FORMAL REPORT OF THE COMMITTEE ON MARITIME ARBITRATION

The following is my report of your Committee's meeting held on April 30, 1998.

Your Committee met at 12:00 p.m. at Cadwalader, Wickersham & Taft. Bill Busch was kind enough to arrange for dutch treat lunch. In all, there were about 40 members in attendance.

There were two main discussions. The first concerned support for the ADR Committee's efforts to develop a list of members of the Association who are willing to act as mediators and arbitrators. The second was with respect to developing guidelines for the awarding of attorneys' fees to the prevailing party in charter party disputes.

Mr. Wittenberg, Chairman of the ADR Committee, spoke concerning his committee's efforts to develop the guidelines on a nationwide basis. We then had brief remarks by Mr. Hobson concerning arbitration outside of New York and by Mr. Bullard who reported on the recent activities of the Houston Arbitration Committee. Lastly, Mr. Nourse of this Committee addressed the report of the Liaison subcommittee which was prepared by him and R. Glenn Bauer. A discussion followed and upon motion, there was a unanimous vote to accept the subcommittee's report as written.

Your Committee then discussed the MLA/SMA Liaison subcommittee report on the awarding of attorneys' fees. This was prepared by Mr. Pare, Mr. Heard and Mr. Pieter Vismans, Vice President of the Society of Maritime Arbitrators. Mr. Zubrod, a past president of the SMA, gave an historical perspective and implied that it is the SMA members who wish to have some guidelines with respect to the awarding of fees. Mr. Paré of this Committee then submitted his report and a general discussion followed. There was a general feeling that awarding of attorneys' fees was clearly the coming trend. Upon motion, made and seconded, the subcommittee report was unanimously accepted.

Respectfully submitted,
Patrick V. Martin, Chair

REPORT OF THE MARITIME ARBITRATION COMMITTEE'S LIAISON SUBCOMMITTEE WITH THE SOCIETY OF MARITIME ARBITRATORS: PROPOSED GUIDELINES FOR AWARDING ATTORNEYS' FEES IN MARITIME ARBITRATIONS

This memorandum suggests certain considerations to be taken into account by arbitrators for awarding attorneys' fees in maritime arbitrations.

I. Basis for an Award of Fees

There are various situations in which attorneys' fees can be awarded by arbitrators in an arbitration. For example, fees can be awarded where this is authorized by an applicable statute or by contract between the parties. Certain charter forms, such as ASBATANKVOY, specifically provide that arbitral awards may include a reasonable allowance for attorneys' fees. A basis for awarding fees may also be found in contractual language incorporating the Rules of the Society of Maritime Arbitrators ("SMA Rules") since section 30 provides that "the Panel is empowered to award reasonable attorneys' fees and expenses for costs incurred by a party of parties in the prosecution or defense of the case." Several printed charter forms—including AMWELSH 93, NYPE 93 and NORGRAIN 89—provide that arbitration thereunder is to be conducted in accordance with the SMA Rules. Other forms may of course be amended or supplemented by the parties to achieve the same result. Additionally, the parties may agree at the beginning or during the course of an arbitration that fees can be awarded, for example in a Submission Agreement or in an agreement that the SMA Rules shall govern the proceedings. If all parties to the proceeding request recovery of their attorneys' fees, then the arbitrators have the power to award fees. *Marshall & Co. v. Duke*, 114 F.3d 188 (11th Cir. 1997); *In re U.S. Offshore Inc. v. Seabulk Offshore, Ltd.*, 753 F. Supp. 86 (S.D.N.Y. 1990).

Even when there is no authorizing statute or contract, fees may be awarded "to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974) (footnote omitted). The bad faith exception was one of the bases relied on in *Marshall & Co. v. Duke*, 114 F.3d 188 (11th Cir. 1997). However, the Courts have emphasized that this is a narrow exception to the "American Rule" that can only be utilized where there is "clear evidence" that claims or defenses are "entirely without color and made for reasons of harassment or delay or for other improper purposes." *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980). Accordingly, arbitrators would be best advised to tread carefully before awarding fees under this narrow exception to the general rule.

