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THE MLA REPORT

THE MARITIME LAW ASSOCIATION OF THE UNITED STATES ★
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EDITORIAL COMMENT

The Fall 2002 edition of the MLA Report includes a report by the recently formed Subcommittee on Maritime Security, headed by Geoffrey Moller of Philadelphia, under the auspices of the Committee on Navigation, Coast Guard and Government Regulation. The new subcommittee is tasked with monitoring and reporting to the MLA about on-going developments related to the security of the marine infrastructure in the United States and abroad. Chairman Moller thus reports that the subcommittee has established liaisons in Washington with the U.S. Coast Guard legal office and with key congressional staff members in order to monitor regulatory and statutory developments at their sources. In addition, he details the expanding role of the U.S. Customs Service through its container security programs, and the port-specific efforts of the Coast Guard through its risk assessment program and through the development of port security plans across the country. This subcommittee report is both fascinating and essential reading for maritime law practitioners.

Two other topical reports also appear in this edition of the MLA Report: the Fall 2002 report of the Subcommittee on Taxation of the Marine Finance Committee, which discusses reciprocal income tax exemptions for foreign corporations under IRS Proposed Regulation 883; and the report of the Committee on Uniformity of U.S. Maritime Law concerning a conflict among circuit courts on the question whether 28 U.S.C. § 1292(a)(3) permits a plaintiff to take an interlocutory appeal before the district court has made a liability determination on the merits of the case.

In addition, our regular contributors—the Carriage of Goods by Sea Committee, the Marine Insurance and General Average Committee, and the Committee on Maritime Arbitration and Mediation—continue to provide informative, timely updates about recent legal decisions within their purview.

Lastly, we include an interesting, highly personal chronicle of changes in the maritime law practice in New York and the shipping industry generally over the past five decades by long-standing MLA member, Daniel J. Dougherty.

Please do not hesitate to contact me (mmarion@healy.com) or LeRoy Lambert (llambert@healy.com) if you have any questions or suggestions.

Matthew A. Marion,
Editor

[13253]

REPORT OF THE SUBCOMMITTEE ON MARITIME SECURITY OCTOBER 11, 2002

As a newly formed Subcommittee of the Committee on Navigation, Coast Guard and Government Regulation, we are charged with monitoring and reporting upon legal developments pertaining to marine infrastructure security.

To that end, we have established liaison relationships with the U.S. Coast Guard legal office at Coast Guard headquarters and with certain key congressional staff members and have been avidly reviewing all reports of developments.

As of the MLA Report deadline, there are a host of new programs and initiatives being discussed and underway both in the U.S. and internationally. Among them are not only two major pieces of legislation pending in Congress, but the Port Security Grant program, the U.S. Customs Service Container Inspection Program, the Coast Guard's Port Security Plan Initiative, and the International Maritime Organization's draft Maritime Security Code.

It appears that Congress will break for "mid-term" elections without final passage of the President's proposed Homeland Security Bill, which calls for a major restructuring of the Executive Branch to pull together into one Department of Homeland Security the many agencies which currently have jurisdiction in that subject arena. Much has been publicized with regard to the Homeland Security Bill and the enormous bureaucratic changes proposed. Given the preoccupation with the Iraqi Intervention Resolution, it is doubtful that the Homeland Security Bill will pass in this Congress.

It is also likely that the Port Security legislation which is currently in Conference Committee will have to be reintroduced next session. Great progress had been reported with regard to the reconciliation of Senate Bill S.1214 and House Bill H.R.3983. (Key provisions of these two Bills include requiring vulnerability assessments at major U.S. seaports, developing comprehensive security plans for all waterfront facilities, establishing local port security committees, assessing antiterrorism measures at foreign ports, conducting antiterrorism drills, credentialing transportation workers and controlling access to sensitive areas at ports.) However, a major stumbling block was placed in the way of passage of the legislation when Senator Hollings, the sponsor of the Senate Bill, introduced in Conference an amendment establishing a framework of fees to be paid by shippers. For example, a $15 per TEU assessment would be made on nonhazardous materials in containers, a $20 per TEU fee would be charged for hazardous materials in containers, and a fee of as much as $.30 per metric ton would be charged for crude oil and other bulk cargos. Not only are the major stakeholders (i.e. importers and exporters) objecting to the imposition of fees, but a constitutional imbroglio has emerged, the House members of the Conference Committee believing that the fee proposal is actually a tax which ought to have originated in the House Ways and Means Committee rather than in the Senate or for the first time in Conference.

Two significant programs have been undertaken by the U.S. Customs Service with regard to container security. First, it initiated the Customs-Trade Partnership Against Terrorism program (C-TPAT), which is a partnership initiative to encourage shippers using containers to develop their own supply chain security systems. The incentive for the shippers would be that the cargo of C-TPAT participants would receive expedited processing by the Custom Service.

Customs also initiated the Container Security Initiative (CSI), which established security criteria to identify high-risk containers, prescreen containers before they arrive at U.S. ports and utilize technology to identify high-risk containers. Toward that end, Customs deployed 20 new mobile gamma ray imaging devices at various U.S. ports. It is also adapting its computer system, which was originally designed for counter-narcotic efforts. This computer system flags suspect shipments for inspection on the basis of an analysis of shipping, intelligence and law enforcement data. Customs has brought its CSI to major foreign ports hoping to prescreen cargo bound for the United States. Arrangements have to date been made with at least nine foreign ports, including three in Canada, Rotterdam, LeHarvre, Hamburg, Bremerhaven, and Antwerp. Arrangements with Felixstowe in the United Kingdom will shortly be finalized.

Customs also announced its intention to begin requiring that U.S. bound ships provide cargo manifests to Customs 24 hours before a container is loaded in a foreign port. This requirement has drawn a great deal of criticism from shippers and freight forwarders, who feel that in order to comply with the 24 hour rule, cargo scheduled for a particular vessel would have to be delivered to the ocean carrier many days earlier than is presently required. There may not be room to store the cargo and any stored cargo will be subject to much greater risk by theft.

The shipping community, particularly in the EU, has also raised the objection that there ought to be uniformity in port security regulations.

They have urged that the United States wait for the International Maritime Organization to develop and implement appropriate standards. The International Maritime Organization's Marine Safety Committee established a working group on maritime security at its meeting in January, 2002. The Maritime Security Working Group drafted new regulations describing control measures available to port states when violations of certain draft security requirements occur. These maritime security regulations use as their model the port state control safety regulations that are a part of SOLAS. The IMO is also attempting to grapple with the issue of "transparency" of vessel ownership and control. At another working group session in July of 2002 various comments to the draft regulations were submitted by the United States and others. A further meeting is scheduled to be held in December of 2002 at which it is hoped that the regulations will be finalized.

The United States Coast Guard has refocused it efforts on port security under its pre-existing enabling legislation (such as the Magnuson Act and the Ports and Waterways Security Act). The Coast Guard detailed its Captains of the Port to conduct risk assessments within their geographical areas to identify high-risk infrastructure and facilities. The Coast Guard has also redeployed some of its assets from offshore law enforcement patrols (drug, immigration and fisheries enforcement), repositioning them to the entrances of ports which are expected to attract high-risk cargo vessels. The Coast Guard also established new guidelines for developing port security plans and implementing security measures for passenger vessels and passenger terminals. It has rejuvenated its so-called special interest vessel program to board vessels at sea to conduct pre-arrival inspections. It has also undertaken a greater level of escort duty for vessels such as LNG carriers which may be targets of terrorist attack.

The Coast Guard has also contracted with a private firm, TRW Systems, to conduct detailed vulnerability assessments of more than fifty-five U.S. ports. The object is to develop methodology and identify security standards and best practices that can be used for evaluating the security environment of various ports.

The Transportation Security Administration, which had been created by Congress under the Aviation and Transportation Security Act of 2001 (P.L.107-71), in partnership with the U.S. Maritime Administration and the Coast Guard, is administrating a Federal grant program to enhance port security. As a part of a DOD supplemental budget appropriation for fiscal year 2002, Congress set aside $93.3 million for TSA to issue such port security grants. By mid-2002, such grants had been awarded to 51 different U.S. ports for security enhancements and assessments.

There have also been initiatives by various state governments towards enhancement of port security. Florida, for example, was the first state to establish security standards for ports under its jurisdiction and to require those ports to maintain approved security plans.

Our subcommittee will continue to monitor and report upon these developments. If any MLA members have concerns or questions with regard to maritime security they are welcome to contact our Chairman.

Jeffrey S. Moller,

Chairman, Subcommittee on
Maritime Security of the
Committee on Navigation,
Coast Guard and Government Regulation

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REPORT OF THE SUBCOMMITTEE ON TAXATION OF THE MARINE FINANCE COMMITTEE

Proposed Regulations—Section 883: The Reciprocal Exemption

On August 1, 2002, the Internal Revenue Service re-proposed draft regulations that would grant foreign corporations equivalent exemptions from U.S. income tax for income earned from the international operation of ships and aircraft. This exemption is provided for in Section 883 of the Internal Revenue Code ("Code"). These new regulations were issued in response to comments concerning proposed regulations which were issued on February 8, 2000.

General Rule

In general, a foreign corporation engaged in the international operation of ships is entitled to a federal income tax exemption under Section 883 of the Code with respect to an applicable category of qualified transportation income ("Qualified Shipping Income") if:

> (i) the foreign corporation is organized in a foreign country that provides a reciprocal exemption from tax on such income to U.S. corporations (a "Qualified Foreign Country"); and
>
> (ii) at least one of the following stock ownership tests is satisfied:
>
>> (a) more than 50 percent of the foreign corporation's stock, in terms of value, is beneficially owned (directly, indirectly or constructively) by individuals ("Qualified Shareholders") resident in Qualified Foreign Countries ("Qualified Shareholder Stock Ownership Test");
>>
>> (b) a class or classes of the foreign corporation's stock is "primarily and regularly traded" on an established securities market ("Qualified Exchange") located in a Qualified Foreign Country or in the United States ("Publicly Traded Stock Ownership Test"); or

(c) the foreign corporation is a Controlled Foreign Corporation ("CFC"), that satisfies certain specified requirements ("CFC Stock Ownership Test").

We discuss below various items which the IRS is specially considering in its re-proposed regulations.

International Operation of Ships

The IRS took cognizance of the new forms of business arrangements and now provides that an investor can be considered engaged in the operation of ships or aircraft where the shipping operations are conducted by a fiscally transparent vehicle, such as a pool, partnership, strategic alliance, joint operating agreement, code-sharing agreement or other joint venture. If the activities of the transparent entity themselves are not considered the operation of a ship or aircraft, the reciprocal exemption is not available unless the investor itself is engaged in the operation of ships or aircraft. The arrangement, however, needs to be a fiscally transparent entity under U.S. tax concepts.

Inland Legs of Transportation

Container rental activities are considered activities incidental to the international operation of ships or aircraft, and the resulting income earned by foreign shipping companies might thereby be exempt from tax under the reciprocal exemption. Several limitations to this provision exist—in particular, the limitation that incidental treatment is only permitted on the rental of containers for use in the United States for a period not exceeding 5 days beyond the original delivery date to the consignee, as stated on the bill of lading. Inland transportation is not incidental to international shipping operations where the bill of lading issued by the foreign carrier is solely for the international carriage of cargo between a U.S. port or airport, where the cargo is loaded on the vessel, and a point outside the United States.

Cruises to Nowhere and Lightering Activities

The re-proposed regulations continue to treat cruises to nowhere as "domestic transportation," which is ineligible for exclusion from income under the reciprocal exemption rule. Lightering activities, however, that extend beyond United States territorial waters will constitute the international operation of a ship under the re-proposed regulations, and the income therefrom might be exempt from U.S. income tax.

Publically Traded Stock Ownership Test

The original proposed regulations provided that a foreign corporation would not be entitled to the reciprocal exemption if 50 percent or more of the vote and value of its stock is owned by individuals who are not residents of a qualified foreign country. The original rule is not applicable to a foreign corporation whose stock is primarily and regularly traded on a securities market in either the United States or a qualified foreign country. The stock of a foreign corporation is considered regularly traded, under the original proposal, where one or more classes of stock, in the aggregate, representing 80 percent or more of the aggregate voting power and value of all classes of stock, is listed on an established securities market. However, a class of stock could not be included in this aggregation if one or more persons who own at least 5 percent of the vote and value of the outstanding shares of the class own in the aggregate 50 percent or more of the vote and value of the stock in the class. The class might nevertheless be included in the aggregation if the foreign corporation could demonstrate that more than 50 percent of the vote and value of the stock in the class is owned by qualified shareholders. Concern existed that ownership of shares by a family of mutual funds or investment companies might cause a class of publically traded shares to be considered closely-held. Names of the 5 percent shareholders are required to be listed in the foreign corporation's U.S. corporate income tax return (Form 1120F).

The re-proposed regulation reduces the 80 percent aggregate required voting power and value requirement for all publically listed classes of stock to 50 percent. As regards closely-held classes of stock, the re-proposed regulations provide that an investment company will not be treated as a 5 percent shareholder for purpose of the closely-held test if no person owning an interest in the investment company is treated as owning 5 percent or more of the value of the outstanding shares of the class of stock of the foreign corporation seeking qualified foreign corporation status. Finally, the re-proposed regulations provide that reliance might be made of the latest SEC Form 13G to determine whether a class of stock has a 5 percent shareholder.

Effective Date

The IRS has scheduled a hearing on the re-proposed regulations on November 12, 2002. The new regulations will be effective for taxable years of a foreign corporation beginning 30 days or more after the date the regulations are published in final form. Thus, if the final regulations are published on December 1, 2002, they will be effective for calendar year taxpayers for 2003.

The re-proposed regulations adopt many suggestions made by commentators, including the MLA. We believe that Treasury's willingness to discuss and modify their proposed regulations will lead to final regulations which embody the Congressional mandate and are workable based on the structure of the Maritime Industry.

Solomon Packer,
Chairman, Subcommittee on
Marine Financing of the
Committee on Marine Financing

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COMMITTEE ON UNIFORMITY OF U.S. MARITIME LAW FALL 2002 REPORT

A recent decision giving rise to a conflict between the United States Circuit Courts of Appeal has come to the attention of the MLA's Committee on Uniformity of U.S. Maritime Law. *Wallis v. Princess Cruises, Inc.*, No. 01-56700, 2002 WL 31108934 (9th Cir. Sept. 24, 2002) creates a conflict on the issue of whether 28 U.S.C. §1292(a)(3) permits a plaintiff to take an interlocutory appeal before the district court has made a liability determination on the merits of his case.

In *Wallis*, the plaintiff brought an action for damages arising from the death of her husband, who drowned after falling from the defendants' cruise ship. 2002 WL 31108934, at *1. The defendants sought to limit their liability based on the legal notice included in the passengers' tickets. *Id.* at *1-2. The United States District Court for the Southern District of Florida granted the defendants' motion for summary judgment on all causes of action, excluding one claim brought under the Death on the High Seas Act ("DOHSA"), and granted the defendants' motion for partial summary judgment to limit their liability. *Id.* at *2. The plaintiff timely filed an interlocutory appeal from the district court's grant of partial summary judgment. *Id.*

In its jurisdictional analysis, the Ninth Circuit examined 28 U.S.C. §1292(a)(3), which permits interlocutory appeals from decisions " 'determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.' " 2002 WL 31108934, at *3. The defendants argued that, because the court had not granted their motion for summary judgment as to the DOHSA claim, the plaintiff was not entitled to an interlocutory appeal under §1292(a)(3). 2002 WL 31108934, at *3.

