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MAY 7, 1993

THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

SPRING MEETING—MAY 7, 1993

PRESENT:

GEORGE W. HEALY, III
CHESTER D. HOOPER
JAMES F. MOSELEY
HOWARD M. MCCORMACK
MARSHALL P. KEATING
THEODORE S. CUNNINGHAM
KENNETH H. VOLK

and the following 295 members:

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Donald C. Adams, Jr.
Stephen A. Agus
C. Theodore Alpaugh, III
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Clarance E. Hagglund
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Edward F. LeBreton, III
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Michael A. McGlone
ReginaLd E. McKamie
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David M. McQuiston
John F. Meadows
John K. Meyer
Patrick G. Middleton
Brian J. Miles
Gray H. Miller
M. Kathleen Miller
William C. Miller
Wm. Jones Miller
Thomas F. Molanphy
Benjamin Allston Moore, Jr.
J. Marks Moore, III
John C. Moore
James F. Moseley, Jr.
Walter R. Muff
Douglas M. Muller
Linda A. Newland
David A. Nourse
George W. Nowell
Henry R. Nussbaum
Francis J. O'Brien
Thomas G. O'Brien
William J. O'Brien
Ashton R. O'Dwyer, Jr.
Michael D. O'Keefe
Brendan P. O'Sullivan
David R. Owen
Richard W. Palmer
Daniel C. Panagiotis
Armand M. Pare, Jr.
Robert B. Parrish
Edward J. Patterson, Jr.
Bruce G. Paulsen
Gordon W. Paulsen
Ronald Payne
William L. Peck
John R. Peters, Jr.
Thomas P. Pender

John J. Picarella
Paul M. Poliak
Lennard K. Rambusch
William A. Ransom, III
Donald T. Rave
Mary Elisa Reeves
Richard E. Repetto
Stephen V. Rible
Winston E. Rice
Jeffrey A. Riggs
J. Ramon Rivera-Morales
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Kenneth E. Roberts
Jack S. Rockafellow
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Thomas A. Russell
John M. Ryan
Michael J. Ryan
Gary T. Sacks
David M. Salentine
Jeremy Salesin
Jill A. Schaar
John P. Schaffer
Mark P. Scheer
Gordon D. Schreck
William P. Schroeder
Janis G. Schulmeisters
Eli Bjornoy-Schweiger
David J. Sharpe
Ralph M. Sharpe, Jr.
John B. Shields
G. Byron Sims
John W. Sims
David F. Sipple
David W. Skeen
James D. Skeen
Capt. Thomas W. Snook
Saul Sorkin
Mark J. Spansel
Brian D. Starer
Graydon S. Staring
Alvin L. Stern
William J. Stewart
Dennis J. Stone
Jaime Morgan-Stubbe
Michael F. Sturley
James R. Sutterfield
Michael L. Swain
Prof. Joseph C. Sweeney
Patrick A. Talley, Jr.
James W. Tarlton, III
James J. Taylor, Jr.
Alice E. Teal
C. Peter Theut
Robert K. Tisdall
Joseph P. Tynan
Theodore A. Ulrich
Braden Vandeventer
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Dewey R. Villareal, Jr.
Allen von Spiegelfeld
Charles F. Vulliet
George L. Waddell
Donald M. Waesche
Thomas J. Wagner
Andrew L. Waks
Brian D. Wallace
James R. Walsh
Guilford D. Ware
Daniel R. Warman
Dennis A. Watson
Gerard P. K. Watson
Russell T. Weil
G. Alex Weller
William H. Welte
Frederick W. Wentker, Jr.
James F. Whitehead, III
Carey R. Wiener
David McI. Williams

Reed M. Williams
Frank L. Wiswall, Jr.
James F. Young
James A. Yulman
George R. Zacharkow
Joanne Zawitoski
Richard M. Ziccardi
Todd A. Zilbert

and the following 10 guests:

Erik Astrom
Ronique J. Bastine
J. Christopher Callahan
Greg Durham
F. David Famulari
Lee Handford
Glen Huff
Lena C. Kumlin
Hon. Mr. Justice W.C. Lee
Helga Vik

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PROCEEDINGS

PRESIDENT HEALY: The meeting is now called to order. Welcome back to the Association of the Bar.

We will begin the proceedings with a report from the Secretary, Howard M. McCormack.

MR. McCORMACK: Good morning, ladies and gentlemen. Mr. President, Fellow Officers, Members and Guests of The Maritime Law Association.

As usual we have the registration cards outside which I would ask that you fill out. I cannot attest to the fact that you are here unless I have a card signed by you. If there are any guests here of the Association, we welcome them. I ask them to sign a card and indicate that they are in fact a guest.

As the members of the Association come up to the podium and to the microphone in front, I ask you to give your card to Ms. Neger, our reporter, and identify yourself to the audience. If you have any report, after you finish I would request you give Ms. Neger a copy of it. I can guarantee you will get it back.

I would also like to note an amendment to the minutes of the Executive Committee meeting in March, which was brought to my attention by Mr. Beale. The Subcommittee on State Legislation of the Recreational Boating Committee had given their report to the Executive Commitee in New Orleans in March. The minutes had indicated that the proposal of the Subcommittee was for the licensing of recreational boat operators. That statement was incorrect. The position of the Subcommittee was that they were, in fact, in favor of mandatory education in lieu of licensing. That correction will appear in the minutes of this meeting.

The minutes of the Proceedings of the November 1992 meeting of the Association, Document No. 699, and the minutes of the Executive Committee meeting held in New Orleans on March 15, 1993 have been sent to the general membership in recent mailings.

If there are no objections or modifications, Mr. President, I move that they be adopted.

PRESIDENT HEALY: Second?

MEMBER: Second.

PRESIDENT HEALY: All in favor?

[Motion was unanimously carried.]

MR. McCORMACK: The Treasurer, Marshall P. Keating of New York, distributed his report at the Executive Committee meeting yesterday, which was accepted and approved. He also reported on the proposal for incorporation of the Association under Illinois law. We will hear further from Mr. Keating this morning concerning his report and incorporation activities.

Membership Secretary, Theodore S. Cunningham, distributed his report, which was accepted and approved. We will hear from him this morning on his activities.

President Healy reported to the Executive Committee on his activities and those events of general interest to the membership since the last Executive Committee meeting. President Healy expressed the gratitude of the officers and Executive Committee to the members of the New Orleans maritime bar for their excellent assistance and cooperation concerning the Executive Committee reception in New Orleans in March 1993.

President Healy also expressed the thanks of the Association to Treasurer Keating, Warren J. Marwedel of Chicago and George D. Benjamin of New York and others for their splendid and diligent dedication in their work concerning the prospective incorporation activity of the Association, about which Mr. Keating will advise you later.

President Healy also reported on the forthcoming CMI Assembly Meeting to be held in Brussels in September 1993. Dr. Frank L. Wiswall, Jr. of Castine, chairman of the CMI Committee, will be reporting to us later today on the CMI Assembly and other activities of his committee.

President Healy also reported on the activities of Mr. Michael Marks Cohen of New York and his Subcommittee on Charter Parties and its coordination with the Committee on Maritime Arbitration. We anticipate hearing from the chairman of the Arbitration Committee later this morning.

Thomas S. Rue of Mobile, chairman of the 1997 Planning and Arrangements Committee and William R. Dorsey, III of Baltimore, chairman of the Site Selection Committee, reported to the Executive Committee relative to their recommendations for a proposed site for the 1997 meeting.

Lizabeth L. Burrell of New York, chairperson of the Committee on Uniformity of US Maritime Law, reported on the status of the *amicus* briefs in the

Miller and *Great Lakes* cases. The *Miller* case had previously been reported in the minutes of the fall meeting and the *Great Lakes* case had been reported to the Executive Committee recently. Ms. Burrell will be reporting further on those matters this morning.

Chester D. Hooper of New York, First Vice-President, reported on the reinstitution of the Ad Hoc Committee on Foreign Soverign Immunity, which will be chaired, as it had been in the past, by William R. Dorsey, III of Baltimore.

Mr. Marwedel, in Mr. Kennedy's absence, reported on the forthcoming fall meeting of the Association to be held at the Southampton Princess in Bermuda. As you are aware, there is a video tape available for viewing this morning outside the Great Hall in the reception area, concerning the facilities at the Southampton Princess. Mr. Kennedy's Committee has also placed outside a new document on the proposed activities at the Fall meeting. You will be hearing further from the chairman of that committee later this morning.

Michael O. Hardison of New York, chairman of the Dinner Arrangements Committee, reported on the activities of his Committee for the dinner this evening at the Marriott Marquis. We will be hearing further from him later today.

The President, officers and members of the Executive Committee expressed their thanks and appreciation to the retiring members of the Executive Committee for their outstanding work and performance during the past three years. They are: John T. Biezup of Philadelphia; John D. Kimball of New York; John R. Peters, Jr. of New Orleans and Frederick W. Wentker, Jr. of San Francisco.

In addition, for those who like to travel far, the Maritime Law Association of Australia and New Zealand have extended an invitation to the members of this Association to attend their Annual Conference on Maritime Law, to be held in Melbourne, Australia, on November 6 to 11, 1993. I have certain data and information on that if anyone is interested in attending.

Mr. President, that concludes the Secretary's report. I move that it be adopted.

PRESIDENT HEALY: Second?

MEMBER: Second.

PRESIDENT HEALY: All in favor, aye?

[Motion was unanimously carried.]

Thank you very much, Mr. Secretary. Next we will hear from the Treasurer, Marshall P. Keating.

MR. KEATING: Thank you, Mr. President.

Good morning, ladies and gentlemen. We have just completed our 1992–1993 fiscal year as of April 30, and our preliminary figures indicate that as of April 30, 1993, we had on hand in the form of cash or equivalents some $297,000. This compares with a year ago on April 30, 1992, with the figure then of some $418,000 on hand. As I told you a year ago that $418,000 figure was somewhat higher than anticipated largely because of the timing of expenses. This year I would say that $297,000 is a little lower than anticipated, again substantially a matter of timing of expenses.

I do believe that we have a continuing problem, since over a number of years we have been spending more in expenses than we take in as income. For the moment, however, it would appear that the dues structure is sufficient. I do not think it will be necessary to change during the next fiscal year. We will keep a careful eye on the financial situation, and particularly on expenditures.

That constitutes the Treasurer's report, and I respectfully move that it be adopted.

PRESIDENT HEALY: Second?

MEMBER: Second.

PRESIDENT HEALY: Any discussion? All in favor, aye.

[Motion was unanimously carried.]

PRESIDENT HEALY: Thank you very much, Marshall.

For those of you who have not read your mail or were not here earlier, we have a hard working Committee on Incorporation that studied the laws in 50 states concerning where was the best place to incorporate. George D. Benjamin of New York, Warren J. Marwedel of Chicago and our Chairman, Marshall P. Keating of New York have been working on this project.

Mr. Chairman, would you please report on the Incorporation Committee?

MR. KEATING: Thank you, Mr. President.

As I reported at the November 1992 meeting of the Association, sometime ago it had been called to the attention of the Executive Committee that a number of Bar Associations, in order to take advantage of the corporate structure to limit the liability of their members, were considering incorporation of what were previously unincorporated associations. One of the first ones to do so was the American Bar Association.

The American Bar Association did an extensive study and comparison of the laws for not-for-profit corporations in various states and concluded that Illinois was the most favorable jurisdiction, offering the best protection for the membership of this type of association. Other associations came to the same conclusion, including the International Association of Defense Counsel. The study which was conducted by our Committee, consisting of Warren Marwedel, George Benjamin and me, came to the same conclusion that the Illinois statute offers the best protection.

I would particularly like to thank the other members of the Committee, Warren Marwedel and George Benjamin, for their very valuable assistance in the work that was done in this connection.

We recommended as a committee to the Executive Committee that we do go forward with the incorporation of this Association under the Illinois Not-For-Profit-Corporation statute. That recommendation was approved by the Executive Committee. We were authorized to submit the proposed recommendation for incorporation to the membership.

Thereafter, the membership received the mailing enclosing the proposed Articles of Incorporation and the proposed resolution adopting the corporate structure. Thereafter, the proposed revised by-laws were also circulated to the entire membership.

In anticipation that this Association would adopt the concept of incorporation, a not-for-profit association incorporated under Illinois law was established. We have received a certificate from the Secretary of State of the State of Illinois showing that there is now in existence The Maritime Law Association of United States, a domestic corporation incorporated under the laws of Illinois.

Following that, yesterday we held the first board of directors' meeting of The Maritime Law Association incorporated of Illinois, at which time officers of the corporation were elected to serve until today when the new officers will be elected by the membership.

A number of housekeeping resolutions were passed, all of which will be recorded in the minutes. These include the usual banking resolutions, the election of the May 1 fiscal year, and that sort of thing.

I would now ask that the membership consider the resolution which was circulated earlier. I submit this resolution for the purpose of incorporation of this Association. The resolution reads as follows.

> "BE IT RESOLVED, that The Maritime Law Association of the United States adopts the Articles of Incorporation draft dated February 1993." I move the adoption of that resolution.

PRESIDENT HEALY: Is there a second?

MR. HIGGINS: Second the motion.

PRESIDENT HEALY: Any discussion, questions? All in favor?

[Motion was unanimously carried.]

PRESIDENT HEALY: Thank you very much, Marshall.

MR. KEATING: I have one more item of business.

We are now a corporation. As a corporation, it is necessary for the membership to adopt the new by-laws, which were all circulated to you recently. In that connection I offer the following resolution:

> "RESOLVED, by the members of The Maritime Law Association of the United States, an Illinois not-for-profit corporation, that all the resolutions of the directors, dated May 6, 1993, including adoption of the By-Laws of this corporation (a copy of which is attached hereto), be and the same are hereby ratified, confirmed and in all respects adopted by the members of this corporation."

I respectfully move the adoption of this resolution.

MR. HIGGINS: Second the motion.

PRESIDENT HEALY: Any discussion, questions? All in favor?

[Motion was unanimously carried.]

PRESIDENT HEALY: Thank you very much, Marshall.

MR. KEATING: Mr. President, you are now president of an Illinois corporation. I congratulate you! That concludes the report of the Incorporation Committee, which has now completed its function.

PRESIDENT HEALY: Thank you for your hard work.

Next we will hear from our Membership Secretary, Theodore S. Cunningham.

MR. CUNNINGHAM: Thank you, Mr. President.

Yesterday at its meeting the Executive Committee voted to admit to membership in the Association 43 new Associate lawyer members, they are:

Thomas B. Ackland of Los Angeles
Francine J. Barton of Houston
James M. Beard of Seattle
Lynne A. Borchers of New York
Lindsey C. Brock, III of Jacksonville
Kent Brooks of Houston
Diane M. Butler of Seattle
Timothy W. Cerniglia of New Orleans
Sean T. Connaughton of Washington, D.C.
John L. Duvieilh of New Orleans
Gerald J. Ferguson of New York
Melanie Fix of Norfolk
J. Baxter Gillespie of Jacksonville
Richard L. Gorman of Houston
Edward S. Grenville of San Francisco
Peirce A. Hammond, II of New Orleans
Lee A. Handford of Washington
William R. Hoffman of Philadelphia
Drew F. Horrell of New York
Glen A. Huff of Virginia Beach
R. Christian Johnsen of Washington, D.C.
Judith L. LaFleur of Boston
John S. Lilly of Houston
Christopher Lowrance of Houston
Chester J. Makowski of Houston
Alex B. Marconi of Phoenix

Daniel P. McKiernan of Providence
Pamela L. Milgrim of New York
Bradley L. Mitchell of New York
John A. O'Donnell of Chicago
Seyun Park of New York
Robert L. Reeb of Chicago
Richard B. Rudolph of Long Beach
Erica K. Reedy of New York
James L. Sears of New York
Melanie E. Shepherd of Jacksonville
Mark N. Tabbutt of Seattle
Jefferson R. Tillery of New Orleans
Sloan A. Tyler of Washington, D.C.
Timothy J. Van Hemert of Miami
Patrick J. Veters of New Orleans
John Christopher Weber of New York
Jeffrey A. Wilhite of Evansville

In addition, 50 Associate members were approved for advancement to Proctor Status; they are:

Donald C. Adams, Jr. of Cincinnati
Robert D. Arrendondo of Houston
Anthony J. Battaglia of San Diego
Roy E. Blanchard of New Orleans
Robert W. Blanck of Miami
Francisco G. Bruno of Hato Rey, Puerto Rico
Michael J. Calabro of Boston
Dennis A. Cammarano of Los Angeles
Fernando D. Castro of San Juan
Charles Dewey Cole, Jr. of New York
Sidney W. Degan, III of New Orleans
Jose E. Alfaro Delgado of San Juan
Thomas M. Eagan of New York
John F. Fay, Jr. of New Orleans
Joseph V. Ferguson, III of Duluth
Beda G. Fajardo of Manila
Joel K. Goldstein of St. Louis
Joel E. Gooch of Lafayette
William J. Griset, Jr. of Boston
Robert J. Gruendel of New York
Seth S. Holbrook of Boston

Kim Jefferies of Portland
C. Scott Kinzel of Houston
Robert L. Klawetter of Houston
Christopher S. Knopik of Tampa
Leroy Lambert of New York
J. Dwight LeBlanc, III of New Orleans
Juan A. Lopez-Conway of San Juan
Hunter W. Lundy of Lake Charles
James E. Mercante of New York
Patrick G. Middleton of Seattle
Stephanie R. Miller of Louisville
Jess B. Millikan of San Francisco
Jaime Morgan-Stubbe of San Juan
James F. Moseley, Jr. of Jacksonville
Dennis E.W. O'Connor, Jr. of Honolulu
Edward J. Patterson, Jr. of Galveston
Bruce G. Paulsen of New York
John S. Pierce of San Francisco
John E.D. Powell of Seattle
Anthony J. Pruzinsky of New York
Joseph A. Regan of Boston
Richard T. Robol of Virginia Beach
Michael P. Ryan of Portland
William B. Schwartz of New Orleans
Joseph B. Stahl of Philadelphia
C. Gordon Starling, Jr. of New Orleans
William T. Storz of Washington, D.C.
Patrick A. Talley, Jr. of New Orleans
Peter B. Tompkins of New Orleans
Irving J. Warshauer of New Orleans

United States District Judge Hayden W. Head, Jr. of Corpus Christi, Texas was elected to judicial membership.

The following persons were elected as Non-Lawyer members:

Richard Bragg of New York
Ed Cave of Cranbury
Richard D. DeSimone of Madison
Richard H. Hobbie, III of New York
John F. Kuzniewski of New York
Thomas V. Leeds of New York

Thomas J. Malia of New York
Christopher I. Perfect of New York
William Trufant, Jr. of New Orleans
Norman A. Tucker of New York
Vincent C. Tumminia of New York

As a result of these new members and advancement of Associate Lawyers to proctorship, the membership of the Association now totals 3,596 persons. The number of members in each category is as follows:

Proctor:	1,865
Associate:	1,205
Honorary:	3
Non-Lawyer:	281
Academic:	58
Judicial:	184

I regret to report the death of the following members since our meeting in November 1992:

Hon. George Arceneaux, Jr. of New Orleans
Harold F. Birnbaum, of Kappa, HI
Hon. John R. Brown of Houston
Harry A. Gotimer of New York
Robert S. Lagattolla of New York

Mr. President, this concludes the report of the Membership Secretary. I respectfully move its approval.

PRESIDENT HEALY: Second?

MEMBER: Second.

PRESIDENT HEALY: All in favor?

[Motion was unanimously carried.]

PRESIDENT HEALY: Thank you very much, Ted.

Congratuations to you, all the new Proctor members, and thanks very much to all Proctor members who encouraged them to join. The Young Lawyers Committee are to be congratulated for the work in increasing the number of Proctors which set a record.

We will now have a report, a special item on the agenda, Benjamin Allston Moore, Jr., of Charleston, South Carolina, who had the privilege of carrying the MLA burgee on a very fine voyage. He will give his report on the activity, on the burgee and the crew that carried it.

MR. MOORE.: Thank you, Mr. President.

Ladies and Gentlemen: Last fall was the occasion of the 500th anniversary of Christopher Columbus' voyage of discovery. A large number of sailboats sailed from the Canary Islands to San Salvador in the Bahamas. Our boat was one of those that went. It was a fine time.

Ahead of time, it occurred to me that I would carry the burgee of the MLA. I wrote to Bunky, I think it was, and said, if no one else is going, I'd be delighted to carry it. Well, it turns out, amazing though it is, the MLA, this august organization, didn't have a burgee! In business for almost a hundred years with Blue Water sailors everywhere, and no burgee! Fortunately, Mr. Healy, who is a Blue Water sailor himself, designed one and had it made in New Orleans—I gather at some expense to the Association. The sacred object arrived in my office the day before I left in November and was reverently carried by me to the Canaries, and was flown on the good ship GAMBIT.

The crossing was some 23 days from Oran Canaria. All during the trip, since Bunky had told me he wanted me to make a report to this body, I was not concerned with the raging seas or the Force 8 winds that accosted us, but with what-in-the-world was I going to do with this burgee when I got to New York, since there was no place to put it.

We ended our voyage on the morning of the eighth of December. You don't stay long in San Salvador. Columbus didn't. Well, it's just a coral rock, nothing else. So we repaired to the little port of Georgetown in the Exumas and we sought solace ashore. We found a wonderful little hotel, called the Peace and Plenty. The Peace and Plenty is a noted yachtsman's hideaway in Georgetown. At the bar of the Peace and Plenty, I discovered that there were any number of ships' burgees, yacht clubs and various and sundry other name plates of vessels.

First of all, I want to show you, here is the burgee flying on the yardarm of the good ship GAMBIT beneath the quarantine flag, the Bahamian flag, the sacred flag of the State of South Carolina, and then the MLA burgee, which is this blue and white object. But what to do with it? Well, the MLA burgee now rests in the bar of the Peace and Plenty at a particularly appropriate spot, midway between High Born Lady and Fascinating Bitch! I thought it was a particularly suitable spot.

You may imagine my disappointment, ladies and gentlemen, when I got to New Orleans for the seminar in March that our penurious treasurer, Mr. Keating, raised hell with me about this—apparently more concerned about the expense of this object and his lack of control over it! So I don't know what to do. It's there for all to see who want to go to Georgetown. I highly recommend that you go. I'm willing to go back and retrieve it, Mr. Keating, if you pay half the cost of the trip. But there is the one and only MLA burgee.

Mr. Healy tells me that they can be duplicated by the same place in New Orleans at a much lesser price than this one cost. Those of you who have sailing vessels, I urge you to buy one.

Thank you, Mr. President.

MR. KEATING: I would like to ask Mr. Moore, since he had so much fun with this burgee and then apparently lost it in some bar, whether he would not be willing now to consider reimbursing the treasury!

MR. MOORE: Times have certainly changed. There was a time when The Maritime Law Association would have applauded this move.

PRESIDENT HEALY: Mr. Secretary, let the minutes of the Association reflect our thanks to the good ship GAMBIT and Benjamin Moore for his wonderful endeavor.

MR. McCORMACK: It will be reflected, Mr. President.

PRESIDENT HEALY: We will now hear from Warren J. Marwedel of Chicago, Chairman of the Committee on American Bar Association Relations.

MR. MARWEDEL: Mr. President, one of the things in the new incorporation that came out of the ABA's activity is that it's part of our plan in the Middle West to gradually move the Association out to Chicago! I attended the ABA meeting in Boston in February. Unlike our organization, in the wintertime they seem to go north and in the summertime they have meetings in the south, so you get the worst of the weather all the time.

There were not any matters of particular concern to us other than there's been a committee established now to come up with the recommendations for attorneys getting certified in particular practice areas. As I mentioned before, proctors in admiralty are still considered a special classification and are not impacted by the change in the ABA's policy for specialization.

But for those of you that have other types of practices, yourself or your firm, you can be sure that within the next few months or a year or so, state bars will be coming up with programs. As I mentioned before as well, they are going to be great fee generating programs for the State Bar Associations.

This summer the ABA will be meeting here in New York during August 4 to 12. There will be a program on August 9 put on by the Young Lawyers Division for Maritime Arbitration. There is a breakfast going to be put on, on August 10, from seven to eight-thirty, of all the various maritime committees in the ABA. I believe Judge Haight will be speaking at that.

There may be some other maritime programs. I will try to get all of that information and get it into one of our Newsletters so if anyone is attending they will be aware of the maritime programs the ABA will be putting on.

PRESIDENT HEALY: Thank you very much, Warren.

Next we have a report from George F. Chandler, III of New York, Chairman of the Carriage of Goods Committee.

MR. CHANDLER: Thank you, Mr. President.

Ladies and Gentlemen of the Association: The Carriage of Goods Committee met on Wednesday and its subcommittees met on Tuesday. Before I get into that, though, I would like to advise you of an item of particular interest for those of you at least who enjoy the world of cargo.

The Journal of Maritime Law and Commerce, Volume 24, Number 1, January 1993 edition, devoted the entire edition to the centennial of the Harter Act, which of course was the precursor of all cargo liability regimes. It was a series of articles that take on the Harter Act, one aspect or another, and where we are going in the future. I would highly recommend it. It is an excellent group of articles that editor Jack McMahon has put together.

Now in terms of the Harter Act, it's been suggested it's time to retire it. Towards that goal, there's an Ad Hoc Study Group within the Carriage of Goods Committee that is looking to revise Harter that met on Wednesday afternoon. We had a very productive and encouraging first session. Hopefully, by Bermuda, we will have a little something more concrete to report.

Various subcommittees met on Tuesday. I will have the subcommittee chairmen report as to those activities. Sandy Balick of Multimodal will follow

me, Mike Ryan of Cargo Liability after him, and Michael Marks Cohen of the Charter Parties will clean up in the final spot.

