DOCUMENT NO. 713
November 4, 1994

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

FALL MEETING—NOVEMBER 4, 1994

PRESENT:
CHESTER D. HOOPER
JAMES F. MOSELEY
HOWARD M. MCCORMACK
WILLIAM R. DORSEY, III
MARSHALL P. KEATING
LIZABETH L. BURRELL
GEORGE W. HEALY, III

and the following 234 members:

Jose E. Alfaro-Delgado
Christopher G.H. Arundell
Frank A. Atcheson
Melissa D. Atkinson
James W. Bartlett, III
Joe E. Basenberg
R. Glenn Bauer
Almer W. Beale, II
George D. Benjamin
Waverley L. Berkley, III
Philip A. Berns
Nash F. Bilisoly
Frank E. Billings
Richard C. Binzley
Geoffrey F. Birkhead
George W. Birkhead
Denise S. Blocker
S. Scott Bluestein
Patrick J. Bonner
Lawrence J. Bowles
Edward T. Brennan
Julia R. Brouhard
Charles D. Brown
Herbert W. Brown, III
Gary A. Bubb
Phillip A. Buhler
William C. Bullard
Frederick F. Burgess, Jr.
James G. Burke, Jr.
Raymond J. Burke, Jr.
Francis X. Byrn
Gordon T. Carey, Jr.
William D. Carle, III
Edward J. Cass
William E. Cassidy
George F. Chandler, III
Peter D. Clark
Robert C. Clyne
Mark T. Coberly
Michael Marks Cohen

Norman J. Cowie
Rae M. Crowe
John R. Crumpler, Jr.
Blane H. Crutchfield
Theodore S. Cunningham
Warren B. Daly, Jr.
Robert C. Davee
David G. Davies
Mark S. Davis
Robert M. Dees
A. Robert Degen
Frank P. Degiulio
Charles G. DeLeo
MacDonald Deming
Vincent M. DeOrchis
William F. Dougherty
Daniel D. Douglass
Janet L. Dowe
John A. Edginton
Wayne F. Emard
Craig S. English
Christopher L. Evans
Warren M. Faris
John F. Fay, Jr.
Peter D. Fenzel
Clark P. Fitz-Hugh
R. Tucker Fitz-Hugh
Kim J. Fletcher
Professor Robert Force
Richard B. Foster
George J. Fowler, III
George D. Gabel, Jr.
Ralph A. Gant
Anthony J. Gaspich
Gerard T. Gelpi
Gene B. George
Harry E. Gerhard
G. Michael German
Robert S. Glenn, Jr.
Joseph A. Goetzke
Alan K. Goldstein
Andrew J. Goldstein
Francis J. Gonynor
John B. Gooch, Jr.
Donald C. Greenman
Robert J. Gruendel
Frederick T. Haas, III
Svend H. Hansen, Jr.
Paul D. Hardy
Emery W. Harper
Kevin J. Hartmann
Walter C. Hartridge
Thomas J. Hawley
Raymond P. Hayden
Reginald M. Hayden, Jr.
Nicholas J. Healy
Charles F. Herd, Jr.
D. Christopher Heckman
Ann-Michele G. Higgins
James J. Higgins
Neal D. Hobson
Joseph I. Hochman
Bruce R. Hoefer, Jr.
Anne D. Hopkins
Robert B. Hopkins
David V. Hutchinson
John G. Ingram
Aileen M. Jenner
Michael Kaplan
Kimbley A. Kearney
Allan R. Kelley
James B. Kemp, Jr.
Donald M. Kennedy
Mary Jane Keriakos
Bruce A. King
Jean E. Knudsen
George J. Koelzer
John C. Koster
Walter M. Kramer
Kenneth D. Kuykendall
Blake W. Larkin
J. Dwight LeBlanc, III

Edward F. Lebreton, III
Manfred W. Leckszas
Raymond T. Letulle
Francis V Liantonio, Jr.
Herbert M. Lord
Charles F. Lozes
Hilliard L. Lubin
Henry C. Lucas, III
Capt. C. E. Lundin
Marilyn Lytle
Francis J. MacLaughlin
Professor Gerard J. Mangone
Bert W. Markovich
Frank J. Marston
Warren J. Marwedel
Raymond L. Massey
Douglas P. Matthews
Michael B. McCauley
John H. McConnell
Daniel G. McDermott
Eugene J. McDonald
Thomas J. McKey
David M. McQuiston
Greggory B. Mendenhall
Brian J. Miles
Ann G. Miller
Kevin E. Mooney
J. Marks Moore, III
Walter R. Muff
Howard L. Myerson
Alan Nakazawa
Carl R. Nelson
Lloyd C. Nelson
David A. Nourse
Ashton R. O'Dwyer, Jr.
Faith O'Malley
Brendan P. O'Sullivan
Richard W. Palmer
Armand M. Pare, Jr.
Robert B. Parrish
Bruce G. Paulsen
Gordon W. Paulsen
William L. Peck
Frank J. Peragine
Abram (Abe)Philips
John J. Picarella
Nathaniel G. W. Pieper
Paul M. Poliak
Edward J. Powers
David W. Proudfoot
Edward C. Radzik
William A. Ransom, III
Donald T. Rave, Jr.
Mary E. Reeves
Richard J. Reisert
Richard E. Repetto
Robert L. Richmond
Edwin D. Robb, Jr.
Jack S. Rockafellow
Thomas S. Rue
Alexander E. Rugani
Thomas A. Russell
John M. Ryan
Michael J. Ryan
Robert I. Sanders
Peter Sandlund
Charles E. Schmidt
Gordon D. Schreck
Janis G. Schulmeisters
James L. Schupp, Jr.
Jerome Scowcroft
Gary F. Seitz
David J. Sharpe
Carolyn J. Shields
David F. Sipple
David W. Skeen
Richard H. Sommer
Saul Sorkin
Mark J. Spansel
Jonathan S. Spencer
Brian D. Starer
Kathy W. Stein

Alvin L. Stern
Richard W. Stone, II
William T. Storz
Professor Michael F. Sturley
Norman C. Sullivan, Jr.
Professor Joseph C. Sweeney
Patrick A. Talley, Jr.
Alice E. Teal
John F. Unger
John P. Vayda
David N. Ventker
Kenneth H. Volk
Allen K. von Spiegelfield
George L. Waddell
Thomas J. Wagner (New Orleans)
Brian D. Wallace
Guilford D. Ware
Charles S. Wassell
James R. Watkins
Harold K. Watson
Ann E. Webb-Crist
Frederick W. Wentker, Jr.
David McI. Williams
James C. Winton
Frank L. Wiswall, Jr.
A. Christopher Young
James F. Young
James A. Yulman
Robert J. Zapf
JoAnne Zawitoski

and the following 4 guests

Beverlyn Grissom
Frank C. Noger
LCDR Steven D. Poulin
Lord Justice Christopher Staughton

TABLE OF CONTENTS

PROCEEDINGS

MR. HOOPER: Let's call the meeting to order. Maybe the rest will join us. We'll start off with the Secretary's report.

MR. DORSEY: Thank you, Mr. President. Good morning, ladies and gentlemen. A couple of brief things first before I get into the basics of my report.

The MLA Report is on the desk in the back of this room. It will be mailed to all members, but if you want an extra copy it's available there for you. Any guest who would like a copy please feel free to take one. That report, as most of you know, is edited by Gordon Paulsen of New York. The associate editor is LeRoy Lambert of New York and the assistant editor is Matthew Marion of New York. They do a heck of a lot of work to get that out and we're all very grateful to them for their efforts.

I'll remind you that if you want to be noted as present at this meeting for whatever reason you may have, that you've got to fill out the cards that are out in the lobby. And any guest who's here I would ask that you fill out the card, too, so that your presence can be recognized.

I would ask any of you who are going to deliver an oral report today, to give your card or at least announce your name so that our court reporter, Mr. Frederick, won't have any trouble identifying you. If you have a written report, please get it to me as soon as possible so that it can be put into the Proceedings of this meeting.

The Proceedings of the spring meeting, May 1994, document number 710, has been sent to the general membership together with the President's newsletter, document number 711. And, Mr. President, if there are no modifications or objections to those Proceedings, I move that they be adopted and approved.

(Motion seconded and carried.)

MR. DORSEY: Thank you. I'll continue with the report of the meeting of Board of Directors which took place yesterday. The minutes of the Board of Directors' meeting of August 6, 1994 which had previously been circulated to the membership were accepted and approved yesterday. At the meeting yesterday Treasurer Marshall P. Keating of New York, and Membership Secretary Lizabeth L. Burrell of New York distributed their respective reports to the Board which were accepted and approved and you will be hearing from each of them later this morning.

First Vice President, James F. Moseley, of Jacksonville exhibited the design of a certificate of appreciation to be sent to immediate past chairs of committees which was approved by the Board. Because of the bylaw restricting service as a committee chair to four years, it was noted that more than half of the Association's committee chairmen were new to their position this year.

Vice President Moseley also reported on the meeting of all committee chairs which took place this Tuesday with all the officers of the Association present as well. At this meeting, each committee chair outlined the plans for their respective committees for the forthcoming year and these plans will be submitted in writing to President Hooper.

President Hooper and Vice President Moseley reported on three amicus curiae briefs that have been or were to be filed on behalf of the association. The first is in the *Sky Reefer* case and is being prepared by Raymond Hayden of New York, Professor Michael Sturley of Austin and Sanford Balick of New York. I understand that brief is going to be filed today.

The second one was in the case of *Sea Savage v. Chevron* and was authored by Douglas B. Matthews of New Orleans. Both of these cases involve conflicts among the Circuits and the Association is taking no position on the merits in these cases. We are only asking the Supreme Court to resolve the conflicts in the interest of uniformity.

The third case, *Dietrich v. Key Bank,* is on appeal in the Eleventh Circuit. The authors of this brief were David Williams of Baltimore, John Edginton of Emeryville, and Bruce King of Seattle.

President Hooper expressed the deep appreciation of the Association for all of the hard work that these men have put into the preparation of these amicus briefs.

Dr. Frank Wiswall of Castine, chairman of the CMI Committee, reported on the CMI meeting in October this year in Sydney, Australia, and you will being hearing his report later on this morning.

In addition the Board received and approved reports of the Association's three working groups in Sydney on the topics of assessment of pollution damages, general average, and mobile offshore craft. You'll be hearing more on those subjects in oral reports today, or by way of written reports that will be made a part of these Proceedings.

President Hooper expressed his thanks to Paul Edelman of New York, who attended, at his own expense, an admiralty seminar in Russia. He will be submitting an article to the MLA Report on the seminar.

Neal D. Hobson of New Orleans advised that the IMO has announced as part of its 1995-1996 agenda that it intends to move forward in light of its Liens and Mortgage Convention which has not yet taken effect. President Hooper has indicated that he would appoint an *ad hoc* committee to determine what follow-up the Association should make in connection with this development.

Board member David A. Nourse of New York, chairman of the Committee on Carrier Security, reported that Congress has recently enacted legislation affecting stowaways, and he'll be reporting later this morning as well.

Warren J. Marwedel of Chicago, chairman of the 1995 Arrangements Committee reported on plans for the meeting next fall in Hawaii, and Christine K. Whitaker of New York reported on arrangements for tonight's dinner dance. You'll be hearing from both of them later.

Board member John Edginton of Emeryville, chairman of the Committee on Practice and Procedure, reported that the federal rules advisory committee had sought the Association's views with respect to amendments to Rule 9(h) and 28 U.S.C. § 1292(a)(3), and he's going to report on that today also.

President Hooper reported that he had spoken at seminars in Houston and at LSU. He will be speaking at the Tulane Admiralty Seminar next March as well as at a seminar just prior to the Tulane seminar on electronic charts, correct?

MR. HOOPER: Right.

MR. DORSEY: The Board considered and approved the recommendation contained in the written report of Graydon Staring of San Francisco, Chairman of the Ad Hoc Committee on State Certification Programs. The work of this committee was prompted by a proposal from the Florida Bar to establish a program for the certification of specialists in admiralty and maritime law in that state. Among the committee's recommendations was, one, that the MLA should promptly consider strengthening its qualifications and screening process and become a certifying organization either under the aegis of the ABA or on some other basis; and, two that the Florida Bar be advised of the MLA's view that state bars or other regulatory bodies are not the appropriate bodies to establish standards and regulate the expertise in admiralty practice.

The Board also authorized Mr. Staring to prepare and submit to the Board for approval a letter or report to the Florida Bar expressing the MLA's position.

Mr. Staring's written report will be included in the proceedings of this meeting.

Mr. President, that concludes my report and I would move that it be accepted and approved.

(Motion seconded and carried.)

MR. HOOPER: The motion is carried. Thank you very much.

Before we go further this may be a good time to introduce an honored guest we have this morning. We're pleased and honored to have with us Lord Justice Staughton of the United Kingdom. He has volunteered to speak at the seminar in this room this afternoon at 2:00. We're very honored to have him with us and Sir Christopher has agreed to say a few words to us at this time.

LORD JUSTICE STAUGHTON: Mr. President, and members of the Maritime Law Association of the United States, thank you for admitting me to your meeting and on behalf of the British Maritime Law Association of which I am the Vice President, or at least I was the last time I went to one of their meetings, I bring you good wishes. Quite a number of you were good enough to come to my lecture yesterday afternoon and I suppose that some of you, probably not the ones that heard me yesterday, may come to the lecture this afternoon. In those circumstances I cannot conceive that you would want to hear any more from me this morning.

Thank you very much.

MR. HOOPER: Thank you. We'll move onto the report from our Treasurer. Those of you who missed the danish this morning should realize we saved some money but Marshall has allowed if there's a great hue and cry we might find enough in our treasury to buy one crust per member.

(Laughter.)

MR. HOOPER: Marshall.

MR. KEATING: Thank you, Mr. President, for blaming the shortage of amenities on me.

(Laughter.)

MR. KEATING: This was, I may say, a decision made at the executive level.

Now, to move on to business, we have been advised by the Barrister Company which has been the software and data processing support organization

for the Association now for a number of years, that it can no longer continue to provide those services. However, they've been very helpful in introducing us to another organization in Buffalo.

This is a firm of accountants who have agreed to take on the dataprocessing services for the organization. The firm is called Brock, Schechter and Polakoff. The timing on this is that we will transfer the functions about the first of the year. You should see no effect of this in connection with mailings or with the receipt of your dues bill which will go out sometime in January. If you have any problems with regard to mailings or communications with the data processing people, or you don't get your bill and you want one, please let me know and we will make sure that the problem is corrected, especially if you didn't get a bill.

Turning to our current situation, I'm happy to report that as of today, we have on hand some $330,000 in cash and equivalents. This is about midyear of our fiscal year and the current balances would indicate to us that there is no need to consider any adjustment in the dues at this time. We are not sure what the effect of the new data support group costs may be. They've agreed to take over that function on about the same basis that we were paying the prior supplier. And hopefully that will not have a substantial effect on costs. And we will monitor those costs very carefully but for now it does not appear necessary to increase the dues.

That constitutes the Treasurers report and I respectfully move its adoption.

(Motion seconded and carried.)

MR. HOOPER: Motion carries. Thank you very much, Marshall.

I should mention that you've probably seen the signs warning us of a fire drill this morning. We've checked with the Bar Association and were told they are going to have a fire drill—I think it's in the building next door where the rest rooms are. They tell us we don't have to leave so I guess we can just sit here and simulate leaving. Unless someone wishes to submit a lengthy report and that person realizes that report will take longer, then that person can take part in the fire drill.

Next is our Membership Secretary, Liz Burrell.

MS. BURRELL: Good morning. Since we met in May the following members of the judiciary have been accepted for judicial membership: Honorable Joseph A. Irenas, United States District Judge for the District of New Jersey;

Honorable Henry F. Martin, Judge for the Fourth Judicial Department of the State of Florida; and Honorable Joel B. Rosen, United States Magistrate Judge, again for the District of New Jersey.

Ten associate lawyer members have advanced to proctor status. They are Jeffrey R. Bale, Robert J. Bocko, E. Paul Gibson, Charles F. Herd, Jr., Sandra L. Knapp, Terrance J. Lestelle, Brian J. Miles, Daniel W. Raab, Thomas L. Tisdale and Joseph A. Walsh, II.

We added 46 new associate members at the Board of Directors meeting yesterday. They are:

Craig H. Allen
Paul Lawrence Anderson
Joshua B. Bereny
Eileen P. Brown
Lawrence C. Browne
Arnold J. Cestari, Jr.
Heather Ann Cicalese
Evanthia Coffee
Patrick J. Corbett
Warren A. Cuntz, Jr.
Shelia A. Dearybury
Thomas M. Donohue
Suzanne C. Etpison
Peter F. Frost
Christopher M. Hanrahan
P.J. Murphey Harmon
Christopher S. Hayes
E. John Heiser
Michael G. Hodgkins
Mark D. Holmes
Kelly Bennett Honig
Howard Lee Jacobs
Barry J. Klinckhardt
Andrew N. Krinsky
William E. Lakis
Patrick F. Lennon
Alexandra G. Lyras
Michael W. McLeod
Gerard M. Nolting
Susan Olick
Brian B. O'Neill
Martin D. Owens, Jr.
Donna J. Popow
J. Ashley Roach
Shari M. Rubin
Alexander V. Sansone
Joseph H. Saunders
James J. Savage
Steven C. Schroer
Benjamin O. Schupp
Mark A. Senter
C. Taylor Simpson
Sylvia J. Sydow
Spiro J. Verras
Wayne G. Zeringue, Jr.
Shanshan Zhou

17 new associate members were approved at the Board meeting which took place in August. They are:

Susan R. Bogart
Laurie L. Crick
Joseph I. Hochman
Lawrence I. Kiern
J. Robert Kirk
Alexander B. Klein, III
Franck F. LaBiche
John H. Musser
David J. Owens
C. Michael Parks
Paul S. Rosenlund
Anthony Michael Sabino
T. Evan Schaeffer
Douglas J. Shoemaker
Anthony G. Simon
Kevin P. Smith
Robert M. Smolens

We have also added six new nonlawyer members, Noreen Arralde, Robert A. Biasotti, Hank van Hemmen, Hildegard Krause, Gerhard Kurz, and Peter Shaerf.

I regret that it also falls to me to report on the deaths of several of our distinguished members. These include Douglas D. Batchelor; John T. Biezup; Raymond J. Burke, Sr.; the Honorable Andrew A. Caffrey; Edward L. Johnson; Eugene, or as we all knew him, Pete Lippman; O. Taft Nelson; the Honorable Robert E. Peckham; Richard A. Peters; Joseph J. Reddington; and Leon T. Seawall, Jr.

With these changes, the membership now totals 3,627. Of these 1,831 are Proctor members, 1,277 are associate lawyer members, three are honorary members, 282 are nonlawyer members, 57 are academic members, and 177 are judicial members.

In addition to my report as Membership Secretary I would also like to say that some of you may be receiving from the Federal Judicial Center, a questionnaire about the issue of what roles certain conflicts may play in your practice. Because the Federal Judicial Center has limited resources and thus will not be sending these questionnaires to everyone, it's very important that you respond if you do receive one. The Center is actually trying to address some of the practical problems of practicing admiralty and I know your responses would be most appreciated.

I move for the adoption of this report.

MR. HOOPER: Is there a second?

(Motion seconded and carried.)

MR. HOOPER: Thank you very much, Liz.

I should also state that Liz is responsible for compiling this directory. You know that she spent quite a bit of time on it. She has been up till 2 in the morning working on it. It's not the most exciting thing to read at 2 in the morning.

Before we get to the committee reports I would like to thank the former committee chairs and the present chairs, but particularly the former chairs, who were gracious enough to assist me in finding their successors. We changed the bylaw a year ago, if you remember, in Bermuda to limit all officers of committees to four-year terms of office. We removed the bylaw which limited the length of time anyone can stay on a committee. So anyone on a committee can stay on that committee as long as that person is performing service to the committee. But the officers will be changing—all of the officers and subcommittee chairs will change every four years and it's hoped this change will give the younger lawyers an opportunity to move up and see some new leadership in the organization. I didn't realize when we passed this bylaw that it meant I had to find 70 new committee officers but we did with the help of the former officers. I don't mean to say 70 people are new committee officers. Seventy people changed. Most of them moved up from vice chair to chair or from secretary to vice chair or whatever. So I'd like to thank them very much for their tremendous help in that process.

We'll start off—we will call the reports in the regular alphabetical order and I think that will give you all a chance to predict when you'll be heard. I ask you to come down near the front of the room before you are called so that we don't have to waste the time of waiting for the next person to come from the back of the room down to the front.

We'll start off with Warren Marwedel who's going to report on the ABA Relations Committee and also on our meeting in Hawaii next year.

Warren.

MR. MARWEDEL: Thank you, Mr. President, members and guests, my first report is on the ABA Relations Committee. The ABA met in New Orleans last August. They didn't have the best attendance because of the heat. But there were a couple of things that were discussed at that meeting that have interest to maritime lawyers. First of all, they passed a resolution that the U.S. become a party to the Law of the Sea Convention. They also passed a resolution that the International Court of Justice be the final arbiter of all treaties, interpretation of breaches of any treaties or obligations, and to determine reparations for any

country that breaches an obligation. I'm not sure where that's going to go but at least that was the position they took.

They also amended the certification rule which we'll hear a little more about later today from other speakers. Our committee is watching this and will be working with the ABA on the issue of certification and specialization. The amendment they made this August allows the ABA to be a certifying body for those statements that do not have a certifying body. I think the coast states will probably come up with the certifying bodies but a lot of other states, especially in the midwest, may not. So we are going to be working with the ad hoc committee here and with the ABA in trying to keep the MLA in the forefront of that particular issue.

The ABA will meet in Chicago next summer in August. There will be a program put on by the young lawyers and I believe it's going to be on intermodalism and as soon as we have more information on that we'll make it available to the membership.

On Hawaii, in 1995, October 15th, we will have our away meeting in Kauai at the Hyatt Regency Hotel. It is a great hotel. Our committee was out there last month. We worked very hard. We checked out the swimming pool. We checked out the little canal you could swim down. We went up the mountains in boats. Everything to make sure when you come your stay will be enjoyable.

We will also have a very complete seminar program and committee meetings. Out on the table we have left some brochures on the Island of Kauai, on the hotel. What we're trying to do is keeping in mind everybody's expense accounts are getting smaller and smaller, we're trying to watch the cost. We've engaged a professional meeting planner to help us. I think a week, if that's what you take there, will be less expensive than a week in Bermuda. We have excellent hotel rates. It's not MAP. We have a very good camp site so if you want to bring your kids we've had a lot of requests for that and it should be a great time. For golfers this week, November 8 and 9, the PGA is going to have their grand slam at the hotel. This is on the Turner Broadcasting System, 7 p.m. The hotel is the sponsor and you'll get a very good idea of what this resort, what the island looks like by watching the golf tournament.

Thanks.

MR. HOOPER: Thank you very much, Warren.

Next we have carriage of Goods for fifteen minutes by George Chandler.

MR. CHANDLER: Thank you, Mr. President, officers and members.

The Committee on the Carriage of Goods and its subcommittees met this week here in New York. First, I'd like to say we have two new subcommittee chairmen: Paul M. Keane for Shipping Documents and Vincent H. DeOrchis for Multimodal Transport. Vince's subcommittee met to review the proposed draft of COGSA that has been circulating for quite some time, particularly to solicit comments from inland transportation interests. Many of the comments received were quite helpful and will be studied further.

