DOCUMENT NO. 681
AUGUST 4, 1989

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

THE MLA REPORT

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EDITORIAL COMMENT

With this issue I retire as Editor of the MLA Report. My successor will be Elliott B. Nixon, Counsel to Burlingham, Underwood & Lord, and Editor of American Maritime Cases. The Association is indeed fortunate to have this maritime editor *par excellence* willing and able to take on the job. Great improvements in the publication are to be anticipated in the near future because, as they say in the Navy: "New ships, new eye splices".

In closing I should like to express my sincere thanks to all those MLA members who have enthusiastically contributed to the MLA Report since it first appeared in February 1983. I also deeply appreciate the many gracious comments about the publication that I have received from members.

David R. Owen

COMMITTEE ON STEVEDORING AND TERMINAL OPERATIONS

July 24, 1989

Memorandum From: W. Boyd Reeves, Chairman

To: All MLA Members

Re: Draft Convention on Liability of Operators of Transport Terminals in International Trade ("OTT Convention")

For some time our committee has been actively representing the MLA in the drafting of this important Convention. In May–June 1989 the United Nations Commission on International Trade Law (UNCITRAL) held a lengthy session on the subject at Vienna. Our committee, and the Association, were represented by David G. Davies of Cleveland, Vice Chairman. He and JoAnne Zawitoski of Baltimore have prepared the following report on this Draft Convention.

DRAFT TERMINAL OPERATORS' CONVENTION PASSES SECOND STEP, ADOPTS LANGUAGE DESIGNED TO ALLOW HIMALAYA CLAUSE

The Convention on Liability of Operators of Transport Terminals in International Trade ("OTT Convention") came a step closer to reality at a three-week plenary session of UNCITRAL (the United Nations Commission on International Trade Law) ending June 2 at Vienna. The Session approved a revised draft of the OTT Convention (UN Document A/CN.9/XXII/CRP.7) for submission to a diplomatic conference, which probably will take place in 1991. The diplomatic conference will undertake a final revision of the text. The MLA and industry representatives thus will have one further opportunity to influence the final product. Under the present draft, the convention then will become effective upon ratification by five states.

Whatever its immediate prospects for ratification in the United States, the OTT Convention will affect the rights of U.S. shippers and carriers in instances where goods are damaged within the jurisdiction of nations that have ratified the convention.

The OTT Convention complements rules governing international carriage, filling gaps in other conventions, existing or proposed, by covering the operations of those who provide terminal and "transport-related services" without themselves transporting goods. In many instances it follows the form and phraseology used in the Multimodal Operators Convention (reprinted 6 *Benedict on Admiralty*, Doc. No. 1-4), completed in 1980; see Driscoll & Larsen, "The Convention on Multimodal Transport of Goods," 57 Tul.L.Rev. 193 (1983).

The OTT Convention covers the operations not only of terminals themselves but also (Article 1) of those who provide services such as stevedoring, trimming, dunnaging, and the like, so long as the goods are moving in international carriage and either (Article 2) the provider's place of business or the place where it provided the services is within a "state party," that is, a nation that has ratified the Convention in its final form.

The provisions of the earlier working group draft (6 *Benedict on Admiralty*, Doc. 1-7) of the OTT Convention are quoted in full and discussed in Larsen, Sweeney and Falvey, "The Uniform Rules on Liability of Operators of Transport Terminals," 20 J.Mar.Comm. 21 (1989).

The new draft follows the same outline, but details differ in significant respects.

The Convention remains, however, a presumed fault/limited liability regime. If damage to goods occurs during the period between an operator's "taking them in charge" and his "hand[ing] them over" or "plac[ing] them at the disposal of the person entitled to take delivery of them," or if the operator has delayed in handing the goods over, the operator is liable for the resulting loss (Articles 3, 5). An operator may avoid liability only by proving that it and its subcontractors "took all measures that could reasonably be required to avoid the occurrence and its consequences."

A terminal operator's liability would be limited to a fixed number of Special Drawing Rights per kilogram (Article 6). The final draft will set the amounts. Bracketed amounts in the plenary session draft, which were not discussed at the plenary session and theoretically have no effect, are 2.75 SDR/kilogram (at present exchange rates, $1.57 per pound) for services "within a port" and 8.33 SDR/kilogram ($4.76 per pound) otherwise. The OTT Convention has no provision for an alternative per-package limitation.

Article 1 of the new draft excludes from the OTT Convention's coverage any operator (not only a carrier as in the earlier draft) who is "responsible for the goods under applicable rules of law governing carriage." Representatives of the MLA and the stevedoring and terminal industries had strongly advocated this change. The U.S. delegation regards its acceptance as a

major concession by the conference: an operator has the option to negotiate with his carrier-customers for "Himalaya Clauses" in bills of lading allowing him to handle goods under rules governing maritime carriage rather than under those of the OTT Convention. However, the operator himself cannot contract out of the obligations that the convention imposes (Article 13).

The new version of Article 4 refines the working group's provisions concerning the effect of documentation on the operator's period of responsibility, but still reflects the tension between those (including the United States) who seek minimization or elimination of legally significant paperwork in fast-moving commercial settings and those who would retain clear documentation in order to pinpoint damages at each step in the sequence of transportation. The plenary draft offers an operator a choice: signing a receipt presented by the customer that merely identifies the goods, or preparing its own document that states the condition and quantity of the goods "insofar as they can be ascertained by reasonable means of checking."

The effect of signing either form of document is left to local law. Presumably, if an operator prepares a document that describes the quantity or condition of the goods, the document at least will be evidence of the stated quantity or condition, although not as irrefutable as a bill of lading. How effective it will be should depend on the extent of the operator's opportunity to check the goods; a discharging stevedore's document, based on goods first seen in stow, should have less effect than that of a terminal operator who sees them piece by piece. Less certain is the effect of a simple receipt presented by the customer that happens to contain statements of quantity and condition, a situation that the OTT Convention does not address.

The limitation of liability provisions of Article 6 have two tiers. The criterion for application of the lower tier of limitation now is whether the operator has received the goods "immediately after carriage by sea or by inland waterway" or is to hand them over for such carriage. An operator who handles a container in Cleveland for shipment to Europe via Baltimore, for example, would be subject to the higher limit on liability (for talking purposes under the present draft, as noted earlier, 8.33 SDR/kilogram), while an operator in Baltimore would be subject to the lower limit (2.75 SDR/kilogram).

Article 5 of the OTT Convention makes the operator liable for acts of independent subcontractors. Article 8 allows limitation of liability to be broken when damage is caused by intentional acts for which the operator is responsible. The plenary session's draft removes intentional acts of *sub-*

contractors of the operator from those that can break limitation. The intentional act of a *servant* still would break limitation, even if outside the course or scope of the servant's employment. (This was a matter of controversy at the plenary session. The prevailing view was that, under most legal systems, the master is liable for selecting the "bad servant.")

An agent or subcontractor must prove that he acted within the scope of his employment by the principal in order to claim limitation of his own liability (Article 7). Rules identical to those providing for loss of the principal's right to limit apply to the agent or subcontractor, as well (Article 8).

Times for giving notice of damage (Article 11) have been extended in the new draft but remain complex because of the OTT Convention's broad coverage. Under the plenary session's draft, goods are presumed to have been handed over in the same apparent condition as received if the operator has not received notice of damage within three days (formerly one day) after turning the goods over to the next party in the sequence of transportation. The goods are presumed free of non-apparent damage in the absence of notice within 15 days after delivery to their "final recipient" or within 60 days after the operator has handed them over to the next party in sequence. The working session draft had provided for 7 and 45 days' notice, respectively.

The time limitation for bringing judicial or arbitral proceedings (Article 12) is two years from delivery of damaged goods or notice or presumption of loss of goods.

The plenary session's draft reflects partial success by the MLA in seeking changes in the working group draft. However, the MLA has not been successful in its general opposition to the presumed-fault regime. Other changes sought by MLA representatives but not adopted thus far include: provisions that would more explicitly rule out the liability of a stevedore or other short-term service provider based upon receipts reciting numbers or conditions that it cannot realistically verify; a package limitation that, like that in the Hague Rules, would be the lower of the alternative limitation amounts provided for; placing the burden on the claimant to prove acts outside the scope of an agent's or subcontractor's employment with his principal in order to deprive him of the right to limit liability rather than requiring the agent or subcontractor to prove acts within the scope of his employment in order to claim the right to limit, as the OTT Convention now provides; confining limitation-breaking acts to those within an agent's scope of employment; replacing the two-year time limitation for commencing suit or arbitration with a one-year period as in the Hague Rules; removal of provisions allowing frequent adjustment of limitation amounts

for inflation; and removal of restrictions on an operator's right to sell leased containers at auction in order to collect unpaid charges.

According to Paul B. Larsen, DOT representative on the U.S. delegation to the plenary session, industry response to the new draft has been favorable.

Comments on the plenary session's draft of the OTT Convention can be addressed to Mr. Larsen, Office of the General Counsel, U.S. Department of Transportation, Washington, DC 20590; to W. Boyd Reeves, Chairman of the Committee on Stevedoring and Marine Terminals, Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, 1300 Amsouth Center, P. O. Box 290, Mobile, AL 36601; or to JoAnne Zawitoski of that committee, Semmes, Bowen & Semmes, 250 W. Pratt Street, Baltimore, MD 21201.

COMMITTEE ON CONTINUING LEGAL EDUCATION

June 26, 1989

Memorandum from: Richard C. Binzley, Chairman

To: All MLA Members

Re: Tulane Admiralty Law Institute 1989

Past President Nicholas J. Healy, who attended the Institute, has favored our committee with a complete report on the program. It is published herewith.

TULANE ADMIRALTY LAW INSTITUTE 1989

The Twelfth Biennial Program of the Tulane Admiralty Law Institute was presented at New Orleans on the campus of Tulane University on March 15th, 16th and 17th, 1989, under the general chairmanship of John W. Sims of New Orleans. Robert B. Acomb, Jr. of New Orleans was Chairman of the Program Committee, whose other members were Manfred W. Leckszas of Baltimore and Braden Vandeventer of Norfolk.

Two topics of current interest were discussed in depth: "Terminal Operations" and "Multi-Modalism". The 375 participants included maritime lawyers, judges, law professors and persons engaged in various segments of the shipping industry, coming from England, Italy, Panama, the Federal Republic of Germany and the People's Republic of China, as well as from all parts of the United States and Canada.

In addition to the presentation of nine papers by individual speakers, for the first time since the Institute was founded in 1966 the Program included four "workshops":, "Multi-Purpose Terminal Operations—Coal and Bulk", chaired by Anthony P. Tripolino, President of Electro-Coal Transfer Corporation; "Grain Elevators—Mid-Stream Operations", chaired by Angus R. Cooper, II, Chairman and Chief Executive Officer of Cooper T. Smith Stevedoring Co.; "Oil and Chemical Terminals," chaired by Eli Ellis of New York, and "Multi-Modal Operations", chaired by Erik F. Johnsen, President of the International Shipbuilding Corporation and its subsidiary, Central Gulf Lines, Inc.

Also included in the Program were two panel discussions, in both of which the audience actively participated. The first was on "Insurance

Risks Involved in Terminal Operations", presented by a panel consisting of an underwriter, Allan B. Pooler, Senior Vice President of the Marine Office of America Corporation, a broker, George D. Benjamin, Vice President of Johnson & Higgins, and two maritime attorneys, Thomas D. Wilcox, Executive Director and General Counsel of the National Association of Stevedores, and John M. Woods of New York. Mr. Vandeventer acted as Moderator and the Co-Chairman was Richard G. Ashworth of New York.

The second panel discussion was on "Liabilities of Multi-Modal Operators and Parties Other than Carriers or Shippers". The panelists were Thomas R. Denniston, Vice President and General Counsel of Bradshaw & Associates, Ltd., North American Correspondents of the Through Transport Mutual Insurance Association, Ltd., Carter T. Gunn of Norfolk, and Alfred E. Yudes, Jr. of New York. Mr. Leckszas was the Moderator and the writer was Co-Chairman.

