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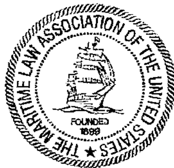

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EDITORIAL COMMENT

The Spring 2003 MLA Report reflects the remarkable diversity of the Association's work and interests. The Report opens with a reprint of the Fall 2002 Nicholas J. Healy Lecture by Patrick Griggs, President of the Comité Maritime International, and closes with the Fifth Cadwallader Memorial Lecture by John D. Kimball of New York.

In his late Fall 2002 lecture, which was delivered at New York University Law School, Mr. Griggs reviews various international maritime conventions covering major subject areas of maritime law and practice. His practical insights and expansive knowledge of the difficulties to achieving uniformity of maritime law through international conventions make his lecture a readable and valuable scholarly work.

Likewise, in a lecture delivered in London last Fall, John Kimball provides us with a succinct, balanced overview of various international and domestic initiatives implemented in the aftermath of 9/11 to combat terrorism. These initiatives represent a rapidly developing area of maritime practice which we must all monitor with great care. Mr. Kimball has aided our efforts considerably.

The Report also includes newsletters by the Carriage of Goods by Sea Committee, Marine Insurance and General Average Committee, Limitation of Liability Committee, and Recreational Boating Committee, a bibliography of uniformity articles, and the first newsletter of the Carrier Security committee. I urge other committees to follow suit with written reports about their work and committee meetings. These materials are valuable to the entire membership and are a good opportunity to showcase the work and talents of each committee.

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

Matthew A. Marion,
Editor

[13444]

NICHOLAS J. HEALY LECTURE

Obstacles to Uniformity of Maritime Law

by

Patrick Griggs, President, CMI
31st October 2002

There seems a certain inevitability about my presence here today to give the NJ Healy Lecture in the presence of the great man himself. In June 1961, by which time I had already spent three years as an Articled Clerk with Ince & Co, it was felt that I should gain first hand experience of life at sea. One of the firm's major clients at the time was States Marine Line and my principle, Donald O'May, asked the head of their Legal Department whether they would be prepared to put me on board one of their ships for a transatlantic voyage. At that time States Marine Line operated a large fleet of wartime built C4s which were used almost exclusively for servicing the needs of US forces in Europe. (I think I am right in saying that these ships carried PX cargo though I can't remember what PX stood for.) When I joined the "*Hoosier State*" one early morning in June 1961 in Southampton and was shown a cargo manifest it seemed to me that most of the cargo consisted of Volkswagen Beetles bought tax free in Europe by US Military personnel and being carried back to the States at the end of their tours of duty — no doubt at US tax payers' expense.

On board the "*Hoosier State*" I reintroduced myself to the Master. About three months earlier I had been onboard the "*Hoosier State*" in the Scheldt where she had just been refloated with the help of no less then 14 tugs belonging to Union de Remorquage. I was there to take salvage statements. The "*Hoosier State*" had survived that grounding experience but her owners had found it necessary to "strap" her, *i.e.,* strengthen her by welding huge longitudinal girders to her upper deck — not pretty but evidently effective since we made it across the Atlantic.

Donald O'May felt that I should not simply make the trip from UK to the US and back but should take advantage of being in the US to find out about the world of maritime law in New York. At that time Donald and my father both had a close friendship and business relationship with Nick Healy and Nick was asked whether he would be prepared to find a desk for me in his office which was then in Wall Street. I was welcomed, not only

into the office, but also into the Healy household and from that day I became part of the remarkable Healy extended family.

Nagendra Singh in the first of his books on Maritime Conventions includes a dedication on the fly leaf of the book which reads "at the feet of My Teacher." Here am I also about to talk about international conventions also at the feet of my teacher.

So, Nick, in a very real sense this lecture is dedicated to you.

WHAT IS THE CMI AND WHAT DOES IT DO?

According to our Constitution:

> The Comité Maritime International is a non-governmental international organisation, the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects. To this end it shall promote the establishment of national associations of maritime law and shall co-operate with other international organisations.

The CMI has been doing just that since 1897.

Why do we need "unification of maritime law"? In an address to the University of Turin in 1860 the Jurist Mancini said: "The sea with its winds, its storms and its dangers never changes and this demands a necessary uniformity of juridical regime." In other words, those involved in the world of maritime trade need to know that wherever they trade the applicable law will, by and large, be the same.

Traditionally, uniformity is achieved by means of international Conventions or other forms of agreement negotiated between governments and enforced domestically by those same governments. My intention this evening is to analyse the problems involved in this process.

It has always been a source of puzzlement me why some conventions appear to be more successful than others. And here, like a good lawyer, I must qualify what I have already said. What, in this context, is "successful" and is there some hidden meaning behind the word "appear to be" — do not appear to be. I have analysed the track record of a number of the better known maritime conventions.

1. Collision

It is tempting to measure the success of a convention on a strictly numerical basis. If that is the proper criteria of success you could say that one of the most successful Conventions ever produced was the very first CMI Convention — the Collision Convention of 1910. The terms of this Convention were agreed on September 23rd 1910 and the Convention entered into force less then three years later on 1st March 1913. In total 88 countries have ratified or acceded to that Convention.[1] One could say, with some confidence, that this Convention has met universal approval in that most maritime nations apply its terms. Another measure of the success of this Convention is that 92 years on nobody has felt it necessary to update it either by Protocol or by a new Convention.

2. Salvage

Almost as successful, in numerical terms, is a Convention of similar vintage namely the Salvage Convention of 1910. Again the speed of take up was rapid (certainly by recent standards). Less then three years elapsed between agreement of the text at the Brussels 1910 Diplomatic Conference and entry into force on March 1st 1913. Eighty-six States have ratified or acceded to that Convention. We are, quite properly, starting to see a number of denunciations of this Convention as countries adopt the new Salvage Convention of 1989.

It is worth recording the fact that the Salvage Convention of 1989, designed to replace the 1910 Convention, did not enter into force until July 1996, *i.e.*, more then seven years between agreement and entry into force (4 years longer than the 1910 Convention). The latest information available to me is that 40 States have now ratified or acceded to the 1989 Convention. Trying to compare like with like, it may or may not be significant that 13 years after the text of the 1910 Convention had been agreed no less then 68 States had already ratified or acceded to the Convention (nearly twice as many). We will have to decide whether this statistic tells us anything.

3. Carriage of Goods

In the past there has been extensive analysis of the history of the Hague and the Hague-Visby Rules. The Hague Rules were the product of a

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1 The source of ratification statistics in this paper is the CMI Yearbook 2001 — Singapore II.

Brussels Diplomatic Conference in 1924 and they entered into force 7 years later on the 2nd June 1931. Despite this relatively slow start the Hague-Rules have, at one time and another, been ratified or acceded to by 89 States. The Hague-Visby Rules, on the other hand, have only been acceded to or ratified by 27 States even though it was not necessary to denounce the Hague Rules before adopting the Visby Protocol. (In passing it is worth noting that the take up of the Visby Rules was slow in comparison with the original Hague Rules. It took nearly 10 years from agreement of the text to entry into force.)

In order to complete the picture on Carriage of Goods by Sea we should just look at the Hamburg Rules which were produced by UNCITRAL, rather then by the CMI / Brussels Diplomatic Conference system. The text of the Hamburg Rules was agreed in 1978 but did not enter force until 1992 — 14 years later. As has been frequently pointed out, most of the States which have ratified or acceded to the Hamburg Rules are cargo importing and exporting countries rather than States with substantial commercial fleets. Perhaps this reflects the fact that the Hamburg Rules are seen to favour cargo interests rather than the interests of carriers. The total number of States which have ratified or acceded to the Hamburg Rules is 28 at a recent count.

(As you are all aware, UNCITRAL is now busy considering a draft transport law convention which contains a chapter on liability designed to replace all previous cargo liability Conventions. I would like to publicly acknowledge the contribution which the USMLA has made to the work of CMI on this project. This seems to be the best, and probably the last, chance of restoring international uniformity in this area.)

4. Limitation of Liability

I turn to the Limitation Conventions which are an area of the law in which I have taken a particular interest.

The text of the first Limitation Convention was agreed at the Brussels Diplomatic Conference in August 1924 but did not enter into force until 1931 — 7 years after the text had been agreed. This Convention was not widely supported and only ever attracted 15 ratifications or accessions. (Curiously, despite the fact that there have been two subsequent Limitation Conventions in '57 and '76 there are still 9 States out of the original 15 which have not denounced the 24 Convention though some of these have

also ratified or acceded to the '57 and/or the '76 Conventions. This, of course, is calculated to cause delicious confusion — I refer to this later).

The CMI had a second go at limitation with its 1957 Convention, the text of which was agreed in October of that year. It entered into force in May 1968 and has been ratified or acceded to by 51 States, though of course a number have subsequently denounced this Convention in order to embrace the third CMI Limitation Convention — that of 1976.[2] At the latest count the '76 Convention has been ratified or acceded to by 37 states.[3]

The fourth instrument on limitation, namely the 1996 Protocol, has not yet come into force, despite the lapse of 6 years since the Diplomatic Conference at which the text of the Protocol was agreed. I can give you no firm prediction as to when this Protocol will enter into force.

5. Oil Pollution

You will be pleased to know that it is not my intention to analyse the track record of every international maritime law convention of the past 100 years but I have particular reasons for wanting to refer to three sets of instruments two of which have a common feature which to my mind have a vital part to play in their "success." I start with what is, by almost any standard of measurement, the most successful maritime law convention of all time. This is the Civil Liability Convention of 1969. The text of that Convention (to which the CMI contributed both in background research and drafting) was agreed at a Diplomatic Conference in 1969 and entered into force 6 years later in June 1975. The Convention has, at various stages, been acceded to or ratified by 103 States (with 2 additional "provisional" ratifications). If we add to this the various States and dependencies which

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2 I call it a CMI Convention. Much of the drafting was done by CMI but the old system of Brussels Diplomatic Conferences had long ceased and the final text was agreed at a Diplomatic Conference convened by IMO.)

3 Or 38 depending on the true status of the accession by Trinidad and Tobago to which some mystery attaches.

come in under the UK umbrella we realise that we are looking at a hugely successful Convention. The 1976 CLC Protocol (which came into force in April 1981) was acceded to or ratified by only 56 States.[4]

That some States did not bother to ratify this instrument is of no great significance.

Turning now to the instrument which supplements the CLC 1969 — the Fund Convention of 1971 — we find that the text of this was agreed at a Diplomatic Conference in December 1971 and the Convention came into force in October 1978 — 7 years. It has been acceded to or ratified by 75 States[5] but ceased to have effect on 24th May 2002. The Fund Convention of 1971 also has its 1976 SDR Protocol — ratified or acceded to by 56 States.

We then have the 1992 Protocols to the CLC and the Fund Convention, the text of which was agreed in November 1992. They both entered into force in May 1996 and have so far been ratified or acceded to by 87 States and by 81 States respectively.

6. Maritime Liens and Mortgages

Because they illustrate a point which needs to be made I must refer to the Maritime Liens and Mortgages Conventions of 1926, 1967 and 1993. The 1926 Convention was ratified or acceded to by 28 States but neither of the other two Conventions has ever entered into force.

7. HNS

I promise that I am now at the end of this tedious statistical analysis and will shortly be embarking upon what I hope will be a rather more exciting analysis of the result of my researches. Sadly there is not a great

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4 This is the so-called "SDR Protocol" whereby gold francs were replaced by Special Drawing Rights.

5 I am sure that there is some reasonable explanation why approximately 30 States which adopted the CLC 1969 did not adopt the complementary Fund Convention.

deal in the way of encouraging statistics to report in relation to the HNS Convention. The text was finally agreed in May 1996 and it remains well short of its entry into force requirements. Indeed, so worried are a number of states that this instrument may never come into force that the subject came back into the work programme of the IMO Legal Committee in October 2001.[6]

The Committee has been asked to look at the problems of implementation. The UK Government has sponsored a set of implementation guidance notes and has created a website to aid States battling with the technical and legal problems involved. I believe that this move is almost without precedent and is a reflection of the complexity of the HNS instrument.

WHAT ARE THE OBSTACLES TO UNIFORMITY?

1. Absence of need

Historically the CMI was the only international organisation concerned with unification of international maritime law. This remained the situation until the *Torrey Canyon* incident of 1967. Following that major oil spill IMCO[7] created a Legal Committee with a specific mission to devise a convention which would deal with issues of liability and compensation for pollution caused by tankers. In 1964, the United Nations General Assembly created the United Nations Conference on Trade and Development (UNCTAD) to deal with matters of trade and development. Two years later, in 1966, the United Nations established the United Nations Commission on International Trade Law (UNCITRAL) as a specialist legal body to deal with the technical examination of legislation regulating international trade.

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6 IMO/LEG 83.

7 IMCO was renamed the International Maritime Organisation (IMO) in 1982.

Inevitably the activities of these three organisations trespassed upon what had previously been CMI territory — private international maritime law. The IMO Legal Committee has now become the primary source of harmonising instruments in the field of private international maritime law. The CMI now works on its own independent projects and acts as a consultant to IMO, UNCITRAL and UNCTAD.

The CMI, in its early years, had no shortage of projects — the only constraint was the availability of enough volunteers to work on individual projects. (CMI was then, and still is, constrained by a shortage of funds.) I have no doubt that on many occasions within the CMI Executive there have been discussions to determine whether time and effort should be devoted to a particular project. The CMI could not afford, in any sense of that word, to tackle a project where there was no need for uniformity or realistic prospect of uniformity. I do not pretend that in every instance the CMI made the right decision. For example much CMI time and effort was devoted to the drafting of the International Convention relating to Stowaways 1957. If ratification is the proper test of success this was something of a disaster as it attracted only 10 ratifications or accessions — it never entered into force. Another example of apparent mis-judgment of need can be found in the Maritime Liens and Mortgages Conventions of 1926, 1967 and 1993. Here we see a clear case of the application of the law of diminishing returns. The 1926 Convention eventually entered into force and was ratified or acceded to by 28 States. The 1967 Convention never entered into force and only found support from 5 States. The 1993 Convention has not entered into force and has also only found support from 6 States.

The IMO and the other UN Agencies to which I have referred also have to decide whether there is a "need" for a unifying instrument. Indeed, the IMO Assembly by Resolutions A.500(xii) and A.777(18) has directed that conventions or other instruments designed to harmonise international maritime law should only be produced where a "compelling need" is established. It worries me that this issue of "compelling need" is often glossed over in the early stages of discussion of a new harmonising instrument. By the time the issue is addressed the forward momentum which the project has developed cannot be checked. An unwanted, unloved and therefore unratified convention may then be the result.

What should we conclude from this? In analysing success or failure we may be forced to conclude that the area of the law covered by the

instrument was not suitable for harmonisation because there was no "compelling need"— time, in consequence, has probably been wasted.

In a paper published in 1990 in the Law Quarterly Review, Mr Justice Hobhouse (as he then was) said:

> What should no longer be tolerated is the unthinking acceptance of a goal of uniformity and its doctrinaire imposition on the commercial community. Only conventions which demonstrably satisfy the well proven needs of the commercial community should be ratified and legislation should only be agreed to if it is demonstrably fit to be enacted as part of the municipal law of this country.

Elsewhere in his paper he draws an interesting distinction between conventions which are regulatory in nature — for example imposing safety standards in ship construction — and those in the private international law sphere which seek what he calls "stark uniformity." The latter, he suggests, are frequently treated by the commercial community "as too obviously lacking in merit to justify... adoption."[8] The message is — if you want a convention which will be widely accepted, "compelling need" must be a precondition to starting work.

2. Time scale

Conventions and other unifying instruments are born in adversity. An area of law may come under review because one or two States have been confronted by a maritime legal problem which has affected them directly[9]. Those sponsoring States may well spend some time reviewing the problem

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8 See for example the Hague Convention of 1964 on International Sale of Goods; incorporated in English law by the Uniform Laws on International Sales Act 1967 and largely ignored by the Commercial Community.

9 A recent example of this is the draft Wreck Removal Convention which (in April 1996) was sponsored by the Netherlands, the UK and Germany who had all experienced problems with wrecks situated a short distance outside territorial waters and with wrecks belonging to bankrupt owners.

and in producing the first draft of an instrument. This draft may eventually be presented to the IMO Legal Committee for inclusion in its work programme. Over ensuing years (with meetings of the Legal Committee every six months or so), issues on the draft will be debated, new issues will be raised and the instrument will be endlessly re-drafted. At some stage a view will be taken that the instrument is sufficiently mature to warrant a Diplomatic Conference at which the text will be finalised. If the instrument is approved at the Diplomatic Conference, it will sit for 12 months awaiting signature and will then be open to ratification and accession. The instrument will contain an entry into force requirement which will need to be satisfied. This requirement may involve accession by 15 or more States. Once the instrument has entered into force it will not be a truly harmonising instrument until ratified or acceded to and implemented by a respectable number of States. This may well require parliamentary time to be found for primary legislation. All this while the clock has been ticking.

I have headed this section of my paper "Time Scale." The process of creating an instrument may take years. For example, it may surprise you to know that the need for a Bunker Pollution Convention was recognised when the 1969 CLC was in the process of being drafted. However, it was not until 2001 that a Convention on this subject was finally agreed. I could quote many other examples of the long delays between conception and birth.

This delay has two major consequences. Firstly, States with a real problem may get fed up with waiting and decide to introduce national legislation to deal with the problem. Secondly, if the instrument contains limits of financial liability these limits may be out-of-date before the instrument ever comes into force. No State will implement a convention which requires them to apply limitation figures which do not meet current domestic needs. A fine illustration of this problem is to be found in the Athens Convention of 1974 and its various Protocols. I analyse this hereafter.

There is no obvious solution to this timing problem. Speeding up the process of drafting an instrument is a reasonable aspiration but an ill-considered instrument is even less likely to attract support than one which has gone through the lengthy refining process to which I have referred.

3. Differences in assessment of claims

I raise a related problem with some diffidence. In these days of political correctness we are required to accept that all men and women of whatever race or creed are equal. As I prepared this paper, we were building up to a Diplomatic Conference to finalise a protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. Under the 1974 Convention the limit of liability for death or personal injury to a passenger was 46,666 SDRs (£38,173.40 or $62,000) per capita.[10] I did not attend the Diplomatic Conference at which this figure was fixed but I do know that by the time the Convention came into force on the 28th April 1987, the UK government and many other European governments considered that this limitation figure was unrealistically low. In fact in June 1987, following the *Herald of Free Enterprise* disaster, the UK Government exercised an option which it had established when incorporating the Athens Convention into English law whereby they could unilaterally increase the limit for carriers whose principal place of business was in the UK. The new limit fixed was 1,525,000 Gold Francs or £80,009.00 ($120,000). This resulted in the odd situation that the limit for a cross channel ferry was £80,009.00 ($120,000) for UK operated vessels and only £38,173.40 ($62,000) for foreign operators — hardly international uniformity.

At an IMO conference held in London in March 1990, a Protocol to the Athens Convention was agreed to "enhance compensation" payable to passengers. The limit in respect of death or personal injury to a passenger was increased to 175,000 SDRs ($232,750). This Protocol received precisely 3 accessions and never entered into force, probably because it was widely regarded as too low.

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10 100,000 Gold Frances in the 1976; replaced by SDR by the 1976 Protocol ("the SDR Protocol").

In the recent run up to the Diplomatic Conference on a new Athens Protocol many figures were bandied about. The UK government, in a submission to the IMO Legal Committee on Friday, October 25th 2002, pointed out that if the 1990 Protocol figure of 175,000 SDRs ($232,750) was right in 1990 (which it was not in the UK government's view) the appropriate figure in the year 2000 would have been 425,000 SDRs ($550,000). The UK government's submission to the Diplomatic Conference was that the appropriate figure for 2002 should be 500,000 SDR plus ($650,000) plus per passenger. By the time this Protocol comes into force the 400,000 SDR ($520,000), actually adopted, may be deemed too low for some States with the result that they will feel obligated to exercise the "opt out" right, contained in Article 7(2) of the Convention as amended by the 2002 Protocol, and increase this overall limit per passenger. This would save the Protocol but would mean that there would be no uniformity of overall limits.

I now turn to my politically incorrect thought. For every "developed" country which finds 400,000 SDRs ($520,000) inadequate, there will be 2 or 3 "less developed" countries for whom the figure is too high with the result that governments of those countries will be under pressure from their domestic Shipowners and insurers not to expose them to this unnecessary extra financial burden. This represents a real dilemma not only in the context of the Athens Convention but also in other limitation conventions.