One of the things that came out of that meeting is that the Safe Container Act, enacted about two years ago to control weights of containers, mysteriously was revoked in July. There's been no indication why, but July was a very eventful month because at the same time that the Safe Container Act was being revoked, the Pomerene Act was substantially changed as part of the U.S. Code revisions. Someone in Congress slipped in a number of changes to the Pomerene Act. As you know, the revisions to the U.S. Code have been taking place for quite some time. A few years ago we had an incident where a Congressional Committee attempted to recodify COGSA as part of the U.S. Code revisions by just changing a few words here and there, which would have had an absolutely astounding effect. Fortunately, we were able to get them to back off. However, this one slipped in. There was no warning it was being done and it just showed up as a *fait accompli* on July 5th. So the Pomerene Act now has some significant changes. For instance, one of the changes is that the Act has always used the term "carrier". Someone decided "common carrier" sounded better. Never mind that it tends to leave out of the term all contract carriage and private carriage. This is one of the things we're going to be taking up within the Shipping Documents Subcommittee. We've also requested that the review of the Uniform Commercial Code, Article 7, by the ABA be revisited. We reported to you sometime ago that was being looked at, but it was determined not to do anything at that time. With the changes to the Pomerene Act, which UCC Article 7 parallels to some extent, the request is out to the Uniform Commercial Code Committee of the ABA to bring their group back to take another look.

Also within the Shipping Documents Subcommittee are some problems that came up with the new UCP 500 put out by the ICC, Paris. Particularly there's one problem that where there is a Master's bill of lading, the requirement is now that the name of the Master has to be inserted. No one has been able to find any commercial rationale for this, and it's causing a lot of problems with some banks. Particularly the bills of lading coming out of Japan. So the Shipping Documents Subcommittee will be putting up a position paper in the hopes of getting the ICC, Paris to see that it's just an irrational requirement and that there's just no justifica-

tion for it. ICC, Paris looked at the issue earlier in September and decided they wanted to keep it. There were several interests that thought it was necessary. But there was significant interests that did not. With this paper and with other interested groups, we hope to get them to revisit the issue.

The Shipping Documents Subcommittee is also taking up a review of draft model laws for EDI (Electronic Data Interchange). UNCITRAL has just completed this draft set of model laws for use of EDI. The Subcommittee is going to see if there's any particular problems with these draft model laws for maritime EDI. Anyone who has an interest in EDI, this being a very immature field just now developing, should contact Paul Keane or myself. We'll get you a copy of these model laws and your comments would be most welcome.

The import of this is that at the next meeting of UNCITRAL they're taking up negotiability and transfer under EDI. Within that subject will be maritime bills of lading. We've let the people at CMI know that this issue is coming and our hope is that they'll be participating in this, and that there will be other maritime organizations that could participate as well. But this is going to be a fairly important issue in maritime commerce and certainly by the turn of the century I think you'll be seeing more and more electronic bills of lading. Thus it's important that the maritime interests be participating at this stage.

The Cargo Liability Subcommittee also met on Tuesday and examined the new questionnaire from the CMI. As a result of the recent CMI meeting, the CMI drafted a questionnaire on cargo liability laws (which you'll hear more about from Frank Wiswall) with particular reference to the problem that a number of countries have started amending either Hamburg or Hague-Visby or some have combined the two. The Scandinavian countries recently incorporated most of the Hamburg Rules into their Hague-Visby Rules. So there was some concern both within CMI and UNCITRAL that both their regimes are being left behind by those that have a need for more modern rules. The questionnaire in essence is attempting to find out if there is broad support for an attempt at reaching a unified cargo liability regime. That is, instead of having two competing regimes, they try to find a middle ground where there will be but one regime instead of the multiple regimes and subparts we have now.

Mike Ryan of the Cargo Liability Subcommittee will be putting together a draft response to the questionnaire, and anyone who has an interest in looking at the questionnaire and proposing pieces or all of the draft, please see Mike—me or Mike Ryan or Chet, for that matter. We each have copies of the questionnaire.

Mike Ryan has set the deadline of November 30th for submission of any proposed answers so there will be time for him and his subcommittee to put a

draft together. I think it's the end of January ultimately when the Association should be providing answers to the questionnaire.

Finally, we had the Carriage of Goods meeting Wednesday. Very spirited discussions took place regarding the proposed draft of COGSA, giving everyone a chance to air their views. The draft of the proposed changes to COGSA should be complete by the end of the year such that it would be before the *ad hoc* committee and then the Carriage of Goods Committee for consideration. Assuming that it's passed on both levels, then we expect that it will be before the Association at the spring meeting for a vote as to whether or not to support that initiative.

That concludes my remarks.

MR. HOOPER: Thank you very much, George.

Next I'd like to call, out of order, Christina Whitaker, the chair of our Dinner Arrangements Committee tonight so Christina can continue the arrangements for the dinner. I would like to express our appreciation for the tremendous work that this committee puts forth. It's an extremely time-consuming job.

Christina.

MS. WHITAKER: Thank you. Thank you, Mr. President. Good morning. This evening's dinner will be at the Marriott Marquis Hotel at Broadway and 45th. As of this morning we had 830 guests attending the dinner. Included in our distinguished guest list will be Judge Brieant and Mrs. Brieant, Judge Mukasey and Mrs. Mukasey, Judge Ward, Judge Sprizzo, Judge Wolin, Judge Stanton and Mrs. Stanton, Judge Baer and Mrs. Baer, as well as the Lord Justice Christopher Staughton from London.

We also will be hosting Mr. Walter Kramer of the American Institute of Marine Underwriters, Mr. John Tull, President of the Association of Average Adjustors, Captain Henry Engelbrecht who's President of the Society of Maritime Arbitrators.

We also have two journalists joining us this evening from the Journal of Commerce: Mr. Stanford Erikson and Mr. Alan Wastler.

This year's menu includes a choice of filet mignon or poached sea bass, mushroom bisque as an appetizer, and an apple tart with a chocolate nest of apple praline ice cream and caramel sauce for dessert.

There will be dancing this evening provided by a 16-piece orchestra from Steven Scott Productions.

Again, I want to remind you that the dinner this evening will be at the Marriott Marquis, not the Hilton, with the general reception commencing at 6:45 on the fifth floor and dinner commencing at 8 p.m. on the sixth floor.

I look forward to seeing everybody this evening. Thank you.

MR. HOOPER: Thank you. Next I'd like to call David Nourse of the Carrier Security Committee.

MR. NOURSE: Good morning, ladies and gentlemen. The Carrier Security Committee meeting was held on Wednesday of this week. We had a rather interesting time discussing developments respecting stowaways over the last six months. You may remember that when I came here before you in May I told you about a resolution which the Association's Board of Directors had adopted respecting a request to Congress to hold hearings on the stowaway problem. And, indeed, for a time this summer it looked as if hearings would be held. I think this was driven in large part by the numerous newspaper articles relating to action by Sea Land in detaining a large number of Rumanian stowaways at a hotel in Newark in leg irons. Even the New York Times became interested in stowaways after that disclosure!

In fact, there were no hearings this summer because Congress became interested in other problems. Disease on cruise liners became a little more topical and, therefore, no hearings on stowaways were held. But there were two very important developments relating to stowaways.

First of all, our Committee member Stephen Vengrow of New York scored a major triumph in the Third Circuit where, after a very careful review of the INS policy on stowaways, the court concluded that INS had not complied with the Administrative Procedures Act. Thereafter, on July 28, INS issued a directive to its district directors setting out a new policy under which INS would take custody of all stowaways who claimed political asylum. Later, in what I think may properly be called a little bit of "Stealth bomber legislation," Congress added an amendment to H.R. 783, entitled "Immigration and Nationality Technical Corrections Act of 1994", on October 7th, just when everyone was going out of town. This amendment had the effect of eliminating the obligation on carriers to detain stowaways from 8 U.S. Code § 1323(d). What was left in the statute was the obligation to deport stowaways or pay the penalty of $3,000 per stowaway for not doing so. But any reference to detention of stowaways was eliminated from the statute.

Now, this last minute legislation actually was not opposed by INS when it came before the President, because there were other good things in the bill that INS wished to have. President Clinton signed this legislation into law on October 28th. Thus it is now the law of the land that a carrier must deport a stowaway, is responsible for paying a fine if he does not, but is not obliged to detain the stowaway pending his deportation. It remains to be seen what INS will do about this. Clearly for an asylum-seeking stowaway now to be detained by INS is a great benefit to carriers because the expense of detaining stowaways has now been passed over to INS. Probably the non-asylum seeking stowaway who comes in on a ship that's leaving tomorrow will be detained by the carrier until he can be deported. What remains to be seen is what is done with the stowaway who, for one reason or another cannot be immediately deported, perhaps because the ship is going into dry-dock or perhaps because the stowaway is ill and must go to the hospital. I'm told that a directive will be coming out from INS within the next week to its district directors telling them how to react to this rather startling change in the law. It will be interesting to see how this develops.

Thank you very much.

MR. HOOPER: Thank you very much for that very interesting report.

Next we're going to hear for six to seven minutes from Dr. Frank Wiswall followed by Nicholas Healy.

I'm not going to ask the court reporter to describe that hat.

(Laughter.)

DR. WISWALL: Mr. President, ladies and gentlemen, this is one of the smaller hats that came back from Sydney.

The Sydney conference, from the Association's point of view, was a success. You will hear in greater detail from the committees charged with responsibility for the specific working subjects in Sydney, how they fared. Apart from the great hospitality that was enjoyed by all who attended in Sydney, it was a hard-working Conference. In addition to three major working subjects there were also three other events which came to be called "sideshows". They were two reports on work ongoing within the Comité, one on third-party liability and limitation which was given by Patrick Griggs; one on classification societies in which I gave a report in general terms on the work that has been done so far, and we then had a panel discussion with two members of this Association participating—Brian Starer and Dick Leslie, who have opposed each other in

cases regarding class societies. Lars Lindfelt is a very colorful character and is always good value to listen to, particularly on this subject on which he has spoken frequently, and Phillipe Boisson, the General Counsel of Bureau Veritas both gave excellent papers. All of these papers will be printed in the 1994 yearbook of the CMI, which will contain all the Sydney papers.

There was also a seminar on marine insurance in which one of our members, Graydon Staring, delivered one of the four papers on the question whether in view of the general trends within the industry there is any longer "ultimate good faith," and whether we should just dispense with the formality.

These "sideshows" were so well attended that there were complaints they had emptied out the working sessions of the committees. Particularly the one on classification societies was quite unexpectedly well attended. Some care will be taken in the future to try to avoid that kind of conflict. But it's probable that all future CMI International Conferences, will feature some "sideshows." Perhaps not three, but one or two.

The US delegation had a breakfast meeting on each working morning of the Conference. That stratagem, which proved its value in Paris, I think proved it again in Sydney. Those who were interested in the particular working subjects were able to sit together, prepare for the day's work, and then give a report to the rest of us. And it was valuable socializing for the delegation and gave a cross-pollination to the efforts that the delegation was undertaking on these three subjects. Following our breakfast, the US delegation joined the Canadian delegation for a free-for-all discussion.

The Assembly which was held after the Conference in Sydney indeed approved all of the recommendations that were forwarded by the Conference. The Assembly dealt with other business of the Comité and it also held the first election under the new Constitution. As it developed, this was an uncontested election and the nominations that were put in by the Nominating Committee were adopted by acclamation. I'm going to supplement my brief oral report with a written report, Mr. President, in which I will give the details. As to the change in structure, the Executive Council has expanded from six members to eight members with two elected annually, and the number of vice presidents is reduced from ten to two with one elected every two years.

The faces have changed, over half of the executive council is composed of new members, but the president, the secretary general, and the treasurer are the same individuals. We have a new administrator, Baron Leo DelVade of Antwerp, who will move the CMI headquarters into his law office as of the 1st of January.

The Executive Council which met after the Assembly then appointed new committees. I will also include information on that in my report. And, the new Executive Council also approved the Questionnaire to be sent out, which George Chandler referred to in his report, concerning the international regime—or I should perhaps say the lack of an international regime—on carriage of goods by sea. At its meeting in Oxford on the 13th of May this year, the Executive Council appointed a working group to examine the problems of proliferation of different unilateral regimes in the area of carriage of goods. That working group produced two reports, both of which have been amalgamated into this Questionnaire as introductory material and specific background materials. Those reports reveal that there are not now simply several different regimes of carriage of goods by sea that are operating today; there are 15 different *types* of regime, with additional minor variations. This is an alarming indication. It prompts the Executive Council so soon after the decision in Paris which was quite firmly in favor of the Hague-Visby regime to ask whether something does not have to be done, and if so whether the CMI should not be the organization taking responsibility for doing it as the parent of the most widespread international regime on carriage of goods, the Hague-Visby regime.

We are now in a rapid downward spiral of disuniformity with the emergence of a new carriage of goods regime on the average every four or five months.

The Centenary Conference will be held in Antwerp in June 1997, so those of you who have an inclination to plan ahead for a really big party might mark that on your calendars.

Lastly, this is the new CMI Yearbook in hardcover, an excellent volume to retain. A certain number will he produced in hardcover each year. If you would like to have one of these '93 yearbooks please give a check to Marshall Keating for $15 before you leave and that will get you one post paid.

I will, Mr. President, if you permit, yield a little time to Nicholas J. Healy of New York, our Honorary Vice President of the CMI, to speak about the CMI American Foundation. Nick, by the way, was reappointed as Chairman of the Nominating Committee for the next election of the Comite'.

MR. HOOPER: Thank you very much. We thought we got to keep the hat, though.

MR. HEALY: Mr. President, ladies and gentlemen, I have very little to report except a shortage of contributions, so please get your pen and ink ready and send your checks to Frank Wiswall or me. We've only had one contribution

as far as I recall since the May meeting and that was a generous one of $500 in memory of Ed Ransom who died during the summer.

The Board of the Foundation met yesterday very briefly, and talked about the second Elliott Nixon award of $1,000 for the best essay dealing with a subject pertaining to the uniformity of the Maritime Law or the International Law of the Sea. The ground rules have been changed very slightly. Instead of an age limit of 30 the Board decided to make the award available to those who are students or who have graduated from law school with a JD degree or equivalent within a period of not more than the last five years. The deadline for submissions will be December 31, 1995 and the award will be made at the spring meeting of the association in 1996. So those of who you have associates interested in submitting essays, or who have sons or daughters in law school, or who are recent graduates of law school, please try to encourage them to submit essays in the competition.

Thank you.

MR. HOOPER: Thank you very much.

Next we have Continuing Legal Education, Robert Glenn.

MR. GLENN: Thank you Mr. President. We had a long and productive meeting yesterday. We basically have two projects going on. One of them is the planning for the 1995 seminar. On one of the days of the next seminar, we're going to use a common fact pattern and relate the talks to that common fact pattern and so we are soliciting suggestions from the membership for speakers particularly on three topics. One of them is mass torts, class actions, and multi-district litigation. Another is the ethical considerations that arise out of mass torts, multi-district litigation. And the third is the admissibility and use of computer generated animation or accident reconstruction.

The other project that we're undertaking right now is to establish or create an index or perhaps you would call it a bibliography of unpublished seminar materials from the MLA, SEALI, Pacific Northwest Admiralty Law Institute, and some of the other recognized seminars. There's a lot of material out there and as far as we know there's no real way to access it all. So that's one of our projects that we hope will be completed in the spring. Ben Reynolds is in charge of that and we need volunteers to help us do some of the indexing, so if you would like to participate or know someone who would like to get involved, we would very much like the help. Thank you.

MR. HOOPER: Thank you very much, Bob. Winston Rice can't be here to report on the International Law of the Sea. But he has submitted a paper which

has already been published in the MLA Report and that can be found on page 10092.

The next committee is Marine Ecology, Jack Vayda.

MR. VAYDA: Thank you, Mr. President. Ladies and gentlemen, the Committee of Marine Ecology met on this Wednesday afternoon. As usual, we had a very lively session which focused on OPA 90 and its aftermath.

OPA 90 was passed four years ago. In those four short years there has been a flurry of federal regulations, state statutes and state regulations which has kept the committee and its members actively engaged. We are now moving out of the period of legislative growth and into a phase where casualties occur, litigation occurs, and new jurisprudence develops.

The committee has agreed that as we are now moving into this new phase it is appropriate that several projects should be commenced in which we should monitor and possibly shape the development of this new case law. Before I share these projects with you I would like to report to you on the present status of one of the most troublesome aspects of OPA which is that tank vessels trading in the US must have COFRS which meet OPA requirements before December 28th of this year. As of today it is reported that there are only about 65 ocean going vessels which qualify. There are only about 500 tank barges which qualify. There are now three different organizations which are attempting to fill this lacuna. They're known as OPA Club, First Line and Shoreline. As of now none of them are qualified and the only way in which COFRS can be issued is with the backup of a surety bond. Oil majors have created captive insurance subsidiaries to fill this gap.

The committee is aware of many fixtures which have not been concluded due to the possibility that the carrying vessel might not be out of the United States by the December 28th deadline. The committee has also heard that the tanker market is now fragmented into two different groups among the OPA COFRS haves and have nots. While the Coast Guard maintains that US oil reserves are sufficient to avoid oil shortages in the US, even if no further COFRS are issued, many are skeptical of this assertion. Hopefully this Mexican standoff can be resolved.

The last major set of regulations contemplated by OPA and still in the initial draft concerns Natural Resource Damage Assessment, or NRA. NRA is essentially a highly controversial set of schemes for the assessment and quantification of damage to fauna and flora caused by oil pollution incidents. It will greatly

increase the damages which will arise out of oil pollution incidents. Therefore, it deserves careful study and is the subject of one of the first projects which this committee may undertake over the next coming year or 18 months.

The committee has also decided to monitor developing jurisprudence on several issues which now seem most likely to become both controversial and susceptible to nonuniform results amongst the various jurisdictions. These include:

1. the interplay of state and federal statutes and regulations;

2. the interplay of judicial and trust fund claims;

3. the constitutionality of criminal penalties, in OPA and/or state pollution schemes;

4. the future course of the *Robins Drydock* doctrine; and

5. the viability of concursus in a spill scenario.

The committee suspects that one or more of these areas will become the focus of both a written report to the President and to the membership and possibly *amicus* briefs for the Association in one or more courts around the United States.

Last, but not least, the committee has agreed to both implementation of a public newsletter to focus on some of these issues and sponsoring a seminar at one or more future MLA meetings.

Mr. President, I'd like to yield the rest of my time to our former president, Tom Wagner, who is the delegate to the CMI Convention in Sydney who would like to report on the oil pollution events there.

MR. HOOPER: Thank you very much.

MR. WAGNER: Thank you, Jack. Good morning, Mr. President, ladies and gentlemen, honored guests. I just want to give a brief report on the developments at Sydney. I had the honor of being the lead delegate to the committee working on the assessment of pollution damages in Sydney.

Just to give you a very brief background—in wake of the Valdez incident and OPA 90, it has been recognized internationally that there has been no

uniform approach or rule regarding assessment of oil spill damages. There was initially some hope that such assessment might be susceptible to convention, treaty, or uniform rule among a number of countries. The potential for disuniformity grew with incidents like the BRAER, and the other countries were beginning to conclude that, if the United States could adopt its own laws with expansive damages, other nations might do something of that sort. With that prospect in mind, the CMI in Genoa held a symposium and gathered the views of the MLA organizations throughout the world as to how pollution damages were being assessed and evaluated. What were the national rules applying and was there any hope for a uniform system?

After the Genoa conference there was tremendous pessimism. There was the *Robins Drydock* bright line approach to economic damages in the United States, but many countries with both common law and civilian traditions had no clear standard whatsoever for pollution damages. There were also varied differences of opinion as to how you handle clean-up costs, recovery equipment utilized, official personnel, salaries, etc. There was tremendous pessimism, and some Scandinavian countries suggested there will be or can be no uniform approach. To the credit of the CMI and its leadership, however, a very workable proposal was meted out by the working group. That plan led to what ultimately was adopted unanimously in Sydney.

The good news is that the CMI resolution synthesizes the tremendous variety of views, very conflicting views, regarding compensation of clean-up costs and for economic loss. It recognized that the *Robins* bright line is probably unacceptable in many jurisdictions, but the proposal offered in its place a fair degree of predictable criteria to handle the challenge of fairly assessing economic damages to be recovered as a result of a spill. The most encouraging aspect was that although there was such a wide variety of views, there was ultimately agreement upon a uniform guideline, which was approved unanimously.

The bad news is that the symposium in Genoa led to the conclusion that no uniform proposal could presently be made concerning the very difficult problem of assessing natural resource damage, with all the ancillary issues concerning contingent valuation and the like. That issue will have to await another day. Nonetheless, much progress was made in Sydney. I would suggest to you that as litigation begins to hit the courts under OPA 90 and state statutes, the CMI proposal should be utilized. These guidelines may help to set clear limits and may have substantial persuasive effect.

Finally, I would like to thank President Hooper, our Association and our Committee for the opportunity to represent the organization at Sydney. It was an honor, a challenge and a pleasure. Thank you very much.

MR. HOOPER: Thank you very much, Tom. Thank you for all the work you and your committee did in Sydney. It was tremendous.

Next we have Marine Financing, Dave Williams.

MR. WILLIAMS: Thank you, Mr. President, ladies and gentlemen. It's been the frequent custom of the Committee on Marine Financing to invite guests from Washington to our meetings here in New York. This time we had three guests from the Coast Guard: Tom Willis, the Chief of the Vessel Documentation and Tonnage Survey Branch, Commander Keith Cameron from the Information Management Branch which is developing the Vessel Identification System regulations, and Jeff Hoedt who is Assistant Chief of the State Affairs Branch.

Also in accordance with our Committee's custom, our guests from Washington took questions on two major issues. First, Mr. Willis discussed what I would characterize as a tidal wave about to hit the existing practices of vessel documentation and marine financing in this country. Some of you who practice in this area will recall that in 1983, the Vessel Documentation Act of 1980 was implemented with the effect that some 58 Coast Guard Offices of Vessel Documentation were consolidated into 15 offices. This consolidation resulted in tremendous backlogs and problems, litigation—the effect of which we now see in the case law. Well, in 1995 the Coast Guard will be consolidating the 15 current Offices of Vessel Documentation into just one national office in Martinsburg, West Virginia.

Bob Poster, chair of our Subcommittee on Documentation and Citizenship, obtained a copy of the Coast Guard's implementation plan which he reviewed with Mr. Willis in the subcommittee meeting. The Coast Guard has determined that this consolidation will provide better service while reducing costs. Naturally, some people have questioned that. The subject has been discussed at three in a series of five public hearings that are scheduled around the country and was discussed in several of our subcommittee meetings this week. Charles Donovan, chair of our Subcommittee on Maritime Liens and Mortgages, brought in a John Pritchard, a specialist in aircraft financing. Mr. Pritchard compared the situation with the FAA system for filing all papers at an office in Oklahoma. Suffice it to say there are many, many differences. Bob Poster's Subcommittee on Documentation and Citizenship got into some of the specific logistical problems which will be presented in transactions all over the country with documents to be filed with the Coast Guard. The Coast Guard's answer to these issues is that filing by fax will be available and eventually computer-to-computer filing. Some have questioned how many fax machines the Coast Guard will need for all these transactions and whether they have the budget to pay for them all.

A more serious issue is that of lien priority. The new statute is designed to give effect to a bill of sale or mortgage upon its filing, not upon it's recordation. That was a much needed change in 1988. Now the basic question arises of what validity under the current law will a fax signature have on documents submitted to the Coast Guard, even if the signed original is promptly submitted thereafter. In the Subcommittee on Documentation and Citizenship, none of our members present indicated that they would give an opinion that such a fax signature did in fact have legal effect.

As a result, Mr. President, our Committee has a legislative initiative to add to those which we have previously submitted. A copy of the text is in the back of the room. Its somewhat technical, I suppose, but rather necessary and not controversial. It was offered by the Subcommittee on Documentation and then approved unanimously by the entire Committee on Marine Financing. According, I move the following Resolution:

WHEREAS,

(1) the U.S. Coast Guard has adopted an Implementation Plan for the centralization of Vessel Documentation functions, and

(2) it appears that any such centralization of Documentation functions will require, for such centralization to be implemented, that the filing of instruments and documents, as required by 46 U.S.C. §12101 *et seq.*, including without limitation the filing of bills of sale, conveyances, mortgages, assignments or related instruments in respect of documented vessels as provided in 46 U.S.C. Chapter 313, be effected in whole or in part by electronic means, and

(3) doubt has been expressed as to whether or not such filing by electronic means is authorized under the provisions of Title 46 of the United States Code as now in force;

THEREFORE, be it now

RESOLVED, that Congress be urged to enact amendments to said Title 46 as now in force specifically enabling the transmission and/or filing, in whole or in part, by electronic means of those writings and/or documents which are required to be or which may be filed pursuant to 46 U.S.C. Chapters 121 and 313.

