

This article was first published in “Long Island Boating World” June 2008 and is reprinted with the kind permission of the author.

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## MANAGING AGENT STATUS FOR PURPOSES OF LIMITATION OF LIABILITY ACT

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After TITANIC struck an iceberg and sank on her maiden voyage, with the loss of 1,513 lives, her owners, the

White Star Line, sought limitation of liability for damage claims in a United States court. The TITANIC, 209 F. 501 (S.D.N.Y.1913), *rev'd sub nom* Oceanic Steam Navigation Co. v. Mellor, 233 U.S. 718 (1914). The case well illustrates the safe haven that the American limitation statutes have provided to vessel owners over the past one hundred and thirty-five years. The TITANIC was a total loss. Her remaining 'value' – and hence the owners' liability – was limited to the value of the few lifeboats that survived the disaster. *Id.*, 209 F. at 509. In its current form, the statute is known as Limitation of Liability Act of 1951, 46 U.S.C. §§ 30501-30512 (the "Act"). The time-honored practice of bringing suit against any and all parties even remotely connected with a maritime disaster has compelled managing agents, as companies, who are frequently responsible for the operation of vessels, to seek protection under the Act. This article examines whether a vessel's managing agent can enjoy the status of an owner, for the purposes of availing itself of the protections of the Act.

The Circuits are inconsistent in their willingness to hold that a managing agent can achieve the status of an owner *pro hac vice* for the purposes of the Act. The rule, at its simplest, appears to be that if the party seeking limitation may be held liable due to its ownership or operation of the vessel, then it can maintain a limitation action. The decisions, however, are not always consistent with this rule. Courts frame their decisions in terms of whether the managing agent has sufficient possessory, managerial and operational control and interest in a vessel. Significant factors include control of the operations of a vessel, payment of repairs and insurance of the vessel, hiring and reimbursement decisions regarding the captain and the crew and ultimate responsibility for potential injuries of the captain and the crew. When considering the issue of control and possessory interest, the courts examine the specific language of the management agreements. In general, the more a managing agent takes on the responsibilities, attributes and potential liabilities of an owner or bareboat charterer, the more likely it is to qualify for the protections of the Act.

## I. Limitation of Liability Act

The Act itself does not address the issue whether a managing agent is entitled to limitation. The Act only specifically addresses the status of an owner and charterer for limitation purposes. The Act allows limitation of liability for loss, damage or injury occasioned or incurred without the privity or knowledge of the "owner". 46 U.S.C. §30505. Section §30501 extends the term 'owner' to bareboat char-

terers, providing in relevant part: "[I]n this chapter, the term "owner" includes a charterer that mans, supplies, and navigates a vessel at the charterer's own expense or by the charterer's own procurement." The Act, however, specifically excludes from coverage a ship's crew and master, as individuals, even if the crew or master happens also to be an owner. *Id.* at §30512. Section §30512 provides: "[T]his chapter does not affect the liability of an individual as a master, officer, or seaman, even though the individual is also an owner of the vessel."

Not only does the Act severely limit the liability of the "Owner", but it enjoins "all claims and proceedings against the Owner" upon the filing of the limitation action. §46 U.S.C. §30511.

## II. Managing Agent as an Owner, Charterer or Owner *Pro Hac Vice* for Purposes of Limitation of Liability Act

A number of cases provide examples of when courts have found sufficient control and/or relationship with the vessel to bring contracting parties, such as managing agents, within the preview of the Act. See Petition of the United States, 259 F.2d 608, 609 (3d Cir.1958) (noting that the words "charter" or "charter party" need not be present in a contract in order for the person taking over the operation of the ship to be considered a charterer or owner *pro hac vice*). In Petition of the United States, the Third Circuit accorded owner status to a contractor who not only provided the crew, food, and personnel-related supplies to a government-owned vessel, but who also provided fuel, controlled navigation, insured the vessel, and agreed to return the vessel to the government in a certain condition. *Id.* at 610. The contractor who sought a limitation of liability did not merely hire the crew, but rather, exercised control over the vessel and was ultimately responsible for the vessel's condition. The contractor moreover had virtually the responsibility of the record owner to third parties arising from the collision and, therefore, the court held that it required "the same kind of protection against the possibility of crushing loss which might arise as is given said owner." *Id.* at 611. The Third Circuit, accordingly, granted the contractor's right to limit its liability. The Court expressed the view that the words of the Act including "owner" and "charterer", must be construed in a "broad and popular sense in order not to defeat the manifest intent" of the Act. *Id.* at 610.