The Shipping Documents Subcommittee met, but Bob Force was a little too bashful to speak before you, so he has asked me to report on that. The work on the UCC Article 7, negotiable documents, under ABA jurisdiction is continuing. Bob is monitoring that. UNCITRAL is continuing its work on Electronic Data Interchange and model laws for EDI. That has some time to go.

The work by the ICC in Paris on the UCP 500, that is, Uniform Customs and Practice 500, has been concluded; that will be taking effect shortly. This, of course, governs letters of credit and is not directly related to our practice, except for the fact that it defines what is an acceptable and clean bill of lading. So, where you have clients who must take that into account when issuing bills of lading or making them up, it is a very important document, and there are some major changes. For the first time, at our encouragement, they have a provision for charter party bills of lading under Uniform Customs and Practice. So, in large commodity shipments now, the UCP 500 can be used to regulate letters of credit. Probably a very useful tool.

I have also asked the Shipping Documents Subcommittee to look into a revision or at least a compilation of rules and regulations governing bills of lading for possible inclusion into any potential revision of the Carriage of Goods by Sea Act. This would be taken out of the Pomerene Act and put where it belongs, in the Carriage of Goods at Sea Act, where it's much easier to access.

That takes care of the activity of the Shipping Documents Subcommittee.

I will now call upon Sandy Balick to give his report on Multimodal Transportation. Sandy, John Moore is present, so beware of using the dreaded "I" word and be sure and tell us about the term "Iced Tea".

MR. BALICK: Thank you, George.

This year the Subcommittee on Multimodal Activities continued its past practice of having speakers appear before us from other interests in the multimodal world. With the generous assistance of Burlington Northern Corporation we heard both from a legal representative and from a maritime representative. They were able to address aspects that we at sea don't frequently have the opportunity to come in contact with on land. We fully hope to continue this series of speakers throughout the next year.

Legislative developments occupied more of the Subcommittee's activities this year. In this regard there were two Acts of particular interest to us and they are, as a matter of fact, of continuing interest to us.

The first involves a bit of sleeper legislation, if you will, the Intermodal Safe Container Transportation Act of 1992. This was an Act that was passed in the very last hours of the Bush Administration. It was passed, interestingly, with virtually no legislative history to aid in its interpretation. By its provisions it will require a rule-making to be conducted by the US Department of Transportation. That rule-making is expected to take place—the process is expected to start, later this year.

Briefly, what this Act will do potentially is to shift the liability for misstating the weight of a container or for providing unbalance in a container. It will shift the liability from truckers and draymen to anyone else involved with the shipment including the shipper, including prospectively ocean carriers and railroads for that matter. It will come as no surprise to you then that that legislation was principally sponsored by the American Trucking Association. We have initiated and maintained informal contact with the American Trucking Association. We are watching this development closely.

We have reviewed the legislation at a meeting. We are standing by to circulate notice of the proposed rule-making to the Subcommittee's membership. We are, for that matter, standing by to recommend participation in the rule-making process if that becomes necessary. I think, as you can tell by my description of the Act, it's quite possible that maritime interests have not been adequately represented with respect to this important piece of legislation.

The next piece of legislation that we have discussed this year is another Act, which I think for our industry is a bit of a sleeper. It's something with the long name of Intermodal Surface Transportation Efficiency Act of 1991. A quick breeze through the legislation, which is almost as thick as a ream of paper, would make it appear as though the Act addresses almost entirely motor carriers and mass transportation. However, a closer look at the Act finds it may impact the maritime business in a number of ways. This includes the planning process, the federally mandated planning process through which federal monies are apportioned to state and local port authorities.

Secondly, there's an entire section devoted to intermodal activity. Although the emphasis is clearly on the non-oceanic, that is to say, the inland aspects of intermodal activity, it nonetheless impacts on our business.

The most visible aspect of this has been the creation by the US Department of Transportation of, I think it's called, the Committee or the Office of Intermodalism. The Bush Administration in its last months did appoint a head of that department but it was, no surprise, a lame-duck operation. President Clinton has

appointed a new head; however, there is at the moment an acting individual until the confirmation process is completed.

It is on our hope that our next speaker before the Subcommittee will be the head of the Office of Intermodalsim. We are also preparing a report on the potential impact of this legislation, which is referred to uniformly as Iced Tea. This will appear, we are hopeful, in the next Newsletter.

Thank you very much.

PRESIDENT HEALY: Thanks, Sandy.

Next we have a report from Michael J. Ryan of New York, Subcommittee Chairman on Cargo Liability.

MR. RYAN: Mr. President, Members and Guests: I am still as short as I was at the last meeting and I will try to be as brief!

Our Subcommittee undertook a study of jurisdictional clause aspects at the request of the MLA of China. That has been essentially completed, and the formal response should be out by, I would say, the end of this month or the early part of next month.

The other activity conducted by the Subcommittee was consideration of Section 10 of the OTT Convention. Since the last report that has burgeoned a bit. So as not to step on the repot of the Committee on Stevedoring, chaired by JoAnne Zawitoski, I will say that we have been coordinating but the ball is in her court.

Thank you.

PRESIDENT HEALY: Thank you, Michael.

Next we have a report from Michael Marks Cohen of New York, Subcommittee Chairman for Charter Parties.

MR. COHEN: Thank you, Mr. President.

Members of the Association: The BIMCO Documentary Committee will meet at the end of this month. There are 19 projects going, of which this Association has really found the resources to work on only about seven. So, if anybody wants to become involved in commenting about drafts of charter parties

and other carriage documents which BIMCO is working on, if you will give me your card at the end of the meeting and write on the back of it just exactly which document you are interested in, I will see to it that you get a copy in the mail and have the opportunity to comment.

The Subcommittee, along with the Committee on Maritime Arbitration, did an extensive review of the draft laytime and demurrage rules which are expected to apply to voyage charter parties. That has now been substantially completed.

BIMCO has adopted a new definition of geographical ranges for voyage charter parties as well as delivery and redelivery under time charters. There are new drafts circulating on the New York Produce Exchange charter, the AmWelsh Coal charter, a brand-new Slot- Hire charter for use in the container trade, as well as General Agency and Standard Liner Agency agreements. With the help of Glenn Bauer, we made extensive comments about the proposed revisions of the BIMCO war risk clauses.

Other BIMCO projects which are now pending, we haven't even commented on, because we simply haven't had the resources to do it, include the SCANCON voyage charter party, CENTROCON grain voyage charter, the Russwood and NUBALT Wood Timber charters, the POLCOALVOY coal charter, and the WRECK-CON and WRECK-HIRE forms which are alternatives to the Lloyd open form. The last two have been referred to the Marine Insurance Subcommittee on Salvage.

There is a brand new draft of the SALEFORM Agreement put out by the Norwegian Shipbrokers' Association. That's been referred to the Marine Finance Committee.

In the world too are draft Bunker Purchase Contracts, Standard Container Leasing form; a COMBIDOC which would be a bill of lading for use with the UNCTAD/ICC Rules for Multimodal Transport; clauses for time charters to deal with the Hamburg Rules and to deal with Stowaways; and a new Standard Crew Management Agreement, which has been referred to the Committee on Maritime Personnel.

I'd be really grateful to have anybody who would like to become involved in these projects get in touch with me.

Thank you.

PRESIDENT HEALY: Thank you, Michael.

Next we have a report from Dr. Frank L. Wiswall, Jr. of Castine, Chairman of the Comité Maritime International.

DR. WISWALL: Thank you, Mr. President.

Your committee met yesterday afternoon and the meeting was very well attended, so well attended that, thanks to my well-known inability to check a generous impulse, we switched rooms with the Practice and Procedure Committee. We had standing room only.

The Executive Council of the Comité held, early in April, its only meeting since our fall meeting in November. Most of the focus was upon the next large event, which is the Sydney Conference. I will say something about that in a moment.

We do have an Assembly (the 27th), coming up in Brussels, in September. It is going to deal mainly with routine business, if such things as deciding what is going to be the status of national member associations who are in arrears of contributions and those who are in habitual default can be called routine. It will deal mostly with housekeeping matters under the new CMI Constitution, and then the approval of the agenda for the Sydney Conference.

The next great event is Sydney, October 2nd through 7th, 1994. What most of you will be interested in hearing is that there is no limitation on the number of our members who may attend at Sydney. If any of you want to go to Sydney and/or participate in the work of the Conference you have the opportunity to do so. All you will have to do is arrange your transportation.

The facilities will accommodate a very large number of people. In fact, the opening reception on the 2nd of October will be held in the Sydney Opera House. Those of you who have been there know that it's large enough.

There will be three definite subjects on the agenda for the Sydney Conference, definite now because they were approved by the 26th Assembly last year in Genoa. These will be: first, the Offshore Mobile Craft Convention, which that is being dealt with in our Association by the Committee on Law of the Sea. That's Winston Rice's Committee. Winston has attended the meetings of the CMI International Subcommittee. There are certain controversial issues involved in this. I am sure he will explain it when he speaks to you.

Secondly, the matter of pollution damage and the assessment of such damage, which is a continuation from the seminar and Colloquium that took place in

Genoa last year. The International Subcommittee will be meeting to get something concrete ready for Sydney. The committee of the Association which is following this is the Committee on Marine Ecology, Tom Wagner's committee. He may have something to tell you about that.

The third item, which of course has longest been approved and been longest in the process of work, is the revision of the York/Antwerp Rules. Your Association has an Ad Hoc Committee on the York/Antwerp Rules. My understanding is that the work is largely completed. There may, however, be some issues that might emerge before Sydney which the committee will take another look at. Nevertheless York/Antwerp seems to be on track and does not appear to be facing great difficulty.

The fourth definite subject, which has not yet been approved by the Assembly but is certain to be approved in September in Brussels, is Limitation of Liability. This occurs because the IMO Legal Committee finally, in its wisdom, has decided that perhaps Hazardous and Noxious Substances is not a subject which requires its sole attention. There is something else that ought to be brought forward and worked on (as it's diplomatically put, on the same level of interest), that subject being a revision of the 1976 London Limitation Convention.

What is actually going on here, at least in the view of the Comité and I think many others, is that the HNS potato has gotten so hot that IMO is looking for a way to drop it. The view of several observers, yours truly included, is that the HNS Convention is in deep difficulty. It's just a question of how to shelve it with the least loss of face to the Organization and to all of those who have been its promoters.

IMO is not about to repeat the failure that occurred in 1984. It seems quite clear that if it presses HNS ahead to a diplomatic conference at this time there is going to be a failure.

The 1976 Convention, it's recognized, needs some revisitation with regard to limits. There are certain other issues involved, however, on which there are varying degrees of feeling. There is probably a fairly broad level of agreement that the concept of tacit amendment should be introduced into the Limitation Convention, whereby it would be unnecessary to hold a diplomatic conference in order to amend the Convention—certainly for the purpose of amending the limits, but perhaps also for amending other areas of the Convention.

This is a technique which has been used with great effect in the technical Conventions of IMO, such as SOLAS and MARPOL and STCW. Whether or not

it should be adopted to a legal convention that deals with all sorts of nontechnical nuances, is, of course, the great question.

Then there are other interests who feel that perhaps the Convention ought to be amended so that the graduated tonnage basis of limitation is changed to take account of other factors. All of this is going to be an interesting exercise, particulary in the case of work to be done by the CMI, because something has to be done in the space of one year in order to get the work ready for the Sydney Conference. The IMO Legal Committee has not yet had its first meeting devoted to this subject.

So, the Committee on Limitation Of Liability of this Association is probably going to be asked to do some crash work on the 1976 Convention. How the work is going to take place, the CMI will be deciding in the next Assembly; but it is the fourth definite subject for Sydney.

A fifth probable subject is Maritime Agents, a clearly European problem which results from some very, very large damage judgments, mostly breach of contract, as I understand it, under European Community Law. It is not something which troubles us. Your President wisely has decided that we ought not to invest a lot of MLA resources and time in preparation of this subject but to monitor it. But, assuming that the Assembly approves Maritime Agents as a subject for the Sydney agenda, there will be a committee of our Association charged with the review of this to assure that any input that needs to be made by the US Association is made.

There will probably be a sixth subject, one of several different projects now being worked upon. Progress between now and the September Assembly will determine which of those it is.

Sydney will be the first CMI Conference ever to take up more than four principal subjects. In addition, there will be a half-day seminar on Marine Insurance. Perhaps I will leave it to the Marine Insurance Committee to fill you in on that.

The arrangements for Sydney are magnificent. I urge you to read it when the flyer reaches you. I don't think that we can distribute them to everyone, but I will try to have, by the time of our Bermuda meeting, some brochures about the Sydney Conference.

I should say that the CMI Executive Council meeting on the third of April was the first meeting under the new Constitution. One of the duties of the

Executive Council was to establish the Nominating Committee for 1994, under Article 15 of the new Constitution, to make the nominations for office. These elections will be held in Sydney.

It's a watershed for the Comité because the entire structure changes quite radically. The task of this Nominating Committee is really quite horrifying. Who else but a great elder statesman should be selected, as he was, by acclamation, to be chair of this Committee? The duties of the chairman are quite clearly specified in the Constitution, and he really does have to carry most of the load.

I must tell you that there was no difficulty at all when the name of Nicholas J. Healy was suggested as Chairman of the Nominating Committee. It was immediately accepted with no other nominations and, I should add, with no hesitation whatever.

Mr. President, I'd like to yield the floor, if I may, to Mr. Nicholas J. Healy of New York, to say something about the CMI American Foundation.

MR. HEALY: Mr. President, ladies and gentlemen, yesterday the Board of the Foundation had a brief meeting. We discussed several important things, one of which of course was the always-present question of finances.

At the moment we have $4,210 in the treasury, a thousand dollars of which has been set aside for the Elliott Nixon prize for the best paper written by a law student or a young lawyer under thirty on the subject of Uniformity of Maritime Law or Uniformity of the International Law of the Sea.

The AMC directors very kindly donated the back cover of the January issue of AMC to the Foundation for two purposes: one, to ask for contributions, as we are always doing; and the other, to give the details concerning the Elliott Nixon prize of a thousand dollars. You will recall that this was decided upon last November, very shortly after Elliott passed on. So far we have received only one paper but I hope that there will be more forthcoming very soon.

Another thing we did yesterday was to select a board of judges for the competition. All three judges selected are members of this association. They are Denise Blocker, who is chair of the Young Lawyers Committee; Lizabeth Burrell, chair of the Uniformity Committee, and Professor Michael Sturley of the University of Texas at Austin.

Any of you who know young people that could be persuaded to contribute papers in this competition could tell them that they may submit them to any one

of the judges, or to Gray Staring or Frank Wiswall or myself. We will see that all three judges end up with copies. The deadline that has been set is December 31, 1993. So please encourage your young friends to contribute.

Also, again, please don't be bashful about sending in contributions, no matter how small. Yesterday we learned from Frank Wiswall that the CMI Charitable Trust now has a fund of £270,000. Even at the lower exchange rate, that's still a lot of money. I should say that a substantial part of that came from our Association. I believe about 10% represents contributions by this Association to the CMI Charitable Trust.

Thank you, Mr. Chairman.

PRESIDENT HEALY: Thank you Frank.

Next we have a report from Richard C. Binzley of Cleveland, Chairman of the Committee on Continuing Legal Education.

MR. BINZLEY: Thank you, Mr. President.

Ladies and gentlemen of the Association: I am pleased to report that we have organized a very fine seminar program for Bermuda. The highlight of it will be Justice Antonin Scalia. I corresponded with Justice Scalia and he is going to present a program on his views on Legislative History. It sounds a little dry but he puts a rather interesting spin on it.

We also have the Chief Judge of the Sixth Circuit, Gilbert Merritt, who will speak. He is from Nashville, Tennessee and has written a number of maritime opinions, including the *Moline* or *Miller* opinion on punitive damages that came out about a month ago.

Also highlighted on our program is Stephen Merrett, who is deputy director of Lloyd's. I think he has some very interesting observations to make to us. I think the program will be the best we have ever put together. I urge all of you to attend in Bermuda if you can.

I might add that this afternoon John Kimball and Brian Flanagan have put together a program on marine insurance. John is going to speak on the Principles of Marine Insurance, and Bryan on Hull Insurance. I urge all of you to attend that if you can.

PRESIDENT HEALY: Thank you Dick.

Next we have a report from Lawrence D. Bradley of Los Angeles, Chairman of the Cruise Lines and Passenger Ships Committee, who will tell us about this fastest growing Committee.

MR. BRADLEY: Mr. President, Members of The Maritime Law Association and Guests: The Cruise Line Committee is celebrating its first anniversary. It's a new committee, one-year old. There's been a great deal of interest in the committee reflecting the cruise line industry, which is a subject of considerable activity.

As an example, at our meeting yesterday we had 45 committee members present. We had a series of speakers to cover the full gamut of the cruise line industry, including Janice Farmer from St. Petersburg, Florida, a stock market analyst who gave the Committee a very comprehensive view of the cruise line industry from an economic standpoint and projection of what an analyst, who is responsible for people investing money, feels that the future of the cruise line industry is.

Brian Starer of Haight's office gave an overall view of the regulation of the cruise line industry from a safety standpoint. As you can appreciate, there's great concern in the International Maritime Organization and in the United States Coast Guard about the safety aspect of the cruise line operation, because these cruise line ships are now carrying up to 2,000 passengers. Many of those passengers are not very mobile. So if there were a serious fire on a ship you can imagine the consequences.

We also had what is referred to as a director of legislative affairs, Sean Connaughton from Haight's office in Washington. When we said, aren't you a lobbyist, he stuck with his title of director of legislative affairs. I gathered maybe they don't have lobbyists doing any lobbying in Washington anymore, but I notice in The New York Times, the press still refers to lobbyists and lobbying.

We also got into a discussion on legislation which could have a very severe impact on the cruise line industry, including driving the industry out of US ports. Several bills pending in Congress could have a serious adverse impact on the industry. There are other aspects of the cruise line industry, such as taxation that could have the ultimate effect of driving cruise liners out of United States ports.

You must understand that cruise ships are almost all foreign-flag, the Bahamas, Liberia and Panama, with some Netherlands flag, German flag and British flag. Most all are foreign flag except for those that operate locally and have special niches and are required to fly the United States flag. In fact, studies

have already been made as to where would cruise ships move. The Bahamas and Mexico are possibilities. Cuba is making a great pitch to develop a cruise line operation out of Havana.

The Committee also discussed a bill that affected the venue provisions in passenger contracts. We learned a bit about how things can work in Washington from our Washington correspondent Sean. Congress changed 46 U.S.C. 183C by adding one word, "any", and it slipped by everybody, but it does have the effect of nullifying the venue provisions in passenger contracts.

Discussion brought out that relatively few attorneys know that the United States is a signatory to MARPOL Annex 5, which has to do with the disposal of waste at sea, other than oil waste. You are all familiar, I'm sure, with what happened with the MARPOL Conventions on oil pollution.

After considerable effort by the Coast Guard and the MLA and general consensus that, for once, the United States would fall in line and ratify a treaty, which would be in step with the rest of world, EXXON VALDEZ came along, topped off by AMERICAN TRADER and MEGABORG. The result was Congress passing OPA '90. Thus, the United States once again went it alone.

MARPOL 5 deals with disposal of waste at sea. There are elaborate rules on disposing of all types of waste other than oil, what you can dispose of, how far out, and what you can never dispose of at sea. What brought about the discussion was an incident off the Florida Keys two or three weeks ago. We couldn't get anyone with personal knowledge to give us the straight scoop. It's rather interesting and we are going to follow up, because it involved a video camera and passengers who were very environmentally oriented and steered by a very powerful environmental group in Washington D.C., which encourages passengers to take video cameras along on passenger ships. This particular passenger with a video camera filmed plastic bags of garbage being dumped from a cruise ship off the Florida Keys. The ultimate result was a $500,000 fine, half of which reportedly then went to the passenger as a squealer fee.

Many people, and I think probably most of the non-navigation managers in the industry look more upon the operation as entertainment, show biz or a hotel that floats in the water, because essentially that's what they are and that's what they are in competition with. Cruise ships have been a very successful operation. The growth rate has been 10% per year for over ten years. Many people have a lot of confidence in this industry, particularly the owners and operators of cruise ships. They have committed $4 billion to new construction expected to be delivered by 1995.

So you can see that there are a lot of optimists, although there are those who feel that eventually there will be overcapacity, as happens so often in segments of the maritime industry. Once there is overcapacity, serious financial problems are inevitable. But the cruise line industry is a very optimistic industry and feels that it can compete with other forms of entertainment and vacationing and that it will continue to prosper.

Something that will happen, and it's going to help the new construction proponents, is many existing ships will be made obsolete by SOLAS regulations, which will no longer permit a cruise ship to not be up to the present day standards of safety, particularly fire regulations. By the year 2010 all of the older ships are going to be outlawed or prohibited from carrying passengers unless they meet current safety regulations.

The two bills that I referred to in Washington are the Gibbons Bill and the Clay Bill. The Gibbons Bill is a bill that is being pushed by the Shipbuilders' Council of America. What the Gibbons Bill does is to require every cruise line owner to certify that he didn't receive a subsidy. Most of the cruise ships are being built in France, Finland and Italy, with the help of subsidies. If a ship received a subsidy in the course of construction, the owner has to return the subsidy or pay it into the U.S. Treasury or the ship cannot come into a US port.

The Clay Bill has been kicking around Congress for six years. It's never gotten anywhere, but now there's a big push. What the Clay Bill does is extend the Fair Labor Standards Act and the National Labor Relations Act law to cruise ships. The cruise line operators say if that ever happened they would have to leave the United States.

So you can see there's a lot going on in the cruise line industry. It's a big industry and it's still a growth industry. I expect that our committee will keep busy following developments. We will attempt to keep you all advised.

Thank you very much.

PRESIDENT HEALY: Thank you Lawrence.

Next we have a report from Thomas J. Wagner of New Orleans, Chairman of the Committee on Marine Ecology.

MR. WAGNER: Thank you, Mr. President.

Fellow members and Honored Guests: The Committee on Marine Ecology met Wednesday afternoon with more than 40 people in attendance. As usual,

OPA '90 is the focus of our attention. Public interest continues to remain acute in the area of oil pollution and it consequently engenders substantial political and governmental activity.

We continue to await formal regulations concerning what are commonly referred to as COFRs, Certificates of Financial Responsibility. OPA '90 increased the limits of liability imposed against ship owners, and financial responsibility up to those limits will have to be certified by operators pursuant to formal regulations when they are promulgated.

There is currently a deadlock between the Coast Guard's position regarding these regulations and the position of P&I and insuring interests. Admiral Kime, Commandant of the Coast Guard, has indicated a willingness to compromise and try to work out those problems, but as yet no middle ground has been reached.

There is some concern that sudden promulgation of final rules would produce what is referred to as a "train wreck", with the transportation of oil and bulk products stopping immediately because of the inability of some operators to comply. We do not think that's likely. Considering the severity of the problem, the duration of inaction, etc., the ultimate regulation will probably be promulgated with some additional time for comment and for preparation.

Civil fines and penalties remain a very hot topic for OPA and OPA-related issues. Recently two spills in Washington State produced in excess of $900,000 civil penalties. Likewise, OPA expanded the fines imposed under MARPOL Annex 5, one of the few treaties which the United States has ratified. The fine of the cruise vessel was $500,000, the maximum amount.

Pollution remains a very keen topic. It is "hot" for politicians, media interests and operators. You can expect those kind of penalties in the area of oil pollution or any other type of maritime pollution.

In the international scene, the 1992 Protocols to the CLC and Fund Conventions were proposed at the Diplomatic Conference in London in November of last year. These provide a procedure to ratify the 1984 Protocols among a number of nations, not including the United States. The increased limits of the CLC (Civil Liabilities Convention) and the International Fund Convention as increased by the 1984 Protocols were essentially re-proposed, but under a scheme that would allow them to come into effect for fewer nations because of an unwillingness to ratify in view of the OPA '90 passage.

There are a couple of other items on which you might want to focus. One of the most difficult problems created by OPA '90 was the unavailability of a single

forum and procedure by which an oil spill incident could be adjudicated. Laws of the states, as well as of the Federal Government, can be prosecuted and be pursued in multi-jurisdictions of state and Federal courts. This presents the very difficult problem as to how does a vessel owner bond out its vessel if it is subject to seizure or arrest at another port or at another location.

There is currently no satisfactory way to do this. The likelihood is that in a major event, the vessel cannot be bonded out and will be subject to a marshal's sale, producing substantially less security than would be available otherwise. This is a very difficult problem with no current solution. Hopefully, in the coming months we may have some kind of proposal or report which will address this problem.

Thank you.

PRESIDENT HEALY: Thank you Tom.

Next we have a report from David McI. Williams of Baltimore, Chairman of the Committee on Marine Financing.

MR. WILLIAMS: Thank you, Mr. President.

Ladies and Gentlemen: The Marine Finance Committee has a great many things going on, as was evident from the five subcommittee meetings and the committee meeting held earlier this week. But in the interests of brevity, and to provide some time for comments by our eminent delegate to the Geneva Convention on Maritime Liens and Mortgages, I will save most of the detail for our written report. There are some projects that we are working on that I did want to highlight. I thank Tom Wagner for the lead-in on the question of OPA '90.