I have on a number of informal occasions suggested that the a solution to this problem would be to insert in limitation articles of conventions a range of figures any one of which a State may adopt and still be treated as a ratifying state. (The same result could be achieved by including higher maximum figures in an "opt out" clause.) I accept that this would lead to forum shopping and problems of conflict of laws but it might at least ensure that the other fundamental liability and compensation issues covered by the instrument are applied universally.

Whenever I have made this suggestion, I have been told that an international organisation such as the IMO cannot be seen to discriminate in this way. If that is the final word on that subject, I think that we may see instruments containing compromise limitation figures struggling for international recognition.

4. Drafting in a void

In the context of the draft Wreck Removal Convention, currently in the work programme of the IMO Legal Committee, the project was initially sponsored by the governments of the UK, Netherlands and Germany. When the matter was first presented at the 73rd Session of the IMO Legal Committee in April 1996, the submission consisted of an introductory memorandum and a draft convention. I would describe this draft instrument as having been "drafted in a void." By that I mean that whilst it may have drawn some inspiration from the law of the United Kingdom, the Netherlands and Germany on the subject of wreck removal, it was not based on a careful review of the wreck removal law of a large number of States. Those of you who have been involved in CMI projects will know that before we put pen to paper to create a new instrument, we consult our member associations so that when the drafting team gets to work it has a clear knowledge of domestic law in a large number of States. If, from this firm base, the drafting is skilfully done this should ensure that the instrument is compatible with the domestic law of a substantial number of States.

I deprecate drafting in a void.

5. Over elaboration

The 1910 Salvage Convention has 16 Articles and occupies 4 pages in the CMI Handbook of Maritime Conventions. The 1989 Salvage Convention, designed to replace the 1910 Convention Consists of 34 Articles, a Common Understanding and two Resolutions. It occupies 10 pages in the Handbook. This illustrates a tendency towards over elaboration of texts. I believe that the longer and more complex a document the less likely it is that national governments will embrace it. This may explain why the 1910 Convention was ratified by 86 states and the 1989 Convention, designed to replace it, has only been ratified by 40 states — at the latest count.

Let me give you a very recent example of what I see as over elaboration. Under the Athens Convention 1974 carriers are presumed to be at fault if the loss arises from "shipwreck, collision, stranding, explosion or fire, or defect in the ship". Since the Convention came into force in 1987 there has never, to my knowledge, been a case in which the meaning of "defect in the ship" has been an issue.

So why not leave well alone? In the Athens Protocol of 2002 it has been thought necessary to define "defect in the ship" as:

> any malfunction, failure in any part of the ship or its equipment when used for the escape, evacuation, embarkation and disembarkation of passengers; or when used for the propulsion, steering, safe navigation, mooring, anchoring, arriving or leaving berth or anchorage, damage control after flooding, or stability, or when used for the launching of life saving appliances.

If definition is intended to give clarity of meaning I think this exercise in drafting fails to achieve its aim. In fact it also creates endless opportunities for arguments about interpretation. Whilst "defect in the ship" might be subject to different interpretations in different jurisdictions I believe that would have been a fair price to pay for the sake of keeping the text short and simple.

6. Have we got the right instrument?

I have spoken so far on the assumption that the only instrument of harmonisation is a Convention. We should not, however, forget that there are codes, model laws, guidelines and rules which may be more appropriate than a convention if harmonisation of law is desired.

A model law has its place and perhaps the best example of this is the UNCITRAL Model Law on Arbitration which now forms the basis of arbitration law in a substantial number of countries. The CMI has recently produced a Model Law on Piracy and Acts of Maritime Violence. Again, the model law approach was deemed more appropriate than a full blown convention.

Back in 1996 the delegation of the United Kingdom to the IMO Legal Committee proposed that there should be an international convention to ensure that Shipowners meet their financial liabilities to third parties by insurance or other means. This was known as the Compulsory Insurance proposal. It subsequently became known as Provision of Financial Security. Somewhere along the line it became apparent that this was not going to be a workable proposition (I need not go into the reasons for this) but we ended up with the 2002 Protocol to the Athens Convention (to which I have already referred) which is designed to protect the rights of passengers not only by a modern liability regime but also by requiring shipowners to provide insurance cover or other security to meet legitimate claims.

However, the UK did not entirely abandon its proposal that all shipowners should be adequately insured to meet the types of claim which arise on a regular basis out of ship operations. This could not be a convention for various reasons but in the end the IMO Legal Committee at its 80th Session in April 1999 approved the text of "IMO Guidelines on Shipowners' Responsibilities in respect of Maritime Claims." This calls upon member States to urge the owners of ships flying their flag to carry insurance (and to be able to produce evidence of that insurance) to cover their liability for the types of claim currently insured by the International Group of P&I Clubs.[11]

The problem with such guidelines is that they are unenforceable and will probably be ignored by the very Shipowners and flag states at which the exercise was initially aimed. Guidelines are certainly the poor relation of conventions but may be better than nothing.

7. Politics

We can immediately identify two types of international convention. Those to which votes may be attached and those which will win no votes at all. Obviously those falling into the first category are more likely to gain legislative time and those in the second category are less likely to do so.

In the first category will certainly be found those conventions which protect citizens (and governments) from the effects of a maritime incident.

It is unsurprising that the 1969 CLC falls into the first category and attracted accession or ratification by 95 States. This was the "perfect" convention. It offered a clear liability regime, compensation for the

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11 The 2002 Protocol to the Athens Convention includes a Resolution urging governments to persuade the owners of vessels flying their national flag to carry adequate insurance to cover any claims to which the Protocol applies.

consequences of oil spills and a direct cause of action against liability insurers. For the UK government, ratifying and implementing this convention was going to be a sure vote winner in Cornwall, which had been devastated by the *Torrey Canyon* oil spill. The Fund Conventions obviously fall into the same category and I would certainly include in this category the Athens Convention and its Protocols. A government in power at the time of a major ferry disaster might find it very difficult to explain a shortfall on claim payments, if this resulted from a failure to sign up to the latest Convention.

Having said that, one would perhaps have expected to see the HNS Convention of 1996 picked up with greater zeal by governments of States exposed to the risk of pollution by hazardous substances other than oil. That has not happened to date and is a cause of some concern. So much so that the problems of implementation have recently been brought back into the Legal Committee work programme. It may be that the problem with the HNS Convention is slightly different and I will refer to that later.

As regards the second category of convention (those to which no votes are attached), one is forced to conclude that a number of the less successful conventions have been less successful because they fall into this category.

That there are no votes in Stowaways may explain the failure of that 1957 Convention. There were certainly no votes attached to the implementation of the convention on Maritime Liens and Mortgages.

A further sub-division of the second category may contain those conventions which would actually be unpopular to an influential section of the community. In this sub-group might appear the Hamburg Rules, which were widely seen as favouring the interest of cargo owners over the interests of Shipowners.

8. Expenses of application

This should, perhaps, be treated as a sub-section of politics. A State may find the financial and other benefits offered by a convention for itself and its citizens a good reason for implementation. Governments may be less excited if they discover that the convention requires them to set up administrative machinery manned by highly paid civil servants to administer some aspect of the convention. I hazard the suggestion that this may be one of the problems with the HNS Convention where States are

required to monitor and report the movement of cargoes falling into the category of HNS. If the expense of setting up the administrative machinery falls, however, on industry (as in the case of the Fund Conventions) the expense argument may be less potent.

9. High thresholds

"Threshold" is the word used to describe the number of states which must ratify a convention before it comes into force internationally. The Athens Convention 1974 had a ten state threshold whereas the threshold for the Bunker Convention is 18. Why the difference? I understand that the Bunker Convention threshold was set so that it will need ratification by more than just the European maritime states to bring it into force. In other words, the Bunker Convention ought to be shown to have truly universal (as opposed to regional) appeal before it can become operational. High thresholds may delay entry into force.

10. Failure to denounce old conventions

I mentioned earlier that some states ratify and implement a new convention but fail to denounce the one which it is designed to replace. Thus Poland appears to have ratified and implemented the 1924, 1957 and 1976 Limitation Conventions but did not denounce the 1924 and 1957 before moving on. It would follow that if a Polish ship has a collision with a ship from Turkey (a 1924 convention country) and the case comes before the Polish Court, the Court would be obliged to permit the Turkish ship to apply the 1924 convention. This is due to the terms of the Vienna Convention on the Law of Treaties 1969, which requires states to apply the "treaty in force" between them — in this case the 1924 Convention, which is the one that they have in common.

11. Implementation and interpretation

I mention this in passing because there is no doubt that governments do find it difficult to convert an international convention into an accessible piece of domestic legislation. Some States implement the convention en bloc whilst others amend their existing legislation to reflect the terms of the convention. Others still may "cherry pick" a convention and incorporate only those parts of the Convention of which they approve. This may often mean that a convention is actually more successful than the statistics of ratification reveal. It is worth mentioning in this context, that

the International Maritime Law Institute (IMLI) in Malta provides an excellent grounding for government lawyers in the understanding and implementing of international conventions.

We should not overlook the work currently being undertaken by the CMI (Professor Francesco Berlingieri) to place on our website reports of cases heard by national courts which involve the interpretation of international conventions. It is hoped to build up a body of case law to which Judges in national courts may turn for help in interpreting international conventions.

12. Failing to set a good example

Here I am at risk of insulting my hosts. It would be so nice if, when seeking to encourage states to implement Conventions we could point to major maritime nations, such as the USA, and say: "If its good enough for them it must be good enough for you". The U.S. is not alone in failing to implement Conventions but it is very influential and I know that there are governments which say: "If it's not good enough for the U.S. why should we bother." I know that there are many in this audience who share my sense of disappointment but, nonetheless, continue to work diligently on CMI projects. When listing, as I have done, obstacles to uniformity, I must include the failure of leading maritime nations to lead by example as a major obstacle.

13. Are we just conventioned out?

I definitely sense a certain inertia amongst national governments when it comes to ratifying or acceding to international conventions. This is probably due to a combination of many factors. Availability of legislative time, availability of lawyers capable of drafting the necessary national legislation, discovery of national opposition to a particular instrument etc., etc. It may also be that in certain respects States relish the diversities of law. For example, I cannot see the South African government ratifying the 1999 Arrest Convention since it would require them to change their law and would circumscribe the current freedom of arrest in that country. There is no doubt that a beneficial legal regime can attract foreign business and therefore foreign currency.

Time alone will tell, but I continue to believe that if proper attention is given to the selection of the project, the appropriate instrument is used and

painstaking ground work is undertaken before the drafting process starts, there remain areas of maritime and maritime/commercial law which would benefit from harmonisation. I like to think that the current efforts of CMI with UNCITRAL to devise a new transport law convention is one such area. I know that many in this audience are watching progress on that front with interest and I repeat my thanks to the USMLA for the support which it has given the CMI in this project. Without the outstanding work of Professor Michael Sturley as Rapporteur, the project would have died in infancy.

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE NEWSLETTER, SPRING 2003

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I. NEWS AND INFORMATION

Some "Interim Guidance" on Complying With the Terrorism Risk Insurance Act

HARRISBURG, PA., APRIL 8, 2003 — A hot dog cart vendor in Harrisburg is making sure he's prepared for the worst. "I'm the first hot dog vendor in all of Pennsylvania to have terrorism insurance," vendor Daniel Krehling said. "It's a $1 million policy."

Krehling knows he may not be a huge target, but his stand is sandwiched between City Hall, the county courthouse, and lots of downtown high rises.

Krehling said the policy covers anything that happens to anyone or anything in a 50-foot radius of his hot dog cart, which includes him and his customers.

The added insurance costs a little more than $100 extra a year. "We have flood insurance, homeowners insurance, liability insurance, why not terrorism insurance?" Krehling said.

Last fall, President George W. Bush signed the Terrorism Risk Insurance Act of 2002 into law. Under the law, insurance companies are required to offer terrorism insurance to businesses. *www.nbc17.com.*

On November 26, 2002, President Bush signed into law the Terrorism Risk Insurance Act of 2002 ("Act"). The Act became effective immediately. It establishes a temporary federal program of shared public and private compensation for insured commercial property and casualty losses

resulting from an act of terrorism, as defined in the Act. The Terrorism Risk Insurance Program ("Program") is administered and implemented by the Department of the Treasury ("Treasury") and will expire on December 31, 2005.

The basic provisions of the Act have been widely reported, and will only be briefly summarized here. The purpose of this discussion is to call the attention of practitioners whose clients must comply with the Act to certain valuable resources.

A January 29, 2003 Treasury press release states that the Act effectively places the federal government in the terrorism risk insurance business until the Act expires at the end of 2005. The federal reinsurance backstop is based on the concept of an insurance company deductible and excess loss sharing with the government once an insurance company has suffered insured losses from acts of terrorism equal to its deductible. Once the deductible is met, Treasury will cover 90% of losses above the deductible. An insurance company's deductible will increase over the life of the program as a percentage of its direct earned premium for commercial property and casualty insurance, rising from 7% in 2002 to 15% in the last year of the program. The program also authorizes Treasury to recoup federal payments under the Act via policyholder surcharges, not to exceed 3% per year.

Other key provisions of the Act:

- Limit the definition of "act of terrorism" to include only acts of terrorism that are related to foreign sources;
- Require mandatory participation in the Program for a defined group of insurers;
- Require insurers to "make available" coverage for acts of terrorism on terms and conditions that do not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from other events;
- Require as a condition for federal payments that insurers make certain disclosures regarding the Program to their policyholders;
- Limit the Program to commercial property and casualty insurance; and

- Provide for specific procedures (*e.g.*, claims consolidation) that are designed to manage litigation arising from or relating to acts of terrorism.

Among the requirements that necessitate more than merely reading the statutory text for clear directions as to compliance are the Act's "disclosure" and "reinstatement" provisions. The Act requires that certain disclosures be made to policyholders as part of the conditions for Federal payments under the Terrorism Risk Insurance Program. Section 103 requires an insurer to provide clear and conspicuous disclosure to the policyholder of the availability of terrorism coverage and the premium charged for insured losses covered by the Act, as well as the federal share of compensation for insured losses, in differing manners depending on the vintage of the policy:

- For existing policies issued before the date of enactment (November 26, 2002), the Act requires that disclosure to the policyholder must have been made not later than 90 days after November 26, 2002;
- For policies issued within 90 days of November 26, 2002, the Act requires that the disclosure to the policyholder be made at the time of offer, purchase and renewal of the policy; and
- For policies issued more than 90 days after November 26, 2002, the Act requires disclosure on a separate line item in the policy at the time of offer, purchase and renewal of the policy.

Section 105(c) of the Act allows an insurer to reinstate preexisting exclusions of coverage for an act of terrorism in a contract for property and casualty insurance that is in force on the date of enactment, notwithstanding the general nullification and general preemption of terrorism exclusions in force on the date of enactment of the Act in Sections 105(a) and (b), but only if 1) the insurer has received a written statement from the insured that affirmatively authorizes such reinstatement or 2) if (A) the insured fails to pay any increased premium charged by the insurer for providing such terrorism coverage and (B) the insurer provided notice, at least 30 days before any such reinstatement of (i) the increased premium for such terrorism coverage and (ii) the rights of the insured with respect to such coverage, including the date upon which the exclusion would be reinstated if no payment is received.

What must a lawyer tell a client insurer to do in order to assure compliance with the disclosure requirements, so as to preserve its right to

federal payments in the event of a covered act of terrorism? What must that lawyer tell the client that wishes to reinstate an exclusion of terrorism coverage, and/or exclude coverage from a newly issued policy?

The Treasury did not immediately promulgate regulations answering these and other questions, but has issued three very helpful "Interim Guidances," dated December 3, 2002, December 18, 2002, and January 22, 2003, all of which are posted on its website, *www.treas.gov* (search "Terrorism Risk Insurance Act"). A notice of proposed rulemaking dated February 25, 2003, also posted on the website, announced an Interim Final Rule primarily devoted to incorporating definitions contained in the Interim Guidances, such as "insured loss" and "insurer," with modifications. While not spelling out compliance requirements, the Interim Final Rule states at §50.7(a): "An insurer will be deemed to be in compliance with the requirements of the Act to the extent the insurer reasonably relied on Interim Guidance prior to the effective date of applicable regulations."

The Interim Guidances are largely structured in question and answer form, and include links leading directly to disclosure forms prepared by the National Association of Insurance Commissioners. Use of these forms will be deemed compliance with the requirements of Sections 103 and 105 of the Act.

The December 3, 2002, Interim Guidance contains this advice:

> **How May an Insurer Comply with the Disclosure Requirements of Section 103(b)(2)(A) If There is No Change in the Premium?**
>
> Prior to the issuance of regulations or further guidance by Treasury, any insurer that uses the Model Form No. 2 attached to the model bulletin on Terrorism Risk Insurance dated November 26, 2002 of the National Association of Insurance Commissioners (NAIC), and posted on the NAIC website at *http://www.naic.org/pressroom/releases/disclosetwofinal.pdf,* as a policyholder disclosure form for in-force policies, if the insurer makes no change in the existing premium, will be deemed by Treasury to be in compliance with section 103(b)(2)(A).

How May an Insurer Comply with the Disclosure Requirements of Section 103(b)(2)(B) for Policies Issued Within 90 days of Enactment?

Either NAIC Model Disclosure Form No. 1 which is posted on the NAIC website at *http://www.naic.org/pressroom/releases/discloseonefinal.pdf*, or NAIC Model Disclosure Form No. 2 which is posted on the NAIC website at http://www.naic.org/pressroom/releases/disclose two final.pdf, may be modified as appropriate by insurers for the particular policy and used for policies issued within 90 days of enactment. Prior to the issuance of regulations or further guidance by Treasury, any insurer that modifies as appropriate and uses either of these model disclosure forms as its disclosure for policies issued within 90 days of enactment of the Act will be deemed by Treasury to be in compliance with the Section 103(b)(2)(B) disclosure requirements.

May an Insurer Use the Same Form to Comply with the Reinstatement Requirements of Section 105(c) and the Disclosure Requirements of Section 103(b)(2)(A) if Applicable?

Yes. Prior to the issuance of regulations or further guidance by Treasury, if applicable to an existing policyholder, *e.g.*, for in-force policies where there is a change of premium, Treasury will deem disclosure by an insurer to an existing policyholder using NAIC Model Disclosure Form 1, posted on the NAIC website at *http://www.naic.org/pressroom/releases/discloseonefinal.pdf*, to comply with the disclosure requirements of Section 105(c) of the Act, as well as the requirements of section 103(b)(2)(A).

Is This Interim Guidance the Exclusive Means By Which an Insurer May Comply with Disclosure or Reinstatement Requirements of the Act?

No. This interim guidance concerning certain disclosures as specified above may be relied upon by insurers as a safe harbor in complying with these requirements of the Act until regulations or further guidance is issued by Treasury, but it is not the exclusive means by which an insurer may comply with these requirements of the Act.

The December 18, 2002 Interim Guidance emphasizes that compliance with disclosure provisions may be evidenced in a variety of ways, including "proof of mailing process, certificates of mailing, returned forms signed by the policyholders, and other methods consistent with the normal forms of communication with policyholders," so long as they show that the disclosures have been made.

Finally, the January 22, 2003 Interim Guidance addresses Section 103's "separate line item" requirement for policies issued more than 90 days after the date of enactment:

> For the purpose of interim guidance, Treasury deems an insurer to be in compliance with the separate line item requirement of Section 103(b)(2)(C) if it makes the required "clear and conspicuous" disclosure: i) on the declarations page of the policy; ii) elsewhere within the policy itself; or iii) in any rider or endorsement that is made a part of the policy, as long as the disclosure is clear and conspicuous and otherwise meets the requirements of section 103(b)(2) and previous interim guidance. This interim guidance is provided as a safe harbor to assist insurers in complying with conditions for federal payment prior to the issuance of regulations; however, it is not the exclusive means by which an insurer may comply with the section103(b)(2)(C) "separate line item" requirement.

It would appear that an adapted version of one of the NAIC forms, signed and returned by the policyholder, would evidence compliance.

Those advising clients on compliance with the Act should remain on the alert for additional regulations, but in the meantime can take considerable comfort from the safe harbors provided by the Interim Guidances and the forms designed by the NAIC.

Submitted by Newsletter Editor Gene B. George

II. RECENT CASES OF INTEREST

U.S. Supreme Court Limits Punitive Damages in Third Party Bad Faith Case Against Insurer

State Farm Mutual Automobile Ins. Co. v. Campbell (U.S. Sup.Ct, decided April 7, 2003)

Investigators and witnesses concluded that Curtis Campbell caused an automobile accident in which one person was killed and another permanently disabled. The insurer, State Farm Mutual Automobile Insurance Company, contested liability, declined to settle for the policy limits of $50,000.00, ignored its own investigators' advice, and took the case to trial. State Farm assured Campbell and his wife that they had no liability for the accident, that State Farm would represent their interests and that they did not need separate counsel. A Utah jury returned a verdict for $185,849.00 and State Farm refused to allow the attorneys appointed by the insurer to appeal. The Utah Supreme Court denied the appeal asserted by the Campbells' personal attorney. Thereafter, State Farm paid the entire judgment in excess of the policy limits.