The individual papers included "Terminal Operations and Multi-Modal Carriage—Their History and Prognosis", by Richard W. Palmer of Philadelphia, President of the Maritime Law Association of the United States; "Legal Relationships: Terminal Owners, Operators and Users", by Chester D. Hooper of New York; "Regulations Affecting Terminal Operations", by JoAnne Zawitoski of Baltimore; "Apportionment of Risk in Vessel and Terminal Contracts", by Jonathan Rodriguez-Atkatz of Seattle; "Legal Principles Applicable to Personal Injury and Death of Terminal Workers", by Joseph D. Cheavens of Houston; "Labor Problems Created by Terminal Operations and Multi-Modalism", by Francis A. Scanlan of Philadelphia; "Statutory Regulation of Multi-Modalism: U.S. Shipping Act; Anti-Trust Law; Staggers Act; Carmack Amendment; COGSA and Harter Act", by Jack G. Knebel of San Francisco; "The European Experience with Multi-Modalism, with Emphasis on British, Dutch, Belgian, German and Japanese Operations", by Prof. Rolf Herber, Director of the Law of the Sea and Maritime Law Institute of the University of Hamburg, and "The Future of Multi-Modalism: Relay/Feedership Operations, Administrative Regulations, Network Liability Systems, Bills of Lading, Relationships With or Without Documents, Including Tariff, Revenue and Regulatory Requirements", by William J. Coffey, Associate General Counsel of Sea-Land Corporation. All of these papers will be published in a forthcoming single issue of the Tulane Law Review, in accordance with the practice that has been followed with respect to the papers presented at all of the previous Tulane Admiralty Institute programs.

In his historical review Mr. Palmer outlined the principal statutes, regulations, conventions and court decisions relating to terminal operators and

multi-modalism in the United States, starting with the Shipping Act of 1916[1] and continuing through the 1984 Amendments[2] to that Act.

Mr. Hooper's paper treated the legal relationships between owners and operators of terminals, on the one hand, and their users, on the other. He analyzed the duties of the operator when acting as the carrier's agent, as a carrier (e.g. in loading the goods on a railroad car or truck for the first segment of multi-modal transportation), as a warehouseman, and as a common law bailee.

Ms. Zawitoski discussed the effect on terminal operators' liability of the various existing and contemplated legal regimes, including the Hague Rules, the Visby Amendments, the Hamburg Rules, the Multimodal Convention, and the UNCITRAL Draft Convention on the Liability of the Operators of Transport Terminals.

In discussing apportionment of risk among the various parties, including shipowners, bareboat and time charterers, and terminal operators, who may be involved in carriage of goods, Mr. Rodriguez-Atkatz emphasized the need for careful draftmanship of the pertinent contracts. He pointed out, for example, the necessity of specifically identifying the categories of entities (e.g. stevedores) intended to be the beneficiaries of a "Himalaya" clause in a bill of lading.[3]

In his paper on claims for injury to and death of terminal workers, Mr. Cheavens compared the rights of longshoremen and other terminal workers and their dependents with the rights of seamen and theirs. He analyzed, in particular, the tests laid down in the various circuits for determination of the often difficult question of whether a particular worker in a "seaman", liability for whose injuries is governed by the Jones Act[4] and the general maritime law as interpreted by the United States courts, or a longshoreman or other harbor worker to whom the Federal Longshore and Harbor Workers' Compensation Act[5] applies.

Mr. Scanlan's paper was largely devoted to labor problems created by the container revolution. Particular attention was given to the recent decision of the United States Court of Appeals for the District of Columbia in *New York Shipping Association v. Federal Maritime Commission.*[6] In that case the court affirmed a decision of the Commission invalidating rules

[1]46 U.S. Code §§ 801-42.

[2]46 U.S. Code §§ 1701-20.

[3]See *Tashio Marine & Fire Ins. Co. v. The Gladiolus*, 762 F.2d 1364, 1987 AMC 2047, (9th Cir. 1985), citing *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 1959 AMC 879 (1959).

[4]46 U.S. Code § 688.

[5]33 U.S. Code §§ 901-50.

[6]854 F.2d 1338, 1988 AMC 2409 (D.C. Cir. 1988).

embodied in collective bargaining agreements which, among other things, required cargo coming from points within a 50–mile radius of the center of a port to be loaded into containers by members of the longshoremen's union, if the containers were owned, leased or used by the carrier.

A detailed exposition of the complex statutory regulation of multi–modal transport in the United States was presented by Mr. Knebel. Among other problems, the speaker covered rate regulation, anti–trust immunities under the 1984 Amendments to the Shipping Act of 1916, and multi–modal operators' liabilities under COGSA,[7] the Harter Act,[8] and the Carmack Amendment (concerning rail and road carriers).[9]

Professor Herber, in discussing the European and Japanese experience with multi–modalism, outlined the liability systems in force under the CMR and COTIF/CIM conventions. He then discussed the Multimodal Transport Convention of 1980, which he was certain would not enter into force unless the Hamburg Rules were first to receive sufficiently wide adherence. Professor Herber pointed out that The Netherlands was one of the few States which have adopted national legislation regulating the liability of multi–modal transport operators. Under the Dutch law the carrier has the burden of proving that damage to the goods did not occur during whatever segment of the carriage was governed by the liability rules which were the most favorable to the shipper.

In his discussion of the future prospects, Mr. Coffey treated, among the other topics, the European Community's impact on multi–modalism, with particular reference to "1992 and Beyond" the future prospects of the Multimodal Transport Convention and the UNCITRAL Draft Convention on the Liability of Operators of Transport Terminals, and multi–modal documentation, including electronic data transmission.

Consideration is already being given to the selection of suitable topics for examination at the next Tulane Admiralty Institute program, to be given in mid–March, 1991.

Nicholas J. Healy

[7] 46 U.S. Code §§ 1300–15.
[8] 46 U.S. Code § 190–96.
[9] 49 U.S. Code § 11707.

COMMITTEE ON INTERGOVERNMENTAL ORGANIZATIONS

July 28, 1989

Memorandum From: Guy E. C. Maitland, Chairman

To: All MLA Members

Re: Maritime Transportation Treaties in Progress

Submitted herewith is the second version of this report.

MARITIME TRANSPORTATION TREATIES IN PROGRESS

David J. Sharpe

The August 1988 issue of The MLA Report (Doc. No. 675) published the first version of "Maritime Transportation Treaties in Progress," an experiment in improving access to some international conventions whose names keep coming up in MLA discussions. For this second version, I have added a couple of entries and subtracted some others, expanded and corrected entries, and updated the content. While not all of the entries are or are intended to become treaties, I have stuck with "treaties" for want of a less misleading short title. I have had splended cooperation from experts who have seen parts of the report in draft form, but the finished text is my responsibility alone.

Sources for Published Texts

"Benedict": Benedict on Admiralty (M. Cohen, editor in chief; 7th ed. looseleaf), v. 6, 6A, 6B, and 6C. Multi-volume treatise.

"Int'l Legal Mat.": International Legal Materials (Am. Soc. for Int'l Law). Bimonthly periodical.

"Journal ML&C": Journal of Maritime Law and Commerce. Quarterly periodical.

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

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

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

Sources for Status Reports

Congress—Status of Legislation by Telephone: Legislative Information Office ("LEGIS"), (202) 225–1772, 9 a.m. to 6 p.m. eastern time, Monday through Friday.

Department of State Bulletin (U.S. Dep't of State): Contains a department called Recent Actions Regarding Treaties to Which the United States Is a Party. Monthly periodical.

International Legal Materials (American Society for International Law). Most issues contain a department called Recent Actions Regarding Treaties to Which the United States is Not a Party. Bi–monthly periodical.

Comité Maritime International Yearbook. Annual summary of CMI treaties and adherences.

Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary–General Performs Depositary or Other Functions (1987). IMO Doc. No. J/2735/Rev.2. Occasional summary of IMO treaties and adherences.

Unpublished and Unnumbered Treaties Index (I. Kavass & A. Sprudzs, eds.; 1st ed. 1987, 2d ed. 1988). Treaties and agreements entered into or signed by the United States from Jan. 1, 1950, through Dec. 31, 1987, which have not yet been (and some may never be) published by the Department of State in its treaty series (TIAS, UST). Most of the items are in force, but the United States has not necessarily acted on them. Treatise.

United Nations Documents, through U.N. Publications, Room DC2–853, New York, NY 10017. Where the U.N. is depositary for a treaty in force, the names of adhering nations can be obtained by telephoning the United Nations treaty section at (212) 963–3813.

Sources For Copies of Individual Documents

House Documents: Document Room, U.S. House of Representatives, Washington, DC 20515; telephone (202) 225–3456.

Senate Documents: Document Room, U.S. Senate, Washington, DC 20510; telephone (202) 224–7860.

Shipping Coordinating Committee (SHC): A joint committee of several United States agencies, particularly the Departments of Transportation and State, that conducts public hearings (noticed in the Federal Register) at

which treaties in progress and other documents are discussed. To get on the SHC mailing list and receive notices of public meetings and documents in advance, write to Coast Guard on the list of Contacts below.

Contacts

In addition to the chairpersons of MLA standing committees and subcommittees, who are identified in the MLA Directory, these people have consented to serve as Contacts:

Coast Guard: CAPT Jonathan Collom, USCG, Chief, Maritime & International Law Division, G–LMI, Commandant, U.S. Coast Guard, 2100 Second St., S.W., Washington, DC 20593; (202) 267–1527; facsimile (202) 267–4163.

Cohen: Michael Marks Cohen, Esq., Burlingham Underwood & Lord, One Battery Park Plaza, New York, New York 10004; (212) 422–7585. Mr. Cohen is Editor in Chief of selected volumes of Benedict on Admiralty.

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

House Merchant Marine: Gerald Seifert, Esq., General Counsel for Maritime Policy, Committee on Merchant Marine and Fisheries, U.S. House of Representatives, 1334 Longworth H.O.B., Washington, DC 20515; (202) 225–6785.

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.

Wiswall: Dr. Frank L. Wiswall, Jr., 10935 Lawyers Road, Reston, Virginia 22091–4908; (703) 620–9119. Dr. Wiswall is sometime chairman of the IMO Legal Committee.

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 International Convention for the Unification of Certain Rules Relating to Arrest of Sea–Going Ships (CMI, Brussels, May 10, 1952), 439

U.N.T.S. 193; 6A Benedict Doc. No. 8–1, entered into force Feb. 24, 1956. The United States did not sign and has not adhered to the Arrest Convention. Dissatisfaction with its operation led the CMI to take up the subject again in 1985.

The CMI draft has theoretically been before the IMO/UNCTAD Joint Intergovernmental Group of Experts ("JIGE") since 1986, but the attention of JIGE has been fully occupied by the Liens and Mortgages Convention. If time becomes available at its final meeting Sep. 25–29, 1989, JIGE may also consider some fairly limited consequential changes intended to conform and modernize the Arrest Convention, so both conventions will be harmonious; otherwise, a special meeting may be called, perhaps by UNCTAD, early in the 1990s, before both conventions go to a diplomatic conference.

United States law on arrest and maritime liens is so different from the laws of other nations that United States adherence to an international convention on either topic seems unlikely. See the United States answers to the 1984 CMI Questionnaire, MLA Doc. NO. 652 at 7910–7923.

Contacts: Coast Guard; MLA Committee on Marine Financing.

COLLISION DAMAGES

Draft Rules for the Assessment of Damages in Maritime Collisions (CMI, Lisbon, Feb. 29, 1988). 6 Benedict Doc. No. 3–4A; Marine Laws, Navigation and Safety § 1390 (3d ed., Supp. 1989).