Pete Lippman of our Committee really identified the multiple arrest problem under OPA '90 last fall when he noted there is pollution insurance available to the mortgagee to cover its interest in a vessel, but that insurance typically adds 30 to 50 basis points to each ship financing transaction in which it is involved. As Peter identified the problem, and as Tom Wagner just explained it, with the possibility of multiple arrests, how is a ship owner going to bond the ship out? The P&I Clubs reserve the right not to post a bond. Yet, if the shipowner can't bond the ship out, there ultimately will be less money for the lien claimants, for the tort claimants involved in the OPA '90 claim, and certainly no money left over for the shipowner. If the ship can be bonded out on the proper terms, all the interested parties may benefit, as the ship continues to earn additional height.

An *ad hoc* group was formed to address the problem. As the group got into it two things became clear: First, OPA '90 is sacrosanct. No amendment to OPA

'90 can be expected to address this problem. Secondly, there likely is no resolution under Rule F, pertaining to limitation of liability. Limitation of liability has its own issues. They should not be the focus here. The point is to get a concursus of claims, not to limit the shipowner's liability. That's a matter of Federal statute.

The *ad hoc* Committee has been hard at work, resulting in lots of correspondence and a meeting this week. There is no definite answer yet, but I think there is a concept developing, which I will try to outline, taking up where Tom Wagner left off.

The idea is that if the shipowner were to enter a general appearance, an appearance that would leave the shipowner responsible without contest for any claims in excess of any bond posted, if an appropriate bond, equal to the value of the ship plus pending freight, is posted to cover all claims arising out of that incident, then an amendment to Rule E might provide that the ship could go free and be available to continue earning for the benefit of all the parties. The procedural device that might be needed may be a transfer of venue for other actions to the court in which the general appearance and the bond are filed.

Exactly how to implement all this in the context of Rule E is not clear. Whether this approach ultimately will prove feasible also is not clear. The *ad hoc* group is working on the problem and, hopefully, they will have something by next fall.

On another topic, Michael Marks Cohen mentioned the BIMCO SALEFORM. The Marine Finance Committee does view this as an important opportunity to participate in developing an important international form. We have a Subcommittee headed by Charlie Brown formed to review the BIMCO SALEFORM and present comments. We solicited members of that group just from those present at the Finance Committee meeting this week. If anyone else is interested in the purchase and sale of ships and the provisions of the BIMCO form, please let Charlie Brown or myself know.

One item that I must again report on, because there has been not much activity since our last meeting, is the legislative effort to overrule the *Fogle* case. Not much has happened because the change of committee assignments in Congress since the fall meeting has made any progress pretty much impossible in the interim. I did recently meet with representatives of the staff of the House committee and Senate committee involved. I think the staff continue to be favorably inclined to our legislation. The legislation is essentially in final form, although we continue to look at it. Hopefully, by the next time we meet we will have something more substantive to report.

On the topic of *Fogle*, I don't want to forget to mention there happily was another California judicial decision recently rejecting *Fogle*, thanks to Tom Russell. That case is in the Practice and Procedure Newsletter and is called *Key Bank v. ASEVER*.

Finally, on Tuesday, August 10th, in connection with the ABA meeting, there will be a presentation by the ABA Subcommittee on Maritime Financing, chaired by Bruce King. The presentation will deal with the general topic of yacht financing and will be a soup-to-nuts discussion well worth attending.

Mr. President, that concludes my report.

I'd like to yield the floor to Emery Harper, who has just returned from Geneva, to report on developments there.

PRESIDENT HEALY: Thank you Dave.

Next we will hear a report by the Subcommittee on Maritime Liens and Mortgages from Emery W. Harper of New York.

MR. HARPER: Thank you, Mr. President.

There is a handout in the back of the room if there is anyone who hasn't already picked it up, which contains a copy of the Convention as it was adopted yesterday at a general meeting of the delegates in Geneva. This product also concludes three years of work by the Joint Intergovernmental Group set up by UNCTAD and IMO, which followed on three years of study by the Comité Maritime International resulting in the "Lisbon" draft revisions in 1985.

As previously reported, there has been little optimism throughout this period that there would be substantial concurrence between this and U.S. law. Nevertheless, we have a text which I believe this final product represents a very serious effort to try to work out on an international level an acceptable compromise on most of the issues which our government representatives, and before that, representatives from the Association, have raised to the group for consideration.

My own conclusion, having read the final version and having lived through the discussions for ten years, is that it's going to be very difficult for people who look on the process as a negotiation to find something really major to complain about. Of course, the underlying assumption was that little could be done to bring the Convention terms into line with U.S. lien law and objectives, were set on "realistic" terms.

I'd like to run quickly through the draft articles, if I could, just to highlight the points as they were discussed and resolved. I think you ought to know where the attention of the delegates was focused and you can judge the results.

Article 1, which was previously reviewed in some detail, was not substantially changed and remains pretty much as it had been presented and discussed at the beginning of the meeting.

Article 2, which set out the ranking of mortgages between themselves is, as we have previously discussed, in accordance with our law. Changes of substance were made.

Article 3 deals with the issues of change in ownership, deregistration of vessels and protection of mortgages. What we now have is an added provision to protect the mortgagee. This requires at least three months before a country can delete a vessel from its registry for purely "public" purposes. Voluntary deregistrations by the owner requires the prior consent of the mortgagee or the prior deletion of the mortgage from the register.

Article 4 is the list of maritime liens which come ahead of the mortgage. This is, as you know, very similar but not the same as our list of preferred maritime liens. The one lien I would point out for particular concern is set out in paragraph 1(a). Under our law, wages of the crew is a rather limited concept. This new information is a much expanded concept and includes items which have been presented to our courts as "wages" and which have been by and large rejected, *e.g.*, the inclusion of social insurance contributions and repatriation expenses are also included later in the Convention as a cost of the forced sale.

A very difficult issue here, may involve the inclusion of severance pay. Under certain contracts I have seen severance pay may be equal to a full year's wages or, under some union contracts in the United States, three years' wages. If this expanded concept of severance pay becomes generally accepted, it will probably have a decidedly negative effect on the ability to mortgage vessels.

Salvage, as a maritime lien, has been redefined with the intention of eliminating environmental awards under the Salvage Convention from priority status. The thought to limit the award to the value of salvage the vessel. Whether this limitation is effective to convey that remains to be seen.

Paragraph 2 of Article 4 is also intended to eliminate certain pollution liability claims from priority over the mortgage.

Article 5 is pretty much the way it has been since the 1967 Convention.

Article 6 is a victory, in a sense, for proponents of maritime liens.

We now have recognition in the Convention that there can be maritime liens to secure claims other than those having priority over the mortgage.

What we have to live with, however, in the Convention is that these maritime liens generally expire only six months after they arise. They expire in any event 60 days after a *bona fide* sale of a vessel.

In Article 7, the issue debated back and forth and never quite resolved before a conference was the right of retention. The right of retention is now in the Convention. It's in the nature of a possessory lien by a shipbuilder or ship repairer. It expires if possession is given up. Later on in the Convention we find a provision which states that in the event of a forced sale, possession must be surrendered in exchange for a claim against the proceeds of sale prior to the mortgage claim, but after the priority maritime liens.

As I have previously reported, one of the major efforts by the US delegation was an attempt to extend the period of extinction for maritime liens. In the 1967 Convention, the period was set at one year. At every opportunity it was pointed out that this was not considered reflective of normal commercial practice. There was no support in Genoa for expanding it beyond the one year period. It is retained in the 1993 Convention as one year.

The other provision of the 1967 Convention, which had given the US representatives considerable concern, was the area of required notice before forced sale. A modest degree of success in efforts reflect US practice can be reported. If you will read Article 11 you will still find that even though there is now a minimum 30-day period which must transpire between notice given to certain categories of potential claimants and any proposed sale, our admiralty procedures can now, with minor changes, be accommodated within that general rule. In this regard, a 30-day period is considered fairly standard. It is the standard for a foreclosure sale as set forth in the International Aircraft Convention. It was impossible to generate any momentum for change. Moreover, you will notice that there is now a minimum period now which must be given before the actual sale, and that is seven days. That was the compromise that was worked out.

In Article 12 dealing with the forced sale, you will find that wreck removal is back in as a first charge. You will also find in paragraph 4 a provision about a shipbuilder/repairer giving up his right of retention for a priority claim against the proceeds.

There was virtually no discussion of the Bareboat Charter Registry paragraph, Article 16. It remains as presented to the Conference from the work of the joint group.

The Entry into Force provision, Article 19, requires ten states to express consent.

The Diplomatic Conference concluded today. The next step here, as I understand it, is for the US delegation to come back and present its recommendations to our government. In this year of unsecured maritime reform there might arise some general push to adopt some version of this Convention or parts of it. I think that this Convention should be referred, Mr. President, back to the Maritime Finance Committee for continued discussion with US Government representatives, as they follow through. Even though the US may never be party to it, our procedures and rules may be held to the standards which this Convention will establish between the states who become parties to it.

I'd just like to say this in closing—the Convention now adds a third potential Convention on Maritime Liens and Mortgages. There was one adopted in 1926, one in 1967, and now that a new generation has had an opportunity to look at this area, a 1993 Convention. If I would have to characterize the new one, I would say it's a bit of an adjustment of the 1967 Convention toward the more flexible rules which are reflected in the 1926 Convention.

I think the new Convention was adopted in a spirit of remarkable good will and thoughtful compromise by a younger generation of delegates. For that reason, it will probably be given very serious consideration by the countries that were at the Diplomatic Conference.

I believe we owe a great deal of gratitude to the people who have carried this project forward at the governmental level, not only at this Conference, but also to those who carried the load during the extensive earlier work. They have sought comments and been responsive to the input from industry sources. They have not at all been bureaucratic in the performance of their responsibilities. They have done good work.

Thank you.

PRESIDENT HEALY: Thank you Emery.

Next we will hear from George L. Waddell of San Francisco, Chairman of the Committee on Marine Insurance.

MR. WADDELL: Thank you, Mr. President.

Fellow members, Ladies and Gentlemen: The Marine Insurance Committee, as most of you know, is comprised of five subcommittees. I am the person who has been designated to report not only on the meeting of the Marine Insurance Committee as a whole but on the separate meetings of each of the five

subcommittees. The hour is getting late and I have been told that we are all supposed to stay within five minutes. I think some of us may not have adhered to that request. I am going to do my best to do so, even though I have five subcommittees to deal with.

I should mention what the format of our committee is. Each of the five subcommittees, which are of the Subcommittees on P&I Insurance, Hull Insurance, Cargo Insurance, Salvage and General Average, meet separately, has its own internal structure and deals with the problems and matters that are of interest to it.

The meetings of the Committee as a whole consist largely of reports from its five subcommittees and discussions of those reports. From time to time other matters are brought up which are considered of general interest to the Committee as a whole. I am just going to deal with the highlights of the matters that were bought up at our Committee meeting, which I think will be of general interest to most, if not all, of the members of this Association.

The first subcommittee that I would like to mention is the Subcommittee on Cargo Insurance, headed by Don Rave. Cargo insurance, as many of you know, is perhaps the most arcane aspect of marine insurance. Very few of us are specialists in it, but almost every one of us who has clients engaged in international trade may have a problem with cargo insurance from time to time. He will probably not know where to turn to educate himself. That situation is being remedied by the Subcommittee on Cargo Insurance.

They have now completed and have ready for submission for printing to the American Bar Association their draft of an annotated cargo policy, using as a basis the American Institute Cargo Clauses. I have seen it. It is a massive work. It is not duplicated anywhere in the literature of marine insurance or elsewhere. I think everyone of us who may have a problem in that field will welcome that publication when it comes out. They have done a splendid job.

Their next project is going to be something of less general interest but one which may come up in the practice of every one of us from time to time. They are going to collect the authorities and come up with a document—exactly what they do with it is uncertain—on the subject of rejection insurance. Many of you may not know what rejection insurance is. Rejection insurance is the insurance normally purchased by an importer of merchandise to insure him against his cargo, when it arrives in the United States, being rejected by a government agency, usually Customs, but it could be the Food and Drug Administration or others. It is a very specialized type of cargo insurance and one that is fraught with

all kinds of problems in the world of international trade which have never before, as far as I know, been subjected to any sort of legal treatment.

The P&I Subcommittee is headed by Ed LeBreton. I'm not going to say much here about that Subcommittee because its meeting was a joint meeting with the Ad Hoc Committee on Narcotics, headed by David Nourse. The subject of the meeting was not narcotics but rather was stowaways. As many of you may know, stowaways are a major problem to the steamship companies bringing their ships to the United States, and to their P&I Clubs. The problem arises from the fact that stowaways, in many cases now, seek political asylum. When they seek political asylum, they have the right to be allowed to remain here until their plea for political asylum is adjudicated, which may take many months. Meanwhile, the Immigration and Naturalization Service requires the steamship companies to finance their stay here, including their living expenses, guards and other expenses. It can be very expensive, running into six figures on a number of occasions. That subject will be addressed separately by David Nourse.

The P&I Subcommittee also is well into completion of its new and revised annotated P&I policy. A draft should be completed by the next meeting of this Association.

The Hull Insurance Subcommittee is headed by George Benjamin. They reported to the Committee as a whole that there are two developments which may be of interest to many of us here who are involved in hull insurance. It appears that in Norway additional clauses are being added, or are planned to be added, to the customary hull policy, with the intention of reducing what has almost come to be the "all-risk" nature of the liner negligence clauses. They are adding additional clauses designed, for example, to assess time limits on reporting, to reduce claims for what amounts to ordinary wear and tear but is commonly treated nowadays as covered voyage repairs. They are going to eliminate insuring the consequences of impure fuel and other liquids. In general, they are trying to cut back on the fact that in recent years, under the liner negligence clauses, almost everything has been treated as covered.

I need not tell you also that the hull insurance world is trying to do its best to reduce coverage by increased deductibles.

There is also an effort by a group of classification societies to assess ship management and use their assessments of the quality of ship management as a factor in underwriting and in rating hull insurance. One of the problems being faced arises from the fact that these days most ships or at least a very high percentage of ships are not managed by either their owners or their charterers,

but are managed by ship management companies, who often are not first-class and do their excessive best to save money for absent owners.

The Salvage Subcommittee, under the chairmanship of Paul Poliak, came up with one of the most interesting aspects of our meeting and one which engendered more attention than any other aspect. It dealt with the matter of jettison of cargo and whether or not jettison of polluting cargo when a vessel is in peril is a viable alternative where it appears that the jettison will reduce the ultimate pollution consequences.

It has been believed by many, including myself, that under the present legal regime no one in charge of a vessel would have the courage under any circumstances to order a jettison of fuel or polluting materials because of a fear of statutory civil or criminal penalties. The National Research Council Commission on Engineering and Technical Systems' Marine Board appointed a committee, headed by Gordon Paulsen, a former President of this Association, to study this matter. They held a symposium in Washington on February 23. Several of our members were in attendance.

We had the feeling that despite the excellent symposium and the many interesting matters that were dealt with, the key problem was not focused on by those in attendance. That problem is the one I have just mentioned, namely, what can be done, if anything, to make jettison a viable alternative for a person in charge of a vessel in such a situation.

It is not an easy problem to resolve but the Salvage Subcommittee has come up with a statement of position which they reported to the Committee as a whole. I have been asked to read it to the Association. It is as follows:

> "It is the sense of the Salvage Subcommittee that jettison should remain a viable option for shipmasters and salvors if jettison will prevent discharge of greater amounts of oil or hazardous substances or more serious environmental consequences than the jettison itself.
>
> The Subcommittee recommends that the Association express this position to the Environmental Protection Agency and the US Coast Guard and request the inclusion of an appropriate provision in the National Contingency Plan currently being revised or in other appropriate documents."

The Statement was approved without dissent by the Committee. We are not at this time asking the Association to take any action, Mr. President, but that

expresses the sense of the Marine Insurance Committee and the Subcommittee on Salvage.

At the main meeting that took place yesterday afternoon there was considerable discussion of a problem which all of you are familiar with, but I will mention only to note that it was taken up and discussed. Nothing has been done about it because it was the consensus that there is no answer; no single thing to be said or done about it. I am referring to the problem which I think many of us are beginning to face both as lawyers with respect to our own livelihoods and as lawyers representing London market underwriters. It is the problem of the recent rash of insolvencies of London companies on slips which, as is always the case in the London market, provide for several liabilities of the underwriters on the slip—each for himself and not for the others.

That problem is a serious one because naturally, the insureds do not want to receive only 90%, 80%, 70%, or whatever it is, the percentage represented by the solvent underwriters remaining on the slip. On the other hand, the remaining underwriters are determined, quite understandably, that they are not going to make up the percentages of the insolvent underwriters.

There is a myriad of ways in which this problem comes up and will come up in the future. All I can say, and all that the Insurance Committee can say, is that each one is different and each one will have to be examined separately from the point of view of negotiating a solution. There is no overall legal solution to the problem. I think most people are agreed that, at least in legal theory, the several liability of underwriters on a properly worded slip will withstand judicial scrutiny.

The Salvage Subcommittee also called attention to the fact there are two new contracts which we have characterized as wreck removal contracts. They are new BIMCO forms provided us by Michael Marks Cohen. One of them is a wreck removal contract on the basis of daily hire. The other is a similar contract calling for a lump-sum payment.

Lastly, the Subcommittee on General Average, headed by Larry Bowles, has reported that his Subcommittee has completed a proposed set of revisions to the York/Antwerp Rules of 1974. They are working, by the way, as an Ad Hoc Committee with the members of the Average Adjusters Association. I will not go into detail. Their proposals are available for anyone who wants to examine them.

Incidentally, the latest MLA report, on page 9855, has a summary of the situation with respect to the revisions of the York/ Antwerp Rules, authored by Howard L. Meyerson who has been working with Larry Bowles.

Thank you very much. That completes my report.

PRESIDENT HEALY: Thank you George.

Next we will hear a report from Wade S. Hooker of New York, Chairman of the Committee for Marine Regulation and Promotion.

MR. HOOKER: Thank you, Mr. President.

The Committee met yesterday and had a very lively discussion. We had hoped to discuss the new Clinton Administration's new U.S. maritime promotional legislation. It had been announced that the legislation would be unveiled by Secretary of Transportation Pena by May 1st, but it still has not been made available.

The Administration has been very reluctant to reveal any aspect of the legislation. However, it is expected that, like the promotional legislation proposed by the Bush Administration last year, it will provide for cash subsidies to shipowners. We also expect that it will include preference features.

It also seems likely that the legislation will include changes in the taxation of shipping. The Clinton Administration has already unveiled a tax bill that provides tax benefits in furtherance of its social programs. In view of the difficulty faced by the Bush Administration in providing funding for its maritime promotional legislation, reducing taxes as a means of promoting the U.S. merchant marine could be a low budget alternative that would be attractive to the Clinton Administration.

Although the legislation was initially expected to be limited to promotion of the U.S. merchant marine, shipper groups have been urging the Administration to include regulatory changes in the U.S. Shipping Act. If they are successful in having the Administration include such changes, Congressional consideration of the legislation would be considerably delayed since there is little sentiment on Capitol Hill for revision of the Shipping Act.

The Committee also discussed the two bills that are currently pending in Congress, the Clay bill and the Gibbons bill, which were reported on earlier this morning by the Chair of the Committee on Cruise Lines and Passenger Ships. We mention them also since they apply far beyond just passenger ships.

Under the Clay bill, H.R. 1517, U.S. labor laws would become applicable also to non-liner cargo vessels calling regularly at U.S. ports, offshore supply

vessels and fish and other processing vessels. A hearing on the Clay bill is scheduled to be held in Washington on May 13th. American labor unions and their allies are expected to testify in favor of the bill. The Association of Passenger Cruise Operators and the Federation of American Controlled Shipping are expected to testify against.

The other pending bill, the Gibbons bill, H.R. 1402, provides for punitive measures to be taken in retaliation against shipyard subsidies granted by other countries. The bill has been referred to the House Committee on Ways and Means. No hearings have yet been scheduled on the bill, possibly because of the hope that agreement on abolishing shipyard subsidies will be reached in the OECD or another international forum. Were it enacted, the Gibbons bill would be a disaster, not only for passenger ship operators but also for cargo ship operators.

First, the bill would bring vessels within the purview of the U.S. anti-dumping laws, which are intended to deal with more fungible goods. Second, the bill would blacklist the vessels and shipowners of any country found by the U.S. Department of Commerce to provide subsidies for the construction or repair of vessels, including not only cash subsidies, loans or loan guarantees but also any type of tax or regulatory preference granted specially to shipyards or shipowners. Sanctions would be imposed upon vessels registered in a blacklisted country or controlled by a national of a blacklisted country, including limitations on sailings or carryings or imposition of fines of between $500,000 and $1 million.

While the Clinton Administration has not announced it position on either the Clay or Gibbons bill, they appear likely to support both. Prior to his election, President Clinton came out strongly in favor of an earlier version of the Gibbons bill. He is known to have had strong support from the maritime labor unions supporting the Clay bill.

It is therefore imperative that each of you who represents a foreign shipyard, shipowner or group of such companies ensure that its views are made known to the Administration and Congress. The failure to do so could lead to the passage of legislation adverse to your clients' interests.

Most of the Committee's meeting was occupied discussing a recent confidential preliminary decision issued by the Commission of the European Communities (EC) with respect to the new Trans-Atlantic conference of cargo liner operators, known as the Trans-Atlantic Agreement or the TAA.

The Trans-Atlantic Agreement becomes effective under the U.S. Shipping Act on August 31, 1993, thereby exempting it from the operation of our anti-trust

laws. Although an application was filed with the EC Commission at the same time for anti-trust exemption under the EC's regulatory regime, the preliminary decision was the first official indication whether the TAA complies with the conditions for an exemption from the EC's anti-trust laws.

In its preliminary decision, the Commission advised that the Agreement appeared to violate the EC's regulation regarding conferences, citing four practices that were inconsistent with the regulation in its view.

First, the Commission advised that two-tier pricing was illegal under EC law, indicating that the TAA violates this requirement since rates of previously non conference parties to the Agreement have, in practice, established lower rates than the parties that were previously conference members. The Commission fails to discuss the fact that prohibiting separate pricing by parties to the TAA would violate the independent action rights accorded to conference members under the U.S. Shipping Act.

Second, the Commission found fault with the provisions of the TAA that are euphemistically called the Capacity Management Program. Under that program, TAA members commit to reduce a majority but not all of their unused capacity in the TAA trade. In the Commission's view, the authority under the EC regulation for conferences to engage in "the regulation of the carrying capacity offered by each member" does not cover a capacity reduction program of the magnitude included in the TAA. The Commission's negative reaction was undoubtedly piqued because the program is aimed at reducing capacity outbound from Europe but not inbound.

Third, the Commission found that the regulation covers only services to or from ports in the EC, and the TAA's through or local rates for inland haulage within the EC are, in its view, beyond the scope of the conference regulation.

In addition to these and other substantive points, the Committee also discussed the procedures utilized by the EC Commission to reach its preliminary confidential decision. These procedures contrast vividly with the procedures followed by our regulatory body, the Federal Maritime Commission, which, under the U.S. Administrative Procedures Act, conducts it proceeding in the open, permitting parties to comment on the submission of other parties and to cross examine each other's witnesses before issuing a decision which is available to the public.

In contrast, the EC Commission obtains its evidence from a variety of sources and is not bound by the strictures against *ex parte* communications that

govern U.S. administrative procedures. Ironically, the evidence utilized by the Commission may include newspaper articles, which themselves are second-hand reports of documents filed with the Commission, but not viewed by the reporters. The questionable nature of statements based upon such evidence and not subject to cross examination or comment, was clearly evident in the one statement about U.S. law in the decision, which was a totally incorrect opinion about the U.S. Shipping Act requirements for service contracts.

The Committee concluded that it would be worthwhile to conduct a study of U.S. and EC regulatory procedures for presentation to the Association at an appropriate time.

Thank you.

PRESIDENT HEALY: Thank you very much, Wade.

Our next report is from Richard E. Repetto of New York, Chairman of the Maritime Arbitration Committee.

MR. REPETTO: Thank you, Mr. President.

Ladies and gentlemen, you stalwart few who have lasted this long, I admire you! The Arbitration Committee has been meeting since September about every six weeks. We had a meeting on Tuesday. We have another meeting set up for June 16. The hot topics have been trying to improve arbitration in the United States. The perception of arbitration users has been basically that it's too slow, it's too costly, it's too arbitrary, and the losers obviously do not like it.

One of the complaints, mainly sponsored by two spokesmen, both of whom work for FD&D clubs, is that attorney's fees should be awarded in arbitration. Some charter parties already provided for it, but a number of arbitrators have ignored it. So the big fight is: Should contracts be changed to mandate the award of attorney's fees to the winning party in arbitration in the United States? There are mixed opinions in the committee. I would commend any of you to the Torts and Insurance Practice Section book on their August '92 meeting in San Francisco, called "The Civil Justice System—Facts and Fiction." There's an article in there discussing the so-called British Rule and how it could or could not work in the United States.

The other big issue that has come up, of course, is this ominous ADR, Alternative Dispute Resolutions. Alternative to what? Alternative to court? Alternative to arbitration? We intend to work with the MLA ADR Committee

who, I understand, have (I sent a spy to their meeting yesterday) some rules for conciliation that I believe have been passed by the Executive Committee. So they told us.

We are working, thanks to Mike Cohen, on an Admiralty Assessors Program to try to make sure that when you go to court with a nice little case, and that says you're going to mandatory ADR, perhaps you will get somebody in the admiralty profession who understands what you are talking about. I had a dispute in the Eastern District and I ended up with two real estate lawyers, who thought a ASBATANKVOY II charter party was nothing but a commercial lease. We settled out of court immediately.

Those are the problems that are now going on. There is also in these pilot programs the early neutral evaluative program, all of which slops back, in other words, to nonessential arbitration.

