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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

THE MLA REPORT

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EDITORIAL COMMENT

We are pleased that the publication of this issue of the MLA REPORT will occur in time so that it can be distributed at the Fall meeting of the Association as has been done in the past. This is possible because of the cooperation of the various committee chairmen who have submitted reports on time and because of the dedication of co-editors, LeRoy Lambert and Matthew A. Marion.

In this issue we introduce a brief Book Review section which we hope will be of interest to our readers. We would like to continue this section in future issues and solicit submission of such reviews on maritime law subjects from the MLA membership. The next issue is scheduled to be published in time for the Spring meeting and material to be published should be in our hands before March 31, 1993.

Gordon W. Paulsen,
Editor

SPECIAL COMMITTEE FOR PLANNING AND ARRANGEMENTS: FALL 1993 MEETING

Report by Donald M. Kennedy, Chairman

The 1993 Fall Convention of the Maritime Law Association will take place in Bermuda at the Southampton Princess on the dates October 24 through October 30, 1993. As many of you know, the MLA earlier had a Convention at the Southampton Princess in 1972. Many of our old timers refer nostalgically to that trip to Bermuda and we have every reason to believe that their pleasant experience will be duplicated. We will be fortunate to have the presence of Mr. Justice Scalia, who has kindly accepted Past-President Volk's invitation to address our group.

The Committee intends to travel to the Southampton Princess in November of this year to begin making the final arrangements for our group.

Our earliest mailing to the membership concerning the details of the Convention shall take place in the Spring of 1993. At that time, we will be able to report on the costs for attendance at the Bermuda meeting and to fill you in on the anticipated program for the Convention.

MARITIME LAW ASSOCIATION OF THE UNITED STATES COMMITTEE ON PRACTICE AND PROCEDURE NEWSLETTER NO. 21

Editors: Edward V. Cattell, Jr. and
Douglas K. Walker

RULE B: PRESERVATION OF APPEAL AFTER RELEASE OF RES—IMPOSSIBLE?

Stevedoring Services of America v. Ancora Transport, N/V, 941 F.2d 1378, 1992 AMC 883 (9th Cir. 1991)

In *Alyeska Pipeline Service Co. v. Vessel Bay Ridge*, 703 F.2d 381, 1983 AMC 2719 (9th Cir. 1983), *cert. dismissed*, 467 U.S. 1247 (1984), the Ninth Circuit dismissed an appeal from a decision challenging the constitutionality of Admiralty Rule C. Previously, the district court in Alaska had held Rule C to be unconstitutional. Consequently, the arrest of the vessel was vacated and the vessel was released. Appeal to the court of appeals followed. The MLA intervened as an amicus.

The case was actually argued twice. Finally, the Ninth Circuit ruled—or, more accurately—declined to rule. The court held that *in rem* jurisdiction was lost when the *res* was released and, consequently, the court had no jurisdiction to consider the appeal. In its opinion, the Ninth Circuit rendered the somewhat mystical statement that:

> When plaintiffs choose to proceed *in rem* they must take the necessary precautions to insure that jurisdiction of the court is preserved. Plaintiffs always have the option of bringing these actions *in personam* as well as *in rem*, which would foreclose the loss of jurisdiction. Plaintiffs can also ask the trial judge to stay imposition of the judgment until they can move to preserve the jurisdiction of the court. If plaintiffs fail to exercise either of these options, they still have a chance to preserve jurisdiction by posting their own security before the security of defendant is released. Given these alternatives, plaintiffs are not denied the opportunity to the meaningful exercise of the right to appeal by permitting release of the *res* at any time following termination of the case.

Alyeska, 703 F.2d at 385, 1983 AMC at 2724.

Obviously, there are certain cases which cannot be brought *in rem* as well as *in personam*. For example, where a charterer fails to pay for

services rendered to the vessel, there is an *in rem* claim against the vessel but no *in personam* claim against its owner. Similarly, the plaintiff may request that the district court stay the release of the *res* pending appeal, however, if the court declines to do so, the plaintiff is relegated to the third option provided in the *Alyeska* opinion. That third option is to post security. Since the *Alyeska* decision was rendered, maritime counsel have pondered this suggestion and asked the question: How can the plaintiff provide security for the release of the defendant's vessel? The answer is now clear: the plaintiff cannot.

In *Stevedoring Services*, the plaintiff attached funds which it argued were owed to its debtor. Service was made solely by attaching the funds. An ineffectual attempt at serving process, by telex, to gain *in personam* jurisdiction was rejected by the court. The garnishee entered a special appearance to contest jurisdiction. The district court ruled that the funds in question were not owed to the defendant. Consequently, the court ordered their release. A motion for reconsideration was denied, as was a stay pending appeal. The plaintiff thereupon posted a supersedeas bond, in accordance with the suggestion of the Ninth Circuit Court of Appeals in *Alyeska Pipeline*, which was followed by the Ninth Circuit in *Teyseer Cement Co. v. Halla Maritime Corp.*, 794 F.2d 472, 1986 AMC 2705 (9th Cir. 1986).

On appeal, the Ninth Circuit in *Stevedoring Services* declared that its previous suggestion in *Alyeska* and *Teyseer* was mere dicta without legal effect. Consequently, it held:

> Plaintiff, by posting a bond, cannot confer jurisdiction on the court were it does not otherwise exist.

941 F.2d at 1383, 1992 AMC 890.

Thus, the perplexing question of how the plaintiff could preserve *in rem* jurisdiction by posting its own bond has finally been answered. That option does not exist and never existed. If the court orders the *res* released, the only way to preserve jurisdiction for the appeal would be to obtain a stay of that release from the district court or the court of appeals. The only way in which a plaintiff's bond might be useful is as a bond to secure costs or damages incurred by the defendant in having its property held pending the determination of the appeal. Such an offer by plaintiff might induce a court to grant the stay. An order releasing the *res*, without a stay, is an unappealable decision.

RULE C: MARITIME LIEN—UNPAID RENTAL ON CONTAINERS CREATES MARITIME LIEN CHARGEABLE AGAINST ENTIRE FLEET

Itel Containers Int'l Corp. v. Atlanttrafik Express Service, Ltd., 781 F. Supp. 975, 1992 AMC 622 (S.D.N.Y. 1991)

In 1987, Judge Carter declined to follow the Ninth Circuit's holding in *Foss Launch and Tug Co. v. Char Ching Shipping U.S.A., Ltd.*, 808 F.2d 697, 1987 AMC 913 (9th Cir.), *cert. denied sub nom., Itel Containers Int'l Corp. v. M/V C.C. SAN FRANCISCO*, 484 U.S. 828 (1987), when he held that the lessor of maritime containers may assert a maritime lien for necessaries *in rem* against a fleet of vessels rather than require that the container must first be furnished to a particular vessel before the maritime lien would attach. *Itel Containers v. Atlanttrafik*, 668 F. Supp. 225, 1987 AMC 2721 (S.D.N.Y. 1987). Briefly, the district court found that the plaintiff supplied maritime containers and entered into lease agreements with the owners of several vessels. The container leases were allegedly breached and plaintiff asserted *in personam* claims against the defendant shipping line and *in rem* maritime lien claims against the fleet of vessels. Subsequently, the district court dismissed plaintiff's claims, but did not discuss the maritime lien claims. On appeal, the Second Circuit affirmed the district court on all issues but was unable to rule on the validity of the maritime liens because the district court had made no findings with respect to them. It therefore remanded the case for findings of fact and conclusions of law.

In the earlier opinion, reported at 668 F. Supp. 225, 1987 AMC 2721 (1987), the district court denied the motion by the vessel owners for partial summary judgment on the validity of the liens. There, the court found that under the relevant statute, 46 U.S.C. §971 (*repealed* January 1, 1989, *replaced* by 46 U.S.C. §31342), plaintiff's leasing of containers and chassies to the shipping line constituted the furnishing of necessaries to a vessel. However, it held that genuine issues of material fact existed concerning whether the containers were used outside maritime commerce and whether at least one plaintiff, Flexi-Van, relied on the creditworthiness of the defendant rather than the security interests in the vessels themselves, when they entered into the leases. The district court concluded that if the vessel owners could prove either of these contentions at trial, they would defeat the maritime liens. *Id.* at 230.

Upon remand, the district court reiterated its position that the containers are necessaries, as defined by 46 U.S.C. §971, in that they are a good or service that is useful to the vessel. Necessaries are things that a prudent

owner would provide to enable a ship to perform well the functions for which she has been engaged. *Itel*, 668 F. Supp. at 228, 1987 AMC at 2724 (*citing Equilease Corp. v. M/V SAMPSON*, 793 F.2d 598, 603, 1986 AMC 1826, 1833 (5th Cir.) *(en banc), cert. denied sub nom., Fred S. James & Co. v. Equilease Corp.*, 479 U.S. 984, 1987 AMC 2406 (1986)). The court in *Equilease* held that "[i]t is the present, apparent want of a vessel, not the character of the things supplied, which makes it a necessary." 793 F.2d at 603, 1986 AMC at 1833. Applying these principals, the district court had no difficulty holding that the plaintiff's containers were necessaries within the meaning of the Federal Maritime Lien Act.

The defendants argued for a reversal of the court's previous holding on the basis that certain portions of the container leases were "preliminary to" the maritime contract, presumably those portions of the lease that occurred before the containers were actually placed on board the ship. Container lease agreements have been held to be within the court's maritime jurisdiction, even when the containers are leased by a general agent to be re-leased subsequently to vessels. *Itel*, 781 F. Supp. at 982, 1992 AMC at 629.

The trial court also rejected defendant's contention that the containers were not "furnished" to the defendant vessels within the meaning of the Act because the containers were leased to a fleet through defendant rather than leased to the individual vessels. In its earlier opinion, the court had held that "[a] lien may attach where services or supplies are provided to a fleet of vessels as long as title is not diverted to an intermediary." 668 F. Supp. at 230, 1987 AMC at 2727 (*citing Bankers Trust Co. v. Hudson River Day Line*, 93 F.2d 457, 459, 1938 AMC 38, 41 (2d Cir. 1937)). Moreover, the court considered that the containers leased for maritime use are the functional equivalent of the hold of a vessel, and thus the delivery of containers to an agent, who in turn delivers them to vessels, does not cut-off liability. Accordingly, the district court rejected defendant's arguments that containers must be delivered directly to the vessels in order to be "furnished" and thus to provide a basis for a maritime lien.

Defendant's argument that the containers must be earmarked for individual vessels in order to sustain a valid maritime lien was likewise rejected. Such a requirement would greatly interfere with industry practice in the container leasing business. Indeed, the court stated that the use of containers has been characterized as one of the most important technological developments in the transportation of goods by sea since steam replaced sail. Thus, the court refused to adopt defendants' narrow reading of the Federal Maritime Lien Act.

The district court then turned to the appropriate apportionment of the lien claims among the fleet. Generally, courts choose equal apportionment

among the vessels of the fleet. However, because the vessels involved in this case varied greatly in freight capacity, the court found that a variable apportionment approach would be inequitable. Therefore, the court apportioned plaintiff's liens according to the ships' relative twenty-foot equivalent units. This unit of measurement is based on the vessels' container capacity and its use allowed the court to attribute to each vessel its pro rata share of the container lease charges based on this uniform measure.

RULE C: MARITIME LIENS-UNPAID INSURANCE PREMIUMS GIVE RISE TO MARITIME LIEN

The Flagship Group, Ltd. v. Peninsula Cruise, Inc., 771 F. Supp. 756, 1992 AMC 815 (E.D. Va. 1991)

Plaintiff, The Flagship Group, Ltd. ("Flagship"), filed a declaratory judgment action against defendant Peninsula Cruise, Inc. ("Peninsula"), seeking an order from the court that Flagship has a valid maritime lien on the cruise ships operated by Peninsula for $6,225.62 in alleged unpaid insurance premiums. Peninsula filed a counterclaim, and both parties filed cross-motions for partial summary judgment on whether Flagship had a valid maritime lien for unpaid premiums under 46 U.S.C. §31302 et. seq.

