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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

THE MLA REPORT

Editor

David R. Owen of Baltimore

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IN MEMORIAM

JAMES J. DONOVAN

1915–1988

President,
The Maritime Law Association of the United States
1978–1980

James J. Donovan was born in New York City on April 15, 1915. He was educated at Fordham Preparatory School, Fordham College, graduating with a B.S. in Business Administration in 1938. He went on to Fordham Law School and graduated with an LL.B. in 1941. He was a member of the Delta Theta Phi Fraternity. He was admitted to the New York Bar in 1941.

Mr. Donovan served in the United States Navy from July, 1941 to October, 1945. During his last year and a half of active duty, he served as U.S. Naval Port Officer, Naples, and for the last three months served also as U. S. Port Officer in the Mediterranean.

Upon his discharge from the Navy as a Lieutenant Commander, he commenced the practice of law in October, 1945 with the firm of Hill, Rivkins & Middleton. He left Hill, Rivkins in 1948, and associated with Lawrence W. McKeon. In 1980, he joined Martin J. Kelly and became a partner of Kelly & Donovan in 1955. Mr. Maloof joined the firm in 1961 as a partner, and the firm was renamed Kelly, Donovan, Robinson & Maloof. In 1969 the firm merged with Watters & Donovan (Jim's first cousin, James B.), becoming Donovan Donovan Maloof & Walsh. The firm grew over the years and is currently known at Donovan Maloof Walsh & Repetto.

Mr. Donovan had been active in the affairs of The Maritime Law Association of the United States. He served as a member of the Executive Committee from 1963 to 1966; Second Vice President 1968–1969; Secretary 1974–1978; President 1978–1980. Mr. Donovan served as a member of the U. S. delegation to the Comite Maritime International at a meeting in Stockholm in 1963 at which time the Visby Rules were formulated and adopted by the Comite.

Mr. Donovan regularly participated in the activities of the CMI. He attending the Plenary Conferences in Stockholm (1963), New York (1965), Tokyo (1969), Hamburg (1974), Rio de Janiero (1977), and Montreal (1981).

Mr. Donovan served as a Maritime Law Association observer to the United States delegation to the United Nations Commission on International Trade and Law Conference on the Carriage of goods by Sea, March, 1978 (Hamburg Rules). He was a titulary member of the Comite Maritime International and a member of the Permanent Advisory Board of the Tulane Admiralty Institute. His law review articles have appeared in the Tulane Law Review, Houston Law School Law Review, and Fordham Law School Institute on Corporate Studies, and the Journal of the International Association of Insurance Counsel.

The Supreme Court of the United States, in its landmark decision, *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 1975 AMC 541 (1975), cited with approval the article co-authored by Mr. Donovan and Lucian Ray which appeared in the Journal of the International Association of Insurance Counsel, 41 Ins. Coun. J. 395 (1974), advocating proportionate fault.

For the Association
Richard W. Palmer, President

COMMITTEE ON INTERGOVERNMENTAL ORGANIZATIONS

July 27, 1988

Memorandum From: Guy E. C. Maitland, Chairman
To: All MLA Members
Re: Status of Work In Progress On International Treaties

Submitted herewith is an extensive report on this subject prepared by Prof. David J. Sharpe that I commend to your attention. Both the idea and the execution were his, but our Committee enthusiastically sponsors the product.

COMMITTEE ON INTERGOVERNMENTAL ORGANIZATIONS MARITIME TRANSPORTATION TREATIES IN PROGRESS

David J. Sharpe[1]

The Maritime Law Association of the United States is a law reform organization, as stated by art. 2 of the Articles of Association, and as demonstrated by the activities of MLA committees; and a good part of maritime law reform takes the form of new or revised maritime transportation treaties, along with implementation in Washington. But treaty-in-progress texts can be hard to find in a hurry; some of them have not been printed in the usual collections; and busy maritime lawyers need to know whom to call for a status check.

In the hope that a consolidated checklist would help, "Maritime Transportation Treaties in Progress" lists twenty items, sketching their present status, citing published texts, identifying contact people, and providing a little recent bibliography. The list omits maritime treaties dealing with public law, pollution, fishing, and labor.

The list originated in a report composed by Guy E.C. Maitland for the MLA Committee on Intergovernmental Organizations, though neither Mr. Maitland nor the Committee is responsible for either the idea or the execution. The assistance of several of the contact people is gratefully acknowledged. Because of the publication deadline and the unexpected magnitude of the undertaking, the compiler has not consulted fully with all the experts; corrections and comments will be gratefully received.

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[1]National Law Center, The George Washington University, Washington, DC 20052, telephone (202) 994-6754.

PRINTED TEXTS

Benedict: Benedict on Admiralty (M. Cohen, editor in chief; 7th ed. loose-leaf), v. 6, 6A, 6B, and 6C.

Int. Legal Mat.: International Legal Materials (American Society for International Law).

Journal ML&C: Journal of Maritime Law and Commerce.

Lloyd's Quarterly: Lloyd's Maritime and Commercial Law Quarterly.

Tetley Cargo Claims: W. Tetley, Marine Cargo Claims (3d ed. 1988).

Tetley Liens: W. Tetley, Maritime Liens and Claims (1985).

National Law Center, The George Washington University, Washington, DC 20052, telephone (202) 994–6754.

DOCUMENT SOURCES

House Documents: Manager, Document Room, U.S. House of Representatives, U.S. Capitol, Room H–226, Washington, DC 20515; (202) 226–3530.

Senate Documents: Senate Document Room, Hart Bldg. Room B–4, United States Capitol, Washington, DC 20510; (202) 224–7860.

United Nations Documents: United Nations Publications, Room DC2–853, New York, NY 10017.

CONTACTS

In addition to MLA Committees, here are other people and/or offices shown as Contacts:

Coast Guard: CAPT Frederick F. Burgess, Jr. USCG, Chief, Maritime & International Law Division, G–LMI, Commandant, United States Coast Guard, 2100 Second St., S.W., Washington, DC 20593; (202) 267–1527. (CAPT Burgess has been recalled from retirement and will resume his duties for a year beginning in mid–August 1988.)

Congress—Status of Legislation by Telephone: Legislative Information Office, (202) 225–1772.

D.O.T.: Paul B. Larsen, Esq., Office of the General Counsel, U.S. Department of Transportation, Washington, DC 20590; (202) 366–9161.

State: Peter H. Pfund, Esq., Assistant Legal Adviser for Private International Law, L/PIL, United States Department of State, Washington, DC 20520; (202) 653–9853.

ARREST

Draft Revision of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea–Going Ships (CMI, Lisbon, May 24, 1985). 6A Benedict Doc. No. 8–1A, MLA Doc. No. 660 at 8310–8316.

The CMI draft is now before the IMO/UNCTAD Joint Intergovernmental Group of Experts (JIGE), which intends to take up ARREST at its concluding meeting, so that ARREST will be harmonious with the Liens and Mortgages Convention to which JIGE is devoting most of its efforts. Contact: MLA Committee on Marine Financing. *See also* LIENS AND MORTGAGES, below.

The International Convention for the Unification of Certain Rules Relating to Arrest of Sea–Going Ships (CMI, Brussels, May 10, 1952), 439 UNTS 193, 6A Benedict Doc. No. 8–1, entered into force Feb. 24, 1956, but dissatisfaction with its operation led CMI to take up the subject again. United States law on arrest and maritime liens is so different from the law of other nations that United States adherence to an international convention on either topic seems remote. *See* the United States answers to the 1984 CMI Questionnaire, MLA Doc. No. 652 at 7910–7923.

COLLISION DAMAGES

Draft Rules for the Assessment of Damages in Maritime Collisions (CMI, Lisbon, Apr. 11, 1987). 6 Benedict Doc. No. 3–4A; 18 Journal ML&C 577 (Oct. 1987).

The Draft Rules, composed of lettered Rules A–E followed by numbered Rules I–V, were circulated within the maritime industries for comment late in 1987. The CMI subcommittee met in February 1988 to review the comments, and it is redrafting the rules in a format of rule–plus–comment that will resemble the American Law Institute's Restatements of the Law. A new draft may be presented to the CMI Plenary Meeting in Paris in July 1990. No decision has been reached on whether COLLISION DAMAGES will be proposed in the form of an international convention or a model law.

Contacts: MLA Committee on Navigation and Coast Guard Matters; Coast Guard; James F. Moseley of Jacksonville, the MLA delegate to the CMI's maritime collisions subcommittee.

See MLA Doc. No. 670 at 8823; *see also* Warot, A Comment on The Lisbon Rules on Compensation for Damages in Collision Cases, 18 Journal ML&C 583 (Oct. 1987).

COLLISION JUDGMENTS

Draft International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction, Choice of Law, and Recognition and Enforcement of Judgments in Matters of Collision (CMI, Rio de Janeiro, Sep. 1977). 6 Benedict Doc. No. 3–6.

Contact: MLA Committee on Comite Maritime International.

COLLISION JUDGMENTS would abrogate the incompatible portions of the International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision (CMI, Brussels, May 10, 1952), which entered into force Sep. 14, 1955. While the draft convention remains on the IMO Legal Committee's long-term work list, it is not scheduled for consideration in the 1988–1989 biennium.

COLREG AMENDMENTS

Amendments to the International Regulations for Preventing Collisions at Sea, 1972 (COLREG 1972) (IMO, London).

Amendments of Nov. 19, 1981: Proclaimed to be in force June 16, 1983. The proclamation only is printed at 33 U.S.C. following § 1602; the amendments text, consisting of 56 numbered changes, is printed at 48 Fed. Reg. 28634.

Amendments of Nov. 19, 1987: IMO A15/Res.626. To enter into force Nov. 19, 1989. Nine changes; no printed text.

COLREG 1972 (IMCO, London, Oct. 20, 1972) appears in full at 28 U.S.T. 3459, T.I.A.S. No. 8587. The version at 6 Benedict Doc. No. 3–4 omits the enacting articles; the commercial collections print the Rules as amended. The unusual amending technique set forth in art. VI of the treaty, 28 U.S.T. 3464, provides for the IMO Assembly to adopt amendments, set a suspense date about six months in the future, and place the amendments in force about a year after that, as long as one-third of the contracting parties have *not* objected by the suspense date. Congress has accepted the technique, 33 U.S.C. § 1602, creating a rather complex

procedure culminating with a presidential proclamation. IMO did not receive sufficient objections to stall either set of Amendments.

Contact: MLA Committee on Navigation and Coast Guard Matters; Coast Guard.

FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA)

A Bill to Amend the Foreign Sovereign Immunities Act with Respect to Admiralty Jurisdiction, H.R. 1149, 1OOth Cong., 1st Sess. No printed text.