MR. HOOPER: Is there a second to that motion to adopt that resolution Dave just read?

(Motion seconded and carried.)

MR. HOOPER: Thank you.

MR. WILLIAMS: Thank you, fellow members. And I will say that Bob Poster's Subcommittee and perhaps also Charlie Donovan's Subcommittee on Liens and Mortgages will be continuing to look at the impact of this centralization and the legislative changes that it may require. There have already been some other suggestions that have been discussed and defined for further study.

The second major issue which we discussed with our friends from the Coast Guard, Mr. Cameron and Mr. Hoedt, concerned problems in yacht financing. I previously reported to this group about the surprising problems created by the fact that there are two separate documents of origin for each yacht; one under the state registration and titling system and one under the Coast Guard's federal documentation system. The situation creates obvious potential for fraud. Another problem has now also come into focus. In the 1994 pamphlet for Title 46, U.S. Code, the West Publishing company corrected a prior omission to print an amendment to the documentation statute, § 12102. This amendment, originally enacted in 1989, will come into effect one year after the Vessel Identification System regulations become effective. That, by the way, is scheduled to happen very soon. It was due in October and Mr. Cameron indicates that those negotiations will be promulgated in final form soon. The amendment to the documentation statute to take effect thereafter is that any vessel titled in a state will be ineligible for federal documentation.

Now, this creates considerable problems in yacht financing. There are currently about 32 states which issue state boat titles. Three of those require state titling even if the vessel is documented. Very few of those 32 states have any provision for the surrender of a state boat title. In addition, partly because of prior problems with delays in the federal documentation process beginning in the early 1980s, it is the practice in yacht financing to register the collateral yacht under state law, and title the boat if state boat titling is in effect in that state, in order to perfect the lender's security interest during the so-called "gap period" while the federal documentation process proceeds. Once the amendment to § 12102 takes effect, state boat titling will have the effect of disqualifying the vessel for federal documentation and the preferred mortgage. What this means is that in thousands, potentially tens of thousands of transactions, the customary security, federal preferred mortgage, will be unavailable to lenders unless the law is changed.

The answer to this situation is not yet entirely clear. It is evident that the 1989 amendment to § 12102 was intended by the House Merchant Marine and Fisheries Committee to help implement the Vessel Identification System and it

may not be easy to amend the documentation statute to take out the titling problem. Perhaps the Coast Guard will agree to accept the surrender of state boat titles. This problem will be studied by our Subcommittee on Yacht Financing chaired by Bob McIntosh. Anyone with clients heavily involved in yacht finance are urged to contact him.

Now on the topic of good news, our Committee's former chair, Dick Barnett, made a brief presentation to our meeting about the fact that he had closed the first transaction under the new Eligible Export Vessel program established by legislation in late 1993. This program provides that Marad may guarantee financing for the construction or reconstruction of vessels in United States shipyards even though vessels will then fly a foreign flag. Prior law made no provision for any Marad guarantee for a vessel flying a foreign flag. The importance of the change was underscored by the presence at the closing of Secretary of Transportation Frederico Pena and two senators and numerous congressmen. The most important change, though, is that Dick reported that the Maritime Administration is bringing a new attitude of cooperation to these transactions. Hopefully this will continue. There seems to be a real hope that the law will help produce more work through United States shipyards and more employment for our Merchant Marines.

MR. HOOPER: Thank you very much, Dave.

Next the Marine Insurance, General Average and Salvage. Ed LeBreton.

MR. LeBRETON: Good morning. The committee heard from its five subcommittees, the first of which was the Salvage Subcommittee, chaired by Paul Poliak.

At the committee's suggestion, this Association previously made a recommendation to the EPA to amend the National Contingency Plan to provide for the purposeful jettison of cargo where that would avoid even greater pollution, and it was felt this is important because salvors have indicated they are reluctant to do this without specific approval. The EPA has replied and turned us down. The EPA decided that there is sufficient case law already. I think the result is to put a lot of pressure on the on-scene coordinator. The EPA's reply is in the Federal Register Volume 59-178, page 47401. It came out the 15th of September of this year.

On the good news front, Paul reported that 12 of the necessary 15 nations have ratified the 1989 Convention on Salvage. This is significant because, due to the leadership of this Association, the United States is among the nations which

have ratified the Convention, and the Convention may come into force here shortly.

It was reported that a group headed by Jim Shirley is working with the Recreational Boats Committee on a US salvage form for recreational and small commercial craft. We hope to be hearing from them shortly.

The subcommittee received a report entitled Reassessment of the Marine Salvage Posture of the United States by the Committee on Marine Salvage Issues of the Marine Board of the Commission on Engineering and Technical Systems of the National Research Council. The report was written by a committee chaired by our former president, Gordon Paulsen, and has a lot of good information about salvage. A limited number of free copies are available by contacting Bill Peck. Significantly, the report suggests that the Salvage Subcommittee make recommendations on updating the standards on salvage awards in view of the modern commercial situation and the issues now involved in salvage, mainly avoidance of pollution. Accordingly, the Salvage Subcommittee is going to make recommendations on revisions and we hope that a working group will have a report by Spring.

Ray Hayden is chairman of the Cargo Subcommittee. The Subcommittee is continuing to push the ABA to publish the Cargo Policy Annotations previously prepared by the Subcommittee.

The Cargo Subcommittee expects to have a paper on rejection insurance in the next issue of the MLA Report, and the Subcommittee is starting a group to work on debris removal and the question of whether that coverage applies to cargo which is itself a pollutant.

The Hull Subcommittee is chaired by Brendan O'Sullivan. Besides reviewing significant new cases, the Subcommittee discussed the new hull policy which is expected shortly from London and the Norwegian Plan which is being revised.

The P&I Subcommittee met under the chairmanship of Tom McGowan. The Subcommittee also is working on annotations to P&I policy. There was a lengthy discussion of certificates of financial responsibility under OPA 90, but I will not repeat what Jack Vayda has just said.

The General Average Subcommittee reported on the CMI Meeting in Sydney at which new general average rules were agreed. I would like to turn over the podium to Larry Bowles, chairman of the General Average Subcommittee, to discuss that.

MR. HOOPER: Thank you very much, Ed.

MR. BOWLES: Mr. President, ladies and gentlemen, good morning. As I said about three years ago when this project commenced, general average is alive and well in the world, despite some criticism here and there. And I'm happy to report that on October 7, 1994 in Sydney, the CMI Conference adopted, unanimously, the York-Antwerp Rules 1994 and suggested that the new rules be used in the adjustment of general average as soon as possible after the end of this year. Copies of the new rules plus an unofficial preliminary analysis of the changes, courtesy of Jonathan Spencer, have been available outside. I hope that Jonathan, if you ask him, can provide a few more copies. If not, I can provide other versions of the new rules. I'm sure that other analyses of the 1994 rules will be published in due time including in the official CMI conference report.

In the new rules there are changes in the Rule of Interpretation, in six of the seven lettered rules and in 11 of the 22 numbered rules. Also a new Rule Paramount has been added. Don't panic. I'm not going to try to go over all of the changes. I'll just give you a few highlights. There was considerable debate over all the changes that were adopted and over many proposed changes that were rejected. Your delegation proceeded as authorized at our meeting in May. The major changes in the rules that we sought were to add a Rule Paramount on reasonableness, to add a Rule Paramount excluding from general average all pollution clean-up costs and liabilities; and third, modifying Rule 14 to overcome the *Bijela* decision in England. We succeeded on our first point and there is now a Rule Paramount on reasonableness. I'm unhappy to say we were defeated in our attempt to overturn the *Bijela* decision, but with the addition of a Rule Paramount on reasonableness, some of us believe that that decision might not occur again. We shall see.

The most important and most heavily debated changes were those that deal with the exclusion of pollution clean-up costs and liabilities from general average. There was extensive debate and input from the hull and cargo insurers who were in favor of the exclusion and also from the P&I clubs who opposed the exclusion. The hull and cargo underwriters made clear that they will amend their respective policies to exclude pollution clean-up costs and liabilities.

This could lead to an owner being uninsured, if these matters were not excluded from general average. In the end, the delegates were agreed that pollution clean-up costs and liability should be excluded and the focus then shifted to how that was going to be done. As I said before, we favored a Rule Paramount, but when that was defeated, we joined in what was called the "pollution package compromise" with changes in Rules C, 2, 5, 8, and 11(d).

Your delegates voted for this compromise after filing a Statement of Understanding that the 1994 rules exclude allowances in general average in respect of liability in consequence of the escape or release of pollutant substances from the property involved in the common maritime venture. A copy of this was available outside. If you don't have one I can provide that. A copy will also be published in the official conference report.

Other changes of note are included in Rule B, adding a provision for tug and tow, in Rule E, adding a provision for twelve months notice for submitting evidence supporting general average claims and in Rule G, adding nonseparation agreement form of language.

Time here does not permit discussion of all of the changes, unfortunately; but if you have any questions I'm sure the members of the committee which attended in Sydney will be happy to respond.

Now, as you know, the York-Antwerp rules apply only when included in contracts of carriage or towage. Your Subcommittee recommends that as soon as possible, you include the York-Antwerp Rules 1994 in all new contracts of carriage and towage.

At this time I'd like to thank all of our members who participated in any way in this interesting and at times exciting project. There are too many to name all of them but I think the persons most responsible for the well thought out positions taken by your delegation in Sydney are the members of the Ad Hoc Committee on Revision of the York-Antwerp Rules. They are, Doug Adams, Ray Hicks, Lou Guiliano, Howard Meyerson, Stuart Rockman, Richard Smith, Richard Stone, Leo Walsh and John Tull.

John Tull deserves particular thanks. For a period of over three years we met monthly and he pushed us along to get our ideas together. Howard Meyerson and Leo Walsh attended meetings in Europe, conferred with other delegations and reported back to us so we could make intelligent responses.

Special thanks also go to our delegation in Sydney, the people who took the time and effort to go there.

Again, Howard Meyerson, Leo Walsh, Jonathan Spencer, and Bill Beavers. They argued the US position at the conference and I would ask for a round of applause for all those people.

(Applause.)

MR. BOWLES: Mr. President, members of the Association, on behalf of our delegation we thank you for giving us the opportunity to represent this organization at this conference. It was a pleasure and an honor. Thank you very much.

MR. HOOPER: Thank you, Larry. Thank you and all your delegations for your tremendous work that you did over there. You walk into that room and hear them discussing line by line and word by word which is quite a tedious process.

Next we have Maritime Arbitration, Glenn Bauer.

MR. BAUER: Mr. President, our committee meets regularly every other month throughout the year. We have held meetings through the summer. Our liaison committee with the Society of Maritime Arbitrators meets and accomplishes quite a bit of work in dealing with the problems that exist in arbitration. Most of our members, of course, are from New York but we do have out of state members, too.

The Liaison Committee's main project this summer was to develop an escrow agreement for the arbitrators' fees. The arbitrators like to get paid at the end of their work when they issue their award and problems have developed in how this payment can be secured because sometimes the losing party doesn't like to pay. An agreement has been drafted in which the money would be held in the escrow accounts of the firms representing the clients, and we worked that agreement over at our meeting this week and I think it's in good shape now.

There are three court decisions I want to mention that have some effect on arbitration. One is the *United Kingdom v. Boeing* which was decided about a year ago in the Second Circuit, holding that consolidation of arbitrations is not permissible under the Federal Arbitration Act. That was a reversal of an earlier decision in New York that had been followed for many years where we did consolidate arbitrations. Now we're learning to live with the new decision. One thing that was done was that the Society of Maritime Arbitrators added to their rules, their new rules which were propounded last May, a provision that parties who agree to arbitrate under those rules also consent to consolidation. And we're also working on other possible ways of getting around this problem.

The second decision of interest was *Webster v. American President Lines* which resolved the issue of what is a commercial man under an arbitration clause and the question was whether or not a lawyer can be a commercial man. The Second Circuit finally authoritatively decided this point, I believe, by holding that a lawyer can be a commercial man if he has had experience in the commer-

cial world, not as a lawyer but as a commercial person, that is working for a steamship company or something similar. I think that question is laid to rest now.

The third case which is of interest to us and also to the Carriage of Goods Committee is the *Vimar Securos v. The Sky Reefer*. It's a First Circuit Appeals case which held that an arbitration clause in a bill of lading requiring arbitration of cargo claims in Tokyo was valid and enforceable. Previously there had been a case in the Eleventh Circuit in 1988 holding just the opposite. Now, this is going to—we're not sure where this will go—but possibly steamship companies around the world will be putting arbitration clauses into their bills of lading. I understand this Association is going to file an *amicus* brief with the Supreme Court where there is a Petition for Certiorari being filed. But, I also understand, the Association is not taking a position on anything except the point of whether the Supreme Court should take the case.

We in the Arbitration Committee have not taken a position either. We are interested, however, to see how this will affect arbitration. I imagine American steamship companies will put New York arbitration or San Francisco arbitration in their bills of lading and foreign companies will do likewise with arbitration around the world. We'll see.

Thank you, Mr. President.

MR. HOOPER: Thank you very much.

Now, George Koelzer from the Maritime Fraud and Crime Committee.

MR. KOELZER: Mr. President, the Committee met yesterday and was principally concerned with two matters. A subcommittee chaired by Helen Benzie and consisting of her, Professor Force, Bill Bullard and Vincent DeOrchis are working on a paper concerning the practical aspects of OPA 90 to be circulated for the members to deal with matters of oil spills and the criminal implications of oil spills.

Secondly, it was surprising to learn that there were a number of maritime references in the recent Crime Control Act. Newly created crimes involving maritime jurisdiction, for example, and a subcommittee consisting of Joseph Hochman, Jack Rockafellow and Vince DeOrchis are preparing a paper on that. The work of the Committee continues and will report further at the next meeting. Thank you.

MR. HOOPER: Thank you very much, George.

Next we have Maritime Legislation, Mark Spansel.

MR. SPANSEL: Thank you, Mr. President, members and guests. I guess everyone is anxiously wondering what happened to the punitive damages effort since last May. After enduring the ambiguous fate of having been tabled, we were not to be deterred. We immediately went back to work with new President Hooper to discuss what, if anything , additionally we want to do in this regard; and, we aired some of the concerns that had been expressed since May. We understood that one of the problems seemed to be a perception, though not a reality, that our effort was intended to be defense-based and designed to preclude the plaintiff interests. That was definitely not true. It may have appeared to have occurred that way as a result of happenstance; but, the history of the effort, I think, speaks for itself. We had been working in the Legislation Committee for six years and reporting to you regularly. While it is true that we did not actively solicit input from the plaintiff bar, by the same token, no one came forward to express interest from that particular group. I think the misunderstanding is now behind us and we're moving forward.

President Hooper came up with an idea that we should continue with our endeavor and retool it, if you will, in terms of forming an *ad hoc* committee, consisting of membership from both the plaintiff bar and the defense bar and crossing Maritime Personnel and Maritime Legislation lines. So we arrived at a committee of Bruce Hoefer of New Orleans (chairman), John Schaffer of Stamford, Frank Byrn of New York, defense practitioners. Then, on the plaintiff side, we have George Cappiello of New York, Paul Edelman of New York, and Jerry Meunier of New Orleans. This group has been working and getting organized since July or so. The first face-to-face meeting took place on Tuesday and it was really an effort to discuss concerns and differences of opinion, lay the cards on the table and find out what the issues are with regard to reform of punitive damages. While nothing is definite at this point, the plaintiff practitioners indicated that they are able to speak for ATLA. The plaintiff interest is concerned that while they are most willing to look at some type of constraints or reform of punitive damages, at the same time they believe that there are other problems in maritime damages and remedies. In particular, they posed for consideration that damages which *Miles* eliminated, such as loss of consortium and loss of society, should be added back legislatively. They also are inclined to disagree with the district courts that have interpreted *Miles* as eliminating punitive damages; however to make certain that their interpretation is correct, they would like the legislation to specifically state that *Miles* does not eliminate punitive damages for Jones Act seamen. Again, its the initial airing out of issues and differences. Bruce Hoefer plans to set up an agenda of telephone conference meetings and personal meetings to see whether anything is feasible under these guidelines and will be reporting to you as that progresses.

The other initiative we have undertaken is one that has been occasionally addressed by the Legislation Committee in the past. We are exploring the feasibility of a uniform statute of limitations, which would govern all areas not otherwise covered by a specific statute, in essence, trying to do away with the uncertain doctrine of laches. I understand from Frank Byrn that the Association passed a resolution several years ago which would basically authorize this particular activity. We have appointed Almer Beale of Jacksonville to head a study group up to look at this particular issue and Dave Sipple of Savannah is joining him. We're also including a member of the Stevedoring Committee to join that group. Thank you.

MR. HOOPER: Thank you very much, Mark. That's quite a project you have going.

Next we have Maritime Personnel, Warren Daly.

MR. DALY: Thank you, Mr. President, ladies and gentlemen. As you probably all know last spring the Supreme Court in the *McDermott* case unanimously affirmed, adopting the Maritime Law Association's views in all respects. For the moment, at least, that puts to rest the tilting at that windmill by our committee. We will be continuing to monitor cases as they develop to see if there are subsidiary issues that arise that merit our attention.

We're also continuing to monitor developments in the Jones Act status case in which the Supreme Court has recently granted certiorari, and there are a number of other issues that our committee is following.

Finally, we spent the majority of our time at our meeting yesterday afternoon discussing various aspects of the work of the *ad hoc* committee on punitive damages. Most of the members of that *ad hoc* committee are also members of the Maritime Personnel Committee and it is an area in which we have considerable interest. We will be assisting that committee and giving them our views as their work progresses. Since Mark Spansel has described that in detail, I won't say anything else.

That concludes my report.

MR. HOOPER: Thank you very much. Next we have Maritime Products Liability. Dave Salentine.

(No response.)

MR. HOOPER: We'll move on to Navigation and Coast Guard Matters, Pat Bonner.

MR. BONNER: Thank you, Mr. President. We've been very active on the COFR front. We've acted as a liaison and set up a number of meetings with the National Pollution Fund Center and certain groups involved in this issue including surety bonding companies. We had a representative at two of these meetings with Bob Skall. We assisted Tucker Fitzhugh in setting up a big meeting here in New York where a number of the representatives from the Clubs of the International Group met within the surety bonding companies and we tried to come up with a solution. There are a lot of facilities out there. I have information on Shoreline, First Line, OPAQUE and OPA Club. If you want any information please see me. I have the up to date information. It's changing day by day.

There's a conference scheduled in New Orleans on March 12–14, 1995 on the Maritime Law and the Electronic Chart. This is right before the Tulane Institute Conference.

Earlier this week, the Committee toured VTS on Governor's Island. They have eight video cameras on the New York Harbor. They're going to have 18 cameras eventually. They have all the radars plugged into a computer scanner and they can show this on a computer monitor. If you're going to practice collision law you have to learn to use this technology. It shows which ship is in the channel and which ship isn't.

MR. HOOPER: Thank you very much.

Next we have Practice and Procedure. John Edginton.

MR. EDGINTON: Thank you, Mr. President. Ladies and gentlemen, and distinguished guests. I trust by now most of you have discovered the Practice and Procedure Newsletter created by editors Ed Catell and Kevin Smith. We will file a written report to be included with the Proceedings on most of the nitty-gritty that the committee and its subcommittees covered during its recent meetings.

I'll just report the highlights on action items. First of all, as you heard in the Board minutes, the committee received two new inquiries from the Federal Rules Advisory Committee through Mark Kasanin. The first agenda item pointed up the "forthwith service" conflict between the Suits in Admiralty Act and the 120 day allowance in Federal Rule of Civil Procedure 4(i). This conflict was again highlighted in the case *U.S. v. Hoemberg*, 1994 AMC 2543. The advisory committee has noted the conflict and has asked the Administrative Office of the Judicial Conference to notify Congress and hopefully to do something about it. They referred this to us for support, and the subcommittee on Rules and Statutes and our main committee unanimously determined to support resolution of the

conflict as requested, by an appropriate letter to the Administrative Office of the Judicial Conference and we will proceed to do that.

The second request asked the views of our committee with respect to modifying Rule 9(h) of the Federal Rules of Civil Procedure to change the definition of an admiralty case from one *consisting* of one or more admiralty claims to one *including* an admiralty or maritime claim. This is to allow a case made up of mixed admiralty and non-admiralty claims the right of an interlocutory appeal under 28 U.S.C. § 1292(a)(3). The Federal Rules Advisory Committee wanted the committee's views on whether this would wreak some sort of havoc in the maritime area or create a number of additional appeals. Judge Niemeyer of the Fourth Circuit was particularly concerned about the last item.

The Subcommittee on Rules and Statutes and the main committee determined unanimously that the interlocutory appeal process is important to maritime law and should be preserved for use in complex bifurcated cases such as collisions or limitation proceedings. These cases are infrequent and mixed cases are even more so. Thus the committee determined to respond by letter to the Federal Rules Advisory Committee supporting the change in language in Rule 9(h) to permit appeals in mixed cases, as is in the case with pure admiralty cases. In other words, there's simply no reason why any non-admiralty issue that has been determined preliminarily, such as on a Motion for Summary Judgment, shouldn't go up with the admiralty issues in a proper case. Judicial economy will be created.

The stylistic changes to the letter rules are still bouncing about in the Federal Rules Advisory Committee as well. They are in a state of limbo at the moment, due to the fact that there just seems to be no real agreement among the members of the Advisory Committee on just what the words ought to be. So our committee is still responding to various drafts, the most recent one being from Dean Cooper of Michigan and we will be providing a letter response to his markup shortly.

With regard to legislative proposals and President Hooper's invitation to provide a package to Congress, we do have some technical changes which we have previously discussed which we will be forwarding shortly. However, our major proposals with regard to the Suits in Admiralty Act, Public Vessels Act and other acts which I discussed at the last meeting are still in the process of being worked up. We hope to be able to complete that project by the May meeting. With regard to substantive rule changes, such as the ones we have previously discussed with respect to Rule C and E to avoid civil forfeiture problems and these kind of things, we're awaiting notice from the Advisory

Committee as to when it is an appropriate time to submit our papers and we will do so in accordance with the authority which the Association has granted. I'm hoping that there's some chance for submission, possibly at their February or April meetings.

We are also considering a recommendation with regard to the admissibility of US Coast Guard reports. This would be a Rules of Evidence change. I would encourage anyone who has any thoughts on the admissibility or non-admissibility of Coast Guard reports to be in contact with our subcommittee chairs on Rules and Statutes, Bob Dunn. We are hopeful that at the spring meeting we will come up with a recommendation for that. The initial feelings of the committee are that such reports as well as NTSB reports should not be admissible.

I would like to alert you that during President Clinton's trip to the Middle East and somewhere over the Atlantic he signed the 1994 Bankruptcy Reform Act. That Act once signed became effective immediately with the exception of a few provisions which will go into effect later and two provisions that are retroactive. It is important that any of you who are involved in the bankruptcy forum to attend a continuing education course on the new changes as soon as possible. And for avid readers of Maritime Bankruptcy, Benedict Volume 3B, a pamphlet will soon arrive in your mail according to our editor, who is also a member of our Association, discussing some of these new changes.

I can also report that those of you who are interested in arrest procedure will find in Volume 5 of Benedict a new pamphlet provided by our members Phil Berns and David Sharpe on arrest procedures. This is new material and will tie in very nicely with the joint subcommittee on foreclosure's model arrest forms project which Benedict will publish as well.

Thank you, Mr. President. That concludes my report.

MR. HOOPER: Thank you, John. Next we have Stevedore and Terminal Operations, Dave Davies.

MR. DAVIES: Mr. President, fellow members: The Stevedoring and Terminal Operations Committee met yesterday back to back with its subcommittee on longshore problems chaired by Doug Matthews. We dealt with four issues that I believe are of general interest to the association.