Arbitrators may wish to take note of a decision of the Second Circuit Court of Appeals, *Paine Webber, Inc. v. Bybyk,* 81 F.3d 1193 (2d Cir. 1996), in which customers of a securities firm demanded arbitration of various disputes, including a claim for attorneys' fees. The securities firm commenced a lawsuit, *inter alia,* to enjoin the Bybyks from even seeking attorneys' fees or punitive damages in the arbitration, on the basis of a New York choice of law clause in the governing contract. The District Court dismissed the lawsuit, allowing the Bybyks to submit all of their claims to the arbitrators. The Court of Appeals affirmed, stating that the "any and all controversies" language in the arbitration clause contained "no express limitations with respect to attorneys' fees." *Id.* at 1202. *Bybyk* did not involve a petition to confirm or vacate an award but simply considered, prior to the arbitration, what claims could be submitted to the Panel. Some members of the bar argue that *Bybyk* means arbitrators have the power to award attorneys' fees even in the absence of language specifically authorizing an award of attorneys' fees, while other members of the bar argue the decision is not that broad. Arbitrators should be aware of the possibility of further developments in this area of the law.

If there is doubt in a particular case and arbitrators wish to have further specifics as to when they can award attorneys' fees, then arbitrators should ask the parties to brief the issue.

II. The General Approach in Determining Fees

Today, attorneys' fees are generally based on the time spent by attorneys (and other fee earners, such as legal assistants) multiplied by prevailing hourly rates. Courts which have been called on to award attorneys' fees refer to this as the "lodestar" amount. The canons of ethics governing attorneys add a variety of other factors which could possibly provide a basis for adjusting a fee upwards or downwards, although hourly and *ad interim* billing have reduced the influence of these factors. In general, however, the lodestar approach, with some possibility of adjustment in the proper circumstances, is the prevailing basis for charging and awarding attorneys' fees today.

These guidelines suggest that the "lodestar" approach be adopted by arbitrators in awarding attorneys' fees to a "prevailing party" in an arbitration, with the caveat that, absent special considerations, not all an attorney's "time" need to awarded. Instead, it is submitted that only time spent in the actual prosecution or defense of the arbitration should typically be awarded, absent the Panel finding some broader approach justified by the facts of an individual case. It should be emphasized, however, that arbitrators should exercise their judgment, based on the particulars of the case, in determining what portion of fees claimed they will award.

An attorney or law firm may agree to handle a case on a contingent fee basis. In such a case, the prevailing claimant would normally compensate its attorney by paying an agreed percentage of the recovery. Although the party has agreed to compensate its attorney on something other than an hourly basis, arbitrators need not make an exception for such cases and can nevertheless require the attorney or firm to submit information concerning time spent on the case and applicable hourly rates so that the lodestar approach may be employed.

III. The Prevailing Party

The first issue to consider is: who is the prevailing party? Frequently, there will be a single issue with one clear winner and one clear loser. That is the obvious case. In other situations, however, there may be multiple issues with one party winning some and another party winning others. In such a case, the arbitrators might consider who is the "net" prevailing party and award only a fraction of fees sought, according to the considerations set forth herein. That fraction might consist of the net amount awarded to the prevailing party (the numerator) over the amount of all claims in dispute (the denominator). The arbitrators should, of course, not feel bound by this approach but should adopt their own approach, according to the idiosyncrasies of the particular case involving multiple issues. Use of a sealed offer of settlement may also affect a panel's determination as to who is the prevailing party.

IV. Other Possible Considerations in Awarding Attorneys' Fees

There are several circumstances in which arbitrators might consider awarding attorneys' fees even if the arbitrators should choose not to do so merely on the basis of which party "prevailed" in an arbitration. For example, fees might be awarded, irrespective of the "prevailing party" analysis, against a party which has provided a frivolous defense or prosecuted a frivolous claim. Similarly, a party's attempt to obtain or oppose discovery might have been unreasonable and might have led to unnecessary legal fees which the Panel might consider appropriate to award against the party at fault in this regard. Also, the Panel might find that testimony offered or cross-examination thereof was excessive in a given case and that legal fees should be awarded on account of this.

