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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

SPRING MEETING - MAY 4, 1990

PRESENT:

RICHARD W. PALMER
KENNETH H. VOLK
GEORGE W. HEALY, III
DAVID W. MARTOWSKI
MARSHALL P. KEATING
HOWARD M. MCCORMACK

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Elliott B. Nixon
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Thomas G. O'Brien
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James E. Ross
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Gordon D. Schreck
Gerhardt A. Schreiber
Janis G. Schulmeisters
Jerome Scowcroft
James J. Sentner
David J. Sharpe
Ralph M. Sharpe, Jr.
Timothy P. Shusta
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David F. Sipple
David W. Skeen
James D. Skeen
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E. Alfred Smith
Joseph C. Smith
Howard J. Sobczak
Mark J. Spansel
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Helen H. Sundgren
James R. Sutterfield
Patrick A. Talley, Jr.
James J. Tamulski
George G. Tankard

James W. Tarlton, III
C. Peter Theut
William B. Thomas
Ray M. Thompson
A. Jackson Timms
Bedell A. Tippins
Robert K. Tisdall
Simon Tonkin
Randell E. Treadaway
Kevin R. Tully
Theodore A. Ulrich
Antoinette J. van Heugten
Braden Vandeventer
Stephen C. Veltman
Dewey R. Villareal, Jr.
Kenneth H. Volk
Allen K. von Spiegelfeld
George L. Waddell
Thomas J. Wagner
David R. Walker
Brian D. Wallace
Leo A. Walsh
Thomas H. Walsh, Jr.
Guilford D. Ware
Daniel R. Warman
Charles S. Wassell
Craig L. Watson
Harold K. Watson
Russell T. Weil
William H. Welte
Frederick W. Wentker, Jr.
Stephen F. White
Reed M. Williams
J. Barbee Winston
Frank L. Wiswall, Jr.
Harold L. Witsaman
Paul N. Wonacott
James F. Young
James A. Yulman
Robert J. Zapf
JoAnne Zawitoski
Richard M. Ziccardi

and the following 10 guests:

Robert J. Barbus
John H. Clegg
James Cooper
Ellen Flynn
Innes Mackillop
Frank E. Perez
Edward B. Ruff
Kathy Stein
George Tsaquris
David N. Ventker

TABLE OF CONTENTS

PROCEEDINGS

PRESIDENT PALMER: Good morning, ladies and gentlemen. I now call the meeting to order. Welcome to the 1990 Annual Spring Business Meeting of the Maritime Law Association of the United States. We are delighted that you all are here.

The first order of business will be our Secretary's Report, David Martowski.

REPORT OF THE SECRETARY

MR. DAVID MARTOWSKI: Mr. President, Fellow Members and Guests of the Association. Those who wish their presence noted should complete the attendance cards which may be found in the lobby.

The Executive Committee met on May 3, 1990 and, with a quorum present, the meeting was called to order by President Palmer.

The minutes of the Executive Committee Meeting held in Mobile on March 2, 1990, appear in the *President's Spring Newsletter,* which was distributed to the membership in April.

Mr. President, if there are no modifications, I now move their approval and acceptance.

PRESIDENT PALMER: Is there a second?

VOICE: Second.

[The motion was put to a vote and unanimously carried.]

MR. MARTOWSKI: Treasurer Keating distributed his report for the three months ended April 30, 1990, which reflects the Association's continuing sound financial condition. On motion duly made and seconded, the Treasurer's Report was approved and accepted.

Membership Secretary McCormack also distributed his report summarizing the present membership as of May 1, 1990, which was approved and accepted. On motion duly made and seconded, the Membership Committee's recommendations regarding applications for prospective Judicial, Proctor, Associate, and Non-Lawyer members were unanimously approved and accepted.

President Palmer briefly reported on the status of the proposed oil spill legislation and on registrants for the Thirty-Fourth International Conference of the CMI, which will be held in Paris on June 24 through 30, 1990.

Frederick W. Wentker, Chairman of the Committee on Maritime Personnel, and Warren B. Daly, Chairman of the Subcommittee on Joint Tortfeasor Settlements, submitted their final report on Joint Tortfeasor Settlements and their draft Maritime Comparative Responsibility Act, which was unanimously approved. Mr. Daly will summarize the Subcommittee's report and draft Act this morning.

Manfred W. Leckszas, Chairman of the Committee on Carriage of Goods, reported on the issues that will be presented at the CMI Plenary Sessions in Paris, and the Executive Committee unanimously authorized that the Association's delegates in their deliberations and voting will be guided solely by the Association's stated policies on the issues under discussion. You will also hear from Mr. Leckszas this morning.

Next, Thomas J. Wagner, Chairman of the Committee on Marine Ecology, reported on the latest developments with respect to the 1984 Protocols to the Civil Liability Convention, S.686 and HR.1465, regarding comprehensive oil pollution liability and compensation. Mr. Wagner will also report to you in greater detail this morning.

Neal D. Hobson, Chairman of the Committee on Transportation of Hazardous Substances, reported on the status of the Convention on Civil Liabilities in Connection with Carriage of Hazardous and Noxious Substances by Sea. He will also address you this morning.

Lastly, Warren J. Marwedel shared his experiences in arguing the *Sisson* appeal before the United States Supreme Court on April 23, 1990.

The Executive Committee Meeting was briefly adjourned and continued over lunch at the Harvard Club where Theodore S. Cunningham, Chairman of the Committee on Dinner Arrangements, reported on this evening's dinner, which is expected to have in attendance 1,500 members and guests. The Officers and Committee thanked Mr. Cunningham for his superlative work over these past years.

David J. Sharpe, Chairman of the Committee on Practice and Procedure, commented on the *Report of the Federal Courts Study Committee*, and you will hear from him further this morning.

President Palmer expressed his thanks to the outgoing Officers and Executive Committee Class of 1990. The Executive Committee also expressed its gratitude to President Palmer for his leadership over the past two years.

There being no further business, the meeting was adjourned at 1:55 P.M.

Mr. President, that concludes my report, and I move its approval and acceptance.

PRESIDENT PALMER: Do I hear a second?

VOICE: Second.

[The motion was put to a vote and unanimously carried.]

PRESIDENT PALMER: So ordered.

Thank you, David.

May we now have our Treasurer's Report, Marshall Keating.

REPORT OF THE TREASURER

MR. MARSHALL KEATING: Good morning. Mr. President, Ladies and Gentlemen:

We have just completed our fiscal year 1989/1990 on April 30th. We have preliminary figures for the year, which are subject to audit, indicating that we have on hand cash and equivalents of some $245,000. This compares with the same period last year when we had a total of some $300,000, indicating that we have expenses exceeding income during the past year of some $55,000. There were special circumstances during this past year which gave rise to the additional expenses, and I hope that for the year 1990/1991 we will be able to better control those expenses.

We will be sending out the usual dues bills shortly. There are quite a number of people in arrears. We would ask you all to pay your dues bills as promptly as possible.

That completes the Treasurer's Report, and I respectfully move its approval.

PRESIDENT PALMER: Do I hear a second?

VOICE: Second.

[The motion was put to a vote and unanimously carried.].

PRESIDENT PALMER: It is approved.

We will now hear from the Membership Secretary, Mr. Howard McCormack.

REPORT OF THE MEMBERSHIP SECRETARY

MR. HOWARD McCORMACK: Mr. President, Members of the Association and Guests: The Membership Committee met this week and recommended to the Executive Committee the nomination of certain new members. The Executive Committee, at its session on Thursday, unanimously approved those recommendations.

I'm happy to announce the following new Judicial members: Alfred M. Wolin, United States District Judge for the District of New Jersey; Joel J. Tyler, Magistrate of the United States District Court for the Southern District of New York; Rebecca B. Smith, United States District Judge for the Eastern District of Virginia.

I'm also happy to announce the election of eleven new Proctor members.

They are: Gordon T. Carey, Jr., of Portland, Oregon; Frank J. Costello of Washington, D. C; William H. Fort of Washington, D. C.; Ronald E. Fox of St. Louis, Missouri; John A. Gaughan of Washington D. C.; Howard A. Levy of New York; David L. Mazaroli of New York; Craig C. Murphy of Portland; Donald C. Radcliff of Mobile; and Amy B. Siegel of New York.

The new Proctors will be receiving their Proctor Certificates in due course from the Membership Secretary.

We also have 74 new Associate Members. They are the following: Frank A. Atcheson of New York, Michael S. Baum of Cambridge, Christopher P. Belisle of New York, F. Joseph Bersch, III of Seattle, James T. Brown of Houston, Frank C. Brucculeri of Long Beach, Michael M. Butterworth of Seattle, J. Michael Cavanaugh of Washington, D.C., Wendy D. Ciolino of New York, Joseph W. Clark of Tampa, David E. Cole of Metairie, Hurlie H. Collier of Houston, J. Shane Creamer, Jr. of Philadelphia, John N. Critchlow of New Orleans, James J. Dailey of Philadelphia, Brian T. Davis of New York, Susan M. Dorgan of New York, Peter Economou of Piraeus, Greece, Sharon Elliot of New York, David H. Fromm of New York, Daniel D. Gartner of Houston, G. Geoffrey Gibbs of Seattle, Joseph A. Goetzke of Fort Meade, Nicholas E. Grasselli of Washington, D.C., Laura Greenstein of New York, Kevin J. Hartmann of New York, Jeremy J. O. Harwood of New York, M. Florence Herard of New York, James H. Hohenstein of Alexandria, Vincent G. Horan of New York, Troy G. Ingram of New Orleans, Aileen M. Jenner of New York, Linden H. Joesting of San Francisco, Michael R. Karcher of Miami, D. Arthur Kelsey of Norfolk, David R. Kunz of Philadelphia, Patrick C. Lagrange of Metairie, Steven C. Lausell of Hato Rey, Beverli J. Lee of Houston, Georges M.

LeGrand of New Orleans, Robert A. Lewis of New York, Marie J. Lucca of New York, Mary A. Mahoney of New York, K. Reed Mayo of Norfolk, Gavin H. McInnis of Houston, Julia A. Meyer of New York, Peter G. Meyer of Houston, Richard J.C. Morgan of Seattle, Foster P. Nash, III of Metairie, Perry W. Neichoy of Beaumont, James E. Neville of Belleville, Faith O'Malley of New York, Michael L. Omer of Houston, John A. Orzel of New York, Renrong Pan of New York, Maria I. Patino of New Orleans, Joseph J. Perrone of New York, Paticia L. Pottmeyer of Seattle, Chris Reeder of Austin, Frederick M. Rosa, Jr. of Washington, D.C., Claire Saady of New York, Sloan Schickler of New York, David Shaw of New Orleans, T. Justin Simpson of Metairie, George N. Sytliades of Philadelphia, Joseph T. Tabrisky of Long Beach, Eric S. Valley of New York, Thomas J. Wagner of Philadelphia, Morgan J. Wells, Jr. of Metairie, Louis A. Wilson, Jr. of New Orleans, Richard C. Wootton of San Francisco, Genrong Yu of New York

We also had ten new Non-Lawyer Members, who are: Daniel L. Baldanado of Charlotte; Donald Rhodes of Houston; Frederick R. Wolke of New York; B. Parker Basden of New Orleans; William A. Chadwick of Reston; Andrew L. Clark of Atlanta; Robert T. Crowley of Wayne; Peter D. French of San Francisco; Karen J. Harding of New York; and Keith Kemp of New York.

I regret to report the death of the following members since the last meeting in October: Judicial — The Honorable Charles J. Carroll of San Francisco; The Honorable Harold R. Medina, Senior Circuit Judge for the Second Circuit and The Honorable Harrison L. Winter, Circuit Judge for the Fourth Circuit.

Proctor Members: Gordon L. Becker of New York; Stuart D. Bradley of Chicago; Thomas L. E. Byrne, Jr. of Philadelphia; Lloyd C. Melancon of New Orleans; Sheldon A. Vogel of New York; and Associate Member Ruth B. Washington of New York.

The present membership of the Association stands as the following numbers: Proctor, 2051; Associate, 1106; Honorary, 2; Non-Lawyer, 285; Academic, 52; Judicial, 192 or a total of 3688 Members.

The McCormack Haberdashery Company is slowing going out of business. My stock is rapidly sinking. If you have any desire to get ties and other remaining doo-dads, please feel free to call upon me.

I would also ask your cooperation in letting me know of any changes in address, et cetera for the directory purpose; and if you would like to have your Fax numbers appear — they are appearing in the geographic list — I would suggest you let me know.

That, Mr. President, concludes the report of the Membership Secretary.

PRESIDENT PALMER: Thank you, Howard. It's very reassuring to know that there are an additional number of Proctor members applying at this particular time, and we wish to encourage this in every way we can.

In fact, we were so overcome with our own generosity that we decided to offer the new Proctor Certificate without charge to new Proctors. For the old Proctors who have not requested a certificate yet, it will still cost $25.

We are reporting today on some of the events that have occurred during the interval of time since our meeting in Orlando. We have already announced this, but I just wanted to tell you again that we have an Ad Hoc Drug Committee, which is dealing with the problem of enforcement on vessels where drugs are found and placed without the knowledge of the owner and creating great complications and extraordinary fines. David Nourse is Chairman of this Committee, and he will be reporting to you later.

We are also creating a separate standing Committee on Maritime Fraud. It may seem that we are getting a little macabre here by moving into the murky areas of our society, but basically this is a positive thing to do. We believe that a certain amount of attention to that kind of detail may help keep it under control, and we are trying to establish a liaison with specialists all around the globe, and in due course you will hear from the Chairman of that Committee, Bill Bullard.

Since November, one of the events we were looking forward to has occurred, and that was the issuance of the Federal Courts Study Committee Report. The details on this, as you heard already, will be furnished by David Sharpe, who has dedicated an extraordinary amount of time to this and which was greatly appreciated by the in-house staff of the committee.

Another interesting and very time consuming effort by one of your standing committees, which worked with some other committees as well, was the Maritime Personnel Committee, who has a Joint Tortfeasor study agreement to report to you this morning, and you will hear the details of that from Fred Wentker and Renny Daly.

Beyond commenting that the Convention on Hazardous and Noxious Substances is heating up; actually it's a Convention on the Transportation of Hazardous and Noxious Substances, but anyway, there will be a meeting at IMO in London in September and Neal Hobson will give you the details of what he thinks we should be doing in the meantime.

I have been greatly impressed by the work of our members who have been watching the oil spill legislation. Probably there's no more frustrating effort than that, but the legislative process grinds on. In the true spirit of

optimism we think something is going to come out of it, but no one knows what will result.

I think Tom Wagner has the most knowledgeable predictions to contribute and I will leave that to him. He has been very ably assisted by Sid Wallace, who has an active radar working in Washington on this subject, among others. Also, Gordon Paulsen and Jim Higgins, long-time experts in the ecology field, oil spill legislation and the Protocols of 1984, have been guiding us in our contributions to Congress, along with Ken Volk, Bunky Healy and me. We'll leave the details to Tom. But it has been a very interesting project to observe.

We have also been preparing for the CMI Plenary in Paris in June. I think I will not and probably better not go into all the details of the delights of Paris in the Spring.

However, any of you who have not sent in your registrations and reservations, although you intend to go, I urge you to get it out and dust it off next week and send it in directly to Paris. If you give me a copy, I can see that you get on the working party that you prefer. There will be four of them. The details of that will come from Manfred and Frank Wiswall and others.

One important event for us is the fact that the American CMI Foundation has just received its Certificate of Exemption from the IRS. This will permit contributions to be made to the American CMI Foundation and such contributions have been classified by out Internal Revenue Service as tax deductible. You will shortly be receiving a circular letter soliciting funds for the purposes of this Foundation, and I hope you will receive it with a positive approach and give it full consideration.

An interesting shipment that has recently arrived at Customs from the CMI Secretariat, somehow or other has become very complicated. There are 500 Yearbooks for 1989/1990 somewhere in Manhattan. When the Yearbooks turn up, Howard will send you one for five dollars. It should be part of your equipment when you go to Paris. Very useful information.

You will recall, in Orlando I mentioned, with some trepidation, the availability of insurance for professional errors and omissions. Actually, admiralty lawyers really do not get into that kind of trouble — but in the spirit of offering services that might be an anchor to windward, one of the new underwriters dealing with E & O insurance was present in Orlando. I have now been advised that the American Lawyers Mutual Association, which is organized by Charles J. Taylor & Co., Lamorte Burns, David Taylor, late of London and now of Windmere, who I hope is here today, has reached a point of organization where they have a Reinsurance Committee and they are ready to talk with anyone who is interested.

I made it quite clear that our Association does not endorse this particular operation. But in the spirit of helping our fellow members, there's a flier that may be out on the registration table or your further information. I am sure David will be quite willing tell you what you would like to know.

I have received an announcement of a very interesting seminar to be held at the ABA Maritime Committee in Chicago this summer, on August 6th, from 3 to 5 PM, at the Marriott Hotel, Chicago. This will be an interesting comparison of the English, Canadian and American Law of Tug and Tow.

I believe that now we have covered the preliminary details, and I thank you for your patience and attention.

I will now call for the Standing Committee reports. Today I am going to start at the end of the alphabet and work toward the beginning. This is not just perversity; I have observed how mightily the Committee Chairmen who are called upon last have struggled to keep your attention in the late morning. They have managed to keep you awake, all right, but I think they are at long last entitled to a break now.

With that, I'm going to ask for the report of our Chairman of the Committee on Uniformity, Lizabeth Burrell.

REPORT OF THE COMMITTEE ON UNIFORMITY

MS. LIZABETH BURRELL: Good morning, Mr. President, Members and Guests.

The Uniformity Committee met on Wednesday afternoon and discussed many topics that have been of continuing interest to the Committee. Among these were Forum Non Conveniens and the relationship between COGSA and the Arbitration Act.

With respect to Forum Non Conveniens, we had a further report on the *Markzannes* case, which is very much like *Chic Kam Choo*. The Louisiana Supreme Court reversed the Court of Appeals and held that Louisiana State procedural law would be applied in Louisiana State Courts. Since cert. was also then denied, it seems this case may prove a problem for uniformity for some time.

On the subject of Carriage of Goods, there continues to be a conflict between the Fifth and the Second Circuits on the subject of whether or not a foreign arbitration clause in a COGSA-governed contract is enforceable,

and recent cases in the Southern District of New York have confirmed the existence of this conflict.

However, I am here before you today, less to report than to make an appeal to you. The Committee on Practice and Procedure and the Committee on Uniformity have for some time been concerned about the existence and proliferation of conflict among the circuits. In fact, I'm sure you will hear more about that when Professor Sharpe speaks on the subject of the Federal Courts Study Committee.

In any event, it was thought to be a very useful idea to compile and to maintain a list of the conflicts between or among the circuits. In connection with this task, while maintaining such a list is certainly within a manageable task for a committee, gathering all of these conflicts is really a very, very large task. And I would like to appeal to all of you and ask that you send to us just a brief note about any conflict that you're aware of, particularly those that you're aware of as the result of your own practice within your own circuit.

Please don't assume that we are already aware of all the conflicts that you're aware of, and try to be as inclusive as possible in your list.

In recognition of the honor of speaking first for change, I am going to honor also the principle of brevity, and conclude my remarks simply by thanking you in advance for your anticipated cooperation in compiling the list.

Thank you, Mr. President. [Applause]

PRESIDENT PALMER: Thank you very much.

We will now hear from the Committee on the Transportation of Hazardous and Noxious Substances, Neal Hobson.

REPORT OF THE COMMITTEE ON THE TRANSPORTATION OF HAZARDOUS AND NOXIOUS SUBSTANCES

MR. NEAL D. HOBSON: Good morning.

Mr. President, Members and Guests: I hate to begin speaking, in this unusual position while there are still people in the meeting, by contradicting our President, but the actual name of the proposed convention is the Convention on Liability and Compensation in connection with the Carriage of Hazardous and Noxious Substances by Sea. It goes on forever!

PRESIDENT PALMER: I stand corrected!

MR. HOBSON: It is called the HNS Convention, for easy reference. As President Palmer indicated, there has been a lot of activity. I attended the IMO meeting in London in April, which was devoted entirely to this subject, and at that meeting it again became obvious that work on a convention is in high gear and, as some say, it's on track and going forward full speed ahead. Some would choose a different metaphor, however, and point out that with a train on track, at least the destination would be known. The HNS Convention, is more like an ocean liner with all engines ahead full, but without a rudder every can see that its going somewhere, but no one knows what the final destination may be.

There are three basic proposals on the table right now: a Dutch proposal, which will essentially be tied to the 1976 Limitation of Liability Convention and would add a new substantially higher level of compensation for HNS accidents, and would put liability entirely on the ship owner.

