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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

SPRING MEETING—MAY 1, 2009

PRESENT:
WARREN J. MARWEDEL
PATRICK J. BONNER
ROBERT B. PARRISH (VIA TELEPHONE)
HAROLD K. WATSON
ROBERT G. CLYNE
DAVID J. FARRELL, JR.
LIZABETH L. BURRELL

And the following 216 members and guests:

Stephen A. Agus
Michael C. Angler
Charles B. Anderson
Joakim Andersson
Paul B. Arenas
Michael H. Bagot, Jr.
Todd Baird
James W. Bartlett, III
Joe E. Basenberg
William Baumgarten
Tracy Becker
Michael Bell
William E. Bell
Nash Bilisolz
Richard Binzley
Jorge F. Blasini
Forrest Booth
Karyn Booth
Richard A. Branca
Lawrence B. Brennan
James Brockmeyer
Patrick Brogan
Philip Brooks
Mary C. Broughton
Charles D. Brown
Christopher Buck
Mark Buhler
Phillip A. Buhler
Lucienne C. Bulow
Robert Burger
Christopher E. Carey
Daniel Carr
David Carrigee
William E. Cassidy
Edward V. Cattell, Jr.
James L. Chapman, IV
A. T. Chenault
Conte Cicala
Mark Coberly
Michael Marks Cohen
William R. Connor, III
James Patrick Cooney

James M. Craig
John Crowley
Michael E. Crowley
Peter J. Cullen
Dr. John C. Daidda, P.E.
K. Blythe Daly
Edward Dangler
Philip N. Davey
Christopher O. Davis
A. Robert Degen
Frank P. DeGiulio
Charles Dela
Joseph Denison
Vincent M. DeOrchis
Christopher Dillon
Susan Dorgan
William Dorsey
William A. Durham
Craig S. English
Don Evans
Caspar F. Ewig
Anthony R. Filiato
Robert B. Fisher, Jr.
Vincent J. Foley
Prof. Robert Force
James E. Forde
Lars Forsberg
Peter F. Frost
Stephen J. Galayi
John J. Gallagher
Gene B. George
Alexander Giles
Robert S. Glenn, Jr.
Andrew J. Goldstein
Glenn Goodier
William A. Graffam
Joseph G. Grasso
Donald C. Greenman
James R. Harris
Damon Hartley
Kevin Hartmann
Walter C. Hartridge
Raymond P. Hayden
Keith W. Heard
Dana A. Henderson
William Hewig, III
Julius H. Hines
Seth S. Holbrook
Barbara Holland
Anne D. Hopkins
Robert Hopkins
Chester D. Hooper
Grady Hurley
Carol Gialat Hurst
Bradley A. Jackson
Aileen Jenner
Stephen B. Johnson
John Paul Jones
Eric Kaufman-Cohen
Allan R. Kelley
R. Brett Kelly
Terence Kenneally
Donald J. Kennedy
John D. Kimball
Bruce A. King
Jean Knudsen
Victor Koock
John Koster
Lynn Krieger
LeRoy Lambert
J. Dwight LeBlanc, Jr.
Edward LeBreton
Joseph E. Lee, III
Patrick Lennon
Richard M. Leslie
Keith Letourneau
Joe Lillis
Geoffrey A. Losee
David Y. Loh
Henry C. Lucan, III
Carl E. Lundin
D. Elena Makin
Jabir Makin
David Maloof
Sam Mandelbaum
Marc Marling

Dana K. Martin
David Martowski
Doug Mathews
Charles W. McCamman
Chas McCarthy
Michael McCauley
Brian McEwing
Kevin L. McGee
Michael A. McGlone
Timothy S. McGovern
Frank McNiff
Colin A. B. McRae
Michael Michel
A. Carter Mills, IV
Dennis Minichello
James F. Moseley, Sr.
Jim Moseley, Jr.
Tom Muzyka
Mark E. Newcomb
Francis X. Nolan, III
David A. Nourse
Kevin O'Donovan
Donald L. O'Hare
John Eric Olson
Richard Ottinger
Armand M. Paré
Natheniel G.W. Pieper
Rand Pixa
Edward J. Powers
Katharina Powers
Edward C. Radzik
Lennard K. Rambusch
Lisa Reeves
Stephen Rible
William J. Riviere
Edwin D. Robb
George Rounree, III
Guerric Russell
Thomas A. Russell
John Ryan
Michael J. Ryan
Robert J. Ryniker
John Scalia
John P. Schaffer
Charles E. Schmidt
Gordon D. Schreck
Janis Schulmeisters
David J. Sharpe
James Shirley
David F. Sipple
David W. Skeen
Peter Skoufalos
Kevin Beauchamp Smith
Steven L. Snell
Don Soutam
Jonathan S. Spencer
Brian D. Starer
Botho Steinuorth
William T. Storz
Michael F. Sturley
Norman Sullivan
Rod Sullivan
Michael L. Swain
Prof. Joseph C. Sweeney
Jeremy J. Thomas
Joseph P. Tynan
Alan Van Praag
Jack Vayda
Dave Ventker
Kenneth H. Volk
Arthur J. Volkle, Jr.
Pahul Wanchoo
Cynthia Anne Wegmann
William H. Welte
Gerard White
Stephen F. White
James F. Whitehead
M.H. Whitman, Jr.
Andrew Wilson
John M. Woods
Daniel Wooster
Robert J. Zapf
Pamela Zarlino
JoAnne Zawitoski
Nancy Zimmer

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SPRING MEETING
NEW YORK, NEW YORK
MAY 1, 2009

PROCEEDINGS

MR. MARWEDEL: Good morning. I want to welcome everybody to our annual meeting, and thank you for coming early today. We have a long agenda, a short debate, and then lunch.

First of all, I would like to welcome some guests and special folks that are here today: William Baumgartner, Admiral, U.S. Coast Guard. I know he was in Congressional committee meetings, and he may not have gotten out. Michael Bird, President of the Canadian Maritime Law Association.

(Applause.)

MR. MARWEDEL: I think I saw Peter Cullen, the Past CMLA President. Are you here, Peter? There he is (indicating).

(Applause.)

MR. MARWEDEL: Mary Helen Carlson from the Department of State.

(Applause.)

MR. MARWEDEL: James Craig, President of the American Institute of Marine Underwriters.

(Applause.)

MR. MARWEDEL: Nigel Frawley, is he here for the CMI? Admiral Charles Michel just walked in. He knows how to make an entrance.

(Applause.)

MR. MARWEDEL: Doug Stevenson, from the Seaman's Church Institute. There he is.

(Applause.)

MR. MARWEDEL: And with him is the Reverend David Rider from the Seaman's Church.

(Applause.)

MR. MARWEDEL: Klaus Mordhorst from the Society of Marine Arbitrators. Also, I would like to introduce Robin Becker, right in the center of the room. She is from P.C. Solutions. She is our web-site administrator. She does everything. I know I could have access to go on to any committee site and do anything I please, but I have to go to Robin. She's the one. Please stand up, Robin.

(Applause.)

MR. MARWEDEL: Now, just so that you know we're watching your dues money, the ABA has 1200 staff employees, and if we had the same ratio of staff to membership, we would have 50. We've got Robin.

I would also like to have everybody just take a moment to remember the men and women in uniform that are serving us and our country.

(A moment of silence was observed.)

MR. MARWEDEL: We'll go to the officer reports. Mr. Secretary.

MR. WATSON: Thank you, Mr. President. I would like to remind everybody, if you haven't filled in an attendance card, please do so. And also, those who are going to be speaking, if you will give your business card to the court reporter before you speak, we would appreciate that, as well.

The Board of Directors has met twice since our last General Meeting in Long Beach, California, last November. We met in New Orleans on March 10th at the Tulane Admiralty Law Institute, then again yesterday here in New York.

One issue that the Board of Directors has been discussing is the bubble of members who will be reaching Life Member status in the coming years. The year 1981 was the last year that one could join the Association as a Proctor Member without going through being an Associate Member first, and so there's a bubble of members coming up in the next decade or so who will be transitioned into Life Member status. That will have an effect on our membership dues and is a matter of concern as to how we are going to replace that revenue.

One thing we have done, not on the replacing revenue side, but on saving expenses, is we are trying to do as much of our communication by way of e-mail as we can, as opposed to sending things in hard copy. For example, for this meeting, all the meeting materials were only sent by e-mail, with the exception being those few members for whom we don't have an e-mail address. I would add, if any of you are in that category of not having provided us with an e-mail address, please do so, so we can communicate with you more quickly.

Other issues under consideration by the Board of Directors are categories of membership and, again, alternate sources of revenue.

At the March Board of Directors meeting, President Marwedel announced the appointment of the Peter Gutowski to be the Association's liaison on Rule B attachments. This is obviously an issue of concern to most of our members.

Also, there have been some new subcommittees created. There's a subcommittee on Places of Refuge, which is a subcommittee of Marine Ecology. That is going to be chaired by Fred Kuffler. There is a Piracy subcommittee, and that is going to be a Subcommittee of the Regulation Committee, and Allen Black is going to chair that subcommittee. We've also taken the committees of what I would call the Arrangements Committee and created an overarching Meetings and Events Committee that is going to be chaired by Charles Schmidt. The Arrangements Committee for the May dinner and for the away meetings, the resort meetings and other meetings, will be subcommittees of that committee.

The website is up. As you know, it is a very valuable tool to the Association. We hope to have up and running very soon a page where news events can be posted on the website; deaths of members, new firms, et cetera.

Also, as we've discussed at the prior meeting, the historical documents of the Association are posted on the website, and an effort is under way to locate any missing documents so they can be put there, as well.

That concludes my report.

MR. MARWEDEL: Do you move its acceptance?

MR. WATSON: I move its adoption.

MR. MARWEDEL: Seconds?

(A chorus of seconds.)

MR. MARWEDEL: All in favor?

(A chorus of ayes.)

MR. MARWEDEL: Any opposed?

(No response.)

MR. MARWEDEL: The report is adopted. Now the Treasurer's report.

MR. CLYNE: Thank you, Mr. President. I'm pleased to report that none of the Association's funds were invested with Mr. Madoff.

(Laughter.)

MR. CLYNE: As of the end of the third quarter of our fiscal year which ended January 31st, we had approximately $330,000 in cash and conservative investments. This is a good figure, because that's the point in the year when our dues notices get sent out again and we replenish the treasury. So that really sort of represents our reserve fund.

I'm pleased to report that for the sixth year in a row we have kept our dues at $135, which I think, if you compare it to other associations, is a very reasonable amount.

The officers and directors are working very hard to minimize expenses and to look for alternative sources of revenue so we can keep the dues at a reasonable level.

We are experiencing a little bit of sluggishness in the collection of the dues this year, which I guess is a sign of the economic times, but we're hoping those will pick up. If you haven't paid your dues, we ask you to please take care of that as soon as possible.

We just completed our second audit under my tenure as Treasurer, which is no small feat these days, and I'm very happy about that.

Our Long Beach meeting was a real success, and I think the reason was we had a terrific staff out there led by Bob Zapf and Bill Collier. We were able to just charge a nominal fee for the Long Beach meeting in the Fall because we

had tremendous sponsorship support. I really want to thank the local firms out there for sponsoring the meeting to help with some of the expenses.

That completes my report. I move for its adoption.

MR. MARWEDEL: Second?

(A chorus of seconds.)

MR. MARWEDEL: All in favor?

(A chorus of ayes.)

MR. MARWEDEL: Anybody opposed?

(No response.)

MR. MARWEDEL: The report is adopted.

I see Admiral Baumgartner has arrived and survived his meeting with Congress yesterday.

ADMIRAL BAUMGARTNER: Yes. Thank you.

MR. MARWEDEL: Now the Membership Secretary.

MR. FARRELL: Thank you, Mr. President. Since the Long Beach meeting last fall, the Board of Directors has elected the Hon. Marianne B. Bowler from the District of Massachusetts as a Judicial Member.

The Board also elevated four Associate Members to Proctor status. They are: Michael D. Eriksen of West Palm Beach, Florida; Dana K. Martin of Houston; Timothy S. McGovern of Palos Heights, Illinois; and Daniel H. Wooster of Philadelphia.

The Board also elected 46 Associate Members, six Non-Lawyer Members, and nine Law Student Members.

However, I regret to advise that the following stalwart members and friends have passed away: John A. Edginton of Point Richmond, California; Renato C. Giallorenzi of New York; Fred T. Lininger of Adamstown, Maryland; Michael J. McHale of Jensen Beach, Florida; former President Gordon W.

Paulsen of Gwynedd, Pennsylvania; and Francis A. Scanlan of Bryn Mawr, Pennsylvania. Please join me standing for a moment of silence.

(Whereupon, a moment of silence was observed.)

MR. FARRELL: Thank you. Mr. President, that completes my report, and I move its adoption.

MR. MARWEDEL: Second?

(A chorus of seconds.)

MR. MARWEDEL: All in favor?

(A chorus of ayes.)

MR. MARWEDEL: Mr. Zapf.

MR. ZAPF: Good morning, Members, Officers, Directors. Thank you very much for this opportunity to speak to you. I had asked Warren for a moment, if I could, to speak about the loss of John Edginton to this Association and to me personally. John has been a longtime friend of mine. He has been a mentor. He has guided me through much of the successes that I think I've had with the Association. He's been a shining guide to all of us in terms of what we do both as a professional in terms of his practice, in terms of his devotion to Bar Association activities, in terms of his writing, his publications. As you all know, he was the founding member of Benedict's Maritime Bulletin. That is going to be taken over very well by Frank Wiswall and Josh Force. That will go on. John's spirit I hope will go on with all the volunteer work that is necessary to make this Association work. As Warren pointed out, we are not professionally run. We are run by people who make the time and the effort, as John has done, as many of us have done. But I would like to thank the Association for this opportunity just to remember John specially as a personal favor. Thank you.

MR. MARWEDEL: Thank you. An awful lot of the work—most of the work of this Association is done by the committees, and the committee chairs herd all of the calves surrounding their committee to get the job done, and they serve for a number of years. They don't get off after one year. And they put in an awful lot of time.

This year we have a number of committee chairs that will be stepping down from several years of service, and I would like to recognize them and

have them stand: Bob Zapf, who was the Co-Chair of the 2008 Fall Committee that we had in Long Beach; and Bill Collier, his Co-Chair. Is Bill here? Tom Russell, who organized a marvelous port tour for many of us who deal with these maritime matters and never get to see a super port like we saw. Dennis Minichello, Chair of the 2007 Fall meeting—that was just an oversight—last year we didn't recognize Dennis. I recognize him every day. He is my partner.

(Laughter.)

MR. MARWEDEL: Don Greenman, Chairman of the Carriage of Goods Committee. But not until the end of this meeting.

(Laughter.)

MR. MARWEDEL: Steve Johnson, Chair of the Fisheries Committee. Doug Matthews, Chair of the Stevedores. Is he here? Kevin O'Donovan, Chair of the Website and Technology Committee. Forrest Booth, who is Chair of a Special Committee on State Certification and Specialization. David Farrell and Kent Roberts were Co-Chairs of an ad hoc committee on America's Marine Highways. They don't really get off because I've turned that into a subcommittee of the Inland Water Committee, so you can continue working. I wanted to recognize the work that all these committee chairs have done over the last few years. They will be getting Certificates of Appreciation.

Then I come to the Board of Directors: These are members who served three-year terms on the Board. We meet four times a year. There's a lot of e-mails, a lot of work that goes to these folks, and then we meet and try to govern the Association through the efforts of the Board to, as the Treasurer has said, keep the dues down, get the maximum bang for the buck, and continue to do all of the work that we do. We have four stepping down: Joe Basenberg, Vince Foley, Grady Hurley, and John Kimball. Will you all stand, if you are here?

(Applause.)

MR. MARWEDEL: Thank you. And again we will have Certificates of Appreciation that we will pass out to the retiring Board members. Unfortunately, there is no pension to any of you folks.

This happens to be the 175th Anniversary of the Seaman's Church Institute. They're down on Water Street. This year we had a number of our committee meetings at their facility. They opened up the facility to us. I've heard many good reports about the hospitality down there and how well it all worked.

But I think, more importantly, I want to recognize the work of the Seaman's Church Institute. When I was a merchant mariner and I came to New York, that's where I would stay. People have raised their licenses there. It's like a home. And if you are a merchant mariner, you know what I'm talking about. When you go to a foreign port, the best place to go is to the Seaman's Church Institute or one of the other seaman's missions around the world. They do really great work for the mariner. They are the only ones that really look out for their welfare. So we wanted to recognize that service, and if the Reverend David Rider would come up.

MR. RIDER: My goodness.

MR. MARWEDEL: I have a little cheat sheet here. It is a little easier to read from this.

> The Maritime Law Association of the United States presents this certificate of appreciation to the Seamen's Church Institute of New York and New Jersey in recognition of its 175 years of distinguished service to the maritime industry.
>
> WHEREAS, since its founding in 1834 The Seamen's Church Institute of New York and New Jersey has grown to be the largest and most comprehensive mariner's agency in North America, and
>
> WHEREAS, the chaplains of the SCI annually visit thousands of vessels in America's waterways, caring for the spiritual and emotional well-being of mariners, and
>
> WHEREAS, the SCI and its attorneys have been zealous and effective advocates for the rights of mariners, seeking to protect and enhance their rights and to educate mariners and those who care for them about those rights, and
>
> WHEREAS, the SCI's education facilities in New York, New York, Houston, Texas and Paducah, Kentucky provide training for mariners, thus contributing to the safety of the nation's waterways, and
>
> WHEREAS, through these activities, the SCI has contributed greatly to the well-being of those men and women who toil in the marine industry for the common good of mankind and to the safety of maritime commerce,

BE IT RESOLVED that The Maritime Law Association of the United States congratulates The Seamen's Church Institute of New York and New Jersey on its 175 years of service to mariners and the maritime industry, and expresses its appreciation and support for that service.

BE IT FURTHER RESOLVED, that a copy of this Resolution be made part of the permanent records of the Association.

(handing).

MR. RIDER: Thank you very much. I appreciate it.

(Applause.)

MR. RIDER: I want to thank you very much for this honor. We will hang this certificate in a place of honor at the Seaman's Church Institute. I see many of our former interns at the Center for Seafarer's Rights here. You will hear from Doug Stevenson later. Just to show you that we are not resting on our laurels, in our Paducah facility today we're going to begin stripping out a simulator, and a month later we will have the most state-of-the-art simulator in the world for maritime inland river safety and navigation. So it's a honor to work with you and to receive this on behalf of the Seaman's Church Institute. Thank you.

(Applause.)

MR. MARWEDEL: Thank you again for your service.

We have one more. He stepped out.

What I will do is I'm going to start the committee reports, and then I may interrupt for the other certificate that we have. I'll start with Arbitration and ADR, Keith Heard.

MR. HEARD: Thank you, Mr. President. Please bear with me while I use this handheld device. I forgot to print out my report. I guess we are state-of-the-art.

The Arbitration and Alternative Dispute Resolution Committee had a luncheon meeting yesterday at the downtown office of the Holland & Knight. It was well attended. We had about 45 members of the Association and four non-U.S. lawyers in attendance.

Our program had three parts: In the first part Lindsay East, a senior partner in the Shipping Department of Reed Smith in London, spoke about the views of London arbitrators and solicitors on the use of Rule B to attach electronic fund transfers to obtain security for claims to be arbitrated in London. Lindsay reported that while the solicitors and the defense club managers like this particular use of Rule B, some, and perhaps many, of the London arbitrators have concerns about the practice. During question time, however, it became apparent that there are aspects of Rule B procedures that are perhaps not fully understood in London.

In the second part of our program, Committee Vice-Chair Sandra Gluck spoke about an interesting maritime arbitration decision by the Second Circuit in the case of *Stolt-Nielsen v. Animalfeeds International Corporation*. In that case, which has a complicated procedural history, a group of claimants wanted to proceed with a class action arbitration against parcel tanker operators who were accused of antitrust violations. The panel of three "triple A" arbitrators ruled that since the relevant charter party arbitration clauses did not specifically prohibit class arbitration, it was permissible. Judge Rakoff from the Southern District vacated that award, and on appeal the Second Circuit reversed him and reinstated it.

The parcel tanker operators have now petitioned the Supreme Court for a writ of certiorari. And two organizations, the Society of Maritime Arbitrators and ASBA, the Association of Ship Brokers and Agents, have sought permission to file an amicus brief in support of the cert petition.

Sandra explained the Second Circuit's decision on the issues of, first, whether the arbitrators' ruling was a manifest disregard of the law; second, whether it conflicted with court cases prohibiting consolidation unless it is contractually agreed; and third, whether the ruling of the award was contrary to the Supreme Court's ruling in another equally complicated case styled *Greentree Financial v. Bazzle*, decided in 2003. *Animalfeeds* is an interesting case with a somewhat challenging cert petition, and we were grateful for Sandra for taking us through it.

The third aspect of our meeting involved a presentation by Michael Marks Cohen of his Minority Report with respect to the proposed approval of the Rotterdam Rules, which I am sure, just as night follows day, you will hear more about later this morning.

(Laughter.)

MR. HEARD: In closing, I would like to make two quick announcements. One is that for those of you who are thinking about attending the International Congress of Maritime Arbitrators, which will be held in Hamburg for a full week in early October, the early bird registration deadline is June 30th. You can find that information about their interesting program on the Internet at www.icma2009.org.

Second, on Monday night in this building, the house of the Association, there will be a program entitled "View From the Bench: Settlement practices in the State and Federal Courts and the Ethical and Practical Issues Involved." That starts at 7:00 and runs to 8:30. There is no admission charge. There will be two Southern District judges, an Eastern District magistrate, and three state court judges.

Mr. President, that concludes my report.

MR. MARWEDEL: Thank you.

I failed to mention earlier that the missing chair is Bob Parrish, who is basking on the beach down in Florida, recovering from a little surgery. But he is on the line. Are you still there, Bob?

MR. PARRISH: Yes, I am, Mr. President.

(Laughter.)

MR. MARWEDEL: We have Fisheries, Steve Johnson.

MR. JOHNSON: Thank you, Mr. President. The Fisheries Committee met at the office of Garvey Schubert Barer at 100 Wall Street yesterday at noontime. We had a good attendance, as we normally do at our luncheon meeting. We had a full agenda.

We spent a lot of time discussing a proposal to facilitate investment in the fishing industry by public companies and pension plans. The proposal is to permit public companies, as an exception to the fishery citizenship standard, to qualify for a fishery endorsement so long as they are eligible to document a vessel under 46 U.S.C. § 12103, and so long as their five percent shareholders satisfy the fishery citizenship standard. We also considered an amendment to the fishery endorsement statute to explicitly permit pension plans organized for the benefit of employees of governmental entities, public companies and others qualified for fishery endorsements to be considered eligible for fishery endorsements.

These proposals come out of an experience I had trying to get a complex private equity investment in the fishing industry approved by all the different agencies that have citizenship responsibility and the difficulty that entailed—although we finally managed to make it happen at great expense. It seemed to me that the exceptions that we're proposing would make it a lot cheaper and easier to qualify public companies and pension plans, and that there really is no issue under the policies that are applicable to fishery endorsements.

The second subject that we discussed was pending fisheries legislation, of which there is currently none. The several proposals that the Fisheries Committee had made for legislation had actually found their way into the Coast Guard authorization bills that died in the last Congress. We are looking to seeing whether they will resurface in the new Congress. We're looking for a new champion. Since Senator Stevens is no longer in the Congress, the fishing industry is somewhat of an orphan and is looking for someone to adopt it.

The third subject that we discussed was the U.S.-build rulings that are pending, or I should say the challenges to the Coast Guard's U.S.-build rulings that are pending in the Fourth Circuit. We were advised by Doug Cameron of the National Vessel Documentation Center that there is a hearing set, I think it's May 14th or 15th, before the Fourth Circuit on the *Sea Bulk Trader* cases that are pending before the Fourth Circuit. So we'll have more information on those points within the next year, at least.

The fourth item that we discussed was EEZ aquaculture. The Gulf of Mexico Fishery Management Council has adopted a plan that includes a permit system for permitting aquaculture, large-scale aquaculture operations in the Exclusive Economic Zone within the jurisdiction of the Gulf of Mexico Fishery Management Council. This follows several years of effort by the National Oceanic and Atmospheric Administration to get a bill passed that would set up a permit system for offshore EEZ aquaculture, which went nowhere within the Congress. So, the Gulf of Mexico Council has now decided to have its own permit system. This is being vociferously challenged by the environmental community and I'm sure some others in the industry in the Gulf. The plan is pending now before the Secretary of Commerce for approval and we'll see where that goes. There will undoubtedly be litigation if it is approved.

Lisa Reeves provided a discussion for us of cases of interest in her Fisheries Committee Newsletter that she has put out in the last couple of years on our behalf, and we'll be posting that on our website.

Thank you very much, Mr. President.

MR. MARWEDEL: Thank you. International Organizations, Alan Van Praag.

MR. VAN PRAAG: Thank you, Mr. President. We had a meeting with 42 members and guests attending yesterday afternoon at Holland & Knight.

First up was Sue Williams, who is a retired Superintendent Inspector at Scotland Yard, in charge of their kidnapping division, who is actively engaged in negotiation with Somali pirates. She gave us an oral presentation by phone from London on the practical considerations in dealing with Somali pirates. She went over the handling of negotiations, crew issues, the media issues dealing with the crew and their families, security negotiations, the payment of ransoms, the fact that the current law is ambiguous, and the economic conditions that create pirates. The pirates, which is something nobody really knew, have a number of specialists. They have designated communicators, technical people, and seamen, besides people who are armed. She went over the need for a security officer on board vessels. And she recommended the prosecution in local African states of those pirates who are captured. This is just the highlights of what Sue went over in a 20-minute report.

Then we were very fortunate to have Admiral Chuck Michel, who gave a PowerPoint presentation on the government's perspective on piracy. He showed that the pirates are really criminal gangs; they should be treated as such. He went over the areas of piracy other than Somalia, including in the Niger Delta and the Straits of Malacca, which we discussed in the 2001 CMI Convention as being the hotbed of piracy at that time. He indicated that in Somalia there are at least 20 naval vessels in the area in designated sea lanes, and he went over a number of recent seizures and the excessive ransoms that were paid, including one from Saudi Arabia, who thought they would get away scot-free. He went over the fact that UNCLOS defines piracy under the 1988 Convention for Suppression of Unlawful Acts, or SUA—which was created in the aftermath of the ACHILLE LAURO matter—was pertinent to this issue now and contained provisions that could cover the prosecution of pirates. He went over the U.S. government's reaction to piracy and the Contact Group on Piracy, with recommendations concerning security devices on board vessels, using high-pressure hoses, and barbed wire around vessels to prevent the boarding by pirates.

Then we had Nigel Frawley, who is former President of the Canadian Maritime Law Association, and is currently an executive with CMI, going over the CMI involvement in UNCITRAL, which will be a topic of conversation today, and future work of the CMI, including environmental salvage and insolvency matters.

Next, Vince Foley talked about the pertinent appeal on the PRESTIGE matter which took place in the Second Circuit just a few weeks ago. The results of that appeal will probably be in time for our next meeting at Hilton Head.

Then Mike Wilson went over the classification societies and new matters happening there, including the effect of the PRESTIGE appeal on the ABS position. He indicated that there were new European Union regulations affecting class. He talked about the creation of a joint body for quality management. And he spoke about mutual recognition of classification society certification.

Doug Burnett was our last speaker, and he spoke about the favorable political climate to pass UNCLOS, but the Republicans in the Senate are apparently impeding passage.

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

MR. MARWEDEL: Thank you. Inland Waters and Towing. Dave Ventker.

MR. VENTKER: Inlands Waters and Towing met at the offices of McAllister Towing on Wednesday at 11:00, and we were attended by 20 to 25 members and guests.

The first thing we did was to receive a paper written by Tom Wynne and presented by Gene George, who is Chairman of the Great Lakes Subcommittee. I highly commend this paper to you. A copy of it is over on the side. Gene and Tom have done a thorough job of discussing ballast water regulations and the attempts of state governments to regulate ballast water, mainly in the Great Lakes, but elsewhere, as well.

We also discussed issues related to the Ad Hoc Committee on America's Marine Highway, which is now a subcommittee of the Inland Waters Committee.

Kent Roberts presented a discussion of the current Stimulus Package funding that is available for projects through MarAd. If any of you have clients that run private shipyards or if any of you represent shipyards, there is money available. You may want to talk to your clients about soliciting money through MarAd for those kinds of projects.

We had a case law update from Kent Roberts. Then we had a regulatory update from Buckley McAllister that fed right into the paper that Tom Wynne and Gene George presented.

The most significant issue deals with NPDES permits. In 1973, the National Pollution Discharge Elimination System was passed by Congress. By regulation, EPA said it doesn't apply to ships. At the end of last year, the Ninth Circuit overruled that decision and ordered the EPA to start enforcing the National Pollution Discharge, the NPDES system for ships. Regulations covered by this permit will include deck runoff, antifouling, leachy, bilgewater, ballast water, the gamut. This doesn't mean a whole lot until you think that if you are loading a barge full of grain and you spill grain on deck and wash the grain into the river. Is that a discharge that needs to be reported? The EPA has a permit available; it's 180 pages. It will apply to anything over 300 tons. So, you want to be ready for this. It's going to be a problem. The EPA doesn't know what to do with it, and the Coast Guard is not going to be responsible for enforcement. It's an EPA problem. As they used to say when I was in law school, "Welcome to Wonderland, Alice."

That concludes my report.

MR. MARWEDEL: Thank you. Chris Davis, CMI.

MR. DAVIS: Thank you, Mr. President. Members, guests.

Alan Van Praag did cover briefly Nigel Frawley's presentation. He is the current Secretary General of the CMI, and he outlined some of the current projects that are currently at work at the CMI.