Introduced Feb. 19, 1987, and referred to the House Committee on Judiciary, Subcommittee on Administrative Law and Governmental Relations. Subcommittee hearings were held May 28, 1987; on Dec. 10, 1987, the Subcommittee reported the bill to the Committee without opposition. Contact: MLA Ad Hoc Committee to Revise the Foreign Sovereign Immunities Act, Chairman, William R. Dorsey, III, of Baltimore.

The Foreign Sovereign Immunities Act of 1976 (FSIA) brought United States domestic law into conformity with the "restrictive view" of governmental immunity that prevailed in most of the world, *see* 1976 U.S. Code Cong. & Admin. News 6604, although no international convention then so provided. *See* Draft Convention on State Immunity (Int'l Law Ass'n, Montreal 1982), 6A Benedict Doc. No. 8–5C; *see also* United Nations Int. Law Comm'n, Draft Articles on Jurisdictional Immunities of States and Their Property, art. 18 (July 1986), 26 Int. Legal Mat. 641 (May 1987). The FSIA contains many provisions on ships and shipping, and several of them have been troublesome in practice.

Amendment of 28 U.S.C. § 1605(b) would relieve the effects of *Jet Line Services, Inc. v. The Marsa el Hariga* , 402 F.Supp. 165, 1979 AMC 543 (D. Md. 1978); other amendments would affect the foreclosure of preferred ship mortgages and maintain the distinction between in rem and in personam actions. Amending the FSIA has been endorsed by the MLA repeatedly, most recently on Nov. 2, 1984, supporting ABA–proposed amendments. *See* MLA Doc. No. 665 at 8553, No. 673 at 90659075.

HAMBURG RULES

United Nations Convention on the Carriage of Goods by Sea (UNCITRAL, Hamburg, Mar. 31, 1978). 6 Benedict Doc. No. 1–3; Tetley Cargo Claims App. A.

Awaiting entry into force. As of Feb. 19, 1988, 12 of the required 20 ratifications had been deposited. Both the HAMBURG RULES and the VISBY AMENDMENTS were introduced as H.R. 3157, 99th Cong., 1st Sess. (1986), but they died on the calendar and have not been introduced in the 100th Congress. Contacts: MLA Committee on Carriage of Goods by Sea; D.O.T.

The Hamburg Rules would radically overhaul the content, structure, and language of the Hague Rules. Shippers support them; they were rejected by the MLA years ago, and the American Bar Ass'n House of Delegates rejected them on Aug. 12, 1987. *See* MLA Doc. No. 673 at 9000–9005, 9022–9024; *see also* VISBY AMENDMENTS, below.

HNS

Convention on Liability and Compensation Related to Maritime Carriage of Hazardous and Noxious Substances (IMO). No printed text.

On the agenda of 60th Session of IMO Legal Committee, London, Oct. 1988. Contacts: MLA Committee on Transportation of Hazardous Substances; Coast Guard.

The IMO Legal Committee completed preparation of a draft HNS Convention in 1982, but the IMO diplomatic conference in May 1984 was unable to agree on liability issues, so no other progress was achieved. *See* DeBievre, Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 17 Journal ML&C 61 (Jan. 1986).

As a basis for resuming HNS negotiations, ten nations submitted an options paper to the 58th Session of the Legal Committee Oct. 12–16, 1987, which voted to work on HNS on a priority basis in 1988. At the preliminary intergovernmental HNS talks Apr. 20–22, 1988, and at the Legal Committee's 59th Session held the following week, significant interest was expressed in an international HNS supplemental compensation fund as an alternative to shipowner liability. *See* MLA Doc. No. 673 at 9031, 9061–9064. The Shipping Coordinating Committee held a special public meeting on HNS on June 30, 1988.

LEASING

Convention on International Financial Leasing (UNIDROIT, Ottawa, May 28, 1988). No printed text.

Awaiting entry into force by accession of three States. Contacts: MLA Committee on Comite Maritime International; State.

Ships are included, art. 7(3)(a), though the CMI observer urged that they be excluded; as a concession, arts. 7(4) and (5) seek to preserve the distinctive maritime law, particularly the arrest of ships. The text evidences no appreciation of the distinction between leasing and chartering. CMI is studying the implications of the treaty.

LIENS AND MORTGAGES

Draft Revision of the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (CMI, Lisbon, May 24, 1985). 6A Benedict Doc. No. 8-3A, MLA Doc. No. 660 at 8323–8328.

Following the CMI's Lisbon meeting, both IMO and UNCTAD took an interest in LIENS AND MORTGAGES, which is presently under consideration by the Joint Intergovernmental Group of Experts (JIGE) named by IMO and UNCTAD. JIGE has met four times since Dec. 1986; it is scheduled to meet next in December 1988, with its final meeting to follow. Contacts: MLA Committee on Marine Financing; Coast Guard.

The International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (CMI, Brussels, Apr. 10, 1926), 6A Benedict Doc. No. 82, Tetley Liens 626, entered into force June 2, 1931. A new convention by the same name (CMI Brussels, May 27, 1967), 6A Benedict Doc. No. 8–3, Tetley Liens 634, never entered into force. The revision proposed by JIGE is to be compatible with the proposed ARREST convention. *See* MLA Doc. No. 673 at 9032. *See also* ARREST, above.

LIMITATION OF LIABILITY

Convention on Limitation of Liability for Maritime Claims (LLMC 1976) (London, Nov. 19, 1976). IMCO No. 77.04.E, 6 Benedict Doc. No. 5–4.

While the United States has lived more or less uncomfortably with its limitation of shipowners' liability act since 1851, the world shipping community has generated three conventions; so far, the United States has ratified none of them. The International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-Going Vessels (Brussels, Aug. 25, 1924), 120 LNTS 123, 6 Benedict Doc. No. 5–1, entered into force June 2, 1931. Of the 15 ratifying nations, 6

denounced the 1924 treaty in favor of the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships (Brussels, Oct. 10, 1957), 6 Benedict Doc. No. 52; it entered into force May 31, 1968, but not enough nations acceded to accomplish international uniformity, and so the CMI has tried again with LLMC 1976.

The United States delegation did not sign LLMC 1976 because the limits of liability were too low. The MLA soon endorsed LLMC 1976, and the MLA has cooperated with the House Merchant Marine Committee as various bills have been introduced. LLMC 1976 entered into force Dec. 1, 1986. Limitation fund amounts in the House bills for personal injury and death have been increased repeatedly. IMO is also considering increasing the Convention limits. *See* MLA Doc. No. 673 at 9009, 9033, 9078.

H.R. 3135, 1OOth Cong., 1st Sess., was introduced Aug. 6, 1987, to bring United States law into conformity, and hearings were held by the House Merchant Marine Committee late in 1987, but no further progress is expected in 1988. Contact: MLA Committee on Limitation of Liability.

LINER CODE

United Nations Convention on a Code of Conduct for Liner Conferences (UNCTAD, Geneva, Apr. 6, 1974). U.N. Doc. TD/CODE/13/Add.1, v. II; 6C Benedict Doc. No. 14-36.

Entered into force Oct. 6, 1983. Not signed or ratified by the United States. To be reviewed by UNCTAD in Geneva Oct. 31-Nov. 18, 1988. Contact: MLA Committee on Economic Regulation of Ocean Common Carriers.

See MLA Doc. No. 670 at 8820. The concept of the LINER CODE is at odds with United States antitrust policy. *See* Buderi, U.S. Policy on Regulation of Liner Shipping in the 1980s: A View from Washington, part I, 17 Journal ML&C 493 (Oct. 1986), part II, 18 Journal ML&C 111 (Jan. 1987); L. Juda, The UNCTAD Liner Code (1983), reviewed at 17 Journal ML&C 453 (July 1986).

MULTIMODAL TRANSPORT

United Nations Convention on International Multimodal Transport of Goods (MT) (UNCTAD, May 24, 1980). U.N. Doc. TD/MT/CONF/17; 6 Benedict Doc. No. 1-4; Tetley Cargo Claims App. A.

Awaiting entry into force. As of Nov. 1, 1987, 5 of the required 30 nations had deposited instruments of ratification. Contact: MLA Commit-

tee on Carriage of Goods by Sea, Subcommittee on Multimodal Transportation (Chester D. Hooper of New York).

The HAMBURG RULES are designed to harmonize with MULTIMODAL TRANSPORT, but neither is making rapid progress toward entry into force. *See* Nasseri, The Multimodal Convention, 19 Journal ML&C 231 (Apr. 1988); Driscoll & Larsen, The Convention on International Multimodal Transport of Goods, 57 Tulane L. Rev. 193 (1982).

PASSENGERS AND LUGGAGE

Convention Relating to the Carriage of Passengers and Their Luggage by Sea (PAL 1974) (IMCO, Athens, Dec. 13, 1974). IMCO No. 75.03E, 6 Benedict Doc. No. 2–2.

The United States delegation did not sign PAL 1974 because the limits of liability were too low. PAL 1974 entered into force Apr. 28, 1987. The SDR Protocol of Nov. 19, 1976, 6 Benedict Doc. No. 2–3, would replace the gold franc with the SDR; it has not entered into force. Contact: MLA Committee on Intergovernmental Organizations.

Owing principally to an initiative by the United Kingdom in the aftermath of the *Herald of Free Enterprise* disaster Mar. 6, 1987, the IMO Legal Committee is considering revisions which would raise the PAL liability limits and provide a new rapid amendment mechanism. The revisions are to be considered at the Legal Committee's 60th Session in October 1988.

REGISTRATION

United Nations Convention on Conditions for Registration of Ships (UNCTAD, Geneva, Feb. 7, 1986). U.N. Doc. No. TC/RS/CONF/23; 6C Benedict Doc. No. 14–35; 26 Int. Legal Mat. 1236 (1987).

Awaiting entry into force by the accession of at least 40 states, representing not less than 25% of the world's tonnage (*see* Annex III). Contact: MLA Committee on Economic Regulation of Ocean Common Carriers.

This is an effort by UNCTAD to introduce the "genuine link" requirement into ship registration, displacing "flags of convenience." *See* MLA Doc. No. 670 at 8835. *See also* McConnell, "Business as Usual:" An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships, 18 Journal ML&C 435 (July 1987); Sturmey, The United Nations Convention on Conditions for Registration of Ships, 1987 Lloyd's Quarterly 97.

SALVAGE

Draft Articles for a Convention on Salvage (CMI, Montreal, May 29, 1981). 6 Benedict Doc. No. 4–2A.

Carried forward from CMI to IMO; awaiting IMO diplomatic conference in London in April 1989. Contacts: MLA Committee on Marine Insurance, General Average and Salvage, Subcommittee on Salvage (K.H. Mao of New York); Coast Guard.