The Ninth Circuit disagreed. Based on two of its earlier decisions, the court held that an interlocutory appeal is permissible where the district court "has upheld the validity of a clause limiting the amount of liability but has not reached the question of whether the defendant was actually liable." *Id.* (citing *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 1989 AMC 913, 871 F.2d 897 (9th Cir. 1989) (accepting jurisdiction to determine whether the defendants' potential liability was properly limited, even though the district court had made no liability determination); and *Vision Air Flight Serv., Inc. v. M/V Nat'l Pride*, 1999 AMC 1168, 155 F.3d 1165 (9th Cir. 1998) (same)).

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The defendants cited several out-of-circuit cases to support their argument that §1292(a)(3) requires a liability determination by the district court. *See Evergreen Int'l (USA) Corp. v. Standard Warehouse*, 1995 AMC 635, 33 F.3d 420 (4th Cir.); *Bucher-Guyer AG v. M/V Incotrans Spirit*, 868 F.2d 734 (5th Cir. 1989); *Burgbacher v. Univ. of Pittsburgh*, 1989 AMC 149, 860 F.2d 87 (3d Cir. 1988). The Ninth Circuit disagreed with the analysis in those cases, however, stating that those circuits "read §1292(a)(3) too narrowly." *Wallis*, 2002 WL 31108934, at *4. In the court's view, to require determinations of liability "would make interlocutory appeals impossible in many admiralty cases, and would do so in precisely those cases where such appeals are most needed." *Id.* at *5. The Ninth Circuit, therefore, concluded that it did have jurisdiction over an interlocutory appeal under §1292(a)(3) where only the validity and applicability of a provision limiting liability has been determined. 2002 WL 31108934, at *4.

The Committee will continue to follow new developments which arise from this conflict among the circuits.

Kimberly A. Kearney,
Chairperson,
Uniformity of U.S. Maritime Law Committee

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COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE NEWSLETTER, FALL 2002

Editors: George N. Proios
Gene B. George
Joshua S. Force

I. NEWS AND INFORMATION

World Trade Center Attack Ruled One Occurrence

It is not a matter of marine insurance or general average. It is the tragic human occurrence of our time, and probably the most significant insurance "occurrence" as well.

In late July of 2001, according to news reports, a group of investors headed by New York real estate developer Larry Silverstein (who owns 11% of the venture) purchased a 99-year lease on all of the space in the World Trade Center complex from the Port Authority of New York and New Jersey. The lessees placed insurance with multiple companies, with a limit of $3.55 billion "per occurrence" in the event that the Trade Center complex was destroyed.

When the Trade Center towers were struck some 16 minutes apart by separate airplanes as part of the same terrorist plot, was that one "occurrence" giving rise to a payment of $3.55 billion, or two, making the payment $7.1 billion? Does it matter that the airplane which struck the first tower did some damage to the second? That the buildings had a common plumbing and air system and one common insurance policy?

Does it matter that the lease reportedly contains language allowing Mr. Silverstein's group to retain a large portion of the insurance proceeds if the Trade Center cannot feasibly be rebuilt exactly as it was and an agreement on an alternate design cannot be reached with the Port Authority? [Newsweek, July 29, 2002] Or that Mr. Silverstein estimated that it would cost $5.7 billion to rebuild the Trade Center, implying that a $3.5 billion recovery would mean it cannot be rebuilt? [www.newsday.com, Sept. 27, 2002] Or that he has promised to rebuild regardless of how much his group receives in insurance proceeds, because "[t]here are always other sources of financing to accomplish the mission," and because the site is "ideally suited not for residential, but for commercial" development? [www.newsday.com, Oct. 9, 2002].

[13264]

The "occurrence" dispute found its way into court early, as Swiss Re International (which provided $780 million in coverage that would be doubled if the two-occurrence theory was applied) filed suit in the U. S. District Court for the Southern District of New York in October of 2001. The action, styled *S R Intl Bus. Ins. Co. Ltd. v. World Trade Center Properties LLC*, No. 01-9291, was assigned to Judge John S. Martin, Jr.

Two insurers settled with the Silverstein Parties in February of 2001. Other underwriters were joined as parties and three of them, Hartford Fire Insurance Company, Royal Indemnity Company and St. Paul Fire and Marine Insurance Company, filed motions for partial summary judgment on the "occurrence" issue. In a 30-page decision issued on September 25, 2002, Judge Martin ruled that the attack constituted a single "occurrence," entitling the lessee "Silverstein Parties" to receive payment from certain insurers only for the face amount of the policy for one occurrence.

Counsel for the Silverstein Parties immediately requested that the trial, scheduled to commence on November 4, 2002, be postponed to permit immediate Second Circuit review of the ruling. According to news reports, Judge Martin agreed to certify the issue for immediate review, but proposed to start trial on two issues: the value of the Trade Center and the appropriate terms and conditions of the insurance coverage. [www.newsday.com, Sept. 27, 2002].

At the time of the terrorist attack on September 11, 2001, over twenty individual insurance companies had signed binders obligating them to provide property damage coverage to the Silverstein Parties, but they had not yet issued formal insurance policies. The movants, Hartford, Royal and St. Paul, asserted that when they issued their respective binders, they agreed to be bound on the basis of the "WilProp" policy form, provided by Willis of New York, Inc., the broker for the Silverstein Parties. They claimed that the WilProp form contains a definition of "occurrence" under which the attack is unambiguously a single occurrence.

The Silverstein Parties argued that the issue of the number of occurrences is a jury question; and that the WilProp definition of occurrence is not incorporated into the binders. Rather, they claimed that the binders only committed the parties to ultimately be bound by contract terms yet to be negotiated by the insureds and the lead underwriter, which in this case became The Travelers Insurance Company. They claimed that the insurers were all bound to the terms that Travelers and the insureds had agreed as of September 11th.

Judge Martin reasoned that the position of the Silverstein Parties depended upon the argument that the binders constituted only a "binding preliminary commitment." That "sort of preliminary binding agreement is one that expresses mutual commitment to a contract on agreed major terms, while recognizing the existence of open terms that remain to be negotiated." *Teachers Ins. & Annuity Assoc. v. Tribune Co.*, 670 F.Supp. 491, 498 (S.D.N.Y. 1987).

Judge Martin instead found that an insurance binder is a unique type of contract. It is a present contract of insurance, a short method of issuing a temporary policy for convenience, to continue until the execution of the formal one. The terms of a binder are not left to future negotiation.

It is clear under New York law that when a binder is signed the contract of insurance is closed and the binder becomes in effect the same as a regular insurance policy. Otherwise, the insured could be deprived of protection pending execution and delivery of a more conventionally detailed policy of insurance.

Granting that, had the terrorist attack never happened, the parties might have agreed to policies that did not define the term "occurrence," Judge Martin considered that possibility irrelevant:

Under New York law, the question to be determined here is not:

> "What were the terms to which the parties might ultimately have agreed to become bound?" but rather, "What were the terms to which they *were* bound?"
>
> Where, as here, there is no complete written contract setting forth the entire agreement between the parties, the court must look to extrinsic evidence of the circumstances surrounding the negotiation and drafting of the agreement as well as correspondence between the parties in order to ascertain the terms of the parties' complete agreement.
>
> * * * *
>
> . . . [T]his Court does not have a roving commission to impose its conception of what is fair upon the parties before it. Nor may the Court consider the public interest in the rebuilding of the World Trade Center in deciding the

> question of whether the binders issued by these insurers entitle the Silverstein Parties to recover twice the face amount of the insurance they purchased.
>
> What the Court must do is examine the facts with respect to the negotiations between the brokers for the Silverstein Parties and each of these insurers to determine what the terms of their binders were on September 11, 2001.

After a lengthy examination of the binders, amendments, and other communications exchanged between Willis and the movants prior to September 11, 2001, Judge Martin concluded that the WilProp form was the only form submitted by Willis to each insurer, and that:

> 1. Hartford bound itself in conformity with the WilProp form, and hence its binder incorporated the WilProp definition of "occurrence."
>
> 2. Royal's binder specifically incorporated the WilProp form as submitted, including its definition of "occurrence."
>
> 3. While St. Paul apparently never reviewed the WilProp form, it accepted an offer by Willis to purchase insurance accompanied by that form, and issued a binder on that basis. Hence St. Paul and the Silverstein Parties were bound by the terms of the WilProp form, including its definition of "occurrence."

His analysis reemphasized the nature of a binder:

> As noted above, a binder is not an agreement to agree to terms in the future. A binder is "a short method of issuing *a temporary policy* for the convenience of all parties, to continue until the execution of the formal one." *Lipman v. Niagara Fire Ins. Co.*, 121 N. Y. 454, 458 (1890).

The WilProp form contained the following definition of "occurrence":

> "Occurrence" shall mean all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one

> occurrence irrespective of the period of time or area over which such losses occurred.

The insurers argued that the striking of one tower by a hijacked airplane at 8:46 a.m., followed 16 minutes later by the striking of the second tower by a second hijacked airplane, constituted "one series of similar causes." The trial court agreed, noting that while under New York law the terms of an insurance policy are interpreted from the vantage point of the "average person in the street," the rule is different for a specialized business policy. In such a case the policy should be viewed as if by a reasonably intelligent businessperson who is familiar with the agreement and the business in question, a role that the court can assume without the aid of expert evidence.

Viewing the clause from that perspective, Judge Martin had no difficulty concluding that there was one occurrence and that each movant should pay its policy limit only once:

> The ordinary businessman would have no doubt that when two hijacked planes hit the Twin Towers in a sixteen minute period, the total destruction of the World Trade Center resulted from "one series of similar causes."
>
> Indeed, this reasonable reading of the WilProp definition of the term "occurrence" apparently caused the Silverstein Parties to accept a payment of one policy limit in full satisfaction of the liability of at least two insurers who indisputably issued binders on the basis of the WilProp form.

Summary judgment was entered for the movants, declaring each liable to the Silverstein Parties for only one payment in the face amount of its policy.

How much insurance should pay for the events of September 11, 2001, will eventually be calculated and declared by the courts. How much was lost never can be.

Submitted by Newsletter Editor Gene B. George.

II. RECENT CASES OF INTEREST

Court Recognizes U. S.-law Maritime Lien for Nonpayment of P & I Premiums Owed under English Policy

Liverpool and London Steamship Prot. and Indem. Assoc. Ltd. v. Queen of Leman MV, No. 01-30325 (5th Cir. June 27, 2002) and *Liverpool and*

London Steamship Prot. and Indem. Assoc. Ltd. v. M/V Abra, No. 01-31142 (5th Cir. June 27, 2002)

Consolidated appeals from Eastern District of Louisiana and Middle District of Louisiana respectively to resolve whether English or U. S. law determines the existence of a maritime lien for unpaid insurance premiums under choice of law provision of insurance contract.

Reversing lower court in *Queen of Leman* and affirming in *Abra*, Court of Appeals holds:

> We interpret the P & I rules to provide generally for the choice of English substantive law, but to except from this choice of law the substantive issue of whether a maritime lien exists in the first place. Under the contract, that question, like the enforcement of such a lien, is to be determined by the law of the local jurisdiction. We therefore conclude that in this case the P & I rules call for the application of United States substantive law to determine the existence of maritime liens.

Court holds that difference in procedural posture does not affect interpretation of insurance contract rules, which presents purely legal issues that are reviewed *de novo*. In *Queen of Leman* appeal was from summary judgment ruling that policy called for application of English substantive law, which does not give rise to maritime lien. In *Abra*, review was of district court's determination of legality of ship's arrest at post-seizure hearing.

Parties agree that English law generally governs the contract and procedure for enforcing liens is controlled by law of the foreign jurisdiction where the lien is being enforced. Issue is whether that foreign law also determines existence of maritime lien. There is no lien under English law, but U. S. Federal Maritime Lien Act, 46 U.S.C. §§31341-43, establishes maritime lien for necessaries, including marine insurance.

Rule 40 of the contract entitles insurer to "a lien on the ships of a member" for any unpaid premium. Rule 47C provides:

> Nothing herein shall affect or prejudice the right of the Association to take action and/or commence proceedings in any jurisdiction to enforce its right of lien on ships or to otherwise obtain security by seizure, attachment or arrest of assets for any amounts owed to the Association.

Rule 48 says the contract shall be construed in accordance with English law, but "subject to the right of the Association under Rule 47C to enforce its right of lien in any jurisdiction in accordance with local law. . . ."

Court concludes that applying English law to issue of existence of maritime lien would render Rule 40's grant of lien meaningless, since English law would not recognize a maritime lien. Likewise, if English law controls and there is no lien, there would be no need for Rule 48, allowing enforcement of the lien "in accordance with local law." In order to give meaning to the entire contract, determination of whether maritime lien exists must be made under U. S. law.

Court is not concerned that lien would appear and disappear as vessel sailed to different jurisdictions, since existence of lien would "only change as the ship entered a jurisdiction that granted more expansive rights than English law." That would not be an absurd result because "the ship's presence in the jurisdiction represents a substantial contact."

Award of Prejudgment Interest and Attorneys' Fees to Insureds Upheld

Murray v. First Marine Ins. Co., 29 Fed. Appx. 503 (10th Cir. 2002)

Action by insureds against property insurer to recover for damage to motorboat engine. Court of Appeals affirms award for plaintiffs, including damages, prejudgment interest and attorneys' fees.

Plaintiffs' boat became airborne when it crossed the wake of another boat that cut across its course, experiencing engine failure when it reentered the water due to "overrev" while airborne. Jury awarded $5,800 in contract damages against insurer, to which district judge added $2,100 in costs and $33,000 in attorneys' fees.

Applying Oklahoma law, court of appeals holds that failure to submit statutorially required proof of loss does not bar recovery of prejudgment interest. Court holds that statute applies to first party actions, indemnity actions and declaratory judgment actions, and that it is satisfied by complying with notice of claim provisions of the insurance policy, followed by institution of suit on those claims. Plaintiffs' submission of information to their agent who generated a company Property Loss Notice "was sufficient to comply both with their obligations under the policy and with the statutory requirement."

[13270]

District court properly struck testimony of defense expert who submitted a written report as required under FRCP 26(a)(2)(B), but whose testimony was based in large part on photographs not mentioned in the report:

> As the district court explained when it admonished the jury to disregard Mr. Hunter's testimony, the idea behind the rule is to give opposing counsel an opportunity to inquire about the basis of an expert's testimony. Because the photographs were not mentioned in the Rule 26 report, the Murrays did not have a fair opportunity to prepare to cross-examine the expert or his evidence.

Ruling is reviewed for abuse of discretion. Since testimony went well beyond opinions expressed in written report and defendant had another expert whose testimony was allowed, there was no abuse.

Court holds Oklahoma statute permitting award of prejudgment interest is constitutional. Economic and commercial regulations survive Equal Protection Clause scrutiny under the "rational basis" test if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose:

> Under this deferential standard of review, we have no difficulty in concluding that section 3629 is constitutional. Among others, one possible rational basis for the statute is Oklahoma's presumed desire to encourage the prompt and efficient settlement of insurance claims. The legislature may have felt that the insurance industry needed the threat of a high rate of prejudgment interest to encourage the settlement of claims.

Award of attorneys' fees and costs is also affirmed. Award of attorneys' fees will only be reversed for abuse of discretion, since appellate court did not see attorneys' trial work at first hand, and is not well situated to assess the course of litigation and the quality of counsel. Under Oklahoma law, even though plaintiffs' tort claim for bad faith was dismissed on summary judgment, plaintiffs were the "prevailing party" entitled to recover fees because the verdict compelled judgment in their favor at the conclusion of the entire case.