Those are the things we are working on to see, in effect, if we can't keep the admiralty bar involved in the courts, who now seem to disregard their constitutional mandate to hear as original jurisdiction admiralty cases, and to let us all do our disputes before real estate lawyers! That is what we are doing.

The BIMCO rules we worked on at the direction of the President. It was scintillating since it had already been done in 1977, and BIMCO disregarded us once again. But they are still around and we are still doing it. We will tell you more next fall in Bermuda.

Thank you.

PRESIDENT HEALY: Thank you Dick.

We will now hear from William C. Bullard of Houston, Chairman of the Committee on Maritime Fraud.

MR. BULLARD: I had asked my vice-chairman George Koelzer to make this talk this morning but he was unavoidably diverted.

All of you should have received last month Association Document No. 700, which is a report of this Committee on Maritime Fraud that embodies George's treatise on Federal Criminal Law for the Maritime Lawyer. We are very proud that we were able to have it published as a document of the Association and hope that it will be quite a bit of assistance to all of you as more or less a desk book, not as a guide for practice of criminal law, but as a check sheet, I guess, to see

whether there are any criminal implications to any matters that come before you in your own practice.

I will file a complete report of the committee meeting proceedings, which were held yesterday in New York.

PRESIDENT HEALY: Thank you Bill.

Next we have a report from Francis X. Byrn of New York, Chairman of the Maritime Legislation Committee.

MR. BYRN: President Healy, Members of the Association: I should say at the outset that Second Vice-President Jim Moseley said since we were going to present a resolution for legislative action here we could have fifteen minutes. We are not going to present such a resolution at this time and therefore I will keep it very short.

We seem to have been discussing punitive damages, which was the subject of the resolution, since almost the advent of steam navigation. But we have been waiting over the years for various Supreme Court cases, such as the *Browning Ferris* case and the *Pacific Mutual* case. We have also been waiting for the ABA which promised some action on punitive damages, and also the fallout from the *Miles v. Apex* decision in the Supreme Court.

Last November, if you have a copy of the minutes of the meeting, we promised a resolution by today. As I said we don't have it. We did present a draft of proposed legislation prepared by our Subcommittee, Mark Spansel, Bruce Hoefer and John Schaffer, to the Executive Committee at their March 16 meeting in New Orleans. We then sought our membership, some 40 members of the Legislation Committee, canvassed them for written comments and received one, two weeks ago, and then two this week.

But a funny thing happened to the resolution on its march to Congress. It ran into a spirited and actually very constructive discussion yesterday at our meeting. A number of changes were proposed, and that is the reason why we do not have the final draft ready for you today. We have prepared a new timetable. I will give it to you right now because we want everyone to know that it is coming, and that is: June 6th for the Subcommittee to come up with its new draft; July 6th, all the members of our Committee should report in, having received the new draft; and August 6th, we intend to present this to the Executive Committee so that it will be ready for the fall meeting.

Two other events have come up. We have had the *Miller* case in the Sixth Circuit, which held that the *Miles v. Apex* decision in the Supreme Court would

not permit punitive damages in the case of a death of a seaman. We also have had the argument in the *TXO v. Alliance* case, a non-maritime case in the Supreme Court but concerned with due process and punitive damages, where the compensatory damages were $19,000 and the punitive damages were $10 million. That was argued on March 31st. We should have a decision by the end of the term at the end of June. That may have some influence on what we recommend to the Association.

Now, cynics may maintain that we have deliberately postponed this to go to Bermuda. I want to assure the Association that we took a loud and forceful vote on what to do about such observations and the result was, "No Comment".

I will close by possibly diverting attention from the fact that we didn't make too much progress by calling the attention of the Association to the fact that we have several guests here from afar. From Finland we have Lena C. Kumlin; Helga Vik from Norway, and Erik Astrom from Sweden, all maritime practitioners in their respective countries. I know we will give them a nice welcome.

Thank you, Mr. President.

PRESIDENT HEALY: Thank you Frank.

Our next report is from Patrick J. Bonner of New York, Chairman of the Committee on Navigation and Coast Guard Matters.

MR. BONNER: Thank you very much, Mr. President.

We had a very good committee meeting in Washington on Tuesday. We had about 40 people turn out. As usual, the Coast Guard put together an excellent program. Mark Yost and Lee Handford had a number of high-ranking Coast Guard officers address us on a wide variety of topics, including the implementation of OPA, MARPOL, the Haitain refugee problem, Mandatory Ship Reporting, Piloting, and other items. As I said, it was an excellent turnout. We had a lot of give-and-take.

The Commandant of the Coast Guard, Admiral Kime, had lunch with us and he addressed us after lunch. This was followed by a long question-and-answer period with him. We were honored that he came, and the thrust of his remarks had to do with the COFRs.

I think we all know what his position is on the COFRs but Tuesday, for the first time publicly, he mentioned the idea of the P&I Clubs making either the

pollution funds or the government a loss payee on the policies. This is an interesting concept. I think this is the first time it's ever been brought up, and this has been relayed to London.

We also had a very lively discussion on the Coast Guard changes in the wording to the Letters of Undertaking. The Coast Guard policy has changed somewhat on this. They have made a number of substantive changes on the Letters of Undertaking, and there really hasn't been much consultation with the admiralty bar on this.

It was suggested that an Ad Hoc Committee from our Committee be formed to deal with the Coast Guard on this issue and try to iron out some wording. However, I understand that the international group of clubs is negotiating directly with the Coast Guard. However, we have offered our services of the Coast Guard Committee to assist in any way possible to iron this out.

I will be submitting a full written report. I would be happy to discuss the COFR issue and the Letters of Undertaking issue with anybody. It was a very interesting and frank discussion.

Thank you.

PRESIDENT HEALY: Thank you Patrick.

We will now hear from John A. Edginton of San Francisco, Chairman of the Practice and Procedure Committee.

MR. EDGINTON: Thank you, Mr. President.

Members and Guests: The Practice and Procedure Committee and its Subcommittees met on Wednesday and Thursday of this week. We will submit a written report for the minutes, but I'd like to present a few highlights, particularly of those things of current interest.

I think most of you by now have found the 23rd edition of the Practice and Procedure Newsletter available on the back table. Thanks to Ed Cattell and his colleagues. They always do good work.

I would like to again suggest that you, and particularly younger members in your firms, get involved with the Practice and Procedure Committee or its Subcommittees. We encourage membership, particularly of those people who will help us and do the work of the committee.

On the administrative side, Ed Cattell will resume the chair of the Subcommittee on Forfeitures. That Subcommittee is continuing its work on the Model Forfeitures Act. It expects to have a meeting in Bermuda whereby, with the assistance of other committees of this Association, we will end up with a final draft and perhaps for recommendation or resolution at the spring meeting.

On to the major subject matter items. With respect to the proposed amendments to the Federal Rules of Civil Procedure (the disclosure rules, Rule 11, and other related items which were reported on at the last meeting) some further changes occurred. The changes to Rule 56 were tabled for later submission and dropped out of the process. Some other minor changes occurred, but, on November 27th, the Advisory Committee transmitted the proposed amendments to the Supreme Court for approval. On April 22nd the Supreme Court approved these proposed amendments as they were, with no changes, and sent them to Congress. The amendments will become effective on December 1, 1993 unless Congress takes some action.

The Supreme Court transmittal took place on a 6–to-3 vote, with Justices Scalia, Thomas and Souter dissenting. The basic thrust of that dissent was that the concept of disclosure and some of the other changes made the litigation situation worse rather than better. Justice White also issued a concurring opinion, but principally raised concern about the process. It contained nothing substantive about any particular Rule. There have already been some legal newspaper articles and other materials on the process. I believe the National Law Journal had an article; the American Lawyer is going to come out with an article, and so on.

As you can tell, proposed amendments do remain controversial. Happily, Mark Kasanin, one of our members from San Francisco, has been appointed to the Federal Civil Rules Advisory Committee and will provide us an important point of close liaison with this process in the future. Mark has heard that there are strong forces that will attempt to delay or derail the proposed amendments in the Congress. Hearings are expected to be held. I gather that some want to have more evidence or more reaction at least from the various pilot projects around the country, which are in process, before these proposed amendments are enacted. Some have expressed the thought the amendments might be delayed for a couple of years.

Notwithstanding this, I understand that the Association plans to make the proposed amendments a subject of the continuing Legal Education Seminars at Bermuda. The Rules and Statutes Subcommittee of the Practice and Procedure Committee will, in addition, at its committee meeting conduct something of a workshop on the Rules at Bermuda. This is all somewhat dependent on what

Congress does because they must act promptly, otherwise the Rules will go into force on December 1.

Now, the fact that these amendments have been transmitted does not mean that the process of dealing with the Federal Rules, and, in addition, the Federal Supplementary Rules, has stopped. The Advisory Committee has asked our input on a draft of what is termed stylistic changes to Supplemental Rules A through F. That has been referred to the Subcommittee on Rules and Statutes, chaired by Bob Dunn of Chicago. If any of you wish to see what this is or participate in the comments that we will make on the stylistic changes, please contact him.

Of course, what we are looking at here is to see if, in fact, there have been any substantive changes made as a result of the stylistic changes, or if, in fact, there is any change that seems to offend the sensibilities of the maritime bar.

In addition, there are proposed changes to Rules 23 and 68. Rule 23 is the Class Action Rule and changes are intended to tighten up the process. That rule amendment has gone through the early process and now will be put out to comment. I imagine we will be looking at the proposed revision, although it does not have substantial relevance to the maritime litigation process.

Rule 68 is in the very early stages of commenting and proposed revision. Rule 68 is the so-called statutory settlement offer rule. What is proposed are some changes which would put some real teeth into a Statutory Settlement Offer under Rule 68, in that you could be forced to pay a substantial portion of your adversary's attorney's fees if you do not accept a settlement offer that turns out to be better than the result. There is a lot of work to be done on the proposal. We will continue to monitor the evolution of this proposal carefully.

With regard to proposed changes to Rules C-4 and C-6, having to do with the filing of a claim of ownership or a right to possessory interest, you will recall that the Association took a position on that at the last meeting. Those comments were delivered to the Department of Justice. We have just received a new working draft from the Department of Justice. That indicates that they have a somewhat separate view from the maritime bar of how these provisions should work. I anticipate that this will probably result in some bifurcation of at least Rule C-6 into subparts to provide provisions which will deal with civil forfeitures somewhat separately from the provision which will deal with maritime actions.

In any event, we are continuing to negotiate with the Department of Justice, with the hope of achieving a joint position on this. If not, we will take our case to

the Civil Rules Advisory Committee, as necessary, to see that no particular violence is done to what we are trying to do and what was approved at the last meeting.

You have heard in the reports of other committees about the work of some our joint Subcommittees such as the Ad Hoc Subcommittee with Marine Finance that are dealing with multiple arrests to a vessel as a result of OPA '90. This has been reported on by David Williams.

There has also been a report from the Joint Subcommittee on Vessel Foreclosures and Insolvency. However, I'd like to mention that Lars Forsberg and Bruce King of that Subcommittee are continuing their work on a set of Model Arrest and Foreclosure Pleadings. We are hoping that project can be finalized at the Bermuda meeting and then published in Benedict on Admiralty shortly thereafter.

Jim Bartlett, Chair of the Subcommittee on Local Admiralty Rules, is continuing his research on what exists presently as local admiralty rules, evaluating those rules with a view toward modifying our own Model Local Admiralty Rules and then continuing our efforts to have the Model Local Rules adopted in as many jurisdictions as possible.

That concludes my report, Mr. President.

PRESIDENT HEALY: Thank you John.

Our next report is from JoAnne Zawitoski, Chairperson of the Stevedoring and Terminal Operations Committee.

MS. ZAWITOSKI: Thank you, Mr. President.

Ladies and Gentlemen: The Stevedoring and Terminal Operations Committee had a lively and well attended meeting yesterday. We had several guest speakers. We discussed a number of issues of interest to practitioners in the stevedoring and terminal operations field.

There are four issues to which I would bring to your attention that I think may be of general interest to you.

One of the first things we discussed was the final report of the US Delegation to the Terminal Operators Convention, also called the OTT Convention. Paul Larsen from the Department of Transportation presented that report to us. We had a candid discussion of the pros and cons of the OTT Convention.

We then heard a report from Chet Hooper of the work that the Ad Hoc Subcommittee of the Carriage of Goods Committee is doing. They are studying a proposed legislative alternative to the OTT Convention, which would perhaps include some amendments to the Carriage of Goods by Sea Act. In particular, Chet discussed with us the fact that these proposed amendments to the Carriage of Goods by Sea Act might include a codification of the Himalaya clause so that stevedores and terminal operators would be expressly covered by the provisions of COGSA.

In view of Chet's report and his optimistic assessment that there is sufficient support not only among various sectors of the industry but also in Congress for these kinds of amendments to COGSA, we agreed to table further discussion of the OTT Convention at this time and not push that Convention in order to give the Ad Hoc Subcommittee a chance to see if these amendments to COGSA can be brought to fruition. David Davies of Cleveland, who is a member of the Stevedoring Committee, is going to be actively involved in working with the Ad Hoc Subcommittee on our behalf and helping to reach that goal. It is the hope of our Committee that we will have a discussion draft of the proposed amendments to COGSA by the time of our Association's next meeting in Bermuda.

The Stevedoring Committee next discussed the International Convention on Maritime Liens and Mortgages, which Emery Harper has presented to you today. In particular, we discussed the fact that Article 6 of that Convention is less favorable to U.S. supply lien claimants than current U.S. law. Article 6 would rank supply liens, regardless of when they arise, after mortgages, both foreign and domestic. Article 6 contains a very short, six-month statute of limitation for prosecuting marine supply liens.

Although our Committee is very concerned at this point about the outcome of the Diplomatic Conference on Maritime Liens and Mortgages, we sincerely appreciate the efforts of the US Delegation and of Emery Harper to try to go to bat for US maritime supply lien claimants. Since we did not have the final draft of the Maritime Liens and Mortgages Convention at our meeting, we could not vote it up or down. However, given the consensus of those present at at our meeting, it is likely that we will formally oppose the Convention at our next meeting.

We had a very interesting guest speaker at our meeting, George Pollack, an Admiralty lawyer from Canada. He discussed with us the enforcement of the U.S. maritime liens in Canada. We were interested to learn that it is very easy to prosecute an *in rem* action in Canada. For example, in Canada, there is no Foreign Sovereign Immunities Act. You do not need a pre-arrest bond or mar-

shal's deposit. No pre-arrest hearing or court order is required. There is an extremely limited basis for wrongful arrest counterclaims.

There is also a Central Registry in Canada for filing arrest actions, so that if you know of a lawyer in Montreal, for example, he or she can file an arrest action for you there for the arrest of a ship in Vancouver. The arrest papers are transmitted electronically through the court's computer system from Montreal to Vancouver. All you need is a process server in Vancouver to serve the process on the ship.

We also found it interesting that Canada will enforce and recognize U.S. liens for necessaries, even though Canadian law does not recognize that the supply of necessaries gives rise to maritime liens.

Finally, we heard a report from Dan Warman of Norfolk, who discussed the recent seizure by the Food and Drug Administration of cocoa beans at a warehouse there. For those of you who may be facing similar problems in your port, Dan has graciously offered to act as a clearing house for advice to the membership on potential experts that you may want to consult and on how to proceed with the Food and Drug Administration.

Mr. President, that concludes the report of the Stevedoring and Terminal Operations Committee. Our Longshore and Harbor Workers Subcommittee is going to be submitting a separate written report.

Thank you.

PRESIDENT HEALY: Thank you JoAnne.

Next we will hear from Neal D. Hobson of New Orleans, Chairman of the Committee on Transportation of Hazardous Substances.

MR. HOBSON: Thank you very much, Mr. President.

I, too, will try to be brief. I was privileged to attend the International Maritime Organization ("IMO") Legal Committee meeting in March and have some of details of that meeting to report.

Alfred Popp of Canada has been elected the new Chairman of the Legal Committee, replacing Robert Cleton of The Netherlands, who moved on to a higher position in his government. Mr. Popp is a very accomplished chairman and manages to move things along quite well.

I hesitate to disagree with my friend, Mr. Wiswall, who is an astute observer of IMO Legal Committee affairs, and has served as Chairman of the Legal Committee, but I really think that it would be premature to declare the Proposed Convention on Civil Liability in Connection with the Transportation of Hazardous and Noxious Substances by Sea ("HNS Convention") dead. It has difficulties; there are no questions about that. There are a lot of difficult issues that either have been put to the technical committee or left to the Diplomatic Convention.

While I would not go so far as to predict that the convention will be adapted, there is little doubt that we are going to see a strong push for adoption from a number of nations. The adoption of a convention has a lot of institutional support in the IMO, which considers the inability to agree on the HNS Convention in 1984 as the only "failure of IMO." The Secretariat and many delegations are trying to rectify that perceived failure.

In addition, the Western European countries, every one of them, face strong challenges from their Green Parties. Every one of these nations is pushing for the adoption of some kind of an HNS Convention. It may be a Convention which will place all of the liability on shipowners if the organization of a fund for the second tier of liability is found to be too difficult.

These are certain groups, such as the LNG group, which have made strong and cogent arguments that the record of the LNG industry is such that the industry should be treated specially, either by establishing a separate fund for them alone or on some other basis. Those are very difficult issues to deal with. These and other difficulties may ultimately torpedo the HNS Convention, but it is submitted that the Convention is far from dead as of this date.

A much more detailed written report will be submitted, including details of events in the Legal Committee meeting dealing with the HNS Convention.

This committee also has two subcommittees. One is a joint subcommittee with the Marine Ecology Committee, dealing with state statutes and state regulations with respect to hazardous and noxious substances. Fred Burgess of Washington D.C. is the subcommittee chairman. He has done an outstanding bit of work, which is coming right along, to catalog all of the state statutes and regulations which would impact on maritime transportation of hazardous goods. He hopes to have that catalog in position to promulgate by the October meeting in Bermuda.

He would like to have some help from some individuals in particular states. If any of you are working on these subjects, particularly in some of the East

Coast States and perhaps some of the Mississippi River States, he would welcome some assistance. Please contact Fred Burgess of Washington in that connection.

There is also a subcommittee dealing with the Basel Convention of Transnational Movement of Hazardous Waste. That is primarily a reporting Convention, which really affects governments more than shipowners and other maritime interests. However, the Convention does have a provision for a future civil liability protocol. The secretariat of the Basel Convention is now pushing for the adoption of such a protocol. Ted Ulrich of New York heads that subcommittee and is watching developments carefully. So far there are no hard developments to report.

Mr. President, that concludes my report here. The written report will be submitted.

PRESIDENT HEALY: Thank you Neal, we would appreciate it.

Next we have a report from Lizabeth L. Burrell of New York, Chairperson of the Committee on Uniformity of U.S. Maritime Law.

MS. BURRELL: Good afternoon, Mr. President, Members and Guests.

The Uniformity Committee met on Wednesday afternoon and discussed a number of topics we have been following for some time because they definitely invoke or perhaps at times impale the uniformity doctrine. One of these areas is navigability, in which there appears to be a trend to restrict the definition of navigability to actual current commercial navigation as opposed to either potential or historical navigability.

There was a recent case in the Eastern District of Michigan, called *Lynch v. McFarland* which exemplifies this trend. As you can imagine, a great number of these cases arise in the recreational boating context. This is exactly where the problem of relationship between recreational and commercial shipping actually engenders more and more problems when judges attempt to reach what they believe to be an equitable result in one context without taking into account the fact that their decisions will and must be applicable in very different situations because both commercial and recreational activities involve the same subject matter.

One of the cases that have arisen in this connection is the *Mullenix* case in the Fourth Circuit. The Court, in a recreational boating accident context, held

that the Potomac River was navigable even though, because of the state boundary definitions, the river is totally within the State of Maryland, and even though there is no cargo on the river except for passengers being transported from West Virginia to Maryland. I don't think that that case signals any reversal in the trend to restrict navigability. Of course, when the definition of navigability is restricted, so is the scope of the admiralty jurisdiction.

There are many cases involving rulings ostensibly on substantive law, which then have an effect on the admiralty jurisdiction. One of the recent cases of this nature is *Joyce v. Joyce* in the Seventh Circuit. That case was decided in the fall, and it has already produced some rather troubling side effects.

One of these was illustrated in the recent decision in the Northern District of Illinois in the case of *Great Lakes Dredging v. the City of Chicago*. This case arises out of the great flood of Chicago which occurred a couple of years ago. Instead of Mrs. O'Leary's cow, it is now alleged the flood was produced by a Great Lakes Dredging barge, which had performed some pile driving work to strengthen a dolphin in the Chicago River.

In *Joyce v. Joyce*, the Seventh Circuit had held that a boat owner who knew enough to be liable for negligent entrustment knew too much to be able to limit liability under the Act; and, on the other hand, if he was not negligent then, of course, he would have no liability and would not need the Act. The Court went on to conclude that there would therefore be no admiralty jurisdiction.

The Court in the *Great Lakes* case relied in part on *Joyce* in holding that there was no right to limitation and no maritime jurisdiction even though many of the facts were significantly different from those in *Joyce*. The Court also found that pile driving was not so uniquely a maritime activity as to fall with the maritime jurisdiction.

The MLA has filed an *amicus* brief to the Seventh Circuit in the *Great Lakes* case, urging both a reversal of the District Court and a reconsideration of *Joyce*. We can hope that the Seventh Circuit will have been influenced by their experience in *Sisson*.

Another area in which uniformity has been taking a beating is of course insurance, ever since *Wilburn Boat*.

I do wish to report one optimistic note here. It appears that the Fifth Circuit is expressing some resentment at being bound to apply the state law. In a case called *5801 Associates v. Continental Insurance*, the Fifth Circuit did apply

Missouri state law on the issue of validity of a severability clause in a marine insurance policy, but in a footnote they noted that they were reluctant to do so because of the resulting fragmentation in an area in which uniformity is very important, and of the encouragement of forum shopping that was an unavoidable consequence of *Wilburn Boat*. Nonetheless, the Fifth Circuit considered that they were bound by *Wilburn Boat*, and did apply the state law. If more courts express their reluctance to apply *Wilburn Boat*, perhaps we will have more success in reattaining uniformity in insurance law.

Another *Wilburn Boat* arose in the *Taylor* case, in which the Fifth Circuit rejected an existing maritime law case which had held that punitive damages awarded against an insured cannot be recovered against an insurer. The Fifth Circuit did not follow that existing maritime law precedent and, instead, applied state law, and allowed a recovery. In *Taylor* the MLA had filed an *amicus* brief in support of a *petition for certiorari*, but the court denied review.

The good news concerns *Miller v. American Dredging*, which is one of the many cases that have highlighted the conflict between some state courts—particularly those in Louisiana and Texas—and the Fifth Circuit on the issue of whether the doctrine of *forum non conveniens* is applicable to all maritime claims, regardless of whether they are brought in state or federal courts. We had filed an *amicus* brief in support of a *petition for certiorari* last spring. In the fall the Supreme Court invited the solicitor general to file a brief as well, to assist the Court in determining whether or not to accept *certiorari*.

Interestingly enough, the solicitor general came down against granting *certiorari*, but very recently the Court went ahead and granted review. We will also be filing an *amicus* brief on the merits in that case as well, taking the position that, the federal maritime doctrine of *forum non conveniens* is applicable in all maritime cases, regardless of where they may be brought. I am hopeful that we will get some clear guidance from the Supreme Court on this issue, although that may be a fond hope, indeed.

Finally, perhaps the most interesting part of our meeting was a discussion led by David Owen, our guest speaker, on the Abandoned Shipwreck Act and the recent decision in *Zych v. THE SEABIRD*. The question in that case is the constitutionality of the Act which abrogates the law of salvage for wrecks within the Act's scope, which are either historical wrecks or wrecks which are embedded, regardless of their historical value. David was such a compelling speaker that the Committee became very interested in pursuing some activity in that case.

That concludes my report. Thank you very much.

PRESIDENT HEALY: Thank you very much Liz.

Our next report is from Michael O Hardison of New York, Chairman of the Dinner Arrangements Committee, who will let us know what is going to happen this evening.

MR. HARDISON: Mr. President, Members and Guests: As of this morning when I left my office we were expecting an attendance tonight of 1,368 individuals. We will have room for everyone. The dinner itself will be held again at the Marriott Marquis Hotel, which is at Broadway and 45th Street here in the city. Our reception will commence at 6:45 PM in the West Side Ballroom, which is on the fifth floor of the hotel. Dinner will begin at 8:00 PM in the Broadway Ballroom, which is on the sixth floor. You just have to take an escalator up one floor.

We have a choice of entree again. For the meat entree the selection is filet mignon with a Cabernet Sauvignon wine reduction sauce. For the fish entree, we are going to have sea bass with a tomato cilantro vinaigrette sauce.

Outside the general reception and the dinner entrances will be tables where members of the Dinner Committee will be present to assist the membership and their guests. Programs will be available at those tables. Should anybody still need to pick up their tickets either from the committee or from other firms who may be holding their tickets, those tickets will be available at either the tables outside the general reception or the tables outside the dinner.

I would like to say that it was a pleasure to put together this dinner for the membership and their guests. I look forward to it, and I hope everyone will enjoy it.

Thank you.

PRESIDENT HEALY: Thank you, Mike.

The next report is from Denise S. Blocker of San Francisco, Chairperson of the Young Lawyers Committee.

MS. BLOCKER: Good afternoon, everyone. It seems like I am always the one that gets to say "good afternoon" instead of "good morning".

Before I start with my very brief summary of our committee meeting; I am going to be the renegade young lawyer here and respectfully ask you, Mr.