Furthermore, it may be particularly appropriate to award attorneys' fees (assuming the Panel has the power to do so) when a party submits a sealed offer of settlement to its adversary prior to or during an arbitration and, when an award is issued, the adversary fares worse than in the sealed offer. In such a case, it may be appropriate for arbitrators to award legal fees

to the party submitting the sealed offer from the date of its rejection or expiration for the further time spent dealing with the claims or issues covered by the sealed offer. *See DIVINE STAR/Asia Marine*, S.M.A. No. 2883 (July 16, 1992) (Nisi, Nichols, Carpenter). Care must be exercised because the sealed offer may relate to only one claim or issue in a case and the fees awarded on the basis of the offer should only relate to the claim or issue involved. Also, the circumstances may not provide any particularly compelling reason (beyond the "prevailing party" analysis) for awarding fees when the issues determined are extremely close. Other factors may also be relevant in a given case. (The use of a sealed offer of settlement is very similar to the use of an Offer of Judgment available under Rule 68 of the Federal Rules of Civil Procedure.)

V. The "Time" which Arbitrators Might Consider in an Award of Legal Fees under the "Prevailing Party" Analysis

In the event of a dispute concerning the amount of fees under the "prevailing party" analysis, arbitrators would need to consider what portion of attorneys' time should be included in a fee award. Attorneys become involved in a case at various levels, some of which may not have a direct bearing on the prosecution or defense of an arbitration proceeding. For example, attorneys may be sent to a port of loading or discharge to investigate a particular incident. They may also be asked to conduct pre-arbitration research and analysis of the merits of a case in order to provide their client with some comfort concerning proceeding with a claim or defense. The arbitrators may consider that such "preliminary" matters should not be included in an award of fees on the theory they are part of the general overhead of prudently operating a business. In a given case involving a deliberate or malicious breach, arbitrators may nonetheless consider such preliminary fees to be recoverable.

Absent special considerations for including all lawyers' time in an award of fees, however, arbitrators might restrict the award of fees to time spent by the prevailing attorneys in the actual prosecution or defense of the arbitration proceedings to include the following specific items:

1. Reasonable time spent obtaining and submitting statements and evidence directly required to present or defend a claim, including preparation of pre-hearing exhibits and brief.
2. Reasonable time spent in connection with discovery (including requesting, producing, reviewing or objecting to discovery).
3. Reasonable time spent preparing for hearings, including preparing for examining or cross-examining witnesses.

4. Time spent travelling to and attending hearings.
5. Reasonable time spent in correspondence with the Panel concerning the proceedings.
6. Reasonable time spent in researching and preparing post-hearing memoranda.

Again, these specific points are not suggested to limit the discretion of arbitrators but rather to provide some overall guidance.

If arbitrators have a concern that a party may be seeking its attorneys' fees for activity occurring prior to the actual prosecution or defense of the arbitration itself, the arbitrators can always request more information on the legal work for which compensation is sought. Another way to deal with the same issue is to have counsel provide information on the starting and ending dates of their work on a case, along with monthly totals of hours and fees. Unless there is some special reason to award them to the prevailing party, fees related to work undertaken before the commencement of the arbitration could be excluded from the amount awarded.

Situations may arise where there are disparities among (a) the time actually recorded by attorneys while engaged on a matter, (b) the dollar amount of fees billed to the client and (c) the amount paid by the client to the attorney or law firm. For example, an attorney or firm may conclude that a bill based solely on the value of time spent on a matter does not provide proper compensation, given the complexity of a case or the results achieved to date (e.g. a favorable Partial Final Award or some other interim triumph). Thus, the attorney or firm may render the bill in a higher amount, invoking some of the factors set forth in the next section of this memorandum. As a separate example, a client may decide to pay less than the full amount of a bill, even if it is based solely on time spent on a matter. Arbitrators may consider all three of these factors when determining the amount of fees to award to a prevailing party.

