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

Held by telephonic conference call and at the offices of
Hill Rivkins & Hayden, New York,
on
August 3, 2001

The meeting was called to order by President William R. Dorsey, III, at 12:00 p.m. In addition to President Dorsey, the following officers were present:

Raymond P. Hayden, First Vice President
Thomas S. Rue, Second Vice President
Lizabeth L. Burrell, Secretary
Patrick J. Bonner, Treasurer
Winston E. Rice, Membership Secretary
Howard M. McCormack, Immediate Past President

The following Board members were present in person or telephonically:

Geoffrey F. Birkhead	Alan van Praag
James Patrick Cooney	James F. Whitehead, III
John B. Gooch, Jr.	Robert J. Zapf
Armand J. Paré	JoAnne Zawitoski

At the invitation of President Dorsey, Past President Chester D. Hooper of New York, the Association's delegate to the American Bar Association House of Delegates, and M. Hamilton Whitman of Baltimore, Chair of the Special Committee on Planning and Arrangements for the 2001 Fall Meeting, were also present at the meeting.

SECRETARY'S REPORT

Secretary Lizabeth L. Burrell of New York reported that many Committee Chairs are forgoing written reports on Committee meetings and activities, so that Association members are deprived of the benefit of reading about the areas of law covered by such Committees. Secretary Burrell therefore asked Board members, each of whom designated as a liaison to two or more Committees, to encourage Committee Chairs to submit written reports for inclusion in the Proceedings.

Upon motion duly made and seconded, the minutes of the May 3, 2001 meeting of the Board of Directors were unanimously approved and

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accepted. The minutes of the March and May 2001 Board meetings were included in the Proceedings of the Spring 2001 General Meeting, which had been published at the time of this Board meeting.

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

TREASURER'S REPORT

Treasurer Patrick J. Bonner of New York presented the Treasurer's Report for the three months ending on April 30, 2001, the date our fiscal year also ends. Treasurer Bonner reported on the cash on hand and investments as of the date of the meeting, as well as anticipated expenses for our next fiscal year, including the publication of the Directory, an audit, and travel in connection with many of our on-going projects.

Treasurer Bonner noted that dues collections are progressing well. We must, however, continue to exercise a policy of fiscal caution in view of other Association projects and activities that will require expenditures over the coming years. Nonetheless, we expect to be able to participate fully in all current areas of endeavor.

Those who have fallen behind on their dues payments continue to be purged from the membership.

Treasurer Bonner also reported on the filing of the Association's tax returns and on the auditors' report.

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

MEMBERSHIP SECRETARY'S REPORT

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

The Proctor Admissions Committee recommended that Associate Lawyer member Nancy L. Hengen of New York be advanced to Proctor status. Upon motion duly made and seconded, the recommendations of the Proctor Admissions Committee were approved and Ms. Hengen was granted Proctor status.

After the May 3, 2001 Board meeting, the Association had 3,324 members. As of August 3, 2001, after the changes approved by the Board at its meeting, the total membership was 3,336.

Membership Secretary Rice also reported that the Directory has been prepared and will be published considerably earlier than in prior years, for which President Dorsey expressed great thanks. In addition, Membership Secretary Rice has made changes to the website to make membership applications more accessible.

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

Canadian Maritime Law Association 50th Anniversary

On behalf of the Association, President Dorsey attended the CMLA's celebration of its fiftieth year during its meeting on June 15 and 16, 2001, together with First Vice President Raymond P. Hayden, Immediate Past President Howard M. McCormack and Past President James F. Moseley. The Association hosted a reception and presented a banner bearing the same design as the home page of the CMLA website, in a size similar to our own Association banner, to reciprocate the kind recognition given this Association by the CMLA at our Centennial.

Average Adjusters' Meeting

President Dorsey attended the meeting of the Association of Average Adjusters on May 10, 2001 in London as the Association's representative.

Southeastern Admiralty Law Institute

President Dorsey attended the SEALI meeting in Orlando on June 19 and 20, 2001, at which he spoke about the *Cammon* case (discussed below in the *Amicus* Request section of these Minutes) and the Association's policy and procedures concerning participation as an *amicus curiae*.