Court notes that bad faith claim, though rejected, was not frivolous, and that fee request was reduced by one-third to account for plaintiffs' lack of success on bad faith claim and withdrawal of claim for hull damage.

[13271]

Enumerates Amounts Recoverable from Insurers and in General Average

Tetuan Shipping Corp. v. Tug Ann Moran, No. 97-3255 (S.D. Fla. Aug. 21, 2002)

Action arising out of grounding of M/V Columbus Olinda while being assisted by Tug Ann Moran in turning maneuver at port of Miami, Florida, in October 1995. After non-jury trial, district court entered judgment for Tetuan Shipping, holding tug captain's negligence was sole proximate cause of grounding. Eleventh Circuit affirmed liability judgment.

District court awards damages in the principal sum of $1,121,681.11; pre-judgment interest at average prime rate from 1995 to 2002 (8.08%); and post-judgment interest. Court finds that vessel underwent repairs to rudder and propeller costing $424,670.07, and that owner's maintenance work and repairs of hull damage sustained during trip to shipyards in Curacao did not extend total repair time. Court also accepts informal general average statement as unrebutted *prima facie* evidence of additional expenses incurred as a result of grounding totaling $240,530.83. These included towage to Curacao; port expenses in Miami and Curacao; common charges; fuel and water in Curacao; advancing commission; interest; and the adjusters' fee.

Court excludes from general average expenses $75,584.10 in crew wages and maintenance that are included in computation of off-hire loss. Court includes in general average expenses $10,685.00 in dry dock overtime charges, with $13,315.00 in overtime charges compensable separately.

Tetuan incurred $47,361.77 in miscellaneous expenses, including expenses of its superintendent, fees of underwriters' consultant in Miami, fees of underwriters' technical consultant in Germany, airfreight charges and overtime of service engineer.

The vessel was off hire for 39.57985667 days, at a rate of $9,800 per day, for a total off-hire loss of $387,882.60. Recovery was not reduced due to simultaneous owner's maintenance and repair work, which did not extend the time in dry dock.

Tetuan also incurred compensable expenses of $2,098.32 for fuel consumed while off hire and $5,822.52 it paid for repairs to a government buoy damaged in the casualty, but did not produce invoices to substantiate $25,000 claimed for administrative expenses, communication costs to Miami and Curacao and services of a technical representative.

Court finds Tetuan's failed to support its claim for $259,070.00 as reimbursement for a 17.9% increase in hull and machinery insurance cost on four vessels following the grounding. Alternative claim for premium increase of $61,670.00 as to the Columbus Olinda only is too speculative since many factors other than the grounding may have contributed to the increase. Court distinguishes *Tiger Well Serv., Inc. v. Travelers Ins. Co.*, 343 So. 2d 1158 (La. Ct. App. 1977), where testimony positively connected insurance cost increase with damage to rig caused by the defendant.

Even though Tetuan received a total of $829,993.59 from underwriters and pursuant to general average agreement, it can recover the full amount of damages from the defendants:

> In cases where an insurer has paid part of the loss, both the insured and the insurer "have substantive rights against the tortfeasor which qualify them as real parties in interest." *United States v. Aetna Cas. & Sur. Co.*, 338 U. S. 366, 381 (1949). In this case, Moran did not move for compulsory joinder of the insurers at any time during the litigation. *See Maggard Truck Line, Inc. v. Deaton, Inc.*, Nos. 84-8598 & 84-8752, 1986 U. S. App. LEXIS 21858, at *7n. 8 (11th Cir. Jan. 22, 1986) (unpublished opinion) ("[W]hen both an insurer and insured are real parties in interest, either party may sue, but upon timely motion the defendant may compel joinder pursuant to Fed. R. Civ. P. 19."). In light of Moran's pretrial conduct, it would not be equitable for Moran to benefit from the absence of the insurers and the general average contributor, through a diminished award to Tetuan.

Recovery by Tetuan is subject to subrogation rights of insurer and general average contributor, but that issue is not before the court.

Breach of Passenger Warranty Voids Coverage

Hartford Fire Ins. Co. v. Mitlof, 208 F.Supp.2d 407 (S.D.N.Y. 2002)

Grants insurer's motion for summary judgment declaring there was no coverage for liability under marine insurance policy in connection with accident involving insured's vessel resulting in injuries to passengers.

Insurer issued "hull protection and indemnity policy" with passenger vessel amendments and warranties for defendant's vessel, later amended to extend coverage to a second vessel. Policy covered damage to vessels themselves and liability resulting from loss of life or personal injuries in their use. American Institute Hull Clauses were attached and policy contained a "Passenger and Crew Warranty" which included following limitation: "Warranted that the number of passengers shall not exceed 49, or the number of passengers permitted by the United States Coast Guard or other governmental authority, whichever is less."

When purchased by defendant, the second vessel was Coast Guard certified to carry 20 passengers and 1 crewmember in Norwalk Harbor area. After sale, seller contacted the Coast Guard to revoke the Certificate of Inspection, which was done effective August 6, 1998.

On August 23, 1998, the vessel capsized while carrying at least 25 passengers and 2 crewmembers on the Hudson River.

Court finds that there is no specific federal rule governing construction of marine insurance contracts. Thus, it applies New York law to determine the scope and validity of policy provisions and consequences of breach. While in other areas of insurance, insured will not be precluded from recovery by breach of warranty that is collateral to the primary risk, warranties in marine insurance contracts must be strictly complied with. N. Y. Ins. L. §3106(c) provides: "This section [stating that breach of collateral warranties shall not preclude recovery] shall not affect the express or implied warranties under a contract of marine insurance." If warranty in marine insurance contract is breached, recovery is precluded, regardless of warranty's materiality to the insurer's risk. This is because it is peculiarly difficult for marine insurers to assess their risk, so that they must rely on representations and warranties made by insureds regarding their vessels' condition and use.

Passenger Warranty is unambiguous, since its second clause states the number of passengers shall not exceed the number permitted by the Coast Guard or other governmental authority. That number (20) is stated in the Certificate of Inspection. Warranty must be strictly complied with as a condition precedent to coverage.

Carrying 25 passengers violated the former owner's Certificate of Inspection. Moreover, since it had been revoked and a new Certificate had not yet been obtained at the time of the casualty, the vessel could not lawfully operate with more than 6 passengers under 46 C.F.R. §176.100(a), which provides that a "small passenger vessel" may not operate without having on board a valid Coast Guard Certificate of Inspection. A "small passenger vessel" is a vessel of less than 100 tons carrying more than six passengers, including at least one passenger for hire. 46 USCA §2101(35)(A). Breach of the Passenger Warranty entitles insurer to deny coverage.

Passenger personal injury claimants argue that "Barratry of the Master," defined as deliberate and willful disobedience of the owner's instructions, is a peril expressly covered by the Hull Clauses, and that the vessel's captain had boarded too many passengers despite strict company policy against passenger overloading. Court concludes this does not alter the result because Barratry is only covered under the "hull" portion of the policy with respect to damage to the vessel itself. Coverage of Barratry does not extend to passenger injuries under the "protection and indemnity" side, and hence does not prevent denial of coverage.

Delay in Giving Notice of Claim Relieves Insurer of Duty to Provide Defense or Indemnification

St. Paul Fire and Marine Ins. Co. v. FCE Indus. Ltd., t/a GMD Shipyard Management and GMD Enterprises Corp., No. 31100/2000 (N.Y. Sup. Ct. April 29, 2002)

Court grants summary judgment for plaintiff insurer. Defendants' unreasonable delay in giving notice of claim breached terms of policy notice provision, so plaintiff is not obligated to provide defense or indemnification in underlying personal injury action.

Marine general liability policy issued by St. Paul to defendants in 1994 provided:

> 1. In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereto, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company as soon as practicable;
>
> 2. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

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The policy defines "occurrence" as:

> An accident, including continuous or repeated exposure in conditions, which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured. . . .

In December of 1997, a subcontractor's employee, Sumner, was burned in a welding accident at GMD Shipyard. In February of 2000 he filed suit against the defendants. In April of 2000 their broker notified St. Paul of the underlying action.

Defendants claim they never expected the injured worker to sue, because he was collecting workers' compensation. Court concludes delay in giving notice was unreasonable. Citing New York case law, court finds that insurer is not obligated to pay loss in absence of timely notice in accordance with policy terms. Requirement of notice "as soon as practicable" is a condition precedent to coverage.

A "reasonable belief in nonliability" may excuse a failure to give timely notice, but the insured has the burden of showing the reasonableness of the excuse under the circumstances. Defendants fail to do so, where assumption that contractor's employee collecting workers' compensation would not sue them is insufficient as a matter of law. Fact that an occurrence may not result in a claim does not relieve the insured of its duty to give notice:

> The mere possibility of a claim should have alerted the defendants to the necessity of promptly informing its insurance carrier of the occurrence. . . . Further, it appears that Sumner never made a claim under workers' compensation and was never collecting workers' compensation.

Accordingly, delay in giving notice is unreasonable as a matter of law.

Broker Malpractice

Baseball Office of the Commr. v. Marsh & McLennan, Inc., 2002 N.Y. Slip Op 03966 (N.Y. App. Div., First Dept., May 14, 2002)

Malpractice action against insurance broker alleging that plaintiffs were left without coverage on underlying liability claim because defendant failed to procure adequate primary insurance; failed to give required notice to excess insurer whose policy did cover the claim; and failed to properly advise plaintiffs with respect to notice obligation. Judgment of Supreme Court, New York County, granting defendant's motion for summary judgment reversed and case remanded for further proceedings.

Underlying action, *Piazza v. Major League Baseball*, 831 F.Supp. 420 (E.D. Pa. 1993) arose out of alleged antitrust and civil rights violations, as well as defamatory statements by a Baseball executive in connection with investigation of a group whose bid to buy a major league franchise was rejected by Baseball. That suit ended in settlement that allocated sums paid by Baseball entirely to the defamation claims.

In the spring of 1992, Baseball, through its broker Marsh, acquired a comprehensive general liability policy from Hartford Fire Insurance Company that provided coverage up to $1,000,000 per occurrence for "personal injury," which, as defined, included defamation. On May 20, 1992, it acquired an excess liability policy from Twin City Fire Insurance Company, which provided in part:

> Failure of the named insured to [maintain in effect the underlying insurance policies] shall not invalidate this policy, but in the event of such failure, the company shall be liable only to the extent it would have been liable had the named insured complied therewith.

By letter to Marsh, dated May 21, 2002, Hartford advised that it had decided to exclude personal injury coverage from the policy, but would provide such coverage for 60 days to allow Marsh to replace the account. The Marsh account executive, although aware that the coverage was important to Baseball (which had historically carried liability coverage with other insurers for the public statements of its executives and committee members), neither secured replacement coverage nor informed Baseball of the exclusion. She forwarded both policies to Baseball with a covering letter saying that everything was in order.

When the Piazza suit was commenced in December of 1992, Baseball's chief financial office reviewed the policies and concluded correctly, at least as to the Hartford policy, that Baseball was not covered. The Marsh executive agreed with his conclusion that neither policy covered personal injuries, in a conversation that she later denied had taken place. She did not tell him that Hartford had provided coverage for 60 days, after which it was excluded, which arguably meant that the excess policy would provide coverage. Consequently, neither Hartford nor Twin Cities was notified of the suit.

In July of 1994, Baseball notified both insurers of the suit. Both denied coverage by letter in August of 1994, citing the Hartford personal injury exclusion and Baseball's failure to provide prompt notice as required by the policies. Both insurers commenced an action seeking a declaratory judgment that there was no coverage, which was granted.

In the malpractice action, Marsh argues that it could only be liable if it were responsible for the delay in giving notice to the insurers. The trial court granted a separate bench trial on that issue and denied Baseball's motion to strike Marsh's late notice defense. Following the trial, at which there was conflicting testimony by the Baseball and Marsh executives as to their conversation, the trial court found that there was no reasonable basis on which a finder of fact could conclude that Marsh had contributed significantly to Baseball's failure to give timely notice. It granted Marsh's motion for summary judgment, citing Baseball's failure to produce evidence that Marsh could have procured replacement coverage, although that issue was never the subject of the notice trial. As to notice, the trial court held that since Baseball was "sophisticated" and had read the policies, Marsh could not be held liable for improperly advising its client that there was no coverage under the excess policy; and that Marsh had assumed no duty to notify the insurers because, based on credibility determinations at the hearing, the alleged conversation between the Baseball and Marsh executives on the subject "never occurred."

Appellate court reverses, finding "a confluence of procedural and substantive errors," starting with grant of a separate trial of the notice issue. While discretionary, such a hearing is traditionally ordered only where the issue does not touch on the merits, but may dispose of the entire action (e.g., release or lack of jurisdiction). Here:

> the timeliness of the notice given the insurers was not the dispositive issue. The failure to procure replacement coverage for personal injury was. Moreover, the two issues were inextricably interwoven and could not be separated. As matters turned out, the hearing on the notice issue was, in fact, a trial of both issues, as to which Baseball was deprived of its right to a trial by jury.

Baseball's theory is that whether notice to Hartford was late or not is irrelevant, because there was no coverage in existence due to Marsh's failures to notify it of the exclusion and to procure replacement coverage. "A broker who agrees to place insurance for a customer must exercise reasonable diligence to do so and if unable to make such a placement must timely notify the customer to afford it the opportunity to procure the insurance elsewhere."

The trial court erred by never affording Baseball an opportunity for jury trial of the notice issue. While a court may order a fact issue raised on motion to be separately tried by the court or a referee, where, as here, the issue is triable of right to a jury, court must afford the parties an opportunity to demand a jury trial.

Resolution of fact issues, in particular the occurrence and content of the disputed conversation between Baseball and Marsh representatives, is for the trier of fact, in this case a jury if Baseball's procedural rights are to be recognized. The question is one of credibility, which may not be resolved by the court on a summary judgment motion.

Baseball executive's misinterpretation of scope of umbrella policy is not dispositive of claim that Marsh failed to advise of notice obligation; nor can Marsh simply argue that the insured should have read the policy:

> It is precisely to perform this service as well as others that the insured pays a commission to the broker. While an insured's failure to read or understand the policy or to comply with its requirements may give rise to a defense of comparative negligence in a malpractice suit against the broker, the insured's conduct does not, as the motion court held, bar such an action.

Trial court also erred in ruling that Marsh could not have procured replacement coverage, a ground not even asserted in Marsh's summary judgment motion. It is error for the court to search the record and grant summary judgment on an issue not raised, and which in this case was not one that could be decided as a matter of law, because the facts as to availability had not been fully developed.

All factual and legal findings vacated, summary judgment reversed, and case remanded for further proceedings before a different Justice.

Newsletter Editors' Note: Items for future issues may be submitted to George N. Proios, Lyons, Skoufalos, Proios & Flood, 1350 Broadway, New

York, NY 10018; Gene B. George, Ray, Robinson, Carle & Davies P.L.L., 1650 The East Ohio Building, 1717 East 9th Street, Cleveland, OH 44114; or Joshua S. Force, Sher Garner Cahill Richter Klein McAlister & Hilbert, L.L.C., Twenty-Eight Floor, 909 Poydras Street, New Orleans, Louisiana 70112-1033.

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COMMITTEE ON CARRIAGE OF GOODS BY SEA CARGO NEWSLETTER NO. 40, FALL 2002

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Consignee Gets Just Desserts . . . .