Similarly, in the Second Circuit, in Chesapeake Shipping, Inc. v. Gleneagle Ship Mgmt. Co., 803 F.Supp. 872,

873-75 (S.D.N.Y.1992), Judge Haight accorded “owner” status to a ship management company that “took over the full management and operation of the vessels.” *Id.* at 873. The company that sought limitation not only provided the crew and crew-related supplies, but also provided engine supplies, controlled maintenance and repairs, and provided parts. Also, the company had entered an agreement with the owner that provided, “[T]o the extent permitted by applicable law, [the][o]wner shall have no liability for personal injury claims relating to the [v]essels ... [and the company] shall process all personal injury claims relating to the [v]essels.” *Id.*

Judge Haight noted that Addendum 1 of the management agreement provided: “The Manager’s authority to act shall be limited to the authority granted herein,” reflecting the parties’ intent not to characterize the contract as a charter party and thus arguably precluding reliance on the Act. *Id.* at 874. Nevertheless, citing the Petition of the United States, supra, Judge Haight pointed to the potential liability of the ship manager as a key factor in bringing it within the protection of the Act. *Id.*

Again, in Complaint of B.F.T. No. Two Corp., 433 F.Supp. 854, 871-73 (E.D.Pa.1977), the court accorded owner or charterer status for a contractor that, under oral agreement, provided a crew and insurance and also arranged for business on behalf of the owner to ensure that the vessel remained gainfully employed and in service. The contractor received a fee from the owner based on the income generated by the vessel during the period of the agreement. The court noted that these facts described a contractor that was more similar to a charterer than to a company that merely provided crewing services. Because the contractor was responsible for insurance as well business, the court held, the contractor was responsible for making decisions above and beyond those normally entrusted to a captain or pilot. Therefore, the court granted the contractor’s right to limit its liability.

### **III. Managing Agent Does Not Rise To The Status of an Owner, Charterer or Owner Pro Hac Vice for Purposes of Limitation of Liability Act**

By contrast, the Seventh Circuit in In re Oil Spill By The AMOCO CADIZ, 954 F.2d 1279, 1302 (7th Cir.1992), denied owner status to a management company that “assist- ed” with the vessel’s maintenance and operation, but was not ultimately responsible for its operation, maintenance,

or repair or for the training of the crew. In this case, the vessel’s titled owner entered a “Consulting and Chartering Agreement” with the management company under which the management company was designated as an agent of the titled owner and “[o]nly the titled owner had the requisite degree of possessory, managerial, and operational control of [the vessel].” *Id.* at 1302-03. Specifically, the court found that the agreement was made simply to “[a]ssist and advise the owner with regards to maintenance and operation of the ship.” *Id.* The court upheld the dismissal of the management’s company petition for limitation. Those in the realist school of jurisprudence have long recognized that the AMOCO CADIZ court - confronting the largest oil spill of the day - was less disposed to grant limitation to the AMOCO companies, which had sought to limit their liability to the \$700,000 value of the ship and freight. For good measure, the court also observed that “[e]ven if the [managing agent] AIOC and Standard [subsidiary of the owner] were the owner for purposes of Act they cannot not prove their freedom of privity or knowledge of the negligence that caused the grounding...” *Id.* at 1303.

Similarly, in Birmingham Southeast LLC v. M/V MERCHANT PATRIOT, 124 F.Supp.2d. 1327, 1338-39 (S.D.Ga.2000), the court found that a contractor did not qualify as an owner where, under an oral management agreement, the contractor hired and managed the crew, but the contractor did not pay the crew’s wages or the expenses of operation and maintenance of the vessel. In Birmingham Southeast, the contractor was in constant contact with the vessel’s owner of record regarding all aspects of operations, including the crew and the vessel, and oversaw maintenance and prepared maintenance budgets, but the titled owner approved and paid for maintenance expenditures. The Court concluded that the contractor “was not a charterer of the vessel and was not involved in the commercial aspects of which ports the vessel called at and what cargoes she carried.” *Id.* at 1330.

In a relatively recent case, In re American Milling Co., Ltd., 409 F.3d 1005 (8<sup>th</sup> Cir. 2005), the Eight Circuit held a managing agent did not enjoy owner status under the Act. *Id.* at 1016-1017. The decision rested in part on the interpretation of the crewing agreement between the agent and the owner, under which the role of the agent was limited and kept in check by owner’s retention of substantial control over decisions related to the operation and control of the vessel, selection of the crew, and maintenance of the vessel. *Id.*

The court’s determination of the managing agent’s status also relied on an analysis regarding the actual operation and control of the vessel. The court noted that the

agent had left daily navigation decisions, such as how to arrange the barges within the tow, when to use helper tugs, and judgment calls regarding the safety of proceeding in light of river conditions, to the crew and captain. The agent also transported the crew to and from the vessel, provided the crew with radio equipment, food, and personnel-related supplies, and was available for the crew to contact while the vessel was in service. *Id.* However, the crew was also in contact with owner and charterer of the vessel. All three of these entities received daily pilot house logs and the owner also received daily engine logs. Importantly, the Court noted that the charterer, not the agent, controlled the ship's destinations and provided the fuel and therefore the agent was wholly uninvolved with "the commercial aspects of which ports the vessel called at and what cargoes she carried." *Id.*

Significantly, under the written management agreement that was orally extended each year, the agent selected the crew, paid the crew, and withheld taxes. *Id.* However, the court noted that the owner dictated aspects of operations of the crew, reserved the right to board the vessel at any time and retained substantial control over hiring decisions. *Id.* The owner retained the ultimate authority over selection of the captain, the composition of the crew, the responsibility for the cost of crew injuries and the cost of maritime maintenance and cure obligations. *Id.* In addition, the owner paid for the repairs and maintained insurance of the vessel and therefore held the ultimate control and investment in the ship. *Id.* at 1017. The court declined to find the agent to be an owner *pro hac vice* due to the agent's role being thus limited.