The Campbells then sued State Farm for bad faith, fraud and intentional infliction of emotional distress. In the first phase of a bifurcated trial, the jury found unreasonable State Farm's decision not to settle. In the second phase, while addressing compensatory and punitive damages, evidence was introduced that pertained to State Farm's business practices in numerous states, but bore no relation to the type of claims underlying the Campbells' complaint, *i.e.* automobile accidents. The jury awarded the Campbells $2.6 million in compensatory damages (emotional distress) and $145 million in punitive damages. The trial court reduced the awards to $1 million compensatory and $25 million punitive. The Utah Supreme Court reinstated the $145 million punitive award.

The United States Supreme Court, in an opinion by Justice Kennedy, explained that the due process clause of the U.S. Constitution prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. Justice Kennedy stated that courts "reviewing punitive damages must consider: (1) the degree of reprehensibility of the defendant's misconduct (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Gore,* 517 US, at 575."

With respect to the first guidepost in *Gore* concerning the defendant's reprehensibility, the Court held that a state does not have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of its jurisdiction. Lawful out-of-state conduct may only be probative when it demonstrates the deliberateness of the defendant's action in the state where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. The Court ordered that a jury must be instructed "that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."

With regard to the second *Gore* guidepost, the Court was reluctant to identify a concrete constitutional limit on the ratio between harm to the plaintiff and a punitive damage award, but, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. The *Gore* court had discussed a four to one ratio of punitive to compensatory damages, in a matter where the compensatory damages were relatively low. In the instant matter, the Court held that the compensatory damages for infliction of emotional distress in the amount of $1 million were substantial and, therefore, the proper punitive damage amount *should be at or near the compensatory damages amount.* "The precise award in any case, of course, must be based on the facts and circumstances of the defendant's conduct and the harm to the plaintiff."

With regard to the third guidepost, the Court held that only the most relevant civil sanction under Utah state law for an act of grand fraud would apply to the analysis, namely a $10,000.00 fine. Any references to a broad fraudulent scheme drawn from out-of-state and dissimilar conduct were irrelevant.

U.S. Supreme Court Affirms Fear of Cancer Damages, Joint and Several Liability in FELA Asbestosis Suit

Norfolk & Western Railway Co. v. Ayers, 538 U.S.__, 123 S. Ct. 1210, 2003 AMC 609 (Mar. 10, 2003)

In a 5-4 majority decision, the Court let stand a West Virginia state court jury verdict awarding $5.8 million, including amounts for fear of future cancer, to six former Norfolk & Western Railway Co. employees suffering from asbestosis, allegedly due to asbestos exposure during the course of their employment.

The majority holds that "mental anguish damages resulting from the fear of developing cancer may be recovered under the FELA by a railroad worker suffering from the actionable injury asbestosis caused by work-related exposure to asbestos." Complainant must prove that his alleged fear is genuine and serious. Thus, the Court found the trial court had correctly instructed the jury that a plaintiff who demonstrated a reasonable fear of cancer related to a proven physical injury from asbestos could recover for that fear as part of the damages awardable for pain and suffering.

The trial court had also correctly instructed the jury not to reduce recoveries because of non-railroad exposure to asbestos, so long as it found Norfolk to be negligent and that exposure at Norfolk had contributed, however slightly, to each plaintiff's injuries. FELA allows worker to recover his entire damages from a railroad whose negligence jointly caused an injury. Railroad has the burden of seeking contribution from other potential tortfeasors. FELA expressly directs apportionment of responsibility between employer and employee based on comparative fault, but nothing in the statute provides for reduction of the amount payable by the employer when the negligence of a third party also contributed in part to causing the injury.

Policies Cover Death of Temporary Worker

Ayers v. C & D General Contractors, 237 F. Supp.2d 764 (W.D. Ky. 2002).

Action against insured general contractor by surviving spouse of construction worker killed at work. Decedent was hired through a newspaper ad to assist in specific dock repair job, for negligence under general maritime law; and against contractor's insurers seeking declaration of coverage under commercial general liability ("CGL") and employer's liability policies. Surviving spouse's motion for summary judgment on issue of insurance coverage granted in part.

Applying Kentucky law, under which insurance policy exclusions are strictly construed and exclusion must be clearly stated in order to apprise insured of exclusion, district court concludes wording of "temporary worker" exception to employee exclusion of CGL policy is insufficient by itself to place killed worker within the clause, which excludes coverage of bodily injury to an "employee" of the insured arising out of and in the course of employment with the insured. Definition of "employee" includes a "leased worker" furnished by a labor leasing firm, but does not include a "temporary worker." Court holds policy definition of "temporary worker"

as "a person who is furnished to you to substitute for a permanent 'employee' on leave or to meet seasonal or short-term, workload conditions" is ambiguous and concludes that question of decedent's status requires evidentiary hearing.

Second exclusion bars coverage for bodily injury arising out of ownership or use of a watercraft. Parties disagree on whether barge with truck crane mounted on it to lift the dock constitutes a contemplated "watercraft." Court holds the barge was not a "watercraft" under dictionary definitions, in that it was not used for transportation during decedent's employment, but only as a platform to enable work underneath the dock. *See Ison v. Roof,* 698 F. 2d 294 (6th Cir. 1983). "Watercraft" exclusion is thus held inapplicable.

Separate Worker's Compensation/Employer's Liability ("WC/EL") policy covers payments made to employee under worker's compensation law, as well as any liability in tort under § 905(b) of Longshore Act for injuries sustained as a result of employer's negligence while acting in capacity of vessel owner. Employer's Liability side of the policy contains exclusion of coverage for "bodily injury to any person in work subject to the Longshore and Harbor Workers' Compensation Act" and certain other specifically enumerated statutes. Plaintiff contends the exclusion is nullified by an endorsement that carves out the Longshore Act from this exclusion. Court agrees that common sense reading of the endorsement extends the entire policy "to all 'work subject to'" the Longshore Act, so that plaintiff is not excluded from coverage under the WC/EL policy.

As regards separate Umbrella Policy, district court concludes that a "temporary worker" as defined therein is excluded from the policy definition of "employees." Thus if the evidentiary hearing establishes that decedent is a "temporary worker," coverage will not be excluded by the "employee" exclusion.

In addition, while the Umbrella Policy contains an effective "watercraft" exclusion containing a definition that would bar coverage, it also contains an endorsement extending coverage to an insured where there are applicable underlying policies. Since the court found that the WC/EL policy applies and that, following a factual determination, the CGL policy may also apply, such underlying insurance exists and the endorsement overrides the watercraft exclusion, so that the Umbrella Policy also provides coverage.

Venue Transfer Denied

Axa–Re Property and Cas. Ins. Co. v. TETRA Technologies, Inc., 2002 WL 31738816 (E.D. La. 2002)

Action by Axa seeking declaratory judgment that it did not provide hull insurance coverage to TETRA on two vessels allegedly damaged in separate incidents during the policy term.

First vessel, which sustained heavy weather damage and partially sank in the Gulf of Mexico, was built out of one half of the hull of a vessel that was scheduled under the Axa policy. Axa claims it was not listed on the schedule of covered vessels and was not surveyed, as required for coverage. Second vessel, damaged while lifting a section of well jacket during a Gulf of Mexico platform demolition project, was not covered in Axa's view because its load prior to casualty exceeded maximum lifting capacity, violating the policy's safe load warranty. TETRA denies safe working load was exceeded.

Case involves parties, witnesses and events in Texas, Louisiana and New York. TETRA's office and principal place of business is in Texas; the policy was issued to TETRA; its vessel owning subsidiary is a Delaware partnership with six offices in Texas and nine in Louisiana. Axa, a subsidiary of a French company, is a Delaware corporation with its principal place of business in New York; its managing general agent is a Louisiana corporation, as is the corporation that does its underwriting and issues policies on its behalf; all claims under the Axa policy were adjusted by a Louisiana company. TETRA's insurance was brokered by a Texas company, which also received TETRA's claims and sent them to Axa's adjuster.

TETRA moved to transfer venue to the Southern District of Texas, contending that the main issue as to the first vessel is coverage, which will turn on the testimony of its vice president in Texas and employees of its Texas broker. Axa claims it will require witnesses from the office of its Louisiana adjuster, as well as testimony of crew members who reside in Louisiana as to whether there were bilge alarms installed aboard the vessel when it sank, and Louisiana surveyors who assessed the damage and conducted the survey that put the vessel on the insured list.

As to the second vessel, TETRA claims the issues are coverage, whether the vessel exceeded its lifting or weight capabilities, and whether

there was pre-existing damage. It claims two barge superintendents and the surveyors from Louisiana, and eight witnesses from Texas, will be needed. Axa contends that crew members, a man who performed weight calculations for the lift, and four witnesses as to the damage to the vessel, all from Louisiana, will be needed.

Trial court denies TETRA's 28 U.S.C. §1404(a) motion to transfer venue because TETRA has not met its burden of showing that transfer will advance the interest of justice and promote the convenience of parties and witnesses. Court lists the following private and public factors to be balanced to determine whether transfer is necessary or desirable:

Private factors —

1. Relative ease of access to sources of proof;
2. Availability of compulsory process to secure attendance of witnesses;
3. Cost of attendance for willing witnesses; and
4. Other practical problems making trial easy, expeditious and inexpensive.

Public factors —

1. Administrative difficulties flowing from court congestion;
2. Local interest in having localized controversies decided at home;
3. Familiarity of forum with law that will govern the case; and
4. Avoidance of unnecessary problems of conflict of laws and application of foreign law.

Unless balance strongly favors the defendant, the plaintiff's choice of forum will not be disturbed. While not technically its domicile, Axa's choice of Louisiana forum will be given some deference, because its general agent/adjuster is a Louisiana corporation and the forum is "not fortuitous or attenuated with the actual events giving rise to the underlying cause of action."

Analyzing each public and private factor separately, court concludes that all private factors are either neutral or slightly favor retaining case in Louisiana (availability of process and cost of attendance for witnesses). Among public factors, court concludes that Texas law is likely to apply, since by statute it governs interpretation of any contract of insurance

payable to any citizen or inhabitant of Texas [Texas Insurance Code, Article 21.42]. Therefore, familiarity of forum and avoidance of conflicts of law factors favor transfer. Applying *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310, 1955 AMC 467 (1955), court concludes there is no entrenched federal maritime rule, and Texas has a substantial and legitimate interest in applying its law to protect its citizens against insurance companies from outside the state.

However, choice of law factors have little weight because "[w]ithin this jurisdiction the court has yet to encounter a court that transferred a case solely because of this familiarity with applicable law factor." Balance favors retaining case in Louisiana because "[typically, the most important factor... is the inconvenience of the forum on parties and material witnesses." More witnesses are in Louisiana, many of whom are not employees of the parties, so it is the more convenient forum.

Venue Transfer Granted

Higgins v. Amazon.Com, Inc., 2002 WL 31760237 (S.D.N.Y. 2002)

Suit by foreign insurer seeking declaratory judgment as to its obligations under marine cargo insurance policy in regard to moldy gift boxes shipped to insured. Magistrate Judge grants insured's motion to transfer venue to W.D. Washington, where insured has related action pending against insurer, and denies insurer's cross-motion to enjoin prosecution of the Washington action and for default judgment.

Action would be transferred pursuant to 28 U.S.C. §1404(a) for the convenience of witnesses and in the interest of justice, where it appeared that none of the key potential witnesses lived or worked in the Southern District of New York, insurer had expressly agreed to litigate anywhere in the U.S., and New York action was filed only three days before the insured's Washington suit.

Amazon is a Delaware corporation headquartered in Seattle, Washington. Insurer carries on its business in London, England. Moldy gift boxes were purchased through a New Jersey supplier and shipped from a source in China to distribution centers in Delaware, Georgia, Kansas, Kentucky, Nevada and Washington. Cargo coverage was negotiated by Amazon's risk department in Seattle with Seattle office of its broker, Aon. Policy contained a U.S.A. Suable Clause giving Amazon the right to institute

any suit relating to the policy "in any court of competent jurisdiction within the United States of America."

As part of settlement of suit brought against Amazon by supplier, supplier agreed to make its witnesses available in Seattle for deposition and trial. Court reviews factors to be considered in deciding §1404(a) motion, noting that "convenience of the party and nonparty witnesses is generally the most important factor in deciding whether to grant a motion to transfer." Key witnesses here will be employees of Amazon and the supplier with knowledge of the order, surveyors who inspected the damaged goods, and persons at insurer and Aon familiar with negotiation of policy terms. None live or work in the Southern District of New York, and the only witnesses on the east coast are employees of the supplier, who will be produced in Seattle.

Case is not "especially document intensive," involving a single insurance policy and a single purchase of goods. Insurance documents are in the possession of the insurer and/or Amazon and Aon in Seattle. Shipping documents are in the possession of Amazon and/or the supplier, which has agreed to cooperate with discovery in Seattle. Transfer to Seattle will be more convenient for Amazon, whereas the insurer, a British entity, will experience some inconvenience litigating anywhere in the U.S. It has sufficient means to litigate the action, as it contracted to do, anywhere in the U.S.

Court has admiralty jurisdiction over the case, and is required to apply federal choice of law rules to determine which jurisdiction's law should govern interpretation of the cargo insurance policy. None of the "contacts" assessed suggest application of New York law, and a court in Washington would have greater knowledge of that state's law if it is deemed applicable. If British law applies, a New York federal court is no better equipped to apply it then a federal court in Washington.

While the "first filed" rule creates a presumption in favor of retaining the case, courts depart from the rule in declaratory judgment actions commenced preemptively on the eve of an anticipated suit in another jurisdiction. Here, court finds no such "gamesmanship", but says weight given to insurer's choice is diminished because New York is not its home base and suits were filed so close together. Courts should be concerned with justice, not who won the race. In addition, the W.D. Washington

docket moves slightly more rapidly than S.D.N.Y., according to "Judicial Caseload Profile Report 2001," available at *www.uscourts.gov/cgi-bin/cmsd2001.pl*. Thus, on balance, the convenience of parties and witnesses, as well as the interests of justice, were deemed better served by transferring case to W. D. Washington.

Marina's Disclaimer Clause Unenforceable under New York Law

Commercial Union Ins. Co. v. Blue Water Yacht Club Assn., 239 F. Supp.2d 316, 2003 AMC 289 (E. D.N.Y. 2003)

Subrogation action by insurers of boats destroyed by fire while in marina's indoor storage facility. Denying marina's motion to dismiss, district court finds that it has admiralty jurisdiction over storage and service agreement requiring mandatory winterizing and servicing of owners' boats, because contract "sufficiently relates to ships in navigable waters to establish admiralty jurisdiction." District court also has supplemental jurisdiction over tort claims arising from the same nucleus of operative facts.

New York, rather than general maritime law, applies to interpretation of disclaimer of liability clause in agreement relied upon by marina. There is no conflict with general maritime law on issue of enforceability of disclaimer agreements; litigants came from New York; damage occurred there; and parties' assumption in briefs that New York law governs constitutes implied consent to its application to the merits.

Under general maritime and New York law, courts must give effect to a disclaimer relieving a party of its own negligence "when it is clear and unequivocal." Absent a contravening public policy, an exculpatory clause, "though disfavored in New York law and closely scrutinized by courts, is generally enforced." Agreement exempting party from, or limiting liability for, willful or grossly negligent acts will not be enforced, nor will exemption from negligence liability where a special relationship between the parties brings to bear an overriding public interest.

Exculpatory clause here provides:

> Licensee expressly acknowledges that Licensor shall not be liable to Licensee or any guest, invitee, employee or

> lienholder for any loss, injury or damage to Licensee's boat, personal property of Licensee or any guest, invitee, employee or lienholder or personal injury thereon, irrespective of how the same is caused, unless the same results from Licensor's willful misconduct or gross negligence and in such event Licensor's liability for property damage and personal injury is expressly limited to the sum of $1,000.

Court holds clause unenforceable and denies marina's motion to dismiss, because:

1. Disclaimer does not expressly state that marina is relieved of it own negligence;

2. Although a disclaimer need not contain the word "negligence" to be enforced, where, as here, it does not convey a similar import, it will not be enforced;

3. The licensees who contracted to winterize and store their boats at the marina may not be sophisticated businessmen;

4. The $1,000 limitation on liability for willful misconduct or gross negligence is unenforceable.

Cargo Policy No Longer in Effect at Time of Damage

New York Marine & General Ins. Co. v. Tradeline (L.L.C.) and Deepak Fertilisers and Petrochemicals Corp., Ltd., 2003 AMC 1414 (S.D.N.Y. 2003)

On remand in declaratory judgment action, court is required to determine whether marine cargo insurance policy remained in effect at time of water damage to portion of a diammonium phosphate shipment stored in a shore-side silo at Jawaharlal Nehru Port Trust ("JNPT") in India. Court concludes policy did not extend to water damage to the cargo in storage in India, so that New York Marine is not liable to defendants.

To cover transit risks on two shipments of diammonium phosphate, Tradeline procured insurance from New York Marine on a warehouse-to-warehouse basis. Policies included Institute Cargo Clause (C) (ICC(C)), which contains a duration provision. Policies were later upgraded by

amending ICC(C) to include rainwater damage coverage, and adding JNPT to Kandla as port of destination, without altering the duration provision.

Cyclone struck during discharge at original port of Kandla, India, closing the port and causing the vessel, with 36,500 metric tons of cargo still onboard, to be diverted to JNPT. Remaining cargo was unloaded and placed in a silo. Some 5 days later, ceiling of the silo was noticed to be leaking, resulting in water damage to the cargo.

Clause 8 of ICC(C) sets forth duration of coverage, and provides in pertinent part:

> 8.1 This insurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit and terminates either
>
> > 8.1.1 on delivery to the Consignees' or other final warehouse or place of storage at the destination named herein,
> >
> > 8.1.2 on delivery to any other warehouse or place of storage, whether prior to or at the destination named herein, which the Assured elect to use either
> >
> > > 8.1.2.1 for storage other than in the ordinary course of transit or
> > >
> > > 8.1.2.2 for allocation or distribution, or
> >
> > 8.1.3 on the expiry of 60 days after completion of discharge overside of the goods hereby insured from the oversea vessel at the final port of discharge, whichever shall first occur.

Court finds that silo at JNPT was the "final warehouse or place of storage" contemplated in clause 8.1.1. since JNPT was added to the policy as a destination; Deepak presented no evidence that it intended to further transport the cargo by vessel; policy did not contain any provisions covering inland destinations; and even after port of Kandla reopened, Deepak elected to store, bag and distribute the cargo from JNPT rather than relocate it.

Court rejects argument that Deepak had not yet gained "dominion and control" over the cargo, which was discharged into the silo by conveyor belt, then bagged for inland shipment, not physically handled by Deepak's "handling agent." Deepak's chief general manager of marketing was present at JNPT, discovered the water leakage at the silo and arranged geographical distribution of the cargo. "[T]hus Deepak exercised dominion and control over the goods in the silo." Accordingly, the cargo was no longer in transit and no longer covered by the marine cargo insurance policy.

Even if JNPT silo was not the "final warehouse or place of storage," coverage would have lapsed under §§8.1.2 and 8.1.2.2 of ICC(C), because cargo had been delivered to a warehouse or place of storage at the destination named in the policy, for allocation or distribution. Deepak had agreed to add JNPT as an alternate delivery site, and agreed with Tradeline that the vessel should be diverted there for unloading and distribution of the cargo after the cyclone shut down Kandla, using the JNPT silo as a warehouse of "allocation or distribution" within the meaning of the duration clause.

Since the cargo was not "in-transit" when damaged in the silo at JNPT, New York Marine is not liable under the policy.

Arbitration Award Affirmed

Aasma v. American Steamship Owners Mut. Prot. and Indemnity Assn., 238 F. Supp.2d 918, 2003 AMC 476 (N.D. Ohio 2003)

Latest round in efforts by seamen/asbestos plaintiffs to recover from P & I clubs that insured bankrupt States Steamship Company ("States"), including defendants The West of England Shipowners Mutual Insurance Association (London) Ltd. and The West of England Shipowners Mutual Insurance Association (Luxembourg). [Collectively "West"].