The question raised in the motion was whether insurance is a "necessary", as defined by 46 U.S.C. §31301(4), such that it gives rise to a maritime lien under 46 U.S.C. §31342.* Plaintiff Flagship relied on a Fifth Circuit case, *Equilease Corp. v. M/V SAMPSON*, 793 F.2d 598, 1986 AMC 1826 (5th Cir. 1986), *cert. denied. sub nom., Fred S. James & Co. v. Equilease Corp.*, 479 U.S. 984 (1986). Peninsula, on the other hand, argued that the controlling law is stated by the Sixth Circuit in *Grow v. Steel Gas Screw Lorraine K*, 310 F.2d 547, 1963 AMC 2044 (6th Cir. 1962).

The district court refused to follow the Sixth Circuit, citing the recent trend toward including as necessaries not merely those things incorporated into a vessel or used on board which are absolutely essential to her existence or preservation, but also those things that a careful and provident owner would provide to enable her to perform well the functions for which, as a maritime agent, she has been designed and engaged. *Benedict on Admiralty*, §35 at 3–27. Thus, the court found that Flagship, and the Fifth Circuit, offer the more persuasive argument.

***NB:** Although the reported decision refers to liens for necessaries under §31329, that section refers to court sales of vessels. Section 31342 deals with liens for necessaries.

In *Equilease*, the Fifth Circuit recognized earlier holdings that insurance payments did not give rise to maritime liens because they were viewed as contracts for the personal indemnity of the insured ship's owner. Under that reasoning, no lien against the ship could possibly arise as a result of the insurance policy. However, it is no longer appropriate to view maritime insurance this way. The modern day realities make marine insurance for a cruise boat as much a necessary as an anchor or propeller. Thus, the circuit court found that insurance is essential to keep a vessel in commerce and therefore insurance is a necessary under 46 U.S.C. §31342. Accordingly, the unpaid insurance premiums gave rise to a maritime lien under the Federal Maritime Lien Act. Because there was no genuine issue of material fact as to whether unpaid insurance premiums give rise to a maritime lien under the Act, Flagship's motion for partial summary judgment was granted and Peninsula's motion for partial summary judgment was denied.

RULE C: MARITIME LIENS-GOVERNMENT MAY ASSERT A PREFERRED MARITIME LIEN FOR CIVIL PENALTIES

Boston Safe Deposit & Trust Co. v. M/Y DULCINEA, 1992 AMC 474 (N.D. Cal. 1991)

Plaintiff in this litigation, Boston Safe Deposit & Trust Company ("Bank"), moved for summary judgment and partial distribution of the proceeds of the sale of the M/Y DULCINEA. The Bank sought a judicial determination that its first preferred ship mortgage took lien priority over the claims of the United States, which had intervened.

On May 17, 1986 the owners of the vessel operated it illegally as a passenger vessel in violation of numerous federal statutes. The district court found that these statutes granted the United States a remedy *in rem* against the vessel to collect civil penalties. Pursuant to 46 U.S.C. §31326(b)(1), a preferred ship mortgage lien takes priority over all other liens "except for expenses and fees allowed by the court, costs imposed by the court, and preferred maritime liens." A "preferred maritime lien," as described by 46 U.S.C. §31301(5), can be a maritime lien on a vessel that arose before a preferred ship mortgage was filed under §31321 of the statute. In this case, the court found that the United States was under no obligation to file and record its lien in order to assert its claim. Moreover, the lien against the vessel arose on May 17, 1986, the date that the owners operated the vessel illegally, which apparently preceded the date on which the Bank recorded its mortgage. Finding that the governments' claim arose before the Bank filed its preferred ship mortgage, the court held that the government's preferred maritime lien for penalties had priority over the

Bank's mortgage claim. Accordingly, the Bank's motion for summary judgment and partial distribution of the proceeds of the sale was denied.

RULE F: LIMITATION OF LIABILITY: A COURT MAY IMPANEL A JURY IN A LIMITATION PROCEEDING BASED ON THE PRESENCE OF A PENDANT STATE LAW CLAIM, EVEN WHEN THERE IS NO INDEPENDENT BASIS FOR FEDERAL JURISDICTION

In Re Poling Transp. Corp., 776 F. Supp. 779, 1992 AMC 1075 (S.D.N.Y. 1991)

The owners of a gasoline tanker petitioned for exoneration from or limitation of liability pursuant to Supplemental Rule F, as a result of a fire and explosion causing personal injury and property damage. The individual claimants previously had commenced state court actions against the vessel owner and others, for injuries, economic loss and loss of services allegedly sustained due to the fire. Those state actions were stayed upon the filing of the limitation petition. These individual claimants maintained that the court should try the issues raised by the limitation petition without a jury, following which the court should lift the stay so that the remaining issues can be decided in state court, presumably with a jury. The individual claimants argued that this approach was proper because the state claims are not properly within the pendant jurisdiction of the court.

The vessel owner countered that the matter must proceed as a bench trial because there is no right to a jury trial in admiralty absent a claim carrying a statutory right to a jury trial, such as one under the Jones Act, or an independent basis of federal jurisdiction, such as diversity. The vessel owner argued that pendant jurisdiction over a state law claim in the limitation proceeding is wholly proper and that all claims may therefore be adjudicated before the court without a jury. Thus the issue raised in this case was whether the limitation and common law issues should be tried to a court sitting without a jury or, stated another way, whether the limitation issues should be tried before the court and the common law issues before a jury.

There is an inherent conflict between the non-jury admiralty tradition and a claimant's right to a jury trial, which springs from the "saving to suitors" clause of 46 U.S.C. §1333. In reconciling this conflict, the court identified two situations in which the exclusive jurisdiction of the admiralty court must yield and allow a claimant to pursue his claim outside the limitation proceeding. First, if the value of the vessel and her cargo (*e.g.*, the limitation fund) exceeds the value of all claims against him, no

concursus is necessary and the claimants may proceed in other fora. *Lake Tankers Corp. v. Henn*, 354 U.S. 147 (1957); *In Re Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750 (2d Cir. 1988). Second, where there is a "lone claimant" seeking to recover in excess of the limitation fund, the admiralty court must lift the stay, provided the claimant concedes the admiralty court's exclusive jurisdiction to determine all issues relating to the limitation of liability. *Dammers*, 836 F.2d at 755. To qualify for the latter exception, the claimant must file certain protective stipulations to safeguard the ship owner against liability in excess of the vessel and its cargo if limitation is ultimately found appropriate. The claimant must stipulate that the value of the limitation fund is the value of the vessel and its cargo; that the state court judgment will not be given *res judicata* effect; and that the district court has exclusive jurisdiction to determine all issues concerning the right of the ship owner to limit liability. *Id.* at 757–58; *See* G. Gilmore & C. Black, Jr., *The Law of Admiralty*, §10–19, at 871 (2d. ed. 1975); T. Schoenbaum, *Admiralty and Maritime Law*, §14–5, at 489 (1987).

In this case the court found that the limitation petition fell under neither of these exceptions. However, the court was motivated by the importance of accommodating both admiralty tradition and the right to a jury trial of common law claims wherever possible. *See Dammers*, 836 F.2d at 760 ("admiralty courts must strive whenever possible to promote the policies underlying both provisions.")

The court also relied on *In Re Complaint of Sheen*, 709 F. Supp. 1123, 1989 AMC 1345 (S.D. Fla. 1989), where it was determined that the limitation issues would be determined first while keeping the stay against state actions in effect. The court in *Sheen* reasoned that in essence, the federal court necessarily determines both negligence and limitation, a decision that satisfies the requirements of the Limitation of Liability Act, and then the court may lift the stay against state action. At that point, the claimant is free to have a state court, even a state jury, determine relative degrees of fault and damages, which satisfies the congressional purposes behind the "saving to suitors" clause. The court in *Sheen* believed little judicial inefficiency would occur because the limitation petition finding would be entitled to *res judicata* effect in state court.

Ultimately, the trial court in this limitation proceeding fashioned a remedy which would ensure that the ship owner would not face liability in excess of the limitation fund, but would also allow the individual claimants a jury on their common law claims. Here, the court reasoned that the individual claimants were forced into federal court by the limitation proceeding. They had already brought their claims in a state court, where they

were entitled to a jury. In that situation, the Supreme Court has held that the right to a jury may not be preempted through procedural tactics. *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473, 479–80 (1962).

Moreover, the district court reasoned that to embark on this limitation proceeding without a jury in the interest of maintaining aesthetic purity, makes no sense. Due to the multi-party nature of this action and complicated questions involving, among other things, causation, a full-blown trial will be necessary simply to resolve the limitation issues of privity and knowledge. This federal court proceeding would be duplicated in a state court if limitation were denied, thus removing the stay and allowing the individual claimants to proceed there. The court held that the proper approach would be to impanel a jury at the outset and allow the trial to proceed as to all issues. At the close of the evidence, the court would determine the admiralty issues, including the petition for exoneration from or limitation of liability. The remaining issues on the state law claims, if any, would then be submitted to the jury.

FEDERAL RULES OF APPELLATE PROCEDURE: RULE 3(c)

CTC Imports & Exports v. Nigerian Nat'l Petroleum Corp., 951 F.2d 573, 1992 AMC 1243 (3d Cir. 1991), cert. denied sub nom., Aham-Neze v. Sohio Supply Co., 112 S. Ct. 1950 (1992)

CTC Imports & Exports sued to arrest the vessel M/V VYTINA. The district court dismissed the complaint and upon motion imposed sanctions against CTC and its attorneys pursuant to Fed.R.Civ.P. 11 and 28 U.S.C. §1927. Plaintiffs and their counsel appealed from an order denying motions by counsel for reconsideration of the imposition of sanctions.

Before reaching the Rule 11 sanctions, the Third Circuit examined the threshold issue whether the notice of appeal filed on behalf of all four parties satisfies Federal Rule of Appellate Procedure 3(c). If a party fails to satisfy the requirements of Rule 3(c), then the appellate court lacks jurisdiction over that party. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988). Rule 3(c) requires the notice to specify the party or parties taking the appeal. *Id.* at 314. In the present case, one of the attorneys filed the notice of appeal not on his behalf, but only on behalf of his client. Since the timely filing of a notice of appeal is mandatory and jurisdictional, improper notice of the attorney's appeal will be fatal unless the attorney files the functional equivalent of a timely notice. *CTC Imports*, 951 F.2d at 576.

The functional equivalent of a timely notice of appeal *must* identify the party taking the appeal. Unfortunately for the attorney in this case, the

only notice of appeal he filed was on behalf of his client, which the court found was not notice on his behalf. Thus, the attorney failed to comply with the jurisdictional prerequisites and his appeal was dismissed. *Id.* at 576. As to his client, however, the Supreme Court has said that "the requirements of the rules of procedure should be liberally construed and that "mere technicalities" should not stand in the way of consideration of a case on its merits. *Torres*, 478 U.S. at 316. If a party files a notice of appeal that fails to meet the letter of the rule, a court may nonetheless find that a litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires. *Id.* at 317. The notice of appeal did identify the client by name and also gave sufficient notice to the court of the issues being appealed. Thus, the Third Circuit found the notice in *CTC Imports* as an "effective, although inept attempt to appeal from the judgment imposing sanctions." Sanctions as to the client were upheld.

RULE 60(b)(6)-REOPENING AND MODIFYING JUDGMENT

Bryant v. Gates Const. Corp., 1991 AMC 2922 (D. Del. 1991)

In 1988, plaintiff commenced an action against his employer, Gates Construction Corporation, under the Jones Act, 46 U.S.C. §688, and general maritime law. Plaintiff sought damages for injuries sustained while employed as a crane operator on defendant's barge. Defendant moved for summary judgment, asserting the court did not have subject matter jurisdiction because plaintiff was not a seaman, but rather a land-based construction worker. The district court granted defendant's motion. 735 F. Supp. 602, 1990 AMC 1988 (D. Del. 1990). Finding that plaintiff did not qualify as a seaman for Jones Act purposes, the district court applied the Third Circuit test, which required that the maritime worker have a significant navigational function on the vessel to which he was assigned. Since the requirement that a Jones Act claimant be a seaman is jurisdictional, the court's finding compelled dismissal for want of subject matter jurisdiction.

