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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

FALL MEETING — NOVEMBER 1, 2002

PRESENT:
RAYMOND P. HAYDEN
THOMAS S. RUE
LIZABETH L. BURRELL
WARREN J. MARWEDEL
PATRICK J. BONNER
PHILIP A. BERNS
WILLIAM R. DORSEY, III

and the following 169 members:

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Paul Antinori
Frank Atcheson
James W. Bartlett
Joe E. Basenberg
George D. Benjamin
Helen M. Benzie
Phil Berns
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James Mercante
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Katherine F. Newman
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Brian St. Jacques
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Michael Stern
William T. Storz
Michael F. Sturley
Joseph C. Sweeney, Prof.
Joseph P. Tabrisky
Joseph P. Tynan
Alan Van Praag
John P. Vayda
Kenneth H. Volk
Rahul Wanchoo
Harold K. Watson
Alan M. Weigel
James F. Whitehead
M. Hamilton Whitman, Jr.
Frank L. Wiswall, Jr.
John M. Woods
JoAnne Zawitoski

and the following 2 guests:

Sean Harrington
Patrick Griggs

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PROCEEDINGS

PRESIDENT HAYDEN: Good morning, ladies and gentlemen.

I'm going to call the meeting to order. I would like everybody to come in from the buffet that has been provided by our Membership Secretary Berns.

Prior to going into the formal aspects of our meeting, I would like to welcome some special guests we have here with us this morning. I believe that Patrick Griggs the President of the CMI, is with us. Patrick is in the back, yes. Thank you for coming, and you gave a wonderful speech last night.

(Applause.)

MR. HAYDEN: I would also like to welcome Sean Harrington, the President of the Canadian Maritime Law Association. I know he is here somewhere.

Sean, welcome.

(Applause.)

MR. HAYDEN: I'm looking forward to seeing you at the dinner tonight, also.

We had as our guest at yesterday's Board luncheon, and also will have at tonight's dinner, Rui M. Fernandes, the President of the Canadian Average Adjustors Association, and Fred Pietropola, the President of the American Average Adjustors Association. But I don't believe they are with us this morning. Are they? But we will welcome them this evening.

We also regret that Nick Healy is unable to be with us due to his illness. It was delightful to see him last night at the Healy Lectures, which are, of course, named in his honor. And he is coming along very well.

Captain Joseph Ahearn, Chief of the Maritime International Law Division of the U.S. Coast Guard, is unable to be with us this morning because he is the head of the delegation at the Athens Diplomatic Conference being held in London.

Therefore, I would just like to proceed with the regular order of business.

May I have the Secretary's report.

MR. MARWEDEL: Good morning, Mr. President, members and guests.

First of all, I want to remind everybody to fill out the attendance cards out in the hall. And, if you are a speaker, please give your business card to the court reporter. Also, if you have any written reports to submit, send them to me either via e-mail or on a disk in the Word format.

Since our last General Meeting we have had two Board meetings; one in Philadelphia last August, and one yesterday. And we would like to thank the members, and Elisa Reeves, of the Philadelphia area, who made the arrangements and for their kind hospitality.

The organization has continued its international participation in various forums, and yesterday there were various presentations made to the Board.

Past President Chet Hooper reported on the CMI Draft Instrument on International Carriage of Goods. And this has been forwarded to UNCITRAL.

Chet reviewed the issues being considered, such as the door-to-door coverage, as opposed to port-to-port, removal of the defense of errors in navigation, burdens of proof, service contracts, principles of freedom of contract, and attempts to define charter parties.

Chet reported that the head of the U.S. delegation, Mary Helen Carlson of the State Department, is having a meeting this December in Washington, and has invited representatives from the truck and rail industry to participate and give their views.

Past President Howard McCormack, the MLA delegate to the CMI Working Group on General Average, reported on changes proposed by IUMI to the York-Antwerp Rules. He has posted a very extensive article on this subject on the MLA web site and I invite everybody to view it.

Immediate Past President Bill Dorsey reported on his attendance at the IMO Legal Committee meeting in London, where they discussed a proposed

Wreck Act Convention. Bill discussed the various issues of who pays, direct actions against underwriters, how far a state may go in removing a wreck, participation by the flag state, their consent, and the act of terrorism defense in cargo liability. He reported there is a lot of work to do on this proposal before it ever goes anyplace.

He also reported on the protocol to SUA. The U.S. has proposed some very broad additions, including the right to board the vessels that might threaten the United States, even if outside of U.S. territorial waters.

He also reported on the CMI's work on place of refuge when a vessel is in peril, and the issues of liability for any damages resulting from either granting or refusing refuge.

He reported to the Board on the CMI Legal Committee's work on the limitation cap in the Athens Convention. He reports that the strict liability limits on direct action compulsory insurance are 250,000 SDRs and 400,000 SDRs for overall liability for shipowners. Insurance companies have indicated there may not be coverage if limits are too high. There is also an opt out provision allowing countries to have higher limits or no limits at all.

Treasurer Pat Bonner reported on his attendance at the IMO/ILO joint working group dealing with issues of seamen's rights relating to abandonment of seafarers. He reported that last year 118 ships were abandoned, stranding over 5,000 crew members.

The seafarers are urging a mandatory instrument, such as a connection, to ensure seafarers are repatriated, and paid compensation if there is an abandonment. Seafarers are also pressing for a procedure to deal with the cases where full contractual compensation is not paid quickly in the event of any injury or death. The Joint Working Group decided to canvas abandonment and compensation, and whether member governments heed the adopted guidelines put forth by the IMO/ILO.

Immediate Past President Bill Dorsey also reported on the oral argument held at the Supreme Court on October 15th in the Sprietsma case. He indicated the arguments were excellent, but could not predict the outcome. He says he has a pretty good record in the past of predicting, but this time he couldn't do it. Admiralty law did not seem to be the central issue; the doctrine of preemption was. Josh Force also attended representing the MLA.

Past President Jim Moseley, our ABA representative, reported on the ABA meeting in August. Of particular interest is the International Law section's review of the Sovereign Immunities Act, and the proposals adopted for multi-jurisdictional practice and ethical considerations in settlement. I think Jim will be reporting on that later this morning.

President Hayden has appointed Second Vice President, Liz Burrell, to head a new ad hoc committee to work on enhancing the membership and participation of the membership in MLA activities. This new committee has a broad geographic base and is somewhat younger than prior committees that have looked at this. We hope that the committee will report to the Board at its next meeting.

The Board passed a resolution proposed by the Young Lawyers Committee to amend Section 502 of the Bylaws. This relates to the limitation of a member only being allowed to be a listed member on two standing committees.

The resolution reads: "Membership in the Young Lawyers Committee shall not prevent a member from serving in two additional standing committees." This will be an addition to the paragraph in 502 that has that limitation.

The Board also passed a resolution allowing Treasurer Pat Bonner to open a separate bank account for revenue and expenses for the Bermuda conference next Fall at the Fairmont Southampton Princess. And we'll hear more about that later on.

Mr. President, that concludes my report and I move its admission.

MR. HAYDEN: Do I hear a second?

(A chorus of seconds.)

MR. HAYDEN: Any discussion?

(No response.)

MR. HAYDEN: All in favor?

(A chorus of ayes.)

MR. HAYDEN: Any opposition?

(No response.)

MR. HAYDEN: The motion is passed.

Thank you, Mr. Marwedel.

Mr. Bonner, may we please have the Treasurer's report.

MR. BONNER: Thank you, Mr. President.

As of September 30th we had assets of about $190,000. This is about $55,000 ahead of where we were last year, which is a very good sign, and I'm confident that we'll have the money to allow the MLA to pursue its goals.

In the summer we had our annual audit given by the large accounting firm of Goldstein Golub. This year for a change I had to keep my eye on the accountants, rather than vice versa.

However, naturally, they found absolutely no problem with our books, and they prepared a bound report. And if anybody would like to read it, I would be happy to show it to you. It's really fascinating reading, of course.

I wanted to remind you that all of our publications are available on-line. The MLA web site is mlaus.org. And due to our increased printing costs, the MLA encourages the members to sign up to receive the documents on-line. If you do sign up, you will get an e-mail saying that the latest MLA report and the latest PROCEEDING is now available on-line, and you will not receive the print copy.

We continue to send out the print copy unless you opt out of it. So, if you don't do anything, you will continue to get the printed copy, and if you would like to sign up for the e-mail advisory, just see me or send me an e-mail at bonner@freehill.com.

Mr. President, this concludes my report and I move its adoption.

MR. HAYDEN: Do I hear a second?

(A chorus of seconds.)

MR. HAYDEN: All in favor?

(A chorus of ayes.)

MR. HAYDEN: Any opposition?

(No response.)

MR. HAYDEN: The motion is carried.

Thank you, Mr. Bonner.

Membership Secretary.

MR. BERNS: First, before I do my formal report, the difficulties in attempting to get people to come into the main meeting here, you are putting the bagels at risk. Secondly, we would like to encourage that in the various firms, that you, in turn, encourage members of your firms to join the MLA and to take active part. I'm attempting to get the Bylaws changed so I get paid on commission.

(Laughter.)

MR. BERNS: And, finally, this is a bureaucratic vote based on my own governmental experience. With the kind graciousness of Pat Bonner, he is now the haberdasher to the MLA bon vivants.

And, well, actually it wasn't so much gracious, but the President had found out that I was working out a deal where I was working for union suits with the MLA logo on the flaps, so he asked if Pat would take over. So, he's now your haberdasher to check with. And Joanne had asked me about it, and if Joanne would speak to Pat about possible additions to the haberdashers for the women members.

My formal report:

Pursuant to Section 203 of the Bylaws and recommendation of the Committee on Proctor Admissions, on October 31, 2002, the Board of Directors approved thirteen members as Proctor Members:

T. Langston Bass, Jr., Barbara D. Burke, Bruce P. Dalcher, Mark S. Davis, Vincent J. Foley, David C. Frederick, William D. Hughes, James H. Hunter, Jr., Kirk Edward Karamanian, Lawrence I. Kiern, F. William Mahley, Eric P. Wise, and Michael E. Unger.

As Associate Members at the August 3, 2002 meeting, twelve new Associate Members were admitted to the Association.

In addition, pursuant to Section 202 of the Bylaws and on the recommendation of the Membership Secretary, on October 31, 2002, the Board of Directors approved seventeen lawyers as Associate Members:

Raul M. Arias, Kevin J. Christensen, Robert E. Falvey, James M. Garner, Eddie Glenwood Godwin, Jason R. Harris, Mark R. Higgins, Carmen V. Irizarry, David E. James, Stephen Nelson Lamb, Susan Poder MacFarlane, Timothy S. McGovern, Michael P. Milton, David A. Neblett, Jennifer L. North, David Holt Savidge, Michael P. Smith.

As non-lawyer members, pursuant to Section 204 of the Bylaws, the following non-lawyers were approved by the Board of Directors on October 31, 2002, as non-lawyer members:

Williette Gardiner, Samuel L. Senders, Wesley D. Wheeler.

I regret to advise that since the last general meeting of the Association the following members have been reported as deceased:

John W. Sims of New Orleans. And, as you know, John was an MLA member since 1945 and President of the Association from 1980 through 1982.

Douglas B. Bowring of Edgartown, Massachusetts.
The Hon. Harry J. Gardner of Long Beach.
William A. Gillen of Tampa.
Richard D. Davis of League City, Texas.
Theodore C. Robinson of LaGrange, Illinois.
Henry J. O'Brien of Brooklyn, New York.
Edwin Longcope. I did not have Ed's location at the time.
The Hon. Bailey Aldrich.
The Hon. Herbert F. Murray of Baltimore.
And Irma Colon of The Bronx.

Mr. President.

MR. HAYDEN: I ask that we all rise for a moment of silence in honor of those deceased.

(Whereupon, a moment of silence was observed.)

MR. HAYDEN: Thank you, Mr. Berns.

MR. BERNS: As to the directory, it has been published. Everybody should receive their copy. It has been distributed to the membership.

In order to facilitate the publication of the next directory, if you remember, Winston had announced when he was retiring as Membership Secretary that there would be no problem with the next directory and that his successor would have no excuse or reason, which I thought was ridiculous, because any attorney can have a good reason why they didn't do something. In any event, we did get it out. There had to be several corrections.

What we're going to try to do is that April 11th of next year will be the last day for submission of changes by membership for inclusion in the printed directory.

May 16th, which is roughly two weeks after the May meeting, will be the last day of submissions of elected officers, Board members, committee and subcommittee chairs and vice-chairs and secretary, where appropriate, new members and proctors.

If you will also note, the printed directory has a printed change of address card in the front of the volume. It would be preferred, and I never thought this day would come, if you would send it to me via computer on e-mail — I've given up my abacus — and this way I can get the changes at any time of the year, get them to our representative in Buffalo, and within approximately two weeks we can get that on the web site.

Your web site is the place to look for probably the most accurate and up-to-date entry for the membership and the various changes. Hopefully, the web site does not crash, as it did recently. But that was corrected rapidly.

So, as I said, during the rest of the year any submissions will be put into the web site listing to provide an up-to-date record of the membership and related changes. E-mail submissions preferred.

With the approval of the Board of the designation of thirteen new Proctors and the admission of the seventeen Associates and the three Non-Lawyer Members, the Association is constituted as follows:

I will give it to you in terms of what we refer to as the active members.

Proctors, 1554.

Associates, 1216.

Non-lawyers, 229.

Taking those and the ex-officios, honoraries, et cetera, our total membership is 3219.

I move the adoption of my report, Mr. President.

MR. HAYDEN: Do I hear a second?

(A chorus of seconds.)

MR. HAYDEN: Any discussion?

(No response.)

MR. HAYDEN: All in favor?

(A chorus of ayes.)

MR. HAYDEN: Any opposition?

(No response.)

MR. HAYDEN: Your presentation is approved.

We can move directly on now to the committee reports.

I will ask that the committee chairman step forward as I announce the committee, and at the same time I will announce the person who is standing in the wings. So, please be prepared. As you step forward to give your report, I would also appreciate your giving the court reporter your business cards so they can get the spelling of the name absolutely correct for the record.

We'll start with the Committee on the American Bar Association Relations, Past President James F. Moseley, and in the wings will be Bob Connor of the Carriage of Goods by Sea Act.

MR. MOSELEY: Thank you, Mr. President.

As you well know, the relationship between the ABA and the MLA is such that the MLA is one of a dozen organizations that has a voting seat at the House of Delegates.

At the midyear meeting in February certain things were outlined that would be voted at the annual meeting in August. And while I have a written report that I've already submitted, which will be in the transcript of these proceedings, I wanted to mention three matters to you.

One thing that the House of Delegates passed was a resolution allowing the International Law Committee and all of the participants in the House of Delegates to study and consider a proposal to amend the Foreign Sovereign Immunities Act.

I mention that to you with special emphasis so you will know that over the next period of years there will be a great deal of study on something that the MLA has been very close to. We were involved in the passage and filing amicus briefs when the occasion arose. We must continue to do so. We certainly don't want another group amending the Foreign Sovereign Immunities Act that hasn't had our input. I'm sure they will request our input, but we need to be proactive.

Secondly, at long last there is a multi-jurisdictional model code which was passed be the House of Delegates. I bring that to your attention because the genesis of this code arose in a California case where a non-California law firm was working on certain things in California. When they submitted the bill, the bill was not paid and the Court of Appeals in California held non payment was right because a midwestern firm could not be giving advice to a California principal.

That law in California has now been changed. But the concept of the multi-jurisdictional problem that the MLA participated in submitting information, has now been approved. In my opinion, and I believe in the opinion of those who had an opportunity to review the model code, it takes care of admiralty practitioners who go from their admitted state into another state to take depositions, and to do certain things on a temporary basis. It has been a problem in the past so I think most issues have been addressed.

What will happen next? The ABA will send this code to your various jurisdictions. So it will go to 50 states, plus the District of Columbia Bar. You really need to keep your eyes open on this. My complete report is in writing. But you need to review the code and make sure when it goes to your state, either your Supreme Court or your mandatory Bar.

The third matter that was discussed, and I would submit this to you because I think it is very helpful to the younger lawyers in your offices, it relates to the ethical considerations during settlement. It's not a model code; it's only guidelines. My review of it and study of it is such that it certainly was something that we as MLA members had been doing before and it was just really an outline of our approach. Probably ten years ago this guideline would have been laughed at by everyone i.e, to have ethical considerations for settlement. Today it is needed.

Those will be the three things that will be reported, so look at the written report for a more complete report.

Thank you, Mr. President.

MR. HAYDEN: Thank you, Jim. I appreciate it very much.

Next will be Bob Connor, the Carriage of Goods by Sea Committee, to be followed by Professor Michael Sturley of the CMI UNCITRAL Group.

MR. CONNOR: Good morning.

Wednesday morning we had a lively committee meeting. Our guest was Mary Helen Carlson, who as Ray had said earlier, is the head of the U.S. delegation to UNCITRAL where they are working on rewriting international law for transportation.

Before I forget, for those of you who would like to read the draft — it's the draft we talked about last year that came from the CMI — it can be found on the MLA web site. Look on the links on there. To U.S. transportation law, United Nations, click through all the things, working groups, English, Working Group 3, and eventually you get down to 9th Session on Transport Law and there is the link to a 70-page draft. Find a high-speed printer if you are going to print it, and don't tie up your own printer. But, anyway, there is the draft that is being worked on.

Our committee had a chance to give Mary Helen some feedback. She gave us some indication of what the timeline is. Not good. We're talking years here. Remember, this is an international operation now.

The one thing that is encouraging: The U.S. is going to put out a paper, and Mike Sturley will probably talk about that more, within the next year. The other countries are looking to the United States to see what it is we are doing.

We have advocated door-to-door, but, as you know, internationally there are a lot of issues with railroads, with the truckers overseas, especially in Europe. And just where this whole project is going to come out and where the United States is going to throw its support is not certain. The world is looking to us for guidance.

I will have a more complete report in writing, but that's kind of where things are. But do download the draft and read it, and you can see where things are going.

Our delegates, by the way, are Chet, Vince, George, and Michael. They're not official delegates. I think their title is advisors to the U.S. delegation, but they are in there fighting for us.

Thank you.

MR. HAYDEN: Thank you, Mr. Connor.

Michael Sturley, to be followed by Richard Brown, Classification Societies Committee.

MR. STURLEY: Thank you, Mr. President, members.

UNCITRAL Working Group III on Transport Law met in Vienna from September 16th to September 20th.

I reported at the last meeting that in April we began a section-by-section "first reading" of the 70-page draft instrument, which was prepared by the CMI. At the September meetings we continued that section-by-section first reading. The working group is literally going through the draft section by section, subsection by subsection, discussing it in great detail. Every member country is getting to have its say on each section. It is a slow process.

For the most part, people are simply expressing views and no decisions are being made. But I think the chair is eager to show that at least some progress is being made. Therefore, the chair announced his conclusion that there was a consensus to eliminate the defense of error in navigation or management. There was then immediately a discussion about whether or not there really was a consensus, but the chair adhered to his view that there was consensus and said that provision will be eliminated from the next draft, which we will probably see next fall.

The next meeting will be a two-week session here in New York. It will be held at the UN headquarters from March 24th to April 4th. The first four days of this session will be devoted to a discussion of the scope of this proposed instrument: Should the convention apply from receipt to delivery, the so-called door-to-door coverage?

We have been careful not to use the word "multi-modal" because that has some negative connotations in the UN context. But the question is: Will the convention cover the entire period governed by the contract, whatever that may be, possibly — more often than not — door-to-door, or will the new convention simply apply port-to-port?

The thought is that "port-to-port" would mean essentially whatever the Hamburg Rules coverage is, although that is not so well defined as we might like. The U.S. position has consistently been that we would like to have the coverage be as door-to-door as possible. It remains to be seen what "door-to-door" will mean.

As Bob just mentioned, there has been some concern with the European railroads and truckers. They already have their regional conventions — CMR, CIM, COTIF — that apply there. But it is hardly limited to the European truckers and railroads. Our own railroads have announced that they would prefer to have nothing whatsoever to do with us. We will see if any progress can be made in that regard.

Once we finish that discussion, we will then resume our section-by-section first reading. And I hope we may even finish getting through the rest of the draft instrument at the spring meeting.

Thank you very much.

MR. HAYDEN: Thank you, Michael.

Our next committee report will be given by Richard Brown, to be followed by Michael Marks Cohen on the Comité International Committee.

MR. BROWN: Thank you, Mr. President.

The Committee on Classification Societies for some years now has been working in connection with the CMI initiative to arrive at principles of liability for classification societies in connection with the shipowners' groups who are to some extent adverse to the class societies. As I reported at the May meeting, in the meanwhile the European Community adopted a directive in December of 2001 which set principles for classification society liability and limitation of liability at least in the European Community.

Following that we made some inquiry as to the prospects for the CMI initiative. The bottom line, as I learned a few weeks ago, is that for all practical purposes the CMI initiative is stalemated, largely because the shipowning interests, following the issuance of the European Community directive, want to see how that works out before they engage in any meaningful discussions, although possibly they may never do so. So, it looks as though the CMI initiative is at an end at least for the foreseeable future, by which I mean for the next few years.

On another subject, a few days ago there was an interesting decision by a panel of New York arbitrators, Messrs. Trowbridge, Berg and Connell, in a dispute between a yacht owner called Ibar and the American Bureau of Shipping in which the panel unanimously held that the American Bureau of Shipping was not liable.

The facts are in a 45-page opinion, which I will not go into, but the opinion does remind us of a very useful decision by Judge Tyler, of the Southern District of New York, which you can find in 1972 AMC 1455, called *Great American v. Bureau Veritas*, in which Judge Tyler, in a very thoughtful opinion, emphasized the relatively limited role of the classification society, vis-a-vis the shipowner in connection with potential liability for a ship casualty. I would remind anybody who is interested in the topic, or has a case dealing with it, to have a look at that opinion.

Thank you very much.

MR. HAYDEN: Thank you, Richard.

Michael, you are next, please, to be followed by Michael Unger on the Cruise Lines and Passenger Ships Committee.

MR. COHEN: Mr. President, thank you.

As you will hear from others this morning, the CMI continues with its work on transport law, general average and Marine Insurance. There will be a colloquium in Bordeaux, France, on June 10th through 13th, which is Tuesday through Friday, 2003, to report and debate these subjects more widely within the CMI. At that colloquium special attention will be paid to issues of electronic commerce. All MLA members are eligible and invited to participate in the colloquium, and it is contemplated that CLE credits may be available.

If you are thinking about attending and would like to use frequent flyer miles for free or upgraded air tickets, you will need to make those arrangements now, focusing your attention on the five international carriers that fly into Bordeaux with connections: Air France, British Airways, Delta, Swiss Air and Iberia. For those of you who travel without using frequent flyer miles, one alternative would be to buddy up and to consider using the American Express Platinum Card two-for-the-price-of-one business class tickets on Delta or Swiss Air. There are also consolidators who sell inexpensive coach tickets, and I will send around a memo to the CMI committee around New Years about their availability.

