

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

Held at the
Association of the Bar of the City of New York, New York, New York
on
May 6, 1999

The meeting was called to order by President Howard M. McCormack at 9:30 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	James T. Shirley
Jean E. Knudsen	Thomas J. Wagner

At the invitation of President McCormack, Charles B. Anderson of New York, Chair of the Committee on the Comité Maritime International, James K. Carroll of New Orleans, Chair of the Special Committee on Planning and Arrangements for the 1999 Fall Meeting, Theodore S. Cunningham of New York, Chair of the Special Committee on the Centennial, Vincent M. DeOrchis of New York, Chair of the Committee on Carriage of Goods, Robert J. Zapf of Los Angeles, Chair of the Committee on Practice and Procedure, and Peter E. Hess of Wilmington were also present at the meeting.

PRESIDENT'S REPORT

President McCormack first thanked Mr. Cunningham, Chair of the Special Committee on the Centennial, Treasurer Emeritus Marshall P. Keating of New York, William M. Billings of New York, Robert G. Clyne of New York, the members of the Centennial Committee and everyone else who contributed to the success of the Association's Centennial meeting for their tremendous efforts in making the celebration of this milestone a truly memorable occasion.

President McCormack also expressed the thanks of the Association for the kind and generous mementoes, gifts, proclamations and events presented in celebration of the Centennial by other maritime organizations, including American Institute of Marine Underwriters, the Association of Average Adjusters of Canada, the Association of Average Adjusters of the United Kingdom, the Association of Average Adjusters of the United States, the Australian and New Zealand Maritime Law Association, BIMCO, the Canadian Maritime Law Association, the Comité Maritime International, the Society of Maritime Arbitrators, the South African Maritime Law Association, the Spanish Maritime Law Association, and the Tulane Admiralty Law Institute. The Association was also honored by proclamations from the President of the United States, the Governor of the State of New York and the Mayor of the City of New York. In addition to these kind commemorations, *Lloyds List*, *The Maritime Advocate* and other publications issued special editions celebrating our Centennial.

President McCormack reported on the Tulane Admiralty Law Institute, especially the change to a panel format. President McCormack also reviewed the activities at which President McCormack will represent the Association later in 1999, including meetings of the Canadian Average Adjusters Association, SEALI and the Houston Marine Insurance Seminar. President McCormack advised the Board of the CMI activities held in conjunction with our Centennial week, including the meetings of the Executive Council and Assembly.

President McCormack reported that the Association has nominated three new titular members to the CMI, including Membership Secretary Winston E. Rice, David W. Martowski of Jersey City and Michael Marks Cohen of New York.

SECRETARY'S REPORT

Secretary Elizabeth L. Burrell of New York reported on the special format for the Centennial General Meeting. There will be two Proceedings volumes published for this meeting. One booklet will reflect the business portion of the week's events, including a transcript of the oral officers' and committee reports, as well as the formal committee reports and board minutes. To will provide a further remembrance of occasion, the second booklet will be a unique Centennial publication, containing a transcript of the remarks of the special speakers at the Centennial General Meeting on May 7, proclamations honoring the Centennial, as well as written reflections of several members.

Secretary Burrell reported on special arrangements made with the Association of the Bar of the City of New York to make sure that all who attend the General Meeting will be accommodated.

Upon motion duly made and seconded, the minutes of the March 16, 1999 meeting of the Board of Directors and the Secretary's report were unanimously approved and accepted. The minutes of the March and May 1999 Board meetings will be published in the business portion of the Proceedings of the Spring 1999 Centennial General Meeting.

TREASURER'S REPORT

Treasurer Patrick J. Bonner of New York presented the Treasurer's Report for the three months ending on January 31, 1999 and reported on the cash on hand and investments as of April 30, 1999, both of which reflect a reduction in the Association's assets. This reduction resulted in

part from certain extraordinary expenditures, including costs for the Centennial celebrations, advances in connection with the upcoming Fall 1999 meeting in Orlando, costs related to the development and implementation of a website, correction of a Y2K problem with our database, and travel expenses incurred in connection with our participation as advisors on international conventions and in connection with the Association's COGSA proposal.

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

MEMBERSHIP SECRETARY'S REPORT

Membership Secretary Rice presented fourteen applicants for Associate Lawyer membership. Upon motion duly made and seconded, the candidates for Associate Lawyer membership were unanimously elected.

