MINUTES OF THE COMMITTEE ON PRACTICE & PROCEDURE
MARITIME LAW ASSOCIATION OF THE UNITED STATES
APRIL 30, 2014
NEW YORK, NY

Chair: Edward J. Powers
Secretary: Gina M. Venezia

Chair Edward J. Powers called the Committee to order at 10:00 a.m. in the office of Ledyard & Milburn, located at Two Wall Street. Twenty four persons physically attended the meeting, and another two attended by telephone conference call. The following agenda items were addressed:

I. Report on Sub-Committee for Maritime Liens and Mortgages

Mr. Mike Frevola of New York, Chair of the Sub-Committee, reported on recent developments in the law regarding maritime liens. Specifically, Mr. Frevola addressed the significance of the following cases:

- *Blue Whale Corp. v. Grand China Shipping Development et al.*, 722 F.3d 488 (2d Cir. 2013) -- changes choice of law analysis in Rule B veil-piercing cases
- Correspondent Bank cases -- decisions concerning whether correspondent bank accounts in New York can be attached for either foreign bank's USD funds or foreign customer's USD funds
- *Commodities & Minerals Enterprise Ltd. v. Gretchen Shipping Inc.*, 1:13-cv-6548-PKC (S.D.N.Y. Sept. 27, 2013) (oral decision -- transcript available) -- letter of credit proceeds may be attachable (although letter of credit is not) **plus** situs of letter of credit proceeds is where documents are to be presented
- *Gretchen Shipping Inc. v. Commodities & Minerals Enterprise Ltd.*, Index #: 654281/2013 (Sup. Ct. N.Y. County Dec. 19, 2013) (oral decision -- transcript available) -- commencing parallel attachment proceeding in state court where federal proceeding already pending in same jurisdiction, without disclosing to court existence of federal proceeding, ruled to be frivolous and $18M attachment vacated. Fees application pending.
- *Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 2:87-cv-00363-RBSVAED (E.D.Va. Apr. 1, 2014) -- federal court/state court jurisdictional battle in connection with intersection of salvage rights and receivership.

Mr. Frevola explained that several of the aforementioned cases were still in litigation and he would provide an update on the status of these cases at the next meeting of the Practice and Procedure Committee.

II. History of the Model Local Admiralty Rules

Professor David Sharpe of the George Washington University School of Law discussed a draft paper he is working on regarding the history of the Model Local Admiralty Rules. Professor Sharpe explained that in the District Courts, procedure and practice are governed by the following bodies of rules.

(1) The primary authority is the *Federal Rules of Civil Procedure for the United States District Courts,* which in 1938 unified the rules of practice in actions at law (formerly the actions were governed by state rules) and in suits in equity (which had been uniform since 1822 because some states had no equity rules to apply).

(2) The *Supplemental Rules for Admiralty or Maritime Claims* in 1966 extracted, invented, restated, and organized important procedures and practices in admiralty cases. The Federal Rules of Civil Procedure apply in admiralty cases, but Supplemental Rule A says that in a conflict, the Supplemental Rules trump the Federal Rules.

(3) *Local Rules* for district courts treat interstitial procedural matters, as enabled and limited by Federal Rule of Civil Procedure 83. Local Rules add consistent, not conflicting, provisions for particular kinds of cases—civil, criminal, and admiralty—within the district. Unlike rules for higher federal courts, the Local Rules are uniform only for the courts within a district. From one district to another, the organization of the local rules is more or less systematic. Updating has been haphazard.

(4) *Standing Orders* of individual federal judges are written rules that are non-uniform and will remain so, as long as they do not conflict with Federal Rules and Local Rules. Standing Orders reflect the independence of trial judges in carrying out their responsibility to run their courts.

(5) *Customs* of courts and judges, usually unwritten, apply in unpredictable ways, and that is why out-of-town lawyers retain local counsel and make friends with judges' clerks.

Professor Sharpe explained that the non-uniformity of the many local admiralty rules which varied from district to district created obvious problems for out-of-district maritime practitioners appearing on short notice. As a result, the Practice and Procedure Committee began considering unification of the district courts' local rules in the early 1980s. In aspiration, uniform model local admiralty rules would be the best solution, but the processes of standing committees of the Judicial Conference of the United States and promulgation by the Supreme Court were daunting—a decade of toil. In practice, model local admiralty rules, using the low-level rule-making power of district courts, would promote uniformity, avoid the formality of the national rule-making process and the rigidity of amending its output, and preserve the creativity of courts and counsel in busy maritime districts.