Plaintiffs began filing suits in 1986, but States had filed for bankruptcy in 1979, its plan was approved in 1983, and its bankruptcy was officially closed in 1991, so States never answered complaints. Default judgment for plaintiffs was entered in 1990.

Plaintiffs commenced a declaratory judgment action, seeking the right to proceed directly against the clubs for payment of their claims, despite "pay first" or "pay to be paid" clause in the policies.

West sought a stay pending arbitration in England based on arbitration clause in the States/West contracts. The Sixth Circuit agreed, finding the plaintiffs stood in the shoes of States and were bound by its contracts requiring that the claims be arbitrated in England and decided under British law.

Arbitration panel ultimately concluded that States must pay plaintiffs before West could be held liable under the insurance contracts, and assessed fees and costs against the plaintiffs, totaling over $500,000 with interest.

On insurers' motion to affirm arbitration award, district court holds that arbitration panel's award of attorneys fees in favor of insurers did not bar confirmation of award under United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, even though fees would not have been permitted under American law. Arbitration agreement specified that arbitration was to be conducted in accordance with British law, which specifically permits award of "legal or other costs."

The Convention is implemented as an amendment to the Federal Arbitration Act, 9 U.S.C. §§201-208. Section 207 states that a foreign arbitration award shall be confirmed if presented to a court having jurisdiction within 3 years after award is made, unless the court finds one of the grounds for refusal or deferral of recognition or enforcement specified in the Convention.

Here, district court finds it lacks authority to review plaintiffs' substantive objections to the arbitrators' decision, which arbitration agreement requires be submitted to the Commercial Court of the High Court of Justice in London. Court also finds award of costs, including legal fees, to be within the scope of the parties' arbitration agreement stating that the proceeding would be conducted in accordance with the Arbitration Act 1996, which provides that absent an agreement regarding costs, the arbitration panel "may determine by award the recoverable costs of the arbitration on such basis as it thinks fit."

Court rejects argument that the award of costs and fees is contrary to public policy, because it was not punitive, and does not qualify for the Convention's narrowly construed exception for circumstances where "enforcement would violate the forum state's most basic notions of morality and justice."

Tenant's Insurance Broker Owed No Duty to Landlord

The Benjamin Shapiro Realty Co., LLC v. Kemper Natl. Ins. Co's (N. Y. App. Div., 1st Dept., Mar. 20, 2003)

Appellate court affirms motion court's order granting defendant insurance broker's summary judgment motion, and dismissing complaint as to it.

Movant, insurance broker of plaintiff landlord's tenant, was under no duty to plaintiff and, hence, was held not liable for negligent misrepresentation or other negligence by reason of issuance of certificates of insurance representing that tenant's policy, which named plaintiff as an additional insured, contained rental coverage for plaintiff's benefit, when it did not. Fact that plaintiff had contact with broker in course of obtaining certificates of insurance did not give rise to sort of relationship, approaching privity, requisite to imposition of liability for negligent misrepresentation.

Where, as here, certificates of insurance contain disclaimers that they are for information only, they may not form basis for claim of negligent misrepresentation; nor was there a triable issue at to whether plaintiff had rights as third-party beneficiary of contract between tenant and broker.

No Double Recovery Reduction under Canadian Private Insurance Exception

Strachan v. Owners and All Others Interested in the Ship Constant Craving, 2003 FCT 86 (Fed. Ct. of Can., Trial Div., Jan. 28, 2003)

Action for limitation of liability arising out of explosion and fire aboard 1961 Chris Craft power boat moored at marina shortly after fueling, causing heavy damage to pleasure craft CONSTANT CRAVING, moored in adjacent slip. (Court labels petitioner "defendant" and respondent owners of damaged boat "plaintiffs").

Defendant, owner of the boat that exploded, purchased it used and refurbished it himself, installing a non-marine automotive-type battery charger that was connected to shore power at the time of the explosion. The battery charger and other appliances on board were not "ignition protected" (*i.e.*, sealed to protect against electrical sparks).

Fire investigator found heavy rust and small perforation in port gas tank and concluded that explosion was caused by accumulated gasoline vapors from the perforated tank, ignited by a spark from the battery charger when it cycled to charge the battery. Marine surveyor and professional engineer reached similar conclusions and defendant owner of boat that exploded offered insufficient rebuttal evidence.

Court finds that defendant's negligence in equipping and maintaining his boat gave rise to or contributed to the explosion and resulting damage to CONSTANT CRAVING, and accordingly, holds defendant liable. Court awards damages of $32,912.70 for repair costs of CONSTANT CRAVING; $22,900.00 for decrease in value; $1,500 each to husband and wife owners for inconvenience or loss of use; $2,593.33 for small items lost, towing charges and storage costs; and pre-judgment interest from date of explosion to date of judgment.

Plaintiffs sought to have CONSTANT CRAVING declared a total loss, which their insurer rejected, and boat was instead repaired, but its market value was significantly reduced, in part because of inadequate repairs. Court awards both cost of repair and diminution of value, citing hornbook principle: "Where the property, after undergoing repair, would still be of less value than it was originally, the owner will be entitled to the cost of repair and an additional sum to compensate for the residual deficiency."

Defendant argues that award for decrease in value should be reduced by amount received by plaintiffs from their own insurer for repairs, in order to avoid an unjustified double recovery or collateral benefit. Situation is unusual in that settlement of plaintiffs' suit against their own insurer over sufficiency of repairs was discontinued with insurer, having indemnified plaintiffs for the cost of repairs, surrendering its subrogation rights to them.

Under "private insurance exception" recognized by Supreme Court of Canada in disability/wage loss cases, defendant's liability for damages is not reduced by amounts received from insurance that plaintiff had the foresight to purchase, whether or not the insurer that paid the benefits exercises its subrogation rights. Court applies same principles here to deny reduction in damages payable to plaintiffs:

> In the result, no modification will be made in my earlier conclusion regarding appropriate damages payable by the defendant to the plaintiffs for decrease in the value

> of the *Constant Craving* by reason of the fact that the plaintiffs will experience a degree of double recovery. As between double recovery to the plaintiffs and a windfall benefit to the defendant by reason of the prudence of the plaintiffs in maintaining insurance on the *Constant Craving*, I conclude that the result should favor the plaintiffs. I am satisfied that such a result is consistent with the current state of law regarding collateral benefit flowing, in these relatively unique circumstances, from the private insurance exception.

Court concludes that if this result is deemed unfair, any change in the rule must come from the legislature.

Virginia Law Applied to P&I Policy Requiring Insurer to Pay the Legal Liability of a Bankrupt Assured

United States of America v. Tug Marine Venture, 101 F. Supp.2d 378, 2002 AMC 1070 (D. Md. 2000).

The Home Insurance Company ("HIC"), the protection and indemnity insurer of Christiansen Marine, Inc., (CMI) sought a ruling that based on a "pay first" provision included in the insurance contract, HIC would not be liable for any judgment obtained by Recchi against CMI, unless and until payment is made by the insured CMI.

The P&I policy included the following "pay first" provision:

> In consideration of the premium and subject to the warranties, terms and conditions herein mentioned, this company hereby undertakes to pay up to the amount hereby insured...such sums as the assured...shall have become legally liable to pay and shall have paid on account of...loss of, or damage to, or expense in connection with any fixed or movable object or property of whatever nature.

The U.S. District Court applied a conflicts of law analysis and held that Section 38.2-2200 of the Virginia Insurance Code applied to the instant case. Section 38.2-2200 provided in pertinent part:

> No policy or contract insuring or indemnifying against liability for injury to or death of any person or for injury

> to or destruction of property, shall be issued or delivered in this Commonwealth unless it contains in substance the following provisions or other provisions that are at least equally favorable to the insured and to judgment creditors: 1. That the insolvency or bankruptcy of the insured or the insolvency of the insured's estate, shall not relieve the insurer of any of its obligations under the policy or contract.

The court held that because the P&I policy was delivered in Virginia, the aforesaid Code was applicable. Although the policy did not contain a provision similar to that set forth in the Code, such a provision was deemed incorporated in the policy by law. The court held that the Virginia Code extended to ocean marine insurance.

CGL Policy Contains "Exclusion," Rather than "Other Insurance Clause," and Therefore Properly Excludes Coverage Provided under P&I Policy

Steinwinder v. McCalls Boat Rentals, Inc., 2002 AMC 1314 (La. Ct. App., 4th Cir., Mar. 20, 2002).

An accident occurred when the plaintiff, Steinwinder, was being transferred in a personnel basket from a vessel, owned by McCalls, to a platform owned by Torch. Plaintiff filed suit to recover for injuries sustained as a result of the accident naming as defendants: McCalls, Torch, and additional defendants and insurers Empire Insurance Company and UNI Storebrand. Torch filed a third party demand asserting that it was entitled to indemnification and defense from Empire and Storebrand, as an additional insured under an independent contractor agreement it had entered into with McCalls.

Pursuant to that agreement, McCalls was obligated to provide coverage for the contracted operations through several species of insurance, including comprehensive general liability (CGL) and protection and indemnity (P&I) insurance.

The CGL policy issued by Storebrand to McCalls contained a "protection and indemnity exclusion and warranty endorsement" which provided:

> Notwithstanding anything contained elsewhere herein to the contrary the comprehensive general liability policy

> to which this endorsement is made a part, specifically excludes, does not provide coverage for and will not pay in any circumstance, in whole or in part, in contribution, in excess of or otherwise, any sum(s) for which the Insured is or is alleged to be liable and for which any coverage is provided to the Named and/or any Additional Insured hereunder by the terms of Protection and Indemnity form SP-23 including contractual liability (whether or not such coverage is in place) and including any and all extensions of coverage thereto including, but not limited to, Additional Assured provisions.
>
> It is further warranted and is a condition of this Insurance that any and all vessels owned and/or operated by the insured are separately insured for Protection and Indemnity risks no less broad than the terms of Protection and Indemnity form SP-23 (Including contractual liability) up to the limit of this policy.

The P&I policy issued by Empire stated, pursuant to the "Cover elsewhere" provision:

> Provided that where the assured is, irrespective of this insurance, covered or protected against any loss or claim which would otherwise have been paid by the Assurer, under this policy, there shall be no contribution by the Assurer on the basis of double insurance or otherwise.

Counsel for Empire argued that both policy provisions constituted "escape clauses" and therefore were mutually repugnant. Due to the fact that the literal effect would leave the assured with no coverage, counsel argued that the loss should be prorated between Empire and Storebrand according to the limits of the policy. Storebrand on the other hand argued that the "exclusion and warranty endorsement" was not an "other insurance" clause. Instead, it submitted that the provision is a true exclusion from coverage for any loss insured by the terms of a P&I form SP-23. The court held that the CGL clause constituted an exclusion of coverage and therefore the "other insurance" allocation of coverage analysis would not apply. Summary judgment was granted.

Under the Law of England, Coverage Was Denied for the Sinking of a Vessel, Even Though "In Class," for Failure to Report a Condition Which Had Given Rise to Damage

Achille Lauro Laines S.R. L. v. West Indies Transport Ltda., 2002 AMC 1963 (11th Cir. 2002).

A vessel had mechanical problems which could not be resolved in a West Indian port of refuge. During an attempt to tow the vessel to Gibraltar for dry docking, the vessel sank while still in Class. Before departure, the owner telephoned the American Bureau of Shipping and reported some difficulties, but did not report all the difficulties, and did not report the plan to tow the vessel to Gibraltar. ABS told the owner to get a surveyor. The owner called the surveyor, who could not attend promptly but who did offer some towing recommendations.

The Standard Owner's Protection and Indemnity Association (Bermuda) Limited (The Standard) argued that owners had violated Club Rule (21.1), which provided in relevant part:

> Unless otherwise agreed in writing between the Owner and the Management the following conditions are terms of the insurance of every ship entered in the Club: (i) The ship must be and remain throughout the period of entry Classed with a Classification Society approved by the Managers. (ii) The Owner must promptly call to the attention of the Classification Society or its officers any incident or condition which has given rise or might give rise to damage in respect of which the Society might make recommendations to repair or other action to be taken by the Owner.

The parties had agreed that the substantive law of England applied to the case. The court held that the P&I rule requiring that a vessel be Classed with an approved Society at all times and promptly notify the society of any incident or condition which might give rise to damage or as to which the society might make recommendations is applicable irrespective of whether the vessel remains in Class. The court held that the incident or condition need not threaten Class.

Insured Bears Burden of Proving That Unexplained Loss Occurred During Transit under All Risk Cargo Policy, in Spite of Unexplained Shortage Clause Regarding Sealed Containers

Coast to Coast Seafood, Inc. v. Assurances Generales de France, 2002 AMC 2553 (Wash. Ct. App. June 3, 2002)

Coast Seafood ("Coast") ordered large amounts of shrimp from suppliers in Thailand which were to arrive in sealed containers in separate shipments involving various vessels. Although some containers arrived with shrimp as ordered, others did not. Rather, certain containers had just blocks of ice with a thin layer of shrimp while others contained a mixed array of seafood.

The all risk policy contained the following language:

> This insurance is also specially to cover unexplained shortages of goods insured shipped in sealed containers whether or not the original seals are intact upon arrival at the final destination, provided that: a. the coverage for the shipment includes loss caused by theft; (and) b. the assured makes every attempt to recover the loss from anyone who may have been responsible for the shortage through involvement in stuffing the container.

Coast maintained that the broad all risk provisions of the insurance policy covered the loss, even if the cargo was not existent. Plaintiff cited *Chemical Bank v. Affiliated FM Ins. Co.*, 1993 AMC 1743 (S.D.N.Y. 1993). The court, however, concluded that the unexplained shortage clause does not relate back in time and provide coverage for a loss that occurred before the goods left the warehouse. Accordingly, the policy does not cover situations where the shipper fails to pack the goods into the containers prior to sealing. The court held that Coast had the burden to prove that the containers left the warehouse and commenced transit with the ordered goods. Summary judgment was granted in favor of underwriters, with the court commenting that the cargo policy was not a performance bond.

No Hull Coverage for Sinking of Houseboat Caused by Rust

Jefferson Ins. Co. v. Jimmy Stevens, 2002 AMC 2835 (D. Miss. 2002).

A hull policy was issued to the assured Jimmy Stevens and covered a houseboat which sank while docked at the marina. Underwriters submitted

a report of a survey conducted after the salvage of the vessel wherein the surveyor concluded that there was extensive rust on the pontoons of the vessel, and that the rusting was the "primary cause of the vessel sinking."

The policy issued by Jefferson Insurance Company contained the following exclusion from coverage:

> We will not pay for loss resulting directly or indirectly: 6. from damage due and confined to wear and tear, gradual deterioration, marine life, inherent vice, vermin, marring, denting, scratching, chipping, electrolysis, insects, corrosion, rust, dampness of atmosphere, weathering and dry rot.

The surveyor's report also concluded that there were "possibilities" that some external force also contributed to the sinking of the houseboat. However, the assured submitted no evidence which might lead the court to conclude that an external force was, in fact, a proximate cause of the sinking of the vessel. In fact, the assured did not respond to the underwriters' motion for summary judgment. Thus, the court granted the underwriters' motion.

Misrepresentation in Application for Hull Insurance Regarding Purchase Price of Vessel Was an Issue of Fact Precluding Summary Judgment

Reliance Natl. Ins. Co. (Europe) Ltd. v. Alain Hanover, 222 F. Supp.2d 110, 2002 AMC 2892 (D. Mass. 2002).

Alain Hanover decided to buy a sailing yacht. In December of 1999, a survey report concerning the sailing vessel STIARNA was delivered to Hanover which disclosed that the steel framing needed reinforcement or replacing. The survey noted that the engine smoked, that the mast required a new stay, and that the electrical system needed repair. Hanover inspected the vessel in Trinidad in January of 2000. Thereafter, Hanover agreed to pay $130,000 for the boat. After consulting with a shipwright, Hanover decided to replace the vessel's engine, iron ribs, hull planking and the stern, keel and horn timbers. Hanover decided to do the refitting at a shipyard in Grenada (some 70 miles from where the vessel was located).

Hanover obtained hull insurance for the STIARNA from Reliance National through a Canadian marine insurance broker. Hanover completed

an insurance application which provided that the insurer had relied upon the information contained therein. It further provided that any misrepresentations in the application for insurance would render the insurance coverage null and void. In the application, Hanover stated that he bought the vessel for $150,000. Hanover later testified that, although he had told the broker he had paid $130,000 for the vessel, he expected to spend at least $20,000 more to prepare the vessel for the trip to Grenada. The underwriter decided to insure the vessel based on the information provided in the application and a copy of the 1999 survey. No details were provided to the underwriter concerning the refitting work to be done in Grenada. Prior to the vessel sailing, the assured discovered that the vessel had considerable rot damage in the area of the mast and, therefore, the mast could not utilized during the voyage to Grenada.

The Hanovers decided that they would replace the mast during the refit in Grenada and concluded that the vessel was seaworthy for the short voyage to Trinidad. During the voyage, a fire broke out in the engine room of the STIARNA and the vessel sank. After the casualty, Reliance issued an endorsement to the policy canceling all coverage from inception. The underwriters returned the premium for crew liability.

Reliance filed a declaratory judgment action in admiralty and the Hanovers counterclaimed for breach of contract, unjust enrichment and bad faith, requesting a jury trial. The district court held that, although the action for a declaratory judgment in admiralty was not subject to a jury, the assured's counter-claim was entitled to be heard before a jury pursuant to the Savings to Suitors Clause, 28 U.S.C. §1333(1). The parties agreed that the issue of the STIARNA's seaworthiness would only be resolved by a fact finding jury or a court sitting in admiralty. The court held that plaintiff's choice of admiralty did not trump a counter-claiming defendant's right to a jury trial, contrary to precedent in other jurisdictions.

Underwriters, however, asserted that they were entitled to summary judgment on the undisputed fact that the Hanovers paid $150,000 for the STIARNA when in fact the true purchase price was $130,000. Reliance invoked the admiralty doctrine of *uberrimae fidei*, arguing that the misrepresentation concerning the purchase price was a material misrepresentation which breached the obligation of utmost good faith. The court, however, stated that the standard for disclosure was as follows:

> An objective one, that is, whether a reasonable person in the assured's position would know that the particular

> fact is material. To be material, the fact must be "something which would have controlled the Underwriters decision" to accept the risk.

Reliance argued that had the underwriter known the STIARNA's purchase price, her poor condition, and the extent of the work to be done in Grenada, it would have declined coverage. The court held, however, that whether the $20,000 added by Hanover to the purchase price was material to the insurance risk, in a sense that a reasonable underwriter made aware that Hanover had paid $130,000 rather than $150,000 would have refused to provide coverage as a result, and whether the disclosure the Hanovers made regarding the vessel's condition satisfied the duty of good faith, were questions of fact and cannot be resolved as a matter of law. The court cited the Second Circuit case of *Knight*, 1987 AMC at 8, for the proposition of materiality: "Materiality of undisclosed information under the doctrine of *uberrimae fidei* is ordinarily a jury issue." Summary judgment was denied.

The Free of Capture and Seizure Warranty in a Cargo Policy When Unambiguous Excludes Cover for Governmental Seizure of Cargo in Peace Time

Intl. Multifoods Corp. v. Commercial Union Ins. Co., 309 F.3d 76, 2002 AMC 2939 (2d Cir. 2002).

The insured cargo owner suffered a fortuitous loss when its cargo was seized by the Russian government for a matter not involving the owner, and it could not regain control of the goods despite efforts to do so. Due to the fact that the owner lost control, it does not matter that the ultimate disposition of the cargo is unknown, although the seizure was not the cause of the loss.

This case raises several issues on contract interpretation with respect to two insurance policies that protected Multifoods against risks associated with a shipment of frozen food that it had sent by the plaintiff, Multifoods, to Russia. Multifoods claims against two all risk cargo underwriters, Indemnity Insurance Company of North America ("IINA") and Commercial Union ("CU").

The applicable clause in the CU policy was: London Institute Frozen Meat Clauses (A) — 24 Hours Breakdown Clause 324 (1.1.86). Clause Six of the "War Exclusion Clause" provided:

> 6. In no case shall this insurance cover loss damage or expense caused by:
>
> 6.1 war, civil war, revolution, rebellion, interaction, or civil strife arising therefrom, or hostile act by or against a belligerent power;
>
> 6.2 capture seizure, arrest, restraint or detainment (piracy excepted) and the consequences thereof or any attempt thereat;
>
> 6.3 derelict mines torpedoes bombs or other derelict weapons of war.