Plaintiff filed a timely appeal to the Third Circuit Court of Appeals, which affirmed the dismissal on October 17, 1990. The appellate court agreed that plaintiff could not satisfy the "aid in navigation" requirement. When judgment was entered for defendant, plaintiff's counsel, by way of a Notice of Judgment, was advised of the following by the appellate court: (1) a petition for rehearing must be filed within fourteen (14) days after the entry of judgment; (2) the appellate court would issue its mandate to the district court twenty-one (21) days after judgment, absent a motion to stay the mandate; and (3) a motion to stay the mandate should be promptly filed if plaintiff intended to petition the Supreme Court for a writ of *certiorari*.

Plaintiff's counsel did not file a motion to stay the mandate, nor did he file a motion for rehearing within the designated time. On November 8, 1990, the court of appeals issued its mandate, taxing costs of the appeal against plaintiff.

Plaintiff's failure to file a motion to stay the mandate was, to say the least, unfortunate. On February 19, 1991 the Supreme Court forever changed the jurisprudential landscape of Jones Act cases by holding that the "key to seaman status is employment-related connection to a vessel in navigation." *McDermott Int'l, Inc. v. Wilander*, 489 U.S. ___, 1991 AMC 913 (1991). Plaintiff sought to revive his claim against defendant and filed a motion, asserting that the *Wilander* decision provided the proper basis for relief from a final judgment pursuant to Fed.R.Civ.P. 60(b).

Under Rule 60(b) a district court may grant relief from an otherwise final judgment for any of the five enumerated reasons or for "any other reason justifying relief from the operation of the judgment." Fed.R.Civ.P. 60(b)(6). While subsection 6 of Rule 60(b) confers broad discretion on the trial court to grant relief from the operation of a judgment, the rule does not confer upon the court a "standardless residual of discretionary power to set aside judgments." *Bryant*, 1991 AMC at 2925. The remedy provided by Rule 60(b) is "extraordinary, and special circumstances must justify granting relief under it." It is not a substitute for appeal. Rule 60(b)(6) is intended to be a means for accomplishing justice in extraordinary situations, and so confined, does not violate the principle of finality of judgments. *Id.* at 2955 (*citing Moolenaar v. Government of the Virgin Islands*, 822 F.2d 1342, 1346 (3d Cir. 1987)).

In the present case, the district court noted that the underlying Fifth Circuit decision in *Wilander* was issued on October 30, 1989, nearly six months before this court granted defendant's summary judgment motion. While the court was obliged to follow the analytical framework established by the Third Circuit, plaintiff's counsel could have presented a *pro forma* argument against the Third Circuit standard in *Griffith*, thus preserving the "Aid in Navigation" issue for argument on appeal. The district court also noted that the Supreme Court granted the *certiorari* petition in *Wilander* on June 18, 1990, which was eight days before plaintiff's counsel filed his opening brief with the Third Circuit. Thus it was possible for plaintiff to alert the appellate court that *Wilander* was pending in the Supreme Court and possibly to ask for a stay pending its outcome.

Based on the above, the district court found that a change in precedent is not one of those extraordinary circumstances under Rule 60(b) which justifies relief from a final judgment.

JONES ACT JURISDICTION: MARITIME WORKER WHOSE OCCUPATION IS ENUMERATED IN LHWCA MAY YET BE A SEAMAN UNDER JONES ACT

Southwest Marine, Inc. v. Gizoni, __ U.S. __, 1992 AMC 305 (1991)

This is the most recent opinion by the U.S. Supreme Court further defining who is a "seaman" under the Jones Act. The question before the Court was whether a maritime worker whose occupation is enumerated in the LHWCA, 33 U.S.C. §901 et seq., may yet be a "seaman" within the meaning of the Jones Act, 46 U.S.C. §688, and thus be entitled to bring suit under that statute.

Gizoni, a rigging foreman for Southwest Marine, worked on various floating platforms owned by the company. He occasionally served as a lookout and gave maneuvering signals to the tugboat operators when the platforms were moved. He also received lines passed to the platforms by the ship's crew to secure the platforms to the vessels under repair. Gizoni was injured on the job and submitted a claim for, and received medical and compensation benefits from, Southwest Marine pursuant to the LHWCA. He later sued Southwest Marine under the Jones Act, alleging that he was a seaman injured as a result of his employer's negligence. The district court granted Southwest Marine's motion for summary judgment upon a finding that the floating work platforms were not "vessels in navigation" and that Gizoni was on board to perform work as a ship repairman and not "in aid of navigation." More important, the district court also concluded that Gizoni was a harborworker and, as such, was precluded from bringing this action by the exclusive remedy provisions of the LHWCA, 33 U.S.C. §905(a).

The United States Court of Appeals for the Ninth Circuit reversed the determination that Gizoni was not a seaman as a matter of law, holding that questions of fact existed as to his seaman status. The Ninth Circuit also reversed the district court's holding that the exclusive remedy provisions of the LHWCA precluded Gizoni from pursuing his Jones Act claim. Whether an injured party may recover under the LHWCA or the Jones Act depends not on the claimant's job title, but on the nature of the claimant's work and the intent of Congress in enacting these statutes. The Supreme Court affirmed.

The Supreme Court found that the district court was plainly wrong in holding that as a matter of law, the LHWCA provided the exclusive remedy for all harborworkers. The Court stated: "That cannot be the case if the LHWCA and its exclusionary provision does not apply to a harborworker who is also a 'member of the crew of any vessel,' a phrase that is a

'refinement' of the term 'seaman' in the Jones Act." *Southwest Marine v. Gizoni*, ___ U.S. at ___, 1992 AMC at 309; (*citing McDermott Int'l, Inc. v. Wilander*, 498 U.S. ___, ___, 1991 AMC 913, 920 (1991)). The Court elaborated on its decision in *Wilander*, where it jettisoned any lingering notion that a maritime worker need aid in the navigation of a vessel in order to qualify as a "seaman" under the Jones Act. "The key to seaman status is employment-related connection to a vessel in navigation. . . . It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Id.* at ___, 1992 AMC at 310 (*citing Wilander*, 498 U.S. at ___, 1991 AMC at 927).

The Court also rejected the idea that where a maritime worker is arguably covered by the LHWCA, the district court should stay any Jones Act proceeding pending a final determination by the administrative agency as to whether the worker is a "master or member of the crew." The Court found no indication in the LHWCA that Congress intended to preclude or stay traditional Jones Act suits in district courts. *Id.* at ___, 1992 AMC at 311.

Finally, the Court discarded Southwest Marine's suggestion that an employee's receipt of benefits under LHWCA should preclude subsequent litigation under the Jones Act. "We have ruled that where the evidence is sufficient to send the threshold question of seaman status to a jury, it is reversible error to permit an employer to prove that the worker accepted LHWCA benefit while awaiting trial." *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 37, 1963 AMC 2276, 2278 (1963). Where an employee receives voluntary payments under LHWCA without a formal award, that employee is not barred from subsequently seeking relief under the Jones Act. *Southwest Marine*, ___ U.S. at ___, 1992 AMC at 312. The Court observed that the Ninth Circuit had concluded that questions of fact existed regarding whether floating platforms were vessels in navigation, and whether Gizoni had sufficient connection to the platforms to qualify for seaman status. As such, summary judgment was inappropriate and the judgment of the Ninth Circuit was affirmed.

COMMITTEE ON CARRIAGE OF GOODS
NEWSLETTER NO. 23

Editors: Richard E. Repetto and Michael J. Ryan

F.I.O.S. = FORGET IT, OWNER SINKS
(Cargo Newsletter No. 22 Revisited)

Associated Metals & Minerals Corp. v. M.V. ARKTIS SKY, No. 92–7219 (2d Cir. Oct. 1, 1992) (1992 U.S. App. Lexis 24809)

On October 1, 1992 the Second Circuit Court of Appeals reversed the lower court decision in *Associated Metals & Minerals Corp. v. M.V. ARKTIS SKY*, 1992 AMC 1217 (S.D.N.Y. 1992), holding that where COGSA applies, the duty of a carrier to load, stow and discharge properly, is totally non-delegable. The Second Circuit held:

> The plain language of section 1303(8) forbids enforcement of agreements to relieve carriers of liability for negligence in carrying out the duties set forth in section 3 of COGSA. (citations omitted). One of the duties assigned to carriers is that of properly and carefully loading cargo. *See* 46 U.S.C. App. §1303(2) (1988). [sic] Thus, an agreement such as the one in question here is "null and void" under the statute because it purports to relieve a carrier of liability for negligence in one of its duties, the stowing of cargo.

The district court had previously granted defendants' motion for summary judgment, holding that the carrier had met its burden under COGSA §1304(2)(i) by showing it was not liable for cargo damage caused by an act or omission of the shipper. The court of appeals, however, rejected the trial court's holding, stating:

> Once a *prima facie* case is created, the burden shifts to the carrier to show, under section 1304(2)(i) and section 1304(2)(q), that the cargo loss or damage results from an act or omission of the shipper or owner of the goods, his agent or representative; or if the loss or damage results from any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier. As previously discussed, this burden cannot be carried by contract terms or language of FIOS contained in a bill of lading. Both are barred by the non-delegable provisions of COGSA under section 1303(8).

* * *

> There should be little dispute that the purpose of COGSA is to place primary responsibility for the safety of the cargo upon the vessel, its operators and owners. The parties cannot by private agreement circumvent the legislative purpose of the Act. 46 U.S.C. App. §1330(8). The vessel may exonerate its responsibility by carrying its burden of proof that the damage did not occur because of its own acts. However, we find that the documentary proof and conflicting affidavits submitted in this case create a genuine dispute of material fact and that the defendants are not entitled at this stage of the proceeding to a judgment as a matter of law. Thus, we find the court has erred in granting a summary judgment in favor of the defendants.

ITS THE WEIGHT (AND RELIANCE ON THE WEIGHT), NOT THE VINTAGE

Continental Distributing Co., Inc. v. M/V SEA-LAND COMMITMENT, No. 90–4981 (S.D.N.Y. June 22, 1992) (1992 U.S. Dist. Lexis 8895) (1992 WL 163158)

Plaintiff purchased two shipments of wine. The first supplier placed 600 cases in container ICSU 379613/1 and sealed its doors. The container was trucked to a second shipper, who broke the seal, placed an additional 145 cases of wine in the container, closed the doors, and placed a new seal on the doors.

The sealed container was then delivered to the M/V SEA LAND COMMITMENT at Anvers, Belgium. There, the carrier issued two (2) bills of lading, which the trial court described:

> Each bill of lading bore the notations "Shippers Stowage Load and Count," and indicated that the seal was "Affixed by Supplier." However, the bills of lading also represented, in the column marked "number of packages" and "gross weight," that the defendant received 600 and 145 cases, weighing 12,643 kg. and 2,650 kg. respectively.
>
> Sea-Land Service carried the sealed container by water from the port of Anvers to Charleston, South Carolina, and then by truck to the Sea-Land Service terminal in Jacksonville, Florida. Defendant claims that records reflect that shipper's seal J.F.H. #010371 remained intact throughout all phases of the journey until it was

> broken by a stevedore employee in Jacksonville. Defendant further asserts that, at that time, the container was stripped and tallies were made by stevedore showing the actual amount of wine in container ICSU 379613/1 was only 635 cases or 110 fewer than the total indicated in the bill of lading.

Not surprisingly a suit followed and the carrier moved for summary judgment, contending the plaintiff had failed to establish a *prima facie* case that 745 cases were delivered to the carrier. The trial court disagreed and granted the plaintiff's cross-motion for summary judgment. The initial decision is reported at 1992 AMC 1743 (S.D.N.Y. 1992).

A motion for re-argument followed, which the court denied in part and granted in part. The trial court modified its March 30, 1992 decision in one respect, finding a disputed issue of material fact concerning whether plaintiff relied on Sea-Land Service's bills of lading. Accordingly, the court denied plaintiff's motion for summary judgment.

In its motion for re-argument, defendant argued that since the bills of lading were straight bills, they were not *prima facie* evidence of the quantity received. The court, however, rejected this distinction, stating:

> Because it is undisputed that the bills of lading in the instant case were straight bills of lading, defendant argues that any indication of quantity on the face of the bills of lading does not constitute *prima facie* proof that Sea-Land Service received 745 cases of wine. Defendant's assertion that the Court should distinguish between straight and order bills of lading in applying the *prima facie* rule is unconvincing and not supported by case law. As Judge Woolsey wrote, over sixty years ago, [i]t matters not. . .that the bill of lading is not negotiable. For what difference can it make whether the steamship owner issues a document which it may reasonably expect will be acted on to his detriment by a particular man or by many men—by a man whose name it knows or by men whose names it knows not? The real question . . .is whether the consignee of a straight bill of lading or the indorsee of a negotiable bill of lading knows, when he pays his money or pledges his credit, that the representation as to the condition of the goods by the shipowner is false. If he does not know of the misrepresentation, the shipowner must stand by his statement of condition. (citations omitted).