Michael Marks Cohen, as the CMI Subcommittee Chair, also distributed the latest newsletter which has detailed minutes of the work in progress and the activities of CMI. It's worth mentioning that the new projects that are on the table include piracy, the roundtable that has been taking place in London; cross-border insolvency, as Alan mentioned. In addition, environmental salvage is a big issue, and there is consideration of a Club poll with the 1989 Club's Convention.

I should also add that on September 23, 2009, in Rotterdam the next Assembly of the CMI will take place. That's in conjunction with the UNCITRAL signing ceremony for the new regime on Carriage of Goods by Sea. And, in addition, there will be a one-day seminar in its port tour as part of that event.

In addition, the next colloquium, which is scheduled to take place in Chile in October of 2001, will now be taking place in Buenos Aires, Argentina. And the next conference in 2012 will take place in Beijing, China.

That concludes my brief report, Mr. President.

MR. MARWEDEL: Thank you. As you know, Marine Ecology and the Regulation of Vessels Committee actually held two joint meetings; one in Washington, and one here in New York, so I'm going to combine their reports here. Tony Whitman is speaking first, and then Dennis Minichello.

MR. WHITMAN: Thank you, Mr. President.

The Committee on Marine Ecology and Maritime Criminal Law and the Committee on Regulation of Vessel Operations, Safety, Security and Navigation—and I have to consult my notes just to get that straight—met jointly in Washington, D.C. on Tuesday of this week at the offices of K&L Gates. They kindly provided an excellent facility for us.

One of the reasons that we have gone back to meeting in Washington, D.C., is to permit members of our Association to have the opportunity to hear from and meet and get to know people at the more or less hands-on level in regulatory agencies and in Congress so that when they have the need to speak to somebody who is doing the actual work, so to speak, they know who to talk to. And this was an excellent meeting in that regard.

We had two Congressional staffers who came and spoke to us. We had Denise Krepp, who is Senior Counsel to the House Committee on Homeland Security, very much involved with the Coast Guard; and we had Dabney Hegg, who is the Majority Senior Professional Staff Member for the Senate Committee on Commerce, Science and Transportation Subcommittee on Surface Transportation and Merchant Marine. Dabney is also presently involved with the Fisheries Subcommittee, the Oceans, Atmosphere and Fisheries Subcommittee that Steve has been active with. And the fellow who was the liaison there has left. He's been replaced by Jeff Willis. So we had the opportunity to hear from the staffers about what their committees and their chairmen were particularly interested in.

We also had Commander Gary Croot, who spoke to us about vessel general permits. And we had Alex Weller from the Coast Guard on places of refuge. Again, people who are down in the trenches dealing with these issues.

So, next time around I urge you to think about our Tuesday meeting as one that you might want to attend in Washington, D.C.

Admiral Baumgartner and Admiral Michel were both with us. Admiral Baumgartner led off with a recapitulation of Coast Guard activities, which is

our custom, and mentioned the Coast Guard priorities; Law of the Sea Convention ratification, Coast Guard modernization, rulemaking reform, and various other issues being dealt with in the Coast Guard authorization bill.

Denise Krepp spoke and addressed TWIC amendments and the TWIC authorization bill mark up, which is going on. Currently, fake TWICs are already cropping up. There have been New York, New Jersey truckers who have been caught with fake TWICs; there have been some Mexicans caught with fake TWICs. So that's going to be an issue. And the other issue that remains: whether the readers are going to work anywhere where it is cold. Those issues are TWIC issues which are being addressed.

Denise said that her committee also, and her chairman, had concerns for the Deepwater Project, Coast Guard modernization of the fleet, and concerns that the Coast Guard may be stretched too thin if the Coast Guard is called upon to respond further with its own assets and its own personnel in terms of the war zone.

Admiral Michel spoke on piracy, largely, and I will pass on that, because that has been addressed by other committees.

Chuck is clearly the most peripatetic member of the Coast Guard at the moment, but he managed to make I think at least four of our committee meetings during the past week.

He did mention that the U.S.-Kenya Memorandum of Understanding to permit pirates to be tried in Kenya is a good thing.

Dabney Hegg from the Senate Subcommittee spoke on a hearing which was to be announced on Tuesday, and I believe is going forward. Senator Lautenberg has become particularly interested in piracy as an issue and whether there is appropriate support for U.S. flag vessels, whether the Navy is responding appropriately; and also the larger picture of the transportation policy, with barge, short-sea shipping, and those sorts of things.

Rand Pixa, General Counsel to MarAd, again addressed piracy from the standpoint of inter-agency cooperation, which MarAd has been involved in. He also mentioned the vessel point-source pollution issue for the MarAd vessels in Suisun Bay, which remains a problem.

Alex Weller addressed us on places of refuge, drawing the distinction between the places of refuge issue and a distress or force majeure issue. There is a Commandant instruction of July 2007 which sets up the national

response team guidelines for places of refuge. There is an issue there, because if you don't have a COFR, the United States isn't going to let you in even on a places-of-refuge kind of approach. So, COFRs may be the hang-up there. And Alex drew the distinction between the M/V ATHOS 1 issue outside of Philadelphia and a true place of refuge issue. His approach was that the incident command system can deal with the issues like the ATHOS 1. If you recall, the ATHOS 1 was torn open by a foreign object in the bottom of the Delaware River, and although some have said that's a places of refuge issue, that's not how Alex viewed it.

Commander Gary Croot spoke on vessel general permits, and a little bit of the history has already been described. This September 19th is the doomsday for vessel general permits. There will be a Coast Guard EPA MOA for enforcement. Captains of the ports have been trying to reach out to their EPA equivalents for area planning meetings. The enforcement of this is supposed to be phased in with audits of record-keeping first, before anybody jumps down too hard on a vessel general permit issue.

We had Stacey Mitchell from the Department of Justice, the head of the Environmental Crimes Unit, along with Joe Poux and Richard Udell, who spoke on an update on vessel crimes, and particularly the *Joel* case and the *Ionia* case, which Stacey said settle the two questions of whether there is jurisdiction over foreign flag vessels for purposes of environmental crimes, and whether "maintain an oil record book" means to maintain an accurate oil record book.

(Laughter.)

MR. WHITMAN: Stacey says that the number of referrals remains constant, but more and more cases are going to trial, which she seemed to like because she seemed to like her trial lawyers getting to trial.

Budd Darr spoke on IMO activities, including ship recycling, greenhouse gasses, Marpol Annex VI, piracy, and seafarer abandonment. And particularly on Marpol Annex VI was the interesting development that in July the IMO will consider whether to allow the establishment of an emissions control area by the U.S. and Canada which would permit the U.S. and Canada to establish a 200-nautical mile zone in which tightening of NOX and SOX limitations could be taken care of.

Our final speaker was Peter King, General Counsel to the FMC, who spoke on some of the administrative issues unique to the FMC; but also, to

come back into our part of the world, spoke on Tom Russell's well beloved Clean Truck Program, which those of you who were with us in Long Beach heard about and saw some clean trucks. And I gather that the FMC has a different view of the Clean Truck Program from the ports of LA and Long Beach, and has actually had a preliminary injunction denied in D.C., but granted in California, so there are challenges to Clean Trucks.

Mr. President, that concludes my remarks.

Thank you.

MR. MARWEDEL: Thank you. Dennis, before you start, I can't pass this one up. On the TWIC card, many of us have the TWIC card, and if you've tried to use it at the airport, often they'll ask what it is. "Do you have a driver's license?" I had a meeting that Liz will report on later at Coast Guard headquarters, and I had it from the highest echelons of the Coast Guard that my TWIC card wouldn't work, and I had to use my driver's license.

(Laughter.)

MR. MARWEDEL: Perhaps there is something on my card that says "Don't let this man in."

MR. MINICHELLO: Thank you, Mr. President.

As Tony said, we have a joint meeting. We have done this for the last couple of years. I'm here to report on the committee's meeting on Wednesday afternoon at the Seaman's Church Institute. There was some overlap between the two committees as far as the subjects which were discussed, but there were also additional topics that were discussed at our meeting yesterday. I'm going to try and emphasize everything that was brought out, because even in those areas where there was overlap, there were some nuances and some additional information that was provided at yesterday's meeting which was not provided at the Tuesday meeting.

We first heard from Colin De la Rue, a colleague of ours from London, as well as Charles Anderson with Skuld, who spoke about the new book that was published by Informa, which they both worked on and are co-authors of. It's a book on the international laws relating to maritime pollution. If you are at all interested, I believe there is a copy of it at the Informa table, which is in the coffee room. It's a very comprehensive look at pollution law worldwide, and I commend it to you for consideration to add to your library.

We next heard from now Admiral Michel. We had listed him as Captain Michel on our agenda materials, but as of I believe last Friday he was promoted. We would like to congratulate you now, Admiral Michel, for the promotion and certainly look forward to your continued participation with the MLA, to the extent you can. Admiral Michel spoke about what is going on in the Coast Guard with regard to reorganization, in particular, in two areas.

The first is the development of the support commands within the Coast Guard. These will be centers of specialization for specific areas of work of the Coast Guard, and that specialization hopefully will be available to the industry going forward.

The second area is the fact that the legal program will probably remain the same, so we will not have to learn anything new in that regard.

He spoke about the Deep Water Program of the Coast Guard; the Coast Guard authorization bill in Congress, which deals with funding for reorganization issues; treatment of seafarers who have been abandoned, and, in particular, the establishment of a fund to assist abandoned seafarers. He spoke about the Marine Safety Program and how this is of particular importance to members of Congress, and that there will be developments in that area. He commented on the Anti-Smuggling Act for Aliens; an ongoing evaluation program of administrative law judges; the efforts to get additional legislation to deal with self-propelled semi-submersible vessels. That's a fancy word for these small submarines that have been constructed by drug smugglers to bring controlled substances into the United States. Perhaps some of you have seen reports about those on television. So, the Coast Guard is actively looking for additional enhanced authority to deal with that issue. He commented on vessel general permits, which I won't go into in any great detail at this point. He also mentioned the Environmental Crimes Program and the efforts of the Coast Guard there to enhance that program. Finally, he did comment on energy issues relating to LNG facilities, as well as security issues and piracy issues.

We next heard from Mike Underhill, who sits in the Phil Berns memorial chair with the Department of Justice. Mike spoke to us about ports of refuge and the issues that arose out of the ATHOS and PRESTIGE events, and gave us some details about the respective issues that come up under the Clear Water Act and force majeure with regard to ports of refuge.

We next heard from Tom Newman. Tom Newman is involved with oil spill management, and he highlighted in his comments the differences that he

sees from an oil spill management point of view, the differences that exist on the East Coast and the Gulf and the West Coast as far as how oil spills are handled and how cleanup efforts are managed in those respective jurisdictions.

We next heard from Christine Fazio on the vessel general permit issue, but more specifically with regard to litigation that her firm is handling with regard to the vessel general permit requirements of New York State. These are being challenged, and her firm is handling that issue and we will be following that closely.

We also heard from Allen Black and, as you know, he is going to be involved with the piracy issue. He basically outlined the challenges with regard to gathering and presenting all of the materials and issues that are part of the piracy problem. We look forward to Allen's further reports at our upcoming meetings.

We then finally heard from Katherine Newman, who is actually Secretary of the Marine Ecology Committee and in-house counsel to ConocoPhillips. Katherine reported on the air pollution issue with regard to ConocoPhillips and, in particular, with regard to the control of SOx and NOx emissions and how those are looked at from a contractual point of view within the industry. So we had an in-house General Counsel's viewpoint on the issues that arise with the new regulations that are out there with regard to SOx and NOx emissions.

That concludes my report, Mr. President.

MR. MARWEDEL: We'll go to Marine Finance.

MR. NOLAN: Thank you, Mr. President.

The Marine Finance Committee met first through its three subcommittees on Wednesday morning at Holland & Knight. The first of these was a Joint Committee on Maritime Liens and Mortgages, which works jointly with the Practice and Procedure Committee. Ed Powers, the chair of that committee, reported on the status of model mortgage foreclosure pleadings. We have 16 model pleadings, orders and assorted associated documents which they are polishing up, and will make available in due course on the website for MLA members. I think Ed is speaking today. He can get into those in more detail.

There was also a report given on Rule B attachments. Mike Frevola of Holland & Knight brought us up-to-date on the latest status of Rule B attachments and electronic transfers.

Then we moved on to the Subcommittee on Yacht Financing. We had two excellent presentations by people in the industry. Lisa Berbit of the U.S. Trust Division of Bank of America Wealth Division, and Peggy Bodenreider of Maritime Capital Group, an MBA, spoke on the status of the industry and what their concerns were.

Steve Whelan, now of the Sonnenschein firm, spoke on the program to basically add liquidity to the asset-backed securities loan products in circulation in the United States.

And then Dave Williams and our irrepressible friend, Bob Fisher, discussed present legislative proposals to address the gap between titling and federal documentation of recreational vessels. This is actually coming along and is in pretty decent shape as a legislative project, which brings us then to the Subcommittee on Coast Guard Documentation, U.S. Citizenship and Related Matters. We continue to address that discussion with David Williams and Bob Fisher.

Margorie Krumholz reported on a meeting that she had with the senior folks at the National Vessel Documentation Center in Falling Waters, also known as Byrdville, West Virginia, where the Coast Guard expressed some frustration with the way they were so far behind in ruling making proceedings and so backed up that they were unable to deal with a number of regulatory projects. So at least in the areas that Margie and her partner, Eileen Brown, discussed with the NVDC folks at that time, the Coast Guard, as we have it now, basically invited us to prepare regulatory initiatives for submission to them to carry forward. We think that this is an opportunity to be of assistance on an even-handed basis, at least to offer up concepts that are very fleshed out for the Coast Guard to continue with. Of course, they will be the judge of whether these ought to be continued or not.

We are taking a look at the list of regulatory initiatives that we on this committee have considered in the past to see which ones we should reactivate, reprioritize, and what might be worth considering as we go forward.

The other matters that were discussed were the pending legislative initiatives we have, the first of which was approved by the MLA Board last year on vessel finance, to create a system for filing of demise charters constituting financing charters as preferred mortgages under the Ship Mortgage Act, which would bring the ship finance laws into line with the laws that apply to aircraft finance, railcar finance, and the financing of other leased equipment under the Uniform Commercial Code.

We have had several meetings in Washington over the past year with Congressional staff members, and also with lobbyists from the organizations that we would anticipate the most resistance from, in order to try to find out whether they had any concerns; really talking about the Maritime Cabotage Task Force and the AWO. The Maritime Cabotage Task Force expressed the view that they didn't see in our legislation that there really was a Jones Act issue, and they were not going to involve themselves in it, and they were not going to support it or object to it. So we consider ourselves to be in a good position that way. And we are pursuing sponsorships with representatives who are members of the Coast Guard subcommittee in the House to see if we can get this bill enacted this year.

The second legislative proposal which is, I think, going back to the shop for some modifications is the Vessel Construction Documentation Statute, which would allow for the documentation of vessels under construction and the imposition of a preferred mortgage or some other kind of unifying central registered lien product that would facilitate financing of shipbuilding in the United States. When that is advanced in its next generation it will be posted at least on the Finance Committee's portion of the website, and when we think it is ready for prime time, we'll put it out on the website generally for anyone who has an interest in it.

We also had a report from Steve Johnson on the proposal to streamline the citizenship requirements in fisheries endorsements, and we're waiting for the developments on that.

Then we got to the afternoon meeting, which was moved from Holland & Knight to the Seaman's Church Institute. We were up on the sixth floor, unfortunately without a telephone. We had about 30 members in attendance there, and I think probably about 40 to 45 during the morning. We reported on all of the morning's developments, and it started to sound very familiar by the time it got done. We had a lively discussion in the context of the Vessel Construction Documentation Statute, which has actually some of the more unique issues that we have seen in any of the things we have considered.

And that, Mr. President, concludes my report.

MR. MARWEDEL: Thank you. Marine Insurance, Jonathan Spencer, followed by Marine Torts, John Scalia.

MR. SPENCER: Thank you, Mr. President. Good morning, everybody. Marine Insurance had a combined meeting of the main committee and the

subcommittees on Wednesday morning at the Wall Street premises of CNA, whose hospitality we are always grateful for.

Piracy was on our minds. Gene George opened the meeting by introducing our newsletter, which has an article on piracy from the insurance perspective, with some notes also from Bruce Paulsen of Seward & Kissel on the legality of making payments of ransom.

The main speaker was James Christodoulou of ISEC, which is a Connecticut-based operator of chemical tankers. James is the owner of the BISCAGLIA, which we understand to be the only U.S.-controlled vessel so far to have been seized and held in Somali waters for ransom. James spoke about that from the firsthand perspective of the operator, starting with the preparation for the voyage through the Gulf of Aden waters, the phone call that he got from the ship on the Friday of the Thanksgiving weekend saying that it had been taken; his firsthand account of the negotiations with the pirates, which he conducted himself, and a description of the condition in which they found the ship after its exit voyage. Virtually everything that wasn't bolted down had been taken, so they had to replenish everything from crews' clothing. All the crews' personal effects had been taken. Even the medicine chest had been emptied. AIMU taped that presentation, and it will soon be available on their website, and we'll tell members where that can be found once it is there. Bruce also spoke to us briefly about the research he had done as James's attorney into the legality of making the eventual payment of ransom.

Speaking briefly of AIMU, for those who are interested, on Wednesday of next week they have their insurance issues seminar in New York, and on June 29th and 30th in Atlantic City they have a global conference. The details are on the AIMU website at www.aimu.org.

We had a lively discussion after James's presentation about how claims of ransom should be dealt with, and the conclusion seems to be that it is properly the subject of general average.

Turning to the more routine work of the committee, Joe Grasso, who chairs our Cargo Subcommittee, described a project that he has undertaken with about a dozen of our members and about a dozen volunteers from AIMU to make a side-by-side comparison of the new English cargo clauses and our American cargo clauses, and we hope to publish that later this year.

Then John Woods, who is Chair of the Hull Subcommittee, gave us an update on the forthcoming new version of the American Institute Hull Clauses, details to be announced shortly.

John will likely revive our project to prepare an annotation of the Hull Clauses once the new version is out. So, we will be calling for volunteers. If you expect to be interested in volunteering for that, please make sure that you are registered as either a voting or listening member of the Marine Insurance Committee.

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

MR. MARWEDEL: Thank you. There are plenty of seats here in the center on both sides.

MR. SCALIA: Mr. President, members and guests. The Marine Torts and Casualty Committee met on Thursday, April 30th, at 2:00 P.M. at the Seaman's Church Institute. Over 75 members and guests were in attendance.

We had three members who gave us excellent presentations. Robert Burger of Cleveland discussed the new reporting requirements instituted by Medicare which take effect on July 1st. These requirements supplement the lien law which has been in place for sometime. Under the new requirements, the paying entity must report all payments to Medicare-eligible claimants or plaintiffs to the Center for Medicare Services. A paying entity is now designated a responsible reporting entity, or RRE, and must register with Medicare between May 1st and June 30, 2009. In most instances a shipowner will be considered an RRE. All reporting is electronic. The fine for not reporting is set at $1,000 per day per person. Reports must be made quarterly, whether or not there is new information. If there is no new information, a negative report must be filed, and there are only 131 fields to file in the form. There is no end date to the regulation—

(Laughter.)

MR. SCALIA: —and once the RRE is registered, there is no provision for opting out. If you are making payments for future benefits, you are required to follow the individual for the life of the individual. And, of course, the published regulations are not clear with respect to their application to foreign shipowners. However, due to the serious ramifications associated with failure to report, you are urged to thoroughly review the requirements. A guide has been published on the CMS website at www.cms.hhs.gov/mandatoryinsrep.

Lisa Reeves of Philadelphia then gave us an update on limitation of liability, reminding us that limitation is still viable and, despite naysayers, limitation establishes concursus and can be a valuable settlement tool. She discussed the recent Fifth Circuit case, which I think was mentioned earlier,

the *Omega Protein* limitation proceedings, in which limitation was maintained when the fishing vessel struck an offshore platform despite the fact that the master was talking on his cell phone and had the interior lights on in the bridge while navigating in darkness.

David McCreadie of Tampa then discussed his appearance in the Supreme Court on March 2nd in the *Atlantic Sounding* matter. The decision should be handed down before the end of the current term, and will resolve a split in the circuits, subsequent to *Miles v. Apex*, with respect to the availability of punitive damages in a maintenance and cure case. When asked how scared he was appearing before the Supreme Court, David said—and I do quote—"pretty scared." David expressed his disappointment with the MLA refusal to support the amicus brief, which led to some discussion from the plaintiff attorneys present.

Our newsletter published by my Vice-Chair Paul Edelman and Secretary Lisa Reeves is on the committee's website and will be submitted to the Proceedings.

We have noted that the MLA last published statistics on success or failure of limitation actions in 1996. The committee will undertake the updating of that report for presentation to the MLA.

In addition to thanking the Seaman's Church Institute for the use of their room, which we filled to near capacity, I would also like the express the committee's thanks to Robert Burger and Dave McCreadie for their great presentations, as well as my gratitude to Paul Edelman and Lisa Reeves for their tireless work on behalf the committee.

That concludes my report.

MR. MARWEDEL: Thank you. Offshore Industries, Brad Jackson. That will be followed by Practice and Procedure, Mike Underhill.

MR. JACKSON: Mr. President, members of the Association. Your Offshore Industries Committee met yesterday afternoon at the Seaman's Church Institute, the sixth floor room, which as has been advertised a moment ago, is an excellent location. I want to express particular appreciation to Doug Stevenson for his assistance with respect to our PowerPoint presentation. He greatly facilitated that particular presentation and made it unnecessary to bring all sorts of equipment from Houston, Texas, which the airlines also appreciated.

We wanted to convey that we took special note of the fact that piracy is not a problem in the Gulf of Mexico.

(Laughter.)

MR. JACKSON: And, in fact, the last well-known pirate, Jean Lafitte, actually helped the United States defeat some red coated folks from the east at the Battle of New Orleans. So, we did take note of piracy, but it's not a problem for our particular interests.

We had a report on offshore facilities and offshore outer Continental Shelf facilities from Michael McGlone of New Orleans. The activity there is not as great as it has been, which might be expected in the current economic climate.

We discussed the forthcoming Fall Meeting at Hilton Head, South Carolina, and made program plans.

We also discussed the importance of the MLA website. I'll be the guinea pig. I'll tell you that recently I forgot my user name and password and was fearful, but found it is very easy to punch the key "forgot your password," and you will get instantaneous information that will assist you on getting on to the website. The website is key to our operations. You will find agendas there and other such useful information.

Finally, we had a program on the Foreign Corrupt Practices Act. That's important to our particular interests because many of the offshore industries that we are involved with operate overseas, and we had to make note of particular red flags that may be potential violations of the Foreign Corrupt Practices Act. Then we had such interesting questions as to whether financial support for a Somalian government official to move your ship up in the queue on getting relief from pirate activity would be a violation of the Foreign Corrupt Practices Act.

We had an interesting meeting and look forward to meeting again in the Fall in South Carolina. And with that, Mr. President, that concludes my report.

MR. MARWEDEL: Thank you. Josh Force couldn't be here, so Mike Underhill will report.

MR. UNDERHILL: Thank you, Mr. President. Our committee met on Wednesday. I'm happy to report we did not deal with piracy, at least of the Somali kind. We dealt with another, at least some practitioners would say,

form of piracy, which is called Rule B attachments. We had a spirited discussion and a spirited debate, especially for those of us that don't live in the Southern District in New York, an educational debate process about Rule B.

In all seriousness, however, one of the major points that was discussed was that the judges in the Southern District of New York, where obviously most of this practice occurs, have balkanized themselves. I didn't know what the word meant and I asked Phil Berns what it meant. He said that he didn't know either. He asked me to ask Hal Watson, who did explain it to me. Essentially, some judges have figured out a way, it appears, to stop Rule B in its tracks, and that's by enforcing stringent requirements that all process, both initial and supplemental process, be served by the U.S. Marshal, with the effect that since the Marshal will take oftentimes two weeks or more to serve process because of the exigencies of Rule B practice, that stops it dead in its track. One member who wishes to remain anonymous indicated that when he files a Rule B case in this district, that he advises his clients that he will file the papers, he will wait and see which judge he draws, and then he will advise them as to whether he thinks they should proceed or not. Without taking any sides as to which side of Rule B parties are on, the committee feels that forcing practitioners into that procedure is not the way the law or the rule should work. You should not know going into the case whether your client is going to end up on the winning or the losing side.

With that in mind, the committee has requested that the Subcommittee on Federal Rules and Statutes, which is under the Practice and Procedure Committee, gather and meet to determine whether the process can be changed either by rule or some other form of agreement. And gladly, we had volunteers from both the plaintiffs and the defense side of that issue, as well as the banks, to see if that is possible. We hope something can be resolved as a result of that.

Next, the committee also received a recent inquiry from the reporter to the Advisory Committee on Civil Rules concerning the notice requirements in Rule C arrest situations. In 2004, this organization approved a committee resolution recommending an amendment to the Commercial Instruments and Maritime Lien Act, the successor to the old Ship Mortgage Act, recommending an amendment to the statute concerning notice, which would expand the field of people and parties who have to be advised in a Rule C arrest situation. That step has not been pursued on the national level, and the Committee believes that it should be. We will see if we can move that process along. In addition, the committee will also explore whether the rules could can be amended to address those notice concerns.

We also discussed issues in our Practice and Procedure Committee on certain problems that practitioners had experienced in various districts with effecting process through the U.S. Marshal. This is not an apocryphal story. I think it's a good example that in one district the local Marshals had proposed a local rules amendment which the local practitioners perceived to be possibly a way of the Marshals getting out of the Rule C arrest business, which is not good since that's how you arrest a vessel. The good side of the story, and I think the lesson learned in this, is that the practitioners gathered together as a group so no one would stand out to be red flagged if the Marshal chose to do that, and went to the Marshals and addressed their concerns. It turns out that their fears were alleviated. Both sides, that is the Marshals, the District Court, and the practitioners, came to an understanding and a resolution that satisfied the Marshals, and hopefully has satisfied the practitioners. We dealt with a few other districts that had experienced problems with service by the Marshals. We would commend to the local Bars, the local practitioners in those districts, to try that same process; to address the Marshals directly, probably not through the lower level echelon, but through the Marshal, him or herself, to see if changes can be effected from the top down.

Finally, the committee discussed the Model Local Admiralty Rules that were endorsed by the MLA as a result of the long and hard slogging work of Professor Dave Sharpe. The President of our Association sent out a letter to all the districts in the United States making them aware that we do have the Model Local Admiralty Rules available for those districts that either wish to use them as guides to amend their own rules, and possibly to better their own rules.

And that, Mr. President, concludes the report. Thank you very much. My apologies extended on behalf of Josh Force, who indicated he had to take depositions and actually make a living this week. So Josh extends his greetings to you.

MR. MARWEDEL: Thank you.

I had appointed Peter Gutowski as a special liaison to the committee that was meeting with the New York Circuit on Rule B. He couldn't be here. I think Pat Lennon had a couple of comments. Pat.

MR. LENNON: Thank you, Mr. President. As you said, I'm standing in for Pete Gutowski today to give a short update on where matters stand in the Southern District of New York. I'm going to give a short update on where

matters stand in the Southern District of New York with Rule B practice, particularly in relation to electronic funds transfers.

I should start by just highlighting a recent decision in the Second Circuit in the case of *STX PAN Ocean v. Glory Wealth*. What that decision basically held was that if a foreign defendant who is subject to a Rule B attachment order had previously registered for authority to do business in the State of New York and appointed an agent for service of process, that would be sufficient presence under Rule B to defeat the Rule B attachment. There had been a number of decisions in the Southern District that held in that manner, and the Second Circuit's decision was not a surprise to most of the practitioners. So that decision itself will have a limiting affect on the future number of Rule B attachments is being filed.

This past fall there was a surge in new filings of Rule B attachments, which was—not really a surprise, given the collapse of the freight market. It was said that in March of this year, roughly one-third of the new cases filed in the Southern District of New York were Rule B attachment filings, and most of the practitioners in the bar who were handling this type of work had heard comments from the various judges sitting in the Southern District about their concerns about the rise of new cases in the Rule B context. They expressed some unhappiness and dissatisfaction with the way these cases are being handled.

That ultimately led to an invitation from the Southern District of New York Judicial Improvements Committee for the bar to come in with the banks, the banking industry, to discuss ways to improve the Rule B practice. There was a meeting in advance of the meeting with the judges that was held here at the City Bar Association, a meeting of a lot of the Rule B practitioners. I think we probably had about 100 people in attendance. That included many of the garnished banks that have been the subject of these attachment orders here in New York. There was a pretty lively and open discussion about practical issues relating to Rule B attachments, not necessarily to litigation aspects, but how attachment orders are served on the banks, how the banks respond to these orders, and just a lot of the practical issues that the banks confront. And I think the bar, to its credit, was very open in the dialogue, in discussing ways that they thought that the process could be improved to alleviate some of the burdens on the banks and also make the process more uniform.

Ultimately that led to a subcommittee that was charged with drafting up a proposed model order to be presented to the judges in the Southern District. And there was a lot of work put in by a lot of people to come up with a

model order that did really not necessarily favor one side or the other. It was a very objectively drafted order that many of the people who worked on it thought would have led to some improvement if it was used uniformly.

The committee that was then formed consisted of Peter Gutowski, who represented the MLA, Tom Belknap and Ray Burke who I believe were acting on behalf of the City Bar Association Admiralty Committee; and there was one attorney representing the banking interests that then met with this Judicial Improvements Committee in the Southern District. They had what appeared to be a lively and open discussion about these issues, and the judges expressed their concerns from a practical standpoint. That then led to the Judicial Improvements Committee requesting that the bar submit this proposed model order for the Court's consideration.