The Damages Rules are a new idea. They are composed of Definitions, lettered Rules A–E, and numbered Rules I–V. They were circulated within the maritime industries for comment late in 1987. See 18 Journal ML&C 577 (Oct. 1987). The CMI subcommittee met in February 1988 and redrafted the Damages Rules in a format of rule–plus–comment that resembles the American Law Institute's Restatements of the Law. Another draft may be presented to the CMI Plenary Meeting in Paris in late June 1990. No decision has been reached on whether the Damages Rules will be proposed in the form of an international convention or a model domestic law.

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 (1987).

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

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.

The predecessor treaty, the International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision (CMI, Brussels, May 10, 1952) entered into force Sep. 14, 1955. 439 U.N.T.S. 217; 6 Benedict Doc. No. 3–1. The United States did not sign and has not adhered to the Collision Judgments Convention.

The 1977 draft convention would abrogate the incompatible portions of the 1952 convention. While the 1977 draft convention remains on the IMO Legal Committee's long–term work list, it is not scheduled for consideration in the 1988–1989 biennium.

Contact: MLA Committee on Comité Maritime International.

COLREG AMENDMENTS

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

The parent convention, COLREG 1972 (IMCO, London, Oct. 20, 1972), entered into force July 15, 1977; it appears in full at 28 U.S.T. 3459; T.I.A.S. No. 8587; U.N.T.S. No. 15824. The United States signed the convention, and the implementing proclamation issued on Nov. 23, 1976. Article VI of the convention provided for future amendments without going back through diplomatic conventions, 28 U.S.T. 3464, and the current printings of COLREG 1972, such as the one at 6 Benedict Doc. No. 3–4, print the COLREGS as amended without indicating the nature or time of amendment.

The amending technique 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 that culminates with a presidential proclamation. IMO received no objections to either set of Amendments:

Amendments of Nov. 19, 1981: Entered into force June 1, 1983. The United States proclaimed them to be in force June 16, 1983. The proclamation only is printed at 33 U.S.C. following § 1602; the text of the amendments, consisting of 56 numbered changes is printed at 48 Fed. Reg. 28634.

Amendments of Nov. 19, 1987: To enter into force Nov. 19, 1989. IMO A 15/Res.626. Nine changes; no published text. See MLA Doc. No. 676 at 9184.

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

ELECTRONIC TRANSFERS

Proposed Rules for Electronic Transfer of Rights to Goods in Transit. No published text.

Not only do goods today move more quickly across seas than documents move through the banks and the mails, but when cargoes are sold repeatedly in transit, the documents cannot physically be transferred quickly enough to meet ships at destination ports. Also, more shippers are seeking to integrate their computerized inventory systems with their purchasing and traffic departments, so that all transactions can be handled completely by computer on systems like EDIFACT.

The electronic transmission and negotiation of bills of lading as "electrodocs" has been under study by the CMI since 1981 in conjunction with sea waybills. CMI draft rules from 1987 are published at 6 Benedict Doc. No. 1–9. In 1989 CMI split the two issues, and the issue of electronic transmission of documents was assigned to a new subcommittee under Prof. Jan Ramberg of Sweden. At the first meeting of the Subcommittee in London on May 31, 1989, a drafting team was assigned to flesh out proposed rules for debate by the Subcommittee in November. The subcommittee wants to submit proposed rules to the CMI Plenary Conference in June 1990.

Contact: MLA Committee on Carriage of Goods, Subcommittee on Electronic Documentation (George F. Chandler, III, United States delegate to the CMI subcommittee).

FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA)

The "admiralty amendments" to the Foreign Sovereign Immunities Act, H.R. 1149, 100th Cong., 1st Sess., finally became law on November 9, 1988. P.L. No. 100–640, 102 Stat. 3333, 1988 U.S. Code Cong. & Admin. News No. 10, 1989 AMC 606. The act drew to a successful conclusion the efforts of the MLA Ad Hoc Committee to Revise the Foreign Sovereign Immunities Act. See MLA Doc. No. 679 at 9353.

The Foreign Sovereign Immunities Act of 1976 (FSIA) brought United States domestic law into conformity with the "restrictive view" of governmental immunity that had 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, Montr 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'l Legal Mat. 641 (May 1987), referred by the General Assembly to member states for comments. The FSIA contains many provisions on ships and shipping, and several provisions have been troublesome in application.

Amendment of 28 U.S.C. § 1605(b) will 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 will affect the foreclosure of preferred ship mortgages and maintain the distinction between in rem and in personam actions.

GENERAL AVERAGE

York–Antwerp Rules (CMI, Hamburg, April 5, 1974). 6 Benedict Doc. No. 4–6; Buglass, Marine Insurance and General Average in the United States (2d ed. 1981), appendix F; Tetley Marine Cargo Claims, appendix A(6).

The York–Antwerp Rules are not a treaty, but they are referred to frequently in international bills of lading and other international transportation agreements. In 1981 the CMI decided not to study general average. In 1989 the IMO diplomatic conference on the new Salvage Convention passed a resolution that calls for minor changes in the York–Antwerp Rules, so as to reflect the intent of art. 14 that salvage payments for preventing environmental damage are not general average charges. IMO LEG/CONF.7/26 (28 April 1989).

Contacts: Committee on Marine Insurance, General Average & Salvage, Subcommittee on General Average; Coast Guard; DOT.

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(4). See MLA Doc. No. 673 at 9000–9005, 9022–9024.

The Hamburg Rules have not entered into force. As of March 4, 1989, 15 of the required 20 adherences had been deposited, none from a major shipowning nation, and in 1988 UNCTAD was vigorously urging more nations to adhere. The United States signed but has not adhered to the Hamburg Rules, which radically reorganize the Hague Rules, with or

without the Visby Amendments, and make substantial changes in the basic liability rules.

While organizations of shippers support the Hamburg Rules, the MLA has voted to support the Visby Amendments (see "Visby Amendments"), and the American Bar Association House of Delegates endorsed the Visby Amendments with the SDR Protocol on Aug. 12, 1987. The Department of Transportation and the State Department have not settled on what advice to give Congress: whether to adopt Visby (amending COGSA), or Hamburg (replacing COGSA), or both. The customary method would be first to ask Congress to enact Visby, creating COGSA/Visby, and then, if a sufficient percentage of United States trading partners adopt Hamburg, to ask Congress to repeal COGSA/Visby and enact Hamburg. An untried method would be to ask Congress to enact Visby now, and to provide in the same act that the adoption of Hamburg by a stated percentage of United States trading partners would automatically "trigger" United States repeal of COGSA–Visby and implementation of Hamburg, without further legislation. See MLA Doc. No. 676 at 9175. In spite of many formal discussions, most recently Oct. 20, 1988, see MLA Doc. No. 679 at 9362, United States shippers and carriers have not agreed either on the convention or the method, and DOT may tire of waiting for consensus.

By the 1990s, three "uniform" bill of lading conventions may be in force: the Hague Rules alone, the Hague Rules with Visby Amendments, and the Hamburg Rules. This topic is on the agenda of the CMI June 1990 Paris Conference, which may produce model rules for interim harmonization, enabling CMI to maintaining its neutrality. MLA Doc. No. 679 at 9337.

Contacts: MLA Committee on Carriage of Goods by Sea; D.O.T.

HAZARDOUS & NOXIOUS SUBSTANCES

Ongoing work to develop a Convention on Liability and Compensation for Damage Caused by the Carriage of Hazardous and Noxious Substances by Sea (HNS) (IMO). No published text.

The IMO Legal Committee had completed a draft HNS Convention in 1982, but the May 1984 IMO Diplomatic Conference on Liability and Compensation for Damage in Connection with the Carriage of Certain Substances by Sea 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. See MLA Doc. No. 679 at 9391. The United Kingdom plans to place a draft text before the IMO Legal Committee in London on Sep. 28, 1989. The Kingdom of the Netherlands has produced a draft convention which will also be discussed; this draft provides primarily for liability on the part of the shipowner. Problems include definition of hazardous and noxious substances in bulk or packages, cleanup activities and environmental harms covered, allocation and levels of funding as between owners and shippers, collection mechanisms, interrelation with the Limitation of Liability Convention of 1976, and availability of insurance.

The latest Shipping Coordinating Committee public meeting on HNS took place June 13, 1989. Neal D. Hobson, who has attended many HNS discussions here and abroad, presented his own version of draft language. This draft was submitted as a personal submission only; it has not received the approval of either the Committee on Transportation of Hazardous Substances or the Maritime Law Association.

Contacts: MLA Committee on Transportation of Hazardous Substances; Coast Guard.

LEASING

Convention on International Financial Leasing (UNIDROIT, Ottawa, May 28, 1988). 27 Int'l Legal Mat. 922 (1988).

UNIDROIT began work on the Leasing Convention in 1974, and it is now open for signature through Dec. 31, 1990. Adherence by three states will cause it to enter into force. While the Leasing Convention was directed at aircraft, ships are included, art. 7(3)(a), although 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 Convention text evidences no appreciation of the distinction between leasing and ship chartering. CMI is studying the implications of the treaty, especially in light of the draft Liens and Mortgages convention.

Contacts: MLA Committee on Comité Maritime International; State.

LIENS & MORTGAGES

Draft Articles for a Convention on Maritime Liens and Mortgages (IMO/UNCTAD, London, LEG/MLM/21, March 1, 1989). No published text.

The initial instrument was 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. Both IMO and UNCTAD then took interest in the CMI draft, which was placed under consideration by the Joint Intergovernmental Group of Experts (JIGE) jointly established by IMO and UNCTAD. JIGE met first in December 1986; it will meet for the sixth and last time in London Sep. 25–29, 1989. The United States submission of June 20, 1989, is available from the Coast Guard. A draft convention is to be considered by a diplomatic conference, perhaps in 1991. Amendments to the Arrest Convention will eventually be proposed to make it compatible with the proposed Liens and Mortgages convention. See MLA Doc. No. 673 at 9032.

The unification of maritime lien and ship mortgage law has been and continues to be difficult to achieve. The International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (CMI, Brussels, Apr. 10, 1926), 6A Benedict Doc. No. 8–2; 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. See MLA Doc. No. 676 at 9182. Nations' present laws and policies vary widely and are held tenaciously, and so a new convention text that satisfies a diplomatic conference may not quickly accomplish the desired unification.

Contacts: MLA Committee on Marine Financing; Coast Guard.

LIMITATION OF LIABILITY

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

The United States has lived more or less uncomfortably with its limitation of shipowners' liability act, 46 U.S.C. §§ 183–189, since 1851. In the twentieth century the world shipping community has generated three conventions, but so far the United States has adhered to 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. 15, 1924), 120 L.N.T.S. 123; 6 Benedict Doc. No. 5–1, entered into force June 2, 1931. Fifteen nations adhered, but six later denounced the convention.

In 1957 a new effort appeared, the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships (CMI Brussels, Oct. 10, 1957), 6 Benedict Doc. No. 5-2. It entered into force May 31, 1968. While 47 nations adhered, 10 (including major ship-flagging nations) later denounced it. The 1979 protocol sought to substitute special drawing rights (SDRs) for gold francs. CMI, Brussels, Dec. 21, 1979, 6 Benedict Doc. No. 5-3. There was considerable dissatisfaction with the 1957 Convention.

In 1976 IMCO brought forth LLMC, which entered into force Dec. 1, 1986. Fifteen nations have adhered. The United States delegation did not sign LLMC 1976, primarily 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. See MLA Doc. No. 679 at 9372. Limitation fund amounts for personal injury and death in two House bills reflected substantial increases over LLMC 1976, but neither bill made progress. IMO is also considering increasing LLMC 1976 limits in the near future, either in conjunction with the ongoing work on an HNS Convention, or soon after it is finished. See MLA Doc. No. 673 at 9009, 9033, 9078. No legislation is currently pending in Congress.

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). 6C Benedict Doc. No. 14-36.