The CMI will hold its 38th Plenary Conference since 1897 at the Westin Bayshore Resort and Marina Hotel in Vancouver during May 30-June 6, 2004. As with the Singapore Conference, our Association will organize working groups to prepare for the Vancouver deliberations. Again, the primary subjects probably will be marine insurance and general average, as well as transport law.

It is expected that CLE credits will be available. A supplemental written report of the CMI Committee's report will appear in the minutes.

Thank you.

MR. HAYDEN: Thank you, Michael.

Michael Unger, Cruise Lines and Passenger Ships, to be followed by Dr. Sam Menefee, International Law of the Sea.

MR. UNGER: Thank you, and good morning.

We had our meeting yesterday morning at Freehill Hogan and Mahar. We had about 20 attendees and we focused a lot of time on the Athens Convention, which is currently being debated over in London. I expect Mr. Dorsey will have spoken in respect to that topic. We also had representatives of the Coast Guard come and speak to us about passenger ship and ferry security issues.

We discussed some proposed rule making by the FMC in respect to unearned passenger revenue for non-performance, and we also spoke about some new and interesting cases that have come down recently, including a case out of the Ninth Circuit which appears to recognize the validity of the Athens Convention and its enforceability.

The problem in that case, a case called *Wallace v. Princess Cruises*, was they found that the ticket did not adequately communicate the Athens Convention to the passenger.

Thank you.

MR. HAYDEN: Thank you very much.

Sam, could you just wait a minute and let Bill Dorsey address the Athens Convention?

MR. DORSEY: Yes, I thought I would make an editorial comment.

You heard in the Secretary's report what limits were established for the Athens Convention. And he mentioned the fact that there was an opt out clause, and that opt out clause does not affect the compulsory insurance levels, but does permit states to raise the overall limit of liability of the shipowner to a higher level or to no level.

And this was very important to the U.S. delegation and to the position of our government. Whether or not there was going to be an opt out provision in the Athens Convention was a deal breaker as far as the U.S. was concerned. They wanted the opt out provision because it, in effect, coincides with our law.

There is no limit of liability for passengers' injury or death claims in this country except to the extent of the rare occasion where our own Limitation of Liability Act is applicable. So, the fact that the opt out

provision was included is important in this sense: It is my view that U.S. government agencies are anxious to have the United States sign on to an international liability convention. As you know, our track record is not very good on that subject. So I know that some of the government agencies are anxious to change that.

My guess is, I'm not certain about this, of course, but my guess is that some of the agencies may push for adoption of this Protocol to the Athens Convention in the United States. And, of course, the MLA will then be called upon to take a position on that in due course.

I might make another comment about the limits of liability. I had to leave London early to come back to this meeting. I left on Tuesday, and it was on that day that the liability limit figures were announced. They were the result of a compromise reached through the efforts of the Chairman of the Diplomatic Conference. But, Patrick Griggs was there and he tells me that the comment of the P&I clubs on the figures reached was that they were not doable. And so it remains to be seen, what the P&I clubs are going to do if this Convention Protocol ever comes into force.

I also understand that the cruise line group, the ICCL, was not terribly happy with the figures. Actually, the figures probably are not satisfactory to flag states and undeveloped countries who wanted lower figures, and are probably not completely satisfactory to a lot of the European nations who wanted higher figures. So, in effect, the figures probably don't satisfy really anybody, which may mean that they are a perfect compromise.

That's all I have to say about it, Ray.

MR. HAYDEN: Thank you, Bill.

Sam Menefee.

Sam will be followed by Mary Elisa Reeves on the Limitation of Liability Committee.

DR. MENEFEE: Thank you, Mr. President.

The Committee on the International Law of the Sea met Wednesday at the South Street Seaport Museum.

After continuing discussions on subcommittee reorganization, the Committee wishes to renew its request to have all or part of the

reorganization scheme it proposed at the May meeting approved by you, Mr. President.

There have been no new ratifications of the 1982 Convention on the Law of the Sea, but Tunisia, Kuwait, Cameroon and Cuba have ratified the Agreement Relating to the Implementation of Part 11, while Cyprus has approved the Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Species.

Additionally, the four chambers of the International Tribunal for the Law of the Sea were reconstituted in early October, while the August meeting of the International Seabed Authority began consideration of how to regulate the exploitation of polymetalic sulfides and cobalt-rich crusts.

The ICJ dispute between Nicaragua and Honduras over boundaries in the Caribbean was noted. There are also current disagreements over the delimitation of the bed of the Caspian Sea.

The 271 piratical attacks in the first nine months of this year is second only to the figures for the year 2000. Indonesia and Bangladesh have suffered the greatest number of attacks, while three U.S. flag vessels were targeted, the most in the last twelve years. India is currently considering a revision to its law on maritime violence, while revision to the SUA Convention have been proposed at the IMO. The recent attack on a French tanker and threats to Mediterranean shipping suggests that the problem of terrorism remains with us.

On behalf of the Offshore Exploration Subcommittee, Chuck Lane reported on a scheme to alert subscribers to offshore blowouts worldwide via the web.

The Committee considered problems with illegal immigrants and the duty to rescue, and requested Larry Cohen to liaise with the Young Lawyers Committee to produce a guide to relevant oceans law web sites for use by Committee members and other interested individuals.

Mr. President, that concludes my report

MR. HAYDEN: Thank you, Sam.

I appreciate it very much.

Mary Elisa Reeves, Limitation of Liability, to be followed by Sandra Knapp, Marine Financing.

MS. REEVES: Good morning, everyone.

The Limitation Committee held its meeting on Wednesday afternoon. We discussed an interesting limitation case currently pending in Philadelphia concerning Pier 34 which housed a restaurant and nightclub on the Delaware River and collapsed in May of 2000, killing three young women and dumping more than 30 others into the river.

Criminal charges have been filed against some individuals as a result, and, of course, civil claims were filed in State Court in Philadelphia against the owners and operators of the pier and the nightclub, and also certain marine contractors and engineers against whom allegations were made of negligent repair and inspection of the pier. Those cases were consolidated in a version of mass tort litigation in the state court last year.

Last year, as well, one of the marine contractors filed a limitation action in the Eastern District of Pennsylvania seeking to limit its liability to the value of its barge which had been used in performing some repairs several years prior to the incident. That is not particularly unusual, except that this summer the marine contractor filed a motion in the Federal Court asking the Court to stay all of the State Court actions against all of the non-marine defendants, as well. So, there are many interesting issues, too many to go into here, but we will be following that case closely.

Also, I would like to thank again Dick Brown and Tony Rodriguez for spearheading our committee's efforts to put together our comments to Dennis Bryant on the Title 46 recodification of the Limitation Act. And, of course, those have now gone to the Department of Transportation.

Finally, thanks to Dana Henderson of Seattle, who is our new secretary of the committee. We finally have a Limitation of Liability newsletter which is available out on the table in the hall and which hopefully will also be available shortly on the web site.

Thank you.

MR. HAYDEN: Thank you.

Sandra Knapp on the Marine Finance Committee, to be followed by Stephen Rible of the Marine Insurance and General Average Committee.

Thank you.

MS. KNAPP: Good morning. Thank you, Mr. President. I'll try to limit my remarks to things of interest to the general membership.

A lot of the things we do most of you are not interested in, but I think I need to highlight some things just from a general maritime practice standpoint. First of all, I would like to say that we had Patrick Wiese as our guest. He's an attorney with MARAD and he came to our meeting on Wednesday afternoon.

Now, we have several subcommittees which you may or may not be aware of. But at the subcommittee meeting level we addressed several important issues, one of which was some bankruptcy matters. Of particular of interest to you all is the issue of whether a vessel can be sold out of bankruptcy court free and clear of all liens without formal foreclosure proceedings. There is an existing case going on here in the Second Circuit on that issue and, of course, it has come up before. There is also bankruptcy code sections that we are looking at, especially regarding accepting and rejecting charters, existing charters.

The Taxation Subcommittee is looking at a second set of proposed regulations regarding the taxation of foreign shipping companies, and that is a very technical area of the law, needless to say, but you should all be aware that those laws are being looked at and changed and pooling arrangements, which are very popular these days, are affected, et cetera.

We also discussed vessel title insurance again. I brought that up a couple of years ago. It is a new product, and we're monitoring how it is taking off, who has been using it, who hasn't been. It is a hard industry to move off some old ways, but they are working on it.

We are looking at reorganizing our subcommittee structure a little bit. We want to perhaps get into some CLE components. We want to revitalize.

Jim Bartlett and I have been talking a little bit about our joint Subcommittee on Insolvency and Foreclosures, so you will see some of that coming on down the pike.

I want to highlight two judicial developments; namely, the Fifth Circuit case *Bank One v. Mr. Dean*. It has to do with maritime liens and charters and the priorities associated with all of the various liens on the vessels, so you may want to review that case.

Also, I want to highlight a customs ruling regarding who is and what is a passenger for purposes of the coastwise laws. And probably the most important thing here for everybody is that it affects business entertainment on vessels, and particularly large yachts. A client of yours may be entertaining business associates on his or her yacht and they may be engaged in coastwise trade unbeknownst to everybody.

Also, we have been following a lot of regulatory and legislative activities, the Title 46 recodification, the Coast Guard Authorization Act, and, in particular the electronic filing of documents and the recording and discharging of notice of claims of lien which I mentioned before that is still around. You need to be aware. You can probably file an NOCL even though there is not a mortgage of record which is new.

MARAD has requested comments on their blanket approval of time charters which we are monitoring and we are also monitoring very closely the hot topic of lease financing and foreign leasing companies involved in the ownership of coastwise trade vessels.

A more detailed report than that, believe it or not, will be submitted. If you are interested in the details, I commend you to the written report.

Thank you, Mr. President.

MR. HAYDEN: Thank you, Sandra.

Steve Rible next on the Marine Insurance and General Average Committee. He is to be followed by Don Kennedy on the Maritime Arbitration and Mediation Committee.

MR. RIBLE: Well, I love Sandra Knapp's style and I'm encouraged to follow her lead while attempting to try to talk about marine insurance.

The breaking news from the dry side of marine is that they are once again attempting to abolish general average. Now, this is not new, but there is a concerted effort in the working group of the CMI to limit the York-Antwerp Rules so that GA ends at the attainment of safety; thus, eliminating allowances for common benefit and the safe prosecution of the voyage. For more details, our GA Chair, Jonathan Spencer, refers you to Howard McCormack's address that can be found on the MLA web site or can be found on a new web site called www.thegapage.com.

Now, on the hull side of marine insurance, Mr. Woods spoke to the fact that the London market will be launching a new hull wording. They will be launching it on October 31st in London, which is just the other day, and November 4th in Greece. Apparently the London market recognized that the 1995 clauses were not selling well to shipowners. I say that because the new clauses seem to more closely resemble the old '83 clauses.

Curiously, the drafters eliminated most of the warranty language in the wording. Perhaps they have the same distaste as I for *Wilburn* boat. But I think more likely shipowners dislike warranties.

Concerning cargo insurance, George Zacharkow presented a speaker, Dan St. Jacques. He's a retired underwriter and current marine insurance expert. Dan traced the history of cargo insurance all the way back to the 1700s in London.

On a somewhat more modern note, we had another speaker, Stephen Clark, who is an underwriter at CNA Insurance. He addressed the business of underwriting marine terminal risks. In my opinion, Steve discussed the future of underwriting marine liabilities.

Basically, old marine coverage terms are being packaged together with comprehensive general liability cover, directors and officers cover, and employment practices cover.

Now, that's a whole lot of increased risk for the marine insurance market, and I'm looking forward to it.

Thank you.

MR. HAYDEN: Thank you, Steve.

Next is Don Kennedy, to be followed by Barbara Burke on Maritime Legislation.

Don.

MR. KENNEDY: Thank you, Mr. President.

Now, the Committee on Maritime Arbitration and Mediation has met a number of times since the May meeting and we have been focusing on two topics.

The first is the Canadian anti-*Sky Reefer* legislation. Peter Cullen from Stikeman, Elliott in Montreal made a presentation to the committee explaining this legislation, which essentially provides that if a claimant has a claim arising out of a contract for the carriage of goods by water and it arises in Canada, they are permitted to ignore a foreign jurisdiction or a foreign arbitration clause. We'll put some more in our written committee report about that.

The second item that we have been discussing is a CMI draft document and the very narrow issue of private carriage. Under the leadership of Jay Pare', we intend to prepare some comments and a little drafting to see that the private carriage distinction is preserved.

Thank you.

MR. HAYDEN: Thank you, Mr. Kennedy.

Next is Barbara Burke, Maritime Legislation, to be followed by a substitute for John Schaffer who sent in a doctor's note, Maritime Personnel, Paul Edelman will follow.

MS. BURKE: I was wondering where Mr. Schaffer was yesterday. He is my vice-chairman.

MR. HAYDEN: He presented this doctor's note. We're going to check it out.

MS. BURKE: Thank you, Mr. President. Good morning, everyone. I just wanted to alert you to an important development in Washington, D.C.

Just before adjourning for the election recess, conferees on legislation to create a Federal backstop for the terrorism insurance did reach a tentative agreement and there is an unofficial draft. Congress returns the week of November 12th for a lame duck session which may or may not accomplish a lot, but chances are very high that this particular piece of legislation will pass both the House and Senate as a conference agreement before Thanksgiving and be signed into law by the President.

The one wild card in the whole process is that the compromise reached between the Administration and Senate Democrats on the controversial tort reform issue that had been holding up the legislation. This compromise so far does not have the agreement of the Chairman of

the House Judiciary Committee, Jim Sensenbrenner. Without him on board, it is not a done deal. So we'll see what happens.

The Chairman of the Judiciary Committee would like to see a stronger ban on punitive damages so that claims against insurance companies and their policyholders would not be made for punitive damages. He also tried to get a restriction, a cap on non-economic damages. None of these other points that the Chairman wanted were included in the compromise, so he's reportedly miffed.

What is in the compromise that has a very good chance of becoming law? It is called the Terrorism Risk Insurance Act, and it requires the primary property casualty industry to share the risk of loss with the Federal Government from future terrorist attacks aimed at U.S. interests. It's a three-year program which will terminate December 31, 2005. There is a minimum of $5 million in damage to trigger the program, and maximum aggregate losses in any year are capped at a hundred billion dollars, unless Congress provides for additional payments.

During the first two years of the program, participation is mandatory by the affected commercial property casualty insurers, meaning terrorism coverage must be offered in all policies issued by these insurers. The covered insurers include everyone, whether on the NAIC surplus lines list, admitted in the state, or you are a foreign insurer which is to be approved by a Federal regulator to be covering a maritime, energy or aviation activity. So, pretty much everyone is in and the coverage is mandatory.

All terrorism exclusions will be void upon the day of enactment of the bill. And these exclusions can be reinstated only with a separate pricing of the coverage for terrorism, which has to be a line item in the policy, and with approval of the assured. So, it is a very important development. It is not a done deal yet, but I wanted you to watch for it.

Thank you, Mr. President.

MR. HAYDEN: Thank you very much.

Paul Edelman, please, on Maritime Personnel, to be followed by Dennis Bryant, Navigation, Coast Guard and Government Relations Committee.

MR. EDELMAN: Good morning, Mr. President, ladies and gentlemen. I'm standing in for John Schaffer who called in sick yesterday, and I will do my best to replace him.

We had a very interesting meeting yesterday. The Maritime Personnel group always has a good turnout. We plaintiffs' lawyers are trying very hard to file a lot of cases to keep the defense Bar busy and financially in good shape. John is always interested and always starts off with what is happening with punitive damages. I don't personally know what is wrong with punitive damages —

(Laughter.)

MR. EDELMAN: — but, anyway, there is a case up in the Supreme Court that we talked about, *State Farm v. Campbell*, a mere $145 million. What is everybody so excited about? It was punitive damages against State Farm, 145 to 1 in terms of the punitives in relation to the compensatory nature of business practices that obviously got somebody very excited.

There is a West Virginia court dealing with railroad workers, so that sort of falls into the Jones Act seamen's situation, one of those problems with asbestos and fear of cancer in terms of the workplace, a mere $5.8 million.

Now the biggy. A California court allowed some lady who smoked Philip Morris cigarettes $28 billion. We'll have to follow and see whether that is maybe cut down to a mere twenty-five or twenty.

(Laughter.)

MR. EDELMAN: There was a note from John on the basis of a lot of cancer claims that are affecting two P&I clubs very badly, particularly the Liverpool and London, which I know has been a little bit shaky, and the UK club apparently is also involved in these asbestos claims.

Another Supreme Court case that we want everybody to look for, *Sprietsma v. Mercury Marine*. This is a case — we almost had a similar case, but it was settled before it got there. It involves the question of the preemption by the Federal Boat Safety Act against local products laws on the question of whether you need a propeller guard on some of these pleasure boats.

Another case that we have to look for may end up in the Supreme Court before we are through. There is a dispute between the Eleventh Circuit and the Fifth Circuit on the question of the Jones Act negligence standard. You know, that has been battered around a little bit by the Fifth

Circuit, as to exactly what they mean when they say that it is not the regular standard; it is a more favorable negligence standard for the seamen.

I don't want to go on into too much detail. We hope to have a lot of the cases that we discussed in our final report, but there have been some interesting Jones Act cases, maintenance cases, some Longshore Act cases, some forum non-convenience cases, and, of course, that affects a lot of areas besides the personal injury area.

And because we really also are involved, most of us lawyers, with cruise lines, we also went over some of the cruise line cases which have been discussed in one of our other meetings.

Now, Mr. President, I think I've gone on long enough.

MR. HAYDEN: Thank you very much. You've done a great job filling in for John.

MR. EDELMAN: Thank you very much.

MR. HAYDEN: Dennis, to be followed by Jim Bartlett, Practice and Procedure Committee.

MR. BRYANT: Thank you, Mr. President. I'm going to take advantage of this open mike to give two reports. I'll start with the report of the Committee on Navigation, Coast Guard and Government Regulation.

Alex Weller from Coast Guard headquarters presented the Coast Guard activities since the last meeting, standing in for Captain Ahearn, who, as mentioned previously, was in London, and gave a very detailed report on Coast Guard efforts with regard to maritime security.

Pat Weese from the Maritime Administration spoke on their activities; in particular, the time charter policy and their reexamination of that issue. And they are still inviting comments from interested parties on whether they should continue their blanket approval of time charterers of U.S. vessels by non-U.S. citizens.

Bill Storz of the Association spoke on the Military Sea Lift Command and gave us a very detailed overview of what that agency does and engendered a lot of questions.

Jeff Muller of the committee, who is also the Chair of the Subcommittee on Maritime Security, spoke on the maritime security issue. This is today what OPA '90 was ten, twelve years ago. It is the hot button issue of the moment and is going to affect virtually everyone's practice. So I strongly recommend that you pay attention to it.

The Coast Guard has been establishing security zones all over the country since September 11, 2001. But it has also been recently putting out NAVICS, most recently on security guidelines for vessels. They are going to be strongly encouraging vessels to voluntarily adopt security plans.

If the maritime security legislation is adopted, as it looks like it will be later this month by Congress, they will then convert that into a regulation. They have admitted that they are already drafting the notice of proposed rulemaking on this issue. So, stand by.

We will have a mandatory vessel security plan requirement of some sort very soon, either following the IMO guidelines, making those mandatory in this country, or under the new maritime security legislation, which is expected to pass.

If the legislation passes, we will also have vulnerability assessments of foreign ports and ports that are found to not be satisfactory. Ships coming from those ports or carrying cargoes from those ports could potentially be banned from coming into U.S. ports. More likely, the Coast Guard will put conditions upon their entry, will demand that the vessels be examined at the sea buoy or something of that nature.

We also discussed the new INS policy on detainees on board and how the Coast Guard is now assisting formally in the enforcement of those provisions and the problems that are being experienced with the INS not having a uniform policy on deciding when a crew member should be detained on board.

We need to assist the INS as much as we can in establishing uniformed guidelines so that our clients will have some idea ahead of time which crew members will pass muster with INS and which ones won't. There will be no guarantees, obviously, but right now it appears to be virtually random.

We also had discussions of criminal liability and other maritime legislation in general. Criminal liability continues to be a big problem. The Department of Justice cannot understand why our clients don't realize the

Department of Justice is serious about full compliance by vessels with the criminal laws of the United States, and they are going to keep putting the pressure on until they perceive that our clients have gotten the message. So to that extent, please advise your clients that they better have their paperwork and other things in order when they arrive here. Their oil record books in particular should be truthful.

There is nothing illegal under U.S. law for a foreign ship outside of U.S. waters to dump oil in the ocean. It may be a problem with the flag state, but it is not going to be a U.S. problem. The problem arises when you don't log it properly in the oil record book and you present the oil record book to the U.S. Coast Guard when you arrive in a U.S. port.

These are not being prosecuted as environmental crimes. They are being prosecuted as false official statements to the U.S. Government. Advise your clients accordingly.

Moving on to the second report, the Ad Hoc Committee on the Codification of Title 46. I'm pleased to say that we have finished our work and I want to thank Hal Watson and the chairs of the various committees and the membership in general for all of the comments that were provided. We're talking about a three hundred and some-odd page document that this Association reviewed, submitted detailed comments on, and the comments were adopted almost verbatim by the Department of Transportation and ONB and they were very appreciative of our efforts. So, you can congratulate yourselves on that, because most of the work was done by the various committees, and I just put it together and passed it along.

The next step in the process is that probably sometime early in the 108th Congress the Administration will submit a proposed bill to Congress for the codification, and given what happened with the codification of the Coast Guard portion of Title 46 back in '83 or so, it will probably take several years to work through. There will be some committee hearings. The MLA may be asked to testify. But the heavy lifting has been completed and that's moving ahead however slowly.

So once again, thank you all for your efforts. And that completes my report.

MR. HAYDEN: Thank you, Dennis, and thank you for your help. Whenever we have questions of what is going on in Washington, Dennis is a great help.

Next we have Jim Bartlett, and he is to be followed by Kimbley Kearney on the Uniformity of Maritime Law.

MR. BARTLETT: Thank you, Mr. President.

The Committee on Practice and Procedure met at Bingham Engler on October 30th, and I would like to thank that firm again for its hospitality.

The first item I would like to report about is with respect to proposed amendments to Rule 53 on special masters. You may recall, I spoke about that at I believe the last meeting. This proposed amendment or these proposed amendments included a provision barring a law firm or its partners from appearing before a judge who had appointed their partner as a special master. The MLA had concerns about this provision. President Dorsey wrote a letter. I'm pleased to report that this provision has been deleted by the Advisory Committee. The MLA was the only organization to comment on this provision, so it was President Dorsey's letter that caused the Advisory Committee to act as it did. So I think we can take some pride in that.

MR. DORSEY: You wrote the letter.

(Laughter.)

MR. DORSEY: But thank you, anyhow, Jim.

MR. BARTLETT: The MLA has passed two resolutions.