There is a United Kingdom proposal, which would not be tied to the 1976 Limitation Convention, but would otherwise build on the Dutch proposal and put a further liability level in the form of a fund somewhat modeled on the oil pollution fund, and which would be constituted by assessments made on international shipments of hazardous material. This proposal would also cover unladen tankers, which has been perceived to be something of a problem under the oil pollution convention. This fund would be supported by assessments on hazardous material shipment possibly collected by cargo underwriters.

The third proposal that's on the table is a Norwegian draft, which would constitute a unitary fund without first level of liability on ship owners, and would likewise be funded by some method of assessing all international shipments of hazardous goods.

It's really quite difficult to predict where the Convention will go. It is obvious, however, that a great number of nations are very interested in getting a convention enacted largely for internal political reasons, and that it is quite likely that a draft convention will emerge..

Up 'til now, I think it's fair to say that the chemical industry, both domestically here in the United States and the worldwide chemical industry, has largely opposed the necessity for any convention. However, I believe it's clear that some kind of convention is going to come out of the meetings.

The next meeting of the Legal Committee will be in September, in London, and we have agreed with some members representing the chemical industry to try to get together and at least talk about what might be the

industry's fallback position in the event it became clear that a convention is going to go forward.

If you have any thoughts on that subject, please contact me and let me have your ideas or any other member of the HNS Committee. We are going to have meetings in mid-June.

I have just heard this morning, Mr. President, there is going to be some further intergovernmental consultation in mid-June in London, and we would like to have some idea of what our various positions and concerns would be. Please contact me or a member of the committee, if you have any direct interest.

Also, if you would like to have copies of some or all of these conventions, please contact me. They are quite voluminous and I did not make copies to bring here. If you have a direct interest, let me know.

I guess the only other thought I had, is that this Committee really grew out of the old LNG Committee some years ago and then with the oil glut, LNG ceased moving at least into the United States. There are several LNG plants open or planning to open at the present time, and if anyone knows of any particular liability issues developing as a result of those openings, it would appear to come under this Committee' cognizance once again.

Mr. President, that concludes my report. Thank you very much. [Applause]

PRESIDENT PALMER: Thank you, Neal.

I take it those consultations or deliberations will occur at the U.S. Shipping Coordinating Committee in Washington.

MR. HOBSON: It would be in conjunction with that perhaps, but only governmental representatives would attend.

PRESIDENT PALMER: Private discussions.

MR. HOBSON: Secret discussions perhaps.

PRESIDENT PALMER: The next report will be from the Committee on Stevedoring and Terminal Operations, JoAnne Zawitowski.

REPORT OF THE COMMITTEE ON STEVEDORING AND TERMINAL OPERATIONS

MS. JOANNE ZAWITOWSKI: Good morning!

President Palmer, Distinguished Members of the Association and Guests: The Stevedoring and Terminal Operations Committee had a very lively and productive meeting yesterday at the offices of Burlingham, Underwood & Lord. At the outset of the meeting we took a few minutes to reflect on the outstanding leadership that we have enjoyed for the past seven years under the guidance of Boyd Reeves, and we unanimously passed a resolution recognizing and honoring Boyd for his contributions to our Committee as its Chairman from 1983 to 1989, and the full text of that resolution, follows:

> "Resolved, this 3rd day of May, 1990, that the Committee on Stevedoring and Terminal Operations of the Maritime Law Association of the United States hereby recognizes and honors W. Boyd Reeves, a man of integrity, scholarship and great humanity, for the many outstanding contributions he made to this Committee as its Chairman from 1983 to 1989"

We next discussed three matters of substantive interest to our Committee, that I want to report upon briefly to all of you.

First, we heard from Paul Larson of the Department of Transportation, who is also a member of the Carriage of Goods Committee. Paul was reporting to us on the status of the UNCITRAL proposed Convention on the Limitation of Liability for Terminal Operators. For those of you who may not know, this is an international convention, which has been proposed, which would limit the liability of terminal operators both abroad and, if adopted by the United States, would also affect US marine terminal operators.

Of interest to our Committee was that in Paul's report there are two provisions that the US delegation has been successful in keeping in the Convention. The first provision was one that would exclude from the operation of the Convention those terminal operators covered by "applicable rules of law governing carriage." In effect, what this would do, is give US marine terminal operators the best of both worlds.

If they come under the provisions of the ocean carrier's bill of lading, the *Himalaya* clause in that bill of lading, they could continue to take advantage of the carrier's defenses under the bill of lading. But, if some reason those defenses were not applicable, then they would have the possibility of coming within the more limited defenses under the UNCITRAL Convention.

Paul Larson also reported that his delegation had been successful in keeping the documentation requirements for stevedores at a minimum, based on the concerns expressed by a lot of stevedores that it would be very difficult for them to prepare their own original paperwork rather than relying on the paperwork generated by the customers, usually the vessel owners and operators.

Next we heard from our member, Terry Coliglio, who reported on the Federal Maritime Commission's Docket 90-6, which is captioned Notice of Inquiry Marine Terminal Operator Regulation. Terry reported to us that the FMC has proposed to deregulate substantially the furnishing of marine terminal services in the United States, and our Committee took a position generally in favor of deregulation.

Terry is going to be drafting a specific resolution for the consideration of our membership on this FMC proposal. We also discussed in conjunction with this the related issue of whether marine terminal operators in the United States should continue to enjoy the antitrust immunity that they had previously had under the Shipping Act of 1916 and whether that should be continued under the Shipping Act of 1984.

Finally, we discussed the issue of whether maritime liens for supplies and necessaries, which includes stevedore liens, ought to be subject to a three-year statute of limitations, as has been adopted* by the Association for all "Maritime Claims" and also proposed by some other Committees of this Association, or whether or not these liens should continue to be governed by the laches Doctrine. Although our Committee recognizes that the laches Doctrine is somewhat uncertain in its application, concern was also expressed by the Committee that a flat three-year statute of limitation would make it virtually impossible for stevedores and other maritime suppliers to enforce their liens *In Rem* against what we call the hit-and-run vessels that come into the United States, run up a big tab for supplies and services, and then leave the jurisdiction, either never to be heard from again or maybe come back, many years later under a new name or a different flag.

We felt that while perhaps some of these vessels could be arrested abroad, we were also mindful of the fact that there are many countries around the world that do not recognize a maritime lien for stevedoring services and/or which do not permit a right to enforce such a lien or such a claim by arresting a vessel.

However, we also wanted to act in a spirit of compromise. So what we proposed and suggested was that we would be willing to support a three-year statute of limitations for maritime supply liens if such legislation had an

*Resolution unanimously adopted on May 6,1983, Doc. 647 .

appropriate "Tolling" provision to protect the stevedores and other suppliers against the hit-and-run type of vessel owner.

It was the Committee's recommendation to the Executive Committee that we meet with the members of the Marine Financing Committee and the Maritime Legislation Committee to sit down with these other Committees and attempt to work out compromise language we could all agree to on this issue.

Mr. President, that concludes my oral report on our Committee's meeting, and I am going to be submitting a more formal report later. Thank you very much. [Applause]

PRESIDENT PALMER: Thank you.

Our next report will come from the our new Committee on Recreational Boating, Chairman Peter Theut.

REPORT OF THE COMMITTEE ON RECREATIONAL BOATING

MR. PETER C. THEUT: Good morning, Mr. President. Members of the Executive Committee, Ladies and Gentlemen of the Association.

This Committee has been in existence for one year now. We set three primary goals when we started this.

The first one was to establish a membership that we felt would be representative of the recreational boating community throughout United States, trying to balance that membership in the various areas in which these boats are concentrated.

The second goal was to establish a Committee that had an effective working structure internally and the capability of relating to certain outside organizations considered to be very influential within the recreational boating industry.

The third goal was to target and prioritize certain specific issues that warranted immediate consideration.

I am very happy to say that at this point we have accomplished our three preliminary goals.

With respect to the membership goal, we have 55 members and five applications for membership pending. That's very encouraging to those of us who were confident that this would be an enthusiastic and interesting Committee for the MLA to form.

Even more encouraging is the fact that membership does indeed now represent an interesting geographical balance throughout the country. We have concentrations, for example, in the cities of Seattle, San Francisco, Los Angeles, Long Beach, New Orleans, Chicago, Detroit, Lauderdale, Miami, the entire East Coast. It would be a fair statement to say that we have been able to establish a membership that is nationwide and representative of most recreational boating areas. That is very important to us, as I think you sense a little bit later in this report.

We have also have tried to interest younger members within the Association in the work of the Committee. It was the Executive Committee's feeling and my own when the Committee was formulated that it might be a Committee that would attract younger people into active participation in the Association. That has proven to be the case.

One of the nice things about having some of the younger attorneys involved is that they are ready, willing and able to work, and that has been very, very gratifying. From the standpoint of our primary membership goals, we are very pleased as to where we stand at this point.

Internally, we have elected to utilize an internal structure that involves a Steering Committee, and I would like to take this opportunity to acknowledge and thank these people. They have been immensely helpful to us in getting this new Committee off the ground. My special thanks to Don Rave from New York, Almer Beale from Jacksonville, Denise Blocker from San Francisco, Tom Russell from Long Beach; Warren Marwedel from Chicago and Craig English from New York, all of whom constitute the Steering Committee.

We strongly suspect, as we delineate topics to address, that certain members of the Steering Committee will evolve into Subcommittee Chairmen. To date, we have formulated one Subcommittee. We prefer to have Subcommittee Chairmen who are assigned specific tasks that we can monitor. I would expect that by the end of this calendar year we will have established two or three additional Subcommittees to cover definitive areas within the Committee's mandate

Internally, we felt that the work of this Committee, like many others within the Association, may from time to time overlap the work of other Committees. Consequently, we considered it essential for us to establish tight liaisons with certain MLA Committees. That has been accomplished. I would like to emphasize the Committees that we anticipate working with, to illustrate the scope of the maritime law that is emerging from within the recreational boating area.

These Committees or Subcommittees are: Limitation of Liability, the Subcommittee on Yacht Finance, Coast Guard and Navigation, Practice and Procedure, Products Liability, Maritime Legislation and perhaps most importantly the Committee on Uniformity .

Externally, during the past year we have also established definitive ties with certain organizations that are very influential within the recreational boating community. These are the National Marine Manufacturers Association and the Marine Retailers Association both operating out of Chicago We intend to correlate our activities with those of the Admiralty Committee of the ABA and shall seek the good offices of Gray Staring in that regard.

There also was some sentiment at our meeting earlier this week that we correlate with Boat US, a consumer organization. We welcome input from Boat US from the consumer standpoint, and hope to establish an appropriate liaison within the next six months.

The last goal and perhaps most important threshold objective was to select specific topics to address. We feel the topics are entirely consistent with the mandate given to us by the Executive Committee. The mandate was to monitor recreational boating law, judicially and legislatively throughout this country.

In order to accomplish that objective, we established a Subcommittee on State Legislation. This group will immediately look into the following legislative areas active within the various recreational boating communities:

Speed limit legislation. The most important state actively considering such legislation is Florida. This emerging legislation could have an dramatic effect upon yachting and other traditional admiralty law concepts as applied to small craft operation. We intend to carefully examine this proposed legislation.

We also intend to look at yacht operating licensing. Such statutes are proliferating in 14 states. A corollary of yacht licensing is mandatory boating education programs, and we intend to look into those as well as "boating while under the influence" (BWI) laws within the next six months.

We also wish again to emphasize that recreational boats are not confined to canoes and bass boats. For the most part here, we are dealing with vessels that often are 40 feet to 120 feet in length and proposed legislation relative to such vessels may be entirely inconsistent with the statutes and case authority that comprise the traditional admiralty law practice.

Finally, part of our mandate is to educate and report to the Association. In that connection, we are tentatively planning a seminar for the 1991

meeting depending upon whether or not the Education Committee will be able to accommodate us. The purpose of such a seminar would be to utilize the talents of the vast number of recreational boating lawyers within the Association and present to the Association a compendium of how recreational boating law interrelates with traditional admiralty law.

Finally, I would like to again thank the Executive Committee and President Palmer for the foresight and courage to create this Committee. It is a very enthusiastic and growing Committee and it is a working Committee. With that, I conclude my report. Thank you. [Applause]

PRESIDENT PALMER: Thank you very much Peter.

PRESIDENT PALMER: May we now hear from Dewey Villareal, Chairman of the Products Liability Committee.

REPORT OF THE COMMITTEE ON MARITIME PRODUCTS LIABILITY

MR. DEWEY VILLAREAL, JR.: Mr. Chairman, Ladies and Gentlemen: The Products Liability Committee's function is obvious. We have collected all the cases that we could find on this subject. We continue to monitor the subject and, besides the cases, we have collected all of the learned articles or papers that have been submitted on the subject.

If you encounter a case with product liability implications please let us know and we'll let you know. We will let you know what we have on point. If you hear of a maritime liability case we might not pick up from the usual sources, please let us know. That concludes my report. [Applause]

PRESIDENT PALMER: Thank you, Dewey.

We will now hear from the Committee on Marine Insurance, Mr. Barbee Winston, Chairman.

REPORT OF THE COMMITTEE ON MARINE INSURANCE

MR. J. BARBEE WINSTON: Good morning.

Mr. President, Fellow Members and Guests: A meeting of the Committee of the whole was held yesterday with 43 members in attendance.

Donald T. Rave, Jr. the Chairman of the Subcommittee on Cargo Insurance, reported that the Subcommittee will explore with the ABA the

possibility of producing, in conjunction with the ABA, an annotation to a standard cargo policy, as was done a few years back with the P&I policy.

Douglas R. Adams, Chairman of the Subcommittee on General Average, reported that in view of the provisions of Articles 3 and 14 of the International Convention on Salvage 1989, a Subcommittee of CMI, to which Mr. Adams was a US delegate, met in Paris in January to consider whether those provisions necessitated revision of the York-Antwerp 1974 Rule 6 and, if so, to draft such revision.

Mr. Adams further reported that the Subcommittee decided that a revision is necessary and has proposed the text of a revision. Mr. Adams is hopeful that certain nonsubstantial but clarifying changes can be made in the wording of a portion of the revision before its presentation to the Plenary Session of the CMI in Paris in June 1990, which Mr. Adams will attend.

If any of you are interested in seeing texts of the proposed revision, please let Doug Adams or me know.

George Waddell, Chairman of the Subcommittee on P&I Insurance and of a working group which is formulating recommendations to this Association on the *Wilburn Boat* problems, reports that that matter is moving forward.

In conclusion, as I am retiring as Chairman of this Committee, I wish to express appreciation to President Palmer and to the other Presidents under whom I have been privileged to serve for affording me this opportunity and for their support, and particularly to express appreciation of the fine work of the Subcommittee Chairmen and Vice-Chairmen. Thank you very much.

[Applause]

PRESIDENT PALMER: Thank you very much. Your term has been distinguished, and we greatly appreciate all your good work and that of your Committee and Subcommittees.

I now call for the report of the Committee on Maritime Personnel, Chairman Fred Wentker.

REPORT OF THE COMMITTEE ON MARITIME PERSONNEL

MR. FRED WENTKER: Mr. President, thank you. I think I will be even briefer than Dewey.

We did have a very energetic meeting on Wednesday afternoon. I will not mention all the subjects discussed and would rather turn over our time to

Renny Daly, who is the Chairman of our Subcommittee which has been working now for two years to prepare a draft Maritime Comparative Responsibility, Contribution Act and we have done just that.

Renny, would you come forward, please, and take over the podium? Before I do turn it over, I want to thank Renny personally for his diligent efforts in the last two years, and to everyone else who has served on the committee. I, too, have advised Mr. Palmer that I am not going to stand for reappointment to the chairmanship of the committee.

MR. WARREN DALY: Fred, thank you.

Mr. President, Fellow Members and Guests, good morning! I cannot tell you how pleased I am to report that the work of our Subcommittee is finally completed. We have been at it for nearly two full years. This is, in fact, the fourth time that I have been called on to report on the progress of our Sub-committee's work. We are now able to let you know what our final product is.

You will recall that our Subcommittee was formed in response to a variety of problems which had arisen over the years in personal injury cases involving multiple defendants. Those problems have arisen typically when one defendant wishes to settle with the plaintiff. Questions often arise as to what effect the settlement is going to have on the remaining defendants, not only with respect to rights of contribution and indemnity, but also various other problems which are related to those topics.

Unfortunately, the courts have not treated these questions uniformly in the various circuits, and litigants, both claimants and defendants, have been left uncertain as to what substantive rules would apply in a given case. Hence, our Committee and Subcommittee is seeking to bring uniformity of practice to these topics.

When we last reported to you in Orlando last fall the Subcommittee's work was nearly done, and we were considering one final topic, which was sent back to the Subcommittee for further study. That was undertaken shortly after the Orlando meeting. A recommendation was made to the full Committee on Maritime Personnel which, by a 16-to-1 vote recommended that the suggested final changes be implemented and that we proceed with a final draft, which we have now done.

The final report and draft legislation were presented to the Executive Committee and also to the entire Committee on Maritime Personnel about a month ago. They were debated and considered again at the Committee's meeting on Wednesday. At that time there was a 19-to-0 vote by which the Committee on Maritime Personnel approved the Subcommittee report and

draft legislation and, accordingly, I am here to present it to you this morning for your approval.

The report is itself 18 pages long and the draft legislation with comments consumes another 20 pages. I can assure you I am not going to go through all of that in detail this morning. However, since we will be offering a resolution in a moment for the Association's approval and adoption of our work product, I want to take just a moment to explain the key essential ingredients which are contained in the draft legislation and in the Committee report.

Preliminarily, this draft legislation pertains, as it is presently drafted, only to personal injury litigation. We had considered earlier whether or not it would be appropriate to include property damage, and we concluded, because of certain quirks in maritime law that are peculiar in property cases, that it was best that we limit our considerations to maritime personal injury cases, which the draft legislation does.

It is also consistent in all respects with and, for the most part, follows the Uniform Comparative Fault Act, which some of you may be familiar. The Act is itself only a little over ten years old and is a pure Comparative Fault Act, which has been adopted by a number of States. In reviewing recent cases on problems of this sort, we find there are more and more agreeing in principle in the various courts of the land.

The essential ingredients are the following: The key problem that we were addressing, and the one which got our project started, was the question of when one defendant settles with the plaintiff and others are left to go to trial, how will the remaining defendants will be credited with the result of the settlement?

There were a couple of maritime cases which had treated this issue differently, namely, the *Self* case in the 11th Circuit and the *Leger* case in the 5th Circuit.

The solution that the Committee adopted about a year and a half ago was: When one defendant settles and others go to trial, any judgment against the nonsettling defendants will be reduced by the proportionate fault of the settling defendant in a similar fashion to the way a plaintiff's recovery is reduced by his own comparative negligence under present law.

Put another way, nonsettling defendants will be liable only for that proportion of the plaintiff's damages caused by their own fault. This is basically the rule that was announced in *Leger*.

As a corollary to that, nonsettling defendants who go to trial and are

held liable will be jointly and severally liable to the plaintiff, with right of contribution among them, as is currently the practice, I think, uniformly.

The third point addressed the question of whether or not a settling defendant would nonetheless be able to go after nonsettling defendants for contribution, and whether he would be immunized from others seeking contributions from him. In other words, if you want to settle your case, can you buy your peace with the plaintiff and go home without being bombarded by contribution actions from other parties?

We concluded, again following the Uniform Comparative Fault Act, that there should be no right of contribution either to or from a settling defendant with the sole exception that, if a defendant settles the plaintiff's entire case, that is to say, buys peace for his co-defendants for a reasonable price, he is then able to seek contribution from them. Otherwise, no contribution is permitted.

Fourth point: Any party, including a settling defendant, may seek indemnity from any other party in the litigation to the extent presently permitted under general maritime law. We intend not to change the law of indemnity which exists today, neither to add indemnity where it might not presently be permitted or to eliminate it where it is.

The fifth and final point, which we struggled with a little bit last fall and through the Orlando meeting and concluded in this spring, concerns the situation where defendants remaining in the case have judgment entered against them jointly and severally, and one of them for whatever reason does not come forward with his share of the plaintiff's judgment. This may be because of a financial problem, such as bankruptcy, or perhaps a limitation of liability. An immunity situation could raise this problem. The question is whether the entire risk of non-recovery should be borne by the remaining defendants, as would be true with pure joint and several liability, whether it should be borne by the plaintiff, as would be true in joint and several liability or whether some in-between ground should be advocated.

After studying this very carefully, the Subcommittee ultimately recommended, and the entire Committee approved, a concept which the Uniform Act calls reallocation. What this means very simply is that in the event that the share of one of the defendants against whom judgment is entered cannot be collected, that share will be reallocated by the court among other parties who were at fault in the case, including the plaintiff if the plaintiff is contributorily negligent, in accordance with their proportionate degrees of fault.