The Liner Code entered into force Oct. 6, 1983, but the United States did not sign and has not adhered to it, and party states have resisted subsequent United States participation. UNCTAD undertook the treaty-required five-year review of the Liner Code in Geneva Oct. 31—Nov. 18, 1988, but the meeting never got beyond procedural problems.

The basic concept of the Liner Code, bilateral cargo sharing between trading partners and outsiders on a 40:40:20 basis, is at odds with United States anti-trust 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 (1986), part II, 18 Journal ML&C 111 (1987); L. Juda, The UNCTAD Liner Code (1983), reviewed at 17 Journal ML&C 453 (1986).

Contact: MLA Committee on Economic Regulation of Ocean Common Carriers.

MULTIMODAL TRANSPORT

United Nations Convention on International Multimodal Transport of Goods (MT) (UNCTAD, May 24, 1980). 6 Benedict Doc. No. 1–4; Tetley Cargo Claims App. A(5).

The Multimodal Transport Convention has not entered into force. The United States did not sign and has not adhered to it. As of March 1989, 5 of the required 30 nations had adhered; evidently the Multimodal Transport Convention is not making rapid progress toward entry into force. See Nasseri, The Multimodal Convention, 19 Journal ML&C 231 (1988), which at 235 n. 19 summarizes the history of attempting to harmonize in a multimodal regime the different viewpoints of road carriage (embodied in the CMR Convention of 1956) and ocean carriage (attempted in the CMI "Tokyo Rules" of 1969, 6 Benedict Doc. No. 1–4A, based on the Hague Rules), and accepted and put into force commercially in the International Chamber of Commerce Rules for a Combined Transport Document. ICC Doc. No. 298. See also Driscoll & Larsen, The Convention on International Multimodal Transport of Goods, 57 Tulane L. Rev. 193 (1982). The MLA subcommittee is studying the subject. MLA Doc. No. 676 at 9147.

Contact: MLA Committee on Carriage of Goods by Sea, Subcommittee on Multimodal Transportation.

PASSENGERS AND LUGGAGE

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

The United States delegation did not sign PAL 1974, primarily 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, but as of March 1989, only 2 of the 10 nations needed to put the SDR Protocol in force had adhered.

Owing principally to an initiative by the United Kingdom in the aftermath of the *Herald of Free Enterprise* disaster March 6, 1987, the IMO Legal Committee in October 1988 initiated revisions that would raise the PAL liability limits and provide a new rapid amendment mechanism, with a Protocol to be ready for a diplomatic conference in the early 1990s. See MLA Doc. No. 676 at 9180.

Contact: Committee on Intergovernmental Organizations.

REGISTRATION

United Nations Convention on Conditions for Registration of Ships (UNCTAD, Geneva, Feb. 7, 1986). 6C Benedict Doc. No. 14–35; 26 Int'l Legal Mat. 1236 (1987).

The Registration Convention is awaiting entry into force by the adherence of at least 40 states, representing not less than 25% of the world's tonnage listed in Convention Annex III. The United States did not sign and has not adhered.

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 (1987); Sturmey, The United Nations Convention on Conditions for Registration of Ships, 1987 Lloyd's Quarterly 97.

Contact: MLA Committees on Economic Regulation of Ocean Common Carriers, Marine Financing.

SALVAGE

International Convention on Salvage, 1989 (IMO, London, April 28, 1989). IMO LEG/CONF.7/27. No published text.

The 1989 Salvage Convention is to be open for signature from July 1, 1989, to June 30, 1990, and it is to enter into force one year after 15 adherences.

The 1910 Salvage Convention, which the United States adhered to in 1913, 37 Stat. 1670; T.S. No. 576, was addressed to property salvage. For the 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 the annotated codes. While proposals to make awards for life salvage have never gone anywhere, the decline of salvage industry profitability, the emergence of liability salvage, and the importance of preventing environmental damage, stimulated the CMI to propose a new Salvage Convention in 1981. Draft Articles for a Convention on Salvage (CMI, Montr, May 29, 1981), 6 Benedict Doc. No. 4–2A; see MLA Doc. No. 673 at 9011, 9027. This was the origin of the 1989 Salvage Convention. While it substantially alters salvage law worldwide, no substantial resistance to United States ratification is presently anticipated.

Contacts: MLA Committee on Marine Insurance, General Average and Salvage, Subcommittee on Salvage; Coast Guard.

SEA WAYBILLS

Draft Uniform Rules for Sea Waybills (CMI, April 14, 1989). No published text.

The "sea waybill" is intended to create national law by which a shipper and a carrier may create a non-negotiable ocean transportation document like the United States straight (not order) bill of lading under the Pomerene Bills of Lading Act, 49 U.S.C. § 82. The sea waybill is to be subject to whatever bill of lading regime is otherwise applicable. For some legal systems abroad, the key provision is that the consignee need *not* present the bill of lading in order to take delivery of goods from an ocean carrier. See Lloyd, The Bill of Lading: Do We Really Need It?, [1989] 1 Lloyd's Quarterly 47. See also MLA Doc. No. 679 at 9365.

CMI interest in sea waybills began at the Venice colloquium in 1983 and intensified at the Lisbon plenary meeting in 1985. The CMI International Subcommittee on Sea Waybills first met in 1987, producing the Draft Uniform Rules found at 6 Benedict Doc. No. 1-8. The CMI Subcommittee issued new Draft Uniform Rules on April 14, 1989. Sea waybills are on the agenda of the CMI plenary meeting in Paris in June 1990.

Contact: MLA Committee on Carriage of Goods, Subcommittee on Sea Waybills and Electronic Documentation (John C. Moore).

TERRORISM

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

The Achille Lauro terrorism incident in October 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. The Terrorism Convention will enter into force 90 days after adherence by the 15th state. The United States signed but has not adhered; the State Department delivered the convention to the Senate in January 1989. Implementing legislation remains to be introduced. Ratification and enactment, respectively, are expected this year or next.

See also the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (IMO, Rome, Mar. 10, 1988), no published text, which is to enter into force 90 days after the third adherence, but only after the Terrorism Convention enters into

force. The MLA supports both the Terrorism Convention and the Fixed Platform Protocol. MLA Doc. No. 676 at 9165, 9213.

Contacts: MLA Committee on Intergovernmental Organizations; Coast Guard; Wiswall; State.

TRANSPORT TERMINAL OPERATORS

Draft Convention on the Liability of Operators of Transport Terminals (OTT) (UNCITRAL, Dec. 12, 1986). 6 Benedict Doc. No. 1–7.

While the liability of maritime carriers is regulated by international conventions, the liability of transport terminals and stevedores performing "transport-related services" is a hodge-podge of domestic and private international law. OTT is intended to harmonize with the Hamburg Rules and the Multimodal Transport Convention. The International Institute for the Unification of Private Law (UNIDROIT) prepared the text of OTT for UNCITRAL in 1983. A State Department private sector study group on the Liability of Operators of Transport Terminals has met, and UNCITRAL produced a revised draft of OTT at its plenary meeting in Vienna in May 1989. It is anticipated that a diplomatic conference will be convened in late 1991 to produce a third and final version of OTT. See MLA Doc. No. 673 at 9060; Larsen, Sweeney & Falvey, The Uniform Rules on the Liability of Operators of Transport Terminals, 20 Journal ML&C 21 (Jan. 1989).

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

See also: Special report on the OTT Draft Convention in this issue of the *MLA Report.*

TWELVE-MILE LIMIT PROCLAMATION

Territorial Sea of the United States of America (Dec. 28, 1988). MLA Report, MLA Doc. No. 678 at 9279 (Feb. 1, 1989).

After two hundred years of observing a three-mile territorial sea, the United States, apparently at the urging of the Department of Defense, proclaimed at the end of 1988 that it will observe a twelve-mile territorial sea. In recognition of some constitutional doubts, the House of Representatives passed a bill parallel to the proclamation, H.R. 5069 (100th Cong., 2d Sess.), but the bill was never considered by the Senate. In the 101st Congress, H.R. 1405 has been introduced by Rep. Shumway (R.-Cal.) to accomplish the same purpose, but the House seems to feel no urgency to consider the bill. For a well-documented discussion of the territorial sea issue in United States law, and a list of five major questions that the

proclamation leaves unanswered, see the memorandum of Bruce E. Alexander to the Committee on International Law of the Sea, Feb. 1989 MLA Report, Doc. No. 678 at 9279, and his forthcoming article in the October 1989 issue of Journal ML&C.

Contact: MLA Committee on International Law of the Sea.

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, Brussels, Feb. 23, 1968). 6 Benedict Doc. No. 1–2; Tetley Cargo Claims App. A(1).

The Visby Amendments make a number of specific changes to the Hague Rules, especially to raise the limitation amount from $500 per package to $800 per package or $2.40 per kilogram, whichever produces the larger recovery for cargo interests—and weight will be more favorable to shippers of packages weighing more than one–third of a metric ton. The Visby Amendments entered into force June 23, 1977; there were 24 adherences as of March 1989. The United States signed but has not yet taken a position on adherence.

The limitation amounts in the Visby Amendments were expressed in Poincaré gold francs (Fr.P.), and, since some nations have adhered to the Visby Amendments without yet adhering to the subsequent Visby SDR Protocol, the Fr.P. is not obsolete. One Fr.P. is a unit representing 65.5 mg. of gold (hence "gold franc"), a unit of value that has been used in other conventions, including the Warsaw Convention governing air transport, where the United States valued the Fr.P. at eight cents, US$ 0.08. The ocean cargo limit of Fr.P. 10,000 per package would be US$ 800, and 30 Fr.P. per kg. would be US$ 2.40. For more information on how to value the Fr.P. in $US, but no formula for getting from Fr.P. per kg. to US$ per pound, see *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 1984 AMC 1817 (1984).

The Visby Rules have been endorsed by the MLA and, on Aug. 12, 1987, by the American Bar Association, with four added suggestions: raising the limitation amount to $1160 per package or about $3.50 per kilo, as in the Multimodal Transport Convention; eliminating the carrier's nautical fault defenses of negligent navigation and management; fixing liability in multimodal movements when the carrier having custody at the time of loss or damage cannot readily be identified; and giving stevedores the same limitations of liability for damages as carriers. See MLA Doc. No. 673 at 9079.

Contacts: MLA Committee on Carriage of Goods; D.O.T.

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] (CMI, Brussels, Dec. 21, 1979). 6 Benedict Doc. No. 1–2A; Tetley Cargo Claims App. A(3).

The Visby SDR Protocol entered into force Feb. 14, 1984. There were 23 adherences as of June 12, 1989, plus 5 acceptances by domestic legislation. The United States signed but has not taken a position on adherence.

The Hague Rules (1924) package limit was 100, and so COGSA (1936) set the United States limit at US$ 500, when the exchange rate of about US$ 5 to 1 was constant. Following World War II, currency fluctuations and the use of cargo containers having very high values as packages caused the Visby Amendments in 1968 to raise the limitation amount to 30 carefully defined "gold francs" per kilogram, which was an increase in amount whose exact value depended on a given nation's gold conversion rate.

In the early 1970s, the International Monetary Fund created the floating (no fixed–value) "special drawing right" (SDR), whose value is set daily and can be found in financial and major daily newspapers. The SDR is based on the weighted average of the values of five currencies: the United States dollar, the West German deutschmark, the British pound sterling, the French franc, and the Japanese yen. For example, 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.

Contacts: MLA Committee on Carriage of Goods by Sea; D.O.T.

