THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

VOLUME 34 OCTOBER 2002 Number 1

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PRESIDENT'S CORNER

The Fall season is in full swing! Our next SMA luncheon will be held on October 16th at The Captain's Ketch, 70 Pine Street, New York City, when John Weale, President of the Canadian Maritime Arbitration Association, will address a subject he knows very well - *Canadian Arbitration*.

Future luncheons will feature the following speakers who need little introduction: November 20 - Robert Shaw - *Maritime Arbitration from Different Perspectives and How to Accentuate the Positive;* December 18 - Joe Hughes - *New York Arbitration from a Club Viewpoint;* January 16 - Bill Honan - *The Doctrine of Adequate Assurance*.

These luncheons not only serve as a platform for speakers with something to say but, just as importantly, provide an excellent opportunity for users of the system, the maritime bar and arbitrators, to get together socially. Such occasions do not arise as frequently as in years past and I strongly urge you to support your arbitral community by attending.

Our Board of Governors had its first Fall meeting in mid-September and is hard at work with the Bar planning events designed to promote New York arbitration. A mock arbitration - similar to those presented at the Panama Maritime Conference in February and to the Houston energy community in April - will go forward at the ASBA/BIMCO Seminar to be held in Orlando on November 7-8.

The Society will be moving with the American Hull Insurance Syndicate from 14 Wall Street to new offices at 30 Broad Street within the next few months - with formal announcement to follow.

Maintaining New York as a viable arbitral center is not a spectator sport and we need your ideas, energy and support. If you would like to join these efforts, please contact me at 201-557-7344 or via email at david.martowski@thomasmiller.com.

David Martowski

SUPREME COURT FINDS COAST GUARD HAS LIMITED AUTHORITY OVER UNINSPECTED VESSELS

By George Weller, U.S. Coast Guard Office of Maritime & International Law

The Supreme Court this year answered the question of which government agency has authority to regulate safety on uninspected vessels. In its January 2002 ruling in Chao vs. Mallard Bay Drilling, Inc., the Supreme Court found that where

the Coast Guard has not exercised its statutory authority to regulate working conditions onboard uninspected vessels, that authority resides with the Occupational Safety and Health Administration (OSHA). Conversely, if the Coast Guard has exercised its authority over working conditions on those vessels, OSHA is pre-empted.

On June 16, 1997, a well being worked over by an inland drilling barge operated by Mallard Bay Drilling, Inc., in Little Bayou Pigeon, La., blew out. Mallard Bay evacuated the off-duty crew, but the rest stayed onboard to try to bring the well under control. Before it could be brought under control, gas found its way into compartments on the barge, and exploded, killing four individuals and injuring two others. The Coast Guard investigated the marine casualty, and following guidance in the Marine Safety Manual, forwarded the report of the investigation to OSHA for further action because the Coast Guard determined that it did not have any jurisdiction over the drill barge or its drilling activities, as it was an uninspected vessel.

OSHA took enforcement action under the Occupational Safety and Health Act against Mallard Bay Drilling, Inc., for failure to comply with OSHA marine safety standards by failing to evacuate the personnel onboard, failing to develop and implement emergency response plans, and failing to train the employees in emergency response. Mallard Bay challenged OSHA's jurisdiction in the 5th U.S. Circuit Court of Appeals, which has jurisdiction in the states of Texas, Louisiana and Mississippi. The 5th Circuit agreed with Mallard Bay's contention that the Coast Guard has exclusive jurisdiction over safety of seamen on vessels on navigable waters, and that, as a result, OSHA was pre-empted from asserting jurisdiction over the drilling barge, notwithstanding that the vessel was not subject to Coast Guard inspection and certification. At the request of the government, the Supreme Court agreed to hear the case because the 5th Circuit's holding was contrary to the law applicable in the rest of the country, as announced by the courts of appeals which had considered similar issues, some involving uninspected towing vessels.

The case turned on whether the Coast Guard had statutory authority to regulate, and had in fact regulated the safety aspects of the working conditions of the seamen on the Mallard Bay drilling barge that were pertinent to the blowout, the resulting explosion, fire and deaths onboard. If the Coast Guard had regulated those working conditions, or had articulated a position that such conditions need not be regulated for safety reasons, then OSHA was pre-empted; if the Coast Guard had not regulated (or articulated a position that no such regulation was necessary or desirable), then OSHA was not pre-empted. The government, on behalf of the secretary of labor, joined on the brief by the Coast Guard and the U.S. Department of Transportation, argued that not only had the Coast Guard not regulated the particular working conditions involved in the explosion, fire and deaths, but the Coast Guard had no statutory authority to regulate those conditions onboard that particular type of uninspected drill barge. In fact, the government argued that the only Coast Guard regulations that applied to the Mallard Bay rig, while it was engaged in the workover operation in the inland waters of Louisiana, were the Coast Guard marine sanitation device regulations.

Various industry groups, including the American Waterways Operators, the Transportation Institute, Associated General Contractors, Dredging Contractors of America and the National Maritime Safety Association, filed "friend of the court" briefs in support of Mallard Bay Drilling, Inc. The Court heard oral argument in the D.C. Circuit Court of Appeals because the Supreme Court was closed due to an anthrax scare, and issued its decision on Jan. 9, 2002.