The Membership Secretary reported that two applicants had been recommended for Non-Lawyer membership. Those recommendations are:

Captain Charles S. Maclin
Annie Ling

Upon motion duly made and seconded, the two Non-Lawyer applicants were unanimously elected to Non-Lawyer membership.

Membership Secretary Rice reported that the Proctor Admissions Committee had recommended that four Associate Lawyer members be advanced to Proctor status. They are:

Joshua S. Force	F. Jay Meyer
Francis V. Liantonio	Stephen M. Uthoff

Upon motion duly made and seconded, the recommendations of the Proctor Admissions Committee were approved and the four Associate Lawyer members were granted Proctor status.

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

The Honorable Clyde Atkins of Miami
Timothy D. Ford of Westbury

As of May 5, 1999, the Association had 3,592 members. As of May 6, 1999, 1998, after the changes approved by the Board at its meeting, the total membership was 3,605.

The Membership Secretary also reported on the efforts that had been undertaken to get the website up and running and advised that he hopes to have it in place by Labor Day.

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.

COMMITTEE AND STUDY GROUP REPORTS

Practice and Procedure

Robert J. Zapf of Los Angeles, Chair of the Committee on Practice and Procedure, reported on the amendments to Supplemental Admiralty Rules B, C and D of the Federal Rules of Civil Procedure, which were approved by the Advisory Committee to the Standing Committee on Civil Rules after being open for public comment at meetings last winter. It is anticipated that the changes will be approved at a meeting of the Standing Committee on Civil Rules States in June 1999, and then passed to the Judicial Conference of the United States which meets in September 1999, after which the Rules will be presented to the United States Supreme Court for adoption. If the Supreme Court approves the Rules and promulgates them by May 1, 2000, the changes would go into effect in December 1, 2000 provided Congress takes no adverse action.

The proposed changes are: (1) inclusion in Rule B of a requirement that the Marshal serve process of maritime attachment and garnishment if the property to be seized is a vessel or property aboard, paralleling the service requirements under Rule C; (2) modification of Rule B's provision allowing use of state court attachment procedures to refer to Rule 64 rather than Rule 4(e) of the Federal Rules so as to avoid the problems that would have been engendered by the replacement of old Rule 4(e) with Rule 4(n)(2) in the 1993 amendments, and thus saving the use of attachment as a security measure even in those circumstances in which personal jurisdiction can be obtained (*e.g.*, in a multidistrict state in which long-arm jurisdiction is available, but the defendant cannot be located within the district in which the property can be found); (3) elucidation in Rule

C to clarify the differences between forfeiture and maritime proceedings; (4) stylistic changes to correct the confusion created by the varying meanings of the words "claim," "claimant" and "claim of owner" to reflect who must appear and what must be filed to assert the right to defend arrested property; (5) conforming amendments to Rule E(3) and Rule 14 to reflect these changes. The foregoing proposed changes had already been approved by the Association's Board.

Before the period for public comment, the Judicial Council for the United States Court of Appeals for the Ninth Circuit proposed modifications to the draft amendments to Supplemental Rule C(4) to define the type of notice to be given in *in rem* proceedings when property is seized. The Ninth Circuit had noted constitutional problems with the provision allowing notice to be given to the owners solely by publication, and proposed a requirement that an attempt be made to give actual notice to owners. The Association's Practice and Procedure Committee's Subcommittee on Federal Rules and Statutes has proposed a change to the Ninth Circuit's language involving notice in an *in rem* action when there is a default, recommending that the proposed Rule C(4) be amended to require that in addition to publication, notice must be given in accordance with existing provisions of 46 U.S.C. § 31325. Mr. Zapf suggested that a further legislative solution will also be required in order to bring the statute into line with the 1993 Convention on Maritime Liens and Mortgages, which may affect the issue of what constitutes due process as a matter of international commercial law, even if the United States does not become a signatory to this Convention.

The Ninth Circuit Judicial Council also had proposed changes to define the time at which the defendant's presence within a district is determined. The Association's Subcommittee has proposed that Rule B(1)(a) be modified to specify that the operative time is the time at which the complaint is filed.

The Committee on Practice and Procedure will vote on the recommendations of its Subcommittee, and if approved, these proposals will be presented for a vote by the Association at its General Meeting on May 7, 1999.