To the right of clause 6.1 appears bold language identifying clause 6 as the "War Exclusion Clause." Second, a "Special Note" at the end of the London Form states: "[T]his insurance does not cover loss damage or expense caused by...rejection, prohibition or detention by the government of the country of import." CU relied on the War Exclusion Clause and the Special Note to argue that the Multifoods loss was excluded from coverage under its policy. IINA, on the other hand, relied on the free-of-capture-or-seizure clause (the FC&S Clause) of its policy. The clause provided: "Notwithstanding anything herein contained to the contrary, this insurance is warranted free from...capture, seizure, arrest, restraint...and the consequences thereof...whether in time of peace or war and whether lawful or otherwise."

The lower court had held that the CU clause was ambiguous and therefore the insured was entitled to judgment in its favor. The court of appeals, however, reversed and remanded the case. The court explained that once a court concludes an insurance provision is ambiguous, the court may accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract. Therefore, the court remanded the case for a determination of the intent to the parties with respect to the meaning of the War Exclusion Clause. The district court was instructed to consider any evidence probative of the parties' intent, including parole evidence and evidence of custom and usage.

In addition, however, the court of appeals affirmed the district court's grant of summary judgment to IINA. The court held that the FC&S clause trumped any other provisions of the IINA policy and therefore summary judgment was appropriate in light of the fact that the FC&S clause unambiguously applied to peace time seizures.

Floating Structure Used for Loading Cargo Qualified for Admiralty Jurisdiction, but Did Not Constitute a Vessel, as to Which the Owner Owes a Warranty of Seaworthiness

Saint Paul Fire and Marine Ins. Co. v. SSA Gulf Terminals, Inc., 2002 AMC 2966 (E.D. La. 2002).

The DELTA CONVEYOR, a floating structure used for loading and off loading grain, sank in the Mississippi River in calm clear weather without being struck by another vessel. St. Paul claims the sinking resulted from several holes in the hull of the DELTA CONVEYOR caused by the repeated bumping of the structure by vessels being loaded with rice. At the time of the sinking, St. Paul and SSA Gulf were parties to an insurance policy listing the DELTA CONVEYOR as a "covered vessel."

The insured sought summary judgment on various issues involving the following three clauses:

(1) The Sue and Labor clause: "In case of any Loss or Misfortune, it shall be lawful and necessary for the Assured...to sue, labor and travel for, in, and about the defense, safe guard and recovery of the Vessel...the charges whereof the Underwriters will contribute their proportion as provided below;"

(2) The Inchmaree (Additional Perils) Clause: "This policy also covers loss of or damage to the vessel directly caused by either: (a) breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, (excluding the cost and defense of replacing or repairing the defective part); or (b) other causes of whatsoever nature arising either on shore or otherwise provided the loss or damage arises from those causes set forth in either (a) or (b) has not resulted from want of due diligence by the Assured, the Owners or Managers of the vessel"; and

(3) The relevant portion of the P&I policy required the "assurer...to make good to the assured...all such loss or damage and/or

> expense the Assured shall as owners of the vessel named herein have become liable to pay and shall pay on account of...the...(7) liability for cost or expense of, or incidental to, the removal of the wreck of the vessel named herein when such removal is compulsory by law.

St. Paul argued that over a six month period prior to the sinking, several holes existed in the starboard side of the hull. The holes were caused by the continued bumping of the barges into the DELTA CONVEYER during the grain loading process. Depositions of various SSA employees indicated that the company had knowledge of these holes, yet did nothing to repair them. St. Paul contended that this failure to repair the holes constituted a breach of what it terms to be an express warranty created by the Sue and Labor Clause. The court held that, contrary to California precedent, the law announced in *Reliance Ins. Co. v. The Yacht Escapade*, 1961 AMC 2410 (5th Cir. 1960), holds that the insured's duty under a Sue and Labor Clause to exercise the care of a prudent uninsured owner to protect insured property in order to minimize or prevent loss does not constitute a warranty but rather a standard of reasonableness. Thus, the court held that the question as to whether SSA was reasonable in failing to repair the holes in the hull of the DELTA CONVEYOR before it sank was a fact-laden question not subject to summary judgment.

The court also held that the DELTA CONVEYOR was not a vessel due to the fact that it no longer had operable engines and a propeller. Therefore, the court held that there was no implied warranty of seaworthiness in the insurance contract.

With respect to the type of coverage provided under the alleged "Inchmaree Clause," the court held that the language in question was similar to a "Liner Negligence Clause." Therefore, the court held that the coverage provided under this clause constituted "all risk" insurance. Hence, the assured only had the burden of showing that a loss occurred during the term of the policy. The insurer had the burden of proving an actual exclusion from coverage.

With respect to SSA's claim for coverage under the P&I clause seeking expenses for removal of the wreck, the Court held that in order to avoid coverage the insurer would be required to prove that SSA had misrepresented the condition of the DELTA CONVEYOR on its proof of claim and at the time the policy was issued. The court held that the insurer

must satisfy the heavy burden of establishing that the assured's conduct involved willful misrepresentations of material fact amounting to an intent to defraud which, if known, would have caused the insurer not to extend coverage.

Dismissal of First Party Insurance Claim for Punitive and Consequential Damages under New York Law

Eurospark Indus., Inc. v. Certain Underwriters at Lloyds, N.Y.L.J., Feb. 7, 2003 (E.D.N.Y.).

"Lloyds" provided Eurospark with two insurance polices for losses arising from theft and "Mass Bay" provided Eurospark with an insurance policy for losses arising from business interruption. The asured commenced an action for breach of the insurance contracts. The district court categorized the actions as "First Party Actions." A First Party Action arises when the insured sues its insurer over its treatment of insurance claims or benefits. First Party Actions are distinguished under New York law from Third Party Actions, where the insured sues the insurer over the insurer's treatment of third party claims against the insured.

The assured's third claim for relief alleged that Lloyds breached the implied covenant of good faith and fair dealing. In New York, all contracts apply a covenant of good faith and fair dealing in the course of performance. This covenant embraces a pledge that "neither shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." While the duties of good faith and fair dealing do not imply obligations "inconsistent with other terms of the contractual relationship," they do encompass "any promises which any reasonable person in the position of the promisee would be justified in understanding were included."

The court recognized that a reasonable insured would understand that the insurer promises to investigate in good faith and pay covered claims. The assured's claim alleges bad faith and delay in paying its covered claim and thus states a cause of action for breach of the implied covenant of good faith and fair dealing. A claim for breach of the implied covenant of good faith and fair dealing, however, is not a separate cause of action, but duplicative of the underlying breach of contract claim.

The court held that it is well settled under New York law that punitive damages can only be awarded in a contract action when a separate tort is alleged. The Court of Appeals of New York stated the standard for punitive damages as follows:

> The elements of a claim that would support punitive damages follow: (1) defendant's conduct must be actionable as an independent tort (2) the tortious conduct must be of an egregious nature (3) the egregious conduct must be directed to the plaintiff and (4) it must be part of a pattern directed at the public generally. Punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as "gross" and "morally reprehensible" and of "such wanton dishonesty as to imply a criminal indifference to civil obligations."

Furthermore, a claim for punitive damages cannot stand as a separate cause of action but must be part of an underlying claim. A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action.

The court held that the implied covenant of good faith and fair dealing cannot be converted from a contractual obligation to a tort duty. The court recognized that New York does not adopt the widely accepted tort cause of action for "bad faith" in the context of a First Party Claim, because to do so would constitute an extreme change in the law of the State of New York. The assured attempted to avoid dismissal of its cause of action by categorizing its claim as one for consequential damages. The court, however, held that consequential damages are not allowed in New York unless the assured pleads that such damages were within the contemplation of the parties at the time of contracting. The bare allegation asserted by the assured that it had repeatedly advised Lloyds that its delay in accepting and paying the claims was causing Eurospark and its creditors extensive damages was not sufficient to set forth a cause of action.

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; Joshua S. Force, Sher Garner Cahill Richter Klein McAlister & Hilbert, L.L.C., Twenty-Eight Floor, 909 Poydras Street, New Orleans, Louisiana 70112-1033.

CARRIER SECURITY COMMITTEE
NEWSLETTER NO. 1, SPRING 2003

The Carrier Security Committee of the MLA will meet on Thursday afternoon, May 1, 2003, from 4:00 to 5:00 p.m., at the offices of Seward & Kissel, LLP, One Battery Park Plaza, New York, New York. Please note that this date and time has been fixed to avoid conflicts with the Navigation and Coast Guard Committee, which is also dealing with maritime security issues. As always, guests are welcome.

In addition to the usual exchange of information of mutual interest to Committee members and guests, our agenda will include discussions of the following specific topics:

(1) Vessel security ramifications of recent reorganization of the U.S. Customs, U.S.C.G., and certain portions of the INS under the Department of Homeland Security;

(2) U.S. Maritime Transportation Security Act of 2002 ("MTSA"), enacted November 14, 2002, and in particular, Section 102 thereof, relating to port and vessel security, including:

(a) "Vulnerability assessments" to be done by U.S.C.G. on vessels posing a high risk for a "transportation security incident";

(b) Vessel Security Plans;

(c) Transportation Security Cards issued by U.S.C.G;

(d) Enhanced Crewmember ID's for foreign seamen;

(e) Automated ID system for certain vessels (Chapter V of SOLAS);

(f) Civil penalties for violations, up to $25,000;

(g) Possible deployment of Sea Marshals.

(3) The International Ship and Port Facility ("ISPF") Code, implemented by the International Maritime Organization ("IMO") by way of amendment to Chapter XI of SOLAS:

(a) Adopted December 2002; most provisions scheduled to come into force July 1, 2004;

(b) Applies to port facilities serving ships on international voyages, all passenger ships on international voyages, and all other ships over 500 G.T. on international voyages;

(c) Parts A (mandatory requirements) and B (guidelines);

(d) ISPF Code highlights:

— Ship Security Assessment ("SSA") (Levels 1 - 3)

— Ship Security Plan ("SSP")

— Ship Security Officer ("SSO")

— Declaration of Security ("DOS")

— International Ship Security Certificate: issued by flag state; valid for 5 years.

— Recognized Security Organization ("RSO"): approves SSP's and issues Security Certificates (ABS, etc.);

(e) Differences between U.S. and IMO requirements.

(4) U.S. Customs Container Security Initiative ("CSI"):

(a) Automated Targeting System ("ATS"), with Anti-Terrorism Targeting Rules;

(b) Inspection of cargo manifests for "high risk" cargo;

(c) Twenty-four hour manifesting prior to loading in foreign ports;

(d) Customs-Trade Partnership Against Terrorism ("C-TPAT").

(5) INS post-9/11 Crew Liberty and Detention Issues:

(a) INS reorganized under Dept. of Homeland Security; effective March 1, 2003, new Bureau of Immigration & Customs Enforcement ("BICE") will handle most crew detention matters;

(b) Enhanced visa requirements;

(c) National Security Entry-Exit Registration System (effective 12/02/02); requiring certain male crew members of targeted countries to register prior to entering a U.S. port.

(6) U.S. Coast Guard SARS ("SARS") Initiative: requiring 12-hour pre-arrival notification of crew member illnesses, pursuant to the U. S. Public Health Service foreign quarantine regulations (42 CFR Part 71)

(7) Up-date on Stowaway Problems.

Committee Chairman,
Gordon D. Schreck

COMMITTEE ON CARRIAGE OF GOODS BY SEA
CARGO NEWSLETTER NO. 41, SPRING 2003

Editor: Michael J. Ryan
Associate Editors: Edward C. Radzik
David L. Mazaroli

FURNITURE BASHED AT SEA THEN MEETS LABOR JUGGERNAUT . . .

Hartford Fire Ins. Co. v. Novocargo U.S.A., Inc., 2003 AMC (S.D.N.Y. Mar. 31, 2003) (Pauley, J.)

A shipment of furniture was damaged on a voyage from Valencia, Spain, to New York. An aircraft tow tractor fell on the container carrying the furniture during a storm at sea. After the container was discharged, it was left uncovered outside during snowstorms, freezing rain and extremely low temperatures. There was ice and snow inside the container and the terminal operators' employees used fork lifts to pry the frozen cartons from the container, thereby causing further damage. When asked by the court why unloading couldn't wait until the weather warmed, the response was that "labor is organized and so on, and nobody is going to turn up and say, okay, we are going to stop this operation because of this. Labor is organized. It is set in motion."

The court, relying on an apportionment by the surveyor, found that 57% of the damage had occurred after discharge. It, thus, concluded that the NVOCC and the liner service were jointly and severally liable for the damage occurring at sea, and that the terminal was directly liable to the plaintiff for post-discharge damage. In addition, it found the NVOCC and liner carrier were entitled to full indemnity from the vessel owner, who had undertaken stowage and lashing of the aircraft tractor. The plaintiff was awarded damages based upon a contract of resale plus incidental expenses and pre-judgment interest.

OWL MOVED FROM NEW YORK BRANCH TO BRANCH IN INDIA

Glyphics Media, Inc. v. M/V CONTI SINGAPORE, 2003 AMC (S.D.N.Y. Mar. 20, 2003) (Buchwald, J.)

Suit was brought by a cargo owner, who alleged that delivery of a shipment of compact disks had been delayed and, by the time the disks

were delivered, a new and higher speed generation of compact disks had come on the market. The receiver of the disks initially refused to accept them but finally agreed to sell the disks and remit the proceeds to the seller. The seller then sued for the difference between the original contract price and the money received from the distressed sale.

The cargo owner sued the NVOCC who, in turn, filed a third-party complaint against the actual carrier and its alleged agent. The carrier and its agent moved to dismiss the complaint based on a forum selection clause in the carrier's bill of lading, which provided for suit in India, while the NVOCC's bill of lading provided for suit in New York.

The court rejected plaintiff's argument that India was an inadequate forum based on an affidavit confirming that admiralty actions could be heard and disposed of within a maximum of three years, contrary to the defendants' assertion that litigation in India could take as much as a quarter of a century. Acknowledging the burden on those opposing enforcement of the forum selection clause, the court enforced the clause, even though it would require the NVOCC to litigate its indemnity claim both in New York and India, stating that the situation was completely foreseeable to the NVOCC when it entered into one contract calling for litigation in New York and another calling for India.

SAME DEAL; ONLY BRANCH IS IN FRANCE

La Fondiaria Assicurazione S.p.A. v. Ocean World Lines, Inc., (S.D.N.Y. Dec. 12, 2002) (Martin, J.)

An NVOCC ("OWL") was sued for damage to a shipment of ham and cheese in New York, the forum called for in the NVOCC's bill of lading. The NVOCC then brought a third-party action against the actual carrier, whose bill of lading contained a forum selection clause calling for litigation in Marseilles.

Noting the presumption of enforceability of forum selection clauses, the court rejected the argument that principles of judicial efficiency would be violated by having the NVOCC defend against the cargo owners' claims in New York and then travel to France to litigate against the actual carrier.

It also stated the certainty of forum selection clauses would be undermined if the NVOCC could impose its forum selection clause on the actual carrier when the actual carrier was not a party to the NVOCC's bill of lading.

BUSINESS COMMON SENSE . .

"The *STARSIN*"; House of Lords' decision, [2003] H.L. 12, 2003 AMC (March 13, 2003)

The court below, by a majority, found a vessel owner was liable to cargo interests for damage. The bills of lading, while signed on the face for the charterer "as carrier," also contained identity of carrier and demise clauses which the lower court found controlling, thus making the vessel owner the carrier.

The case was appealed to the House of Lords. In a 93-page opinion, the Lords reversed, holding that the charterer was the carrier under the bills of lading and referred to the Uniform Custom and Practice for Documentary Credits, which deems acceptable a bill of lading that "appears on its face to indicate the name of the carrier and stamped or otherwise as indicated." The Lords also noted the signatures on the bills of lading contradicted the form, *i.e.,* the identity of carrier clause on the back of the bill of lading. The shipowner's appeal was thus allowed.

TRIP TO WALMART UNRAVELS "Q" CLAUSE DEFENSE

Levi Strauss & Co. v. Tropical Shipping & Constr. Co. Ltd., 2003 AMC 283 (S.D. Fla. 2002) (Ryskamp. J.)

A cargo owner contracted with a carrier to ship a loaded, sealed container of men's pants from the Dominican Republic to Arkansas. The container was delivered to the carrier in the Dominican Republic in exchange for bills of lading. The cargo was then carried to Florida where the carrier contracted with a trucker to complete carriage from Florida to Arkansas.

After picking up the cargo, the trucking company's driver drove for two hours and then decided to stop and visit his daughter and newborn granddaughter. He obtained a room at a local hotel, unhitched the trailer in the hotel parking lot, and used the tractor to go to Walmart to shop for personal items. Thereafter, he spent the evening with his daughter. The

next morning it was discovered the truck had been stolen and the driver contacted the police. The tractor and trailer were found in Miami where the police recovered 14,590 pairs of pants. However, 6,976 pair were never found and the cargo owner brought this action to recover the value of the stolen pants.

The parties stipulated that COGSA applied due to the Clause Paramount in the carrier's bill of lading, which extended COGSA to the overland transportation. The court found that the cargo owners had established their *prima facie* claim under COGSA and then addressed the issue of the carrier's negligence. The court noted there were few Eleventh Circuit cases applying COGSA and its "Q" clause exceptions to a carrier's negligence for cargo stolen from a truck. In addressing whether the carrier and trucker were liable for the theft, the court stated that the carrier must prove that it had exercised due diligence to prevent the loss or that the loss had resulted from one of the exceptions in 46 U.S.C. §1304. Specifically, §1304(2) limits liability for "any other cause arising without the actual fault of the carrier and without the fault or neglect of the agents or servants of the carrier."

The carrier argued that the exception in §1304(2) applied because the theft had occurred without the actual fault, privity, or neglect of the carrier or its agents. The court, however, found that the carrier and their agents *were* at fault or negligent.

Although the driver testified he had chosen the hotel and taken certain security measures, the district court found the carrier and the truck driver's security measures were insufficient. The court compared procedures followed by another trucking company, which instructed drivers to reduce the risk of theft by driving as far as possible from the shipper before stopping, not delaying cargo in transit for unnecessary reasons, having one driver stay with the truck, and not parking a load in an unsecured facility while in transit. In addition, the court relied on the fact that the defendant had not presented evidence showing it required its drivers to take particular measures, and its findings that the driver had previously hauled similar cargo for plaintiff and knew the cargo was valuable, had only driven two hours before stopping for the day, and had spent the rest of the day and night at a hotel.

The trial court analogized the present case to *Asahi America, Inc. v. M/V ARILDMAERSK*, 602 F. Supp. 25, 1986 AMC 53 (S.D.N.Y. 1985),

where the court found a carrier liable when a driver had left a truck and container parked on a local street. The court stated that the truck in the instant action was no more protected in a hotel parking lot than if it had been left on a public street, as in *Asahi*. In addition, the court relied upon the Second Circuit case, *Hartford Fire Insur. Co. v. M/V OOCL BRAVERY*, 79 F. Supp. 2d 316, 2000 AMC 1305 (1999), *rev'd on other grounds*, 230 F.3d 549, 2001 AMC 25 (2dCir.2000), to illustrate options available to defendant to protect the cargo.

The court concluded that the carrier was negligent in not requiring additional safety precautions and because the truck driver did not take greater security measures, thus, Tropical could not claim COGSA's limitation or the "Q" Clause exception.

ACTUAL LOSS EQUALS FAIR MARKET VALUE

Jessica Howard Ltd. v. Norfolk Southern Railway Co., 316 F.3d 165, 2003 AMC 80 (2d Cir. 2002).

The cargo plaintiff contracted to have 4,440 ladies' garments transported from Shanghai, China to New Jersey, where delivery was made less 1,243 garments. The rail carrier admitted liability and both parties moved for summary judgment on damages.

The cargo plaintiff sought actual market value at destination: $62,142.00. The rail carrier argued that its liability was limited to the cost of acquiring the goods at the shipment's origin, $15,164.70. This shipment moved pursuant to a freight forwarder's bill of lading, an ocean carrier's bill, the railroad's Intermodal Rules Circular and, there was "some evidence" that the rail carrier had issued an "edi waybill."

On appeal, the Second Circuit held that the district court had erred in determining, as a matter of law, that all of the potentially controlling documents limit the rail carriers' liability to value at the point of origin. The Second Circuit recounted the long history of carriers' liability provisions defining actual loss most frequently as the fair market value at destination. The Second Circuit went on to say that an exclusion of consequential damages does not foreclose liability for lost profits to the extent those profits merely reflect the value of the goods at destination. The case was remanded for a determination as to which document governed the carriage so that liability could be determined under that contract.

WRONG PLACE, WRONG TIME

Continental Ins. Co. a/s/o J & F Steel Corp. v. M/V DAVIKEN, 2003 AMC 346 (N.D. Ill. Feb. 18, 2003).