Dessert Service, Inc. v. M/V MSC JAMIE/RAFAELA, No. 01-1684 (S.D.N.Y. Aug. 14, 2002) (NRB)

The cargo plaintiff was the exclusive U.S. distributor of Italian frozen desserts. A shipment of these desserts was damaged due to thawing during carriage, and the ocean carrier stipulated to liability. On a motion for summary judgment with respect to damages, the cargo plaintiff argued that the damages should be measured by the sound market value of the goods at their intended place of arrival and that the pre-judgment interest rate should be the New York statutory rate of 9%. The ocean carrier asserted that damages should be measured by the replacement value and that the pre-judgment interest rate should be the average annual T-Bill rate. The carrier also alleged that the plaintiff had failed to mitigate its damages.

The trial court noted that the cargo plaintiff maintained a substantial inventory of frozen desserts by placing periodic orders to the supplier in Italy. Thus, the court found the cargo plaintiff was able to fill all of its customers' orders due to the size of the existing inventory in its Gardena facility and the replacement of desserts provided by its Totowa facility.

Plaintiff claimed a total loss of $100,503.50 while the carrier argued that the loss should be limited to $40,622.12 less salvage value of $6,056.19. The court noted the traditional measure is the difference between the fair market value of goods at the port of destination in their condition as shipped and their value as damaged. However, the court acknowledged an exception where replacement value should be considered the appropriate measure of damages. The court noted other decisions in which courts have found "special reasons" may render the market value rule inapplicable where a cargo interest can replace the shipment at cost and suffer no loss of profit. The rationale is that the cargo interest has received the profit it anticipated and thus should not be accorded more than full compensation for the loss it sustained. Where goods are stolen, the exception is not applicable and fair market value applies because the stolen goods compete with the manufacturer and, thus, no true replacement is possible. The instant case involved damaged or destroyed goods, therefore market competition did not occur. Replacement cost would place the plaintiff in the same position as if the goods had not been damaged.

With respect to the issue of mitigation, the carrier argued that there were triable issues of fact. The cargo plaintiff took the position that the desserts were not salvageable. However, the court noted that plaintiff did not retain a salvage expert but based its position only on an employee's inspection of the desserts and his determination that simply re-freezing the thawed desserts containing ingredients would not have restored its flavor, texture or wholesomeness. The ocean carrier presented testimony by two surveyors who had inspected the shipments and believed that the thawed desserts were wholesome and had a salvage value. The carrier also retained an experienced cargo salvor, who testified that there likely was a secondary market for the damaged shipment.

The district court stated that the cargo owner has a duty to mitigate damages; however, the burden of showing a failure to mitigate rests on the carrier. The court found that the ocean carrier had presented sufficient evidence of some salvage value to defeat the cargo plaintiff's assertion that there was no issue as to the quantum of damages, particularly considering possible salvage value.

Finally, the court allowed the T-Bill rate as opposed to the New York state statutory rate, stating that the T-Bill rate more closely paralleled the income damages would have earned in a short-term, risk-free investment.

A Trip to London and Back Again . . . .

Thyssen, Inc. v. Calypso Shipping Corp., S.A., No. 01-9044 (2d Cir. Sept. 26, 2002)

Suit was brought in the district court for damage to a shipment of steel coils. The vessel was under sub-charter and the governing bills of lading incorporated the terms and conditions of the sub-charter, including an arbitration clause calling for London arbitration. The district court stayed proceedings based upon incorporation of the arbitration clause.

Although London arbitrators were appointed, the parties agreed to allow the Commercial Court in London to decide whether or not the claims were time-barred. That court decided the claims were indeed time-barred and dismissed the claims in a decision that was not appealed.

The case returned to the United States district court, which confirmed the arbitration award, and an appeal was taken. The court of appeals treated the arguments in turn. The cargo claimant asserted arbitration was waived because of the defendant's delay in asserting arbitration. The appellate court noted the strong presumption in favor of arbitration and that waiver of the right to arbitrate is not to be lightly inferred. An inquiry into whether there is a waiver of an arbitration right is fact-specific and not susceptible to bright line rules.

"The key to a waiver analysis is prejudice" and the court recognized two types: substantive prejudice and prejudice due to excessive cost and time delay. There was no evidence of excessive costs and though there was a significant length of time between the filing of the complaint and the assertion of the right to arbitrate, there was no evidence of extensive discovery or substantive motions by the cargo interests. Citing cases, the court stated the presumption in favor of arbitration cannot be overcome based merely on the length of the delay.

As to substantive prejudice, the court rejected an argument that the right to arbitration was not set forth in the answer. Noting there was no *per se* rule that arbitration must be pleaded in the answer to avoid waiver, the court referred to "applicable precedent of this Court," stating that: "[a]bsent a demonstration of prejudice ***, the bare fact that the defendants filed an answer is inadequate by itself to support a claim of waiver of arbitration."

The argument was also made that by the time arbitration was reached, the claim was already time-barred. The court accepted defendant's response that the time bar period had already expired before it had even answered, thus there was no substantive prejudice. The court affirmed the district court's conclusion that there was no waiver.

Cargo appellant argued that the district court had erred in dismissing its *in rem* claim because London arbitration could only deal with the *in personam* claim, since English law does not grant arbitrators *in rem* jurisdiction. The circuit court noted that almost all maritime disputes generate both an *in personam* and an *in rem* claim and, if plaintiffs were able to bring *in rem* claims in court after a failure of the *in personam* claims before an arbitrator, parties would have no incentive to arbitrate maritime matters.

Under §8 of the Arbitration Act, the plaintiff may seize a vessel *in rem*, obtain security and proceed with arbitration. If it wins but cannot recover against the owner, it can recover against the vessel itself. The *in rem* claim serves to make sure a plaintiff can recover if it wins in arbitration.

> Any interpretation of the FAA that allowed an *in rem* claim to proceed after the failure of an *in personam* claim would undermine the purpose of the Act with respect to maritime proceedings. All maritime contracts that called for arbitration of *in personam* claims could be sidestepped simply by bringing *in rem* claims. The FAA clearly states that it controls maritime transactions, and we must interpret it in a way that furthers that purpose.

As to the argument that COGSA invalidated the reference of the *in rem* claim to arbitration, even assuming that the lack of an *in rem* cause of action could be considered a violation of COGSA "(a ruling that would contradict most case law on the matter ***)" there was no violation because the *in rem* rights were protected. A Club Letter of Undertaking had been accepted. Moreover, if the cargo claimant had won in arbitration and the owner had tried to avoid the court's order, recovery could have been made against the Club Letter. "A letter of undertaking replaces the vessel as the *res* and moots the question of the need for separate *in rem* claim" (citing cases).

Finally, the court agreed that the charter party provisions were properly incorporated into the bill of lading and that the cargo appellant was bound, despite the fact it had no actual or constructive notice of the terms of the charter party provisions. The court of appeals affirmed the district court's grant of summary judgment.

Buzzing of the (b)s; Clause Stings Anyway

Jockey Intl., Inc. v. M/V LEVERKUSEN EXPRESS, 2002 WL 1940308 (S.D.N.Y. Aug. 22, 2002)

An action was brought for fire and water damage to a shipment of goods from Thailand to Charlotte, North Carolina, via Savannah, Georgia. The carrier brought a motion to dismiss based on a mandatory forum selection clause which required claims to be brought in Hamburg, Germany. The cargo claimant opposed the motion on the grounds that the clause should be excluded as a discovery sanction or that it had been waived by defendants' participation in the lawsuit.

Initially, the court *sua sponte* took up the procedural rule which it felt governed consideration of the motion. Defendants had purported to bring their motion based on lack of personal jurisdiction, improper venue and failure to state a claim (Rules 12(b)(2), (3), and (6)). However, the trial court found no decision which analyzed the enforcement of a forum selection clause as a personal jurisdiction issue. Thus, in its view, Rule 12(b)(2) seemed irrelevant and inappropriate. At the same time, the court noted numerous courts within the circuit had utilized Rule 12(b)(3) and 12(b)(6). However, the practical difference between the sections, according to the court, is that the former rule allows courts to consider materials outside the pleadings while the latter does not.

Because materials outside the pleadings were submitted, the court treated the motion to dismiss based on the forum selection clause as falling under Rule 12(b)(3). The court recognized that mandatory, exclusive forum selection clauses are presumptively valid and must be enforced unless they are unreasonable or constitute the result of fraud or overreaching. A party attempting to avoid a valid forum selection clause must "show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."

The plaintiff ignored the factors usually asserted in arguing the clause should not be enforced and argued instead that the defendant's failure to furnish copies of exhibits should carry the sanction of non-enforcement. The court noted that the failure to furnish was both substantially justified and harmless oversight (since the exhibits were only four days late). Additionally, the defendants' answer asserted an affirmative defense which referred to a forum selection clause. Thus, the court noted that "apart from a generic cry of prejudice," plaintiff had not argued that anything would have been done differently by the parties opposing the motion. Defendants were warned from the outset that the forum would be challenged and the opponents to the motion could not reap a windfall by precluding the defense merely because of an inadvertent lack of disclosure. Thus, the court found no justification for invoking the sanction of Rule 37 as requested.

Plaintiff also argued that the defendant's failure to produce a copy of the actual bill of lading should give rise to a negative inference that the bill of lading for the shipment did not exist. The plaintiff requested this adverse inference on the production of a "print out" and a copy of the standard long-form bill of lading. However, the court found that at the request of the shipper; the carrier supplied not a paper bill of lading but an "ECB," which could be issued entirely through a computer system without any paper trail.

A printout of the ECB from its database was filed with the motion, along with a copy of the standard terms and conditions of the ECB and a copy of the standard long-form bill of lading incorporated by reference in the ECB's terms and conditions. Both contained identical forum selection clauses and the court refused to draw any negative inference, thus allowing defendants to rely on the documents.

As to waiver, the forum selection clause was raised at the earliest possible time, *i.e.*, as an affirmative defense in the answer. Noting that participation in a lawsuit did not constitute waiver unless the opposite party was prejudiced, the court also recognized that participation in litigation to protect oneself does not constitute a waiver.

The court stated that only "collateral challenges" had been made to the clause and noted that Plaintiff had not argued that the clause was mandatory, exclusive or the result of fraud. Likewise, the forum called for was not gravely inconvenient. Thus, in the court's view, application of the clause would not contravene public policy United States. The court found the clause to bind not only the NVOCC but also the plaintiff (technically not a party to the ECB) (citing cases).

Burden Bounces Rubber to Singapore

Alcan Rubber and Chemical Co. v. M/V STAR GRAN, No. 00-0033, C/W No. 003467 (E.D. La. May 20, 2002)

Liner bills were issued with respect to a shipment of rubber from Indonesia to New Orleans. The booking indicated the rubber was to be carried from the port of shipment and transshipped on a connecting vessel for continuation to New Orleans. The bills of lading provided that the responsibility of the carrier was limited to its own portion of the voyage and the jurisdiction clause of each bill of lading selected "the country where the carrier has his principal place of business." During the transshipment voyage, a fire allegedly occurred damaging the rubber and suit was instituted, naming the vessel and others, including the time charterer of the initial vessel. The time charterer thus moved to enforce the forum selection clauses in the bills pursuant to FRCP 56.

The district court noted that forum selection clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances. The burden of proving unreasonableness is a heavy one, carried only by a showing that the clause results from fraud or overreaching, that it violates a strong public policy, or that enforcement of the clause deprives the plaintiff of his day in court.

The cargo interests argued that the clauses were too vague because they did not identify the specific forum where it had to file suit and also noted that while the moving defendant was located in Singapore, the other carrier was a Norwegian company. The court recognized that there might be more than one carrier; but noted that the bills of lading involved were between only two companies, the cargo plaintiff and the time charterer, and thus found the time charterer's place of business to be relevant.

Cargo interests further argued that it would be prejudiced by having the dispute against the two carriers heard in two separate forums. However, the court stated increased costs and inconvenience were insufficient reasons to invalidate forum selection clauses.

Finally, plaintiff argued that it would be prejudiced if the forum selection clause were enforced because Singapore might enforce the identity of carrier clause contained in each bill of lading which would be invalid under §1303(8) of COGSA. The court stated that it had not been provided with any proof that the Singapore court would be required under Singapore law to enforce the identity of carrier clause in violation of COGSA. Thus, the court concluded that the cargo plaintiff had failed to carry its burden of showing enforcement of the clause would be unreasonable and unjust.

Clause Doesn't Let Carrier off Hook . . .

P.T. Indonesia Epson Indus. v. Orient Overseas Container Line, Inc., 2002 WL 1008443 (S.D. Fla. May 15, 2002)

A container of computer printers was shipped from Singapore to Long Beach, California, and thence overland by railroad to Miami, Florida. From there, the container was supposed to be delivered by a trucking company to the consignee.

After three days of storage at the rail yard in Miami, a trucker picked up the container for transport and delivery to the consignee. En route, the driver of the truck stopped briefly at a cafeteria and on his return to his truck and container, was assaulted at gunpoint by two armed robbers who hijacked the container. The container of printers never arrived at their ultimate destination.

[13287]

Plaintiffs sued an ocean carrier in state court. The case was removed to federal court by the ocean carrier who later filed a cross-claim against the trucker and a third-party complaint against the insurer of the trucker alleging coverage to itself as well. Plaintiffs then moved for summary judgment on the issue of liability.

The district court considered the application of COGSA, the Carmack Amendment, the Harter Act, and state common law, noting that the through bills of lading specified that COGSA was to apply to the entire transport, including the inland leg. The court rejected the application of Carmack as there was a single through bill of lading covering both the foreign and domestic legs of the transport. As to COGSA, the court noted COGSA did not apply as a statute. However, the bill of lading indicated the parties' intent that COGSA govern before loading, after discharge and while subject to the through bill of lading. Absent this clause, the bill of lading would be governed by the Harter Act.

The court then found that the plaintiffs had established a *prima facie* case because the through bill of lading listed the weight of the cargo demonstrating that the cargo was delivered to the carrier in good condition, and there was no dispute that the printers had never arrived at final destination. The through bill of lading contained no limiting language and was sufficient to satisfy the first prong of a *prima facie* case.

The court then considered the burden which shifted to the carrier to show that it was not responsible for the loss. A clause of the bill of lading allowed the carrier to subcontract a portion of the transport. The ocean carrier argued that the clause relieved it from any liability as an agent or trustee of the trucker, a participating carrier.

The court found the clause was void under §1303(8) of COGSA. Thus, the carrier remained liable for the trucker's potential negligence. In order to avoid liability, the carrier must show the loss of the printers arose without its actual fault and privity and without the fault or neglect of the trucker (deemed to be its agent).

The court considered evidence produced at the deposition of the truck driver: *i.e.*, keys to the truck, the driver's wallet, the contents of his wallet including $150.00 were still in the truck when it was found after the alleged hijacking and the fact that only his cell phone and the company radio were missing. The police report stated that the driver recovered his truck near his home and reported it to the police. However, this statement conflicted with the driver's testimony that he had been called by his dispatcher, who told him his truck was seen, which prompted him to call the police. The police report also noted that the police suspected the driver of being involved.

Based on the evidence most favorable to the carrier, the court found a genuine issue of fact as to whether the driver was involved in the alleged hijacking. If it could be shown that the driver had participated in the theft, the carrier might not be able to shield itself from liability under COGSA's "q" clause because the loss would have been caused by the fault and neglect of the driver, a potential agent or servant of the carrier as an employee of the trucker. However, if the driver was not involved in the loss of the cargo, the "q" clause would apply and shield the carrier from liability. Additionally, the court was unable to determine whether the driver could be considered an agent or servant of the trucker.