Those are the main ingredients of this Act. Mr. President, we hereby request that our report and draft legislation with comments be printed in an

appropriate publication of the Association so that the full text will be available to all members of the Association for their review at a later date. And with that premise, I would like to offer a resolution, if I may.

PRESIDENT PALMER: Please proceed.

You have explained, I take it, that you had the unanimous approval of your Committee of this report?

MR. DALY: Yes, Mr. President.

The Committee on Maritime Personnel thus presents the following resolution to the Association: Resolved, That the Maritime Law Association approve the Committee on Maritime Personnel's report on Joint Tortfeasor Settlements and further approve its draft Maritime Comparative Responsibility Act, which is based upon the Uniform Comparative Fault Act, and that the President of the Maritime Law Association or his designee be authorized to present the report and draft legislation to the United States Congress for consideration.

PRESIDENT PALMER: Gentlemen, you also are advised that this report was unanimously approved by the Executive Committee yesterday as a very realistic compromise. I will now ask if I hear a second.

VOICE: Second.

PRESIDENT PALMER: Is there any discussion about this question, any comments or suggestions?

Hearing none, I put this to a vote. All those in favor signify by saying "aye." Numerous ayes. Those opposed? No response. It is unanimous.

And I congratulate you and Fred and your Committee for doing an extraordinary piece of work in resolving these issues, something which many individuals feel differently about; but they also feel that it is paramount to have a rule, rather than no rule and confusion. Thank you again. [Applause]

We will now proceed to hear the report of the Committee on Marine Financing, Richard Barnett, Chairman.

REPORT OF THE COMMITTEE ON MARINE FINANCING

MR. BARNETT: Thank you, Mr. President.

At our meeting in Orlando I reported to the Association on the status of the Technical Corrections Act, which was then pending in Congress; in fact,

a hearing had been held that week, in which members of our Committee testified. The purpose of the Technical Corrections Act was to correct certain defects in the new Ship Mortgage Law which had been adopted by Congress one year earlier to replace the Ship Mortgage Act of 1920.

Our Committee had three items on its agenda for that Act, which we felt were very important.

The first was to make it clear that a foreign ship mortgage can still be enforced in *In Rem* proceedings in the United States, as it was enforceable under the old Ship Mortgage Act of 1920. There had been no intention to change the law in that respect. But the language, as a result of some last-minute tinkering when the new Ship Mortgage Law was being adopted, did not make it clear that a foreign ship mortgage was still enforceable.

The second thing we were concerned about were the provisions with respect to the effective date of certain parts of the law that affected yacht financing.

The third thing that we were particularly concerned about was to make it clear that even though the new law sets forth a remedy for enforcing a mortgage in the United States, setting forth this particular remedy did not preclude the mortgagee from using other remedies that might be available under applicable law, such as, for example, enforcing the mortgage on the US-flag ship in a foreign port and then having the sale recognized here in the United States. Also, there was concern about the continued availability of self-help remedies.

The first two items on our agenda survived the legislative process and were part of the final law as it was adopted in December.

The third item on our agenda fell victim to the controversy that developed at the last minute about the three-year statute of limitations on enforcement of maritime liens which was included in the same bill. The three year statute originated as a proposal of the Coast Guard and the Staff of the House Committee on Merchant Marine and Fisheries, which drafted the Legislation.

We hope that favorable administrative rulings and court opinions may make it unnecessary to pursue the third item on our agenda. However, we will reserve on that to see what happens.

At our meeting of the Marine Finance Committee this week, we had as our guest Tom Willis, who is Chief of the Vessel Documentation Section of the Coast Guard. The Coast Guard is going to issue a complete new set of regulations dealing with the documentation of vessels and the recording of mortgages. Tom Willis explained to us that what they are trying to do is (a)

simplify the procedure and (b) cut out a lot of paperwork. I think every one on our committee applauds this philosophy. We will, of course, have to look at the regulations when they finally come out, which we hope will be soon, to see whether they have accomplished this purpose.

The other principal item of discussion at our meeting was the new Maritime Administration Regulations, which are proposed to substitute for the existing regulations, implementing again the new Ship Mortgage Law provisions and the changes in Section of the Shipping Act, which now prohibit transfer of "control" to non-citizens without Maritime Administration approval.

I think the view of the Committee was that the new regulations which are proposed are better than the existing regulations, but that they are still unsatisfactory in to the Maritime Administration. Due date for comments is June 10th.

If you have comments on the regulations which you would like included, I would suggest you send them to me or to Dick Tieman or Amy Siegel at Winston and Strawn, who are on the Subcommittee dealing with this.

Thank you very much, Mr. President.

[Applause]

PRESIDENT PALMER: Thank you, Dick.

We now hear from the Committee on Marine Ecology, Mr. Tom Wagner, Chairman.

REPORT OF THE COMMITTEE ON MARINE ECOLOGY

MR. TOM WAGNER: Good morning. Mr. President, Fellow Members, Honored Guests: We had a very active and engaging meeting this Wednesday. The issues involve areas of significant concern to our membership and clientele. I will not enumerate all issues and will limit my focus upon those of immediate interest and significance in terms of the pendency of national action.

I am referring in particular to the current consideration by the Congress of oil spill legislation. In August of 1989 the Senate passed S.686, which is a comprehensive proposal dealing with oil spill compensation and liability. Thereafter, in November, subsequent to our meeting in Orlando, the House passed a bill HR.1465, which also proposed a comprehensive program to

deal with oil spill problems. The goal of both these measures is to combine in one enactment a remedial scheme for oil spills and supplant the numerous conflicting provisions which currently exist under the FWPCA, the Trans-Alaska Pipeline Authorization Act, the Deepwater Ports Act, and the Outer Continental Shelf Lands Act Amendments of 1978.

As measures designed to combine into one form a comprehensive basis of liability, these pieces of legislation have enjoyed some degree of support from this Association. Indeed, it was the mandate of this Association to support national legislation to the extent that it represented a comprehensive, uniform and exclusive basis of liability. Both of these measures achieve some comprehensiveness. Difficulty arises, however, in the area of exclusivity and uniformity which might be achieved through preemption of state laws.

The battle of preemption has been waged for years, and unfortunately, preemption is proposed in neither bill. In the wake of VALDEZ, the last provisions of preemption were lost on the floor of the House in November of last year. But the House did pass Title III of H.R. 1465, the Joinder Provision, which would achieve some exclusivity.

The Joinder Provision provides that if the 1984 Protocols to the Civil Liability Convention and the International Fund Convention, if those Protocols are ratified by the United States Senate, then the vessel's owners liability will be applied consistently with the Protocols. There is no counterpart to the Joinder Provision in S. 686 which passed the Senate.

Following the passage of these bills by the House and Senate, respectively, there had been no action until February of this year when House and Senate conferees were designated to consider the conflicting proposals. Over the last three months, their staff members have met in an effort to resolve the conflicts. The major battle lines are now being drawn in the areas of Protocols and the issue of whether there will be an immediate phaseout requirement for double hull and/or double bottoms or a future phaseout pending further study. The conferees have met together as single body only once.

At the direction of President Palmer, I have authored on behalf of the Marine Ecology Committee, a letter directed to each of the conferees, indicating the Association's support of the Protocols, not just in terms of oil spill legislation but also in terms of the United States' position as a leader in international law. Our credibility in the area of international environmental and safety areas hangs in the balance and will be seriously affected by our inaction on these measures. President Palmer has also authored a letter to Senator Mitchell as well as to the other conferees, directly underscoring the

value of the channeling provisions of the Protocols as well as the fund scheme set up by those Protocols.

Originally, the forecast for enactment date was projected for the anniversary of the VALDEZ incident. The date has come and gone. The now-projected date is the end of May – Memorial Day. Whether or not that will be achieved is substantially uncertain at this point.

This obviously is the critical time when our representatives are making their final decisions with respect to the Protocols. If you have an interest in this area, if you believe the uniformity of the Protocols is worthwhile, now is the time to write and express your views. Throughout the month of May there will be meetings with staffers followed by meetings of conferees themselves. Now is the time, if you are interested, to act and indicate your support.

On a related note, I would like to bring you up to date on where things stand in the VALDEZ litigation. There have been joint meetings of the two judges, federal and state, in an effort to coordinate the initial discovery process.

Preliminary motions are expected following the initial phase of discovery. These will include some jurisdictional motions and questions as to the effect on TAPA and other pieces of legislation.

In that regard you should be aware that just recently, in the beginning of April, there was a significant decision IN RE GLACIER BAY in Alaska. The Alaska district court held that the effect of the Trans-Alaska Pipeline Authorization Act was to repeal the Limitation of Liability Act for oil spill litigation arising under the statute as well as for related claims permitted by TAPA though not arising under the statutes.

This decision is viewed as the precursor to the EXXON VALDEZ litigation which will likewise involve several significant issues, including the effect of the Trans-Alaska Pipeline Authorization Act on pure economic claims arising under the general maritime law. As many of you know, TAPA allows for pure economic recovery, and a holding similar to GLACIER BAY might be applied to defense based upon the *Robins Drydock* discussion disallowing pure economic claims.

That concludes my comments for today. I would again mention that if you are interested in the Protocols or you are interested in uniformity, now is the time for Congress to hear from you. Thank you very much. [Applause]

PRESIDENT PALMER: Thank you very much, Tom.

Incidentally, some of us here may need a copy of the GLACIER BAY decision. I have a copy burning a hole in my dispatch case. I better give it to somebody.

May I now call on the Limitation of Liability Committee, Dick Brown.

REPORT OF THE COMMITTEE ON LIMITATION OF LIABILITY

MR. RICHARD BROWN: Thank you.

Mr. President, Ladies and Gentlemen: I thought you might be interested in hearing about the progress of the matter of *Petition of Sisson*, which you may recall was the Seventh Circuit decision dismissing the Limitation of Liability petition filed by the owner of a recreational vessel following a fire which destroyed several other recreational vessels and damaged property in a recreational marina. The dismissal was on the ground that there was no admiralty jurisdiction.

We submitted a brief amicus on behalf of the petitioner to get that decision reversed. As of the Orlando meeting, we had not heard; but subsequent to Orlando the Supreme Court did grant certiorari and, interestingly enough, they also requested that the parties brief the question of whether *Richardson vs. Harmon* should be reconsidered by the Supreme Court.

As you may recall, *Richardson vs. Harmon* was the 1911 decision in which the Supreme Court held that by virtue of the Limitation of Liability Act there was admiralty jurisdiction over a non-maritime tort. This question arose because in the *Sisson* proceedings the Solicitor General had filed a brief suggesting such reconsideration.

Certiorari having been granted, we also submitted a brief on the merits, amicus, on the side of the petitioner, and the case was argued on April 23rd. Warren Marwedel, who represented the petitioner, did a fine job on the argument, I thought. It was an interesting argument. The court seemed very interested in the questions presented, especially in the question of admiralty jurisdiction, and had a lot of questions concerning recreational vessels, and so forth.

Warren did a fine job. He was only momentarily nonplussed when Justice Rehnquist asked him, what is a yacht? But he recovered very nicely. And I learned for the first time that a yacht is a vessel over 26 feet long. However, that answer seemed to go down pretty well with the Justices. And if I had to make a guess on what the tenor of the questions indicated, I would say we have a winner.

Having said that, we will now wait for the decision, which should come out sometime in the summer. And if anything goes wrong, we can blame Warren! Thank you very much. [Applause]

PRESIDENT PALMER: Thank you very much, Dick.

By the way, does anybody happen to know the answer to the question of the derivation of the word yacht is? When I heard the question posed by the Supreme Court I thought they might want to know the answer to that one. I haven't found out yet. It would be interesting to hear.

We now call upon the Committee for Economic Regulation of Ocean Carriers, Russ Weil.

REPORT OF THE COMMITTEE ON ECONOMIC REGULATION OF OCEAN CARRIERS

MR. RUSS WEIL: Thank you, Mr. President.

I had not intended to make any oral report at this time, but a written one. But I thought there was at least one humorous matter and some serious matters that you might be interested in.

One of the areas we look at in this committee is the ICC because of its intermodal supervision over ocean common carriers and their flow of cargo. One of the commissioners has recently indicated that he doesn't like some of the decisions they have been rendering because there's too much Latin in there. And he said he could go with *pro se* and *idem*, and so on. But he was damned if there would be any more Vietnamese generals in those opinions. And so, if he gets his way, no *Nunc Pro Tunc* will appear in any further decisions! [Laughter]

On a serious note now, the Committee has had two meetings since Orlando, and principally directed to the Shipping Act of 1984. As you know, under that Act, a review was mandated and the Commission was supposed to, and did, file a report in September. The Justice Department's report was not filed in November, but in March. The DOT filed its report. There was a commission supposed to have been appointed by September. No commissioner has yet been appointed.

The names have gone to the President. There are reports from the West Coast that some neighbors of one of the appointees have been asked some embarrassing questions about their neighbor, and we think something is going to happen, and the Presidential Advisory Commission will get under

way in early September probably. They will have a year to report. At the end of the year, they will submit a report to the Congress.

The chief issue or the principal issue as far as carriers are concerned is the antitrust immunity they get under the Shipping Act of 1984 for Conferences and Rate Fixing, and all other types of agreements, and then the Congress will look at this. And if you look at it from a political perspective, we will probably be seeing congressional action after the presidential election, probably in '93.

Two other points: The EEC hasn't done anything since I last reported. They are still studying the OP issues of how far they will give exemption to Conference-type and related agreements. They do give a block exemption now. But the hangup is on the relationship between Conference members and independents, and there is a famous Iriquois agreement in that area which they have not ruled on as yet.

Finally, you should keep in mind that there are people, Senator Mack among others and other representatives from Florida, who have introduced legislation which would require seizure and forfeiture of vessels which have been to Cuba within the past 180 days. So far that is not going to take place. That legislation is probably not moving at this time in the bill that was introduced. But you must be aware that there are people who would like to introduce such legislation, and it will be coming up on another bill probably in the near future.

Thank you. [Applause].

PRESIDENT PALMER: Thank you, Russ.

Our next report will come from David Nourse, Chairman of the Ad Hoc Committee on Drugs.

REPORT OF THE COMMITTEE ON DRUGS

MR. DAVID NOURSE: Mr. President, Members of the Association: This is a brand-new Committee, and I have a very short report because we really haven't had much opportunity to work.

On the other hand, we had our first meeting yesterday, and we have approved a series of guidelines for practitioners in dealing with the telephone call probably received on a Friday-afternoon, that tells you that a client's vessel is on the way to your port and that there has been a discovery of unmanifested narcotics on board.

Frankly, this is probably a new area for many of you, and it's an area in which the penalties for taking the wrong action are substantial. We are talking about a thousand dollars per ounce for unmanifested heroin or cocaine or other substances; and it was the Committee's objective to give some guidance to practitioners in how to deal with these very serious questions.

On the table outside are copies of these guidelines, which we hope will be helpful to you. If you have already had these problems and, having looked at our guidelines, you think that there's a different approach, we would welcome that advice.

In drafting these guidelines, Larry Jacobson of Transport Mutual Services; Nate Bayer of Frehill, Hogan & Mahar; and Steve Vengrow of Cichanowicz, Callan & Keane, have been very helpful, using their experience as a basis for the suggested actions.

The Committee is new and still studying its agenda. Certainly among the issues that we design in our proceedings to deal with is the question of the standard of "highest degree of care and diligence". As you know, a redefinition of that standard is expected, and we will review it and comment on it.

We also hope to work with Customs in trying to work out some of the problems that presently exist when you are dealing with a Customs group that is inspecting a vessel and has found unmanifested drugs. I think this is an area in which greater liaison with Customs should be helpful, and it's an objective of the Committee to try to provide that.

Thank you very much. [Applause]

PRESIDENT PALMER: Many thanks, David, for getting that Committee up and running, and especially we congratulate your group on the guidelines paper which has been made available downstairs at the main registration table.

I now call for the report of the Committee on Comite´ Maritime International, Frank Wiswall.

REPORT OF THE COMMITTEE ON COMITÉ MARITIME INTERNATIONAL

DR. FRANK WISWALL: Mr. President, your Committee met yesterday afternoon at the offices of Haight, Gardner, where we were confronted with heaps of fresh fruit that would have put to shame any head-dress of the

late Carmen Miranda! Despite our large turnout, there was sufficient left there after the meeting that I told our host, that I would not come again without bringing one of the free plastic bags that I got from Peter Reeves and that I filled up with maybe seven or eight gallons of Mobil Super Unleaded!

Three points only, Mr. President.

The large report will be the Paris post mortem next fall.

Firstly, for members who are thinking of going to Paris and have not yet put in your forms- - I think that despite the fact that the official closing date being the 25th of April, there is a quite good chance that applications can be accommodated during the next couple of weeks. After that I should doubt it very much, because those hotel rooms which have been reserved by the French association and that have not been taken up will then have to be released.

Those of you who have sent in forms but have for some reason not sent copies to our President should please do so forthwith, because it's essential that we know how many are attending and also what committees you prefer to sit on. There may be, if necessary, meetings of the US groups within those committees at some time before Paris. That will be up to the respective chairmen of our four groups within the committees. But they can't let you know unless they know which is your desired seat at the Paris Conference.

Secondly, as you also have said, Mr. President, the CMI Yearbook is an essential piece of hardware. It's available for five dollars from Howard McCormack. Probably any officer of the Association will take your check, and we trust that you will get a copy of the Yearbook.

Lastly, there is a meeting this afternoon of the dozen or so members of the official delegation. That meeting will be held in the lobby out side of this room on this floor of the Bar Association at 2:30 PM, and it should not take more than half an hour.

Mr. President, with your permission, I would like to yield the floor to Nick Healy to say a word in his capacity as Chairman of the CMI American Foundation.

PRESIDENT PALMER: Yes, of course.

MR. NICHOLAS HEALY: Thank you, Frank. Thank you, Mr. President.

Ladies and gentlemen, I will make this very brief. As President Palmer has said, at long last the CMI American Foundation, Inc. has received the blessing of the IRS and we are now very definitely a tax-exempt organization, and that means that we will welcome contributions right now. As a

matter of fact, we need a bit of seed money even before the letter soliciting contributions goes out. To save expense, that might be delayed until the minutes of this meeting are ready and it might be out in the same mailing. Meanwhile, we need money for printing, mailing expenses and the like and therefore we would welcome contributions.

One thought I had this morning is that possibly some of us might want to make contributions in memory of deceased members of the Association, particularly those who were close friends. If that is done, we will see to it that the families of these decedents will receive an acknowledgment and a note saying that a contribution, without mentioning the amount, has been received in memory of the deceased member of the Association.

These contributions could be sent to Frederick Lovejoy at Bigham, Englar, 14 Wall Street, New York, 10005, New York, and he will see to the that they are properly deposited, or to Frank Wiswall or to me or to Doug Jacobsen, who is Vice-President of the Foundation, or to any of its Directors.

This reminds me that I would like to say a word of appreciation to Fred Lovejoy who did a lot of work in getting the approval of the State of New York for the organization as a charitable organization, and then for getting the blessing of IRS. We are now a 501-c- 3 tax-exempt organization. You can all at least get the benefit of a tax deduction if you make contributions. [Applause]

Thank you.

PRESIDENT PALMER: Thank you very much, Nick. I hope all of you here will consider the CMI American Foundation among your beneficiaries.

We now call on the Carriage of Goods Committee, Manfred Leckszas, Chairman, and I am going to say that we have 35 minutes here to finish the ABA and Nominating Committee Reports. I know that each of you are intimately and intensely concerned to save time, but I want you to have the time you think you need. I just wanted to indicate that perhaps we are heading to a photo finish.

REPORT OF THE COMMITTEE ON CARRIAGE OF GOODS

MR. MANFRED W. LECKSZAS: Thank you.

Mr. President, Fellow Members, Honored Guests: I shall not be as bold as some of the speakers; I will say I shall try to be brief rather than saying I shall be brief.

The Carriage of Goods Committee met in New York on Wednesday and received reports from its four subcommittees: the Subcommittee on Maritime Fraud, the Subcommittee on Multimodal Transportation, the Subcommittee on Electronic Contracts of Carriage; and the Subcommittee on Sea Waivers.

As you have heard from the President in his own report, the Subcommittee on Maritime Fraud has been elevated to the status of standing committee, and at the next meeting of the Association you will hear a report from the new Committee Chairman, Bill Bullard of Houston.

Is Bill in the audience by any chance? Yes. Would you please stand, Bill, so the people will know you.

[Applause].

This Committee has an interesting agenda set for itself and it is still, I believe, looking for more members.

One of the things that this Committee is planning is a White Paper that can be prepared for the use of US attorneys in the prosecution of maritime fraud cases. It is felt that very often busy US attorneys may not be ready to undertake maritime fraud cases and that they can use whatever help this Association and this particular Committee may furnish.