* * *

Because the court did not explicitly state, in its March 30, 1992 decision, whether there is a relevant distinction between straight and order bills of lading, defendant's motion for reargument is granted on this issue. However, for the foregoing reasons, the court finds that its holding in the March 30, 1992 decision applies to straight, as well as order, bills of lading.

* * *

However, the court finds convincing defendant's assertion, upon re-argument, that plaintiff must establish reliance upon the bill of lading when it made its payments for 745 cases of wine. (citations omitted). Whether Continental Distributing relied upon the weight or quantities indicated in the bills of lading is a disputed issue of material fact which cannot be decided on a motion for summary judgment. *Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990) (*quoting Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987)).

Accordingly, defendant's motion for reargument is granted on this issue. For the foregoing reasons, the court finds that there is a disputed issue of material fact concerning reliance by plaintiff. Consequently, plaintiff's motion for summary judgment must be denied.

BLOOD, SWEAT AND STEEL

Associated Metals & Minerals Corp. v. S.S. J. JASMINE, 90 Civ. 5242 (S.D.N.Y. March 24, 1992) (Carter, J.) (1992 WL 77564)

Plaintiff purchased quantities of hot rolled steel plates in India. The bills of lading were apparently claused "Material with Superficial Atmospheric/ Surface Rust" and/or "Edges Rusty", which clauses were acceptable under the letter of credit. Upon arrival in various U.S. Gulf ports the consignee and its customers complained of seawater damage. Plaintiff's surveyor "subjected some of the pieces to a silver nitrate test, which tested positive for seawater corrosion." He also testified that the ship's holds revealed a pattern of seawater seepage, and that in Houston he saw rust streaking on the hatch coamings. The damaged cargo was, for the most part, sold at salvage. The court found that plaintiff had made out a *prima facie* case and concluded:

Defendants have not met their burden of overcoming plaintiff's *prima facie* case. The defendants' attempt to show that the con-

densation in the holds of the vessel was not seawater fails, since the evidence establishes that the vessel had an inadequate ventilation system—the only ventilation being supplied by the movement of the vessel. There was no hygrometer on board, no fans and no attempt to ventilate the cargo during the voyage.

Defendants' attempt to reduce the damages claimed based on the testimony of Dr. Brandt Rising also fails. Dr. Rising's testimony has to be disregarded under any circumstances because he was relying on analysis of materials retained by surveyors many months before being sent to defendants' counsel, who thereafter turned the materials or samples over to Rising for analysis. This analysis, made on samples so long after the voyage, particularly when we do not know the conditions the samples were subjected to in the surveyor's custody, is unreliable and valueless.

MY B/LADING IS BIGGER THAN YOURS

Gross Machinery Group v. M/V ALLIGATOR INDEPENDENCE, No. 91–0460 (S.D.N.Y. March 2, 1992) (Martin, J.)

Plaintiff sued the vessel, her owner, NYK Line and an NVOCC because his $300,000 package of machinery was dropped during discharge in New York. The defendants sued the stevedore. Everybody claimed the COGSA $500 package limitation.

The NVOCC had issued its own bill of lading, and then shipped with NYK, who issued its bill of lading to the NVOCC. Then NYK put the cargo on a Mitsui OSK chartered vessel pursuant to "a space-sharing agreement." The cargo was intended to be discharged at New York for on-carriage transportation by truck to Toronto. During discharge using the stevedore's share crane, the machine fell after passing the ship's rail.

The court held that the liability of NYK, the vessel, the owner and the stevedore was governed by the NYK bill of lading, which, it further held, contained a valid package limitation, "before and after COGSA extension, and HIMALAYA" clauses. The actual owner of the cargo was held bound by the NYK bill of lading since the NVOCC acted as the cargo owner's agent in contracting with the actual carrier and because the NYK bill of lading bound the "Merchant," which was defined therein to include "not only the shipper of the goods, but also any consignor, owner and receiver, or holder of the bill of lading."

In the trial court's view, however, the NVOCC could not avail itself of either COGSA's $500 package limitation or its bill of lading limitation of

Swiss Fr. 20,000 per event. The NVOCC's bill of lading did not specifically incorporate COGSA nor did it contractually extend COGSA's application to the period of time after discharge. The court noted that even if COGSA applied *ex proprio vigore*, its application ceased when the goods were off-loaded. As to the bill of lading's internal limitation, the court noted:

> It is well settled, however, that a contract purporting to limit the common-law liability of a common carrier is valid only where the shipper has been given the option or choice of contracting for the carrier's service without any restriction of liability. In other words, a carrier must provide a shipper with a "fair opportunity" to declare excess value. Thus, stipulations limiting the liability of a carrier to a specified amount are invalid unless the shipper has the alternative of shipping such contract of limited liability in consideration for the lower rate, or of shipping the cargo under the carrier's common law liability at a reasonable rate. (citations omitted.)
>
> Although on its face the Danzas Bill of Lading limits the liability of Danzas to 20,000 Swiss Francs, it fails to provide any notice that greater protection may be obtained by paying a higher rate. The Bill of Lading neither expressly incorporates COGSA nor provides a space for declaring excess value. As such, the Danzas Bill of Lading fails to provide adequate notice, and hence "fair opportunity."

"CY/CY" BRINGS SIGHS

Delbert Christie v. Temco Service, No. 90–1085 (E.D.N.Y. March 27, 1992) (Johnson, J.)

A longshoreman sued an ocean carrier for alleged injury sustained when a drum fell on him while he was stripping a container. The container had been transported "house to house". The bill of lading specified that the shipment was "CY/CY" and the container had been delivered to the consignee's trucker the day before. Delivery records reflected the same seal noted on the bill of lading at the time of receipt for shipment.

Granting the ocean carrier's motion for summary judgment, the court stated:

> Plaintiff has produced no concrete evidence to contradict the bill of lading which states on its face "CY/CY" and "shipper's load and count" and both of these terms are understood in the industry

to mean house to house. I take judicial notice of the fact that "house to house" means the cargo is received by the carrier fully loaded and sealed from a consignor and it's discharged in exactly the same way to the consignee. Furthermore, the defendant has proffered the affidavit of one of its employees that further supports the conclusion that the shipment was house to house, that is fully loaded, stuffed and secured in a container prior to receipt by Hanjin. Besides the terminology used in the bill of lading, the price reflected therein and the absence of any changes to such price or other notation corroborates defendant's assertion. Plaintiff simply alleges that even defendant's employee cannot guarantee that its personnel in Japan did not load the cargo and avers that this is sufficient basis alone to defeat summary judgment. Such speculation, however, is not a basis upon which summary judgment may be denied.

WOOD NOT SUBJECT TO "RETLA RUST"

GF Co. v. Pan Ocean Shipping Co., Ltd., No. 90–6952 (C.D. Cal. June 4, 1992)

The U.S. District Court for the Central District of California took an interesting route between *Tokio Marine & Fire Ins. Co. v. Retla*, 426 F.2d 1372 (9th Cir. 1970) and *Portland Fish Co. v. States Steamship Co.*, 510 F.2d 628 (9th Cir. 1974), to invalidate the "Pan Ocean Wood Clause" and uphold the *prima facie* effect of an otherwise clean bill of lading and the consignee's right to rely thereon.

Plaintiff GF Company ("GF") purchased wooden doorskins from Pyramid Trading Company ("Pyramid"), a supplier in Taiwan. The cargo, packed into 406 cartons, was shipped aboard the "Pan Queen," a vessel owned and operated by defendant Pan Ocean Shipping Co., Ltd. ("Pan Ocean"). The cargo was purchased pursuant to a letter of credit issued by the Banque Indosuez. This letter of credit required Pyramid to present "clean on-board ocean bills of lading" before Banque Indosuez would render payment.

Pan Ocean had issued clean negotiable bills of lading which contained an additional clause that attempted to qualify the phrase "apparent good order and condition" and read:

THE TERM *APPARENT GOOD ORDER AND CONDITION* WHEN USED IN THIS BILL OF LADING WITH REFERENCE TO IRON, STEEL OR METAL PRODUCTS OR WOOD

> PRODUCTS DOES NOT MEAN THAT THE GOODS, WHEN RECEIVED, WERE FREE OF VISIBLE RUST OR MOISTURE, STAINING, CHAFING AND/OR BREAKAGE. IF THE SHIPPER SO REQUESTS, A SUBSTITUTE BILL OF LADING WILL BE ISSUED OMITTING THE ABOVE DEFINITION AND SETTING FORTH ANY NOTATIONS AS TO RUST OR MOISTURE STAINING, CHAFING AND/OR BREAKAGE WHICH MAY APPEAR ON THE MATES, OR TALLY CLERKS RECEIPTS.

When the cargo was delivered it was found to have substantial physical damage, including broken and missing bands, and waster sheets adrift. Some crates bore forklift blade marks.

Plaintiff moved for summary judgment based on the clean bills of lading and the obvious discharge damage. Pan Ocean asserted that the "wood clause" allowed it to show that any damage to the cargo occurred prior to its receipt of the goods. The trial court disagreed, holding that the wood clause, unlike the RETLA RUST Clause, impaired the negotiability of the bill of lading and violated COGSA. The court noted that the rust clause for steel was needed "due to the progressive nature of the rusting process, which forced the carrier to detail every bit of moisture and rust that it detected at the time of shipment to protect itself against the likely possibility that the rusting process would reach fruition during carriage." Many unclean bills of lading resulted, leading banks to reject the bills and withhold payment. Hence, according to the trial court, "the practical effect was that the sale transaction was interrupted and in innumerable instances: the shipper could not get paid, the receiver could not receive his cargo (because his bank had not accepted the bills of lading), while the banks were themselves perceived as being unreasonably technical."

The Retla Rust Clause, in the court's view, solved many of these practical problems where steel was concerned:

> In banking terms, it created an acceptable document, since no stamped or written clauses were placed on the bill of lading. The actual condition of the cargo on receipt was recorded on mates' receipts or tally clerks' receipts so that a record was maintained. By virtue of the specific statement in block capital, on the face of the bill of lading, the buyer of the steel pursuant to bill of lading transfer was always aware that no representation of condition was made.

In sum, the Retla Rust Clause "restored the negotiability to bills of lading used in connection with the transportation of steel while at the same time

protecting ocean carriers from the undeterminable consequences of the rusting process."

The court, however, distinguished the "Pan Ocean Wood Clause", stating:

> Neither the staining, chafing, nor breakage of wood is the result of a progressive process. At the point of origin, the wood is either chafed, stained, or broken, or it is not. Thus, the ocean carriers' concern about the rusting process that justified the decision in *Tokio Marine* is not present in this case. Since the carrier need not anticipate that some progressive process will damage the wood, the carrier must issue a clean bill of lading if the wood is in good order and condition upon receipt.
>
> Since the concerns that were present in *Tokio Marine* are wanting in this case, the court is guided by the underlying rationale of the *Portland Fish* holding. In the court's view, the Pan Ocean Wood Clause, if validated, creates a situation that is ripe for abuse. Specifically, the shipper may only receive payment if it obtains a "clean" bill of lading from the carrier. Since the international banking community treats a bill of lading that contains a Pan Ocean Wood Clause as "clean", ... the shipper may deliver damaged wood to the carrier and accept a bill of lading containing such a clause. The shipper receives payment long before the consignee can inspect the wood, while the carrier may deny that the wood was in good order and condition at the point of origin. The burden is thus unfairly shifted to the innocent consignee, who is left attempting to demonstrate the condition of the wood delivered many months prior to a distant port.

Plaintiff's motion for summary judgment was granted.

GLOBAL GATHERINGS

YOU GET A BOX, YOU GIVE A BOX . . .

Eastern Federal Union Ins. Co., Ltd. v. American President Lines, Ltd., Supreme Court of Pakistan, dated March 8, 1992.