In the past, you may recall with respect to changes to two Supplemental Rules, Rule B (1) (a) to make the time for determining whether a defendant can be found within a district to add the language: "When a verified complaint praying for attachment and the affidavit required by Rule B (1) (b) are filed."

The other resolution passed by this organization was with respect to Rule C6 (b) (i) (b) and this was to correct an error in the amendments to Rule C that were made in 2000.

This proposed amendment would clarify that a person asserting a right of possession or ownership interest in arrested property must file a verified statement of right or interest within ten days of the execution of process. Well, I'm pleased to report that the Advisory Committee has approved both

of these proposed amendments in a report it issued, I believe, on October 4th.

Now, these revisions or amendments will go to the Standing Committee, and then they will have to go through a process of publication, then perhaps a judicial conference, and then before the Supreme Court. So it appears that these changes will not go into effect until 2005.

The committee suggests that the members of this organization, when they are dealing with these rules, start to follow these procedures as if they were in effect now, and if you do so, you will not have a problem. This will be published in Volume 29 of Benedict's in the future.

One note here. Most of this information that I've just related was provided to the committee by Mark Kasanin who has served for ten years on the Advisory Committee on Civil Rules. And I think this organization should thank Mark for his service. He's stepped down now, but he's done a great job in representing the interests of the MLA and maritime practitioners generally on that committee.

With respect to the status of proposed Supplemental Rule G, this was a rule proposed mostly by the Department of Justice to deal with non-maritime forfeiture procedures. I am reporting now that the criminal defense Bar, at least some elements of that Bar, have strongly opposed Rule G. I am told that a subcommittee will be appointed, and it will probably be several years, if ever, before we see a Rule G.

A subcommittee has been formed to deal with perceived problems with notice of *in rem* actions dealing with Rule C (4) and 46 USC 31325 (d), the Ship Mortgage Act. And they are to propose changes either in the rule or in the amendment — or in the statute or both. And I will report further on that in the future.

Former President Moseley reported on the ABA Commission on Multi-Jurisdictional Practice, so as Chair of the Ad Hoc Committee on Multi-Jurisdictional Practice of the MLA, I have nothing to report other than what President Moseley reported.

One last note, a little bit off the track. On a personal note, somewhat, in case some of you have not heard, in September the *Calhoun* case was tried in Philadelphia. I'm happy to report that it was a defense verdict, with the jury finding no product defect and no failure to warn.

With that, Mr. President, I conclude. Thank you.

MR. HAYDEN: Thank you very much, Jim.

Before we go on to the next report, where is Mark? I think he's here.

Mark, thanks for your help. And let's give him a round of applause.

(Applause.)

MR. HAYDEN: Kimbley Kearney, to be followed by Josh Force of the Young Lawyers Committee.

MS. KEARNEY: Thank you, Mr. President. Good morning.

This term the Uniformity of Maritime Law Committee has updated its bibliography of law review articles which focus on the issue of uniformity in admiralty law.

The committee would like to thank Alex Giles of Baltimore, a member of the Young Lawyers Committee, for all of his fine work on that project. And the committee hopes to have that bibliography posted soon on the MLA's web site.

The committee has also identified two cases emanating from the Ninth Circuit in September of this year in which the Court has acknowledged placing itself in conflict with other circuits.

The first case is *Wallace v. Princess Cruises* which was discussed earlier this morning by former President Dorsey in connection with the applicability of the limitation of liability provision under the Athens Convention. The case is also significant in that the Court has held that in admiralty cases a District Court may entertain an interlocutory appeal even when the District Court has made no determination of liability of the parties.

The second case is *Ventura Packers v. the Fishing Vessel JEANINE KATHLEEN*, and in this case the Ninth Circuit places itself in conflict with numerous circuits, stating that a claim brought under the Federal Maritime Lien Act creates an independent basis of admiralty jurisdiction even where the contract for services which is giving rise to the claim of lien is not a maritime contract.

The committee will follow both of these cases through the pending applications for en banc review and report findings later.

Thank you, Mr. President.

MR. HAYDEN: Thank you.

Josh, to be followed by Robert Parrish of Jacksonville on planning arrangements for 2002.

MR. FORCE: Thank you, Mr. President.

The Young Lawyers Committee met yesterday and, as you've already heard this morning, remains very active working on a number of different projects. We discussed a number of those projects yesterday. Currently, we are working with approximately half a dozen of the standing committees on different projects.

You just heard Kim talk about the bibliography that Alex Giles worked on for the Uniformity Committee, and you have also heard about the Limitation of Liability newsletter that Dana Henderson has been working on. In addition to those projects, I would like to mention one other project that we continue to work very hard on and that is an indexing project in which we are trying to produce an index of the MLA proceedings from 1986 to the present.

There are approximately nine members of our committee who are trying to collect the various MLA proceedings and prepare the index so the Association will be able to access its earlier work product, which is voluminous, but largely inaccessible at present. In addition to our ongoing projects, we also discussed two new projects that we have been asked to assist with.

One of them is from the Law of the Sea Committee as Professor Menefee mentioned earlier. The Arbitration Committee has also asked us to provide some assistance in looking at certain contract issues in arbitration awards involving service contracts.

The Young Lawyers Committee remains very interested in assisting all of the standing committees. And I would really ask all of the committee chairs and others that if you have projects, we have people who want to

get involved in your committees and help you and want to become active in the Maritime Law Association. So, please let me know if you have any projects that you need help on or you can contact Larry Kahn or Katherine Newman, who are the other officers of the Young Lawyers Committee.

In addition to those projects, we discussed our ongoing efforts to improve our membership guidelines and also our outreach. You heard the Secretary speak earlier about the Bylaw amendment that we authored and which we were very appreciative was passed.

In addition to that, we have been encouraging our members to get involved in their local communities by organizing regional get togethers and regional projects so that apart from the two MLA meetings we can try to foster some camaraderie and also professionalism among the young lawyers who are not able to come to the MLA meetings. And, of course, we encourage all of the members of the Association to get their young lawyers involved and to try to get as many as possible to be active in the Maritime Law Association. We're hoping to revive our liaison system with the standing committees, which has worked very effectively in the past and is probably a little bit out of date, and we hope to report on that further in the future.

Finally, I would just like to thank the President and the Officers and the Board for allowing me to represent the MLA along with Past President Dorsey at the *Sprietsma* argument which was both very interesting and very educational.

Thank you.

MR. HAYDEN: Josh was the principal author of the *Sprietsma* brief submitted on behalf of the Association. And I must tell you he did a wonderful job.

Next we have Bob Parrish.

MR. PARRISH: Thank you, Mr. President.

I'm pleased to report that my committee has been feverishly at work trying to build up their tolerance to a local concoction known as a dark and stormy. We plan to continue that effort next week as we continue planning arrangements for the 2003 resort meeting, out of New York meeting next Fall.

Just briefly, I hope that at this time on Friday, October 31, 2003, next year, we will not be here but rather we'll be at the Southampton Princess in Bermuda in committee meetings. You recall that next year the format is different. The days will be shifted by one day. So that we'll start on Wednesday, the 29th of October 2003, and will conclude on Saturday, November 1, 2003, with our general meeting that morning followed by the dinner dance that evening.

Thank you very much.

MR. HAYDEN: Thank you, Bob.

I can tell you he has got a very eager staff that is looking forward to attending with him at the practice run that I think they are planning for next week or thereafter.

The next speaker will be Alfred Kuffler, Environmental Crimes Committee.

He will be followed by Dr. Wiswall. Dr. Wiswall has been looking at his clock and trying to figure out whether he gets the rest of the hour.

(Laughter.)

MR. HAYDEN: And I can tell you, Frank, you do not.

MR. KUFFLER: Mr. President.

Frank, don't worry, unlike his predecessor, he hasn't got the red/ green light that appears in the Appellate Courts.

Members, guests, this has been a very busy time for the Maritime Environmental Crimes Subcommittee since our May meeting, and I think a very successful time. In June, Captain Ahearn facilitated a meeting between committee members and representatives of the Environmental Crime Section of the Justice Department, their counterpart at the EPA. We had an opportunity to present our agenda. There was I think what diplomats call a full and frank discussion. And the meeting ended with an agreement that we would consider our positions and reconvene.

The committee met yesterday. We have a program now to follow up. And I think between now and the spring meeting I hope there will be quite a bit more activity.

One very positive, substantive matter came out of that June meeting.

There was discussion about what to do when a shipowner discovers that they indeed are in violation of environmental laws with the prospect of criminal sanctions. For now the better part of 20 years, the EPA and the Justice Department have had guidelines for voluntary disclosure. If you step forward and disclose the violation, and agree to a quite elaborate compliance procedure, the penalties that go along with these things will be mitigated, and from the standpoint of this committee, the criminal prosecutions will not proceed.

The Coast Guard at our June meeting has agreed to take a look at whether they would be willing to implement a similar program for the maritime community. I understand from Captain Ahearn that that effort is under way. I believe this is an extraordinarily positive step.

In addition, at President Hayden's request I attended another meeting hosted by Captain Ahearn in August which was set up as part of the joint Coast Guard-industry initiative on the recruitment and retention of merchant mariners. They have some concerns about criminal prosecutions which overlap in part what we're trying to do. That meeting basically recycled a lot of the discussion that was had two months earlier. We are continuing to stay in touch with the industry representatives of that group and we'll see where that goes.

Another and I believe positive outgrowth from our efforts to engage the Justice Department, shortly after the June meeting I was asked by the environmental crimes people in Washington whether I would be willing to speak at a training seminar that was being conducted under the auspices of the U.S. Attorney in Philadelphia to talk about the maritime scene, some of the issues that we face on our side. I did so, and you will all be happy to know that I volunteered you all for similar efforts around the country as the Justice Department organizes these things. So, please don't be surprised if somebody from the Board, the officers or yours truly calls and says do you remember on November 1, 2002 Fred Kuffler said I volunteered you? Okay, now you've got to produce.

The second thing, the second inquiry from the Justice Department, about a month ago President Hayden received a draft of a proposed amendment to the Suppression of Unlawful Acts Convention with a request that the MLA comment. We didn't have much time. President Hayden asked

me for a few comments. I gave them. And off people went to the IMO legal Committee meeting.

I think these two outreaches from the Justice Department are again positive. There was no discussion at all. Now there is the beginnings of some discussion on the issues that the MLA has raised, and indeed the effort is increasing.

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

MR. HAYDEN: Thank you very much, Mr. Kuffler.

Dr. Wiswall. Keep it short.

(Laughter.)

DR. WISWALL: Thank you, Mr. President.

Yesterday afternoon the Directors of the American Maritime Law Foundation voted to award the Elliott B. Nixon prize next year. The prize will be in the amount of $1500. It will be awarded for the best essay by a law student or a young lawyer. The details of how a young lawyer is defined will appear subsequently in printed form. The deadline for submissions of essays will be the 31st of May of 2003.

The subject of the essay must be practical measures to achieve greater uniformity in either American domestic maritime law or international maritime law or both. And the winner of the competition will be announced at the Bermuda meeting at the Southampton Princess a year from now.

Thank you.

Oh, one further thing.

Now, gifts to the American Maritime Law Foundation are not only gladly received; we have a number of them just out of an instantaneous spirit of generosity or in memoriam. So, I'm looking around the room here to see if there is anybody who shows of departing.

(Laughter.)

DR. WISWALL: I also would like to announce that Pat Bonner was elected a Director and our new Treasurer of the Foundation, and the

Directors wish me to express their appreciation to him for taking this on. So those of you who are moved to take out your wallets or checkbooks can contact either me or Pat and you will receive quick and precise instructions as to how to transfer the funds.

Thank you.

MR. HAYDEN: Frank, don't leave the microphone for a minute, please.

You told about how you are going to give a $1500 grant to the recipient of the award at Southampton.

DR. WISWALL: Excuse me. I said the winner will be announced at Southampton.

MR. HAYDEN: I was going to ask if you are going to bring the winner there and pay his way.

DR. WISWALL: If he can swim, we'll give him a towel on the beach, a hotel towel.

(Laughter.)

MR. HAYDEN: Thank you.

Have I missed any committee chairs that wish to give a report this morning?

(No response.)

MR. HAYDEN: All right.

I do want to thank some Immediate Past Presidents who have given me a lot of help and who have attended a lot of functions on behalf of the Association. I'm talking particularly about Messrs. Hooper and Moseley and McCormack and Dorsey who I have called upon to attend different international convention meetings and chairs and things like that, and I certainly do appreciate their help.

I also would like to call your attention that this afternoon the Young Lawyers Committee and the Forum of Maritime Law teachers are presenting papers on the international law of the sea and the forum selection clauses and forum non-conveniens.

There will be CLE credits awarded for those in attendance this afternoon. It starts at 2:30 and that will be right here in this building. I'm sure it will be very interesting. The speakers will be Professor Sam Menefee and Professor Martin Davies from the Tulane Law School.

I don't believe there is any other formal business for the meeting today and I therefore call upon our most senior Past President here, Gordon Paulsen, to make a motion.

MR. PAULSEN: Despite the fact that it is too early for a motion to adjourn, it is contrary to the nature of maritime lawyers to do anything ahead of time. We never adjourn before noon. We could sit in silence.

(Laughter.)

MR. PAULSEN: But that also is contrary to the nature of maritime lawyers.

(Laughter.)

MR. HAYDEN: Gordon, my watch says one minute of twelve.

MR. PAULSEN: I have never set my watch on the current time.

Nevertheless, I move that we adjourn.

(A chorus of seconds.)

MR. HAYDEN: Any discussion?

(No response.)

MR. HAYDEN: All in favor?

(A chorus of ayes.)

MR. HAYDEN: The meeting is adjourned:

Thank you all for attending. I appreciate it.

(Applause.)

(Time noted: 11:15 o'clock a.m.)

FORMAL REPORT OF THE COMMITTEE ON AMERICAN BAR ASSOCIATIONS RELATIONS

There were several matters of significance and interest brought before the House of Delegates in August 2002 that you should find of interest and would wish to continue monitoring.

I. RESOLUTION CONCERNING FOREIGN SOVEREIGN IMMUNITIES ACT

Recommendation 119 was previously on the Agenda of the House of Delegates during August 2001 and February 2002 but was withdrawn to allow additional time for further comments. A summary of the recommendations is that the amendments to the U.S. Foreign Sovereign Immunities Act currently be modified to address conflicting judicial decisions, ambiguities and confusion.

The general information form submitted by the Section of International Law and Practice stated that this recommendation is needed to permit the ABA to begin the process of discussing the need for the legislation proposed in the recommendations and report. It was considered that the "process will be lengthy". Two portions of the Resolution as originally submitted have been removed since the U. S. Supreme Court had accepted Certiorari in a case that would resolve these issues. The recommendation was revised and approved as an ABA Resolution as follows:

TEXT OF RESOLUTION *

NOTE: * Strikethrough area is the matter that is not approved.
Underline area are new provisions for the Resolution.

RESOLVED, That the American Bar Association recommends that the Congress and the President of the United States enact amendments to the Foreign Sovereign Immunities Act ("FSIA or "Act") in accordance with the following principles:

(1) Amend the FSIA throughout to separate the definitions of "foreign state" and "agency or instrumentality" for all purposes, and amend section 1603 to (a) clarify the term "foreign state" to include the government of the State and its departments, ministries, armed forces, and independent regulatory agencies; and

(b) shorten the phrase "agency or instrumentality" to just "instrumentality".

(2) Amend section 1603 to apply the Act ~~to entities indirectly owned by a foreign state and~~ to entities owned by more than one foreign state, ~~while adding~~ and to add to that section a provision to avoid the application of the FSIA to any entity designated under the International Organizations Immunities Act; ~~and adding to the commercial activity exception in section 1605(a)(2) a rebuttable presumption that an instrumentality owned by another instrumentality rather than the state itself is engages in commercial activity. The presumption would not apply to foreign central banks.~~

(3) Amend section 1603 to apply the Act to individuals who are officials or employees of a foreign state or instrumentality and who act within the scope of their office or employment, adding appropriate new provisions for service on individuals and provisions expressly preserving diplomatic, consular, or other immunity from suit or service under any treaty, other international agreement, or other federal statute of the United States. This amendment would not apply the Act to heads of state.

(4) Amend the waiver exception in section 1605(a)(1) to limit implied waivers to those situations in which a foreign state or instrumentality participates as a defendant in litigation without properly raising or preserving a defense of sovereign immunity and to specify the choice-of-law rule for determining a person's actual or apparent authority to waive sovereign immunity.

(5) Amend the commercial activity exception in section 1605(a)(2) to remove immunity for claims "based upon a legal obligation to make a payment at a location in the United States in connection with commercial activity," to require a "substantial" and direct effect in the United States when applying the third clause dealing with commercial activity and acts occurring outside of the United States, and to clarify that the types of claims that may not be brought under the tort exception, such as defamation, deceit, and malicious prosecution, may be brought under the commercial activity exception.

B. RECOMMENDATION OF MLA/ABA COMMITTEE

It is the recommendation of the Chair of the ABA Relations Committee and the Vice-Chair; both of who are Past Presidents of this Association that we continue to monitor this for future progress and implementation of any modifications that may be suggested from our MLA members or Committees.

II. MULTIJURISDICTIONAL PRACTICE

A. RESOLUTION

The Multijurisdictional Practice Report No. 201 of the ABA was reviewed, voted upon and approved. The draft Report had been submitted to the MLA Board at its Board meeting in early August in Philadelphia. The Report itself is too long (sixty pages) to fully provide it herein. However, copies can be obtained from the ABA.

Your Committee provides the following summary of the Report:

201A

RESOLVED that the American Bar affirms its support of a principle of state judicial regulation of a practice of law.

201B

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States Jurisdiction and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or

order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

I draw your attention to the fact that there are twenty-one provisos in this recommendation that have been approved. Each should be studied before entering a state where such model has been adopted or will be adopted.

201C

This recommendation was revised and was then passed. It involves disciplinary authority of the non-admitting state and the state in which the lawyer is already admitted.

201 D

Amends Rule 6 and 22 of the ABA *Model Rules* of lawyer discipline enforcement.

201 E

Recommends the use of National Lawyer Regulatory Data Bank to promote interstate disciplinarian enforcement mechanisms.

201 F

This recommendation was revised and approved concerning a model rule for *Pro Hac Vice* admissions. Also included is Appendix A.

201G

The model rule for admission by motion was approved as amended requiring that an applicant, inter alia, must be a graduate of an ABA accredited law school.

201 H

That the ABA encourages jurisdictions to adopt the ABA Model Rule for License and Legal Consultants.

201 I

There is no text for 201 I.

201J

The ABA adopted the proposed Model Rule for Temporary Practice for Foreign Lawyers.

B. RECOMMENDATION OF MLA/ABA COMMITTEE

It is recommended that all members be advised that these *Model Rules* will be submitted to their state Bars for approval. It does not appear that there are any matters adverse to admiralty practitioners or rules substantially different from the way we practice at this time. This is particularly so because it covers circumstances where you are litigating within your own jurisdiction or potential litigation within your own jurisdiction. In such circumstances you may go to another jurisdiction temporarily.

III. SETTLEMENT NEGOTIATIONS

The ABA Section on Litigation submitted a Report entitled "Ethical Guidelines for Settlement Negotiations", dated August 2002. It is a resource designated to facilitate and promote ethical guidelines in settlement negotiations, but was not designed to replace existing law or rules of professional conduct. These guidelines were approved as revised; however, it appeared that they were in keeping with the standards in place by the Admiralty Bar and our own Maritime Law Association of the United States Code of Professional Conduct.

IV. SUMMARY

There were other matters that came before the House of Delegates that are of general interest to the Bar. However, these are the most significant to the members of our group specifically. I anticipate that I will receive the Agenda for the Mid-Year meeting early January 2003 with sufficient time to submit them to the Officers meeting and Board members.

Respectfully
submitted,

James F. Moseley,
Chair

FORMAL REPORT OF THE COMMITTEE ON CARRIAGE OF GOODS

The committee met at the offices of Holland and Knight on Wednesday October 30, 2002. There were approximately 50 members present.

We were privileged to have as our guest Mary Helen Carlson, Office of the Assistant Legal Advisor for Private International Law. Mary Helen chairs the U. S. Delegation to UNCITRAL, which is currently working on the draft for changes in international transportation law. The draft, as proposed by the CMI last year, will undergo several years of study and drafts before a final proposal is adopted and sent to all nations for consideration.

The Department of State has included in its delegation four MLA members as technical advisors. Mary Helen indicated that the U.S. Delegation would most likely be issuing a position paper later this spring for which she will need our input. The U.S. has been instrumental in moving the various drafts forward and many of the other nations are looking to the U.S. for direction during the sessions.

As most members now realize, the original MLA proposed rewrite of the U.S. COGSA is sitting in suspense until such time as UNCITRAL finishes its work and reports back to the United Nations in final form. The 70 page draft may be downloaded from the MLA website.

We have invited Ms. Carlson to attend our May meeting and give us an update on the progress made during the March/April sessions.

Respectfully submitted,

William R. Connor III, Chair

FORMAL REPORT OF COMMITTEE ON CARRIER SECURITY

The Carrier Security Committee met at 4:00 p.m. on Wednesday, October 30, 2002 at the offices of Seward & Kissel, LLP One Battery Park Plaza, New York City. The meeting was well attended, with nine (9) members and three (3) guests, including Robert F. McKeon, North Atlantic Director for the Maritime Administration.

Agenda topics included the following:

1. A report from Committee member K. Gale Hawkes, Esquire, on the status of IMO-mandated international ship and port security requirements, including the status of a proposed new Maritime Security Code.

2. A discussion of U.S. Customs' newly implemented Automated Targeting System ("ATS") for high-risk cargo, and the affect of this national anti-terrorism program on the containerized shipping industry.

3. A discussion of newly implemented INS regulations and policies concerning entry visas for alien crew members, including requirements for fingerprinting and photographing certain aliens under the National Security Entry-Exit Registration System scheduled to take effect on December 2, 2002.

4. A roundtable discussion concerning the practical problems posed by compliance with the Maritime Security Act of 2002 and the Homeland Security Act.

The Committee continues to work in cooperation with the Maritime Security Subcommittee of the Committee on Navigation, Coast Guard and Government Regulations, in an effort to coordinate the Association's response to post-9/11 issues related to maritime security and its impact on the ocean shipping industry. The Committee also continues to liaise with U.S. Customs and INS officials on matters pertaining to carrier security, including drug smuggling and stowaways. The Committee will meet again at the Spring meeting in New York and at the Fall 2003 meeting in Bermuda.

Respectfully submitted,

Gordon D. Schreck,
Chair

FORMAL REPORT OF THE COMMITTEE ON CLASSIFICATION SOCIETIES

The Committee met on October 31, 2002, with six members and five guests attending, and formally reports as follows:

1. The CMI initiative to develop agreed principles of liability for classification societies.

Following the issuance of the European Community ("EC") directive including provisions as to class society liability and limits of liability, as reported at the May 2002 meeting, there has been no further progress in connection with the CMI initiative. Our information is that, after the EC action the shipowning interests are no longer interested in pursuing the topic, at least pending further experience with the EC directive. The directive is scheduled to appear in the next release (No. 89) of Benedict as Doc. No. 14-20A in Vol. 6E.