The court thus found an issue of material fact as to the driver's participation and the minimal evidence of the trucker's responsibility for the possible acts of the driver, and denied plaintiffs' motion for summary judgment against the ocean carrier.

Railroad Derailed in Bid for Himalaya . . .

James N. Kirby Pty. Ltd. v. Norfolk Southern Railway Co., 2002 U.S. App. LEXIS 26372 (11th Cir. Aug. 8, 2002).

The U.S. Court of Appeals for the Eleventh Circuit held that an inland rail carrier was not entitled to limit its liability for cargo damage under the ocean carrier's bill of lading because there was no privity in contract between the rail carrier and the ocean carrier.

Cargo interests brought suit for damage to machinery which occurred due to a train wreck while the cargo was being transported from the discharge port of the inland place of destination. The district court decided that the rail carrier could limit its liability on the basis of the Himalaya clause in the ocean carrier's bill of lading. The circuit court reversed the district court's determination that the cargo consignee was not a party to the ocean carrier's bill of lading and was not bound by its terms. The circuit court also ruled that while the cargo consignee was a party to a bill of lading issued by an NVOCC, the rail carrier could not invoke the protections of that bill since it was not a "clearly intended beneficiary" of the Himalaya clause in the NVOCC's bill.

The appellate court found that the NVOCC's use of the *FIATA Multimodal Transport Bill of Lading* ("FBL") form was indicative that the NVOCC was acting as a principal and not merely as an agent for the shipper. That conclusion, said the court, was reinforced by the fact that the ocean carrier issued a separate bill of lading which listed the NVOCC, and not the actual shipper, as the party with whom the ocean carrier was contracting.

The court cited the seminal American case on Himalaya clauses, *Robert V. Herd & CO. v. Krawill Machine Corp.*, 359 U.S. 297 (1958), for the rule that "contracts purporting to grant limitation of liability must be strictly construed and limited to their intended beneficiaries." The court held that the engagement of the rail carrier not directly by the NVOCC but by the ocean carrier clearly excluded the rail carrier as one of the intended beneficiaries of the NVOCC's Himalaya clause and also held that privity of contract was required where the terms being interpreted in the clause—such as "agent", "servant" or "independent contractor"—were "relational."

Beef Chipped to Tokyo

TMC Co. Ltd. v. M/V MOSEL BRIDGE, 2002 WL 1813303 (S.D.N.Y. Aug. 7, 2002)

Plaintiff sued the ocean carrier to recover for damages suffered when a cargo of chilled beef being shipped from Oakland to Osaka thawed. The bill of lading issued by the ocean carrier contained a Japanese choice of law provision and a forum clause requiring that any action thereunder be brought in the District Court of Tokyo.

Cargo interests opposed the ocean carrier's motion to dismiss, contending that the forum clause was permissive and not mandatory, and, further, that a service contract between the parties superceded the bill of lading and contained its own forum selection clause providing for New York arbitration.

The court dismissed the plaintiff's arguments in turn. It held that the plain language of the bill of lading forum clause: "[s]hall be brought before the Tokyo District Court", meant exactly what it said. The contention that the forum selection clause is permissible is irreconcilable with its plain language.

The court went on to find that the terms and conditions of the service contract were effectively trumped by the terms and conditions of a subsequently issued bill of lading.

[13290]

Cheese Spoiled; Bill of Lading Not

Albany Ins. Co. v. M/V SEALAND URUGUAY, No. 00-3497 (S.D.N.Y. Aug. 12, 2002)(JSM).

Plaintiff cargo owner moved for partial summary judgment on liability against an ocean carrier and a vessel owner. The case involved alleged spoilation of five shipments of Uruguayan cheese which were moved from Montevideo to New York.

In Uruguay, the shippers had prepared the bills of lading, loaded the cargo into refrigerated containers supplied by the ocean carrier and trucked the cargo to the port. The shipper did not set the temperature on the refrigerated containers but gave instructions to the ocean carrier regarding the temperature requirements for the voyage. When the containers arrived in New York, it was apparent that the cheese had been transported at a temperature well below the required temperature. Though salvageable, the cheese was unfit for its intended purpose.

The district court held that under the bills of lading, it was clear that the obligation to set the temperature on the refrigerated containers rested with the plaintiff cargo owner. The court cited the clear language of the bill of lading:

> If perishable goods requiring special temperature are delivered to the Carrier in a refrigerated container, the Merchant undertakes that the Goods have the temperature provided on the face hereof and that they have been properly stowed and the thermostatic controls have been properly set by him before delivery of the goods to the Carrier.

Plaintiff attempted to persuade the court that local custom at the port of Montevideo prevented the shipper from setting the temperatures on the refrigeration containers. According to plaintiff, shippers and truckers were forbidden from activating the refrigeration units. The court, however, was not persuaded on the issue of proof of causation and thus held that the local custom may not be introduced to contradict the clear and unambiguous language of the bill of lading. The court, thus, found the defendants not liable for the cargo damage and denied plaintiff's motion for summary judgment.

[13291]

Korean Clause Controls Again

Hukje Huajae Ins. Co. Ltd. v. M/V HYUNDAI LIBERTY, 2002 WL 1371059 (9th Cir. June 26, 2002).

The Ninth Circuit affirmed a decision from the Central District of California which had dismissed an *in rem* action against a vessel and held that the shipper was bound by a forum selection clause in a bill of lading issued by the shipowner to an NVOCC.

The subrogated cargo insurer of a lathe which was transported from Busan, Korea, to Los Angeles, California, sued an NVOCC, the vessel owner and the vessel *in rem* after the lathe arrived damaged from the sea voyage. The NVOCC's bill of lading issued to plaintiff contained a New York federal court forum clause but the NVOCC did not seek to enforce that clause. The vessel owner's bill of lading issued to the NVOCC contained a mandatory Seoul (Korea) forum clause.

The vessel owner moved to dismiss the complaint seeking to enforce the Korean forum selection clause in the vessel owner's bill of lading. The district court initially denied the motion on the ground that there was no proof that the plaintiff had "accepted" the vessel owner's bill of lading. The district court intimated that it would, however, entertain the vessel owner's motion again if the vessel owner could establish plaintiff's acceptance of the vessel owner's bill of lading.

On appeal, the circuit court held that the district had abused its discretion when it failed to enforce the forum selection clause and dismiss the action, including the *in rem* claims, at the outset of the litigation. Relying upon its prior holding in *Fireman's Fund Ins. Co. v. M.V. DSR ATLANTIS*, the Ninth Circuit re-affirmed its ruling that a dismissal of all claims for cargo damage, including *in rem* claims against a vessel, is warranted, notwithstanding the fact that the foreign forum does not provide for the adjudication of *in rem* claims.

The appellate court further held that under a theory of agency, the cargo owner was bound by the ocean carrier's bill of lading forum selection clause even though a separate bill of lading had been issued to the cargo owner by the NVOCC. For reasons not explained, neither the plaintiff nor the NVOCC pressed for the enforcement of the New York forum clause in the NVOCC's bill of lading.

[13292]

Iffy Clause Ineffective

Eurosteel Corp. v. M/V MILLENNIUM FALSON, 2002 WL 1972266 (N.D. Ill. Aug. 20, 2002).

Plaintiff filed suit alleging damage to a shipment of steel coils which moved from Fos Sur Mer, France, to Burns Harbor, Indiana. The defendant time charterer of the vessel moved for summary judgment dismissing the complaint or staying the proceedings for failure to arbitrate the dispute in accordance with the terms and conditions of the bill of lading.

The Northern District of Illinois (Eastern Division) ruled that the plaintiff was not required to arbitrate the dispute and denied the defendant charterer's motion for summary judgment.

The bill of lading contained express language which properly incorporated the terms and conditions of a charter party, including the arbitration clause: "ALL TERMS, CONDITIONS AND EXCEPTIONS INCLUDING ARBITRATION CLAUSE OF C/P DATED FOR SUR MER 3rd OCTOBER 2000 ARE HEREWITH INCORPORATED." The arbitration clause of the charter party, however, did not require the parties to arbitrate their dispute, stating instead: "[a]rbitration, if any, to be settled in Paris by Chambre Arbitrale. General Average, if any, to be settled in Paris."

The court found that the language of the arbitration clause was unambiguous and, in fact, mandated arbitration of disputes. However, the court also found that the prepositional phrase "if any" indicated that arbitration would take place in Paris *if* arbitration were to take place. The court found there was no additional language either in the bill of lading or charter party which mandated that all disputes be brought by arbitration, distinguishing from cases that require arbitration to proceed based on language which mandated arbitration.

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1. Existence and Enforceability of Arbitration Agreements

In *Sphere Drake Ins. Ltd. v. Clarendon National Ins. Co.*, 263 F.3d 26 (2d Cir. 2001), the U.S. Court of Appeals for the Second Circuit clarified the issues of whether the existence and enforceability of a contract containing an arbitration clause must be submitted to a court or to arbitrators.

In *Interocean Shipping Co. v. Nat'l Shipping & Trading Corp.*, 462 F.2d 673 (2d Cir. 1972), the party resisting arbitration claimed that there had been no "meeting of the minds" on entering into a contract which contained an arbitration clause. Hence, it argued that there was no contract and no obligation to arbitrate. The court ordered a trial on the question whether a contract had come into existence. By contrast, in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the party resisting arbitration had claimed it had been "fraudulently induced" to enter into the contract and, on that basis, claimed that the contract and its arbitration clause should be held unenforceable by the court. However, the Supreme Court rejected this argument, holding that the issue whether the contract had been fraudulently induced or not was a matter for the arbitrators to decide. The only exception under *Prima Paint* is when a party has been fraudulently induced into agreeing *to the arbitration clause itself,* as opposed to the contract as a whole.

The Second Circuit in *Sphere Drake* sought to harmonize these two holdings. Although not explicitly stated in either case, the critical distinction according to the circuit court was whether the underlying contract was "void" or "voidable." *Interocean,* it explained, was "a good example of a void contract, for when parties fail to agree on essential contract terms, the agreement does not come into existence and it is void and wholly unenforceable." *Id.* at 31. Thus, issues involving whether a contract is "void" are for a court to decide. In *Prima Paint,* by contrast, "the contract at issue there was merely voidable because an allegation of fraud in the inducement is a defense that renders contracts voidable, but not void." *Id.* Issues involving whether a contract is "voidable" are hence for arbitrators to decide.

On the basis of this distinction, the Second Circuit in *Sphere Drake* found that the party resisting arbitration had raised sufficient evidence that only one of the several reinsurance contracts was void. Thus, the court remanded the case, in part, for a trial on that one contract and affirmed the remainder of the trial court's decision ordering arbitration on the other contracts.

This same distinction was embraced in a charter party dispute in *Ministry of Indus. & Trade v. S. Kasmas & Bros. Ltd.*, No. 01-3575, 2001 U.S. Dist. LEXIS 13878 (S.D.N.Y. Sept. 7, 2001) (Chin, J.), where a trial was ordered on the existence of the contract.

2. Existence of Agreement to Arbitrate—The Battle of the Forms Continues

In *Aceros Prefabricados, S.A. v. Tradearbed, Inc.*, 282 F.3d 92 (2d Cir. Feb. 13, 2002), Aceros, a buyer of steel, argued that it should not have been bound to arbitrate by reason of an unnegotiated arbitration provision contained in confirmation orders.

This is the so-called "battle of the forms" problem of contract formation that arises under Uniform Commercial Code §2-207. Under New York law, as announced in *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 408 N.Y.S.2d 410 (1978), an arbitration provision is deemed, as a matter of law, to be a material amendment to a contract and, hence, does not become part of a contract absent express and unequivocal assent.

In *Aceros*, however, the Second Circuit stated that the rule in *Marlene* unlawfully "discriminated" against arbitration in violation of *Perry v. Thomas*, 482 U.S. 483 (1987), and concluded that the *Marlene* rule could not govern a case subject to the Federal Arbitration Act ("FAA"). It also noted that an unrejected, proposed arbitration provision might fail if it were *proven* to constitute a material alteration in a given case. The circuit court further held that the burden of proof of materiality was on the party "that opposes inclusion" and that a "material alteration is one that would result in surprise or hardship if incorporated without express awareness by the other party." It ultimately found that Aceros had failed to prove any surprise or hardship and, therefore, was bound to arbitrate under the proposed additional terms, including arbitration, to which it had not specifically disagreed in 2 of the 3 contracts in question.

3. Arbitration Agreements Must Be Mandatory

In *Hartford Fire Ins. Co. v. Novocargo USA Inc.*, 2002 AMC 314 (S.D.N.Y. 2002), the court denied a motion to stay a cross-claim in favor of arbitration on the ground that the clause in the United Alliance Agreement was not sufficiently mandatory. The first part of the clause in question provided that any party "may give written notice" of a dispute and the other parties "shall have sixty (60) days in which to endeavor to settle." *Id.* at 321. The second part of the clause then provided that if the parties failed to settle the dispute within 60 days, "the matter shall be submitted to arbitration and shall be finally settled under arbitration of the London Maritime Arbitrators' Association." *Id.* The court ruled this only provided an *option* for arbitration and denied the motion for a stay.

4. Arbitration Agreement in Employment Contract Held Unenforceable as "Unconscionable"

In *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002), the Ninth Circuit ruled that an arbitration agreement may be invalidated under general state contract law principles such as fraud, duress, or unconscionability.

Adams had signed a standard "Circuit City Dispute Resolution Agreement" as part of his employment contract. Circuit City would not employ anyone who failed to sign the agreement or who withdrew assent to it within three days. The agreement required all employees to submit all claims and disputes to binding arbitration, and outlined rules and procedures which defined the claims subject to arbitration, discovery, the allocation of costs and fees, and the remedies available, including the amount of recoverable damages. However, the agreement permitted Circuit City to pursue its claims against its employees through the courts or arbitration.

Adams sued Circuit City and three co-workers in state court for sexual harassment, retaliation, constructive discharge and intentional infliction of emotional distress and for discrimination based on sexual orientation under California statutes. Circuit City petitioned the U.S. District Court for the Northern District of California for an order staying the state action and compelling arbitration under the agreement.

The district court granted Circuit City's petition, but the Ninth Circuit reversed, holding that the Adams' agreement did not fall within the purview of the FAA. The Supreme Court granted *certiorari* and reversed the Ninth Circuit by holding that the employment agreement was subject to the FAA. 532 U.S. 105 (2001).

On remand, the Ninth Circuit looked to §2 of the FAA, which provides that arbitration agreements are valid "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. §2, and held that Adams' agreement was unenforceable because it was both procedurally and substantively unconscionable under California law. The agreement was procedurally unconscionable because it was a contract of adhesion prepared by Circuit City which, as the potential employer, held superior bargaining power over applicants. An unmodified agreement was a prerequisite to employment, leaving an applicant only with the option to take it or leave it. Moreover, the Agreement was substantively unconscionable because it failed to show "the 'modicum of bilaterality' that the California Supreme Court requires for contracts to be enforceable under California law." 279 F.3d at 894. The agreement was asymmetrical and substantively unconscionable because it only required employees to arbitrate their claims while freeing Circuit City to sue or arbitrate. Further, the agreement was unconscionable because it provided employees with far fewer remedies and damages than were available to employees under relevant California statutes.