See MLA Doc. No. 673 at 9011, 9027. This convention would replace the 1910 Salvage Convention, which the United States adhered to in 1913, 37 Stat. 1670, T.S. No. 576, and would introduce incentives to salvors to protect the marine environment. For the 1910 text, *see* 3A Benedict (Norris on Salvage) App. B, and 6 Benedict Doc. No. 4–1; it is *not* reprinted in the United States Code or its proprietary parallels.

SEA WAYBILLS

Uniform Rules for Sea Waybills (CMI). No printed text.

The CMI International Subcommittee on Sea Waybills met Oct. 9, 1987; the CMI Assembly had the subject on its agenda for the Apr. 22, 1988, meeting; it is expected to be discussed at the CMI Plenary Meeting in Paris in July 1990. Contact: MLA Committee on Carriage of Goods, Subcommittee on Sea Waybills (John C. Moore of New York).

See MLA Doc. No. 670 at 8811, No. 673 at 9021.

TERRORISM

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (IMO, Rome, Mar. 10, 1988), SUA/CONF/15. No printed text.

Awaiting 15 national accessions, following the IMO diplomatic conference. The United States signed. Contact: MLA Committee on the Transportation of Hazardous and Noxious Substances, Subcommittee (not named) (Samuel P. Menefee of New Orleans); Coast Guard.

The *Achille Lauro* terrorism incident in Oct. 1985, and a United Nations General Assembly resolution in December, spurred IMO to have a preparatory committee draft the convention in May 1987, and the Legal Committee approved the draft in October 1987. *See* MLA Doc. No. 670 at 8833, No. 673 at 9027, 9061.

See also Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (IMO, Rome, Mar. 10, 1988), SUA/CONF.16/Rev. 1. No printed text. To enter into force (1) after TERRORISM enters into force, then (2) 90 days after the third accession to the Protocol.

TRANSPORT TERMINALS

Model Law or Convention on the Liability of Operators of Transport Terminals (OTT) (UNCITRAL, Dec. 12, 1986). U.N. Doc. A/CN.9/298. 6 Benedict Doc. No. 1–7.

Contacts: MLA Committee on Stevedoring and Terminal Operations; D.O.T.; State.

Originated in UNIDROIT; transferred to UNCITRAL in 1983. A State Department study group met most recently Dec. 11, 1987; the UNCITRAL working group took up the matter Jan. 18–29, 1988; it is to be discussed by the next UNCITRAL plenary meeting (Vienna, May 1989). *See* MLA Doc. No. 673 at 9060.

VISBY AMENDMENTS

Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading [The Hague Rules, CMI, Aug. 25, 1924, T.S. No. 931, 120 LNTS 155] (Feb. 23, 1968). 6 Benedict Doc. No. 1–2; Tetley Cargo Claims App. A.

Entered into force June 23, 1977; 24 accessions as of March 1988. Awaiting reintroduction in Congress. Contacts: MLA Committee on Carriage of Goods; D.O.T.

The VISBY AMENDMENTS make a small number of specific changes to the Hague Rules, especially to raise the $500 package limitation. Endorsed by the MLA and, on Aug. 12, 1987, by the American Bar Association (text, MLA Doc. No. 673 at 9079). D.O.T. does not plan to ask Congress to consider the VISBY AMENDMENTS until the shippers (who favor HAMBURG RULES) and the carriers (who favor the VISBY AMENDMENTS) agree on a common approach. *See also* HAMBURG RULES, above.

[9096]

VISBY SDR PROTOCOL

Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading [The Hague Rules] (Dec. 21, 1979). "SDR" stands for "Special Drawing Right." 6 Benedict Doc. No. 1-2A; Tetley Cargo Claims App. A.

Entered into force Feb. 14, 1984. 11 accessions as of Sep. 1987. Awaiting introduction in Congress as part of the VISBY AMENDMENTS. Contacts: MLA Committee on Carriage of Goods by Sea; D.O.T.

The Hague Rules (1924) package limit was (100, and so COGSA (1936) set the United States limit at US$ 500, when the exchange rate was rigid. Currency fluctuations following World War II caused the VISBY AMENDMENTS (1968) to set the package limit at 10,000 "gold francs," which was an increase in amount whose exact value depended on a given nation's conversion rate. In the early 1970s the International Monetary Fund created the SDR, whose value floats. When the SDR is worth US$ 1.25, the package limit of 666.67 SDRs under the VISBY SDR PROTOCOL equals US$ 833. Standing alone, this proposal is not controversial. At US$ 1.25, the 835 SDRs of the HAMBURG RULES would equal US$ 1044.

COMMITTEE ON MARINE INSURANCE, GENERAL AVERAGE AND SALVAGE

July 1, 1988

Memorandum To: All MLA Members

From: K. H. Mao, Chairman,
Subcommittee on Salvage of the Committee on Marine Insurance, General Average and Salvage

Re: Abandoned Shipwreck Act of 1987.

This statute, P. L. 100-298, 43 U.S.C.A. §§ 2101-2106, became law on April 28, 1988. It applies to abandoned shipwrecks of the following types located in state waters, tidal and non-tidal: (a) embedded in submerged lands of a state, (b) embedded in coralline formations protected by a state on its submerged lands, and (c) on submerged lands of a state included in or officially determined eligible for inclusion in the National Register of Historic Places. "Embedded" is defined as firmly affixed such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the wreck. The Act does not apply to wrecks merely sitting on the bottom unless they are included in the National Register; nor does it apply to any wrecks on the Outer Continental Shelf or on submerged lands in territorial waters owned by the United States, such as underwater national parks.

The Act provides that the United States asserts title to all wrecks to which the Act applies, and at the same time the United States transfers its title to the state in or on whose submerged lands a wreck is located. Thus, the states are given full responsibility for and control of such wrecks, which shall henceforth be governed exclusively by state law. Federal law is disposed of in the following words: "The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 6 of this Act applies." Thus the Act changes the governing law in most of the "treasure salvage" cases, such as *Cobb Coin Company v. The Unidentified Wrecked and Abandoned Sailing Vessel* , 525 F.Supp. 186, 1983 AMC 966 (S.D. Fla. 1981), and 549 F.Supp. 540, 1983 AMC 1018 (S.D. Fla. 1982). However, the statute does not affect the decisions in the famous series of cases involving *Treasure Salvors, Inc.*, commencing with 569 F.2d 330, 1978 AMC 1404 (5th Cir. 1978), since they involved a wreck on the OCS. *See* (Note) *The Treasure Below: Jurisdiction over Salving Operations In International Waters*, 88 Col. L. Rev. 863 (1988).

An article fully discussing the Act has been written by David R. Owen and will appear in the October 1988 issue of the Journal of Maritime Law and Commerce.

COMMITTEE ON MARITIME LEGISLATION

July 27, 1988

Memorandum From: Joseph D. Cheavens, Chairman

To: All MLA Members

Re: Wreck Act Amendments of 1986

Early in April 1988, I received a telephone call from Carter Quinby of San Francisco saying that he had a new Wreck Act case and that his research indicated that the Act had been amended in important respects in 1986. He inquired whether I knew anything of this, the answer to which was in the negative.

I did verify that the Act had been amended, apparently to impose strict liability for wreck removal, rather than liability only for negligent sinking, upon the owner, operator of charterer. An announcement to this effect was made to the membership as part of our Committee's report at the Spring Meeting held on May 6, 1988. The general reaction of the members has been one of great surprise at learning of this important, but unannounced, amendment.

At my request Carter Quinby has prepared a comprehensive memorandum on this subject, which is presented herewith.

COMMITTEE ON MARITIME LEGISLATION

July 20, 1988

Memorandum To: Joseph D. Cheavens
From: Carter Quinby
Re: Wreck Removal—Wreck Act Amendments of 1986

Sooner or later almost every maritime lawyer will have to deal with problems arising in connection with the wreck of a vessel which has been sunk or stranded in navigable waters. Maintaining expertise in the field is becoming increasingly difficult because they keep changing the rules on us. The most recent change deprives the innocent vessel owner of the right to avoid personal liability by abandoning the wreck of his vessel.

Most admiralty lawyers were startled by the 1967 decision in *Wyandotte Trans. Co. v United States*, 389 U.S. 191, 1967 AMC 2553 (1967), holding that the negligent owner of a wrecked vessel was liable to remove it or reimburse the Government for doing so, since the prevailing view had been that the Government was limited to its statutory remedies against the wrecked vessel *in rem* assuming a proper abandonment by the owner. *See, United States v. Moran Towing and Transportation Co.*, 374 F.2d 656, 1967 AMC 1733 (4th Cir. 1967); *United States v. Bethlehem Steel Corporation*, 319 F.2d 512, 1963 AMC 1673 (9th Cir. 1963).

In dictum the *Wyandotte* opinion noted that "a non-negligent sinking . . . is not forbidden" (389 U.S. 191, 197 n.6, 1967 AMC 2553, 2558 n.6) and it became the prevailing view after 1967 that the *in personam* liability created by *Wyandotte* would be imposed only upon negligent owners, with innocent owners retaining the right to abandon their vessels and escape personal liability. *Agri-Trans. Corp. v. Gladders Barge Line. Inc.*, 542 F.Supp. 961, 1983 AMC 1931 (N.D. Miss. 1982), *modified*, 721 F.2d 1005 (5th Cir. 1983); *United States v. Ohio Barge Lines, Inc.*, 607 F.2d 624, 1980 AMC 2199 (3d Cir. 1979). The Fifth Circuit had stated specifically that "The Wreck Act is not a liability without fault statute." *Nunley v. M/V Dauntless Colocotronis*, 727 F.2d 455, 459, 1984 AMC 2920, 2924 (5th Cir. 1984) (*en banc*). Now, however, by 1986 legislation which is obscure in its origin and received virtually no publicity when it was considered or enacted, Congress has amended the Wreck Act to impose a wreck removal obligation upon even a completely innocent vessel owner.

The Wreck Act, codified at 33 U.S. Code, Sections 409–415, was enacted as part of the Rivers and Harbors Act of 1899. Prior to the 1986 amendments, Section 409 declared it unlawful to "voluntarily or carelessly

sink, or permit or cause to be sunk, vessels or other craft in navigable channels." Section 414 empowered the United States at its discretion to remove the wreck of any abandoned vessel and to receive the proceeds from sale thereof, and Section 415 contained similar provisions and expedited procedures applicable to any wreck deemed to constitute or create an emergency. The 1986 amendments (Pub. L. 99–662, 100 Stat. 4199) changed the foregoing provisions in two ways. First, the quoted phrase "voluntarily or carelessly" was deleted from Section 409. Second, the prior language of Sections 414 and 415 was designated as subsection (a), with a new subsection (b) being added to each section as follows:

> (b) *Liability of Owner, Lessee, or Operator.* The owner, lessee, or operator of such vessel, boat, water craft, raft, or other obstruction as described in this section shall be liable to the United States for the cost of removal or destruction and disposal as described which exceeds the costs recovered under subsection (a) of this section. Any amount recovered from the owner, lessee, or operator of such vessel pursuant to this subsection to recover costs in excess of the proceeds from the sale or disposition of such vessel shall be deposited in the general fund of the Treasury of the United States.

