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**MINUTES OF THE BOARD OF DIRECTORS MEETINGS  
OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES**

Held at the  
Louisiana Bar Foundation Bar Center Building,  
New Orleans, Louisiana  
on  
March 16, 1999

The meeting was called to order by President Howard M. McCormack at 9:00 a.m. In addition to President McCormack, the following officers were present:

William R. Dorsey, III, First Vice President  
Raymond P. Hayden, Second Vice President  
Lizabeth L. Burrell, Secretary  
Patrick J. Bonner, Treasurer  
Winston Edward Rice, Membership Secretary  
James F. Moseley, Immediate Past President

The following Board members were present:

James W. Bartlett, III	George J. Koelzer
Denise S. Blocker	Alfred J. Kuffler
Lawrence J. Bowles	Marion E. McDaniel, Jr.
David G. Davies	Gordon D. Schreck
Bruce A. King	Thomas J. Wagner
Jean E. Knudsen	

At the invitation of President McCormack, Patrick Griggs, President of the Comité Maritime International, Alfred Popp, Chairman of the International Maritime Organization Legal Committee, James K. Carroll of New Orleans, Chair of the Special Committee on Planning and Arrangements for the 1999 Fall Meeting, Edward V. Cattell, Jr., of Philadelphia, Chair of the Study Group on ALI Restatement of Marine Insurance, Vincent M. DeOrchis of New York, Chair of the Committee on Carriage of Goods, Past President George W. Healy, III of New Orleans, Chair of the Committee on ABA Relations, Thomas S. Rue of Mobile, Chair of the Site Selection Committee, Professor Michael F. Sturley of Austin, a member of the Study Group on ALI Restatement of Marine Insurance, M. Hamilton Whitman, Jr., of Baltimore, Chair of the Committee on Planning and Arrangements for the 2001 Fall Meeting, and Robert J. Zapf of Los Angeles, Chair of the Committee on Practice and Procedure, were also present at the meeting.

**SECRETARY'S REPORT**

Secretary Lizabeth L. Burrell of New York reported that the Proceedings of the Fall 1998 Meeting have been distributed to the members and that arrangements have been made with the Association of the Bar of the City of New York for the Association's general meetings through November 2000, and for the related Board meetings in New York.

Upon motion duly made and seconded, the minutes of the November 5, 1998 meeting of the Board of Directors and the Secretary's report were unanimously approved and accepted. The minutes of the November 5, 1998 Board meeting will be published, together with those for the Board's August 21, 1998 meeting, in the Proceedings of the Fall 1998 General Meeting.

**TREASURER'S REPORT**

Treasurer Patrick J. Bonner of New York presented the Treasurer's Report for the three months ending on October 31, 1998 and reported on the cash on hand and investments as of January 31, 1999. He noted that our reserves are less than they were a year ago.

Upon motion duly made and seconded, the Treasurer's report was unanimously approved and accepted.

**MEMBERSHIP SECRETARY'S REPORT**

Membership Secretary Winston Edward Rice of New Orleans presented twenty-three applicants for Associate Lawyer membership. Upon motion duly made and seconded, the candidates for Associate Lawyer membership were unanimously elected.

Membership Secretary Rice also reported, with regret, the death of the following members:

Almer W. Beale of Jacksonville	Gregory P. Massey of Lake Charles
William C. Bullard of Houston	Braden Vandeventer of Norfolk
Brendan J. Connolly of Jamesburg	Robert K. Wood of Philadelphia
Hon. Lee P. Gagliardi of Manchester	

As of March 15, 1999, the Association had 3,603 members. As of March 16, 1999, after the changes approved by the Board at its meeting, the total membership was 3,626.

The Membership Secretary also reported that he will be trying to increase the number of candidates for Associate Lawyer membership, particularly in geographic areas in which we have fewer members. He also reported that an integrated database and website are being developed that will eventually lessen the cost and need for a paper directory and allow for easy retrieval of important documents from our archives.

Upon motion duly made and seconded, the Membership Secretary's Report was unanimously approved and accepted.

The list of all the successful candidates for membership and Mr. Rice's written report are appended to the original of these minutes.