#### IV. Venue

It should be noted that the venue for filing a petition under the Act is to be determined under Rule F (9) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure. The parties seeking limitation must file the complaint (1) where the vessel has been attached or arrested, (2) if the vessel has not been attached or arrested, then in any district where the owner (and/or in our case, the managing agent) is sued, (3) failing the foregoing, where the vessel is located and (4) if none of the previous venue requirements are met, in the U.S. district court of choice.

#### Conclusion

The cases discussed in this article represent only a few of the reported decisions on the subject, but they illustrate

that the right of a managing agent to claim the status of an owner *pro hac vice* under the Limitation of Liability Act depends on it having sufficient control and interest in the vessel. To foster this result, a management agreement needs to provide explicit wording defining the managing agent's exclusive possessory managerial and operational control of the vessel. If, following a casualty, an agent hopes to improve its prospects of qualifying for the protections of the Act – and providing circumstances so permit, under Supplemental Rule F – it should promptly file for limitation in a favorable forum, which under current law, would include a United States district court of within the Second and Third Circuits.

*Note:* Mr. Kleiner acknowledges the valuable assistance of his colleague, Boriana Farrar, in the research and preparation of this paper.

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## THE IMPACT OF COMPANY INSOLVENCY ON COMMENCED ARBITRATIONS

by Gary K.L. Soo, Barrister (Hong Kong)

### Introduction

In modern commerce, company insolvency can occur anywhere, at any time, in any trade and for any number of reasons. It can occur in good times or bad. In the construction industry, for example, insolvencies arise from a combination of economic downturns and the traditional way in which the industry operates. Contractors commonly fund their operations through overdrafts and trade credits and are usually paid in arrears. Their activities inherently involve a high degree of risk. Uncertainties in pricing arise in the tendering process because works are priced before construction commences. It is, therefore, commonly believed that insolvency is more likely to occur in the construction industry—one of the largest users of arbitration—than in many others.

The insolvency of a party to arbitration proceedings is an external factor that can seriously affect the future conduct of proceedings that have been commenced. A court or the arbitral tribunal may be required to decide what should happen to such proceedings pending the outcome of any insolvency proceedings. In many jurisdictions, the courts have a discretion to stay or restrain all further proceedings in any action or proceeding brought against a company

when insolvency occurs. This is a matter of the applicable national law.

### Commenced arbitrations and insolvent parties

In Hong Kong, winding up proceedings are governed primarily by Parts V, VI and X of the Companies Ordinance (Cap 32). Section 181 of the Companies Ordinance, in particular, provides:

“At any time after the presentation of a winding-up petition and before a winding-up order has been made, the company or any creditor or contributory may –

(a) where any action or proceeding against the company is pending in the Court of First instance or the Court of Appeal, apply to the court in which the action or proceeding is pending for a stay of proceedings therein;

(b) where any action or proceeding against the company is pending in any court or tribunal other than the Court of First Instance or the Court of Appeal, apply to the Court of First Instance to restrain further proceedings in the action or proceeding, and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.”

Arbitrations in Hong Kong are governed by the Arbitration Ordinance (Cap 341). By virtue of s 2AA(1) thereof, the object of the Arbitration Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense. The achievement of this object is based on the following principles, which are set out in s 2AA(2):

“(a) Subject to the observance of such safeguards as are necessary in the public interest, the parties to a dispute should be free to agree how the dispute should be resolved; and

“(b) the Court should interfere in the arbitration of a dispute only as expressly provided by this Ordinance.”

On the face of it, therefore, any interference by the courts, unless expressly provided in the Arbitration Ordinance, appears to conflict with the object and principles set out in s 2AA of that Ordinance. Where, however, a party to an arbitration that has already been commenced becomes insolvent and winding up proceedings are in prospect, the following question arises: can and should such arbitrations be restrained from proceeding further under the Companies Ordinance?

This is the very issue that fell to be decided by Le Pichon J in *Re UDL Contracting Ltd* ([2000] 1 HKC 390 (Court of First Instance, Hong Kong)). The case concerned an application made on 10 December 1999 for an order

restraining all further proceedings in an arbitration until the conclusion of the hearing of a winding-up petition against the applicant company. The arbitration had commenced in September 1998 and pleadings closed on 23 August 1999. On 24 August 1999, a petition to wind up the applicant company was presented, based on non-compliance with a statutory demand that was founded on a judgment debt of about HK\$900,000. On 7 December 1999, the arbitrator proposed to make a default award against the applicant company in respect of its defence and counterclaim. It was against this background that the application came before the court.

The application was made under s 181(b) of the Companies Ordinance. In the course of submissions a key issue arose that required determination by the court, namely whether an arbitration is an “action or proceeding” within the meaning of s 181(b) of the Companies Ordinance, thus giving the court jurisdiction in the matter.

In opposing the application, counsel for the respondent submitted that s 2AA of the Arbitration Ordinance effectively displaces s 181 of the Companies Ordinance. Thus, said Counsel, if an arbitration is on foot and the court is asked to interfere, then the court may do so only within the confines of the provisions of the Arbitration Ordinance.