As stated above, the origin of the 1986 amendments is obscure. U.S.C.A. contains a general reference to 1986 U.S. Code Cong. and Admin. News, p. 6639, for the legislative history, but the reader will search the published reports and statements in vain for any mention of the Wreck Act amendments. They appear as Section 939 of the massive "Water Resources Development Act of 1986" that consists of 192 pages. Section 939 is sandwiched between a section on "Reports on Small Business Contracts" and one on "Shore Damage Mitigation." 1986 U.S. Code Cong. and Admin. News, 100 Stat. 4199. The House and Senate Committee reports, comprising 109 pages, do not refer to Section 939 at all. 1986 U.S. Code Cong. and Adm. News, p. 6738. The Wreck Act amendments appear to have been added at the instance of the United States, and without any involvement (and possibly without any knowledge) on the part of shipowners, P&I clubs or the MLA.

Although the origin of the legislation may be obscure, its purpose is not. The obvious intent of the 1986 amendments, confirmed by informal discussions with the Office of the General Counsel, Corps of Engineers (where they originated), is to remove the distinction between negligent and non–negligent owners and to make all such owners strictly liable for the costs of removing sunken vessels. Strict liability always did exist under Section 408 for damage to aids to navigation (*see Hines, Inc. v. United States*, 551 F.2d 717, 1977 AMC 380 [6th Cir. 1977]) and the Department

of Justice had argued repeatedly that the same standard should apply to wreck removal. *See, e.g., United States v. Nassau Marine Corp.*, 577 F.Supp. 1475, 1985 AMC 474 (E.D. La. 1985), *aff'd*, 778 F.2d 1111 (5th Cir. 1985). It would appear that the government lawyers have now succeeded in obtaining from Congress what they were unable to accomplish in the courts.

In what ways have the 1986 amendments changed a vessel owner's obligations and liabilities? Clearly it is now the law that negligence has disappeared as a factor in determining responsibility for wreck removal, and has been replaced by a strict liability standard. Beyond that, as is so often the case, the amendments raise more questions than they answer:

1. *Who is Strictly Liable?* The question did not arise under pre-existing law, since liability followed fault. Now, however, liability is imposed upon the "owner, lessee, or operator" of the sunken vessel, apparently in the disjunctive. Assuming that none of them is at fault, which of these unfortunate entities is responsible for removing the wreck? In the absence of any legislative history at all we are left without guidance.

2. *Is the Non-negligent Owner Guilty of a Crime?* Section 409 is a criminal statute, violation of which subjects the offender to punishment by fine and/or imprisonment as set forth in Section 411. Heretofore such violations required proof of fault; now they appear to be status-oriented. It remains to be seen whether the Government will seek and the courts will impose criminal penalties upon completely innocent owners, lessees, and operators.

3. *Do the Amendments Create New Civil Liabilities?* Although Section 409 is a criminal statute, it has been held to create a duty to which owners of sunken vessels should be held in civil actions. *Morania Barge No. 140, Inc. v. M. and J. Tracy, Inc.*, 312 F.2d 78, 1963 AMC 678 (2d Cir. 1962). For example, in *Humble Oil and Refining Company v. Tug Crochet*, 422 F.2d 602, 1972 AMC 1843 (5th Cir. 1970), plaintiff's vessel collided with a wreck which had sunk due to defendant owner's negligence but on which the Coast Guard had maintained a lighted wreck buoy for a number of years. On the night of the collision the light had gone out because of causes for which the Coast Guard was exonerated. Defendant owner, however, was held liable because of its failure to fulfill its statutory duty to remove the wreck. Now that an innocent owner is subject to the same statutory removal obligation which previously impacted only negligent owners, will the courts impose the same civil liability consequences for breach of the statutory duty, even in the absence of negligence or other fault? Time will tell.

4. *Are the New Liabilities Subject to Limitation? Wyandotte* expressly left open the question of whether limitation of liability is available in an action by the United States to recover wreck removal expenses, but the lower federal courts have universally denied limitation when it has been raised as a defense. *See, e.g., University of Texas Medical Branch at Galveston v. United States*, 557 F.2d 438, 1977 AMC 2607 (5th Cir. 1977); *Hines, Inc. v. United States*, 551 F.2d 717, 1977 AMC 380 (6th Cir. 1977). Whether an innocent owner should be allowed to limit against his statutory strict liability is a more difficult question. Certainly the equities are different, and at least one court has suggested a different result. In *United States v. Nassau Marine Corp., supra*, the Fifth Circuit, in discussing its concern with the government's argument for strict liability under the pre-1986 statute, pointed out that "non-negligent shipowners may be entitled to limit their liability under 46 U.S.C. Sections 181-89" (778 F.2d at p. 1114).

5. *Is the Amended Statute Constitutional?* It will be no surprise if legislation which treats an innocent shipowner so rudely is challenged on constitutional grounds. Presumably such challenge will fail, as did the challenges to related sections of the Wreck Act in *The Gansfjord*, 25 F.2d 736, 1928 AMC 1283 (E.D. La. 1928) and *The Scow No. 9*, 152 Fed. 548 (D. Mass. 1907).

6. *What About Insurance?* In *St. Paul Fire & Marine Ins. v. Vest Transp.*, 500 F.Supp. 1365, 1982 AMC 450 (N.D. Miss. 1980) *aff'd per curiam*, 666 F.2d 932 (5th Cir. 1982), a tug had negligently sunk its innocent barge, in consequence of which their common owner had incurred a wreck removal liability to the United States. The Fifth Circuit decision, denying coverage under the barge P&I policy for lack of barge fault, highlighted an uninsured gap for many tug and barge operators, since coverage under the negligent tug's tower's liability policy would have been excluded by the standard wreck removal exclusion. The 1986 amendments obviously changed the result of the *Vest* case. Fault is no longer a predicate for wreck removal liability, and the innocent barge owner's new statutory liability should be covered by his P&I policy. However, many tug and barge operators filled the uninsured gap by amending their tower's liability policies to cover wreck removal liabilities in the *Vest* situation. Risk managers and underwriters involved in such coverages should examine their policies to make sure that they do not provide double coverage in view of the 1986 amendments.

7. *Is There Any Reason to Abandon?* Prior to 1986 it was standard practice for the innocent owner of a wrecked vessel to notify the Corps of Engineers and the Coast Guard that he had abandoned the vessel, the

purpose of such abandonment being to shift to the Government responsibility for both marking and removing the wreck. Now that such an innocent owner has a continuing statutory duty to remove the wreck, is there any point in such an abandonment? There would be if the limitation defense is made available to such an owner; otherwise probably not. Unless the owner can limit, it would seem wiser for him to remove the wreck himself than to wait for the Government to do so and sue him for the inevitably greater expense involved in government work.

The foregoing list is not intended to be comprehensive, but rather indicative of the problems created by legislation which apparently was drafted to accomplish the narrow purpose of its proponent, without any opportunity for input from other affected interests. It is safe to say that it will take much litigation and many years before we learn the new rules of wreck removal.

COMMITTEE ON MARITIME PRODUCTS LIABILITY

July 29, 1988

Memorandum From: Dewey R. Villareal, Jr., Chairman
Re: Notes on Recent Literature

Those interested in marine products liability will find Professor Steven R. Swanson's article in 12 *Tulane Maritime Law Journal* 135 (Fall, 1987), formerly *The Maritime Lawyer*, of considerable interest. Entitled "The Citadel Survives a Naval Bombardment: A Policy Analysis of the Economic Loss Doctrine", the article gives prime attention to the Economic Loss Doctrine, tying it into *East River SS Corp. v. Transamerica Delaval, Inc.*, 106 S.Ct. 2295, 90 L.Ed.2d 865, 1986 AMC 2027 (1986). The product is one that will be a very useful item to anyone interested in this subject area. For those who may have missed it, the *Tulane Admiralty Law Institute Symposium: Products Liability in Admiralty*, is to be treasured. 62 Tul. L. Rev. 313 (1988).

Readers may also enjoy *Comind Companhia de Seguros v. Sikorsky Aircraft, et al.*, 116 F.R.D. 937 (D. Conn. 1987), a thoughtful and thorough consideration, on defendants' motion for summary judgment, of the court's jurisdiction over an aircraft insurer's claim for loss of a helicopter due to the failure of a defective part, in a crash at sea off the coast of Brazil in which 14 persons lost their lives. The interplay between admiralty jurisdiction and admiralty substantive law and the law of the state of manufacture (Connecticut) *East River SS Corp. v. Transamerica Delaval, Inc.*, 106 S.Ct. 2295, 90 L.Ed.2d 865, 1986 AMC 2027 (1986); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 468, 3 L.Ed.2d 368, 1959 AMC 832 (1959); and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174, 1986 AMC 2113 (1986), led the court to the conclusion that substantive admiralty law permitted the application of substantive state negligence and strict product liability theories and that the defendants' contractual disclaimers did not shield defendants from state law–afforded tort remedies.

COMMITTEE ON MARITIME ARBITRATION

NEWSLETTER NO. 1

"VOUCHING" APPLIED TO ARBITRATION

In *SCAC Transport (USA) Inc., et al v. SS "DANAOS" and Big Lift U.S.A., Inc., et al*, 845 F.2d 1157 (2d Cir. April 25, 1988), the common law practice of voucher was held to be a proper basis for binding a U.S. stevedore, as indemnitor, to a London arbitration award in favor of a vessel owner against a time charterer for vessel and cargo damage caused by the stevedore's negligence.

The case arose out of the loading of cargo on the DANAOS at Port Newark when, during operations by the stevedore's personnel, the vessel's boom collapsed, damaging the boom, the cargo being loaded and other parts of the vessel. The vessel's owner, having settled with cargo, commenced a London arbitration against the time charterer under their charter party. The time charterer demanded that the stevedore appear, defend and indemnify it from the results of the London arbitration but the stevedore refused to do so. The London arbitrators, after hearing live witness testimony including the longshoremen who operated the vessel's winches, made an award in favor of owner, finding that the accident occurred because of the stevedore's negligence without fault on the part of owner or the vessel. Trial in the U.S. District Court for the Southern District of New York on the time charterer's indemnity claim against the stevedore resulted in a similar finding of negligence. However, on appeal, the Second Circuit held that the trial court should have given the vouching notice served in the London arbitration preclusive effect on the issue of the stevedore's negligence.