### **PRESIDENT'S REPORT**

President McCormack reported on the January 19, 1999 officers' meeting in Washington, D.C. The officers were joined during lunch by representatives of the Navy, Coast Guard, State Department, Civil Division of JAG, and NOAA in order to foster and maintain the excellent communication among our organizations.

President McCormack represented the Association at a celebration of the centennial of Il Dirittimo Marittimo, which is the Italian equivalent of American Maritime Cases. CMI President Patrick Griggs and member Frank Wiswall delivered fine papers at that meeting.

President McCormack also reported on final round of the Judge John R. Brown Moot Court Competition, which was held in the courthouse of the United States Court of Appeals for the Ninth Circuit and at which he, Past President Chester D. Hooper and Board member Denise S. Blocker served as oral argument judges. The Board members serve as brief judges as well. As has been done on the last two competitions, the Board approved a donation as an award for the best brief next year.

### **COMMITTEE AND STUDY GROUP REPORTS**

#### **Study Group on ALI Restatement of Marine Insurance**

Professor Michael F. Sturley of Austin, a member of the Study Group, presented its most recent design proposal for a Restatement of Marine Insurance, to be drafted in cooperation with the American Law Institute ("ALI"). Professor Sturley reported that the Study Group would make its final modifications to the design proposal in a meeting immediately

following the Board meeting. Professor Sturley therefore asked the Board to authorize President McCormack to review and approve the final draft of the design proposal, and if he deemed it appropriate, to transmit the proposal to the ALI.

Upon motion duly made and seconded, the Board approved the proposed resolution.

### **Environmental Crimes Subcommittee**

The Subcommittee has prepared a report recommending that the Association undertake certain actions in order to ameliorate the current state of the law arising from application of strict liability and negligence-based criminal statutes to those involved in pollution incidents. In order to explain the Subcommittee's recommendations and determine what course of action by the Association had the greatest chance of success, Board member Alfred J. Kuffler, who heads the Subcommittee, outlined the implications of the May 1998 hearing, chaired by Congressman Gilchrest, of the Subcommittees on Coast Guard and Maritime Transportation of the U.S. House of Representatives' Committee on Transportation and Infrastructure on the Coast Guard Policies and Procedures for the Criminal Enforcement of Environmental Laws.

It appeared from the comments of Congressman Gilchrest at the May 1998 hearing that there is finally some consideration being given to revising OPA in order better to coordinate that statute with the preexisting criminal laws which are being invoked in recent years in connection with pollution incidents, particularly the Migratory Bird Act, 16 U.S.C. §§ 703 *et seq.*, the Refuse Act, 33 U.S.C. §§ 407, 411, and other strict liability and negligence-based criminal statutes. Congressman Gilchrest wished to examine whether it was appropriate to impose criminal sanctions on people who have not deliberately engaged in criminal activity and have done their best to cooperate with authorities and to comply with the law. USCG Captain Malcolm J. Williams, Jr., Chief of the Office of Maritime and International Law, maintained that although the Coast Guard does not generally seek to impose criminal sanctions in pollution incidents, it wishes to retain the existing criminal laws as an enforcement tool for circumstances involving deliberate pollution, repeat offenders and those who obstruct investigations. Many attendees, however, noted that the Justice Department may not restrict its own prosecutions to those situations in which the Coast Guard would seek criminal sanctions, and expressed concern that the potential imposition of criminal sanctions deterred rather than encouraged the cooperation necessary to minimize the impact of a pollution incident.

The Environmental Crimes Subcommittee's report proposes a program for Association action, including participation in congressional and governmental administrative activities (particularly the Coast Guard and Justice Department). There are also comments regarding *United States v. Rivera*, the difficult position of attorneys counseling parties to oil spills and the possibility of developing a practice manual for such situations.

Congressman Gilchrest will be holding a second hearing on this subject on March 24, 1999 and because one of the Association's Subcommittee's suggestions was to participate in the legislative process, the Subcommittee sought and received the officers' authorization to send a representative to address the problems arising from the current state of the law on environmental crimes. In particular, the Association Subcommittee recommended that the Association urge the adoption of limited immunity from criminal prosecution for those cooperating in the management of a spill.