First, to amplify somewhat on what you heard in the President's report, Mr. Matthews and Professor Michael Sturley authored an *amicus curiae* brief in support of certiorari on the delineation of Longshore Act coverage. The underly-

ing case, *Randall v. Chevron,* is reported in 13 F.3d 888. It goes up under the name of *Sea Savage v. Chevron.* The Fifth Circuit Court of Appeals decided that, as between the status of the worker and the situs of the accident, situs dominated in determining Longshore Act coverage for a claim for the death of a marginally maritime worker.

Meanwhile, the neighboring Eleventh Circuit had focused all of its attention on status. Between these two southern circuits next door to each other you have very different tests.

There is a home town issue that the brief points out: under the Fifth Circuit test if your associate goes on board a ship to investigate an accident and slips and falls, she is a maritime worker. We learned earlier today that a lawyer can be a commercial man; a lawyer can also be a harbor worker, and covered under the longshore act—and the act says that if you don't have insurance for that coverage you are subject to criminal penalty, so call your insurance broker if you're concerned.

Secondly, we continue to be allowed to participate in the deliberations of the Study Committee to reform COGSA and to bring it up to date. Our particular side of that project is to bring stevedores, terminal operators and other shoreside operators that make maritime commerce happen under the umbrella of caps on potential damages. The Study Committee's present draft would do that. The Stevedoring and Terminal Operations Committee applauds that particular step. (One thing that might happen is that we might become the "Committee on Performing Carriers" for those of who you have read the draft.)

Thirdly, we are working with the Carriage of Goods Committee on electronic data transfer. We have studied the IMO draft on electronic data interchange. (One member of our committee actually understands it.) We will pass on his comments to the Carriage of Goods Committee.

Finally stevedores and terminal operators sometimes don't get paid. Emery Harper has fought the good fight in deliberations over the proposed Convention on Maritime Mortgages. The present draft would allow liens under national law to be imposed but would also give such liens a life of only six months. This committee has previously reported its opposition to that provision of the draft convention. In this particular meeting, Anne Michele Higgins of Philadelphia has put together an excellent collection of cases on the application of the laches doctrine. The consensus of the committee was that, in spite of its reputation for messiness, laches has worked very well and very fairly. The committee continues to oppose the six-month limitation and believes that in the present context,

when a US lienholder cannot enforce a lien except in the courts of the United States and of a handful of other countries, any fixed statute of limitations for enforcement of a lien has a potential for unfairness in a number of situations. It's a subject that needs further dialogue and further study and recognition of the fact that there is an interaction between the limitation of the time that you have to enforce the lien and the tools that you have to enforce it.

Mr. President, that concludes my report. Thank you.

MR. HOOPER: Thank you very much, Dave.

MR. HOOPER: Next we will have Neal Hobson who's reporting for the Transportation and Hazardous Substances.

MR. HOBSON: Thank you very much, Mr. President. Basically, several weeks ago I attended the IMO Legal Committee meeting in London. This meeting dealt primarily with the proposed HNS Convention (Convention on Civil Liability in Connection with the Transportation by Sea of Hazardous and Noxious Substances). Very briefly, the Legal Committee has more or less completed drafting the proposed convention. The Committee will proceed to an official reading of the full text at the next Legal Committee meeting scheduled in April of 1995, and then the proposed convention is scheduled for a diplomatic convention to be held in early 1996, although the dates have not yet been selected.

A number of decisions were made at the Legal Committee meeting. As always, such decisions are not final, and are subject to being revisited, particularly at the final reading which will take place next April. Two major developments at the recent meeting were: (1) the assessments to be used to constitute the second tier fund are now to be collected from the receiver of hazardous and noxious substances rather than from the shipper as has been in the draft for about six years now; and (2) it was decided again to maintain linkage between the HNS Convention 1976 with the Limitation Convention or with other applicable national limitation law of signatory nations.

A more startling development took place not at the IMO but at a meeting of the parties to the Convention on the Transboundary Movement of Hazardous Wastes (the Basel Convention) which no one from this organization attended.

The Basel Convention deals primarily with a requirement the governments give notice of transboundary movement of hazardous waste to the receiving government, but the convention contains a provision that a protocol may be adopted to deal with civil liability arising out of such movement. The meeting of

that convention's signatory nations included an observer delegation from the United States. A draft protocol provides for strict liability for harms resulting from transboundary movement of hazardous waste, that there will be joint and several liability placed on the shipper and on the carrier and that there will be no limitation as to the amount of liability. It has been reported that the United States delegation (happily not including United State Coast Guard representations) objected to the proposed language and stated that liability should not be strict but should be absolute. It has been further reported that the position taken by the United States Delegation was that joint liability on the part of the shipper and carrier was unsatisfactory; rather, liability should be imposed on the generator, the shipper, the owner, the carrier, the owner of the vessel or the charterer of the vessel, the receiver and the terminal operator without limitation as to amount.

The HNS Committee will attempt to be included in further discussions on this subject and to see what can be done to get a more reasonable position adopted by the United States. These reported developments represent quite a startling position.

The interesting thing is that representatives of the State Department and the EPA, of course, were the United States delegates and have traditionally taken what some may consider to be extreme positions. This far it's been very, very difficult for this Association to even be included in their discussions. The State Department seems to change representatives to the Basel Convention frequently and every time the HNS Committee is able to establish connections with one individual, he seems to move on and the Committee is required to start over again.

The other side of the coin is that the Coast Guard, which represents the United States at IMO when dealing with HNS and other subjects, is exceptionally cooperative with this organization at all times. Captain Dave Kantor is head of the Maritime and International Law Division at the Coast Guard and his new deputy, Lieutenant Commander Steve Poulin, is here today. Commander Poulin replaced Lieutenant Commander Lee Hanford who many of you know. This organization certainly owes its deepest appreciation to the Coast Guard, to Captain Kantor and to both Lee Handford and Steve Poulin for this continued outstanding cooperation. Thank you very much, Mr. President.

MR. HOOPER: Thank you very much, Neal.

MR. HOOPER: Next Denise Blocker for the Young Lawyers.

MS. BLOCKER: Thank you, Mr. President. Officers, members and guests.

This is the last time I'm going to keep you all from your lunch—just so you know. For reasons which I hope are very obvious to you (and if they're not I will stand sideways), I probably will not be at the May meeting next year. As a result, even though I don't give up my post as the Young Lawyers chair until after next May, I will not be able to give my last report. Since this is probably my last report I want to thank the current officers, and the past presidents who have been so supportive of this committee and of me and my efforts to get it off the ground: Ken Volk, Dick Palmer, Frank O'Brien and Bunky Healy. In particular, I must thank Bob Acomb, who began this committee eight or nine years ago, and had enough confidence in me to turn it over to me when he did. Since he turned the Committee over to me, we have grown from 15 members to about 92 or 93 members now and we're very proud of that.

As usual, we are still succeeding in fulfilling our goals. Our first goal has always been to encourage those who are currently Associate members to do what they can to become proctor members of this association. We have in place a system now whereby every spring all those who are eligible are informed of that fact and are encouraged to apply. I believe that the ranks of the proctor membership, since the distinction was created many years ago, have swelled in the last few years because of the efforts of our committee; in particular those of our current Vice Chair Andy Tsukamoto. These efforts will continue into the future.

Our second goal, of course, is to assist the younger members of the Association in gaining exposure to the rest of you—so that you can get to know them, and so that they can become more comfortable in this organization. One of the main ways we accomplish this goal is by encouraging our members to participate in the work of the substantive committees. We have liaisons, varying in number from one to three, who participate as liaisons with 20 of the Association's substantive committees. Obviously we have more committees than that and we're trying to encourage our members to join those committees that currently have no Young Lawyer liaison.

We also encourage our young lawyers to give speeches, get their articles published and the like. We currently have a joint venture with the Tulane Maritime Law Journal. We were published in this summer's edition for the very first time. We put together an article on recent developments, which included five papers submitted by the members of this committee. We also already have in place the authors who are going to be submitting their papers by the end of this month for next spring's edition.

In addition, I just got finished talking with Robert Glenn of the CLE Committee and he informed me that his Committee has agreed to include the Young Lawyer's Committee in the CLE program in Kauai.

Yesterday we had a very short meeting, as everyone was anxious to leave in order to attend the Nicholas Healy lecture given by Lord Justice Staughton. Tom Wagner was kind enough to be our guest speaker. He enlightened us as to what it was like to argue the *America Dredging Company v. Miller* case before the Supreme Court. He had some very interesting insights. He also provided information regarding the Marine Ecology Committee and encouraged the young members to become involved in that Committee's work.

The last thing I want to mention to you is that this afternoon, the Young Lawyers Committee is a co-sponsor of the CLE program which will be right here 2:00. Lord Justice Staughton will speak this time on "Plain English for Lawyers and Some Plain Thought on General Average." I encourage everyone, young or not, to attend.

Thank you very much for all of your support while I've had this post. Maybe I'll see you again in some other capacity. I would like to say that if anyone ever considers me as a potential chair of a committee again, I would request that the committee begin with the letter A. And if it doesn't, my first job as Committee chair would be to change the name of the committee, so that it does start with the letter A! Thank you very much.

MR. HOOPER: Thank you, Denise, and we sure appreciate all your tremendous efforts. And we should note that Denise is now on the Board of Directors so she continues to play an active part in our Association.

Next is the Committee on the Centennial, Ted Cunningham.

MR. CUNNINGHAM: Thank you, Mr. President. I promise not to take more than 60 seconds and I'm going to be certain not to break that promise. I only wanted to say that this committee is beginning to plan for 1999 and if any of you have ideas or proposals, please contact me, whether by telephone or in writing, today or whenever. Thank you, Mr. President.

MR. HOOPER: Thank you, Ted. That was less than 60 seconds.

Any old business?

(No response.)

MR. HOOPER: New business?

(No response.)

MR. HOOPER: I guess it's time to ask Professor Healy —

MR. HEALY: Well, the motion I'm about to make would become unnecessary in a little while if I didn't make it now because of the departure of so many of our members from this meeting so I move we adjourn, Mr. President.

(Motion seconded and carried.)

MR. HOOPER: Thank you.

(Meeting adjourned at 11:42 a.m.)

FORMAL REPORT OF THE AD HOC COMMITTEE ON STATE CERTIFICATION PROGRAMS

I. INTRODUCTION

This committee was appointed in May, 1994 to consider the position and appropriate action of the Association in response to information concerning a proposal in the Florida Bar to establish a program for the certification of specialists in admiralty and maritime law in that State. Efforts to defer consideration of the proposal in committees while the MLA formulated a response were unsuccessful. We are now informed, however, that, when the proposal was submitted to the Board of Governors of the Florida Bar for approval in September, 1994, it was deferred for further study, along with two other proposals for new specialty programs,[1] and that it is uncertain when it will come up for consideration again, but probably not before December. This gives the Association an opportunity to state its views to the Board of Governors before they act upon the proposal and submit it to the Florida Supreme Court for approval, if that should be their decision.

In thinking about admiralty as a specialty, we have concluded that the matter could not well be considered in relation to Florida alone and should be treated as a national and long-term problem. The question has arisen before, not only in Florida but elsewhere, and can be expected to arise again. Our response to the Florida proposal should express policy developed on a broad basis, with a view to the good of the public and the perceived needs in various quarters for a certified admiralty specialty.

II. THE SPECIALIZATION MOVEMENT

The decline of generalism and the prevalence of practical specialization in commercial and industrial practices, at least in the larger cities, has long been evident. The pressure for official recognition of legal specialization began to be

[1] "Proposed certification standards for aviation law have cleared the Board of Governors, but the board tabled guidelines for business litigation, international law and admiralty and maritime law certification.

"The Program Evaluation Committee recommended approval of three of the four areas, but board members, acting at their Miami meeting, expressed reservations about two of those.

"PEC and board members said they were concerned business litigation had a significant overlap with civil trial certification. Members expressed the same reservations about admiralty and maritime certification and aviation law. Some board members also said they were concerned that aviation law was a very narrow area. . . .

"The board eventually voted to approve aviation law standards, which will go to the Supreme Court for approval in early 1995. It voted to defer standards for admiralty and maritime law, international law and business litigation for more study." *Florida Bar News*, October 15, 1994.

well documented in the MLA at least as early as 1952, when the President's Advisory Committee reported in response to concerns at that time about proposals for admiralty specialty certification. *See* Pres. Adv. Comm. Rept. 7/2/80, pp. 12 *et seq.*

Specialization programs embracing more and more fields have been set up in a number of States and the trend continues. The ABA has a standing committee on the subject, which deals with standards for certification and has itself once considered, but not adopted, a very detailed set of standards for certification of an admiralty specialty. It is too late to question the principle of specialization generally. The remaining questions concern what fields shall be included and how they shall be defined.

III. ADMIRALTY AND MARITIME LAW—THE SCOPE OF THE SUBJECT

"Admiralty" is a jurisdiction of the Federal courts, shared to a degree but not in its most characteristic aspects, with State courts. The functions not shared are adjudications of title and possession of vessels and cargo, partition, security for safe return, limitation of liability, enforcement of liens on vessels, cargo and freights (and therefore a number of contracts and events giving rise to them), maritime attachments, and the power to deliver clear title to a vessel. "Admiralty law" refers to the body of law and system of practice in the admiralty courts, starting with the limited jurisdiction of the Admiral's court in England, and expanding in the United States to embrace all, or nearly all, of the maritime law. Procedures in the exclusive admiralty jurisdiction of the Federal courts are, in a number of respects, distinctive and technically stringent.

The term "maritime law" was used in the Constitution and statutes to confer Federal jurisdiction and control of a broader body of law than was practiced in the English Admiralty Court. It "was doubtless added to guard against any narrow interpretation of the preceding word 'admiralty' ". J. Story, *Familiar Exposition of the Constitution of the United States* 94 (1840). It refers to a body of law for the most part controlled exclusively by Admiralty and applied in other jurisdictions to the maritime subjects permitted to them. *See generally* G. Gilmore & C. Black, *The Law of Admiralty* §1-1 (2d ed. 1975).

The admiralty and maritime law today embraces a number of international conventions and special statutes, as well as a rich and distinctive jurisprudence, all in the jurisdiction of the admiralty courts, and differs in many and sometimes complex ways from the common law of torts, contracts, and security. The general practice of it requires either personal or institutional understanding of its differences.

The practice of maritime law is, however, often seen as broader still than the admiralty and maritime law proper, embracing matters not within even the modern admiralty jurisdiction. These include: the commercial regulation of shipping, a subject akin to the regulation of other forms of transportation; shipbuilding contracts, which are common law construction contracts; and complex vessel financing transactions, apart from the preferred mortgages that figure in them. The "maritime practice" thus overlaps certain other areas of de facto, if not de jure, specialization, such as government regulation law, construction law, and security financing law. Also, much maritime industry concern today is with environmental laws, in which the maritime practitioner shares the field fully with those who concentrate on the representation of the petroleum industry. Throughout the practice runs the requirement of strong trial skills.

IV. TRADITIONAL RECOGNITION OF ADMIRALTY AND MARITIME PRACTICE

Historically the practice in England was by a segment of the bar known to concentrate, or be well-versed, in it. It was conducted in the Admiralty Court or Division, except as to maritime matters not within the English Admiralty jurisdiction, which have been mainly concentrated in the Queens Bench, and now the Commercial Court of the Queen's Bench. This historic division of jurisdiction in England is presumably responsible for the use of the terms "admiralty and maritime" in the United States.

In the United States, in the Nineteenth and Twentieth Centuries, the maritime practice was increasingly by lawyers in growing firms well-known to the general bar and maritime industries. The practice has been in and under the control of Federal courts in its most important technical aspects, in relation to the Admiralty's most important and characteristic powers, and as to definitive statements of its law. Maritime cases have often been brought in State courts. However, not only must all causes reserved exclusively to the Federal courts be brought there, but also all the other most important cases on maritime law have ultimately been decided in Federal courts, because it is in those courts that the law is made.

In the late Nineteenth Century and the Twentieth Century, the corpus of maritime law in the United States has undergone a vast growth in volume and complexity. This is the product of statutes on industrial injuries to seamen and harbor workers and on lost and damaged cargo, increasingly complex navigational rules and technology, mortgage and lien laws, shipping acts, marine financing and subsidy laws, and swingeing laws for the protection of the environment and governmental works, and the consequent body of court decisions

about all these matters. This growth has affected the capacities of individuals to embrace the field. "It probably can be stated conservatively that there is no admiralty or maritime lawyer fully qualified to represent clients in all phases of maritime practice." Pres. Adv. Comm. Rept. 7/2/80, p. 27.

V. SPECIALIZATION AND RECOGNITION

A. De Facto Specialization.

In the Nineteenth Century, when firms were few and small, some lawyers are known to have distinguished themselves in the maritime law, and they were probably competent in most of its corpus at the time. With the growth of both the law and the law firms, by the first quarter of the Twentieth Century, the practice of maritime law was concentrated in a few firms in each port, except for individuals representing personal injury plaintiffs, mainly seamen. Among and within many of those firms a tendency developed to specialize de facto in divisions of the maritime law, the principal ones being collisions and other vessel casualties, cargo and personal injury and death, with considerable overlap at points. As firms continued to grow, and in keeping with the general tendency of the bar toward de facto specialization, this trend has continued, and a number of de facto specialties, of which two or more may be practiced by an individual, can now be recognized, about as follows: (1) vessel casualties; (2) personnel; (3) cargo; (4) insurance; (5) finance; (6) regulation; and (7) environment. Pres. Adv. Comm. Rept. 7/2/80, pp. 27–28.

The practice is in fact therefore specialized in several of its parts and it would be idle to premise our position on the notion that admiralty and maritime practice is not a specialty, or rather more accurately, a group of specialties.

B. Public Designation.

The Federal courts historically admitted lawyers as "proctors" explicitly, until sometime after 1966, when all lawyers began to be admitted simply as "attorneys", since lawyers appearing in admiralty cases were no longer called proctors. The ABA and the States have historically recognized the Federal designation of proctors, and the prerogative of the Federal courts in this field, by permitting lawyers to designate themselves publicly as "proctors in admiralty".

It was noticed in this Association in 1980 that admiralty law had been recognized by the ABA "as a distinct field of specialization . . . exempt from advertising prohibitions" and that, in the overhaul of its Code of Professional Responsibility in 1976 "admiralty was retained as a historically recognized

exempted specialty". Pres. Adv. Comm. Rept. 7/2/80, p. 23 (Footnotes omitted).

Those admitted as proctors in the Federal courts could surely not be prevented from advertising the fact, as indeed they have traditionally done. The change in terminology in the Federal courts suggests several provocative questions: Did the Federal courts mean to recognize only a change in terminology or a broader change of status? Would the courts now say that those of us admitted as proctors could no longer say so? And is there a difference in the prerogatives of those admitted earlier and later?

C. Recognition by Clients and Perceptions of a Need for Publicity.

Most of the service and expertise in maritime law has historically been needed by sophisticated segments of the shipping industry and its investors, that is to say, ship owners and charterers, shipbuilders and repairers, vessel and cargo underwriters, and banks. These people and institutions make it their business to know the maritime bar. Seamen and harbor workers have been strongly unionized and their unions have directed them to experienced counsel to deal with their industrial injuries and employment rights. *See* Pres. Adv. Comm. Rept. 7/2/80, p. 27. The requirements of passengers and others falling outside these patterns were once not a very substantial or complex part of the practice.

This situation has been changed somewhat by several developments in recent years: (1) the proliferation of pleasure craft (and the marinas and other facilities to serve them) and claims arising from their navigation and maintenance and alleged defects; (2) the growth of the cruise industry and consequent increase in passenger claims; and (3) the emergence of classes of individuals and small enterprises claiming for environmental injuries.

The operators of pleasure boats and those injured on and by them are not part of the maritime "industry" and may be generally unacquainted with the maritime bar. The same is true of cruising passengers and of many of those claiming environmental injury. The family and neighborhood lawyers to whom these people turn sometimes turn to lawyers with maritime experience. Sometimes they do not. Even the underwriters involved in pleasure boat cases frequently employ counsel without significant maritime learning or experience. Some lawyers acquainted with these fields, who cannot rely on an established industrial connection or recognition, would like to be acknowledged as qualified and bring their qualifications to more general public notice. These changes place pressure on the traditional admiralty bar and its attitude to the advertising of a specialty.

D. Responses to Pressures.

In 1979, the ABA's Standing Committee on Specialization put forward a *Model Plan of Specialization.* In 1980, a Commission on Evaluation of Professional Standards appointed by the President of the ABA put forward a draft of new *Model Rules of Professional Conduct,* of which Rule 9.4, on indication of areas of practice, omitted the exemption previously stated for proctors in admiralty, apparently in recognition of the new movement represented by the *Model Plan of Specialization.* The MLA President's Advisory Committee Report was submitted to the ABA Commission and, at public hearings held by the Commission in 1980, the views of this Association were forcefully presented by our ABA Delegate, Herbert M. Lord, and prevailed, so that proctors in admiralty were restored to the language of exemption in Rule 9.4.

In 1981, the MLA, foreseeing that pressures would grow for recognition of an admiralty specialty, adopted the designation of Proctor in Admiralty as a foundation for moving more strongly onto the field and occupying it, if necessary, to forestall piecemeal State certification. Existing members were "grandfathered" into Proctor status and later members have been required to qualify by education and experience. The system has not been essentially changed since it was adopted.

A proposal was later advanced in the ABA to establish specific standards for admiralty specialization (attached as Exhibit A)[2], and there have been proposals in the States of Washington (now abandoned or dormant) and Florida. The ABA scheme defined the field somewhat broadly and would have required the aspirant to qualify in detailed ways by experience in some unspecified number of the following fields: CARRIAGE OF GOODS (including limitation, liens, arrests, attachments and general average); CHARTER PARTY (including arbitrations); COLLISION (including limitation, pollution, general average and salvage); SHIP FINANCING (including Title XI, making and foreclosing mortgages, liens, foreign registrations and tax aspects); and PERSONAL INJURY.

The Florida Bar is a leader among the States in designating specialties for certification. It presently recognizes eight and has others under consideration.[3]

---

[2]Copies of this and all other Exhibits are attached to the original of this report. Copies can be obtained from the Secretary.

[3]The present specialties are: Appellate Practice; Civil Trials; Criminal Law; Marital and Family Law; Real Estate; Taxation; Wills, Trusts and Estates; and Workers' Compensation. According to an ABA bulletin, Specialization *Update,* of August, 1994, the Board of Legal Specialization had also approved Immigration and Naturalization Law and Health Law and, as appears in note 1 above, it has approved Aviation Law, Business Litigation and International Law in addition to Admiralty and Maritime Law.

As the report quoted in note 1 above will suggest to some, questions of overlap or conflict may be expected as specialty certifications proliferate. The Florida scheme we now confront (attached as Exhibit B) is the admiralty certification scheme that has the most pressure behind it and has gone furthest. We understand that it has been fueled by the elimination from the Florida Rules in 1990 of the traditional exemption permitting proctors in admiralty to so describe themselves publicly, and possibly by a growing impression that the Florida Supreme Court favored a widespread certification system. The scheme has a comprehensive description of scope, embracing about the fullest conceivable breadth of maritime law and practice, which immediately highlights questions of realism and practicality. It would require an examination on selected topics within the field. In contrast with its comprehensive description of the practice, however, the scheme appears to require no breadth of experience, but only experience somewhere in the field, which might be in the handling of routine cargo claims or passengers' or seamen's injury claims. The scheme comes from the Admiralty Committee of the Florida Bar, in which it evidently has strong support. Notwithstanding a request from the MLA for delay, it was adopted by the Board of Specialization and sent to the Board of Governors for approval and submission to the Florida Supreme Court for adoption. The Board of Specialization has indicated that it would not approve the feature of the proposal that would "grandfather" some practitioners of long experience without examination.

A judicial response arising from another field of practice is *Peel v. Attorney Disciplinary* Committee, 496 U.S. 91 (1990), which holds that a lawyer may publicize his certification by the National Board of Trial Advocacy, and that lawyers similarly certified by private associations, at least when the certification requires substantial evidence of qualifications, may advertise that fact.