I have asked the Chairmen of the other three Subcommittees to render individual reports. It's one of my ways to say thank-you to them for the outstanding work they have done. Also, two of these chairmen will be the American delegates to the working groups at the CMI Conference on Sea Waybills and Electronic Contracts, and therefore I think you will be interested in hearing from them.

In addition to receiving the Subcommittee reports, the Committee reviewed and considered the final report of CMI President, Francesco Berlingeri, the Chairman of the International Subcommittee on the Uniformity of the Carriage of Goods in the 1990s. That study, which is the final work-product of the International Subcommittee, was passed at its last meeting in Paris in January of 1990. That study is, I believe, an excellent piece of work from an academic standpoint, and I think anyone who deals in the law of the carriage of goods will be happy to have it on his or her desk and refer to it when problems under it arise.

The final draft of the International Subcommittee does not materially differ from the draft that was available and others which we have reported earlier. There are still eight topics that the Committee considered important or worthy of being studied in deciding whether the Hague-Visby Rules had well served the maritime industry to the fullest expectation. These eight

topics are: Identity of the carrier, contracts and documents, deck cargo, period of application, exemptions from liability, limits of liability, deviation damages, and delay. Under each of these subheadings, the subject questions are, first of all, are there any differences in interpretation, any difficulties in interpretation that have been encountered, or any areas that the Hague-Visby Rules did not address?

Another question then is, once solutions have been found and have been addressed, in what form will these solutions be rendered?

It is, indeed, very difficult at this stage to predict where the CMI is going to go at the Paris Conference. As you will recall from earlier reports, the International Subcommittee at its first meeting in Belgium rejected the approach that the CMI would attempt to draft an entirely new convention or even draft a protocol to the Hague-Visby Rules. The working group which was then put in session after the first meeting of the International Subcommittee suggested that working rules for voluntary adoption should be drafted. The International Subcommittee at its second session rejected that approach and opted for the study project, and what we have received is, indeed, the result of that effort.

At the third meeting of the International Subcommittee in Paris in January, the French delegation resuscitated the approach of working rules.

And we have to bear in mind that the high-water mark of attendance of the International Subcommittee was 24 delegates. It is anticipated at the Plenary in Paris, between 30 and 40 countries will send delegates. So we may have an entirely new audience that is going to look at this study, and it's going to be very interesting to see what comes out of it.

We are prepared to participate to the fullest extent. The Executive Committee has given us full freedom to deliberate the issues. Of course, the American delegation, as always at the CMI, is going to be guided by the stated policies of the Association.

We are looking forward to Paris. I think we are going to have an interesting time, and at the next meeting I hope to give you a full-blown report of what transpired at the Plenary.

I am now going to call on Chet Hooper, the Chairman of the Subcommittee on Multimodal Transportation, to make some short remarks and then, in sequence, George Chandler and John Moore.

Thank you, Mr. President.

PRESIDENT PALMER: Thank you very much, Manfred.

REPORT OF THE SUBCOMMITTEE ON MULTIMODAL TRANSPORTATION

MR. CHET HOOPER: Mr. President, Members and Guests: We have struggled with the difference between the Carriage of Goods by Sea Act governing ocean shipments and the Carmack Amendment governing land shipments. We have developed a proposed scheme, contractual scheme, which carriers and shippers might be able to use to lessen these conflicts.

We realized, in lengthy discussion, that there are many different means used to carry cargo and many different schemes used by ocean carriers and land carriers to describe their liabilities. Some schemes are governed by contracts and some are not.

So, we are sort of retrenching and drafting two clauses for use in bills of lading and one for use in clause contracts between carriers. The clauses will address the different limits of time in which a claim or lawsuit may be filed, the different limitations of liability, package or weight limits of liability, and the different standards of liability. We will be reporting further on that at the next meeting.

Thank you. [Applause]

MR. GEORGE CHANDLER: The subject we are dealing with in the Subcommittee on Electronic Contracts of Carriage is called the Electronic Transfer of Rights to Goods in Transfer, which is a long way of saying electronic bills of lading.

I have been fortunate to participate as far as the drafting committee of the International Subcommittee in these rules. We have narrowed them down to 12 rules. I have left copies out at the desk for those of you who have an interest in this area. If they are gone, give me your card and I will get a copy to you.

Our guiding principle in these rules is to facilitate issuance of Bills of Lading electronically in a such a way as to mirror the way they would be done on paper. Rather than having a piece of paper, however, the transfer would take place between computers. This is to facilitate the coming event known as EDI, Electronic Data Interchange, wherein the purchases and sale and the transfer of goods, and so forth, will take place entirely electronically. It is being done in certain areas, particularly in Europe, and by very large companies in the United States now.

It's just a question of time before this reaches full effect internationally, particularly being helped along by the UN/ EDIFACT. This is one of the better projects that the UN has worked on to facilitate trade through EDI. It's coming, just a question of when.

Our marching orders are to make sure that when bills of lading are transferred electronically, it does not interfere with the practice as we know it. That's been our guiding principle and will continue to be our guiding principle at Paris.

Thank you very much. [Applause]

MR. JOHN MOORE: I don't know but what I should have been put on before George, because George has responsibility for the ultimate solution, and my problem is how to deal with the differences between English and American law in connection with papers sometimes called "bills of lading."

But apparently the difficulty in the English law and in the law among some of the people on the Continent that have followed the English bellwether is that their problem is that any paper which is called a "bill of lading" has to be taken up by the carrier; and it's the name on the paper, not the substance, that counts.

We don't have the problem because we have our Pomerene Act, which provides for a straight or nonnegotiable bill of lading which does not have to be taken up, or a negotiable bill of lading which serves as security for the goods.

The difference is very important in these days of faster ships and slower mail. I think we are all suffering under slow mail, and the mail can't get the bill of lading there as fast as the ship can get the goods there. That's especially true in the short trades around the coast of the Europe. But it's true in the North Atlantic, too.

There is an ancient rural wisdom that says that the way to deal with a mule is to hit him on the head with a hard stick to get his attention. We have finally gotten the attention of Sir Anthony Lloyd. He understands that it's not possible to produce a single solution to this kind of a problem, because if the English law is dealt with in a way which makes them happy and the same solution is applied to American law, then there may be real trouble.

To say that the bill of lading is not a document of title, as has been said in some of the earlier CMI drafts, might contract out application of the Hague-Visby Rules because, under United States law, our Carriage of Goods by Sea Act only applies to bills of lading or "similar documents of title."

I consider a straight bill of lading to be a document of title because it says who is entitled to delivery of the goods.

The traditional work of the CMI has been to produce a single uniform result. Our present objective is to produce a single uniform result, but we

have to do it by varying means. The means to the end has to be different for United States law as against English law, and apparently there are in-between cases in the law of at least other countries.

We have Sir Anthony's attention now, and I think we can find two or three agreed means to achieve a single end. We are going to have some fun next month!

Thank you very much. [Applause]

PRESIDENT PALMER: Thank you very much, John. And the members of this Carriage and Goods Committee who are going to carry the flag in Paris, we appreciate all your efforts.

One dangling question up there which I want to deal with is the derivation of the word "yacht". The answer has just now been furnished here by our official historian, Elliott Nixon, multlinguist, distinguished raconteur and other things, as well as a master of trivia. He says the word yacht derives from the Dutch word, and here I run into it a little trouble: J-a-g-h-t-s-c-h-i-p, meaning "hunting ship." Thank you, Elliott, wherever you are. [Applause]

The next report is from the Committee on ABA Relations, Gray Staring.

REPORT OF THE COMMITTEE ON ABA RELATIONS

MR. GRAYDON STARING: Mr. President; Friends: When I addressed you last fall I think that I spoke principally about the fact that a major topic in the House of Delegates at its next meeting would be the report of the ABA Commission on Mass Torts, a weighty and, in many ways, impressive proposal. It did, of course, come up on the docket in the February meeting. But meanwhile a bill had been introduced in Congress for the consolidation of certain cases involving mass torts, and that bill was somewhat more conservative than the proposal of the Commission on Mass Torts.

Briefly, the congressional bill would have authorized consolidation in federal courts of multiparty, multiclaim controversies in cases arising from a single event or occurrences where 25 or more persons have been injured in the amount of $50,000 or more. A proposal was put before the House of Delegates to support the congressional bill, and that proposal came up for debate before the report of the Mass Tort Commission.

The congressional bill contained, as did the Mass Tort Commission's report, a proposal which I think I can fairly describe as permitting the federal

judge with the consolidated cases to reach into the grab bag of available state laws and select a state law that would apply to the whole case, notwithstanding that it was probable in many instances that parties to the case would be found in a number of states and there would be arguments for the application of various state laws.

The debate, so far as it was a principled debate (and it was for the most part) concentrated on the choice-of-law provision, and there were very few speakers in favor of supporting this bill and there was most vigorous and interesting debate against it, primarily on the choice of law.

The proposal to support the congressional bill was decisively defeated, and the Commission on Mass Torts immediately withdrew their report from the docket and did not permit it to be debated or voted on, because I think it was quite evident it would go down ignominiously, had it been brought up.

That was the result on a principal matter of interest to you. The news of this item and other items that the House considered was drowned out, I am sure, by the news of a resolution and debate on the subject of the legality of abortion. And I am going to content myself in commenting on that with simply assuring you that I did not seek to present your views to the House on that subject [laughter].

Once again, I am most appreciative of the honor of representing this Association in the House.

Thank you very much. [Applause]

PRESIDENT PALMER: Thank you very much, Gray.

I now call on the Chairman of the Nominating Committee, Francis O'Brien.

REPORT OF THE NOMINATING COMMITTEE

MR. FRANCIS O'BRIEN: Mr. President and Fellow Members: I report to you that the Nominating Committee met Wednesday and has proposed the following slate of nominees for your attention: for President, Kenneth H. Volk of New York; for First Vice President, George W. Healy III of New Orleans, commonly known as Bunky Healy; for Second Vice President, Chester D. Hooper of New York; for Secretary, Howard M. McCormack of New York; for Treasurer, Marshall P. Keating of New York; for Membership Secretary, Theodore S. Cunningham of New York.

For the four vacancies existing on the Executive Committee, the following four candidates: John R. Peters, Jr. of New Orleans, Frederick W. Wentker, Jr. of San Francisco. John T. Biezup of Philadelphia, and John D. Kimball of New York.

Mr. President, I would ask you to recognize the Association's Parliamentarian, Mr. Higgins.

PRESIDENT PALMER: Mr. Higgins is recognized.

MR. JAMES J. HIGGINS: For the benefit of the reporter, I happen to have a card!

Mr. President, Fellow Members of the Maritime Law Association: You have heard the report of the Nominating Committee, and I have only one question for its Chairman. Perhaps I did not hear correctly, but did you include among the nominees a Treasurer?

MR. O'BRIEN: He was greeted with such acclaim and enthusiasm that his name slipped my memory. You are quite correct.

The guardian of our treasury, famed boulevardier, raconteur, bon vivant, Mr. Marshall P. Keating.

MR. HIGGINS: God forbid, we should leave his name out!

Having disposed of that, you heard the recommendation of your Nominating Committee and if the Chair would accept an appropriate motion to close the nominations if there are no other nominees—

VOICE: I so move.

PRESIDENT PALMER: Do I hear a second?

VOICE: Second.

MR. HIGGINS: It has been moved and seconded, and the next appropriate motion that the Chair would receive would be one to adopt the unanimous report of the Nominating Committee, and authorize the Secretary to cast one ballot in the name of the members of the Association for the slate proposed in the report.

PRESIDENT PALMER: Mr. Higgins, do I understand that you are making such a motion?

MR. HIGGINS: I would be pleased to do so.

PRESIDENT PALMER: Is there a second?

VOICE: Second.

[Passed unanimously]

MR. HIGGINS: That having been accomplished, it is so ordered. Mr. President, you will receive, along with the rest of the officers, proper congratulations, et cetera. But I personally wish to congratulate and welcome you to a very select band known as the Past Presidents of this organization. We are getting quite numerous, elderly, not necessarily affluent. But we welcome you, Mr. Past President Palmer, and now you can sit in the back of the room at some of these meetings and mutter to yourself, as we have all done, I did it better! [Applause]

PAST PRESIDENT PALMER: Thank you, Mr. Higgins. [Standing Applause]

PRESIDENT-ELECT VOLK: Mr. Past President, Immediate Past President and Continuing Member of the Executive Committee: I want to congratulate you for a splendid job and, on behalf of the Association, thank you for your efforts and your tireless work on behalf of the Association for two years. You provided us with outstanding leadership, and we are all truly grateful.

In recognition of your term as President, on behalf of the Association I am very happy to present to you this scroll commemorating your term in office, and I will read it; it is a handsome piece of penmanship:

"The Maritime Law Association of the United States presents this testimonial of appreciation to Richard W. Palmer in recognition of his distinguished service as President during the years 1988-1990, and the Association takes this means of recognizing his able and successful leadership, his constructive efforts and outstanding contributions to the Maritime Law Association of United States and to the field of maritime law."

Congratulations!

PRESIDENT PALMER: Thank you.

[Applause]

This is indeed a handsome scroll.

It, in fact, bears those magnificent words that I have never heard before and I, no doubt, will never hear again. But I am delighted to receive this very handsome picture, which I shall hang on my wall.

PAST PRESIDENT PALMER: I just want to say a couple of words before we adjourn and, as I see the clock, I think it will be a photo finish.

I want to say to the new members of this Executive Committee that I congratulate them very much. I think they are starting on a new course

which will be challenging and very interesting, and I am sure you will find this a very special honor and privilege to serve this Association as a member of the Executive Committee.

And for those of you who are continuing your service to this organization, I am equally certain you will continue to enjoy the honor you have had before and the privilege that you will exercise in the future.

It is most appropriate at this moment to add my tribute of thanks and congratulations to those who are retiring from the Executive Committee, whom Frank has named. For their diligent concern, we have to honor Chet Hooper, our new Second Vice President; Henry Lucas; Rusty MacLaughlin, Chairman of the Committee for Scottsdale; and Boyd Reeves.

These gentlemen have done a very diligent job, and I personally congratulate them and thank them for the attention that they have given to the work that they have done.

I personally am also very pleased to express my great appreciation and thanks to our retiring secretary, David Martowski, whose faithfulness to detail and perceptive discretion in respect of the many facets of the Secretary's duties, made it possible for all of us to serve this Association. David has done a magnificent job in a post requiring not only considerable diplomacy, but effective action.

Before I surrender this podium permanently to my successor, I would like to add that serving as your President for the last two years has been a great personal honor and privilege to me. The functions of this office, however, depend directly on the talent and dedication of the Officers and the Committee Chairmen and their members, and the good will and fellowship of the membership as a whole.

It is appropriate to also congratulate you all on the great willingness of each member of the Committees for their willingness to do what they say they will do, and they get it done when they say they will do it. This really makes this organization work.

I personally would like to express my appreciation to the members of the President's Advisory Committee, consisting of members who are Past Presidents of this Association, for their study and recommendations concerning our nominating procedures, on electronic process, and other good and sage advice.

And my special thanks to our Immediate Past President, Frank O'Brien, for his wise counsel and guidance during some interesting moments when a little light needed to be shed, and he has done it with great good judgment and perspective, and with never-failing good humor.

Thank you again for this privilege, and I will now surrender a gavel I haven't got here — but maybe you will find it somewhere! [Applause].

PRESIDENT-ELECT VOLK: Fellow Members, Friends and Guests: It is indeed a very high honor to be elected President of this great Association. And it is particularly gratifying to me, as I suppose it would be to any admiralty lawyer, to be given the opportunity to serve our profession in this way.

I look forward to working with the outstanding group of Officers and Members of the Executive Committee, whom you have elected, and I am very confident that with their support and help this Association will continue to fulfill its role as the pre-eminent voice of the admiralty practice and profession.

I thank you for electing me to this high office. I promise to devote my fullest energies to fulfilling my responsibilities as your President for the coming year.

Thank you. [Applause]

And now there being no further business before this house, for the closing words of this meeting it is my great pleasure to call upon a man who has served this Association with distinction and devoted much time and energy and skill on our behalf. And for that we are greatly in his debt, Past President John C. McHose of Los Angeles! [Applause]

MR. JOHN C. McHOSE: Mr. President, I think this motion should be addressed to you rather than to the members.

With appreciation and congratulations to the outgoing administration, which has worked long and hard to carry out the policies of this Association and has done so very successfully, and with conviction that the incoming administration will continue to carry out those policies during an era which I believe can be of substantial importance to the Maritime Law Association of the United States, I move we adjourn. [Applause]

PRESIDENT-ELECT VOLK: The meeting is adjourned.

[The meeting was adjourned at 12 Noon.]

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FORMAL REPORT OF THE COMMITTEE ON CARRIAGE OF GOODS

The Carriage of Goods Committee met in New York on May 2, 1990. The Committee received and approved reports from its subcommittees on Multimodal Transportation, Maritime Fraud, Sea Waybills and Electronic Contracts of Carriage. Copies of the reports of these subcommittees will be appended to this report as Exhibits A through D. The Committee also considered the final report from CMI President Francesco Berlingieri, the Chairman of the International Subcommittee on Uniformity of the Law of the Carriage of Good By Sea in the 1990's, which contains the Committee's comprehensive study of problems of the Hague-Visby Rules and possible solutions.

The Study of the International Subcommittee on Uniformity will be the major topic of discussion at the CMI Plenary in Paris during the period June 24-29, 1990. Both President Berlingieri's final report (UNIF-16/III-90) and the International Subcommittee's Study (Unif-17/III-90), which will be appended to this report as Exhibits E and F,* were mailed to the members of the Committee prior to its meeting. Unfortunately, because these documents were not received by the Chairman until April 1, 1990, this mailing occurred at a late hour. Yet, except in a few instances, the Study in its final version closely tracks the draft study of the International Subcommittee published after its meeting in London on September 4 and 5, 1989, which was received here at the time of the MLA Fall Meeting in Orlando and subsequently distributed to the members of the Committee for their information and comment.

The final Study embraces the work of the International Subcommittee at its meetings in Knokke in April of 1989, in London in September of 1989, and in Paris in January of 1990. It is anticipated that the Study will be considered, debated and voted on by the national delegations at the Paris Plenary on three separate levels:

1. Do the eight topics (identity of the carrier; contracts and documents; deck cargo; period of application; exemptions from liability; limits of liability; deviation; and damages including damages from delay) exhaustively represent the area in which problems have arisen under the Hague-Visby Rules, or are there some that should be deleted from the list, and others that should be added?

2. As regards each of the subject matters to be discussed, do the delegates agree with the nature of the problems which have been identified, and how they should be solved?

*Exhibits E and F are attached to the original of this report and may be obtained on request.

3. To the extent that any need for a change is felt, what form should such change take (rules for voluntary adoption, a protocol to the Hague-Visby Rules, an entirely new convention)?

As reported earlier, and also pointed out in President Berlingieri's final report, the first meeting of the International Subcommittee of Knokke rejected the convention and protocol approaches. The second meeting of the International Subcommittee in London also rejected the rules-for-voluntary-adoption approach. The latter had been recommended by the International Subcommittee's Working Group at its meeting in Paris in June, 1989; however, its proposal was rejected by the International Subcommittee agreed upon at the Knokke meeting, i.e. that is the Hague-Visby Rules were found to be wanting in any way, the International Subcommittee should attempt to remedy the situation by "fine tuning" them.

With this history, it is interesting that at the third meeting of the International Subcommittee in Paris in January, 1990, the French delegation once again submitted a draft of rules for voluntary adoption. It appeared that this draft was prepared in considerable haste. Aside from any objections to it on substantive grounds, those attending the third session felt that because of the recent rejection of the working rule approach and the proximity of the Paris Plenary, it was entirely too late to abandon the study approach. Nevertheless, with many more national delegations expected to attend the Plenary than were represented at the meetings of the International Subcommittee, it is not improbable that the working rule approach will be resuscitated in Paris.

The Carriage of Goods Committee has studied UNIF-16 and UNIF-17 and agrees that all eight topics enumerated by the International Subcommittee should be further considered at the Paris Plenary. The Committee further agrees that with respect to all of these topics, there are areas which the Hague-Visby Rules do not, or do not sufficiently address, or where there are problems of interpretations.

a. On the question of identity of the carrier, the Committee agrees that recent commercial developments dictate a broadening of the definition of the contracting carrier and also make it desirable that the performing carrier be brought into the framework of uniform rules, and that the rights and obligations between it and the shipper/consignee be clearly spelled out.

b. On the question of contracts and documents, the Committee agrees that sea waybills are "documents of title" covered by the Hague-Visby Rules, likening them to straight bills of lading, as defined by the Pomerene Act.

c. Insofar as deck cargo is concerned, the Committee agrees that Article 1(c) of the Hague-Visby Rules does not address the problem of the carriage of containers on deck of a full container vessel, and that this gap should be filled. The Rules should also address the legal consequences of authorized on-deck carriage when compared with unauthorized on-deck carriage. Insofar as authorized on-deck carriage is concerned, the liability of the carrier to the consignee should be defined, to the extent that the consignee is not aware that the shipper had in fact authorized on-deck carriage.

d. Insofar as the period of application is concerned, the Committee agrees with the suggestion of the International Subcommittee that the period of responsibility should be made to coincide with the period of application. This suggestion appears to be entirely consistent with existing U.S. law. The restriction of "port limits" may require definition as a result of the recent establishment of inland "container ports", in some instances a considerable distance from an existing sea port.

e. On exemptions from liability, the Committee recommends that the distribution of risk evidenced in Articles 3(1) and (2) and Article 4(1-4) of the Hague-Visby Rules by retained, including the defenses of Error in Navigation, Error in Management, Fire and Salvage. Insofar as salvage is concerned, the Committee agrees with the suggestion of the International Subcommittee that this defense should be available to the carrier on all navigable waters.