A defendant time charterer moved to dismiss three consolidated actions involving alleged damage to three separate shipments of steel coils which had been transported from Ghent, Belgium, to Burns Harbor, Indiana on three commonly chartered vessels. The bills of lading issued to the consignee specified the "District having admiralty jurisdiction of the port of discharge" as the only place where suit could be brought. The charterer argued that the cases should have been filed in the Northern District of Indiana rather than the Northern District of Illinois, and that, as a result of the misfiling, should be dismissed.

In addition, the charterer contended that the claims were time-barred because the prior suit time extensions given by the charterer were contingent upon the consignee submitting the "complete claims supporting documents." The parties disagreed as to what constituted the "complete claim documents." The plaintiff cargo interest argued that defendants should not be able to rely upon the alleged shortcomings of the documents because they never specified what they wanted. The court found that the term "complete claim documents" was ambiguous. However, the court went on to find that it was the claimant's burden to clarify any ambiguity over what documents were required or, in the alternative, to file suit within the statutory limitation period.

The court further held that transfer of the action to Indiana was unjustified. The court reasoned that where the parties are "commercially sophisticated and familiar with the forms of litigation in which they engage", there was nothing to "justify giving the plaintiffs a second chance to proceed in the correct court."

FOOD FOR FAMINE WINS RELIEF

United States v. Ocean Bulk Ships, Inc., 248 F.3d 331, 2001 AMC 1487 (5th Cir. 2001).

A U.S. government agency, as shipper, appealed a final judgment in the amount of $7,300.08 on its claims for cargo loss and damage under COGSA. The Fifth Circuit vacated the district court's limited damages award and

rendered judgment against the carrier in the amount of $203,319.87 plus prejudgment interest.

In an effort to assist famine-stricken areas of Africa, cargoes of foodstuffs were shipped pursuant to charter parties made expressly subject to COGSA and aboard several specifically named vessels. The cargoes originated in the United States and were destined for several ports along the African coast. Clean bills of lading were issued for each shipment after the cargo was stowed, indicating the cargo had been received by the carrier in good condition. However, the shipments were not received in the same quantity or quality when discharged in Africa. Survey reports documenting the loss and damage indicated several problems. Some parts of the cargo were simply not received at all, other parts were received in damaged and unusable condition. The total documented loss and damage to the cargo was $203,319.87.

In a consolidated action, the shipper sued the carrier for the loss. In December of 1999, the district court entered judgment in favor of the shipper in the amount of $7,300.08, which was the amount of damage the carriers admitted had occurred prior to discharge. The shipper appealed from this judgment.

After describing the burdens on each party, the Fifth Circuit reviewed the district court's application of this burden shifting and other legal issues *de novo* and factual findings for clear error. The appellate court noted that the district court had accepted the clean bills of lading as evidence that the cargo was delivered to the defendants in good condition and did not question the reliability of the survey reports as tendered to establish loss or damage to the cargo upon discharge. In fact, the district court had accepted the virtually undisputed fact that the cargo was either lost or damaged upon discharge, yet held that the defendants were not responsible for the losses either: (1) because the damage occurring during discharge could have been caused by third parties, such as the port authority or its agents per 46 U.S.C. §1304(2)(q), or (2) because the shipper had failed to respond to the defendants' suggestion that improper packaging, an excepted cause under 46 U.S.C. §1304(2)(n), played a role in the loss with evidence that the loss or damage was caused, at least in part, by negligence attributable to the carrier.

As to the defendants' main defense that a significant portion of the damage had been caused by the shipper's failure to package the goods in a

manner sufficient to survive the voyage, the Fifth Circuit noted an apparent conflict or, alternatively, an incomplete resolution of the scope of the rebuttal burden under §1304(n) in the circuit. However, the court determined it was not compelled to decide whether the defendants' rebuttal burden under §1304(2)(n) was one of production or persuasion because the defendants had failed to produce competent evidence to meet either standard. In making this determination, the Fifth Circuit stated that the carrier must do more than offer mere speculation as to the cause of lost or damaged cargo. Since the survey reports prepared at discharge solely relied upon by defendant carriers were too speculative to explain what took place, the court concluded as a matter of the law that the carrier had failed to meet its burden under §1304(2)(n).

The defendants also asserted the §1304(2)(q) catch-all defense against liability by arguing that a portion of the loss and damage to the five shipments was attributable to pilferage, either from the vessel or the docks and environs during discharge. In response, the circuit court noted that the carrier's duties under COGSA extend through discharge, including its duty to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." 46 U.S.C. §1303(2). Thus, while the court recognized that §1304(2)(q) may shield a carrier from liability when the carrier has absolutely no control over the selection of port stevedores or the rate they will be paid and, further, no control over how or when the cargo is discharged, clause "Q" was not broad enough to shield the carrier from liability for *all* stevedore negligence. As to this exception, the defendants clearly bore, not only the burden of production, but the burden of persuasion per 46 U.S.C. §1304(2)(q). Defendant carriers equally failed to carry their burden under this exception as their exhibits were probative as to whether pilferage had occurred, but failed to establish that the defendants had not control over either the stevedores or the discharge process. In some instances, these exhibits tended to prove the exact opposite — evidencing control by the carriers to select safer docks and contractual means of recompense to the carrier for stevedore negligence.

The Fifth Circuit, after holding that the defendant carriers had failed to meet their burdens under both 46 U.S.C. §1304(2)(n) and §1304(2)(q), also concluded that even if it were assumed that the defendants had satisfied their rebuttal burden, carrier negligence was at least a concurrent cause of the damages claimed, and that the defendants had failed to make any attempt to apportion or separate the losses attributable to their own negligence from losses attributable to pilferage or some other cause. In

failing to allocate the loss, the carrier would, therefore, still have been liable for the entire loss. Accordingly, the Fifth Circuit vacated the district court's award and rendered judgment in favor of the shipper for $203,319.87, based on the actual cost of the cargo to the shipper, and prejudgment interest.

COMMITTEE ON RECREATIONAL BOATING NEWSLETTER, FALL/WINTER 2002

Editor: Frank P. DeGiulio

Court Rejects Challenge To Local Ordinance Banning Jet Skis

In July, 2002, the California Court of Appeal upheld a Marin County ordinance prohibiting the use of personal watercraft ("PWC"), generically known as "jet skis," on "all waters within the territory of the County of Marin accessible from a shoreline." *Personal Watercraft Coalition v. Board of Supervisors*, 100 Cal.App.4th 129, 2002 AMC 1817 (Ct. App. 2002).

The 1999 Marin County Ordinance defines a PWC as "a vessel that is less than twelve feet in length, propelled by machinery, that is designed to be operated by a person sitting, standing, or kneeling on the vessel, rather than in the conventional manner of sitting or standing inside the vessel." The ordinance defines the prohibited use area as "all waters within the territory of the County accessible from a shoreline, or the farthest extension of the shoreline of Marin County as defined by its landmarks includ[ing] the shoreline of the Pacific Ocean the San Francisco Bay shoreline all estuaries, rivers and bays[and] a distance of 7 miles inland from the mouth of the rivers or navigable creeks." By its own terms, the ordinance amounts to an absolute prohibition of PWC use on or within waters bounded by County land, including portions of the Pacific Ocean and San Francisco Bay. Violation of the ordinance is a summary criminal offense, subjecting violators to fines of $100 to $500.

We have previously reported on litigation arising from restrictions imposed by the federal government on PWC use within certain national parks and recreation areas. *See 10 Boating Briefs No.* 1 (Spring/Summer 2001) and 11 *Boating Briefs No.* 2 (Fall/Winter 2002).

Various plaintiffs filed suit against Marin County seeking to have the ordinance declared unconstitutional and unenforceable under both California and federal law. The trial court granted judgment in favor of the plaintiff-challengers on the ground that the ordinance was void for vagueness. Specifically, the trial court concluded, based on the text of the ordinance, that PWC users could not readily ascertain the boundaries of the waters where use was prohibited and, therefore, had no reasonable means to avoid a violation of the ordinance. The trial court thus held that the ordinance was unconstitutional and void.

The County appealed the trial court's decision to the California Court of Appeal. In a lengthy decision the court of appeal discussed and rejected numerous arguments advanced by the challengers for invalidation of the ordinance under both California and federal law.

The challengers' primary argument was that the ordinance was unconstitutionally vague under California law because PWC users could not readily ascertain the boundaries of the waters where use was prohibited in order to avoid those areas and the potential fines imposed by the ordinance. In support of their argument the challengers submitted a map of the waters in and around Marin County which divided the waters into numerous segments corresponding with governmental jurisdiction. The map showed a "checkerboard" of geographic areas bordering the County over which the federal government, the State of California, Marin County and individual incorporated cities and towns within the County have either shared or exclusive jurisdiction. The challengers also offered uncontradicted evidence that there were no buoys, signs or other physical markers to identify the specific waters within the jurisdiction of the County where PWC use was prohibited. In these circumstances the challengers argued that it was impossible for a PWC operator to identify and avoid the areas where use is prohibited by the ordinance.

In rejecting the challengers' vagueness argument, the California Court of Appeal relied heavily on the fact that none of the plaintiffs had been charged with a violation of the ordinance in question. In those circumstances the court held that the lawsuit did not present an issue of whether the ordinance was unconstitutional as applied in a particular case, but rather, whether the ordinance was impermissibly vague on its face and thus void in its entirety. The Court of Appeal held that in such circumstances the statute must be presumed to be valid on its face unless there is no conceivable factual situation in which the law could be constitutionally enforced.

Applying this standard, the appellate court reasoned that the jurisdictional map submitted by the challengers demonstrated that an individual seeking to avoid violation of the ordinance could in fact ascertain the boundaries of the prohibited use areas by reference to other statutes and documents. Further, the court noted that the challengers did not argue that the portion of the ordinance making the prohibition applicable to "rivers or creeks" was unclear or uncertain, thus impliedly admitting that this portion of the ordinance was valid under the vagueness test.

Although the Court of Appeal rejected the challengers' vagueness argument as presented, the court left open the possibility of a future challenge by a person charged with a violation of the ordinance if the County does not erect or install buoys, signs or other markers to identify the waters where PWC use is prohibited.

The challengers argued in the alternative that the county ordinance was an impermissible exercise of local governmental power under California state statutes governing the regulation of navigable waters. In this regard the challengers relied on the prior decision of the Court of Appeal in *People ex. rel. Younger v. County of El Dorado*, 96 Cal.App.3d 403, 157 Cal.Rptr. 815 (1979). In the *Younger* case, the court held that a county ordinance making it illegal to "float, swim or travel by artificial means" on a portion of the American River used by the public for whitewater rafting was an unreasonable and impressible exercise of the county's police power. Faced with this argument, the court in *Board of Commissioners* distinguished the ordinance at issue in the *Younger* case on the basis that it effectively prohibited all available recreational uses of the river. In contrast, the Marin County ordinance banning PWC use is limited to a single and specific use of its waters and is based on a finding by the County that PWC use was incompatible with other recreational activities such as swimming, surfing, kayaking and canoeing. The court found that the California Harbors and Navigation Code did not preempt all local regulation of navigable waters and that the Marin County ordinance was a reasonable exercise of the limited powers granted to local governments by the state statute.

As a further alternative argument the challengers took the position that the county ordinance was preempted by federal law, specifically the Federal Boat Safety Act ("FBSA"). The FBSA, 46 U.S.C.A. §§ 4301-4311, provides that "a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment that is not identical to a regulation prescribed" by the Coast Guard. The Court of Appeal in Board of Commissioners held that the Marin County Ordinance did not purport to propose any standards for vessels or equipment within the meaning of the federal statute and that the FBSA does not prevent state or local governments from simply restricting or prohibiting the use of recreational craft.

Breach of Captain Warranty Voids Coverage

In *Yu v. Albany Insurance Company*, 2002 AMC 660 (9th Cir. 2002), the Ninth Circuit Court of Appeals held that Underwriters had expressly reserved the right to approve any change of the identity of the vessel's captain in their marine policy and therefore owed no coverage for the sinking of the vessel while under the command of a non-approved individual, despite the absence of any causal connection between the warranty breach and the casualty. The court affirmed the district court's grant of summary judgment in favor of Albany.

When Jacinta Yu, Eric Yu and the AAS Corporation (the Yus) purchased the vessel *Liberty*, they approached a broker, Ocean Marine Insurance Agency to obtain insurance. The agent, through its employee Patrick Kudlich, purchased a policy that was underwritten by Albany Insurance Company. The Albany policy contained a "Captain Warranty" which stated as follows:

> It is understood and agreed that the Captain of the vessel is Gregory P. Walker, and it is warranted by the Assured that Gregory P. Walker shall be aboard at all times the vessel is navigating. If Gregory P. Walker is not aboard the vessel while it is navigating, and if Underwriters have not previously agreed to a suitable replacement, coverage under this policy shall be suspended until Gregory P. Walker returns to the vessel.

Kudlich sent the policy to the Yus along with a cover letter in which he advised them to review the policy, particularly the Captain Warranty. The letter stated as follows: "The Captain Warranty is very important, that you must tell me the name of any new captain that replaces Greg Walker prior to the new captain operating the vessel. Failure to abide by this warranty could null and void the insurance policy."

A month later, the Yus orally requested the broker to add another captain. Kudlich requested the new captain's resume which was forwarded to and approved by Albany. Albany issued a policy endorsement confirming that the new captain was an "additional approved operator."

Eleven months later the *Liberty* sank of the coast of Hawaii. At the time of the sinking neither of the previously approved captains was aboard.

Jorge Perez was at the helm. When the Yus tendered the claim to Albany, Albany refused to pay on the grounds that it had not approved Perez as a captain and that the Yus had therefore breached the policy's Captain Warranty.

The Yus argued that they had complied with the warranty and were entitled to coverage. Although denied by Kudlich, Eric Yu claimed that he had left a telephone message on the broker's answering machine indicating that Jorge Perez was to be the new captain of the *Liberty* in July, 1997, six months before the sinking. For the purposes of Albany's summary judgment motion, the court accepted the Yus' contention as true.

The district court granted summary judgment in favor of Albany. The court held that the Yus had failed to comply with the policy's requirement that they obtain Albany's approval of any new captain in order to maintain coverage on the *Liberty*. Therefore, coverage was suspended at the time of the sinking.

On appeal the Yus argued that the district court should not have granted summary judgment in favor of Albany because the Captain Warranty was ambiguous or inconspicuous, that the prior course of dealing negated the terms of the warranty and that there was no evidence that their alleged breach of the warranty was causally related to the sinking of the vessel.

The Ninth Circuit held that the Yus breached the Captain Warranty because its plain language required that Albany agree to a replacement captain in order for coverage to be effective. It was undisputed that Albany did not agree to Captain Perez as a replacement. A telephone message to the broker did not meet the requirements of the warranty.

The Ninth Circuit also rejected the appellant's contention that the Captain Warranty was ambiguous or inconspicuous and therefore unenforceable. The appellate court found that there was nothing ambiguous about the statement "coverage under this policy shall be suspended until [an approved captain] returns to the vessel." The policy's Captain Warranty was printed in bold, underlined and in capital letters. The approved Captain's name was typed in a different font filling in a blank line. The broker's cover letter called attention to the Captain Warranty and further warned the Yus that failure to comply with the requirements of the warranty could void the policy.

When the Yus sought approval of a new captain a month after the policy was issued, Albany had approved the request and agreed that the coverage for the replacement captain would be retroactive for six weeks. The Yus contended that Albany had therefore waived its requirement for agreement to a replacement captain in the warranty by extending coverage retroactively. However, the court rejected the Yus' argument, finding that the Yus' position would mean that the insured had unbounded discretion to choose any replacement captain without first obtaining the underwriters' agreement.

On appeal the Yus' also argued that summary judgment was improper because Albany had submitted no evidence of any causal connection between the alleged breach of the Captain Warranty and the sinking. Further, the appellant argued that the issue of whether proof of a causal connection between an alleged breach of warranty and a loss is necessary to void coverage should be governed by Hawaiian rather than federal law. In granting summary judgment the district court found that the issue was governed by an established federal maritime law rule which does not require proof of causation in breach of warranty cases. Although recognizing that the courts of Hawaii had not addressed the issue, the Ninth Circuit held that the state would adopt a rule that breach of a policy warranty voids coverage regardless of causation if confronted with the issue. Accordingly, the court held that the Yus' breach of the Captain Warranty voided coverage in the absence of any proof that the breach was related to the sinking, regardless of whether federal maritime or state law applied.

In its holding, the Ninth Circuit underscored the importance of a captain's warranty in a marine insurance policy:

> Like warranties concerning navigation, the captain's warranty permits the insurer to control the amount of risk that it assumes, and the insured thereby to secure a reasonable premium. To inject a requirement of loss causation would lead to uncertainty in determining the obligations of the parties, and would make coverage depend on highly hypothetical determinations of causation. Thus it is not unreasonable to permit the parties to insert and enforce a captain's warranty in a marine insurance policy.

Insurer Not Entitled To Summary Judgment Based On Misrepresented Purchase Price

In 1999, Massachusetts residents Alain Hanover and his son Daniel decided to purchase a classic yacht. The father saw an advertisement for *Stiarna*, a 1937 Camper & Nicholson yacht, on the website of Authentic Yacht Brokerage. The advertisement specified an "asking price" of $250,000. According to the website, $800,000 had been spent on refurbishment since the 1980s and she had been "carefully maintained" and was "85% of excellent." The yacht broker provided Hanover with a 1999 survey of the vessel which identified certain deficiencies in the hull, rigging and engine but concluded that most of the systems were in "very good" or "excellent" condition.

The yacht was located in Trinidad and the Hanovers traveled there to conduct a personal inspection and sea trial in January, 2000. They also spoke to the boatwright who had maintained the yacht in Trinidad. Based on their inspection, review of the 1999 survey and discussions with the boatwright, the Hanovers offered to pay $130,000 for *Stiarna* and the offer was accepted. At that time the Hanovers estimated that an expenditure of $250,000 would be required for initial refitting to replace the engine and to renew various steel structural members and hull timbers. They also estimated that an additional $450,000 would be required to refurbish the yacht's interior accommodations. The Hanovers made arrangements for the initial refitting work to be done at a shipyard on the neighboring island of Grenada.

The Hanovers submitted a copy of the 1999 survey and an application for insurance to a Canadian marine insurance broker to obtain insurance on *Stiarna*. The application form contained a notice advising the applicant that the information provided therein would be relied on by the insurer and that any misrepresentations could void coverage. Alain Hanover completed the application and stated that the purchase price was $150,000, twenty thousand dollars more than the agreed purchase price. There was evidence that Hanover told the insurance broker that although he had paid $130,000 for the yacht, he expected to spend an additional $20,000 to prepare *Stiarna* for the initial voyage from Trindad to Grenada for refitting and therefore sought hull insurance for the increased figure. There was no indication that the broker passed this information to the insurance underwriters.

Based on the 1999 survey, the insurance application and additional information provided by the broker, Reliance National agreed to provide hull and crew liability coverage for *Stiarna* subject to the condition that a new out of water survey be completed "after refit and prior to voyage to Boston." The broker confirmed the binder on February 3, 2000 and advised Reliance that the boat would leave Trinidad on February 20th for Grenada where the refit work would occur.

The Hanovers hired a professional captain for the voyage from Trinidad to Grenada. At the recommendation of the captain they also arranged for a commercial power boat to accompany them on the voyage. *Stiarna* departed Trinidad on February 23rd. An hour after departure an engine fire broke out. *Stiarna* was abandoned and sank on the same date.

Following the loss Reliance hired a surveyor to investigate the sinking. In April, 2000, the surveyor advised Reliance of his opinion that the sinking was wholly fortuitous, that all defects had been disclosed to the underwriters and that the sinking was not related to any of the known deficiencies.

Thereafter Reliance filed a declaratory judgment suit in the U.S. District Court for the District of Massachusetts in admiralty seeking a declaration that no coverage was owed in connection with the loss due to the alleged unseaworthiness of *Stiarna* and Hanover's alleged misrepresentation of the purchase price. The Hanovers filed a counterclaim for breach of contract, unjust enrichment and bad faith.

Reliance filed a motion requesting the district court to grant summary judgment in its favor and to declare the policy void based on the undisputed fact that Alain Hanover had represented that he paid $150,000 for *Stiarna* when in fact the agreed purchase price was $130,000. Reliance claimed that summary judgment was proper under the marine insurance doctrine of *uberimmae fidei* or utmost good faith. The Hanovers filed a cross motion for summary judgment, arguing that they were entitled to a finding that the coverage was effective because they had fully disclosed the vessel's condition to the underwriter and the $20,000 purchase price discrepancy was immaterial to the underwriter's evaluation of the risk.