COMMITTEE ON CARRIAGE OF GOODS

CARGO NEWSLETTER NO. 19

THEN IS STILL NOW—SECOND IMPRESSION

Newsletter No. 15 revisited)

The United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision upholding the carrier's right to a package limitation in *Carman Tool v. Evergreen.* The plaintiff, an F.O.B. purchaser and named consignee, conceded that the bill of lading satisfied the "fair opportunity standards." However, it agreed that it was denied a fair opportunity to opt for higher liability limits because it did not receive the bill of lading until long after the goods were shipped. It argued that the carrier had to give actual notice to the consignee who bore the risk of loss. The Court of Appeals stated:

> We decline to expand the fair opportunity requirement as suggested by Carman. The requirement is not found in the language of COGSA; it is a judicial encrustation, designed to avoid what courts felt were harsh and unfair results. See Sturley, Part II at 177 & nn. 319–20. The requirement has been criticized for introducing uncertainty into commercial transactions that should be governed by certain and uniform rules. To accept Carman's suggestion would greatly magnify these problems. A carrier would not only be required to bring the liability limitation to the attention of the party it actually deals with, but also to other parties that it knows, or should know, have an economic interest in the goods being shipped. This would place far too heavy a burden on the carriers.

Carman Tool & Abrasives, Inc. v. M/V EVER GIANT, EVERGREEN LINES et al., 871 F.2d 897, 1989 AMC 913 (CA9,1989)

INFERENCE TO INVOICE TO INCREASE: OUT AT FIRST

The carrier creamed the consignee's crates and cases and moved for partial summary judgment limiting its liability to $500 per crushed crate. The Court found that the bill of lading clauses gave the right to declare a higher value. The Court stated:

> This limitation is recited in both the bill of lading and in the bill of lading tariff. It is well established that to take advantage of the pack-

age limitation, the carrier must give the shipper a fair opportunity to declare a higher value. *Tessler Brothers (B.C.) v. Italpacific Line,* 484 F.2d 438, 443, 1974 AM 937, 942 (9th Cir. 1974).

Recitation of the § 1304(5) package limitation language in a carrier's bill of lading is *prima facie* evidence that a reasonable opportunity was given. *Id.* The language in APL's bill of lading comports with § 1304(5).

Finding that APL has made a *prima facie* case of affording Hitachi a reasonable opportunity to declare a higher value, the burden of showing otherwise shifts to Hitachi. Hitachi fails to present any factual support or legal authority to support opposition.

Hitachi's claim that the invoice number for the cargo was on the face of the bill of lading and that the invoice contained the actual value of the cargo is without merit. Moreover, Hitachi did not pay the *ad valorem* freight rate. It is therefore undisputed that Hitachi did not declare a higher value for the cargo.

HITACHI AMERICAN LTD. et al. v. M/V WASHINGTON and AMERICAN PRESIDENT LINES, (N.D. Cal., No. C–88–0439 JPV, Jan., 1988).

LOSING JEWELS, NOW AND THEN . . .

Plaintiffs sought unlimited liability when they received only empty packages instead of three (3) shipments of jewels. The air express carrier sought to limit its liability to $100.00 on packages where no value was declared and to $500.00 where a value was declared. Federal Express, the carrier, moved for summary judgment which was granted, with the Court noting ". . . when there is nothing more than a metaphysical doubt as to material facts, summary judgment should be granted."

The plaintiff argued that the gems were liberated by the carrier's employees and that limitation must be denied because the carrier had engaged in intentional and willful wrong–doing.

The Court held that federal common law governs a carrier's liability for lost freight and that federal common law survives deregulation. The Court also stated:

> Plaintiffs claimed that Federal knew of the clear likelihood of plaintiffs' loss, but failed to warn plaintiffs of that fact. Alternatively, plaintiffs assert that Federal's employees intentionally converted the jewels and that these acts are attributable to Federal in some unspecified way. Accordingly, plaintiffs conclude that such willful or inten-

tional misconduct renders the limitations of liability provisions void as against public policy.

The Court held:

As a legal matter, the contractual limitation of liability provision may be avoided only if plaintiffs prove that Federal converted the property for its own use or gain.

Moreover, as these packages flowed through interstate and not international commerce, contrary to plaintiffs' suggestion, the limitation of loss provisions are not subject to the Warsaw Convention's "willful misconduct" rule.

Turning to plaintiffs' first argument, even if Federal failed to warn plaintiffs that jewels sent via Federal most likely would be stolen, that would not allow them to escape the contractual provisions limiting Federal's liability. Plaintiffs do not argue that Federal's alleged failure to warn in any way amounted to a conversion of their property for Federal's benefit, and in any event, without proof of that, plaintiffs' first argument is without merit. As for plaintiffs' second argument, the evidence, when seen in the light most favorable to plaintiffs, indicates that while Federal employees in some locations pilfered packages including jewels, Federal had concluded that elements of organized crime most probably had stolen plaintiff's packages, just as they had stolen many other Federal gems. However, even if Federal employees had pilfered the jewels sent by plaintiffs, there is no evidence that the thieves acted for Federal's benefit, at its direction, or even with its tacit consent. Federal's program of targeting suspects, testing their honesty with dummy shipments, and then firing those who did not pass muster, is uncontradicted evidence that the firm did not tolerate thieves among its employees.

Finally, plaintiffs claimed that the carrier had fraudulently induced it to enter the carriage contract because it knew there was a substantial certainty that the jewels would be stolen and that the carrier misrepresented its ability to perform the contract.

The Court stated:

As an initial matter, in order to prove fraudulent inducement under New York law, Precious Gem must show that (1) Federal made a representation, (2) as to a material fact, (3) that was false, (4) and known to be false by Federal, (5) that the representation was made for the purpose of inducing Precious Gem to rely on it, (6) that Precious Gem did rightfully so rely, (7) in ignorance of the statement's falsity, (8) to Precious Gem's injury . . .

The evidence indicates that from January 25 through February 27, 1985, Federal handled approximately 11,700,000 packages. During this time period, there were 26 inquiries regarding lost or delayed shipments. In other words, there were inquiries regarding about 222 millionths of one percent of the packages shipped via Federal. Even presuming that all of these packages were jewels, and all were stolen by Federal employees, that does not amount to Federal knowing with a substantial certainty that Precious Gem's package would be pilfered by Federal employees.

Moreover, Precious Gem adduces evidence that in January and February 1985, Federal lost or could not account for 20 packages of jewelry. There were about 24,360,000 packages shipped via Federal during those two months. Presuming that all of the lost packages were stolen by Federal employees, that amounts to 82 millionths of one percent of the total shipments that Federal made during those two months. That also does not indicate that Federal knew with a substantial certainty that Precious Gem's shipment would be stolen by Federal employees.

Precious Gem's theory of fraudulent inducement is not supported by the facts, even when they are seen from its point of view.

Precious Gem Resources, Inc. v. Federal Express Corp. (S.D.N.Y., March 30, 1989, 86 Civ. 7576 MBM).

REAL PARTIES IN WARSAW

The Queens Bench Commercial Court took a long look at who can sue under the Warsaw Convention. The Court, after reviewing New York and other precedent, held that Warsaw did *not* limit the right to sue the shippers and consignees named in the air waybill, but allowed a suit by the owner of the goods, who appeared only as a notify party. The judge refused to follow *Manhattan Novelty Corp. v. Seaboard & Western Airlines*, 5 Av. Cas. (CCH) ¶ 17,229 (N.Y., 1957) and *Holzer Watch Co. v. Seaboard's Western Airlines*, 5 Av. Cas. (CCH) ¶ 17,854 (NY, 1957). The English Court noted:

> Nor do I follow the point that it is reasonable that the carrier should only be liable to parties with whom it "knowingly" dealt. The carrier by sea is not so protected. The cargo is the same cargo, whoever may be the owner. What magic is there in the name on a waybill?

In my view the owner of the goods damaged or lost by the carrier is entitled to sue in his own name and there is nothing in the Convention which deprives him of that right.

* * *

The fact is that the Convention is silent where it could easily have made simple and clear provision excluding the rights of the "real party in interest", had that been the framers' intention.

It would be a curious and unfortunate situation if the right to sue had to depend on the ability and willingness of the consignee alone to take action against the carrier, when the consignee may be—and no doubt frequently is—merely a customs clearing agent, a forwarding agent or the buyer's bank. It would seem artificial in the extreme to require a special contract in the air waybill itself under art. 15(2) to provide the goods owner with a remedy in such a normal situation.

Gatewhite Ltd. et al. v. Iberia Lineas Aereas De Espana, S.A. [1989] 1 LLR 160.

Ed. Note: For a different twist see *Kenner Products v. Flying Tigers Airlines*, 20 Av. Cas. (CCH) ¶ 18, 282 (N.D.Ill., 1987).

TRAVELERS TOLD TO TRAVEL TO TURKEY

Travelers, as subrogated underwriter, sued for damage to a shipment of corn oil carried from New York to Turkey. There was an admiralty claim against the carrier and a diversity claim against a Swiss Corp. for alleged breaches of an agreement to repack the shipment in Turkey for final delivery in Iraq. The bill of lading contained a Turkish jurisdiction clause. However, all defendants moved to dismiss on *forum non conveniens* and not on the jurisdiction clause.

The dismissal was granted. The Court noted that in *Indussa v. Ranborg* (377 F.2d 200, 1969 AMC 539) the Second Circuit explicitly stated that it was not determining whether *forum non conveniens* could apply to an action under COGSA. Here, the District Court held that it could.

Travelers Indemnity v. M/V ALCA et al, 710 F. Supp. 497 (SDNY, 1989).

NO INDUSSA-MENT TO FOREIGN ARBITRATION, PER SE

(Cargo Newsletter No. 18 revisited)

Another Judge in SDNY refused to follow the decision in *MEDITERRANEAN STAR*, 1988 AMC 2483, stating that the decision was inconsistent with the Eleventh Circuit's decision in *M/V WESERMUNDE*, 838 F.2d 1576, 1988 AMC 2328.

The Judge stated that the Second Circuit had distinguished the *Indussa v. Ranborg* arbitration footnote in *AAACON Auto Transport v. State Farm Mutual Auto Ins.*, 537 F.2d 648 (CA2, 1976), *cert. den.* 429 U.S. 1042 (1977) where the Circuit Court held that an arbitration clause in an interstate carrier's bill of lading constituted a "limitation of liability" and therefore was null and void under the Interstate Commerce Act, 49 U.S.C. § 20(11). The District Court then noted that "It is self evident that a foreign arbitration clause constitutes a greater limitation of a carrier's liability than a domestic arbitration clause. . ." The Court stated:

> In *AAACON Auto,* the Second Circuit distinguished the suggestion in the *Ranborg* Footnote that a foreign arbitration clause in an ocean bill of lading for common carriage might be enforceable. *AAACON Auto, . . . see also Siderius*, 613 F.Supp. at 920–21. The Court stated that:
>
> "While the [*Ranborg* Footnote] expressly stated that the ruling did not 'touch the question' of arbitration clauses in bills of lading, its reference in the next sentence to charter parties indicates that its concern was primarily focused upon those commercial situations in which the economic strength and bargaining power of the parties is roughly equal."

Finally, in an effort to make sure that the holding in the case be clear and certain, the Court stated that:

> (1) a foreign arbitration clause in an ocean bill of lading for common carriage is *per se* a violation of § 1303(8) of COGSA, and therefore null and void and of no effect, and (2) the Arbitration Act does not save such clause. A rule which would require the courts to analyze the effect of each foreign arbitration clause in each bill of lading for common carriage on a case by case basis and to engage in balancing with respect to such issues as how distant the place of arbitration is to the United States and the size of the particular claim, etc. would do severe damage to the COGSA's underlying policy to achieve simplified ocean bills of lading with uniform effects. It would complicate and slow down the manner in which international business transac-

tions are typically conducted. In the absence of a *per se* rule, the consignee could be very concerned about the arbitration, and attempt to condition the transaction and the letter of credit on the place of arbitration. The shipper would then be required to negotiate the terms of any jurisdictional/arbitration clause with the limited number of ocean carriers calling at the available ports of embarkation. The respective parties might then find it necessary to consult counsel to determine if the place of arbitration in a foreign arbitration clause offered by the shipper would be considered by the courts to be "sufficiently close" to the United States so that such clause would be enforced. Ocean bills of lading for common carriage would no longer be simple forms, but would become negotiated contracts. The process of conducting international business transactions would no longer be simple and certain, and the viability of ocean bills of lading would be reduced.