The Committee has noted with some concern that in the final study, the reasoned recommendation of the London draft for retention of the error in navigation defense has been replaced by a mere recitation that the committee was split three ways on the issue (with a large majority favoring retention).

f. On the question of limits of liability, the Committee welcomes the decision of the International Subcommittee not to set specific monetary limits in deference to specific economic or equitable principles.

g. As regards deviation, the Committee agrees that because of the marked differences between Anglo-American law and Continental law, there is little hope that uniformity can be achieved. In any event, the re-working of the deck cargo rules may eliminate one principal reason for the application of the deviation doctrine, thereby limiting it to geographic deviation.

h. On the question of damages, the Committee disagrees with the International Subcommittee's suggestion that the Hamburg Rules constitute

a satisfactory solution of the delay problem. The Committee believes that with respect to recovery for either delay or economic loss, the parties to the transportation contract should be governed by the principle of freedom of contract.

Following a time-honored practice, the Executive Committee, at its meeting on May 3, 1990, has decided that the members of the U.S. Delegation to the Paris Plenary, who will be speaking for the MLAUS at the working sessions on Sea Waybills, Electronic Transfer for Rights to Goods in Transit, and Uniformity of the Law of the Carriage of Goods, shall be guided in their deliberations and votes by the stated policies of the Association.

Respectfully submitted,

Manfred W. Leckszas
Chairman

EXHIBIT A

REPORT OF THE SUBCOMMITTEE ON MULTIMODAL TRANSPORTATION

The Multimodal Subcommittee met at 3:00 PM on May 1, 1990. It discussed two clauses which could be used in multimodal bills of lading to reduce conflicts between ocean carriage governed by COGSA and inland carriage which might be governed by the Carmack Amendment. It also discussed one proposed clause to be used between the ocean carrier and other carriers in the multimodal system to attain the same goal. The Subcommittee recognized that this effort represented only the first step towards a solution. It did not address conflicts between U.S. law and the law of other countries in the multimodal system, no did it address problems created by non-vessel owning common carriers. The Subcommittee discussed proposed working of:

(1) A clause in the multimodal bill of lading to limit the carrier's liability both under Carmack and COGSA;

(2) A clause in the multimodal bill of lading to attempt to unify the standard of liability between COGSA and United States inland carriage; and

(3) A clause in the contract between ocean carriers and U.S. inland carriers to unify the time to commence suit of file claim against the ocean carrier and U.S. inland carriers.

The Subcommittee did not reach agreement on any wording and realized that more study is required.

The Subcommittee also discussed, in general, other methods which could be used to unify or make more predictable the various laws which govern multimodal shipments.

EXHIBIT B
REPORT OF THE SUBCOMMITTEE ON MARITIME FRAUD

This subcommittee, the latest to be created under the aegis of the Carriage of Goods Committee, is setting its agenda. It is looking to the possibility of developing a "white paper" that can serve as guidance to U.S. attorneys in the prosecution of maritime fraud cases. of setting up a data bank which may aid members in handling litigation involving maritime fraud; and to establish contact with official and private groups involved in the investigation, prosecution and documentation of maritime fraud.

The subcommittee chairman, William C. Bullard, has suggested that although in the past maritime fraud has frequently occurred in the issuance and transfer of documents in connection with the carriage of goods, the subcommittee's work is expected to involve increasingly other areas of maritime activity. Therefore, Mr. Bullard, with the backing of the Chairman, Manfred W. Leckszas, has suggested to President Palmer that the subcommittee be elevated to the status of a standing committee. Mr. Palmer has taken the matter under advisement, and it is expected that it will be discussed at the meeting of the Executive Committee on May 3, 1990.

EXHIBIT C
REPORT OF THE SUBCOMMITTEE ON SEA WAYBILLS

The Subcommittee on Sea Waybills has been closely following, and participating in, the CMI effort to find a single solution to the problems caused by the law of many countries, led by the UK, which requires the carrier to take up, in exchange for delivery of the goods, any document entitled "bill of lading". The requirement does not distinguish between negotiable and non-negotiable or "straight" bills of lading.

In theses days of faster ships and slower, mail, this problem has become increasingly important because, especially in the shorter trades such as in Europe, the cargo often moves faster than the papers can.

This is not a problem under U.S. law because our Federal Bills of Lading ("Pomerene") Act, 49 USC 81 et seq. provides that cargo carried under non-negotiable or "straight" bills of lading may be delivered to the named consignee without surrender of the paper. However, in international trade the Pomerene Act applies only outward, so the problem comes to us with the goods, and papers, from Europe.

The CMI proposal is to use a straight, or non-negotiable, bill of lading but to avoid the necessity of the carrier taking up the paper by calling it a "Sea Waybill".

The matter is complicated by the fact that the Hague Rules apply only to cargo covered by "a bill of lading or similar document of title". The only official text of the Hague Rules treaty is in French but the only text in force in the U.S. and, apparently in the UK is the English language version.

While may meetings have been held, and 86 formal documents have been written, it is expected that there be hard negotiating at Paris. It may be that two or more solutions will have to be worked out in order to find a single, uniform result, due to the varying national statutes.

It is your Subcommittee's recommendation that, so far as this point is concerned, our Association's delegation to the CMI Plenary Conference be authorized to agree on behalf of our Association to whatever solution may be found which, in the delegation's opinion, would be commercially acceptable and consonant with U.S. law.

EXHIBIT D
REPORT OF THE SUBCOMMITTEE OF ELECTRONIC CONTRACTS OF CARRIAGE

The Comité Maritime International (CMI) has undertaken the project of drafting voluntary rules for the electronic transmission of ocean bills of lading. Presently entitled "CMI Rules for the Electronics Transfer of Rights to Goods in Transit", these Rules, as the name implies, cover negotiable (and non-negotiable) bills of lading and their transfer by EDI (Electronic Data Interchange). The subject is being followed by this Subcommittee. Out delegate to the CMI on these rules has been part of the International Subcommittee's drafting group. This drafting group completed the final draft, as enclosed, this April for consideration by the CMI during the June, 1990 meeting in Paris.

These Rules, as presently drafted, are intended to duplicate exiting bill of lading practice. The heart of the Rules is the Private Key (Rule 8), which

is intended to be the replacement for the set of original paper bills of lading. The party to whom the Private Key is assigned, has the same legal rights as the holder of the set. When the holder electronically transmits instructions to the ocean carrier and verifies the message with the Private Key, transfer or delivery will proceed in accordance with those instructions.

Thus, when the transfer of rights to good takes place within the context of a Letter of Credit transaction, acceptance of the bills of lading based upon the description of the good, will be completed by transmittal of the new Private Key to the bank by the ocean carrier. The only significant change to existing practice is the verification of the description of the goods by the ocean carrier rather than the paper bill of lading - which should help to reduce some forms of bill of lading fraud. Accordingly, all transfers, to be effective, must take place through the ocean carrier, otherwise multiple parties would have the Private Key and access to the goods.

The advantages to such a system are that review of the bill of lading descriptions can be enhanced and automated, and that transfers will not suffer from the current delays. Where there are string transfers, the time lag is physically transferring the bills of lading can have serious consequences, particularly in the event of an intervening bankruptcy of one of the parties in the string. Inasmuch as the transfer would take place immediately upon acceptance of the description of the goods, a subsequent bankruptcy should have no effect.

It is recommended that, with regard to these Rules, our Association's delegation to the CMI Plenary Conference be authorized to agree on behalf of our Association to the formulation of such Rules consistent with the General Recommendation and to the extent that such Rules do not interfere with existing Bill of Lading Practice.

CMI RULES FOR THE ELECTRONIC TRANSFER OF RIGHTS TO GOODS IN TRANSIT

1. SCOPE OF APPLICATION

These rules apply whenever the contracting parties either by a prearranged code or otherwise agree to the application of the CMI Rules for the Electronic Transfer of Rights to Goods in Transit to their transaction.

2. DEFINITIONS

a. "Contract of Carriage" means any agreement to carry goods wholly or partly by sea.

b. "EDI" means Electronic Data Interchange, i.e. the interchange of trade data effected by teletransmission.

c. "UN/EDIFACT" means the United Nations Rules for Electronic Data Interchange for Administration, Commerce and Transport.

d. "Transmission" means one or more messages electronically sent together as one unit of dispatch which includes heading and terminating data.

e. "Acknowledgment" means a Transmission which advises that a Transmission has been received in good order, correct and complete in form.

f. "Confirmation" means a Transmission which advises that the content of a Transmission appears to be correct, without prejudice to any subsequent consideration or action that the content may warrant.

g. "Sender" means the party sending a Transmission, either directly or through a third party acting on the sender's behalf.

h. "Recipient" means the party to whom the Transmission is made, either directly or through a third party acting on the recipient's behalf.

i. "Private Key" means any technically appropriate form which the parties may agree for securing the authentication and integrity of a Transmission.

j. "Holder" means the party in actual possession of the Right of Control and Transfer as referred to in article 7.8. and entitled to a Private Key.

k. "Electronic Monitoring System" means the device by which a computer system can be examined for the transactions that it recorded, such as a Trade Data Log or an Audit Trail.

l. "Electronic Storage" means any temporary, intermediate or permanent storage of electronic data including the primary and the back-up storage of such data.

3. RULES OF PROCEDURE

a. When not in conflict with these rules, the Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission, 1987 (UNCID) shall govern the 'conduct between the parties.

b. The Electronic Data Interchange under these Rules should use the relevant UN/EDIFACT standards. However, the parties may use any other method of trade data interchange acceptable to all of the users.

c. Unless otherwise agreed, a Recipient is not authorized to act on a Transmission unless he had transmitted an Acknowledgment of a Confirmation.

d. In the event of a dispute arising between the parties as the data actually transmitted, an Electronic Monitoring System may be used to verify the data received. Data concerning other transactions not related to the data in dispute are to be considered as trade secrets and thus not available for examination. If such data are unavoidably revealed as part of the examination of the Electronic Monitoring System, they must be treated as confidential and not released to any outside party or used for any other purpose.

e. Any transfer of rights to the goods in transit shall be considered to be private information, and can not be released to any outside party not connected to the transport or clearance of the goods.

4. FORM AND CONTENT OF THE RECEIPT MESSAGE

The carrier of its agents or representatives, upon receiving the goods from the shipper, or those acting on the shipper's behalf, shall give notice of the receipt of the goods to the shipper or the party designated by the shipper by a message at the electronic address specified by the shipper. This receipt message shall contain: (i) the description of the goods, possible reservations and representations, in the same tenor as would be required if a paper bill of lading were issued; and (ii) the Private Key to be used in subsequent Transmissions. The information contained in (i) above shall have the same force and effect as if the receipt message were a paper bill of lading. The Recipient must confirm the receipt message to the carrier, upon which Confirmation the Recipient of the receipt message shall be considered the Holder.

5. TERMS AND CONDITIONS OF THE CONTRACT OF CARRIAGE

a. The message containing the acceptance of the initial booking by the carrier shall include a reference to the terms and conditions which would have applied if the customary written document had been issued. By making such reference these terms and conditions form part of the Contract of Carriage, provided that such terms and conditions are (or have been) made readily available to the parties involved in the transaction. In the event of any conflict or inconsistency between such terms and conditions and these Rules, these Rules shall prevail.

b. The date and place of issue of the Contract of Carriage shall be deemed to be the date and place of the receipt of the goods by the carrier.

c. Unless the parties otherwise agree, the document format for the Contract of Carriage shall conform to the UN Layout Key or compatible national standard for ocean bills of lading.

6. APPLICABLE LAW

The Contract of Carriage shall be subject to any international convention or national law which would have been compulsorily applicable if the Contract of Carriage had been in the form of a paper bill of lading.

7. RIGHT OF CONTROL AND TRANSFER

a. The party entitled to the Right of Control and Transfer of goods during transit may, as against the carrier and subject to the terms and condition of the contract:

(1) nominate the consignee or substitute a nominated consignee for any other party, including itself;

(2) split a consignment of goods while stating the consignee for each part of the goods;

(3) give or modify instructions as to the delivery of the goods;

(4) request delivery of the goods before their arrival at the destination;

(5) transfer the Right of Control and Transfer to another party;

(6) instruct the carrier on any other subject concerning the goods, provided the carrier expressly agrees.

b.The execution of the instructions described in the previous paragraph under (1) - (4) must be possible at the moment that they reach the party under the duty to carry them out and may not interfere with the normal business of the carrier or any party interested in other goods carried on the same voyage. Otherwise, it any additional costs occur due to the carrying out of such instructions, the party giving such instructions shall compensate the carrier for such additional costs. If the vessel or cargo has been directed to a port other than originally contracted for, the party requesting such diversion shall pay the carrier a reasonable remuneration and the party requesting the diversion has confirmed its instructions notwithstanding such notice.

c. Any such transfer of the Right of Control and Transfer shall be effected: (i) by notification of the current Holder to the carrier of its

intention to transfer its Right of Control and Transfer to a new Holder, and (ii) Confirmation by the carrier of such notification message, whereupon (iii) the carrier shall transmit the information as referred to in article 4 and 5 to the new Holder, whereafter (iv) the new Holder shall advise the carrier of its acceptance of the Right of Control and Transfer, where upon (v) the carrier shall cancel the current Private Key and issue a new Private Key to the new Holder.

d. If the new Holder advises the carrier not to accept the transfer or the Right of Control and Transfer or fails to advise the carrier of such acceptance within a reasonable time, the transfer of the Right of Control and Transfer shall be deemed not to have taken place.

The carrier shall notify the current Holder accordingly and the current Private Key shall retain its validity.

e. The transfer of the Right of Control and Transfer in the manner described above shall have the same effect as the transfer of a paper bill of lading.

8. **THE PRIVATE KEY**

The Private Key is to be a combination of numbers and/or letters unique to each successive Holder of a Contract of Carriage. It is not transferable by the Holder. The carrier and the Holder shall each maintain the security of the Private Key. The carrier shall only be obligated to make Acknowledgment or Confirmation of an electronic message to the last Holder to whom it issued a Private Key, when the Transmission is made by the last Holder and secured by the use of the Private Key issued by the carrier to that Holder., The Private Key must be separate and distinct from any means used to identify the Contract of Carriage, and any security password or identification used to access the computer network.

9. **DELIVERY**

a. The carrier shall, before the goods arrive at the place of destination, notify the Holder of the place and date of intended delivery of the goods. Upon such notification the Holder has a duty to nominate a consignee and to give adequate delivery instructions to the carrier with verification by the Private Key. In the absence of such nomination, the Holder will be deemed to be the consignee.

b. The carrier shall deliver the goods to the consignee or the consignee's representative upon production of proper identification in accordance with the delivery instructions specified above in paragraph (a).

c. The carrier shall incur no liability for wrongful delivery if it proves

that it exercised reasonable diligence to deliver in accordance with the delivery instructions and to ascertain that the party claiming to be the consignee or its representative was in fact such party.

10. PARTIES TO THE CONTRACT

The parties sending and receiving data are to be regarded as parties to the Contract of Carriage effected by the Electronic Data Interchange.

11. OPTION TO RECEIVE A PAPER DOCUMENT

a. The Holder has the option at any time prior to delivery of the goods to demand from the carrier a paper document evidencing the Contract of Carriage. Such document shall be made available at a location to be determined by the Holder, provided that no carrier shall be obligated to make such paper document available at a place where it has no facilities and in such instance the carrier shall only be obliged to make the paper document available at the facility nearest to the location determined by the Holder. The carrier shall not be responsible for delays in delivering the goods resulting from the Holder exercising the above option.

b. The carrier has the option at any time prior to delivery of the goods to issue to the Holder a paper document evidencing the Contract of Carriage, unless the exercise of such option could result in undue delay or disrupts the delivery of the goods.

c. Such substitute paper document shall state the same description of the goods, including possible reservations and representations, and the date and place of issue as contained in the electronic Contract of Carriage which it replaces.

d. The issue of a paper document evidencing the Contract of Carriage shall cancel the Private Key and terminate the procedures for Electronic Data Interchange under these Rules. However, the parties may, at any time, agree to print out copies of the Contract of Carriage for special purposes (i.e. Customs, etc.) without interrupting these procedures. Termination of these procedures by the Holder or the carrier will not relieve any of the parties in privity to the Contract of Carriage of their rights, obligations or liabilities while performing under the present Rules nor of their rights, obligations or liabilities under the paper document evidencing the Contract of Carriage.

12. ELECTRONIC DATA IS WRITING

The carrier and the shipper and all subsequent parties utilizing these procedures agree that any national or local law, custom or practice requiring the Contract of Carriage to be in writing and signed, is satisfied by the transmitted and confirmed electronic data residing on computer data storage

media displayable in human language on a video screen or as printed out by a computer. Any party attempting to avoid this contract with the defense that this contract is not in writing in the traditional sense or is not otherwise tangible, after first using these procedures, but not having exercised the option for a paper document, shall be estopped from utilizing such a defense.

FORMAL REPORT OF THE COMMITTEE ON COMPULSORY DISPUTE RESOLUTION

During the course of our meeting, Robert Marzik, presented copies of the Rules and a memorandum to counsel concerning the Summary Jury Trial Procedure utilized by Magistrate Eagen of the United States District Court in Hartford, Connecticut. He noted that Magistrate Eagen was very supportive of this type of compulsory dispute resolution and further noted that more than 90% of the cases using this procedure settled as a result.

It generally involves counsel summaries and comments on the evidence and law of a particular case to a jury and a subsequent jury's decision on this presentation. No testimony is taken from sworn witnesses, however, counsel may re-state the anticipated testimony of trial witnesses and are free to produce and introduce exhibits for the jury. Selection of the jury and the actual trial proceeding is normally concluded in one day.

One week prior to trial an evidentiary pre-trial is conducted, at which time proposed exhibits are marked and any rulings on the admissibility of evidence is made by the presiding judicial officer. At the actual summary jury trial, attendance by the clients or a representative is expected and is essential. Counsel's presentations, which are normally limited to one and one-half hours, must be supportable by references to discovery material, including deposition, stipulations, signed statement of witnesses, or by professional representation that counsel personally spoke with the witness and is repeating what the witness stated.

Exhibits which are submitted to a jury must have been approved as admissible by the presiding judicial officer. Counsel may stipulate that a consensus verdict by the jury will be deemed a final determination on the merits, but normally the outcome of the case does not limit the parties from a full trial *de novo* on the merits.

The Chairman of the Committee also summarized the report of the Federal Court Study Committee insofar as it related to alternative dispute resolution of cases. This generally recommended that Congress should broaden statutory authorization for local rules for alternative and supple-

mentary procedures in civil litigation, including rules for cost and fee incentives. This should specifically eliminate any doubt that all federal courts may adopt local rules establishing dispute resolution mechanisms that complement or supplement traditional civil pre-trial, trial and appellate procedures.

This should also permit but no require District Courts to include in their local rules mandatory mechanisms such as mediation, early neutral evaluation, and Court-annexed arbitration, with limitations on types of cases submitted to mandatory reference and authorization for motions to exempt cases from an otherwise mandatory procedure. The legislation should also forbid the creation of financial incentives in mandatory initial ADR proceedings (except as a sanction for misconduct), but permit experimental use of cost and fee incentives for parties who reject arbitration hearing awards and fail later to improve on them.

The Committee also requested Congress to authorize and provide funds for sustained experimentation with alternative and supplementary techniques, subject to guidelines stated in the report and other limitations which Congress may deem advisable.

The Committee also recommended that the Federal Judicial Center should establish a committee to provide advice and guidance to Courts about alternative dispute resolution. Its membership should include practitioners experienced in such alternative devices, dispute resolution specialists, and thoughtful skeptics.

It was unanimously decided by those attending this meeting that our Committee should follow up with the recommendations proposed and also seek to have input into any Committee which may be established by the Federal Judicial Center.