In 1993, the ABA adopted a scheme for accrediting organizations that certify lawyers as specialists under the rule of the Peel case. ABA Model Rule 7.4 formerly provided that, in jurisdictions with no procedure for certification of specialties or for approval of certifying organizations, a lawyer's advertisement of certification otherwise than by the State must clearly state the lack of such procedure. The ABA has now changed the Rule to allow specialists certified by ABA-accredited organizations in States that choose to adopt this provision of the Rule to communicate their certification without the disclaimer. The same Rule 7.4 continues to provide that "a lawyer engaged in Admiralty practice may use the designation 'Admiralty,' 'Proctor in Admiralty' or a substantially similar designation," and no change is known to be proposed in that portion of the Rule.

VI. MLA REQUIREMENTS

Membership in the Maritime Law Association of the United States as an Associate Lawyer requires being "interested in the objectives of the Associa-

tion", admission to practice before a court in the United States, the support in writing of two Proctor Members and the further interest implied by the fact that the member is willing to pay the dues. By-laws 201, 202, 209.

Except for those many members who were "grandfathered" into the Proctor designation when it was adopted, an applicant to be a Proctor must ordinarily have been a member for four years, have the support in writing of two Proctor Members and provide satisfactory evidence of experience and qualifications as required by the Committee on Proctor Admissions. By-law 203. While the Committee has required evidence of lasting interest and substantial experience in one or more of the divisions of the maritime law, it is safe to believe that its requirements have not approached qualification in all phases of maritime practice.

VII. REASONS FOR OPPOSITION TO STATE CERTIFICATION

A. Scope

Admiralty is too broad a subject to be a single specialty in the pattern of State specialization schemes. This is so because few, if any, people can be well-qualified in all of it. The difficulty is seen by examination of the ABA and Florida schemes attached.

The ABA scheme recognizes the breadth of experience that ought to be required by so broad a certification of competence. But it would surely admit few, if any, to the specialty if competence had to be demonstrated in all five of its stated topics. The narrowing of those topics, as a practical accommodation, to two or three chosen by the candidate, would result in misrepresenting the candidate's breadth of expertise to the public. The problem is aggravated by the probability that those most likely to seek the certification would be least concerned about the misrepresentation.

The Florida scheme is more radical and would appear to confer the accolade of general competence on a lawyer whose entire experience had been in the handling of routine claims of a single sort.

B. Competence

A State is not competent to establish standards and regulate the expertise in admiralty practice. The subject is under Federal control and restricted to Federal courts in its most characteristic aspects, and State bar committees will lack sufficient scope and depth in the subject to do the job in a reliable way unless, as

is unlikely, they could attract the commitment to the task of sufficient lawyers already distinguished in the practice, who would surely be among the most experienced members of the MLA.

C. Federal Prerogative and National Uniformity

Many practitioners hold certificates explicitly admitting them to Federal courts as "proctors". They, at least, must presumably be able to say so. In the *Peel* case, the Supreme Court cited against the Disciplinary Committee, and therefore without implication of criticism, the Committee's own rule permitting the advertising of the title "Proctor in Admiralty".

Because of its Federal character and the transient nature of maritime activity, the practice commonly crosses State lines and involves questions also crossing international boundaries, including complex questions of choice of law. Even were it legally competent to a State to establish standards for admiralty specialization, it would be presumptuous, in light of the Federal prerogative, the international implications of the subject and the reduced interest of the States. It will be possible for lawyers without State certification to advertise their concentration or interest in admiralty, including their MLA membership, in ways that would diminish the significance, if any, of State certification, and it is predictable that Federal courts will not support any claim to exclusiveness of the State schemes and will instead support the rights of lawyers whose competitive advertising of admiralty practice the State does not endorse.

Considering the national and Federal, and moreover international, character of the subject, the consequent need for substantial uniformity and the source of collective expertise for the purpose, there is no more likely or appropriate body to provide standards for admiralty and maritime specialization than the MLA, which embraces the lawyers undoubtedly best qualified to do so.

D. Unrealism

The Florida criteria are unrealistic and likely to be the foundation for a charade, since only a few, if any, people in that State or any other, with long and varied admiralty experience, and those few in broad-scale admiralty firms, or in academia with substantial experience also in practice, could qualify if the standards were administered with substantial integrity in relation to the announced scope of the certifiable practice.

E. Use and Abuse

The consumers of most of our services will not be interested in State certifications because they will know more about the competence of the bar than

will the certifiers; to them certification will be useless. The rest of the consumers are subject to being misled if the State certifies generally the practitioners probably most desirous of advertising certification; to them certification will be an abuse.

State certification will foster undesirable, misleading competitive advertising. Firstly, it will provoke the permissible competitive advertising of specialized qualifications by others in the State not so certified. Secondly, because of the national character of the practice and its frequent crossing of State lines, competitive advertising must be expected also between lawyers certified in one State and lawyers in another State, not so certified, for cases in the Federal courts of either State. This competition is clearly beyond the actual ability of a State to control. Such competitive advertising can only be confusing, rather than helpful, to the public, and contrary to the professional responsibilities and aims of the State bars as well as this Association.

VIII. RECOMMENDATIONS

A. MLA Certification or Designation

The MLA should promptly consider strengthening its qualifications and screening processes and either: (1) becoming a certifying organization for its properly qualified members as specialists in the admiralty and maritime law, under the aegis of the ABA and the *Peel* case; or (2) establishing itself in respect of its members as an alternative on another basis. We recognize that such steps may require organizational expansion and increased expense.[4] Specific recommendations of such steps are beyond the purview of this Committee.

In exploring an enhanced program, either independently or as an ABA approved certifying organization, we should seriously consider the ultimate designation of members in one or more sub specialties, for example, navigation, personnel, cargo, insurance, finance, regulation and environment, or combinations of such topics.[5] The argument against the breadth of the ABA and Florida schemes applies equally to the MLA, since it is questionable how many members could meet suitably stringent general qualifications and "grandfathering" is obviously not an acceptable answer in the long term and probably also not in the short term.

---

[4]The practice in some States at least is to defray the cost of a specialization program by fees charged the candidates and those certified.

[5]An analogy may be seen by those of us who read the certificates on the walls of our board-certified internists and observe that they are ordinarily certified by the board in one of the several subdivisions of internal medicine.

B. Action on the Florida Proposal and Others

The substance of the matter in topics III, V.B, V.C (para. 1) and VII above, appropriately edited, should be expressed by the MLA, through our President, to the Board of Governors of the Florida State Bar, and to the Florida Supreme Court if necessary, and to any other State bar known to be considering admiralty as a certified specialty, and to the ABA's Standing Committee on Specialization. The MLA should also urge the Florida Bar to recommend the restoration to its Rules of the traditional exemption for admiralty practice.

C. Representation

The MLA should take steps to be represented and continually active, if possible, on the ABA's Standing Committee on Specialization, and to promote its views there and benefit in turn from the thought and experience of that Committee in dealing with specialization questions.

D. Research and Writing

The MLA should commission for publication, at a high level of scholarship and policy judgment, an article on the subject of certification of admiralty and maritime law or its components as specialties, considered in relation to other certification programs and their aims, to serve as a thesis for continuing influence on the development of thought and policy in the MLA, the ABA and the State bars. The article would probably be most credible and influential if written by an academic, rather than a practicing, lawyer. It should be useful to discuss the scope of this project with some of our Academic Members.

E. Publicity

The MLA should seek publication of its views on this subject to the bar at large, through a news report in the ABA Journal and other periodicals reaching bar leaders, and should take particular pains otherwise to see that its views reach the State bars of all the maritime States.

Respectfully submitted,
Graydon S. Staring, Chairman

FORMAL REPORT OF THE COMMITTEE ON AMERICAN BAR ASSOCIATION RELATIONS

The 116th Annual Meeting of the American Bar Association was held August 4–10, 1994, in New Orleans, Louisiana. The meeting highlighted a year-long theme of finding "Just Solutions" to problems faced by the justice system and the profession. During the meeting, members had the opportunity to volunteer their time to work with several New Orleans public service agencies to construct a "Habitat for Humanity" home inside the Morial Convention Center that was later moved to a permanent site in New Orleans. As you may be aware, Habitat for Humanity seeks to eliminate impoverished housing and to make decent shelter a matter of conscience and action. The house will be occupied by a local needy family selected by Habitat officials according to criteria established by the organization.

The Business Assembly of the Association, which is comprised of all members of the Association who register for the Annual Meeting, convened on Monday, August 8 at 2:00 p.m. Because the Assembly lacked a quorum, no business was transacted, and any matters requiring action by both the Assembly and the House of Delegates, such as Constitutional amendments, House action will control. No assembly resolutions had been filed for consideration.

The House elected Roberta Cooper Ramo of Albuquerque, New Mexico as the Association's President-Elect and Martha W. Barnett as Chair of the House of Delegates. The President's gavel was passed to George E. Bushnell, Jr., of Detroit, Michigan who addressed the House of Delegates on Wednesday, August 10, 1994. In his address he stated that he believes that the House of Delegates is the ABA in that it reflects the changing face of the Association, and that the appropriate role for the ABA is to debate and reach consensus on the important issues facing the country in an effort to create a more just and tolerant world. He outlined several goals for the coming year, including: better support for the courts than is presently the case, enhancement of the work of the Legal Services Corporation, addressing the problems facing children today, assisting solo and small firms, and state and local bar associations, fighting violence and racism, and finally, celebration of the diversity of our nation. In his parting message, President R. William Ide, III of Atlanta, Georgia stated that he believes the duty of the ABA is to face and deal with the social and political issues facing this country at this time. He outlined a ten point action plan which he believes must be initiated to address the public's dissatisfaction with lawyers and the legal system. The action plan would: (1) deal with all forms of public complaints; (2) publicly denounce unethical action by lawyers and judges; (3) isolate undignified forms of advertisements and develop an advisory system to publicly notify those

whose advertising is considered undignified; (4) help people find good lawyers by assisting state and local bar associations in restoring credibility in referral services and by mounting a comprehensive, public service campaign that notifies people of the availability of such services; (5) help people avoid bad lawyers by working with state and local bar associations to establish something akin to local "better business bureaus"; (6) stop unethical solicitation; (7) address the "billable hours syndrome", (8) ask law schools to provide curricula that is more "practice-oriented" such as courses in ethics and client relations; (9) support our state and local bar associations; and (10) bring the public into the system by establishing a permanent non-lawyer advisory committee to the ABA.

The ABA medal was presented to Justice William Brennan for his work in the protection of individual rights and accepted by his son, William Brennan, Jr., a member of the House of Delegates.

M. Peter Moser, Treasurer of the Association, reported that the Association had completed negotiations to purchase a building to serve as the permanent facility for staff of the ABA's Washington office. The office will be housed at 740 15th Street, north of the White House. It is expected that occupancy will begin early in calendar year 1995. He also reported that the Standard & Poors Corporation gave the ABA an "AA" rating which is the highest rating achievable for a not-for-profit organization. He went on to explain that while dues revenues were below expectation, expenditures were as well, which resulted in a surplus of nearly $1,000,000. Of that amount, $500,000 has been earmarked to fund next year's programs. The balance has been set aside in a contingency fund.

Dean Robert Stein of the University of Minnesota School of Law was introduced as the new Executive Director of the ABA, succeeding David J.A. Hayes, Jr.

Howard H. Vogel was nominated and elected to the Committee on Scope and Correlation of Work.

Chair Anderson received and read to the House a letter from Boris Yeltsin commending the ABA on its work and extending his good wishes.

Alex Forger, a member of the House from New York and the new President of the Legal Services Corporation (LSC) reported to the House on the status of LSC. Mr. Forger observed that while the current administration and Board are friendly toward legal services, there remains hostility from Congress to providing proper funding for it. $500,000,000 has been requested for the next fiscal year, but it is anticipated that the appropriation will be less than that. Mr. Forger

noted that currently 40,000,000 people in the United States reside at the poverty level—the highest number since 1963. Obviously the need for legal services for the poor exists. The LSC continues to be subjected to hostile bills intended to "cut heart and soul out of the legal services program."

A brief summary of the items on which action was taken in the House of Delegates at the meeting follows:

ABA STRUCTURE AND GOVERNANCE

1. An amendment proposed to the Constitution that would have changed age eligibility for a young lawyer delegate representing a state or local bar association from less than thirty-five years of age at the beginning of his or her term to "less than thirty-seven years at the beginning of the term" failed to receive the required two-thirds vote to amend the Constitution. The vote was 198 to 116 against; 209 was needed for approval.

2. By two-thirds voice vote, the House approved an amendment to the Constitution to provide a mechanism to initiate a member referendum to change (but not initiate) an Association policy and to amend the Bylaws to clarify that law student members are not entitled to vote in an Association referendum. The mechanism provides that a referendum is initiated by filing a petition signed by at least eight percent (8%) of the Association's membership. No more than twenty percent (20%) of the required signatures may be members from the same state.

3. The House referred to the Special Committee on Governance a proposal that would have increased Section representation on the Nominating Committee and instructed the Special Committee to file all Constitution/Bylaw amendments by the filing deadline established for consideration of such proposals at the 1995 Annual Meeting.

4. Two additional proposals to amend the Constitution to increase Section representation in the House of Delegates and on the Board of Governors were withdrawn by the proponents.

5. The House approved Rules Concerning Campaigning for Office, effective August, 1994. These rules were developed pursuant to a House directive that the Special Committee on Governance recommend a plan to encourage adequate representation from all states and territories and from solo and small firms as officers of the Association. The adopted rules provide that a candidate's letter of intent to run for office shall be filed no sooner than eighteen months prior to the

midyear meeting at which the nomination will be made. No candidate or person acting on his or her behalf shall solicit a public or private commitment from any member of the Nominating Committee prior to the candidate's filing the letter of intent except the candidate's own state delegate. The new rules encourage Nominating Committee members to meet with candidates during the midyear or annual meeting and discourage travel by the candidates to the Nominating Committee members in their home states. Nominating Committee members are encouraged to afford candidates an opportunity to meet with other members of his or her delegation and to consult with such members before making a commitment. No candidate will sponsor or permit others to sponsor a reception or similar social function in support of his candidacy. Instead, the Nominating Committee will sponsor a "Meet the Candidates" social function at which candidates will be introduced and allowed to speak briefly.

6. By a standing vote of 267–150, the House approved an amended recommendation from the Special Committee on Governance that the American Bar Association pay its President a stipend of $100,000 and its President-Elect a stipend of $50,000 beginning at the conclusion of the 1994 Annual Meeting.

7. By standing vote of 48–58, the House failed to approve a recommendation submitted by the State Bar of Texas that requested the Special Committee on Governance to consider the establishment of three positions on the Board of Governors to be filled with racial and ethnic minorities. In the debate it was noted that racial and ethnic diversity is already at the forefront of all study and consideration currently being conducted by the Special Committee of possible revisions in the governance structure of the Association.

8. By voice vote, the House approved several amendments to the Bylaws that: dissolved the Standing Committee on National Conference Groups; dissolved the Standing Committees on Lawyers in the Armed Forces and Military Law and created a new Standing Committee on Armed Forces Law composed of members of both former committees; provide that the Standing Committee on Forum Committees shall consist of the current chairs of each Forum Committee and the chair of the Committee, who shall be appointed annually by the President and shall be a former chair of a forum committee; provide that the Standing Committee on Ethics and Professional Responsibility consists of 10 members; and reconfigured the Standing Committee on Professional Discipline so that it consists of 17 members after the 1994 Annual Meeting, 15 members after the 1995 Annual Meeting and 13 members after the 1996 Annual Meeting.

ADMINISTRATIVE LAW

By voice vote, the House approved an amended resolution with respect to the recruitment and selection of Administrative Law Judges that recommends that the Office of Personnel Management and Congress, where necessary, develop strategies to increase the percentage of women and minority applicants for positions on the Administrative Law Judge register of eligible candidates. In particular, there was a recommendation to eliminate the veterans' preference in selection. The second part of the resolution recommends the creation of the system for receiving and evaluating complaints or allegations of misconduct by an Administrative Law Judge and a system for receiving and evaluating allegations of unlawful agency infringement on decisional independence or other improper interference in the fulfillment of adjudicative responsibilities.

ANTITRUST LAW

By voice vote, the House approved a resolution urging the governments of the three signatories to the North American Free Trade Agreement (NAFTA) to work together to implement the competition and antitrust aspects of NAFTA.

2. By voice vote, the House approved a resolution presented by the State Bar of Arizona and cosponsored by the Standing Committee on Federal Judicial Improvements supporting legislation amending the Federal Rules Enabling Act to require that at least 50% of the membership of each Committee of the Judicial Conference of the United States recommending rules to be prescribed under 28 U.S.C. §2072 be practicing lawyers. This lack of appropriate representation of lawyers on the committees was brought to a head in 1993 when the ABA and various lawyers' groups across the country appeared before Congress to oppose the approval of proposed rules. A representative of the Appellate Judge's Conference opposed the resolution stating that such legislation would be in impingement on the Separation of Powers. An amendment by the Judicial Administration Division to make the resolution non-mandatory failed.

CRIMINAL LAW

1. The House debated the currently relevant topic of trial publicity and approved a resolution amending Rules 3.6 and 3.8 of the Model Rules of Professional Conduct to read as follows:

Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reason-

able person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in this matter.

(b) Notwithstanding paragraph (a), a lawyer may state:
(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
(2) information contained in a public record;
(3) hat an investigation of a matter is in progress;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case, in addition to subparagraphs (1) through (6):
(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

2. By voice vote, the House adopted the black letter amendments dated August, 1994 to Chapter XI "Discovery and Procedure Before Trial" of the 2nd Edition of the American Bar Association's *Standards for Criminal Justice*.

3. The House approved a resolution urging federal, state, territorial and local governments to support continuing research regarding victim-offender mediation/dialogue programs and to incorporate such programs consistent with the "victim-offender mediation/dialogue program requirements" dated April, 1994 into their criminal justice system.

FAMILY LAW

1. The House approved a resolution reaffirming its commitment to unified children and family courts previously adopted in 1980 and set forth in the ABA Standards Relating to Court Organization and Administration, Standard 1.1. By doing so, the ABA pledged itself to promote the implementation of such courts. The resolution clarifies various components of Standard 1.1, by explaining that one of the goals of such a special court would be the quick and economical resolution of disputes. Another is providing greater access and better services to all families who come in contact with the Court, particularly the poor. According to the report, recent conferences and studies support the concept of a unified court.

2. The Young Lawyers Division withdrew a recommendation calling for the enactment of state legislation that would institute courses designed to educate divorcing parents to the needs of their children, both during and after the divorce process and to provide that a court may, at its discretion, order that such courses be completed prior to the granting of a divorce decree. The recommendation was withdrawn to provide an opportunity for other entities having an interest in the subject the time to review it.

FEDERAL ELECTION COMMISSION

The House deferred action on a proposal to change the structure and the administration of the Federal Elections Commission (FEC) as a part of any new legislation affecting the regulations of federal campaign finances. While the report was submitted in time for inclusion in the bound book of reports with recommendations, those seeking to defer it argued that a matter of this importance warranted additional time for review and study. As of this writing, the proponents, the Standing Committee on Election Law, anticipate resubmission of this report for consideration at the Midyear Meeting next February.

GUN VIOLENCE

One of the liveliest debates of the meeting focused on recommendations presented by the Task Force on Gun Violence in conjunction with several local bar associations, the Sections of Litigation and Criminal Justice, the Government and Public Sector Lawyers Division, and the Standing Committee on Public Education. By voice vote, the House approved an amended version of the resolution, which had four major components. The first component dealt with education of the public about the causes, risks, and costs of gun violence, and the meaning of the second amendment to the United States which has been inter-

preted uniformly in the courts to mean that the right to bear arms is related to a "well regulated militia" and that there are no constitutional barriers to the regulations of firearms in private hands.

The second component calls for amendment of the Gun Control Act of 1968 to address deficiencies such as prohibiting persons convicted of any violent misdemeanor from acquiring a firearm and requiring persons with a "personal arsenal" (more than 20 firearms or more than 1,000 arms of ammunition) to obtain a special federal arsenal license.

The third component of the resolution dealt with more extensive control of handguns through background checks, safety training and increasing safety in the use of these through better safety features and increased tax on the sale of handguns and handgun ammunition. The final component of the resolution provided for a private right of action for victims of gun violence.

Governor Peter Langrock of Vermont led an effort to amend the resolution by eliminating some of its specific recommendations while maintaining its anti-violent philosophy. In proposing amendments to the resolution, he explained that he was speaking on behalf of those who live in more rural parts of the country where guns are used as tools in farming or ranching. While the statistics cited by the proponents were convincing, all amendments proposed failed. In speaking in opposition to the amendments, Dr. Johnston of the American Academy of Pediatrics cited a study which confirmed that if there is one episode of violence in a home leading to an emergency room visit, the risk of homicide in that home increases ten-fold. He added that one out of five teen deaths in the United States is due to firearms.

HEALTH CARE

After lengthy debate, by voice vote, the House declined to approve a resolution submitted by the Section of Antitrust Law that called for support of legislation that would provide access to quality health care and support legislation that enhances consumer access to diverse health plans and providers; supported legislation that encourages consumers to be more price-sensitive in the selection and utilization of health care services; urged that such legislation involve the minimum government regulation necessary to promote the goals of reform; opposed legislation that creates antitrust immunities, exemptions or special treatment for the health care industry that would discourage competition to the detriment of consumers; supported legislation that promotes competition among health care providers and plans for the benefit of consumers; opposed the creation of government-sponsored or private monopolies; and opposed the dis-

placement of competition with price regulation. Opponents argued that the rule appeared to rule out the single payor option which had previously been endorsed.

HOMELESSNESS

By voice vote, the House approved a resolution urging state, territorial and local bar associations to develop, support and lead state and local initiatives, projects and programs which address the many facets of evictions which lead to homelessness. These include review of relevant statutes, provision of counsel to low income persons, development of mediation as a solution to landlord/tenant disputes, the establishment of home owner and tenant assistance funds, and the education and training of the public about early intervention, financial assistance and legal rights for tenant problems. The ABA will cooperate in supplying expertise, clearinghouse services and other assistance to those state, territorial and local bar associations which undertake the programs and projects consistent with the intent of the resolution.

HOUSE RULES OF PROCEDURE

With one amendment offered during debate, the House approved several amendments to the House Rules of Procedure proposed by the Committee on Rules and Calendar. As approved, the amendments will:

1) provide that no materials can by distributed in the House of Delegates, except by a delegate, without prior authorization by the Committee on Rules and Calendar;

2) codify the process by which a non-delegate seeks the privilege of the floor and clarify that the extension of privileges of the floor to a non-delegate entitles the individual to speak once in the House of Delegates;

3) provide that following adoption of a motion to cut off debate, the person who presented the report with recommendation under discussion may speak for two minutes to close debate;

4) provide that all entities represented in the House, including individual delegates, comply with currently established technical requirements for submission of a report with recommendations to the House of Delegates; and provide that all affiliated organizations comply with all established filing deadlines for submission of a report with recommendations to the House of Delegates;

5) make stylistic and grammatical changes with respect to §45.3 Informational Reports, that do not affect the intention of the rule;

6) make stylistic and grammatical changes with respect to §45.8 Motions to Amend Recommendations that do not affect the intention of the rule; and

7) require that 100 delegates, present and voting, are necessary for a roll call vote.

INSURANCE LAW

A resolution opposing in principle, any legislation that would effectively prohibit lawyers from issuing title insurance policies on behalf of clients in real property transactions was withdrawn by the proponents, the Standing Committee on Lawyers' Title Guaranty Funds.

INTERNATIONAL LAW AND PRACTICE

1. By voice vote, the House approved a recommendation that recommends that the United States Government take action in cooperation with other nations to maintain and strengthen the international regimes designated to control the proliferation of weapons and mass destruction.

2. By voice vote, the House approved a resolution that urges the U.S. Senate to give its advice and consent as soon as possible to the ratification of the convention on the prohibition of development, production, stockpiling and use of chemical weapons and on their destruction.