With respect to the stevedore's objection that vouching was not applicable because arbitration lacked the procedural safeguards of litigation, the court, observing that "arbitration is an especially important and efficient means of dispute resolution in the maritime field", concluded that procedural differences between arbitration and court litigation were not a ground for denying preclusive effort to the vouching-in notice in the absence of a particularized showing of harm. In this connection the court noted that the arbitrators were experienced in maritime matters and that their award was subject to judicial review. Although usually a party could not be bound by arbitration absent its consent, the court noted that a party could be vouched into a judicial proceeding without its consent. Given that arbitration was the "common method" by which disputes were resolved in the maritime

field, the court saw no reason to distinguish between vouching in litigation and in maritime arbitration, concluding:

> "Absent a particularized showing of prejudice, there is no reason to subject parties to maritime transactions to multiple proceedings to resolve a single dispute. One trial, whether before arbitrators or a court, is enough".

The time charterer accordingly was entitled to indemnity not only for the owner's repair costs, loss of hire during repairs and its settlement with cargo, all of which had been awarded against the time charterer in the London arbitration, but also for the time charterer's own costs and attorneys, fees in connection with its defense of the London proceedings.

EFFECT OF COGSA ON ARBITRATION CLAUSES IN BILLS OF LADING

In *State Establishment for Agricultural Product Trading v. M/V WESERMUNDE*, 838 F.2d 1576 (11th Cir. 1988), a London arbitration agreement, incorporated into an ocean bill of lading which also incorporated U.S. COGSA by reference, was held to be unenforceable on the ground that London arbitration would have lessened the liability of the carrier.

The bill of lading, issued in Tampa for carriage of eggs to Aqaba, Jordan, incorporated "all the terms, conditions, liberties and exceptions" of a time charter party (identified only by date) between vessel owner and charterer (who was not a party to the action for damages). The bill of lading also provided that it was subject to the provisions of any legislation incorporating the Hague Rules, which "shall be deemed to be incorporated herein". The Tampa District Court ordered cargo interests to arbitrate in London and, when they refused to do so, dismissed their action for failure to prosecute. On appeal the Eleventh Circuit reversed and vacated the order of dismissal.

The court noted that COGSA did not apply to the bill of lading *ex propio vigore* but the parties had adopted COGSA into the bill of lading. Citing *Indussa Corp. v. SS Ranborg*, 377 F.2d 200, 203–204, 1967 AMC 589 (2d Cir. 1967) concerning the invalidity in a COGSA bill of lading of requiring a consignee to litigate in a foreign forum, the court stated:

> "* * * While we do not believe that arbitration in and of itself is *per se* violative of COGSA,s provisions, * * * the court does believe that a provision requiring arbitration in a foreign country that has no connection with either the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict with COGSA's general purpose * * *"

None of the parties had any connection with the United Kingdom and the facts of the case had no relation to that country. On this basis the court considered that, had COGSA applied *ex proprio vigore*, the provision requiring London arbitration would have been void under Section 3(8). Even as only a contractual incorporation, the court considered that the London arbitration agreement was in "conflict with COGSA's implied policy that an American forum will be made available to a consignee when a bill of lading is issued subject to the terms of that Act" and that cargo interests "must be given *actual* notice of the conflicting provision before entering into the contract in order to have that provision enforced." On the record the court was unable to find any evidence that the cargo interests had been given actual notice of the London arbitration provision or had expressly agreed to London arbitration. Accordingly, the District Court's order compelling arbitration was held to be erroneous.

An interesting case to compare is *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 1988 AMC 82 (E.D. La. 1987) in which, on the authority of *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 11–15, 1972 AMC 1407 (1972), the court referred a general average dispute to the courts or to arbitration in China. The bill of lading in that case provided "All disputes arising under or in connection with this bill of lading shall be determined by Chinese law in the courts of or by arbitration in the People's Republic of China" and also stipulated for the applicability of COGSA. The court rejected plaintiff's argument that determination of the general average dispute in China was contrary to the stipulation for COGSA stating:

> "* * * Chinese courts, according to the exhibits submitted by plaintiff and defendants, honor and apply any contractual choice of law provisions between litigants (such as Clause 27's stipulation of COGSA, so that whereas Chinese law governs the adjustment of general average, under the bill of lading it is expressly contemplated that Chinese courts will apply COGSA where pertinent, as for example, to the question of liability for general average); * * *"

JUDICIAL SUPPORT FOR ARBITRATORS' POWER TO AWARD PUNITIVE DAMAGES

Peabody v. Rotan Mosle, Inc., 677 F.Supp. 1135 (M.D. FLA. 1987) and *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988), both arising out of the Tampa District Court, have held arbitrators have power to award punitive damages.

Much interest has been generated in maritime arbitration circles lately because of an arbitration award rendered last September in which a char-

terer was awarded punitive damages in the amount of $100,000, on top of compensatory damages for the value of cargo which the Arbitrator found to have been converted by the shipowner for use as bunkers. *Octonia Trading Ltd. v. Stinnes Interoil GMBH*, SMA Award No. 2424, 1988 AMC 832. (Arb. at N.Y. 1987) The arbitrator based his authority to award punitive damages on certain federal cases, although the New York Court of Appeals had held that it was against public policy in New York for arbitrators to award punitive damages. *Garrity v. Lyle Stuart Inc.*, 40 N.Y.2d 354 (1976).

The two Florida cases, one of which is the first U.S. Court of Appeals decision to fully discuss the subject, have held that arbitrators do, indeed, have power to award punitive damages. Both of these recent cases involved arbitrations between stockbrokers and their customers. The arbitrations were conducted pursuant to the United States Arbitration Act, Title 9, U.S. Code, Sections 1–14. Both cases involved the mishandling of a customer's brokerage account by employees of the defendant investment firms. Both cases also involved the testimony of the same alleged "expert" who claimed to be a college graduate and money manager with an honorary doctorate degree, whereas, in fact, he had never been a licensed securities broker and was not qualified to be an expert. The arbitration panels in both cases had awarded punitive damages.

In *Peabody*, the District Court case, the court held that the perjury was not important enough to have caused the award to be procured by fraud. It also held that punitive damages were within the power of the arbitrators because the authority given them in the arbitration clause "authorized the panel to fashion any appropriate remedy". This was broad enough to include the power to award punitive damages, if the arbitrators, believed such damages were an appropriate remedy. Therefore, the court said, it was not manifest disregard of the law to award such damages.

In the *Bonar* case, the Court of Appeals held that the "expert's" perjury required vacation of the punitive damages portion of the award. The case was remanded to the arbitrators for a new award. In remanding, the court passed upon the Arbitrators' power to award punitive damages in order to guide the arbitrators in their further decision. The contract provided that disputes should be arbitrated under the rules of the American Arbitration Association, if so chosen. It also provided that the agreement should be "governed by the laws of the State of New York". The court therefore had to determine whether the *Garrity* case of the New York Court of Appeals prohibited the arbitrators from awarding punitive damages. The court held otherwise. They said that *Garrity* dealt only with the powers of arbitrators under state law and state public policy. Since *Bonar* arose under the United

States Arbitration Act, the power of the arbitrators was governed by federal law. Federal law looked to the breadth of the arbitration agreement, which in this case, under the rules of the American Arbitration Association, allowed the arbitrators to grant "any remedy or relief which he deems just and equitable and within the scope of the agreement of the parties". This meant they could award punitive damages.

One judge wrote a separate concurring opinion agreeing with the decision, but disagreeing with the majority's interpretation of the AAA rules. He said that "within the scope of the agreement" meant that the AAA rules limited their arbitrators to a determination of contract disputes only, not punitive damages.

Since the wording of the arbitration clause has been emphasized by both courts as controlling, it is clear that the last word has not yet been written on this subject.

ATTACHMENT AND ARBITRATION

In *Continental Chartering and Brokerage, Inc. v. T.J. Stevenson & Co., Inc.*, 678 F.Supp. 58, 1988 AMC 617 (S.D.N.Y. 1987), Continental sought an attachment under a 1985 amendment to the New York arbitration statute, set out in CPLR § 7502(c), which permits attachment in aid of arbitration where an award "may be rendered ineffectual without such provisional relief." Continental argued, *inter alia*, that it was entitled to an attachment under CPLR § 7502(c) simply by showing the defendant was in precarious financial condition without the further obligation of complying with the New York attachment rules, set out in CPLR § 6201 *et seq.* The court rejected this argument and held that a party seeking to attach under CPLR § 7502(c) must also show a basis for an attachment under CPLR § 6201. [The case of *Saferstein v. Wendy*, 137 Misc.2d 1032, 523 N.Y.S.2d 725 (Sup.Ct., N.Y. County, Dec. 21, 1987) has a parallel holding that all the usual requirements for injunctive relief must also be satisfied in order to obtain injunction in aid of arbitration under CPLR § 7502(c)].

Maritime attachment had not been sought by Continental and it was conceded during the hearings that a maritime attachment was not available since the defendant was found within the district. No argument was raised that maritime attachment was precluded because the arbitration had commenced. While the decision speaks of the unavailability of maritime attachment, it is submitted that it does so only because, under the facts of the case, plaintiff could not invoke maritime attachment. It is further submitted that since the discussion of maritime attachment in the case is

obiter dictum, the case should not stand for the proposition that maritime attachment is unavailable in aid of arbitration once the arbitration has been commenced, as has been suggested (*see* headnote 1988 AMC 617).

CONSOLIDATION OF ARBITRATIONS

In *Jamaica Commodity Trading Company Limited v. Connell Rice & Sugar Co., Inc.*, 1988 AMC 1011 (S.D.N.Y. 1988), the petitioner, Jamaica Commodity Trading Co., Ltd. ("JCTC") sought to consolidate a dispute it had under a charter party with a vessel owner, L&L Marine Service, Inc. ("Vessel Owner"), with a dispute JCTC had with its seller, Connell Rice & Sugar Co., Inc. ("Supplier") under a contract of sale. The charter party called for arbitration under the Rules of the Society of Maritime Arbitrators, Inc. whereas the contract of sale called for arbitration under the Rules of the American Arbitration Association (although each party was to nominate its own arbitrator under the contract of sale). The court, while recognizing the developing split of authority on the subject of consolidating arbitrations, stated that it had "the discretion to compel consolidation." It nevertheless refused to consolidate the dispute because "the arbitration clauses contained within each contract are not identical" and "the legal issues involved in the disputes are disparate enough to warrant separate arbitration panels." However, because "the underlying facts giving rise to the dispute are identical for all the parties involved," the court ordered that joint evidentiary hearings go forward on the common questions of fact.