This submission was rejected by Le Pichon J who, after reviewing the object and principles of the Arbitration Ordinance, said:

“... [I]t is in that context, ie how the dispute between the parties is to be resolved, that interference should be restricted. The decision of the Court of Appeal in *SOL International Ltd v Guangzhou Dong-Jun Real Estate Interest Co Ltd* [1998] 3 HKC 493 is entirely consistent with the approach set out above. It is to be noted that the question whether s 2AA displaces other ordinances such as s 181 of Cap 32 did not arise for determination. Accordingly the Court of Appeal's observations as to the effect of s 2AA must be read with that in mind.”

Relying on the additional words “in any court or tribunal” that are contained in the Hong Kong provisions, as compared with the parallel English provision, Le Pichon J continued:

“That would suggest that ‘proceeding’ is not to be confined to court proceedings. Further as pointed out by Kelly J in *Re Vassal*, ‘proceeding’ has been given a wider meaning in the cases referred to in his judgment and the view of Lord

*Simon (obiter) in the House of Lords' decision in Herbert Berry Associates Ltd v Inland Revenue Commissioners [1978] 1 All ER 161 appears to stand alone. 'Action or proceeding' is also used in s 186. As will become apparent, arbitrations are encompassed in the automatic stay imposed by that section. The same meaning must therefore be accorded to s 181(b). For all these reasons, the wider interpretation is to be preferred. In my judgment, an arbitration is a 'proceeding' for the purposes of s 181(b) of Cap 32."*

Any creditor of or contributory to the company may make an application under s 181 of the Companies Ordinance. In other words, the application may be made by persons other than the parties to the arbitration. As stated in *Re Oak Pitts Colliery Co* ((1882) 21 Ch D 322), the purpose of this section is to maintain the *status quo*, to preserve the company's assets and put all unsecured creditors on an equal footing.

It should be noted further that this section has to be read together with s 186 of the Companies Ordinance, which provides:

*"When a winding-up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose."*

These two sections complement each other. They share a common purpose, save that the burden is different: prior to a winding-up order being made or provisional liquidator being appointed, the burden is on the applicant to justify a stay. Obviously, there is a material difference in law and in effect between the presentation of a winding-up petition and the making of a winding-up order. This is of growing importance, particularly in times when winding-up proceedings are commonly used – or abused – as a tool for collecting disputed debts.

In her judgment, Le Pichon J did read these two sections of the Companies Ordinance together and said, in relation to s 186:

*"There is little doubt but that s 186 extends to arbitrations. When a provisional liquidator assumes office, he takes over the control of the company and its assets. If proceedings by and against the company are to be continued, leave of the court must be obtained. In other words, no expenditure may be incurred without such leave. If*

*[the respondent's] submission regarding the effect of s 2AA is correct, it would mean that arbitrations to which a company is party remain unaffected by the appointment of a provisional liquidator. That plainly is not the case since ongoing proceedings need to be funded and it is the provisional liquidator who is in control."*

Thus, the mere presentation of a winding-up petition can have a profound impact in restraining further proceedings in arbitrations already commenced.

In the United Kingdom, equivalent provisions are set out in the Insolvency Act 1986 and the European Union Regulation on Insolvency Proceedings (Reg No 1346/2000). By virtue of these provisions, the appointed receiver, liquidator etc is the legal representative of the company who is authorised to continue the arbitration. If the winding-up is compulsory, leave of the court is required to continue the arbitration. This system is similar to that of Hong Kong and is in line with international practice.

### The exercise of discretion

These provisions are intended as a check upon proceedings that might operate to the prejudice of the creditors. As such, it is unlikely that the court would sanction anything that would be improper or contrary to the ordinary course of business. In the exercise of the court's discretion, regard must be had to the primary object of winding-up, namely, the collection and distribution of assets *pari passu* among unsecured creditors after payment of preferential debts. In *Attlee Investments Ltd v Lee Chun t/a Lee Chuen Furniture Co* ([1983] HKLR 420), the Hong Kong Court of Appeal laid down the general principle that was applicable in these circumstances. It is of fundamental importance that the court's discretion should be exercised for the benefit not of any particular creditor or creditors, but for the general body of creditors so interested. Where a petition has been presented that might result in a winding-up or a scheme of arrangement, no creditor should gain priority over others in the same class.

In the *UDL* case, it was the position of the applicant company that it could no longer fund the arbitration. The management accounts showed that its liabilities exceeded its assets and it had but a nominal amount of cash in its bank account. Yet, unless the arbitration was stayed, the applicant company would be in breach of the peremptory order. The likelihood was that it would not be allowed to pursue its counterclaim and, also, not even be in a position to properly defend the claim. The prejudice that would have

been caused to the creditors was evident. Further, the applicant company was undergoing a restructuring process and a scheme of arrangement under s 166 of the Companies Ordinance was under formulation and review for sanction. In making an order that all further proceedings in the arbitration be restrained until the conclusion of the hearing of the petition to wind up the applicant company, Le Pichon J took into account the above factors and exercised discretion in favour of the applicant company. She held:

*“In the exercise of the court’s discretion under s 181(b) the test is whether substantial injustice will result if the arbitration is not stayed. It is inarguably in the interest of the company’s creditors and contributories that [the respondent’s] claim be properly defended and the counterclaim asserted. Against that I have to balance any potential prejudice to [the respondent].”*

This seems also to be consistent with the approach taken in *Bowkett v Fuller’s United Electric Works Ltd* (1923 1 KB 160) that, in the absence of special circumstances, a stay of proceedings may be granted pending the formulation of a scheme of arrangement.