3. By voice vote, the House approved a resolution recommending that the U.S. Government present a declaration recognizing as compulsory the jurisdiction of the International Court of Justice in all legal disputes concerning (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation subject, however, to certain exceptions.

4. By voice vote, the House approved a resolution recommending that the United States Government take an active role in the establishment of an international criminal court based on certain delineated principles.

5. By voice vote, the House approved a recommendation that the United States Government take steps to advance the promotion and observance of international human rights particularly by strengthening the Office of the United Nations High Commissioner for the promotion and protection of all human rights.

6. By voice vote, the House approved a recommendation that the United States Government support the creation by the United Nations, in addition to trained peacekeeping forces, of trained stand-by military forces for peacemaking and peace enforcement, composed of units from the national military forces of state members of the United Nations, which would be available on call by the Security Council under conditions prescribed in agreements to be concluded pursuant to Article 43 of the United Nations Charter.

7. By voice vote, the House approved a recommendation that the United States become a party to the 1982 United States Convention on the Law of the Sea and to the agreement relating to the implementation of Part XI of the United States Convention of the Law of the Sea of December 10, 1982 dated July 29, 1994.

JUDICIAL ADMINISTRATION

1. The House approved a resolution that urges state, territorial and local bar associations to actively work for the adoption of merit selection in jurisdictions where judges are elected, and to consider means of improving the judicial elective process, including campaign conduct and financing. Suggested methods for accomplishing this include seeking legislation to improve financial reporting requirements governing judicial elections, developing guidelines for ethical and proper conduct of such campaigns, educating the public and press about the nature of judicial work, sponsoring candidate forums and developing procedures for responding quickly to unfair criticism of judges.

2. After lengthy and heated debate, by voice vote, the House approved a resolution submitted by the Arkansas Bar Association, the State Bars of South Dakota, Georgia, Mississippi and the General Practice Section, opposing any legislation authorizing the installation of any mandatory arbitration program in U. S. District Courts where such participation is made a condition precedent to the right of litigants in civil cases to a trial before a jury or federal judge.

Senior U. S. District Judge G. Thomas Eisele of the Eastern District of Arkansas presented the proponents' arguments stating that the issue raised by the resolution was one of protecting the unabridged right of civil litigants in Federal courts to their right to a trial before a judge or a jury conducted in accordance with judicial standards of due process. He noted that at present, ten U. S. District Courts can deny this right under existing pilot mandatory programs. He further posited that the problem is pending legislation in Congress that almost passed last year, and if passed, would authorize every District Court in the United States to install mandatory programs. He stressed that while they do not oppose ADR as

a voluntary option, they believe strongly that litigants should have the opportunity to decide for themselves whether they wish to participate in such programs.

He further posited that several myths about the court system are misleading and have been fueling the debate. The first being that mandatory programs must exist because Federal courts are swamped and sinking under an ever increasing and burdening caseload. He offered that in fact, the number of cases each judge is responsible for has dropped consistently and reached the lowest point last year when it came to thirty. He said the second myth, that delays in the Federal court system are such that an alternative is needed to push these controversies to resolution at a shorter time, is not true because Federal District Courts remained stable during the 1970's and 1980's and that delays were about the same in 1986 as they were in 1971. He stated that he is of the opinion that little evidence exists to support the view that time to disposition has been lengthening noting the disincentives designed into these programs to discourage those who are dissatisfied with the arbitrators award from seeking a trial de novo.

Speaking in opposition to the resolution, Robert D. Raven, former President of the ABA and Chair of the Dispute Resolution Section, reviewed the history and development of ADR in this country over the last 18 years noting that in 1976, based upon positive results in the state courts with court-connected ADR, a task force was created to follow-up on the Pound Conference. The recommendation of the Conference was that experimentation begin in the Federal courts with arbitration. Then Attorney General Griffin Bell enlisted the cooperation of three Federal district courts: the Northern District of California, the Eastern District of Pennsylvania and Connecticut to undertake the experimentation. Later, in 1985, Congress authorized ten district courts to use court-annexed arbitration including both the Northern District of California and the Eastern District of Pennsylvania. In 1988, Congress mandated that the ten original districts continue arbitration programs and authorized the development of arbitration programs in ten additional districts to develop arbitration in a manner they wished.

Mr. Raven then reminded the House of the Association's current position in this area, which the House adopted in August, 1989, which provides:

> . . . that the Association support the continued use and experimentation with alternative dispute resolution techniques, both before and after suit is filed, as necessary and welcome components of the justice system of the United States. These dispute resolution techniques include early neutral evaluation, mediation, arbitration, summary jury trials and mini

trials. All alternative dispute resolution techniques should assure that every dispute is constitutional and other legal rights and remedies are protected.

Mr. Raven urged the continued experimentation and study of arbitration, and commented that if Arkansas doesn't need it they should not be burdened with it. He then discussed the legislation addressed in the resolution, HR 1102 noting that when he testified for the Dispute Resolution Section, before the House Judiciary Committee in May, 1993, HR1102 provided that the 94 United States District Court, could install or were authorized to install such programs. However, he clarified that on October 12, 1993 Representative Hughes amended HR1102 so that it substituted "shall" for "may". While a representative of the Section testified for before Senator Howell Heflin's Committee in the Senate, Mr. Raven explained that the Section did not support that mandatory charge.

Mr. Raven added that as he understands it, HR1102 is in Senator Heflin's subcommittee of the Senate and will remain there as long as the mandatory directive remains a part of it. As recently as the day prior to the meeting, Mr. Raven commented that he had spoken to members of Senator Heflin's staff was assured that there's no expected consideration of HR1102 in the Senate this year. In his opinion, the most likely action to take place will be a resolution to be adopted by the House and the Senate extending the present 20 districts another year.

3. By voice vote, the House approved a resolution that adopted various amendments to the *Standards Relating to Appellate Courts* dated May, 1994.

4. By voice vote, the House approved new *Model Rules for Judicial Discipline Enforcement*. These rules are the culmination of two years of work by the joint Subcommittee on Judicial Discipline representing the Judicial Administration Division and the Standing Committee on Professional Discipline.

LEGAL EDUCATION AND ADMISSIONS TO THE BAR

1. By voice vote, the House approved a resolution recommending that when making character and fitness determinations for the purpose of bar admission, state bar examiners should consider the privacy concerns of the applicants and tailor questions concerning mental health and treatment narrowly in order to elicit information about *current* fitness to practice law and further that fitness determinations may include specific, targeted questions about an applicant's behavior, conduct or any current impairment of the applicant's ability to practice law. The proponents of this measure represented that it was a compromise

version which would protect the public by barring applicants who are not fit to practice law. A representative of the Section on Individual Rights and Responsibilities moved to defer because the recommendation confirms the right of examiners to inquire into mental fitness without time limit and without standards. He also suggested that the recommendation would be a direct violation of the Americans With Disabilities Act. The motion to defer failed by a vote of 159 to 248.

2. By voice vote, the House approved a resolution urging that the training of lawyers include education in law practice management and client relation skills and that mandatory continuing legal education accrediting bodies give full credit for such courses.

3. By voice vote, the House approved an amendment to Standard 211 of the American Bar Association's Standards for the Approval of Law Schools to add sexual orientation to the categories of prohibitive discrimination.

4. By voice vote, the House approved a resolution granting provisional approval to the University of Seattle School of Law and deleting the University of Puget Sound School of Law from the approved list.

5. By voice vote, the House approved a recommendation that provides provisional approval to Texas Weslyan University School of Law.

6. By voice vote, the House approved the report of the Standing Committee on Legal Assistants which granted final approval, reapproval and extended the term of final approval for several legal assistance programs.

LEGAL PROFESSION

1. By voice vote, the House approved a resolution that any state and territorial regulation of investment advisors and financial planners allow a lawyer's exemption consistent with the Federal Investment Advisors Act. That is, exemptions of lawyers whose activities are solely incidental to the practice of the profession.

2. By voice vote, the House approved an amendment to Rule 7.4 of the American Bar Association *Model Rules of Professional Conduct*. The prior Rule required an attorney in jurisdictions where no appropriate regulatory authority existed for granting certification to state this in any advertisement. The new Rule exempts the attorney from making this disclaimer if the certifying authority has been accredited by the American Bar Association.

LEGISLATIVE OVERSIGHT

The proponents of a resolution that urged adherence to several principles when a legislative committee seeks information from a prosecutorial agency withdrew their proposal.

ADMINISTRATIVE MILITARY PERSONNEL

The House approved a resolution supporting the enactment of federal legislation to provide that advance medical directives prepared for members of the Armed Forces, their spouses and other persons eligible for legal assistance be recognized as lawful and given full legal effect notwithstanding state and territorial law. This resolution is intended to deal with such directives as living wills and health care proxies.

TAXATION

1. By voice vote, the House approved a resolution recommending that the Internal Revenue Code of 1986 be amended to clarify that the purpose of the penalty authorized by Section 6701 is to penalize conduct that results in the submission of false or fraudulent returns, that there is no statute of limitations regarding the assessment of this penalty and that the standard of proof necessary to support the assessment of the penalty is "clear and convincing evidence."

2. By voice vote, the House approved a resolution recommending that the Internal Revenue Code of 1986 be amended to simplify rules concerning employment taxes for domestic workers to increase compliance, reduce taxpayer burden and bring domestic workers within the Social Security and Unemployment Insurance safety nets.

3. By voice vote, the House also approved a related resolution concerning domestic employment, that recommends that the Internal Revenue Service announce that the non-filer program extends to the domestic worker employment cases allowing a grace period for filing unfiled returns interest free.

REAL ESTATE

1. By voice vote, the House approved a resolution urging certain amendments to the rules and regulations pertaining to the Real Estate Settlement Procedures Act (RESPA) so as to deter any anticompetitive effects of the statute and build in consumer protection limitations provided by attorneys and independent title agencies.

UNIFORM LAWS

1. By voice vote, the House approved a new Uniform Partnership Act promulgated by the National Conference of Commissioners on uniform state laws. This Act represents the first major revision of the Act since 1914.

2. The National Conference of Commissioners on Uniform State Laws withdrew a recommendation concerning the Uniform Statute and Rule Construction Act to provide additional time for review and consideration by entities having an interest in the subject.

WORKERS' COMPENSATION

By voice vote, the House approved a recommendation that states and territories promote the establishment of non-profit charitable organizations to receive donations and establish college scholarships for the benefit of children of workers' compensation claimants.

Respectfully submitted,
Warren J. Marwedel, Chairman

FORMAL REPORT OF COMMITTEE ON ALTERNATE DISPUTE RESOLUTION

At our Spring Meeting in 1994 the Committee on Alternate Dispute Resolution focused it's attention on defining the MLA and the Alternate Dispute Resolution Committee's role with respect to mediation/conciliation. Among the issues considered were:

(a) Training/education
(b) Who are the service providers?
(c) How should service providers be selected?
(d) Should the ADR Committee develop skill standards for mediators/conciliators.

Also, various comments/suggestions from the MLA membership regarding the MLA Rules of Conciliation were distributed. It was proposed the Rules be revisited for appropriate changes or modifications.

Since our Spring meeting there has been considerable dialog between the committee membership concerning the above. As a result, the committee's actions have and will continue to include the following:

TRAINING AND EDUCATION: The ADR Committee will identify and publish an informative list of mediation courses regionally available with emphasis on the mediation process and basic mediation skills.

MLA/MEDIATORS: The committee will prepare a questionnaire for distribution to it's membership for those members who wish to be listed as mediators. The list will be distributed to the maritime industry.

MLA RULES OF CONCILIATION: The Committee will revisit its recent "Rules of Conciliation" for changes and/or modifications on the basis of the comments received from its membership. During this process we continue to solicit comments from the MLA membership.

Respectfully submitted,
Robert G. Phillips, Chairman

FORMAL REPORT OF THE COMMITTEE ON CARRIAGE OF GOODS SUBCOMMITTEE ON CHARTER PARTIES

BIMCO's Documentary Committee will meet later this month and is expected to adopt a new BARGEHIRE charter for use in the offshore oil industry; a new MULTIDOC 94 multimodal transport document for use under the UNCTAD/ICC multimodal rules; a revised SOVIETWOOD timber charter; a revised PANSTONE charter for the stone trade; a revised GENCON charter for all dry cargo trades; and a new Return of Containers Clause making shippers responsible for delays by receivers in returning containers to a carrier.

The Documentary Committee may also adopt a new CONLEASE standard contract form for the rental of containers, although the major container leasing companies declined to support the project.

BIMCO has become discouraged with the lack of progress in its negotiations with the Argentine grain companies and is expected to discontinue efforts to revise the old CENTROCON grain charter.

My thanks to John Koster of Healy & Baillie for his helpful comments about the GENCON and CENTROCON charters as well as to Dan Samford of Monsanto for his suggestions about CONLEASE.

BIMCO is still considering a draft of the FUELCON form for the purchase of bunkers. I am grateful to William Burke of Omnium Agencies for his com-

ments. Anyone else who would like to review the draft and make suggestions to improve it should please get in touch with me.

Respectfully submitted,
Michael Marks Cohen, Chairman

FORMAL REPORT OF THE COMMITTEE ON THE COMITÉ MARITIME INTERNATIONAL

The Assembly of the CMI held in Sydney on October 8, 1994 elected the following officers under the provisions of the new 1992 Constitution:

Four-year terms

President—Dr. Allan Philip, Denmark
Vice-President—Prof. Hisashi Tanikawa, Japan
Secretary-General—Dr. Norbert Trotz, Germany
Treasurer—Henri F. Voet, Esq., Belgium
Administrator—Baron Leo Delwaide, Belgium
Executive Councillors—Maitre Jean-Serge Rohart, France
—Dr. Frank L. Wiswall, United States

Three-year terms

Executive Councillors—W. David Angus, Q.C., Canada
—Karl-Johan Gombrii, Esq., Norway

Two-year terms

Vice-President—William R. Birch Reynardson, United Kingdom
Executive Councillors—Patrick J.S. Griggs, Esq., U.K.
—Ronald J. Salter, Esq., Australia

One-year terms

Executive Councillors—Luis Cova Arria, Esq., Venezuela
—Dr. Rolf Herber, Germany

The Assembly also admitted to membership the Maritime Law Association of Malta, bringing the number of Member National Associations to 54.

The new Executive council following the Assembly appointed several working groups:

Off-Shore Mobile Craft—Richard Shaw (Chairman), Edgar Gold and Hisashi Tanikawa;

Third-Party Liability—Patrick Griggs (Chairman), Jan Ramberg, Norbert Trotz and Karl Gombrii;

Classification Societies—Frank Wiswall (Chairman), Karl Gombrii, William Birch Reynardson and Jorgen Bredholt;

Hamburg / Hague-Visby—Francesco Berlingieri (Chairman), Frank Wiswall (Rapporteur), Roandl Salter, Jean-Serge Rohart and David Angus;

Wreck Removal—Bent Nielsen (Chairman), Erik Japikse and Patricia Birnie;

Nominating Committee for 1995—Nicholas Healy (Chairman), Allan Philip and Francesco Berlingieri (*ex-officio*), Jan Ramberg and Niall McGovern;

Centenary Conference Planning—Allan Philip (Chairman), Francesco Berlingieri, Patrick Griggs and Frank Wiswall.

The next meeting of the Executive Council will be in Brussels, 19 May 1995, followed by the 29th Assembly on 20 May.

Respectfully submitted,
Dr. Frank L. Wiswall, Chairman

FORMAL REPORT OF THE COMMITTEE ON CRUISE LINES AND PASSENGER SHIPS

The Cruise and Passenger Ship Committee of the MLA held its Fall Meeting at the Seamen's Church Institute in New York City commencing at 10:00 a.m., Thursday, March 3, 1994. The meeting was well attended with forty-seven (47) members, as well as eight (8) guests, including the U.S. Coast Guard Office of Marine Inspection for the Port of New York, cruise ship line representatives, P & I Club representatives, and a representative of the Republic of Panama. Our guest speaker was Ensign Charles V. "Bud" Darr, U.S.C.G., New York who gave an extremely interesting and useful presentation concerning inspection of passenger vessels at the Port of New York. There was both a formal and informal question and answer session with the U.S.C.G. representative.

The Committee also discussed pending legislation on the Federal level that would impact the cruise industry, as well as recent cases of interest around the country in both the state and federal courts.

The Committee is exploring the possibility of sending out a newsletter on points of interest to the industry.

The Committee is also hopeful that they will be able to participate at the upcoming Maui meeting in the fall of 1995 through a seminar program which would involve a hypothetical collision between an oil tanker and passenger ship in Hawaiian waters, with a walk though of the events and the various responses of the parties and other involved entities.

Anyone wishing to join the Committee and participate should contact the Chairman.

Respectfully submitted,
Reginald M. Hayden, Jr., Chairman
Ann Miller, Vice Chairman

FORMAL REPORT OF THE COMMITTEE ON MARITIME FRAUD AND CRIME

The Committee on Maritime Fraud and Crime met in New York on November 3, 1994. There was a general discussion of matters of interest in the news and elsewhere touching upon maritime law and criminal law, including news reports of several recent incidents.

The Committee then discussed pending and future matters. Work continues on a paper entitled "How the System Works," which will be an outline of how a criminal case is processed through the United States Department of Justice. There was also a discussion on the recent amendments to the Pomerene Act.

Subcommittees have been appointed to undertake two projects, which will be completed during 1995. The first is an analysis of the maritime aspects of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103–322 ("1994 Crime Control Act"). It was noted that there are numerous matters in the 1994 Crime control Act which concern the marine industry. Another subcommittee has begun work on a paper for the MLA membership on the criminal aspects of OPA '90, which will include a discussion of the practical aspects and problems encountered by an attorney or shipowner involved in an oil spill.

It is expected that these projects will be completed and available for circula-

tion throughout the Maritime law Association of the United States by the October, 1995 Meeting at Kauai, and possibly by the May, 1995 Meeting in New York City.

Respectfully submitted,
George J. Koelzer, Chairman

FORMAL REPORT OF THE COMMITTEE ON THE INTERNATIONAL LAW OF THE SEA

The regular semi-annual meeting of the MLA's Committee on the International Law of the Sea was held in the New York offices of Hill, Rivkins, Loesberg, O'Brien, Mulroy & Hayden on the morning of November 2, 1994.

This was an especially propitious meeting for our Committee given the coming into force on November 16, 1994 of the United Nations Convention on the Law of the Sea, which was first promulgated back in 1982. Significantly, the Convention will come into force with the support of the United States of America and other developed nations.

Given the coming into force of UNCLOS 1982, specific attention was returned to the Committee's work on revision of the U.S. Piracy Code, and it was agreed that Chairman Rice would work with President Hooper to propose to Congress and the Department of State enactment of this needed legislation, especially in view of the fact that the Piracy Code was last amended in 1847.

Chairman Rice also reported to the Committee on the work of the CMI Conference at Sydney in respect of mobile offshore craft, which was also the subject of a special meeting of the Committee held in Houston, Texas on September 17, 1994. A more detailed report by Chairman Rice on the results of the CMI Conference in Sydney appears in the MLA Report dated October 31, 1994, Document No. 712.

The Committee is also working on a presentation in consultation with the Seaman's Church Institute on the subject of piracy.

Respectfully submitted,
Winston Rice, Chairman

FORMAL REPORT OF THE COMMITTEE ON LIMITATION OF LIABILITY

The Committee on Limitation of Liability met in New York on Thursday, November 3, 1994, and discussed the following:

1. *Possible Revision of the Convention on Limitation of Liability for Maritime Claims, 1976 ("LLMC 76").*

The Committee has been following the progress of the IMO Legal Committee with respect to possible amendments to LLMC 76, which are being considered by the Legal Committee as it continues developing a draft Hazardous and Noxious Substances Convention. The 71st session of the Legal Committee took place in London between October 10 and 14, Neal Hobson attending on behalf of the MLA and as an Adviser to the United States Delegation. LCDR Steven D. Poulin, USCG, who served as the Alternate Head of the U.S. Delegation to Legal Committee, gave a summary to our Committee with regard to matters affecting LLMC 76.

It is anticipated that the HNS Convention and amendments to LLMC 76 may be considered at a Diplomatic Conference in 1996. The possible amendments to LLMC 76 fall into two general categories: (1) those driven by the HNS Convention and (2) those which may be made independent of the HNS Convention.

Amendments in the first category relate to the concept of linkage between the HNS Convention and other limitation of liability regimes. "Linkage" means the handling of HNS claims in a general limitation of liability fund along with other types of claims. The original version of the HNS Convention would make it optional for countries to require HNS claims be made in a limitation of liability proceeding under LLMC 76, for those countries adhering to that convention, or national law, for other countries (which include the United States). A special supplemental fund in the limitation of liability proceeding would cover HNS claimants up to the HNS Convention limits, to the extent hat they were not satisfied from the general limitation fund.

At the 71st session the majority of delegates favored changing linkage between the HNS Convention and limitation to mandatory from optional. The necessary amendments to LLMC 76 are being considered. Since the United States is not party to LLMC 76, the amendments would not directly affect us. However, an HNS Convention requirement for linkage to national limitation law (where LLMC 76 is not in force) would require amendment to our limitation law

if the United States were to become party to the HNS Convention. All of this is somewhat speculative at present, but this Committee will continue to follow the matter.

As to LLMC 76 amendments in the second category, the thought continues that the limits need to be increased for inflation and that a procedure to amend the convention for technical revisions without a Diplomatic Conference should be developed. At the 71st session of the Legal Committee it was the consensus that the limit for passengers should be increased to 175,000 SDR per passenger to match the Athens Convention (although Athens bases the limit on passengers carried while LLMC 76 uses passengers allowed). There is also overwhelming sentiment to abolish the overall 25,000,000 SDR cap for passengers. Our Committee is maintaining a watching brief on these developments since low limits were the principal reason the United States did not sign LLMC 76.

2. *Recreational Boat Limitation*. Despite doubts about the application of our limitation laws to recreational boats, limitation has been applied by all Courts of Appeal to consider the issue to date. Nevertheless, in many cases the owner is also operating or aboard the boat when an accident occurs. In such a case the question arises as to whether the owner can maintain an action seeking exoneration or limitation, since, if not exonerated,presumably any fault would be within the owner's privity or knowledge. It was noted that several recent cases have reached results which are not entirely consistent on this subject: *Polly v. Carlson*, 1994 AMC 2878 (E.D. Mich.) (allowing) *Marine Sports Lim. Procs.*, 1994 AMC 1678 (D. N.J.) (D. Md) (disallowing); *Cirigliano Lim. Procs.*, 1989 AMC 999 (allowing). It was suggested that cases on this subject be brought to the attention of the Committee to see if there is a problem with lack of uniformity.

3. *Statistical Study of Limitation Cases*. In 1982, a study of limitation cases for the period 1953—1981 was published by the MLA (Document No. 640). This showed the statistical results of published cases where the right to limit was granted or denied, the types of casualties, types of vessels, types of claimants, nationalities of vessels (U.S. or foreign), and categories of reasons where limitation was denied. Although the study is a dozen years old and could be up-dated, it was the consensus of the Committee that there is presently no activity occurring which would warrant the effort to do so.

Respectfully submitted,
Donald C. Greenman, Chairman

FORMAL REPORT OF THE COMMITTEE ON MARINE FINANCING

David McI. Williams, Chairman, called the Committee Meeting to order on November 2, 1994 at 2:30 p.m. at the offices of Haight, Gardner, Poor & Havens, New York, New York. The Members of the Committee, additional Members of the Association, and Guest listed in Exhibit A to these minutes were in attendance.[1] Using the same reference numbers as appear in the Meeting Agenda, attached as Exhibit B, the following matters were covered:

I. Dave Williams announced the passing away of Peter Lippman on August 3, 1994 and that all will miss him not only as the Chair of several subcommittees of the Committee, but as a great friend. A moment of silence was held.