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Shipping Coordinating Committee

On behalf of the Association, President Dorsey attended the July 20, 2001 and will attend the August 7, 2001 meetings of the Coast Guard's Shipping Coordinating Committee, which have to do the with draft Protocol on the Athens Convention discussed below.

Houston Marine Insurance Seminar

President Dorsey will attend the Houston Marine Insurance Seminar, at which he will present a paper on the draft Protocol to the Athens Convention, discussed below.

INTERNATIONAL ACTIVITIES

Comité Maritime International

International Sub-Committee on Transport Law

Past President Hooper reported on the present draft of the International Sub-Committee's work, and the plan to get a draft to UNCITRAL by the end of the year to comply with the schedule proposed by UNCITRAL Secretary Jernej Sekolec. National maritime law and trade associations have been invited to comment on the present draft by September 28, 2001. There will be another meeting of the International Sub-Committee in November 2001 in Madrid, after which the instrument will be given to UNCITRAL by the end of the year. UNCITRAL meetings on the draft will start in April 2002 in New York. Further meetings will follow in Vienna in the Fall of 2002.

A difficulty posed to the Association is that our comments on the draft are being sought before our next Board and General Meetings, but it is difficult to determine in advance of those meetings whether the draft will generally accord with the COGSA proposal, greatly differ from the COGSA proposal or deal with subjects on which the Association has not previously taken a position. Accordingly, President Dorsey asked President Hooper to work with Association's Committee on Carriage of Goods to provide comments to the Board describing where the draft falls among these various possibilities so as to guide the Board's action in providing comments to the CMI.

Jurisprudence on Interpretation of Maritime Conventions

Dr. Francesco Berlingieri is heading a CMI project to gather information on how the courts in various nations are construing maritime conventions. He has requested all members of this Association to forward to him any court decisions interpreting maritime conventions.

International Maritime Organization

Protocol to the Athens Convention

President Dorsey will attend the next meeting of the IMO Legal Committee during the week of October 8, 2001, at which the Draft Protocol to the Athens Convention on Liability Relating to Carriage of Passengers and their Luggage by Sea will be the main topic. After receiving recommendations from Ann G. Miller of San Francisco, Chair, with the advice of the Committee on Cruise Lines and Passenger Ships, President Dorsey prepared a position paper based on the industry reaction and historic concerns of the Association, which he sent to the Coast Guard, with Board approval by poll after its May 3, 2001 meeting.

The paper conveys the view that the approach taken by the proposed Protocol is fundamentally at odds with current U.S. law and practice and that these deviations are without inherent merit. In particular, the position paper notes that the proposed Protocol provisions on liability, burden of proof and direct action conflict with not only U.S. maritime law but also transportation tort law in most U.S. jurisdictions, and that there has been no showing of a need to change existing law, which balances both carrier and passenger interests, on these issues.

The Coast Guard expressed its appreciation of the Association's comments, but the official position of the U.S. delegation has not yet been determined.

UNESCO Convention on Underwater Cultural Heritage

The Joint International Group of Experts considering the UNESCO Draft Convention had its fifth meeting in Paris from July 2 through 6, 2001. John D. Kimball of New York, Chair of the Association's Study Group on Underwater Cultural Heritage, and Rapporteur of the CMI's Working Group on Underwater Cultural Heritage, is also a member of the U.S. delegation. The Association has already criticized the provisions of the draft Convention which abrogate the laws of salvage and finds, oust

the courts of jurisdiction over matters involving objects which had been underwater for over one hundred years, omit any recognition of commercial usage of recovered artifacts, define "underwater cultural heritage" in an overly broad manner without any requirement that the artifacts have some historical or cultural significance, and potentially conflict with the Law of the Seas Convention.

Mr. Kimball reported that the Working Group has finished its work and that a vote was taken—in itself a deviation from custom in drafting Conventions, in which consensus is usually sought—to approve the draft. The U.S. delegation, which has only observer status because the United States is not a member of UNESCO, together with other maritime nations which are members, does not support the draft. Because of the composition of UNESCO, there will be no review of this Convention by the United Nations Security Council.