The Supreme Court of Pakistan gave thorough consideration to what it described as "* * * one of those cases in which the claim amount is insignificant but the principle and question of law involved is of great importance."

The action involved a claim for shortage of two bales of second hand clothing from a shipment said to be 213 bales. The containers had been discharged at Karachi and were inspected at that time and the seals found intact. The shortage was noted when the seals were broken and the containers opened.

The Court stated the principal question to be "* * * whether a carrier which carries the cargo in containers under bill of lading giving number of containers loaded and also the particulars of cargo stuffed in it with qualifying remarks like CY/CFS and STC is bound to deliver only the number of containers as shown in the bill of lading or the cargo as described in the bill of lading contained in the container."

The Court went on to consider the background and basis of the Hague Rules, Hague/Visby Rules and COGSA. It referred to a number of United States cases and to decisions from other courts and jurisdictions, including Singapore, Canada, Australia, as well as texts and commentaries.

The Court stated:

> A bill of lading with notations like CY/CY, CFS or STC is a *prima facie* evidence as provided by law but its rebuttal by the carrier becomes easier and the burden becomes much lighter than in other cases. Such or similar notations on the bill of lading have gained currency and their meaning is well understood in shipping, commercial and banking circles to mean that the carrier was not associated with the stuffing of the container which was exclusively done by the shipper. In the face of such bill of lading the carrier need not prove these facts unless rebutted. It has only to establish that such sealed container was properly and carefully loaded, handled, stowed, carried, kept, cared for and discharged. The burden will then shift to the shipper to prove that the number of packages or goods as shown in the bill of lading were stuffed in it. Without such proof the claim for loss or damage cannot suc-

ceed. Where the bill of lading is in respect of a container without describing the goods contained in it, the words "apparent order and condition" will refer to the apparent condition of the container.

In the present case admittedly the bill of lading was marked with notations CY/CY, STC, which *prima facie* established that the containers were stuffed exclusively by the shipper. The respondents have proved by cogent evidence that the containers were discharged at Karachi with seals intact. They have further, by evidence in rebuttal, proved that they have discharged their duties as carriers properly. The appellant has not produced any evidence in rebuttal to prove the number and condition of bales stuffed in the containers.

Plaintiff's appeal was therefore dismissed.

MASTER OF THE OWNER'S UNIVERSE . . .

The M.S. Jasmin, Tokyo District Court, Civil Affairs Division No. 28, March 19, 1991.

The District Court of Tokyo considered a claim for damage to a cargo of rice carried from Indonesia to Korea. Bills of lading were issued "For the Master". The suit was brought against the owner of the vessel and the time charterer.

In considering the issue of whether the time charterer was a party to the contract (*e.g.*, carrier) evidenced by the bills of lading, the court found the expression "For the Master" was understood to be a description that the shipowner himself was a party to the contract of carriage.

The time charter contained a provision that the master authorized the charterer or his agent to sign bills of lading on behalf of the master in conformity with mate's or tally clerk's receipts. The court found the shipowner, not the time-charterer, was the carrier. The court went on to find the cause of damage—excessive moisture—to have been the result of a latent defect in the cargo itself and of the failure of the cargo owner's servants to control the cargo properly after discharge.

October, 1992

COMMITTEE ON MARITIME ARBITRATION NEWSLETTER NO. 8A[1]

Editors: David A. Nourse and R. Glenn Bauer

COURT OF APPEALS SETS UP DOUBLE STANDARD IN FAVOR OF ARBITRATORS WHEN REVIEWING DISTRICT COURT DECISIONS ON MOTIONS TO VACATE AWARDS

In *Robbins v. Day*, 954 F.2d 679 (11th Cir.), *cert. denied*, 61 U.S.L.W. 3261 (1992), an arbitration took place before the National Association of Securities Dealers between the trustees of an estate and Paine Weber. The award was challenged by the trustees, who considered it unjust. The Eleventh Circuit Court of Appeals reviewed the district court's decision vacating the award. They established two standards of review: (1) where the district court refuses to vacate the award, the standard is "abuse of discretion"; (2) where the district court vacates an award, the appellate court will review the matter *de novo* "to protect the integrity of the arbitration process". These uneven standards are set to promote the primary advantages of arbitration, "speed and finality".

In its review of the award, the court recognized that some courts consider "manifest disregard of the law" as a ground for vacating an award, but the 11th Circuit declined to adopt that standard. Where no reasons are given for the award, the court will determine whether "a rational ground for the arbitrators' decision can be inferred from the facts of the case". An arbitration award containing only a lump sum is presumed to be correct. The party challenging it must prove there was no rational basis for it. Where a rational basis can be inferred, the award will stand.

Looking at the statutory grounds for vacating an award, the court found no misconduct by the panel in refusing to hear evidence where the brokers refused to testify on the grounds of the 5th Amendment. The trustees had opposed any delay until pending criminal proceedings were concluded. An arbitrator enjoys wide latitude in conducting the hearing and the Federal Arbitration Act allows arbitration to proceed with only a summary hearing. The award was confirmed.

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[1]The decisions discussed herein include those contained in Newsletter No. 8, dated May 1, 1992, which was distributed at the Spring Meeting of the Maritime Law Association, as well as four more recent decisions set out at the end of this Newsletter.

FOURTH CIRCUIT USING "COMMON SENSE" SAYS UNDER 9 U.S.C. § 11(a) COURT MAY DETERMINE FORGOTTEN CLAIM WITHOUT REFERRING IT BACK TO ARBITRATORS

In *Transnitro, Inc. v. M/V WAVE*, 943 F.2d 471 (4th Cir. 1991), charterer arrested a vessel, alleging breach of a charter party. The vessel was released on the filing of a bond and the suit was stayed pending arbitration. The arbitrators awarded vessel owners' detention damages, attorney's fees and costs of the bond, together with interest of $56,767.71 on the amount of the bond. After the award, owners revealed that the collateral for the bond actually had earned interest of $34,000 and that owners had additional expenses of $28,147.01 respecting the arrest which had not been claimed in the arbitration. The charterers paid the award except for the interest and petitioned the court to vacate that part of the award under 9 U.S.C. §11. The district court, concluding that it had power to modify and correct the award "so as to effect the intent thereof and promote justice between the parties", reduced the interest to $23,676.71, the difference between the amount awarded and the interest actually earned by owners, but refused to consider owners' claim for additional expenses respecting the arrest, apparently on the ground that owners should have submitted the claim to the arbitrators.

The Fourth Circuit affirmed the district court's determination on the interest claim but remanded for further proceedings respecting owners' claim for additional expenses. The court noted that the errors in question were made by the parties and not by the arbitrators but concluded that, even where "an evident material mistake" was made by one or both parties, the district court was empowered under 9 U.S.C. §11(a) to do equity and justice. However, on "a common-sense basis" the Fourth Circuit concluded that the district court should proceed to determine the remaining claim for additional expenses without requiring the parties to return to the arbitration in support of this intent. In support, it cited *Nat. Post Office Mailhandlers, Watchmen Messengers and Group Leaders Div., Laborers Int'l Union of N.A., AFL-CIO v. United States Postal Serv.*, 751 F.2d 834, 844–45 (6th Cir. 1985).

ARBITRATOR MAY BE ENJOINED FROM SERVING BEFORE ARBITRATION COMMENCES IF THERE IS OVERT MISCONDUCT

In *Metropolitan Property and Casualty Co. v. J. C. Penney*, 780 F. Supp. 885 (D. Conn. 1991), it was held that a court may disqualify an arbitrator in appropriate circumstances before the arbitration commences. Penney appointed one McNamara as its arbitrator. McNamara, even before he was appointed, travelled to Dallas and met with Penney officials to discuss the merits of the case. After being appointed he received documentary evidence on the case from Penney. He then attempted to discuss the merits of the case with the other party's arbitrator even before a third was selected. Metropolitan sought an injunction in the state court to prevent McNamara from serving.

The case was removed to federal court and, on a motion to remand, the district court considered whether McNamara was a real party for diversity jurisdiction or merely a "nominal" party, and this led the court to determine whether grounds existed for enjoining him from serving on the panel. After considering the position of a party-appointed arbitrator, the court concluded that he need not be impartial. However, the party-appointed arbitrator had a duty to remain faithful to the arbitration process itself, to preserve the fairness of the process, and to act fairly. In this case McNamara had gone beyond the bounds of permissible conduct and engaged in overt misconduct. The court discussed cases holding that an arbitrator's misconduct cannot be considered by a court until a motion to confirm the award, but held that this procedure would be senseless under the circumstances. It remanded the case to the state court to consider enjoining McNamara from serving.

SHIP OPERATOR HELD NOT COMPETENT TO ENFORCE ARBITRATION CLAUSE AGAINST CHARTERER

In *Matter of Keystone Shipping Co. v. Texport Oil Co.*, 782 F.Supp. 28 (S.D.N.Y. 1992), Judge Edelstein refused to allow Keystone Shipping, a ship operator, to require a charterer to arbitrate disputes arising out of a fixture made with the charterer by Keystone on behalf of the owner.

The charterer had commenced a suit against the vessel *in rem*, her owner, and Keystone Shipping as the vessel's operator. The charter party was clearly between the owner and charterer, and it contained a broad arbitration clause requiring "any and all disputes and differences of whatsoever nature arising out of this charter" to be arbitrated. The court described Keystone as a non-signatory.

Four circumstances were described in which a non-signatory can be compelled to arbitrate. First, the corporate veil may be pierced. In this case, Keystone and the owners were "affiliated" but neither company controlled the other. Second, a nonsignatory may be held a party to the bill of lading. In this case Keystone had nothing to do with issuing the bill of lading. Third, an arbitration agreement may be implied from conduct. Here, however, none could be derived from conduct. Fourth, a nonsignatory may sometimes enforce the arbitration under an agreement made by the non-signatory on behalf of a principal. Keystone, however, acted only as agent for a disclosed principal, and the Court said signing as an agent for a disclosed principal does not make one a party to an arbitration clause.

The court refused to compel arbitration of the dispute between charterer and Keystone.

VOUCHING IN EFFORT FAILS BECAUSE OF POTENTIAL CONFLICT OF INTEREST BETWEEN INDEMNITEE AND INDEMNITOR

In *Universal American Barge Corp. v. J-Chem., Inc.*, 946 F.2d 1131 (5th Cir. 1991), *reh'g denied*, 1992 U.S. App. Lexis 505 (5th Cir. January 3, 1992), J-Chem fumigated the holds of the ENERGY FREEDOM prior to its carriage of a cargo of bagged wheat flour from the U.S. to Egypt. A fire broke out in the vessel's holds during its voyage and some cargo was damaged. Universal, which had contracted with the cargo receivers for transportation of the wheat flour, sought unsuccessfully to compel J-Chem to join in its arbitration with the receivers. Universal then tendered defense of the arbitration to J-Chem but the fumigators declined the tender. While the arbitration was still pending, Universal sued J-Chem for indemnification. The arbitrators eventually concluded in their award that the fire was caused by improper application of the fumigant used by J-Chem and that Universal was liable to carriers for the cargo damage. Universal then settled the award by payment of $3.5 million and moved for potential summary judgment against the fumigators. The district court granted Universal's motion, concluding that estoppel was a bar precluding litigation of the fumigators' fault.

The Fifth Circuit reversed the district court's decision. The court denied the fumigators' challenge to the application of "offensive" collateral estoppel respecting a primary determination rendered in an arbitration proceeding, concluding that the application of collateral estoppel from arbitral findings was within the broad discretion of the district court. The court also denied the fumigators' contention that the arbitration would not

have provided them with a full and fair opportunity to present their case. However, the court accepted the fumigators' argument that the application of collateral estoppel was improper because there was a distinct conflict of interest between Universal and J-Chem which prevented Universal from adequately representing the fumigators' interests in the arbitration.

MANDATORY NON-BINDING MEDIATION AND VOLUNTARY ADR RECOMMENDED FOR SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

The Report and Recommendations of the Southern District of New York Civil Justice Reform Act Advisory Group, dated November 1, 1991, propose that the Southern District implement a mandatory, non-binding pilot mediation program and voluntary ADR program providing litigants with the option of selecting non-binding arbitration, mediation, early neutral evaluation, mini-trial or summary jury/non-jury trial. The Report and Recommendations were adopted and implemented by the Board of Judges for the Southern and Eastern District of New York respectively, on January 1, 1992.