## Procedural options

When a winding-up petition has been presented, and before a winding-up order is made or a provisional liquidator is appointed, it is necessary to consider whether the arbitration should still proceed or should be stayed pending the outcome of the winding-up proceedings. An arbitral award obtained between the presentation of the petition and the making of the winding-up order does not normally have any real benefit but would surely result in costs unnecessarily incurred.

Furthermore, the date of commencement of winding-up is not the date when the winding-up order is made. A compulsory winding-up is deemed to commence at the time of filing of the petition; a voluntary winding-up commences at the time of passing of the resolution to wind-up. As such, winding-up has a significant impact on the conduct of the arbitration in at least two ways. Firstly, after commencement of winding-up, any disposition of the company’s property, other than one made by the liquidator, is void unless the court orders otherwise. Secondly, creditors cannot enforce any judgment or award obtained after the commencement of winding-up.

Arbitral proceedings may be restrained on such terms as the Hong Kong courts think fit. The relevant factors to be taken into account may be discerned from a US case, *Vesta Fire Insurance Corp v New Cap Reinsurance Corp*

(244 BR 209 (SDNY 2000)). In that case, US arbitration proceedings were ordered by the US court to be stayed pending the resolution of insolvency proceedings before an Australian court.

It should also be borne in mind that, where winding-up proceedings are an abuse of process, the court has power to strike out a winding-up petition (See *Re First GNP Hong Kong Ltd* [1995] 2 HKC 380).

## Conclusion

A discretion is vested in the Hong Kong courts to restrain all further proceedings in an arbitration already commenced in Hong Kong, pursuant to s 181 of the Companies Ordinance, upon the mere presentation of a winding-up petition. Other jurisdictions make similar provision. Thus, where a party to an arbitration is facing insolvency, all involved in the arbitration should consider and evaluate the available procedural options.

*Note:* This article first appeared in the “Asian Dispute Review” April 2008.

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## ARE YOU A “SEAMAN”?

by James E. Mercante, Esq.  
Partner, Rubin, Fiorella & Friedman

In admiralty law, whether or not someone is a member of your “crew” has important legal significance and can impact everything from vessel owner liability for personal injury to proper marine insurance coverage.

Recreational and race sailors often invite guests to assist as crew. Same with recreational fisherman. However, if an injury occurs, that person’s status aboard your vessel is hugely important. In a recent case, the owner of a sail boat was sued in federal court under U.S. admiralty law after one of his racing crew members was struck and injured by the boom during a jibe. *Heather Knight v. Christopher Longaker*, 2007 WL 1864870 (2007).

Heather (“plaintiff”) was injured during the course of a jibe maneuver which involves the shifting of sails. The starboard side of the vessel touched down into the water and the boom and chute swung around striking plaintiff from behind. Plaintiff was knocked off her feet and came down head first on a metal winch. Christopher (defendant/vessel owner) was at the helm despite having been injured himself earlier in the race in heavy wind conditions.

## Special Treatment for Seamen

For centuries, crew members of vessels have been treated liberally by courts to the point where true seamen have become somewhat of a protected class known as “wards” of the admiralty court. This is because seamen historically were called upon to endure long stretches of time away from home while at sea, were particularly vulnerable to the perils of the sea, and were subject to orders and discipline of often cranky old sea captains. While this scenario may not apply to a weekend sailor or a fishing crew on a trip to the Canyon, shrewd admiralty attorneys can and do craft legal arguments in an effort to stretch the fabric of maritime law applicable to traditional seaman beyond the original intent. The special legal treatment afforded to a seaman is enticing to a maritime lawyer because it can result in lucrative monetary awards handed down by a federal judge or jury.

## Seaman’s Rights and Remedies

A seaman even has different remedies and causes of action that he or she may pursue against a vessel owner. Unlike a guest or passenger whose only cause of action for an on board injury typically is in tort for general maritime “negligence” against the vessel owner, the “seaman” has a “statutory” remedy against his or her “employer” for negligence under the “*Jones Act*,” a cause of action for “*unseaworthiness*” of the vessel, and another for “*maintenance*” and “*cure*” under general maritime law. Maintenance and cure covers such things as food, lodging and medical expenses. For this reason, if you think you may be employing a “seaman” aboard your vessel for sail races or fishing excursions, it’s imperative that the vessel owner consider the potential legal ramifications and discuss with your insurance agent the appropriate marine insurance coverage for this special class of mariner.

## BOOM!

After the plaintiff was hit by the boom, the unwary boat owner found himself at the helm of a federal lawsuit — he was sued by his racing guest for Jones Act negligence, unseaworthiness of his vessel and for maintenance and cure. Naturally, this all came as a big surprise and a rude awakening to the vessel owner who had only invited plaintiff to lend a hand during races whenever she had the spare time, did not compensate her, and the only reward was “bragging rights” if they won a race.