President and the officers and maybe the Executive Committee, to consider switching the order in which committee chairmen are called to report to the Assembly at the Bermuda meeting. I know that Dick Palmer told me that once the MLA did switch the order, allowing the committee beginning last in the alphabet to go first. I propose that instead of letting age come before beauty, let us switch that around next time. I'd like to start before I lose everyone to the beach and the golf course.

Anyway, the Young Lawyers Committee, as I told you all before, has three main goals:

The first one is to encourage all young associate members to become very active, hard-working members of the Association. We are doing that. We have approximately 84 members. About 40 of those really are active in various committees. The other 44 are just getting their feet wet, but we are seeking ways to get them more involved.

Second, we try to give our members the opportunity for exposure. One of the ways we are doing that is by participating in the Bermuda program. Dick Binzley has given us the task of reporting on Recent Developments in Admiralty Law. We have solidified those plans. I won't tell you all about them. I won't bore you. I will instead let you get to lunch. We expect it to be a very good program, put on by some very young, upbeat speakers.

Our last and main goal is to encourage the associate members to become proctors in admiralty. That is why our committee was formed in the first place—and the fruits of our labor have certainly paid off this time.

I would like to give our committee a pat on the back. I know you have already done that, but I'd like to do it again. I would especially like to give Andrew Tsukamoto of New York a pat on the back. He sent out 650 letters to eligible members, and the Association has in turn approved the largest proctor class ever since the split between associate and proctor members was made. I just want to say that I am very proud of our committee for these efforts.

The last thing I'd like to say is—and it's another thing I have told you before—when you are all considering who is going to go to Bermuda and who is going to stay back in the office, remember that your younger lawyers should be given a chance. This is especially important if they are going to become effective contributing members to this organization. Think of it this way, you can let them attend the committee meetings and you can go out on the golf course and have a good time.

Have a great lunch.

PRESIDENT HEALY: Thank you, Denise.

Let the record reflect that the Young Lawyers Committee will be first on the docket in Bermuda.

Next we will about Bermuda from Donald M. Kennedy, Chairman of the 1993 Planning and Arrangements Committee.

MR. KENNEDY: Mr. President, Members and Guests: You have been hearing about it. We are getting very close to it; that is, the 1993 return of The Maritime Law Association to Bermuda. The dates are October 24 through 29. As you all know, it's at the Southampton Princess. We have a full schedule planned. The Committee has done a tremendous amount of work. I must say that I am very pleased with the activity of the Committee.

We have seminars and committee meetings. We have daily social activity. We will have the golf tournaments, the tennis tournaments, the fishing tournament. There is some slight hitch on the sailing, but I think we can solve that problem.

We also will be graced by the presence of Mr. Justice Antonin Scalia, who will address the Association at the Wednesday seminar. At the Thursday seminar we will be graced with the presence of Judge Gilbert Merritt, the Chief Judge of the Sixth Circuit. We also expect to have short addresses by dignitaries from Bermuda.

There was some slight problem in the mailing of the brochure. We obtained from the printer copies of the material that we produced. Many of you picked them up on the way into the meeting from the registration desk. The remaining brochures are now at the desk at the entrance to the hall. They are the blue colored forms.

As far as the full mailing is concerned, that is in process as we speak. I have been assured by the printer that the stuffing began yesterday. I would expect that within a matter of a week or so all of you will have full registration material, which will include the brochure from the hotel and the hotel registration form. The registration fee for each attendee at this convention is $325. As you probably know, this money is used to defray much of the social activities. Commencing on Monday evening and terminating on Friday evening, we will have a social event including, by the way, a very fancy buffet on Wednesday and, of course, the black-tie dinner-dance on Friday.

The cost for the hotel per couple, exclusive of gratuities and taxes, is $350. This includes the Dine Around Plan. We know it as MAP; in other words, the cost of the hotel room per couple includes two breakfasts and two dinners. The charge for a single is $297, which includes the one dinner and the one breakfast.

We have arranged with two airlines to participate and sponsor the meeting in terms of carriage. I ask that you strongly consider or endeavor to use the airlines because the arrangement we have with them produces a number of free tickets for the Association, that is, for The Maritime Law Association, not the committee necessarily, which the Association can use in defraying travel cost for the Executive Committee and other necessary travel.

Much of this material, by the way, is contained in the brochure. If you haven't already seen it, you will have an opportunity to review it when you receive the mailing. I look forward to seeing all of you in Bermuda, that is, the young people, and let's not forget about the old people. I will say to Denise, let's not forget about the old people. I think the young people should come also. We will see you October 24 through 29 in Bermuda.

Mr. President, that concludes my report.

PRESIDENT HEALY: Thank you Don, we appreciate that.

Next we will hear from Warren J. Marwedel of Chicago, Chairman of the 1995 Planning and Arrangements Committee.

MR. MARWEDEL: Thank you, Mr. President. Even if we reverse the order of committee reports I seem to start out and end. So I'm here for the whole thing anyway.

In 1995 we are going to Kauai. As you know from the prior report, we did have a little storm that did considerable damage to the island and some to the hotel as well, but the hotel opened up last week. I have heard reports from people out there that it looks better than it did originally. Most of the foliage is back on the island. In 1995 I think we will have a great time in Hawaii, the way we did in 1986. Also, John Moore is preparing a treatise on the geological and cultural history of the Island, which will be part of the material.

Thank you.

PRESIDENT HEALY: Thank you Warren.

We will now hear from Kenneth H. Volk of Portsmouth, Chairman of the Nominating Committee.

MR. VOLK: Mr. President, the Nominating Committee of The Maritime Law Association met in this building last Wednesday and after due deliberation unanimously proposes the following slate:

For a term of one year: President, George W. Healy III of New Orleans;

First Vice-President, Chester D. Hooper of New York;

Second Vice-President, James F. Moseley of Jacksonville;

Secretary, Howard M. McCormack of New York;

Treasurer, Marshall P. Keating of New York;

Membership Secretary, Theodore S. Cunningham of New York.

For a term of three years on the Board of Directors, which we now are, formerly the Executive Committee:

George F. Chandler III of New York;

John A. Edginton of San Francisco;

Brendan P. O'Sullivan of Tampa; and

Thomas S. Rue of Mobile.

Mr. President, that concludes the report of the Nominating Committee.

MR. HIGGINS: Mr. President, prior to making the necessary motion, on a point of privilege, I should like to address Liz Burrell and suggest that rather than reverse the order in Bermuda of these committees that she give some thought to changing the name of her Committee, the Recreational Boating, to say, "Fun Boating". That will move it way up there. "Amusing Boating", and you could lead the pack, Liz.

But to more serious matters, I should now like to move that the nominations be closed.

MR. PAULSEN: Second.

MR. HIGGINS: Seconded. Hearing no objections, I should now like to move that the Secretary of the Association be authorized to cast one vote on

behalf of the members of the Association in favor of the Officers and Board of Directors nominated in the report.

VOICE: Second.

PRESIDENT HEALY: Thank you Ken. Any discussion? All in favor?

[Motion was unanimously carried.]

MR. HIGGINS: You now have the privilege, Mr. President, of saying, so ordered.

PRESIDENT HEALY: So ordered. Thank you.

Is there any new business to come before the meeting?

MR. MOORE: I move we adjourn.

PRESIDENT HEALY: Mr. Healy.

MR. HEALY: I have been preempted!

Now that we are a corporation with corporate officers, board of directors and all that sort of thing, I hope the latter will not be tempted to emulate their counterparts in General Motors and some of the other big corporations and try to vote themselves fat salaries and bonuses and other perks. And before they have a chance to do any of that, I join in John Moore's motion that we adjourn.

PRESIDENT HEALY: The meeting is adjourned.

[Concluded at 12:45 P.M.]

MINUTES OF THE EXECUTIVE COMMITTEE MEETING OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

Held At

Association of the Bar
of the
City of New York

on

Thursday, May 6, 1993

The meeting was called to order by President George W. Healy, III at 9:30 a.m. In addition to President Healy, the following officers were present:

Chester D. Hooper
James F. Moseley
Howard M. McCormack
Marshall P. Keating
Theodore S. Cunningham
Kenneth H. Volk

and the following Executive Committee members were present:

George D. Benjamin
John T. Biezup
Richard C. Binzley
Lizabeth L. Burrell
Joseph D. Cheavens
John D. Kimball
J. Dwight LeBlanc, Jr.
David A. Nourse
John R. Peters, Jr.
Winston E. Rice
Frederick W. Wentker, Jr.

Philip A. Berns was excused

and, present by invitation:

William R. Dorsey, III of Baltimore; Michael O. Hardison of New York; Warren J. Marwedel of Chicago; Thomas S. Rue of Mobile and Dr. Frank L. Wiswall, Jr. of Castine.

President Healy welcomed the members of the Executive Committee and guests.

I. SECRETARY'S REPORT

Secretary McCormack reported that the Minutes of the Executive Committee meeting held in New Orleans on March 15, 1992, were mailed to all members. He also reported that the MLA Report, Document No. 701 dated March 1993, would be available to all members attending the meeting on May 7, 1993. The entire membership would have the document mailed to them. Secretary McCormack indicated that Almer W. Beale, II of Jacksonville, Chairman of the Subcommittee on State Legislation of the Committee on Recreational Boating, brought to his attention a modification that should be made to the minutes of the Executive Committee meeting of March 16, 1993, and particularly Paragraph VIII. The minutes indicated that Mr. Beale reported on the proposal of their Committees "for the licensing of recreational boat operators". Mr. Beale indicated that the correct comment was that his Committee reported on the proposal "for the mandatory education of recreational boat operators". Secretary McCormack indicated that the minutes of the Executive Committee meeting of March 16, 1993, in that regard would be amended to reflect the modifications proposed by Mr. Beale.

Secretary McCormack also reported on the invitation of the Maritime Law Association of Australia and New Zealand to attend their Annual Conference to be held on November 6–11, 1993 at the Sheraton Hotel in Melbourne, Australia. The invitation was submitted to our Association by R.E. Withnell, Assistant Secretary of the Australian and New Zealand Association. Anyone with a desire to attend the meeting should contact their Conference Organizer, Ms. Cindy Last of KK Conference Management Services, 627 Chapel Street South Yarra, Victoria 3141 Australia; telephone: 03–826–2788; fax: 03–827–0959. Secretary McCormack told the Australian and New Zealand Association that he would extend the invitation to those attending the general meeting of the United States Association on Friday, May 7, 1993.

Upon motion duly made and seconded, the Executive Committee Minutes of the March 16, 1993 meeting, as amended, were approved and accepted.

II. TREASURER'S REPORT

Treasurer Keating reported the cash on hand and investments for the period through April 30, 1993 reflected the Association's sound financial position. The total cash and investments on hand were $297,323.09.

The Treasurer also reported on the status of the incorporation of the Association as an Illinois not-for-profit corporation. He reported that the Association had been incorporated as a not-for-profit corporation on April 14, 1993. If the membership approved the incorporation, then all of the present officers would become officers of the corporation and the present Executive Committee and future Executive Committee members would become directors of the corporation. Accordingly, Treasurer Keating requested the President to adjourn the regularly scheduled meeting of the Executive Committee and call to order the first meeting of the Board of Directors of the Illinois not-for-profit corporation, The Maritime Law Association of the United States. Accordingly, President Healy adjourned the meeting of the Executive Committee of the Association and called to order the first meeting of the Board of Directors of the Association, as an Illinois not-for-profit corporation.

A quorum of the Board of Directors of the Association was present. Mr. Healy acted as Chairman of the meeting and Mr. McCormack acted as Secretary. Mr. Keating reported that the Certificate of Incorporation was filed with the Secretary of State on April 14, 1993 and that the incorporation was effected as of that date. Chairman Healy then stated that the first business to come before the meeting was the election of officers. The following persons were thereupon nominated to the offices as follows:

George W. Healy, III, President
Chester D. Hooper, First Vice President
James F. Moseley, Second Vice President
Howard M. McCormack, Secretary
Marshall P. Keating, Treasurer
Theodore S. Cunningham, Membership Secretary

The Board of Directors then adopted, by motion, the proposed By-Laws of the corporation and authorized the Treasurer to open one or more bank accounts on behalf of the corporation with Marine Midland Bank, New York. The Board also approved the fiscal year of the corporation to commence as of May 1, 1993. With no other business being presented, upon motion duly made and seconded, the meeting was thereupon adjourned.

President Healy then called to order the previously adjourned MLA Executive Committee meeting and continued with said meeting. Treasurer Keating

then proposed the following resolution to the Executive Committee, which was unanimously adopted:

> "BE IT RESOLVED that the Maritime Law Association of the United States adopts the Articles of Incorporation draft dated February 1993."

The Executive Committee unanimously approved this resolution as well as the form of resolution to be voted upon by the membership of the Association on May 7, 1993 as follows:

> "RESOLVED, by the members of the Maritime Law Association of the United States" an Illinois not-for-profit corporation, that all the resolutions of the directors dated May 6, 1993, including adoption of the By-Laws of this corporation (a copy of which is attached hereto), be and the same are hereby ratified, confirmed and in all respects adopted by the members of this corporation."

Upon motion duly made and seconded, the Treasurer's report was approved and accepted.

III. MEMBERSHIP SECRETARY'S REPORT

Membership Secretary Cunningham reported that the Association's total membership was 3,540 as of May 6, 1993. He also presented the names of 50 applicants qualified for advancement to Proctor status. Upon motion duly made and seconded, the 50 Proctor applicants were unanimously elected. He also presented the names of 43 applicants for Associate membership. Upon motion duly made and seconded, the 43 Associate applicants were unanimously elected. He then presented the names of 11 applicants recommended for Non-Lawyer membership. Upon motion duly made and seconded, these Non-Lawyer members were unanimously elected. He also presented the name of one new Judicial member. Upon motion duly made and seconded, the Judicial member was unanimously elected.

He also reported with regret the death of the following members since the March 16, 1993 meeting:

Hon. George Arceneaux, Jr. of New Orleans

Upon motion duly made and seconded, the Membership Secretary's report was approved and is appended to the original copy of these Minutes.

IV. PRESIDENT HEALY REPORTED ON THE FOLLOWING TOPICS

A. Executive Committee Reception at Tulane—March 1993

President Healy advised that he had received numerous letters of appreciation from members of our Association and from foreign visitors who attended the Executive Committee reception during the Tulane Law Institute. He extended the appreciation of the Association to the members of the New Orleans Committee for their outstanding work. President Healy also expressed the gratitude of the Association to Treasurer Keating, Mr. Marwedel, Mr. Benjamin and others for their splendid and diligent dedication regarding the formation of the Illinois not-for-profit corporation of the Association.

B. CMI Assembly—1993

President Healy advised that the next meeting of the CMI Assembly would take place in Brussels on September 25, 1993. The Executive Committee approved a motion to authorize President Healy and Vice Presidents Hooper and Moseley to attend the Assembly on behalf of the Association and to use their discretion to vote on matters that will effect the Association. The Executive Committee also approved a motion that the reasonable expenses of the President and Vice Presidents be reimbursed, pursuant to the Treasurer's travel cost guidelines.

C. Iberoamerican Institute of Maritime Law

President Healy also reported on the invitation of Jose M. Alcantara of Madrid, Chairman of the Iberoamerican Institute of Maritime Law, regarding their meeting to be held in Santo Domingo from October 17–20, 1993. He anticipated that information concerning this meeting would be made available to our membership in future mailings.

V. AMICUS BRIEFS

Lizabeth L. Burrell of New York, Chairperson of the Committee on Uniformity of U.S. Maritime Law, reported on the status of the *amicus* briefs in the *Miller* and *Great Lakes*, which had previously been reported on in the minutes of the Fall Meeting and subsequent Executive Committee discussions in New Orleans. Ms. Burrell indicated that the United States Supreme Court has accepted certiorari in the *Miller* case, which concerned the issue of Louisiana law on *forum non conveniens*. The Court had invited a brief from the Solicitor General of the United States in September 1992. It was understood that the

Solicitor General was opposed to *certiorari* and filed that objection with the Court in March 1993. The Supreme Court, however, granted *certiorari*. The briefs of the parties are due in June 1993. The petitioner in the Supreme Court is represented by Thomas J. Wagner of New Orleans.

Ms. Burrell also reported on the filing of the *amicus* brief in the Seventh Circuit Court of Appeals in *Great Lakes*. The brief was filed on behalf of the Association by Warren J. Marwedel and Dennis Minichello of Chicago, after approval had been received from the Executive Committee. Messrs. Marwedel and Minichello had been under extreme time pressure of the Court in filing the brief. The argument before the Seventh Circuit was heard in late April.

Ms. Burrell also reported on the initial request of one of the litigants in a case involving the *Sea Bird*, which was an issue concerned with the Abandoned Ship Wreck Act of 1987. The matter had been discussed by the Committee on Uniformity and there was also a general discussion of the issue by the Executive Committee. President Healy advised, as a result of the discussions within the Executive Committee, that he would consult with the Vice Presidents to determine whether the full Executive Committee should be polled once the applicant had adhered to the procedures set forth in the By-Laws for a request to the Associatin to file an *amicus* brief. The Executive Committee indicated in their discussions that they had insufficient information at that time to consider the suggestion of an *amicus* brief.

VI. AD HOC COMMITTEE ON FOREIGN SOVEREIGN IMMUNITY

First Vice President Chester D. Hooper of New York reported on the reinstitution of the prior Ad Hoc Committee on Foreign Sovereign Immunity. This was done in connection with a draft convention on sovereign immunity, which the U.N. International Law Commission was studying. William R. Dorsey, III of Baltimore, the previous Chairman of the Ad Hoc Committee, had accepted the request of the President to re-constitute the Committee. The Committee will study the draft and report further to the Executive Committee.

VII. ARRANGEMENTS COMMITTEES—1993, 1995, 1997

Thomas S. Rue of Mobile, Chairman of the 1997 Planning and Arrangements Committee and William R. Dorsey, III of Baltimore, Chairman of the Site Selection Committee, reported to the Executive Committee on their recommendations for the situs of the 1997 Fall Meeting. Messrs. Rue and Dorsey recommended the Marriott Dessert Springs Hotel in Palm Springs, California. By unanimous approval of the Executive Committee, the recommendations of

Messrs. Rue and Dorsey were accepted and the conditional contract signed by them on behalf of the Association was also approved. Mr. Rue reported that the contract contained penalty clauses in favor of the Association, so that the difficulties that were encountered in the Marco Island Marriott meeting would not be repeated. President Healy expressed the gratitude of the Executive Committee to Messrs. Rue and Dorsey.

Warren J. Marwedel of Chicago, Registration Chairman of the forthcoming 1993 Bermuda meeting, reported on that meeting. Mr. Marwedel indicated that information concerning the Fall meeting was being mailed to the members of the Association. He summarized the information by reporting that the registration fee was in the amount of $325 per person and the MAP/Eat Around room charge would be $350 for a double room at the meeting with a diminished cost for the room on Thursday as a result of the removal of the dining plan for that night so that the members would have an opportunity to consider dining facilities in other areas. A video tape concerning the Bermuda meeting would be available for the members at the general meeting to be held on Friday, May 7, 1993.

Warren J. Marwedel of Chicago, Chairman of the 1995 Planning and Arrangements Committee, to be held in Kauai, Hawaii, reported on the condition of the hotel and the progress made on repairs after the recent hurricane. The meeting will be held the third week in October 1995.

VIII. CONTINUING LEGAL EDUCATION COMMITTEE PLANS FOR BERMUDA

Richard C. Binzley of Cleveland, Chairman of the Continuing Legal Education Committee, reported on the CLE activities for the Bermuda meeting. The program for Wednesday will include a panel discussion on the issues of Alternative Dispute Resolution. That same morning there would also be talks by Steve Martin of Steamship Mutual P&I Club and Steven R. Merrett, Deputy Chairman of Lloyds. In addition, the Association was pleased to announce that the Honorable Antonin Scalia, Justice of the United States Supreme Court, will speak to the members of the Association on one of his favorite topics, namely, legislative history and its consideration by the Supreme Court. On Thursday, there will be another panel discussion relative to the Americans With Disabilities Act, a lecture by Mr. William P. Schroeder concerning visual aids in litigation and computer graphics. In addition, the Hon. Gilbert S. Merritt, Chief Judge for the United States Court of Appeals for the Sixth Circuit, will speak on a topic of his choice. The meeting will conclude with a Young Lawyers Committee presentation concerning developments in the various Circuit Courts of Appeal.

IX. COMITÉ MARITIME INTERNATIONAL

Dr. Frank L. Wiswall, Jr. of Castine, a member of the Executive Council of the CMI, reported on the CMI Executive Council meeting held on April 3, 1993 in Copenhagen. Dr. Wiswall reported that the agenda for the Sydney conference was still being considered, but would include, in addition to two or three other items, the following topics which may be considered by the conference:

1. York Antwerp Rules;

2. Offshore Mobil Craft;

3. Pollution Damage and Assessment; and

4. Possible discussion of the 1976 Limitation Convention.

The United States delegation will be limited to ten official delegates, but the number of unofficial observers will not be limited. There might be six to seven topics, including a seminar on Marine Insurance on the issue of utmost good faith and warranties, and a seminar on the subject of Third-Party Liability. All other work of the Conference will be suspended during those seminars. The agenda for the Conference was still under consideration by the Executive Council and will be finalized at the forthcoming Assembly meeting in Brussels in September 1993.

Dr. Wiswall also reported on the work in progress concerning the CMI Yearbook, which will be different from the previous yearbooks. All prior CMI newsletters would be published in the MLA Report. Dr. Wiswall further reported on the activities in the Assembly meeting in Copenhagen. There were no extraordinary issues considered at the meeting, but it was expected that there would be some contentious issues to be considered at the Assembly meeting in Brussels in September, including the application of South Africa to join the CMI and other matters of a similar nature. Dr. Wiswall also reported that the IBA was planning a meeting in Melbourne one week after the CMI Conference in October 1994.

The meeting then adjourned to the Harvard Club where discussions continued.

X. DINNER ARRANGEMENTS

Michael O. Hardison of New York, Chairman of the Dinner Arrangements Committee, reported to the Executive Committee that in excess of 1,360 mem-

bers and guests were expected to be present at the dinner to be held at the Marriott Marquis on Friday evening, May 7, 1993. President Healy expressed the appreciation of the Executive Committee to Mr. Hardison and the members of the Dinner Arrangements Committee for their extraordinary work and assistance in arranging this dinner.

The President, Officers and members of the Executive Committee expressed their thanks and appreciation to the retiring members of the Executive Committee for their outstanding work and performance during their three year term. They are: John T. Biezup of Philadelphia; John D. Kimball of New York; John R. Peters, Jr. of New Orleans and Frederick W. Wentker, Jr. of San Francisco.

There being no further business, the Executive Committee meeting was adjourned at 2:00 p.m.

Respectfully submitted,

Howard M. McCormack
Secretary

FORMAL REPORT OF THE COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

The Alternative Dispute Resolution Committee met on May 6, 1993 at 3:00 p.m. The Committee Chairman reported to the Committee there appeared to be considerable interest in the ADR initiative in connection with Bermuda panel discussion regarding ADR/Mediation and Rules of Conciliation. The speakers and topics have been selected for the Bermuda meeting. The agenda and papers will be submitted to the Continuing Legal Education Committee by September 1, 1993.

The Rules for Conciliation of the Maritime Law Association have unanimously been approved by the Executive Committee of the Association. The manner by which these rules will be circulated to the membership and the marine industry will be discussed with President George W. Healy, III.

There was some discussion regarding the Chairman of the ADR Committee attending the Maritime Arbitration Committee's June 16, 1993 meeting in New York in order to explore avenues of common interest. This issue was tabled for future discussion.

Respectfully submitted,
Robert G. Phillips, Chairman

FORMAL REPORT OF THE COMMITTEE ON CRUISE LINES AND PASSENGER SHIPS

The Spring meeting of the Committee was held in conjunction with the MLA Spring meeting of 1993. The meeting was attended by 45 Committee members reflecting continuing interest in cruise line operations, which continues to be a dynamic sector of the maritime industry.

At the meeting, a series of excellent presentations were made by Janice Farmer, Brian Starer and John Sean Connaughton. Janice Farmer is a stock market analyst at Raymond James & Associates, St. Petersburg, Florida. When Carnival Cruise Line went public, Janice Farmer was assigned by Raymond James & Associates to analyze the cruise line industry and, in particular, Carnival Cruise Line. Janice gave the Committee a comprehensive view of the cruise line industry from an economic standpoint with slides to graphically present the data she had worked up. She explained vividly the reasons behind her projections and opinion as to the future for the cruise line industry. Janice distributed at the

meeting her 45 page detailed study of the cruise line industry, which is an exceptionally good analysis of the various factors that affect its economic well being.

Brian Starer of Haight's office gave a most interesting presentation of the four "safety nets" or levels of enforcement of safety standards to cruise ships. The importance of maintaining a high level of safety on cruise ships was pointed out and the economic impact analyzed.

Sean Connaughton, from Haight's office in Washington, gave an update on pending legislation in Congress and their possible impact on the industry. In particular, the Gibbon's Bill and the Clay Bill were discussed. It was noted that if either bill passed it is not inconceivable that many cruise ships would switch their operations from United States ports to foreign ports. Studies have already been made on the feasibility of operating cruise ships out of ports in the Bahamas and Mexico using airlines as a link up for United States passengers.

There was an interesting discussion on how the Washington legislative process functions and how a bill with a serious impact on an industry may slip by unnoticed. The recent Amendment of 46 U.S.C. §183c was used as an illustration. Recently, one word "any" was added to Section 183c, but the effect was venue provisions in passenger contracts are nullified.