VI. The "Hourly Rate" Consideration

Among the members of the maritime arbitration bar, there is probably considerable common ground on what is an appropriate hourly rate in any particular case. If one party submits a fee application and the opposing party does not challenge the appropriateness of the attorneys' hourly rates, then there would appear to be little need for the arbitrators to address the appropriateness of the rates on their own. If there is such a challenge, and the opposing party offers specific details of the basis for the challenge, then arbitrators, in this connection, might consider the following factors taken from the American Bar Association's Code of Professional Responsibility, Disciplinary Rule 2-106 and cases decided thereunder.

1. The time and labor required.
2. The novelty and difficulty of the questions.
3. The skill requisite to perform the legal service property.
4. The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer (or law firm).
5. The fee customarily charged in the locality for similar legal services.
6. The amount involved and the results obtained.
7. The time limitations imposed by the client or by circumstances.
8. The nature and length of the professional relationship with the client.
9. The experience, reputation and ability of the lawyer or lawyers performing the services.
10. Whether the fee is fixed or contingent.

After considering these and any other factors deemed relevant, arbitrators could determine an hourly rate and multiply this rate by the hours they consider appropriate given the idiosyncrasies of the particular case. As suggested in the preceding section, the arbitrators might consider whether time should be restricted to that actually involved in the prosecution or defense of the arbitration although, again, a different approach might be warranted by the facts of a particular case.

VII. Methodology the Panel Might Consider

The process of awarding attorneys' fees should not become a second arbitration. To avoid this, the Panel might request that each party submit a request for attorneys' fees with its main post-hearing brief, reply brief or separately ten days after submission of reply briefs. Submission of the request with a party's main brief allows the opposing party to respond to the request in its reply brief but of course requires the applicant to supplement the request to cover time spent on the reply brief. It is for the arbitrators to determine which method is appropriate in a given case, and to instruct counsel accordingly.

If any party has an objection to the other side's fees request, the specifics of such an objection should be given to the arbitrators in writing within, say, 10 days of receipt of the fee request to which there is an objection. Absent an objection from a party, the panel may not consider it necessary to request additional information on a party's fees.

If the panel considers it necessary, the arbitrators might consider having the parties submit a form, such as the one attached to these guidelines, to streamline the exercise. Although simplicity and avoiding collateral disputes are desirable, in an individual case, the arbitrators might deem it appropriate to ask for further information, such as time records, copies of actual accounts sent or affidavits on particular points. (It may be necessary for time records and accounts to be redacted to avoid disclosure of information protected by the work product doctrine or the attorney-client privilege).

Exhibit to Report of the Maritime Arbitration Committee's Liaison Subcommittee with the Society of Maritime Arbitrators:

FORM FOR REQUESTING
ATTORNEYS' FEES AND DISBURSEMENTS

1. Request submitted on behalf of [party to case].
2. Indicate all attorneys, paralegals or other fee earners involved for the above party.
3. Hourly rate of such involved attorneys, paralegals or fee earners.
4. Indicate the approximate time spent on the items below and multiply this by the hourly rate sought for each involved attorney, paralegal, or other fee earner in the following categories:
    1. Obtaining and submitting statements and evidence, including preparation of pre-hearing brief;
    2. Requesting, reviewing, producing or objecting to discovery;
    3. Preparing for hearings;
    4. Attending hearings;
    5. Correspondence with Panel;
    6. Preparing post-hearing memoranda;
    7. Other (please specify);
    8. Total amount sought excluding item 7.
5. Indicate total amount sought in fees: _____.
6. Itemize by category and amount all disbursements for which an award is sought.

7. Attach supporting invoices for all individual disbursements in excess of $500.

Dated:

By: _____
Attorney for
Office & P.O. Address