U.S. delegation's main objection to the current draft is its extension of coastal state jurisdiction to the exclusive economic zone out to the continental shelf, which is regarded as a violation of the Law of the Sea Convention. Other problems exist in the ambiguity of the jurisdictional provisions, but proponents of the draft argued that ambiguity was both desirable and constructive in that it would leave the States which became parties to the Convention free to interpret these provisions as they wished.

Mr. Kimball noted that there may be some attempts to modify the language of the current draft before it goes to the UNESCO General Assembly, but there will be no diplomatic conference prior to the submission of the draft to the UNESCO General Assembly. Mr. Kimball pointed out that the current draft is in direct conflict with virtually all of the positions taken by the Association, and encouraged the Association to continue to work with the U.S. government towards the laudable end of protecting underwater cultural heritage in a manner that would be consistent with the recognition of other rights and interests.

Mr. Kimball's report will be available on the Association's website.

Law of the Sea Convention

In view of the change in leadership of the Senate committee dealing with this Convention, President Dorsey will forward a copy of the Association's earlier resolution urging the United States to ratify this Convention.

COMMITTEE AND STUDY GROUP REPORTS

American Bar Association Relations

Past President Hooper reported that at the August 2001 meeting of the ABA, the House of Delegates will consider the following resolution concerning unpublished opinions:

Resolved, that the American Bar Association urges the Federal Courts of Appeals uniformly to

- (1) take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or internet websites; and
- (2) permit citation to relevant unpublished opinions.

Upon motion duly made and seconded, the Board unanimously resolved to instruct Past President Hooper, our delegate to the House of Delegates, to vote in favor of the ABA resolution concerning unpublished opinions.

Past President Hooper is also making efforts to foster exchange of information between the ABA and the Association so that we can better coordinate our work and avoid duplication of effort.

Carriage of Goods

Past President Hooper reported on that the status of the proposal for a new Carriage of Goods by Sea act, and the delays in its consideration caused by the changes in congressional committees. In view of the delays, it is possible that CMI International Sub-Committee on Transport Law might complete its draft for UNCITRAL, and even that UNCITRAL might act, before the proposed new COGSA is acted on by Congress. In such case, it would make little sense to advocate purely domestic legislation if an appropriate international regime might be adopted by the United States, particularly as it now appears that the current CMI draft is in many respects similar to the COGSA proposal.

Electronic Communications and Commerce

The Committee is studying issues arising from the courts' increasing use of electronic filing, including difficulties that may arise when a variety

of system failures prevent compliance with deadlines. President Dorsey will forward to the Committee Chair, Glen T. Oxtton of New York, comments by Philip A. Berns of San Francisco on these issues.

Fisheries

Pursuant to the action taken by the Association at its May 4, 2001 General Meeting, President Dorsey forwarded to the Chair and minority leaders of the House and Senate Appropriations Committees the Association's recommendation that the effective date of the section 202(b) of the American Fisheries Act and 46 U.S.C. 12102(c)(4) be extended for at least 18 months to permit development and consideration of amendments to protect the interests of the current holders of preferred ship mortgages on fishing vessels of 100 feet or greater in registered length and the vessel owners. A bill extending the effective date has now been passed.

Marine Ecology

In his helpful and timely newsletter, Dennis L. Bryant of Washington, D.C., Chair of the Committee on Navigation, Coast Guard and Government Regulation, reported that the National Oceanic and Atmospheric Administration (NOAA) is proposing to amend its Natural Resource Damage Assessment (NRDA) regulations under OPA 90 to clarify issues raised in a 1997 federal court decision, as well as to make various technical changes, and that comments should be submitted by September 29, 2001. 66 Fed. Reg. 39464.

President Dorsey forwarded this report to Committee on Marine Ecology to determine whether or not the Association should comment.

Mr. Bryant subsequently reported that the NRDA comment period had been reopened to November 5, 2001. 66 Fed. Reg. 50919.

Marine Financing Committee Subcommittee on Coast Guard Documentation

Pursuant to a request from the Board, the Subcommittee, chaired by Robert L. Poster of New York, drafted comments in response to a request by the Coast Guard on proposed changes to 46 C.F.R. Part 67, dealing with documentation of vessels in the coastwise trade, and in particular with lease financing for such vessels. There was a difference of opinion within the Subcommittee, however, about certain of the comments, and

some Subcommittee members suggested that the Association should remain neutral in view of the controversial nature of some of the proposed regulations and varying views about whether or not the proposed regulations accord with the purpose of the statute.