Mr. Williams also announced the filing of the amicus brief prepared by Dave Williams, John Edginton and Bruce King in the appeal to the Eleventh Circuit in *Dietrich v. Key Bank, N.A.*, 693 F. Supp. 1112 (S.D. Fla. 1988), a case involving the peaceful repossession of a vessel by a mortgagee. Hopefully this appeal will reverse the *Fogle* case, which limits a mortgagees' remedies to judicial foreclosure. The reply brief is due in about two weeks and a decision is expected next year.

The Minutes of the last meeting held on May 4, 1994 were published in the October 31, 1994 MLA Report including the BIMCO Salesform Subcommittee Report.

II. Thomas L. Willis, the Chief of the Coast Guard Vessel Documentation and Tonnage Branch addressed the amendment to 46 U.S.C., Section 12102. He stated that Coast Guard documentation officers may not accept a surrender of state title for a yacht and then document the yacht. Some agreement must be obtained with the States on surrender of title.

Under the amendment to Section 12102, after the Secretary approves a State titling system, if a vessel is "titled" and then documented with a preferred mortgage, there is a possibility that the mortgage will not be valid because a titled vessel cannot be documented.

Mr. Willis then discussed the consolidation or centralization of the fifteen documentation offices into one office to be located in Martinsburg, West Vir-

[1] Copies of this and all other Exhibits are attached to the original of this report. Copies can be obtained from the Committee Secretary, Charles D. Brown of New York.

ginia, the location of the central computer. It is inevitable that the consolidation will happen. Documentation papers and mortgages can be faxed or eventually be sent via E Mail (electronic transmission via computer) to Martinsburg and the Coast Guard will give up to ten days for the hard copies to be received. The recordation date will be the date of the sending of the fax provided the originals are received within the ten day period from the date of the fax transmission. The Coast Guard has proposed an amendment to 46 U.S.C. Sections 121 and 313 to permit the electronic filing.

Bob Poster and his subcommittee on Coast Guard matters have suggested such amendments to make certain that faxed copies of documents such as bills of sale, mortgages, satisfactions and other related instruments will be sufficient for "filing". There is a preliminary Coast Guard opinion that, in effect, that a faxed document may have the legal effect of a signed original but none of Bob Poster's committee members would back up such an opinion. Poster suggested that in the interim period before the passage of a new amendment, originals of documents could be delivered to Coast Guard officers as, for example, in New York, for forwarding to Martinsburg or at any former documentation port or that the document could be sent ahead of time to Martinsburg to be prepositioned. Some of the mortgages may be 300 pages in length when exhibits are added.

A discussion followed on how to shorten and simplify mortgages such as deleting the acknowledgements or using a British type of statutory one page mortgage or Uniform Code financing statement type of notice, but Mr. Willis added that if the proposed amendment for electronic filing became controversial, then hearings would have to be held and the matter may be delayed for a year or more. A motion was made at the Marine Finance Committee meeting and a resolution for transmission/filing by electronic means was unanimously passed in form of Exhibit C. Other matters for simplification of mortgages were put off for a future date.

Mr. Willis then stated that he thinks the Coast Guard has authority to delegate to the States the power to issue temporary certificates of documentation for yachts and other recreational vessels. Car dealers usually have the authority from a State to issue temporary car registrations so a car buyer can leave the showroom with a temporary registration. Documentation Services could do the same for yachts if the Coast Guard delegates its power to the State and the State in turn authorized the Documentation Services. An association of documentation services might be given this authority.

Mr. Willis also confirmed that to ease the impact of centralization of the Coast Guard documentation offices, Customs will accept a faxed copy of a

newly issued marine document so a vessel can clear port without the original document being aboard the vessel. In addition, in large commercial transactions the Coast Guard will be able to preclear and prepare the marine document in advance of the closing date leaving the date blank on the new marine document. The old rule that a valid mortgage could only be executed and delivered after the vessel had been documented was discussed (the vessel must be documented anew as a vessel of the United States and the mortgage must be valid under state and federal law) and as long as the mortgage was valid, the mortgage can be executed before a bill of sale was filed and be prepositioned for filing.

Credit cards such as a Visa or Master Card types from Mellon Bank may be used to pay Coast Guard fees. There is a possibility that lawyers or Documentation Services can set up an account with Coast Guard to pay fees. An 800 phone number will be established to answer questions regarding documentation and to provide phone mail.

III. Keith Cameron of the Coast Guard Information Management Branch gave a brief discussion of the Vessel Identification System. A copy of the *Notice of Proposed Rule Making* appearing in 58 Fed. Reg. 51920 of October 5, 1993, was handed out. The system is called *Vessel Identification and Documentation System* (VIDS). There will be two central computer systems in Martinsburg, one to assist Tom Willis in regular documentation and the other for the Vessel Identification System which will electronically give access to numbering and titling information as well as for documented vessels on a nationwide basis. The system is still voluntary for States insofar as obtaining preferred mortgage status for mortgages on vessels titled with the States that meet the Secretary's guidelines. Data bases of participating States and the Coast Guard will be linked together and information can be exchanged as to title, lien and to identify vessels on a nationwide basis. Some time in 1996 the Coast Guard will have an operating system to which States can sign on. [States will decide who can sign on and levy a user fee.]

One unanswered question was brought up by Dave Williams in that once the system is up and a yacht obtains her State title, it will be impossible to document the vessel until her title is surrendered. See 46 U.S.C. Section 12102. The mechanics of surrendering title have not been worked out.

IV. Jeff Hoedt, Coast Guard's Assistant Chief of State Affairs Branch, discussed Hull Identification Numbers, and Manufacturers' Certificates of Origin set forth in the *Notice of Proposed Regulations,* 59 Fed. Reg. 23651 of May 6, 1994. Jeff is working with the States and the National Association of State Boating Laws's Numbering and Title Committee to work out a 19 number boat

identification system similar to a VIN number for a motor vehicle to aid in law enforcement and to provide useful information about vessels in general. The Certificate of Origin is to be on an approved form as set forth in the regulations. Dave Williams' concern in connection with the amendment to Section 12102 was what to be done if a State titled a vessel and the owner tries to document the vessel. There are no Regulations concerning the surrender of a State title. There must be a uniform method of surrendering a State title to enable a yacht owner to document a boat. In addition, there is still a need to consolidate a Manufacturer's Certificate of Origin and a Certificate of Origin to deter possible fraudulent transfers when a boat owner can number a boat in one place with a Manufacturer's Certificate of Origin, and document the boat in another with a Certificate of Origin. In other words, there should not be two title documents outstanding at the same time. The Coast Guard is considering a workshop on HIN and matters relating thereto.

V. Richard Barnett proclaimed that a new dawn has arisen! A foreign shipowner has actually ordered up to 4 new 46,000-dwt product carriers from a United States Yard which is a first since about 1957. Dick announced the signing of a commitment for the Title XI guarantee for the $140 million dollar ship loan by Secretary Pena and witnessed by Senator Warner and Senator Robb at Newport News for Dick's client, the Eletson Corporation, of Greece. The vessels will be built by Newport News and fly the Greek flag. The United States will guarantee through its Title XI program 87-1/2% of the loan and the term will be up to 25 years. The vessels will be of a very modern design. Will this "Export Vessel" loan be the start of a revitalization of our shipbuilding industry? The Maritime Administration required usual legal opinions from Greek lawyers and Liberian lawyers. The ship owner is Liberian and the vessels will fly the Greek flag. The vessels are priced competitively and are of high quality for the world market. Dick thinks that there is a future for the United States in shipping and that our Yards will be expanded rather than be contracting. Newport News is now fully booked for the immediate future.

VI. Emery Harper kept the Committee up-to-date on the International Convention on Liens and Mortgages by stating that nine nations have signed the Convention which will go into effect after ten nations sign the Convention. UNCTAD has established a series of workshops to be given by the Joint International Group of Experts ("JIGE"), which will review the 1952 Arrest Convention in Geneva. Emery hopes but is doubtful that JIGE will consider the enforcement of ship mortgages, the law of which is still like a jungle worldwide. Emery will follow the studies with the Coast Guard.

VII. David McI. Williams gave a status report of the Alternate Remedy Amendment that will overrule the *Fogle* case, 673 F. Supp. 305 (N.D.Cal.

1985). Attached as Exhibit D is a copy of the Committee's comments to Congressman Owen Pickett's discussion draft of the Amendment. Comments on the Discussion Draft should be sent to Bruce King. The non-controversial Bill will hopefully go before Congress in January 1995.

VIII. Bob Zapf's Ad Hoc Subcommittee on OPA '90 Concursus of Claims involves the Marine Finance, Practice and Procedure, and Marine Ecology Committees. John Edginton, Laurie Frost and Ed Cattell actively participated in the meeting. The main problem is what happens when there is a multiple jurisdiction oil spill. Can a vessel involved in such a spill post security and then continue to trade? Can there be a concursus of claims in one court? P&I Clubs will not issue security if a vessel is first arrested in an *in rem* action because the vessel may still be subject to state court attachments under State pollution laws. There are no clear rules or legislative fixes that would enable a federal court to stay all litigation and decide all problems in one forum. If security cannot be obtained to free the vessel from arrest or attachment, then can there be a concursus? The recent Tampa spill may have a practical effect in a limitation action one forum is presently deciding all actions. The subcommittee will now prepare a focus paper that can be disseminated to the other three committees in time for the next Committee meeting.

IX. Subcommittee Reports.

(i) *Coast Guard Documentation Citizenship and Related Matters.* Bob Poster presented his Agenda for the meeting with attached exhibits. See Exhibit E hereto. The subcommittee extensively discussed the Coast Guard consolidation of offices and the problem of the Coast Guard's current position of the legal effect of faxing or transmitting documents via E Mail as duplicate original documents capable of being filed. None of the subcommittee would give an opinion that such faxed filing would be effective. A proposed resolution was adopted by the subcommittee recommending that *Title 46* be amended to permit faxed filings in Chapters 121 and 313. An amendment to Section 12102 was requested by the subcommittee last May and approved by the MLA to make consistent a documentation citizen corporation which is a general partner in a partnership with the requirement for such a citizen as a sole corporate owner. In addition, it was proposed that Section 31329 entitled *Court Sale of Documented Vessels* be amended to permit preapproval of sales to aliens. Tom Willis also stated that he will also propose an amendment that would permit court sales of fishing vessels and yachts to aliens without any further approvals since the owners of such vessels are now free to transfer them to an alien. Limited Liability Companies are a new type of owner that is being scrutinized by the Coast Guard on a State by State basis to determine whether such an entity is an

association, in which case, all of its members must be citizens or treated like a partnership or corporation. There are different Coast Guard internal rulings and memoranda in effect and Tom Willis will provide the Committee with copies of such rulings. The new *Title XI* regulations seem to require opinions from local lawyers in places where a vessel will serve. Dick Barnett assured us that in the Eleston financing, this requirement was not raised. If required, conceivably an opinion from each major port in the world would be required for a containership on an around the world voyage. It is customary for New York lawyers to give opinions on general Delaware law and Liberian law.

(ii) *Maritime Liens and Mortgages*. Frank Nolan chaired the meeting and introduced John Prichard, an expert in aircraft financing, to explain how a central registration for registration of aircraft and filing of mortgages in Oklahoma under the *Federal Aviation Act of* 1958 works in light of the looming centralization or consolidation of Coast Guard offices. Documents are sent to Oklahoma usually by Federal Express and there are about four major firms who give opinions on filing of documents and registration of aircraft. These firms usually give two opinions—one on the day of the closing, and the second on recordation. Many of the documents have handwritten inserts. See also discussion in II above.

(iii) *Taxation*. Bruce D. Garrison reported on recent IRS activity on the Section 883 exemption for exempt corporations that are more than 50% owned by foreigners, provided a similar exemption is given by the country where the corporation is incorporated and the difficulty in determining the 50% interest in publicly held corporations. Guidance from the IRS is needed and will be forthcoming next year. Three other items of interest were Customs' user fees in connection with the audit of cruise liners in the Miami area, employment taxes for non-resident aliens, and state taxes—New Jersey has finally agreed to recognize the § 883 exemption. Attached as Exhibit F are the Agenda and Minutes of the Tax Subcommittee meeting.

(iv) *Vessel Foreclosures and Insolvency*. Bruce King recommended that vessels get the same treatment as aircraft in the new amendment to the Bankruptcy Reform Act laws Section 1110—a special relief after a 60 day stay from a stay order now accorded aircraft and I.C.C. Certificated vessels. The model foreclosure forms that Lars Forsberg is editing will be circulated before the next meeting and later compiled in Benders.

In connection with the Article 9 revisions by the American Bar Association's Committee headed by Steve Weiss, we should send comments through the new Chairman, Tom Russell, who has replaced Bruce King as the Chair of the

Committee on Maritime Financing of the American Bar Association. Charlie Donovan is also working on issues of freights and subfreights. In addition to assignments of earnings of a vessel and freights, such topics as warranty of title in foreclosure and sale of vessels, assignment of charter parties, assignments of insurances and proceeds and security interests in deposits in banks will be covered. Any comments should be sent to Bruce King.

Another convention to monitor and watch is the Unidroit Convention on Security Interests in Mobile Equipment including ships. Charlie Donovan will track this convention.

In *Kessby v. Inga G,* a Ninth Circuit case, a crew's wage claim lien attached to equipment owned by an equipment lessor aboard a vessel on grounds that the equipment was essential to the navigation of the vessel. The usual rule for a mortgage lien priority is that a mortgage lien will only attach if the equipment cannot be readily removed from the vessel. 1994 West Law 380541 No. 93–35–165.

(v) *Yacht Financing. See III. and IV. above.*

Bob McIntosh Chaired the Subcommittee Meeting and both Keith Cameron and Jeff Hoedt participated.

There being no further business, the meeting was adjourned.

Respectfully submitted,
Charles D. Brown, Secretary

FORMAL REPORT OF THE COMMITTEE ON MARITIME ARBITRATION

Since the meeting of this Association in May, the Maritime Arbitration Committee has held two meetings, one on September 13, 1994 and another on Wednesday of this week. The Subcommittee on Liaison with the Society of Maritime Arbitrators (SMA) has held three meetings.

In cooperation with the SMA, the Liaison Committee tackled one of the major concerns of the arbitrators and a thorny problem for the attorneys, that is the arrangement of security for the fees of the arbitrators. In the past, it has sometimes occurred that arbitrators have difficulty collecting their fees, particularly against the losing party. The establishment of a formal escrow in the name of the SMA was not a popular solution in the eyes of a number of clients and their

maritime lawyers. The practice of holding a deposit in the attorneys' special accounts has not always been satisfactory, especially when clients instruct their lawyers not to pay the fees. The Liaison Committee took up the task of preparing a form of escrow agreement which would secure payment of arbitrators' fees and yet avoid the risk and expense of an advance payment of fees into an SMA Account or bank account.

The Liaison Committee utilized a working group and several meetings to develop a short form of escrow agreement in which the attorneys for the parties will hold the deposits in their own special accounts, yet the funds would not be subject to their clients' control. The form was presented to the full Committee at this week's meeting. It was discussed and some minor changes were suggested. The final form will be attached to the next formal report of this Committee.

The Committee's Subcommittee on Education has again sponsored a series of seminars for the training of arbitrators. The first of these programs was held in September and another will be held this month.

Our Committee has established a new liaison with the ADR Committee of the MLA to work out better cooperation and avoid duplication of effort in the field of ADR.

A discussion was held of the effect of COGSA on charter parties in the draft of a new COGSA prepared by the "CoCoG." Our Committee's concerns will be taken up by that Committee's Study Group.

Several recent court decisions have been influential on the practice of maritime arbitration. The *Boeing* case of last year has taken away the power of the federal courts to order consolidation of arbitrations, and we are learning to live with that ruling. The SMA revised its Rules of Procedure to include an agreement for consolidation. If both arbitrations are subject to SMA rules, the parties will now have agreed to consolidation where there are common questions of fact or law.

In the case of *Webster v. American President Lines* decided August 2, 1994, the question of whether a lawyer could be a "commercial man" was authoritatively decided. If the lawyer had actual commercial experience he would be qualified, but the mere practice of law, even in a commercial field, would not qualify the arbitrator as a "commercial man".

More controversial is the case of *Vimar Seguros v. M/V SKY REEFER*, 29 F.3d, 727, in which the First Circuit held that an ocean bill of lading requiring

arbitration in Tokyo was not in conflict with COGSA and that the strong federal policy in favor of arbitration requires the upholding of such an arbitration clause. This case conflicts with the earlier 11th Circuit case, *The State Establishment v. Wesermunde*, 838 F.2d, 1576, in which it was held that a bill of lading clause requiring arbitration in London was contrary to the provisions of COGSA. A petition for *certiorari* to the Supreme Court is pending, and the MLA may file an *amicus* brief. The outcome might affect the quantity of maritime arbitrations in the U.S.A. Should steamship companies begin to include arbitration clauses in all bills of lading, maritime arbitrations may increase both in and outside of New York.

Future plans include continuing working with the SMA to improve the quality of arbitration in New York and to encourage more use of arbitration in ports outside of New York.

Respectfully submitted,
R. Glenn Bauer, Chairman

FORMAL REPORT OF THE COMMITTEE ON NAVIGATION AND COAST GUARD AFFAIRS

The Coast Guard issued the long awaited regulations on the Certificates of Financial Responsibility on July 1, 1994. Since that date, Members of the Committee have worked on finding an acceptable solution to the problem. We have served as a liaison between the National Pollution Fund Center and various interested parties including Surety Bond brokers and underwriters. The Chairman of the Committee also assisted in setting up a meeting with various P&I Club representatives, Surety Bond underwriters and brokers an other interested individuals to discuss using surety bonds as a guarantee vehicle. We are pleased that the Committee was used as a channel of communication in trying to solve this controversial problem.

The Committee met at Governor's Island on November 1. Commander O'Brien discussed the Port State Security Program with us and he distributed the criteria used in New York to determine which vessels are boarded.

Following lunch, we toured the New York Vessel Traffic System Headquarters with Commander Jack Olthuis. This is a state-of-the-art facility using video cameras and radar transmitters located throughout the harbor which transmit back to television monitors and computer terminals in the VTS Center. Collision lawyers will have to become familiar with this system if they are involved in collisions occurring in a VTS area.

The Committee was advised that there will be a seminar on Maritime Law and Electronic Charts in New Orleans from march 12 through March 14, 1995. All were encouraged to attend.

The Committee will have its annual meeting in Washington on May 2, 1995. As in the past, the Coast Guard will be arranging speakers to brief us on topical issues in the Coast Guard, including Certificates of Financial Responsibility, OPA Regulations, Port State Control and the VTS System.

Respectfully submitted,
Patrick J. Bonner, Chairman

FORMAL REPORT OF THE COMMITTEE ON PRACTICE AND PROCEDURE

The Committee met on November 3, 1994, at The Seaman's Church Institute, 241 Water Street, New York, New York with John A. Edginton, Chair, presiding.

The following Subcommittee reports were received.

A. *Federal Rules and Statutes:*

Robert N. Dunn, Chair, reported on the status of amendments to Rules C and E of the Supplemental Rules for Certain Admiralty and Maritime Claims (the "Admiralty Rules"). A recommendation was given a year ago. When the Federal Rules Advisory Committee is prepared to move on substantive changes, the proposals we had discussed earlier will be forwarded. The Department of Justice has agreed to "bifurcate" their proposals for changes to the arrest procedures with respect to civil forfeitures and address them as separate subsections.

Issues regarding the 1993 International Convention on Maritime Liens and Mortgages and specifically the difference between the Admiralty Rules provisions and those of the Convention concerning notice for foreclosure sales were put off to the Spring 1995 meeting of the Subcommittee.

The proposal concerning amendments to 28 U.S.C. §2342(3)(a) regarding appeals from MarAd citizenship decisions directly to the Court of Appeals will be addressed in the package of legislative proposals. A recent Third Circuit decision has held that such direct appeal is permissible notwithstanding language in the legislation suggesting otherwise. Ted Perlman will update the case-law on the issue.

Interlocutory appeals of non-admiralty claims brought into an admiralty case under pendant jurisdiction principles was then discussed. The Reporter to the Federal Rules Advisory Committee has sought the MLA view on restyled language for the last sentence of Rule 9(h) to read "A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. §1292(a)(3)." The Subcommittee recommended the changes to Rule 9(h) to clarify that the right of interlocutory appeal would apply to all claims within an admiralty case. The Practice and Procedure Committee as a whole adopted the Subcommittee's view that such a change would be appropriate, and that view will be passed to the Reporter with an emphasis upon the importance of retaining the right of interlocutory appeals in admiralty cases.

The provision under the Suits in Admiralty Act, 46 U.S.C. §742, which requires "service forthwith" upon the Attorney General and the U.S. Attorney, and its conflict with Rule 4(i)(1) and 4(m) which permits up to 120 days for service was discussed. The Federal Rules Advisory Committee has suggested an amendment to the Suits in Admiralty Act to provide for service in accordance with Rule 4, and this proposal will be endorsed and supported.

The perceived conflict between Rule E(5)(a) and 28 U.S.C. §2464 on the setting of the amount of a release bond will be addressed at the Spring 1995 meeting, including the provision in the Rule limiting the amount of the bond to the value of the property seized (which limitation does not appear in the statute), as well as the limitation to 6% interest on such bonds.

The issue of the admissibility of NTSB and U.S. Coast Guard reports was also discussed. NTSB regulations prohibit admissibility of their reports, but the USCG regulations are not so prohibitive. The Subcommittee concluded that neither should be admissible in litigation, particularly where current USCG regulations greatly limit the availability of personnel as witnesses at trial or deposition. The Subcommittee will further study the matter and issue a final recommendation and suggestion for appropriate remedial action, if such be necessary.

With regard to pending legislative proposals, Professor David J. Sharpe reported on the proposed repeal of the Suits in Admiralty Act and the Public Vessels Act, and concurrent amendment of the Federal Tort Claims Act, with repeal of the Admiralty Extension Act provision regarding notice of claims against the United States. A paper is being written on the issues together with proposed legislation. The proposed legislation would also amend 28 U.S.C. §1333 to expressly provide that the Admiralty court has equitable powers.

B. *Local Admiralty Rules:*

James W. Bartlett, III, Chair, reported that many jurisdictions have not adopted the 1988 Model LARs. He was authorized to address a letter to the Chief Judge of each maritime district forwarding a copy of the LARs, and urging adoption of them.

C. *Forfeitures:*

Jeffrey S. Moller, Chair, reported that he had not received any feedback from the chairs of the various committees to which the Draft Uniform Forfeitures Act had been forwarded, but additional questions were raised in the Subcommittee meeting, including the possibility of substantive law changes, such as expressly preserving the interests of mortgagees. These issues will be addressed in a revised draft which will be circulated to the Committee members for comment.

D. *Joint Ad Hoc Committee On OPA '90 Concursus:*

Robert J. Zapf, Co-Chair, reported that the subcommittee had been formed to deal with the potential problem of multiple arrests of a vessel involved in a substantial oil spill. The practicalities of providing security and forcing a concursus were reviewed. It was determined that no underwriters were interested in putting up security for the full value of a vessel to prevent its subsequent arrest. It was also determined that there is no existing legislation empowering a district court to stay proceedings in other districts or in state courts to compel a concursus. There was great reluctance to seek amendment to OPA '90 to address this potential problem. A focus paper will be circulated to the Maritime Finance Committee, the Practice and Procedure Committee and the Marine Ecology Committee seeking views on the likelihood of the problem occurring, and suggested solutions. If the view is that this is a conceptual problem, and not a situation likely to occur in practice, the Joint Subcommittee will recommend no action be taken and that it be disbanded.

E. *Joint Subcommittee On Foreclosures and Insolvency:*

Bruce A. King, Chair, reported that the Department of Justice foreclosure forms being adapted for commercial use are being circulated to the Recreational Boating Committee for review. Lars Forsberg is also polling the various offices of the U.S. Marshal for any peculiarities in particular jurisdictions. When all input has been received, the specific means of publication and circulation (e.g., Bender's, Benedict's, etc.) will be determined.