RAYMOND T. LETULLE,
Chairman

FORMAL REPORT OF THE COMMITTEE ON ECONOMIC REGULATION OF OCEAN COMMON CARRIERS

The Committee on Economic Regulation of Ocean Common Carriers has held two meetings since the last meeting of the Association. On December 5, 1989, the Committee met at the offices of the United Shipowners' of America in Washington, D.C. for an all day meeting with speakers and lunch. The Committee first reviewed its relationships with other committees of the Maritime Law Association, the possibility of forming

new subcommittees and an outline of future programs. It then heard in the morning from Donald O'Hare, an attorney from Sea-Land Service, Inc. whose duties embrace following those international agencies which affect shipping: UNCTAD, GATT, OECD, The European Common Market and the International Chamber of Commerce. He reviewed the current state of the UNCTAD Liner Code and the procedural issues which are currently blocking the scheduled review conference. Among the principal issues are whether nonsignatories to the code may participate and whether such nonsignatories can vote on any new amendments to the code. Group B, which includes the Western nations, favors participation by the United States, including a voting participation in the review conference. As a result of the impasse when the question of participation and voting was last considered, a small committee was appointed whose duties included resolution of the procedural impasse. No resolution has been reached. Mr. O'Hare also discussed the current state of EEC regulation and the further questions, whether so-called "outsider agreements" would be approved or permitted under the competition rules of the EEC and whether "consortia" would receive a block exemption. Discussions also took place on whether shipping should be included in the so-called Uruguay Round which is taking place under the auspices of GATT.

After lunch, the Committee was addressed by Gerald Siefert, General Counsel, Maritime Policy of the Committee on Merchant Marine and Fisheries of the House of Representatives. He reviewed the current state of legislation, the status of the Advisory Commission, which was authorized under the Shipping Act on 1984 and the reports on that Act of the Federal Maritime Commission, the COT, The Federal Trade Commission and the Department of Justice. The Committee also reviewed current legislation.

On May 3, 1990, the Committee again met in New York. At that time it noted that no progress has as yet been made with respect to the issues before the EEC; that the procedural deadlock with respect the UNCTAD Liner Code Review conference was still in effect and that the United States and other countries had not yet resolved the issue of whether to include shipping as a service under the Uruguay Round. In particular, it noted that the EEC was still considering how to treat "outsider agreements" and was still reviewing a proposed regulation with respect to "consortia". The status of the review of the Shipping Act of 1984 was also considered, including the reports of the Department of Justice and of the Federal Trade Commission which became available in the first part of 1990. As of the date of the Committee meeting, the members of the Advisory Commission had not yet been appointed. The Committee also noted and reviewed legislation which and been introduced in the House of Representatives which would subject

vessels to forfeiture if they had called at Cuba within the preceding six (6) months. In that connection, the Committee noted at Aide Memoire which had been submitted by the Consultative Shipping Group consisting of the European community, 11 European nations and Japan opposing the proposed legislation.

Members of the Committee further reported upon the efforts to increase the membership of the committee.

Respectfully submitted,

Russell T. Weil
Chairman

FORMAL REPORT OF THE COMMITTEE ON INTERGOVERNMENTAL ORGANIZATIONS OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

SUMMARY

In early 1990, the relationship of the United States with those intergovernmental bodies concerned with maritime legislation was heavily influenced by (1) the United States' domestic oil spill debate and (2) the continued unwillingness of Congress to fully pay the U.S.' dues to the specialized agencies of the United Nations. A third factor contributing to the unsettled maritime climate both in Washington and abroad is the recent spate of fires aboard passenger vessels (including SCANDINAVIAN STAR, April 7, 1990), together with reaction to last year's EXXON VALDEZ incident, which has given rise to concerns that port state controls on environmental and safety matters are not sufficient. New European Community proposals on port state control are being developed and the United States is expected to be in the forefront of new passenger ship safety initiatives in the IMO, although as of May 3, 1990, these had not yet been submitted. This report touches upon possible future legal developments which, while speculative, need in our opinion to be mentioned in the event that Congress fails to adopt the 1984 Protocols to the 1969 oil spill Civil Liability and 1971 Fund Conventions. Finally (4) shipping is part of the $600 billion in international trade in services included in the GATT Uruguay Round, which is scheduled to end in December. Maritime interests around the world continue to press for exclusion of shipping from any

services agreement. If it is included, however, Maritime programs and regulatory regimes of the U.S. and its trading partners could be dramatically altered.

SELECTED INTERGOVERNMENTAL MEETINGS OF IMPORTANCE, 1990

- IMO Preparatory meeting for the International Conference on International Co-operation of Oil Pollution Preparedness and Response London, May 14 - 18, 1990.
- OECD Special Group on International Organizations, June 5 - 6, 1990, Paris.
- OECD Maritime Transport Committee, June 7 - 8, 1990, Paris.
- UNCTAD Committee on Shipping (14th Session), Geneva:

  June 21 - 29, 1990. Topics: Multimodal and Intermodal Transport Future Work Programme, Future Work on Hamburg Rules.
- UNCTAD Possible two-day Conference on Liner Code Rules of Procedure either 2 days prior or two days after Committee on Shipping (See above).
- UNCTAD Working Group on International Shipping Legislation (WGISL); Subject: Charter Parties, etc. Dates: October 22 - 30, 1990, Geneva.
- UNCTAD Possible Liner Code Resumed Session of Review Conference (contingent upon agreement on Rules of Procedure), November 5 - 23, 1990
- IMO Maritime Safety Committee, 58th Session, London, May 21 - 25, 1990.
- IMO Council, 64th Session, London, June 11 - 15, 1990.
- IMO [DATE TENTATIVE, subject to Council approval] International Conference on Co-operation on Oil Pollution Preparedness and Response, London, November 19 - 23, 1990.
- IMO Council, 65th Session [DATE TENTATIVE, 30th Session, London, November 12 - 16, 1990.

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1. The International Maritime Organization (IMO)

For the first time in more than sixteen years, the IMO acquired a new Secretary General, Mr. C. P. Srivastava having retired as of January 1, 1990, and been succeeded by Mr. William A. O'Neil. Mr. O'Neil was previously Director of the St. Lawrence Seaway Authority of Canada. Among other noteworthy developments, the United States signed the 1989 Convention on Salvage, signifying intent to ratify, on February 29, 1990.

a. 1990 Athens Protocol

On March 30, 1990, the IMO concluded work on a Protocol to the Athens Convention Relating to Carriage of Passengers and Their Luggage By Sea, 1974. This Protocol sets forth substantially increased limitation amounts for loss of life, personal injury and the loss or damage to the property of passengers, viz., 175,000 SDR^{s} for loss of life and personal injury; 1,800 SDR^{s} for vehicular damage. The limits set for loss of life, personal injury and damage to vehicles are somewhat higher than what could have been anticipated during debate in the IMO legal Committee. That debate had given some indication that the European states party to Athens 1974 favored doubling the existing per-passenger limits for loss of life and personal injury, to a level of between 100,000 and 150,000 SDR^{s}, with approximate doubling with respect to the other limitation categories.

The 1990 Protocol allows agreements between vessel operators and passengers, setting deductibles not to exceed 300 SDR^{s} for damage to vehicles, and 135 SDR^{s} for damage to luggage, representing an increase over their 1974 counterparts of 117 and 13 SDR^{s}.

The 1974 Convention required 10 ratifications for entry into force. As part of a compromise, consisting of a "personal deal" on the limitation figure of 175,000 SDR^{s} for loss of life and personal injury, the OECD countries agreed to the same number - minimum of 10 ratifications -- for entry into force of the 1990 Protocol, which was the price of support by African, Asian and Latin American delegations for these higher limits; most European states had favored a lower entry-into-force provision. As part of this compromise, Denmark did not press forward with an earlier proposal that States party be allowed to set an "automatic" deductible under the Athens Convention, instead of having to obtain the consent of each passenger for its application.

b. Consideration of Possible Compensation Convention on Carriage of Hazardous and Noxious Substances By Sea (HNS)

At its 61st Session, in September of 1989, the IMO legal committee reaffirmed its previous commitment that top priority would be given to preparation of a draft Convention on liability and compensation in connec-

tion with the carriage of hazardous and noxious substances (HNS). The IMO Council and Assembly have ratified this decision.

The 62nd Session of the Legal Committee of the IMO (April 2 - 6, 1990) took place in the shadow of doubts as to the future of efforts to secure ratification by the United States of the 1984 Protocols to the 1969 Oil Pollution Civil Liability and 1971 Fund Conventions. The possibility has demonstrated the lack of coordination and coherence in the International structure of compensation for shipborne pollution damage, and also has served to highlight the wide philosophical gap between the coastal states of the European Community, on the one hand, and the United States on the other.

A further factor apparent in this Session was the existing low level of compensation for maritime claims made possible under the 1976 London convention on Limitation of Liability for Maritime Claims. This clearly influenced the desire of some States to establish a new regime, ostensibly governing liability and compensation for the carriage of hazardous and noxious substances by sea (HNS).

While a possible Convention on HNS would govern compensation for damage caused by chemicals and other toxic or hazardous man-made substances, it did become clear during the course of the April session that some delegations desire that oil pollution compensation be included within its scope. This significant development would appear to anticipate the legal situation that will arise upon the likely failure of the United States Congress to ratify the 1984 Protocols.

By the close of the 62nd Session, it was apparent that the Legal Committee favored a "two-tier" HNS compensation system, consisting of:

1. Strict shipowner liability resting upon a specific Civil Liability Convention dealing with HNS (possibly including both crude and refined oil products); and

2. An "International Insurance Scheme," designed to cover those claims exceeding the limit of the vessel owner's liability, and which would comprise insurance cover purchase on the international market and paid for by a levy imposed upon cargo.

Comprehensive proposals were put before the Committee by the United Kingdom, Netherlands and Norway. The trend of discussion indicated that a proposed convention may not be limited to catastrophic incidents only, and that it therefore could "stand alone," with linkage to the 1976 London Limitation Convention.

The IMO in the 1990s

The development of a long-term agenda for the IMO has been burdened by uncertainty over whether money will be available to fully fund the proposed work of the Organization. At the present time a number of members are in arrears on dues, including the United States, Liberia and Panama, a state of affairs caused in part by inability, and in part by unwillingness to pay. There is growing criticism that the existing formula for computation of dues -- based *inter alia* on vessel tonnage under a member's flag -- has led to some imbalance, depending on the viewpoint of the country concerned. This attitude, while not yet pervasive at IMO, may pose some risks to the Organization's future. The IMO has the necessary drawback, like all UN agencies, of being an association of governments, whose working delegations are primarily made up of government officials; it follows that governments are by their nature slow to respond to changing safety and environmental conditions. In particular, observers have noted that while shipping is overwhelmingly a private business, its chief international regulatory agency is one in which the voices of governments predominate.

At the same time, the ability of the IMO to take difficult or controversial decisions is hampered by the "outsider" role of its less-developed or developing "silent majority" member States. This was strikingly shown at the 1984 Diplomatic Conference, when a large number of developing countries appeared and exercised their power to prevent adoption of a draft HNS Convention. To this day, the support of developing countries for IMO, a critical factor for the survival of a United Nations agency, is not conspicuous. The failure of the 1984 HNS draft is a warning that the IMO must do more to earn the institutional loyalty of a majority of its members, and the support of the world maritime community than it has yet done. This Committee is mindful that its first Report, submitted in October, 1981, dealt largely with IMO's work on a draft HNS Convention. The present Report, nearly nine years later, deals in part with the same subject. While it would be unfair to criticize the Organization for this state of affairs, it is the opinion of many observers that a second failure to reach an HNS agreement -- though a remote prospect--cannot be ruled out.

There is no clear consensus within the IMO on where its future efforts should be focused. While primarily concerned with safety at sea and the marine environment, its alleged legislative shortcomings have not unnaturally been criticized by some of its members. It has been generally agreed by the IMO Council that securing the implementation of existing instruments should take priority in the Organization's future work program, a view also often expressed by its new Secretary-General. IMO's financial crisis gives it little choice.

2. United Nations Conference on Trade and Development (UNCTAD)

The Fourteenth Session of UNCTAD's Committee on shipping will meet June 21 - 29, 1990 in Geneva, during a time of political change occasioned by the disintegration of Group D, or as it used to be termed, the East Bloc. UNCTAD meetings within recent months have been enlivened by the refusal of Poland, Hungary and Czechoslovakia to be counted as being a part of Group D during the March meeting of the Trade and Development Board, although as yet the Soviet Union does not appear to desire to stand as a separate "Group," in the manner of the People's Republic of China.

The Shipping Committee will take up the general subject of Model Rules dealing with Multimodal Transport (cf. the 1978 UNCTAD Convention of that subject); intermodal transport; the state of acceptance of the Hamburg Rules; and proposals for the organization's future work programme. Among items definitely in prospect are Charter Parties, which will be taken up by UNCTAD's Working Group on International Shipping Legislation (WGISL), meeting in Geneva from October 22 - 30, 1990.

The Code of Conduct for Liner Conferences faces a possible resumed session of the Review Conference from November 5 - 23, 1990, also in Geneva, contingent on results of a likely two-day meeting on Rules of Procedure, just before or just after the June meeting of the Committee on Shipping. The Group of 77 (Developing Countries) is said to be stalled on terms for the Review Conference by the failure of the African Group to agree, as yet, on whether it wants a review at all. The agreement of Group B (the OECD countries) to participate in the procedural meeting has already been signalled.

The UNCTAD Shipping Committee, when it meets in June, will have before it the following documents:

Item 3: Multimodal Transport

"The Economic and Commercial Implications of the Entry in Force of the Hamburg Rules and the United Nations Convention on International Multimodal Transport of Goods"

TD/D/C4/315 - Part I (31st December 1987)
Part II (10th November 1989)

"Inventory of existing mandates and new draft programme of work in the field of multimodal transport and technological development" (TD/D/C,4/329)

"developments in multimodal transport" TD/D/C,4/328

Item 4: Economic co-operation among developing countries

For reference:

"Report of the group of experts on economic co-operation among developing countries in shipping, ports and multimodal transport" TD/B/C.4/321 - TD/B/C.9/AC. 10/3)

"Economic co-operation among developing countries in the field of shipping, ports and multimodal transport - overview of recent developments" (TD/B/C.4/332)

Item 5. Work Programme on shipping

For reference:

"Review of the work programme of the Committee on shipping, the implementation of decisions relating thereto and proposals for further work" (TD/B/C.4/335)

"Final report of the joint intergovernmental group of experts on maritime liens and mortgages and related subjects" (TD/B/C.4/327 - TD/B/AC.8/27

"Evaluation of technical assistance and training activities" (TD/B/C.4/331.)

3. General Agreement on Tariffs and Trade (GATT)

GATT negotiations on a framework agreement to reduce barriers to trade in services continue in Geneva. The Uruguay Round, of which the services talks are a part, is scheduled to be concluded at the end of this year. U.S. maritime interests continue to press the U.S. Government to exclude shipping from any services agreement. The draft text of the General Agreement on Trade in Services (GATS) remains heavily encased in square brackets, after the May 9 - 11 meeting of the Group for Negotiation on Services (GNS). The text contains a bracketed provision proposed by the U.S. which would permit countries to exclude service sectors from coverage by the agreement.

At the May GNS meeting, several sectoral working groups, including one on shipping, were established. A meeting of the working group on shipping will be held in Geneva on July 2 -3. The U.S. formal position remains that all sectors are included, but last year the U.S. submitted a paper to the GNS detailing the problems of applying a GATT to shipping and aviation.

4. The European Community

The EEC continues to discuss the possibility of a "Euros" flag, as a sort of parallel registry. This would allow access to member states' cabotage trades, if adopted.

The European Commission is involved in three investigations based on the 1986 competition regulation. Each of the three issues could potentially bring EC competition policy into conflict with the U. S. Shipping Act of 1984.

a. Eurocorde - The Competition Directorate (DG-IV) of the EC is in the process of considering Eurocorde after new outsiders were brought in and the Agreement is in the process of discussing with DG-IV certain conditions under which Eurocorde would be granted the exemption. European shippers have also indicated that they would oppose any stabilization agreements in the US/Europe/Far East Trades.

b. Consortia - The EC (DG-IV) is involved in a study of shipping consortia and how the competition regulations will apply to them. DG-IV will prepare a report on the issue for presentation to the Council of Ministers sometime this year. In dealing with this issue, DG-IV must define what constitutes a consortium, and what practices a consortium may perform in order to qualify for an exemption under the competition regulation.

c. **Inland Rates** - European shippers last year filed a complaint with the Commission against the Far East Freight Conference (FEFC) setting of inland rate for intermodal shipments. Again DG-IV is reviewing the situation and will probably be rendering a decision this year, and this could lead to a review of intermodal rate-making in the US/Europe trade.

5. US/CSG

The U. S. governments of the Consultative Shipping Group (Europe and Japan) met in Oslo on April 25 - 26, 1990 for discussions on shipping policy. A communique issued after the talks reported as follows:

a. Discussions on shipping policy have taken place between representatives of the countries of the Consultative Shipping Group (Belgium, Denmark, Finland, France, Federal Republic of Germany, Italy, Japan, Netherlands, Norway, Spain, Sweden and the United Kingdom), the European Community and the United States in Oslo on the 25 and 26 of April, 1990.

b. The representatives expressed their sympathy with the Norwegian and Danish people following the tragic loss of life in the recent incident involving the SCANDINAVIAN STAR and stressed the importance at all times of full adherence to internationally agreed maritime safety standards.

c. The Governments and the Commission of the European Community reaffirmed their policies to safeguard and promote competition in all sectors of ocean shipping and to maximize the amount of cargo subject to competitive access, as articulated at Copenhagen in April 1986.

d. The participants renewed their opposition to protectionist policies of third countries, and agreed to continue to act in concert against such measures where appropriate. In doing so, they concluded that the consideration of shipping in the GATT's Group of Negotiations in Services should fully reflect the long history of international treatment of maritime problems and guard against any endorsements of existing restrictive practices.

e. In noting the varying degrees of progress being made in economic reform in Eastern Europe, they agreed that they should encourage the liberalization of the economies and maritime trading practices of the East European countries, and observed that work is currently taking place on this issue in the OECD.

f. They recognized the strong interaction between shipping policy and competition policy and endorsed the need for co-operation and close consultation both in the application of existing regulatory arrangements and in their future development, so as to establish a certain legal framework for carriers and shippers alike.

g. In the light of recent tanker accidents, the representatives of the European shipping nations, the European Commission and the United States agreed the urgent need to take steps to up-date and improve the worldwide regime for oil spill liability and compensation. Representatives agreed that the key to doing this was to bring into force the 1984 Protocols agreed in the International Maritime Organization.

6. Organization For Economic Cooperation and Development (OECD)

The OECD Special Group on International Organizations (SGIO) will meet in Paris on June 7-8, 1990 and the Maritime Transport Committee (MTC) will meet on June 9-10, 1990. Following are key agenda items for both meetings.

SGIO:

- Preparation for the U. N. Liner Code Convention Review Conference
- Preparation for the 14th Session of the UNCTAD Committee on Shipping

MTC:

- EEC Shipping Policy
- U. S. Shipping Policy
- Shipping Relations with East European Countries
- GATT Trade in Services

7. **United Nations Commission on International Trade Law**

At its twenty-second session, held in Vienna from May 15 to June 2, 1989, the United Nations Commission on International Trade Law (UNCITRAL) adopted the text of a draft Convention on the Liability of Operators of Transport Terminals in International Trade. The Convention will be taken up as a diplomatic conference to be held in Vienna from April 2 -19, 1991. In advance of that conference, the U.S. Government will be submitting written comments to UNCITRAL which will, together with the comments received from other countries, constitute a preliminary exchange of views to facilitate the negotiations. Interested parties (including the MLA) will have an opportunity to offer input to the U.S. Government in connection with its preparation of such written comments.

FORMAL REPORT OF THE COMMITTEE ON INTERNATIONAL LAW OF THE SEA

The international Law of the Sea Committee met on May 3, 1990, at the offices of Hill Rivkins Loesberg O'Brien Mulroy & Hayden with 19 members present.

The meeting opened with a review of the highlights of the Fall Meeting - 1989 by our Vice-Chairman, Winston Rice, for the benefit of those committee members who did not attend. Mr. Rice presided at the LOS committee meeting in Florida, where he and our Association president arranged for Professor Anatoly Kolodkin to address our committee on the position on the convention by the Soviet Union. Mr. Rice noted his views are similar to those of the United States in regard to the Convention provisions regarding underseas development for mining.

Professor Menefee joined the meeting by telephonic link and reported on his sub-committee's activities. From their discussion in Washington, D. C. with State Department spokesmen, it was noted the U.S. position had not changed since first assessed by this Committee. He reported the U.S. is satisfied with the status quo prevailing until a reasonable compromise on sea-bed mining can be reached. The ABA position was discussed along with cutting from the treaty the sea-bed mining issue.