The Subcommittee will prepare a statement of proposed testimony to be submitted at the upcoming congressional hearing.

The Board approved the positions expressed in the Environmental Crimes Subcommittee's report.

### **Special Committee on the Centennial**

President McCormack reported on the special format for the Centennial General Meeting on May 7, 1999. The business portion of the meeting will be shortened to allow addresses by the Honorable Charles S. Haight, Jr., and Sir David Steel, the new Admiralty judge for the United Kingdom, as well as brief talks and anecdotes by some of our members on the history of the Association. President McCormack described the archives of the Association, including irreplaceable documents of great historical interest, and the efforts he is making together with First Vice President William R. Dorsey, III, and Secretary Burrell to make these documents more accessible.

Social events will include a reception at the Boathouse in Central Park on Tuesday, May 4, 1999, a black tie buffet dinner at the Museum of Modern Art on May 5, 1999 and a maritime exhibition and reception at the new Federal Courthouse in Manhattan on Thursday, May 6, 1999 sponsored by the United States Court of Appeals for the Second Circuit, the Federal Bar Council, the Ocean Liner Museum and the Association.

### **Special Committee on Planning and Arrangements for the 1999 Fall Meeting**

James K. Carroll of New Orleans, Chair, reported that the Committee has arranged an interactive CLE seminar on Professionalism for the meeting in Orlando during the week of October 11, 1999. A differential registration fee, previously approved by the Board, will be employed for that meeting. Registration material will be sent out after the Centennial in May 1999.

### **Special Committee on Site Selection**

Thomas S. Rue of Mobile, Chair of the Site Selection Committee, and M. Hamilton Whitman, Jr., of Baltimore, Chair of the Committee on Planning and Arrangements for the 2001 Fall Meeting, reported on the Committees' examination of sites in the San Diego area, particularly the Del Coronado. The Board had previously approved the Site Selection Committee's recommendation of San Diego as the location of the 2001 Fall Meeting. Upon motion duly made and seconded, the Board authorized the Committee to negotiate for the best arrangements for a meeting during the week of October 13 through 21, 2001 in San Diego.

## **INTERNATIONAL ACTIVITIES**

### **International Maritime Organization**

First Vice President Dorsey reported that he and President McCormack will attend a meeting of the IMO Legal Committee in London during the week of April 19, 1999. The subjects are to include amendments to 1974 Athens Convention on Passenger Claims, the proposed Convention on Wreck Removal, the proposed Convention on Bunker Pollution, an IMO Guidelines on Financial Security for Maritime Claims and whether there is any need for the proposed Convention on Off-Shore Mobile Craft.

USCG Captain Malcolm J. Williams, Jr., Chief of the Office of Maritime and International Law, asked the MLA to address certain questions, raised at the last IMO meeting, as to whether shipowners could use personal accident insurance instead of traditional liability insurance to provide financial security for passengers who suffer injury on cruise or passenger ships. Edward F. LeBreton, III, former Chair of the Committee on Marine Insurance and General Average, and Ann G. Miller, Esq., Chair of the Committee on Cruise Lines and Passenger Ships, prepared materials on U.S. consumer protection laws and personal accident insurance to address these questions.

### **Arrest Convention—JIGE**

Robert J. Zapf of Los Angeles, the Association's advisor to the Coast Guard at the Diplomatic Conference on the Arrest Convention, reported on the Diplomatic Conference called by the United Nations which took place from March 1 through 12, 1999 in Geneva. At the Conference, a draft Arrest Convention was approved and will be circulated for ratification.

A major development at the Conference was the adoption of a closed list of claims giving rise to a right of arrest. The Joint Intergovernmental Group of Experts ("JIGE") draft of the proposed Arrest Convention had been based on the draft prepared at the CMI meeting in Lisbon in 1985, which had included an exemplary list of claims but only by way of illustration, and thus did not attempt to delimit the types of claims that would give rise to a right of arrest (the "open list" concept). Civil law countries, however, favored a closed list, specifically enumerating the only claims for which a claimant could arrest a ship, in the same manner as that used in the 1952 Arrest Convention. At previous sessions of the JIGE, an open list had consistently been favored because it would allow the Convention to remain responsive to changes in and evolution of maritime law, as, for example, in the case of container liens and pollution claims, so that the Convention would not need to be modified in response to developments in the law and technology.