The United States District Courts and even the United States Supreme Court has addressed the issue of who quali-

fies as a “seaman” hundreds of times. Unbelievably, it is still a hotly-contested issue in admiralty law today, long since “ship’s were made of wood and men were made of iron.” It is the courts, not the legislature, that has defined the term seaman in legal parlance. In 1991, the United States Supreme Court articulated a requirement that the person have an “*employment-related connection to a vessel in navigation*.” Then, in 1995, the Supreme Court expanded on that test laying out two essential elements to the “employment-related connection to a vessel in navigation” requirement.

*First*, the employee’s duties must contribute to the function of the vessel or to the accomplishment of its mission. This is a broad requirement and it has been applied to all types of maritime employees who work at sea in the service of a ship. For example, even a hairdresser aboard a cruise ship has been found to contribute to the accomplishment of a cruise line’s mission. *Second*, a person must have a *connection to a vessel in navigation that is substantial in terms of both its ‘duration’ and its ‘nature.’* The purpose of this substantial connection test is to separate out those who only have a transitory or sporadic connection to a vessel. Thus, someone who spends only a small fraction of his or her working time aboard a vessel is generally not considered a member of the vessel’s crew regardless of his or her duties. One federal court took a stab at a rule of thumb (later adopted by the U.S. Supreme Court) and suggested that a worker who spends less than 30% of his or her time in the service of a vessel in navigation should *not* qualify as a seaman.

The federal court in the sail racing injury referred to above, determined that plaintiff did not qualify for seaman status. While plaintiff met the first element of the test, i.e., that she contributed to the function of the vessel or to the accomplishment of its mission by trimming lines for the sails and keeping with the ultimate goal of getting the most out of the available wind, it was the second element that tripped her up. This element required that she demonstrate a substantial connection to a vessel in both “duration” and “nature.” It was shown that plaintiff had a full-time job on land as a language professor and her connection to the sailing yacht was not substantial because she assisted as crew only one or two weekends a month. Her connection to the vessel was deemed to be inadequate under the 30% rule of thumb in that she spent less than 30% of her time in the service of a vessel in navigation. The court did not accept plaintiff’s argument that her connection to the vessel was substantial because she was a “key, steady official crew member, and virtually all of her sailing was aboard the vessel.” Instead, the court determined that plaintiff

was a recreational boater whose connection to the yacht was unrelated to her employment ashore and that the boat entered several races that plaintiff missed such that her connection to the vessel was less than significant.

Because plaintiff sailed only on weekends and by her own testimony had missed “bunches of races,” she could not satisfy the substantial connection in terms of “duration” test. Accordingly, given the plaintiff’s full-time employment on land and purely recreational participation on the boat, as well as the infrequency of her sailing, the court ruled that plaintiff’s connection to the vessel was not substantial either in *nature* or in *duration* and therefore she was not a “seaman” under maritime law. As a result, the court granted summary judgment in favor of the vessel owner dismissing plaintiff’s claims for negligence under the Jones Act, unseaworthiness of the vessel and for maintenance and cure under general maritime law.

## Conclusion

As this case demonstrates, it is important to know who you are under admiralty law and that is not always who you think (or say) you are!

*Note:* This article appeared in the September 2008 “Long Island Boating World.”

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## NEW YORK ARBITRATORS DENY HEAD OWNER’S MOTION TO CONSOLIDATE “DISPUTES” ARISING UNDER THREE “IN CHAIN” TIME CHARTERS

*Maribus Shipping Company Ltd., as Owner of the LAC-ERTA and Bottiglieri Di Navigazione S.p.A., as Charterer, under a time charter dated January 11, 2003*

by **Patrick V. Martin, Esq.**  
Counsel to the SMA

The law in the United States clearly states that there is no right to consolidate disputes involving common issues of fact or law arising under separate but related contracts containing arbitration clauses such as charter parties. However, the various parties in their contracts can agree to consolidate such common disputes before a single arbitration panel.

The arbitration at hand involved a chain or string of three separate time charters in which the head owner asserted damages for loss when there was a late redelivery of the vessel under the head charter and presumably the two sub-charters. Not content with pressing the claim against the head charterer, the owner petitioned the arbitration panel for an order consolidating that dispute with an allegedly similar dispute under the two sub-charters. The purpose of the motion was to allow the owner to have discovery and claim damages against all three charterers whom, the owner alleged, ordered the vessel on a final voyage knowing that there would be an overlap in a rising market. At the end of this final voyage the vessel was redelivered under all three time charters.

Each of the three charters was on the NYPE form and provided in printed clause 17 for arbitration in New York. A separate clause in each charter incorporated the Rules of the Society of Maritime Arbitrators (the “SMA”).

Part I, Section 2, of the SMA Rules states:

*The parties agree to consolidate proceedings relating to contract disputes with other parties which involve common questions of fact or law and/or arise in substantial part from the same maritime transaction or series of related transactions, provided all contracts incorporate SMA Rules.*

*Unless all parties agree to a sole Arbitrator, consolidated disputes are to be heard by a maximum of three Arbitrators, to be appointed as agreed by all parties or, failing such agreement, as ordered by the Court.*

Pursuant to clause 17, the owner demanded arbitration from its time charterer and appointed an arbitrator. The charterer appointed its arbitrator and the two appointed a third thus completing the panel under the head charter. At this stage, the owner then made a motion to the panel for an order bringing in the other two sub-charterers. As stated above, the owner sought consolidation so that it could obtain discovery from the sub-charterers and also obtain a judgment against them.