2. Recent decisions of interest.

An October 28, 2002, Final Award by a New York panel of arbitrators (Trowbridge, Berg, Connell) in *Ibar Limited v. American Bureau of Shipping* (ABS), held that claimant Ibar failed to prove by a preponderance of evidence that fault or breach of warranty by ABS proximately caused the loss of the large yacht STANY in 1990 due to fire. In the course of a detailed discussion of the evidence, the panel held that class societies are not chargeable with duties corresponding to those of owners' design agents, naval architects, and marine engineers who produce the final design, but have a narrower role, citing *Great American Insurance Company v. Bureau Veritas*, 338 F.Supp. 999, 1011, 1972 AMC 1455, 1472 (SDNY 1972), aff'd 478 F.2d 236, 1973 AMC 1755 (2d Cir. 1973) to the effect that a class society's first duty is to survey and classify vessels in accordance with its rules and its second duty is to exercise due care in detection and notification of defects (Award, 21).

An August 5, 2002, decision in *Otto Candies, LLC v. Nippon Kaija Kyokai Corp.,* 2002 WL 1798767 (ED La), held a third-party purchaser of a vessel entitled to recover from the class society (NKK) on a negligent misrepresentation claim, where NKK had certified the vessel to be restored to class despite the existence of class deficiencies (as the court found), with the purchaser having relied on the restoration of class certificate (as the court also found).

Respectfully submitted,

Richard H. Brown, Jr., Chair

[13372]

FORMAL REPORT OF THE COMMITTEE ON COMITÉ MARITIME INTERNATIONAL

1. CMI Colloquium, Bordeaux, June 10-13, 2003

Copies of the brochure are available from Vice Chair, Chris Davis.

2. CMI 38th Plenary, Vancouver, May 30 - June 6, 2004

The sessions will be held at the Westin Bayshore Resort and Marina Hotel. Details will be forthcoming later.

3. Issues of Transport Law

UNCITRAL continues its work based on the CMI draft instrument. The CMI International Subcommittee will meet on February 27-28, 2003, and UNCITRAL will discuss the matter further in New York on March 24 — April 4, 2003. Some recent developments:

a. Nautical fault exception is completely deleted from the text.

b. Elimination of the fire defense is still being discussed.

c. The scope of the convention — i.e. door-to-door (the U.S. position) or only port-to-port has not been decided.

d. While there is no dispute that charter parties and other agreements for private carriage should be excluded, how to do it has created somewhat of a drafting problem. The Committee on Maritime Arbitration has offered to assist.

4. Marine Insurance

The foci of the CMI's work are:

a. Duty of disclosure;

b. Duty of good faith;

c. Alteration of risk; and

d. Warranties

The project is not expected to result in any approved text, but simply to offer guidance for possible new legislation or policy terms. Proposals for reform legislation in Australia have stalled.

5. General Average

The principal topics being considered:

a. Abolition of g.a. for common benefit sacrifices — i.e. limiting g.a. to just common safety sacrifices — which would, among other things, moot substitute expenses and port of refuge expenses;

b. Abolition of commissions on g.a. disbursements;

c. Time bar;

d. Interest rate; and

e. Abolition of re-allocation of salvage charges

6. Places of Refuge

The loss of the PRESTIGE and resulting pollution have heightened interest in the need for an international agreement about places of refuge, which is an item on the agenda of the IMO Legal Committee.

7. Wreck Removal

The IMO Legal Committee is making some progress on a draft instrument to provide for wreck removal. Some issues still not resolved:

a. Compulsory insurance;

b. Direct action;

c. Coastal state jurisdiction; and

d. Cargo contribution

There is talk about the possibility of calling a diplomatic conference in 2003.

8. Athens Protocol

The new passenger protocol establishes several new principles and limits;

a. Although there is strict liability for injury and death arising from nautical causes, owners will be liable only for negligence causing such injury or death in the hotel context;

b. There is compulsory insurance and direct action; and

c. Strict liability is limited to 250,000 SDRs, but for gross negligence, each state can opt to limit liability to at least 400,000 SDRs, or have no limit at all.

9. Suppression of Unlawful Acts

The IMO Legal Committee is considering a protocol which would, among other things, cover the use of ships for criminal purposes and grant expanded powers to board ships on the high seas.

10. Maritime Security

A diplomatic conference is scheduled for December 2002 to consider automatic identification systems for ships, and a port facility security code as part of SOLAS.

11. Ballast Water Management

A diplomatic conference is scheduled for 2003.

12. Protocol to 1992 Fund Convention

A draft protocol is being considered by the IMO Legal Committee to establish a third tier of compensation from an optional supplementary fund.

13. Abandoned Seafarers

Work continues on a proposal for mandatory security to cover costs of aiding abandoned seafarers.

14. Classification Societies

There appears to be renewed interest in the industry about seeking agreement on the amount which would constitute limitation of liability.

15. Underwater Cultural Heritage

It does not appear that the Convention will be sent to the Senate for ratification.

16. Piracy

The MLA proposal has been put before the Senate Judiciary Committee.

17. HNS Convention

Only two ratifications so far.

18. Judgments Convention

The Hague Conference on Private International Law is struggling to produce a consensus about recognition of choice of forum clauses and enforcement of the resulting judgments. Among other things, there is a need to accommodate anti-*SKY REEFER* legislation including multiple fora terms, such as those found in the Warsaw Convention and the MLA revised COGSA proposal.

The ALI has been making considerable progress with a draft Federal statute to enforce foreign judgments generally. It appears that the proposal will contain a reciprocity requirement — i.e. the statute will apply only to judgments of countries which would enforce U.S. judgments. Although the draft statute will embrace the need for minimum contacts to seize property as security for a foreign judgment, Rule B and Rule C suits will be exempt from such a requirement (as they are now).

19. Implementation of National Conventions

Professor Francesco Berlingieri continues to solicit reports of cases involving interpretation of international maritime conventions for an Internet data base.

20. CMI Administration

Wim Fransen of Belgium is the new CMI Administrator.

Respectfully
submitted,

Michael Marks
Cohen, Chair

FORMAL REPORT ON THE COMMITTEE ON CONTINUING LEGAL EDUCATION

This past year, the MLA Continuing Legal Education ("CLE") Committee prepared its Annual Report to NYS CLE Board, which is necessary to maintain the MLA's status as an accredited provider of CLE programs in New York State. The Committee also guided coordinators of the various MLA's CLE Programs; provided CLE information as a co-sponsor of the Connecticut Maritime Association's Conference "Shipping 2002"; and guided attorneys from states other than New York as to their state's reciprocity for credit for CLE Programs given by the MLA which is accredited only in New York.

In the coming year, The MLA CLE Committee expects to continue with the above, plus every three years, the Committee will apply for reaccredidation as CLE provider in New York.

Respectfully
submitted,

Lawrence J. Bowles,
Chair

FORMAL REPORT OF THE ELECTRONIC COMMERCE AND COMMUNICATIONS COMMITTEE

1. Website developments were reported by the chair. The number of unique visitors to the MLA website for the last five months was about 1,100 to 1,200 per month, which is a substantial increase over the same period last year when there were about 800 unique visitors per month. The breakdown of usage has not changed. The areas most frequently visited are those with the members' and firms' directory information. Online forms were accessed roughly 30 times a month, and archived articles (i.e., the Library) were accessed about 6 times per month.

2. An interim report was provided by Kevin O'Donovan via email on the Committee's project to review e-filing differences among districts. Kevin's email is attached. Gene George described some of the rules relating to the e-filing procedures in effect in the Northern District of Ohio.

3. Ed Cattell provided a brief report by email as to the revision of UCC Article 7. Ed's report is attached.

4. John Devine of Thomas Miller (Americas) presented a description (by telephone) of his company's conversion to a paperless office using their proprietary "Oasis" system. From John's interesting presentation, it appears that the system is a highly automated and integrated work flow and document management system.

5. Several developments in e-commerce were discussed.

a. It was mentioned that one of the flags (Marshall Islands or Liberia) was planning to issue crew member ID Cards with biometric identification.

b. Section 420 of the Port Security Act amends the law governing electronic filing of commercial instruments with the National Vessel Documentation Center. Upon passage of the Act, the requirement to provide an original paper document within 10 days of an electronic filing will be eliminated.

c. It was reported that Adobe Reader 5.1 (a free product) is enabled to handle digital signatures, which may prompt wider use of electronic documents.

d. George Chandler presented his views as to why the adoption of true electronic bills of lading has proceeded so slowly. George sees the P&I Clubs as creating obstacles, as well as those who assert that a document cannot be a legal bill of lading unless it complies strictly with the requirements of English law.

6. New Business. Mark Kasanin suggested that this Committee, perhaps in conjunction with the Practice and Procedure Committee, should look into the issues of discovery of information held in electronic form particularly as they would apply to foreign clients. It was agreed that this would be a good project for our committee, however, no one in attendance was able to volunteer to work on it. Volunteers are needed. Please contact the Chair if you are interested.

Respectfully
submitted,

Glen T. Oxton,
Chair

FORMAL REPORT OF THE
COMMITTEE ON FISHERIES

The Fall meeting of the Fisheries Committee was held at DeOrchis & Partners on October 31, 2002. Nine people attended.

Patrick Wiese of MARAD reported on the timing of regulations implementing the "Lender Amendments" to the American Fisheries Act. It is anticipated they will be published as a Final Rule in mid-December 2002.

The Committee addressed civil fines and forfeitures arising from fishery violations levied against fishermen, permits, and vessels by the Office of NOAA General Counsel. We reviewed trends over the past months and concluded that typically initial assessments appear shockingly high but substantially lower settlements can usually be achieved.

The principal subject of our meeting involved a lively discussion of fishing "rights" versus "privileges." Paul Antinori introduced the topic with a report on *Conti v. U.S.*, in which he is seeking a writ of certiorari, asserting that fishery closures give rise to unconstitutional takings claims. Vice-Chair Stephen B. Johnson then reported on a draft Congressional bill that precludes "any right of compensation" if a fishing quota is revoked or limited.

The Committee decided to closely watch two developments in the months ahead. First, we will monitor Congressional bills related to the reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act. Second, we will liaise with the Coast Guard regarding post-9/11 waterfront security, particularly in view of difficulties posed by the fishing fleet's widespread waterfront facilities and transient crewmen.

Respectfully
submitted,

David Farrell, Jr.,
Chair

FORMAL REPORT OF THE COMMITTEE ON MARITIME ARBITRATION AND MEDIATION

Since May, 2002 the Committee has met twice to discuss issues relating to Maritime Arbitration and Mediation and has been working on a variety of projects.

1. CMI Draft Instrument on Transport Law

Proposed CMI Instrument: The Committee is concerned that the proposed CMI instrument be drafted such that it cannot be construed as applying to private contracts of carriage. The Committee is working with the COGSA committee and with Mary Helen Carlson, from the United States State Department to take the necessary steps to have the Committee's view on the private carriage issue before the State Department for consideration and inclusion in its position paper.

2. UNCITRAL

Mr. Kennedy participated in a planning meeting on September 26, 2002 with Mr. Kovar from the State Department and with members of the U.S. Delegation which developed a position on interim measures of relief to be advanced at the Working Group on Arbitration and Conciliation meeting in Vienna on October 7-10, 2002. Mr. Kennedy did not attend the Vienna meeting. These documents (A/CN.9WG.II.121) can be found at the UNCITRAL website (www.uncitral.org).

3. Canada's Anti *Sky Reefer* Legislation:

Peter Cullen of Strikeman Elliot in Montreal made a presentation to the Committee on October 30, 2002 about Section 46 of the Canada Marine

Liability Act which, essentially, invalidates foreign arbitration and forum selection clauses in respect of contracts for the carriage of goods by water and allows a claimant to arbitrate or litigate its claim in Canada. A copy of Mr. Cullen's paper is attached to this report.

4. MLA/SMA Liaison Committee

The Liaison Committee has been working with the Society of Maritime Arbitrators in developing a seminar program for arbitrators and related matters.

Respectfully
submitted,

Donald J. Kennedy,
Chair

FORMAL REPORT OF THE COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE

The Committee met on October 30, 2002.

Jonathan S. Spencer, Chairman of the Subcommittee on General Average, reported regarding recent developments in the revision of the York-Antwerp Rules and a BIMCO Special Circular dealing with a new model General Average absorption clause. The new BIMCO clause has been designed to help ship owners avoid involving cargo interests in smaller General Average claims and one of its more innovative provisions is that the hull deductible will not apply to claims under the clause. Meanwhile the CMI's revision of the York-Antwerp Rules has proceeded with the formation of a CMI international working group to which Ex-President Dorsey appointed Howard McCormack as the only non-European member. The initiative to change the York-Antwerp Rules is being driven by individuals in the British cargo insurance market and their basic thrust is to restrict General Average strictly to attainment of safety, eliminating allowances of expenditure for the common benefit and safe prosecution of the voyage that have long been a basic tenet of United States adjusting practice. Under current market forms of hull and machinery insurance policies, there would be no coverage for this type of expenditure if it were eliminated from General Average and some of the more seasoned commentators see a real possibility of cargoes being abandoned at ports of distress by less solvent ship owners, transferring the burden to the cargo insurers who under typical policies insure the venture as well as the

physical property. Once the report of the CMI Subcommittee becomes available, the General Average Subcommittee hopes to foster more participation in the debate by members of the United States underwriting market. The American Institute of Marine Underwriters, under its President Walter Kramer, has advised of the Institute's interest in this matter.

Jonathan Spencer also recommended the attention of members to an address delivered by Howard McCormack, as outgoing Chairman of the Association of Average Adjusters of the United States, in which the history of the current debate is discussed in detail. The BIMCO circular and Mr. McCormack's paper may be found on a new website entitled: www.TheGApage.com

George R. Zacharkow, Chairman of the Subcommittee on Cargo Insurance, reported that the Subcommittee is in the process of preparing an analysis of "All Risk" cargo insurance. Mr. Zacharkow has received contributions from numerous Committee members summarizing legal precedent addressing "all risk" cargo insuring terms.

Mr. Dan St. Jacques, retired underwriter and current marine insurance expert, delivered a comprehensive presentation to the Cargo Subcommittee outlining the history of "All Risk" cargo insurance as it developed in the United States and London markets.

John M. Woods, Chairman of the Subcommittee on Hull and Protection & Indemnity Insurance, reported that the Subcommittee will proceed with the Annotations Project concerning the "American Institute Hull Clauses (June 2, 1977). Mr. Woods also reported that the Joint Hull Committee in the London Market will be unveiling a new Hull wording on October 31, 2002 in the Old Library at Lloyd's and on November 4, 2002 at the Yacht Club in Piraeus. He further advised that new United States legislation is pending that may void any exclusions from coverage relating to terrorism in insurance policies issued in the United States or relating to subject matter in the United States. The Terrorism Risk Insurance Act is intended to create a federal backstop for terrorism insurance. Further details regarding the House and Senate bills (H.R. 3210 and S. 2600) may be found in the Maritime Legislation Committee Report.

Stephen V. Rible, Committee Chairman, introduced the Speaker for the Main Meeting: Mr. Stephen L. Clark, Asst. Vice President and Underwriter for CNA Marine. Mr. Clark delivered an outstanding presentation on "The Business of Underwriting Marine Terminal Liability Exposures." Marine

terminals risks are being insured under a variety of insuring terms, including traditional marine cover as well as commercial general liability cover, directors and officers cover, and employment practices cover.

Gene B. George, Committee Vice Chairman, reported on publication of the Committee's Fall Newsletter containing an excellent review of the recent insurance decision regarding the World Trade Center, in addition to other marine insurance decisions. The Newsletter is available on the MLA Website. Members are encouraged to submit summaries or citations of recent insurance decisions to the Marine Insurance Committee via e-mail to: stephen.rible@mendes.com or ggeorge@rayrobcle.com

Respectfully
submitted,

Stephen V. Rible,
Chair

FORMAL REPORT OF THE COMMITTEE ON MARITIME PERSONNEL

I would like to thank Paul Edelman, Esq. very much for kindly chairing the Committee Conference for me and also for preparing these excellent minutes. Paul is a real credit to our Association. I am also grateful to John Ingram, Esq. for his assistance.

The Committee met on Thursday, October 31, 2002, in New York, New York at the Fall Meeting of the Association. Twenty-three members and guests participated in a lively meeting on proposed changes in legislation and important cases and developments affecting maritime personal injury practitioners.

1. Supreme Court Cases

a. *State Farm Mutual v. Campbell* The issue is the constitutionality of a punitive damages award of $145 million, some 145 times the compensatory damages. The claim involved State Farm business practices nationwide over 20 years. Case below, 2001 WL 1246676 (Ut. 2001). Supreme Court No. 01-1289.

b. *Norfolk & Western Ry. Co. v. Ayers* This raises the issue of recovery by FELA railroad workers for fear of cancer from exposure to asbestos. The damage award was $5.8 million. The case impacts on the Jones Act, which incorporates the FELA.

c. *Sprietsma v. Mercury Marine* The issue is whether the Federal Boat Safety act pre-empts state law in a case alleging that a boat propeller without a safety guard is defectively designed.

d. A case which may end up in the Supreme Court. Cert was requested in *Foussel v. Parker Drilling Offshore, USA*. The application sought to resolve a possibly irreconcilable conflict between the Fifth and Fourth Circuits in a Jones Act case using an "ordinary negligence" standard and the Second, Third and Ninth Circuits, which use a "featherweight" standard.

e. In the famous *Yamaha v. Calhoun* case, allowing state death statutes to apply in state waters, after trial there was a defense verdict in the products case.

2. Punitive Damages

Besides the *State Farm* case above, one other memorable verdict is a verdict of $28 billion recovery to a smoker of Phillip Morris cigarettes. Recovery was for Betty Bullock, 64, before a jury in Los Angeles Superior Court.

In *Jurgensen v. Albin Marine, Inc.*, 214 Fed. Supp. 2d 504 (D.C. Md. 2002), the Court held that punitive damages were available for a maritime products liability case, but were not recoverable in this particular case where a vessel sank six months after purchase.

In *Wright v. CSX Transportation*, the railroad company was successful against a railroad crossing death claim asking $12 million. This was in a state court in Macon, Georgia. A GM vehicle black box was used as evidence.

3. Jones Act Cases

a. Jones Act — status Dredge dump foreman, permanently assigned to a dredge, was not a Jones Act seaman when he spent only approximately 10 percent of his work time aboard the dredge. *Nunez v. B&B Dredging, Inc.*, 288 F. 3d 271 (5th Cir. 2002). Pile driver on a barge aided in moving the barge two or three times a week. Held for the jury as to seaman status. *Gault v. Modern Continental/Roadway Construction Co.*, 2002 WL 1478603 (Ca. App. 2d Dist., 10 July 2002).

The fact that plaintiff occasionally handled lines did not make him a Jones Act seaman where his duties were not sea based, but were maintenance and repair work at a construction site at which a derrick barge was used, tied to a pier. *Spears v. Kajima Engineering & Construction, Inc.*, 2002 WL 1923814, (Ca. App. 2d Dist., Div. 7, 8/21/2002)

b. Admiralty/Jones Act Jurisdiction A casino boat was located in a creek flowing into Lake Michigan. The creek was not deep enough to move the boat, although small boats could navigate the area. It was situated in a man made area and the Coast Guard could assert regulatory jurisdiction. Nevertheless, the court held the creek not navigable in fact and denied admiralty jurisdiction and Jones Act status to the casino worker. *Solomon v. Blue Chip Casino, Inc.*, 2002 WL 1763935 (In. App. 7/31/2002).

The Jones Act applies to seamen injured ashore while in the service of their ship. In *Diamond Offshore Management Co. v. Guidry*, 2002 WL 1679736, (Tx. App., Beaumont, 7/25/2002), Guidry and members of his offshore drilling crew drove in a truck to view a sister drilling rig. They stopped at a bar and afterwards, in bad weather, Guidry fell out of the truck and later died. His blood alcohol was twice the legal limit, but the jury was only told he had been drinking. In a Jones Act suit, the jury found him 65 percent at fault, reducing the total judgment of $400,000.

c. Vessel In Navigation A barge that is towed from Seattle to Alaska each year for the fishing season and brought back may be a vessel in navigation. *Martinez v. Signature Seafoods, Inc.*, 303 F. 3d 1132, (9th Cir. 9/11/02, No. 01-35768).

d. The Primary Duty Rule Although this rule is not favored, it was applied in the case of the master of a fishing vessel, who was also part owner. The Limitation of Liability Act would not apply due to his privity. The vessel sank because of excessive speed, causing icing and the carrying of an excessive number of crab pots. *Northern Queen, Inc. v. Kinnear*, 298 F. 3d 1090, 2002 WL 1799711 (9th Cir. 8/7/2002).

4. Violation Of a Safety Statute

A ship company's violation of a Coast Guard marine casualty reporting requirement was held not to be a violation of a marine safety statute sufficient to apply the Pennsylvania Rule. *Joseph v. Tidewater Marine, LLC*., 2002 WL 1870025 (E.D. La. 8/13/2002). Note *Chao v. Mallard Bay*

Drilling, 122 S. Ct. 738, allowing Coast Guard and OSHA to regulate uninspected local vessels.

5. Maintenance and Cure

An amount for maintenance can include the cost of plaintiff's mortgage payments. There is no proration such as for a food bill. *Hall v. Noble Drilling (U.S.) Inc.*, F. 3d (5th Cir. 2/14/2001).

Concealment of a pre-existing medical condition may preclude recovery of maintenance and cure, but it is no defense to the Jones Act and unseaworthiness claim. Comparative negligence could apply. *Courtney v. American Seafoods Co.*, 42 Fed. Appx. 984, 2002 WL 1929461 (9th Cir. 8/21/2002).

An oil worker on an offshore rig was told to wait for a ride after he fell ill. He died due to the delay. A Jones Act case was filed for failure to provide adequate medical care called for under the maintenance doctrine. He could have had local care. An award was made by the appellate court after dismissal at the trial level. *Labat v. Mallard Bay Drilling Co.*, 806 So. 2d 917 (La. Ct. App. 2002).

6. Forum Non Conveniens

In *Solano v. Gulf King 55, Inc.,* 30 F. Supp. 2d 960 (D.C. Tx. 1998), Judge Kent, a plaintiff's lawyer's friend, allowed a Nicaraguan citizen to sue in the U.S. when he was injured on a vessel stationed in Nicaragua while supervised by a Nicaraguan employer. The vessel was a shrimping vessel, owned by a Texas corporation whose stock was held by Americans. All major operational and maintenance decisions had to be confirmed in the U.S. However, the decision was reversed on appeal, 212 F. 3d 902 (5th Cir. 2000).