Nonetheless, the closed list was incorporated in the draft which was approved at that session and will be circulated for ratification. Mr. Zapf reported that although an open list would have been preferable, the list of claims set forth in the Convention is fairly broad. For example, there is a right of arrest for loss or damage arising out of operation of a ship.

While it is unlikely that the United States will become a party to the new Convention, its provisions are still of importance to American maritime interests because as international suppliers of goods and services, U.S. citizens will need to employ the Convention to assert claims against ships that do not visit the United States.

Another area of concern for U.S. interests involves the interaction of the new Arrest Convention with Article VI of the 1993 Convention on Maritime Liens and Mortgages, which recognizes maritime liens created under the laws of contracting states and allows a forum court to enforce by means of arrest a lien created under the national law of another contracting state if the forum's conflicts law allows foreign liens to be recognized. Under the new Arrest Convention, however, Article VI of the Convention on Maritime Liens and Mortgages will be useless unless the forum law itself actually recognizes and enforces the lien giving rise to the arrest.

Other provisions of the new Convention also are of interest to our members. Unlike U.S. domestic law, under which the ship is released and cannot be rearrested once security is posted, the Convention permits rearrest under certain circumstances, for example, where the claimant has underestimated his claim. Countersecurity provisions were heavily debated because civil law countries had wanted to make countersecurity mandatory and to give cargo interests, port authorities and other parties affected by an arrest a right to require countersecurity. The new Convention maintains the JIGE preference for giving the court discretion as to whether or not the claimant seeking to arrest a vessel will be required to post countersecurity and restricts the availability of countersecurity to claims by the owner of the ship. One area, however, in which our delegation was not successful was in the language defining when a claimant will be liable for claims that the arrest was wrongful, for the Convention provides that a claimant is answerable for damages when the arrest is determined to be "wrongful" or "unjustified." Because it could be argued that an arrest was "unjustified" any time the court eventually determines that a right of arrest did not exist or the claimant does not prevail on his claim, this provision could be troublesome.

It is likely that the Arrest Convention will be widely ratified in Europe in short order.

#### **UNESCO Convention on Underwater Cultural Heritage**

President McCormack reported on the November 17, 1998 seminar in Washington on the proposed Convention on Underwater Cultural Heritage. President McCormack has expressed to the State Department the Association's concern that the draft Convention ignores the positive role commercial interests can play in the retrieval and preservation of artifacts and unduly interferes with the maritime law by abolishing the law of salvage and finds.

The proposed Convention is moving forward rapidly, without much attention being paid to traditional maritime law or the views of commercial interests.

On March 30, 1999, there will be a meeting of the Shipping Coordinating Committee in Washington to formulate the U.S. position on the draft Convention. A special Study Group, chaired by John Kimball of New York, submitted a Report and Position Paper to the Board explaining the history and provisions of the draft Convention and noting problems that exist in its current draft. The Study Group recommended that the Board adopt the Position Paper as the Association's statement of its views



on the proposed Convention and asked that the Position Paper be presented to the Shipping Coordinating Committee.

In a vote by poll after the meeting, the Board resolved to adopt the Study Group's Position Paper as the view of the Association and authorized the transmission of the Position Paper to the Shipping Coordinating Committee.

### **PROPOSED LEGISLATION ON CARRIAGE OF GOODS**

President McCormack, Immediate Past President James F. Moseley, Past President Chester D. Hooper and Vincent M. DeOrchis of New York, Chair of the Committee on Carriage of Goods, met with the head of the Maritime Administration, Clyde J. Hart, Jr., who had expressed an interest in learning more about the COGSA proposal.