The head time charterer strongly objected to the panel ordering consolidation. It argued that there was no dispute between it and its sub-charterer and consequently it had made no demand for arbitration. Therefore, consolidation, which was meant to facilitate dispute resolution, was in this instance being used to create disputes where none

existed. The two sub-charterers were even more vehement in their opposition.

The first sub-charterer confirmed that there were no disputes between it and its owner (head charterer) and likewise none between it and its charterer. It asserted that it was not a party to the head charter and under the law there was no contractual privity with the head owner. The second sub-charterer argued that granting the owner's motion would be unnecessarily disruptive of commercial practices and the owner had all the remedies it needed under the head charter. It further stated that it had no participation in the composition of the panel and therefore any order the panel may make ordering consolidation would necessarily be unenforceable.

The panel majority denied the motion to consolidate pointing out that section 2 of the SMA Rules does not automatically generate a consolidation status amongst all the parties in the chain. Moreover, consolidation is to be invoked not by the head owner but by the head charterer and proceed down the chain. "Consolidation does not equate to the right of combining parties in sub-charters to create the effect of a class action." In this instance, consolidation could "... achieve a punitive result..." by allowing the head owner to collect damages from those sub-charterers not in contractual privity with the head owner. They concluded that the evidence established that there was a late redelivery under the head charter "... entitling the owner to damages [from its charterer] at a quantum to be determined by this panel."

The dissenting arbitrator stated that by agreeing to incorporate the SMA Rules in each charter, all the parties in the chain were obligated by contract to consolidate disputes involving common issues of law and fact. The charterers refusal to nominate arbitrators was a breach of contract and the panel should simply have entered a default judgment compelling the unwilling parties to arbitrate.

The matter was heard by Manfred W. Arnold, Alexis Nichols (dissenting) and Klaus C.J. Mordhorst (Chair). The Owner was represented by Poles, Tublin, Stratakis, Gonzalez & Weichert LLP, and the Charterer was represented by Nourse and Bowles, LLP. The award, dated October 12, 2007, is reported in the Awards Service of the SMA number 3983.

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## SECURITY FOR LEGAL FEES

by **Terry L. Stoltz, Esq.**  
**Partner, Nicoletti Hornig & Sweeney**

As Klaus Mordhorst has stated, attorneys' fees are "regularly...awarded to the prevailing party" in New York arbitration.<sup>1</sup> The authority of a panel to award fees and expenses is now indisputable, as S.M.A. Rule 30 provides that "[t]he Panel is empowered to award reasonable attorneys' fees and expenses or costs by a party or parties in the prosecution or defense of the case."

However, an award of fees and expenses would be a pyrrhic victory if it is not collectible. In an industry where it is not uncommon to arbitrate with a foreign, single ship-owning company, perhaps even after that the single ship has been sold, it is paramount that the issue of security for legal fees should be addressed at an early stage when the adversary still believes it has a reasonable prospect for success. It is often too late to seek security after the panel has rendered an award in your favor.

The S.M.A. panels have certainly come to realize the advisability of obtaining security with respect to their own fees; it is now customary for the panel to require both parties to post security for the panel's anticipated fees before the matter proceeds too far. Similarly, when counsel for a party has reason to believe that an eventual award of fees and expenses against an adversary would be uncollectible, it is appropriate to take guidance from the panel and make an application, at an early stage, to require the adversary to post security for legal fees.

An arbitration panel is empowered to require a party to post security for fees and expenses. S.M.A. Rule 30 provides that "[t]he Panel...shall grant any remedy or relief which it deems just and equitable..."<sup>2</sup> The Courts have confirmed awards requiring that funds be placed in escrow<sup>3</sup> or that a bond be posted.<sup>4</sup> Indeed, the Courts acknowledge that arbitrators "may grant equitable relief that a court could not."<sup>5</sup>

However, even if an application for security for legal fees is made, granted by the panel and the security actually put in place, counsel should not assume that is the

end of the matter. It remains important to monitor the fees and expenses incurred as the arbitration proceeds and to revisit the amount of the security to insure that the amount eventually awarded can actually be collected. If necessary, a second application should be made to insure that the security remains adequate.

1. *The Maritime Advocate Online*, Issue 342 (April 15, 2008); see also *Transportes Coal-Sea de Venezuela C.A. v. Ship Management & Transport of Limassol (M/V SOMERSET)*, S.M.A. No. 3892 (July 25, 2005) (awarding prevailing party \$617,257.75 in fees and expenses incurred defending non-meritorious claim); *Transportes Ferreos de Venezuela, C.A. v. C.V.G. Ferrominera*, S.M.A. No. 3954 (awarding \$375,000 toward fees and expenses of the prevailing party).

2. See *Transportes Ferreos de Venezuela, C.A. v. C.V.G. Ferrominera*, S.M.A. No. 3900 (October 31, 2005) (requiring insurance proceeds to be deposited in an escrow account).