The Ninth Circuit observed that its decision was consistent with federal law concerning arbitration since federal courts have recognized that while statutory rights can be arbitrated, the arbitral forum must allow the claimant to adequately pursue those rights. The court of appeals also observed that its decision adhered to the FAA "because unconscionability is a defense to contracts generally and does not single out arbitration agreements for special scrutiny [and is therefore] a valid reason not to enforce an arbitration agreement under the FAA." *Id.* at 895. As a result, the Ninth Circuit reversed the district court order compelling arbitration under Circuit City's employment agreement with Adams.

5. EEOC Not Barred from Enforcement Action by Arbitration Clause

In *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279, 151 L.Ed. 2d 755 (2002), the Supreme Court considered whether an arbitration clause in an employment contract barred the EEOC from pursuing "victim-specific" judicial relief in an enforcement action alleging that the employer had violated the Americans with Disabilities Act. ("ADA").

In his application for employment with Waffle House, the employee agreed to arbitrate any dispute concerning his employment. Shortly after beginning work, he suffered a seizure on the job and was soon discharged. The employee did not demand arbitration but filed a discrimination charge with the EEOC, alleging that his discharge violated the ADA.

The EEOC filed an enforcement action (to which the employee was not a party) in the U.S. District Court for the District of South Carolina. In its suit, the EEOC alleged that the employer had violated the ADA and sought injunctive relief, punitive damages and specific relief to make the employee whole, including backpay, reinstatement and compensatory damages.

The employer defendant moved to alternatively stay the suit and compel arbitration or to dismiss the suit. The district court denied the motion and, on appeal, the Fourth Circuit held that the arbitration agreement in the employment application did not foreclose the EEOC's enforcement suit but limited the possible remedies for the EEOC to injunctive relief, precluding victim-specific relief. The Supreme Court reversed, holding that the arbitration agreement did not bar the EEOC from pursuing victim-specific relief in an ADA enforcement action, and remanded for further proceedings.

The Court began its analysis by pointing out that relevant federal statutes clearly authorized the EEOC to obtain the relief it sought in its complaint, if it could prove its case against the employer. In addition, there was no language in relevant provisions of Title VIII of the Civil Rights Act of 1964 or in prior Supreme Court cases suggesting that an arbitration agreement between private parties changes the EEOC's function or the remedies it could seek. As for the FAA, it "does not mention enforcement by public agencies" and, other than ensuring the enforceability of private agreements to arbitrate, "does not purport to place any restriction on a nonparty's choice of a judicial forum." 151 L.Ed. 2d at 766. The instant case involved a private agreement to arbitrate but the EEOC was not a party to the contract containing the arbitration clause nor had it otherwise agreed to arbitrate its claims. Thus, "the proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so." *Id.* at 769. According to the Supreme Court, the solution reached by the Fourth Circuit "turns what is effectively a forum selection clause into a waiver of a nonparty's [i.e., the EEOC's] statutory remedies." *Id.* The Supreme Court reversed to prevent the EEOC's enforcement action from being compromised by the employer's reliance on the arbitration clause in the employee's application.

6. The New York Convention Does Not Apply to Seaman's Contracts Providing for Arbitration

In *Jaranilla v. Megasea Maritime Ltd.*, 171 F. Supp. 644 (E.D.La. 2001), a seaman filed a claim for injuries against his employer in Louisiana state court. The defendant employer removed the case to federal court on the ground that the seaman's contract, which apparently contained an arbitration clause, was governed by the Convention on the Recognition and Enforcement of Arbitration Awards, 9 U.S.C.A. §201 *et seq.* (West 1999) (the "Convention"). However, the court remanded the case to state court, finding that, under §1 of the FAA, seamens' contracts were specifically exempt from coverage and should not be considered "commercial contracts." Because of this provision in the FAA, and because, under §208 of the Convention, the FAA is incorporated into the Convention, a seaman's contract is also outside the scope of the Convention. The case was, therefore, remanded to state court.

7. Time Bar and Issues of "Arbitrability"—Whether for Courts or Arbitrators

The United States Supreme Court has granted *certiorari* in *Howsam v. Dean Witter Reynolds, Inc.*, U.S. , 122 S.Ct. 1171, 152 L.Ed.2d 115 (Feb. 25, 2002). In an earlier decision, the Tenth Circuit had ruled in *Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956 (10th Cir. 2001), that questions concerning the timeliness of an action and "arbitrability" generally are governed by federal rather than state law, and that under federal law, timeliness and "arbitrability" questions are to be decided by the court, absent a "clear and unmistakable agreement." There is a split in the circuits (and between state courts) on this issue which should now be resolved by the United States Supreme Court.

8. Manifest Disregard of Contract Law

In *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 162 F. Supp.2d 278 (S.D.N.Y. 2001), the district court vacated a substantial American Arbitration Association award rendered by an attorney sitting as sole arbitrator on the basis of manifest disregard of the law.

The dispute arose out of a contract in which Westerbeke agreed to buy "carcass" engines from Daihatsu for "marinization," a process which would make the engines suitable for operation in marine environments. Westerbeke argued the contract applied to a new engine Daihatsu had developed years after the contractual relationship had commenced which Daihatsu began to market in the United States through another company. When Westerbeke contended that Daihatsu had breached the sales agreement, the latter terminated the contract, prompting the former to demand arbitration.

During the arbitration, the arbitrator bifurcated proceedings into separate phases for liability and damages. At the close of the liability phase, the arbitrator issued an Interlocutory Award concluding that Daihatsu had breached the contract by refusing to negotiate the inclusion of the new engine within a provision of the agreement covering engines other than those specifically described in the contract. However, the court noted that "the [arbitration] Tribunal effectively replaced its liability analysis in the Final Award of damages," *id.* at 282, ruling that Daihatsu had breached an obligation to sell the new engines exclusively to Westerbeke, causing the latter to suffer substantial damages when that agreement was breached.

Noting that the scope of review is "extremely limited" when manifest disregard is urged as the basis for vacatur, the court nevertheless held that the award of expected profits to Westerbeke "was one of those 'extremely limited' instances when the Tribunal manifestly disregarded the controlling law." *Id.* at 284. The court noted that the contractual provision at issue was a preliminary agreement to negotiate which Daihatsu clearly breached. Under New York state law, which controlled pursuant to a choice of law clause in the sales agreement, one cannot recover anticipated lost profits for breach of a preliminary agreement to negotiate. The court observed that "awarding expectancy damages in this case… would give Westerbeke full damages for breach of a contract which was never reached, a result which runs counter to the principle that courts and arbitrators alike should give primary effect to the intentions of the parties." *Id.* at 287. In addition, the Court determined that the arbitrator had found a "legally binding obligation" on the part of Daihatsu to sell the new engines to Westerbeke by giving weight to documents which were "extrinsic to any negotiation between the parties." *Id.* at 289. In doing so, "the final Award stretches beyond the limits of sound jurisprudence and in effect substitutes the Arbitrator's own judgment for the intentions of the parties." *Id.* In short, the Court ruled that the arbitrator had awarded impermissible damages by concluding Daihatsu had breached an agreement that, in fact, had never been reached.

The court concluded that relevant state law on preliminary agreements and recoverable damages was clear and well-defined, having been articulated by the New York Court of Appeals in decisions rendered in 1986 and 1992. In addition, it was clear from the two awards that the arbitrator knew and appreciated the law on both issues, yet "ignored or refused to apply" it properly, requiring *vacatur*. *Id.* at 291. The court remanded the case to the arbitrator for "an appropriate determination of damages" consistent with the court's decision. *Id.*

This decision, which is on appeal to the Second Circuit, is of particular interest because, unlike other recent cases in which manifest disregard was successfully argued, the rights at issue were not rooted in federal statutory law but were instead based on state common law.

9. Vacating Awards—Attorneys' Fees under New York State Law; Irrationality and Manifest Disregard

In *In re UBS Warburg LLC and Auerbach, Pollak & Richardson, Inc.* (New York Supreme Court, New York County, Index 119163/00), *New York Law Journal*, October 22, 2001, p. 24, col. 4, the New York Supreme Court, New York County reviewed an arbitration award under §7511 of the New York Civil Practice Law and Rules ("CPLR"). The court vacated the award of attorneys' fees in that case, noting that, under New York state law and, in particular, CPLR §7513, arbitrators may not award legal fees "[u]nless otherwise provided in the agreement to arbitrate." In addition, the court vacated the majority's decision awarding consequential damages.

The basis for this vacation was two-fold. First, the court found that the majority demonstrated an "irrational refusal to even consider the applicable law which governed the dispute." The court noted that one arbitrator indicated it did not know the law and would not read any cases submitted. The court also referred to the Panel's ruling which limited the parties' ability to cite precedent in support of their positions in post-hearing briefs. The court also found the award in "manifest disregard for well-established public policy" since it ignored the so-called "net capital rule" of the Securities and Exchange Commission by which a broker-dealer that fails to meet the established net capital ratio is required to immediately cease operations. The court found that it was irrational and in breach of a strong public policy for the Panel to find consequential damages in favor of the plaintiff given that the plaintiff should have ceased operations under this rule. In the court's opinion, the entire award was to be vacated unless the plaintiff consented to a lesser award as provided in the court's opinion, and if the plaintiff did not consent, that portion of the award was to be remanded to a *new* arbitration panel with the remaining portions of the award being dismissed with prejudice.

10. Attempted Vacatur: Eligibility of Arbitrator and Manifest Disregard

In *U.S. Ship Management, Inc. v. Maersk Line, Limited,* No. 01-9689 (S.D.N.Y. Feb. 13, 2002), a bareboat charterer of former Sea-Land containerships sought to vacate an arbitration award requiring it to provide certain financial information to Maersk, the vessels' time charterer. In support of the effort to vacate, the bareboat charterer argued that Maersk had appointed someone who was not qualified to serve as an arbitrator in the case and that the award was made in manifest disregard of the law or public policy. Specifically, the bareboat charterer argued that Maersk's appointee, New York attorney and consultant Emery W. Harper, was not "a commercial person knowledgeable in the operation and chartering of container vessels and the operation of scheduled container services," as required by the arbitration clause in the time charters.

The bareboat charterer argued that Harper did not satisfy the charters' definition of "commercial person" in that whatever knowledge he may have possessed about container vessels and services was not acquired during his work as a consultant but from services he previously rendered as a full-time lawyer. The court concluded, however, that the bareboat charterer had failed to meet its burden of establishing that Harper's commercial experience relating to container shipping acquired after he established his consultancy in 1997 "was not substantial." Op. at 20.

Moreover, the court concluded that even if the amount of commercial knowledge and experience Harper gained from his work as a consultant was not substantial, that would not disqualify him from serving in the case since there was no requirement, as the court read the arbitration clause, that status as a commercial person and knowledge of the container shipping industry had to be acquired simultaneously. Thus, Harper's knowledge of container shipping developed as a practicing lawyer could be coupled with his status as a "commercial person" gained through his work as a consultant to satisfy the clause's requirements.

Separately, the bareboat charterer argued that the award should be vacated as having been rendered in manifest disregard of the law, since the panel refused to adopt an interpretation of the financial reporting provisions of the time charters contained in a letter from MARAD's Acting Associate Administrator for National Security. The court rejected this argument, concluding that the MARAD letter could not properly be characterized as a ruling, a "governing legal principle" or a law "well defined, explicit, and clearly applicable to the case." Op. at 30. In addition, the court was not persuaded "that the arbitrators ignored the position MARAD expressed, or indeed that it applied to the circumstances the facts here presented." *Id.*

11. Manifest Disregard; Safe Berth and Attorneys' Fees

Manifest disregard was also rejected as a basis for vacating an award in *Duferco International Steel Trading v. T. Klaveness Shipping A/S*, 01 Civ. 6438 (S.D.N.Y. Feb. 11, 2002). In that case, the vessel's registered owner commenced a London arbitration against the time charterer Klaveness for alleged breach of the safe port/safe berth warranty in connection with the vessel's call at Taranto, Italy. Klaveness notified voyage charterer Duferco of the nature and pendency of the London arbitration and tendered a vouching-in notice demanding that Duferco defend the proceedings, which was declined. The registered owner prevailed against Klaveness in the London arbitration, recovering damages on the basis that the berth at Taranto had been unsafe as well as its legal fees and expenses.

In a subsequent arbitration under the voyage charter in New York, Duferco argued it was not liable for the incident at Taranto because that port (and the discharge port) had been named in the subcharter, shifting to the disponent owner the risk of foreseeable conditions at the chosen ports. Duferco lost the New York arbitration and moved to vacate the award, contending that the majority of the New York panel disregarded principles of collateral estoppel and issue preclusion in ruling in favor of Klaveness on the Taranto indemnity claim.

The district court rejected Duferco's arguments. Although Duferco apparently argued that the arbitration panel majority had failed to consider its "named port" argument on the ground that the vouching-in notice had a preclusive effect, the district court concluded that the majority rejected the argument "not because it considered the matter foreclosed by the London award, but on the merits." 2002 WL 221490, *2. According to the court, the panel majority concluded that the safe berth warranty was breached under the voyage charter and that Klaveness had not waived the warranty when it agreed to Taranto as the loading port. Although the court noted that "this is arguably indicative of legal error on the part of the majority," the court concluded this was not grounds for vacatur since "mere error in the law or failure on the part of the arbitrators to understand or apply the law is not sufficient to establish manifest disregard of the law." *Id.* at *3 (quoting *Yusuf Ahmed Alghanim & Sous, W.L.L. v. Toys AR@ Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997).

The court further concluded that the panel's refusal to award Klaveness indemnity for the legal fees and expenses awarded against it in London did not establish manifest disregard since that portion of the panel's ruling "is not fundamentally inconsistent with its conclusion on the indemnity liability issue... given the panel's finding that the London arbitration did not determine the respective legal rights of the parties to the New York proceeding." *Id.* at *3. Finally, the court refused to award Klaveness its attorneys' fees on the vacatur and confirmation action since it considered Duferco's position "not so wholly frivolous as to justify an assessment of costs and fees." *Id.* at *4.

12. Attempts to Contractually Expand Judicial Review of Arbitration Awards

Refusing to follow the Fifth and Ninth Circuits, the Tenth Circuit ruled in *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001), that an agreement by private parties to expand the scope of judicial review of an arbitration award is unenforceable.

A landowner asserted breach of contract and tort claims in federal district court against Amoco Pipeline Co. ("Amoco") for hydrocarbon contamination to a creek located on his property. Seeking a stay pending arbitration pursuant to a 1918 right-of-way agreement between predecessors in interest, Amoco asserted that the arbitration panel would have the power to decide all of the property owner's claims. The record indicated that, during the arbitration, Amoco engaged in certain tactics that the Tenth Circuit described as a "less than forthcoming approach to this entire matter." *Id.* at 929 n.2. The arbitrators ruled in favor of the property owner, requiring Amoco to deposit over $3,000,000 in an escrow fund to be used by a special master responsible for supervising the abatement of the contamination and further requiring Amoco to pay $1,000,000 in punitive damages.

The proceedings were conducted pursuant to certain private arbitration rules that had been modified so that either party would have the right to appeal an award to the district court "on the grounds that the award is not supported by the evidence." *Id.* at 930. They also agreed that the district court's ruling "shall be final." *Id.* Amoco filed a notice of appeal pursuant to these modified rules but the district court did not apply the parties' expanded judicial standard of review and declined to vacate the award.