An amicus brief was prepared on behalf of the MLA and filed in the 11th Circuit in the *Dietrich v. Key Bank* case, supporting the availability of alternative remedies to foreclosure under the Admiralty Rules.

The draft of the Alternative Remedy Amendment to the Ship Mortgage Act (the "Anti-*Fogle* Legislation") is being finalized and will be sent to Congressman Owen Pickett of Virginia who has agreed to review and possibly sponsor it.

Article 9 of the UCC is being redrafted. Any proposed changes affecting maritime interests will be circulated and discussed at the Spring 1995 meeting of the Joint Subcommittee.

F. *Ad Hoc Committee on the 1906 Marine Insurance Act:*

Edward V. Cattell, Jr. reported on plans to issue a research memo on the English Marine Insurance Act of 1906, comparing it against U.S. law, in the near future. It will be circulated among the committee members by March 15, 1995 and then circulated to interested MLA committees (Practice and Procedure, Marine Insurance, and Maritime Legislation) prior to the Spring 1995 meeting.

Other subjects of general interest reported on included:

A. *Stylistic Changes to the Admiralty Rules:*

Chairman Edginton reported that these were still being considered by the Federal Rules Advisory Committee and that good liaison exists in the process.

B. *Federal Rules Amendments:*

The Regional Representatives were asked to update the summary of Districts which have implemented the 1993 FRCP amendments as written, modified them, or opted out of them. The summary was last published in the MLA Report.

C. *The Newsletter, No. 26:*

The 26th edition of the Newsletter was published, and highlights, of which there were many, were discussed. The Newsletter will be reproduced in the forthcoming MLA Report.

D. *Other Matters:*

It was pointed out that the Ninth Circuit, in the *Kesselring* case (1994 WL 380451) held that the seaman's wage lien extends to leased equipment essential to the functioning of a vessel.

The 1994 Bankruptcy Reform Act has been signed, and all members involved in bankruptcy matters were encouraged to attend CLE courses on it. Conforming modifications to the Bankruptcy Rules are anticipated soon. A pamphlet highlighting the changes of interest to maritime practitioners will be circulated to subscribers to Volume 3B of Benedict on Admiralty.

A new pamphlet on the Law of Arrest, authored by Prof. David J. Sharpe and Philip A. Berns, has been published in Vol. 5 of Benedict on Admiralty.

Respectfully submitted,
John A. Edginton, Chairman

FORMAL REPORT OF THE COMMITTEE ON UNIFORMITY

Since the spring meeting of the Association, the United States Supreme Court has rendered on decision involving inter-circuit conflict. In *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. , 114 S.Ct. 2057, 129 L.Ed.2d 78 (1994), the Supreme Court resolved an ongoing conflict between the Third Circuit and the Ninth Circuit. The court sustained the Third Circuit's position that a vessel need not inspect or supervise the loading stevedore's cargo operations (whether in foreign or domestic ports) for the benefit of longshoremen in later ports. While the Supreme Court affirmed the position of the Third Circuit with respect to the vessel's limited duty, the court did reverse the lower courts, pointing out that there were still issues of fact to be resolved.

The controversy among the Circuits with respect to the applicable test for determining seaman status is once again in full bloom. During the latter part of 1993, the First Circuit in *Coats v. Penrod Drilling Corp.*, 5 F.3d 877 (5th Cir. 1993), reaffirmed the *Robison* test which it believed was left completely intact by *McDermott v. Wilander*. In the late spring of 1994, the Second Circuit decided *Latsis v. Chandras, Inc.*, 20 F.3d 45 (2d Cir. 1994), once again squarely rejecting the *Robison* test and reversing a district court that relied on *Robison*. On July 15, 1994, the United States Court of Appeals for the Third Circuit in *Reeves v. Mobile Dredging and Pumping Company, Inc.* set forth the seaman test for the Third Circuit. 226 F.3d 1247 (3d Cir. 1994). On August 15, 1994, the United States Court of Appeals for the Sixth Circuit ordered the publication of its opinion in *Hatch v. Durocher Dock and Dredqe Incorporated*, 33 F.3d 545 (6th Cir. 1994), originally issued as a "unpublished decision" on May 25, 1994. *Hatch* reflects both the latest statements of position of the Sixth Circuit and the First Circuit [*DiGiovanni v. Traylor Bros. Inc.*, 959 F.2d 1119 (lst Cir. 1992) *en banc*]. On October 17, 1994, the United States Supreme Court granted certiorari in *Latsis v. Chandras Inc.*, 63 U.S.L.W. 3160. The stage is now well set.

Two cargo conflicts of interest have occurred. The most recent was *Henley Drilling Company v. Magee*, 36 F.2d 143 (lst Cir. 1994), decided on September 27, 1994. This case involved the "fair opportunity" question and also the question of whether a drilling rig constituted a "package" or more correctly a "customary freight unit." The case presents once more the conflict that exists between the Ninth Circuit on one hand and the Second, Fourth, Fifth, Eleventh (and now the First) Circuits on the other.

The Ninth Circuit is also engaged in a controversy with the Second Circuit on the definition of "package" taking particular exception to the Second Circuit's consideration of the subjective purpose of the packaging. *See Travelers Indemnity Company v. The Vessel Sam Houston*, 26 F.3d 895 (9th Cir. 1994).

In *Vimar Sequros Y Reseguros. S.A. v. The M/V Sky Reefer*, 29 F.3d 727 (5th Cir. 1994), the First Circuit rejected the Second Circuit's decision in *Indussa v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (*en banc*) with respect to the validity of foreign forum clauses under §3(8) of COGSA. The First Circuit questioned the continued vitality of *Indussa* in light of *The Bremen* [*The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 13 L.Ed.2d 513 (1972)] and *Carnival Cruise Lines. Inc. v. Shooty*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). The First Circuit was of the opinion that if *Indussa* could survive scrutiny under those cases, it cannot prevail against the Federal Arbitration Act. This conflict may not be as critical as it might otherwise seem in view of the fact that *Indussa* does suggest that its rule might not prevail against the Federal Arbitration Act.

Wilburn Boat again made an appearance this time in *Thanh Long Partnership v. Highlands Insurance Company*, 32 F.3d 189 (5th Cir. 1994). This litigation involved the sinking of a vessel while it was tied off to an uninhabited oil platform about 30 miles offshore. It involved both express and implied warranties. The plaintiff sought to assert the Louisiana law which prohibits implied warranties in insurance policies. With respect to the implied warranties, the Fifth Circuit held that "[e]ntrenched federal precedent exists on the implied warranty of seaworthiness and the interpretation of Inchmaree clauses in maritime insurance contracts, which displaces Louisiana law" and "that federal admiralty law displaces state law as to the implied warranty of seaworthiness in maritime insurance contracts." 32 F.3d at 193–94. The court held that there was no similar choice of law issue with respect to the express warranty issue since Louisiana and federal maritime law were in accord that the breach of the express warranty also voided the coverage.

Two interesting cases which involve the question of whether the admiralty courts can utilize state law remedies arose in the First and Eleventh Circuits. In

Ballard Shipping Company v. Beach Shellfish, 32 F.3d 623 (lst Cir. 1994), an oil tanker ran aground and in the process spilled 300,000 gallons of heating oil into Narragansett Bay, Rhode Island. The ship had strayed from her designated shipping channel and struck a reef, resulting in the closing of Narragansett Bay to all fishing activities. An action for limitation of liability was filed by the shipping company and the shellfish dealers filed a claim alleging severe economic losses arising from the two weeks that the bay was closed down. The dealers' claims were filed under the general maritime law and under the law of Rhode Island. The shipping company relied on *Robins Drydock*, objecting to the claim of the shellfish dealers as one purely for economic losses unaccompanied by any physical injury to their properties or persons. The Court of Appeals reluctantly conceded that the shellfish dealers could not recover under maritime law. It then permitted the claimants to utilize the "saving to suitors" clause (28 U.S.C. §1333), to obtain access to the law of Rhode Island (Rhode Island Compensation Act) which provided the needed remedy. The Court of Appeals found nothing antithetical with the application of the Rhode Island Compensation Act.

On the other hand, the court in *Mink v. Genmar Industries. Inc.*, 29 F.3d 1543 (llth Cir. 1994), was not so generous. *Mink* was an action brought against the manufacturer of a pleasure craft for injuries sustained by a passenger who was "slammed" into the deck of the pleasure craft as it was being operated at a high rate of speed on the navigable waters of the United States. The manufacturer moved to dismiss the Complaint and the district judge granted the motion. The Court of Appeals held that the passenger had no maritime remedy because he had delayed more than three years from date of the accident to file suit. The court relied largely on *Sisson* and indicated that this was basically a jurisdictional matter and there was no question about the applicability of admiralty law. The plaintiff argued that he was also stating a cause of action for the same personal injuries under the Florida law of implied warranty. The Eleventh Circuit pointed out that this was a tort action, that maritime personal injury law was intended to be uniform in its application and that this included the statutory limitation as well. The court pointed to the reverse-Erie doctrine which requires that the substantive remedies afforded conform to governing federal maritime standards:

> "If [a plaintiff] could merely cast his claim for personal injuries to fit a different state law cause of action and succeed in obtaining a different set of governing standards, the federal interest in uniformity would disintegrate." 29 F.3d at 1549.

The essence of the matter may well be that the determination of whether state remedies may be borrowed will depend on the balancing of public policy interests and that, when it comes to the environment, courts will be inclined to

hold that where admiralty law gives no remedy for losses arising from damage to the environment, courts will permit the borrowing of existing state remedies.

The search for new active Committee members is in progress. The first concern is to bring in new active members so that the rest of the program can go forward.

Respectfully submitted,
Norman J. Cowie, Chairman

MINUTES OF THE BOARD OF DIRECTORS MEETING OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

Held at the

Association of the Bar of the City of New York

on

Thursday, November 3, 1994

The meeting was called to order by President Chester D. Hooper at 9:05 a.m. In addition to President Hooper, the following officers were present:

James F. Moseley
Howard M. McCormack
William R. Dorsey, III
Marshall P. Keating
Lizabeth L. Burrell
George W. Healy, III

The following Board members were present:

Richard C. Binzley
David A. Nourse
Joseph D. Cheavens
Denise S. Blocker
George F. Chandler, III
John A. Edginton
Brendan P. O'Sullivan
Thomas S. Rue
Neal D. Hobson

George D. Gabel, Jr.
James B. Kemp, Jr.
George William Birkhead

Joining the meeting in progress by invitation were:

Dr. Frank F. Wiswall of Castine
Warren I. Marwedel of Chicago
Christina K. Whitaker of New York
Thomas J. Wagner of New Orleans

SECRETARY'S REPORT

Secretary William R. Dorsey, III of Baltimore reported that the minutes of the Board of Directors Meeting held in Tarrytown, New York on August 6, 1994 had been circulated to all the members of the Board and the membership in general. Upon motion duly made and seconded the minutes of the Board of Directors Meeting of August 6, 1994 were approved and accepted.

Secretary Dorsey reported that he had, after consultation with all Committee Chairs, formulated an up-to-date list of Committee members and had sent copies of same to all Officers. Any member of the Board who wanted all, or a portion, of the listing of all the Committee members, was asked to contact Secretary Dorsey.

On motion duly made and seconded the Secretary's report was approved and accepted.

TREASURER'S REPORT

Treasurer Marshall Keating of New York reported the cash on hand and investments as of September 30, 1994, which reflected the Association's sound financial position. He also distributed the Treasurer's Report for the three months ended July 31, 1994 and Deloitte & Touche's Auditor's Report and Statements of Cash Receipts and Disbursements for the years ended April 30, 1994 and April 30, 1993. Copies of these reports are annexed to the original of these minutes.

Treasurer Keating then advised that Barrister was no longer willing to be our computer data supplier but had been helpful in searching for a replacement. As a result of this assistance and investigation by Treasurer Keating and Membership Secretary Lizabeth L. Burrell of New York, we have received a proposal from Messrs. Brock Schechter & Polakaff, Certified Public Accountants in Buffalo, to

perform these services using state-of-the-art data processing. A copy of this proposal was distributed to the Board and is annexed to the original of these minutes. The charges for the various services to be provided were in line with those previously charged by Barrister. It was Treasurer Keating's and Membership Secretary Burrell's recommendation that we proceed to engage the services of Messrs. Brock Schechter & Polakaff in accordance with the terms of their proposal, provided that their due diligence checks did not produce unfavorable comments. Upon motion duly made and seconded, the Board approved the acceptance of the proposal of Messrs. Brock Schechter & Polakaff, subject to the due diligence inquiry by Treasurer Keating and Membership Secretary Burrell.

Treasurer Keating then indicated that the auditors feel that we should have a dissolution provision in our By-Laws providing for the disposal of the Association's assets in the event the Association does dissolve. He had prepared a draft of such a Resolution and circulated it to the members of the Board. This proposal will come up for a vote by the Board at the Board's March meeting.

Treasurer Keating then initiated a discussion on whether or not the Association should raise its dues now. The consensus of the meeting was that dues should not be raised at this time.

Treasurer Keating then reported that a bank account would have to be opened for the 1995 Arrangements Committee in order to finance their activities and provide a separate depository for funds received in connection with the 1995 meeting in Hawaii. On motion duly made and seconded the Board unanimously adopted the Bank Authorization Resolution; a copy of which is annexed to the original of these minutes.

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

MEMBERSHIP SECRETARY'S REPORT

Membership Secretary Burrell reported that the Association's total membership was 3,573 as of November 3, 1994. She presented the names of 46 applicants for associate membership and 2 applicants for judicial membership. On motion duly made and seconded the 46 associate applications and 2 judicial applications were unanimously elected.

Membership Secretary Burrell also reported that the Proctor Admissions Committee had recommended that 10 associate members be advanced to proctor status. In addition because academic member George A. Zaphiriou has with-

drawn from George Mason University's School of Law and reentered private practice, the Proctor Admissions Committee recommended that he be returned to proctor status. Upon motion duly made and seconded the recommendations of the Proctor Admissions Committee were approved, and Mr. Zaphiriou and the 10 associate members were granted proctor status.

In addition, Membership Secretary Burrell indicated that 6 non-lawyer applicants had been recommended for non-lawyer membership. Those recommended are Noreen Arralde, Robert A. Biasotti, Hank vonHemmen, Hildegard Krause, Gerhard Kurz, and Peter Shaerf. Upon motion duly made and seconded the 6 non-lawyer applicants were unanimously elected to non-lawyer membership. The list of the successful candidates for membership and for admission to proctor status, and Ms. Burrell's written report, are annexed to the original of these minutes.

Membership Secretary Burrell also reported, with regret, the death of the following members: Raymond J. Burke, Sr. of New York, Edward L. Johnson of New York, Eugene ("Pete") R. Lippman of Philadelphia, O. Taft Nelson of Southberry, Richard A. Peters of Staten Island, Joseph J. Reddington of Middle Village, and Leon T. Seawell, Jr. of Norfolk.

Membership Secretary Burrell then indicated that the Directory's geographical listing of law firms will only list those cities in which an MLA member of the firm maintains an office. There then followed a general discussion of the need for a geographical listing in the Directory with some Board members indicating that they felt it wasn't necessary at all while others felt that it was quite a benefit to have such a listing.

On motion duly made and seconded the Membership Secretary's Report was approved and accepted and is appended to the original copy of these minutes.

MARCH 1995 OFFICERS AND BOARD OF DIRECTORS MEETING

The Board unanimously agreed upon the date of March 13, 1995 for the next Officers meeting and Tuesday, March 14, 1995 for the next meeting of the Board of Directors, both of them to take place in New Orleans immediately preceding the Tulane Seminar.

CERTIFICATE OF APPRECIATION TO PAST CHAIRS

First Vice President James R. Moseley of Jacksonville exhibited the design of a Certificate of Appreciation to be sent to the immediate past chairs of

Committees, which received the unanimous approval of the Board. Vice President Moseley noted that because of the By-Law restricting service of Committee chairs to four years, more than half of the Association's current Committee chairmen were new to their positions this year.

Vice President Moseley also reported on the meeting of all Committee Chairs which took place on Tuesday, November 1, with all the Officers of the Association present. At this meeting each Committee Chair outlined the plans for their respective committees. These plans will be submitted in writing to President Hooper. Vice President Moseley expressed his appreciation to all the Officers for their participation in this meeting which was well received and attended.

AMICUS BRIEFS

President Hooper, Vice President Moseley and Board Member John Edginton reported respectively on three *amicus* briefs that had been or were to be filed on behalf of the Association. The first is in the *Sky Reefer* case and is being prepared by Raymond Hayden of New York, Professor Michael Sturley of Austin and Sanford E. Balick of New York. The second is in the case of *Sea Savage v. Chevron* and is authored by Douglas Matthews of New Orleans and Professor Michael Sturley of Austin. Both of these cases involve conflicts between circuits. Discussion ensued as to whether or not the Association should take a position on the merits in the *Sky Reefer* case. The Board unanimously agreed that no position should be taken on the merits that case. It was noted that no position on the merits is being taken in the *Sea Savage v. Chevron amicus* brief, which had already been filed. In each case, therefore, the Association is taking no position on the merits but only asking the Supreme Court to resolve the conflict between the Circuits in the interests of uniformity.

An *amicus* brief has been filed in the case of *Dietrich v. Key Bank,* which presents *Fogel* case issues and is currently on appeal in the Eleventh Circuit. The authors of this brief were David McI. Williams of Baltimore, John Edginton of Emeryville and Bruce A. King of Seattle.

President Hooper expressed his deep appreciation on behalf of the Association to the authors of these *amicus* briefs, noting that the quality of scholarship and amount of effort that had gone into them was outstanding.

President Hooper then indicated that the Association may receive a request for an *amicus* brief in the *Gamma-10 v. American President Lines* case. This was a case in the Eighth Circuit where it was held that a shipowner cannot rely on the one-year COGSA limitation period contained in a Bill of Lading where damage

to cargo occurs beyond ship's tackle unless the shipper has been given a fair opportunity to negotiate different terms.

CMI MEETING IN SYDNEY

Dr. Frank L. Wiswall of Castine, Chairman of the CMI Committee, reported on the CMI's meeting in October of this year in Sydney, Australia, detailing the change in officer and executive council memberships. The Board received and approved reports of two of the Association's working groups in Sydney on the topics of Assessment of Pollution Damage and Mobile Offshore Craft. In addition, Vice President Howard McCormack of New York reported that, with respect to the General Average rules, the efforts of the working group had been to simplify and clarify the rules and not expand the role of General Average. The CMI approved new rules for General Average on October 8, 1995 with the hope that they will become active by agreement as soon as January 1, 1995.

Dr. Wiswall indicated that the Centenary Conference of the CMI will take place in Antwerp in June 1997. He also indicated that the CMI has decided to apply for consultive status in the United Nations. It is probable that an American will be the CMI's permanent representative to the U.N. In that eventuality, Dr. Wiswall has been asked to fill that position.

CONFLICT OF NOVEMBER MEETINGS WITH HALLOWEEN

Membership Secretary Burrell pointed out that there was often a conflict between the scheduling of our fall meetings and Halloween. She pointed out that this often prevented members, particularly younger members, from taking part in what to children is an important family event. The general consensus of the Board was that this conflict, as well as any conflict with Election Day, could be resolved by moving the New York fall meetings to the third Friday in October. It was noted that the 1995 Fall Meeting in Hawaii would take place from October 15 to October 20 so that it presented no such conflict. President Hooper indicated that he would refer this matter, along with the Board's views, to the Ad Hoc By-Laws Committee for the appropriate recommendation and action.

ASSISTANCE TO FEDERAL JUDICIAL CENTER

Membership Secretary Burrell also reported that the Federal Judicial Assistance Center plans to send a questionnaire to selected members of the Association concerning the Center's study of unresolved Circuit conflicts. She noted that it was important for members so contacted to respond as requested.

RUSSIAN SEMINAR

President Hooper expressed his thanks to Paul Edelman of New York who attended a maritime law seminar in Russia, at his own expense. He will be submitting an article to the MLA Report on this Seminar.

IMO ARREST CONVENTION

Board member Neal D. Hobson of New Orleans advised that the IMO has announced that as part of its 1995–1996 agenda it intends to revisit its Arrest Convention in light of its more recent Liens and Mortgage Convention, which has not yet taken effect. President Hooper indicated that he would appoint an *ad hoc* committee to determine what input the Association should make in connection with this development.

STOWAWAYS

Board Member David A. Nourse of New York, Chairman of the Committee on Carrier Security, reported that Congress has recently enacted legislation, the effect of which is that vessels are no longer obligated to detain stowaways until repatriation occurs.

PROPOSED AMENDMENT TO RULE 9(h)

Board Member John Edginton of Emeryville, Chairman of the Committee on Practice and Procedure, reported on a request received from the Federal Rules Advisory Committee for the Association's views with respect to proposed amendment to Rule 9(h) and 28 U.S.C. Section 1292(a)(3). It was his recommendation, which the Board unanimously approved, that the Association take no position with respect to these proposed amendments, which concerned the question of interlocutory appeals in non-admiralty causes of action that were pendent with admiralty causes of action.

AD HOC COMMITTEE ON STATE CERTIFICATION

The Board considered and approved the recommendation and written report of Graydon Staring of San Francisco, Chairman of the Ad Hoc Committee on State Certification Programs and approved all the recommendations contained in the Report. A copy of this report will be appended to the original of these minutes. Among the Committee's recommendations were: (1) that the Association should promptly consider strengthening its qualification and screening process and become a certified organization either under the aegis of the ABA or on

some other basis, and (2) that the Florida Bar be advised of the MLA's view that state bars or institutions are not the appropriate bodies to establish standards and regulate expertise in admiralty practice.

The Board also authorized Mr. Staring to prepare and submit for Board approval a letter or report to the Florida Bar expressing the position of the Association as reflected in the Ad Hoc Committee's Report.

The Board then considered, but rejected, a proposal that a letter be sent to the Florida Bar president concerning professionalism of attorneys in the context of that Bar's Petition for Certiorari of a recent holding by the Eleventh Circuit that a Florida Bar rule which prohibits lawyers' solicitation within thirty days of an accident was unconstitutional.

1995 FALL MEETING IN HAWAII

Warren J. Marwedel reported that arrangements for the Association's 1995 fall meeting at the Hyatt Regency in Kauai, Hawaii were proceeding smoothly.

CLASSIFICATION SOCIETIES

President Hooper indicated that he was considering the formation of a committee on classification societies. It is possible that the CMI might address problems facing classification societies, and that the Association would be asked to comment.

ABA

The Association has been asked to the report to the ABA any matters it wishes considered by the ABA House of Delegates mid-winter meeting by November 21, 1994. President Hooper intends to advise the ABA that the Association does not wish to submit any matters to be considered at this time.

PRESIDENT'S SPEAKING ENGAGEMENTS

President Hooper reported that he had spoken at seminars at Louisiana State University and Houston and is scheduled to speak at the Tulane seminar in March as well as at a seminar on electronic charts in New Orleans just prior to the Tulane seminar.

1999 MEETING SITE

Secretary Dorsey, reporting for the Site Selection Committee, indicated that sites in Puerto Rico (El Conquistador), Naples, Florida (Ritz-Carlton) and Para-

dise Island, Bahamas (Atlantis) were currently under consideration for the 1999 Fall Meeting. It is hoped that a recommendation can be made by March.

The meeting then adjourned to the Harvard Club for lunch. During lunch the following reports were made.

COMMITTEE ON CARRIAGE OF GOODS

Board Member George Chandler, Chairman of the Committee on Carriage of Goods, reported that he hopes to present any proposed revisions to COGSA at the 1995 Spring Meeting of the Association.

COMMITTEE ON DINNER ARRANGEMENTS

Christina Whitaker reported on the arrangements for the Dinner Dance to be held at the Marriott Marquis on Friday, November 4. President Hooper expressed the gratitude of the Association to Ms. Whitaker and her Committee for all of their hard work in planning and supervising this event. Over 800 members and their guests are expected to attend.

There being no further business to come before the Board, the meeting adjourned at approximately 2:00 p.m.

Respectfully submitted,
William R. Dorsey, III
Secretary