3. *Pacific Reinsurance v. Ohio Reinsurance*, 935 F.2d 1019 (9th Cir. 1991); *Blue Sympathy Shipping Co. Ltd. v. Serviocean Int'l, S.A.*, 1994 W.L. 597144 (S.D.N.Y. July 6, 1994); *Atlas Assurance Co. v. American Centennial Ins. Co.*, 1991 W.L. 4741 (S.D.N.Y. Jan 16, 1991); *Konkar Maritime Enterprises, S.A. Compagnie Belge D'Affretement*, 668 F.Supp. 267 (S.D.N.Y. 1987).

4. *Compania Chilena de Navegacion Interoceanica v. Norton Lilly & Co.*, 652 F.Supp. 1512, 1516-17 (S.D.N.Y. 1987).

5. *Sperry International Trade v. Gov't of Israel*, 532 F.Supp. 901, 905 (S.D.N.Y.), *aff'd*, 689 F.2d 301 (2d Cir. 1982); see also *Southern Seas Navigation Ltd. v. Petroleos Mexicanos*, 606 F.Supp. 692, 694 (S.D.N.Y. 1985).

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## LETTERS TO THE EDITOR

Finally! It really has happened.

In response to Chris Hewer's article "Rotterdam Rules, OK?" (Issue No. 4 July 2008), I received the following comment:

I enjoyed, as usual, the latest edition of *The Arbitrator*, and even though there is no Letter to the Editor column, and probably for good reason, I feel that I must comment on Chris Hewer's contribution, "Rotterdam Rules, OK".

I think the residents of The Hague and Visby would both be surprised and somewhat disappointed to hear that their places of residency do not exist. Perhaps Mr. Hewer should visit the UN and there learn about the contributions the countries containing these very old, beautiful, and definitely existing cities have made to the UN and civilization.

Thanks and Regards,

Don Lundberg

The Dow Chemical Company  
Global Bulk Marine Procurement  
2020 Dow Center  
Midland, MI 48674 USA

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In rebuttal, Mr. Hewer writes:

SIR: Mr. Lundberg may well be right.

Chris Hewer  
High Dudgeon

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## SOME PERSONAL NOTES

by **Manfred W. Arnold**  
Editor

As many of you may know, on September 24, 2008, the SMA celebrated its 45<sup>th</sup> anniversary at the venerable Union League Club.

It was a well-attended and congenial event, which gave the SMA members an opportunity to spend an enjoyable evening with old and new friends, colleagues, the New York bar and the maritime industry at large.

I was pleased to hear that several of our members, unable to attend the dinner, nevertheless sent in their checks in support of the SMA. I should like to thank those generous SMA members and sincerely hope that their actions will be an example for others in the future.

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The Inaugural Lecture of the Lloyd C. Nelson Professorship of International Law, “Man of Peace: Rehearing the Case Against Leo Strauss,” will be presented by Professor Lloyd Howse on Tuesday, October 7, 2008 at 18.00 at the Vanderbilt Hall, Greenberg Lounge, 40 Washington Square South.

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I just learned the sad news that Clifford Clark has passed away. Clifford was a founding member of the LMAA and served as its president from 1973-75 and 1980-83. Those of us who knew him appreciated and respected his business acumen and his accomplishments as one of the busiest arbitrators in London during his prime. Rest in peace, old friend.

•

Some of you may remember 1105 Park Avenue as the address where our late colleague and friend, Frank Crocker, resided. Quite recently, the building lost another illustrious tenant, Judge Charles S. Haight, Jr. and his wife Mary Jane moved to North Branford, Connecticut. Judge Haight has been permanently reassigned from the Southern District of New York to the District of Connecticut, where he will continue as Senior Federal Judge with chambers and courtroom in New Haven.

We will miss his presence in New York – New York’s loss is Connecticut’s gain.

**IN MEMORIAM**

*It is with deep sadness that Hill Rivkins & Hayden reports the passing of their dear friend and colleague, Richard Howard Webber. Dick passed away Sunday night, August 31, 2008, at the age of 68 after a valiant battle with cancer.*

*Dick was born on December 31, 1939, the son of Harry G. and Anne Webber. The elder Mr. Webber was employed in the marine industry and was principal surveyor in North America for the Salvage Association of London. He was also a distinguished maritime arbitrator and a member of the Society of Maritime Arbitrators of New York.*

*Dick graduated from Yale University in 1961 with a Bachelor of Arts in History. Upon graduation, he received a commission in the United States Navy. Upon leaving active military service in 1965, he attended Columbia Law School, graduated in 1968, when he joined the firm of Symmers Fish & Warner. In 1973, he became a member of Hill Rivkins.*

*Dick specialized in maritime and commercial litigation. An expert in alternate dispute resolution, he appeared before the Society of Maritime Arbitrators, American Arbitration Association, Grain and Feed Trade Association, the International Chamber of Commerce, and the North American Export Grain Association. He also served as an expert witness on United States commercial and maritime law before foreign tribunals. He was a member of the Maritime Law Association of the United States, the American Bar Association, and the Association of the Bar of the City of New York.*

*You will be missed.*

**THE ARBITRATOR****Manfred W. Arnold, Editor**[arnoldwestmarine@comcast.net](mailto:arnoldwestmarine@comcast.net)

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