* * * *

MORE RECENT CASES

ATTACHMENT OF BUNKERS ON TIME CHARTERED SHIP HAS DESIRED EFFECT OF OBTAINING SECURITY EVEN THOUGH THE CASE IS DISMISSED FOR FORUM NON CONVENIENS

In *Great Prize, S.A. v. Mariner Shipping Pty., Ltd.*, 967 F.2d 157 (5th Cir. 1992), the Fifth Circuit upheld the district court's conditional dismissal of a suit brought to obtain security for a London arbitration. A Rule B Attachment was obtained over bunkers allegedly owned by an Australian time charterer. Another related Australian company intervened, claiming ownership of the bunkers, and moved to dismiss the attachment. The bunkers were released after a third party subcharterer deposited $91,000 as security with the Court. The court refused to decide who was entitled to the security, and dismissed the suit for *forum non conveniens*, conditioned upon defendant's agreement to satisfy any final judgment rendered by an Australian court where the suit could be properly brought and to submit to the jurisdiction of the Australian court. Thus, the dispute over ownership

of the bunkers was relegated to Australia and the initial disputes continued to be determined in a London arbitration. In the meantime, the $91,000 security remained on deposit in New Orleans.

On appeal, the Fifth Circuit declared that it needn't decide who owned the bunkers before determining whether it had *in personam* jurisdiction over the defendant. It was enough if the defendant who allegedly owned the property failed to contest jurisdiction over it. The court also rejected an argument that the district court was compelled to order arbitration, holding that in a case involving only foreign nationals in which the only contact with the U.S. was the presence of the *res*, an arbitration clause would not prevent the court from transferring or dismissing the case based upon *forum non conveniens*. The result, of course, was that the security remained with the court and, as a practical matter, the attachment served its purpose.

COURT UPHOLDS AWARD FOR CARGO DAMAGE ALTHOUGH ON ITS FACE CLAIM WAS TIME BARRED UNDER COGSA; FURTHERMORE, CLAIM APPEARED TO BE VIOLATIVE OF INJUNCTION IN LIMITATION PROCEEDING

This case arose in a rather complicated procedural setting. The owners of the MASTER PETROS filed a limitation proceeding when the vessel grounded and the voyage was abandoned. Cargo owner (also charterer) filed a claim in the limitation proceeding which was withdrawn "without prejudice". The limitation proceeding was later wound up *without* the cargo claim and a final decree of exoneration from liability was entered. Thereafter, the shipowners commenced an arbitration to recover a general average contribution from the cargo owner who had withdrawn its claim. The cargo owner counterclaimed in the arbitration for cargo loss and damage. The arbitrators dismissed the general average claim and entered an award in favor of the cargo owner for over $900,000.

In *Exportkhleb v. Maistros Corp.*, 790 F. Supp. 70 (S.D.N.Y. 1992), the court upheld the award even though the cargo counterclaim seemed obviously to be time barred and contrary to the final order entered in the limitation proceeding. The counterclaim was submitted to the arbitrators more than four years after the accident, but the arbitrators measured COGSA's one-year time bar from when the limitation proceeding was dismissed and the arbitration commenced. The court reasoned that by proceeding with the arbitration, the shipowners had waived their right to object to the arbitrability of the cargo claim. Moreover, the cargo owner was not bound by the order in the limitation proceeding because it had

withdrawn from that proceeding. The court said, first, that there was no "manifest disregard of the law" and, second, that "even if in error", the award did not disregard the law. Also, in the trial court's view, the award was not irrational since there was "some" evidence in the record to support it.

COURT DEFINES "UNDUE MEANS" IN FEDERAL ARBITRATION ACT

In *A. G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401 (9th Cir. 1992), arbitrators in a securities case issued an award in favor of the brokers without giving reasons. The disappointed investors argued that the brokerage house had submitted affirmative defenses which were meritless on their face and thus had obtained the award by "undue means". The district court accepted this argument, but the Ninth Circuit Court of Appeals did not. The circuit court defined "undue means" as behavior that is immoral if not illegal. Simply submitting a meritless defense, however unfortunate, was in the court's view part and parcel of the business of litigation. The court further noted that if awards could be set aside on this basis, courts would be free to vacate an award in any case in which the winning side had raised even one meritless defense. In addition, given that arbitrators were not required to provide written reasons for their decision, it would often be impossible for reviewing courts to determine whether a meritless defense impacted upon the panel's reasoning.

DISTRICT COURT HOLDS FRAUD IN INDUCEMENT TO SIGN CONTRACT RAISES ISSUE FOR COURT, NOT ARBITRATORS

In *Kyung In Lee v. Pacific Bullion (New York), Inc.*, 788 F. Supp. 155 (E.D.N.Y. 1992), a woman investor alleged that she was misled by advertisements to invest money in a precious metals and foreign currency commodity account with a guaranteed profit. She had signed a document with the broker containing an arbitration clause. Upon the broker's motion to stay the suit pending arbitration, the court held that the making of the arbitration agreement was an issue for the court. It distinguished *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), as lacking the "fraud in the factum" present in this case. Here, the woman's signature on the agreement was obtained by a misrepresentation that the document, in a language she could not read, was merely an "administrative document".

COMMITTEE ON MARINE INSURANCE, GENERAL AVERAGE, AND SALVAGE, P & I SUBCOMMITTEE[1]

NEWSLETTER NO. 3

Editor: John Sandercock

PARTICIPATION OF EXCESS INSURER IN SETTLEMENT DISCUSSIONS NOT AN ASSUMPTION OF THE INSURED'S DEFENSE

Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp., 932 F.2d 442 (5th Cir. 1991)

A shipowner was forced to undertake its own defense in a suit filed by an injured seaman when its primary P & I insurer became insolvent. The excess insurer participated in settlement negotiations to protect its exposure above $500,000, paid the settlement when the assured refused to contribute, then brought suit against the assured for reimbursement of the primary insurer's $500,000 retention. The district court granted summary judgment for the assured on the ground that the excess insurer had assumed the assured's defense.

The Fifth Circuit reversed and rendered judgment for the excess insurer, holding that the excess insurer did not make an implicit promise of coverage by participating in settlement negotiations with the claimant during a trial conducted by the assured's independent counsel.

INJURIES SUSTAINED DURING OPERATION OF A CRANE MOUNTED ON A BARGE NOT WITHIN WATERCRAFT EXCLUSION

Consolidated American Ins. Co. v. Mike Soper Marine Serv., 951 F.2d 186 (9th Cir. 1991)

Applying California law, the court held that the watercraft exclusion clause in a comprehensive liability policy did not exclude a claim for bodily injury sustained during the operation of a crane mounted on a barge.

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[1]The Chairman of the P&I Subcommittee is Edward F. LeBreton, III, Esq. The Vice-Chairman is John H. Cassedy, Esq. This Newsletter was prepared by the P & I Subcommittee of the Committee on Marine Insurance, General Average, and Salvage, and covers the period from June 1991 through September 1992. The assistance of Julia Symon is gratefully acknowledged.

The court found that the term "watercraft" was ambiguous because (1) the policy did not define watercraft; (2) the term watercraft could include a barge with a crane on it but not necessarily so; (3) the injury was caused by the crane, which could have been assembled on shore; and (4) the assured's business was a watercraft machinery repair shop and the insurer's interpretation would render the policy meaningless. The insurer was also held liable for an amount in excess of the policy limit for breaching its duty to defend the insured.

WRECK REMOVAL HELD "COMPULSORY BY LAW"

Grupo Protexa, S.A. v. All American Marine Slip, 954 F.2d 130, 1992 AMC 1227 (3d Cir. 1992)

The owner of a vessel which sank off the coast of Mexico was issued a written order by the Port Captain requiring it to post a bond "to guarantee the cleaning up of the area and the salvaging of [the] vessel." The vessel owner undertook to remove the vessel itself and subsequently submitted to its P & I insurers a claim which exceeded $12,000,000. The insurers refused to reimburse the owner, claiming that the removal of the sunken vessel was not "compulsory by law" and that the owner had not acted as a prudent uninsured.

On an appeal by the vessel owner, the Third Circuit adopted the Fifth Circuit's interpretation of the phrase "compulsory by law", holding that removal would be considered compulsory by law if either (1) the removal is directed by governmental order, statute or regulation, or (2) removal is reasonable under a cost-benefit analysis taking into consideration the probable cost of removal and the likelihood and amount of liability which could be imposed for failing to remove the wreck. Following this interpretation, the court of appeals remanded the case to the district court to determine, under Mexican law, whether the Port Captain's order expressly directed removal. The court of appeals also held that the "prudent uninsured" requirement did not preclude the shipowner from recovering the costs of removal of the sunken vessel but noted that the policy might restrict recovery to reasonable removal costs.

CARGO POLICY COVERING DEBRIS REMOVAL INCLUDES REMOVAL TO AVOID LIABILITY TO THIRD PARTIES

Morey v. All Alaskan Seafoods, Inc., 1992 AMC 1551 (W.D. Wash. 1992)

Cargo underwriters brought an action seeking a declaration of nonliability regarding the removal of cargo debris (frozen crab) from a

stranded vessel. The policy provided coverage for the removal of all debris of covered property remaining after any loss the policy insured against. The cargo was covered by the policy and the vessel's stranding was a covered peril. The underwriters, however, claimed that the policy only provided coverage for the removal of debris when it was necessary to salvage the vessel and not when the sole purpose was to avoid legal liability to third parties. The court denied underwriters' motion for summary judgment because the policy clearly covered removal of debris and there was no evidence of the parties' intent otherwise to limit the coverage.

P & I UNDERWRITERS HAVE NO STATUTORY RIGHT TO A FEDERAL FORUM UNDER THE LIMITATION OF LIABILITY ACT

Magnolia Marine Trans. Co., Inc. v. Laplace Towing Corp., 964 F.2d 1571 (5th Cir. 1992)

A deceased tug captain's widow filed a state court claim under the Jones Act and general maritime law, naming the owner of the tug and its P & I insurers as defendants. P & I insurers filed a declaratory judgment action in federal court claiming the right to a federal forum and the vessel owner filed a petition for limitation of liability. After the federal cases were consolidated, the district court enjoined the state action and denied the plaintiff's motion to dismiss the declaratory judgment suit.

On appeal, a divided panel of the Fifth Circuit reversed the district court's decision, holding that nothing in the Limitation Act or in *Wilburn Boat* requires that an underwriter be sued only in federal court. In order to preserve the shipowner's insurance coverage from being depleted before the limitation action was finished, however, the Fifth Circuit held that the state court suit should be enjoined until steps had been taken to protect the shipowner's contractual rights.

INSURED DID NOT HAVE RIGHT TO SELECT FORUM TO LITIGATE QUESTION OF ARBITRABILITY DESPITE SERVICE-OF-SUIT CLAUSE

McDermott Intern., Inc. v. Lloyds Underwriters of London, 944 F.2d 1199 (5th Cir. 1991)

The insured sued its insurer in state court after the insurer denied coverage. The insurer demanded that the insured submit to arbitration in accordance with the terms of the policy and the insured, in a separate

action, asked the court for a declaration that it was not obligated to arbitrate. The insurer removed both cases to federal court but the district court granted the insured's motion to remand, holding that the insured was entitled, pursuant to the policy's service-of-suit clause, to choose the forum where the arbitrability of the dispute would be resolved.

In an unusual appeal from a generally unreviewable order, the Fifth Circuit held that the policy did not unambiguously give the plaintiff the right to select the forum in which the dispute regarding arbitration would be resolved and, thus, vacated the order to remand.

The insurer argued that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards conferred a non-waivable right to a federal forum for disputes concerning arbitrability not entirely between United States citizens. The court of appeals held that the right to a federal forum could be waived, but found that the insurer had not explicitly waived that right.

DAMAGES TO SCHEDULED VESSEL NOT COVERED BY P & I POLICY

Gulf Island, IV v. Blue Streak Marine, Inc., 940 F.2d 948 (5th Cir. 1991)

The owner of a vessel which sank off the coast of Mexico brought an action for the loss of use of the vessel and property damage against the operator of the vessel, the insurer under both Hull and Protection and Indemnity (P & I) policies and the umbrella insurer. The district court granted motions for summary judgment in favor of the two insurers. Both the owner and the operator appealed. The Fifth Circuit affirmed the lower court's decision with respect to the P & I insurer. It found that the P & I policy covered only damages to "other vessels" and because the sunken vessel was scheduled on the policy, it could not be classified as an "other vessel." Also, the word "property" as used in the introductory clause to the P & I policy (as opposed to the hull policy) only referred to property on board the "other vessel" and not to the scheduled vessel itself.