Study Group on ALI Restatement of Marine Insurance

Board member Jean E. Knudsen, who also chairs the Association's Committee on Marine Insurance and General Average, reported that the American Law Institute is considering President McCormack's proposal for a joint effort between the Association and the ALI on a Restatement of Marine Insurance. Professor Michael F. Sturley of Austin, a member of the

Study Group, will attend the ALI's meeting later in May 1999 and will report on their response.

In anticipation of a favorable response, the Study Group is fleshing out sections of an outline on marine insurance.

Environmental Crimes Subcommittee

Board member and Subcommittee Chair Alfred J. Kuffler first thanked President McCormack for the support he has given to the work of this Subcommittee and his energy and devotion to the affairs of the Association as a whole.

Mr. Kuffler then presented a report on his attendance at the Joint Hearing on March 24, 1999 of the Congressional Subcommittee on Water Resources and the Environment and the Subcommittee on the Coast Guard and Maritime Transportation of the parent Committee on Transportation and Infrastructure. The hearing dealt with issues relating to OPA 90, including Natural Resource Damage Assessment, adequacy of current dollar amounts in Certificates of Financial Responsibility, strict criminal liability under the Refuse Act and Migratory Bird Act, and prosecution of Royal Caribbean International for intentional discharge and falsification of records.

Industry speakers addressed the subject of criminal liability, and it appears that the Congressional Subcommittee may have some interest at this time in ameliorating the current unsatisfactory state of the law on this subject by 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.

The Association's Subcommittee drafted a position paper, which was distributed to and approved by the Board, and which President McCormack presented to the House of Representatives. The position paper set forth the positions taken by the Association in our *amicus* briefs in the *Rivera* case, which involved criminal liability under 46 U.S.C. § 10908, and the *BALSA 37* case, as well as positions previously expressed by the Association's Committee on Marine Ecology on the issue of *concur-sus*. The Board approved the positions expressed in the Environmental Crimes Subcommittee's position paper.

The Environmental Crimes Subcommittee's report to the Board also recommended a program for Association action, including participation in congressional and governmental administrative activities (particularly the Coast Guard and Justice Department), which was approved by the Board.

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. Mr. Carroll also reported on continuing negotiations for a theme dinner. 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.

INTERNATIONAL ACTIVITIES

Comité Maritime International

Charles B. Anderson of New York, outgoing Chair of the Committee on the Comité Maritime International, reported that the CMI Executive Council will hold a joint meeting with the Association's Committee, as part of an attempt to improve channels of communication between the Committee and the CMI. The appointment of Michael Marks Cohen as Chair of the Committee and as a titular member of the CMI should also improve communication. Mr. Anderson also commented on the speech of CMI President Patrick Griggs on CMI's incentive to involve younger members.

President McCormack reported that communications have already improved, and noted that the Association was responding to a CMI questionnaire on carriage of goods and had responded to a CMI questionnaire on piracy.

Board member Knudsen, Chair of the Committee on Marine Insurance and General Average, reported on the Association's response to a CMI questionnaire on marine insurance. Immediate Past President James F. Moseley commented on the fine quality of this response and suggested that the final version of the response to the questionnaire be printed in the Proceedings as a valuable summary of U.S. law on this subject.

International Maritime Organization

First Vice President William R. Dorsey, III, reported on the meeting of the IMO Legal Committee in London during the week of April 19, 1999, which he attended as an advisor to the U.S. delegation. The subjects included a protocol to the 1974 Athens Convention on Passenger Claims, the proposed Convention on Wreck Removal, the proposed Convention on Bunker Pollution, IMO Guidelines on Financial Security for Maritime Claims and whether there is any need for the proposed Convention on Off-Shore Mobile Craft.

First Vice President Dorsey reported that the Athens Convention protocol and Convention on Bunker Pollution are nearing completion. Progress is also being made on the IMO Guidelines on Financial Security. The Guidelines, which will be voluntary, invite Flag States to urge owners to comply with the Guidelines' directive to maintain insurance coverage in accordance with its provisions. It is expected that the work on the Guidelines will be completed at the Legal Committee's next meeting in October 1999, and the Legal Committee therefore has requested the IMO Council to submit a proposed resolution on the Guidelines to the next IMO Assembly, which will take place in November 1999.

There has been a change in the way that the IMO formulates its work schedules so that efforts at Legal Committee meetings will be concentrated on a few of the projects nearing completion so as to move these along. Work at the next sessions will be devoted to the Athens Convention protocol and the Bunker Pollution Convention so that drafts can be ready for a diplomatic conference in either 2000-2001 or 2002-2003.