For the foregoing reasons, defendants' motion to stay the complaint and compel arbitration is denied.

Organes Enterprises, Inc. v. M/J KHALIJ FROST, 1989 AMC 1460 (S.D.N.Y. 1989).

BANANAS REACH CLIMACTERIC; BUT NO VICE FOUND

In a detailed decision concerning the life style of bananas, the Southern District of New York noted that:

> Bananas are supposed to be shipped green and to be kept while on the vessel at a temperature of about 56 degrees Fahrenheit to prevent the onset of their climacteric, the point at which ripening begins.

Involved was the excessive ripening of an entire shipment of bananas carried from Puerto Bolivar, Ecuador to Marseilles. After an extended discussion of the facts and theories advanced the Court found in favor of cargo interests and noted:

> In general, it appears that defendants' factual claims about adverse conditions that allegedly afflicted the bananas before they reached the holds of the Zyrardow, advanced in support of defendants' theory of inherent vice, all suffer from an inherent vice of their own: Although they are all plausible in an abstract sort of way, they are not supported at critical points by direct evidence and, when considered in light of circumstantial evidence, they simply do not make sense.

Transatlantic Marine Claims Agency v. S.S. ZYRARDOW, 84 Civ. 2603 (MBM), (S.D.N.Y. May 9, 1989).

ZIPPOS SNUFFED BY SAME SEALS

Plaintiff brought two actions for no–delivery of cartons of Zippo Lighters shipped in two separate shipments from New York to Germany. Shipper delivered 2 lots of 100 cartons of lighters to AID Export to warehouse, load and secure for shipment. The lighters were loaded into the "nose" of a container and other freight was loaded behind the containers. The containers were sealed and delivered to the carrier's terminal.

On outturn it was found that some, but not all, cartons of lighters were missing. In granting the ocean carrier's motion for summary judgment, the court held:

> There is no dispute that goods were lost in both instances. Thus, plaintiff has made out a *prima facie* case against Hapag Lloyd.
>
> Once a *prima facie* showing has been made, the burden shifts to the carrier to rebut that showing by proving that the loss falls under one of the exceptions contained in section 4 of COGSA codified at 46 U.S.C. § 1304. See *Vana Trading*, 556 F.2d at 105, 1977 AMC at 708. Courts have held that such a burden is satisfied if a carrier can show that it is free from any fault or negligence. *See* 46 U.S. § 1304(2)(q); *Nissho–Iwai Co., Ltd. v. M/T Stolt Lion*, 719 F.2d 34, 38, 1984 AMC 2611, 2617 (2d Cir. 1983).
>
> In the present case, [owner] has made such a showing. The uncontroverted facts indicate that as to the first shipment the container was inspected without the removal of any freight and resealed with [owner's] Seal No. 276900. . . . Upon discharge both the [owner's] seal and German customs seal were found intact and no party alleges that the shortage could have occurred after discharge.
>
> * * *
>
> The fact that all seals remained intact throughout the time when the container was in [owner's] custody indicates no fault on the part of [owner] in accordance with 46 U.S.C. § 1304(2)(q), and rebuts the *prima facie* showing made by the issuance of a clean bill of lading. Aid Export makes a conclusory statement that plastic seals may be broken, but makes no showing whatsoever to support such a statement.
>
> As to the second shipment, the case for [owner] is even stronger. Since there was no inspection prior to the container being loaded on the Dusseldorf Express, no [owner's] seal was ever put on in place of the initial Aid Export seal. Both the Aid Export seal and German customs seal were found intact upon discharge. Once again, such uncontroverted evidence is sufficient to show freedom from negli-

gence of [owner] and to rebut plaintiff's *prima facie* showing of liability.

As to defendant Aid Export, plaintiff moves for summary judgment for conversion. It has been held that a plaintiff establishes a *prima facie* case of conversion against a warehouseman if it shows proof of delivery to the warehouse and failure to return property upon proper demand. See *I.C.C. Metals, Inc. v. Municipal Warehouse Co.*, 50 N.Y.2d 657, 661 (1980). The burden then shifts to the warehouseman to come forward with an explanation for the loss of the goods. *See Colgate Palmolive Co. v. S/S Dart Canada*, 724 F.2d 313, 317, 1984 AMC 305, 311 (2d Cir. 1983), *cert denied*, 466 U.S. 963, 1984 AMC 2402 (1984); *I.C.C. Metals*, 50 N.Y.2d at 661, 665.

In the present case, plaintiff has shown delivery of both shipments of lighters to Aid Export and Aid Export does not dispute this fact. It is also undisputed that Aid Export has failed to return the lost cartons to plaintiff. Thus plaintiff has made a *prima facie* showing of conversion and the burden now shifts to Aid Export to provide an explanation for the loss of the cartons.

* * *

. . . defendant [owner's] motion for summary judgment is granted and the complaint is dismissed as to them. Plaintiff's cross-motion for summary judgment is denied as against defendant [owner], but granted as against defendant Aid Export.

Roco Carriers, Ltd. v. M/V NURNBERG EXPRESS, M/V DUSSELDORF EXPRESS, 83 Civ. 8904, 8905 (JFK), (SDNY, June 14, 1989).

SWEATY PERILS

A panel of New York arbitrators (Cuneo, Berg and Cederholm) were faced with a claim for rust damage to 1 shipment of steel coils (172 coils) out of 25 shipments totaling 1942 coils carried on the IRENES EXTASY from Savona, Italy to Bridgeport, Connecticut. In denying the cargo owner's claim, the panel unanimously held:

It is the panel's unanimous decision that even if the damage did occur on board the vessel, that [owner] is not responsible inasmuch as sweating and/or other moisture in the holds is a peril of the sea for which the carrier is not responsible. The evidence indicates that the vessel's crew ventilated cargo when it could, weather and humidity conditions permitting, and that they took proper precautions to see that the vessel's holds and hatches were tight and seaworthy. The panel

finds the consignee's arguments concerning a failure of the vessel to find weather routing which would permit continuous ventilation to be unconvincing as sufficient to establish negligence on the part of the owner. The panel also finds the consignee's arguments asserting that the vessel was unseaworthy from the outset due to an inadequate ventilation system to also be unconvincing, particularly in view of the fact that the overwhelming majority of the remaining similar cargo was delivered apparently intact and without damage. The panel finds that the prevailing evidence supports [owner's] contention that it did exercise due diligence to make the vessel seaworthy and that the ventilation equipment was adequate to carry out suitable ventilation. The evidence further supports [owner's] contention that it did affect such ventilation when the weather permitted.

Jordan International Co. v. Dimico Shipping Co., N.Y. Arb., June 13, 1989..

COMMITTEE ON MARITIME ARBITRATION

NEWSLETTER NO. 3

CERTIORARI DENIED

The MLA supported a motion for *certiorari* to the U.S. Supreme Court in the case of *Hughes Drilling Fluids v. M/V LUO FU SHAN*, 852 F.2d 840, 1988 AMC 2848 (5th Cir. 1988). However, *certiorari* was denied. The motion was intended to attract the attention of the Supreme Court, once more, to the issue of whether a bill of lading clause requiring arbitration of disputes in a foreign country is contrary to COGSA. The Supreme Court had previously refused *certiorari* in the case of the *M/V WESERMUNDE*, 838 F.2d 1576, 1988 AMC 2328 (11th Cir. 1988), (see Newsletter No. 1). The bill of lading in the *LUO FU SHAN* case required all disputes to be determined by Chinese Law "in the courts of or by arbitration in the Peoples Republic of China". Suit was brought in the Eastern District of Louisiana for cargo damage, and a counterclaim for general average was filed by the shipowner, together with a motion that the entire dispute, including general average, be submitted to a Chinese agency for arbitration. The Court of Appeals, reversing the District Court, held that the District Court in Louisiana had jurisdiction over both the cargo claim and general average. It held that requiring litigation in China lessened carrier's liability contrary to COGSA.

CONSOLIDATION OF ARBITRATIONS

The Supreme Court has also just recently denied *certiorari* in *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 1989 AMC 537 (1st Cir. 1988). In that case the issue was whether or not two arbitrations could be consolidated against the wishes of one of the parties under the United States Arbitration Act or the Massachusetts Arbitration Act. The Court first noted that whenever the United States Arbitration Act ("Act") applies to an arbitration agreement, it has never been construed to preempt all state law on arbitration. The Supreme Court cases on the subject have overruled state law only when the state laws seek to limit the use of the arbitral process. Consolidation, therefore, may be ordered under a state statute whenever the contract is silent on the subject, especially under a broad arbitration clause. The Court held that neither the Act nor the Supreme Court precedents mandate the view that courts should refrain from involvement with arbitration other than as stated in the Act. Under the Massachu-

setts Arbitration Act, a party may apply to the state court for an order consolidating one arbitration with another if the method of appointment of the arbitrator or arbitrators is the same in both arbitrations. The statute further provides that no provision in any arbitration agreement shall bar or prevent action by the court. Not having found any prohibition in the Act or Supreme Court cases against applying Massachusetts law, the court ordered consolidation of the arbitrations before it.

The New York Supreme Court, applying the Act and following *Compania Espanola de Petroleos S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 1975 AMC 242 (2d Cir. 1975), *cert. denied*, 426 U.S. 939, 1977 AMC 1498 (1976), has concluded that seven AAA arbitration proceedings involving customer claims of $2.25 million against a stock brokerage firm should be consolidated. In *Bock v. Drexel Burnham Lambert Inc.*, 541 N.Y.S. 2d 175 (N.Y. Sup. Ct. 1989), the court concluded that consolidation was a procedural matter and within the inherent power of the court. Noting that there was no uniform federal policy concerning consolidation the court concluded that it was free to order consolidation when the parties' arbitration agreement was silent on the point. The court rejected Drexel's argument that consolidation should not be ordered when there is no relationship among the claimants, finding that the claims (which included RICO claims) posed common questions of law and fact and Drexel had failed to meet its burden of demonstrating prejudice.

The Eleventh Circuit Court of Appeals in a decision handed down May 23, 1989, *Protective Life Insurance v. Lincoln National Life Insurance*, 873 F.2d 281 (11th Cir. 1989) has joined those Circuits led by the Ninth in *Weyerhauser v. Western Seas Shipping*, 743 F.2d 635, 1985 AMC 30 (9th Cir. 1984) which have held that the Federal Arbitration Act does not grant power to the Federal Courts to consolidate arbitrations unless the arbitration agreement itself provides for consolidation.

On the other hand, in *Hoover v. Probala*, 710 F.Supp. 677 (N.D. Ohio 1989), a district court decided on April 25, 1989, after reviewing the position of the Ninth Circuit in *Weyerhauser* and of the Second Circuit in *Nereus*, the more liberal reading of the Federal Arbitration Act in *Nereus* was the correct interpretation and issued an order consolidating two arbitrations before it, both of which arose out of sales agency contracts which required arbitration under the American Arbitration Association rules.

NEW YORK CONVENTION AND INSURERS IN LIQUIDATION

In *Corcoran v. AIG Multi-Line Syndicate, Inc.*, (N.Y. Sup.Ct. Mar. 6, 1989), N.Y. Law Journal, March 21, 1989, a suit by an insurance company in liquidation for recovery of reimbursements under reinsurance contracts was stayed pending New York arbitration. Recognizing that under federal and state authorities exclusive jurisdiction is vested in the court supervising the insurance company's liquidation so as to preclude arbitration under the United States Arbitration Act, the court found that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, applicable because a number of the reinsurers were foreign corporations having their principal place of business in Bermuda, required arbitration. The court considered the controversy as to whether adequate proofs of claim for the reimbursements had been submitted was a dispute within the broad terms of the arbitration agreement which required an "irreconcilable difference of opinion" as to the interpretation of the reinsurance contracts. The court rejected arguments that a service of suit provision in the contracts was inconsistent with an intent to arbitrate, noting that it had the effect of facilitating enforcement of arbitration.