In *Mansel v. Baker Hughes, Inc.*, 203 F. Supp. 2d 745 (D.C. Tx. 2002), Judge Kent had to deny Jones Act coverage to a seismic gunner, a German citizen, permanently residing in Peru, injured on a vessel in Nigerian waters. He held the case governed by § 688(b) of the Jones Act, which denies coverage for foreigners on research or exploratory vessels in foreign waters. He also found that this section denied coverage under the Oceanographic Research Vessels Act (ORVA), 46 U.S.C. 441, *et. seq.*, which ordinarily would allow scientific personnel to bring an action under the General Maritime Law. Section 688(b) precluded any action in the U.S.

The Supreme Court of Alaska, in *Nunez v. American Seafoods*, 2002 WL 1485362 (S-9875, 7/12/00), held that a forum selection clause violates the FELA, §§ 5 and 6, and was unenforceable. It cites the FELA cases of *Boyd v. Grand Trunk W.R.R. Co.*, 338 U.S. 263 (1949) and *Brown v. State*, 816 P. 2d 1368 (Ak. 1991). A Fifth Circuit case and others were distinguished as involving foreign seamen.

In *Esfeld v. Costa*, 2002 WL 799582, (11th Cir. 4/30/2002), three elderly U.S. couples were injured in a vehicle accident in Vietnam during a cruise. The Florida state courts dismissed the cases, relying on the argument that Florida had no meaningful relationship to the case and would send the case to Italy. Suit was then re-filed in federal court, where the court looked at U.S. contacts, not only Florida contacts when the case was appealed to the Eleventh Circuit. A major factor in a decision for the plaintiffs was to ensure access to U.S. courts by U.S. citizens.

Cf., *Warn v. M/V Maridome*, 169 F. 3d 625 (9th Cir. 1999) (base of operations was in U.S., but there were no other U.S. contacts as to crew, flag, owner; suit dismissed).

Venue rules had a place in another of Judge Kent's cases. In *Barnett v. Kirby Inland Marine,* 202 F. Supp. 2d 664, (D.C. Tx. 2002), the judge denied a motion to transfer the case to Arkansas. There was no venue jurisdiction in that state and convenience rules looked to Texas. Change of venue would create delay and deny plaintiff a choice of forum.

In *Iragorri v. United Technologies Corp.*, 274 F. 3d 65 (2nd Cir. 2001), the court denied a transfer where defendant sought to have the case sent to Colombia, where the accident occurred. The court said the motion required a discussion of whether the plaintiff or the defendant was looking to acquire a "tactical advantage", rather than a "legitimate reason" for its choice of forum. Here, the court decided defendant was looking for the improper advantage.

Plaintiff was a bar waitress from the Philippines on a cruise ship. She sued under the Jones Act and under the court's admiralty jurisdiction for sexual harassment and discrimination. Defendant proffered a forum selection clause in the employment contract requiring claims in the Philippines. Plaintiff contended she was never given a copy of the standard contract or revisions. Summary judgment for defendant was denied where the contents of the clause might not have been reasonably communicated to her. *Angeles v. Norwegian Cruise Lines, Inc.*, 2002 WL 1997898 (S.D. N.Y. 8/29/2002).

The Fifth Circuit upheld an arbitration agreement in a Filipino seaman's employment contract. The Convention on Recognition of Foreign Arbitral Awards was held to trump the Federal Arbitration Act, under which seamen may not be required to arbitrate their claims. *Francisco v. M/T Stolt Achievement*, (5th Cir. 6/4/02), Op. No. 01 30694.

The Ninth Circuit held in *Wallis v. Princess Cruises*, 2002 WL 31108934 (9/24/02), that a ticket clause that merely refers to "Convention Relating to the Carriage of Passengers and Their Luggage By Sea of 1976 (Athens Convention)" does not reasonably communicate limited liability.

Presumably, a more detailed statement of the limitation amount might be acceptable. The Athens Convention applies to most non-U.S. cruises and discussions are taking place to increase the limitation amount at the International Maritime Organization.

7. Longshoremen's Act Cases

An adjustment of an award need not be made where the wage scale during the time of the partial disability was the same, even though there was a rise in the inflation rate. *Johnston v. Matson Terminals, Inc.*, (9th Cir. No. 01-70201, 2/2/2002).

Where a settlement check was sent by the insurer to the wrong address, claimant could recover a penalty under § 914(f) of the LHWCA. Equity was not to be considered. *Hanson v. Marine Terminals Corp.*, (9th Cir. 10/9/02, No. 00-35871).

The Longshoremen's Act does not allow indemnity between an employer and contractor. This does not apply if OCSLA applies. Indemnity by contract was allowed in *Diamond Offshore Co. v. A&B Builders, Inc.*, (5th Cir. No. 01-40366, 8/30/2002).

Per diem payments made to the employee to cover food and lodging expenses are to be included in wages to determine disability benefits under the Act. *Custom Ship Interiors v. Roberts*, 2002 WL 1869672. Whether taxable or not was held irrelevant.

A longshoreman was injured when steel piling sheets on a ship fell on him while he was on the pier. It was held that it would not be a General Maritime Law case, but it did come within the Admiralty Extension Act. The district court also had supplemental jurisdiction for other related claims

against others. *Magana v. Hammer & Steel, Inc.*, 206 F. Supp. 2d 848, (D.C. Tx. 2002, Kent, D.J.). A claim was denied where a shipfitter was injured on a facility on a river dock. *Walker v. Metro Machine Corp.* (4th Cir., No. 02-1059, 10/29/02).

Section 905(b) will not apply where a dock foreman was injured by shoreside equipment during unloading of fish. *Mayberry v. Daybrook Fisheries, Inc.*, 2002 WL 1798771 (D.C. La. 8/5/2002).

A claim for Longshore Act compensation was denied in the U.S. Department of Labor decision in *Morganti v. Lockheed Martin*, OWCP No. 02-130074, 10/7/02, Teitler, ALJ. The decedent, Morganti, an engineer, tested sonar transponders to be sold to the Navy. He died due to defects in a boat used to take him to and from a barge where the test facilities were located. The ALJ held that he satisfied the situs test on a barge on Lake Cayuga, reached by a boat. However, his services on the barge and boat were held to be transient and he failed the test of maritime employment. An appeal has been filed.

8. Coast Guard and NTSB Investigations

In a recent September press release, it was stated that the Coast Guard and the National Transportation Safety Board had concluded a new agreement, setting each agency's role in an investigation of a major marine accident. The NTSB will have the option to assume the lead in a case involving high loss of life or heavy property damage.

9. Class Action

A class action was to be certified for crew members of cruise lines suing to be paid wages, overtime and penalties under the Seaman's Wage Act. *Bolanos v. Norwegian Cruise Lines, Ltd.*, 2002 WL 1611644, (S.D. N.Y. 7/22/2002).

10. Title 46 Recodification

The recommendations by the various MLA committees dealing with recodification have been accepted by the U.S. Department of Transportation and will be integrated into the version which will be submitted to Congress.

11. 9/11 Victims Fund

In August, the Victim Compensation Fund announced awards averaging $1.36 million. The low was $300,000 and the high $3 million.

As of November, some dissatisfaction at the pace of decisions has been evidenced. Less than 800 claims have been filed and there was an average award of about $1.5 million. Still to be resolved are issues involving highly paid decedents and whether there will be a cap.

12. IMO/ILO *Ad Hoc* Working Group

This section has submitted answers to a questionnaire involving abandonment of seamen in foreign ports and the U.S. law on maritime injuries and death for crew members. The last meeting of the IMO/ILO Working Group was from 30th September to 4th October of this year.

A consensus was reached that guidelines for assuring financial security for claims would be monitored for effectiveness and that a database be established to provide such monitoring. Meetings to establish informal claims resolution procedures are to be held. Discussions on mandatory requirements in which P&I clubs are especially interested were put off until October of next year.

13. Tort Reform — The Medical Liability Bill

On 26th September, the House of Representatives passed legislation, opposed by the ABA, that would pre-empt state medical liability laws and limit damage awards, as well as lawyers' fees in medical malpractice cases. A limit of $250,000 would be imposed for non-economic awards for pain and suffering. Punitive damages would be capped and lawyers' fees based on a sliding scale would apply with 15 percent over $600,000 or greater recovery. Lawsuits against HMO's, drug and medical device manufacturers, nursing homes and other health providers are also dealt with.

With a Republican Congress, and a President in support, we shall see what finally emerges.

14. Asbestos Claims

Claims against Shell Oil's shipowning companies for asbestos related injuries are expected to run to tens of millions of dollars. The UK Club insures two-thirds of the fleet and Liverpool & London insures one-third. The Liverpool & London, already under financial pressure, is resisting payments and is apparently no longer underwriting. Many of the claims originated in U.S. lawsuits.

As many as 35,000 claims running to billions of dollars face the P&I clubs as a result of the widespread use of asbestos on ships until 20 years ago.

Relatively few claims have been settled and all are complicated by seafarers serving on multiple vessels and maybe working for owning companies that no longer exist.

15. Marine Transportation Security Act

It is now expected that this proposed Act will be passed in November. The Act requires designation of company and ship security officers for many ships coming into U.S. ports. The U.S. Coast Guard will also be involved. The Act will track some of the provisions of an IMO draft ship security convention.

We are always looking for additional and interesting projects, relevant decisions, and are also continuously seeking potential new members.

Respectfully
submitted,

John P. Schaffer,
Chair

FORMAL REPORT OF THE NAVIGATION, COAST GUARD, AND GOVERNMENT REGULATION COMMITTEE

The meeting was called to order by Chairman Dennis Bryant at 16:05 in the offices of Holland & Knight, LLP, 195 Broadway, New York, NY. The meeting was attended by 38 members and guests. The attached agenda was followed.

The first speaker was Alex Weller from the United States Coast Guard who was making an appearance in substitution for Captain Joe Ahern and Commander Steve Poulin. Mr. Weller gave a very informative talk pertaining to the Coast Guard's Maritime Homeland Security Initiatives. He discussed the existing legislative authority for the issuing of regulations pertaining to the issues of maritime security including the Ports and Waterways Safety Act and the Magnuson Act (50 USC 191 et. seq.) Mr. Weller explained how under the Magnuson Act the security of vessels and waterfront facilities primarily rest with the owners of same but that the Captain of the Port can

issue various orders, such as the establishment of security zones. The most broadly worded of the existing enabling authorities is the Ports and Waterways Safety Act, which is partially implemented by the regulations in 33 CFR Parts 120 and 128 pertaining to the security of passenger vessels and waterfront facilities. Mr. Weller explained that a number of regulatory initiatives have been taken under the existing authorities since September 11th including requirements for advance notice of arrival, maritime identification credentials, security zones and regulated navigation areas. There are also two key Navigation and Vessel Inspection Circulars (NVICs) issued on the topic. Mr. Weller's talk also explored legal issues arising from the security efforts, such as Constitutional concerns and unfunded mandates. He also discussed the international efforts pertaining to maritime security and the Coast Guard's participation at IMO. He also discussed the possible future regulations under the then-proposed Maritime Security Act, including security assessments, vessel security plans, port plans and port facility plans. Mr. Weller also spoke about the likely organization of the Department of Homeland Security and how the Coast Guard would fit into it. He described the intended transition process which would be undertaken by both the new department and the Coast Guard.

The next speaker on the agenda was LCDR Charles Dahill, also a representative of the Coast Guard. Commander Dahill is working with our committee's ad hoc group pertaining to the Coast Guard's informal casualty investigation process. The Coast Guard is uncertain whether there are significant existing issues, but it is willing to discuss the matter with the ad hoc group. Additional volunteers for Andy Anderson's ad hoc group are: Jim Bartlett, David Sump, Daniel Fitzgerald and John Ingram.

The next speaker was Pat Wiese, Deputy Chief Counsel, Maritime Administration. Mr. Wiese indicated that the final regulations pertaining to the implementation of the American Fisheries Act would soon be out. On the issue of foreign time chartering of U.S. vessels, a number of comments had been received by MARAD which are now being considered. Mr. Wiese advised the group that the administrative waiver program that allowed MARAD to authorize small passenger vessels to operate in coastwise trade has essentially expired and has not yet been renewed by Congress. [Note: the administrative waiver program was revived by Congress in November 2002.] Finally, Pat discussed the fact that numerous Jones Act waiver requests had been received pertaining to the West Coast Port strike. The strike was resolved but in order to clear the back up without reliance upon rail or motor carrier, numerous requests had been received to allow foreign

vessels to operate in the coastwise trade. The agency has denied all of these requests since they believe there was neither a pressing need nor a shortage of available U.S. flag tonnage.

A very informative talk was given by William Storz of the Maritime Sealift Command. Since MSC is the largest U.S. flag ship owner and the largest employer of U.S. merchant mariners, its activities are of substantial interest. MSC exists to provide ocean transport for the Department of Defense around the world. They handle approximately 95% of the Department of Defense supply cargo. Some 128 ships, not including the Maritime Administration's Ready Reserve fleet, are operated by MSC.

The next speaker was Jeff Moller, Chairman of the Subcommittee on Maritime Security. His discussion essentially followed the text of the subcommittee's report which was soon to be published in the MLA Report. He discussed IMO initiatives, the TSA Grant Program, Customs initiatives and the Coast Guard programs under its existing legislative authority.

The next speaker was Larry Kiern of Washington who discussed the pending Maritime Security legislation. He forecasted that both the Maritime Security Act and the Homeland Security Act would pass during the post-election lame duck session of the then current Congress. As to the Maritime Security Act, its passage was made possible by Senator Hollings' retraction of his demand for a fee system. Mr. Kiern went on to discuss the various aspects of the Maritime Security Act which he expected to be included in the final law as emerging from the Conference Committee. Among those highlights are a clear definition of the Government's right to intervene on the territorial sea, authorization for continuing of the Sea Marshal Program, an emphasis on port security assessments both here and abroad, and an emphasis on the transparency of vessel ownership.

David Dickman of Washington discussed the current status of criminal liability for environmental mishaps. He stated that the FBI is now going to be involved in investigating any major oil spill type casualty. Apparently there are 16 marine industry personnel currently under indictment and 10 prosecutions pending. He pointed to the Norwegian Cruise Line case as being an example of how helpful it can be if the company comes forward and reports its problems and implements a compliance program. He also reported on the meeting that was held between the Coast Guard, the Department of Justice, the EPA and a number of Maritime Law Association members with regard to criminal enforcement. Both the EPA and the DOJ

reiterated the position that compliance programs, self-auditing, and voluntary disclosure will lead to friendly treatment and will most likely avoid criminal penalties. The Coast Guard doesn't have a specific policy with regard to compliance programs, self-auditing, and voluntary disclosure but they are considering adopting one. It was made clear that the Federal authorities are serious about pursing both corporate officers and members of Boards of Directors. They are doing their best to encourage sharing of information by whistle blowers. Finally, he discussed the case of *U.S. v. Thurston*. Mr. Thurston was a chief mate on a ship. He pled guilty to negligent manslaughter in the case of a wrongful death of a crewmember who died in a vessel tank that had not been properly gas-freed.

THE MEETING WAS ADJOURNED AT 18:15.

AGENDA

Maritime Law Association of the United States

MEETING OF COMMITTEE ON NAVIGATION, COAST GUARD, AND GOVERNMENT REGULATION

October 30, 2002 (Wednesday) at 4:00 p.m. to 6:00 p.m.
Haight Gardner Holland & Knight
195 Broadway, 24th Floor, New York, NY

U.S. Coast Guard & IMO Activities (CAPT Joseph Ahern, USCG)

Maritime Administration Activities (John Patrick Wiese, MARAD)

Military Sealift Command Activities (William Storz)

Port & Maritime Security (Jeff Moller)

Proposed Maritime Legislation (Larry Kiern)

Territorial Sea, Navigable Waters, and USCG Jurisdiction

Ballast Water Management

Criminal Liability (David Dickman)

[13394]

Automatic Identification System [AIS] and Voyage Data Recorders [VDR]

Proposed Maritime Security User Fees

USCG Marine Casualty Investigations (Andy Anderson)

FORMAL REPORT OF COMMITTEE ON STEVEDORING AND TERMINAL OPERATIONS

This Memo will serve as the combined minutes, newsletter and a general inquiry with regard to the future activities of your committee. The fall meeting convened at the offices of Healy and Baillie at 9:30 a.m. on October 31, 2002. I was unable to attend due to unavoidable conflicts at home and thus, the meeting was chaired by Nash Bilisoly of Norfolk, the Vice-Chair of the Subcommittee on Longshore and Harbor Workers' Compensation issues. Mr. Bilisoly advises that the usual conference room was filled to capacity although only 16 individuals managed to sign the roster.

The LHWCA meeting, as usual preceded the full committee meeting. The principal focus of the meeting was a discussion dealing with the feasibility of moving the compensation subcommittee to the Maritime Personnel Committee. The reasoning behind this suggestion was that those on the compensation subcommittee are engaged primarily in personal injury issues and they have little familiarity or indeed interest as to stevedore operations or marine terminals. The comp lawyers argue that their focus on personal injuries has far more in common with the practice of those lawyers on the Maritime Personnel Committee. Having said this, it was also the opinion of a number of those in attendance that the MLA was unlikely to approve of such a transfer. I am in contact with John Schaffer, the Chair of the Maritime Personnel Committee to determine his view on the matter. In the meantime, since a relatively small percentage of the roster of the full committee was present at our meeting, it seems appropriate to poll the entire committee to determine your view of the matter. I would appreciate hearing from each of you by e-mail if possible as to your opinion (jryan@vanblk.com). Please indicate whether you are or are not a member of the compensation subcommittee.

Nash advises that following the subcommittee meeting, the full committee meeting convened and, as was the case with last Spring's meeting, the principal topic was port security. Pending legislation (now

passed) was discussed generally. There was a strong sense that there is a need for port wide identification systems for those whose business or profession requires that they visit multiple port installations in the course of their activities. While the focus of the discussion was primarily concerned with lawyers and their need to obtain access to various marine facilities, this same reasoning would seem to apply to surveyors, agents, chandlers, etc. Lt. Charles Dayhill who is in the USCG's Chief Counsel office in Washington was present at the meeting and advised that while he was not directly responsible for the rule making procedures, he could put us in contact with those who were. I have since talked with Lt. Cdr. Dayhill who advises me that the person who is addressing this issue is Cdr. Steven Poulin with whom I hope to be in contact in the near future. I will advise you as to his comments.

The foregoing summarizes the New York meeting and the issues addressed on that occasion. I would like to suggest to the committee that while port security is of course on the front burner, there are probably other important issues our committee needs to consider. In that regard, I would like to invite you to identify those matters which you feel our committee should address and thereby serve the purposes of the Maritime Law Association. I invite you to write me with any thoughts and suggestions you may have along these lines. I, in turn, will try to put them together and circulate them for your consideration.

I apologize for missing our last meeting, but it was unavoidable. Halloween 2002 was my wife's 60th birthday, an event she did not want to celebrate away from home. I am sure that all of you can understand why I was absent.

I wish you all happy holidays and I look forward to hearing from you in the not too distant future.

Respectfully
submitted,

John M. Ryan, Chair

FORMAL REPORT OF THE COMMITTEE ON UNIFORMITY OF U.S. MARITIME LAW

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

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

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

The Ninth Circuit disagreed. Based on two of its earlier decisions, the Court held that an interlocutory appeal is permissible where the district court "has upheld the validity of a clause limiting the amount of liability but has not reached the question of whether the defendant was actually liable." *Id.* (citing *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 189 AMC 913, 871 F.2d 897 (9th Cir. 1989) (accepting jurisdiction to determine whether the defendants' potential liability was properly limited, even though the district court had made no liability determination); and *Vision Air Flight Serv., Inc. v. M/V Nat'l. Pride*, 1999 AMC 1168, 155 F.3d 1165 (9th. Cir. 1998) (same)).

The defendants cited several out-of-circuit cases to support their argument that § 1292(a)(3) requires a liability determination by the district

court. *See Evergreen Intl (USA) Corp. v. Standard Warehouse,* 1995 AMC 635, 33 F.3d 420 (4th Cir.); *Bucher-Guyer AG v. M/V Incontrans Spirit,* _____ AMC _____, 868 F.2d 87 (3d Cir. 1988). The Ninth Circuit disagreed with the analysis in those cases, however, finding that those circuits "read § 1292(a)(3) to narrowly." *Wallis*, 2002 WL 31108934, at *4. In the Court's view, to require determinations of liability "would make interlocutory appeals impossible in many admiralty cases, and would do so in precisely those cases where such appeals are most needed." *Id.* at *5. The Court therefore found that it did have jurisdiction over an interlocutory appeal under § 1292(a)(3) where only the validity and applicability of a provision limiting liability has been determined. 2002 WL 31108934, at *4.

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

Respectfully
submitted,

Kimbley A.
Kearney, Chair

FORMAL REPORT OF THE COMMITTEE ON AVERAGE ADJUSTERS

REMARKS BY HOWARD M. MCCORMACK, CHAIR, AVERAGE ADJUSTERS ASSOCIATION OF THE UNITED STATES—"THE IMPETUS FOR CHANGE IN THE 1994 YORK-ANTWERP RULES—REAL OR FANCIFUL"

1. INTRODUCTION

It has been a privilege and an honor to have served as your chairman for the year 2001-2002. The tragedy of September 11 had a substantial impact upon our association as it deprived us of three of our outstanding members, Bob Colin, Bob Miller and Bill Wilson of Aon.

As I said at the November meeting, I had returned to my original roots since I started my career in the maritime field, not necessarily in the practice of maritime law in which I have been engaged since 1961, but in the practice of marine insurance. For a few months I was a yacht and cargo adjuster at Atlantic Mutual Insurance Company and learned all about the arcane concepts of how many cocoa beans could fit into a bag, how many

bales of rubber could be contaminated and how much the polarization of sugar was impacted by seawater. Although I found these absolutely exciting issues, I received a most welcome telephone call from Ed Cartier, one of the giants in the average adjusting community, who invited me to join him and others at the firm, then known as C. R. Black Jr. Corporation. That was probably one of the best moves I made in my entire career since I was a beneficiary of Ed's outstanding tutelage. I embarked upon what I then thought would be a lifetime career as an average adjuster.

At that time, as you know, I was also attending Fordham University School of Law as a student during the evening, together with other friends and colleagues in the marine insurance industry, including one of my oldest friends, Bill Craig, who recently retired from the American Club. During my time at Black I had the opportunity to change from the field of adjusting. I gave it a great deal of thought, but was intrigued with the thought of continuing on with the practice of marine insurance as a marine insurance broker, which I then did for the balance of my time at Black. Once I completed my studies at law school, I then reflected again upon my career path. I made the choice at that time to leave the marine insurance industry in one phase, but continued it in another by becoming a member of the maritime bar with a leading law firm, then followed by time as Maritime Counsel at Bethlehem Steel Corporation and ultimately as a partner in the law firm of Healy & Baillie. I am delighted to have followed my senior partner, Nicholas Healy, both as the President of the Maritime Law Association of the United States as well as the Chairman of this august group.