In its decision, the district court denied both motions for summary judgment. *Reliance National Insurance Company (Europe) Ltd. v. Hanover*, 222 F. Supp.2d 110, 2002 AMC 110 (D.Mass. 2002). The court

concluded that the issues of whether the purchase price discrepancy was material to the underwriter's risk and whether the Hanover's disclosures concerning the condition of the yacht satisfied their obligations of utmost good faith were disputed issues of fact which could only be resolved at trial by the fact finder.

Parental Immunity Doctrine No Bar to Contribution Claims Against Father of Injured Child

In September, 1997, Charles Szollosy, a minor, was injured as a result of a jet ski accident while vacationing with his parents at the Hyatt Regency Resort in the Cayman Islands. Prior to the incident Charles and his father approached several idle jet skis floating near a watercraft rental concession on the Resort's beach. According to a complaint filed on behalf of the child by his mother, the jet skis were moored and their engines were not turned on. The complaint alleged that the father seated his son on one of the jet skis which suddenly propelled forward with the child aboard. The jet ski collided with a breakwater causing Charles to be thrown over the handlebars. Charles struck the breakwater and sustained permanent injuries. Mrs. Szollosy filed suit against the Hyatt Resort and the watercraft concessionaire alleging negligence, breach of warranty and products liability claims in the U.S. District Court for the District of Connecticut.

Thereafter the defendants filed a third party complaint against Mr. Szollosy for contribution or indemnity, alleging that his negligence caused or contributed to the accident. Mr. Szollosy filed a motion to dismiss the third party complaint on the grounds that the defendants' claim was governed exclusively by Connecticut state law and that the state's parental immunity statute barred the defendants' claims against him. In *Szollosy v. Hyatt Corp.*, 208 F.Supp.2d 205, 2002 AMC 1432 (D.Ct. 2002), the district court denied the father's motion to dismiss, finding that the neither federal maritime law nor Connecticut state law shielded Mr. Szollosy from potential liability to the defendants in the circumstances.

In response to the father's motion to dismiss the defendants argued in the alternative that: (1) the claims were governed by federal maritime law which precluded the application of a state parental immunity statute; (2) maritime choice of law principles required application of Cayman Islands substantive law on the issue of parental immunity, and; (3) even if Connecticut law applied, its parental immunity statute is inapplicable to

tort claims involving the negligent operation of a vessel. Both the plaintiff and Mr. Szollosy took the position that federal maritime law was inapplicable to the lawsuit because the tort claims arising from the incident did not fall within the court's admiralty jurisdiction or, alternatively, because maritime choice of law principles would require the court to apply Connecticut substantive law on the issue of parental immunity.

In its opinion the district court first considered Mr. Szollosy's argument that the claims did not fall within the court's admiralty subject matter jurisdiction. Mr. Szollosy and the plaintiff argued that the defendants could not invoke admiralty jurisdiction in connection with their third party claims because the plaintiff brought its complaint subject to the court's diversity of citizenship jurisdiction and the defendants do not expressly identify their claims in their third party complaint. The district court found that admiralty subject matter jurisdiction did not depend on the presence or absence of a specific statement in the pleadings and that federal maritime law would apply to the case despite the plaintiff's reliance on diversity jurisdiction if the incident giving rise to the claims satisfied the test for admiralty tort jurisdiction.

The court applied the "situs" and "nexus" tests for admiralty tort jurisdiction in accordance with the U.S. Supreme Court's decisions in *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 1995 AMC 913 (1995) and *Sisson v. Ruby*, 497 U.S. 358, 1990 AMC 1801 (1990) to the facts of the case. The district court found that the jet ski accident clearly satisfied both prongs of the Supreme Court's test because the accident had occurred on navigable waters, the incident and subsequent rescue had the potential to disrupt maritime commerce and the activity in question, the operation of a vessel in navigable waters, had a substantial relationship to traditional maritime activity.

Having concluded that admiralty jurisdiction was present, the district court addressed the parties' choice of law arguments to determine whether the third party claims should be governed by federal maritime law, Cayman Islands' law or Connecticut state law. At the outset of its discussion, the court noted that because the incident had occurred in foreign waters the maritime choice of law rules established in *Lauritzen v. Larsen*, 345 U.S. 571, 1953 AMC 921 (1953) would ordinarily require an evaluation of whether United States maritime law or Cayman Islands law should apply. However, based on the submissions of the parties, the court found that there is no recognized doctrine of parental immunity under either federal maritime law or the laws of the Cayman Islands. Accordingly, the court

concluded that it was unnecessary to conduct a choice of law analysis in the absence of an actual conflict between the U.S. and foreign laws.

The district court then considered whether it must look to Connecticut law on the subject of parental immunity. The court noted that state law may apply in certain maritime cases if the state law does not contravene an established principle of federal maritime law and the court is satisfied that application of the state law will not impair the uniform application of maritime law principles. The court found that while federal maritime law clearly recognizes the right of a defendant to assert claims for contribution and indemnity against another potential tortfeasor, it does not include any established principle addressing the issue of parental immunity. Accordingly, the court concluded that the maritime choice of law rules required it to determine whether Connecticut law addressed the issue of parental immunity and, if so, whether application of the state law would impair the uniformity of federal maritime law.

The district court found that Connecticut law generally recognizes the doctrine of parental immunity. Connecticut courts have held that the doctrine not only bars a minor child from suing his or her parents for personal injury but also applies to bar third party actions against parents for contribution or indemnity. However, the district court found that Connecticut has statutorily abrogated the parental immunity doctrine in cases arising from a parent's alleged negligence "in the operation of a vessel." The court observed that the third party complaint against Mr. Szollosy alleged in part that he caused or contributed to the child's injuries by causing the jet ski to start. The court reasoned that this allegation related to the negligent operation of a vessel for which parental immunity is abrogated by statute under Connecticut law.

In the circumstances the district court concluded that the doctrine of parental immunity was not available to shield Mr. Szollosy from potential liability regardless of whether the issue was governed by federal maritime law, Cayman Islands law or Connecticut law.

REGULATORY DEVELOPMENTS AND OTHER RECENT CASES OF INTEREST

Personal Floatation Devices for Children

On June 24, 2002, the Coast Guard published an Interim Rule amending 33 C.F.R. § 175 making it unlawful to operate a recreational vessel unless children under 13 years of age are wearing personal floatation devices ("PFD's") when above deck on a vessel underway. 67 Fed. Reg. 42488. The requirements imposed by the Interim Rule become effective on December 23, 2002. The Coast Guard had previously issued a Final Rule on the same subject in February, 2002. The Final Rule was withdrawn prior to its effective date when the Coast Guard discovered potential conflicts with State laws requiring PFD's for children. The Interim Rule seeks to eliminate the conflicts by making the federal regulation applicable only in those States or U.S. Territories which have not enacted PFD requirements for children. The requirement also applies to U.S. owned vessels operating on the high seas. The federal regulation adopts the individual State requirements in those States which have PFD requirements for children. To find out if your State has a regulation requiring children to wear PFD's you may wish to refer to the Reference Guide to State Boating Laws (6th ed.) published by the National Association of State Boating Law Administrators ("NASBLA"). That publication as well as a wealth of additional information concerning state boating laws, is available through NASBLA's website at *www.nasbla.org*.

Coast Guard Safety Alert

The Coast Guard's Office of Boating Safety has issued an advisory to recreational boaters warning of dangers posed by gasoline-powered generator exhaust. The Coast Guard has advised operators to turn off gasoline powered generators with transom exhaust ports when swimmers are in the water due to the danger of carbon monoxide poisoning. The Coast Guard has determined that the levels of carbon monoxide produced by generators present a potentially lethal risk to swimmers, particularly on boats which are designed with a cavity between the aft swim platform and the boat's transom. The full text of the advisory is available on the Coast Guard Office of Boating Safety website, *www.uscgboating.org*.

Security Issues for Recreational Boaters

Captain Scott Evans, Chief of the Coast Guard's Office of Boating Safety, issued a statement to recreational boaters regarding security issues in the aftermath of the World Trade Center attack. The Captain's statement includes various security guidelines and recommendations for recreational boaters. Pleasure boat owners should keep in mind that federal law provides for a 100 yard security zone around all military or commercial cargo vessels. The operator of a pleasure boat who enters a vessel security zone is subject to criminal prosecution under federal law with penalties of up to six years in prison or a $250,000 fine. The full text of Captain Evans' statement is available at *www.uscg.mil/news*.

NASBLA Releases 2001 Boating Accident Study

The National Association of State Boating Law Administrators has issued the results of its 2001 survey of recreational boating accidents. According to the survey the number of fatalities continues to decline, dropping to what is said to be a record low of 695 deaths in 2001. The study indicates that the highest number of reported deaths from recreational boating was 1,750 in 1973. According to the accident statistics compiled by NASBLA, fully four out of five fatalities in 2001 occurred on boats less than 26 feet in length. The study concludes that forty-five percent of all reported injuries involved open motorboats. Thirty-six percent of all injuries were associated with personal watercraft or "jet skis." The survey includes a state by state summary of fatalities and is available on the NASBLA website, *www.nasbla.org*.

Jurgensen v. Albin Marine, Inc., 214 F.Supp.2d 504, 2002 AMC 2533 *(D. Md. 2002)*.

Owners of a new Albin 33 Express Trawler sued the manufacturer and seller of the boat after the vessel sank in the Chesapeake Bay six months after purchase. The owners sought compensatory damages for loss of the vessel based on theories of negligence, products liability, breach of contract and breach of warranty. In addition, the complaint sought punitive damages against the manufacturer on the ground that Albin was aware of the defects which caused the sinking but failed to take corrective action. Albin moved for summary judgment, seeking dismissal of the punitive damage claims.

The district court held that federal maritime law governed the availability of punitive damages as to all claims other than the breach of

warranty claims, which were subject to Maryland state law. Rejecting the reasoning of a number of federal courts which have concluded that punitive and other non-pecuniary damages are generally not available under maritime law in the wake of the U.S. Supreme Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 1991 AMC 1 (1990), the district court adopted the reasoning of other courts which have limited the maritime rule barring punitive damages to cases involving seamen. Although the *Jurgensen* court held that punitive damages could be awarded in the circumstances of the case, the court held that Albin was entitled to summary judgment and dismissal of the tort-based punitive damage claims because the plaintiffs could not prove that Albin had acted with intentional, wanton or reckless disregard for the rights of the plaintiffs. Similarly, the court held that Albin was entitled to dismissal of the warranty-based punitive damages claims under Maryland law, which required proof that the defendant had acted with "actual malice."

McMellon v. U.S., 194 F.Supp.2d 478 (D.W.Va. 2002).

Plaintiffs sued the United States under the Suits in Admiralty Act, 46 U.S.C. § 741 *et seq.*, ("SIAA") to recover for personal injuries allegedly sustained in August, 1999, when their boat went over the Robert C. Byrd dam. The dam is owned by the United States and operated by the U.S. Army Corp of Engineers. The Army Corp had removed a series of warning buoys above the dam during a rehabilitation project in 1995. The buoys were not replaced after the project was completed. The plaintiffs also alleged that they did not see warning signs installed along the banks of the river above the dam because the signs were obscured by vegetation.

The U.S. moved to dismiss the suit on the alternative grounds that the government was immune from suit or that the government did not breach any duty owed to the plaintiffs. The government argued that it was immune from suit because claims brought under the SIAA are subject to the discretionary function doctrine contained in the Federal Tort Claims Act, 28 U.S.C. § 2680 ("FTCA").

The district court concluded that although there is a split of authority on the question among federal courts, the Fourth Circuit Court of Appeals does not recognize the FTCA discretionary function doctrine in SIAA cases. Accordingly the district court denied the government's motion to dismiss based on sovereign immunity. However, the district court concluded that

the U.S. was nevertheless entitled to summary judgment because the Corps of Engineers had breached no duty owed to the plaintiffs. Specifically the court found that the Corps had no duty to place warning buoys on the river and could therefore have no liability for its decision to remove the buoys. The court recognized that the government can have liability if it undertakes a duty to warn boaters of hazardous conditions. However, in the case of warning signs the court concluded that liability can arise only if the warnings are misleading. In this case there was no allegation that the signs were misleading. As a result the court found that the U.S. could not have liability for failing to trim vegetation which allegedly obscured the otherwise proper warning signs.

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This Bibliography was prepared by Alexander M. Giles, Baltimore, Maryland

LIMITATION OF LIABILITY COMMITTEE FALL 2002 NEWSLETTER *

Limitation Act Superceded (again) by Environmental Statute

Tug Allie B., Inc. Limitation Proceedings, 273 F.3d 936, 2002 AMC 49 (11th Cir. 2001)

Like the Oil Pollution Act of 1990 and the Marine Protection, Research, and Sanctuaries Act of 1972, the Eleventh Circuit Court of Appeals in the case *Tug Allie B., Inc. Limitation Proceedings*, 273 F.3d 936 (11th Cir. 2001), found the Limitation of Liability Act to be superceded by a more recent environmental statute, here, the Park System Resources Protection Act (PSRPA), 16 U.S.C. §19jj *et seq.*, which imposes strict liability for damage to public lands.

On July 20, 1998, the tug ALLIE-B, towing a 354-foot barge, ran aground and collided with coral reefs in Biscayne National Park. *Id.* at 939. Though the tug was able to power itself off the reef and pull the barge free from its grounded position atop the reef, the efforts to remove them from the reef caused significant injury to national resources located within the National Park. *Id.* After the collision, the owner and operator of the tug boat filed a petition for exoneration from or limitation of liability for damages arising out of the grounding of the tug boat and barge. *Id.* The United States and the owner of the barge filed their own claims for damages against the tug in excess of the limitation fund. *Id.* at 940. The United States claimed that pursuant to the PSRPA, it was entitled to all damages due to injuries to resources in the National Park as a result of the grounding. *Id.*

The Court of Appeals, having concluded that the two statutes pose an irreconcilable conflict, held that the Limitation Act did not apply to claims brought under the PSRPA. *Id.* at 948-949. The PSRPA is the most recent in time and is the more specific statute, and therefore controls. *Id.* at 949.

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* The Chairperson of the Limitation of Liability Committee is Lisa Reeves of Glenside, Pennsylvania. The Vice-Chair is Kathy Stein of Long Beach, California. The Committee Secretary is Dana Henderson of Seattle, Washington.

Update on M/V BRIGHTFIELD Limitation Action

In re Clearsky Shipping Corp., 2002 WL 1974098 (E.D. La. Aug. 22, 2002).

In re Clearsky Shipping Corp., 2002 AMC 2901 (E.D. La. Aug. 22, 2002), arose out of the allision between the bulker M/V BRIGHT FIELD and the Riverwalk Shopping Center in New Orleans. On December 14, 1996, the BRIGHT FIELD was traveling downriver on the Mississippi River, en route to Japan, when it struck and damaged parts of a wharf including the Riverwalk shopping center, One River Place condominium, the New Orleans Hilton Riverside Hotel, and other nearby structures. *Id.* at *1. Within a few days of the allision, claimants began to file lawsuits in state and federal courts, seeking damages for alleged personal injury and property damage. *Id.* at *1.

The owners of the BRIGHT FIELD filed a limitation action and established a fund of some $16 million against which over 1,500 claims were filed. *Id.* at *1, *5. Some, but not all, of the claimants agreed to a procedure that adopted the usual stipulations to protect the owner's right to limitation but which would allow them to try their claims to a state court. *Id.* at *4-5. However, because not all of the claimants would agree with the stipulations and the claimants did not stipulate to the priority of their respective claims, the court refused to lift its injunction against proceeding in state court. *Id.* at *5-6.

Dominant Mind & Flotilla Doctrine

Seaspan Intl., Ltd. Limitation Proceedings, 172 F. Supp.2d. 1314, 2001 AMC 2366 (W.D. Wash. 2001)

Seaspan Intl., Ltd. Limitation Proceedings, 2001 AMC 2366 (W.D. Wash. 2001), arose when the tug SEASPAN QUEEN, attempting to moor the barge HARRY A. MERLO, allided with the loading ramp at Pier 15½ in Seattle, Washington. Because the captain of the SEASPAN was unable to see the loading ramp from the pilothouse of the tug, a mate of the SEASPAN boarded the MERLO to radio directions and engine instructions to the captain. *Id.* at 2366. During the docking procedure, the mate, confused as to the position the SEASPAN in relation to the MERLO radioed an incorrect instruction resulting in the MERLO's allision with a flotation tank on the eastern side of the loading ramp. *Id.* at 2367.

What occurred immediately following the allision is disputed. However, approximately 20 minutes after the allision, the ramp capsized throwing two employees of the loading ramp into the water. *Id.* One employee drowned and the other suffered severe physical injuries. *Id.*

During the course of the towage, the MERLO was under bare boat charter to a wholly owned subsidiary of Seaspan, Ltd. *Id.* at 2368. In claimants' joint motion to add the value of the barge MERLO to the limitation fund, either because both vessels were offending vessels or in the alternate, because SEASPAN and MERLO constituted a flotilla, the court concluded that the MERLO was the dominant mind when the allision occurred. *Id.* at 2368-2370. Because the docking operation was, of necessity, controlled from the MERLO, and because the MERLO was the injury causing vessel, the court reasoned that the value of the MERLO should be included in the limitation fund. *Id.* at 2370.

Correspondence from Claimants' Counsel Does Not Necessarily Constitute "Written Notice"

In re Salty Sons Sports Fishing, 191 F. Supp. 2d. 631, 2002 AMC 1323 (D. Md. 2002)

In *In re Salty Sons Sports Fishing*, petitioners, owners of a sports fishing boat named SALTY SONS, filed suit seeking exoneration from or limitation of liability arising from an incident which occurred July 20, 1999 when an alleged business invitee was injured aboard the vessel. In their motion for summary judgment, claimants contend that petitioners' complaint is barred by the applicable six-month limitations period.

The District Court for the District of Maryland disagreed. The court noted that letters from petitioners' insurance company to claimants, acknowledging that claimants had engaged legal counsel and were investigating medical expenses incurred, did not amount to quantification of the claim. Subsequent letters sent from claimants' attorney to petitioners' insurance adjuster, which discussed the accumulation of medical records, further failed either to: (1) inform the vessel owner of claimants' demand of a right or supposed right, (2) blame the vessel owner for damage or loss, or (3) call upon the vessel owner for something due claimant.

In denying claimants' motion for summary judgment the court affirmed a long standing rule of law. Only when a petitioner is informed by written notice that the damages claimed might be expected to exceed the value of the vessel should the petitioner be required to assume the burden and expense of complying with the six months statutory period by timely filing a limitation of liability action.

[13532]

THE LONDON SHIPPING LAW CENTRE
FIFTH CADWALLADER ANNUAL MEMORIAL LECTURE

SHIPPING AND THE FIGHT AGAINST TERRORISM

by

John D. Kimball
October 24, 2002

1. Introduction

9/11 was a galvanizing event without parallel in modern times for America and countries around the globe. It was plain for all to see that our country was caught with its guard down with tragic consequences.

The lesson to be learned was instantly clear. If our guard was down on 9/11, we can never let it happen again. Putting that awareness into tangible action, however, presents huge difficulties. Our governments are racing against time to put themselves in a position of catch-up to prevent other and perhaps even more horrific events from occurring. This process will continue indefinitely, but life as we knew it before 9/11 will never be the same.

The topic of discussion tonight is Shipping and the Fight Against Terrorism. I will speak in fairly broad terms about a range of actions which are being taken by the United States Government to protect the shipping industry from being the victim of terrorist acts and from being used to carry out such attacks.

Some of the initiatives are essential. Others are questionable. Well-intentioned mistakes will be made. What is abundantly clear is that no matter how annoying and vexing the problems may seem, they must be dealt with now. One of the key problems our governments face in dealing with the daily threat of terrorism concerns basic human rights. Basic human freedoms which we value above all else must be protected. But we must prevent those freedoms from being used to allow terrorists to live and work among us like ordinary citizens in order to plan and carry out their attacks. The videotape of Mohammed Atta standing in line on 9/11 to board an airplane like any other passenger is an unforgettable image.

The clear goal of the United States is to prevent terrorists from having the opportunity to cause destruction and the fear it is intended to create.

To achieve that goal, we have adopted a policy of pre-emptive action. When the main weapon of choice is suicide bombing, traditional concepts of law enforcement are turned on their head. Trying to catch the bad guys who organized or assisted in carrying out an attack obviously remains a high priority. Stopping them from killing people or disrupting trade is a higher one. It also is more difficult.