ARBITRATION CLAUSE IN BILL OF LADING ISSUED UNDER TIME CHARTER BINDS BOTH SHIPOWNER AND VESSEL IN REM

In *The Maize Board of the Republic of South Africa v. M/V COURAGEOUS I*, 1988 U.S. Dist. LEXIS 5099 (S.D.N.Y. June 1, 1988), decided by Judge Sprizzo of the Southern District of New York, the consignee had brought suit against vessel and her owner for cargo damage. Owner had time chartered the vessel under NYPE form containing a N.Y. arbitration clause. Time charterer had the right to issue bills of lading. A second back-to-back sub-time charterer made a voyage charter on Baltimore Form C Berth Grain charter-party. The Master signed authorization for the agent to issue a bill of lading "for the Master" which incorporated terms of the voyage charter. The printed bill of lading form also incorporated the "Centrocon" Arbitration Clause requiring London arbitration. Shipowner,

for itself and vessel, sought a stay of suit under the bill of lading pending arbitration in London. The court held the Master's authorization to sign bills of lading was given as agent for owner, not as agent for time charterer. It held the authorization was binding on owner, choosing to follow *Sea Pacific Employers Ins. Co. v. M/V Gloria*, 767 F.2d 229 (5th Cir. 1985) over *Yeramex Int'l v. S.S. Tendo*, 595 F.2d 943, 1979 AMC 1282 (4th Cir. 1979). Owner was thus bound to arbitrate with bill of lading holder, and *vice versa*. The court said, however, it "found no authority supporting the proposition that a vessel can force a plaintiff to arbitrate an *in rem* dispute against the vessel". Nevertheless, the suit against the vessel was stayed pending resolution of the arbitration. The court cited *Bunge v. M/T Stolt Hippo*, 1980 AMC 2611, (S.D.N.Y. 1979) where a similar stay had been granted. (The COGSA point as raised in the *WESERMUNDE, supra*, was not discussed because this case was argued prior to the *WESERMUNDE* decision.)

APPEALS RESPECTING ARBITRATION: DEMISE OF THE ENELOW-ETTELSON DOCTRINE

The United States Supreme Court, in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, ___U.S.___, 108 S.Ct. 1133 (1988), has simplified federal practice by overruling the so-called *Enelow-Ettelson* doctrine under which certain orders, staying or refusing to stay judicial proceedings, were treated as injunctions and thus appealable under 28 U.S.C. § 1292(a)(1). Under that doctrine, developed in *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935) and *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942), an interlocutory appeal was permitted from an order granting or denying a stay of an action pending the outcome of arbitration if, prior to the adoption of the Federal Rules of Civil Procedure, the claims in that action would have been regarded as being predominantly "at law". No interlocutory appeal was permitted if the claims would have been regarded as "in equity" or in admiralty. *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454, 1935 AMC 423 (1935).

In overruling the *Enelow-Ettelson* doctrine the Court stressed that it was "unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals". The Court noted that its holding would not prevent interlocutory review of district court orders "when such review is truly needed" and stated:

> "Section 1292(a)(1) will, of course, continue to provide appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have

'serious, perhaps irreparable, consequence'. [citations omitted] As for orders that were appealable under § 1292(a)(1) solely by virtue of the *Enelow–Ettelson* doctrine, they may, in appropriate circumstances, be reviewed under the collateral–order doctrine of § 1291 [citations omitted], and the permissive appeal provision of § 1292(b), as well as by application for writ of mandamus." 108 S. Ct. at 1142–1143.

While the *Gulfstream* decision did not involve arbitration, it has the effect of eliminating the usual theory for appeal of orders granting or denying a motion to stay an action pending arbitration under Section 3 of the U.S. Arbitration Act.

MLA SUPPORTS RIGHT TO APPEAL

To remedy the situation that exists in connection with appeals from orders to stay suits pending arbitration, and to compel arbitration, the MLA has joined with the American Bar Association, Section of International Law and Practice, in support of an amendment to the United States Arbitration Act which will permit appeals from interlocutory court orders denying a party's right to arbitration, but will not allow appeals from orders which enforce a party's right to arbitration.

ARBITRATION IN THE P.R.C. AND IN HONG KONG

In April 1988 nine members of the Association, including three members of this Committee, traveled to The People's Republic of China ("PRC") with representatives of the New York maritime arbitration community to promote arbitration as a means of resolving international commercial disputes. The delegation conducted seminars at Shanghai, Beijing and Guangzhou, presenting papers on various topics of United States arbitration practice and procedure as well as a mock arbitration, complete with arguments of counsel and deliberations of the arbitrators. Audiences for these seminars were drawn from the PRC host organizations which included the Shanghai Maritime Institute, the Maritime Arbitration Commission of the China Council for the Promotion of International Trade, the People's Insurance Company of China, China Ocean Shipping Company, China P&I and the Guangzhou Navigation Institute. The delegation also visited organizations involved in arbitration in the PRC such as the Ministry of Foreign Economic Relations and Trade, the Beijing Bar Association and the China International Trust and Investment Corp.

After departure from the PRC the delegation visited Hong Kong where it presented seminars to audiences drawn from the maritime bar and shipping community. Host organizations were the Chartered Institute of Arbitrators (Hong Kong Branch), the Hong Kong Shipowners Association, the Hong Kong Institute of Shipping and the Hong Kong Institute of Sea Transport. The delegation also visited the facilities of the newly established Hong Kong International Arbitration Center.

It was the perception of the delegates that there is very strong interest both in the PRC and in Hong Kong in making arbitration the preferred means of resolving commercial disputes. As the PRC's international commerce develops, it seems likely that PRC commercial entities will be involved increasingly in arbitration in the United States and other countries and that United States companies will have occasion to be involved in arbitration in Beijing. Accordingly further contacts with the PRC and exchanges of information concerning our respective arbitration systems would be mutually advantageous.

Editors: David A. Nourse
R. Glenn Bauer

COMMITTEE ON CARRIAGE OF GOODS

CARGO NEWSLETTER NO. 17

SOGGY "DRIED" GINGER SUCCEEDS

Plaintiff's claim of moisture damage to a house-to-house cargo of dried ginger was tried before a Magistrate. The goods were shipped in an unventilated open-top container covered with a sound plastic tarpaulin. Both the carrier's surveyor and the cargo surveyor were of the opinion that moisture in the cargo went through an evaporation/condensation cycle provoked by changes in ambient heat during the ocean voyage.

The court held the carrier liable for the damage, noting that, despite plaintiff's failure to introduce direct evidence of the condition of the ginger or shipment, the nature of the damage was consistent with good order on shipment.

Defendant's inherent vice defense was rejected and inadequate ventilation found to be the proximate cause of the loss. The court also applied the rule that the carrier is, as a matter of law, presumed to know the special characteristics of a cargo it accepts for carriage, and to take appropriate steps to preserve the goods. *Accurate Ingredients, Inc. v. M/V MING SUN*, 85 Civ. 1941 (RWS); S.D.N.Y., Feb. 4, 1988.

COURT PREFERS LIVE WITNESSES

Plaintiff brought suit in New York for damage to bond paper carried from Santos, Brazil to Savannah, Georgia. Defendants impleaded the stevedore and terminal operator, who, in turn, impleaded the Georgia Ports Authority.

The stevedore and Port Authority moved to transfer venue of the entire action to Savannah. The Court stated:

> "In this case, the critical activities occurred in locations other than New York. The cargo was loaded in Brazil and carried to Savannah and then to Atlanta. The vessel involved, the S/S Lady Marina, did not even call at a New York port during its voyage. The bulk of the relevant documents, sources, of proof and witnesses are located in Savannah, well beyond the subpoena power of this Court. The employees of Strachan and the Georgia Ports Authority who had contact with the cargo and have knowledge of the relevant events are in Georgia, not the Southern District of New York. The presence of live witnesses is clearly preferable to the use of deposition testimony and

can occur far more readily in a Georgia forum. The Court takes into account the fact that plaintiffs have New York offices, and does not lightly transfer this action. However, this case clearly involves events that took place in and around Georgia, and that is where this dispute should be litigated."

Mead Corporation, et ano v. S/S LADY MARINA, et al, 86 Civ. 3209 (JFK); S.D.N.Y., Apr. 22, 1988.

STEVEDORE VOUCHED IN LONDON ARBITRATION

(Cargo Newsletter No. 16 revisited)

The Second Circuit reversed the district court's denial of summary judgment and remanded with instruction for the modification of judgment to include sums which had been disallowed.

The opinion extensively reviews the common law practice of voucher. Satisfied that London arbitration afforded adequate procedural safeguards and that the interests of the vouchee/indemnitor had been adequately represented, the Court further noted that there was no "particularized showing of prejudice" in binding the stevedore to the result of an arbitration conducted in accordance with their terms of a charter to which it was not a party.

As to damages, the Court ruled that the trial judge erred in denying charterer recovery for its attorneys' fees expended in defense of the London arbitration, owner's attorney's fees as awarded in the arbitration, arbitration "costs" and full interest on the principal amounts as awarded and paid by plaintiff.

(Ed. Note: For a more complete review of this decision *see* the Committee on Arbitration News Letter No. 1.)

SCAC Transport (USA) Inc. v. S.S. DANAOS, 845 F.2d 1157 (2d Cir. 1988)

COGSA "RULED" OUT

Plaintiff sued for damage to a shipment of steel and the carrier interposed a defense of $500.00 per package based upon a clause of the bill of lading as authorized by COGSA.

The Court noted,

"* * * although COGSA governs the bill of lading here at issue, that statute explicitly permits shippers and carriers to raise the shipper's

(sic) liability by contract above $500 per package. 46 U.S.C. Section 1304 (5). Like all bills of lading, the one at issue here is a contract, and one whose terms are determined by the carrier."

"Here, where the clause refers to the Hague Rules and takes as its point of reference law applicable in the jurisdiction where the bill of lading was issued, there is every reason to read "rules, thereto annexed" as including the Visby Amendments, which have been adopted in Belgium."

In finding liability based upon the Visby Amendments to the Hague Rules, the Court stated:

"* * * it is a contract with which we are dealing, and one whose liability limitations COGSA permits the parties to set at any level above $500 per package. 46 U.S.C. Section 1304 (5). This they may do by incorporating any document or standard they choose, whether or not it comes from a source ratified by the United States, or is of their own or someone else's creation."

Daval Steel Products v. M/V ACADIA FOREST, et al, 86 Civ. 8296 (MBM); S.D.N.Y., Apr. 13, 1988.

BULLDOZER PLOWS HIMALAYA

Caterpillar shipped an unboxed bulldozer from Peoria to Portsmouth, Virginia for carriage on a Farrell Lines ship. Bills of lading were prepared by the freight forwarder, but never issued.