I have continued my activity in the field of average adjusting by membership on the Comité Maritime Internationale (CMI) Working Group on General Average. I am also the Chairman of a subcommittee on General Average of the Maritime Law Association of the United States. I have had a tremendous amount of help in these activities from members of the Executive Committee of this association, as well as my colleagues at the maritime bar and those members of the Maritime Law Association, who are intimately involved and work in the field of marine insurance and average.

I have changed the usual approach of Chairmen in their speeches in that I intend to discuss with you today issues which I believe are quite critical to the future of the average adjusting community as well as to shipowners and hull underwriters. These issues pertain to the proposal for changes to the York-Antwerp Rules 1994, which are now being studied by

the CMI Working Group. I will be discussing the history and background of this activity, (which started shortly before the Sidney experience when the 1994 Rules came in to existence as a result of the CMI meeting there) and the events leading up to the present time with the rather draconian proposals put forth by the International Union of Marine Underwriters (IUMI) which are now the subject of review by the CMI Working Group.

I believe it imperative that all involved in marine insurance industry, particularly shipowners, hull underwriters and those who are users of the marine insurance system be fully aware of the potential for the changes and the impact that they may have upon issues of coverage, and perhaps the way shipowners and cargo interests will now interact if these changes are made. Succinctly put, the main thrust is to amend the York-Antwerp Rules to provide for the concept of common safety rather than the present concept of common benefit. The result would be to terminate the General Average upon reaching the port of refuge with any further expenses excluded from General Average.

BRIEF HISTORY OF THE YORK-ANTWERP RULES

In the interest of completeness, I would like to share with you a short background of the history of the York-Antwerp Rules as it is necessary in order to understand the issues we are now facing and how these issues have come about. Of course, I am preaching to the choir since all of you here today are fully involved in activities of marine insurance and average, but I think it worthwhile that we all start from the same page and have a full understanding of how we got to where we are today and what the potential changes are and the ramifications thereof.

As Leslie Buglass, a leading author on the subject of marine insurance has stated:

> "General average is as old as the oldest commercial sea voyages and is a natural law of the sea founded on equity. . . . The international maritime law of general average has for centuries, recognized such inequities (a discussion of the issue of jettison) and the law of general average as it exists today has been evolved on the simple basis that, in such circumstances, all the parties engaged in a maritime adventure must be contribute in proportion

> to the value of the property safely delivered.[1] These rules long preceded the continental law on the subject and can be traced back as long as 900 B.C. with comments in the Rhodian code, which was later incorporated by the Romans in their own civil law."[2]

Those concepts in the Rhodian code and Roman law were continued in the various laws of Mediterranean states, but it was not until the latter part of the 19th century that real efforts were made to achieve international uniformity in the adjustment of general average.[3] The York-Antwerp Rules occupy a unique position in international maritime law in that they depend upon voluntary acceptance by the maritime community.[4] As was stated by a learned author Knut Selmer "It may safely be said that general average is a field of maritime law where the international unification effort has succeeded to the greatest degree."[5]

As described by Geoffrey Hudson in his excellent work, the quest for uniformity began in a letter of May 1860 to the maritime countries of Europe by the National Association for the Promotion of Social Science, signed by, among others, the chairman of Lloyds, the London General Shipowners Society, various Chambers of Commerce and other bodies representing shipping, mercantile and underwriting interests in the United Kingdom.[6] As a result of that letter, a conference assembled in Glasgow and adopted a number of resolutions in order to allow Parliament to draft a bill with the view to being enacted into law by several nations.

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1. Buglass Marine Insurance and General Average in the United States, 3rd Edition, Cornell Maritime Press, 1991, page 194-195.
2. Buglass *supra* at 194-195.
3. Buglass *supra* at 197
4. York-Antwerp Rules and The Principles and Practice of General Average Adjustment, 2nd Edition, N. Geoffrey Hudson, LLP 1996, page 7
5. The Survival of General Average (Oslo Universal Press 1958) page 58
6. Hudson *supra* at page 7

The next step took place at the city of York in September 1864 when the Third International General Average Congress met to discuss the draft bill and other suggestions. Eleven Rules, known as the York Rules, were agreed upon with a recommendation that the clauses be introduced into bills of lading. As with any activity in an international setting, there was no great urgency or rush to put these principles into practice. However, a further conference was held in Antwerp in 1877 where the York Rules were amended, thus becoming the York-Antwerp Rules and the foundation of the present York-Antwerp Rules analysis.

From 1877 to 1890 there seemed to be a general consensus that the Rules, as formulated in 1877, were being given universal approval and adoption in the maritime industry. The 1877 rules made no attempt to define general average, and dealt only with specific situations, because general average developed along two different lines. One school of thought, (which was designated English), insisted the general average act must have been performed or the expenses incurred for the preservation of ship and cargo. This essentially is the present basis for the proposed changes now being considered. Another school of thought, (which was designated French), maintained that steps taken for the common good qualified as general average.[7] It is the common benefit against the common safety issue which brings us to the discussion we are having today.

Further development of the rules continued in 1890 when they were extended to 18, again, without any effort to define general principles. The 1890 rules came into being at a meeting held in Liverpool. Those rules were continued in practice until 1924, after the intervention of the first World War delayed consideration of the rules when there was a further revision.

It was at that time (1924) that an international conference at Stockholm took place and the great majority of the present rules were adopted and the statements of principle became the present lettered rules of the York-Antwerp Rules.[8] There was a dichotomy of position between the English and American market at that time, particularly in view of the fact that the Americans did not believe that Rule A was sufficient to allow expenses that would be expected to be made at a port of refuge.

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7. Hudson *supra*, page 5
8. Hudson *supra*, page 10

There continued to be further refinements of the rules in the revisions of 1950. At this time, such revisions were undertaken under the auspices of the Comité Maritime International (CMI). They have continued to be the custodian of the York-Antwerp Rules through today.

Between 1950 and 1974, when the rules were amended again, there were serious discussions undertaken by the European Association (AIDE) as well as by the general average committee of the International Union of Marine Underwriters (IUMI). The CMI set up a conference in Hamburg in 1974 with an emphasis upon simplification of the rules. Although the 1950 rules had worked fairly well in practice, there was still concern in the industry, particularly among the hull and cargo interests, for further simplification and modernization which led to the 1974 rules.

There was a further amendment at the CMI conference in Paris in June of 1990, solely with regard to Rule VI dealing with salvage. That history then set the stage for the further consideration of the Rules that ultimately led to the embodiment and establishment of the York-Antwerp Rules in 1994 at the CMI meeting in Sydney.

2. THE SYDNEY EXPERIENCE

1. Background of the Sydney Rules

a. UNCTAD REPORT 1991

In 1991, the United Nations Conference on Trade and Development (UNCTAD), particularly its Committee on Shipping and the Working Group on international shipping legislation, produced their report entitled "General Average—A Preliminary Review."[9] Essentially, the document was a primer on the issues of general average including a historical background, definitions, discussion of recovery of general average contributions, review of criticisms of general average and alternatives to the system.

In their conclusions, UNCTAD considered various issues, including the abolishment of general average, simplifying it, and reducing or abolition of contribution in selected instances. There was also discussion about the comprehensive analysis of general average by Professor Selmer.[10] He concluded that abolition was the best solution.

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9. UNCTAD document TD/BC.4/ISL/58 August 19, 1991
10. See footnote 5

One of the ultimate conclusions of the UNCTAD report was that UNCTAD, after consultation with CMI, should approach marine insurance interests with a view towards setting up and organizing investigations and discussions between insurance interests to ascertain whether new insurance arrangements could be brought into being which would allow the abolition of the existing general average system[11]. If however, the insurance interests were to conclude that there was no possible insurance solution, then it would be appropriate to consider, as a second stage, how best the existing GA system and the York-Antwerp rules might be simplified or reformed (whether a partial abolition or otherwise updated.[12]) This, then, was the basis for further discussion and consideration by the CMI, which as I have mentioned, was the custodian of the York-Antwerp Rules.

3. 1992 CMI WORKING GROUP ON GENERAL AVERAGE

In 1992, the CMI Working Group on General Average reported to the CMI International subcommittee on General Average.[13] David Taylor, now Honorary Secretary of the UK Association and Secretary of the Joint Hull Committee as well as a special adviser to the International Underwriting Association of London, was the Chairman of the CMI Working Group, a position he continued to hold and which he conducted with great enthusiasm and excellence at the 1994 Sydney meeting of the CMI. His 1992 report referred to a CMI decision in December 1990 to carry out a study of the law of general average and the York-Antwerp Rules.

The Working Group was essentially European, with one Japanese representative. It considered replies to questionnaires prepared by the CMI to determine the issue of the future of general average and the York-Antwerp Rules. Reference was also made to the UNCTAD report, infra. The 1992 CMI report reviewed the close working relationship between the UNCTAD secretariat and the CMI Working Group. This report should be reviewed by anyone who wishes to understand the history of this activity because it considered the responses by the various maritime law associations to the CMI questionnaire.

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11. UNCTAD Document infra paragraph 175
12. UNCTAD Document infra paragraph 177
13. 1992 CMI Yearbook, pages 97-113

The Maritime Law Association of the United States (MLAUS) was quite instrumental in supplying substantial comments and contributed to discussions with the CMI on this issue. In his report, Mr. Taylor concluded that, although one comment indicated an absence of controversy with no demand from commercial interests for abolition or radical revision of the general average system, this now seemed to be an appropriate time (1992) for work to be undertaken in considering improvements to the system. Mr. Taylor indicated that "close regard should be had to the unique uniformity of acceptance of the rules and to the extent to which those rules balance the interest of all parties."[14] He stated that with one exception, all responses were unanimous in expressing a desire to maintain the existing fundamental principles of general average concerning, as they do, (a) sacrifices and expenditures made and incurred for the preservation of the property at risk in the common maritime adventure (Rule A) and (b) expenditures incurred and respective measures undertaken to preserve the voyage with cargo.[15]

It should be noted that the UNCTAD 1991 Report[16] discussed the issue of common safety as follows:

> "Common Safety
> 37. Under Rule A of the York-Antwerp Rules the general average act must be made with a view to preserving from peril all interests involved in a common maritime adventure. Thus a sacrifice made or expenditure incurred for the safety of a part of the property involved in the adventure does not give rise to a claim for general average contribution, but will be a charge on the owner of the particular property preserved by such sacrifice or expenditure. (citations omitted)
>
> 38. Although Rule A adopts the English view of limiting the scope of the general average act to attaining common safety and, unlike the United States law, does not extend the principle to include the common benefit and the safe prosecution of the voyage, yet certain numbered rules of the York-Antwerp Rules, such as Rules (X)b and XI(b) allow in general average certain expenditure of such nature. Since, by virtue of the Rule of

14. 1992 CMI Yearbook, page 98
15. 1992 CMI Yearbook, page 100
16. UNCTAD Report infra paragraphs 37-38

> Interpretation, the numbered Rules prevail over the lettered Rules, expenses incurred for the common benefit of the whole adventure and for the safe continuation of the voyage will be allowed under the York-Antwerp Rules(citations omitted). Thus, the expenses allowed in general average are not limited to those incurred for the attainment of safety, but also include expenses incurred for the mutual benefit of ship and cargo to enable the voyage to be completed, such as temporary repairs and other expenses incurred in a port of refuge."

The CMI Working Group had also considered the leading work of Professor Selmer referred to infra. The Working Group considered each of the comments made by the various maritime law associations with reference to the 1974 York-Antwerp Rules. There was some discussion in the CMI report as to the issue of General Average absorption clauses, which shall be discussed later. The CMI Working Group Report of March 1992 was then passed to the International Subcommittee of the CMI with the responsibility for further study of General Average and the York-Antwerp Rules.

4. THE REPORT OF THE CMI INTERNATIONAL SUBCOMMITTEE—MAY 1994

As indicated above, the International Subcommittee of the CMI then undertook the study of a potential review of General Average and the York-Antwerp Rules 1974 with a view toward full discussion at the plenary session to be held in Sydney in the latter part of 1994. The members of the Subcommittee at this time included an American, Doug Adams, former chairman of this Association, as well as various Europeans and a Japanese participant.[17] This report should be reviewed by all with an interest in this issue since it includes the report of the CMI International Subcommittee meeting of December 1993, the various proposals recommended by the subcommittee as well as suggestions contained in the report of AIDE of September 1993 and general average statistics.

Mr. Taylor, in his May 1994 report indicated that IUMI had established a specialist committee that year, but they had yet to produce its report (which I believe was still not available at the time of the meeting in Sydney in October 1994.) The general context of the CMI report was that the

17. 1993 CMI Yearbook (Sydney 1), pages 140-193

responses to the CMI questionnaire indicated a serious interest in the continuation of efforts to update, simplify and improve the rules to take account of present day circumstances.[18] The general tenor of the report was no support for any tendency to extend the scope of general average, but merely to work with the members of the industry and commercial interest to consider the advantage and disadvantage of absorption clause and other items.

a. Further UNCTAD Report—March 1994[19]

Shortly prior to the 1994 report of the chairman of the CMI International Subcommittee, UNCTAD came out with a further report headed "The Place of General Average in Marine Insurance Today." This document was an update of their prior document of 1991.[20] This 1994 report contained a substantial number of statistics and pie charts which I would leave to those with an interest in that for a more complete understanding. This report should be reviewed as a historical part of the process, since it was the work of a UN agency which had studied the extent to which insurance arrangements could simplify the general average system. It essentially indicated that the entire matter would be considered by the CMI at the meeting in Sydney. The UNCTAD secretariat was represented at the meetings of the International Subcommittee of the CMI as an observer and participated in those activities which were reflected in the report of Mr. Taylor.

5. THE US DELEGATION IN SYDNEY

The U.S. General Average Delegation was headed by Larry Bowles of Nourse & Bowles whose vice chair was Howard Myerson. At that time there was a substantial number of other marine insurance people and average adjusters who were present at the meeting in Sydney. There was a very spirited debate on the entire issue of the York-Antwerp Rules. The modifications that came out of the Sydney meeting were to be known as the 1994 York-Antwerp Rules. The full report of the Sydney meeting was set forth in the 1994 CMI Yearbook.[21]

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18. 1993 CMI Yearbook (Sydney 1) page 141
19. UNCTAD/SDD/LEG 18 March 1994
20. See 1991 UNCTAD Report infra
21. 1994 CMI Yearbook (Sydney II), pages 134-165

There was also substantial debate and colloquy put forth by the various entities representing IUMI which apparently had produced an extensive report to their assembly at their meeting in Toronto in September 1994. That report was not readily available at the Sydney meeting in October, although the proponents of the report were quite active in putting forth their views. There was a consensus at the Sydney meeting that there was wide resistance to any tendency to expand the scope of general average. For the first time, a new rule was introduced, namely the Rule Paramount, to introduce the concept of reasonableness throughout the rules.

I attended the Sydney meeting and was a member of the U.S. delegation on general average as well as a participant in the other U.S. delegations covering other subjects since, at that time, I was a vice president of the Maritime Law Association of the United States. I can attest to the dedication and hard work by all of the members of the American delegation, particularly those members of this Association who were full time average adjusters and who were of substantial assistance to the members of the Maritime Law Association. The MLA position had been set forth in their response to the questionnaire put out by the CMI, which, as you are aware, is composed of the various national maritime law associations.

Once the 1994 rules were put into effect, IUMI then continued their substantial commentary by the members of the cargo underwriting fraternity to limit the approach of the York-Antwerp Rules from what it was, namely, actions taken for the common benefit. The IUMI position wanted to reduce General Average expenses and to limit them to actions taken for the common safety, which seemed to be a retrograde approach to the position that existed in the UK in the late 1800's.

6. ATTACK ON THE 1994 SYDNEY RULES

The substantial impetus for movement or changes in the 1994 rules originated with IUMI. Apparently the report of Matthew Marshall of IUMI as well as that the Toronto report of IUMI may have been known at the Sydney conference but it was not able to be considered in view of the fact that IUMI had just met the month before. The position of IUMI at that time (October 1994) continued to be that they wanted a change made in the York-Antwerp Rules which would provide a radical reform in the scope of general average. One of the leading IUMI proponents said at the IUMI conference in Oslo in September 1996 "It is not beyond our combined wit or wisdom to produce a readily understood set of rules paying only

sacrifices or expenses incurred whilst in the grip of a peril, until such time as common safety is reached. In other words, do away with safe prosecution of the voyage and all the layers of extraneous expense that go with it."[22]

The Oslo conference also considered a paper by Mr. Marshall on the statistical update of general average, which apparently was an update of his paper presented to IUMI in September 1994. One factor to be noted in Mr. Marshall's comments was that the larger the loss, the heavier the cargo share of the total. The reason for this was that container ships had high values and, perhaps, greater expense then older ships and small ships which tended to carry lower valued cargoes.

The other comment from Mr. Marshall was that older ships, which had lower values of cargo, picked up a proportionally higher amount of General Average expenses.[23] Mr. Gooding took the position that there was only one marine body with real international muscle and that was IUMI and IUMI must back the call for change. That call has now been sounded throughout the IUMI comments since 1996 to the present time, with substantially more success then IUMI had in their arguments at the Sydney meeting. This then brings us to the issue of the demand for change by IUMI.

I believe that this demand is based upon an erroneous premise and I will discuss that shortly. It is my personal view that the position of IUMI is solely the position of the cargo underwriters side of IUMI and is not necessarily shared by the hull underwriters, nor have the hull underwriters in the United States or elsewhere paid particular attention to the substantial impact these changes may bring about, if the York-Antwerp Rules are amended to reflect the common safety issue as opposed to the present common benefit concept.

In essence, under the IUMI proposals, rules X and XI will no longer be applicable and general average will terminate once the vessel has reached the port of safety at a place of refuge with all other charges being imposed upon the owners or others, as the case may be, but certainly not upon cargo interests.

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22 *General Average Time for A Change*, Nicholas Gooding, Lloyds and Lloyds Underwriters Association Paper at IUMI meeting at Oslo, September 1996.

23 *General Average A Statistical Update*, General Average presentation, IUMI Oslo conference 1996, Matthew Marshall

David Taylor was a participant at the 1996 Oslo IUMI conference. His paper attempted to reflect some of the more conservative commentary in view of the fact that the Sydney conference was not yet two years old when the IUMI proposals for change were put forward. He urged against seeking to write a new set of rules and strongly recommended that all participants, i.e., IUMI, CMI, AIDE and others establish a much improved dialogue. He noted that insurers had not taken their places at the table of discussion within each maritime law association (I believe this also may reflect my understanding, even though we have a very active maritime law association marine insurance committee).

Mr. Taylor made a very prescient statement which I believe reflects the principal rationale for the attack on the York-Antwerp rules. Mr. Taylor indicated "the complaint that the shipowner, who operates badly maintained and incompetently crewed vessels, can benefit under general average and the York-Antwerp Rules is, to my mind, not a criticism of a general average system, but a criticism of the fact that such shipowners are tolerated and even insured.[24] It is my opinion that the IUMI proposal to change General Average is an attempt to resolve a commercial problem that is not even remotely connected causally with the issue of General Average."

The October 1996 IUMI meeting was the beginning of the assault upon the concept of general average and has continued to date. I would like to discuss the activities that have taken place since the 1996 IUMI Oslo meeting with specific reference to the more strident tones that have been taken in this continuing debate.

7. FURTHER IUMI ACTIVITIES SINCE OSLO MEETING 1996

Since the meeting and program by IUMI in Oslo in 1996, there have been a series of papers setting forth positions taken by IUMI that continue to press the major point of their difference with the 1994 rules, namely the modification of the rules to provide that general average terminates when the vessel has reached the position of safety as opposed to the concept that the general average continues for the common benefit. The net result of the IUMI position would be that all GA charges would terminate once the vessel has arrived at a port of refuge and any charges thereafter, including

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24 Remarks of David W. Taylor on General Average Session at IUMI Conference, Oslo, 1996, page 6

loading/unloading cargo etc. would not be considered as general average charges unless they were necessary for the common safety. There are also other issues on some modifications and respective changes to the Rules, but this is the most substantive one.

IUMI had created a GA drafting Working Group which consisted of Nick Gooding, a Lloyds Underwriter, Eamonn Magee, an Irish underwriter, Matthew Marshall of ILU and Ben Browne, a solicitor then with Clyde & Co., now with Shaw & Croft. They prepared the document which is the basic document that the CMI Working Group is considering. This paper was prepared for presentation at the IUMI meeting in Berlin in 1999, although the article was apparently finalized in April of 1998. The articulated purpose of the report was to "reign back the progressive extensions in the scope of general average which taken place over at least the last 100 years with a view toward lessening the burden which general average places on property underwriters worldwide."[25]

Their purpose is to have the loss lie where it falls to a greater extent then it does at present as they consider the current concept of general average outdated. Their primary purpose was to propose a statement of principle governing general average similar to Rule A of the 1994 Rules, which redefinition would be drawn from section 66 of the English Marine Insurance Act 1906. The IUMI concept would be that there was "a general average act when and only when any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety in time of peril for the purpose of preserving the property from peril."[26] Their recommendation is that ordinary crew wages during the peril should not be included, the cost of transshipment to destination not be included, the ship's expenses at a port of refuge should not be included, temporary repair costs, unless carried out when a ship and cargo are in the grip of a peril, such as in a salvage situation, are not to be included; the cost of discharging, storing and reloading while the vessel repairs at the port of refuge should also not be included. They reason that these expenses should be born by the carrier under its contract of carriage, nor would consumption of extra fuels and stores, once the immediate peril had ceased to exist, be included.

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25 Report of IUMI GA Drafting Working Group, IUMI conference Berlin, 1999 page 1

26 Report of IUMI GA Drafting Working Group, IUMI conference Berlin, 1999 Section 1

Potentially, their concept would be that substituted expenses should be abandoned. The proposed reform is to stop expenses going into GA after the ship and cargo have been brought to safety, such as a port of refuge, therefore a definition of peril was needed.[27] The general theme of this proposal was that the concept of "common safety" should underlie the "new" general average replacing the common maritime adventure concept, which now forms the basis of the current 1994 rules. IUMI's position is that once the peril has passed, expenses such as those incurred at the port of refuge or temporary repairs are more properly in the domain of maintenance, in other words, the "common safety" approach would reduce the exposure of hull and cargo underwriters to general average claims.[28] This is the primary change that IUMI is seeking.