The banks, however, were reluctant to endorse the model order that the committee had drafted, so there was some additional work trying to get a consensus on what should be included in this order. That was ultimately presented to the Southern District Judicial Improvement Committee at a subsequent meeting, and ultimately in early April the Southern District issued its own model order. Surprisingly, the model order did not include many of the things that the Maritime Bar Committee had suggested.

I'm just going to highlight a few of the things the model order does, because I think it's important to understand where we're headed here. The model order permits the assigned judge to require either the U.S. Marshal Service, as Mike discussed a moment ago, or allows the plaintiff's attorney to appoint a process server. The significance of that is a cost factor. It probably increases the cost of a Rule B attachment by at least a factor of two if you're required to use the U.S. Marshal Service. It is not necessarily, however, the death knell to the effectiveness of Rule B. It just increases the cost and the time it takes to effect attachment.

Another provision allows the banks to charge a reasonable fee for processing a maritime attachment order at the bank's discretion. Most of the people in the bar and most of the attorneys in the bar who saw this provision realized right away that this was going to lead to a lot of problems, because every bank has a different view on what is reasonable, and the fee that is charged is also going to increase the cost of Rule B attachment excessively. Just as an example, if you are serving ten banks, which actually is probably a modest number, these banks are charging a fee of $300, so right away you have got a $3,000 cost just to effect the service on the bank So that is going to be an issue that is going to have to be resolved one way or the other.

The model order also provides for an automatic termination after 60 or 90 days of the attachment order. That can be extended. The model order provides it can be extended for good cause shown.

Another area of concern is that the model order prohibits the issuance of supplemental process by the Clerk of the Court without getting a further order from the Judge, which most of us believe is in direct conflict with the express wording of Rule B itself.

The model order also provides that pursuant to Federal Rule of Civil Procedure 5, the garnishee banks can agree to allow supplemental service, meaning daily service after the first in-hand service to be made by fax or e-mail. That is consistent with the practice that has developed here in the Southern District for the last six to eight years, but it makes it discretionary, as it always has been. Many of the banks now seeing this model order are starting to say, "No, we will not agree to accept the supplemental service by fax or e-mail. We want in-hand service every day." We go back to some of the practical problems that are going to arise from that are going to be that the banks are going to then have to answer every day and indicate whether or not they searched and found any assets of the defendant at the particular moment when the attachment order was served.

So there are a lot of practical problems that potentially are going to come to exist here as we go forward. The model order also requires the plaintiff to advise the Court within five days of any property being attached, and within 30 days to advise the Court whether the parties, meaning the plaintiff or the defendant, have agreed to some alternative disposition of the attached funds. If so, the Court is then going to proceed to dismiss the case without prejudice to it being reopened for further proceedings, such as enforcement of an arbitration award. That is also something that developed as a practice within the Southern District over the last couple of years, mostly because the judges are trying to keep a number of these cases off their docket and reduce the number of pending cases. And, again, that is an issue that is going to cause some consternation, or has caused consternation in the bar, simply because if you have funds that are attached and your case has been dismissed, it raises questions as to whether the Court truly still has jurisdiction over these funds. So that is an area of ongoing concern.

Ultimately, as Mike said, and I think I did use the word, but it wasn't mine, this process has led to balkanization clearly in the Southern District of New York. We have this model order on the one hand, but there is only a

handful of Judges using the model order as it is drafted. So you have got 40-some odd judges sitting in the Southern District of New York, and one or two or three of them are actually using this model order, and if you present it to some of the other judges, they actually will disregard it entirely. They will issue an order that they have used in prior cases that doesn't reflect any of these changes that are in the model order; and some of the other ones will just take it and strike provisions that are in the model order and use an addendum of their own rules and practices for what they want in a particular Rule B case.

All of this has really led to a very confused state of affairs here in the Southern District. These cases are still being filed, but the flood of cases that we saw in the Fall has really fallen off in the last couple of weeks to months simply because I think the number of disputes and broken contracts out in the market have already gone through the system. So are going to have a decreasing number of cases being filed. The remedy still exists, but we are actually in a more confused state of affairs than we have ever been.

This has led a lot of us in the practicing bar to consider ways to try and actually address this issue; go back to the judges and try to figure out a solution to this problem now so that perhaps they are not suffering under the fear that they are going to be flooded with ongoing cases. The Practice and Procedure Committee did appoint a subcommittee to study the possible amendment to Rule B itself to address some of these problems maybe particularly with respect to the service by the Marshal issue, et cetera.

The only other issue I wanted to mention was that there is a Second Circuit case now that I think has been argued or is about to be argued that simply deals with the question of whether or not property that is being paid to a defendant electronically as opposed to a defendant paying itself, whether that property before it reaches the defendant's bank account actually constitutes property for Rule B attachment purposes. That has been an issue of several cases that have been decided in the Southern District of New York, most of which hold that with that type of property the defendant has a sufficient interest in it to allow the attachment to stand. There's a couple of decisions that go the other way, but that's a decision to watch out for that could have a further limiting effect on the use of Rule B attachments.

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

MR. MARWEDEL: Thank you. Recreational Boating, Frank DeGiulio, followed by Salvage, Jason Harris.

MR. DeGIULIO: Thank you, Mr. President. The Recreational Boating Committee met on Thursday at the New York Yacht Club. I want to thank our Vice Chair, Lars Forsberg, for arranging that once again. It's a great venue for our committee.

We were fortunate to hear a presentation from Gregory Glover and Gayle Forsyth, both of Marsh in their Yacht Division, on the current state of the yacht insurance market and some very interesting developments in that area.

Robert Fisher and David Williams gave us a rundown on a proposed amendment to the documentation statutes to provide a mechanism for the surrender of a state title when a boat is being transferred to federal documentation.

Present at our meeting was Mr. Ian Miller, who is the Director of Legislative Services for the Commonwealth of Virginia. He's a member of the National Conference of Commissioners on Uniform State Laws, the people who brought us the UCC. He is chairman of a new task force to develop a Uniform Certificate of Title Act for vessels. We were very pleased to have him present. He welcomes input from our Association, and we are happy to be a part of that. The work of this task force is expected to take well over a year. We'll be posting materials on our Committee's website. If people are interested in this subject, please check periodically for materials.

The committee discussed an amendment to the Longshore Act, Section 902, which expanded the exemptions for recreational vessel workers. This particular amendment was buried in the bailout bill, somewhere in the 4,000 pages. It actually was brought to my attention by John Chamberlain of the Department of Labor, who called me and asked the question: "What's a recreational vessel?" because it's not defined in this exemption. So he is actually looking at that subject right now.

Finally, we heard from Dan Wooster, the Committee's secretary, and also the editor of our newsletter Boating Briefs. He reviewed the cases that are reported. There are copies of our newsletter in the rear of the hall. We are in our eighteenth consecutive year, the fourth editor, and I want to thank Dan for continuing that effort.

Mr. President, that concludes my report.

MR. MARWEDEL: Thank you, Frank. Jason Harris, Salvage.

MR. HARRIS: Thank you, Mr. President. Good morning. The Salvage Committee met on Wednesday, April 29th, at the law offices of Holland & Knight downtown. About 25 people were in attendance, several by telephone.

We received comments from Professor David Bederman from Emory, first regarding the *BLACK SWAN* litigation, and second regarding the *TITANIC* litigation. The *BLACK SWAN* litigation is pending in the Middle District of Florida and involves a discovery by Odyssey Marine Exploration off the coast of Portugal. There are several claimants in the action, including Spain, who has a motion to dismiss currently pending that will be of some interest to the Committee and many U.S. practitioners.

Concerning the *TITANIC*, the current status is that the salvor and the government have submitted covenants and conditions relating to the treatment of certain artifacts. Particularly, it would call for oversight by NOAA.

Some guy named Jason Harris wrote a recent development in salvage law, and you can pick up a copy at the entrance, a few notes on it. First of all, I want to thank my law partners George Rountree and Geoff Losee for their contributions and thorough support in the preparation of that update, as well as their support in related endeavors.

Next you may notice that it is dedicated to Mike McHale. We appreciate the committee recognizing him earlier this morning. Last year at the Salvage meeting Mike McHale presented to us concerning the *Beck* case, and it was subsequently followed by the *Waterdog* case, and the citations of each are in the case law update. The case is important because it struck down a federal statute requiring licensure for salvaging activities off the coast of Florida. So his contributions to the salvage law community are greatly appreciated, and he will be dearly missed.

The Committee received a presentation by Dr. Dagmar Etkin, a Harvard Ph.D., concerning her involvement with the Wreck Oil Removal Program and initiative, particularly in coordination with the American Salvage Association. She demonstrated some of the models that are used as risk assessment tools in wreck removal and averting damages. It may be more interesting, the response costs associated with those.

A note to Mr. Farrell: Her application for Nonlawyer membership is pending at this time.

We also received comments from Dick Fredricks, the Director of the American Salvage Association. He also spoke about the WORP initiative and

gave an overview of the new Salvage and Firefighting Regulations. They were published at the end of 2008, and they went into effect January 30, 2009. However, there is an 18-month period for compliance. For those of you with math skills like mine, that will be June 2010. They can be found at 33 CFR Part 155, and a guidance document from the Coast Guard is expected to follow.

Next we received comments from Jim Shirley, particularly concerning the general health of the salvage industry and certain salvage law practices. He gave a prediction of an increase in environmental disaster avoidance litigation. The prediction is at least reliable, because Jim also reminded us that he was the first to predict the collapse of the housing market.

(Laughter.)

MR. HARRIS: The committee noted a law review article written by Professor Martin Davies in the *Journal of Maritime Law and Commerce*, Volume 39, No. 4, October 2008, entitled "Whatever happened to the Salvage Convention of 1989?," which is a good question.

Finally, Rich Buckingham, who regrets that he could not be here due to some personal matters, wanted me to remind everyone that the National Maritime Salvage Conference and Training Seminar will be in Arlington, Virginia on October 6th through 8th of this year.

And, Mr. President, that concludes my report. Thank you very much.

MR. MARWEDEL: Thank you. Stevedores, Marine Terminals, Tony Filiato, followed by Young Lawyers, Alex Giles.

MR. FILIATO: Good morning, Mr. President, members, guests. The Stevedores, Marine Terminal and Vessel Services Committee met yesterday at Jones Hirsch Conners & Bull, and we thank Bill Bell for providing the space.

We started with our traditional roundup of cases involving the Longshore Act. The main point in litigation in the past year has been the fee shifting provision, Section 28 of the Act, where generally all the Circuits have accepted that the fee shifting needs to be applied strictly and literally, except, of course, in the Ninth Circuit. Also, in that vein with the claimant's attorney's fees and the fee shifting issue was that traditionally with the fee, the hourly fee rate was based on what the local community would charge in the longshore industry. Unfortunately, again the Ninth Circuit has felt differently and has decided that it should be comparable to any complicated litigation. So now we have

claimants' lawyers claiming they be paid like antitrust lawyers. Whether one finds anything wrong with that, depends on if you pay a lot of these fees, but it's interesting. And, again, the Ninth Circuit being the outlier.

We then had an update on the TWIC implementation program, again the lack of readers being an issue. We were then joined by Doug Stevenson from the Seaman's Church Institute, discussing—which had not occurred to most of us—the issue of how do the seafarers come through the terminals on shore leave. It's an interesting concept because you usually need one TWIC cardholder for each person being escorted. Doug informed us we can have one TWIC holder per van of crew members. That's certainly interesting, and we look forward to reports from Doug further on this topic.

We then discussed some legislative issues. It was mentioned earlier, the recreational boat exemption was amended in the Longshore Act. As Frank said, the Department of Labor does not know what a recreational vessel is. It has never been litigated. There are some Coast Guard regs, but they don't fit squarely under the Longshore Act.

In addition to that, there are issues of withdrawal of the jurisdiction of the Longshore Act over the water. What does that mean vis-a-vis an injured employee's rights in admiralty? Are we going to see tort actions again? We all concluded generally that the Stimulus Bill was the best place to put that amendment because certainly it will stimulate the finances of maritime law.

We again discussed the Medicare Set Aside and Reporting Statute. Particularly in one of those 182 fields that they are requesting that in occupational disease cases the first date of exposure; whether it was to the asbestos or to the loud noise in hearing loss cases or to diesel fumes. Under the Longshore Act, we only concern ourselves with the last date of exposure. So we're trying to figure out how we're supposed to come up with a date, and they are still working on that.

Next we had another guest speaker. We had District Director Richard Robilotti of the United States Department of Labor Office of Worker's Compensation Programs. He's in charge of District 2, which covers the Ports of New York and New Jersey. He gave us a general overview of the workings of the longshore program currently. Of particular interest is that District 2 also covers the Defense Base Act, which is an extension of the Longshore Act, which covers Afghanistan and Iraq. Mr. Robilotti reported that he has been seeing on average between 1200 and 1600 cases per month being filed. For the maritime lawyers, and especially those who do longshore work, the issue

here is how is this going to affect the system in getting your cases resolved. Obviously the system is under great strain at the moment, and resources are simply not there to deal with that volume of cases.

Finally, we had an update from JoAnne Zawitoski on the UNCITRAL and the Rotterdam Rules. I'm sure we'll be hearing about that later. There was an overview with particular emphasis on how it will impact stevedore and marine terminals. It was very insightful for us and will be useful to inform our clients.

Mr. President, that concludes my report.

MR. MARWEDEL: Thank you. Young lawyers, Alex Giles.

MR. GILES: Good morning, Mr. President, members of the Association. The Young Lawyers met yesterday at the offices of Freehill, Hogan & Mahar. It was a well attended meeting, and we were fortunate enough to have Dave Martowski, Jim Whitehead and Terry Reilly as our featured guests. They graced us with their wealth of knowledge regarding maritime arbitration, which led to a spirited and lengthy discussion of tips, tools, and advice pertaining to maritime arbitration.

We also welcomed Vince DeOrchis from the Carriage of Goods Committee, who made a presentation, requesting the assistance of the Young Lawyers Committee for a project pertaining to the Rotterdam Rules.

In addition, we have recently received new assignments from both the Association and from the Marine Ecology and Criminal Law Committee, so we look forward to providing assistance to that committee and the Association as a whole.

With this meeting we have new officers, featuring myself as the incoming Chair; Betsy Bundy from Freehill, Hogan & Mahar of New York as Vice-Chair; and Norman Stockman of the Hand Arendall firm in Mobile, Alabama, as our Secretary. We would like to thank our outgoing Chair, Dana Henderson, for her leadership over the last two years.

Finally, and the part that I'm sure you all are waiting to hear, last night the Young Lawyers met at Elizabeth Restaurant in the Nolita District of Manhattan for our typical and usual social event and dinner, which was organized by Pamela Schultz from Freehill's office. The event was extremely well attended, featuring approximately 60 individuals for cocktails, and 40 of those individuals stayed on for dinner. We also were graced with the presence of Pamela's

close friend, Tyra Banks, who evidently decided the best way to celebrate yesterday's conviction of her stalker was to hang out with the Young Lawyers.

(Laughter.)

MR. GILES: That concludes my report.

MR. MARWEDEL: Thank you. American Bar Association, Dick Leslie, followed by Continuing Legal Education, Mike Ryan.

MR. LESLIE: Thank you, Mr. President. As most of you know, the MLA has a voting representative in the House of Delegates of the ABA. So, this report is telling you about the last meeting in Boston, and how it affects us in some ways and some ways probably not as much so.

I have been attending these now for ten years, because I was elected from the Miami Bar for five years, and then four years I worked for the Florida Bar, so that gives us a good working knowledge. Also, we have got a good friend coming in, Steve Zack, who will be the new President Elect in August. If there is anything that we do need, he would be the one to get it to us for another year. Then the final year, from August of 2010 to 2011, he will be the actual President.

The meeting is always started with some statements by the President, the Chair of the House of Delegates, the Treasurer, the Executive Director. As some of you know, the Executive Director is our own Hank White, who was an admiralty attorney for a long time and is still a member of the MLA.

The finances of the ABA are in good shape. They're more costly than ours, so obviously Bob Clyne in our group is doing a better job.

The Committee on Credentials, Rules and Calendar, and Nominating all gave their reports.

There were remarks from the President of the Conference of Chief Justices which was interesting because she talked about the state of the courts.

And also there was a report on Abraham Lincoln as America's greatest lawyer. I was shocked to find out he actually tried a thousand lawsuits. I doubt there is anybody in this room that has tried a thousand lawsuits. That was pretty amazing. And several hundred were in the Illinois Supreme Court.

Resolutions were proposed to the House of Delegates, debated, voted upon—thirty-six matters—most of which, fortunately, did not pertain directly to us.

The only one that maybe would be significant for you all is the screening of lawyers. You used to call that a Chinese Wall. Someone would come into your law firm, he or she had something to do with a client that was going to be adverse, and you just kind of kept them away. And that was kind of done as an ad hoc method. But there were a lot of problems with that, a lot people were upset about it, and there were a lot of, I believe, maybe more traditional or older lawyers who said the clients don't understand this.

After a long debate they decided this was the modern world and we could still do this, and one lawyer coming from a 1,000-person firm to a 2,000-person firm shouldn't throw that other firm totally out.

So that was maybe the biggest thing that went on, other than the rights of the people in Guantanamo. They have been extended habeas corpus and right of counsel, which everyone seemed to agree with is a good right, even though we might not like the people down there too well.

No matters of specific importance to the MLA, no maritime issues that were really presented or debated. The screening was the only other thing.

The next House of Delegates meeting is August 3rd and 4th.

That concludes my report, Mr. President.

MR. MARWEDEL: Thank you. Mike Ryan, followed by the Uniformity of U.S. Maritime Law.

MR. RYAN: Thank you, Mr. Chairman. Good morning members and guests. My report essentially will be the same song, different day, and I promise not to mention the word "p – – – – y."

Members, individuals, pay attention to the requirements of your local state bar. It's your responsibility, your CLE. Keep in touch with them so that you know if there are changes, modifications. That way you know what you have to get and then you go and see about how you get it.

Chairmen, I heard a lot of presentations mentioned this morning, and my recollection is that someone in the last few days, including today, could

get at least five CLE credits if you could arrange your schedules. Professor Jones this afternoon, I think his program has two. The Healy Lecture last night was one, Carriage of Goods Committee is another one, and Uniformity is another one. There may have been some out there that could qualify. So check your agendas and see if they can't be formulated to fit the requirements. We should be able to offer more than five, and that's a nice chunk. If you have any problems with that, get in touch with Betsy Bundy. You can call me anytime, but chances are I'll ask you to call Betsy Bundy. She'll help on this here. I think you ought to consider formulating your meeting so that you can offer a CLE credit.

Having mentioned Betsy, I would like to formally recognize the outstanding job that Betsy and Danielle Kaminski have done with this committee. They have done an excellent, excellent job.

Mr. Chairman, So endeth the report . . . argh.

MR. MARWEDEL: Thank you. JoAnne Zawitoski, Uniformity Committee.

MS. ZAWITOSKI: Good morning, everyone. I'm here to give the report for the Committee on Uniformity on behalf of Dan McDermott, who could not be here this morning. We had our meeting yesterday at the offices of McDermott & Radzik on Wall Street Plaza. We had a very nice and well attended meeting.

We were particularly gratified that a number of younger lawyers attended. That was no doubt, in part, due to the fact that we were offering one hour of CLE credit for the meeting. So, I hope for future meetings those of you who are interested in getting CLE credit will look to attend the meetings of the Uniformity Committee, because we're hoping to be able to continue that at Hilton Head and in other subsequent meetings.

The meeting opened with a report of Ed Radzik of New York on an overview of the new Rotterdam Rules.

Then we were extremely pleased and gratified to have a presentation by David McCreadie of Tampa and Rod Sullivan of Jacksonville, who were the two lawyers who argued the case of *Atlantic Sounding Company v. Edgar Townsend* before the United States Supreme Court recently. These two gentlemen, who were on opposite ends in the Supreme Court argument, gave us a wonderful overview of how they prepared for the argument, the kinds of questions the Justices asked, and some of their thoughts about what the

likely outcome of that decision might be. For those of you who are interested, we do have a written report which details some of the background of the decision over on the table, but it has to do with whether or not you can recover punitive damages for willful refusal or denial to pay maintenance and cure. So if any of you are interested in that topic, I encourage you to pick up a copy of our report. Rod and David tell us that we can expect a decision any day on that case, so keep an eye on your Westlaw or LexisNexis for that decision.

Mr. Chairman, that concludes my report.

MR. MARWEDEL: Thank you, JoAnne. Website and Technology, Kevin O'Donovan.

MR. O'DONOVAN: Good morning. The Website and Technology Committee met yesterday at Jones Hirsch Conner & Bull. We also thank Bill Bell for graciously hosting the meeting and setting up a nice lunch.

You have heard today from several committee chairs about their uses of the website. There are a couple of things I want to remind you that are available on the website. If you want to join a committee, if you want to change your status from voting or a listening member, all you need to do is go on the website and you have the ability to do that.

Also, before all of the MLA meetings, each committee posts their agenda on the website. So, if you want to decide which meeting you want to go to, go to the website and you can see what agendas interest you, perhaps what meetings are having CLE, and be guided accordingly.

The Website Committee is actually starting a new project which we will be putting together; a tech tips or technological tips which will be found on our section of the website that you can come to to find ideas to help you in your practice, or websites or software that various members have identified that they have found helpful. If anybody else comes up with a tech tip they would like to put on up on the site, send me an e-mail, or Mark Marling or Lynn Krieger, who are going to be in charge of this side of things.

We then turned to the technology side of the committee. There was some discussion about a few recent cases in which jurors have been posting during deliberations on their Facebook page, or there was one gentleman in Philadelphia who was tweeting during jury deliberations, and motions to strike the jury verdict have been filed. So that is something we should all be

aware of. A lot of the jurors nowadays, obviously being younger, that is what they do. They are on Facebook, they are tweeting. If they are spending five days in a jury trial, they very well might want to post something.

And then, of course, we had to talk about piracy from a different perspective. We talked a little bit about the technology that ships are using to prevent pirate such as electrified fences. There is also apparently a slippery gel that can be put down the side of the ship to prevent the pirates from climbing up the ship.

Mr. President, that concludes my report.

MR. MARWEDEL: Thank you. The U.S. Coast Guard Relations Ad Hoc Committee, Liz Burrell.

MS. BURRELL: Thank you very much.

The Coast Guard forum was created about a year ago at the behest of Admiral Baumgartner. We have had two meetings, the first at our general meeting last fall in Long Beach and the second this March at Coast Guard headquarters.

The March meeting focused on interactions between government and industry in connection with pollution events. It was attended by representatives of companies that are involved either in insuring or managing spills in U.S. waters as well as government personnel from various branches of the Coast Guard and the National Pollution Fund Center.

Some of the issues that were raised by industry included the timeliness of claims review; the need to establish a protocol outlining procedures for turning over a spill to the government; questions about activation of COFRS without notice to the guarantor; the importance of determining whether wreck removal is being sought for avoidance of pollution or as a navigational impediment; and application of the federal debt priority statutes, which some companies feel hamper their ability to pay responders in a timely fashion. There were also requests for better coordination among the various governmental agencies that are involved in spills and for command responses commensurate with the scope of the spill; and questions about what kinds of liabilities may arise when a company's actions satisfy one branch of the government but not another and whether or not regulations are being extended in effect to vessels that are not legally required to comply with to any specific set of standards.

A very striking aspect of this meeting was the sincere interest of the Coast Guard and other national representatives in these concerns and the ability and willingness on the part of the Coast Guard to make changes swiftly in some instances. For example, in response to comments about the need for better comprehension and appreciation of the challenges faced by different interests in the context of a pollution event, Admiral Baumgartner immediately invited industry representatives to attend both as students and lecturers at the Coast Guard programs on management of spills in order to foster better the communication and mutual understanding.

There was also that general enrichment that occurs when people who approach things from different perspectives learn finally why some point that seems minor to them is quite important to others. One illustration is the characterization of the cause for removing a wreck: a government official whose objective is to get something cleaned up may not be aware that his designation of the reason for the removal may determine which insurance interest will bear the cost, which in many cases can be very significant.

Even though the Coast Guard forum has not been in existence for very long, it has already been extremely successful in terms of both specific practical results that are being even implemented as we speak, and also in fostering the exchange of information that promotes the kind of mutual understanding, leading to better results for everyone. We continue to be extremely grateful for the opportunity to bring government and industry together, with the MLA acting only to identify issues rather than to take sides on whatever solution may be most beneficial. The common element among all participants is a desire to get the job done right.

The continued success of the forum, however, depends on you and your clients providing grist to the mill. If you or your clients have any concerns about the way issues are being handled by the Coast Guard, please bring those concerns to Warren, to me, or to the Chairs of relevant Committees. The ground rules are there is no treatment or discussion of pending cases or recently closed cases, but as for all other matters—and in particular, if you or your clients have any reservation about being identified—this is the place to get those concerns addressed. We have a golden opportunity to improve the system. Please take advantage of it.

Thank you.

MR. MARWEDEL: Thank you, Liz. The Dinner Committee, Boriana Farrar, followed by the Fall Meeting, Charlie Schmidt.

MS. FARRAR: Good morning, Mr. President, members. It's my pleasure to remind you that the cocktail hour starts tonight at 6:30 at Pier 60. The dinner will commence at 7:45 P.M. There will be a booklet. If you are interested as to where you sit, your name and table number is in the booklet. If you have any questions, the members of the Dinner Committee will answer the questions. We will be at the door. We'll greet you. Please come to us. We'll accommodate you.

There are buses which leave at 9:30 P.M. right in front of the hall, which go to Penn Station and the Port Authority and Grand Central upon request.

We hope you will have a good time, and we're looking forward to seeing you there. Thank you.

MR. MARWEDEL: Thank you. And I have her assurance it is not going to rain tonight. Charlie.

MR. SCHMIDT: Thank you, Mr. President, officers, directors, distinguished guests and fellow members.

Your Special Committee on Arrangements for the 2009 Fall Meeting met yesterday morning. We continued our preparations for what we believe will be a really great meeting later on this year.

The Fall Meeting will be held at the Hilton Head Marriott Golf and Resort facility in Hilton Head, South Carolina. The dates will be Wednesday, November 4th through the following Saturday. Our tentative schedule has been posted on the MLA website for a number of weeks now. I'm pleased to say we're on the verge of finalizing that without any change.

This resort is set on a fabulous beachfront. It offers a wide range of amenities, including a variety of dining options, a beautiful spa, and ready access to a number of athletic facilities, including a tremendous amount of golf courses, tennis, cycling and fishing. We will offer the full complement of the MLA's usual social, athletic and CLE activities. Our CLE again will be facilitated by Tulane, so it will be accepted as widely as possible. We will continue to offer special pricing for members of less than ten years' tenure in the Association.

There are brochures outside this meeting room on either side of the hall immediately outside the doors for the hotel. We will be sending out an e-mail notice in the very near future of the final program and the registration material. Additionally, this year for the first time we'll be able to register with

the hotel via a website. A special web page will be put up by the Marriott facility for reservation by members directly with Marriott, a link, if you're on the MLA's website, as soon as that becomes available.

We look forward to seeing all of you in Hilton Head this coming November for what we believe will be a very successful meeting.

Thank you. That concludes my report.

MR. MARWEDEL: Thank you.

We have a Certificate of Appreciation to give to our newly minted Admiral. Chuck Michel, if you would come up, please.

I've had the pleasure to accompany Chuck to the IMO two times in the last year, and I have seen him firsthand to be a representative of the Coast Guard, and a diplomat. I must say that Michael Marks Cohen, who has been known for his ties—well, when Chuck wears civilian attire and, I'm sorry, you're out.

(Laughter.)

MR. MARWEDEL: We have a new tie person. They are very nice ties he wears.

ADMIRAL MICHEL: Thank you.

(Applause.)

MR. MARWEDEL: The certificate says:

> The Maritime Law Association of the United States expresses its sincere appreciation for the services and exemplary assistance of Rear Admiral Charles D. Michel, United States Coast Guard, Chief, Office of Maritime and International Law, Washington, D.C.
>
> Admiral Michel has been a dedicated officer of the United States Coast Guard since 1985, carrying out many highly significant responsibilities and serving with distinction in numerous capacities.
>
> His prior staff assignments include Legislative Counsel for the Office of Congressional and Governmental Affairs, head of the Operations

Division within the Office of Maritime and International Law, and Staff Attorney at the Eighth Coast Guard District. In his afloat assignments, he served as Commanding Officer of the USCGC RESOLUTE and USCGC CAPE CURRENT and Executive Officer of the USCGC DAUNTLESS. In his service to the Country and the Coast Guard, he has performed his duties as Chief, Office of Maritime and International law, in an outstanding manner.

Despite the time required by the aforesaid duties, Admiral Michel has participated in numerous activities of the Maritime Law Association of the United States by making presentations to committees of the Association on topics of maritime law, marine ecology, governmental relations, Coast Guard policy, proceedings at the IMO and other matters, contributing not only his expertise, talent and knowledge, but a sense of camaraderie, friendship and collegiality. In doing so, he has continued and expanded the tradition of cooperation between the United States Coast Guard and the Association.

In consideration of the foregoing:

BE IT RESOLVED, that The Maritime Law Association of the United States expresses its sincere and profound appreciation for the services and assistance of Rear Admiral Charles D. Michel, and we express our gratitude to our professional colleague and friend.

BE IT FURTHER RESOLVED, that a copy of this Resolution be made a part of the permanent records of the Association.

Thank you so much (handing).

(Applause.)

REAR ADMIRAL MICHEL: Thank you very much, Warren, and thank you for the compliment on my ties, as well. I usually only get one choice of color to wear, and that's blue every day, so whenever I get the opportunity to actually put a little more color on things, I always take that opportunity.