Accordingly, the Board, upon motion duly made and seconded, resolved that the Association should take no position on the proposed regulations, noting, however, that individual members could of course comment as they wished, provided they made clear that they were not speaking on the Association's behalf.

Marine Insurance and General Average

The valuable work of this Committee in creating Annotations to the P&I policy will be published in the Fall 2001 MLA REPORT. The Annotations are already available on the Association's website.

Navigation, Coast Guard and Government Regulation

President Dorsey reported that a new bill, H.R. 2228, was introduced in the House of Representatives on June 19, 2001 by Representative Green of Wisconsin, entitled "The Maritime Disaster Family Assistance Act of 2001." The proposed legislation would delegate certain duties to the Secretary of Transportation in the event of a maritime disaster, including: the provision of mental health services and counseling to the families of victims and a place for them to grieve privately; to contact, meet with and arrange for travel of the families to the disaster; and to arrange for a suitable memorial, in concert with the families. The act would also prohibit a range of persons from contacting the families of victims for the purpose of soliciting them to commence suits for personal injury or death for forty-five days after the disaster.

Practice and Procedure

Pursuant to the action taken at the Association's May 4, 2001 General Meeting, President Dorsey forwarded to the Advisory Committee the Association's resolution to clarify Rule B and define the time for determination of when the defendant is "not found within the district" to be at the time of the filing of the complaint and affidavit required by Rule B(1).

Salvage

Pursuant to the action taken at the Association's May 4, 2001 General Meeting, President Dorsey forwarded to Assistant Legal Advisor for Treaty

Affairs of the State Department the Association's resolution recommending that the United States denounce the 1910 Salvage Convention.

Uniformity of U.S. Maritime Law

In his newsletter, Dennis Bryant reported that the Coast Guard has issued a Supplemental Notice of Proposed Rule-making ("SNPRM") concerning the reporting of maritime casualties. The proposal would add "significant harm to the environment" as a reportable marine casualty. As stated in Mr. Bryant's report, "Comments were submitted after issuance of the initial Notice of Proposed Rule-making indicating that the federalism section of that document could be read to mean that states were preempted from promulgating their own reporting requirements. The federalism section has been revised to indicate that the federal government has exclusive jurisdiction over issues such as design, construction, and operation of inspected commercial vessels operating on U.S. navigable waters. States continue to have concurrent jurisdiction with regard to certain aspects of marine environmental protection. Comments on the SNPRM should be submitted by September 10, 2001. 66 Fed. Reg. 36530."

President Dorsey has asked Board member James Patrick Cooney of Houston, who also chairs the Uniformity Committee, to undertake a study of the SNPRM to determine if any federalism issues that might concern the Association are raised, and to make a recommendation about whether or not the Association should file comments.

Special Committee on Planning and Arrangements for the Fall 2001 General Meetings

A. Hamilton Whitman, Chair, reported that we were getting a good number of registrations for our Fall meeting in San Diego during the week of October 15 at the Hotel del Coronado in San Diego, with about one third of the registrants coming from overseas. Mr. Whitman reported that he is monitoring the number of registrations so that, if necessary, we can reduce the number of registrations guaranteed to the hotel by the applicable deadline.

Special Committee on Site Selection for the Fall 2005 General Meetings

Arrangements have been made to hold our Fall 2005 meeting at the Scottsdale Princess from November 2 through 5, 2005. President Dorsey thanked Second Vice President Thomas S. Rue and Marion E. McDaniel,

Jr., of Houston, Chair of the Special Committee, for their work in negotiating favorable terms for this event.

TITLE 46 RECODIFICATION

The U.S. government is considering a major recodification of Title 46 of the United States Code, with the expressed intention of avoiding any modification of existing substantive law. The purpose of the recodification is to modernize language and organize the material. Dennis Bryant, Chair of the Committee on Navigation, Coast Guard and Government Relations, also heads an *Ad Hoc* Committee made up of Committee Chairs, including Harold Watson, Chair of the Committee on Maritime Legislation, and the Chairs of several substantive Committees affected by Title 46, to examine proposed revisions for consistency with existing law and report further on the results of this examination.