Most importantly, the court concluded that New York's statutory scheme concerning the liquidation of insurance companies which vested exclusive jurisdiction in the court did not preclude arbitration as a matter of public policy. The court noted that the Convention was the supreme law of the land and took precedence over local statutes. Further, the public policy defense under the Convention, asserted as a bar to arbitration, was to be narrowly construed and must touch "the forum state's most basic notions of morality and justice". The court concluded that:

> The interests of international comity outweigh such local statutory policy claims as antitrust and securities violations and regulations of bankruptcy proceedings, even where a different result might occur in a purely domestic context.

Although not all of the insurers were foreign companies and entitled to arbitration under the Convention, the court ordered consolidated arbitration of all claims by both foreign and domestic underwriters as being the most expeditious means of resolving the controversy.

"MUTUALITY OF REMEDY" AND ARBITRATION

An arbitration agreement contained in an employment contract requiring only one party to arbitrate all disputes and allowing the other party the choice of arbitrating or litigating is not invalid for lack of mutuality of remedy or obligation if there is sufficient consideration for the entire agreement. In *Sablosky v. Edward S. Gordon Co.*, 72 N.Y.2d 133 (N.Y. 1989), the New York State Court of Appeals overturned a rule adhered to for almost 20 years by the appellate divisions in New York that mutuality of remedy was required in arbitration contracts. The court noted that there is no necessity for mutuality of remedy in contracts in general and no reason for a different mutuality rule in arbitration cases. Further, arbitration should be encouraged as a matter of public policy:

> Although a party gives up an important right when it agrees to submit a dispute to arbitration, such proceedings are not less effective in discovering the truth than are judicial proceedings and it is not, as a matter of public policy, per se unfair to give one party the right to select them.

The court also held that the arbitration clause in question was not void as being unconscionable, either substantively or procedurally.

BIAS OF ARBITRATORS CANNOT BE SHOWN BY REMARKS DURING HEARINGS UNLESS ISSUE IS RAISED AT HEARINGS

In *Fort Hill Builders, Inc. v. National Grange Mutual Insurance Co.*, 866 F.2d 11 (1st Cir. 1989), the First Circuit Court of Appeals rejected a disappointed loser's claim of bias in an arbitration under the United States Arbitration Act and Rhode Island law. The allegation of bias was based upon the arbitrator's intemperate remarks during the hearings in which, from the outset, he continually interjected comments helpful to the side which appointed him and critical of the other side. In denying the claim of bias, the court said that no such claim of bias could be raised in a challenge to the award if it had not been raised at the arbitration proceedings. The court said, rather unrealistically perhaps, that the lawyer for the aggrieved party could have objected at the hearings and opposed and corrected the arbitrator's statements. This decision is one which does not bode well for decorum in future hearings since it implies that attorneys should "make a record" before the arbitrators if they suspect one of being biased against their client's position.

LEGISLATIVE ACTION CONCERNING ARBITRATION

Practitioners should note the following changes in the United States Arbitration Act and the Foreign Sovereign Immunities Act and the addition to the Judiciary Code and Judiciary:

The United States Arbitration Act, 9 U.S. Code §1 *et seq.*, has a new section concerning appeals. An appeal may be taken from an order (a) refusing a stay of any action pending arbitration; (b) denying a petition under Section 4 of the Act to order arbitration to proceed; (c) denying an application under Section 206 of the Act to compel arbitration; (d) confirming or denying confirmation of an award or partial award or (e) modifying, correcting or vacating an award or from an interlocutory order which grants an injunction against an arbitration which is subject to the Act. An appeal may *not* be taken from an interlocutory order which grants a stay of an action pending arbitration or directs arbitration to proceed or refuses to enjoin an arbitration. See P.L. 100–702 Sec. 1019 – Nov. 19, 1988; 102 Stat. 4671; 1989 AMC 908.

The Act also has a new section providing that the enforcement of arbitral agreements, confirmation of arbitral awards and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine. In addition, the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S. Code § 1602 *et seq.*, has been amended by the addition of § 1605(a)(6), providing that a foreign state shall *not* be immune from the jurisdiction of the courts of the United States or the States in any case in which the action is brought either to enforce an agreement to arbitrate made by the foreign state or to confirm an award made pursuant to such an agreement if (a) the arbitration is to take place in the United States; (b) the agreement or award is governed by a treaty in force for the United States calling for the recognition and enforcement of arbitral awards and (c) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court. Section 1610(a) of the FSIA also has been amended to provide that the foreign state's property is *not* immune from attachment or execution respecting a judgment based upon an order confirming an arbitral award rendered against the foreign state, provided such attachment or execution would not be inconsistent with the arbitration agreement. See P.L. 100–669, Nov. 16, 1988; 102 Stat. 3969–3970.

Finally, a new Chapter 44 entitled Arbitration has been added to 28 U.S. Code. This provides that certain United States district courts by local rule may authorize the use of arbitration in any civil action, including an adversarial proceeding in bankruptcy. Section 652 of this Chapter provides

that the court may *allow* the referral to arbitration of any civil action pending before it if the parties consent to arbitration and may *require* the referral to arbitration of any such action if the relief sought consists only of money damages not in excess of $100,000 or such lesser amount as the court may set. Section 655 of the Chapter provides that, within 30 days after the filing of an arbitration award made by an arbitrator under this Chapter, any party may file a written demand for a trial *de novo* in the district court. No penalty for demanding a trial *de novo* shall be assessed by the court but the court may assess costs and reasonable attorneys fees against the party demanding trial *de novo* if the party fails to obtain a judgment which is more favorable than the arbitration award and the court determines that the party sought such a trial in bad faith. See P.L. 100–702—Nov. 19, 1988; 102 Stat. 4659–4663.

SUPREME COURT MAY HAVE DEALT A DEATH BLOW TO "MANIFEST DISREGARD OF THE LAW"

In *Rodriguez De Quijas v. Shearson/American Express*, 57 LW 4539, decided May 15, 1989, the U.S. Supreme Court overruled its earlier decision in *Wilko v. Swan*, 346 U.S. 427 (1953). *Wilko* had held that agreements to arbitrate in brokerage contracts were not enforceable in certain claims brought under the Securities Act of 1933. In that case the Supreme Court expressed its famous dictum that interpretation of the law by arbitrators, "in contrast to manifest disregard", was not reviewable. This dictum took on a life of its own as a possible reason for vacating an arbitration award in addition to the extremely limited reasons specified in the U.S. Arbitration Act. Now, this latest case in the Supreme Court not only criticized the *Wilko* case but absolutely disavowed its holding. The court said that *Wilko* was pervaded by the old judicial hostility toward arbitration, and said "To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." Since no case has ever upset an award on the ground of manifest disregard of the law, in any event, this new decision may very well have buried the doctrine forever.

[9550]

COURT DENIES RIGHT TO TAKE DEPOSITIONS BEFORE ARBITRATION FOR PURPOSE OF LOCATING ASSETS

Judge Leisure in *Oriental Commercial and Shipping Co., Ltd. v. Rossell, N.V.*, 84 Civ. 7173, decided May 9, 1989, Southern District of New York, held that after an order had been entered ordering the parties to proceed with an arbitration, a party could not require the other party to submit to depositions for the purpose of determining whether there were sufficient assets reachable to satisfy any arbitration award. The court recognized that as a general rule the discovery provisions of the Federal Rules of Civil Procedure are not available in arbitration. However, discovery "in aid of arbitration" is sometimes permitted by the courts where a party can demonstrate "extraordinary circumstances". An example of such circumstances are where a vessel is about to sail with crew members on board possessing particular knowledge of the dispute. In this case the argument was made that the arbitration would be futile if there were not assets available to pay the award. It was asserted that assets were already being moved into Saudi Arabia out of the possession and control of the other party. The court however distinguished between discovery in aid of Arbitration and discovery for other purposes. It said "the term 'exceptional circumstances' addresses situations where a party's ability to properly present its case to the arbitrators will be irreparably harmed absent court ordered discovery". Discovery for the purpose requested was denied and the court refused to maintain jurisdiction over the action.

Editors: David A. Nourse
R. Glenn Bauer

COMMITTEE ON PRACTICE AND PROCEDURE

NEWSLETTER NO. 15

Rules C, E; No *In Rem* Jurisdiction in the Contiguous Zone

Indian River Recovery Co. v. The CHINA WRECK, et al., 645 F.Supp 141, 1989 AMC 50 (D.Del. 1986)—*In rem* process can be served "only within the district," saieth Supplemental Rule E(3). The cited case was a dispute over the rights to a shipwreck located just outside the mouth of the Delaware Bay. A warrant of arrest had been issued by the Court and affixed to the submerged wreck. However, the Court held that it was without *in rem* jurisdiction because the remains of the vessel were, although within the federally administered contiguous zone, seaward of the State of Delaware's territorial boundary. None of the artifacts removed from the vessel had been placed in the Court's custody so "quasi *in rem*" jurisdiction (relied upon in the case of *Treasure Salvors, Inc. v. The ATOCHA*, 546 F.Supp 919, 1983 AMC 2040 (S.D. Fla. 1982)) could not be exercised. Without *in rem* jurisdiction, the plaintiff's salvage petition could not be considered. (The Court went on to enter a permanent injunction against the plaintiff in favor of an intervening group of fishing and diveboat captains, holding that the plaintiff had not exercised sufficient control to acquire title under the law of finds, and that its attempts to commercially salvage the vessel would be impractical and harmful to the intervenor's commercial enterprises.) [Editor's Note: The laws of Salvage and Finds would no longer be applicable to title disputes over shipwrecks found on or embedded in the submerged lands of a state, title to those wrecks having been given by Congress to the state. Abandoned Shipwrecks Act of 1987, 43 U.S.C. § 2101, *et seq.*]

28 U.S.C. § 1292; Interlocutory Appeal

Burgbacher v. University of Pittsburgh, et al., 860 F.2d 87, 1989 AMC 149 (3rd Cir. 1988)—The Court dismisses the interlocutory appeal brought by defendants whose motions for summary judgment had been denied below. The defendants had pressed for dismissal of plaintiff's claim based upon certain workman's compensation statutes, but the District Court held that these statutes did not bar the plaintiff's claim. 28 U.S.C. § 1292(a)(3) permits appeals of interlocutory decrees which have determined "the *rights* and *liabilities* of the parties to admiralty cases". In dismissing the appeal, the Third Circuit opted for a restrictive reading of the statute, holding that

unless the interlocutory decree included a liability determination, no right to appeal exists. The Court justified its strict construction by citing the origin of the statute, the traditional admiralty practice allowing interim appeals from liability judgments to avoid the expense of trials upon damages issues. A liberal reading of the statute "would make every substantial legal ruling in admiralty proceedings immediately appealable even though liability remained undetermined". [Editor's note: Cf. *King State Oil v. Green Star*, 815 F.2d 918, 1987 AMC 1521 (3d Cir. 1987) (allowing an appeal from an order determining administrative expenses in a vessel sale) and *In re Bave*, 314 F.2d 335, 1963 AMC 670 (3d Cir. 1963) (dismissing an appeal because "neither the merits of the petition nor of appellant's defenses has been determined by the order from which the appeal is taken"). The Trial Court decision in *Burgbacher* knocked out two important defenses that may have terminated the litigation.]