Farrell cancelled the vessel's call at Portsmouth and arranged to truck the bulldozer to Norfolk. On route between terminals the tractor fell off the truck.

Farrell was held to be entitled to the applicable COGSA package limitation. The trucker claimed to be an independent contractor and entitled to limitation under the Himalaya clause. The Court held that "all independent contractors" was ambiguous and did not indicate *whose* agents or independent contractors were meant by the term.

Caterpillar Overseas v. Farrell Lines, Inc., et al, 87 Civ. 327N, U.S.D.C., E.D. Va., April 28, 1988.

JUDGE SWALLOWS SURVEYORS' DISCOUNT: DISCOUNTS BUSINESSMEN

The M/V SWALLOW lifted consignments of steel plate and steel pipe from Rumania to four discharge ports in the United States. Evidence was introduced that the shipments had been exposed to ice and snow prior to loading and loading exceptions noted the shipments to be "partly rusty."

At the same time, the Court noted evidence of salt water contamination and advanced corrosion noted by surveyors who inspected the cargo at the discharge ports.

The Court found there was a clear disparity in the pre-shipment condition of the cargo and the condition of some of the cargo on outturn. The Court found the evidence attributed the disparate condition to exposure to salt water. At the same time, the Court referred to confusing evidence as to when this exposure occurred and why it occurred on only parts of the cargo in question. Referring to the applicable burdens of proof, the Court found that even if it were to conclude that the shipper had presented a *prima facie* case as to all damage, the defendants sustained their burden of proving a discreet and unidentifiable portion of the cargo as not being actually damaged. As to the damaged portion of the cargo, the Court noted no explanation as to how sea water found its way on the cargo and found the defendants liable for a portion of the cargo exposed to "sea water."

As to the quantum of damage, the Court referred to testimony tending to establish a soft steel market which prevented it from concluding that the plaintiff's invoices reflected fair market value. At the same time, as the Court found liability for damages "sustained by discrete portions of the cargo" the Court was of the opinion that the plaintiff was entitled to some compensation.

Referring to a negotiated discount and using the negotiated discounts approved by responsible marine surveyors as a basis, Judge Schwartz applied a "lodestar"[1] factor of 10% of the discounts as an extra measure of recovery.

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1. ED. NOTE: A review of dictionaries by the Editors reveals:

"lodestar"—a star that leads or guides, esp. North Star; something that serves as a guiding star. *Webster's New Collegiate Dictionary, G. & C. Merriam Company*, 1974

"lodestar"—a star that shows the way. Polaris. Something that serves as a guide or on which the attention is fixed. *The Random House Dictionary of the English Language, Random House*, 1971

HOWEVER . . .

In a similar case, Judge Schwartz again considered a claim of rusting from exposure to sea water to a consignment of coils of wire rods shipped from Sweden to New Orleans.

The Court referred to evidence introduced that the vessel encountered severe winds and seas (force 10/12) on three days and noted structural damage having occurred to the vessel during its ocean voyage despite an altered course and reduced speed.

The Court found the plaintiff had not established that any handling damage was for the carrier's account and referred to a "discount" as being allocated on a percentage basis for sea water wetting.

Noting the only damage for which the carrier would be responsible was that caused by sea water wetting, the Court nevertheless found the defendants established rust damage due to sea water wetting was due to a peril of the sea.

As to the measure of damages, the Court referred to its decision in the SWALLOW stating the measure of damages should be ideally assessed "based upon the fair market value of sound cargo less the market value of the cargo in its damaged state."

The Court went on to state:

> "The proof in this case barely approaches that sufficient to warrant a departure from this rule, as is appropriate in cases where customary discounts are approved by marine surveyors based upon a representative examination of the cargo are accepted as a fair measure of cargo loss. The deposition testimony suggests a settlement between businessmen based on their working relationship. The Court is unable to discern how large a factor business considerations, rather than the cargo's condition played in the particular discount negotiated."

While the Court found the evidence disclosed questions as to proof and the cause and extent of damages, it noted that if any one of such issues existed in isolation in a particular case presenting otherwise strong bases for recovery, it might be inclined to resolve a close issue in favor of the plaintiff, in considering the evidence as a whole, the Court was convinced the plaintiff did not establish entitlement to recovery and that an award of damages would be inequitable. Compare *Trade Arbed, Inc. v. M/V SWALLOW, ETC., et al*, 86 Civ. 1637 (CS); U.S.D.C., E.D. LA, June 17, 1988 with *Intersteel East, Inc. v. M/V FEDERAL HURON, ETC., et al*, 86 Civ. 162 (CS); U.S.D.C., E.D. LA, June 30, 1988.

CARRIER BLOWS BURDEN ON BURNED BOARDS

Upon receipt of plaintiff's cargo of lumber the carrier issued clean bills of lading attesting to its apparent good order. Plaintiff had purchased the cargo under a normal letter of credit arrangement which required clean bills. At discharge, the president of plaintiff attended to monitor operations and found many bundles "dripping wet, noticeably water stained and damaged."

The cargo was segregated by plaintiff. The undamaged lumber was kiln dried to prevent deterioration using the damaged material to firm plaintiff's kiln.

The Court held that plaintiff had presented a *prima facie* case and that the carrier failed to allege and prove an exculpating cause of the loss or failure to mitigate damages.

The Court stated:

> "The burden of proving a cargo owner's failure to mitigate losses rests with the carrier who occasions the damage. *Emmco Insurance Co. v. Wallenius Caribbean Line, S.A.*, 492 F.2d 508, 514 (5th Cir. 1974).
>
> [Carrier] has not offered any evidence purporting to show that Overseas Hardwoods failed to mitigate its losses, or that greater savings would have been realized had plaintiff pursued alternative courses of action in dealing with the cargo claim. The Court finds that the plaintiff's efforts to mitigate its losses were reasonable and economically sound under the circumstances."

Plaintiff's award included its purchase price, ocean freight and extra expenses, less the reasonable value of the damaged cargo as fuel.

Overseas Hardwoods Co. v. M/V Luna (r) Venture, 85 Civ. 5707 (FM); U.S.D.C., E.D. LA, June 9, 1988.

CARRIER DANCES TO CHICARGO TWO STEP:

The Court considered a claim for damage to resistors packed in a container. The bill of lading described the shipment as "TOTAL NO. OF Packages" as "ONE (1) CONTAINER ONLY." The bill of lading also contained a description of packages as "nine cases and 42 cartons." The Court referred to the "two levels of packaging" and followed the decision in *BINLADEN BSP Landscaping v. M.V. Nedlloyd Rotterdam*, 759 F.2d 1006, 1013 (2d Cir. 1985), stating:

> "* * * this court holds that 'package,' as it is used in § 1304(5), refers to the individual cartons and cases contained in a large container, and not the large container itself, when the number of individual cartons

and cases is disclosed, at least in the absence of a clear and unambiguous agreement to treat the container as the package."

International Adjustors, Inc. v. Korean Wonis-Son, U.S.D.C. N.D. Illinois, E.D., March 21, 1988, 682 F.Supp. 383.

THE BURDEN OF BEING FAIR:

The Fifth Circuit once again dealt with the "fair opportunity" doctrine involving cargo owner's option to avoid the COGSA package limitation.

The District Court had found the carrier liable for salt water rust damage to a shipment of coils of steel, on the grounds that the carrier had failed to prove that the damage was due to one of the excepted causes under Section 1304(2) of COGSA. However, the District Court also held that the carrier's liability was limited to $500.00 per coil.

The District Court had held that because the plaintiff did not produce any evidence to show that a fair opportunity to avoid the limitation did not exist and because the bills of lading contained no declaration of value, the plaintiff could recover a maximum of $500.00 per coil.

The Circuit Court reversed on this issue. The Circuit Court stated that in the case before it, the carrier had "relied *solely* on the following provision in the bills of lading:" . . .

"ADDITIONAL CLAUSES

(To be added if required in the contemplated trade).

. . . .

B. U.S. Trade. Period of Responsibility.

In case the Contract evidenced by this Bill of Lading is subject to the U.S. Carriage of Goods by Sea Act, then the provisions stated in said Act shall govern before loading and after discharge and throughout the entire time the goods are in the Carrier's custody."

The Court also noted that:

"The District Court held that this clause incorporated COGSA into the bills of lading, provided the shipper with adequate notice of the terms of Section 1304(5), and therefore constituted sufficient evidence of fair opportunity to shift to [plaintiff] the burden of showing that no opportunity actually existed.

On appeal, [plaintiff] raises essentially one issue: whether the District Court erred in holding that a carrier presents *prima facie* evidence that it afforded the shipper a fair opportunity to avoid the $500.00 per package limitation by merely adducing a bill of lading that refers to COGSA.

The District Court held that because the consignee did not produce any evidence to show that a fair opportunity did not exist and because the bills of lading contained no declarations of value, the carrier could limit its liability to $500.00 per coil."

The Court of Appeals reversed, and stated,

"In our cases cited by the District Court, incorporation of COGSA was not determinative; we relied on evidence that the carrier gave the shipper a choice of rates and valuations. *See Peisander*, 648 F.2d at 424–25; *Stuttgart Express*, 711 F.2d at 622. In each case, the terms of the carrier's tariff clearly afforded the shipper an opportunity to declare an increased value and pay a higher freight charge. In this case, by contrast, Clause B contains no indication that a choice of shipping rates existed or that the shipper knew a particular rate was tied to a limited value. *Jugolinija points to no other evidence, such as a tariff, to show that it offered the shipper the option to declare a value*. Therefore, the District Court wrongly concluded that Jugolinija was entitled to limited liability because of unrebutted evidence of fair opportunity."

The Court held,

. . . "the carrier must present some evidence of fair opportunity before the shipper is required to come forward with its evidence that no opportunity existed."

[Ed. Note]: The steel in this case was loaded in Spain in 1983, prior to the enactment of the Visby Amendments by Spain. Clause 2 of the bills of lading provided in part:

"2. General Paramount Clause.

The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply."

The Court did not mention this clause at all, and apparently neither did the carrier.

See the statement of the U.S. Department of State to the Italian ambassador referring to COGSA:

"It was the intention of this Government that the Carriage of Goods by Sea Act should bring the American statute law as to ocean bills of

lading into accord with the Brussels convention and that it should not contain any provisions that would interfere with substantial compliance with the provisions of the convention on the part of the United States." Quoted in *Tetley*; Marine Cargo Claims (1965) at page 302.

See also Tetley at page 284:

"The United States of America incorporated the Hague Rules into American law by enacting the Carriage of Goods by Sea Act, 1936 (COGSA)."

COUTHINO, CARO AND CO., et al v. M/V SAVA and JUGOSLAVENSKA LINIJSKA, 87 Civ. 3295, U.S.C.A., 5th Circuit, June 28, 1988.