But I do want to thank Warren, members of the Association, dear friends, many around. I greatly appreciated the opportunity to work with the Association. It's been extremely valuable to me on a personal basis and on a professional basis with the Coast Guard in getting my job done. There are so many areas of work that we share together, and there are so many individual

connections I've made here that have allowed me to better serve the nation and to serve the maritime community as a member of the Coast Guard, I just can't say. I have made so many close personal friendships and established such trust and close relationships with so many people here. I greatly appreciate the opportunity to work with you.

I hope I can work with you in the future in my new assignment as the Assistant Commandant for Government and Public Affairs dealing with congressional affairs and public affairs for the Coast Guard. Maybe at some point I can actually come back, perhaps following the very large shoes of Admiral Baumgartner, as a Judge Advocate General. I will keep my fingers crossed, but obviously that is also up to the Commandant. That's my boss.

Thank you again, and I hope to work with each of you in the future. Thank you.

(Applause.)

MR. MARWEDEL: I'm going to do the Nominating Committee next. Liz Burrell.

MS. BURRELL: Well, I thought I had more time to prepare.

I am pleased to report that the Nominating Committee met on Wednesday and makes the following proposal for the individuals and the positions listed to be the candidates:

For the Board of Directors: Joshua S. Force of New Orleans; Bradley A. Jackson of Houston; James F. Mosley, Jr., of Jacksonville; and Arthur J. Volkle, Jr. And in case you don't know who that is, that is Skip Volkle of Seattle.

For Membership Secretary, David J. Farrell, Jr.; for Treasurer, Robert G. Clyne; for Secretary, Harold K. Watson; for Second Vice President, Robert B. Parrish; for First Vice-President, Patrick J. Bonner; and for President, Warren J. Marwedel.

I would move that the Secretary be authorized to cast one unanimous vote in favor of these candidates.

MR. MARWEDEL: Is there a second?

(A chorus of seconds.)

MR. MARWEDEL: All in favor?

(A chorus of ayes.)

MR. MARWEDEL: Thank you.

(Whereupon, a unanimous vote was cast.)

MR. MARWEDEL: Anne, did you want to say something?

MS. HOPKINS: Thank you. Mr. President, fellow members, I'm reading this because I don't want to make the meeting any longer with a long speech.

The AMC editors wish to call to your attention the special recognition which has been given this year to two MLA members both named Michael. Michael F. Sturley was initially suggested by Nick Healy a few years ago, and strongly endorsed by Gray Staring, who is sorry he couldn't be here. He doesn't like to fly. There was no question that here was a person who had made outstanding contributions to maritime law; thus, this teacher, author, and U.N. advisor, known to many of you for his work in the MLA, is the person to whom the seventeenth Five-Year Digest is dedicated. You can read all about him in Volume 1 of the Digest. Michael, congratulations.

From time to time AMC has used the annual bound volumes to honor someone who has been an important force in the unending chores of keeping the "yellow journal" afloat. Michael Marks Cohen became a special features editor in 1974—he predates me—and produced a cross-cite—remember the pink, yellow and blue pages? Subsequently he has been a steady behind-the-scenes force in assuring the quality and accuracy of the printed pages. He has always cared about every aspect of AMC. Michael, congratulations.

MR. COHEN: Thank you.

(Applause.)

MR. MARWEDEL: Don Greenman, Carriage of Goods.

MR. GREENMAN: Thank you, Mr. President, members and distinguished guests. In view of the hour, I'm not going to read all of this, but I'll report on our committee meeting on Wednesday, and then get into the nuts and bolts of the Rotterdam Rules.

On Wednesday we had a CLE program by Chet Hooper and Professor Sturley, the title of which was "Ocean Cargo Destroyed in Train Wrecks: What did Congress intend? What do railroads really want? And what should the courts decide?" The last question is still open, because the Circuit Courts of Appeal are not unanimous on whether Carmack applies to a through bill of lading from a nonadjacent foreign country. They're not unanimous on whether an ocean carrier who issues a through bill of lading that includes railroad transport can be subject to the Carmack Amendment itself. These are important issues that are still stirring around under existing U.S. law.

There will be significance to the domestic law with the Rotterdam Rules because the Rules do not provide for liability or limits of liability for rail carriers or any inland carrier. The reason for that is that they didn't want to be bothered by another new international Convention.

Turning to the Rotterdam Rules, which is a very important issue that we are to vote on this morning: If you printed our committee report,[1] you would have a document of about this size (indicating), which I'm not going to read or even hand out. Instead, you might want to look at a handout which we have here entitled "Rotterdam Rules" that contains four sections of the Committee report, namely, the four resolutions that we propose, a summary of the Rotterdam Rules, a chart that shows the difference between the Rotterdam Rules and COGSA, and a chart that shows the international disuniformity of the carriage of goods by sea law around the world. I'm going to present briefly, I hope, the road that leads us to where we are today, and then Michael Sturley is going to bring us up-to-date a little bit on the subject of what the Rotterdam Rules really do.

Our present law consists of the Harter Act of 1893; the Hague Rules as promulgated in 1924, to which the Senate gave advice and consent in 1935, and which Congress enacted into COGSA in 1936, and the Senate then gave advice and consent again, following which the President deposited our ratification at the Hague in 1937.

The business part of shipping is regulated by the Shipping Act and the Ocean Shipping Reform Act. They do not regulate anything to do with liabil-

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[1] Copies of the Report of the Working Group of the MLA on Carriage of Goods on the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, the Minority Report of Michael Marks Cohen, the Minority Report of David T. Maloof, and the Dissenting Report of Professor Joseph Sweeney can be found on the Association website under the heading "Rotterdam Rules."

ity, but the Shipping Act and OSRA do allow shippers and carriers to have special contracts, which we call service contracts, by which a carrier can give shippers benefits that he doesn't give other shippers without violating the antidiscrimination provisions of the Act. Carriage of goods is also subject to the Pomerene Bills of Lading Act, which applies to inland carriers as well as outbound shipments by sea.

Our committee resolutions are four, and each of them is a stand-alone resolution, so you can vote yes for all, or yes for some, or no for some, and so forth. The first resolution has to do with whether the United States should sign and ratify the Rotterdam Rules. The second one is if the United States is party to the Rotterdam Rules, should we opt into the provisions of the Convention on jurisdiction. The third resolution is similar, but it is should we opt into the provisions of the Convention on arbitration. The final resolution is just a housekeeping thing that authorizes our President to make our wishes known.

The existing law is pretty old. Since the law was passed there have been great changes. Cargoes in containers move from one inland point to another inland point under a through bill of lading. A through bill of lading might have been issued by an NVOCC who doesn't own a ship or a railcar or a truck. Admiralty jurisdiction, in the *Kirby* case went inland and now covers the railroads. The values have changed since a 100-pound sterling limit in the Hague Rules and $500 in COGSA per package or customary freight unit.

The international community has tried to bring the Carriage of Goods by Sea law up-to-date and to create a uniform international regime. The first effort was the Visby Amendments of 1968, which our Committee and our Association strongly supported, but which the United States has never become a party to. They would recognize the increasing limits of liability and deal better with how you determine what a COGSA package is.

In the 1970s the international community developed the Hamburg Rules. The Hamburg Rules went into effect, but not in the United States or any of the major trading partners for the United States. Our Association has never endorsed the Hamburg Rules.

In 1996 our Association was concerned about the state of nothing happening. There was nobody going for Visby here and nobody going for Hamburg. The international state of the law involved us in confusion, and so our Committee decided to have a revision of the U.S. Carriage of Goods by Sea Act and we'll go it alone. At the meeting in 1996, May of 1996, our Association

approved the amendments that we had drafted for COGSA. They ended up having some traction in the Senate, but they are still there.

Also in 1996, the United Nations Commission on International Trade Law requested the CMI and other organizations to draft a new international convention that would presumably supersede Hamburg. The CMI set up a Working Group in 1998, and on December 11, 2001, the CMI submitted a draft instrument to UNCITRAL.

The work on what ultimately has become known as the Rotterdam Rules started then with the appointment of a Working Group under UNCITRAL. Four members of the Working Group, Mary Helen Carlson from the State Department, Chet Hooper, Michael Sturley, and Vince DeOrchis from our Association, have been working with that Working Group since the early 2000s. Michael has reported to us on the progress of the sessions periodically. They had two sessions a year, so we've been having two reports a year on what is going on.

Our Committee, the Carriage of Goods by Sea Committee, appointed a Working Group to study the Rotterdam Rules and whether they would be good or bad for the country. The group owes a word of thanks to Liz Burrell, who drafted the Working Group Report based on input from a number of our Working Group members. We also thank David Maloof, Karyn Booth and Don O'Hare, who gave separate conflicting views on the advisability of applying the rules to service contracts or volume contracts; and to Michael Marks Cohen, Chet Hooper and Vince DeOrchis, who presented different ideas with respect to jurisdiction and arbitration. I believe that you will hear from some or all of them today.

The report of the Committee is based on a meeting that we held on February 27th, followed by electronic voting. As a result of the electronic voting, the first three resolutions that we have in the handout were substantially approved and included in our Committee report.

As I mentioned, Professor Sturley has been around for a while. He has been engaged in this process since the beginning with the MLA amendments to COGSA. He was involved with the CMI drafting of the Convention. He then was a member or advisor to the Working Group for the State Department to the United Nations. And, as I am told, he is scheduled to speak at the signing ceremony for the Rules in Rotterdam next September. I'm going to turn it over to Michael in just a second, but there is one thing I want to emphasize about where we stand. The Rules, they are called UNCITRAL Rules

or Rotterdam Rules, were formally approved by the General Assembly of the United Nations last December. They are frozen in concrete in terms of what they say. There is no more room for changing the language this way or the other, except that each country can opt into the jurisdiction and arbitration provisions or not. But other than that, the Convention is fixed. With that, I'm going to turn it over to Michael, and he will tell us about what the rules do.

PROF. STURLEY: Thank you very much, Don. Don has asked me to put on my professorial hat and teach a short class on the differences between the Rotterdam Rules and the Carriage of Goods by Sea Act. As a professor this is what I'm used to doing. But I'm happy to say that at the end of this session the exam will have only one question, and I don't have to grade it. This is the best of all possible classes from my perspective.

As Don has pointed out, it is entirely appropriate that we look at the comparison between the Rotterdam Rules and COGSA because that's the choice we are facing now. After seventeen years of work within this Association leading to this goal, we are finally at the stage where the United Nations has actually approved the new convention. The Rotterdam Rules are what they are. Our choice now is to accept them or to stick with what we currently have. My task is accordingly to compare the Rotterdam Rules to COGSA.

I think it helps to start by looking at the big picture. The Rotterdam Rules represent an evolutionary change compared to what we have now, not a revolutionary change. The primary focus of the Rotterdam Rules, first of all, is on updating and modernizing the existing regimes—Hague, Hague/Visby, and Hamburg—all of which are really ill-equipped to handle some of the current and anticipated business practices, such as electronic commerce, for example. Second, the Rotterdam Rules fill in some of the gaps that have been identified over the years, addressing unanticipated issues. And third, perhaps most importantly, they harmonize the law when possible, making an effort to restore the uniformity in international maritime law that existed at the end of the 1930s, but has not existed for many decades now.

Even though the changes are not earth-shattering, I think it is important for members to be aware of at least the principal differences between the Rotterdam Rules and COGSA, so I propose to focus now on a nonexclusive list of the highlights. Those of you who want more details have had numerous opportunities to read the documentation that Don has just shown us. I have a dozen of what I think are the most important highlights of which you should be aware.

I think the most significant difference is that the Rotterdam Rules provide door-to-door multimodal coverage for the contracting carrier, at least when the contract is on a door-to-door basis. Anyone who does any work at all in this field knows that commercial parties today do not contract on a tackle-to-tackle basis. The Rotterdam Rules finally recognize this modern commercial practice. This still isn't an earth-shattering change, because commercial parties in practice often obtain door-to-door coverage by contract. Under the clause paramount, they will contractually extend the maritime regime inland. The problem, of course, is that such attempts take effect only with the force of contract, not with the force of law. So the real change here is that the Rotterdam Rules will apply on a multimodal door-to-door basis with the force of law, displacing any inconsistent law, at least with respect to the contracting carrier. As Don has mentioned, inland carriers have decided they don't want any part of this, so the Rotterdam Rules do not cover inland carriers.

Second on my list is a closely related issue. Once we have inland coverage—door-to-door coverage—the next step is to recognize direct coverage of maritime performing parties. And this means full coverage with all of the accompanying advantages and disadvantages, whichever side you are on. On the one hand, a cargo claimant will get a direct cause of action under the Rotterdam Rules against maritime performing parties for the damages they cause. Thus terminal operators, stevedores, and ocean carriers (even when they are not contracting carriers) will be directly subject to the Rules, and it won't be necessary to sue them in tort for a cause of action under the Rotterdam Rules. On the other hand, maritime performing parties—who have long had the benefit of Himalaya clauses in practice so that they will get all of the protections that the contracting carrier gets automatically—will themselves get this protection under the Rotterdam Rules. There won't need to be endless fights about whether a particular Himalaya clause is broad enough to cover a particular situation. That will happen automatically. Inland carriers, once again, are outside of the Convention, so this does not affect them.

Third, the Rotterdam Rules will create at least the potential to address the jurisdiction and arbitration issues, the issues that members of this Association have been referring to as "the *SKY REEFER* problem" for 14 years. I don't want to discuss those issues specifically now, because that will be the subject of the second and third resolutions when we talk about whether or not we want to opt in to chapters 14 and 15. But it is, nevertheless, a relevant point now, because if the United States does not become a party to the Rotterdam Rules, then there will be no opportunity to opt into chapter 14 and 15. So if that is an important issue to you, recognize the first step—that opting in requires becoming a party to the Convention.

Fourth on my list is the treatment of volume contracts. I think we will hear a lot more about this topic in the minutes ahead, so I won't discuss the merits here. But I do want to give some background and explain what the Rotterdam Rules do.

For over a century now, since the late nineteenth century, U.S. law has distinguished trades that are subject to mandatory rules from trades in which at least some freedom of contract is permitted. COGSA, for example, has mandatory rules for bills of lading and complete freedom of contract for charter parties. That worked reasonably well when bills of lading and charter parties were the only games in town. But modern commercial practice recognizes a much broader range of options. The issue in our discussions in this Association and then in the CMI for many years now has been the treatment of arrangements that are neither bills of lading nor charter parties.

UNCITRAL has decided that some arrangements are sufficiently like bills of lading that they will be subject to mandatory rules, even though no bills of lading are issued. Thus liner shipments without traditional documents will be subject to the same rules as bills of lading. They will be subject to mandatory rules, with no freedom of contract. Other arrangements they have decided are enough like charter parties that full freedom of contract is appropriate. Examples include towage contracts, heavy-lift contracts, and others "quasi-charter parties", if you will.

And then we have an intermediate arrangement in this country, service contracts, which sort of morphed into volume contracts in the international context. In 1996 this Association voted to leave service contracts out of COGSA completely. In other words, we voted to treat them like charter parties, with complete freedom of contract. UNCITRAL has instead taken a different approach. It has decided that volume contracts will be subject to an intermediate position.

First of all, the Convention will apply as a default rule, meaning that if the parties do nothing, the volume contracts are subject to the Rotterdam Rules. Second, there will be limited freedom of contract. This is subject to certain strict safeguards to protect small shippers, uninformed shippers. At least in some situations, however, freedom of contract will be possible under volume contracts. But third, there are "super-mandatory" provisions in the Convention that are not subject to derogation. Issues relating to vessel safety, for example, are not subject to derogation. The provisions on breaking package limitations, for example, are not subject to freedom of contract. So there are some subjects for which, even in a volume contract,

there is no freedom of contract. Finally, the derogations apply only between the contracting parties, so third parties (who are not parties to the volume contract) will still be protected by the Rotterdam Rules. It is a complex arrangement with the volume contracts in the middle. There is some freedom of contract, but the default rule is to subject volume contracts to the Rotterdam Rules.

Continuing on my list, the rest of the items I will cover more briefly. Number five on my list: The carrier's obligation to exercise due diligence to furnish a seaworthy vessel at the beginning of the voyage has been extended. It is now a continuing obligation throughout the voyage.

Number six: Article 17 of the Rotterdam Rules largely codifies the U.S. rules on the shifting burdens of proof—the famous ping-pong game with which we are all familiar. But one important difference is the elimination of the *Vallescura* rule in the final step. If there are multiple causes, the burden will no longer be on the carrier to segregate the loss. It will now be a shared burden between cargo and carrier, each having to prove the elements that they wish the Court to find.

Number seven: There are two major changes to the traditional catalog of defenses. The Rotterdam Rules eliminate the nautical fault defense. It rarely works in U.S. litigation anyway. The Rules also modify the fire defense so that the carrier will be responsible for employee fault. The fault provision of current section 4(2)(b) will no longer be an issue. Except for those two changes, the catalog of defenses is maintained in article 17(3), with minor updating—terrorism, avoiding environments risks, that sort of thing.

Number eight on my list: The Rotterdam Rules increase the package limitation in article 59(1). It goes up to 875 SDRs per package. That is $1,310.60 as of yesterday's exchange rate, so we have more than a doubling of the limitation amount. More significantly, the Rotterdam Rules adopt a weight-based limitation, as in the Hague-Visby and Hamburg Rules. The limitation amount is 3 SDRs per kilo, which is $2.04 a pound as of yesterday's exchange rate. And in connection with all this, the Rotterdam Rules eliminate the customary freight unit. It will be shipping units, not customary freight units.

Number nine on my list: The container clause. Article 59(2), is very similar to the Hague-Visby and Hamburg container clauses. It is essentially the same as U.S. practice under the *Mitsui-Binladen* line of cases. The big difference is that enumerated packages on pallets are packages for limitation purposes. Under the *Mitsui-Binladen* approach, the palletized unit is a package.

Number ten: Breaking the package limitation is based on carrier fault under article 61, rather than on the arbitrary historical doctrines that have developed in the U.S., such as deviation and fair opportunity. Under current U.S. law, if the carrier steals the goods, it can still limit liability, but if the carrier deviates two miles to drop off a pilot, it can lose limitation under the deviation doctrine. That will be gone, and will instead have article 61. The question will be whether or not the carrier acted deliberately, intending to cause the damage, or recklessly, with knowledge that such damage would likely result.

Number eleven: The Rotterdam Rules clarify the use of qualifying clauses in bills of lading—"said to contain," "shipper's load and count," those sorts of clauses. And the Rotterdam Rules largely follow the innovations that were first proposed by this Association in 1996. Carriers will be able to rely on qualifying clauses when they were, in fact, unaware of the contents of the container, but they will no longer be able to rely on the *Retla* rust clause, or things along that line.

Finally, number twelve on my list: The time-for-suit period is extended from one year to two years under article 62(1). And under article 23(1), notice of non-apparent loss is required in seven working days, rather than the current three days.

This was a quick run-through of the highlights of the difference between the Rotterdam Rules and COGSA. If any of you have questions, I am sure that several people here will be happy to address them.

And thus we face the choice: Do we want this new set of rules, or do we want to stick with what we have? That is the choice we face. Thank you very much.

MR. MARWEDEL: Thank you. Don.

MR. GREENMAN: Mr. President, fellow members, on behalf of the Carriage of Goods Committee, I would like to propose the first resolution that I urge the Association to adopt. There are four of them, but I will introduce each separately, and we can have discussion on each separately because, as I mentioned earlier, they all stand alone. The first one is that,

> RESOLVED that The Maritime Law Association of the United States urges the United States of America to sign and ratify the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which will probably be known as the Rotterdam Rules.

That is our motion. If there is a second.

(A chorus of seconds.)

MR. MARWEDEL: Any discussion?

MR. MALOOF: May I?

MR. MARWEDEL: Yes, sir. Come up, please.

MR. MALOOF: David Maloof. I would like to speak on the Rotterdam Rules.

My name is David Maloof. I represent primarily cargo interests. I think this is a very important vote. The last time we changed our cargo law was 73 years ago. If we do that calculus, if we ratify this, the next time we'll change it will be the year 2082.

This is not a referendum on the MLA or on Chet Hooper's hard work. I think we all want to honor that. I think Chet deserves maybe a special award from the MLA for his many, many years with respect to this issue.

I sat down and looked at the Rules for the first time to write an article for he New York Law Journal, and I expected to write a very positive, supportive article, because as someone who represents cargo interests, we all know the $500 per package in 1936 is not worth today what it is worth then, and our law is the most antiquated law in the world in terms of recovery for cargo interests.

But there is a serious flaw in these Rules which causes me to not support them, and that is Article 80, which is the volume contract exception, which says that, however many pages are written here, the carriers can throw it all in the trash and write their own contract and that will be the law.

We have never had an exception like that. It's not in the Hague Rules, it's not in COGSA, it's not in Hague-Visby, it's not in Hamburg.

There are some protections: The consignees have to agree and sign something. They put in what they consider to be protections. But the bottom line is it is an exception to the entire set of rules.

My position, which I would urge you to consider, is to vote against the ratification of the Rotterdam Rules. And the message to the Association and

to the Congress is we want change. We want new Rules. If you look at the Appendix, which has ten items, we're willing to accept Items 1 through 9, but we're not willing to accept Item 10, which is the volume contract exception, which for the first time in the history of cargo law in the world says the carriers can completely rewrite these Rules so that, for example—and we all know that 90 percent of shipments now move under what are effectively volume contracts. They're called service contracts. So the exception will be 90 percent of the shipments, and the rest of the shipments will follow the law, the 10 percent.

It will result in the least uniform system in the history of the world, because when you get a file, how long will you have to sue? If 90 percent of the shipments are under a volume contract, the contract may say you only have six months to sue. Cosco may put six months, Maersk may put three months, somebody else may put ten months, somebody else will put five years. It will be completely diverse as to the time you have to sue.

Where do you sue? Cosco will put China. That will now be a matter of treaty where our courts will not be able to change that. Somebody else may put, you know, London. Again, you'll have no way of knowing where to sue until you get the service or the volume contract.

So my position, which I would urge you to agree with, is that the volume contract exception will create massive lack of uniformity, it will probably lower freight rates as the shipowners inevitably put in the contracts: "You know what we pay you when we damage your goods, when the ship sinks? We pay you nothing or we pay you a dollar." That is what will be in those volume contracts.

And what is a volume contract? It doesn't say. It says a series of shipments. So if you sit down today and say I'm going to manufacture some yachts and I want to ship them abroad, and you ship two a year, you could be subject to this volume contract by shipping two a year; and if some carrier damages your goods, you might have to sue in China to get your money back.

The MLA has done a terrific job, they have worked extremely hard. Chet has worked extremely hard.

By the way, volume contracts were not popular. We had to push them through the U.N. We could go to the Congress and say ratify this as domestic legislation, but just drop the volume contract exception when you make it domestic legislation, and I think the rest of the world would go along with that.

So my position, which I would urge you, is either to vote against it, or if you really don't understand it, to simply abstain. I think to abstain is a principled vote, if you don't know the economic effect. But this will affect every shipper in American, 239,000 American shippers, very few American shipowners. So the real effect on America is what does it mean for the shippers. I would urge anyone who doesn't understand the economic effect to abstain. Abstaining is not saying we give up; it's saying we want the Congress to study the volume contract exception. At least put a minimum: 500 per year is a volume shipper, not somebody who is just trying to start his business that is going to be subject to this legislation.

Thank you very much.

MR. MARWEDEL: Any other discussion?

MR. HOOPER: I couldn't resist the opportunity to thank David for the award. It sort of reminds me of the Mark Twain comment. After tar and feathering someone to ride him out of town on a rail, the victim said, "If it weren't for the honor of the whole thing, I would just as soon walk."

(Laughter.)

MR. HOOPER: But a lot of the comments about the volume contract are simply not true. We'll hear some from industry in a few minutes, I hope. We now have the law that David Maloof fears we are going to get because we have had service contracts since OSRA. We have had service contracts before OSRA, but OSRA in 1998 perfected them and they have come into use. They are not governed by COGSA today. COGSA governs bills of lading or similar documents of title. It does not govern service contracts.

But industry wants service contracts to be governed by the Rotterdam Rules. I told the industry representatives that Professor Black had told me not to pick up flypaper; I might not be able to put it down. The industry representatives explained that they want to start negotiations of volume contracts with the Rotterdam Rules. They don't want to start with a clean sheet of paper. They want to start with the Rotterdam Rules, but we want to be able to derogate from the Rotterdam Rules. The service contracts are very close to charter parties, and industry wants to use the Rotterdam Rules basically as a pro forma charter party and negotiate from there.

Now, at this time we probably all know the shippers have the greater bargaining position. The carriers are now buying extra insurance to cover the extra liability, which they're voluntarily assuming.

But if you look at Article 80, the protections in 80(d) do not allow derogation to be incorporated by reference from another document nor included in a contract of adhesion that is not subject to negotiation. Now, if a carrier says to a shipper, a small shipper, "You may have my service contract. You may not negotiate. This is it. If you don't want my service contract, I'll sell you a bill of lading, but I'll charge you a heck of a lot more freight," I think that's an adhesion contract, and that wouldn't be enforceable.

Now, the terms of a volume contract may be extended to third-party holders of bills of lading issued under the volume contract, but they may only be extended to those parties who expressly consent to be bound by the derogation in the volume contracts that has been brought to their attention. The express consent takes us out of the normal letter of credit. You would have to have something else.

So I think these two protections are the main protections. When I chaired my last meeting in 1996, we thought of service contracts as charter parties that don't need to be governed at all by the instrument. Now we're saying that they are going to be governed by a default setting, but you can't derogate from the Rotterdam Rules in a contract of adhesion. If you extend the derogation to a third party, the third party must expressly consent to be bound. These are the bigger contracts, generally, where maybe the shipper and consignee are related or something.

Thank you.

MR. MARWEDEL: John Kimball.

MR. KIMBALL: Thank you. For those of you who don't know me, my name is John Kimball. I also would like to briefly address David Maloof's concerns about volume contracts.

I think it is commendable that David has raised his concerns. It's very important for the Association to consider all aspects of these proposed rules before we make a decision on whether to support them.

I think it's very important to remember what the interests of this Association are. We are a bar association, an association of lawyers, and we are not a trade group representing shippers or carriers. As an association of maritime lawyers, we have a collective range of clients whose interests are always going to end up on both sides of a transaction that will be affected by these rules.

We also are not a political body whose philosophy of international trade is at stake. As many others have emphasized from the beginning of our

involvement in attempting to get revision of the Carriage of Goods by Sea Act and to promote the development of the Rotterdam Rules, our interest has been in promoting uniformity of law. That remains our primary interest with respect to the Rotterdam Rules.

We all know that COGSA has long been out of date. Anyone who practices in this field knows that. The Rotterdam Rules are very long overdue. My own view is that we should support them, recognizing that they reflect compromises on the part of the many interests who will be directly affected.

With respect to volume contracts, my view is that Section 80 takes account of the concerns expressed by Mr. Maloof. As far as I can tell, those concerns are really business oriented and reflect the interests of one segment of the industry. The section is expressly written to establish a legal framework permitting volume contracts which avoid the commercial outcomes he is worried will result from the inequality of bargaining power. As Chet noted, it's important to remember that sometimes it is the shipper who has the bargaining power, not the carrier.

There is a detailed discussion of the checks and balances built into Section 80 in the Working Group's detailed report. Section 80 is designed to allow a fair playing field for the negotiation of volume contracts. That is the hallmark of a good set of rules. In my opinion, the section fairly protects the rights of both sides to volume contracts and does so in a balanced way, as a good legal document should do. The protections do extend to small shippers, the parties that Mr. Maloof, I think, is concerned with. For this reason I believe the Association should support the adoption of Section 80, and heartily recommend that we support the Rotterdam Rules as a whole.

Thank you very much.

MS. BOOTH: For those who don't know me, as well, I am Karyn Booth. I'm a partner at Thompson Hine in Washington, D.C.

I'm here today to represent the interests of shippers. We are an IMO counsel to the National Industrial Transportation League, which is a trade association in Washington, D.C. that has over 700 shipper members of all sizes; small shippers, medium shippers, and large shippers that ship all types of commodities around the world. I can assure you that shippers that are importers and exporters involved in the United States trade strongly support the Rotterdam Rules and strongly support the volume contracts exception that exists in the rules.

When I'm not working on the Rotterdam Rules, a big part of my practice is actually to negotiate and draft service contracts, and the members of the NIT League and other clients that we represent now have over ten years of experience since the changes were brought about under the Ocean Shipping Reform Act. Those changes have allowed shippers and carriers to negotiate one-on-one customized contracts today that are intended to meet the business requirements of both sides. It's a give and take, it's a negotiation, and liability is one aspect of all of the different factors that are going to go into the negotiations between the parties.

Now, I can assure you that uniformity will not necessarily be completely consistent with the volume contracts exception. But in response to Mr. Maloof and with all due respect, this is what industry does today; they negotiate customized arrangements that meet their individual requirements, and this is what they want to see in the Rotterdam Rules, because we don't want to go back to COGSA and to the Hague Rules and to the Hamburg Rules. We are moving on, and we are here to modernize and bring about change in the United States that reflects the commercial practice that exists today.

Now, with respect to some of the concerns of small shippers, you've already heard that there are protections in the instrument. These are very important, and I really urge all of you, as you think this through, to take a closer look at these, because those factors and those protections were not adopted without very careful consideration to ensure that if a contract was presented that had a derogation in it, that it would be very apparent to the contracting parties. There has to be prominent notice that there's a derogation in the contract. You have to point out exactly where the derogation exists in the contract. Derogation cannot be in a bill of lading. The derogation cannot be in a tariff. So we were very careful to ensure that there are going to be no surprises here. If you don't like the contract that includes the derogation, the carrier must offer you an opportunity to conclude a separate arrangement that is consistent with the Rotterdam Rules. So there are options here for parties who decide they don't like a derogation in a service contract, known as volume contracts under this new instrument.