A recent incident in which a Princess Cruise Line ship was fined $500,000 for dumping trash in plastic bags off the Florida Keys was discussed. Unfortunately, no one at the meeting had personal knowledge of the incident. Reportedly, a passenger with a video camera filmed the dumping of the trash in plastic bags and turned the film over the Coast Guard. Apparently, the Coast Guard did not take prompt action and the passenger retrieved the film and turned it over to a very aggressive environmental group in Washington which put the heat on the Coast Guard and Princess Cruise Line resulting in the $500,000 fine, a substantial part of which was paid as a squealer fee to the passenger.

The discussion brought out that while it is well known that the United States broke ranks with the international maritime world and adopted OPA '90 as a reaction to EXXON VALDEZ rather than the international MARPOL Conventions on oil pollution, it is not well known that the United States is a signatory to MARPOL Annex 5, which has to do with disposal of waste at sea other than oil. MARPOL Annex 5 has very elaborate regulations on what waste may be dumped at sea, in what condition and where, that is, how far off shore. Although most waste or trash such as paper, glass and wood may be disposed of at sea at specified distances off shore, plastic may never be dumped at sea. Apparently,

the problem with the Princess Cruise Line ship was the otherwise disposable trash was being dumped in plastic bags.

Cruise ship operations have continued to be very successful. The growth rate has been ten percent per year for over ten years. There is great confidence in the industry and over $4 billion has been committed to new construction to be delivered by 1995. Ships to be constructed are very large and will carry 2,000 or more passengers. Such will add considerable berths to be filled and there is concern amongst some that there may be over capacity. However, many existing ships will be made obsolete by SOLAS Regulations which are currently in the International Maritime Organization mill. The older ships will not be continuously grandfathered and by the year 2010 it is contemplated that all cruise ships which do not meet current safety regulations will be outlawed. All safety standards are being upgraded, particularly the fire regulations. There is great concern that it would be catastrophic if one of the large cruise ships had a serious fire with so many passengers on board, many of whom are relative immobile. The cruise line industry is big business and, although the cornerstone is a ship, the operation is more akin to entertainment or vacation on a floating hotel. There are many dramatic developments in store which will warrant close watching by the Committee.

Respectfully submitted,
Lawrence D. Bradley, Jr., Chairman

FORMAL REPORT OF THE COMMITTEE ON LIMITATION OF LIABILITY

The Limitation of Liability Committee met on Thursday, May 6, 1993. The following recent cases are of interest in the field of limitation of liability.

Persons Qualified to Limit

In our report at the November 1992 meeting of the MLA, we mentioned Judge Haight's October 6, 1992 decision in *Complaint of Chesapeake Shipping, Inc.*, which has since been reported at 803 F. Supp. 872, 1993 AMC 691.

In a case involving a somewhat related questions, the District Court for the Middle District of Florida (Judge Moore) followed *Flink v. Paladini*, 279 U.S. 59, 1929 AMC 327 (1929), in holding that the president and sole shareholder of the vessel-owning company (who also had exclusive possession, management and control of the vessel) was entitled to invoke the protection of the Limitation Act. *Lady Jane, Inc., Lim. Procs.*, 1993 AMC 490 (M.D. Fla. 1992).

Does the Limitation Act Provide an Independent Source of Jurisdiction? Still in the Negative.

On another subject addressed in our last report, the Fifth Circuit has followed the Eighth and Eleventh in a *per curiam* holding that the operator of a bass boat employed on the waters of a reservoir wholly within Louisiana and unconnected with interstate waters (i.e., not a navigable waterway) is not entitled to invoke the court's admiralty jurisdiction by means of a limitation of liability complaint. *Guillory v. Outboard Motor Corp.*, 956 F.2d 114, 1993 AMC 490 (5th Cir. 1992).

If You Would (or may) Not be Entitled to Limit (if found liable) Are You Nevertheless Entitled to Seek Limitation of Liability? Not in Illinois.

In *Joyce v. Joyce*, 975 F.2d 379, 1993 AMC 312 (7th Cir. 1992), the Court of appeals affirmed the District Court's *sua sponte* dismissal of a limitation complaint for lack of subject matter jurisdiction in a motorboat accident. The reasoning for dismissal was that the only allegation (in a state court action) against the limitation plaintiff, William Joyce, was that he had negligently entrusted his boat to the operator, so that either (1) Joyce had entrusted the boat (negligently or not), in which case that entrustment was within his privity or knowledge and he would not be entitled to limit or (2) he had not entrusted the boat, in which case he would not be liable at all and hence would have no need to limit. The majority of the Court of Appeals affirmed. The dissenting judge would have held that, rather than dismiss, the District Court should have abstained as, legally, it did have subject matter jurisdiction and there was a possibility (admittedly unlikely) that the state court might not recognize Joyce's right to limit in circumstances where the right should exist.

Subsequently, in *Great Lakes Dredge & Dock Company v. City of Chicago*, Northern District of Illinois, Eastern Division, 92C 6754, a February 18, 1993 opinion by Judge Kocoras relied in part on *Joyce v. Joyce*, dismissed plaintiff Great Lakes' limitation complaint for lack of subject matter jurisdiction. The case concerned allegations that Great Lakes, in driving pilings into the riverbed (for protection of a bridge) had caused a tunnel wall to break, flooding much of Chicago's commercial district. In dismissing the Great Lakes limitation complaint, the court concluded *inter alia*:

(1) There were no traditional maritime concerns involved and hence no admiralty jurisdiction.

(2) The Limitation Act does not provide a separate basis of admiralty jurisdiction [as usual].

(3) Moreover, assertedly following *Joyce v. Joyce*, as it was alleged that Great Lakes knew of the tunnel and that the pile driving work could damage the tunnel, a finding of liability against Great Lakes

> "will be tantamount to a finding of Great Lakes' privity or knowledge, thereby precluding Great Lakes from seeking limitation pursuant to the Act under *Joyce*."

Accordingly, dismissal was also granted on the ground of failure to state a claim upon which relief could be granted.

The last point seems to embody seriously flawed logic, and the opinion as a whole is open to question. It is under appeal, and the MLA has filed a brief *amicus curiae*.

Prospective Activity

Two projects are in the offing which are expected to involve this Committee.

First, an *ad hoc* group in the MLA, headed by Eugene R. (Peter) Lippman, is considering how to devise a procedure to achieve a concursus in regard to OPA '90 oil pollution claims in order to avoid the potential of repeated arrests. This, to some extent, may touch on the concept of concursus now available in limitation of liability cases.

Second, the Legal Committee of the IMO has put on its agenda "on a priority basis" consideration of revision of the 1976 Limitation of Liability Convention. The possible revision might be confined to the limits of liability and introducing a tacit amendment procedure. However, it may be broader. In connection with the IMO action we are informed that the subject of revision of the 1976 limitation convention will be one of the topics of the CMI's conference in Sydney in October 1994.

Respectfully submitted,
Richard H. Brown, Jr., Chairman

FORMAL REPORT OF THE COMMITTEE ON MARINE FINANCING

The Committee met on November 4, 1992 at 2:30 p.m. at the offices of Haight, Gardner, Poor & Havens in New York City, New York.

1. Pending Federal Legislation and Coast Guard Matters—Mr. Willis

Mr. Thomas L. Willis, Chief of Documentation of the United States Coast Guard reported on two proposed Bills, H.R. 1250, which is designed to prohibit a "cruise to nowhere" by a foreign flag passenger vessel from a U.S. Port and H.R. 1159, which is not aimed at yachts but at larger passenger vessels and redefines "passenger" as distinguished from "owners" or "charterers". Copies of both Bills are attached as Exhibits A and B.[1]

The new Coast Guard forms of Bills of Sale (CG-1340 and 1356), application (CG-1258), Builder's Certification (CG-1261), and Mortgagee's consent (CG-4593), just published will be used immediately, but the existing forms are not obsolete and may still be used. By popular demand, Certificates of Ownership may still be issued. Abstracts of Title will be forwarded by the Coast Guard to a vessel's new home port. Fax machines have been purchased for major offices so that Certificates of Ownership can be faxed.

Any input regarding consolidation of the Manufacturer's Statement of Origin, and the Builder's Certificate into one document would be appreciated by the Coast Guard.

2. Draft Articles for an International Convention on Maritime Liens and Mortgages, 1993 Just Approved by Diplomatic Conference in Geneva—Mr. Harper

Emery W. Harper reported on the draft Convention which is attached as Exhibit C[2] that represents seven years travail by the Joint Committee of UNCTAD and IMO. Before a vessel can be de-registered, a mortgagee must be given at least three months prior notice. The Draft follows the 1967 Convention in ranking all maritime liens ahead of mortgages. Claims for wages of the crew and sums due the master were expanded to include social insurance contributions. States are free to grant other maritime liens such as for supplies or container liens, provided such liens will expire in 6 months or 60 days following a sale, and will rank after mortgages. Regular maritime liens will lapse after one year unless the vessel is arrested. At least 30 days prior notice must be given for a forced sale of a vessel. Ten states are needed to sign the Convention before the Convention goes into effect.

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[1]A copy of these exhibits may be obtained from the Chairman.

[2]A copy of this exhibit may be obtained from the Chairman.

3. Ad Hoc Committee on Concursus of Claims and "OPA '90"—Mr. Lippman

Peter Lippman stated that since it is impracticable to propose amendments to OPA '90 at this time, a vessel that is arrested for an oil pollution claim (i) should be freed upon the posting of a general or special bond in the value of the vessel to enable the vessel to earn freights for both the owner and her creditors, and (ii) all claims should be gathered together and heard in one forum. Existing Rules E and F may be amended. Rule E amendment seems like the best route. PandI clubs may not bond a vessel if the Club knows that the vessel will immediately be rearrested for a pollution claim. The problem is real and will increase the costs of insurances. Several drafts for Rule E changes have been drawn (Exhibit D)[3] but a new draft will be presented at the next MLA meeting.

4. Proposed Legislation to Cure the Fogle Decision—Mr. Williams

Dave Williams reported that the Bill had been drafted and presented to Chairman Jones but because of his death, the Bill will have to be reintroduced to the new Congress. A copy of the Draft of 4–7 is attached as Exhibit E.[4] Mr. Williams urged members to start a letter writing campaign in support of the Amendment.

5. Subcommittee Reports

(a) Coast Guard Documentation, U.S. Citizenship, etc.—Peter Lippman Reported in the Absence of Richard B. Tieman

The Committee reexamined the Conoco-Dupont case and Robert Postner's draft City Bar recommendations concerning the 75% citizenship requirement for holding companies. The Committee recommended that (i) the Fair Inference Rule (percentage of U.S. addressees for stock holders that will establish U.S. Citizenship) that originated by judicial decision and was recently dropped by the Coast Guard, be reinstated, (ii) the duty of the mortgagee to notify a court of citizenship restrictions imposed on prospective purchasers at foreclosure sale be dropped to eliminate the extraterritorial effect of Section 9, and (iii) eliminate or reduce the citizenship requirement for mortgagees or lessees in pure financial transactions and concentrate citizenship requirements on operations rather than on holders of a security interest. The uncertainties of the future of the U.S. flag fleet were discussed as well as the importance of the proposals to aid its preservation.

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[3]See page 10308

[4]See page 10310

Mr. Willis suggested that a request for a regulatory change be submitted to Marad in order to reinstate the Fair Inference Rule.

(b) Committee on Maritime Liens and Mortgages—Peter Lippman

Emery Harper reported on the Draft Convention in Geneva. A report was given from the Ad Hoc Committee on OPA '90 Concursus and multiple arrest problem. Robert Zapf gave a summary of his Fines and Forfeiture Subcommittee report and reported that some of the forfeiture statutes do not give notice to the mortgagee.

Key Bank of Maine v. the ASEVER, 1993 AMC 263 (C.D. Ca. 1992), was reported as not following *Fogle*. In *Itel v. Atlantrafik and M/V TAVARA*, 982 F.2d 765, 1993 AMC 609 (2d Cir. 1992) the lien of a container lessor was denied on grounds that the identity of the vessel for which the containers were leased was never given.

(c) Joint Subcommittee on Vessel Foreclosure and Insolvency

Bruce King reported that Phil Berns compilation of arrest and foreclosure forms will be put in final form at the Fall MLA meeting and will then be submitted to John Edginton for publication in Benedict.

In *Michael Kesselring, et al. v. F/T ARTIC HERO, et al.*, 1993 AMC 447 (D. Alaska 1992), the United States does not have a maritime lien for a seaman's withholding tax. In *Ponce Federal Bank v. LADY ABBY*, 980 F.2d 56, 1993 AMC 807 (1 Cir. 1992), a deficiency judgment was given to the mortgagee against a subsequent purchase of a vessel who agreed to continue to pay the mortgage payments.

(d) Taxation—Derick W. Betts, Jr.

At the meeting, Elizabeth Johnson, a Canadian lawyer, discussed the legislation in Canada in 1991 to encourage foreign shipowners (principally from Hong Kong) to shift the situs of vessel business to Canada. Canada also has a provision similar to U.S. Internal Revenue Code Section 883, which exempts shipping income realized by corporations of other jurisdictions that provide an equivalent exemption to Canadian operations.

In *Itel v. Huddleston*, 113 S.Ct. 1095 (1993), the U.S. Supreme Court held that the State of Tennessee was permitted to impose its sales tax on leases of cargo containers used in international commerce mainly because the tax did not

involve import or export but on transfer of title and possession. The lesson of the *Itel* case is that if transactions involve accepting or transferring containers, you must choose your jurisdiction carefully.

(e) Yacht Financing—Robert S. Fisher

The new Coast Guard forms for documentation were reviewed. Mr. Willis confirmed that a summer residence address will be sufficient for the Application (CG-1258). The need for a marking card will hopefully be eliminated when new regulations come out this fall. A Social Security or Tax Identification number is required on the application. With respect to the Builder's Certificate (CG-1261), the actual builder should sign and not an importer or trading company. The Manufacturer's Statement of Origin and the Builder's Certificate should be combined to make on title document which will prevent the opportunity for fraudulent transfers, i.e., the wholesaler holds on document and the retailer holds the other. The Bill of Sale (CG-1340) has a blank space on the back for disclaimers of warranties or to add encumbrances.

Sec. 933 of PL 102–550 1992 HR 5334 was reviewed. This section prohibits use of "Rule of 78's" in certain refinancings and means that origination fees may have to be refunded if the loan is over 61 months.

Ernest J. Cicconi of the CIT Group and Robert Mauer of ITT Commercial Finance representing retail and wholesale yacht financiers, discussed the need for a interface between the two groups to control fraudulent sales when a Manufacturer's Statement of Origin is held by the wholesaler and the Builder's Certificate is held by the other. The builder and dealer documentation service as well as the wholesaler and retail financiers should interface to prevent fraudulent sales of yachts. The trick is to communicate.

Respectfully submitted,
David McI. Williams, Chairman

EXHIBIT D

E(6) **Reduction or Impairment Security.** Whenever security is taken the court may, on motion and hearing, for good cause shown, reduce the amount of any security given; and if the surety shall be or become insufficient, new or additional sureties may be required on motion and hearing. Should an incident or occurrence give rise to multiple claims *in rem* against a vessel in excess of its value and the vessel is attached or arrested, security shall be reduced to an amount as hereinafter set forth provided the owner, demise charterer or operator of the vessel shall entered a general appearance whereby such person shall become liable for any deficiency in excess of security filed. Upon such entry of appearance and the posting of a security equal to the value of the vessel plus pending freight, together with such sum as the court may fix to provide for the costs of the proceeding, conditioned to answer the judgment of the court or any appellate court with respect to all actions arising out of such incident or occurrence in which process for the attachment or arrest of the vessel has been or may thereafter be issued, such vessel shall be released. The filing of such security shall be deemed in the nature of an interpleader for the value of the vessel and the execution of further process against the vessel arising out of such incident or occurrence shall be stayed. Such stay shall not affect the right of a claimant to file an action against any person with respect to such incident or occurrence in any forum in a jurisdiction in which he may be found.

[10310]

EXHIBIT E

(a) Section 31325(b) of Title 46, United States Code, is amended

(1) by striking the words "mortgage may" immediately preceding paragraph (1) and inserting the words "mortgagee may";

(2) by striking "; and" at the end of paragraph (1) and inserting ";"; and

(3) by inserting at the end of paragraph (2) the following:

(3) enforce the preferred mortgage lien or a claim for the outstanding indebtedness secured by the mortgaged vessel by exercising any other remedy (including an extra-judicial remedy) against a documented vessel, a vessel for which an application for documentation is filed under chapter 121 of this title, a foreign vessel, or a mortgagor, maker, comaker, or guarantor for the amount of the outstanding indebtedness or any deficiency in full payment of that indebtedness if -

"(A) the remedy is allowed under applicable law and

"(B) the exercise of the remedy will not result in a violation of sections 9 or 37 of the Shipping Act, 1916 (46 App. U.S.C. 808, 835).

"(4) (A) Before title to the documented vessel or vessel for which an application for documentation is filed under chapter 121 is transferred by an extra-judicial remedy, the person exercising the remedy shall give notice of the proposed transfer to the Secretary, to the mortgagee of any mortgage on the vessel filed in substantial compliance with section 31321 of this title before notice of the proposed transfer is given to the Secretary, and to any person that recorded a notice of a claim of an undischarged lien on the vessel under section 31343(a) or (d) of this title before notice of the proposed transfer is given to the Secretary.

"(B) Failure to give notice as required by this subsection shall not affect the transfer of title to the vessel. However, the rights of any holder of a maritime lien or a preferred mortgage on the vessel shall not be affected by a transfer of title by an extra-judicial remedy, regardless of whether notice is required by this subsection or given.

(b) The Secretary shall prescribe regulations on the time and manner for providing notice under section 31325(b)(4) of title 46, United States Code (as enacted by subsection (a)).

(c) The amendments made by subsection (a) of this section may not be construed to imply that remedies other than judicial remedies were not available before the date of enactment of this section to enforce claims for outstanding indebtedness secured by mortgaged vessels.

FORMAL REPORT OF THE SUBCOMMITTEE ON TAX

The Spring meeting of the Tax Subcommittee of the MLA Committee on Marine Financing was held at the offices of Watson, Farley & Williams, 380 Madison Avenue, New York, New York at 2:30 p.m. on May 3, 1993.

After some introductory remarks by Derick W. Betts, Jr., Chairman of the Tax Subcommittee, the discussion turned to the matters listed on the meeting agenda.

1. *Legislation Enacted in Canada in 1991 primarily designed to encourage foreign shipowners (principally from Hong Kong) to shift their situs of vessel management to Canada; related Canadian tax issues.* Elizabeth Johnson of Fasken Campbell Godfrey in Toronto reported on the enactment in 1991 of Subsection 250(6) of the Canadian tax law which was designed to allow non-Canadian shipping companies to be managed and controlled in Canada and not be subject to tax in Canada. Ms. Johnson explained that under the Canadian common law, a foreign corporation that has its central management and control in Canada is considered resident in Canada and subject to tax on its worldwide income. Subsection 250(6) provides an exception to the common law for certain qualifying foreign shipping companies. Foreign shipping companies that qualify will be deemed to be resident in their jurisdiction of incorporation.

In order to qualify under Subsection 250(6) a foreign incorporated international shipping company must meet the following two part test (which is applied and must be satisfied on an *annual* basis):

(a) The corporation's "principal business" must consist of the operation of ships that are used primarily in transporting passengers or goods in international traffic (international traffic, as defined, does not include Great Lakes traffic); and

(b) "All or substantially all" of the corporation's gross revenue must be from the "operation" of ships in international traffic.

Revenue Canada has interpreted the phrase "principal business" as to mean "chief business" and the phrase "all or substantially all" to mean 90% or more.

For purposes of the 90% test, gross revenue would not include proceeds from vessel dispositions. Bareboat charter hire is not considered to be income from the operation of ships; however, income which is merely incidental to the operation of ships would be included as income for purposes of the 90% test.

The exemption provided in paragraph 01(1)(e) of the Canadian Income Tax Act (the analog to Section 883) provides an exemption from tax for non-resident corporations for Canadian source shipping income earned, subject to a reciprocity requirement not dissimilar to the Section 883 requirement.

The tax exemption afforded by Section 250(6) can be a trap for the unwary. For example, if a foreign shipping corporation managed and controlled in Canada falls short of satisfying the 90% income requirement (even if only by 1%), it will be subject to Canadian tax on its *entire* worldwide income. In other words, the exemption for foreign shipping companies afforded by Subsection 250(6) is an all or nothing proposition.

Ms. Johnson reported that Subsection 250(6) can be used by Canadian shipping companies who set up subsidiary companies in off-shore jurisdictions and manage such companies from Canada. In addition, since Canada's analog to the U.S. controlled foreign corporation rules only applies to passive income, the Canadian parent can build up profits in its off-shore shipping subsidiaries and pay no Canadian tax on such profits until they are repatriated to the Canadian parent as dividends.

Ms. Johnson then briefly discussed certain personal income tax provisions:

- Once an individual becomes resident in Canada, he is subject to Canadian law (the current rate is high: 50% or more in some provincial jurisdictions) on his worldwide income provided, however, he is granted a special five year exemption for passive income earned by off-shore "immigrant trusts" established prior to becoming a Canadian resident.

- On becoming a resident, the tax basis of the individual's assets are "stepped-up" to their fair market value without the payment of tax. However, on departure from Canadian residency, such assets are deemed to be sold for their fair market value and the gain is subject to Canadian income tax. This so-called "departure tax" does not apply to assets owned at the time the individual becomes resident if an individual leaves Canada after having been resident in Canada for less than five years.

- Canada does not have an estate tax at either the Federal or provincial levels. However, all assets at the time of death are deemed disposed of at

fair market value and any gain is subject to Canadian income tax. Transfers at death to a surviving spouse generally fall outside this deemed disposition rule. Since the tax imposed on a deemed disposition at death is an income tax rather than an estate tax, there is no available crediting mechanism, for example, for U.S. situs assets which are subject to U.S. estate tax.

2. *Itel v. Huddleston and related state tax developments.* Joel Pangborn of CSI Corp. reported on the recent U.S. Supreme Court decision in *Itel Containers International Corp. v. Huddleston*, 113 S.Ct. 1095 (1993) which upheld the imposition by the State of Tennessee of its sales tax on leases of cargo containers used in international commerce. Mr. Pangborn briefly reviewed Itel's arguments that the imposition of the Tennessee sales tax violated the Supremacy, Foreign Commerce and Import-Export clauses of the U.S. Constitution.

- *Supremacy Clause*—Itel argued that the Tennessee sales tax violated the provisions of two container conventions entered into by the U.S. government and therefore violated the Supremacy Clause. The court found that the container conventions only applied to prevent taxes imposed on the "importation" of containers and the Tennessee sales tax is not an "import" tax.

- *Foreign Commerce Clause*—Itel argued that Tennessee's sales tax violated the Foreign Commerce Clause under the test set out in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) which, among other things, required that the tax must not (i) result in an unacceptable risk of multiple international taxation or (ii) prevent the U.S. government from speaking with one voice in regulating foreign trade. The court held that the Tennessee sales tax does not pose an unacceptable risk of multiple taxation since it only applies to the delivery of containers within its borders. The court relied on an *amicus* brief filed by the U.S. government in holding that the Tennessee sales tax does not prevent the government from speaking with one voice.

- *Import-Export Clause*—The court held that the Tennessee sales tax was not in violation of the Import-Export Clause because the tax is not an import tax.

Mr. Pangborn reported that the court's decision in *Itel* does not, in his view, add much to existing law on states rights to tax instrumentalities of international commerce. Mr. Pangborn reported, however, that following the *Itel* decision, the U.S. Supreme Court vacated and remanded *Harris County Appraisal District v.*

Transamerica Container Leasing, Inc., 821 S.W.2d 637 (Tex. Ct. App. 1991) in which the Texas courts had struck down an *ad valorem* property tax imposed by Harris County, Texas on containers located within its borders on the grounds such taxes violated the two part test set out in *Japan Lines* (see discussion of foreign commerce clause above).

Mr. Pangborn raised the question as to whether other states may attempt to impose taxes on containers in light of *Itel*. Mr. Pangborn also noted that, to his knowledge, New Jersey (where CSX Corp. is located) is not considering levying any taxes on containers since the state would like to promote the commerce associated with the use of containers within its borders.

3. *Status of various Regulatory Projects*. James Wall reported that he had spoken with Patricia Bray, the attorney at the IRS with principal responsibility for drafting regulations under Section 997, 862 and 863(o) of the U.S. Tax Code, on the previous Friday. Ms. Bray advised that it is not likely that regulations under Sections 887, 883 and 863(c) would be forthcoming anytime soon. In fact, the Section 887 and 883 regulation projects are not even on the 1993 IRS Business Plan. She said that a tentative deadline of June 30, 1993 has been set for submitting draft regulations under Section 863(c) to Treasury for their review. However, Ms. Bray has not started drafting such regulations and she is hopeful that the deadline will be moved to later in the year. Ms. Bray also reported that some consideration had been given to issuing a revenue ruling to deal with the publicly traded rules under Section 883 but no timetable has been set for issuing such a ruling.

4. *Other Matters of Interest*

- Gene Yourch reported that there have been several recent editorials in various trade papers calling for reinstatement of the Subpart F reinvestment provisions for controlled foreign shipping corporations. It is not clear whether the reinvestment provisions will be re-enacted into law and, if so, what form they will take.

- Derick Betts reported on HR 1250 which, among other things, prohibits U.S. based cruises-to-nowhere from being conducted by non-U.S. flag vessels on the theory that such activity is coastwise trade and therefore should be reserved to U.S. flag vessels. The position adopted by HR 1250 is consistent with that of the IRS which views cruises-to-nowhere as not constituting "international" transportation and therefore not eligible for Section 883 exemption. Under the IRS position, 100% of the earnings from cruises-to-nowhere being subject to tax as U.S. source income.