There were also other issues such as the effect of fault, as they wanted Rule D to be expanded wherein no party to the venture would recover any GA loss or sacrifice to the extent the loss was shown to have been directly caused or consequential upon any breach of the ISM code, the STCW convention or the classification society rules. The concept of going back to the initial common safety concept also had IUMI proposing that substituted expenses under Rule F be abandoned. Their argument was that "if it is intended to substantially amend the York-Antwerp Rules to remove from general average expenses and sacrifices suffered or incurred, once ship and cargo are no longer in the grip of the peril and it would follow that this usual scenario could not arise because the cost of discharging, storing and reloading cargo would not in any event be recoverable in GA."[29]

Also a strongly pressed issue in their paper is Rule VI on the reapportionment of salvage which does irritate the cargo underwriters in IUMI. The IUMI position is that Rule VI(a) would indicate that the salvage payments, including legal fees, should lie where they fall and not be brought into general average, save only that any amounts paid by one party to the GA in respect to the proportion (calculated on salved values and not GA contributory values) of another party or parties, shall be apportioned between the parties to the GA in accordance with these rules. Their

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27 Report of IUMI GA Drafting Working Group, IUMI conference Berlin, 1999 Section 1

28 Report of IUMI GA Drafting Working Group, IUMI conference Berlin, 1999 Section 3

29 Report of IUMI GA Drafting Working Group, IUMI conference Berlin, 1999 Section 9

concept also requires the provision of Rules X and XI (a, b, and c) covering expenses to be disallowed in GA. Rule XII would only cover to the effect that the damage and loss must occur to the cargo etc. while the ship and cargo are in the grip of peril but not otherwise.[30]

They discussed Rule XIV—temporary repairs and the House of Lords decision in the BIJELA 1994 AC which supported the accepted practice of average adjusters that temporary repairs of accidental damage effected at the port of refuge are allowable as GA up to the savings in GA allowances. The IUMI position would be that if temporary repairs at the port of refuge are no longer included in GA (as they proposed), then there is no need to address the problem in new rules as temporary repairs would not be recoverable. The scope of the temporary repair rule XIV would be drastically curtailed but not, IUMI contends, extinguished altogether.[31]

I believe that this is a statement of an expectation that is not likely to be achieved and that the temporary repairs will go the way of all other parts of the Rules that they seek to remove.

There are some other issues which I believe that members of the adjusting community should review, such as commissions and interest as well as time bar. These had been discussed extensively in Sydney and time bar still remains a rather elusive concept to be able to achieve on the issue of uniformity.

IUMI also would like a new rule to the effect that no contribution shall be due from any party whose surveyor has been refused access to the vessel or documents and any documents relating to the vessel for its maintenance not on the vessel, which are reasonably requested in writing may be inspected by any party acting on their behalf to determine whether or not that party should be liable to contribute in general average.[32] It is evident, therefore, that by these suggested changes the thrust of this issue of rule change is foisted upon the shipping industry by the cargo underwriters. Their avowed premise is that they are tired of paying general average for what they call substandard vessels, which they believe are using general average contributions to pay for what should be ordinary maintenance.

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30 Report of IUMI GA Drafting Working Group, IUMI conference Berlin, 1999 Section 20

31 Infra Section 22

32 Infra at Section 31

We submit that this argument is completely irrelevant in that, if cargo has been loaded on a substandard vessel, there are various remedies available to cargo interests, which they generally take advantage of on many occasions. One would also inquire as to the obligation of cargo underwriters, as well as their insureds, to consider themselves as to what duty each has to conduct due diligence of the type of vessels on which they are placing their valuable cargo and which they are seeking to have insured on an all risk basis.

We would suggest the possibility that cargo underwriters can resolve this perceived problem by imposing more stringent requirements and over age penalties, such as restricting insurance to certain flag vessels, increasing the premium for certain flag states, as well as restricting the coverage of vessels to certain classification societies, again, with additional penalties for those vessels which are not within the agreed upon classification society. In essence, there are many ways that cargo underwriters can achieve their desired result other then by making this substantive change to the York-Antwerp Rules in what I believe is an unnecessary approach.

The IUMI Berlin drafting document on general average is still the basis of IUMI's position, which their representatives continue to press both with the CMI Working Group as well as in other venues in which they have been able to put forth their position.

8. CMI TOLEDO COLLOQUIUM—2000

The CMI, at intervals between a plenary session, has a colloquium, which is a seminar on various topical issues of interest to the CMI. There was a colloquium that took place in Toledo in September 2000 under CMI auspices. One of the basic issues was the continued presentation of the IUMI position on their desire to reform general average. These comments and their positions can be found in the CMI Yearbook 2000 ("Singapore I") since the Singapore plenary session was to take place in February of the following year.

The IUMI proposal was well represented in Toledo by the detailed paper of Eamonn Magee, one of the authors of the IUMI 1999 Berlin document. In early 1999, the general secretary of IUMI requested the president of the CMI to place the case for revision of the York-Antwerp Rules back on the working agenda of the CMI. Another CMI Working

Group consisting of almost exclusively Europeans, was set up and a questionnaire prepared which was sent to all the international maritime law associations. That Working Group was chaired by Thomas Reme, a former underwriter and maritime attorney in Germany and a member of the CMI Executive Council.

In his report of February 2000, preceding the report of the Toledo conference, he indicated that he may have unintentionally created the impression that the concept of common benefit was introduced relatively recently whereas, in fact, it can trace its origins to 1890 and possibly to 1864.[33] The US and UK associations were rather strong in their views on this point in pointing out this oversight. Chairman Reme indicated that the answers to the questionnaire were not exactly strong one way or the other as to whether or not the concept of retaining the common benefit principle should be retained. Therefore the subject was to be open for discussion in Singapore in February 2001. In order to permit the delegates for the Singapore meeting to prepare for that discussion, the 2000 Yearbook included documents from the Toledo colloquium.[34]

Mr. Magee, at the Toledo meeting, set forth his views which reiterated positions previously taken by IUMI in Berlin. Annexed to Mr. Magee's paper on general average reform, was the Berlin report of the IUMI drafting Working Group. The Berlin paper is the basic document upon which IUMI is making their entire presentation. It is evident as to what is bothering the cargo underwriters since Mr. Magee contends that some 67% of general average disbursements (per their statistics) show they have been funded by cargo interests or more likely, their underwriters. The majority of those disbursements, (which he considered inequitable) showed that the general average tended to be exclusively related to issues involving the management of the vessels, such as engine breakdown, mechanical and structural failure, grounding through negligent navigation and so on. He contends the IUMI recommendations are aimed at addressing these inequities.

There was no discussion in Mr. Magee's paper of the IUMI position relative to the Hague Rules or the Carriage of Goods by Sea Act as to the various defenses available to vessel owners such as negligent navigation and

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33 2000 CMI Yearbook (Singapore 1), pages 290-291.

34 2000 CMI Yearbook (Singapore 1) pages 294-324

other relevant ones. His Toledo paper is a summary taken from the 1999 IUMI position paper.[35]

The Colloquium was also fortunate to have the benefit of the response of Geoffrey Hudson, former chairman of the UK Average Adjusters and the author of the learned work on the York-Antwerp Rules. He stated his very strong position with regard to the consequences in the market and shipping community, if the IUMI proposal should be put into effect. He analyzed the shipowner's expenditures at a port of refuge between the costs of discharging cargo, warehousing cargo, and costs of reloading cargo as well as outward port charges.

It was his position that the proposed curtailment of general average allowances would remove the positive incentive which the York-Antwerp rules provide to encourage a shipowner to take the proper measures to fulfill his obligations under contract of carriage.[36] It was also his opinion that the proposed curtailment of GA allowances put forth by the IUMI at a port of refuge would directly increase the number of valid abandonment cases.

He then discussed various examples showing how that would be achieved.[37] The IUMI proposals, according to Mr. Hudson, would do away with all issues of saving the voyage by forwarding of cargo on a non separation agreement, since the IUMI proposal would have no allowances and general average in a port of refuge and moreover would abolish the principle of substituted expenses altogether.[38]

10. 2001 CMI MEETING—SINGAPORE

One of the substantive topics discussed at the CMI plenary session in Singapore was the IUMI proposal. Mr. Magee was unable to attend but Ben Browne, one of the coauthors of IUMI Berlin draft proposal, was present in Singapore, and delivered a very eloquent argument in favor of the IUMI position. Mr. Hudson was also present. He reiterated the position he had

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35 Cf General Average Reform-The IUMI position, Eamonn Magee, 2000 CMI Yearbook 294-313

36 2000 CMI Yearbook, 314 at 321, *Lets Be Realistic*, N. Geoffrey Hudson

37 Hudson *supra* at 322

38 Hudson *supra* at 324

taken at the Toledo conference as to the errors of the IUMI proposal and the difficulties in making the proposed changes that IUMI wanted to the York-Antwerp Rules.[39]

I was the vice chair of the US GA delegation; and Howard Myerson was the chair of that delegation. The United States and two other entities, the International Chamber of Shipping and the International P&I Group were the only entities that voted against the proposal at Singapore that would consider what changes would be made, if any, to the York-Antwerp Rules. In essence, the position of IUMI, which they were unable to achieve at the 1994 CMI Sydney meeting, has now been achieved in that they were getting an audience receptive to the proposals that IUMI have been making since Sydney, particularly their Berlin and Toledo proposals.

As a result of the Singapore meeting and the resolution of the GA session, a Working Group was nominated by the CMI to consider the entire issue of what, if any, changes should be made to the York-Antwerp Rules 1994, despite the position taken by the United States that there was no necessity to take it up at this time as the 1994 Rules had not been given any time frame to achieve their desired effect.

11. CMI WORKING GROUP

CMI originally set up a Working Group under the chairmanship of Bent Nielsen. He is a Danish lawyer and the chairman of CMI General Average Working Group prior to the 1994 Sydney meeting. The vice president of the CMI, Frank Wiswall, a member of the MLA and a member of the CMI Executive Council was in overall charge of oversight of the activities of the Working Group. All members of the Working Group at that time (mid 2001) were European. They included an English average adjuster, a Danish average adjuster, and members of the UK, Danish and French insurance community plus Ben Browne and Richard Shaw, UK solicitors.

The first meeting took place at the offices of Ince & Co., the office of the president of the CMI, Patrick Griggs in May 2001. Fortunately, Jean Knudsen, former chairperson of the Average Adjusters Association was able to attend the meeting as was Howard Myerson. The viewpoint of these

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39 His commentary in Singapore was identical to the position he articulated in Toledo

Americans was made fairly clear to the Working Group and was based upon the prior answers to the CMI questionnaire by the MLAUS. At that meeting the position of IUMI was reiterated once again by Mr. Browne and Mr. Marshall. Mr. Wiswall then prepared a report of that meeting which indicated the areas under discussion.

Mr. Wiswall had indicated he would recommend to the CMI Executive Council that the Council undertake a study of the IUMI proposals. This would be in the context of amplifying the resolution on the GA issue taken in Singapore a few months earlier. There was no representative of any hull underwriter present at the meeting in London of May 2001. Although the report of the meeting indicates that certain people were present for the hull and cargo insurers, actually these people were only the IUMI cargo representatives and the authors of the IUMI draft working paper given in Berlin. There were no other people present representing any other insurers except the London P&I interests. The meeting concluded with an agreement to continue the discussion at the second session of the group in December 2001.

In the interval between those meetings another IUMI meeting took place in Genoa. Unfortunately, a majority of the American participants were unable to attend due to the tragedy of September 11. Ben Browne spoke again on these issues at this meeting.[40]

Mr. Browne gave an update on the IUMI proposals and discussed some particulars of the proposed reform. Mr. Browne did concede that some of the gains to be achieved by these changes would be offset by increased expenses, particularly for hull underwriters in port of refuge expenses, but he opined the net overall gain, even to hull underwriters, would be considerable. Unfortunately Mr. Browne did not discuss specifics as to what that would achieve.

I strongly recommend a review of his paper as it sets forth the specifics of the IUMI rationale. At that time (September 2001) the CMI Working Group was still under the chairmanship of Bent Nielsen. It also included Hans Levy, a Danish lawyer formerly with Skuld and now in private maritime law practice, Richard Cornah of Richards Hogg Lindley of Liverpool, Pierre Latron, who had been a member of the previous CMI

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40 The Progress of the IUMI Proposals for the Reform of the York-Antwerp Rules - IUMI - Genoa, September 2001

Working Group prior to the Sydney meeting, Richard Shaw, a solicitor and former partner of Shaw & Croft and rapporteur of the CMI Working Group as well as the rapporteur of the Singapore conference on general average, Jens Middelboe, a Danish average adjuster and Mr. Browne. Subsequent to that time, I was able to obtain the agreement of Mr. Nielsen and the president of the CMI to have an American on the Working Group. The President of the Maritime Law Association thereafter appointed me as the U.S. delegate to that Working Group.

11. SECOND MEETING OF THE CMI WORKING GROUP IN LONDON, DECEMBER 2001

Fortunately, I was able to attend the meeting in London together with my good friend and colleague Howard Myerson, who has been of tremendous assistance to me in these activities. The December meeting was attended by the IUMI representatives i.e., Ben Browne and Matthew Marshall. There were also representatives of the UK Average Adjusters, as well as the United States Average Adjusters, and other members of the Working Group. Fred Robertie of the American Hull Syndicate was able to be present for a substantial portion of the meeting.

We were able to resolve some of the issues that had been discussed at the previous meeting in May. The meeting, chaired again by Frank Wiswall, evolved essentially into a detailed discussion of some of the items from the IUMI agenda, particularly the proposal to amend the rules to reflect the "common peril" as opposed to "common benefit" issue and the salvage matters.

Mr. Wiswall conducted an outstanding meeting and was able to deflect some of the issues with an indication that they would probably not be taken up by the CMI, such as the issue of effect of fault. In his report to the Executive Council a few days later he indicated that the conclusion drawn by cargo interests from Mr. Marshall's statistical presentation was that cargo's share of GA expenses was unfairly burdensome in the magnitude of 60-65%. This was claimed to be partly as a result of substandard vessel operations.

There was a discussion on the issue of port of refuge expenses, since it appeared that the IUMI proposal would, in essence, make a change from general average to a series of particular averages and, even if they were not adjusted, the actual expenses would continue to be incurred and disputed.

Mr. Wiswall recommended that certain of the IUMI points be taken up by the Working Group, including port of refuge expenses, absorption clauses, salvage claims, interest expense, temporary repairs, time bar and substituted expenses. He recommended that other points in the IUMI proposal should not to be taken up by the Working Group and were withdrawn from consideration from the Working Group's discussions.

12. WORKING GROUP MEETINGS

There have been two meetings of the Working Group in 2002. The position of the United States Average Adjusters and MLAUS was submitted to those attending the Working Group meeting in March 2002 in London through the assistance of Tim Madge, the present chairman of the UK Association. The results of the meeting in March were reflected in the June 24 draft report by Bent Nielsen, chairman of the Working Group on General Average. This was submitted to the members of the Working Group about a week before the second meeting was to take place in Copenhagen.

The June 24 draft report was an excellent one in that it reflected the history of the General Average issues discussed in this paper, the position of IUMI and their recommendation for changes in the rules. The draft report suggested that various scenarios could be considered with the possibility of amending the rules to achieve certain IUMI objectives. The report also contained a list of arguments for and against accepting the "common benefit" expenses which was to be the subject of the further meeting in Copenhagen.

It is my assessment that the position of the Working Group seems to be heading toward making a recommendation of some changes to the York-Antwerp Rules that would seek to adopt the position in part of IUMI. Although I was unable to attend the second meeting in Copenhagen in July, I was able to furnish to the chairman of the Working Group the position of the Average Adjusters Association of the U.S. as well as the position of the Maritime Law Association regarding the IUMI proposals. I was aided substantially in this by the comments of Jonathan Spencer and Howard Myerson in order to enable me to prepare the position report to Mr. Nielsen. I have not yet received the minutes of the Copenhagen meeting. I am advised by Mr. Nielsen that these should be coming by the end of October.

It is my expectation that the Working Group draft report will reflect the position of the majority of the Working Group (I seem to be in the

minority) that the CMI should consider the possibly of amending the York-Antwerp Rules 1994 to include some of the views put forth by IUMI. It is expected that this would be reflected in a more detailed document reflecting the majority and minority positions, if any, of the Working Group.

It is expected that the CMI will then form an International Subcommittee, similar to what they did for the meeting in Sydney, to consider what, if any changes should be made, based upon the draft report of the International Working Group. The composition of the international subcommittee is to be determined by the President of the CMI. It is hoped and anticipated that there will be a member from the United States on that subcommittee when it is officially formed.

13. PRESENT STATUS OF THE PROPOSALS

As I have indicated above, it is my assessment that the CMI Working Group will come out with a draft final report proposing changes to modify the York-Antwerp Rules on the basis of common safety as opposed to common benefit. This will represent a substantial shift in the present law as well as the present practice. It will also impact substantially upon vessel owners since they will now lose insurance coverage for their expenses incurred at a port of refuge, if the changes are made.

Hull underwriters pay for valid GA expenses. If the GA terminates at the port of refuge, then all the other expenditures that had been considered general average expenditures in the past and picked up by hull underwriters on their proportionate share will not be covered. The P&I clubs will not cover these expenses because they will only pay the vessel owner for the cargo proportion of uncollectible GA as a result of the violation of some statute or due to the unseaworthiness of the vessel directly causing the incident for which the owner is unable to obtain the benefit of the usual JASON clause.

The IUMI proposal also seems to suggest that all of this can be resolved by the presentation of GA absorption clauses. In my opinion this is a total misapprehension in that it is an attempt to resolve an underwriting problem (which is caused when cargo underwriters are insuring cargos on substandard vessels to begin with), by virtue of the absorption clause. It should be understood that an absorption clause is nothing more than a

business transaction between the vessel owner and its hull underwriters. This is primarily done in the container trade due to intense competition although it may also be done on the bulk trade. In the liner container trade, if there is a general average, given the number of containers and the substantial number of individual parties involved in the ownership of the goods, the vessel owner is looking at a possible substantial impairment of his business relationship with cargo interests due to the need to collect security.

Therefore, this trade has come up with an agreement whereby the hull interests will pick up the cargo's share of a valid general average contribution up to a certain amount, which is reflected in the hull insurance policy. Whether or not hull underwriters charge additional premiums for this is a matter of conjecture, but I would strongly recommend that hull underwriters give some consideration to this because the potential expenses to be incurred on behalf of cargo for GA can be extremely high. BIMCO has now come out with a Standard Absorption Clause which may be of assistance to the entire marine industry. The American Hull Syndicate also has an absorption clause.

The question therefore is, where are owners to go to seek coverage for what are now not going to be proper GA expenses because the York-Antwerp Rules would not cover them? There seems to be to be a definite gap in insurance coverage. It may well be that hull underwriters would be willing to write additional risks for the prior usual port of refuge expenses and temporary repairs etc. if they would have been GA expenses prior to the amendment of the Rules for the common safety theory.

This may well be a new product that has to defined by the hull underwriters. However, it is evident to me that the marine insurance hull market is substantially unaware of the potential problems that they are facing in the future, if this change takes place. Their assureds, the shipowners, will clearly want coverage for these expenses. Essentially, it appears to me to be a substantial change proposed in which cargo underwriters are attempting to solve a commercial problem the wrong way.

Since they argue that the majority of their assureds' cargo general average contributions are impacted as a result of the engine problems or lack of performance by substandard vessels, therefore they propose that the York-Antwerp Rules should be changed to take care of that. I would suggest, as indicated above, there are other and better ways in the marine

insurance market to take care of this perceived problem for cargo underwriters. These suggestions include

1. Reduce the over age penalty from 20 years to 15 years.
2. Cargo underwriters only accept risks if the vessels are registered in certain flag states and certain class societies. They should charge substantial additional premiums to the vessel owner if ships do not meet these standards.
3. If the cargo underwriting interests want to get rid of substandard vessels, there are ways to do that in the market place. They can limit the types of flag states for which they will accept coverage on those vessels. They should be prepared to increase the premium substantially to cover these perceived "substandard vessel" risks.

What are the potential side risks for all concerned? I believe that you will be looking at the possibility of more abandonment of voyages by vessel owners where they normally would have either discharged cargo, repaired the vessel and then reloaded it, or alternatively, would have entered into a non separation agreement to carry the cargo to destination. It is expected that if the abandonment of the voyage takes place, cargo underwriters will be exposed even more to the risks of cargo damage, particularly if the port of refuge is in an area quite distant from good repair facilities or other problems of a similar nature. Cargo underwriters should be more aware of the business practices of their assureds. They should investigate how their assureds arrange to ship cargo on vessels, and who makes that determination, including the determination to use NVOCC's.

In essence, I would suggest that there could well be additional penalties imposed by cargo underwriters for not having vessels registered under a specific flag or a specific class society, or they must be of a certain age less than the 20 years. Cargo underwriters should also be able to check the detention records of various vessels to which their cargo assureds are entrusting valuable cargo and, if necessary, propose penalties on cargo interests for carriage on these vessels.

14. CONCLUSION

The proposals of IUMI, which are being considered by the CMI Working Group, are in my opinion, a substantial change in the philosophy of general average. It seeks to go back to what was the original English

concept of common safety as opposed to the European and American concept, which has been embodied in the York-Antwerp Rules, namely, common benefit. It is my view that there has been no significant substantive analysis of the effects of the 1994 rules and how these rules would impact on the proposed changes. It is also my opinion that the IUMI proposed changes were essentially considered at the Sydney meeting and rejected by the various delegations. Therefore, not having been able to achieve the result in Sydney, cargo underwriters are trying once again (and were successful in Singapore) in getting the CMI to enter upon a new study.

I trust that the ultimate report of the Working Group should produce the result that the 1994 rules are still valid and should continue to be used without substantial change. The problem lies not in the rules, but in the commercial activity of cargo interests and their underwriters in failing to take the proper steps to see to it that their assureds are taking all reasonable steps to place their cargo on ships that are run by good, competent operators registered in well known and well respected flag states and classed with well known and well respected class societies and are of a certain age, e.g. under 15 years.

It is submitted that this commercial quest cannot and should not be achieved by manipulating the York-Antwerp Rules. Good commercial underwriters should be able to resolve, in the market place, the problems they are articulating as the rationale for the change in the rules. It is my hope and expectation that the United States marine insurance industry, particularly the hull market and the ship owning industry, takes this as a call to become much more involved in these issues or suffer the consequences of their ostrich like approach.

I apologize for the lengthy discussion considering the history of these activities, but hull underwriters and the marine insurance market must understand how the IUMI arguments have been formulated and the basis upon which they have been put forth. It is, in my opinion, an imprecise premise and not a logical extension of the rationale as to how one resolves the issue of cargo interests and substandard vessels. It is obvious that 90 to 95% of the world ship owning interests are competent and take great care to see to it that they have competent crews with vessels which are well managed and well maintained.

There will always be a number of substandard vessels, substandard vessel owners and substandard vessel operators that exist. They can be

permitted to exist only by the utilization of their vessels by those entities willing to get a cheaper freight rate, particularly if cargo interests feel that their cargo underwriters will pay for it in any event, since they perceive that this is the whole purpose of insurance. This is a position that should not be accepted. It is a position that all reputable underwriters should be able to resolve, not only the hull but also cargo interests.

The proposal for change is put forth essentially by cargo underwriters who have a desire to rid themselves of losses that are the result of their assureds making poor commercial decisions and placing at risk very valuable cargoes in order to achieve a lower freight rate.

As long as those activities continue to take place, this issue will remain with us. It is submitted that the way to resolve this problem does not include manipulating the York-Antwerp Rules.

Respectfully
submitted,

Howard
McCormack

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

Held at the Sheridan Society Hill Hotel, Philadelphia, Pennsylvania
on
August 3, 2002
9:00 a.m.