And so I stand here today to bring to you that perspective, because I think it's important for everyone to appreciate that shippers and carriers both desire this protection, and that this was not something that the carrier industry tried to jam down shippers throats. In fact, freedom of contract is a principle that the NIT League supported well before the Rotterdam Rules began to be negotiated at UNCITRAL. In fact, we have been very strong friends with the MLA throughout these proceedings going back ten years, when Chet

Hooper first came to the NIT League and brought the MLA compromise. And, in fact, in that compromise is a provision that allowed for shippers and carriers to negotiate limits up or down in service contracts. And so I think the MLA has been consistent in advocating that position, and shippers also are very supportive of that.

Thank you.

MR. MARWEDEL: Thank you. Yes?

MR. O'HARE: My name is Don O'Hare. I represent the World Shipping Council in Washington. We represent the liner carriers who are obviously very heavily impacted by this Convention.

I want to support the last two speakers. Liner carriers have been working on this issue very heavily since the 1990s. I was at Sea-Land at the time, and we worked very closely with the Carriage of Goods Committee here to develop and draft the COGSA 1999 legislation. We were very supportive of it. We formed the World Shipping Council in 2000, and in 2001 we recognized that that legislation was not going to go anywhere. We brought together a group of advisors from all of our member shipping lines and developed objectives that we would like to see in an international solution, and then began meeting with the National Industrial Transportation League and developed a document that had our joint position on ten or twelve key issues that we wanted to see in any kind of a new international convention. Once we agreed on that in late 2001, we took it to the U.S. Government, and we sat down with the State Department and the DOT and advocated that this was an agreement between shippers and carriers, and we were eager to have an international solution that we obviously couldn't get domestically. We then proceeded to serve on the U.S. delegation as advisors during the entire process.

One dynamic that took place over the seven years of this negotiation was that the U.S. delegation was recognized as having by far the most balanced input by the industry representatives. There were a lot of very heavily oriented shipper countries—quite a few, as a matter of fact—a smaller number of heavily oriented carrier countries. But I think the reason the U.S. was successful in getting the kind of balance in this agreement and this Convention that they sought at the beginning was the balance that they had on the delegation with the State Department and the DOT. We thank them for that.

So just to add our liner carrier voice to support the Convention, we would ask all of you to vote favorably on this resolution. Thank you.

MR. MARWEDEL: Thank you. Yes?

MR. PRUZINSKY: My name is Tony Pruzinsky. I'm a partner with the firm of Hill, Rivkins & Hayden here in New York.

Just some brief comment about the Rotterdam Rules. Our partnership unanimously supports the adoption of the rules and the adoption of the resolutions here today. These rules I believe are exciting in that they provide a tremendous amount of uniformity that we haven't seen in decades.

I think that we'll find, as we found with OSRA, that the rules will be applied a lot more than you might expect with the presence of, "volume contracts." One way to look at that and to tell that is to look at how OSRA fared in the United States. OSRA in the past ten years has been a tremendous success. We heard that 90 percent of the cargo is shipped under service contracts. However, most of those contracts seem to use the Carriage of Goods by Sea Act.

Another thing to look at, which we did, was how has OSRA fared in the courts? And it's pretty clear that there's very little litigation about OSRA and about service contracts; that the service contracts have not created a lot of chaos in the law, and there is no reason to expect that under the Rotterdam Rules they will.

Many of you know that our firm represents a lot of cargo interests and subrogated cargo insurers. The increase in the limits of liability in the Rotterdam Rules I think will ultimately prove to be a benefit to those people who have cargo damage cases, who have losses, particularly the subrogated insurers and cargo owners.

And our firm as a partnership supports the rules. Thank you.

MR. MARWEDEL: Thank you. Yes, David?

MR. MALOOF: Can I correct a misstatement?

MR. MARWEDEL: Would you come up to the microphone?

MR. MALOOF: Just to correct a point from a legal point of view. It has been stated repeatedly that we have seen service contracts work. Volume contracts are the equivalent of service contracts, so what's the problem? The truth is with service contracts you still issue a bill of lading and it is still subject to

COGSA. So there's no parallel between the current service contracts and what we will have with the volume contract exception where bills of lading will no longer be subject to COGSA. We have many, many files on all of our desks, those of us who handle cargo claims, and it is virtually unheard of to have more than $500 per package as a limit coming into the United States. So the idea that service contracts are the equivalent of volume contracts is simply a legal misnomer.

Secondly, I have with me the proxy of another shipper organization. George Pezold, who runs it, is voting against the Rotterdam Rules. I don't know the composition of NIT League, but they certainly have many large shippers among their members. George's organization is opposed.

Thank you.

MR. MARWEDEL: Just for the record, I did not authorize proxy votes for this meeting.

Does anyone else wish to speak before we call the question?

PROF. SULLIVAN: I'm Rod Sullivan. I'm a Professor of Law at Florida Coastal School of Law, but I began my career as a maritime lawyer working with David Maloof's firm 26 years ago as a cargo attorney, so I have been through this issue many times.

The Rotterdam Rules are not perfect, but I don't think any of us would vote for the Rules if we thought that the volume contract provisions were going to be used as a means of doing an end run around the rest of the provisions of the Rotterdam Rules. I think this organization could go on record as saying that we would not even vote for the Rotterdam Rules if we thought it was going to be used as a means of taking away the rights that are granted therein. Therefore, I think that the Rules are a great step forward for us, and I would call on you to support them. I think we all understand David's concern. We share his concern. But we have to honestly and truthfully believe the rules will not be used or circumvented by Rule 81. And, therefore, I would suggest that we all vote for it.

MR. MARWEDEL: Michael Sturley.

PROF. STURLEY: Thank you very much, Mr. President. I no longer have my professorial hat on, but I still feel a little bit like I'm correcting exams. I do want to make a couple of points.

Basically, what we are being asked to do here is make some empirical predictions. I think Rod's points were very well taken. I understand David's concerns. And if you share David's prediction about what carriers are going to do, you should be concerned.

But I think we have much better evidence about what carriers are likely to do that will enable us to make this prediction more accurately. Everything that David fears could happen under the volume contract provision could already happen today. If carriers really wish to avoid the mandatory rules, there are procedures they can use now to take themselves outside of the fairly limited application of COGSA. If they operate a trade in which they do not issue bills of lading, then COGSA does not apply. If they set up their transactions using charter-parties, nothing stops a carrier from having a slot charter for one slot or one voyage, if it really wants to avoid mandatory rules. I've never seen that happen. I've never heard of anybody who has seen that happen. But it could happen, if that is really what you think carriers are going to do.

And take David's very own example. The one hypothetical he gave is if you have a client who is shipping two yachts a year. Well, yachts are carried on deck. Deck carriage is already excluded from COGSA. If carriers want to have *de minimis* liability for carrying yachts, they can do that today.

In my experience, in almost all of these cases the carriers, in fact, voluntarily incorporate COGSA because they would rather have uniform rules so they can conduct a business in which all the cargo can be treated pretty much in the same way. My empirical prediction is therefore that carriers are not going to use the volume contract exception, the freedom of contract opportunities for volume contracts, as a way to avoid the Rules.

But we are also being asked to make another empirical prediction, and that is what would happen if the United States does not ratify the Rotterdam Rules. David has suggested that Congress would be willing to pass domestic legislation incorporating all of the Rotterdam Rules except the volume contract exception. And once the rest of the world sees that we've done this, they will say "that's a good idea, let's do the same thing ourselves," and we will get uniformity that way. My empirical prediction is this will never happen.

First of all, I do not think that Congress will pass this as domestic legislation without the volume contract provision. Second, I do not think the rest of the world would follow our lead even if Congress did.

I think our choice now is to adopt the Rotterdam Rules as they are drafted or to stick with the Carriage of Goods by Sea Act for at least another generation. I do not see any other opportunity for getting rid of it that is likely to happen in the foreseeable future. So my empirical prediction is if we do not adopt the Rotterdam Rules, then we are going to continue to have what we currently have now for the remaining professional careers of everybody sitting in this room.

Thank you.

MR. MARWEDEL: Yes?

MR. HEARD: I didn't come here this morning expecting to speak about this, and I won't be long. I'm not standing up here as a spoiler, but my conscience is going to bother me if I don't say this before we take the vote.

I tried to be a good student when Professor Sturley conducted his tutorial, and I took notes. One of the things he said was that the nautical fault provision in the Hague Rules is really no longer a valid defense. That's not right. I understand that in service contracts the carrier, shipper interests pretty much demand that error and navigation and error in management be written out of those contracts, and that carriers frequently have no choice but to agree with that. If you look at the American Maritime Cases over the past 30 years, you will find cases where carriers prevailed in error in navigation or error in management, depending on the facts. That also has application in GA cases where carriers have to rely on those same provisions because of the Jason clause.

The fact that those defenses will be abolished to me is not a reason to vote against the Rotterdam Rules. On balance, although it has been said before that they are imperfect, I agree with that, but I don't think that any of you should vote in favor of the Rotterdam Rules because you have been told that the carriers aren't giving up anything and they're giving up error in navigation and error in management. I don't think that statement is properly supported by the current state of U.S. law, and I just want you to bear that in mind.

Thank you.

MR. MARWEDEL: Yes, Mike.

MR. RYAN: I will be extremely brief. I will go back to 1996 when we were all in this room, at least a lot of us, voting on what I will call the MLA's attempt to reform COGSA. It was recognized at that time that amendment of COGSA

was necessary to put the United States on the same level playing field with the rest of the world. A Committee was formed, did its work and this Association passed and approved the work of the committee. It then went through permutations in Congress, and it really didn't get anywhere. Congress was not interested because we did not have, as far as Congress was concerned, agreement across the board.

What I hear today principally is that commerce wants this; they want change to COGSA. The World Shipping Council, NIT League, the insurance industry, this is what we want: They want to change COGSA.

Gentlemen, I submit that if we do not recommend or approve a change in COGSA today, we're going to, as Professor Sturley said, live with COGSA for the foreseeable future, because Congress is not going to be interested in taking it up *sua sponte*; absolutely not. This is a time for us to say, all right. Let's change COGSA. We can do it now. We can make an effort to put the world on a level playing field. If we don't do it, I can't see that the rest of the people who are interested in change will. This will never happen. The U.S. has to lead this time. Let's be leaders.

MR. MARWEDEL: Thank you. The motion has been moved and seconded. Just to clarify: We're dealing here with Chapters 1 through 13, is that correct?

PROF. STURLEY: And 16.

MR. GREENMAN: Well, 14 and 15 are separate items.

MR. MARWEDEL: I understand. I just wanted to clarify your motion. If you would like to restate the motion before we call the vote.

MR. GREENMAN: The motion is:

> RESOLVED that The Maritime Law Association of the United States urges the United States of America to sign and ratify the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which will probably be known as the Rotterdam Rules.

This would involve signing the next two resolutions that we have that deal with Chapters 14 and 15, which are jurisdiction and arbitration. So you can vote for this one, in favor of it, and you can vote against jurisdiction and arbitration in the next of the resolutions. That issue has not been discussed on

this motion, but I'm sure that it will be discussed on the next motion, because I see Michael Marks right here next to me.

MR. MARWEDEL: All in favor of the resolution please raise your hands.

(A show of hands.)

MR. MARWEDEL: Thank you. All opposed please raise your hands.

(A show of hands.)

MR. MARWEDEL: The motion is carried.

(Whereupon, the motion was carried.)

MR. MARWEDEL: Don, you have a second motion?

MR. GREENMAN: The next two resolutions have to do with jurisdiction and arbitration, but there are enough differences between the two that we have separate resolutions, and I think we need separate discussion and votes on each.

The next resolution is:

> RESOLVED that The Maritime Law Association of the United States urges the United States of America to opt into Chapter 14 (Jurisdiction) of the United Nations Convention on Contracts for the International Carriage of Goods by Sea, which will probably be known as the Rotterdam Rules.

On behalf of the Committee on Carriage of Goods, I move that resolution, if there's a second.

(A chorus of seconds.)

MR. MARWEDEL: Discussion? Michael.

MR. COHEN: Mr. President, I offer an amendment to the resolution. I move to amend the resolution so that it will provide:

> RESOLVED that The Maritime Law Association of the United States urges the United States of America to opt into Chapter 14 (Juris-

> diction) of the United States Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which probably will be known as the Rotterdam Rules

—now comes the additional text—

> provided that a third party claiming cargo loss or damage under a volume contract bill of lading will not be subject to an exclusive choice of foreign court clause contained therein, without the third party's express consent to be bound by such derogation from the Rules, under the same terms and conditions described in Articles 80(5)(b) and 80(6) of the Convention.

I move that and ask for a second.

(The motion was seconded.)

MR. MARWEDEL: Any discussion?

(No response.)

MR. COHEN: I guess I'm the movant, so I should go first.

Chapter 14 is set up in a way that would enable parties to volume contracts to agree on an exclusive forum for resolution of their disputes. I have no problem with that. So my discussion this morning of this amendment to the resolution does not deal with volume contracts, but rather deals with bills of lading that are issued under volume contracts. Today will probably be the last opportunity we will have in our professional lifetimes to take a hopefully successful step toward overruling *SKY REEFER*. You will recall that in 1995 the Supreme Court handed down the *SKY REEFER* decision, and since then American courts have routinely enforced exclusive foreign forum clauses and foreign arbitration clauses by sending abroad cases for damages to cargoes discharged in U.S. ports. No other country on earth regularly declines to hear cases for damage to cargoes which have been discharged in its ports. We are the only one that does it on a regular basis.

That same year, the MLA Carriage of Goods Committee was finishing up its project to reform COGSA. One of the most controversial issues then, as it is today, was whether to allow service contracts (volume contracts), and bills of lading issued under service contracts, to derogate from the new COGSA. At the suggestion of the Committee on Maritime Arbitration, and in order to

attract more support for the COGSA reform project, the Carriage of Goods Committee proposed a compromise by adding a provision to the COGSA reform project to overrule *SKY REEFER*.

As the Chair of the Carriage of Goods Committee noted when discussing the importance of the anti-*SKY REEFER* provision in the project at the May 1996 meeting, "It protects the interests of American parties to resolve their disputes at home." The compromise worked. The project with its provisions to allow volume contract derogation and to eliminate *SKY REEFER* was overwhelmingly approved by our Association.

When UNCITRAL took over the project, the MLA goal was to have anti-*SKY REEFER* terms incorporated into the jurisdiction and arbitration chapters of the Rotterdam Rules. That plan partially succeeded, because under the Rotterdam Rules the general principle is that exclusivity of choice of court clauses and arbitration clauses are unenforceable for cargo damage.

However, several derogations from this principle are authorized for certain bills of lading. No derogation at all is permitted in charter party bills of lading on substantive matters, and exclusive choice of court clauses in charter party bills of lading will not be enforced. Substantive derogation from the Convention is authorized in volume contract bills of lading, but only with the express consent of third-party receivers. As Chet pointed out quite accurately this morning, that express consent which the third-party receivers must give can't be done in boilerplate, can't be done in a tariff. There has to be an express consent in some other way, some singular way by third-party receivers under volume contract bills of lading, before they are bound by derogations from the Rotterdam Rules.

A fight broke out in UNCITRAL about whether exclusive choice of court clauses should be enforceable in volume contract bills of lading without the consent of the third-party receivers, and UNCITRAL could not resolve that fight. So here's what it did in the end: It was agreed that the enforcement of exclusive choice of court clauses in derogation of the Convention in volume contract bills of lading—whether they would be enforced only with the consent of the third-party receivers or without the consent of the third party receivers—would be left up to local national law.

The existing local national law in the United States is *SKY REEFER*, which enforces such clauses against third-party receivers without the need for a third party's consent. The proposed original resolution would perpetuate *SKY REEFER* for service contract bills of lading. Nearly one-third of the Carriage of Goods Committee voted to reject it.

My amendment seeks to bridge the differences between those who support opting into Chapter 14 and those who are against opting in. My amendment would treat derogation from the general principle in the Rotterdam Rules, which invalidates exclusivity of choice of court clauses in bills of lading, just like derogation from any other part of the Rotterdam Rules in volume contract bills of lading—by requiring express consent of the third-party receiver.

The proponents of opting in without requiring third-party consent, say that Article 14 is a compromise. We went to UNCITRAL and we hashed this thing out. It is a compromise. But it is not a compromise. It is an optional chapter. Whether the U.S. agrees to adhere to Chapter 14, and what conditions it chooses to impose under its own domestic law, will have absolutely no impact whatsoever on whether other countries ratify the Rotterdam Rules.

The proponents say why can't you be satisfied with anti-*SKY REEFER* terms and the general principle in the Rotterdam Rules? The reason is because this is one of those examples where the exceptions swallow up the rule. Ninety percent of all liner cargoes imported into the United States which are covered by bills of lading move under service contract bills of lading. The CIF sellers of Far East cargoes into the United States will enter into service contracts for ocean transportation with Far East shipowners and the sellers will agree in a heartbeat that all cargo claims in connection with their cargoes offloaded to their customers in the United States must be heard in Beijing, Tokyo, and Singapore.

My amendment of the resolution would require that the principle already found in the Rotterdam Rules, invaliding the exclusivity of choice of court clauses, would permit derogation but only in accordance with the other principle already found in the Rotterdam Rules, i.e. with the express consent of the third-party receivers of service contract bills of lading. This amendment, therefore, not only would comport with the basic principles in the Rotterdam Rules regulating derogation, it would also advance the MLA goal of overruling *SKY REEFER*.

Thank you.

MR. MARWEDEL: Yes. If we can make it brief, and then I would like to call the question.

PROF. STURLEY: I'll try to at least be briefer than the motion. I have a number of disagreements with Michael's motion here, and there is a wide range of them. Some of it goes back to what has now become ancient history.

For example, the original MLA proposal was not drafted in response to *SKY REEFER*. We drafted the proposal before *SKY REEFER* was even decided to include the jurisdictional provision.

The service contract exception is, I think, much broader than Michael suggests, because consignees are included in the "shipper" definition for service contracts. But much of that is really irrelevant here.

Assume that one accepts the underlying policy behind Michael's motion here, that one takes the position that our goal should be to eliminate the enforceability of forum selection clauses as broadly as possible. I recognize, obviously, that many people in the room share that goal. Many people in the room also oppose that goal. But even if we accept that as the proper policy, I would still oppose Michael's proposed amendment here.

The way the Rotterdam Rules are set up, article 66 sets the default rule, which gives the cargo interests the choice of the forum in which to litigate, notwithstanding any forum selection clause. And then article 67 creates a limited exception for volume contracts. Michael is particularly concerned about article 67(2), which addresses enforceability against third parties.

A number of provisions have to be satisfied before a forum selection clause will be enforced against a third party. What may turn out to be the most important in practice is that forum selection clauses will be enforceable against third parties only if the place designated is a country that has ratified the Rotterdam Rules. To the extent that a carrier wants to have its case decided at home, the carrier first has to persuade its own country to ratify the Rotterdam Rules.

There is also a notice provision. Even under the Rotterdam Rules, there will no longer be a situation in which the consignee will first discover about the forum selection clause after it is too late to do anything about it. A boilerplate clause in the bill of lading will no longer be binding on third parties, because the third party will not have been given "timely and adequate notice."

The most important exception, though, may be the fourth exception or the fourth qualification here. Michael has alluded to it. In the end, the question is left to national law. I interpret Michael's amendment here as suggesting that the United States should change its domestic law in order to prevent the enforcement of forum selection clauses against third parties unless they have expressly consented. If he means to say that we should renegotiate the Rotterdam Rules, that is really a non-starter. So I'm assuming he is trying to change domestic law here. If that is the goal, there is nothing inconsistent

with opting in to the jurisdiction chapter and, in addition, seeking a modification of domestic law along the lines that he proposes.

In my view, chapter 14 gives us 90 percent, even 95 percent, of what Michael is trying to obtain here. I think we should take that 90 or 95 percent, and then those who want to go on and get the last five or ten percent, go ahead and do that. There is nothing inconsistent between those two goals. My concern is that if we try to hold up the 90 or 95 percent unless we get the last five or ten percent in addition, we are subject to a very serious risk of losing one hundred percent—of not getting any of what this Association has gone on record in favor of supporting.

My recommendation is therefore to vote in favor of the original motion without the amendment, take the 90 to 95 percent of what we want, and then go ahead and try for the five or ten percent that many of us would like to get, as well. If we can get that last five or ten percent, then we will have it all. But in the meantime, let's at least get as much as we can, at least get our 90 to 95 percent and not risk that 90 to 95 percent in the hopes of getting the last five or ten, which may or may not be possible.

Thank you.

MR. MARWEDEL: I would like to call the question on Michael's motion to amend the original motion. So this is a vote on the amendment as proposed by Mike Cohen. All those in favor of the amendment raise you hands.

(A show of hands.)

MR. MARWEDEL: All opposed.

(A show of hands.)

MR. MARWEDEL: The Chair rules that the motion does not carry. Don.

MR. GREENMAN: We need to vote on the original motion.

MR. MARWEDEL: All right. Now I'm going to call the question on the original motion. All in favor of Don's original motion?

(A show of hands.)

MR. MARWEDEL: All right. Thank you. All opposed?

(No response.)

MR. MARWEDEL: The motion is carried. Don, bring your third motion.

MR. GREENMAN: The third resolution that I would like the Association to adopt on behalf of the Committee on Carriage of Goods is that; it be

> RESOLVED that The Maritime Law Association of the United States urges the United States of America to opt into Chapter 15 (Arbitration) of the United Nations Convention of Contracts for the International Carriage of Goods Wholly or Partly by Sea, which will probably be known as the Rotterdam Rules.

MR. MARWEDEL: Is there a second?

(The motion was seconded.)

MR. MARWEDEL: Discussion?

MR. COHEN: I move to amend the resolution because Chapter 15 dealing with arbitration is somewhat broader than Chapter 14. One problem with Chapters 14 and 15 has to do with volume contract bills of lading. I've lost that, so I give up on volume contract bills of lading.

But Chapter 15 also covers arbitration under charter party bills of lading. UNCITRAL provided that there cannot be any derogation at all from the Rotterdam Rules in charter party bills of lading on substantive provisions. Moreover, the Rules prohibit an exclusive choice of court agreement in charter party bills of lading. It is simply unenforceable. The only thing that can be the subject of derogation in charter party bills of lading is arbitration under Chapter 15. It is left up to local law whether, without the consent of the third party receivers, by inserting in the charter party bill of lading an arbitration clause, parties can be required to go abroad in order to recover on damage claims for cargo that is discharged in the U.S.

So it's a similar principle, only we're dealing here not with volume contracts, but with charter party bills of lading. Remember now, volume contracts you can derogate from, but charter party bills of lading, you can't derogate from them at all, except this one way, you can derogate from it for arbitration and you don't have to get the consent of the third-party receiver.

Therefore, I move to amend the resolution so that it would read:

> RESOLVED that The Maritime Law Association of the United States urges the United States of America to opt into Chapter 15 (Arbitration)

> of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which will probably be known as the Rotterdam Rules, provided that a third party claiming cargo loss or damage under a charter party bill of lading will not be subject to an exclusive foreign arbitration clause contained therein, without the third party's express consent to be bound by such derogation from the Rules, under the same terms and conditions described in Articles 80(5(b)and 80(6) of the Convention.

I make that motion and I ask for a second.

(A chorus of seconds.)

MR. MARWEDEL: Any further discussion?

MR. HOOPER: What Michael is urging basically is to change the law of the United States as it existed before *SKY REEFER*. The arbitration provision, Chapter 15, gives the consignee the same choice of places to arbitrate as Chapter 14 gives the consignee or the cargo interests, cargo claimant, to litigate. If you choose a place of arbitration in a bill of lading pursuant to Article 15, the plaintiff must arbitrate, but the plaintiff may choose any of those Article 66 places in which to arbitrate, such as the place of receipt, the first port of loading, the carrier's principal place of business, the final port of discharge, or the place of destination. No carrier is going to put such an arbitration clause in the bill of lading, I don't think, knowing that the cargo interests can choose the place to arbitrate.

But what Michael is complaining about is Article 76.2, which states that if a charter party—which is not governed by the Rules, of course—if a charter party has an arbitration clause, a bill of lading issued under that charter party may incorporate the charter party, including the arbitration clause, if it uses very specific terms, and bind the third-party holder of the charter party bill of lading to that place. I believe that's been the law of the United States for many years.

The only thing that I've seen litigated is whether the bill of lading is incorporated in the charter party clearly enough. And the Rotterdam Rules now would say how clear you must be, what you must say to incorporate that charter party into the bill of lading. I think this is a fair compromise, I think the industry wants it, it's all we could get in UNCITRAL, and I think it makes sense, and I urge that you vote against the motion to amend.

Thank you.

MR. MARWEDEL: I'm going to—yes? Jay Pare.

MR. PARE: I'm just a little bit confused, I guess, about where we're going to be going from here. I think we have had a clash of two great principles in dispute here. On the one hand you have those who say that cargo interests do not get a fair shake if they are forced to go abroad to litigate their dispute under a bill of lading to which they are deemed to have agreed under the law. You have that principle on the one hand, and on the other hand you have the principle which the carriers seek to urge, which is perfectly understandable on their part, which is they want so-called freedom of contract and certainty, that if they have a bill of lading that the arbitration will be in London, Hamburg or wherever, they know they are going to have that. These two principles are on a collision course with one another. You can't have both.

And so far the debate has been, on the international level, that we have gotten the most that we can get out of Chapters 14 and 15, and I accept that. And it seems that we have at least half a loaf. But what I'm not clear on is what the Association is going to be doing from here, because it seems to me that as I read Professor Sweeney's proposal, there should be enabling domestic legislation, and that seems to me to give us the opportunity to say, in domestic legislation, that these charter party bills of lading should be subject to the menu choice in the Rotterdam Rules.

I would quibble with one thing that Chet did say, and I had this debate with him before in e-mails, over the question of whether or not the pre-*SKY REEFER* law was that you could enforce a forum selection clause in the charter party bill of lading. I know Chet has written on that. I think he cited eight cases for that proposition. I responded to that at one point, and I said each of those cases did not involve a shipment to or from the United States, or for some other reason did not involve the Carriage of Goods by Sea Act. And there is at least one case in the Southern District which did not enforce a charter party bill of lading forum selection clause because of COGSA. So I think it is open for debate, as to what the pre-*SKY REEFER* law was.

But I'll just close in saying that it seems to me there is still a choice for the Association to make at the time that domestic legislation is sought as to whether or not it does want to now still insist on total *SKY REEFER* protection for charter party bills of lading.

Thank you.

MR. MARWEDEL: Thank you, Jay. I am going to call the question on the amendment to the original motion. All in favor of the amendment?

(A show of hands.)

MR. MARWEDEL: All opposed?

(A show of hands.)

MR. MARWEDEL: The Chair rules that the majority are opposed. We'll go back to the original resolution. Is there any further discussion? Vince DeOrchis.

MR. DeORCHIS: Thank you, Mr. President. I just want to make three relatively brief points.

The first is that, as you know, Chet and I were appointed to represent the MLA at the UNCITRAL discussions, and we did try to arrange for bills of lading issued under charter parties to be subject to the anti-*SKY REEFER* provisions. We lost, the U.S. lost on it. Mary Helen herself tried, with some difficulty, to convince other countries to adopt this. In particular, if I recall, Italy, Sweden, and Denmark all opposed it.

Secondly, I think when it comes to arbitration clauses that are incorporated into bills of lading, we're talking about a somewhat special situation from the viewpoint of the Europeans. What you have is a back to back situation where there's an arbitration clause between the owner and the charterer and then there is one between the charter and the cargo interests. The point of the incorporation of the arbitration clause is to provide a bridge between subsequent litigation that might arise. It's to allow for the famous maritime concursus, and the aim is to try to get all of the litigation that arises out of an incident aboard a vessel that has been chartered to take place at the same place and at the same time so as to avoid a disparity that might occur if you have the dispute between the owner and charterer resolved in one country, and the dispute between the charterer and the cargo owner in another place.

Thirdly, I think we have to remember that a number of disputes that arise under bills of lading that have an arbitration clause in them reflecting an underlying charter party are resolved right here in the United States. The Society of Maritime Arbitrators spends a significant amount of time on those disputes, and many of those disputes do not involve shipments that come to or from the United States.

Those are the three reasons I wish you would bear in mind when it comes to this proposal.

MR. MARWEDEL: Thank you, Vince. I am ready to call the question. All those in favor of the third resolution raise your hand.

(A show of hands.)

MR. MARWEDEL: All those opposed?

(A show of hands.)

MR. MARWEDEL: The Chair rules that it is carried. We have a short fourth resolution.

MR. GREENMAN:

> IT IS FURTHER RESOLVED that the President of The Maritime Law Association of the United States or his delegate is authorized to make known these resolutions to the Secretary of the State of the United States and such other parties or organizations as the President may consider to be desirable.

(A chorus of seconds.)

MR. MARWEDEL: All those in favor?

(A chorus of ayes.)

MR. MARWEDEL: Any opposed?

(No response.)

MR. MARWEDEL: Before we leave, just a couple of more things. I do want to thank Chet Hooper, Mike Sturley, Vince DeOrchis, George Chandler, who used to be involved in the group, for all of the hard work over the years. We know what time and effort you put in. Our Treasurer, of course, knows what it has cost. But you brought the ship home, and that's what counts.

I would also like to thank Mary Helen Carlson, who is here. She has worked very closely with us and is a good demonstration of how we can work well with the government.