Mr. DeOrchis reported that the proposed legislation is moving forward at a deliberate pace dictated by Congress. Texas Senator Kay Hutchinson wanted the Association to clear up the objections of the American Waterways Operators (AWO) before moving forward. Through the efforts of Past President Hooper, there was a meeting in January with members of AWO, including Linda O'Leary, who is now AWO's representative and is well-versed in the issues. The AWO's central objection has been the elimination of the error in navigation defense, but Mr. DeOrchis and Past President Hooper in meetings with AWO have attempted to assuage these concerns by pointing out that COGSA will not apply by its terms to the private carriage in which AWO's members are involved. The AWO has proposed that tug contracts and contracts of affreightment be specifically excluded from the scope of the proposed statute, but enumerating specific exceptions may pose *ejusdem generis* problems. Mr. DeOrchis now believes that while the AWO may not support the proposed legislation, neither will they object.

Mr. DeOrchis also reported on further correspondence with FIATA, a Geneva-based organization composed of freight forwarders and intermediaries, who proposed that foreign railroads and truckers be specifically excluded from the legislation. As such exclusion accords with the original intent of the Association's proposal, these changes were agreed.

Past President Hooper and Mr. DeOrchis also met with P&I clubs in London to explain the proposal and answer questions about it, and Past President Hooper has recently participated in a debate at a symposium sponsored by BIMCO about the proposed legislation. The major objections expressed by the clubs were the section invalidating foreign

arbitration clauses in bills of lading and the move away from international uniformity that might be engendered if the proposal is adopted. One club had issued a letter to its members mistakenly asserting that the proposal would extend the reach of U.S. extraterritorial jurisdiction, but Mr. DeOrchis made it clear that the proposal would neither expand nor contract current jurisdictional limits. Mr. DeOrchis also pointed out that those who are exposed to tort liability under the current statutory regime would have the benefit of contractual limitations if the new legislation is passed. It appears that the basic objection of both the P&I clubs and BIMCO is lack of uniformity, but some commentators recognize the unlikelihood of the United States signing on to an international convention and the current lack of uniformity in the international arena. Mr. DeOrchis also spoke in Scandinavia to assist international understanding of the proposal. Communications have also been on-going with Waterman Steamship Lines in an effort to clarify certain sections of the proposal.

Mr. DeOrchis reported that there appears to be a change in the balance of views within the CMI on the proposal's elimination of the error in navigation defense. The Board was fortunate to have CMI President Patrick Griggs at the meeting, who indicated that although the CMI Executive Council wants to promote international uniformity, the CMI does not police domestic legislation. A report is being prepared addressing issues of liability and is expected to reflect that there are a variety of views within the CMI about the wisdom of eliminating the defenses based on errors in navigation and management. The CMI's focus at the moment is on UNCITRAL and a special international working group who will be sending out a questionnaire to all of the CMI's constituent member associations on a wide range of carriage issues, including multimodal transport, to see whether a new liability regime might be useful.

President McCormack reiterated the Association's policy of responding fully to any questions and comments about the effect of the COGSA proposal, and, together with Past President Hooper and Mr. DeOrchis, is in the process of drafting a response to a letter from the Canadian Maritime Law Association commenting on the proposal. Mr. DeOrchis has written to the CMLA's committee on carriage of goods and will continue to discuss the proposal with them.

## ARCHIVES

Immediate Past President Moseley raised the subject of improving access to the Association's documents. Past President Kenneth H. Volk had prepared an index to our documents, and methods of disseminating these valuable resources will be explored.

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**AMICUS REQUESTS**

The Supreme Court accepted the Association's amicus brief in the Balsa 37 case, *Bouchard Transportation Co. v. U.S.*, on the issue of whether Rule F concursus is available to claims brought under OPA, but declined to hear the case.

President McCormack distributed copies of the Ninth Circuit's denial of petitions for rehearing and suggestions for rehearing *en banc* in *INTER-TANKO v. United States*, No. 97-35010, which involved questions of OPA 90's preemptive effect.

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There being no further business to come before the Board, the meeting was adjourned at 12:25 p.m.

Respectfully submitted,

/s/ Lizabeth L. Burrell  
Secretary

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