The question also arose as to whether certain matters should be deleted from the Legal Committee's work program. On the Association's recommendation, the U.S. delegation proposed the deletion of a Convention on Offshore Mobile Craft, but a number of nations expressed the view that it would be premature to do so at this time.

Draft Convention on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters

Robert J. Zapf, Chair of the Practice and Procedure Committee and the Association's advisor to the Coast Guard at the Diplomatic Conference on the Arrest Convention, presented a position paper to the Board on the Draft Convention on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters.

The current language of the draft Convention would restrict a court seizing a defendant's property to entry of provisional rather than binding measures with respect to that property, and would also prohibit the exercise of jurisdiction unless there were a basis for the exercise of personal jurisdiction over the owner of the seized property, namely, "a sufficiently close link with the parties, the circumstances of the case, [or] the cause or object of the action." Any judgment rendered on the basis of a prohibited exercise of jurisdiction would not be entitled to international recognition and enforcement. The draft Convention would therefore conflict with Supplemental Admiralty Rules B and C, and the provisions of the 1999 International Convention on Arrest of Ships and the 1993 International Convention on Maritime Liens and Mortgages.

Other problems with the draft language exist in connection with *forum non conveniens* and the effect and enforceability of decisions rendered by default.

The position paper criticizes the current draft Convention's provisions as unworkable in the context of American maritime law and industry, particularly in connection with ship financing, extension of credit to vessels, and enforcement of claims for personal injury, cargo damage and other tort claims, because the draft Convention would impair the ability of claimants to seize the vessel as security and to exert jurisdiction over responsible parties. The position paper suggests resolutions to the problems noted above, particularly the addition of a provision that nothing prohibits a court's exercise of jurisdiction in maritime cases based upon a court's seizure of maritime property in accordance with national or international law.

Upon motion duly made and seconded, the Board duly approved the position paper as a statement of the Association's position and endorsed its transmittal as a letter signed by President McCormack to the Office of the Legal Advisor of the Secretary of State.

The State Department asked that the Association send an observer to the U.S. delegation to the next drafting session, which will take place at the Hague in June 1999.

President McCormack called the Board's attention to the letter by Rear Admiral Shkor, U.S. Coast Guard Chief Counsel, praising the outstanding and invaluable assistance rendered by Mr. Zapf to the United States delegation to the United Nations/International Maritime Organization Diplomatic Conference on the Arrest of Ships. The text of Admiral Shkor's letter will appear in the Proceedings for the Spring 1999 General Meeting.

UNESCO Convention on Underwater Cultural Heritage

Peter E. Hess of Wilmington reported on drafting sessions in Paris from April 19 through 24, 1999 on the proposed Convention, which he attended as the Association's unofficial observer. The members of the United States delegation were Michele Aubry (National Park Service), Bob Blumberg, Esq. (State Department), Mike Bok, Esq. (Department of Defense), Jerome Hall (Institute of Nautical Archaeology), Russ Lamont, Esq. (State Department, and the delegation's official "legal advisor"), Greg Stemm (Odyssey Marine Exploration, Inc., a commercial salvor) and Ole Varmer, Esq. (NOAA).

The proposed Convention would give title to "all traces of human existence underwater" to coastal nations and grant them the power to prohibit the recovery of underwater cultural heritage by private entities. The Convention would also abolish the laws of salvage and finds. Any nation which ratifies the Convention is obligated to rescind any domestic law which provides an incentive for the recovery of underwater cultural heritage.

Mr. Hess speculated that the Convention will probably be presented for adoption at the UNESCO meeting in 2001, after which it will go to the member States for ratification.

Mr. Hess noted that the proposed Convention is fundamentally inconsistent with the United Nations Law of the Sea Convention (UNCLOS), and that the primary goal of the U.S. delegation was to try to modify the current UNESCO draft to harmonize as much as possible with UNCLOS. There was, however, some recognition by the U.S. delegation of legal and commercial problems posed by the proposed Convention's wholesale ban on exploration and salvage of historic wreck sites, and therefore encouraged modification of the draft to allow "multiple uses" of underwater resources.