Another old hand in the LOS business, but new to our committee, was most welcome and helpful at our meeting, Professor Gerard Mangone. He compared the old and new look at developing nations on the part of the U.S.S.R. and the key words were "former solicitude". The Professor cautioned the U.S. should finesse the treaty until action is warranted.

Member Bruce Alexander presented a scholarly report prepared on the "National Historic Preservation Policy Act of 1989" (S. 1579) designed to preserve archaeological artifacts. While the bill may be flawed to the extent there is no ownership of the land underneath, we were kindly led through the Law of Finds.

The Chairman of our Underseas Mining and Exploration Sub-Committee has advised us he will determine if there is any underseas mining activities being undertaken now or in the foreseeable future in Antarctica and confirm our previous understanding that there was none. He also advised he will be formulating an agenda for the coming years and will incorporate suggestions from former Chairman Richard Brown.

Committee member James Sutherland discussed local indemnity legislation and developments by Exxon on seabed exploration and he will continue to keep us advised.

The meeting adjourned after consideration of these matters and the membership will continue to monitor on behalf of the Association.

Respectfully submitted,

MARTIN B. MULROY, Chairman

FORMAL REPORT OF THE COMMITTEE ON MARINE FINANCING

Richard Barnett called the Committee Meeting to order on May 2, 1990 at 2:30 P.M. at the offices of Haight, Gardner, Poor & Havens, 195 Broadway, New York, New York. The members of the Committee and additional members of the Association listed on Exhibit A* to these minutes were in attendance. The agenda of the meeting is set forth as Exhibit B hereto.

*Exhibits A – G are attached to the original of this report and may be obtained on request.

Technical Corrections Act

David McI. Williams reported that on December 12, 1989 legislation making technical corrections to the 1988 recodification of the Ship Mortgage Act (Public Law 100-710, 102 Stat. 4735) (the "Statute") was enacted as Title III of the Coast Guard Authorization Act of 1989 (Public Law 101-225, 103 Stat. 1908) (the "TCA"; copy attached as Exhibit C).

Mr. Williams summarized the more important issues covered by the TCA, as follow:

(i) **Enforcement of Preferred Mortgages on Foreign Vessels** - Subsection 31325 (b) of the Statute has been amended to include therein an express reference to foreign vessels in providing for the enforcement of a preferred mortgage lien in a civil action in rem in a U.S. District court.

(ii) **Declarations of Citizenship** - Section 31306 of the Statute has been amended to permit the Secretary of Transportation to waive the requirement of the filing of a declaration of citizenship in connection with the recording or filing of an instrument transferring an interest in a vessel.

(iii) **Vessels Eligible for Documentation** - The TCA establishes a moratorium on the requirement that a certificate of title be surrendered before a vessel is eligible for documentation by providing that the amendments made to the matter preceding paragraph (1) of 46 U.S.C. Section 12102 (a) are inapplicable to a vessel titled in a State until one year after the Secretary of Transportation prescribes guidelines for a titling system under 56 U.S.C. section 13106(b)(8).

One of the requests made by the Committee which has not been included in the TCA is a clarification that the rights and remedies provided under subsection 31325(b) do not preclude the use of other lawful rights and remedies available under the mortgage and/or applicable law (e.g., extra-judicial self-help remedies under state law and foreign foreclosure proceedings where a vessel is located in a foreign jurisdiction). David McI. Williams explained that, at the time of the hearings on the TCA held on October 25, 1989, the TCA did not include language suggested by the Committee in respect of this issue. Discussions occurring after the hearing resulted in such a clarification, in the form of a proposed new subsection 31325(f), being incorporated in the next draft of the proposed technical amendments.

Said draft, however, also included two controversial provision. One controversial provision was a proposed amendment to Section 31343 of the Statute which would have permitted the recording of a notice of a claim of lien against any documented vessel, as opposed to being limited to vessels

covered by preferred mortgages. The second controversial provision was the addition of a new Section 31344 which would have required an action to enforce a maritime lien (except a preferred mortgage lien) to be brought within three (3) years after the day when the lien arose. Although the Maritime Law Association had authorized support for a uniform three-year national statute of limitations for all admiralty and maritime claims by unanimous resolution (Document No. 647, May 6, 1983), our Committee recognized these changes in lien law as controversial and at the hearing on the TCA on October 15, 1989, we did not support them. (See Document No. 681, 9538-9541, October 17, 1989.) Nevertheless, they remained in the Bill as it was passed by the House on November 20, 1989. Ultimately, the provision for a limitations period on the enforcement of maritime liens met with strenuous opposition from the National Association of Stevedores. As a result of that Association's eleventh hour lobbying efforts, both controversial provisions were dropped from the TCA and do not appear in the text approved by first the Senate and then the House on November 21, 1989. The language requested by our Committee in the proposed new subsection 31325(f) to clarify the availability of other remedies was deleted as part of this package even though it was not viewed as controversial. Compare 135 Cong. Rec. H9178-79, H9183 (daily ed. Nov. 20, 1989) with 135 Cong. Rec. S16,832 (daily ed. Nov. 21, 1989 and 135 Cong. Rec. H9307-8 (daily ed. Nov. 21, 1989).

A subcommittee has since been formed to study the three (3) year limitation period. Although this is not an issue of major importance to our Committee, we intend to monitor it to assure that the final version of this provision does not adversely affect preferred mortgages or the ability of mortgagees to enforce them.

The clarification concerning the availability of other remedies is important to our Committee because of its substantial potential impact in relation to the self-help repossession of mortgaged yachts and the foreclosure of domestic preferred mortgages on ships in foreign jurisdictions.[1] Apparently, the position taken by the National Association of Stevedores was directed at the controversial changes in maritime lien law proposed in the TCA draft, on which our Committee did not take any position, rather than at the provision for the availability of other remedies, which we supported. The Committee intends to look for future opportunities to seek this clarification legislation in which controversial provisions are not included.

[1]The problem presented by the decision in *Bank of America National Trust & Savings Ass'n* v. *Fogle*, 637 F.Supp. 305 (N.D. Cal. 1985), have not abated. *See Nate Leasing Co.* v. *Wiggins*, 114 Wash. 2d 5087, 519 (Sup. Ct. Wash. 1990), where the court misinterprets a misleading section of the House Report for Public Law 100-710.

Proposed Coast Guard Regulations and Other Matters Relating to the Coast Guard

Thomas L. Willis, Chief of Vessel Documentation Branch, United States Coast Guard, discussed the proposed Coast Guard regulations (Interim Final Rule, 54 F.R. 41835 (October 12, 1989); the "Coast Guard Rule") amending vessel documentation regulations to implement the Statute. Mr. Willis reported that a notice of proposed rulemaking is in progress and that the Coast Guard Rule contains the currently governing regulations. The philosophy that will underlie the notice of proposed rulemaking is that of minimum regulation while maintaining the integrity of the program.

It was noted that Section 221.5(a) (2) of the notice of proposed rulemaking (55 F.R. 14040 (April 13, 1990); the "MarAd"), discussed *infra*, states that a citizenship declaration need not be filed in connection with certain transactions for documented vessels used in the fisheries or for pleasure that meet the requirements of 46 C.F.R. Section 221.15(b), unless preservation of its eligibility to participate in the coastwise trade is desired in connection with a sale of the vessel. The discussion of rulemaking text relating to Section 221.5 states that if the transaction involves the sale of any such vessel, the Coast Guard will assume, in the absence of a citizenship declaration, that the vessel is being "sold foreign". Mr. Willis stated that this assumption is not correct and that the Coast Guard will not assume the vessel is being "sold foreign" if the purchaser is eligible to own a documented vessel in the coastwise trade. The Coast Guard will be responding to the MarAd NPRM with respect to Section 221.5 and will be submitting a letter of comment in respect thereof.

Mr. Willis also confirmed that MarAd's interpretation of the "Controlling interest" test as it relates to citizenship criteria applicable to a vessel owner or operator is consistent with the Coast Guard's interpretation, although the Coast Guard has received comments challenging its position.

In addition, Mr. Willis suggested that the Committee review those provisions of the MarAd NPRM which make reference to tonnage because of the difference between formal measurements and measurements made pursuant to formula and the fact that MarAd has not specified which definition of tonnage it intends to rely on under the MarAd NPRM.

Mr. Willis indicated that some form of paperwork will be required for an interim owner who does not document a vessel but rather has temporary ownership of the vessel pending resale. In addition, he indicated that a noncitizen mortgagee approved as such under the Statute will not be required to file a citizenship declaration in certain situations.

In addition to the forthcoming notice of proposed rulemaking, Mr. Willis indicated that we can look forward to receiving new Coast Guard forms upon which the Committee will be requested to comment. One important new form that will be circulated will be a mortgage filing sheet which, if properly completed, will obviate the need for Coast Guard officials to review the entire mortgage prior to recording it.

Mr. Willis also reported the following plans on behalf of the Coast Guard:

(i) The Coast Guard will adopt standardized notarizations for use throughout the country;

(ii) Abstracts of title will be reduced to letter size;

(iii) There is a possibility that a "900" telephone number will be instituted for the purpose of obtaining copies of abstracts;

(iv) There is a possibility that the certificate of marking requirement will be dispensed with;

(v) 46 C.F.R. Park 67 will be completely rewritten; and

(vi) Coast Guard fees will be increasing and will no longer be computed on a per word basis.

The Coast Guard is very interested in obtaining the Committee's comments in respect of the aforementioned items.

NEW MARITIME ADMINISTRATION REGULATIONS - REPORT OF JOINT MEETING OF THE SUBCOMMITTEES ON COAST GUARD DOCUMENTATION, U. S. CITIZENSHIP AND RELATED MATTERS AND U. S. SHIP MORTGAGE ACT RECODIFICATION

Richard Teiman reported on the Joint Meeting of the Subcommittees on Coast Guard Documentation, U.S. Citizenship and Related Matters and U.S. Ship Mortgage Act Recodification which was held on May 1, 1990. The members of the various subcommittees and guests listed on Exhibit D to these minutes were in attendance.

The main items of business discussed at said meeting were the TCA, discussed *supra*, and the MarAd NPRM, proposing to amend the regulations issued as an interim final rule (54 F.R. 5382 (February 2, 1989), as amended by 54 F. R. 8195 (February 27, 1989); the "MarAD Rule") to

reflect changes in the law as a result of the Statute. The MarAd NPRM calls for comments to be received on or before June 12, 1990. The Members of the Committee were requested to forward their comments to Richard Barnett, Richard Teiman or Amy Siegel by the end of May 1990 to permit such comments to be incorporated in a letter comment to be sent on behalf of the Committee. Until new regulations become effective, the MarAD Rule remains in effect.

Mr. Teiman circulated a chart (See Exhibit E hereto) which compares the provisions of the MarAd NPRM to the comparable provisions under the MarAd Rule and which sets forth extracts form the discussion of rulemaking text accompanying the MarAd NPRM which highlight the substantive changes included therein.

Mr. Teiman summarized certain of the provisions of the MarAd NPRM:

(i) **Section 221.13 Noncitizen Control of a Documented Vessel** - New Paragraph (a)(3) of this provision is intended to provide a "safe haven" for vessel financing transactions, where certain rebuttable presumptions of transfer of control of a citizen-owned documented vessel to a noncitizen would otherwise arise, by allowing the interposition of an approved trustee. However, the issue of transfer of control still remains a problem with any noncitizen mortgagee other than an approved trustee. This result runs contrary to the original intent of the Statute which was to broaden the eligibility of persons that can act as mortgagee of a vessel with a preferred mortgage, so as to encourage the financing of U.S. Flag vessels and to make syndicate lending feasible.

Based on the philosophy underlying the Statute, it was suggested that MarAd interpret the Statute as affording an exemption from the transfer of control restrictions for any preferred mortgage financing transaction for which general MarAd approval has been granted or with respect to which MarAd approval is not necessary.

(ii) **Section 221.17 General approval** - Subsection (e) extends the period for which general approval of charters of documented vessels by citizens to noncitizens is granted from six (6) months to five (5) years, subject to filing requirements and certain stated exceptions.

(iii) **Section 221.59 Conditions attaching to approvals** - Subsection (c) requires that an approved mortgagee or trustee (a) promptly notify MarAd of the commencement of a foreclosure proceeding in a foreign jurisdiction involving a documented vessel to which 46 U.S.C. App. 808 (c) and Section 221.11 of the MarAd NPRM are applicable, and (b) ensure that the foreign court or other tribunal has proper notice of those provisions and of the definition of "transfer".

This proposed regulation presents a problem when the effect of restricting bidders in a foreign foreclosure proceeding to U.S. citizens runs contrary to the law of the foreign jurisdiction. Under these circumstances, an unfair burden is placed upon the approved mortgagee or trustee by requiring it to notify the local tribunal of a restriction prohibited by local law.

The Committee concluded that the most that should be required by this subsection is that an approved mortgagee or trustee which is the moving party in a foreclosure proceeding in a foreign jurisdiction should be required to give MarAd notice of the proceeding. MarAd would then have the opportunity to intervene in the proceeding if it so desire.

Robert S. Fisher suggested that, in the event an approved trustee becomes foreign-owned, the regulations should provide the trustee with a sufficient amount of time within which to transfer the mortgage to another approved trustee.

Mr. Barnett concluded this discussion by commenting that the area of most concern to our Committee under the MarAd NPRM is the issue of control. He stressed that the intent of the underlying Statute is to liberalize the financing of U.S. flag vessels and that these proposed regulations undermine that intent. As a result of these proposed regulations, most foreign lenders would be forced to continue to employ WESTHAMPTON Trustees even when such foreign lenders are otherwise approved mortgagees. Absent the use of a WESTHAMPTON Trustee, such foreign lenders would need to obtain prior MarAd approval of the covenants set forth in their loan documentation. These results are contrary to the statutory intent which dictates that a financing trans-action involving an approved mortgagee should not require further MarAd approval of the loan covenants governing such transaction.

REPORT OF SUBCOMMITTEE ON YACHT FINANCING

Robert Fisher reported on recent developments involving the Subcommittee on Yacht Financing.

As stated above, the TCA establishes a moratorium on the requirement that a state certificate of title be surrendered before a vessel is eligible for documentation until one year after the Secretary of Transportation prescribes final guidelines for a titling system. The Subcommittee has been involved in the development of such a system and, in that regard, met with a New Jersey Deputy Attorney General, Sherri L. Gibble. New Jersey has agreed to try to develop a computer "block" to be levied against a particular

title after the state has received official notice that the vessel has been documented. Such notice may be in the form of notification from the Coast Guard or a certified copy of the certificate of documentation of the vessel.

Mr. Fisher noted, however, that merely "blocking" a title may be insufficient if the title continues to remain in effect once blocked. In addition to New Jersey, title surrender procedures will have to be developed in all of the other states. Mr. Fisher also noted that for purposes of federal documentation, a builders' certificate must be presented, while for purposes of titling a vessel under state law, a manufacturer's certificate of origin is generally required. Mr. Fisher questioned whether in the future it will be possible to use one document for both purposes. Mr. Willis indicated that this may pose a problem in the event that a certificate submitted to the state authorities is not retained by such authorities and is subsequently needed to obtain a coastwise or fishery endorsement under federal law.

Mr. Fisher also pointed out that additional problems may result from differing state procedures, including the facts that: (i) some states deem a security interest to be perfected from the date that the requisite documents are lodged with the state authorities, while in other states, security interests are not perfected until noted on the certificate of title of the vessel; and (ii) some states (e.g., New York) forward the certificate of title to the vessel owner which may render it difficult for a mortgagee to cause the title to be surrendered.

REPORT OF SUBCOMMITTEE ON MARINE INSOLVENCY AND BANKRUPTCY AND PROPOSED REVISIONS TO ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE

James B. Kemp, Jr. reported on the meeting of the Subcommittee on Marine Insolvency and Bankruptcy held on May 2, 1990. He stated that Charles S. Donovan had brought to the Subcommittee's attention the fact that revision of Article 9 of the Uniform Commercial Code (the "UCC") is being considered by the permanent Editorial Board (the "PEB") for the UCC. Mr. Donovan reported that an article in the March/April 1990 issue of The Business Lawyer Update indicated that the PEB has established a study committee to review Article 9 of the UCC and that interested lawyers were requested to submit their lists of issues in time for the committee to consider them at its first meeting which was scheduled to take place in late April 1990. Mr. Donovan sent a comment, on his own behalf, suggesting that the committee consider changing Article 9 to make it clear that the

UCC's perfection requirements do not apply to a shipowner's maritime lien on subfreights. A copy of Mr. Donovan's comments together with The Business Lawyer Update article are annexed to these minutes as collective Exhibit F. Mr. Donovan suggested that any other party having comments on this issue send their comments to him.

It was then suggested that the Committee go on record as favoring an amendment to the above effect and it was determined that this issue would have to be presented to the Executive Committee for authorization before the Committee can go on record with an official position.

At the meeting of the Subcommittee on Marine Insolvency and Bankruptcy, Bruce A. King reported that the case of Key *Bank of Puget Sound* v. *Alaskan Harvester, et al.*, No. C89-814Z (W.D. WA. 1989), offers a good discussion of the issue of equitable subordination.

REPORT OF SUBCOMMITTEE ON TAX

Derick W. Betts, Jr. reported that the meeting on the Subcommittee on tax was scheduled to take place on Thursday, May 3, 1990. He indicated that the topics to be covered at that meeting include: (i) a Price Waterhouse study on efforts to reinstate the Internal Revenue Code's controlled foreign corporation shipping reinvestment provisions; and (ii) the imminent settlement of an audit being conducted by the IRS in Miami concerning wage withholding issues affecting the cruise industry. Mr. Betts noted that settlement of this audit will likely include an agreement relating to the payment of withholding taxes on wages for both U.S. and foreign persons working on the ships. He further noted that although the impact of the outcome of these audits will be limited to the cruise industry, the results could ultimately affect other offshore transportation businesses. A copy of the minutes of the meeting of the Tax Subcommittee, together with the exhibits thereto, are annexed to these minutes as collective Exhibit G.

REPORT OF SUBCOMMITTEE ON MARITIME LIENS AND MORTGAGES CONVENTIONS

In Emery W. Harper's absence, Guy E. C. Maitland reported on developments in the area of maritime liens and mortgages conventions. Mr. Maitland stated that there will be a diplomatic conference within the next several years and that the forthcoming convention promises to have an interesting feature in that it will contain a provision on bareboat charter

registered vessels. He noted that the United States courts have still not rendered an interpretation as to how bareboat charter registries will be treated in the United States.

Mr. Maitland indicated that he believed there to be little chance that the United States, the United Kingdom or the EEC will ratify the forthcoming convention.

REPORT OF THE JOINT SUBCOMMITTEE ON VESSEL FORECLOSURE SALES

John A. Edginton reported that the MarAd NPRM is being reviewed from the point of view of foreclosure sales and requested that anyone having comments on those provisions forward their comments to his attention.

Mr. Edginton noted that it appears that MarAd is moving in the direction of becoming more willing to pre-approve a foreign purchaser at a foreclosure sale and in permitting a vessel to be moved during a foreclosure proceeding. Although concerned that the TCA did not incorporate the Committee's suggestion to add proposed subsection 31325 (f) (other remedies), discussed *supra*, Mr. Edginton noted that the MarAd NPRM contains language which could be construed as recognizing the right to use extra-judicial self-help remedies in certain instances.

There being no further business, the meeting adjourned.

Respectfully submitted

Amy B. Siegel, Secretary

FORMAL REPORT OF THE COMMITTEE ON MARITIME ARBITRATION

Since the last meeting of the Association at Orlando, this Committee met in New York on December 19, 1989, February 13, 1990, April 3, 1990 and on May 1, 1990.

The Committee completed its report on guidelines for discovery in arbitration and obtained the agreements of the Society of Maritime Arbitrators, Inc., of New York to the guide lines. These guidelines are annexed to the Committee's Newsletter No. 4 which is to be included in the latest M.L.A. Journal.

At the May 1st meeting three specific topics were discussed. First, the problem of run-on *sur reply* briefs and evidence submitted after the conclu-

sion of evidentiary hearings. This is the "who gets the last word" syndrome.

Second, we discussed the issue of the power of arbitrators to award punitive and/or RICO damages. The RICO issue is currently before the Southern District of New York in connection with a motion to vacate an award of RICO damages by the majority of a panel of New York maritime arbitrators.

Finally, we discussed the power (or lack of power) of arbitrators to order a party to post security for a claim prior to the resolution of the dispute.

The Committee is also studying various proposals to amend the Federal Arbitration Act (Title 9, U. S. Code); in particular a proposal to amend §4 to provide specifically for consolidation of arbitrations.