At the end of the meeting when we adjourn I would like any retiring Chairs and Board members who are still here to come on up. We have some

Certificates of Appreciation we will give you. We didn't have them at the time you were recognized.

Ken, would you like to make a motion for us?

MR. VOLK: After a very stimulating and productive meeting, I move we adjourn.

(A chorus of seconds.)

MR. MARWEDEL: All in favor?

(A chorus of ayes.)

MR. MARWEDEL: The meeting is adjourned.

(Time noted: 12:57 o'clock P.M.)

NEWSLETTER OF THE COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE

Committee on Marine Insurance and General Average

Committee Chair
Jonathan S. Spencer
New York, New York

Editor: Gene B. George
Cleveland, Ohio

The following articles, case notes and comments are for informational purposes only, are not intended to be legal advice, and are not necessarily the views of the Maritime Law Association of the United States or the Committee on Marine Insurance and General Average.

PIRACY IN 2009
Jonathan S. Spencer

The phenomenon of piracy has persisted in some form or another even in modern times. Attacks against merchant vessels off Indonesia and Singapore in the 1980s, for example, prompted the formation in 1992 of the International Maritime Bureau's Piracy Reporting Centre (IMBPRC) in Kuala Lumpur.

However, piracy in that region took the form of occasional thefts of entire vessels and their cargoes or, more frequently, a brief attack on a vessel with the objective of stealing valuables from the ship's safe. The pattern of piracy that has developed more recently off the Horn of Africa has taken a different form, involving the seizing and detention of vessels and their cargoes to procure the payment of ransom.

The cost is huge. Some secrecy surrounds the quantum of the ransom payments but they are widely believed to be in the range of $1,000,000 to $2,000,000, or more, per event. The cost of assembling, transporting and delivering the ransom, with payment typically being demanded in used bank notes of small denominations, can easily approach half a million dollars. And for the shipowner, it is the tip of the iceberg, with the negotiation of ransom commonly taking 50–60 days, during which time the vessel is not earning freight. The crew is usually confined to the accommodation block and is able to perform only minimal, if any, maintenance so that, on release, the major machinery and a lot of ancillary equipment requires immediate repair, resulting in further delay to the vessel and her cargo before the voyage can be resumed.

The International Maritime Bureau's Piracy Reporting Centre recorded in its 2008 annual report that 111 of the 293 incidents of piracy and armed robbery against ships which took place last year occurred off the Somali coast. Nigeria ranked second in the world for hijackings—though some of these were politically-motivated whereas the Somali activity is purely for financial gain. The main difference between the East and West African pirate activities is that almost all the incidents in Nigeria are conducted within its territorial waters, therefore come within the jurisdiction of national authorities, whereas the incidents along the East coast of Africa and in the Gulf of Aden occur on the high seas.

Multinational naval forces have been assembled to respond to the threat in the Gulf of Aden, Somali Basin and Horn of Africa. These seemed initially to be effective—in January and February 2009 there were, respectively, zero and two attempted attacks off the east coast of Somalia. However, March 2009 then saw a spike, with fifteen reported attacks off Somalia, resulting in eight hijackings, a spike which has continued at the time of this writing in early April.

The pirates have been operating further and further afield, now avoiding the northern coast of Somalia and operating 400 or 500 miles off the eastern coast, and further south into the Indian Ocean—an attack on a bulk carrier was reported 900 nautical miles off the coat of Kenya. The area involved is therefore vast. The U.S. Fifth Fleet issued an alert to mariners on April 7th 2009 describing it in the following terms: "The scope and magnitude of problem cannot be understated. The area involved off the coast of Somalia and Kenya as well as the Gulf of Aden equals more than 1.1 million square miles (2.5 million square kilometers), roughly four times the size of Texas or the size of the Mediterranean and Red Seas combined. The length of the Somali coastline is roughly the same length as the entire Eastern Seaboard of the United States." This means that when an attack occurs far offshore, any prospect of intervention can often be several days away.

In 2008, according to IMBPRC statistics, 42 vessels were hijacked off Somalia, with 815 crew taken hostage. As at December 31st 2008, Somali pirates were holding 13 vessels for ransom and 242 crew hostage. It can readily be appreciated that the direct and indirect costs run into hundreds of millions of dollars. What are the implications for marine insurers?

In the first place, some have seized it as an opportunity. For example, kidnap and ransom insurance, a line of business that has existed for decades, is now being extended to vessels and their crews, although rates of premium

have increased substantially in the early months of 2009. Nevertheless, the April 9th 2009 issue of TradeWinds reported an Aon spokesperson as saying that the increase in pirate attacks means that shipowners could be paying $30,000 for $3m of K&R cover for seven days, a premium of about 1%; this might seem low in relation to the apparent exposure but the entire phenomenon must be viewed in the context of some 20,000 transits of the Gulf of Aden each year, the vast majority of them being completed without material incident.

It was also Aon who in December 2008 launched a new insurance policy for charterers, shipowners and cargo owners to cover loss of earnings from a ship being detained by pirates.

In the absence of special insurances—and even if there are special insurances, because claims on K&R policies can be complicated by an 'other insurances' exclusion—where does the payment of ransom and its attendant costs fall?

In the first place we must establish where coverage for piracy lies. Here, different insurance regimes have evolved in different markets. In London, for example, piracy has been treated as a marine risk in the standard hull & machinery forms since 1983 and in the all risks cargo policy. In standard AIMU forms, it is treated as a war risk. The London market has also announced moves to move piracy from the marine policies to the war risks cover. The distinction is quite important in hull insurance, because hull war risks traditionally has not carried a deductible, although that appears likely to change.

On the other hand, war risks underwriters charge an additional premium for each transit through what is considered a war zone at any given time. This enables the market to adjust its prices to more accurately reflect the current risk though makes budgeting difficult for vessel owners, because whereas rates of premium can be adjusted from day to day the freight to be earned for the voyage in question might have been fixed weeks before.

Some commentators have suggested that ransom be treated as Sue and Labor. However, Sue and Labor expenditure by definition is an expenditure incurred solely in respect of a single insured interest thus where a ship and cargo is seized it would technically be necessary for each interest—which might include not only those concerned in the vessel and its cargo but also owners of such other interests as shipping containers and time charterers' bunkers—to negotiate a separate ransom, for this to be recoverable under the respective interests' insurances as Sue and Labor.

There have also been suggestions that the P&I Clubs somehow have a dog in this fight, although for public consumption at least they have resolutely maintained the position that hijacking is an issue for the property underwriters. There have been a handful of cases where Clubs have contributed a small portion of a ransom, on the basis that they insured the lives of the crew and had benefit from their safe release, but it seems wholly insidious to ascribe a monetary value to the lives of seafarers for this purpose. The principle established in *The Bosworth (No. 3) (1962) I.L.R. 483*, that where salvors had their award enhanced by virtue of saving the lives of the crew, this cost nevertheless fell on the property insurers, seems equally appropriate here. By the same token the crews' lives, and their personal effects, have never been called on to contribute in General Average.

Surprisingly, given the general level of opposition to the institution, there has been a high degree of consensus that ransom properly forms the subject of General Average. For example, Chris Potts of Crump & Co.'s Hong Kong office in a paper dated March 11th 2009 called "When the Worst Happens: Recovering Piracy Losses" states that "In most piracy situations affecting cargo, the shipowners or their protection and indemnity insurers or hull underwriters will be obliged to negotiate and pay a ransom and related expenses. The shipowners will then endeavour to recover a contribution in general average from cargo interests after obtaining a general average bond or guarantee."

Speaking at the Connecticut Maritime Association in March this year, James Gosling of Holman Fenwick was reported in the March 30th issue of Business Insurance to have said ' "I think it's generally accepted by adjusters that ransom is a (general average) expense.' " The article goes on—"But Mr. Gosling also said in piracy cases he has handled, his firm asks for a voluntary contribution from the cargo insurer to avoid the need to declare general averages, and that many cargo underwriters have done so."

The idea of an informal settlement seems an appropriate response, thus avoiding the extra trappings of General Average. Under the 1994 York-Antwerp Rules, assuming payment of $1,500,000 in ransom, the General Average commission alone would be $30,000 and interest would accrue at a rate slightly in excess of $2,000/week from the date of payment until 90 days after the issue of the adjustment. Nevertheless insurers often are constrained from such an arrangement by the terms of their reinsurance contracts, which generally preclude extra-contractual settlements.

WK Webster put out a position paper on "General Average and Piracy" in January 2009 which is worth quoting in full, because it summarizes the major issues:

> WK Webster have been involved on behalf of cargo Insurers in a number of recent piracy cases where the ship owners have declared General Average (GA) and indicated that they would seek recovery of a share of any ransom payments made through GA proceedings. As yet, no such payments have been demanded or made and there is no legal precedent. However, the following aspects are common to all enquiries so far:
>
> [. . .] under the York-Antwerp rules, common law GA requires four key elements:
>
> - Peril
> - Extraordinary Loss/Expenditure
> - Voluntary incurring of such Loss/Expenditure
> - Common Benefit/Common Maritime Adventure
>
> Armed pirates on board the vessel without doubt constitute a peril.
>
> Ransom payments do not constitute expenditure reasonably contemplated in the fulfillment of the intended voyage—they are extraordinary.
>
> There is no legal duty or pre-existing (contractual) obligation to pay a ransom—it is voluntarily incurred.
>
> It allows release of ship & cargo so that the common maritime adventure may be fulfilled.
>
> It is for the common benefit.
>
> Also, albeit in passing, the standard textbook on GA (Lowndes & Rudolf) allows piracy as a GA casualty.
>
> Under Rule D of the York Antwerp rules, contesting a GA tends to be almost exclusively limited to demonstrating pre-existing unseaworthiness before and at commencement of the voyage. It is difficult

> to imagine a circumstance where that defence would be appropriate in cases of piracy.
>
> Concurrently, there have been questions regarding the legality of paying ransoms under FSA-type regulations, Proceeds of Crime legislation, etc. These do not hold water. Not least, the Insurance Market offers K & R policies.
>
> Consequently we believe that seeking to dispute GA in principle will fail.
>
> What is left open, however, is the difficulty shipowners will have in proving their losses—the total amount (it's in cash these days), whether they actually paid it out (or all of it), what were the ancillary expenses, etc. There remains scope for negotiation on quantum.

Case law is quite sparse. The most-cited English case is *Hicks v. Palington (1590) Moore's (Q.B.) R 297*, where cargo given to pirates by way of ransom was treated as a General Average sacrifice, an example of voluntary sacrifice cited with approval by the United States Supreme Court in *Ralli v. Troop (1894) 157 US 386*.

An interesting case was reported in the New York Times of March 20th 1875, the decision on March 18th of that year by the Court of Commissioners of the Alabama Claims in the case of *Moses Hyneman v. the United States*, involving an action arising from a ransom bond exacted by the rebel cruiser "Alabama" from the master of the steamship "Ariel", bound with cargo from New York to San Francisco.

> On the arrival of the goods at San Francisco, the owners of the steamship line, regarding the case as one of the [*sic*] general average, placed it in the charge of professional adjusters. [. . .] They apportioned the respective amounts which the vessel, the freight, and the cargo were liable to contribute if payment of the bond were fully exacted, and they also apportioned the expense of the adjustment among these different interests." With the cessation of hostilities, the bond was not enforced, but the Commissioners, who had been asked to adjudicate over a sum of gold paid as security by the hapless Hyneman, determined that the ransom, if paid, would have been General Average. "It may be freely admitted that where a ship is seized and detained by superior force a

> sum of money paid to ransom her constitutes a case of General Average." (Emerigion on Insurance, 485; Parsons on Maritime Law, 299; Clarkson vs. Phoenix Insurance Company, 9 of Johnson.).

A thorough review under the title "Piracy, Ransom, and General Average Risk" was published by Ik Wei Chong and Derek Hodgson of Clyde & Co. in that firm's December 2008 Shipping Update, and is worthy of reproduction here:

> The 'General Average Contribution' scheme is a system long entrenched within the Maritime industry. "There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in the common maritime adventure." (York-Antwerp Rules, Rule A.1)
>
> Traditionally, it has been accepted that any loss suffered as a result of a ransom paid due to piracy, will be covered under a General Average contribution. *Barnard v. Adams* (51 U.S 270 [1850]) saw the Court enunciate that "the ransom from pirates is to be contributed for; the loss is inevitable, and indeed actual."
>
> Similarly, in *Hicks v. Palington* (1590 Moore's QB R 297) the Court held that cargo given to Pirates by way of ransom was a sacrifice which could properly be the subject for General Average contribution. The rationale under English law for such practice is premised on the idea that any reasonable payment made to hijackers to secure the release of the ship and cargo, represents a general average sacrifice; a sacrifice which the ship-owners are entitled to recover contributions from cargo and other interests (*Royal Boskalis Westminster NV v. Mountain* [1999] QB 674).
>
> Germany also provides useful guidance in that the German Commercial Code provides: "when in a case of arrest of the ship by enemies of pirates, ship and cargo are ransomed, whatever is paid as ransom forms part of general average together with the expenses incurred by maintenance and the ransom of hostages." (S 706.6)
>
> And as further evidence of this practice to compensate for ransom monies, the United States Supreme Court in *Peters v. The Warren Insurance Company* (39 U.S. 99 [1840]) deemed "the ransom a

necessary means of deliverance from a peril insured against, and acting directly upon the property."

The issue becomes less lucid when the definition of 'piracy' is questioned. Some consider piracy to be a 'war risk'. For example, the Norwegian Marine Insurance Plan 1996 (2007) does not make any distinction between 'piracy' and 'war' and therefore losses related to piracy are covered as a 'war risk.'

Other parties however, traditionally term piracy as a 'marine risk'. Complications thus arise as 'terrorism' would be considered a 'war risk' so potentially the pirate could be classed as a terrorist. Therefore the characterization of the 'piracy attack' is seemingly important, yet clearly difficult in practice.

(For further see: Terrorism goes to Sea (available at http://www.iags.org/fa2004.html)

"Payment of ransom has not been illegal per se under English law since the repeal of the 1782 Ransom Act and early cases support the view that payment of a ransom in cash or kind to obtain the release of ship and cargo is a General Average matter. A distinction may also exist between the initial payment of a ransom and the subsequent payment or contribution to the resulting General Average. The question of legality may be more difficult if the captors are an overtly political or terrorist organization, given the extensive modern legislation relating to providing financial support for such entities. Where the payment of a ransom is illegal in the jurisdiction(s) of the parties the adventure it is difficult to see how any right of contribution could be enforced." (Lowndes and Rudolf (General Average and York Antwerp Rules 13th Edition 2008) at A.68)

To conclude in short, it seems accepted that the payment for a ransom in a piracy case will be included in a 'General Average Contribution'. Given the sharp increase in piracy attacks in the recent decade, and the suggested links with terrorism post-September 11th, it is likely that the definition and characteristics of piracy are going to be subjected to further scrutiny in future years.

The preponderance of commentary thus supports the precept that ransom is claimable as General Average. The principle is borne out by a study of the ancient texts, specifics of which are beyond the scope of this paper but,

in summary, the Digest of Justinian, Rhodian Law and Consolado del Mare, together spanning the 6th through 15th centuries AD, all appear to endorse the payment of ransom as General Average, provided it was done voluntarily and with the agreement of those merchants available to be consulted.

What we are left to grapple with is, which policy pays? It is a well-founded principle that, to be recoverable on the policy, Sue and Labor charges or General Average expenditure must be incurred in the avoidance of a peril insured against. Under the current, albeit obsolescent, English scheme of hull and cargo insurance, where piracy is a marine peril, the distinction is not too fine. However, under the American scheme of things, where marine perils are on the hull policy and piracy is on the war policy, what peril insured against is being avoided?

The argument can go both ways; damage done to the ship by pirates is, under the American scheme of things, claimable on the war policy. If, therefore, the pirates say that they will blow up the ship if the Owner does not pay ransom, and ransom is then paid, the proportion attaching to the ship clearly is claimable on the hull war risks policy, having demonstrably been incurred to avert a peril insured under that policy.

The reality, however, is that the demand for ransom and the ensuing negotiation is not, typically, accompanied by such an overt threat. It is more of a waiting game. The pirates know that pay day eventually will arrive and the timing is determined at the intersection of the pirates' avarice and the owners' patience. Meanwhile, the ship is not being maintained, a proper watch is not being kept, the anchors and chains are not being tended—so what is the real peril? Arguably, it is that a storm could blow up and drive the ship ashore before she could start her neglected engines (Somali pirates customarily directing their captives to anchorages off hitherto unheard of places like Eyl or Garacad, reasonably convenient to shore and home) or that the ship is unable to avoid being struck by, or even timely spot, another vessel bearing down on her. These are marine perils and are not they, truly, the perils that are being averted by the payment of ransom?

Finally, no discussion of the payment of ransom would be complete without some analysis of the legality of it. Bruce Paulsen of Seward & Kissel, who advised the owners of the only US-controlled vessel thus far seized for ransom, has provided the following commentary:

> The basic provision of the FCPA [Foreign Corrupt Practices Act] defining outlawed conduct is found at 15 U.S.C. § 78dd. This statu-

tory provision expressly makes it illegal for any domestic concern, or for any officer, director, employee, or agent of such domestic concern, to make payments intended to undermine the rule of law in a foreign country. It is clear from the text of the statute that Congress intended to prevent US firms from engaging in acts intended to influence the acts or decisions of foreign officials, political parties, etc. Nowhere in the FCPA does it refer to gifts or payments to private persons except in the context of those to be shared with foreign government officials, foreign parties or officials thereof and only if such individuals are expected to affect or influence any act or decision of such government or instrumentality in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person. Given that the pirate gangs that seize vessels appear to be freelancers operating wholly outside the law of Somalia, the ransom funds do not appear to be intended to influence or undermine the Somali government's actions or policies and the FCPA should not apply to ransom payments to such pirates.

In addition, OFAC [US Treasury Office of Foreign Assets Control] administers a series of regulations (the "OFAC Regulations") that impose economic sanctions to further U.S. foreign policy and national security objectives against hostile targets. A close reading of the OFAC Regulations makes it evident that the sanctions are targeted at certain foreign governments, political parties, terrorist groups and numerous individuals. The critical step for any US entity is to ensure that any ransom proceeds that are paid do not go to any person, organization or foreign government on OFAC's list of Specially Designated Nationals and Blocked Persons (the "SDN List"). To date, there has been no information that would confirm that pirates who have been paid ransom are on the SDN List.

With respect to anti-money laundering laws, the principal federal statute detailing the rights and obligations of individuals, banks and financial institutions with respect to money laundering is the Bank Secrecy Act ("BSA") of 1970. The implementing regulations of the BSA are found at 12 CFR 21.21 and 31 CFR 103.14-23. Most pertinent is 31 CFR 103.23, which applies to all individuals who physically transport monetary instruments of more than $10,000 at one time from a place in the United States to or through a place outside the United States. A person is deemed to have caused such transportation if s/he aids, abets, counsels, commands, procures or requests

it to be done by a financial institution or any other person. If funds originating outside the US are used to pay ransom, federal anti-money laundering laws are not implicated."

We suspect that this topic is going to be with us for a while and will welcome any comments and feedback, for inclusion in future newsletters.

RECENT CASES OF INTEREST

Stephen V. Rible
Joseph G. Grasso
Andrew C. Wilson

Washington Court Rejects Ensuing Loss Argument With Respect to Yacht Policy Exclusion For Lack of Due Diligence and Wear and Tear

Shepard v. Foremost Ins. Co., 2009 U.S. Dist. LEXIS 21110 (W.D. Wash 2009)

Mr. Shepard was operating his 1993 Four Winns cabin cruiser in Lake Union, Seattle, Washington when he heard a loud noise, opened up the engine hatch and saw that water was coming into the boat. The U.S. Coast Guard arrived, pumped the water from the boat, and towed the vessel to safety. Experts for the owner and the insurer conducted inspections of the vessel to determine the cause of the failure. The court found that the efficient proximate cause of this loss was the lack of reasonable and proper maintenance, as well as the gradual build up of rust scale, which led to the failure of the exhaust cooling system to function properly and caused the rubber boot to rupture and allow water into the boat.

The Foremost Family Boater's Insurance Policy contained exclusions for loss directly or indirectly caused by an excluded event. A "Loss" was considered an excluded event if the event directly and solely resulted in loss; or initiated a sequence of events that results in loss, regardless of the nature of any intermediate or final event in that sequence. There were express exclusions for (a) lack of reasonable care or due diligence in the maintenance of the watercraft and for (b) wear and tear.

The owner argued that the water caused the damage to the boat, and as an ensuing loss, there should be coverage under the policy. The court held: (1) that Washington law applied to the interpretation and construction of the policy; (2) that the language of the policy was clear and unambiguous; (3) that

merely because certain words are undefined, does not mean that they are vague or ambiguous; and (4) that undefined terms should be accorded the meaning found in a standard English dictionary. The court further held that Washington State law applied to the issue of proximate causation—it is the efficient or predominant cause which sets into motion the chain of events producing the loss which is regarded as the proximate cause, not necessarily the last act in a chain of events. As the loss arose from a single incident in which damage was caused by an unbroken sequence of events, there is no ensuing loss or resulting loss at issue in the case.

The Eroding Attorney Client and Work Product Privileges in Insurance Coverage Litigation

Navigators Management Co. v. St. Paul Fire and Marine Ins., 2009 U.S. Dist. LEXIS 14021 (E.D. Missouri 2009)

This case involved an insurance coverage dispute that arose after a collision and resulting secondary allisions caused by the towboat ANNE HOLLY striking the Eads Bridge at St. Louis, Missouri in 1998. American Milling (AM) owned the ANNE HOLLY. The captain of the towboat and crew were employees of Winterville Marine. As a result of this incident, the President Riverboat Casino and its patrons sustained substantial damages and injuries.

AM and others filed petitions for limitation of liability. AM was successful in limiting liability and the limitation fund was apportioned amongst the claimants. However, Winterville and Captain Johnson were denied limitation and $7 million in damages was awarded to President Riverboat Casino.

The plaintiffs in this action, Navigators Management and American Home (collectively, Navigators) were underwriters of a bumbershoot policy held by American Milling (AM) that provides coverage to AM for liability in excess of its primary coverage. Navigators commenced a declaratory judgment action seeking a declaration that Winterville and Captain Johnson were not entitled to coverage under the bumbershoot policy. President Riverboat Casino and its insurers (St. Paul, et al.) intervened in the declaratory judgment action and thereafter, Captain Johnson executed an assignment to President Casino and St. Paul conveying whatever rights he had against AM and Navigators, in return for a covenant not to execute against him. President Casino and St. Paul were thereafter substituted for Captain Johnson in the declaratory judgment action.

St. Paul on motion then sought to compel the production of documents which Navigators claimed were protected by the attorney client privilege and

the work product doctrine. During the limitation proceeding, the attorneys representing AM were passing their reports to the insurer, Navigators, through the broker—the Crane Agency. Navigators claimed that the attorney client privilege was not waived by sending the reports to Navigators because these disclosures to a "third-party" were protected under the common interest or joint defense doctrine. The court held, however, that there was only a common interest with respect to the limitation proceeding, and not the insurance coverage dispute. Therefore, the court ordered disclosure.

St. Paul also demanded the underwriting and claims files of Navigators. Many of these files involved communications sent to the Crane Agency. The court held that these documents were not protected under the attorney work product doctrine because these communications were not in anticipation of litigation, but were in the ordinary course of business. The Court found that any communication between a broker for the insured and the insurer, after an accident, regardless of the threat of litigation (whether it concern the underlying limitation action or questions of insurance coverage) is not covered under the work product doctrine because it is deemed part of the everyday course of business. The court ordered production.

A Collision Coupled with a P&I Insurer's Declaratory Judgment Action Raises Multiple Insurance Coverage Issues

Gabarick v. Laurin Maritime, 2009 U.S. Dist. LEXIS 14414 (E.D. La. 2009)

On July 23, 2008, the M/V TINTOMARA and the Barge DM-932, which was being towed by the M/V MEL OLIVER, collided on the Mississippi River, causing oil to spill into the river. As a result, several lawsuits were filed against ACL, the owner of the barge, DRD Towing Company, Inc. ("DRD"), the operator of the towboat, and Whitefin Shipping Co., Ltd., Laurin Maritime (America), Inc., Laurin Maritime AB and Anglo-Atlantic Steamship Limited (collectively "the TINTOMARA interests"), the owners of the M/V TINTOMARA. The parties filed four limitation proceedings with respect to these vessels.

IINA issued an insurance policy to DRD that was in effect at the time of the collision. In response to multiple demands on the Protection and Indemnity (P&I) section of its policy, IINA filed an interpleader complaint, naming as defendants DRD, ACL, law firms retained by DRD and another entity on behalf of DRD, and several plaintiffs who had filed class actions against DRD and ACL for economic and compensatory damages. In connection with the interpleader action, IINA deposited its P&I policy limits, $1 million less the $15,000 deductible, into the Court's registry.

IINA's complaint also requested that the court declare, pursuant to 28 U.S.C. §2201, whether it has a duty to defend or indemnify DRD and ACL. In particular, IINA requested that the Court declare: (1) that the barge was not a covered vessel under the policy, (2) that any losses due to a breach of the warranty of seaworthiness or a want of due diligence by the insureds are not covered under the policy, (3) that claims against ACL or DRD for punitive or exemplary damages were not covered under the policy, and (4) that many claims against ACL and DRD were excluded from coverage under the American Institute Pollution Exclusion Clause and Buy Back Endorsement A of the Policy. IINA also requested that, in the event the Court finds that the IINA policy covers claims by or against DRD or ACL, the Court declare that its liability could not exceed the $985,000 P&I policy limits.

The court held that IINA's complaint for declaratory relief indicated that a controversy exists. By asking the court to declare that the barge is not covered, that losses resulting from a breach of the warranty of seaworthiness or want of due diligence are not recoverable, that any claims against ACL or DRD for punitive damages are not covered and that many claims are excluded by the American Institute Pollution Exclusion Clause and Buy Back Endorsement A, IINA is in effect denying coverage to ACL. ACL's counterclaim for indemnity creates a controversy, as it is an attempt to redress the threat of excluded coverage. Specifically, IINA asked the Court to declare that many claims against ACL and DRD are excluded from coverage under the American Institute Pollution Exclusion Clause and Buy Back Endorsement A of the Policy, which provides that the IINA policy will not indemnify against any amounts paid nor insure against any liability "with respect to any loss . . . incurred by or imposed on the Assured, directly or indirectly, in consequence of, or with respect to, the actual or potential discharge, emission, spillage or leakage upon or into the seas . . . of oil. . . ."

ACL asserted a counterclaim alleging that ACL incurred substantial costs in removing the barge's wreckage. The court found that the barge, as a vessel used in connection with DRD's work but not owned by DRD, was a covered vessel under the policy pursuant to the policy's Non-Owned Vessels Clause. The court explained, however, that its ruling did not establish that ACL was entitled to recover removal costs from IINA because the Non-Owned Vessels Clause deems the barge an insured vessel "but only with respect to the liability of the Insured arising out of or in connection with such non-owned vessels." As such, IINA's responsibility to pay removal costs is contingent on a finding of DRD's liability "arising out of or in connection" with the barge.

The court also found that IINA's policy did not obligate IINA to defend ACL, only to reimburse for defense costs incurred. Notwithstanding IINA's admission that ACL hds a "valid claim for reimbursement," IINA had not reimbursed ACL for its incurred costs and IINA was seeking to cap ACL's reimbursement, arguing that claims for defense costs wee subject to IINA's $985,000 policy limits. Moreover, IINA had acknowledged that several parties might be entitled to its limited policy proceeds, and instead of reimbursing ACL directly for costs incurred by ACL, IINA deposited its policy limits into the Court's registry to be allocated among the multiple, competing claimants. ACL filed its counterclaim in response to IINA's interpleader action and deposit of policy proceeds, alleging that it had incurred $250,000 in defense costs and that it continuds to incur costs. Although there is no dispute as to whether ACL was entitled to reimbursement of defense costs, a controversy did exist, particularly with respect to the amount to which ACL was entitled and whether an amount greater than the policy limits could be recovered by ACL against IINA.

ACL also stated in its counterclaim that IINA failed to post security in DRD's limitation action for the M/V MEL OLIVER. ACL's counterclaim alleged that ACL was an additional insured on DRD's policy, that it had a right to benefits under DRD's policy, and that IINA's failure to post security in DRD's limitation action compelled ACL to file a separate limitation action on behalf of the M/V MEL OLIVER. These statements alleged both a duty owed to ACL as an additional insured on DRD's policy and an injury resulting from an alleged breach of the policy. Furthermore, ACL appeared to seek defense costs incurred in initiating a separate limitation action. ACL's insurer posted security in the form of a letter of undertaking in the amount of $780,000.

Finally, the Court did not determine that defense costs were subject to IINA's policy limits. In the event that the Court finds that defense costs fall outside the policy limits, ACL may have a right to relief against IINA, notwithstanding the demands of other claimants. In such case, ACL may be able to obtain its requested relief without having to prevail against other claimants in the interpleader action.

Expected or Intended and the *Youell* Decision

ZRZ Realty Co. v. Beneficial Fire and Cas. Co., 201 P. 3d 912 (Court of Appeals of Oregon 2009)

This insurance coverage dispute involved environmental contamination that resulted from plaintiffs' dismantling of navy and merchant marine vessels at a site along the Willamette River. Plaintiff ZRZ Realty owned the site.

In 1919, Zidell established a scrap metal business at Moody Avenue on the bank of the Willamette River. After World War II, Zidell began acquiring decommissioned navy and merchant marine ships, towing them up the Columbia and Willamette Rivers to the Moody Avenue site, and dismantling them. Between 1947 and 1978, Zidell dismantled upward of 200 ships and, at the height of its business, processed 2,000 to 3,000 tons of steel each day.