There being no further issues for discussion, the meeting was adjourned at approximately 4:30 p.m.

Respectfully submitted,
Derick W. Betts, Jr., Chairman

FORMAL REPORT OF THE SUBCOMMITTEE ON YACHT FINANCING

The Yacht Finance Subcommittee met on May 5, 1993 at the offices of Haight, Gardner, Poor & Havens to discuss: (i) the progress being made in the Subcommittee's efforts to effect a consolidation of the Builder's Certification and Manufacturer's Statement of Origin title source documents; (ii) various new U.S. Coast Guard forms that had just been distributed by the Coast Guard; (iii) possible effects of §933 of the Community and Housing Development Act of 1992 on non-refundable yacht loan origination fees; and (iv) problems in interfacing between wholesale and retail yacht financers.

Attending as special guests with respect to the wholesale-retail segment of the program were Robert Mauer of ITT Commercial Finance, a major inventory financer, Ernest Cicconi of the CIT Group Sales Financing, Inc., a major retail financer, and Bruce Alexander, Esq. in-house yacht finance counsel for Maryland National Bank, which has been active in both wholesale and retail yacht financing.

Robert S. Fisher, Subcommittee Chair, reported that Subcommittee member Robert McIntosh had reported that the State of Florida, one of the most active states for documentable yachts, had no objection to the proposed consolidation of title source documents and that the National Association of Boat Title Administrator's was considering the proposal. The Chair presented the final form of Builder's Certification which Coast Guard had just distributed and commented that the only items required on most MSOs that were missing from the Builder's Certification form were engine numbers for which ample room existed in subsection C of Section H headed "Vessel Data".

Mr. Alexander agreed to present the format to the State of Maryland which he did shortly after the meeting.

Thomas Willis, Chief of Documentation for the Coast Guard, explained that he had no objection to the addition of engine numbers but that the impetus for such insertion would have to come from the states because Coast Guard had no need of such data.

The Chair announced that other Subcommittee members had agreed to present the proposal to their respective states. He said that New Jersey had already approved, subject to getting engine numbers inserted.

David McI. Williams, Chair of the Marine Finance Committee, recommended that the Subcommittee seek MLA approval for the consolidation of title source documents, which the Subcommittee Chair has agreed to do, as soon as several additional states respond. The Subcommittee is certain that no insurmountable technical obstacles exist to its implementation. The aim of the consolidation project is to minimize the possibilities for fraud by reason of two different title source documents.

The Subcommittee discussed the new forms of Application for Documentation (CG-1258) Builders' Certification and (CG-1261) Bill of Sale.

Mr. Willis explained that summer residences would suffice for documentation domiciles of individuals and that marking certificates would still be required until the effective date of the new U.S.C.G. regulations on documentation, which will make such certificates unnecessary. A late summer effective date for the new regulations was anticipated.

Mr. Willis also discussed the distinction between a builder (manufacturer) and an importer or dealer. Only the builder (manufacturer) can sign a Builder's Certification. This interpretation is directed at preventing fraudulent Builder's Certifications by importers or dealers.

The Subcommittee Chair then raised issues that have been frustrating yacht inventory lenders. Mr. Mauer of ITT acknowledged that vessels purchased in the Fall or Winter for Spring delivery, that spent the winter in the dealer's showroom, posed a recurrent problem. He asked that retail lenders advise the dealers inventory lender of such transactions so as to avoid double-financing.

A discussion then ensued concerning security interests in vessels used as demonstrators, vessels taken to boat shows and vessels owned by a consumer that are moored at a yacht dealership for long periods of time.

The pros and cons of use of a preferred mortgage on inventory were also discussed at length. It was suggested that legislative clarification of the status of a preferred mortgage on inventory may be in order, in view of the forthcoming Uniform Commercial Code revision activity.

Another issue that was extensively discussed was the power of an inventory financer to insist on physical possession of Builder's Certifications and Manufac-

turer's Statements of Origin. It was noted that some state laws require the dealer to hold the manufacturer's statement of origin. Presumably, a consolidated Builder's Certification—Manufacturer's Statements of Origin would be subject to the same laws. The Subcommittee will look further into this matter.

Verification of inventory pay-off figures for yachts about to be sold and financed at retail and document escrow procedures pending payment of prior security interests or liens on a yacht were also discussed.

The Subcommittee has been trying to encourage attorneys for other yacht inventory financers to join and participate in the Subcommittee's work.

A seminar on registration and mortgaging of yachts abroad may be planned for the Fall meeting in Bermuda. MLA members interested in such a program should contact the Subcommittee Chair.

Respectfully submitted,
Robert S. Fisher, Chairman

FORMAL REPORT OF THE MARINE INSURANCE, GENERAL AVERAGE AND SALVAGE AD HOC COMMITTEE ON THE REVISION OF THE YORK/ANTWERP RULES 1974

The Committee on the revision of the York Antwerp Rules 1974 met on April 28, 1993. It considered the following Summary of the proposed revisions to the York/Antwerp Rules 1974 made by the Committee as of March 31, 1993. I want to emphasize that it is still considered an informal document which has not been reviewed or approved by the entire Committee. It deals only with the present XXII Rules. It is anticipated that the Committee will continue to review and refine its position at its monthly meetings in order to have a final document to present to the Association for its consideration in preparation for the CMI Conference to be held in Sydney, Australia in 1994.

I would like all members of the Association to review the following Summary. If you have any objections, comments or suggestion about it, please contact me at the offices of Nourse & Bowles; One Exchange Plaza at 55 Broadway; New York, New York 10006.

SUMMARY

This is a summary of the revisions of the York/Antwerp Rules 1974 made by the Ad-Hoc Committee as of March 31, 1993. It is an informal document which has not been reviewed or approved by the Committee members and it only deals with the present XXII Rules. New Subjects for inclusion are to be dealt with at the April 28, 1993 and subsequent meetings.

RULE OF INTERPRETATION:

ADDITION TO RULE:

"In no event shall there be an allowance with respect to pollution liability or clean up costs of pollutants."

LETTERED RULES:

A) and B) No Changes

C) (Note: this Rule subject to further consideration.)

"Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average".

"Demurrage, loss of market and any indirect loss whatsoever or damage sustained or expense incurred by reason of delay, whether on the voyage or subsequently, shall not be admitted in general average".

D) and E) No Changes

F) "Any extra expense incurred in place of another expense which would have been reasonably incurred and allowable in general average shall be deemed to be general average and so allowed without regard to the saving, if any, to the other interests, but only up to the amount of the general average expense avoided".

G) "General average shall be adjusted as regards both loss and contribution upon the basis of the values at the time and place when and where the adventure ends. Disbursements in other currencies shall be exchanged into United States money at the rate prevailing on the dates made, and allowances for damage to cargo claimed in other currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship.

This rule shall not affect the determination of the place at which the average statement is to be made."

NUMBERED RULES:

RULE I No Change.

RULE II The Title of the Rule to read:

"DAMAGE BY SACRIFICE FOR THE COMMON SAFETY."

RULE III "Damage done to a ship or cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good in general average; except that no compensation shall be made for damage by smoke however caused, or heat of the fire, or to such parts of the ship or bulk cargo, or to such separate packages of cargo, as have been on fire."

RULE IV The committee has recommended that this Rule be rescinded and the following Rule be adopted:

"When the ship and cargo or other property on board the ship sustains a combination of sacrificial damage and damage which is not general average the amount made good in general average under any of these Rules shall not exceed the net increase in repair or replacement costs resulting from the sacrificial damage."

RULE V

It was agreed to return to the 1950 Rule which read:

"When a ship is intentionally run on shore, and the circumstances are that if that course were not adopted she would inevitably drive on shore or on rocks, no loss or damage caused to the ship, cargo or freight or any of them by such intentional running on shore shall be made good as general average, but loss or damage incurred in re-floating such a ship shall be allowed as general average.

In all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average."

RULE VI

No Change.

In spite of the apparent clear wording of this Rule there is, apparently, a divergence of practice with regard to treatment of legal expenses among Adjusters. The Committee considers that this is a question for the Executive Committee and Rules of Practice Committee to look into.

RULES VII and VIII

No Changes.

RULE IX

"Cargo, ship's materials and stores, or any of them, necessarily used for fuel for the common safety at a time of peril shall be admitted as general average when, and only when an ample supply of fuel had been provided; but when such an allowance is made for the cost of cargo, ship's materials and stores, the general average shall be credited with the estimated cost of fuel which would have otherwise been consumed in prosecuting the intended voyage."

RULE X

(a) First paragraph.

The commas after "port or place or place of refuge"...and "other extraordinary circumstances" should be deleted. The first paragraph now reads as follows:

> "When a ship shall have entered a port or place of refuge or shall have returned to her port or place of loading in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety. . .".

(b) Second paragraph to read:

"When a ship is at any port or place of refuge and is necessarily removed to another port or place because neither temporary nor permanent repairs necessary for the safe prosecution of the voyage can be carried out in the first port or place, the provisions of this Rule shall be applied to the second port or place as if it were a port of place of refuge. The provisions of Rule XI shall be applied to the prolongation of the voyage occasioned by such removal; however, the cost of temporary repairs and towage necessary for such removal shall be treated as part of the cost of repairs effected at the second port or place.

(b) No Changes.

(c) "Whenever the cost of handling or discharging cargo, fuel or stores is admissible as general average, the costs of storage, including insurance if reasonably incurred, reloading and re-stowing such cargo, fuel or stores shall likewise be admitted as general average. The provisions of Rule XI shall be applied to the extra period of detention occasioned by such reloading or restowing."

Note: The balance of this Rule to remain unchanged.

RULE XI

(a) No Changes.

(b) (**Note:** This revision contains new wording and a reordering of the paragraphs.)

"(b) When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, the wages and maintenance of the master, officers and crew reasonably incurred during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed on her voyage, shall be admitted as general average.

Fuel and stores consumed during the extra period of detention shall be admitted as general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.

Port charges incurred during the extra period of detention shall likewise be admitted in general average except such charges as are incurred solely by reason of repairs not allowable in general average.

Provided that when damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstance connected with such damage having taken place during the voyage, then the wages and maintenance of master, officers and crew, fuel and engine stores consumed and port charges during the extra detention for repairs to damages so discovered shall not be admissible in general average, even if the repairs are necessary for the safe prosecution of the voyage.

When the ship is condemned or does not proceed on her original voyage, wages and maintenance of the master, officers and crew, fuel and engine stores consumed and port charges shall be admitted as general average only up to the date of the ship's condemnation or of abandonment of the voyage or up to the date of the completion of discharge of cargo if the condemnation or abandonment takes place before that date.

(c) No Changes.

(d) No Changes.

RULES XII and XIII No Changes.

RULE XIV The second paragraph to be deleted.

RULE XVII The fourth paragraph to be eliminated and replaced by:

"Passengers' luggage, personal effects and accompanied private motor vehicles not shipped under bills of lading and mails shall not contribute in general average".

RULES XVIII and XIX No Changes.

RULE XX First paragraph:

The exceptions pertaining to wages and maintenance of master, officers and crew and fuel and stores not replaced during the voyage should be deleted.

Second paragraph to read:

"The cost of insuring general average disbursements shall also be allowed in general average".

RULE XXI No Changes.

RULE XXII Treatment of Cash Deposits:

"Where cash deposits have ben collected in respect of cargo's liability for general average, salvage or special charges, such deposits shall be remitted to the average adjuster and exchanged into United States money and held in a special account in the name of the average adjuster pending settlement of the general average, salvage and special charges and refunds or credit balances, if any, shall be paid in United States money. Payments on account or refunds of deposits may be made if certified to in writing by the average adjuster, subject to the approval of the Depositor. Such deposits or refunds shall be without prejudice to the ultimate liability of the parties."

Respectfully submitted,
Lawrence J. Bowles, Chairman

FORMAL REPORT OF THE COMMITTEE ON MARITIME FRAUD

The meeting of the Committee was held in the offices of Baker & Botts, L.L.P., 19th Floor, 885 Third Avenue, New York, New York, beginning at 10:00 a.m. and adjourning at 11:50 a.m.

PROCEEDINGS

Federal Criminal law for the Admiralty Lawyer

The Committee discussed the publication this Spring of MLA Document No. 700, a report of the Committee, entitled "Federal Criminal Law for the Maritime Lawyer," generated by the Vice Chairman. Considerable discussion was held concerning the distribution and reception of the paper among the Association membership. Additional copies were obtained by the Chairman from Gordon Paulsen and are available from the Chairman as needed.

It was agreed that it would be premature at this point to distribute the document to U.S. Attorneys in the port cities since many appointments have not yet been made by the incoming President and it will probably be at least the end of this year before appointments are made and confirmed by the Senate.

"How the System Works

The Committee is making plans for an additional publication for distribution to the membership, again under the auspices of the Vice Chairman, George J. Koelzer. For now, the paper will be called "How the System Works" and is 'intended to be a practical guide for the maritime lawyer for the enforcement of federal criminal law in the maritime field. It is felt that many insurance underwriters are hesitant to prosecute maritime criminal actions because they most often result in civil suits sometimes against the underwriters themselves. We believe this to be an area of concern that deserves further consideration by the Committee.

Name Change for the Committee

Difficulty is encountered in trying to give the Committee a more definitive name. The Committee originated as a subcommittee of the Carriage of Goods Committee and was basically interested, for the most part, in fraud in relation to shipping documents. The interest of the Committee necessarily evolved into other fields with the significant developments in criminal environmental law and

illegal trafficking. On the other hand the work of the Committee is not basically to be thought of as the interest of lawyers engaged in criminal practice. If the name of the Committee were changed to the "Committee on Maritime Criminal Law, " it would be a misnomer, since the Committee is not devoted to the criminal law practice, but only the relationship of maritime crime to the interest of civil practitioners and their clients. Any suggestions from Association members outside the Committee would be most welcome.

Recent Developments

There is evidence of a renewal of the Nigerian oil fraud.

There is a suggestion that the Pomerene Act is so beneficial to the United States, although applying only to outbound shipments, that the provisions of the Pomerene Act should be the subject of an international treaty.

There is change going on with respect to the handling of stowaways, particularly with respect to the problem of "political asylum" declarations by stowaways and the responsibilities being placed on vessel owners by the Immigration and Naturalization Service. A recent district court case in Baltimore greatly reduced the responsibilities of the owners with respect to the maintenance of "political asylum" stowaways in the U.S. pending determination of their eligibility for asylum.

The new Coast Guard regulations concerning intoxication onboard vessels was discussed at some length. It was noted that the alcohol level deemed to be intoxicating is .04 (about 2 beers) and that the regulations apply in all vessels on all U.S waters. Further, the master and chief engineer are considered to be on duty 24 hours a day, and the Coast Guard intends to follow strict enforcement of the new regulations.

A discussion was held concerning the OTT Treaty giving a maritime lien on cargo to a terminal operator. This matter was discussed at some length at the meeting of the Carriage of Goods Committee.

The Vice Chairman discussed the situation with respect to the criminal charges against the master of the EXXON VALDEZ as pertains to his conviction under Alaskan state law, although a conviction could not be obtained under United States law due to the provision of the United States Pollution Act in effect at the time that says that if an oil spill is promptly reported the reporter will be granted immunity. The State of Alaska is taking the position before its Supreme Court that Capt. Hazelwood's acquittal should be reversed. If that should occur,

the Committee would ask the Association to become active in any appeal to the United States Supreme Court on constitutional due process questions.

A presentation was made by Michael Sparfven of Quantum Resources, Ltd., based in Providence. That company is engaged in "investigative accounting", and has quite a good record of assistance to civil lawyers in the handling of cases involving questionable financial transactions.

Respectfully submitted,
William C. Bullard, Chairman

FORMAL REPORT OF THE COMMITTEE ON NAVIGATION AND COAST GUARD MATTERS

The Navigation and Coast Guard Committee met on May 4 at the Metropolitan Club in Washington, D.C. Admiral Kime addressed the Committee at lunch and repeated his offer to meet with the insurers to discuss the OPA Certificates of Responsibility. Approximately forty people attended the meeting and a special thanks should go to Lieutenant Lee Handford for putting together the program.

The excellent program and list of distinguished speakers is set forth below. We hope to continue this type of program in the future.

PRESENTATIONS

A 1993 Perspective on the C.G. Legal Program
Rear Admiral Paul E. Versaw
Chief Counsel of the Coast Guard

Implementing the Oil Pollution Act of 1990
Captain Dennis L. Bryant
Chief, OPA 90 Project Development Staff

Vessel/Facility Response Plans
Lieutenant Commander D. Michael Smith
Marine Environmental Protection Division

Damage Claims under OPA 90
Commander Lawrence I. Kiern
Legal Counsel, National Pollution Funds Center

A 1993 Perspective on the Coast Guard Legal Program
Admiral J. William Kime
Commandant, U.S. Coast Guard

MARPOL Draft Air Pollution Protocol
Commander Kevin J. Eldridge
Marine Technical and Hazardous Materials Division
Chief, Hazardous Materials Branch

Letters of Undertaking
Lieutenant Commander Gregory Adams
Port Safety and Security Division
Chief, Port Operations Branch

Recent Developments in Pilotage
Mr. Frank J. Flyntz
Ass't. Chief, Merchant Vessel Personnel Division

Recent IMO Legal Committee Deliberations
Lieutenant Lee A. Handford
Maritime and International Law Division

Mandatory Ship Reporting Systems and the IMO
Mr. Christopher Young
Merchant Vessel Personnel Division
Ass't. Chief, Vessel Manning Branch

Respectfully submitted,
Patrick J. Bonner, Chairman

FORMAL REPORT OF THE COMMITTEE ON PRACTICE AND PROCEDURE

The meeting was called to order at 2:40 p.m. at the offices of Haight, Gardner, Poor & Havens, 195 Broadway, New York, New York 10007 with John A. Edginton, Esq., Chair, president.

I. SUBCOMMITTEE REPORTS

A. *Federal Rules and Statutes:*

Mr. Dunn reported on the existing projects of this subcommittee as follows:

(1) Proposed amendments to Rules C(4), C(G), E(7) and E(9): The Department of Justice prepared and circulated a draft amendment to Rule C. Mr.

Edginton is corresponding with the DOJ to confirm this proposal to the language suggested at the 1992 Fall MLA meeting;

(2) The subcommittee is working with the Ad Hoc Committee on Concursus for OPA claims in connection with possible amendments to Rules E and F to provide for single bond and proceeding for determination of *in rem* claims against a spilling vessel;

(3) the subcommittee will monitor and report on the continuing development of the proposed new International Convention on Liens and Mortgages with respect to the timing of notice provisions on forced sales of vessels;

(4) the subcommittee is continuing to review the methods to eliminate the conflict between 28 U.S.C §161(a) and Rule E(5) concerning the amount of the bond required to release a vessel from arrest when the parties cannot agree; and

(5) the proposed repeal of 28 U.S.C. §2342(3)(A) involving differing appeal tracks from Marad decisions on citizenship and other issues has been referred to this subcommittee for a report and recommendation. The Chair will then discuss the matter with the Executive Committee and the President to determine the appropriate action to take.

Mr. Dunn reported on new projects undertaken by the subcommittee as follows:

(1) the inconsistency in judicial decisions concerning the admissibility of USCG and NTSB reports is being reviewed. 49 U.S.C. §1903(c) bars the use of NTSB reports in judicial proceedings, but some courts have admitted them into evidence. Since the 1988 *Beechcraft* decision, USCG reports have been admitted. Suggested solutions include statutory bar on the use of USCG reports or repeal of 49 U.S.C §1903(c).

B. *Forfeitures*

Mr. Cattell has accepted reappointment as subcommittee chair. The draft model Uniform Forfeitures Act has been circulated to the members of this Committee and to other possibly interested committees. The Marine Finance, Fisheries, Recreational Boating, Uniformity and Ad Hoc Committee on Narcotics will be asked to assign interested members to work on the project.

C. *Local Admiralty Rules*

Mr. Bartlett reported that the Subcommittee is continuing to collect copies of the LARs adopted by all districts to establish a library of them. Some of the

districts have adopted model forms and the subcommittee is examining the feasibility of amending the MLA LARs to include forms as well.

Mr. Bartlett further reported on his attendance at the ABA Relations Committee meeting, where ABA assistance in the enactment of the Uniform Model Forfeiture Act was discussed. It was suggested that the Litigation Section of the ABA would be an appropriate vehicle for this approach.

The subcommittee will also examine the problem of the costs of custody pending a sale and the appointment of the plaintiff as the substitute custodian as a means of reducing expenses. Concerns arise over the continued jurisdiction of the court over the *res*, whether such expenses are to be treated as *in custodia legis* expenses, notice to lien holders and publication.

II. JOINT SUBCOMMITTEE/LIAISON REPORTS

a. *Insolvency & Vessel Foreclosure:*

Mr. Bruce King reported that Lars Forsberg has been appointed to chair a subcommittee to review the vessel sale and foreclosure forms used by the DOJ, to take into account any differences which might be appropriate in a commercial setting. This project will be the focus of activity at the Fall MLA meeting in Bermuda. The forms, as finalized, will be published in *Benedict's* and the able assistance of Ms. Aileen Jenner was recognized in this regard.

The *Anti-Fogle* legislation is still in the works, having been slowed by the changes in personnel under the new administration. The House Merchant Marine & Fisheries Committee staff have advised that there is a serious need to generate public support for the Act, so as to avoid the taint of being considered a "lawyer's bill". Mr. David McI. Williams has prepared a suitable draft letter to the House Committee and a covering memo to explain the need for this legislation. If anyone has clients who would be interested in seeing this legislation enacted, they may contact Mr. Williams for copies of the memo and letter.

Mr. Tom Russell advised the Committee of a new form of Letter of Undertaking used by the USCG in a Portland, Oregon case, in which the government does not agree that it will refrain from rearresting the vessel in connection with an oil pollution case. Such a form may become the model for other Coast Guard districts as well.

Mr. King announced that the ABA Business Section Admiralty Committee will present a program on Tuesday, August 10 at the Intercontinental Hotel

immediately following a joint breakfast meeting hosted by the Admiralty Committees of the Litigation, Business, Torts and Insurance Practice and Young Lawyers Sections of the ABA. All who will be attending the ABA meetings and who can attend the breakfast and following are urged to do so.

B. *Ad Hoc Committee on Concursus for OPA Claims Liaison Report:*

Mr. Peter Lippman reported on the efforts of this Committee to devise procedural mechanisms to avoid multiple arrests, achieve concursus and arrange for a single bond or undertaking to secure *in rem* claims arising out of an oil spill in light of OPA '90's elimination of the availability of relief under the Limitation of Liability Act. As the posting of security by underwriters is usually discretionary, in view of the possibility of multiple arrests under current law and procedures, it may be difficult to obtain undertakings from insurers. While there is insurance available to lenders in connection with OPA claims, this insurance does not protect owners/borrowers, other lien holders or pollution claimants in the event of forced sale. The lender's risk insurance is very expensive and increases the cost of borrowing. Possible amendments to Rule E to provide for bonding, a concursus and a general appearance by the owner were circulated and discussed at the subcommittee meeting. Legislation to address the issue is not deemed to be politically possible.

C. *Recreational Boating Liaison Report:*

The Recreational Boating Committee is focusing on methods of training boat operators, rather than licensing. It is developing a model act for mandatory education, with possible use of USCG Auxiliaries or the Power Squadron as educators and a written examination to be given by the State Department of Motor Vehicles.

In a joint effort among recreational boating insurers and the Marine Index Bureau, a "Recreational Boating Accident Register" will be created.

The Committee is working on a video tape presentation as an education tool regarding the rules of the road. While the tape would not be sponsored by the MLA, its development would be coordinated by the MLA.

The Committee was addressed by Mr. William H. Gossard of the National Transportation Safety Board concerning a report soon to be issued which will encourage licensing, education, use of PFDs (personal flotation devices) and a "0 Tolerance" for the use of alcohol or drugs by operators. This report was

generated by statistics showing that recreational boating is the second highest cause of injury and death behind automobile accidents. After the report is finalized and released, copies may be obtained by writing to Mr. William H. Gossard, NTSB, (RE-10), Washington, D.C. 20594; Tel: (202) 382–0566.

III. OTHER ACTIVITIES

A. *The Newsletter was Circulated and Various Significant Cases were Discussed*

The Supreme Court decision in *Republic National Bank of Miami v. United States*, 506 U.S. ___, 121 L.Ed.2d 474 (Dec. 14, 1992) suggests that the Courts of Appeal decisions holding that *in rem* jurisdiction is lost when a *res* is released are incorrect. The presence of the *res* is necessary at the outset of the case to invoke *in rem* jurisdiction, but is not lost if the *res* is removed thereafter. It was reported that *Stevedoring Service of America Inc. v. Ancora Transport N/V*, 953 F.2d 552, 1992 AMC 883 (9th Cir. 1991) was vacated and remanded for further consideration in light of this decision.

In *Itel Containers International Corporation v. Atlantrafik Express Service, Ltd.*, 982 F.2d 765, 1993 AMC 609 (2d Cir. 1992), the Second Circuit followed the Ninth Circuit's decision in *Foss Launch and Tug Company v. Char Ching Shipping USA, Ltd.*, 808 F.2d 697, 1987 AMC 913 (9th Cir. 1987) in holding that breach of a container lease agreement does not give rise to a maritime lien against the vessels carrying the containers, when the containers are not delivered directly to or earmarked for the particular vessel against which the lien is asserted.

In *Key Bank of Maine v. M/V ASEVER*, 1993 AMC 263 (C.D. Ca. 1992), the Central District of California declined to follow the *Fogle* case.