Based on the Coast Guard's advice that this project is moving forward quickly, the Association's comments will be drafted on an expedited basis in order to provide them before the Fall meeting.

ABA STUDY ON MULTIJURISDICTIONAL PRACTICE OF LAW

After Board approval of the comments of the *Ad Hoc* Subcommittee on Multijurisdictional Practice, President Dorsey forwarded these comments to the ABA.

AMICUS REQUESTS

President Dorsey reported on developments in *Cammon v. City of New York*, 95 N.Y.2d 583, 721 N.Y.S.2d 579, 2001 AMC 210 (N.Y. 2000). In this suit, New York's highest court allowed a marine construction worker, who was injured on a work platform on navigable waters allegedly because of a surge caused by a passing tug, to assert a claim for negligence and strict liability under New York Labor Law against third parties. The case raises the issue at the center of the current debate among commentators of such stature as Professors Robert Force and David Robertson about the vitality and proper application of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917).

While the issue is at the heart of the Association's concerns, in view of the unresolved procedural issues in the case (denial of a motion for summary judgment), the Board resolved at its May 3, 2001 meeting that *amicus* support for the petition for *certiorari* was not appropriate at that time.

After that meeting, President Dorsey asked the parties to keep us advised of the progress of the matter to determine whether or not the Association should participate at a later point in time, particularly if the Supreme Court decides to accept the petition for *certiorari*. The wisdom of the Board's view of the procedural posture of the case was subsequently borne out by the fact that the defendant's counsel reported that the defendant had been unable to satisfy the Supreme Court's finality doctrine and therefore was not going to file a petition for *certiorari* at this time.

The Board had resolved by poll after its May 3, 2001 meeting to authorize the Association's participation as *amicus* in *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135 (2d Cir. 2001), pursuant to an invitation from the United States Court of Appeals for the Second Circuit, on petition for rehearing *en banc*, for *amicus* briefs from, *inter alia*, maritime law and trade organizations. The sole issue on the petition for rehearing is whether or not the Second Circuit should overrule *Great Circle Lines v. Matheson & Co.*, 681 F.2d 121 (2d Cir. 1982), in which the court had held that a fixture "subject details" constituted a binding charter.

President Dorsey expressed the Board's appreciation to Donald J. Kennedy of New York, Chair of the Committee on Maritime Arbitration and Mediation, for the Committee's recommendations, which were composed on an urgent basis, and to Board members Armand J. Paré and Vincent M. DeOrchis and Committee member Keith W. Heard, for their efforts in writing the brief, also under great time pressure. A copy of the Association's *amicus* brief is available on the website. The Association's brief urges the Second Circuit to revisit *Great Circle* for clarification.

President Dorsey reported on a request for the Association to participate as *amicus* in *Senator Lines v. Eastern Sunway*, which involved the issue of whether strict liability or negligence standard should govern the liability of a shipper of dangerous cargo when that cargo causes damage to a ship and other cargo. The case was on appeal to the United States Court of Appeals for the Second Circuit after a ruling by the trial court that the carrier had to prove negligence—by showing that the shipper knew of but failed to disclose the cargo's dangerous propensities—to recover. In light of By-Law 702.1, which requires that *amicus* participation be sparingly authorized, and the procedural posture of the case, *amicus* participation was declined.

RESOLUTION TO CHANGE DATE OF FALL 2002 MEETING

Upon motion duly made and seconded, the Board resolved to hold the Fall 2002 General Meeting on Friday, November 1, 2002.

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MEMBER NEWS

Immediate Past President McCormack has been nominated to serve as the next Chairman of the Association of Average Adjusters of the United States.

President Dorsey conveyed the Association's congratulations to honorary member Dr. Francesco Berlingieri on the occasion of his being awarded the honorary degree of *lauriate ad honorem* from the University of Bologna.

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: There being no further business to come before the Board, the meeting was adjourned at 2:15 p.m.

Respectfully submitted,

/s/ Lizabeth L. Burrell Secretary