SUIT BY INSURER AGAINST INSURED NOT NECESSARILY AGAINST PUBLIC POLICY

Peavy Co. v. M/V ANPA, No. 91-3827 (5th Cir. Sept. 14, 1992)

A marine liability insurer settled a claim against its insured and then filed a cross-claim against the insured to recover the settlement and counsel's fees it had incurred, claiming that it had been prejudiced by late notice. Applying Louisiana law, the district court held that the insurer had not been prejudiced and had waived any defense of late notice. The court also held that the insurer's suit was against public policy and imposed a penalty of $5000. The Fifth Circuit affirmed the district court's holding with respect to late notice, but reversed the award of penalty fees, recognizing that while public policy does not allow an insurer to sue its own assured on the insurance policy, the insurer may have causes of action outside the policy as in this case, where the suit arose out of the stipulation of settlement.

STATE LAW GOVERNS RECOVERABILITY OF PUNITIVE DAMAGES UNDER *WILBURN BOAT*

Taylor v. Lloyd's Underwriters of London, 972 F.2d 666 (5th Cir. 1992)

The district court held that the general maritime law disallowed the recovery of punitive damages from an insurance company, and plaintiff appealed, arguing that the court should have applied Louisiana law. The court of appeals held that the cases cited by the insurers had not established a specific and controlling federal rule prohibiting the recovery of punitive damages from insurers and remanded the case to the district court with instructions to apply the law of the state having the greatest interest in the resolution of the issues.

LONDON ARBITRATION CLAUSE IN CLUB RULES ENFORCED DESPITE ASSURED'S LACK OF KNOWLEDGE THEREOF

Organ v. Conner, 792 F. Supp. 693 (D. Alaska 1992)

The court compelled the owner of a fishing vessel to submit its claim against its mutual hull Club to arbitration in London as per the Club Rules, which were incorporated into its marine insurance policy despite the owner's contention that he had not received a copy of the Rules when purchasing the insurance through a broker, and therefore was unaware of any arbitration requirement. The court held that the broker, as the insured's

agent, knew that the coverage was subject to the Rules and should have been aware that arbitration clauses are commonplace in Club Rules.

COURT CONFIRMS LONDON ARBITRATION AWARD UNDER P & I CLUB RULES

Psarianos v. Standard Marine, Ltd., 790 F. Supp. 134 (E.D. Tex. 1992)

A panel of arbitrators in London found that the shipowner had no coverage for liabilities arising out of the sinking of its vessel because it had breached the Rules of its P & I Club by failing to comply with the requirements of the Classification Society.

The shipowner and its judgment creditors moved to set aside the award, claiming that the arbitration was a "farce" because the shipowner appeared *pro se*. The court, however, found no infirmity in the award because the panel had reviewed the Club Rules and heard factual representations from both the shipowner and the Club.

UNDERWRITER OWES NO DUTY TO THIRD PARTY TO ACT IN GOOD FAITH OR TO SETTLE CLAIM

Mathis v. Union Exploration Partners, Ltd., 1992 AMC 719 (E.D. La. 1991)

An injured worker sought to amend his complaint, in an action against the owner of the fixed platform on which he was injured, to include a claim against the owner's insurer for breach of its obligation under Louisiana law to act in good faith and its duty to make a reasonable effort to settle claims. The court denied the motion, holding that the insurer owes a duty of good faith only to its insured and not to third parties asserting claims against the insured.

LOUISIANA'S DIRECT ACTION STATUTE INCORPORATED BY OCSLA

Freeport McMoran Resource Partners v. Kremco, Inc., 1992 AMC 1796 (E.D. La. 1992)

The court held that the Louisiana direct action statute is incorporated into the Outer Continental Shelf Lands Act (OCSLA) in an action for damage to property on an offshore platform. Contrary to the same court's holding in *Couvillion v. Nicklos Oil & Gas Co.*, 671 F. Supp. 446, 1988 AMC 828 (E.D. La. 1987), the district court held in this case that state law

should apply under OCSLA unless there is a contrary and relevant federal law. Because there is no federal law applicable to this action for damage to property, Louisiana law and, thus, Louisiana's direct action statute, should be applied.

P & I POLICY COVERS TIME CHARTERER'S LIABILITY DESPITE "AS OWNER" LIMITATION

Randall v. Chevron U.S.A. Inc., 788 F. Supp. 1398 (E.D. La. 1992)

Following a bench trial in a wrongful death action, Chevron, in its capacity as time charterer of the M/V SEA SAVAGE, was found to have negligently ordered the vessel to encounter dangerous seas. Chevron's liability was fixed at 25% of plaintiff's total damages.

Prior to the trial, the owner's primary and excess P & I underwriters had successfully argued that the claim asserted by plaintiff against Chevron fell outside the scope of the policy (even though Chevron was an additional assured on the policy) because the policy limited coverage to liability incurred "as owner" of the insured vessel. After trial, Chevron moved for reconsideration of that ruling.

On reconsideration, the court held that Chevron incurred liability "as owner" of the vessel because its liability arose from its status as time charterer of the vessel and because the Longshore and Harbor Workers' Compensation Act treats a time charterer as a vessel owner.

SHIPOWNER CANNOT ASSIGN INDEMNIFICATION RIGHTS TO INJURED LONGSHOREMAN (SO AS TO ALLOW DIRECT ACTION) IF PROHIBITED BY POLICY

Oberton v. Amer. S.S. Owners Mut. Protection & Indemnity Assoc., 1992 AMC 1545 (S.D.N.Y. 1992)

After a settlement agreement was reached between an injured shipyard worker and various defendants, the shipowner defendant filed for bankruptcy. With the approval of the bankruptcy court, the plaintiff loaned the shipowner the amount of the settlement and the shipowner purchased an annuity for plaintiff with the proceeds of the loan. The shipowner also assigned to the plaintiff its right to indemnification from its P & I underwriter. After the shipowner failed to obtain indemnification from its P & I insurer, the plaintiff brought an action against the insurer, claiming that the shipowner had assigned its indemnification rights to him in the loan agreement approved by the bankruptcy court.

On a motion for summary judgment by the plaintiff, the district court held that the shipowner's P & I policy expressly prohibited any assignment of claims and that the shipowner, having simply paid to plaintiff money it had borrowed from plaintiff, never sustained a loss that would require its insurer to reimburse it.

NEW YORK DIRECT ACTION STATUTE NOT APPLICABLE TO OCEANGOING VESSELS' P & I INSURANCE

Royal Ins. Co. of America v. A & C Ship Fueling Corp., 1992 AMC 1686 (E.D.N.Y. 1992)

New York's direct action statute excludes certain kinds of marine insurance, including P & I insurance "in connection with oceangoing vessels."

A default judgment was entered against an insolvent corporation whose tug was responsible for damage to a barge. The district court had to determine on a motion for summary judgment whether the tug owner's P & I policy fell within the marine insurance exclusion.

The court held that the statute excludes marine P & I insurance only in connection with "oceangoing vessels" and that whether the tug involved was "oceangoing" was an issue of fact not appropriate for resolution on summary judgment. The court did note, however, that if it were shown that the tug intended to travel in international waters, it would be considered an "oceangoing vessel."

LOUISIANA DIRECT ACTION STATUTE INAPPLICABLE TO MARINE OPERATOR'S LIABILITY INSURANCE

Primeaux v. Linden, Inc., 1992 AMC 178 (W.D. La. 1991)

Underwriters who participated in a marine package policy (hull, P & I and marine operator's/charterer's legal liability) moved to dismiss an action filed against them by a personal injury claimant. The underwriters argued that Louisiana's Direct Action Statute is inapplicable because the injuries were covered by the P & I section of the policy and P & I has previously been held to be "ocean marine insurance" exempt from direct actions.[2] Plaintiffs contended that the injuries were covered by the marine operator's

[2]Underwriters could have difficulty making this argument today in light of *Hae Woo Yun v. Maritime Overseas Corp.*, No. 91-CA-407 (La. App. 5th Cir., July 27, 1992), which held that Louisiana's direct action statute allows a plaintiff to proceed directly against all liability policies, including ocean marine indemnity insurance policies. The court distinguished prior cases on the ground that they involved claims against the Louisiana Insurance Guaranty Association.

liability section which has not heretofore been held to be "ocean marine insurance." The court, however, held that because the marine operator's liability section covers risks associated with maritime activities, it too would be classified as "ocean marine insurance," thereby exempting the underwriters from a direct action. The court did not decide which section of the policy covered the plaintiff's injuries because direct actions are not available in Louisiana for claims under either P & I or marine operator's liability policies.

LOSS OF CARGO STORED INLAND WAS NOT WITHIN ADMIRALTY JURISDICTION

Atlantic Mutual Ins. Co. v. Balfour Maclaine Int'l, Ltd., 968 F.2d 196 (2d Cir. 1992)

The Second Circuit held that an action concerning the "Shore Risks Coverage" provision of a marine open cargo policy was outside the scope of admiralty jurisdiction. This provision extended coverage to goods during storage at inland warehouses and during inland transportation. Coverage was not restricted to goods intended for marine transport. The court stated that the dispute was "so attenuated from the business of maritime commerce that it [did] not implicate the concerns underlying admiralty and maritime jurisdiction." The coffee shipment never became maritime cargo and did not enter the maritime stream of commerce.

EIGHT DAY STOPOVER CONSTITUTES INTERRUPTION OR SUSPENSION OF TRANSIT

Switzerland Ins. Co. v. Hualey Knitwears (U.S.A.), Inc., 1992 AMC 1394 (S.D.N.Y. 1991)

A marine insurer sought a declaratory judgment establishing non-coverage under a policy for loss of cargo. The shipment vanished while being temporarily stored for eight days in a trucking company's yard. The policy granted coverage on the condition that there be "no interruption or suspension of transit unless due to circumstances beyond the control of the insured." The court held the eight day stopover was an interruption or suspension of transit and therefore the loss was excluded from coverage. It was immaterial in the court's view that the cargo was to be moved again for ultimate delivery.

RECOVERY UNDER A STRIKES, RIOTS AND CIVIL COMMOTION ENDORSEMENT NOT LIMITED TO PHYSICAL DAMAGE

New Market Inv. Corp. v. Fireman's Fund Ins. Co., 774 F. Supp. 909 (E.D. Pa. 1991)

An importer of fruit brought an action against its insurer under the Strikes, Riots and Civil Commotions (S.R. & C.C.) endorsement to its Open Marine Cargo policy for damages it sustained due to terrorist threats aimed at Chilean fruit. The insurer claimed that the S.R. & C.C. endorsement limited the insured's recovery to physical damage, *e.g.*, to fruit actually damaged by terrorist acts. The district court, however, held that the plain meaning of the term "damage" in the open marine cargo policy did not limit recovery to the fruit which was directly tampered with.

The insurer also argued that the Free from Capture and Seizure and the delay and loss of market clauses in the policy excluded the loss from coverage. However, as the S.R. & C.C. endorsement was purchased subsequent to the main policy, the court held that it would prevail over any conflicting provisions.

MERE MENTION OF AMERICAN INSTITUTE CLAUSES INSUFFICIENT TO INCORPORATE THEM BY REFERENCE INTO CARGO POLICY

Bacchus Assocs. v. Hartford Fire Ins. Co., 766 F. Supp. 104 (S.D.N.Y. 1991)

In another Chilean fruit case, the court denied insurers' motion for summary judgment based on various standard warranties in the policy. The court held that mere reference to American Institute Cargo Clauses in a policy does not adequately describe the terms of those clauses and therefore the insurer was "not necessarily entitled, as a matter of law, to the benefit of incorporation by reference" of the exclusions.