The meeting was called to order by President Raymond P. Hayden at 9:00 a.m. In addition to President Hayden, the following officers were present at both meetings:

Thomas S. Rue, First Vice President
Lizabeth L. Burrell, Second Vice President
Warren J. Marwedel, Secretary
Patrick Bonner, Treasurer
Philip A. Berns, Membership Secretary
William R. Dorsey, III, Immediate Past President

The following Board members were present:

James K. Carroll	Armand J. Parè
Robert G. Clyne	Alan Van Praag
James Patrick Cooney	Mary Elisa Reeves
Robert S. Glenn, Jr.	James F. Whitehead, III
Glenn G. Goodier	Robert J. Zapf
Richard M. Leslie	JoAnne Zawitoski*

* Attended by telephone

At the invitation of President Hayden, Past President James F. Mosley, of Jacksonville, Chair of the American Bar Association Relations Committee, was also present at the meeting.

SECRETARY'S REPORT

Upon motion duly made and seconded, the minutes of the May 2, 2002, meeting of the Board of Directors and the Secretary's report were

unanimously approved and adopted. The minutes of this meeting will be published in the PROCEEDINGS of the Fall 2002 General Meeting.

TREASURER'S REPORT

Treasurer Patrick J. Bonner, of New York, presented the Treasurer's Report for the three months ending on April 30, 2002. He reported on the cash on hand and indicated that dues bills have been sent out, and, as of July 31, 2002, 87% has been collected. This is somewhat less than last year, due to a slight decrease in membership. It is anticipated that a balance of about $60,000.00 will be on hand at the end of the Association's fiscal year, January 31, 2003. The printing of the directory will cost about $39,000.00. He also reported that the Association successfully underwent a two day audit in July.

Treasurer Bonner commented on the need to build up the Association's reserve fund, to approximately $300,000.00, to deal with special projects, meetings, and as a buffer for any shortfall at a resort Meeting.

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

MEMBERSHIPS SECRETARY'S REPORT

Membership Secretary Philip A. Berns, of San Francisco, presented twelve applicants for Associate Lawyer membership. Upon motion duly made and seconded, the candidates for Associate Lawyer Membership were unanimously elected.

Membership Secretary Berns also reported, with regret, the death of the following members:

John W. Sims of New Orleans
Douglas B. Bowring of Massachusetts
Harry J. Gardner of Long Beach
William A. Gillen of Tampa
Theodore C. Robinson of Chicago

Membership Secretary Berns reported that the Association had a total membership of 3,215. Of that number, 1,541 are Proctor Members. The directory should be out in mid to late September.

Upon motion duly made and seconded, the Membership Secretary's Report was unanimously approved and accepted. The list of all successful candidates for membership and Mr. Bern's written report are appended to the original of these minutes.

INTERNATIONAL ACTIVITIES

Protocol to the Athens Convention

Immediate Past President William R. Dorsey, III, of Baltimore, reported on the status of the Protocol to the Athens Convention. He indicated there would be a meeting of the IMO Legal Committee this fall that will consider an amendment to the 1988 Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation and Fixed Platforms.

There will also be a diplomatic conference on the Athens Convention Protocol that will run concurrently with the IMO Legal Committee meeting. A discussion was held on various aspects of the Protocol, including the two tier system of liability and the definition of "Defects in the Ship." A primary area of concern is who will provide insurance to Shipowners under this Protocol. There is an increased trend to permit direct actions against underwriters and increased amounts of liability. P&I Clubs are concerned about these trends, and the ability of the market to meet the potential value of claims given the higher limits of liability that will be proposed for the Protocol.

U.N. Commission on International Trade Law (UNCITRAL)

President Hayden reported that there was a meeting of the working group in New York, and that there was a great deal of unanimity except for UNCTAD. UNCTAD was critical because of their involvement with Inland Conventions. There will be a further meeting in Vienna in October of 2002, and it will be attended by Professor Michael Sturley, of Austin, and two members of the MLA working group that consists of Vincent M. DeOrchis, of New York, Past President Chester D. Hooper, of New York, and George F. Chandler, of Houston.

Essentially, the working group expects to have its draft done by April of 2003. Past President James Moseley of Jacksonville, indicated that there was a good background article in a past issue of the *American Shipper*. This article will be circulated to the Board.

Comité Maritime International (CMI) Working Group on General Average

President Hayden reported on the status of the CMI Working Group on General Average. He recently met with Ben Brown, of London, head of the IUMI working group, who indicated that London cargo underwriters are in favor of the recommended changes, hull underwriters in London don't have a position, and average adjusters in London are against the recommended changes. On the U.S. side, AIMU reports that the hull side is not in favor of the changes, questioning who will pay. The cargo side may be in favor.

It is not clear if the working group's suggested changes are going to materialize.

COMMITTEE AND STUDY GROUP REPORTS

Amicus Report In U.S. Supreme Court

Immediate Past President, William R. Dorsey, III, of Baltimore, reported on the background and status of the Association's Amicus Brief filed in the *Rex R. Sprietsma v. Mercury Marine* matter pending in the United States Supreme Court, with oral argument on October 15, 2002.

This is a case, originating in the State Court in Illinois, wherein a Plaintiff is contending that recreational boats should be required to have propeller guards. The MLA filed an Amicus brief on behalf of Mercury Marine, a boat manufacturer, arguing that maritime product liability law, not state common law, governs the case and that the Federal Boat Safety Act pre-empts plaintiff's claim. Some years ago, the U.S. Coast Guard did a study and concluded that not only would it not require propeller guards on recreational boats, but that they could even be dangerous. However, the Solicitor General of the United States has filed an Amicus brief on behalf of the Plaintiff, and the U.S. Coast Guard has signed on to this brief. Essentially, the Solicitor General is arguing that the Coast Guard has not pre-empted this field of law. He argues that the prior Coast Guard report was just a letter, and not a statement or position of pre-emption.

Copies of all briefs, including the MLA brief are on West Law's Judicial Materials site. The MLA brief is on the MLA website.

President Hayden gave special thanks to Joshua S. Force, of New Orleans, who was primarily responsible for drafting the brief. Joshua S.

Force was assisted by James Patrick Cooney, of Houston, Donald C. Greenman, of Baltimore, and Immediate Past President William R. Dorsey, III, of Baltimore.

American Bar Association Relations Report

Past President James Moseley, of Jacksonville, presented a report of activities of the American Bar Association as they relate to the MLA. ABA Liaison, James Moseley, reported that the ABA House of Delegates considered a number of issues. The D.C. Bar has proposed that anyone admitted to one federal bar should be automatically admitted to any other Federal Court. This issue has been presented before, and is unlikely to pass.

The House of Delegates approved the name change of TIPS to CTIPS, the Court Trial and Insurance Practice Section.

The House of Delegates also passed several ethical guidelines which are not part of the ABA recommended rules of professional conduct. While they are just guidelines, members are urged to check any revisions to their local professional rules of conduct for inclusion of any of these ethical guidelines.

The House of Delegates will also consider Resolution 119, seeking permission to re-examine, for fine tuning, the Foreign Sovereign Immunity Act.

The House of Delegates will also consider recommendations to the model rules regarding multi-jurisdictional practice. MLA delegate, James Moseley, has outlined these recommended changes in his report. Of most interest, are the proposed rules, supported by the majority of the state bar associations, that reaffirm the right of the individual states to regulate the practice of law within its borders. There are exceptions to accommodate multi-jurisdictional practice, such as the use of local counsel and legal service ancillary to a case in your home state. While the model rules recognize the growing multi-jurisdictional nature of the practice of law, the new model rules do not significantly alter present practice. None of the new proposals deal with admiralty practice issues.

Practice and Procedure—American Law Institute (ALI) Foreign Judgment Project

Alan Van Praag, of New York, reported on a meeting of the Practice and Procedures Committee regarding the ALI Project to draft a federal

foreign judgments statute. The ALI will be inviting the MLA to be an advisor to the ALI on this project, for maritime matters. With consent of the President, Alan Van Praag will be that liaison member.

Committee Chair Assignments

President Raymond P. Hayden reported that in reviewing committee assignments, he and Membership Secretary Philip A. Berns, noted that a number of committees have chairs or vice-chairs who are not Proctor Members, as required by the By-Laws. President Hayden moved, pursuant to By-Law 502, that the Board waive the Proctor requirement for the following members:

Michael E. Unger, Chair of Cruise Lines and Passenger Ships
Lawrence I. Kiern, Vice Chair of Marine Ecology
Thomas M. Russo, Chair of Maritime Criminal Law and Procedure
Barbara D. Burke, Chair of Maritime Legislative Committee
F. William Mahley, Chair of River and Ocean Towing
Mark S. Davis, Vice Chair of Salvage
Lawrence J. Kahn, Vice Chair of the Young Lawyers Committee

The above-mentioned Chairs and Vice-Chairs are asked to immediately file their applications for Proctor Status.

Upon motion duly made and seconded, the President's motion was unanimously approved and accepted.

Environmental Crimes Committee Meeting in Washington with U.S. Coast Guard, Department of Justice and Environmental Protection Agency, June 10, 2002

President Hayden reported on his attendance at a meeting with the U.S. Coast Guard, Department of Justice and Environmental Protection Agency to discuss the increasing enforcement of criminal statutes against mariners. It was the MLA's position that the government's increasing enforcement of criminal statues against mariners is causing an industry problem. While the Coast Guard did not necessarily agree with that position, they did acknowledge a perception in the industry of a problem in investigations. The DOJ was of the opinion that there was no problem because they only seek criminal prosecutions in one out of eight hundred cases. There is another group, called the Mariner Retention Working Group, made up of a number of steamship lines, maritime organizations

and pilot associations. This organization has prepared a position paper which outlines the criminalization of marine acts, and the problem of retaining mariners in the industry in the face of increasing governmental criminal prosecution.

There will be future meetings of this working group and Alfred J. Kuffler, of Philadelphia, will attend on behalf of the MLA.

Project to Increase Membership/Participation

James F. Whitehead, III, of Seattle, reported on a membership/participation project in the Seattle area. James Whitehead and Bruce King, of Seattle, held a meeting of the Seattle MLA membership, to discuss increasing membership and participation of Seattle members in the MLA. The Board discussed various observations of this working group and re-visited, in discussion, the report of George Waddell's long range planning committee issued in 1998. It was observed that both the industry and the legal profession have changed considerably in the past years, and further discussions will be held on the MLA's attempts to adjust to those changes. President Hayden indicated the Officers would discuss these issues further, and suggested that Board members discuss these issues with members in their geographic areas.

President Hayden further reported on how the MLA has attempted to implement some of the study recommendations by broadening the national participation by members, restructuring resort meetings, and increasing available CLE to the Membership. He further indicated his desire to increase participation by other members of the marine community such as towing and marine finance. Strategic planning is an ongoing and very important project of the Board.

Presidential Activities

The Average Adjusters Meeting was held on May 9, 2002 and the CMI Assembly was held in London on May 10, 2002. These meetings were attended by Immediate Past President William R. III, of Baltimore, President Raymond P. Hayden, of New York, First Vice Thomas S. Rue, of Mobile and Past President Howard M. McCormack, of New York.

President Hayden reported that a CMI colloquium will be held in France, June 10 through 13, 2003. One full day will be on Trade Transportation in the Electronic Age and one full day will be on developments on various international conventions.

Calendar

A. On September 15—19, 2002 IUMI will meet in New York. Past President Graydon S. Staring, of San Francisco will attend on behalf of the CMI.

B. On September 23, 2002, President Raymond P. Hayden, of New York will speak at the Houston Marine Insurance Seminar, asking underwriters and brokers their understanding of the new conventions and resulting insurance requirements.

C. The IMO Legal Committee Meeting and Diplomatic Conference will be held in London from October 21 to November 1, 2002. Past President William R. Dorsey, III, of Baltimore, will attend as a private sector advisor to the U.S. delegation.

D. Past President James Moseley, of Jacksonville, will speak at the Pacific Admiralty Law Seminar in San Francisco this October.

E. Patrick Griggs, President of the CMI, will be a speaker at the Healey Lecture in New York on October 31, 2002.

F. The Annual Fall Meeting and Dinner Dance will be held in New York on November 1, 2002.

G. The CMI Colloquium will be held in June, 2003 in France.

H. The CMI Conference will be held in Vancouver in May 30—June 6, 2004.

Future Officer and Board Meetings

A. The Officers will meet at the offices of Hill, Rivkins & Hayden on October 29, 2002.

B. The Association Board of Directors will meet on October 31, 2002, at the Association of the Bar of the City of New York, followed by a luncheon at the New York Yacht Club.

C. The Officers will meet in Washington, D.C. in January, 2003, the exact date to be determined.

D. The Officers and Board will meet in New Orleans on March 17 and 18, 2003.

E. The 2003 Spring Meeting will be held in New York.

F. The 2003 Fall Meeting will be held in Bermuda at the Fairmont Southampton Princess. Wednesday will be an activities day, followed by committee meetings and seminars on Thursday and Friday. The general meeting will be Saturday morning and the dinner dance will be Saturday evening.

G. The 2005 Fall meeting will be held in Scottsdale at the Fairmont Princess.

There being no further business to come before the Board, the meeting was adjourned at 11:30 a.m.

Respectfully submitted,

/s/ Warren J. Marwedel
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
on
October 31, 2002
9:30 a.m.

The meeting was called to order by President Raymond P. Hayden at 9:30 a.m. In addition to President Hayden, the following officers were also present:

Thomas S. Rue, First Vice President
Lizabeth L. Burrell, Second Vice President
Warren J. Marwedel, Secretary
Patrick J. Bonner, Treasurer
Philip A. Berns, Membership Secretary
William R. Dorsey, III, Immediate Past President

The following Board members were present:

James K. Carroll
Robert G. Clyne
James Patrick Cooney
Robert S. Glenn, Jr.
Glenn G. Goodier
Richard M. Leslie
Armand J. Parè
Alan Van Praag
Mary Elisa Reeves
James F. Whitehead, III
Robert J. Zapf
JoAnne Zawitoski

At the invitation of President Hayden, Past President James F. Mosley, of Jacksonville Past President Chester D. Hooper of New York, and Past President Howard McCormack, of New York, was also present at the meeting.

SECRETARY'S REPORT

Upon motion duly made and seconded, the minutes of the August 3, 2002, meeting of the Board of Directors and the Secretary's Report were unanimously approved and accepted. The minutes of this meeting will be published in the PROCEEDINGS of the Fall 2002 General Meeting.

TREASURER'S REPORT

Treasurer Patrick J. Bonner, of New York, presented the Treasurer's Report for the last quarter. He reported on the cash on hand, and indicated that dues collections were running about 89%. Last year at this time dues collections were about 87%. Collections are about $19,000.00 less than last year due to a slight decrease in membership. It is anticipated that a balance of between $25,000.00—$30,000.00 will be in the bank at the end of the year.

At the request of Treasurer Bonner, a resolution was unanimously approved authorizing the Treasurer to open up a separate bank account for revenue and expenses involved in the Bermuda meeting in the fall of 2003. As part of that resolution, the Association will advance $25,000.00 to the Bermuda committee to cover initial expenses.

Upon motion duly made and seconded, the Treasurer's Report was unanimously approved and accepted. A copy of the Treasurer's formal written report will be appended to the original of these minutes.

MEMBERSHIP SECRETARY'S REPORT

Membership Secretary Philip A. Berns, of San Francisco, presented 13 applicants for proctor membership, 17 applicants for associate lawyer membership and 3 applicants for non-lawyer membership. Upon motion duly made and seconded, the candidates were unanimously elected.

Membership Secretary Berns also reported, with regret, the death of the following members:

Richard D. Davis of League City, Texas
Henry J. O'Brien of Brooklyn
Edward Longcope of New York
Honorable Bailey Aldridge of Cambridge
Honorable Herbert F. Murray of Baltimore
Irma Colon of the Bronx

Membership Secretary Berns reported that the Association had a total membership of 3,219. Of that number, 1,554 are proctor members.

The Membership Secretary also indicated that next years submission date for the Membership Directory will be April 11, 2003.

Upon motion duly made and seconded, the Membership Secretary's Report was unanimously approved, and accepted, including the list of all successful candidates for membership. Mr. Berns written report will be appended to the original of these minutes.

INTERNATIONAL ACTIVITIES

CMI Draft Instrument On The International Carriage Of Goods By Sea

Past President Chester D. Hooper, of New York, reported to the Board on work on the CMI draft instrument on the International Carriage of Goods By Sea Convention, which has been forwarded to the United Nations Commission On International Trade Law (UNCITRAL). Past President Hooper reviewed the various issues being considered, such as: door to door coverage as opposed to port to port coverage, removal of the defense of error in navigation, shifting burdens of proof, service contract issues, principles of freedom of contract, and attempts to define the term "charter party." Past President Hooper reported that the head of the U.S. delegation, Mary Helen Carlson, of the State Department's Office of the Assistant Legal Advisor for Private International Law, will host a meeting this December in Washington, and has invited representatives from the truck and rail industry to participate and present their views on the CMI draft.

Comité Maritime International (CMI) Working Group On General Average

Past President Howard M. McCormack, of New York, the MLA Delegate to the CMI Working Group On General Average, reported on changes proposed by the International Union Of Marine Underwriters (IUMI) to the York-Antwerp Rules. Past President McCormack has posted a very extensive paper on these issues on the MLA web-site for everyone's review.

IMO LEGAL COMMITTEE

Wreck Convention

Immediate Past President William R. Dorsey, III of Baltimore, reported on his attendance at the IMO Legal Committee Meeting in London where they discussed a proposed Wreck Removal Convention. Mr. Dorsey discussed various issues being considered such as who pays for wreck removals, direct actions against underwriters, how far a state may go to

remove a wreck, flag state consent to wreck removal, act of terrorism defenses and cargo liability. Mr. Dorsey reported there is a lot of work to do on this proposed convention, and it will take some time before it is completed.

The Suppression Of Unlawful Acts Against The Safety Of Marine Navigation (SUA)

Mr. Dorsey also reported on the United States Delegation's proposal for amendments to the 1998 Convention for the Suppression of Unlawful Acts Against The Safety Of Marine Navigation and its 1988 Protocol Relating to Fixed Platforms on the Continental Shelf. The United States, as part of its anti-terrorism efforts, has proposed broad changes, adding new offenses for acts against or by ships. The United States also seeks new boarding rights of vessels, even outside State territorial waters.

Place Of Refuge

Immediate Past President Dorsey also reported on the IMO's work on guidelines for places of refuge for ships in need of assistance. Important issues include the liability for any damages resulting from either granting refuge or denying it.

Athens Convention

Mr. Dorsey also updated the Board on the IMO sponsored Diplomatic Conference which adopted a Protocol to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea. He reports that the strict liability limits, direct action and compulsory insurance limits are 250,000 SDR's. The overall liability limit for shipowners is 400,000 SDR. There is also an opt out provision allowing States to have higher limits, or no limits at all. The P&I Clubs have indicated there may be coverage problems given the limits set.

Mr. Dorsey also noted that the Protocol distinguished hotel functions of a ship from the pure shipping operations by allocating differing burdens of proof depending upon the nature of the incident which causes a passenger injury or death.

International Maritime Organizations (IMO)

Treasurer Patrick J. Bonner, of New York, reported on his attendance as advisor to the United States delegation, at the IMO/ILO Joint Working

Group dealing with the issues of seaman's rights relating to abandonment of seafarers. He reported that last year 118 ships were abandoned, stranding 5,229 crew members. Seafarers are urging a mandatory instrument, such as a convention, to ensure seafarers are repatriated and paid compensation if there is an abandonment. Seafarers are also pressing for a procedure to deal with the cases where full contractual compensation is not paid quickly in the event of any injury or death. The Joint Working group decided to canvas member governments on their laws and regulation on abandonment and compensation, and to see whether member governments had adopted the guidelines put forth by the IMO/ILO.

COMMITTEE AND STUDY GROUP REPORTS

Amicus Argument in U.S. Supreme Court

Immediate Past President William R. Dorsey, III, of Baltimore, reported on the oral argument on October 15, 2002, in the U.S. Supreme Court. He indicated the arguments by all parties were excellent, but could not predict the outcome. Admiralty law did not seem to be the central focus, but rather the Doctrine of Preemption.

Joshua Force, of New Orleans, also attended the argument on behalf of the MLA.

American Bar Association Relations Report

Past President James F. Moseley, of Jacksonville, presented a report on activities of the American Bar Association and its General Meeting in August of this year. Of particular interest is the International Law Section's study of the Foreign Sovereign Immunities Act, and the proposals adopted on Multi-Jurisdictional Practice and Ethical Considerations In Settlements. Mr. Moseley indicated that these new rules will be considered by the various state bar associations, and members should closely review any amendments to their local bar rules. A copy of Past President Moseley's report will be appended to the original of these minutes.

New Ad Hoc Committee

President Raymond P. Hayden has appointed Second Vice President Lizabeth L. Burrell, of New York, to chair a special ad hoc committee to work on enhancing MLA membership and member participation in MLA activities. The Committee has a broad geographic membership base, and

will look at recommendations the Association may consider in light of the changing maritime industry and related practice of law. It is hoped that the Committee will have its first report at the next board meeting, in New Orleans, next March.

Young Lawyers Committee—Resolution

Upon motion duly made and seconded, the Board passed a resolution proposed by the Young Lawyers Committee to amend Section 5.02 of the By-laws relating to the limit of two (2) general committee assignments per member. The resolution reads:

> Membership in the Young Lawyers Committee shall not prevent a member from serving on two (2) additional standing committees.

PRESIDENTIAL ACTIVITIES

President Raymond P. Hayden reported on his attendance at the Houston Marine Insurance Seminar, The Average Adjusters Presidents Dinner, The Average Adjusters Dinner, The New York Marine Insurance And Claims Association Dinner and The Environmental Crimes Committee Meeting in Washington with the Coast Guard and Department of Justice and Environmental Protection Agency.

Calendar

A. The Spring Meeting will be May 2, 2003.

B. There will be a CMI colloquium in Bordeaux, France in June 2003.

C. There will be a CMI conference in Vancouver, Canada in June 2004.

D. The MLA 2003 Fall Meeting will be at the Southampton Princess in Bermuda, Wednesday, October 29, 2003 through Saturday, November 1, 2003.

Future Officer and Board Meetings

A. The Officers will meet in Washington, D.C. in January 2003.

B. There will be an Officers meeting on March 17, 2003, and a Board meeting on March 18, 2003, in New Orleans, just prior to the Tulane Maritime Conference.

C. There will be an Officers meeting at Hill, Rivkins & Hayden in New York on April 29, 2003, at 9:30 p.m.

D. There will be a Board of Directors meeting at the Association of the Bar of the City of New York on May 1, 2003, at 9:30 a.m.

E. There will be an Officers and Board of Directors meeting in Seattle, Washington on August 1 and 2, 2003.

There being no further business to come before the Board the meeting was adjourned at 11:30 a.m.

Respectfully submitted,

/s/ Warren J. Marwedel
Secretary