One such proposal suggests an amendment to §4 by adding a new subsection, as follows:

(b) A district court may order the consolidation of two or more proceedings which it has the power to order to proceed to arbitration where (1) such proceedings involve a common question of law or fact, (2) the parties have not by agreement precluded consolidation of the proceedings, and (3) the court concludes that the interest of justice, expedition, and the economy would be served by consolidation. A court ordering the consolidation of two or more proceedings may make such orders concerning the conduct of those proceedings as may rend to avoid unnecessary costs or delay, including such provision for the number and method of selection of arbitrators as may be necessary to effect the consolidation.

Your Committee expects to report more fully on this topic at the Fall, 1990 meeting. In the meantime, we invite all members of the Association to comment on the above proposal.

Richard E. Repetto,
Chairman

FORMAL REPORT OF THE COMMITTEE ON PRACTICE AND PROCEDURE

Part I. NOTES OF THE SPRING MEETING 1990

The spring 1990 meeting of the Committee on Practice and Procedure took place from 9:30 to 11:30 a.m. on Thursday, May 3, 1990, at Messrs. Haight, Gardner, Poor & Havens; 35 persons signed the attendance sheet. These Notes were prepared in June as a synopsis of the minutes for the general membership.

The chairman reported that amendments to Supplemental Rules C and E. requiring United States marshals to serve arrest warrants on vessels and cargoes, are moving forward without opposition in the U.S. Judicial Conference's Standing Committee on Rules of Practice and Procedure, which received the MLA's letter of endorsement. The Standing Committee has put out for comment a proposed overhaul of Fed. R. Civ. P. 56 (summary judgment). 127 F.R.D. 370. The Subcommittee on Rules and Statutes will review the proposals for applications in admiralty practice.

Judicial compensation is going up a little at a time; by 1991 district judges will receive $120,000 per year.

The Supreme Court has upheld transient jurisdiction of the defendant against due process attack in a domestic relations case. which in itself would have no impact on admiralty practice. *Burnham v. Superior Court*, 58 U.S. L.W. 4629 (May 29, 1990). However, if the decision had gone the other way and expanded the rationale of *Shaffer v. Heitner*, so as to impose a new requirement that the nonresident defendant must have minimum contact with the state, instead of merely passing through the state where personal service was made, the implications for *in rem* practice would have been substantial.

The Subcommittee on Forfeitures reported progress toward preparing a report on all United States forfeiture laws and regulations. The report will contain recommendation on making all federal forfeiture procedures uniform and constitutional, no matter what property is forfeited or in what context.

Owing to laches of the chairman, the proposal from the Subcommittee on Federal Rules and Statutes to repeal 28 U.S.C. § 2107[3] (time for appeal of admiralty decisions; in conflict with Fed. R. App. P. 4 (a) (1)) required unanimous consent but did not receive it. The proposal will reappear at the fall meeting.

The Subcommittee on Local Admiralty Rules reported that the District of Hawaii has promulgated the West Coast variant of the Model Local Admiralty Rules. The Southern District of California seems to be the only maritime district in the Ninth Circuit that has not adopted these rules in one format or another.

The Joint Subcommittee on Vessel Foreclosure Sales met May 2. It continues to consider federal and state foreclosure laws as applied to vessels, including the role of self-help.

The seventeenth edition of the *Practice and Procedure Newsletter* was distributed Friday morning at the Spring Meeting.

Part II. THE MLA AND THE FEDERAL COURTS STUDY COMMITTEE

1. The Involvement of the MLA

Most lawyers have heard about the Federal Courts Study Committee, but few have read its ***Report***. As congestion in all courts draws increasing attention from lawyers, governments, and the press, the ***Report*** will become better known; and because of the Study Committee's prestige, its recommendations will be taken seriously. Members of the Maritime Law Association should know that President Richard W. Palmer took a strong interest in the Study Committee, beginning with the first reports from Chief Judge Roney at the Fall Meeting in 1988. that the MLA moved quickly and as thoroughly as time permitted to respond to topics put forward by the Study Committee for comment; and that the MLA submitted its responses to the Study Committee on schedule.

The Federal Courts Study Committee was enabled by Title I of the Judicial Improvements and Access to Justice Act. Public L. No. 100-702, 102 Stat. 4644, 28 U.S.C. § 331 note (Nov. 19, 1988). The legislative history of the Act contains no clue to the origin of Title I, but the concept appeared in Judge J. Clifford Wallace's article, Working Paper -- Future of the Judiciary, 94 F.R.D. 225 (1981). Congress gave the Study Committee little time in which to do its work -- the final report was to issue fifteen months after the effective date of Title I (Jan. 1. 1989), i.e., Monday, April 2, 1990.

The fifteen Study Committee members were appointed by the Chief Justice of the United States by Jan. 10, 1989. The chairman was Senior Circuit Judge Joseph F. Weis of the Third Circuit. Members came from the federal and state judiciary, Congress, and the bar. The staff's office was in Judge Weis's Philadelphia chambers.

The Study Committee issued its first list of topics March 3, 1989. The list was sent to the MLA and to hundreds of other organizations. President Palmer assigned to the Committee on Practice and Procedure the task of drafting the MLA responses.

The second list of Study Committee topics arranged by subcommittee, issued April 14, 1989. President Palmer sent copies to MLA officers, the executive committee, and the standing committee chairmen.

MLA draft comments prepared by the Practice and Procedure Committee circulated within the MLA under dates of May 23, June 1, and June 9, and many comments were received and considered. On June 20 the President sent the proposed final version to the officers and executive committee

members. The final MLA document, "Comments and Recommendations" (25 pp.), was delivered to the Study Committee August 28, 1989. The MLA Committee on Uniformity of United States Maritime Law will maintain and update the list..

The Study Committee's Tentative Recommendation for Public Comment issued December 22, 1989, and the draft MLA responses (18 pp.) were sent to President Palmer January 4, 1990. After consultation and deliberation, the President decided not to respond in detail to the Tentative Recommendations, either in writing or at one of the Study Committee's public hearings early in 1990. The chairman of the Committee on Practice and Procedure delivered the written MLA testimony (3 pp.) January 31, 1990, at the Study Committee hearing in Washington, D.C.

2. The Study Committee's Report

a. Structure and Direction of the Report

The final ***Report of the Federal Courts Study Committee,*** issued April 2,1990, consists of Part I, Overview, and Part II, Summary of Recommendations. Part III, Detailed Analyses of Selected Issues, will be published separately at some unannounced date in the future. Part II contains a few indication of matters to be treated in Part III. Because of the wide range of topics treated, the ***Report*** is difficult to summarize; a summary by a Study Committee Reporter, Diana G. Culp, appeared in the June 1990 ABA Journal at 63. Copies of the ***Report*** may be obtained by writing to the Federal Courts Study Committee, 22716 U.S. Courthouse, 601 Market St., Philadelphia, Pennsylvania 10106-1722.

The format and location of topics in the April 1990 ***Report*** changed substantially from the December 1989 *Tentative Recommendations,* and so cross-referring from one to the other must be done topic by topic. Likewise the wording of the Study Committee's recommendations changed substantially, often to improve the focus, as though the Study Committee had gathered confidence and determination since December 1989. In the future, the ***Report*** will be the key Study Committee document and no reader of the *Tentative Recommendations* should feel qualified to hold an opinion about the ***Report*** without examining it carefully.

Part I of the ***Report,*** the Overview, is new. In it Judge Richard Posner states vigorously and at length the underlying Study Committee policy against increasing the size of the federal trial and appellate judiciary in proportion to its present workload. The authorized number of all federal judgeships is 753 (several are vacant), and the Overview's contemplated ceiling is about 1,000. The reader of the ***Report*** should start with the Overview, appreciating that this is the first public appearance of a stated

policy that must lead to recommending the reduction of the federal courts' work load to fit the projected size of the judiciary. Had the Overview's policy been stated in mid-1989, the MLA's submissions to the Study Committee probably would have been fewer and shorter, because much of what the MLA asked for would require more federal judges.

b. Matters of Concern to the MLA

(1) Supporting the Uniformity of Maritime Law

The ***Report*** states the familiar but controversial view that the diversity jurisdiction should be reserved for situations (such as interpleader, mass torts, and actions involving aliens) where no state forum has the capacity to give full relief, and that otherwise, Congress should abolish the diversity jurisdiction. Report 38-42. The Overview says that the state courts should make state law and the federal courts should make federal law. Report 14. This , of course, takes no account of the unique place of the federal courts with respect to the uniformity of maritime law.

Should the MLA have anticipated the omission of maritime law and responded to it, having seen no draft of the Overview? The MLA did anticipate the omission, but it decided not to respond. The *Tentative Recommendations* gave notice of the Study Committee's attack on diversity jurisdiction, which involves federal court actions between private parties under state law. The uniformity doctrine also involves actions between private parties, though under federal law. The MLA decided not to draw the uniformity doctrine to the Study Committee's attention, reasoning that attention would be unlikely to produce a recommendation of favorable treatment for maritime law, that at worst it would draw fire aimed at the diversity jurisdiction, and that the meaningful forum will be the Congress, if Congress is jurisdictional in maritime cases.

(2) Specialized Federal Courts

(i) Trial Courts. While the ***Report*** proposes to divert to specialized federal forums a number of federal question matters, such as tax, bankruptcy, social security disability, and Longshore Act appeals, it does not suggest any specialized-court mechanism for keeping any class of civil litigation (such as maritime commercial cases) from being pushed off district court trial calendars by criminal trials under the Speedy Trials Act. If the Study Committee had taken notice of maritime commercial cases, it probably would have proposed to dump them into the state courts, like diversity cases, rather than to set up specialized federal courts or dockets to hear them. The ***Report*** was a disappointment to MLA members who had hoped that the Study Committee would propose a federal commercial court or docket.

(ii) Appellate Courts. Members of the Study Committee at the hearing in Washington on January 31, 1990, said that they had read and used the MLA's supplementary presentation identifying conflicts of maritime law among the circuits, but the Study Committee apparently could not agree on recommending a judicial mechanism for resolving conflicts. Although the statutory mandate called upon the Study Committee to study conflicts among the circuits, see Title I, § 102 (b) (2) (C), at Report 189, and although the ***Report*** devotes considerable space to the problems of the Courts of Appeals, see 116-129, the ***Report*** contains only one concrete recommendation: that Congress enable the Supreme Court to experiment for five years with delegating to uninvolved circuits a few intercircuit conflict cases for *en banc* consideration, with the *en banc* result to nationwide precedential effect. See 126. This might resolve a few inter-circuit conflicts of maritime law, but it might also lead to hearing major maritime conflict cases in Denver, if the only uninvolved circuit were the Tenth. How the Supreme Court will react to the proposal remains to be seen, but it has been hostile in the past to the proposal to insert a National Court of Appeals between the Courts of Appeals and the Supreme Court.

(3) The Jones Act.

The ***Report*** recommends repealing the Jones Act and throwing seamen's negligence claims into the Longshore Act. By comparison with the *Tentative Recommendations*, the ***Report's*** text is shorter and the account of legal history is correct. The ***Report*** says nothing about seamen's claims for maintenance, cure, unearned wages, or unseaworthiness, or about § 905 (b) negligence claims. For reasons stated above in connection with uniformity, the MLA did not invite the Study Committee's attention to these claims, feeling that the Study Committee would be unlikely to recommend that they be litigated in federal courts, let alone given special attention.

(4) Alternative Dispute Resolution

MLA members who like alternative dispute resolution will be interested in the Study Committee's proposals, Report 81-87, but MLA members who want to be able to litigate in federal courts will see the ADT proposals as one more ways of moving cases off federal dockets.

(5) Admiralty Venue

The MLA said nothing about the ***Report's*** criticisms of federal statutory venue, at 94, because the broad admiralty venue resides quietly in the decisional law. Not Title 28.

(6) Unpublished Opinions

The Report at 130 acknowledges criticisms of unpublished opinion rules, which the MLA has been criticizing for years; it suggests that declining costs of computerized legal research services may have weakened the reasons for courts of appeals to order that some opinions not be published.

3. The Future of the Report

As of June 1990, it seems probable that some of the less-controversial, smaller-scale recommendations of the Study Committee will be attached to the bill proposing general improvements in justice that is now making its way through the Senate Judiciary Committee. The Practice and Procedure Committee will keep in touch with people who know about these matters, so the MLA can make timely decisions on whether to formulate positions on legislation pending in Congress.

Respectfully submitted,

DAVID J. SHARPE, Chairman

FORMAL REPORT OF THE COMMITTEE ON UNIFORMITY OF U. S. MARITIME LAW

The Uniformity Committee met on May 2 at 2 P. M. We first discussed *Markzannes* v. *Bermuda Star Line, Inc.*, 545 So.2d 537m 1989 AMC 2988 (La. Sup. Ct.), *cert. denied*, 58 U.S.L.W. 3449, 110 S. Ct. 837, 107 L. Ed.2d 832 (1989), a case dealing with the issue of *forum non conveniens* that has been of continuing interest to the Committee. The Louisiana Supreme Court overturned the Court of Appeals and held that "Louisiana courts may apply Louisiana procedural law in causes of action brought in Louisiana courts." The Court stated that a Louisiana procedural statute "which authorized dismissal on *forum non conveniens* grounds of a claim predicated solely on a federal statute based on acts of omissions originating outside the state, is not applicable to causes of action brought under 46 U.S.C. App. 688 of the federal maritime law. LA. C.C.P. art 123 C." The doctrine of *forum non conveniens* may well be unavailable in maritime litigation in Louisiana state courts even in suits between foreign litigants.

On the subject of maritime liens, we discussed the case of *Alaskan Seafoods, Inc.* v. *M/V Sea Producer*, 882 F. 2d 425, 1989 AMC 2935 (9th Cir. 1989), in which the Ninth Circuit held that a cargo claim can be recharacterized to sound in tort and therefore get lien priority. This area will require monitoring.

The Committee discussed the status of the *Sisson* case and the grant of *certiorari*. Argument has taken place and the outcome is awaited with great interest. The Committee complemented the excellent *amicus* brief filed by the Association in this matter. It is hoped that the Court's ruling will clarify this subject in view of the proliferation of cases with opposing ruling.

On the subject of damages for wrongful death, the conflict between the Fifth and Ninth Circuits about whether there can be a survival action for future lost wages was noted. Compare *Miles v. Melrose*, 882 F. 2d 976 (5th Cir. 1989) with *Evich v. Morris*, 819 F. 2d 256 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987).

The Committee discussed recent cases about whether cargo owners/ voyage charterers can recover from vessel owners as third-party beneficiaries of the vessel owners' seaworthiness warranty to time charterers, e.g., *Siderius v. M. V. Amilla*, 880 F.2d 662, 1898 AMC 2533 (2d Dr.,1989), *Dant & Russell, Inc. v. Dillingham Tug & Barge Corp.*, 896 F. 2d 507 (9th Cir. 1989), and of extension of the *Himalaya* clause to inland legs of multimodal transport. *E.g., Tokio Marine & Fire Ins. Co. v. Hyundai Merchant Marine Co.*, 717 F. Sup. 1307, 1989 AMC 2672 (N. D. Ill. 1989); *Caterpillar Overseas, S.A. v. Marine Transport Co.*, 900 F.2d 714 (4th Cir. 1990). Some European lawyers have expressed concern about the state of flux of U.S. law concerning what law is applicable to the different segments of multi-modal carriage. Developments will be watched with interest by the Committee.

In the area of continuing intercircuit conflicts, the Committee reviewed a recent decision of a district court in the Second Circuit expressly confirming the conflict between the Fifth and Second Circuits about enforceability of clauses providing for arbitration abroad in contracts governed by COGSA: *Kaystone Chemical, Inc. v. Bow Sun*, 1989 AMC 1976 (S.D.N.Y. 1989). It was noted that the Association has participated as amicus in two recent cases —*Wesermunde* and *Luo Fu Shan*— involving this question and in both cases *certiorari* was denied. It appears this conflict will persist.

The status of the Federal Courts Study Committee Report and its various recommendations were reviewed. Some expressed disappointment in the Report's findings. The June CMI meeting was also briefly discussed, particularly the uniformity issues likely to arise at that gathering.

The Committee has undertaken two important projects. The first is developing a catalog of conflicts between and among circuits. In the Committee's oral report to the Association, we requested the assistance of the entire membership in accumulating a comprehensive listing of such conflicts. The second project is a report on the subject of *forum non conveniens* and the problem of lack of uniformity in state court treatment of this issue,

even in cases governed by maritime law. Two Committee members, Joan Califf and Dan McDermott, have accepted the task of producing this report. The Committee also discussed whether a chronicle of the uniformity doctrine in the courts could be compiled. This subject will receive further consideration at the Fall Meeting. Liaisons with the Committees on Practice and Procedure, Recreational Boating and Stevedoring and Terminal Operations have been established.

Lizabeth L. Burrell
Chairman

Appendix A

Minutes of the Meeting of the Executive Committee of The Maritime Law Association of the United States held at the Association of the Bar of the City of New York, on May 3, 1990.

The meeting was called to order by President Richard W. Palmer at 9:30 A.M. In addition to the President, there were also present:

Kenneth H. Volk	James Hanemann, Jr.
George W. Healy, III	Raymond P. Hayden
David W. Martowski	Raymond T. Letulle
Marshall P. Keating	Paul N. Wonacott
Howard M. McCormack	Waverley L. Berkley, III
Francis J. O'Brien	Reginald M. Hayden, Jr.
Chester D. Hooper	Warren J. Marwedel
Henry C. Lucas, III	Ben L. Reynolds

and by invitation, Frederick W. Wentker, Jr., Warren B. Daly, Jr., Manfred W. Leckszas, Thomas J. Wagner, and Neal D. Hobson.

Secretary Martowski reported that the minutes of the Executive Committee Meeting held in Mobile on March 2, 1990, appear in the *President's Spring Newsletter* which was recently mailed to the membership and, on motion duly made and seconded, the minutes were approved and accepted, as was the Secretary's report.

Treasurer Keating distributed his report for the three months ended April 30, 1990, which reflects the Association's continuing sound financial condition. On motion duly made and seconded, the Treasurer's Report was approved and accepted, and is annexed to the original of these minutes.

Membership Secretary McCormack also distributed his report summarizing the present membership as of May 1, 1990, which was approved and accepted and is annexed to the original of these minutes. On motion duly made and seconded, the Membership Committee's recommendations regarding applications for prospective Judicial, Proctor, Associate, and Non-Lawyer members were unanimously approved and accepted.

President Palmer briefly reported on the status of proposed oil spill legislation and on registrants for the Thirty-Fourth International Conference of the CMI which will be held in Paris on June 14-30, 1990.

Frederick W. Wentker, Chairman of the Committee on Maritime Personnel, and Warren B. Daly, Chairman of the Subcommittee on Joint Tortfeasor Settlements, submitted their final report on Joint Tortfeasor Settlements and their draft Maritime Comparative Responsibility Act. On motion duly made and unanimously seconded, it was:

RESOLVED: THAT The Maritime Law Association of the United States approve the Committee on Maritime Personnel's Report on Joint Tortfeasor Settlements, and further approve its draft Maritime Comparative Responsibility Act, which is based upon the Uniform Comparative Fault Act; AND, THAT the President of The Maritime Law Association of the United States, or his designee, present the report and draft legislation to the United States Congress for consideration.

Manfred W. Leckszas, Chairman of the Committee on Carriage of Goods, reported on the issues that will be presented at the CMI Plenary Sessions in Paris, and the Executive Committee unanimously authorized that the Association's delegates, in their deliberations and voting, be guided solely by the Association's stated policies on the issues under discussion.

Next, Thomas J. Wagner, Chairman of the Committee on Marine Ecology, reported on the latest developments with respect to the 1984 Protocols to the Civil Liability Convention, S. 686 and HR.1465, regarding comprehensive oil pollution liability and compensation

Neal D. Hobson, Chairman of the Committee on Transportation of Hazardous Substances, reported on the status of the Convention of Civil Liabilities in Connection with Carriage of Hazardous and Noxious Substances by Sea.

Lastly, Warren J. Marwedel shared his experience in arguing the *Sisson* appeal before the United States Supreme Court on April 23, 1990.

The Executive Committee Meeting was briefly adjourned and continued over lunch at the Harvard Club where Theodore S. Cunningham, Chairman of the Committee on Dinner Arrangements, reported on arrangements for the Spring Dinner which is expected to have in attendance 1,500 members and guests. The Officers and Committee thanked Mr. Cunningham for his superlative work over these past years.

David J. Sharpe, Chairman of the Committee on Practice and Procedure, commented on the Report of the Federal Courts Study Committee.

President Palmer expressed his thanks to the outgoing Officers and Executive Committee Class or 1990. The Executive Committee also ex-

pressed its gratitude to President Palmer for his leadership over the past two years.

There being no further business, the meeting was adjourned at 1:55 P.M.

Respectfully submitted,

David W. Martowski
Secretary