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COMMITTEE ON PRACTICE AND PROCEDURE

NEWSLETTER NO. 13

RULE E(4)(F); GARNISHEE'S STANDING

Con-Cept Container Corp. v. Container Express Lines, Inc., et al, (E.D. Va. Memorandum Opinion dated 8 April 1988, Civil Action No. 88-0214-R)—In a case of apparent first impression, the Court holds that a mere garnishee, who has no ownership interest in the attached property, is without standing to demand the prompt post-attachment hearing allowed by Rule E(4)(f). The garnishee in this case, a shipper, owed freights to the defendant charterer, but the charter party granted a lien on those freights to the vessel's owner. The plaintiff was a container owner who allegedly was owed money by the charterer.

The shipper/garnishee brought a motion to dissolve the attachment, pleading that the court lacked jurisdiction over the freights because of the owner's lien. The court, however, dismissed the motion because, according to Rule E(4)(f), only persons "claiming an interest" in attached property are entitled to apply for dissolution of the attachment. The garnishee's sole duty is to turn over the contested property to the court.

RULE C; PLEADING ON BEHALF OF A VESSEL WAIVES JURISDICTIONAL CHALLENGE

United States v. Republic Marine, Inc., et al, 829 F.2d 1399 (7th Cir. 1987). Even if no service of process was made upon a vessel per Rule C, a judgment *in rem* against a defendant vessel cannot be challenged if the vessel "generally" appears and fails to challenge jurisdiction in an affirmative defense. The complaint in the case specifically identified a certain barge as a defendant and prayed for judgment condemning and selling the vessel. The owner/operator of the vessel was also named as a party defendant. The answer of the operating entity made no mention that its appearance was a "special" one as regards the vessel. The court found that the vessel had, in fact, been represented in the case based upon the text of the operator's answer because certain specific denials and admissions relative to the barge's conduct were made. Without an "explicit disavowal" of representation of the barge, the vessel was deemed to have been represented.

In addition, the operator had, in the preface to its answer to the third party complaint, styled itself as "claimant to barge CCT-124, *in rem*".

The court held that once a party has asked a court to make determinations regarding its claim to property, the property has itself effectively appeared in the case.

RULE E; MARITIME ATTACHMENT NOT AVAILABLE TO ARBITRATING PARTIES

Continental Chartering & Brokerage, Inc. v. T.J. Stevenson & Company, Inc., 678 F.Supp. 58, 1988 AMC 617 (S.D.N.Y. 1987). In a charter-party dispute which is being arbitrated pursuant to state procedure, the creditor party is not entitled to the attachment process described in the Admiralty Rules; a state procedure of pre-award attachment, if any, is its sole remedy. Where the underlying dispute is not being tried before or determined by the court but is being handled by a private arbitration system, maritime attachment process will not issue. It is felt that for the "extraordinary" remedy of prejudgment attachment to be used, the issuing court must have control over the proceedings and the timing thereof if abuse is to be prevented. Plaintiff is restricted to his state law remedy for attachment in aid of arbitration.

JOINDER; JONES ACT CLAIM PLUS INTENTIONAL TORT CLAIM AGAINST FELLOW CREWMAN

Pearson v. Rowan Companies, Inc., 674 F.Supp. 558 (E.D. La. 1987). Although the Jones Act forbids suit against a fellow crewman for injuries due to negligence, no such prohibition against suits involving intentional torts is found, and such claim can be joined with a Jones Act/unseaworthiness claim then pending against the employer. Claims under the Jones Act are typically joined, via the admiralty court's equitable powers, with claims for maintenance and cure or under the general maritime law. Because the plaintiff alleged an intentional infliction of harm, and because cases brought by seamen fall into a special class, the court allows the claim to be brought against the fellow crewman.

MARITIME CONTRACT; INSURER'S BAD FAITH REFUSAL CLAIMS

Pace v. Insurance Company of North America, 838 F.2d 572 (1st Cir. 1988)—Even though a policy of hull insurance is concerned strictly with a maritime risk and has been held to be a maritime contract, there is no reason in admiralty law to deny a policyholder a claim based in state law

against the insurer alleging a bad faith refusal to pay. The Supreme Court's decision in *Wilburn Boat Company v. Firemen's Fund Insurance Company*, 348 U.S. 310, 1955 AMC 467 (1955), held that a marine insurance policy was a maritime contract and properly the subject of a federal court's admiralty jurisdiction. However, the Supreme Court also said in that decision that "it does not follow . . . that every term in every maritime contract can only be controlled by some federally-defined admiralty rule" and that state regulatory power is "particularly broad in relation to insurance companies and the contracts they make." 348 U.S. at 313, 314, 316-21.

The defendant insurer failed to point out any reason requiring admiralty law to create its own rule with respect to bad faith claims instead of relying upon the state rule. The court also points to cases in the 11th and 9th Circuits which allowed such claims without question. (*Kilpatrick Marine Piling v. Firemen's Fund Insurance Company*, 795 F.2d 940 (11th Cir. 1986); *Bohemia, Inc. v. Home Insurance Company*, 725 F.2d 506 (9th Cir. 1984)). The court also alluded to those cases which allow "direct actions" against marine insurance companies to be brought even though state, not federal, law provided such remedy. (Citing *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485, 1986 AMC 1641 (11th Cir. 1986)).

ADMIRALTY COURT'S INJUNCTIVE POWER

China Trade & Development Corporation v. M/V CHOONG YONG, et al, 837 F.2d 33, 1988 AMC 880 (2d Cir. 1987). Traditionally, an admiralty court is without authority to issue injunctions; whether or not this power actually exists, it was not appropriately exercised vis-a-vis the declaratory judgment proceedings instituted in a Korean court subsequent to the filing of this admiralty claim in the United States. The Second Circuit notes that the traditional admiralty rule against issuance of injunctions has been re-examined by several courts, but it refuses to re-examine the rule in this case, finding other grounds upon which to dissolve the District Court injunction.

Claim had been filed in the Southern District of New York alleging damages in excess of $7.5 million to a cargo of soybeans in the grounding and flooding of defendant's vessel. After two years of extensive discovery on the claim, the defendant filed a parallel case in a Korean court. Upon the motion of the cargo owner, the District Court entered an injunction against the foreign litigation.

The Second Circuit, following the rules that injunctions against foreign court litigation should be granted "only with care and great restraint" and that parallel proceedings are ordinarily tolerable, determines that an

injunction should issue only if (1) a foreign action threatens the jurisdiction of the enjoining forum, and (2) strong public policies of the enjoined forum are threatened by the foreign action. (Citing *Laker Airways, Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 927, 937 (D.C. Cir. 1984)). In the present case, the Korean court had not threatened to oust the New York court of jurisdiction and no substantial differences in the law to be applied in each forum were evident. The restraint and caution required by international comity were therefore not overcome by any equitable factors, and the injunction was dissolved.

TIME TO APPEAL GOVERNED BY F.R.A.P. 4(a), NOT 28 U.S.C. 2107

In re White Cloud Charter Boat Co., Inc., 813 F.2d 1513, 1987 AMC 2216 (9th Cir. 1987). Under the Rules Enabling Act (28 U.S.C. § 2072) rules of procedure promulgated by the Supreme Court supplant preexisting statutes to the extent that they conflict. Federal Rule of Appellate Procedure 4(a) allows thirty days for the filing of a notice of appeal after the entry of the questioned judgment or order. However, 28 U.S.C. § 2109 allows only 15 days to press an interlocutory appeal (90 for appeals of final decisions). The time deadline set by the duly-promulgated rule takes precedence.

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Jeffrey S. Moller
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(206-543-0059, Ann Magee)

*6th Annual National Fishery Law Symposium**

October 7–8, 1988

Seminar on Maritime Torts
Louisiana State Univ. Law
Center
Baton Rouge, LA 70803

Louisiana State Univ. Law Center
Baton Rouge, LA 70803
(504-388-8701,
Prof. Frank L. Maraist)

*Biennial Seminar on Maritime Torts**

November 1 and 3, 1988

Maritime Law Association
Marriott Hotel
Marco Island, FL

Maritime Law Association
c/o Thompson, Hine and Flory
629 Euclid Ave.
Cleveland, OH 44114
(216-566-5579,
Richard C. Binzley)

*Seminars**

November 1, 1988

8:45 a.m.	*Speaker:*	Dr. Philip K. Anthony
	Topic:	Psychological Strategies for Jury Persuasion (VHS player and monitor carousel slide projector—80 slot tray)
9:25 a.m.	*Speaker:*	Donald C. Greenman, Esq.
	Topic:	Substantive Aspects of Section 905(b), LHWCA
9:50 a.m.	*Speaker:*	Raymond T. Letulle, Esq.
	Topic:	Compulsory Dispute Resolution

BREAK—10:15-10:30

10:30 a.m.	*Speaker:*	Judge Thomas E. Scott Southern District of Florida at Miami
	Topic:	Follow Up on Rule 11
10:55 a.m.	*Panel Discussion:*	Frederick W. Wentker, Jr., James P. Cooney, Warren B. Daly, Jr., Thomas O. Murphy, Esqs.
	Topic:	Recent Developments in Maritime Personal Injury Law

November 3, 1988

9:00 a.m.– 10:15 a.m.	*Panel Discussion:*	David R. Owen and Bruce E. Alexander, Esqs. and Capt. Frederick F. Burgess, Jr., USCG (Ret.)
	Topic:	"Old Wine In New Bottles": Modern Applications of the Ancient Law of Salvage

BREAK—10:15–10:30

10:30 a.m.	*Speaker:*	Chief Judge Paul H. Roney Eleventh Circuit
	Topic:	Recent Maritime Cases before the Eleventh Circuit
10:55	*Speaker:*	Chester D. Hooper, Esq.
	Topic:	Current Issues Involving Multimodalism and Containers
11:20	*Speaker:*	Robert E. Seward, Esq.
	Topic:	Coverage Issues—Toxic Tort Litigation

January 6, 1989

Pacific Rim Maritime Law Seminar Ilikai Hotel Honolulu, HA	Lane, Powell, Moss & Miller 3800 Rainier Bank Tower Seattle, WA 98101 (206-223-7000, W. L. Rivers Black)

Marine Insurance, P&I and Shipping Law Issues

January 6–9, 1989

Asia-Pacific Lawyers Association Ilikai Hotel Honolulu, HA	Lane, Powell, Moss & Miller 3800 Rainier Bank Tower Seattle, WA 98101 (206-223-7000, Jed Powell or Stephen C. Smith)

3rd Biennial General Assembly; Proceedings and Presentations by the Maritime Committee

* Approved by MLA for CLE credit.