On appeal, the property owner contended the parties' agreement that the district court's ruling "shall be final" foreclosed appellate review. The Tenth Circuit noted that "although parties to an arbitration agreement may eliminate judicial review by contract, their intention to do so must be clear and unequivocal." *Id.* at 931. In this case, however, the court ruled that the parties' agreement "may be construed as nothing more than a finality clause expressing their intent to have the district court enter judgment on the arbitration award." *Id.* As a result, the court of appeals proceeded with its review.

Amoco argued that the parties had contracted for expanded judicial review by agreeing that the award would be appealable if "not supported by the evidence," an argument rejected by the district court. Admitting that this was "a difficult question," the Tenth Circuit nevertheless concluded that "the purposes behind the FAA as well as the principles announced in various Supreme [Court] cases, do not support a rule allowing parties to alter the judicial process by private contract." *Id.* at 933. The court reviewed contrary decisions by the Fifth and Ninth Circuits but concluded that "no authority clearly allows private parties to determine how federal courts review arbitration awards." *Id.* at 934. Instead, the court expressed concern that enforcing clauses expanding the scope of judicial review threatened to undermine the policies behind the FAA, threatened to reduce the independence of the arbitration process and "place[d] federal courts in the awkward position of reviewing proceedings conducted under potentially unfamiliar rules and procedures." *Id.* at 935-36.

Having disposed of the argument in favor of expanded judicial review, the court of appeals considered Amoco's contentions under the traditional FAA and manifest disregard standards. Amoco argued that, in granting the property owner's equitable request for abatement of the contamination, the arbitrators exceeded their powers and acted in manifest disregard of the law by ignoring an Oklahoma statute vesting exclusive jurisdiction over such a remedy in an agency of the Oklahoma state government. The court pointed out that Amoco's contention was directly at odds with its own argument that the panel could grant injunctive relief and remediation, "a position Amoco advocated throughout the arbitration and only now wishes to abandon." *Id.* at 937. Moreover, the rules under which the arbitration was conducted clearly provided that the arbitrators had the power to decide challenges to their jurisdiction but "Amoco chose not to challenge their jurisdiction to order abatement before or during arbitration." *Id.* at 938. Accordingly, this challenge to the award was rejected.

For its final argument, Amoco claimed the panel lacked the authority to award punitive damages and, alternatively, awarded them in manifest disregard of Oklahoma law. The court of appeals rejected the first contention because the parties agreed to be governed by broad arbitration rules that authorized "any remedy or relief which the Tribunal deems just and equitable" and rejected the second because there was no clearly applicable Oklahoma state law on the issue and, in any event, there were several aspects of Amoco's conduct prior to and during the arbitration that supported the panel's ruling on punitive damages.

13. Second Circuit Rejects "Independent/Imbedded" Distinction for Appellate Review

In *Salim Oleochemicals v. M/V SAPPHIRE*, 278 F.3d 90 (2d Cir. 2002), the Second Circuit ruled that the dismissal of an action without prejudice in favor of arbitration is an appealable "final decision" under 9 U.S.C. §16(a)(3).

A cargo claimant brought suit in the Southern District of New York for breach of a bill of lading contract. Thereafter, defendants requested that the lawsuit be stayed pending arbitration in London pursuant to an arbitration clause in a contract of affreightment incorporated in the bill of lading. The claimant agreed to arbitrate but sought to do so only under the terms of the contract of affreightment ("COA"), prompting defendants to obtain dismissal of the London arbitration for lack of subject matter jurisdiction.

Following the arbitrator's ruling, the claimant reopened its action in the Southern District and moved for summary judgment. Defendants opposed the motion and moved to compel the claimant to bring the claim in a London arbitration under the COA as incorporated in the bill of lading. The district court denied claimant's motion, granted defendants' motion and dismissed the case without prejudice to the claimant's right to reopen it at the conclusion of the arbitration. The claimant appealed but defendants moved to dismiss the appeal on the grounds this was an "embedded" action and thus not appealable under Second Circuit precedents.

Reviewing prior cases, the court of appeals noted that whether an arbitration order is immediately appealable in the Second Circuit previously depended upon whether the underlying action was "independent" or "embedded". The court pointed out, however, that the "independent" versus "embedded" distinction was no longer relevant because the Supreme Court established a different analytical approach for appeals under 9 U.S.C. §16 in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000). In that case, the Supreme Court held that an order dismissing an entire action with prejudice and ordering arbitration is an appealable "final decision" under 9 U.S.C. §16(a)(3), regardless of whether the action would be deemed "independent" or "embedded", but if the district court simply enters a stay rather than a dismissal, the order is not appealable.

The Second Circuit observed that, unlike the action in *Green Tree*, the dismissal in the instant case was without prejudice to reopening upon issuance of the arbitrator's decision. In the Second Circuit, however, "dismissals with and without prejudice are equally appealable as final orders." 278 F.3d at 93 (quoting *Allied Air Freight, Inc. v. Pan Am. World Airways, Inc.*, 393 F.2d 441, 444 (2d Cir. 1968)). As a result, the court concluded that a dismissal without prejudice was no less a "final decision" under *Green Tree* than a dismissal with prejudice, rendering the dismissal in the instant case appealable under Section 16 of the FAA. Given the impact upon appealability, the court of appeals urged "district courts in these circumstances to be as clear as possible about whether they truly intend to dismiss an action or mean to grant a stay pursuant to 9 U.S.C. §3 . . . or whether they mean to do something else entirely," noting that "unnecessary delay of the arbitral process through appellate review is disfavored." *Id.* at 93.

14. A Petition to Confirm an Arbitration Award Under the New York Convention Requires Personal Jurisdiction

In *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002), a successful litigant in a London arbitration sought to confirm the award and reduce it to a judgment in the district court in San Francisco. The court of appeals, in affirming the decision of the district court, which had dismissed the petition for lack of personal jurisdiction, stated that it was a "bedrock principle of civil procedure" that personal jurisdiction over the defendant must exist before any relief, including the confirmation of an award, could be given under the Convention on the Recognition and Enforcement of Arbitration Awards, 9 U.S.C.A §201 *et seq.* (West 1999). The court in that case also ruled that the defendant's involvement in 15 shipments of rice from the port of San Francisco was insufficient to create general jurisdiction over the defendant.

15. Confirmation of a Judgment Based on an Award Is Not Subject to New York Convention Defenses

In *Ocean Warehousing B.V. v. Baron Metals and Alloys, Inc.*, 157 F. Supp.2d 245 (S.D.N.Y. 2001), the issue was whether a New York state court attachment obtained in aid of a foreign *judgment* should be vacated or confirmed. The judgment had been obtained from a Dutch court when it affirmed an arbitration award in the Netherlands obtained by default. No issue was raised concerning the giving of notice of the arbitration. Instead, the point was raised by the defendant that Dutch law would not have recognized the defense, allegedly contained in Article II(1) of the Convention on the Recognition and Enforcement of Arbitral Awards, 9 U.S.C.A. §201 *et seq.* (West 1999), that an arbitration agreement must be "executed [in] a written agreement." On this basis, it was claimed that the foreign judgment should not be recognized and hence the attachment should be vacated.

The court found that the Convention offered no basis for challenging the *judgment* even though the judgment had been based, in turn, on an arbitration award. The court further noted that no effort had been made to challenge the judgment under the bases provided in Article 53 of the New York Civil Practice Law and Rules, which addresses challenges to foreign judgments. The court also noted that "defendants here were permitted to contest the arbitral award prior to the confirmation as a judgment in the Netherlands, but they chose not to appear." The court found that the plaintiff had made the necessary showing of a "probability that [it] will succeed on the merits" and hence the attachment was confirmed.

The Newsletter Editors gratefully acknowledge the contributions of Michael Marks Cohen, LeRoy Lambert, David A. Nourse and Katharine Newman in providing recent cases.

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THE ANCIENT MARINER—NOT A RIME
by
Daniel J. Dougherty[1]

Perhaps there are still a few practitioners of maritime law in the U.S. going back to the early-mid 1950's: meaning the full-time practice, or at least the very predominant practice. However, I don't know of many. Nor does Roger Vaughan of Tampa, who helped me write this article.

In the 1950's, major "fleets" and "liner services" abounded, and dominated the maritime scene:

Grace Line	(SS SANTA ROSA and SS SANTA PAULA.; and scores of "Santa" freighters, many with accommodations up to 12 passengers)
United States Lines	(SS UNITED STATES (the "Big U") and SS AMERICA; and scores of "PIONEER" and "AMERICAN" freighters)
Moore McCormack Lines	(SS ARGENTINA and SS BRAZIL, etc.)
American Export Lines	(SS CONSTITUTION and SS INDEPENDENCE; etc.)
Isbrandtsen Lines	(The SS FLYING ENTERPRISE which along with Capt. Kurt Carlson, was later to make world headlines)
Isthmian Lines	(years later, merging with States Marine Lines, Isthmian was to become the world's largest steamship company in terms of "bottoms." The world had not yet experienced the phenomenal growth of Japanese fleets. The Japanese ships' name "MARU"was only occasionally heard in the U.S.)
Cunard Line, Ltd.	(who could forget the famous QUEENS)
French Line	(the NORMANDIE and other famous ships)
Delta Lines	(SS DEL SUD, SS DEL NORTE and other "DEL" ships)

[1] Daniel J. (Dan) Dougherty, the "Ancient Mariner", was formerly a partner of Kirlin, Campbell & Keating, New York City.

Lykes Brothers S.S. Co.	(The largest non-subsidized U.S. Carrier; owned by Canadian-Pacific R.R.)
Pacific Far East Line	(The "Bears" ships)
American President Lines	(The "PRESIDENT" ships, providing round-the-world service)
Matson Lines	(Noted for its Hawaii service)

Furness-Withy's "QUEEN of BERMUDA," built almost entirely of wood, except for her engines, comes to mind.

Steel and aluminum production was one of America's industries. United States Steel Corporation, Bethlehem Steel Company and Aluminum Corporation of America (ALCOA) owned or bareboat chartered remarkably large fleets of vessels. "Chartering," by time charters or voyage charters, a few years later, became more and more common for these and other companies. So did the use of "foreign bottoms" to transport products.

Puerto Rico's economy was said (in maritime circles) to be "synonymous with" the status of A.H. Bull Steamship Company (Manuel Kulukundis, who later presided over Bull Line's demise into bankruptcy, had not yet purchased "Bull Line"). The lucrative Puerto Rico trade, fostered by "Operation Bootstrap," was carried on, beginning a decade or so later, by a young, energetic, Mobile-based organization named Sea-land Service Inc. that later merged with another "name" company, Waterman Steamship Corporation of Mobile.

Mergers were beginning to change the marine landscape. Shortly thereafter, a fire-extinguisher manufacturer, Walter Kiddie Corp., bought U.S. Lines and the "Big U" (unthinkable!).

Major stevedores and terminal operators dominated the waterfront scene:

I.T.O. (International Terminal Operators)
Universal Stevedores
American Stevedores
Maher Stevedoring Co.
Ellerman Company
John W. Mc Grath

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Bush Terminal was the country's largest and busiest warehouse and shipping terminal—a veritable beehive of activity, seven days a week. Now it is going to ruin.

The Manhattan and Brooklyn, N.Y. piers—now rather defunct—were the scenes, daily *and* throughout every weekend, and on holidays, of frenzied activity. Waterfront crime was rampant; but "the whistle hadn't yet been blown" on crime. The G.A.I. (Guaranteed Annual Income) for longshoremen had not yet been instituted.[2]

The membership in the Maritime Law Association of the United State was, in those days, approximately 2,000. Today, the membership totals approximately 3,300. The *Maritime Law Reporter* was not yet being published. The *Journal of Commerce* frequently ran articles about maritime matters.

"*Free-flagging*"[3] was an idea in the minds of American shipowners but had not yet reached an industry-crippling level. Wages for American seamen (nearly all seamen on U.S. flag ships were U.S. citizens or residents) were among the highest, but business was so good that this was not an insurmountable problem.

"*Containerization*" was an idea, in maritime circles (Sea-Land was late to become a leader in this endeavor), but had not yet "caught on." Freight forwarding was a thriving business. 17 Battery Place, 26 Broadway (both very large business buildings) and various State Street addresses—all in New York City—had, for major shares of their rentable spaces, tenants who were freight forwarders.

[2] One may recall, many years later, reading in a trade journal that some longshoremen—noteworthy among them, hatch bosses, Hi-lo (forklift) drivers, crane operators, checkers and hatchtenders (signalmen)—were earning $80,000 annually; *and* that they, and all longshoremen, were guaranteed their annual salaries, whether or not there was sufficient work for them. Some of them were only "badging-in," *i.e.*, showing up for work at 0800 hours, signing in with a gang, and then disappearing to work a second job, ashore.

In Puerto Rico, an analogous racket involved a longshoreman (there called "estibador") lending his social security number to someone who, with no stevedoring experience or skill, would shape up for a day's pay—splitting the wages with the lender.

[3] "Free-flagging" is here defined as the decision, by an American shipowner, that it would be economical, indeed necessary, to "flag" or register his ships in a foreign country, *e.g.* Vanuatu, Panama, or the Philippines; and employ local (foreign) seamen at *substantially* lower wages. Also, as an added benefit, the American shipowner might be able to avoid (some would alter say, "evade") American laws relating to safety and (courtroom or lawsuit-related) damages. The unions called these "flags of convenience." The companies called them "flags of necessity."

The scope of our canvas does not allow us to recount even the highlight of the major *maritime disasters* of the era under discussion. However, one cannot cogitate on those years without a few of these coming to mind: The ANDREA DORIA—STOCKHOLM collision; the FLYING ENTERPRISE (Capt. Carlson) saga; the Texas City disaster; the MORMACKITE; the YARMOUTH CASTLE, which kept Roger Vaughan of Wagner, Vaughan and McLaughlin, Tampa, busy for a long time; the AGHIOS GIORGIS sinking, which made a big impact on Greek-American shipping relations and which kept Paul Edelman of Kreindler & Kreindler, New York, busy for a long time; the TANKER OKLAHOMA disaster; and the MARINE SULPHUR QUEEN.

The combined effects of "free-flagging," waterfront crime and rackets a containerization (which greatly reduced the number of injuries caused by the old methods of handling "breakbulk" cargo) were destined to greatly reduce the "volume" of maritime cases that required legal consultation and assistance.

Strikes in the various marine industries, later to spread and adversely affect the entire country, first affected the Northeast ports (especially New York City) driving more and more maritime work to the other coasts.

Mergers were a thing of the future: Isthmian–States Marine Lines (supra) Grace Line–Prudential Line; and many others.

Two radical developments that require more detailed mention, in terms of affecting marine litigation between the 1950's and today are *Containerization* and the *1972 amendments to the LHWCA.*

Puerto Rico is an excellent illustration of the former. In the "breakbulk" days, 255-pound sacks of sugar were being loaded upon pallets (made of wood, 6 feet by 4 feet). The bags were "secured" by the "endless rope sling," eleven sacks to a load, at the major ports of San Juan, Ponce and Mayaguez.

The pallet was hoisted by a winchman "taking a pick" on his up-and-down winch. [In those days, on Bull Line ships, (all ships bearing girls' first names), the winches were steam-operated, not yet electric.] Reaching the level of the hatch coaming, the Signalman or "Gangwayman" (nothing to do with the ship's gangway) would signal the Winchero to "burton" the draft of cargo, *i.e.*, lateralize it with the power of the other winch.