The scrapping operation was, by all accounts, messy business. Various metals, petroleum products, tributyltin, polychlorinated biphenyl (PCB), asbestos, and other contaminants were present on the ships. For instance, on ships built prior to 1960, nearly every surface was covered in lead-based, anticorrosive paint. The typical Liberty ship that was dismantled at the Moody Avenue site contained approximately 80 tons of dried paint; the typical Victory ship contained approximately 100 tons of dried paint. PCB was present in paint, hydraulic oil, fluorescent light fixtures, electric cables, transformers, wires, and gaskets on ships, and the scrapping of a single C-4 vessel could generate 75,000 pounds of PCB-contaminated material. As vessels were cut up piece by piece and moved in and out of the water, a number of those hazardous substances entered the Willamette River and the soil and groundwater at and around the Moody Avenue site. Additional contamination resulted from fires, spills, and barge-building activities that occurred at the site over the years.

Eventually, DEQ became concerned about environmental contamination in sediments at the Moody Avenue site and, in May 1994, issued a "potentially responsible party" notice to Zidell. DEQ demanded that Zidell investigate and clean up certain damaged property, including the groundwater, Willamette River, sediments, and subsurface soil contamination at and around the Moody Avenue site. Zidell undertook that investigation as well as various efforts at remediation. In July 1994, Zidell sent a letter to its insurers regarding the potentially responsible party notice that Zidell had received from DEQ. In response, the insurers denied coverage. Zidell subsequently brought this action seeking coverage for existing and future environmental cleanup costs at the Moody Avenue site.

The trial court ruled that the insurers were obligated to pay Zidell's costs of defense and determined how future coverage would be allocated under various policies. The trial court then entered judgment awarding attorney fees to Zidell in excess of $1.3 million, and declaring that the insurers were obligated to pay Zidell's future defense costs in responding to a claim by the Department of Environmental Quality (DEQ).

The insurers appealed the judgment, asserting that the trial court had incorrectly placed the burden of proof on the insurers. The trial court found

that each of the policies at issue contained either an express or implied requirement that the harm be unexpected and unintended. The court, however, placed the burden on the insurers to prove that the environmental contamination was expected or intended under all of the policies and rejected the argument that Zidell, as the plaintiff on the declaratory judgment claim, had the burden of proving its affirmative allegations. On appeal, the Court of Appeals concluded that, on some of the policies, the trial court erred in allocating the burden of proof with respect to whether the environmental contamination was "expected and intended" by Zidell and that the case must therefore be remanded.

The insurers also petitioned the Court of Appeals to challenge the trial court's conclusion that two bumbershoot policies provided coverage for losses that Zidell expected but did not intend. The Court of Appeals held that the bumbershoot policies are marine insurance policies and are therefore governed by established, controlling federal law. The court found that a controlling federal rule excludes marine insurance coverage for expected but unintended losses. The conclusion was based on the court's discussion of marine insurance coverage in *Youell v. Exxon Corp.*, 48 F.3d 105, 110 (2d Cir. 1995), vac'd on other grounds, 516 U.S. 801, 116 S.Ct. 43, 133 L.Ed.2d 9 (1995), adhered to on remand, 74 F.3d 373 (2d Cir. 1996), cert. den., 517 U.S. 1251, 116 S.Ct. 2514, 135 L.Ed.2d 203 (1996). The court explained that the

> question presented to us—whether a principle of admiralty law precludes recovery for expected but unintended loss—strikes us as substantively similar to the issue of first impression identified but not decided in *Youell*. Expected but unintended losses are akin to recklessly caused losses; the insured expects that some loss is *highly probable to result from his or her intentional conduct, but the insured proceeds to act in the face of that expectation of harm*. For that reason, we conclude that there is no established and controlling rule of admiralty law that excludes marine insurance coverage for expected but unintended damage.

In its petition to the Court of Appeals for reconsideration of an earlier Court of Appeals opinion, the insurers argued that the Court of Appeals' analysis did not take into account the trial court's definition of "expected" damage, which neither the insurers nor Zidell challenged on appeal. Before trial, in deciding Zidell's motion for summary judgment, the trial court ruled:

> A person ***intends*** a result when they act for the purpose of accomplishing that result. * * *.

> A person ***expects*** a result if they act with awareness that the result is substantially certain to follow. * * *

The insurers contended that the Court of Appeals' understanding of *Youell*, in the earlier opinion, "does not account for the trial court's determination of what constitutes an 'expected' loss in this case." The Court of Appeals stated:

> London [the insurers] is correct in that regard; our opinion did not account for the trial court's definition of the term "expected." As we observed in our original opinion, *Youell* explained the concept of recklessness as falling "somewhere between intent to do harm, which * * * *includes proceeding with knowledge that the harm is substantially certain to occur*, and the mere unreasonable risk of harm to another involved in ordinary negligence" 222 Ore App at 483 (quoting *Youell,* 48 F.3d at 111) (emphasis added). That description, London points out in its petition for reconsideration, comports with Prosser's explanation of intent
>
> > The three most basic elements of this most common usage of "intent" are that (1) it is a state of mind (2) about consequences of an act (or omission) and not about the act itself, and (3) it extends not only to having in the mind a purpose (or desire) to bring about given consequences *but also to having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act.*
> >
> > W. Page Keeton, *Prosser and Keeton on the Law of Torts* § 34, at 212 (5th ed. 1984). Thus, London argues, "Prosser's (and *Youell's*) "extended" understanding of "intent" is plainly the trial court's "intended *and* expected." An "intended" act, the trial court held, is a purposeful act, while an "expected" act is one done "with awareness that the result is substantially certain to follow."

The Court of Appeals agreed with the insurers that the trial court's definition of the term "expected" appeared to refer to one of the commonly understood permutations of "intent"—that is, an act undertaken with knowledge that the result is substantially certain to occur. The Court of Appeals stated:

> That is not how we meant to use the term "expected". . . . Rather, we used the term "expected" to mean something *less than* the commonly understood definition of "intent"—that is, we understood

> "expected" to refer to a degree of awareness *less than* a "substantial certainty" that damage would occur. (using the phrase "highly probable" rather than "substantial certainty" in describing expected harm).
>
> . . .
>
> [N]othing in this opinion is intended to preclude London or Zidell from arguing about the legal effect of the trial court's earlier definition of "expect" or "intends, or to preclude London from arguing that, in light of those definitions, the bumbershoots do not cover damages that Zidell knew were "substantially certain" to occur.

Coverage Action Dismissed for Inconvenient Forum

Cavlam Business Ltd. v. Certain Underwriters at Lloyd's, (SDNY, March 13, 2009)

This case involved an insurance policy underwritten by certain underwriters at Lloyd's of London, covering the yacht AMIRA, which sank in Venezuela in December 2004. The insured owners were a French citizen permanently residing in the Bahamas, and a British Virgin Islands shell corporation. The policy had been placed in London through a broker in Maryland.

After the sinking, underwriters declined the claim on the basis that the sinking was not caused by an insured peril, and that the insured had overstated the value of the yacht. The underwriters commenced proceedings in the London High Court in May, 2006, seeking a declaration that the loss was not covered. In March, 2008, the insureds commenced this action.

Underwriters moved to dismiss on three grounds: forum non conveniens; the existence of a forum selection clause in the policy; and international comity. The court granted underwriters' motion based on forum non conveniens, thereby finding it unnecessary to address the two latter grounds. The court focused on the Second Circuit's decision in *Iragorri v. United Tech Corp.*, which set forth a three-step framework for resolving a motion to dismiss based on forum non conveniens, and the court essentially found in favor of underwriters on all three parts of the framework:

1. Degree of deference to be afforded to the plaintiff's choice of forum. This was diminished in this case, as the plaintiff was a non-resident of the United States.

2. Whether an adequate alternative forum exists. The court felt that London met this requirement.

3. Balancing of public and private convenience and interest factors. The court found that this weighed slightly in favor of dismissal, as the vast majority of witnesses and evidence were outside the United States, and New York had no contact with the dispute.

Thus, the court dismissed the case in favor of the parallel proceedings pending in London.

Watercraft Exclusion in CGL Policy Applied

First Specialty Insurance Corporation v. American Home Insurance Co., Case No. 08-1244 (1st Cir., February 27, 2009)

The Court of Appeals affirmed a decision of the USDC for the District of Maine. In the lower court a CGL carrier argued that the watercraft exclusion in its policy precluded coverage for claims arising out of the grounding of a 150 foot barge while in tow of a 25 foot tug. Some of the claimants argued that because there was an exception in the policy for vessels under 26 feet in length, and because the tug was the cause of the casualty, there should be coverage. The district court held that it was the grounding of the barge that resulted in the losses, and therefore the policy exclusion applied.

The Court of Appeals saw the case as presenting two questions: (1) whether the watercraft exclusion applies to a barge being pulled by a tug and (2) whether Maine law would bar all recovery if the barge is excluded, even though the tug is not excluded. It upheld the lower court's grant of summary judgment barring all recovery.

The policy excluded coverage for bodily injury or property damage arising out of the ownership, maintenance, use or entrustment to others of, among other things, any "watercraft" owned or operated by, or loaned to any insured, but further provided:

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge.

The tug was 25.5′ long, and undisputedly not excluded. The 150′ barge served as a floating platform for marine construction projects, traveling

"through the water to arrive where it was needed." It had no means of self-propulsion or steering and no crew, and was not U.S. Coast Guard inspected. Neither the tug nor the barge ferried persons or property for a charge.

The Court of Appeals reasoned that because the policy was a commercial general liability policy, and the case came before it under diversity, not maritime, jurisdiction, it should apply Maine law to resolve the issues on appeal.

Under Maine law, whether an insurance contract is ambiguous is a question of law for the court. Unambiguous contract language must be interpreted according to its plain and commonly accepted meaning. Determining whether an insurance contract is ambiguous requires an evaluation of the instrument as a whole. It is to be construed in accordance with the intentions of the parties, ascertained from an examination of the whole instrument.

Applying these principles, the Court of Appeals agreed with the district court that the barge, "which is a vessel for use in the water, and which moved across the water to its destination, was a watercraft." Further, it was being "operated" by the insured, in that it was being towed at the time of the casualty.

Thus, the barge was excluded from coverage, but should there still be some recovery for any damages caused by operation of the tugboat? The Court of Appeals, finding that the casualty "arose out of" the operation of the barge, concluded there should not be coverage:

> The exclusion provided that insurance does not apply to bodily injury or property damage caused by an occurrence arising from the operation of a watercraft.
>
> It is true that the exclusion does not apply to certain watercraft, including the [tug] Seawind II. . . . [However] [s]imply because accidents arising from the use of the Seawind II are not excluded does not mean that any accident involving the Seawind II is automatically covered. Rather, if such an accident also arose from the use of the [barge] DS64, it would not be covered.

The accident would not have occurred but for the presence of the barge, an excluded watercraft, so there could be no coverage for the damage that "arose out of the joint operation" of the tug and barge.

[15552]

Breach of Captain Warranty Bars Recovery by Tug Owner and Mortgagee

Northern AssuranceCompany of America v. Rathbum, 2008 U.S. Dist. LEXIS 56478 (D. Conn. 2008).

In a declaratory judgment action, the district court granted the plaintiff insurer's motion for summary judgment, holding that the terms of its policy covering the owner of a commercial fishing vessel and naming its mortgagee as loss payee were violated by the owner's breach of the "captain warranty" provision. The clause provided that the assured "shall disclose" the names of all captains operating the boat as of the effective date of the policy, as well as provide information as to any additional or replacement captains, including their "experience, qualifications and general reputation within the industry as soon as possible." The assured also agreed to exercise due diligence in hiring or replacing captains. The policy would also be void if there was "any change of management or charter of the vessel without the previous consent in writing" of the insurer.

The boat owner, without notifying the insurer or providing the required information, hired a new captain. Under his command, the boat ran aground and sank.

The insurer's action claimed that the boat owner could not recover under the policy because of his breach of the captain warranty, and that the mortgagee/loss payee also could not recover because it had no greater rights than the boat owner.

The insurer moved for summary judgment on its claims against the mortgagee. The district court, after reciting the choice-of-law criteria set forth in *Advani Enterprises, Inc. v. Underwriters at Lloyds*, 140 F. 3d 157, 162 (2d Cir. 1998), agreed with the parties that Connecticut law should apply because the owner obtained the policy in Connecticut and the boat was docked there.

Finding no Connecticut law on captain warranties, the court cited Second Circuit authority to the effect that warranties in marine insurance contracts must be strictly complied with, even if they are collateral to the primary risk that is the subject of the contract. Any breach bars recovery, even though a loss would have happened had the warranty been carried out to the letter.

Here, the change of captain constituted a change in management of the vessel, which would have entitled the insurer to cancel its coverage had it

been informed, which it was not for a period of over five months before the vessel grounded and sank.

The policy was void by its express terms because of the change of captain. Pursuant to the "rule of strict compliance" the vessel owner would not be able to recover under the policy, and since the policy did not grant any greater rights to the mortgagee, it was also barred from recovering. Rejecting the mortgagee's argument, the court found that the language of the captain warranty unambiguously required the owner to inform the insurer when he hired a new captain, which he did not do.

The court also rejected the mortgagee's argument, made without any citation of authority, that the insurer must show that it was prejudiced by the absence of notice, saying that the "rule of strict compliance . . . does not require proof of prejudice."

Excess Insurer Recovers From Primary Insurer for Breach of Antisubrogation Doctrine

Federal Insurance Company v. North American Specialty Assurance Company, Index No. 603926105 (Supreme Ct. of N.Y., Cty. of N.Y., Commercial Div., December 15, 2008)

Plaintiff Federal Insurance, the excess insurer for Galaxy Contracting Corp. in another action, alleged that the defendants (collectively "CUIC"), Galaxy's primary insurers in that action, acted in bad faith by manipulating the action to enrich the primary insurer at Federal's expense. In so doing, CUIC allegedly violated the antisubrogation rule, the purpose of which is to prevent an insurer from acting against the interests of its insured.

Galaxy, the contractor on a construction project, purchased policies from CUIC providing primary liability coverage for itself and the owners of the site in the amount of $1 million each, and a $10 million excess policy for itself from Federal. An employee of a subcontractor who was injured on the site sued Galaxy and the owners. Galaxy initially assigned the defense of both to the same law firm, then later appointed separate counsel for Galaxy. Thereafter the site owners amended their answers to add claims for indemnity and breach of contract against Galaxy.

The owners secured a conditional summary judgment on the grounds that Galaxy controlled and supervised the injured plaintiff's work and the owners did not cause his injury. Galaxy's motion for rehearing, alleging that

the antisubrogation rule barred it from indemnifying the owners, was denied because Galaxy should have raised the issue in its original response to the owners' motion.

Ultimately the plaintiff settled with Galaxy for $3 million. CUIC paid him its policy limit, $1 million, and Federal paid the other $2 million. Federal did not oppose the settlement, but sought to recover its alleged losses from CUIC, which it accused of manipulating the settlement so that it was against Galaxy only, thereby paying only $1 million instead of $2 million, to Federal's detriment. Federal also claimed that CUIC made no effort to find evidence that would aid in Galaxy's defense, causing Galaxy to bear the entire brunt of the settlement in violation of the antisubrogation rule.

Under the "antisubrogation exception" to subrogation, where the same insurance company provides coverage for the injured and the wrongdoer for the same risk, the insurance company may not recover from the wrongdoer. An insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered. The antisubrogation rule bars the insurer from recovering from its insured up to the policy limits. The rule is commonly triggered when the insurer provides coverage to both sides of a third-party action for the same incident, in which the third-party plaintiff seeks indemnity from the third-party defendant that it claims actually caused the injury, resulting in vicarious liability for the third-party plaintiff.

Where the third-party defendant raises the antisubrogation rule, the action is barred, because their common insurer cannot recoup from the third-party defendant that it insured a payment that it made on behalf of the third-party plaintiff that it insured. The doctrine is intended to prevent an insurer from passing its loss to its own insured, thus avoiding the coverage that the insured purchased and for which it paid premiums. This prevents the insurer from encountering a conflict of interest that might inhibit its incentive to provide a vigorous defense for an insured.

Agreeing that by failing to abide by the antisubrogation rule, CUIC kept the owners out of the settlement, reducing the amount it had to pay to the injured plaintiff and increasing the amount Federal had to pay under its excess policy, the court granted Federal's motion for summary judgment.

A primary insurer owes both its insured and the excess insurer a duty to exercise good faith in handling a claim. Violation of the antisubrogation doctrine is evidence of bad faith. In addition, when a primary insurer appoints

counsel to defend interests in a suit including those of the excess insurer, it is a fiduciary to the excess insurer.

Actions by Insured and Subrogee Including Insured and Uninsured Claims To Be Heard Together

Hodder Tugboat Co. Ltd. v. JJM Construction Ltd., et al., 2009 FC 161 (Canadian Federal Court, February 13, 2009)

In the instant lawsuit (the 08 Action), plaintiff Hodder sued multiple parties for negligently loading, storing, towing and securing two of its barges that had been chartered to defendant JJM, which in turn hired defendant Pacific Towing to transport them from defendant Texada's loading dock on Texada Island to Vancouver.

In the course of the tow one of the barges (NA194) sank. The other (NA195) was taken by a Hodder tug to JJM's ramp in Vancouver, where it began to list and ultimately sank before its cargo of stone could be unloaded.

Defendants Texada and Pacific moved to strike Hodder's Statement of Claim against them on the ground that they were defendants in an earlier lawsuit (the 07 Action) filed against them by Hodder and JJM, pleading the same cause of action and factual matrix, claiming damage to the barges and loss of use.

The sole plaintiff in the 08 Action was Hodder, seeking damages for loss of hire and business loss due to the loss of both barges, as well as damage to the deck of one of the barges. The 08 Action added a new claim by Hodder that JJM's negligent securing of the barge that did reach its ramp caused damage to its hull, resulting in its eventual sinking.

Under the Hodder/JJM charter agreement, JJM was obligated to insure the barges and name Hodder as a co-assured, which it did. The insurer, Navigators, indemnified Hodder and received a subrogation receipt and release as to each barge, whereby Hodder's rights and remedies, together with authority to sue in Hodder's name, were transferred to Navigators, all prior to commencement of the 07 Action. The subrogation receipts also provided that Hodder would "not make any claim or take any proceedings, respecting physical damage to the Barge NA194, against other person or corporation (sic) who might claim contribution or indemnity . . . from the person, persons or corporation discharged by this release." It was further provided that the subrogation receipts did not alter any rights Hodder might have against JJM for hire under the charter agreement, or for "business loss claims."

After Texada and Pacific filed their motion, the solicitors representing Hodder in the 07 Action, who were different from those in the 08 Action, wrote to Texada and Pacific's solicitor, to explain that in the 07 Action they were only proceeding with the portion of the claim with respect to "subrogated recovery of the monies paid to Hodder/JJM" by insurers, and would not continue the action with respect to "the unidentified portion of Hodders's loss" (sic). Counsel for Navigators advised the court that it would not proceed "with respect to the un-indemnified portion of Hodder's loss."

Counsel for Hodder in the 08 Action argued that if both suits could not continue, it should control the 07 Action; plaintiffs' counsel in the 07 Action argued that the underwriter (Navigators) should control.

The Court recognized that there is a general rule of law against unjustified multiplicity of proceedings and the splitting up of a cause of action into separate suits for an insured subrogated loss and the uninsured loss. Courts have at times recognized an exception arising out of conflicts between an insured and an insurer that do not cooperate to bring one action that would suffice for all purposes. In some cases the second action will be dismissed, but wherever possible, courts must endeavor to prevent an injustice being done by a dismissal that prevents a party who has a proper cause of action from recovering. One solution has been to try the two cases together. *Arrow Transit Limited v. Tank Truck Transport Ltd*. (1968), 65 D.L.R. (2d) 683.

The position at common law, which was not altered by passage of the Marine Insurance Act in 1993, is that where an insurer has paid the full amount called for in the policy, but that amount does not fully indemnify the insured for his loss, it is the insured who is entitled to control any litigation against the person(s) said to have caused the loss. If the insurer wishes to control such litigation, the contract of insurance must provide for complete indemnity of the insured, which must be paid. *Farrell Estates Ltd. v. Canadian Indemnity Co*. (1990) 69 D.L.R. (4th) 767.

Courts will not apply the principle of avoiding multiplicity of actions arising out of a single cause of action blindly. "There are recognized exceptions to the general rule; one which qualifies is if not permitting the second action to continue would cause a real injustice to the plaintiff."

Applying these principles, the Court ordered:

1. Counsel are to cooperate to restructure the actions so that plaintiff in the 07 Action becomes JJM, pursuing its subrogated and uninsured

claims against Texada and Pacific, and plaintiff in the 08 Action remains Hodder, pursuing both the subrogated and uninsured claims against JJM, Texada and Pacific;

2. Both actions shall continue as a "specially–managed proceeding;"

3. The actions shall be heard together, but not consolidated;

4. JJM in the 08 Action may make third-party claims against Texada and Pacific.

Upon performance of those conditions, the motions to strike were ordered dismissed.

Ambiguous Warranty Read Contrary To Interests of Party Seeking To Rely Upon It

Pratt v. Aigaion Insurance (The "Resolute"), EWCA Civ. 1314 (English Court of Appeal, November 27, 2008)

The claimant and his crew of 3 returned from a day of fishing, moored the trawler "Resolute," landed the catch, readied the vessel for the next day, then all went ashore. The claimant received a telephone call at about 2220 hours, informing him that the vessel was on fire. When he and the crew returned to the vessel they found the Fire Brigade fighting the fire, which was not extinguished until about 0045 hours the next day.

The policy issued by the defendant insurer, Aigaion, was on its Standard Trawler form, and included the following additional express provision described as a "CONDITION":

> Warranted Owner and/or Owner's experienced Skipper on board and in charge at all times and one experienced crew member . . .

The insurer declined to pay for the constructive total loss of the vessel, citing the "at all times" crewing warranty. (The Court pointedly noted that the "living accommodation on the vessel comprised a crew cabin 6 feet by 9 feet and a galley 6 feet by 6 feet," implicitly recognizing that it would be unlikely that two people would literally be on board at all times.)

Additional policy clauses/warranties/conditions considered for purposes of the Court of Appeal opinion included Aigaion's Trawler Wording:

> [Condition 26.1] The Vessel is covered while anchored, moored or navigating within the geographic limits set out in the Schedule, including while aground at customary berth and, provided in the following cases the contractor carries adequate liability insurance, and no waiver of the insurer's subrogated rights of recovery applies, at place of storage ashore, including lifting out and launching, while being moved in shipyard or marina, while being dismantled, fitted out, refitted, overhauled or undergoing major repairs. Gear and equipment are covered whether on board the Vessel or not, while in transit to and from place of storage ashore, always subject to the terms and conditions of this insurance.
>
> . . . .
>
> [Condition 26.5] It is warranted that unless the Vessel is manned by at least two persons who are medically fit in all respects to man such a vessel, one of whom shall be competent to be in command, she shall not be navigated.

The sole question on appeal was whether the claimant shipowner failed to comply with the typed warranty relied upon by the insurer. The insurer claimed that, where no one was on board at the time of the fire, there was no "Owner and/or Owner's experienced skipper on board and in charge at all times." The shipowner countered that the typed warranty was obviously directed to periods when the vessel was navigating or working and if applied literally, would lead to absurd results. It was agreed that if the fire had occurred at a time when the shipowner was required to comply with the warranty and not doing so, there was no coverage; and if the insurer could not rely on the warranty, there was coverage, since fire was a covered peril, and there was no suggestion that fault of the shipowner or crew caused the fire so as to give the insurer a defense.

The Court of Appeal noted that in the interpretation of policy language, the inquiry will start, and usually finish, with the ordinary meaning of the words used. The more unreasonable a result, the less likely that the parties intended it, unless they had made that intent very clear. A warranty in a contract should be read with such limitations and qualifications as will render it reasonable.

A principle of construction which assists the assured who contends that he has complied with the warranty is that any ambiguity in the terms of the policy must be construed against the insurer.

The Court of Appeal reasoned that the purpose of the "experienced Skipper . . . and one experienced crew member" warranty was to protect the vessel when at least two member of the crew, i.e. the skipper and one other, could be expected to be on board. These would be when the vessel was navigating, or when landing her catch. The critical question was how much the expression "at all times" should be qualified. The clause was ambiguous and should be construed against the insurer because it does not give any indication of what the extent of that qualification should be. If the insurer had wanted the clause to apply even when the vessel was securely tied up in port it could have said so, but it did not. Given that ambiguity, the insurer had not established a breach of the warranty.

Even if the warranty was unambiguous, there was no breach, because its purpose was to protect the vessel when a skipper and an experienced crew member could be expected to be needed if something went wrong, which would not be the case when the vessel was tied up and the crew went ashore. In addition, the standard wording of Condition 26.1, set out above, showed "that the vessel was to be subject to cover in circumstances when no one could have sensibly have thought that any crew should or could be on board." Considering Condition 26.5 as well the most likely intent was that the skipper and one experienced crewmember should be on board when the vessel was navigating or in other circumstances where their presence would be appropriate. The appeal was allowed.

"Manufacturer's Defect" Coverage Defined

St. Paul Fire & Marine Insurance Co. v. Lago Canyon, Inc., No. 08-13398 (11th Cir., March 6, 2009)

Defendant Appellant Lago Canyon, Inc. ("Lago") owned a yacht that partially sank at its dock while undergoing engine repairs, causing over $1.2 million in damage. After Lago made claim under its marine insurance policy, the insurer, St. Paul, commenced an action seeking a declaratory judgment that the damage was not covered because it was caused by a corroded part. Lago counterclaimed for breach of contract.

After a bench trial the lower court found that the proximate cause of the damage was the failure of a hose barb resulting from corrosion. The marine policy excluded corrosion, and provided that a loss "is not covered by the Policy unless a provable manufacturer's defect can be shown." The district court also make a finding that the manufacturer used yellow brass for the hose barb, knowing its exposure to salt water "created a condition likely to

cause corrosion," but that this was not covered by the term "manufacturer's defect" in the policy.

On appeal, Lago argued that the lower court erred in: (1) applying admiralty law and striking Lago's jury demand; (2) concluding that the damage was not covered under the policy; and (3) not awarding Lago prejudgment interest on towing charges.

The Court of Appeals affirmed in part and reversed in part, holding that because St. Paul had invoked admiralty jurisdiction, Lago was not entitled to a jury trial, but that the term "manufacturer's defect" could mean either a manufacturing defect or a design defect.

The district court found that the under the policy a "manufacturer's defect" is an example of a covered, fortuitous loss where no deductible applies. The policy, however, expressly excluded loss or damage "caused by or resulting from corrosion" in the following provision:

> **Exclusions:** We will not provide Property Damage Coverage for any loss or damage caused by or resulting from wear and tear, electrolysis, lack of maintenance, corrosion, deterioration, mold or fiberglass blistering.

The commercial towing section of the policy covered reasonable costs, up to $7,500.00, of towing the yacht if it was disabled from a cause other than a covered loss.

St. Paul brought suit in admiralty, citing rule 9(h), and Lago counterclaimed in diversity. The Court of Appeals agreed with the district court that under precedent adopted as controlling by the 11th Circuit, St. Paul's election to proceed in admiralty was controlling and the trial court correctly ruled that Lago had no right to a jury trial on its claims. *See Harrison v. Flota Mercante Grancolombiana, S. A.*, 577 F. 2d 968 (5th Cir. 1978). It made no difference that the suit by the plaintiff longshoreman in *Harrison* was for damages, whereas St. Paul's action was for a declaratory judgment, since in each case the plaintiff chose admiralty over some other available basis for jurisdiction.

The parties agreed on appeal that damage caused by a "manufacturer's defect" is a covered loss under the policy, but hotly disputed what is encompassed within the term "manufacturer's defect."

The trial court treated the policy term "manufactur*er*'s defect" as if it read "manufactur*ing* defect," meaning a problem in the manufacturing process, as distinguished from a design defect, a problem with the design of the product. Finding that damage due to a design defect was not covered by the policy, the lower court concluded that Lago "failed to submit any evidence to establish that the hose barb deviated from the manufacturer's own design, standards or specifications, or establish that something went wrong during the manufacturing process."

On appeal, Lago contended that the manufacturer's choice of yellow brass for the hose barb was a manufacturer's design defect that caused the part to fail and the ultimate water intrusion that resulted in the damage. At trial, St. Paul had asserted that such fittings can provide many years of service if properly maintained, and that in any event the choice of yellow brass for the part was a design defect, not a manufacturing defect, and hence not covered by the policy.

On appeal, Lago argued that the term "manufacturer's defect" encompassed any defect attributed to a manufacturer, and is not limited in any way, thus including both design and manufacturing defects. The Court of Appeals agreed, citing its own prior authority to the effect that while "there is a distinct difference between a manufacturing defect and a design defect, manufacturers may be liable for both types of defects." *See Jennings v. BIC Corp.*, 181 F. 3d 1250, 1255 (11th Cir. 1999) (Under Florida version of Restatement (Second) of Torts, § 402(A), a manufacturer may be held liable for a design defect, a manufacturing defect, or an inadequate warning).

Because its ruling triggered the need for the district court to make findings on issues that it did not reach after concluding that there was no coverage, the case was remanded for further bench trial proceedings on the "manufacturer's defect" issues, as well as to deal with the claim for prejudgment interest, which was not addressed in the district court's ruling.

And this (only) from Louisiana—Louisiana Court Refuses to Reform Hull Policy

Stoneys Services Corp v. Travelers' Insurance Company, 2009 WL 112308 (W.D. La. 1/12/09).