In the future, business as usual must be carried out in a different way, fully alert and conscious of the threat that terrorist acts might be carried out at any time or any place. While the Government will work with business, the underlying points are that (1) security cannot be left to the marketplace, and (2) security comes first when it conflicts with the way business has been carried out in the past.

If we examine shipping in this context, it bears emphasis that in the eyes of Al Qaeda and its offshoots, the entire global trading system is an enemy. With the entire global trade network as a target, there are a huge number of vulnerable points in the chain. It can be seen that ships represent several things: A ship can be a weapon; a ship can be used as a simple mode of transport for people intent on carrying out attacks or weapons shipped as cargo; a ship and its crew and passengers can be hostages; and a ship itself can be the target of a terrorist attack, as we saw with the Limburg. Last but not least, a ship can be used as a revenue source or a vehicle for money laundering that funds terrorist activities. Ports also provide major targets since there is always a great deal of movement and a successful attack on a port could disrupt the economy.

A key dynamic in shipping is the number of different national interests involved in any given voyage. We begin with the flag state of the vessel, which may or may not be the same as the state of the owning company. A charterer or cargo interests may be of a different nationality than the owner. Insurers based here in London or elsewhere also have a key stake. Then we have the port states in which loading and unloading takes place. And I haven't mentioned the crew, which may be comprised of persons of many different nationalities. In the case of passenger vessels, of course, we have the added element of the nationalities of the passengers. I don't know of any other industry that has persons of so many different nationalities with an interest in a single venture.

The United States, of course, has a vital stake in maritime security. The United States is the largest trading nation in the world for both imports and

exports, accounting for about 20 percent of the world trade in goods.[1] The consequences of a shutdown of a major U.S. port because of a terrorist attack could be huge and could run into the billions of dollars in just a few days, with worldwide impact.

2. IMO Initiatives

The U.S. government has focused much of its response to 9/11 on working with the United Nations. Because of the global nature of shipping, we have worked extensively with IMO on the initiatives Frank Wall will discuss. Prior to 9/11, no less than 12 major multilateral conventions and protocols had been adopted to combat terrorism.[2] These include one major treaty aimed at shipping, which came about following the Achille Lauro atrocity, and is called the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, or SUA for short.[3]

a. SUA Amendments

The main purpose of SUA is to ensure that terrorists are prosecuted for crimes they commit. The convention obliges contracting governments either to extradite or prosecute alleged offenders.

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1 U.S. Accounting Office, Rep. No. GAO-02-1033, Federal Financing and a Framework of Infrastructure Investment, September 9, 2002, at 3, available at *http://www.gao.gov*.

2 These include the International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR 6th Comm., 54 Sess., 76th mtg., Agenda Item 160, U.N. Doc. A/54/109, 39 I.L.M. 270 (Dec. 9, 1999), available at *http://un.org/law/cod/finterr/htm*; International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS No. 11,081, 1316 U.N.T.S. 205, available at *http://undep.org/odccp/terrorism-convention-hostages.html*; Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, TIAS No. 8413, available at *http://untreaty.un.org/english/terrorism/conv16.pdf*.

3 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988, 27 I.L.M. 668 (1988), available at *http://imo.org* (entered into force generally on March 1, 1992 and for the United States on March 6, 1995).

The United States has proposed amendments to SUA which would do several things.[4] First, we would expand the offenses listed in SUA to ensure that it sufficiently covers a wide range of terrorist acts. The new list of offenses is designed to catch terrorist acts involving the possible use of biological, chemical or radioactive weapons. The proposed amendments also would establish accomplice liability to cover persons who organize or direct actions that constitute offenses.

In addition, the proposed amendments would fill a significant gap which currently exists in SUA by establishing procedures for boarding ships on the high seas in order to prevent or respond to a terrorist act.

It may be easier to consider the point if I use an example. Let us suppose that a nuclear weapon or component parts are smuggled aboard a Liberian registered containership bound for New York. I will use New York as an example only because that is where I am from, but in reality it could be Rotterdam, Hong Kong, Felixstowe or anywhere container ships are docked. Suppose further that while the vessel is in the Atlantic Ocean in international waters, the United States Coast Guard receives what is considered to be a reliable tip that the vessel has such a weapon or the component parts of such a weapon aboard, along with a few crew members who are part of an Al Qaeda cell. What can the United States Government do?

Under SUA as now written, the United States may not be authorized to do anything until the ship enters the U.S. territorial sea. Whether the flag state itself could take effective measures is questionable. It is clear that we do not want a ship carrying weapons of mass destruction to enter United States waters. Thus, to deal with this sort of nightmare scenario, the United States has proposed that IMO expand the scope of SUA to allow the state to which the vessel is headed to intervene on the high seas in order to take preventive action.

In my view, there can be no question that the proposed boarding provision is consistent with international law. First, flag state consent is to be requested before the boarding takes place. Second, there is substantial precedent for the proposed amendment in existing conventions which

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4 Draft Amendments to the SUA Convention and SUA Protocol, Submitted by The United States to The IMO Legal Committee, 85th Session, Agenda Item 4, LEG 85/4, Aug. 17, 2002, available at *http://afls16.jag.af.mil/dscgi/ds/py/view/collection-4966*.

allow states to take action on the high seas against foreign flag vessels. Several U.N. conventions deal with criminal acts such as drug smuggling and have nearly identical provisions to the proposed SUA amendment.[5] There also is the Convention for Intervention on the High Seas for ships threatening to create an oil spill.[6]

With these points in mind, hopefully the proposed SUA amendments will not be considered controversial when they are considered by the IMO Legal Committee in April 2003.

b. SOLAS Amendments

Another major area of IMO activity concerns amendments to SOLAS.[7] Frank Wall will cover the coming SOLAS[8] amendments which are to be adopted when IMO meets in December.

The only point I should like to discuss concerns Regulation 9, which deals with the subject of Port State Control of Ships. Regulation 9 is a key part of the amendments because it creates a port state control mechanism. The draft regulation makes it clear that ships can be denied access to a port if they are not in compliance. The latest draft of Regulation 9 covers the obligations of ships in order to gain access to ports to load or unload cargo or for any other operations. It also regulates the requirements governments may impose. In this regard, governments will be permitted to require proof that a ship possesses a valid International Ship Security Certificate and that the vessel is operating at adequate security levels.

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5 *See, e.g.*, Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988; Articles 7 to 9 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nationals Convention against Transnational Organized Crime. *See also* IMO Legal Committee Document LEG 85/4 dated 17 August 2002, Statement submitted by the United States concerning Draft Amendments to the SUA convention and SUA protocol.

6 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, Art. 8, 26, U.S.T. 765, 97 U.N.T.S. 211, 9 I.L.M. 25, available at *http://www.imo.org* (adopted as a result of the Torrey Canyon Disaster of 1967).

7 International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, U.N.T.S. 113, TIAS No. 9700, available at *http://imo.org*.

8 *See* IMO Doc. MSC 76/4/1 dated 25 September 2002.

3. United States Maritime Homeland Security Strategy

Let me now turn to what has been happening on a domestic level in the United States. Our concerns about maritime security are part of a larger picture which falls within the general ambit of what has been labeled "Homeland Security." Deciding to make the war against terrorism a national priority is easy to say, but organizing the response is not. We have a very large government, with many departments responsible in some degree for dealing with terrorism. Deciding what agencies will coordinate the effort is by itself a major task.

Shortly after September 11, President Bush created the Office of Homeland Security. One of the initiatives of the Administration has been passage of legislation to completely reorganize the federal government to make homeland security a top priority. After months of debate, legislation was passed by Congress on November 22, 2002, to establish the Department of Homeland Security. The New York Times described passage of the bill as "Washington's biggest transformation in 50 years".[9] This new department will become the umbrella for key agencies which deal with terrorist issues, including the Coast Guard and parts of U.S. Customs.

a. The Maritime Transportation Security Act of 2002

The Maritime Transportation Security Act of 2002 (S. 1214) was passed by Congress in late November 2002. The new law is broad in scope and intended to protect the security of United States ports. Among other things, the Act:

1. Mandates that vessels have security plans and incident response plans in place which are to be approved by the Coast Guard.

2. Compels commercial vessels to be equipped with and operate an automatic identification system (AIS) when navigating on the waters of the United States.

3. The bill also will authorize the Coast Guard to board ships entering U.S. ports in order to deter hijackings or other terrorist threats and to develop maritime safety and security teams.

b. 96-Hour Notice of Arrival

Let me speak now about some of the key initiatives which have emerged from the United States Coast Guard.

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9 New York Times, Nov. 20, 2002, at 1. The Department will have 170,000 employees and the secretary of the department will be a cabinet-level position.

One of the Coast Guard's initiatives concerns requirements for notice of arrival at a U.S. port. Prior to 9/11, ships had to notify the Coast Guard at least 24 hours before arrival, and provide certain information.[10] As a result of the attacks, on October 4, 2001, the Coast Guard implemented a temporary rule extending the notification requirement to 96 hours in advance and requiring additional information.[11] This rule has become permanent, albeit with some changes. Under the rule, ships wishing to enter U.S. ports have to provide 96 hours prior notice of arrival to the U.S. Coast Guard, along with crew, passenger and cargo information.

Additional information must be included in the Advance Notice of Arrival. *E.g.*, the name of the charterer must be indicated.[12] The Notice must include for each port of arrival the name of the receiving facility, the port or place of destination, and a listing of all persons on board (crew and passengers), with date of birth, nationality, and passport number.[13] The Notice must include the vessel name, country of registry, call sign, official number, registered owner of the vessel, operator, classification society, a description of the cargo, and date of departure from last port and that port's name.[14] A key requirement is that the name and telephone number of a 24-hour point of contact for each U.S. port included in the Notice must be provided.[15] Additional information concerning the vessel's ISM certification also is required.[16]

For vessels carrying certain dangerous cargoes, the Notice must also include the name, amount and stowage location of each dangerous cargo carried. The definition of "dangerous cargo" has been expanded.[17]

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10 33 C.F.R. §160.207 (2000).

11 33 C.F.R. Section 160.T208 (2002). An amendment to the rule dated August 19, 2002, requires the owner, master, operator, agent, or person in charge of the vessel to identify the charterer of their vessel. Notification of Arrivals, Departures, Hazardous Conditions, and Certain Dangerous Cargoes, 67 Fed. Reg. 53,735 (2002). All federal register documents since 1994 are available at *http://www.access.gpo.gov/su_docs/aces/aces140.html.*

12 Notification of Arrivals, Departures, Hazardous Conditions, and Certain Dangerous Cargoes, 67 Fed. Reg. 53,735 (2002) (to be codified at 33 C.F.R. 160.T208).

13 33 C.F.R. Section 160.T208 (2002).

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

c. Port Security and Port Security Plans.

Immediately after 9/11, the Coast Guard established security zones in all United States ports. Basically, the purpose of the security zones is to restrict access until a vessel has been approved by the Coast Guard. In addition, Vessels which are perceived to present a security threat or to be at risk can be placed in isolated security zones. This happened recently with the Palermo Senator in N.Y.[18] The security zone rules for each port are published and available on the internet. Vessels carrying dangerous cargoes are subject to special restrictions. Vessels passing by sensitive areas, such as power plants or oil storage tanks, are subject to special restrictions.

The Coast Guard very recently published a circular which is meant to be a full-scale mobilization plan to create a permanent infrastructure to prevent or deal with terrorist acts.[19] The circular provides for the creation of Port Security Committees and Port Security Plans. The Port Security Committees will be interagency bodies, including the Coast Guard, Department of Defense and other federal, state and local agencies. The goal of the Committee would be to establish joint security plans to detect vessels that may present a high risk of terrorist activity. In addition, the plans will deal with all of the detailed contingency planning for responsive actions that would be triggered in the event of a terrorist incident in a U.S. port. The responses could involve ship boarding teams. These plans are consistent with the Maritime Transportation Security Act I mentioned earlier.

In this area, the U.S. is working within IMO towards the adoption of uniform requirements. It is anticipated that the ISPS Code to be adopted by IMO will, in turn, be used by the Coast Guard for U.S. port security plans.

4. Enhanced Border Security and Visa Entry Reform Act

President Bush recently signed into law the Enhanced Border Security and Visa Entry Reform Act.[20] The law has a range of important provisions concerning ships entering or leaving the U.S. The law detailed requirements for information which must be provided on a manifest for each crew member or passenger. Of particular import to the maritime industry, the new law directs the Attorney General to develop machine-

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18 "FBI leads probe over Palermo Senator," Lloyd's List, Sept. 13, 2002 at 18, available at *http://www.lexis.com*.

19 *See* Navigation and Vessel Inspection Circular No. 9 02, United States Coast Guard, issued Sept. 30, 2002.

20 Pub. L. No. 107-173, 116 Stat. 543 (2002).

readable, tamper-resistant visas and other travel documents that use biometric identifiers for seamen and port workers.

5. Detainment of Crew

Probably the most contentious measure taken by our government involves restrictions on shore leave for foreign crew members who come to U.S. ports.[21] In a number of cases, shipowners have been required to hire security guards to enforce these shore restrictions and limit access to the vessels. I think it is fair to say that the policy of the Immigration and Naturalization Service is still evolving. It is also fair to note that the evolution has been and will continue to be pretty bumpy.

The INS has instituted a selective "detain on board" policy, which has already started in some ports and is expected to be implemented in other U.S. ports. INS is requiring that ships calling at some ports have a crew member security plan in place. Under its policy, INS compares crew names listed on the manifests that owners must file before arrival against a database of persons who are considered to be national security risks. Crew members whose names match those in the database cannot go ashore, even if they hold an otherwise valid visa. Sometimes shore leave is denied in a blanket fashion and the reasons for the grant or denial of entry are often unclear.

A wide range of interests in the shipping industry has criticized the measures denying shore leave. The outcry on this issue has reached very high decibel levels with even Lloyd's List running tabloid headlines.[22]

A key point to bear in mind is that crew detainment is an immigration issue. It is not a human rights issue.

For many years, going back to the 1950's, the U.S. Immigration Service has exercised the authority to detain crew on board a vessel. The INS and

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21 *See, e.g.*, Douglas B. Stevenson, "Allies, Not Enemies," J. Comm., Sept. 23, 2002, at 38; Bill Hensel Jr. and Kevin Moran, "Seafarers Held as Virtual Prisoners; Tighter Security Measures Cut Into Shore Leave," Houston Chron., Sept. 6, 2002, at 1; Chris Dupin, "Guarding the Gangplank; New Policies for Ship Security in Ports Attract Criticism from Shipowners and Seafarer Advocates," J. Comm., Sept. 2, 2002, at 23.

22 "New U.S. Rules 'An Incentive to Murder Stowaways,'" Lloyd's List, Oct. 14, 2002, at 3, available at *http://www.lexis.com*.

Coast Guard recently have been working on the adoption of Standard Operating Procedures for dealing with seafarers whom INS determines should not be allowed to come ashore. The criteria used by INS for making these decisions is classified and I therefore am not able to speak about them.

The purpose of the program, however, is to prevent persons from coming ashore who present a security risk to the U.S. Clearly, the vast majority of seamen present no security risk to the U.S. or any other place. I can only urge INS to be prudent in making its decisions. I have no doubt that mistakes will be made, probably many more than there should be. The shipping industry has to recognize, however, that its own record in vetting crew members is spotty. The message to the industry from INS is plain: If there is a basis for believing that a crew member may present a security risk, the U.S. immigration service is going to err on the side of being careful.

6. United States Custom Service

The United States Customs Service has jurisdiction over the importation of goods into the United States. As a result, it has become a key agency in a number of initiatives to prevent terrorist acts. The primary focus of its efforts is the Container Security Initiative.

a. Container Security Initiative ("CSI")[23]

CSI was first proposed last January, and has already gained strong global support. CSI is based on the premise that the global trading system will be more secure if cargo containers which present a high risk of being used for terrorism are targeted and screened before they are loaded. The goal of CSI is to improve security without slowing down the movement of legitimate trade.

To implement CSI, U.S. Customs is partnering with foreign governments. U.S. Customs officers assist customs agencies at foreign ports. They target and screen high-risk containers for security inspections using technology—including radiation detectors and large-scale x-ray and gamma ray machines—before the cargo is shipped to U.S. ports. The goal is wherever possible to have the screenings done during periods of down time, when containers sit on the docks waiting to be loaded on a vessel.

23 For a comprehensive treatment of CSI details, see *http://www.customs.gov*.

Once the screening is done, it will not, except in rare cases, need to be done again in the U.S. Nearly all CSI-screened cargo clears customs on arrival in the U.S. without further inspection.

The U.S. started implementing CSI with Canada last spring. In Europe, the U.S. has signed agreements with The Netherlands, Belgium, France and Germany. According to a recent Lloyds' List article, the UK is likely to sign on before the year is out.[24] In the Far East, Singapore, Hong Kong and Japan, all have agreed to participate in CSI.[25]

b. The 24-Hour Rule

On October 31, 2002, the U.S. Customs Service issued final regulations for what is called the "24-hour rule".[26] The "24-hour" rule concerns the presentation of vessel cargo declarations to customs before cargo is loaded aboard vessels at foreign ports for transport to the United States. The regulations require ocean carriers to transmit cargo manifests for cargo being shipped to the United States 24 hours in advance of loading at foreign ports. The regulations apply to container vessels and, on a case-by-case basis, may apply to shipments of break-bulk cargo. Bulk carriers are exempt from the regulations.

The 24-hour rule will have a major impact on vessel owners, charterers and shippers and has generated a strong response.[27]

Current U.S. customs laws and regulations impose well-understood requirements for vessels which arrive in the United States to discharge their cargo. Every vessel must have a manifest that meets the requirements of published regulations. Essentially, to get cargo off a ship, a manifest has to be available on arrival at the U.S. port. The usual practice is that the manifest is prepared after all of the cargo has been loaded. Current

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24 *Id.*

25 For comprehensive treatment of CSI details, see *http://www.customs.gov*.

26 67 Fed. Reg. 66318 (Oct. 31, 2002).

27 *E.g.*, Gregory Crouch, "U.S. Port Security Plan Irks Europeans," N.Y. Times, Nov. 6, 2002, at W1; Matthew Flynn, "South Korea Protest Over CSI," Lloyd's List, Sept. 2, 2002, at 3; Peter Tischwell, "The 24-Hour Controversy," J. Comm., Sept. 30, 2002, at 4.

regulations require users of the Automated Manifest System to file the manifest 48 hours before arrival.[28]

The new 24-hour rule adopted by customs changes the procedure dramatically. The regulations require that customs must receive the manifest from the carrier 24 hours before the cargo is loaded aboard the vessel at a foreign port. In addition, customs requires that the cargo declaration separately list cargo not destined for the U.S. that is to remain on board, as well as empty containers that are on the vessel.

One of the requirements in the new regulations is that there be a precise description of the cargo. In the case of sealed containers, generic descriptions such as "STC" ("said to contain") are no longer acceptable.

U.S. customs' argument in support of the 24-hour rule is that it is essential to know before cargo is loaded what is going to be on board. Customs claims that having the information in advance is necessary to assess the risks presented by shipments while providing for expedited treatment of the cargo upon arrival.

Customs is faced with the challenge of dealing with about 6 million containers heading to U.S. ports each year.[29] The liner industry has built a logistics system that is designed to make delivery of containers fast and efficient. But this system was not designed for national security. In fact, the whole concept of presenting sealed containers at the loadport which are not to be opened until delivery creates a very fertile environment for terrorists. The nightmare scenario of containers being used to conceal a weapon of mass destruction is unfortunately a real possibility. It can be discounted, but no one can say the possibility is not a real one.

c. Customs-Trade Partnership Against Terrorism (C-TPAT)[30]

Another U.S. customs initiative is the Customs Trade Partnership Against Terrorism (C-TPAT). This is a joint government-business initiative to build cooperative relationships that strengthen the overall supply chain and

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28 Presentation of Vessel Cargo Declaration to Customs Before Cargo Is Laden Aboard Vessel at Foreign Port for Transport to the United States, 67 Fed. Reg. 66,318 (Oct. 31, 2002) (to be codified at 19 C.F.R. pts. 4, 113 and 178).

29 For comprehensive treatment of CSI details, see *http:/ www.customs.gov*.

30 For comprehensive treatment of C-TPAT, see *http://www.customs.gov*.

border security. Through this initiative, customs is asking businesses to ensure the integrity of their security practices and communicate their security guidelines to their business partners within the supply chain. What customs offers in return is expedited clearance of cargo at the U.S. border. The process was opened on July 15, 2002, with very strong support from virtually all of the major companies in the liner shipping industry. At last count, over 500 companies had signed on.