In *Steedman v Scofield*, [1992] 2 Lloyds Rep 163 (Q.B. Adm Ct), the English court held that a jet ski is not a "vessel" and that a collision between a jet ski and a motor vessel towing a skier is not subject to the two year statute of limitations under the Maritime Conventions Act, 1911, but rather falls under the general negligence statute of limitations (three years).

Other cases on this are set forth in the Newsletter. Regional Representatives are encouraged to find and report interesting cases and rule interpretations to the chair and Mr. Cattell for inclusion in the Newsletter.

The Regional Representatives will also be asked to assist in other general projects, such as reporting on and assisting in the promulgation of the adoption of LARs in their areas.

B. *Miles v. Apex*

The *Miles v. Apex* case study continues. Summaries of cases dealing with *Miles* issues are sought and should be reported to Mr. Dunn.

C. The Chair reported that the Supreme Court has passed to Congress the proposed amendments to the Federal Rules of Civil Procedure. Absent congressional action, the Rules will go into effect December 1, 1993. There is continued substantial opposition to the amendments and a possibility that Congress will at least delay implementation of them in light of the experiments now underway in numerous districts under the Civil Justice Reform Act of 1990. The Fall meeting in Bermuda will devote more attention to these amendments, in the form of a short CLE presentation.

D. Mark Kasanin has been newly appointed to the Advisory Committee on the Federal Rules of Civil Procedure, which reports to the Judicial Conference which reports to the Standing Committee on the Federal Rules which reports to the Supreme Court. Mr. Kasanin reported that the MLA has been asked to review and comment upon proposed "Stylistic Changes" to the Admiralty Rules. The changes are not intended to be substantive, but must be carefully reviewed to insure that no inadvertent substantive change might be caused by the change in language. The subcommittee on Federal Rules and Statutes will examine the draft. Anyone interested in obtaining copies of the draft changes should contact Robert J. Zapf, Burlingham Underwood, One Battery Park Plaza, New York, New York 10004.

Mr. Kasanin also reported that the Advisory Committee has approved changes in Rule 23 on class actions which have been reported to the Judicial Conference and Standing Committee. Possible changes to Rule 2G regarding protective orders are being considered in light of "sunshine" laws in many states. Finally, Mr. Kasanin reported on possible changes to Rule 68 in the context of offers of settlement to permit fee shifting, rather than merely cost shifting, in an effort to encourage early consideration of settlements.

Respectfully submitted,
John A. Edginton, Chairman

FORMAL REPORT OF THE COMMITTEE ON RECREATIONAL BOATING

The Recreational Boating Committee of the Maritime Law Association met at the offices of Burlingham Underwood in New York on Thursday, May 6, 1993 at 10:00 a.m. The General Membership Meeting was immediately preceded by a meeting of the Subcommittee on Legislation.

We are pleased that there are now 82 members of the Recreational Boating Committee, most of whom are quite active in the affairs of the Committee. The Committee's size facilitates accomplishing many of our objectives through the appointment of subcommittees. The membership includes representation from 22 states including all major states in which the recreational boating industry has a significant presence. Approximately 42 of the Committee members were in attendance at the General Membership Meeting.

It has been the policy of the Recreational Boating Committee to convene an interim meeting in Miami in February in connection with the Miami Boat Show. This year's interim meeting occurred on February 10, 1993. The following significant actions were taken at the Miami interim meeting:

1. Creation of a Subcommittee on Recreational Boat Salvage to be chaired by Greg Ligelis of Connecticut.

2. Creation of a Subcommittee on International Affairs to be chaired by Michael McCauley of Philadelphia.

The Recreational Boating Committee is pleased with the significant contributions made by various individual members of the Committee to the volume entitled "Recreational Boating Law" published by Matthew Bender in late 1992. C. Peter Theut served as Editor In Chief of this publication and 10 of the Committee members served as Contributing Authors to a volume which includes a total of 17 chapters. The book was extended a favorable review in the April 30, 1993 edition of "The MLA Report" commencing at page 9859.

Almer Beale, Chair of the Subcommittee on Legislation reported that the Subcommittee's Model Bill on Safe Boating Certificate is complete. The Subcommittee will now prepare a full report on the nature of the Model Bill, which report will be made available to the Association membership and other interested parties. Chairman Beale wishes to emphasize that the purpose of the Model Bill is to promote boating safety and boater education. Nothing in the Model Bill should be construed to advocate mandatory licensing of yachts.

Michael McCauley presented the inaugural report of the newly created Subcommittee on International Affairs. This Subcommittee will study a broad range of issues including:

- Customs and immigration issues involving foreign yachts in U.S. waters and American yachts in foreign waters.
- Validity and enforcement of letters of credit for the sale of recreational vessels between citizens of different nations.
- Tax implications of foreign vessel sales transactions.
- Enforcement of judgments against foreign interests arising out of recreational boating litigation.
- OPA '90 requirements applicable to pleasure yachts.
- Products Liability issues arising when foreign citizens are injured by reason of defects on American made vessels or components and vice-versa.
- Construction contracts with foreign yacht builders.

Arrangements are being made for a joint meeting between the Subcommittee for Yacht Finance and the Subcommittee for International Affairs to consider issues of mutual interest.

Noreen Arralde, Program Manager for the Marine Index Bureau Foundation, Inc, ("MIBF") reported on the progress of MIBF in working with a broad range of insurers to develop essential sources of information relative to boating claims. The goal of MIBF is to work with insurance companies, the United States Coast Guard and state and local boating authorities to create a better understanding of boating accidents and losses. Toward this end, MIBF has developed the Recreational Boating Accident Register, or R-Bar, to gather valid statistics on boating losses. R-Bar is a first step toward conducting research on boating safety and promoting practices to avoid boating accidents. The Recreational Boating Committee is pleased to have worked closely with MIBF from the inception of this project. A formal report will soon be issued describing the significant accomplishments of MIBF in 1992 and briefly describing the Foundation's plans for 1993 and beyond. The findings of MIBF and R-Bar will be made available to the general membership of the MLA. The Recreational Boating Committee will continue to cooperate with MIBF in its important work.

William Gossard of the National Transportation Safety Board ("NTSB") in Washington, D.C. presented a synopsis of a recent Study on Recreational Boating Safety completed by the NTSB. According to Mr. Gossard, the recreational boating safety issues discussed in this Study include:

- Alcohol involvement in recreational boating accidents;
- Minimal use of personal floating devices for recreational boaters;
- Lack of a requirement for boat operators to demonstrate an understanding of the Rules of the Road and their ability to operate the vessel; and
- The lack of quality information reported on recreational boating accidents.

As a result of the study, recommendations were recently issued by NTSB to the Governors of all 50 states. The Recreational Boating Committee will continue to monitor the work of the NTSB in this area in order to ensure uniformity.

William P. Schroeder, a Committee member and Professor of Admiralty at the University of Cincinnati, presented a short video prepared by the University of Cincinnati on "Boating Safety and Rules of the Road". The purpose of the video was to endeavor to make the recreational boater more aware of the hazards of navigating a recreational boat on waterways frequented by large commercial vessels. The Recreational Boating Committee will continue to monitor the work of Mr. Schroeder and the University of Cincinnati in connection with this video.

Tom Russell, Chair of the Subcommittee on Education, distributed the fourth issue of "Boating Briefs". This Newsletter summarizes the latest cases, statutes and other developments which impact significantly upon the recreational boating industry nationwide. Regular input is received from the Committee Member Editors appointed in each of the Federal Judicial Circuits. The Newsletter reported in considerable detail the Ninth Circuit opinion in *Delta Country Ventures, Inc. v. Magana*, 1993 U.S. App. LEXIS 1802, 93 Daily Journal D.A.R. (9th Cir. Feb. 5, 1993) which held no substantial relationship to exist between diving off a pleasure boat and traditional maritime activity. Michael McCauley advised the Committee that the Ninth Circuit has denied rehearing and that the plaintiff has petitioned the U.S. Supreme Court for *certiorari*. The Recreational Boating Committee will discuss with the Executive Committee of the MLA the feasibility of filing an *amicus* brief in this particular case.

The Newsletter also summarized *Joyce v. Joyce*, 975 F.2d 379 (7th Cir. 1992) holding that a boat owner's "privity or knowledge" will defeat his claim

under the Limitation of Liability Act, *Pree v. Brunswick Corp.*, 983 F.2d 863 (8th Cir. 1993), which denied an injured boat passenger recovery against a boat engine manufacturer for product design (propeller guard case) and *Ramsey v. Lucky Stores, Inc.*, 1993 Tex. App. LEXIS 787 (Tex. Ct.App. March 18, 1993) which denied recovery in a products liability case against the manufacturer of a life jacket.

Greg Ligelis, Chairman of the Subcommittee on Recreational Boat Salvage, indicates that this Subcommittee is considering the various short form salvage contracts including arbitration clauses currently proliferating nationwide throughout the recreational boating industry. Mr. Ligelis will report further on this subject at the meeting in Bermuda.

The Committee members also were reminded that C. Kent Roberts of Portland has prepared a comprehensive compendium on the laws and statutes governing personal watercraft throughout the nation. This compendium will be updated and made available at the Fall meeting in Bermuda.

The Committee also expressed its deep appreciation for the outstanding original paper and subsequent update prepared by Robert Dunn of Chicago and the Ad Hoc Committee on *Miles v. Apex Marine Corporation*, 498 U.S. 19, 111 S.Ct. 317, 1991 AMC (1990).

Respectfully submitted,
C. Peter Theut, Chairman

FORMAL REPORT OF THE COMMITTEE ON STEVEDORING AND TERMINAL OPERATIONS—SUBCOMMITTEE ON LONGSHORE AND HARBOR WORKERS COMPENSATION ACT

The meeting of the Subcommittee on the Longshore Act was held on Thursday, May 6, 1993. Being the second meeting of this Subcommittee, a certain amount of time was spent addressing the scope of the Subcommittee's future conduct. The preliminary focus of the Subcommittee will be to report on developing substantive issues arising under the Act and to advise the parent Committee on Stevedoring and Terminal Operations of the need for *amicus* action when it is perceived. The Subcommittee stands prepared to become more proactive, if needed, whenever the historically expected Congressional re-amending of the Act is initiated.

Several recent cases were reported at our meeting as having effect upon certain areas under the Act. The Act has now been interpreted in two Circuit

Courts of Appeals to not provide a remedy of the recoupment to the employer/carrier where fraud on the part of the employee has induced the overpayment of benefits. See: *Stevedoring Services of America, Inc. v. Eggert*, 953 F.2d 552 (9th Cir. 1992) and *Ceres Gulf v. Cooper*, 957 F.2d 1199 (5th Cir. 1992), *rehearing denied*. The *Eggert* matter is apparently proceeding in its state's court system and is expected to face the application of the doctrine of preemption.

The same two Circuit Courts have also held that the jurisdictional definition of a "pier" would cover any structure extending from land notwithstanding an inquiry as to its maritime use. See: *Hurston v. Director, OWCP*, 1993 WL 92570 (9th Cir.) and *Ingalls Shipbuilding v. Director, OWCP*, C.A. Nos. 92–4077 and 92–4078, (April 6, 1993).

Several post *Cowart* cases were also reported dealing with issues arising under Section 933 of the Act. In *Hillman v. Ingalls Shipbuilding, Inc.*, 26 B.R.B.S. 412 (ALJ) (1992) the ALJ used *Cowart* to dismiss claimant's claim where he had settled several claims against asbestos manufacturers. In *I.T.O. Corp. of Baltimore v. Sellman*, 967 F.2d 971 (4th Cir. 1992) the issue of apportionment of employee's third party damages to the employer's credit under §933 was addressed.

Respectfully submitted,
Douglas P. Matthews, Chairman

FORMAL REPORT OF THE COMMITTEE ON TRANSPORTATION OF HAZARDOUS SUBSTANCES

The Committee on Transportation of Hazardous Substances met on May 5, with seventeen members present. The principal item on the agenda was a report by Lt. Lee Handford, of the Coast Guard International Legal Office, on developments concerning the HNS Convention at the recent IMO Legal Committee Meeting, and a general discussion of that report. A summary of his report is presented here:

As you may recall, it was anticipated that the draft convention would not be ready for a Diplomatic Conference in 1994. This prediction was borne out by the Legal Committee's decision to recommend to the Council that the scheduled HNS Diplomatic Conference be removed from the 1994–1995 Work Program of IMO. In another development that may delay the work on HNS even further, the Committee moved work on revisions to the 1976 Convention on Limitation of

Liability for Maritime Claims (1976 LLMC) to "equal priority" with HNS on the Work Program. Depending on the submissions received from member nations prior to the next Legal Committee session, to be held in September, 1993, the Committee's time will be evenly divided at that session.

There are many important areas that still need further discussion and development. The March Legal Committee session was a strong indication that there is much to be settled before the prospects of a final draft convention solidify. Some have suggested that these events will be the death of HNS, but that remains to be seen. It was decided that the Working Group of Experts would continue priority work on HNS. Also, it should be remembered that the European political situation is such that many influential delegations will not sit still for any attempt to kill off the draft convention. Within IMO, the unsuccessful attempt at a diplomatic conference on HNS in 1984 is seen as a "failure" of IMO that must be rectified. Finally, the strength of the worldwide environmental movement and the focus on compensation for victims of environmental incidents is such that strong international regulation in this area is only a matter of time. While the form it may take is uncertain, influential representatives to IMO continue to predict that there will be an HNS Convention in the foreseeable future.

The Legal Committee has undergone a change of leadership and this may have an effect upon the HNS work. The new Chairman, Alfred Popp of Canada, and the new vice-chair, Rosalie Balkin of Australia, have only just begun to lead the Committee. The previous Chairman, Robert Cleton of the Netherlands, had presented a paper before he left, urging the Committee to adopt a single-tier, shipowner only liability regime and to drop the second tier as it was too complicated as currently proposed. While the direction in which the New Chairman will lead the Legal Committee is only beginning to be evident, it is not yet apparent what his full intentions may be.

In any event, one U.S. goal has been that the Committee go forward deliberately, exploring all of the options carefully. We now have several new alternatives with respect to the second-tier and the next session or two will largely consist of deliberating upon those alternatives.

Turning to the details of 68th Session, the issues will be dealt with in the order in which the Legal Committee considered them:

1. a short, general introduction to the session;

2. a review of those submissions relevant to the work of the experts;

3. a look at the submissions addressing issues in the first ten articles of the convention; and

4. a report on the work of the technical experts.

The Secretary-General of the IMO, William O'Neil, stated that in light of the complexity of HNS, the IMO Council would be willing to consider a request by the Legal Committee to move the HNS Diplomatic Conference off the 1994–1995 Biennum Work Plan to allow more time for development. He reminded the delegations that it would be useless to have a Diplomatic Conference if the draft text was politically unacceptable. He encouraged member states to make the "necessary political decisions," in his words, to get HNS back on track.

The Working Group of Experts

The Committee first took up issues relevant to the Experts' deliberations of the week.

Japan proposed a system of four separate accounts for four different sectors of industry: Oil, LNG, LPG, and other HNS. The thrust of this approach is to maximize equity by ensuring that each sector—which may have different properties, shipping methods, safety records, and so forth—only pay for damage caused by that sector of the industry to avoid so-called "cross-subsidization"—which actually could be good or bad depending on your point of view.

Under the Japanese proposal, only the HNS fund would be financed in advance by contributions through issuing agents. The other three sectors would be funded post incident (as in the 1971 Fund Convention), with contributions based on tonnage shipped during the year preceding the incident. There is a great deal of support for the principle of separate accounts (especially for LNG as a separate account) and the support seems to be growing. Open support in plenary was expressed by Korea, Australia, Italy (though Italy later backed off and reserved its position), Belgium, and Algeria. Other counselled caution and had reservations about going beyond a single account but expressed no objection to having the proposals studied by the Experts: among this group was the US, Norway, Sweden, France, Finland (who did openly prefer a single account), Argentina and Greece. Open opposition to multiple accounts was heard from Denmark. Post incident funding was supported by Poland, Algeria, Mexico and Sweden (with reservations that limits of liability must be "high enough"). The chairman referred this paper to the Experts for study.

The next submission reviewed was LEG 68/4/6, Submission by Indonesia, which supported and elaborated on the Japanese submission, LEG 68/4/4, and proposed the Lloyd's Register Summary of the Pilot Study of Ship Casualty Data, 1989—1992, and background on the Lloyd's Maritime Information Ser-

vices casualty file as a source of Statistics to enable setting of all sector factors prior to the Diplomatic Conference. The submissions also urges adoption of an HNS points system based on a calculation method utilizing the hazard factor, quantity fact, and sector factor, and presses for a revision of the definition of the word "shipper" in the convention. With regard to separate accounts, Indonesia suggests that the test for establishing an independent account should be whether the Legal Committee can be persuaded that the particular HNS substance's industry is sufficiently concentrated to enable second tier liabilities to be enforced in a timely manner. Regarding the definition of shipper, Indonesia proposes a separate definition for LNG substances based on the holder of title. The chairman referred this paper to the experts for study as well.

A paper from the International Association of Independent Tanker Owners ("INTERTANKO") proposed a procedure by which designated port personnel would make spot checks to ensure the appropriate certificates had been obtained by shippers, and suggested the replacement of the word "consignor" with "shipper" in Article 4.2(d). This is the so-called "consignor misconduct" clause, presently in brackets, which absolves the shipowner of liability if he/she is not properly informed of the nature of the substances shipped by the consignor. The Chairman referred this paper to the Experts for study.

In answer to a request for clarification from the Experts, the US Delegation stated that if damages by domestic shipments of HNS are to be covered by the convention, then second tier levies must also be collected from those shipments. There was much support for the US view (Australia, Mexico, Netherlands, Poland, Germany); though it was opposed by Japan and The Peoples Republic of China.

The International Union of Marine Insurance (IUMI) reminded the delegations that there is no realistic prospect for the availability of more than 100M SDR in insurance capacity when the convention is in force. IUMI stated that their previous assessment that 100M SDR would be available was still valid but that it was unknown for how long this estimate would be supportable by market conditions.

Plenary Discussions

The Chairman focused discussion on the first ten articles of the draft convention.

Australia and Mexico proposed the adoption of a discrete, freestanding list of substances promulgated solely for the INS Convention. Generally the US

view, shared at least at some point by most other delegations, has been that reference to existing lists is preferable in that it takes advantage of the existing amendment procedures by the various IMO bodies.

Given the split of opinion, the Chairman referred the papers to the Experts with the specific mandate to comment on the practical aspects of administering a freestanding list and to look at those substances which should not be included. Member states were also requested to review these proposals prior to the 69th Session.

The US proposed to eliminate all liability and compensation in the draft convention for damage from IMDG Code 7 Radioactive materials. It was supported by several nations. There have been indications that exclusion of all radioactives from the convention is politically unacceptable to many of the smaller countries. A compromise was suggested in order to retain coverage of low level radioactives, and the Chairman urged interested parties to discuss the matter and return with a practical solution for the 69th Session.

There is an issue as to whether HNS should provide for liability for damages arising from London Convention activities: that is, intentional dumping of substances at sea. There are a couple of aspects to this issue, and the Legal Committee has already answered two of them. First, the Legal Committee agreed to include liability for damages arising from incidents occurring during the transport of all HNS carried as cargo for the purpose of ocean dumping. Second, the Committee agreed to exclude all damages caused by the intentional dumping of HNS otherwise authorized under the LC or applicable national law (in the US, the Ocean Dumping Act, 33 U.S.C. §1401 *et seq.*). What has not been decided is whether HNS should include liability for damages caused by dumping of HNS *unauthorized* by LD.

The Chairman then directed discussion in the plenary to the first ten articles of the convention as a "sort of final" reading of that section of the convention.

Some points raised during the discussion on the first ten articles were: the need to amend article 3 to reflect the decision previously made to exclude liability for authorized dumping; the necessity for further debate on the thresholds for compulsory insurance; the desire to add Spanish as an original language for HNS certificates; the need to correct the definition of "carriage by sea" to include the process of loading; and, of course, many reservations regarding the definition of "shipper."

The Working Group of Experts

The Legal Committee's Working Group of Experts met during the 68th Session. For the most part, the group continued its work on the HNS points system and possible procedures for collection of levies/contributions to the second tier. It began work on proposals for independent accounting systems in the second tier.

At the outset, the Experts agreed that it was premature to indicate preference for the independent accounts or the sector factor but instead sought to identify the main characteristics of both systems to assist the Committee in its deliberation. There were concerns that if independent accounts were established, sufficient funds might not be available under each sector to finance second tier obligations. Several restrictions on the formation of independent accounts were suggested to minimize this possibility. Delegations representing LNG, oil, and LPG interests advocated independent accounts for these sectors which would operate similarly to the IOPC Fund. Funding by the sectors would be post-incident.

Some of the group's recommended amendments concerning the draft HNS Points System were noteworthy. First, the Hazard Factor for bulk liquids was simplified by deleting the MARPOL Annex II Pollution Category since this information is generally accounted for when the ship type for a substance is assigned. The Hazard Factor is now directly related to ship type which significantly simplifies the calculation of the HNS Points system, and in turn, the entire second tier.

Second, the Bulk Solids entry was restricted to IMO Classes 1 through 8, deleting those cargoes that are a hazard only to the crew. Thus the group recommends that coal, woodchips, and other similar products would not be subject to a second-tier levy.

Much discussion in the Expert's group focused on whether it is possible to develop a practical method to levy packaged goods for the second tier fund. A number of delegations felt that packaged goods should be exempt from levies, which would simplify the second tier. Other suggested an exemption for short voyages or domestic shipments.

The Experts also discussed the proposal of Norway on the use of industry associations for contribution of levies as an alternative to individual shippers purchasing individual HNS certificates for each shipment. Although there are some problems to be worked out, the Experts agreed that it is a useful option that certain industries could choose since it would simplify the work of both shippers and the scheme.

The European Council of Chemical Manufacturers' Federations (CEFIC), speaking on behalf of chemical manufacturers, advocated that the shipowner should share the burden of contributing to the second tier in accordance with the "polluter pays" theory (*i.e.* the ship operator). This proposal was not well received by shipowner interests who argued that it violated the fundamental concept that the second tier would be financed by cargo interests. The Experts concluded, however, that this was a policy matter best left to be resolved by the Legal Committee.

The US delegation presented an informal paper on methods of documenting and electronic data systems to support various reporting/collection mechanism scenarios. The US, supported by other delegations, proposed that the scheme allow state parties flexibility in the area of implementation procedures. The Canadian delegation suggested that the Committee be invited to consider a modified approach whereby parties would choose the method for collection of levies under the second tier.

The relatively short period of 2–3 days available to the group for discussions combined with a large number of complex submissions assigned to it for review by the plenary resulted in many subjects receiving only brief review. This problem may be partially alleviated by the slightly altered working arrangement contemplated for the 69th Session. The plan is for the group to present the 69th Session's written report to the plenary at the 70th Session, rather than the last day of the 69th Session as would normally be the practice. This arrangement should allow substantive discussions to continue throughout the week of the session, rather than having them wind up in time for the group to draft and then present the paper to the plenary on Friday.

Public Input

There are some specific areas in which the U.S. is developing positions and on which comments would be appreciated. The first is the desirability or feasibility of the separate accounts formation of the second tier along with post incident funding for certain of the accounts.

The second issue on which input is desired is the deletion of certain bulk solids—coal, woodchips, and similar substances—from the convention altogether.

Any members wishing to present information on views on these subjects should contact the committee chairman, or Captain David Kantor or Lt. Lee Handford of the Coast Guard International Legal Office.

Respectfully submitted,
Neal D. Hobson, Chairman

FORMAL REPORT OF THE AD HOC COMMITTEE ON JUDICIAL EDUCATION

I reported to the fall meeting about the first Maritime Law Seminar for federal judges, which had been funded from the Federal Judicial Center's 1992 budget. (Document No. 699 at 10215.) The Seminar lasted two and one half days and presented many speakers. By contrast, and reflecting the competition for funding, the Federal judicial Center budget for fiscal year 1993 contains funds for one maritime law session at each of three Workshops for federal judges. At each Workshop, the Ad Hoc Committee has arranged for one maritime law speaker to deliver a one and a quarter hour talk on recent developments.

Professor Robert Force of Tulane Law School made the first of the 1993 Workshop presentations on March 23rd in New Orleans; I will make the second presentation May 21st in Washington; and Philip A. Berns will make the third presentation in San Francisco on September 3rd. The Workshops keep the subject of maritime law before district judges who want to attend, but each presentation competes with two other presentations, in other rooms, at the same time slot.

As for the future, the Federal Judicial Center's budget for 1994 is expected to be about the same as that for 1993. By then, the Ad Hoc Committee may experiment with topics left out of the 1992 Seminar in Annapolis, such as cargo law. The FJC might add magistrate judges. The second Maritime Law Seminar may be proposed for fiscal year 1995.

Finally, the Federal Judicial Center is publishing a series of 175 page paperbound monographs for federal trial judges, treating topics that the judges probably encounter for the first time on the bench. The monograph series presently includes Patent Law and Copyright Law. Monographs on Bankruptcy Law and Securities Law are being prepared. On behalf of the Ad Hoc Committee, I am engaged in early discussions over the preparation of a monograph on Maritime Law for the series. The Southeast Admiralty Law Institute (SEALI) has been cooperating with me. I will also bring into the process Admiralty teachers from the Association of American Law Schools.

Your Ad Hoc Committee on Judicial Education is grateful for the interest in judicial education expressed by MLA officers and members. You may be assured that the Committee stands ready to furnish speakers and materials when and where, and as rapidly, as the Federal Judicial Center is able to absorb them.

Respectfully submitted,
David J. Sharpe, Chairman