A barge owner which provided barge and port cleaning services in Louisiana transported a barge to a shipyard in Port Arthur, Texas for repairs. During sea trials in Texas following the repairs, a pump failure caused an oil

spill on the deck of the barge which contaminated all six cargo tanks on the barge and allegedly resulted in permanent damage and/or expenses to the tanks in excess of $250,000. Subsequently, in the course of presenting its insurance claim, the barge owner discovered there was only $250,000 in hull coverage available. As a result, the barge owner filed suit in Louisiana state court seeking a "reformation of the policy to increase the hull policy limits from $250,000.00 to $500,000.00."

The hull insurer removed the case and then, instead of addressing the issue of reformation, moved to dismiss because the loss occurred outside the Louisiana "Navigating Limits" set forth within the hull policy and thus there was no coverage. In response to the motion, the barge owner first stipulated that the incident occurred in Texas but then attempted to amend the pleadings to reform the policy on another basis: to enlarge the navigation limits.

The court, ruling on the motion to dismiss, first noted that under Louisiana law, reformation is an equitable remedy that may be used when a contract between the parties fails to express their true intent, either because of mutual mistake or fraud. Because the barge owner had failed to plead facts in support of these basic elements of a reformation action, the court then held that the barge owner had simply failed to plead a claim of reformation with sufficient "particularity" with regard to the navigation limits and dismissed the case.

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

**Held in the offices of Jones Walker LLP,
201 St. Charles Ave.
New Orleans, Louisiana
on
Tuesday, March 10, 2009
8:30 A.M.**

The March 10, 2009 meeting was called to order by President Warren J. Marwedel at 8:30 A.M. In addition to President Marwedel, the following officers also were present:

Patrick J. Bonner, First Vice President
Robert B. Parrish, Second Vice President
Harold K. Watson, Secretary
David J. Farrell, Jr., Membership Secretary
Lizabeth L. Burrell, Immediate Past President

The following directors also were present:

Joe E. Basenberg
Grady S. Hurley
Forrest Booth
Donald J. Kennedy
Frank P. DeGiulio
Robert B. Hopkins
John D. Kimball
Vincent J. Foley
Janet Wessler Marshall
C. Kent Roberts
Barbara L. Holland

James W. Bartlett III was also present at the invitation of the President.

SECRETARY'S REPORT

Upon motion duly made and seconded, the minutes of the November 7, 2008 meeting of the Board of Directors were unanimously approved and accepted. The minutes of the November 7, 2008 meeting of the Board of Directors will be included in the Spring 2009 PROCEEDINGS.

TREASURER'S REPORT

In the absence of Treasurer Robert G. Clyne, President Marwedel presented the Treasurer's report for the three months ended October 31, 2008.

Mr. Marwedel reported that the Association's cash position is good, with total cash and investments of $417,333.99. Both the Sanibel and Long Beach meetings returned a small profit.

Dues revenue currently essentially matches the Association's expenses, and efforts are being made to reduce expenses. The notice of the May meeting is being sent via email, and will be mailed only to those approximately 450 members for whom the Association does not have email addresses. The schedule of committee meetings and other events will be sent only by email, resulting in considerable savings in postage.

On motion duly made and seconded, the Treasurer's Report was unanimously approved and accepted. A copy of the Treasurer's formal report for the three months ending October 31, 2008 will be appended to the original of these minutes.

MEMBERSHIP SECRETARY'S REPORT

Membership Secretary David J. Farrell, Jr. presented the Membership Secretary's report. The following applications for membership have been received:

Judicial Applications (1)
Hon. Marianne B. Bowler, Boston, MA

Associate Member Applications (22)
Erin J. Ackor, Coral Gables, FL
Draughn B.W. Arbona, Norfolk, VA
Rachelle M. Barstow, New York, NY
David R. Boyajian, San Francisco, CA
Alan Braun, Houston, TX
Andrew R. Brown, New York, NY
Edward J. Carlson, New York, NY
Johnlee S. Curtis, Coral Gables, FL
K. Blythe Daly, New York, NY
Thomas E. Dunlap, Baltimore, MD
Damon T. Hartley, Miami, FL
Mary A. Holmesly, Houston, TX
Christy L. Johnson, Homer, AK
Jesse Lloyd Kenworthy, Philadelphia, PA
Linda D. Lin, New York, NY
Brian McEwing, Glenside, PA
Cassandra M. McGarvey, Houston, TX

David G. Meyer, Houston, TX
Robert G. Moll, Houston, TX
Christian Mollitor, Seattle, WA
Clay M. Naughton, Coral Gable, FL
W. Bruce Pasfield, Washington, DC

Reinstatement (2)
Morgan J. Gray, Quincy, MA
John H. Hickey, Miami, FL

Student Applications (4)
Charles C. Blanton, Durham, NC
Thomas J. Daly, New York, NY
Joseph W. Denison, Chestnut Hill, MA
Jeremy E. Juenger, New Athens, IL

On motion duly made and seconded, these applications were approved, and the reinstatement fee was waived for Linda D. Lin.

It was noted that 1981 was the last year in which one could join the Association as a proctor member, and that accordingly there is a "bubble" of members who joined prior to that date and will reach life membership status in the next few years. This will have an impact on dues collection, and it was the consensus of the Board that life members should be given the option of continuing to pay dues if they so desire. The Membership and Finance subcommittees were asked to further explore the issue of life membership, and make a recommendation to the Board at the May meeting.

On motion duly made and seconded, the Membership Secretary's report as approved and accepted.

ASSOCIATION MANAGEMENT

Special Appointments

President Marwedel announced that he has appointed Peter J. Gutowski to be the Association's liaison on Rule B attachment issues. He also asked the Board to reach out to potential new board members, and noted that anyone can now nominate potential board members.

BOARD SUBCOMMITTEE REPORTS

Committees

Second Vice President Parrish reported on the schedule for committee meetings in May. There will be a meeting of the Marine Ecology and Maritime Criminal Law and Regulation of Vessel Operations committees in Washington, D.C. on Tuesday, April 27. Mr. Parrish also reported that a number of committee meetings and other events will be held at the Seamen's Church Institute, which is celebrating its 175th anniversary.

Finance

In view of the previous discussion on the coming decline in dues-paying members, the need to find alternative sources of revenue was discussed. President Marwedel pointed out that there are limitations on how much income the Association can earn and maintain our tax exempt status.

Messrs. Kennedy and DeGulio reported on the possibility of allowing vendors space at Association meetings for a fee. In this regard, President Marwedel reported that vendor contributions made it possible to avoid a registration fee at the Long Beach meeting. It was noted that the Association of the Bar of the City of New York has restrictions on the space in their building that may be used for this purpose.

Mr. Kennedy reported that the Connecticut Maritime Association has been very successful in obtaining advertisements, and the possibility of accepting ads from entities other than law firms on the MLA website and for the MLA directory was discussed. Other possibilities for raising additional revenue discussed included raising dues, charging members for the directory, and selling the directory and address labels to third parties. The Finance Subcommittee was asked to report back to the Board with recommendations.

It was also reported that the ABA is considering establishing a separate corporation to provide services to organizations like the MLA, and President Marwedel will explore this and report back to the Board.

The auditors have completed their review, and all was found to be in order. Because of increased scrutiny by the IRS of not-for-profit organizations, the auditors have made a number of recommendations. Treasurer Clyne will get language from the auditors and circulate it to the Board for further discussion.

Membership

Membership Secretary Farrell reported on the proposed amendment to article 204 of the by laws to expand non-lawyer membership to include non-resident non-lawyers and foreign lawyers. It was generally agreed that participation by foreign lawyers enriches the activities of the Association, but it was questioned whether foreign lawyers would be more likely to attend if they were members or were invited by the President. The Board also discussed the issue of how Law Student membership applies to lawyers who are admitted in foreign countries but are studying in the U.S.

Mr. Farrell also discussed the new consolidated membership form and the Board approved the form in principle. A couple of minor changes were suggested, but there was general agreement that the new form was a good idea.

A number of ideas were discussed regarding the attraction of new members. Categories of lawyers where the Association is underrepresented include lawyers handling cases reported in American Maritime Cases, plaintiffs' lawyers, lawyers doing marine financing work, government lawyers, regulatory lawyers, and Coast Guard lawyers. It was suggested that a document explaining why lawyers doing maritime work should join the Association be prepared, and that committee chairs be asked to pass down the need to push for new members.

Website

First Vice President Bonner reported that the announcement page that will be called "Breaking News" is ready, and should be up and running soon. The representatives of PC Solutions will be at the May meeting and will meet with the committee chairs.

Mr. Bartlett reported that he is working with Doug Petco of PC Solutions to have the the numbered documents on the website indexed. ICVM Group has been asked if they can make the necessary changes. It is hoped that this project can be completed by May.

Attempts will be made to locate any missing documents. It was suggested that Holland & Knight may have a complete set.

Presidential correspondence relating to substantive issues is being assembled, and will be put on the website.

BOARD REPORTS

Standing Committee Reports

Mr. Bonner reported that the International Organizations, Conventions and Standards Committee will have speakers at the May meeting.

Ms. Burrell reported that the Carraige of Goods Committee created a working group to report to the Association on the Rotterdam Rules. The committee met, and voted to recommend that the Association recommend adoption of the Rules, and recommend that the United States opt in on the jurisdiction and arbitration chapter. The committee is preparing a majority report and a resolution to be voted on at the General Meeting in May. It is anticipated that there will be one and perhaps two dissenting reports. The areas of dispute are the recommendation that the United States adopt the jurisdiction and arbitration chapter, and the exemption of volume contracts from the application of the Rules.

Mr. Hurley reported that at its May meeting the Offshore Industries Committee will address regulatory issues likely to arise with the new administration, and the potential impact of the *Townsend* decision.

Mr. Roberts reported that the Marine Financing Committee is close to having a proposal for preferred ship mortgages for ships under construction.

Ad Hoc Reports

Coast Guard Forum

President Marwedel reported that a meeting is scheduled for March 23 between the Coast Guard and representatives from the insurance industry over the way the Coast Guard handles oil spills. An issue to be discussed in the future will be the responsiveness of the Coast Guard to Freedom of Information Act requests.

Special Committee Reports

Fall 2009 Hilton Head Meeting

The materials for this meeting are in draft, and will be circulated immediately after the May meeting.

Certification

Mr. Booth reported that California has made admiralty law a specialty for which certification is available.

American's Marine Highways

Mr. Roberts reported that MARAD has been given $100 million in the stimulus package for small shipyards, and that legislation will be introduced to eliminate the double taxation on shipments that is impeding the development of short sea shipping.

City/Regional Luncheons

Mr. Farrell recently organized a meeting in Boston. Mr. Roberts commented that these meetings are a good tool for recruiting new members.

MLA Report

Mr. Watson reported that Leroy Lambert has solicited articles for the MLA Report. Ms. Burrell noted that previous reports had included tributes to deceased leaders of the Association, and that this format could be repeated.

RECENT ASSOCIATION ACTIVITIES AND PROJECTS

President Marwedel reported on the January 14 meeting of the officers with various representatives of government agencies. The meeting was well attended and appreciated.

INTERNATIONAL ACTIVITIES

IMO/ILO Expert Working Group on Abandonment and Contractual Claims

In February, Mr. Bonner attended the IMO/ILO meeting on abandonment and compensation for contractual claims in Geneva. There will be an amendment to the International Labor Convention, but it is not known if the United States will accede to this.

British Maritime Law Association Annual Dinner

President Marwedel attended the British Maritime Law Association dinner in November, 2008.

CMI

President Marwedel has inquired into the manner in which CMI dues are apportioned to the various member associations. Mr. Chris Davis has been asked to make sure that this item is on the agenda of the CMI.

CALENDAR

President Marwedel reported on the following upcoming events:

President Marwedel will attend the IMO Legal Committee meeting March 30–April 4 in London. The topics to be discussed include hazardous substances, ports of refuge, and piracy.

The Nicholas J. Healy Lecture will be held on Thursday, April 30. The Hon. Peter Hall of the Second Circuit will deliver the lecture.

The Board of Directors will have a joint meeting with the Board of the Canadian MLA in Quebec City August 21–23.

The CMI will meet September 20–23 in Rotterdam for the signing of the Rotterdam Rules. President Marwedel will attend.

NEW BUSINESS

Mr. Kennedy reported on a proposal to have a CLE program in Park City, Utah next March. A proposal should be ready for the Board to consider in May.

There being no further business to come before the Board of Directors, the meeting was adjourned.

Respectfully submitted,
Harold K. Watson, Secretary

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

**Held at the Association of the Bar of the City of New York
42 West 44th Street
New York City
on
Thursday, April 30, 2009
8:30 A.M.**

The April 30, 2009 meeting was called to order by President Warren J. Marwedel at 8:30 A.M. In addition to President Marwedel, the following officers also were present:

Patrick J. Bonner, First Vice President
Robert B. Parrish, Second Vice President (by telephone)
Harold K. Watson, Secretary
Robert G. Clyne, Treasurer
David J. Farrell, Jr., Membership Secretary
Lizabeth L. Burrell, Immediate Past President

The following directors also were present:

Joe E. Basenberg
Grady S. Hurley
Forrest Booth
Donald J. Kennedy
Frank P. DeGiulio
Robert B. Hopkins
John D. Kimball
Vincent J. Foley
Janet Wessler Marshall
C. Kent Roberts
Barbara L. Holland

In addition, the following persons were present at the invitation of the President:

Charles Schmidt, Chair, Planning and Arrangements Committee,
November 2009 Meeting
Donald Greenman, Chair, Carriage of Goods Committee

SECRETARY'S REPORT

Upon motion duly made and seconded, the minutes of the March 10, 2009 meeting of the Board of Directors were unanimously approved and accepted. The minutes of the March 10, 2009 meeting of the Board of Directors will be included in the Spring 2009 PROCEEDINGS.

TREASURER'S REPORT

Treasurer Robert G. Clyne presented the Treasurer's report for the three months ended January 31, 2008, together with report and a letter to the Board of Directors from McGladney & Pullen, the Association's auditors. Mr. Clyne reported that the Association's cash position is good, with total cash and investments of $333,746.63. Dues collections have been somewhat sluggish, with approximately $220,000 of approximately $339,000 collected as of the end of March.

Approximately 860 people have signed up for the dinner on May 1. This is slightly behind the figures for 2008, but is good considering the economy.

A budget is being developed, and savings are being achieved with regard to mailing expenses.

The auditors have made four suggestions to the Board. First, they recommend that the Association consider implementing a procedure whereby wire transfers require the approval of two separate officers. Mr. Clyne indicated that the Association only makes wire transfers to transfer funds from one of the Association's accounts to another, but it would not be difficult to require dual authorization for this. Secondly, the auditors recommended that the Association implement a "whistle-blower" protection policy and a communication vehicle for volunteers to lodge complaints relating to unethical treatment of individuals or fraudulent activities, so as to encourage such communications without fear of retaliation. Third, the auditors recommended that the Association develop a policy on the retention and destruction of records. Finally, they recommended the Association develop a conflicts of interest policy.

The Board felt that these recommendations do not appear to have a great deal of relevance to the operation of the Association, but that in an abundance of caution, it made sense to adopt these policies. Accordingly, on motion duly made and seconded, the Board unanimously approved the

recommendation of the auditors that written procedures be implemented with an effective date of April 30, 2009 with respect to the following:

1. The approval of another officer in addition to the Treasurer for all wire transfers of funds;

2. A whistle-blower protection policy and communication vehicle;

3. A policy on the retention and destruction of documents; and

4. A conflicts of interest policy for the officers and directors.

On motion duly made and seconded, the Treasurer's Report was unanimously approved and accepted.

MEMBERSHIP SECRETARY'S REPORT

Membership Secretary David J. Farrell, Jr. presented the Membership Secretary's report.

The Committee on Proctor Admissions recommended seven names for Proctor status, and on motion duly made and seconded, the Board approved the following three Associate members for elevation to Proctor status:

John K. Fulweiler, New York
Raymond T. Kaiser, Long Beach
William Myhre, Washington, D.C.

None of the other persons recommended for Proctor status had been Associate members for the four years required by the By-laws, and while the By-laws provide that this requirement may be waived, it was the view of the Board that waiver of this requirement should be engaged in only in exceptional circumstances. Examples mentioned where this might be appropriate included individuals who have rendered exemplary service to the Association in some other category of membership such as an academic member, or high ranking government officials. In addition, there was concern that unless waiver was engaged in sparingly, the Committee on Proctor Admissions would be overwhelmed with requests for waivers, and would have a very difficult time dealing with these requests in a consistent manner.

The following 20 applications for Associate membership were received:

Paul Thomas Beckmann, Mobile, Alabama
Jay E. Bitseff, Seattle, Washington
Samuel P. Blatchley, Boston, Massachusetts
Lisa Manget Buchanan, Houston, Texas
Evan T. Caffrey, New Orleans, Louisiana
Wook Chung, Paramus, New Jersey
Michael E. Conroy, Miami, Florida
R. Todd Elias, Houston, Texas
Carol Finklehoffe, Miami, Florida
Steve Gordon, Houston, Texas
Marc R. Greenberg, Long Beach, California
Matthew Koch, Chicago, Illinois
Melinda J. MacConnel, Tampa, Florida
James A. Marissen, Long Beach, California
Crystal G. Moroney, New York, New York
Joseph J. Roby, Jr., Duluth, Minnesota
Richard A. Tabuteau, Baltimore, Maryland
Eric L. Toxey, Birmingham, Alabama
Patrick J. R. Ward, Mobile, Alabama
Brian Flood, Houston, Texas

In addition, the following application for Associate reinstatements was received:

George F. Klauke, Jr., Chicago, Illinois

In addition, the following five applications for Law Student membership were received:

Jason DeRosa, University of Washington School of Law
Michael P. Gerrity, Ave Maria School of Law
Robert Isaak Hurst, University of Utah, S.J. Quinney College of Law
Maggie Riley, Tulane Law School
Justin M. Woodard, Tulane Law School

In addition, the following six applications were recommended by the Committee on Non-Lawyer Nominations:

Russell D. Brown, New York, New York
Dr. Dagmar Schmidt Etkin, Cortlandt Manor, New York

Richard E. Fredricks, New York, New York
Laura L. Moore, New York, New York
Thomas D. Neumann, Paoli, Pennsylvania
Harry A. Yerkes, New York, New York

On motion duly made and seconded, these applications were approved.

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

ASSOCIATION MANAGEMENT

Committee Leadership Appointments

President Marwedel announced the formation of a subcommittee of the Marine Ecology Committee on Places of Refuge. This subcommittee will be chaired by Alfred J. Kuffler.

President Marwedel also announced the formation of a subcommittee of the Committee on Regulation of Vessel Operations, Safety, Security and Navigation on Piracy. This subcommittee will be chaired by H. Allen Black, III. This subcommittee has already held two meetings. Admiral Charles D. Michel is the principal contact with Coast Guard with respect to this issue along with Charles "Bud" Dahr, a civilian Coast Guard lawyer.

President Marwedel also announced that the Ad Hoc Committee on America's Marine Highway has been made a subcommittee of Inland Waters and Towing, and will be chaired by C. Kent Roberts.

President Marwedel reported that John Paul Jones has reported that the law professors who have heretofore presented the CLE program on Friday afternoon after the May General Meeting are no longer meeting as a group. Accordingly, this CLE program will now be coordinated by the Continuing Legal Education Committee.

President Marwedel also reported that he has created a MLA Meetings and Events Committee with Charles E. Schmidt as chairman. This committee will serve as an umbrella committee for the various meetings, with the Dinner Committee, and Planning and Arrangements Committees for the resort and away meetings constituted as subcommittees.

President Marwedel also reported that Michael K. Bell has been appointed chairman of the Planning and Arrangements Committee for the meeting in the fall of 2010 to be held in Houston.

President's Advisory Committee

Past President Rue had been asked to review Association policies and positions. He is talking to past presidents, officers and directors to compile these policies.

Nominating Committee

Immediate Past President Burrell reported that the Nominating Committee had nominated all current officers to serve another term, and that the following persons had been nominated to serve three year terms on the Board of Directors: Joshua S. Force of New Orleans, Bradley A. Jackson of Houston, James F. Moseley, Jr. of Jacksonville, and Arthur J. Volkle, Jr. of Seattle.

Board Subcommittee Reports

Committees

Mr. Parrish reported that he and the other officers had met with the Committee chairs, and that he had once again emphasized the need to post committee agendas in advance of committee meetings. A presentation was made by Doug Petco and Robin Becker of PC Solutions and Kevin O'Donovan and John Paul Jones of the Website and Technology Committee to familiarize the Committee chairs with the use of the website. It was pointed out that all Committee voting is done via the website, because this is the only way to limit voting to Committee members. It was also pointed out to the Committee chairs that it is relatively easy to obtain CLE credit for Committee meetings, and the chairs were encouraged to do this.

Finance

Mr. Clyne reported that this subcommittee had met before the March Board meeting and discussed finding alternative sources of revenue. It was noted that there will be three sponsors at the General Meeting, American Maritime Cases, Westlaw, and Informa, all of whom agreed to pay $1,000.

Mr. DeGiulio reported that he had spoken with Jill Warner with the American Bar Association regarding their affinity programs with companies such as Hertz, and that these relationships do not generate revenue for the ABA, but merely provide benefits for ABA members. In addition, most vendors are not interested in an organization the size of the Association, except for vendors with a particular interest in maritime matters such as certain publishing

houses. It was suggested that we need to develop written policies with respect to vendors, and that these policies should include such things as informing the vendors that they are not to solicit members, but rather to respond to the members who approach them.

The possibility of obtaining revenue through advertising in the Directory was discussed. This may require hiring a contractor to solicit ads, and the subcommittee was asked to obtain names of companies who could provide this service.

Raising revenue through sources other than dues may present tax issues, and Mr. Clyne will discuss this with the Association's auditors.

Finally, President Marwedel announced that henceforth, the Association raising the amounts to be charged for various items. The new price for Association mailing labels will be $1,500 to for-profit groups, $750–$1,000 for related bar associations and similar organizations, and $500 for members; proctor certificates will now cost $50, and additional directories will now cost $50. Ties will still be available for $25.

Membership

A vigorous discussion was held regarding proposed amendments to the By-laws regarding classes of members. Among the issues discussed were whether to allow foreign lawyers to join the Association, whether the category of Academic Members should be continued, what classes of members should be entitled to vote, whether any changes should be made with regard to Life Members, whether admittance to the practice of law in a foreign country should disqualify someone who resides in the United States from being a Non-Lawyer Member or from being a Law Student Member. It was decided to carry this issue over to the next Board meeting. In preparation for that meeting, the subcommittee was asked to discuss possible changes with Academic Members, and the Board was asked to discuss these subjects with the membership. In addition, President Marwedel will solicit the views of past presidents and Committee chairs.

Website

Mr. Bonner discussed certain additions to the website. Both he and President Marwedel expressed appreciation to Doug Petco and Robin Becker of PC Solutions for their dedication to the Association.

Board Reports

MLA Report

Mr. Watson reported that LeRoy Lambert, the editor of the MLA Report is making progress on getting an issue out in June. There will be tributes to Herbert Lord and Gordon Paulsen, and material from various Committee newsletters.

Special Committee Reports

USCG Relations

Immediate Past President Burrell reported that the Coast Guard Forum had met on March 23, with representatives of companies involved in insuring and managing oil spills, the National Pollution Trust Fund, and several branches of the Coast Guard present. The ground rules for the meeting were that there would be no discussion of open or recently closed cases. The matters discussed included the timeliness of claims review, establishing a protocol outlining procedures for turning over a spill to the government without jeopardizing the right to limitation of liability, the Coast Guard's activation of COFRs without notifying the guarantor or giving time to find a cost effective solution, possible insurance consequences of characterizing a demand for wreck removal as a pollution threat as opposed to a navigational hazard, effect of using the Federal Debt Priority Statute on the ability to pay responders in a timely fashion and the effect of this on future response. As a result of the meeting, the Coast Guard invited insurers to attend or instruct at the Coast Guard's On Scene Coordinators Crisis Action Course, and efforts will be made to address the various issues raised. Additional follow-up meetings will be held on an individual basis as required. The meeting had the immediate benefit of increasing the parties' understanding of the impact of their actions on the other parties who are involved in the process.

Fall 2009 Hilton Head Meeting

Mr. Schmidt reported for the Planning and Arrangements Committee for the Fall 2009 meeting, which will be held in Hilton Head, South Carolina at the Hilton Head Marriott Resort & Spa. A contract has been signed with the resort, with guarantees geared to the attendance at the 2007 meeting at Sanibel Island. The Marriott is going to make it possible to register for the hotel on their website. All the usual activities will be available, with the possible excep-

tion of sailing, since the only nearby yacht club is private. There will be a CLE program, and the Committee is exploring the possibility of making it possible for young members to attend only the CLE portion of the meeting with per event pricing. The Committee is also considering reduced prices for members of the same firm, and is exploring trying to attract members of SEALI and other non-MLA members.

The Committee has sufficient funds for their present activities, but needs to be able to write checks. On motion duly made and seconded, the Board authorized the execution of the documents necessary so that the chairman and treasurer of the Committee can sign checks.

DISCUSSION ITEMS

Rotterdam Rules

Mr. Greenman reported on the procedure to be followed at the General Meeting for the vote on whether the Association should recommend that the United States sign and ratify the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, also known as the Rotterdam Rules. The Carriage of Goods Committee has recommended passage of three resolutions. The first resolution will recommend that the United States sign and ratify the Convention; the second and third resolutions will recommend that the United States opt in to Chapters 14 and 15 of the Convention, which deal with jurisdiction and arbitration respectively. Mr. Greenman will present the resolutions and discuss the history, and Professor Michael Sturley will discuss the Rules themselves. Minority reports have also been filed. All documents were made available to the membership in accordance with Association By-Laws.

Ski Trip

Mr. Bonner indicated that he would send out an email to determine interest in a ski trip/CLE seminar.

RECENT ASSOCIATION ACTIVITIES AND PROJECTS

Ms. Burrell reported that she had attended the 15th Annual John R. Brown Admiralty Moot Court Competition in Charlseton, South Carolina. President Marwedel reported that he had served as the John W. Sims Distinguished Admiralty Practicioner in Residence at Tulane University Law School.

INTERNATIONAL ACTIVITIES

IMO Legal Committee

President Marwedel reported that he attended the meeting of the IMO Legal Committee in London, and reported on the progress of the Ports of Refuge Convention, and the new protocols to the HNS Convention.

NEW BUSINESS

Certificates of Appreciation

Upon motion duly made and seconded, the following resolution was adopted to express the Association's appreciation for the work of the Seamens' Church Institute of New York and New Jersey:

> The Maritime Law Association of the United States presents this certificate of appreciation to the Seamen's Church Institute of New York and New Jersey in recognition of its 175 years of distinguished service to the maritime industry.
>
> WHEREAS, since its founding in 1834 The Seamen's Church Institute of New York and New Jersey has grown to be the largest and most comprehensive mariner's agency in North America, and
>
> WHEREAS, the chaplains of the SCI annually visit thousands of vessels in America's waterways, caring for the spiritual and emotional well-being of mariners, and
>
> WHEREAS, the SCI and its attorneys have been zealous and effective advocates for the rights of mariners, seeking to protect and enhance their rights and to educate mariners and those who care for them about those rights, and
>
> WHEREAS, the SCI's education facilities in New York, New York, Houston, Texas and Paducah, Kentucky provide training for mariners, thus contributing to the safety of the nation's waterways, and
>
> WHEREAS, through these activities, the SCI has contributed greatly to the well-being of those men and women who toil in the marine industry for the common good of mankind and to the safety of maritime commerce,

BE IT RESOLVED that The Maritime Law Association of the United States congratulates The Seamen's Church Institute of New York and New Jersey on its 175 years of service to mariners and the maritime industry, and expresses its appreciation and support for that service.

BE IT FURTHER RESOLVED, that a copy of this Resolution be made part of the permanent records of the Association.

Upon motion duly made and seconded, the following resolution was adopted to express the Association's appreciation for the work of Rear Admiral Charles D. Michel:

The Maritime Law Association of the United States expresses its sincere appreciation for the services and exemplary assistance of Rear Admiral Charles D. Michel, United States Coast Guard, Chief, Office of Maritime and International Law, Washington, D.C.

Admiral Michel has been a dedicated officer of the United States Coast Guard since 1985, carrying out many highly significant responsibilities and serving with distinction in numerous capacities.

His prior staff assignments include Legislative Counsel for the Office of Congressional and Governmental Affairs, head of the Operations Division within the Office of Maritime and International Law, and Staff Attorney at the Eighth Coast Guard District. In his afloat assignments, he served as Commanding Officer of the USCGC RESOLUTE and USCGC CAPE CURRENT and Executive Officer of the USCGC DAUNTLESS. In his service to the Country and the Coast Guard, he has performed his duties as Chief, Office of Maritime and International law, in an outstanding manner.

Despite the time required by the aforesaid duties, Admiral Michel has participated in numerous activities of the Maritime Law Association of the United States by making presentations to committees of the Association on topics of maritime law, marine ecology, governmental relations, Coast Guard policy, proceedings at the IMO and other matters, contributing not only his expertise, talent and knowledge, but a sense of camaraderie, friendship and collegiality. In doing so, he has continued and expanded the tradition of cooperation between the United States Coast Guard and the Association.

In consideration of the foregoing:

BE IT RESOLVED, that The Maritime Law Association of the United States expresses its sincere and profound appreciation for the services and assistance of Rear Admiral Charles D. Michel, and we express our gratitude to our professional colleague and friend.

BE IT FURTHER RESOLVED, that a copy of this Resolution be made a part of the permanent records of the Association.

There being no further business to come before the Board of Directors, the meeting was adjourned.

Respectfully submitted,
Harold K. Watson, Secretary