A COMPROMISED TOTAL LOSS NOT EXCLUDED FROM COVERAGE BY A "FREE FROM PARTICULAR AVERAGE" CLAUSE

American Marine Ins. Group v. Neptunia Ins. Co., 775 F. Supp. 703 (S.D.N.Y. 1991), aff'd per curiam, 961 F.2d 372 (2d Cir. 1992)

The M/V SPES suffered severe hull damage after encountering bad weather enroute from Aruba to Boston and the shipowner claimed the

vessel was a constructive total loss. The primary hull insurer, Neptunia, settled the claim for $4 million. Plaintiff, one of Neptunia's reinsurers, who was obligated to "pay as may be paid in connection with the original insurance", refused to pay its 6.5% share of the settlement. Claiming that the "free from particular average" ("F.P.A.") clause in the reinsurance contract barred recovery for a compromised total loss, plaintiff sought a declaration of non-liability under the policy.

The district court agreed with plaintiff that the F.P.A. clause excluded recovery of partial losses. Nonetheless, the court, relying on *Street v. Royal Exchange Assurance*, (1914) 19 Com. Cas. 339 [C.A.], held that a claim for constructive total loss is settled in a form of total, and not partial, loss. The reinsurer, then, was obligated to "follow the fortunes" of Neptunia and reimburse it for 6.5% of the settlement.

INSURABLE INTEREST IN VESSEL

El Fenix de Puerto Rico v. Serrano Gutierrez, 786 F. Supp. 1065, 1992 AMC 486 (D.P.R. 1991)

Insurer sought a declaration that its yacht policy was null and void because the named assured and the loss payee both lacked an insurable interest in the vessel at the time it was seized for drug trafficking. The named assured had sold the speedboat five months before taking out the latest policy on the vessel. The court held that the assured lacked an insurable interest and that the assured had voided the policy by misrepresenting to the insurer that he was still the owner. The court also found that the loss payee bank had failed to record its mortgage with the Coast Guard and therefore had neither a lien nor an insurable interest.

The court awarded attorneys' fees to the insurer, finding that the co-defendants' conduct revealed "a degree of temerity too obvious to ignore."

CANCELLATION NOTICE TO BROKER HELD INEFFECTIVE

McAllister Bros., Inc. v. Ocean Marine Indem. Co., 1992 AMC 1512 (S.D.N.Y. 1992)

A tug owner brought an action against one of its hull underwriters to recover losses sustained in the second half of the policy year. The underwriter claimed that the policy had been canceled for non-payment of premiums and therefore it was not liable for the losses. The underwriters' agent had addressed and sent written notice of cancellation only to the assured's exclusive marine insurance broker. The policy required that the

notice of cancellation due to non-payment of premiums be provided in writing. The underwriters claimed that sending a cancellation letter to the assured's broker was sufficient notice to the assured. The court held, however, that the insurer must send notification to the assured at his last known address or in care of the broker who negotiated the policy. As the cancellation letter was sent and addressed only to the broker, it did not effectively terminate the policy.

The underwriter further claimed that it is a custom in the marine insurance trade to permit the notice of cancellation to be sent to a broker. However, the court found that the insurer failed to establish such a custom and, therefore, the policy remained in effect for the full term despite the non-payment of premiums by the assured.

COMMITTEE ON MARINE INSURANCE, GENERAL AVERAGE & SALVAGE, SUBCOMMITTEE ON SALVAGE

Report by Paul M. Polliak, Chairman

The Subcommittee on Salvage of the Maritime Law Association of the United States has been reviewing OPA 90 as it affects the salvage of vessels in distress. Specifically, the committee is studying how the salvor can expeditiously obtain permission from the "Federal On-Scene Coordinator" and any other authorities, state or federal, to jettison cargo from a distressed vessel in order to save the vessel and, in the salvor's opinion, reduce the risk of additional pollution.

Likewise, the National Research Council's Committee on Marine Salvage Issues, under the auspices of the National Academy of Science, is studying problems resulting from OPA 90's prohibition against the deliberate spilling of oil in order to minimize damage from a casualty. On Tuesday, February 23, 1993, a symposium on this subject will be held at the Academy at 2101 Constitution Avenue, Washington, D.C. If you are interested in receiving an invitation to the symposium, please contact the Chairman, Gordon Paulsen, Esq., c/o Healy & Baillie, 29 Broadway, New York, New York 10006 (Tel. 212-943-3980), or Mr. Charles Bookman, National Research Council, 2101 Constitution Avenue, Washington, D.C. 20481 (Tel. 202-334-3119).

COMMITTEE ON AMERICAN BAR ASSOCIATION RELATIONS

Excerpts from Report on the American Bar Association's 1992 Annual Meeting and Actions of the ABA House of Delegates

By Warren J. Marwedel, Esq.

San Francisco was the site of this year's action-packed Annual Meeting, which ran from August 6 through August 12, 1992. Dignitaries at the American Bar Association's ("ABA") Annual Meeting included Supreme Court Justices John Paul Stevens and Anthony Kennedy. Retired Justice Thurgood Marshall received the prestigious ABA Medal. Hillary Clinton, the immediate past-chair of the ABA Commission on Women in the Profession, was the keynote speaker at the Margaret Brent Women Lawyers of Achievement Awards luncheon, which honored Anita Hill and others.

The Opening Assembly featured speaker was Anthony Lewis, a columnist for the *New York Times*. Secretary of the Department of Health and Human Services, Dr. Louis Sullivan, was also a guest speaker during the convention.

Both the General Assembly and the House of Delegates were sites of heated debates over the abortion rights issue. The pro-choice resolution passed the Assembly by a vote of 659 to 340 on Monday. That same resolution was later debated in the House.

The House elected R. William Ide, III of Atlanta, Georgia, as the Association's President-Elect and Philip S. Anderson of Little Rock, Arkansas, as Chair of the House. The President's gavel was passed to J. Michael McWilliams of Baltimore, Maryland.

The issues that are of greatest interest to MLA members include the reversal of the prohibition of ancillary business activities of lawyers, formulation of criteria for affiliated organizations, creation of a special committee on small firm practitioners, dissolution of the Standing Committee on Admiralty and Maritime Law, and recommendations for the communication of fields of practice and certification, among others. Following is further information relating to these various issues.

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ANCILLARY BUSINESS ACTIVITIES OF LAWYERS

In a very lively debate, the House narrowly *approved* by a vote of 190 to 183, a resolution seeking to amend the Model Rules of Professional Conduct to delete Rule 5.7 concerning the provision of ancillary services. The effect of this resolution is to rescind the present version passed by the House at the 1991 Annual Meeting. The main opponent of the resolution was the Litigation Section, which sponsored the version adopted last year. Proponents of this change argued that the Rule, as passed, has many implications not considered by the House in 1991 due to what it considered to be an abbreviated debate. They further pointed out that Rule 5.7 has not been adopted by a single jurisdiction, and that there has been no evidence to date of attorney abuse of the right to conduct ancillary services. Opponents of the resolution urged the ABA to set the standard, to take action before it is done by another entity.

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BAR ASSOCIATION MATTERS

Solo and Small Firm Practitioners

The House *approved* a resolution creating a nine-member special committee on solo and small firm practitioners to facilitate ongoing Association efforts to address the needs of these practitioners. The special committee will be charged with pursuing the adoption and implementation of the recommendations contained in the Report of the Task Force on Solo and Small Firm Practitioners, dated November 1991.

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Amendments to the Constitution, Bylaws and Rules of Procedure of the House of Delegates

The House, based upon the majority vote in the Assembly, *approved* a proposal of the Committee on Scope and Correlation of Work to amend the Bylaws to dissolve the Standing Committee on Admiralty and Maritime Law. The Standing Committee has not met since November 1987 and at least five ABA entities were identified with having programs in the area of admiralty or maritime law.

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LEGAL PROFESSION

Specialty Certification Organization

The House *approved* a resolution offered by a number of state bar associations calling for the ABA to establish standards for accrediting private organizations which certify lawyers as specialists, and to establish and maintain a mechanism to accredit such organizations which meet those standards. The goal is that the ABA develop a national program for evaluating and accrediting such organizations in light of the U.S. Supreme Court decision in *Peel v. Attorney Registration and Disciplinary Comm.*, 469 U.S. 91 (1990).

Legal Assistants

The House *approved* a resolution granting final approval for, reapproval for, provisional approval for and extending the term of final approval for, specifically stated legal assistant and paralegal educational programs.

Task Force on Member Benefits for Disabled Lawyers

The House *approved* a resolution by the Task Force on Member Benefits for Disabled Lawyers to: (a) provide leadership in coordinating ABA compliance with the Americans with Disabilities Act; (b) assist in acquiring information concerning members with disabilities and identifying their specific needs so to better serve these members; (c) provide expertise and assistance to all ABA entities as to methods to allow disabled members accessibility to member activities and benefits; (d) facilitate outreach, as appropriate, to bar associations and other professional associations; and (e) assist the Board of Governors in implementing such guidelines as the Board may adopt. The Task Force was created in February 1991 with the House's adoption of a resolution committing the ABA to "providing the benefits of membership to its disabled members to the maximum extent feasible." The Task Force has completed its report and seeks continuation as an entity to assist in the implementation of the report.

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Attorney Certification

The House *approved* a resolution to amend Rule 7.4 of the ABA Model Rules of Professional Conduct concerning the Communication of Fields of Practice to include Communication of Fields of Certification in accordance with the U.S. Supreme Court decision in *Peel v. Attorney Registration and Disciplinary Comm.*, 496 U.S. 91 (1990), holding that states may not constitutionally impose a blanket prohibition on a lawyer's truthful communication that he or she is certified as a specialist by a bona fide organization. The amended rule provides specific standards for the communication of fields of specialization. In order to comply with Rule 7.2, all such communications must clearly state whether the certification is from an approved organization.

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TAXATION LAW MATTERS

Interest on Student Loans

The House *approved* a resolution recommending that Congress amend Internal Revenue Code 163(h) to allow a full deduction for interest paid on student loans obtained for the purpose of attending an institution of post-secondary education. It further defines student loan as "a loan to a student attending a post-secondary college, university, trade school, or similar institution, that is either made by or guaranteed by a governmental agency or by the student's school." In response to the unofficial position taken by some members of the Taxation Section that the Code should be simplified and not used to implement social policy, the Law Student Division responds by saying that so long as the current deductions remain, which deductions total far more than the deduction sought here, there is no reason not to permit this type of deduction.

Technology Law Matter

The House *approved* a resolution supporting action by federal and state governments, international organizations and private entities to: (a) facilitate and promote the orderly development of legal standards to support and encourage the use of information in electronic form, including in education; (b) encourage the use of appropriate security techniques, procedures and practices to assure authenticity and integrity of information in electronic form; and (c) recognize that such information may, where appropri-

ate, be considered to satisfy written or signatory legal requirements to the same extent as information in conventional forms once the above-mentioned security techniques, practices and procedures have been adopted. The resolution does not propose any particular legislative changes, recognizing that it will take time to accommodate the shift from conventional to electronic forms of information.

BOOK REVIEW

Editor's Note: From time to time, we will include in the MLA REPORT reviews of recent books and other publications of possible interest to MLA members. The first such review appears below.

FEDERAL REGULATIONS AND THE FREIGHT FORWARDER by Vera Paktor (Boskage Commerce Publications, P.O. Box 337, Allegan, MI 49010). Most admiralty law practitioners encounter freight forwarders only occasionally. We know something about their basic roles, and recognize the importance of their work; however, many of us understand only vaguely their day-to-day activities in the ocean transportation of goods to or from the United States.

This handbook helps to close that gap. It includes a thorough discussion of the regulations governing freight forwarding and a concise list of FMC procedures, including the preparation and filing of complaints and the informal docket and regulatory process as it related to freight forwarders. It also describes the Federal Maritime Commission's responsibilities under the Shipping Act of 1984 and Title 46 of the Code of Federal Regulations. A section entitled "Questions Frequently Asked About Ocean Freight Forwarding" is particularly valuable.

The author, a former district director of the Federal Maritime Commission, obviously knows whereof she speaks. Unfortunately, she appears to assume more knowledge on the part of the reader about what freight forwarders actually are supposed to do (as distinguished from penalties which can be imposed by the FMC for failure to perform their duties) than some readers may possess. Thus, the inclusion of a section describing the commercial functions of a freight forwarder would have made this volume even more valuable to the practitioner of maritime law who deals only occasionally with freight forwarders. Nonetheless, this is a useful volume for maritime lawyers involved in cases with freight forwarders.