Mr. Hess reported that the delegations of other nations were composed mainly of people who had no contact with responsible recovery of historical marine artifacts, and who have no faith in the controls such as those which have been imposed by U.S. admiralty courts to preserve and make available to scholars and others the archaeological value of underwater historic sites—such as site-mapping and strict requirements for preservation and public display—while granting salvors some incentive to explore and recover items of interest and value. The view of most delega-

tions is that it is better to leave cultural heritage underwater, *i.e.*, "preservation in place," than to allow any private sector recovery whatsoever.

The U.S. delegation has indicated its willingness to meet with the Association's Study Group on the UNESCO Convention to try to develop proposals to minimize intrusions into the law of admiralty and meet private sector concerns. First Vice President Dorsey commented that the central issue among U.S. interests is the protection of historical artifacts with reasonable accommodation of commercial interests, and whether a judge or a regulatory agency will decide the disposition of underwater cultural heritage. He stated that the Association should consider creative solutions to reach the best possible result.

The U.S. delegation has suggested a reservation enabling signatory nations to opt out of the provision stating that the laws of salvage and finds shall not apply to underwater cultural heritage.

Mr. Hess recommended that the Association work with U.S. government agencies involved in the U.S. delegation to UNESCO, as well as the CMI and IMO to protect the laws of salvage and finds, and to protect other industries which would be affected by the Convention, including fisheries and those dependent on marine cables.

President McCormack noted that our Study Group on the UNESCO Convention will make further recommendations about the Association's role concerning this issue, and that the Study Group includes members with expertise in salvage, marine insurance, Law of the Sea, fisheries and marine ecology to ensure that all U.S. interests can assist in formulating the Association's position.

PROPOSED LEGISLATION ON CARRIAGE OF GOODS

Vincent M. DeOrchis of New York, Chair of the Committee on Carriage of Goods, reported that there was encouraging news about the Association's proposal. After the Committee's meeting on May 5, 1999, Mr. DeOrchis and Past President Chester D. Hooper met with Linda O'Leary of AWO and agreed on language which resolve the AWO's objections to the proposal. Ms. O'Leary advised that she will write to Texas Senator Kay Hutchison to advise that the AWO now supports the Association's proposed legislation. Other members of the industry will also express their endorsement and urge the Senate to act.

Senator Hutchison has advised that the bill will be introduced this year, although international affairs have also occupied the attention of Congress.

Mr. DeOrchis reported that CMI President Patrick Griggs has indicated that the CMI will not take a position on the proposed legislation since the CMI does not view itself as policing domestic law.

As a result of meetings with representatives of FIATA, a Geneva-based organization composed of freight forwarders and intermediaries, their objections appeared to have been resolved.

The Canadian MLA has, however, expressed objections to the Association's proposal, which have been addressed by Mr. DeOrchis, Past President Hooper and President McCormack in meetings with the Chairman of the CMLA's Committee on Carriage of Goods, Rui M. Fernandes. The major objection centers on the provision in the proposed legislation negating the effect of contractual provisions designating a foreign arbitration forum for dispute resolution.

Despite this objection, Mr. DeOrchis concluded that there is now more cause for optimism than ever before that the proposal will be introduced this year.

AMICUS REQUESTS

President McCormack advised that the Board would be receiving a formal request that the Association participate as *amicus* in *INTERTANKO v. United States*, No. 97-35010, which involved questions of OPA 90's preemptive effect.

On a vote by poll after the Board meeting, upon motion duly made and seconded, the Board voted in favor of *amicus* participation.

NEW BUSINESS

First Vice President Dorsey advised that there have recently been challenges by respected academics to the proposition that federal courts have power to make admiralty law. These commentators have taken the position that the constitutional grant of admiralty jurisdiction is best construed as a grant of jurisdiction only to hear and manage admiralty cases rather than to craft substantive maritime law, which is within the exclusive province of Congress or, if Congress fails to act, of state legislatures.

[11845]

Professor Robert Force of Tulane commented on this question at the Admiralty Law Institute in March 1999 and has since sent First Vice President Dorsey an article representative of this trend. Professor Force's concern about this school of thought is expressed in a short composition which will appear as part of the Centennial Proceedings. Professor Force cautioned admiralty practitioners that articles questioning the federal courts' role in declaring maritime law must be confronted and countered in articles of equally able scholarship and urged the Association to undertake efforts to address this issue.

* * *

There being no further business to come before the Board, the meeting was adjourned at 12:10 p.m.

Respectfully submitted,

/s/ Lizabeth L. Burrell
Secretary