FSIA (28 U.S.C. § 1602, *et seq.*);
Supreme Court Dismisses High Seas Tort Claim v. Sovereign

Argentine Republic v. Amerada Hess Shipping Corp., 57 U.S. L.W. 4121, 1989 AMC 501 (1989)—Reversing the Second Circuit, the U.S. Supreme Court determines that the case brought by a tank-ship owner against the Argentinian Republic for loss of its vessel during the Falklands War was not within the jurisdiction of any United States district court. The Court holds that the action does not fit any of the exceptions to sovereign immunity laid out by Congress in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602, *et seq.* The Second Circuit's reliance upon the Alien Tort Act (28 U.S.C. § 1350) was misplaced, largely because the subsequently passed FSIA contains a specific statement that "a foreign state shall be immune from the jurisdiction of the Courts of the United States and of the States except as provided [therein]". The Supreme Court held that the FSIA was the sole basis for obtaining jurisdiction over a foreign state. The Alien Tort statute states that a district court "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States", but it does not make specific reference to suits against sovereign nations. The Court dismissed the case for want of jurisdiction because none of the FSIA exceptions fit the facts of this case. (The alleged tort, a wrongful bombing of a neutral vessel, did not occur "in the United States" because it was in the high seas off the Falklands, nearly 5,000 miles from the territorial waters of the U.S.; 28 U.S.C. § 1605(a)(5) therefore did not apply.)

Comity; International Respect for Marshal's Bill of Sale

Korchenski v. The GALAXIAS, 1989 AMC 348; [1989] 1 F.C. 375 (Canada F. Ct., Trial Division 1988).

In an interesting discussion of the international effect of a marshal's vessel sale, a Canadian Federal Trial Court holds that valid clear title had been transferred in the sale and dismisses a claim brought against the marshal by the buyer. Per the order of the Canadian Court, the marshal had sold the GALAXIAS with a Bill of Sale declaring that it was free and clear of all liens and encumbrances. Among the claimants to the sale fund was the Greek Seamens Union. The vessel had been of Greek registry. In order to register the vessel in its own name, the purchaser had to obtain a Deletion Certificate removing the vessel from Greek registry. Because the sale preceded the payment of the Union's claim, the Greek Minister of Merchant Marine had refused to issue the Deletion Certificate.

The Canadian Court held that under Canadian law the marshal's sale had cleared the title of all encumbrances. The Court felt that to hold otherwise would be to unnecessarily diminish the value of vessels subsequently sold by judicial process. The Court recognized that its order could not guarantee that the integrity of the sale would be recognized by all foreign governments, but felt that the Bill of Sale had contained no such guarantee. The Court felt that disrespect, if any, of its orders by other countries was a political problem over which it had little power. [Editor's Note: *Caveat emptor*. Counsel for prospective purchasers would be wise to check with the authorities of the country of intended registry and obtain a waiver of the deletion certificate requirement.]

Rules C, E; A Stipulation to Avoid Arrest Allows *In Rem* Jurisdiction

Panaconti Shipping Company S.A. v. M/V YPAPANTI, 865 F.2d 705, 1989 AMC 1417 (5th Cir. 1989)—Where a stipulation by the parties followed the filing of an *in rem* complaint and a motion for the issuance of a warrant of arrest and had as its stated purpose the avoidance of the vessel's arrest as well as the provision of security, the Court was possessed of *in rem* jurisdiction despite the lack of an arrest. The stipulation was analogous to a letter of undertaking, which has been held to be sufficient to perfect *in rem* jurisdiction. A letter of undertaking provides that, in consideration of the forebearance from seizure, the vessel owner will file a claim to the vessel and pay any judgment entered. The stipulation in this case expressly stated that its purpose was to avoid the arrest. The stipulation required the payment of at least a portion of the disputed amount and did

not contain any counter promise to withdraw the *in rem* claim. The District Court's dismissal of the case was an abuse of discretion for failing to honor the stipulation of the parties. For the proposition that a letter of undertaking perfects *in rem* jurisdiction the Court relied upon *Continental Grain Company v. Federal Barge Lines, Inc.*, 268 F.2d 240, 1959 AMC 2158 (5th Cir. 1959).

Rule C; Dead Ship Doctrine Inapplicable to Sunken Vessel

Goodman v. 1973 26 Foot Trojan Vessel, 859 F.2d 71 (8th Cir. 1988)—The "dead ship" doctrine, under which a court will not exercise *in rem* jurisdiction when a vessel is no longer serving as a vessel, has no applicability to a dispute where a boat sank and is merely in need of repair. The underlying dispute in the cited case was a claim for dockage. The plaintiff padlocked the vessel when dock rent was overdue, the state registration subsequently expired, and the vessel sank at the dock for lack of attention. At the time of suit the vessel had been refloated and put in storage ashore. When the dispute arose, the vessel had been made fully functional and was used as a recreational craft. The "dead ship" doctrine forbids the exercise of *in rem* jurisdiction over those vessels that are no longer serving any navigation function. It most frequently applies to vessels that are permanently moored and in use as restaurants, museums, etc. See e.g., *Mammoet Shipping Company B.V. v. MARK TWAIN a/k/a Mark Twain Showboat*, 610 F.Supp. 863 (S.D.N.Y. 1985). Merely because a vessel is stored ashore and is in need of repair does not mean that the court cannot exercise *in rem* jurisdiction over it, holds the Eighth Circuit.

Rule B; Wrongful Attachment By Any Other Name. . .

Furness Withy, Inc. v. World Energy Systems Associates, Inc., 854 F.2d 410, 1989 AMC 696 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 1118 (1989).—Where the factual underpinnings of defendant's counterclaim for conversion are exactly those relied upon for a wrongful attachment claim, a showing of bad faith on the part of the plaintiff is still required. In order to recover for wrongful Rule B attachment in admiralty law there must be a showing of bad faith on the part of the plaintiff. Although the common law tort of conversion does not contain a bad faith element, a conversion claim stemming from plaintiff's Rule B action must have a bad faith element. Counterclaimant was seeking the same measure of damages under its conversion theory as it had under a wrongful attachment theory (previously dismissed), namely, compensation for the loss of use of its property during

the period of attachment. The Eleventh Circuit declined defendant's invitation to draw upon the common law of conversion to award those damages.

Limitation Act (46 U.S.C. § 183); No Admiralty Jurisdiction for Destruction by Fire of a Recreational Vessel

Complaint of Sisson, 837 F.2d 341, 1989 AMC 609 (7th Cir. 1989) – Admiralty jurisdiction can exist with respect to torts involving non-commercial vessels, but only if those torts are somehow related to navigation or had some impact on commercial shipping. The Limitation of Liability Act does not provide an independent basis of admiralty jurisdiction if the underlying tort claims are not cognizable in admiralty. Attempting to follow the Supreme Court's guidance on admiralty tort jurisdiction in the *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 1982 AMC 2253 (1982) and *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 1973 AMC 1 (1972) cases, the Seventh Circuit determines that there is no admiralty jurisdiction with respect to disputes arising from the destruction by fire of a pleasure vessel moored at a recreational boat marina. The Court admits that its decision might be otherwise if the pleasure boat fire had occurred while the vessel was underway or if the pleasure boat fire had occurred at a municipal marina and thereby threatened commercial vessels or dock space usable by commercial vessels. The Court recognizes that there is a body of Coast Guard regulations pertaining to fire prevention aboard pleasure vessels but reads the *Foremost* case strictly, noting the Supreme Court's reliance in *Foremost* upon the probable need to interpret the Rules of the Road in resolving the dispute. Although the Court declines to determine whether or not a pleasure boat owner may avail himself of the benefits of the Limitation of Liability Act, the Court determines that the Act does not provide an independent basis of jurisdiction; if the claims from which the petitioner seeks protection are not cognizable in admiralty, the petition is not properly before the admiralty court. The Court relies, in part, upon the body of scholarly criticism which points out that admiralty law developed because of the need for dispute resolution in the maritime industry. [Editor's Note: See also, *Lloyd's of London v. Montauk Yacht Club & Inn*, 704 F.Supp. 1175, 1989 AMC 1229 (E.D.N.Y. 1989); *Lewis Charters, Inc. v Huckins Yacht Corp.*, 871 F.2d 1046, 1989 AMC 1521 (11th Cir. 1989).]

[9556]

Rules D, C; No Right to Seek Partition Without Title

Cary Marine, Inc. v. M/V PAPILLON, et al., 701 F.Supp. 604 (N.D. Oh. 1988)—A charterer has no right to utilize Rule D process to recover possession of a vessel from its sub–charterer. Plaintiff's rights in the vessel stemmed from the "Yacht Charter and Purchase Agreement" which it had entered into with the vessel's owner, involving a prepayment of all charter hire, and including an option to purchase. Prior to the option date a subcharter and purchase agreement was executed with the individual defendant. Subcharter hire was not paid but the subcharterer refused to return the vessel. The Court held that plaintiff was not an owner of the vessel and was therefore not entitled to pursue a Rule D possessory action. Legal, not merely equitable, rights in the vessel are a Rule D prerequisite.

Editors: Edward V. Cattell, Jr.
Jeffrey S. Moller

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Books, Seminar Papers, and Misc.

BOOK REVIEWS

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SEMINAR

SOUTHEASTERN ADMIRALTY LAW INSTITUTE 1989, published by the Institute of Continuing Legal Education in Georgia, University of Georgia School of Law Building, Athens, Georgia 30602. Papers were presented by the following:

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September 17–19, 1989

Houston Mariners Club
Adams Mark Hotel
2900 Brianpark Drive
Houston, TX 77042

Houston Mariners Club
c/o Johnson & Higgins of Texas
1400 McCorp Plaza
Houston, TX 77002
(713-651-1900,
Mimi McCullough)

*24th Annual Marine Insurance Seminar**

October 25 and 26, 1989

Maritime Law Association
Hyatt Regency Grand Cypress
Orlando, FL

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

*Fall Meeting Seminars**

Wednesday, October 25
9:00 a.m. to 12:30 p.m.

9:00 a.m. Introductory Remarks—President Richard W. Palmer
Seminar Introduction—Richard C. Binzley

9:10 a.m. Committee on Insurance Panel Discussion

Donald T. Rave, Jr., Panel Chairman

Panelists:
Edward F. LeBreton, III—New Orleans
Concealment, Misrepresentation, and the Obligation of Utmost Good Faith in Modern Marine Insurance Contracts

James R. Sutterfield—New Orleans
The Effect of Primary Insurers' Insolvencies on the Excess Carrier—The "Drop-Down" Problem

Brendon P. O'Sullivan—Tampa
The Scope of the Sue & Labor Clause in Marine Insurance Hull Policies

10:25 a.m. Kenneth A.C. Patteson, London Britannia P & I Club
P & I Current Topics

10:50 a.m. Robert M. Jarvis, Fort Lauderdale
Ethics in Admiralty

11:15 a.m. Justice Harry A. Blackmun
Associate Judge
Supreme Court of the United States

Thursday, October 26
9:00 a.m. to 12:30 p.m.

9:00 a.m. Samuel M. Van Wyck
Society of Marine Consultants, Ltd., Linthicum, MD
ARPA: Radar's Replacement (If You Believe the Ads)

9:25 a.m. Committee on Practice and Procedure

David J. Sharpe, Panel Chairman

Panelists:
Steven V. Gibbons, Seattle
Notice of Appeal in Admiralty: The Hazards of Legislative Jetsam

Mary Jane Keriakos, Annapolis

Antoinette J. Van Heughten, Houston

M. Hamilton Whitman, Jr., Baltimore
Recodification of the Maritime Lien Act: Is "No Substantive Change" a Snare for the Unwary?

10:15 a.m.	Judge Alex T. Howard, Jr. United States District Court Southern District of Alabama
10:40 a.m.	Edward M. Keech, San Francisco Recent Developments in Maritime Lien Law
11:05 a.m.	Recent Developments in the Circuits George R. Alvey, Jr., Panel Chairman
	Panelists: Kenneth H. Volk, New York Second Circuit
	J. Kelly Duncan, New Orleans Christopher E. Carey, New Orleans Fifth Circuit
	Francis J. MacLaughlin, Los Angeles Ninth Circuit
	Denise Savoie Blocker, San Francisco Brewster H. Jamieson, Seattle Eleventh Circuit
	Robert Force, New Orleans Other Circuits

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