The greater the winchero's expertise, the closer he could maneuver the draft to the vessel's metal hatch coaming, before lowering it into the hold or tween decks. [Thus, he would try to describe a smooth parabola with the draft instead of a "square" route.] The problem sometimes encountered was that the winchman would "trip the coaming" with the draft. The sacks of sugar, loosely secured by the endless rope sling, would fall, along with the pallets, into the hold of the vessel.

Longshoremen called "holdmen," waiting below, were under orders to stand under the overhead or in the "wing," but only barely, or perhaps not quite, under it—so as to be ready to jump out into the "square" to handle the landed draft without any loss of time. Time was money. Falling sugar bags caused numerous injuries in those years—some of them paraplegia and quadriplegia.

Change this example of palletized cargo to bales of rubber or cotton and you can imagine the bouncing and tumbling and injury-causing effects of the falling cargo.

"Spaghetti steel" is another cargo that illustrates the difference, in terms of accident and litigation potential, between "breakbulk" cargo with the "up-and-down and burton" winching system, and *Containerization*.

Lcdos. Harvey B. Nachman, Stanley Feldstein and Gustavo Gelpi, among others, devoted nearly a lifetime, as "plaintiffs' lawyers," to obtaining redress for injured Puerto Rico longshoremen. Hartzell, Fernandez, Novas and Ydrach were the principal Puerto Rico defense "proctors in admiralty." (The "Ancient Mariner," under the proctorship of Vernon S. Jones of Kirlin, Campbell and Keating, New York, "cut his teeth" on Puerto Rico trials.)

In the late 1960's the costs of litigation had escalated and "calendar congestion" had become a common term. Longshore litigation became an obvious target for action. Hence, the Amendments to the LHWCA, which took away "unseaworthiness" or "liability without fault" from the longshoreman's arsenal of remedies. The Amendments left "negligence" in his arsenal; but the new statue, 33 U.S. Code §901 *et seq*., and the courts' interpretations of it, greatly restricted the interpretation of shipowners' negligence in this context. Also, the legislators and agencies substantially raised the amounts of workmen's compensation for injured longshoremen. Then, to "top it off," the courts began to allow stevedores and their underwriters, as *lienors*, to recover all or most of their amounts paid out in compensation, *i.e.*, recover these amounts from shipowners and from plaintiffs' judgments or settlements, if shipowner negligence could be proved. This meant that relatively little would be left for the longshore-plaintiff and his lawyer: once again deterring litigation.

"Air cargo" was a "wave of the future"—destined to further crimp maritime businesses. Aircrafts' jet engines were just then beginning to take over: the piston-engine was the machine of the day, for planes. Terms such as "land-bridge" were not yet used for over-the-road trucking of cargo brought to our shores by ship.

Japan was tooling up to manufacture ocean-going ships in "cookie-cutter fashion. Soon, twice a year, a new "MARU" would be introduced to the American service. Gala celebrations would be held aboard the latest "MARU," in the hatches, where Japanese technology had designed a simple way to move aside the fore-and-aft bulkheads so as to create large spaces for inaugural parties in ports around the world.

Japanese automobiles were beginning to dominate the market. They were being shipped in "ro-ro" ("roll-on, roll-off ") fashion. However, shipboard *elevators* were the state-of-the-art design in those days. Each new car was put from the hold or tween deck of the vessel onto an elevator, to be brought to the main deck for discharge. Spiral ramps were a thing of the future for Japanese shipowners. (Perhaps one can imagine the amount of litigation that arose from the elevator-mode of discharging procedure.) Honda and Toyota sales were about to escalate greatly.

Seamen's lawyers, of a national scope, included Silas Blake Axtell, Eldridge Sampliner, Jake Rassner and Leonard Jaques, as well as a few Gulf and West Coast lawyers. Mr. Jaques was later to become noted for filing thousands of asbestosis cases in the Northern District of Ohio before Judge Tom Lambros, and in numerous other courts, both state and federal; but he hadn't yet thought of asbestos, except as a useful heat-resistant product in homes and factories (but he was "raising hell" in personal injury and collision cases in the Great Lakes federal courts).

Defense firms of a national scope included Kirlin, Campbell and Keating and Haight, Gardner, Poor and Havens, both of New York—and the largest maritime law firms in the world in that era. Individuals' names that stand out, at those two firms, in that era, are Vernon Sims Jones and Walter X. Connor, J. Ward O'Neill and Jim Estabrook, respectively. They are all deceased now. There were, of course, many other luminaries in each firm;

and many, many other outstanding defense firms, and individuals, in the seaports around the U.S.

Reflecting on longshore cases, Phil DiCostanzo of Brooklyn (one of my "partners" in conducting workshops for the Practicing Law Institute or P.L.I., on "the trial of a maritime personal injury case") comes to mind as perhaps "the" plaintiffs' lawyer. His law partner, Bob Klonsky was also noteworthy. Roger Vaughan of Tampa, another of the author's "partners" on the P.L.I. Faculty, was then—and still is—outstanding.

Maintenance and Cure litigation was "volume" on those days. New York had two lawyers then—individual practitioners—who made very good livings almost exclusively on "M&C" cases, George Engelman and Tom Breen. For them, when drafting a complaint, a Jones Act cause of action was a "throw-in" (unthinkable!). One year's maintenance was worth a round-figure $3,000 (365 days times $8). Tuberculosis cases had a "book value" of $3,000 or $6,000, depending on whether surgery or medication was required to achieve maximum cure for the seaman-patient. At least in the marine hospitals (free treatment for seamen; and far more hospitals and outpatient clinics than are open today) the state of art in medicine had not yet advanced to the stage where many T.B. patients could avoid cutting a curvilinear scar of some 18" to 24" in length down the patient's shoulder and back, to cut out the disease. Those major-surgery cases settled for $6,000 (liability without fault; ill while in the service of the ship; no allegation of negligence or unseaworthiness); non-surgery cases settled for $3,000 regardless of how long the seaman was "on the beach," *i.e.*, out of work.

The $8 figure was "carved in stone"—whether or not specified in the N.M.U. or S.I.U. contract. No one even thought about claiming that the actual amount spent by a seaman living ashore and attending the M.H. or clinic as an outpatient, while attaining maximum cure, was recoverable. The definition of "maximum cure" frequently went before a court. (The U.S. Supreme Court granted *certiorari* in that era and decided a few cases on M&C).

Years later, litigation waxed hot over the $8—versus-amount-actually-spent issue. A lawyer in New Orleans made a handsome living and left a trail of defeated shipowners' lawyers by his substantially increasing the $8 daily recovery in cases where the amount of maintenance had not been specified in the union contract. His name: Jim Wysocki.

Claims handlers for shipowners, negotiating face-to-face with a seaman, would often be generous (unthinkable!) with $8 amounts, in order to "keep the seaman in line" or to "keep him out of the hands of a lawyer."

Two-for-one penalty cases were becoming more common during the era under review. So were passenger cases. In those years, injured passengers, especially those hurt on tenders or launches, did not generally think about consulting a lawyer. And many such would-be cases were rejected by "shoreside" lawyers.

The Ancient Mariner does not feel qualified to more than mention that cargo litigation in the 1950's was big, "volume" business. COGSA (Carriage of Goods By Sea Act) and the "package limitation doctrine" generated many cases.

Collisions and allisions were much more common then (radar was a more primitive instrument). Major plaintiffs' or cargo-claimants' firms were Hill, Rivkins; Middleton, Lewis & Warburton; and Bigham, Englar, Jones & Houston.

"Heavy Cases" in that long-gone period of time cannot be well defined (it's too much a matter of opinion). However, it's interesting to reflect on the "fact" that nearly everyone with a kin of that age would agree that a $50,000 case was indeed very "heavy." Six-figure verdicts—or settlements—were almost unheard of in the marine personal injury world. In the large defense firms a "partner" was expected to handle a case "reserved" at $50,000; an "associate" assigned a $5,000 case.

It is beyond the scope of this paper to more than quickly reflect on these, among other, visions of the "old days." The American Maritime Cases regularly ground out thick, paper volumes that were essential to the good practice of this species of law. Large firms had at least 2 or 3 complete sets of AMC's. Lloyds' various sources of valuable shipping information were large. The lawyer who was well-equipped with these sources impressed London P. & I. underwriters and was likely to receive the defense of the latest marine disaster. Shepards regularly ground out its pamphlets and books. Library shelves filled up. Lawyers stacked books behind, and atop, one another.

Rents increased greatly in the big cities. Starting salaries for new associates skyrocketed. Secretaries' salaries rose. Small, individual practitioners retired, merged, moved to cheaper office space.

AMCs became testamentary dispositions when lawyers could no longer afford the books, because of money or space (reminiscent, years later, of pro football season ticket holders trying to "will" their tickets). Lawyers began to welcome the computer, if for no other reason than to save library shelf space. Clients and courts wanted beaucoup copies of report letters and pleadings (and briefs), respectively. "Paper reduction" wasn't yet an outcry. Typewriters were primitive. White-Out fluid wasn't yet on the market for the secretary. She had to rubber-erase the original and each copy.

We didn't have fax machines, hence clients' and opponents' communications could be answered "in due course," not on the same day. We didn't have e-mail.

Judges were what judges always were, and always will be.

The word, "outports" was not yet a dirty word. (By that I mean that in the 1950's almost all of the major marine-law business in the Western Hemisphere came through New York City and any other city was deemed an "outport" by some (not by all). But outports were on the verge of ascendancy—indeed, almost primary.

The Gulf of Mexico's federal court jurisdictions were gearing up to become the leaders in maritime matters and the venues of the greatest number of maritime cases. The Fifth Circuit Court of Appeals (there was no Eleventh yet) later was called, "The Blessed Circuit."

New Jersey was "way out." Sea-Land Service had not yet bought out (or otherwise succeeded to) Bull Line and had not yet changed the face of the New Jersey waterfront: a change that, a decade or two later, had in turn changed the face of the New York waterfront. Connecticut, for water, was for swimming, not shipping.

Oil companies in the 1950's were operating very large fleets of ocean-going tankers, hauling oil from far-corners of the globe to America—a "gas-guzzling" nation. ESSO (not yet Exxon), Standard Oil, Gulf Oil, Amoco, Mobil Oil and others kept maritime lawyers—sometimes called "proctors"—very busy. I don't know OPEC's official birth date, but I know it wasn't as prominent in the 1950's. Pipelines, of course, then existed, but the Alaska Pipeline (ALYESKA) was not the conduit that it is today. Hence, tankers thrived. So did "bulk carriers." This term related not only to oil carriers but also to Great Lakes carriers of grain and ore. Litigation in Great Lakes' courts was about to burgeon.

"Inland rivers" was a known expression, but those waters were usually (and erroneously) not thought of as being "maritime" (meaning, in those days, "federal"); and certainly not "admiralty."

In those days, for a maritime lawyer, an "exotic trip" was a trip to London. As was a trip to Scandinavia. A trip to Tokyo was imagined to be a trip to the very end of the earth! Today, a trip on maritime-law business to London is routine. So is a trip to Scandinavia, or Tokyo.

Money was not plentiful, as it was later to become, with inflation and progress. Distances were, or seemed to be, daunting (pistons, not yet jets).

"Japan P. & I. Ass'n" was not yet a "name" in our hemisphere. English "P. & I. Clubs" were well known in America (but the equally "known" underwriters were The American Steamship Owners Protection and Indemnity Association (The "American Club" managed by Shipowners Claims Bureau at 25 Broad Street). Also, Travelers, Allstate, Prudential, Hartford, etc., wrote marine-related risks but they were more into insuring pier and warehouse and overland haulage risks and "brown-water" risks, than deep water or "blue-water" risks.

In those days, a "federal lawyer" was the "cream of the crop." "State-court lawyers," especially those who "dared to try to handle" a Jones Act or longshore case, were few and far between. The *Maritime Law Reporter* was not yet in business.

As I look back upon the maritime litigation of the 1950's and 1960's, my "overview" is this. The federal courts were loaded—congested—with marine cases. Suits under The Jones Act (46 U.S. Code §688) and the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code §901, *et seq.*) (the LHWCA) predominated.

In the United States District Court for the Southern District of New York, Tuesdays and Thursdays were "motion days." The "I.C." system (individual calendars for judges) had not yet been instituted. There were no "Settlement Parts," *per se*. The Southern District of New York motion calendar was called in the largest courtroom of the largest federal courthouse in the country.

Some judges had a "heavy hammer," many did not. "Calendar congestion" was on the horizon, to be followed by judges who made names for themselves more by "moving cases" with a heavy hammer than by their judicial acumen.

The "trial parts" were loaded with three-party cases (longshoreman vs. shipowner vs. stevedore) and trial lawyers agonized over the precise wordings of the Jones Act and unseaworthiness charges ("liability without fault;" "scintilla of evidence;" etc.) Whether jury trials were allowable in cases that combined Jones Act (jury) counts and Death on the High Seas Act counts ("admiralty" or non-jury) was a then-current issue. [The answer proved to be "yes." *Cf. Red Star Towing vs. Ming Giant*, 522 F.Supp. 367 (S.D.N.Y. 1982).]

Many—perhaps most—of the U.S. federal courts shared their building with the federal post office. (If the cab driver at the airport in the "outport" didn't know where the federal court was located, he probably knew where the State Supreme Court or Post Office was. If you, the out-of-town trial lawyer, were rushing to court off a plane and in a hurry, it was a good bet to direct him to the Post Office building.

Almost every Tuesday and Thursday in the Southern District of New York the motion calendar listed well over 50% maritime cases. The "Motion Part" was fertile training ground for young "Associates" of the large maritime law firms—both the arguing of the motion and the research of the law for the affidavits and briefs.

"Discovery" was running wild. Rule 26 F.R.C.P., even in those days called for liberal discovery. Indeed, that was the "hallmark" of federal practice. However, the liberality of discovery had not reached nearly the level that it today reaches. Rule 33 and Rule 34 motions were legion (interrogatories and objections to same; and production of documents and things). Litigation was running rampant.[4]

"*Ambush*" was not yet a dirty word. Indeed, the better or more notable maritime trial lawyers made their names, in large measure, precisely because they were skilled in "ambushing" their opponents; and, of course, in smelling (and avoiding) their opponents' ambush tactics.

The ambush concept later led to some U.S. Supreme Court decisions on the subject; and to many modifications to the F.RC.P.; also, of course, it contributed to the introduction of the Federal Rules of Evidence in 1975. Desirous of making an ambush, or surviving one, in a case to be scheduled for trial soon, sometimes a "Senior Partner" would show up to argue a "discovery" motion; but not often.

The Ancient Mariner, frankly, was a devotee of "ambush" and, recently, I could not help but take note of this quote, from "*The Peloponnesian*

[4] There is a big difference between a "trial lawyer" and a "litigator."

War" by Thucydides (as translated by W. Blanco and edited by W. Blanco and J.T. Roberts, 1998; published by W.W. Norton & Company, Inc.):

> "The tricks by which a general deceives his enemies earn him the greatest reputation and do the most good for his friends." (Book 5, page 203)

The scope of our canvas has allowed us to describe in some detail the maritime-law world (of the United States of America) of the 1950's and 1960's.

Hence, the Ancient Mariner now asks himself where is he headed—with this article. After all, a ship must have, or ought to have, a course; and a destination. A trial lawyer, in pursuit of a reasonable fee and the successful outcome of his case needs an objective, he (she) needs to "build" a case; or a defense.

However, I am an "ancient mariner"—retired. I don't have to "build" anything anymore; I don't have to "make a point" or "prove a case," nor even persuade or impress *you*. I've spent a lifetime trying to do that.

I now can simply relax, and end this article here.