At Practice and Procedure Committee meetings in the early 1980s, discussions were had regarding how to systematize the local admiralty rules without becoming entangled with the Advisory Committee. At the 1982 MLAUS Fall Meeting, Professor Sharpe presented to the Practice and Procedure Committee a demonstration draft of local rules (a) and (b) and a sketch of rules (c) through (g). Over the next several years, the Practice and Procedure Committee considered various drafts before finally agreeing on the final draft at the meeting in Spring of 1986. The Committee presented a cover letter for MLAUS President Frank O'Brien to complete and sign. The letter introduced the Model Local Admiralty Rules ("MLARs") and offered them to the chief judges of the maritime districts, making it clear that the districts could adopt the MLARs, in whole or in part, as their own, neither imposed by Washington nor endorsed by the whole MLAUS. By intention, there were no revisers' notes. Adopting or adapting the MLARs, putting them into operation, and later amending them, would require no formalities except adoption by the judges of a district court under the notice provisions of FRCP 83. The MLARs would be a

radical change in organization and in coverage for every district, and implementation would take time and stimulus.

In conclusion, Professor Sharpe noted that by applying the authority of individual districts with the nationwide expertise of the MLAUS, the MLARs have achieved maximum practicality with minimum bureaucracy. He also pointed out that enticing judges, rather than imposing rules, has been effective in reforming specialized admiralty procedure and practice in trial courts.

III. Admiralty Jurisdiction and Maritime Enforcement Remedies in South Africa

Mr. Dave Dickinson of Durban, South Africa, gave a presentation regarding admiralty jurisdiction and maritime enforcement remedies in South Africa. Mr. Dickinson explained that the South Africa Admiralty Jurisdiction Regulation Act of 1983 provides for adjudication in the courts of South Africa, "irrespective of the place where a claim arose, or the place of registration of the ship concerned or of the resident, domicile or nationality of its owners." In other words, South African maritime law permits its admiralty courts to assume jurisdiction over a wide ambit of potential maritime claims, "entitling the wandering litigants of the world to consider South Africa as an appropriate jurisdiction to enforce claims."

Mr. Dickinson explained that an action *in rem* may be brought by the arrest of an "associate ship" instead of a ship in respect of which the maritime claim arose. Under South African law, an "associate ship" means a ship, other than the ship in respect of which the maritime claim arose: (a) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or (b) owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or (c) owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled the company which owned the ship concerned, when the maritime claim arose.

Mr. Dickenson discussed the preferential ranking of maritime claims which come ahead of the mortgage as follows: (1) custodia legis expenses; (2) a claim to a preference based on possession of the property in question, whether by way of right of retention or otherwise; (3) a claim which arose not earlier than one year before the commencement of proceedings to enforce it or before the submission of proof thereof and which is a claim in respect of (a) crew claims; (b) port dues; (3) loss of life or personal injury directly resulting from employment of the ship; (4) damage to property resulting directly from operation of the ship; (5) repair of the ship; (6) salvage of the ship; (7) premiums owing under any policy of marine insurance with regard to the ship.

IV. Amedments to 28 U.S.C. Section 1441

Chair Powers reported on recent district court cases which address the 2011 amendments to 28 U.S.C. Section 1441. Several decisions out of the Southern District of Texas have held that the 2011 amendments were substantive in that an action arising out of the general maritime law filed in state court may now be removed to federal court regardless of the savings to suitors clause. *See e.g., Ryan v. Hercules Offshore*, 945 F.Supp.2d 772 (S.D. Tex. 2013) However, at least one recent decision out of the Western District of Washington has declined to follow the lead of the Texas courts, explaining that the 2011 amendments were more cosmetic than substantive and were not intedned to change long-standing precedent that holds that general maritime claims brought in state court under the savings to

suitors clause may not be removed unless an independent basis of federal jurisdiction exists under 28 U.S.C. 1331-1332.

The meeting was adjourned at 12:05 p.m.

The following persons were in attendance:

Kirby L. Aarsheim, Boston, MA
Spencer Aronfeld, Miami, FL
James W. Bartlett, III, Baltimore, MD
Samuel P. Blatchley, Boston, MA
Dane C. Bruun, Corpus Christi, TX
John C. Cleary, New York, NY
James L. Chapman, IV, Norfolk, VA
Daniel J. Cragg, Duluth, MN
Dave Dickinson, Durban, ZA
Gary E. English, Sumerville, SC (via telephone)
Robert B. Fisher, Jr., New Orleans, LA
Joshua S. Force, New Orleans, LA (via telephone)
Michael J. Frevola, New York, NY
Shari L. Friedman, Chicago, IL
Jason R. Harris, Jacksonville, NC
Donald M. Kennedy, New York, NY
J. Dwight LeBlanc, New Orleans, LA
Jessica L. Martyn, Philadelphia, PA
Richard H. Ottinger, Norfolk, VA
Edward J. Powers, Norfolk, VA
Zoe E. Sajor, New York, NY
David J. Sharpe, Hudson, NY
Rick A. Steinberg, Hackensack, NJ
G. Robert Toney, Ft. Lauderdale, FL
David R. Walker, Houston, TX
Kevin P. Waters, Houston, TX