The Supreme Court reversed the decision of the 5th U.S. Circuit Court of Appeals. The Court of Appeals noted that although 14 U.S.C. 2 seemed to grant the Coast Guard broad authority to regulate to achieve safety of seamen on vessels, Congress had enacted an elaborate regime for Coast Guard "inspected" vessels, but had given the agency much less authority over uninspected vessels, including the Mallard Bay inland drill barge involved in the case. The Court noted that the Coast Guard and

OSHA had agreed in a 1983 Memorandum of Understanding that the Coast Guard had exclusive jurisdiction over inspected vessels, but this case involved an uninspected vessel. In order to determine whether OSHA was pre-empted onboard an uninspected vessel, the particular working condition involved in the case must be examined. If the Coast Guard had regulated that working condition (risk of explosive gas accumulating in a confined space onboard the vessel), or articulated a formal position that no regulation was necessary or appropriate, OSHA was pre-empted. The Court found no such Coast Guard regulation dealing with that particular risk, and no statement that no regulation was appropriate, and therefore, ruled that OSHA was not pre-empted. In so holding, the Court returned the law in the 5th Circuit's jurisdiction to that of the rest of the country.

There have been many questions about the impact of the Court's ruling by those involved in the various uninspected vessel communities, including the Passenger Vessel Association, the American Waterways Operators, smaller uninspected towing vessel industry groups, and the Commercial Fishing Vessel Safety Advisory Committee. The Coast Guard does not foresee any change in its regulatory posture as a result of the ruling by the Court of Appeals. Further, it does not anticipate any change in the regulatory posture by OSHA. Rather, the Coast Guard anticipates that the Court of Appeals' ruling merely restored the two agencies to their respective regulatory jurisdiction and posture in the Gulf Coast states that existed before the 5th Circuit's ruling.

For the future, the Coast Guard expects to work closely with its industry partners, as well as OSHA, to further the goals of maritime safety. The Coast Guard hopes that by working together, the government and industry can bring their collective talents and resources to bear on the problem of how to make the nation's waterways safer without unduly burdening commerce and the independence of the small operator. Such action may involve revisiting the 1983 Memorandum of Understanding with OSHA to expand its scope to cover uninspected as well as inspected vessels in order to bring more certainty to the regulated public as to which agency—OSHA or the Coast Guard—has primary governmental responsibility for maritime safety on uninspected vessels.

This article appeared in the U.S. Coast Guard Journal of Safety at Sea: PROCEEDINGS of the Marine Safety Council, April-June 2002 edition.

HAMLET REDUX
A Case for Brevity & Reasoned Enquiry

By Rodney Elden

Polonius: *"What do you read, my Lord?"*
Hamlet: *"Words, words, words."*

How often I feel Hamlet's pain when confronted with the mile-high stacks of briefs and counter briefs that are the arbitrator's lot. Not to mention the endless inventory of documentation that is politely tendered as evidence of a client's grievance. Log and Bell books, Notices of Readiness, Surveys, Overtime Sheets, Stevedore Damage, Escalation and Weather Reports — a hurricane of words and figures! A creative owner once even presented a bill for limes to assuage his crew's thirst in the tropics! Is the Orinoco beyond *Institute Warranty Limits*?

Having been a passenger (en route to ICMA XIII in Paris) on TWA Flight 800 a few days before the Flight 800 tragedy that took 230 lives, I was recently amazed to see a report that the weight and volume of investigatory documentation covering this casualty now equals the takeoff weight (875,000 pounds) of this Boeing 747 aircraft! The legendary Broadway producer, David Belasco, would have said that he could write the proximate cause of this accident "on the back of my business card." It would probably read "Loss of Buoyancy."

Compounding the propensity for excess verbiage these days is the exponential increase in equipment technicality. In World War II, a fine naval fighter aircraft, the Grumman Wildcat, was constructed and maintained with a total documentation of about 800 pages. The current documentation required for the building and

maintenance of a North American F-16 fighter plane is approaching 80,000 pages! Ocean-going ships are not far behind. A liquified natural gas carrier costing $250,000,000 is one of the most complicated structures and systems ever devised. The complete drawings and manuals required to build and operate such a ship, no doubt, equal those for an F-16 or a 747 Jumbo Jet.

John Paulos, noted professor of mathematics at Temple University, tells us that "most adults are unable to model situations mathematically, seldom estimate or compare magnitudes and, most distressing of all, hardly ever develop a critical, skeptical attitude toward numerical, spatial and quantitative data or conclusions." A few examples of this paucity of understanding should be instructive.

The Perils of Ambiguity

As an arbiter, I have too often witnessed disputes that were superficially about matters common to maritime controversy, but in reality, *masked problems* that the parties preferred not to expose to public or regulatory scrutiny. The case of the MV Golden Ego is instructive. The 20 year old bulk carrier had called at Hyandry Shipyard in Cartagena to complete her Special Survey prior to loading grain at New Orleans. The shipyard's claim was for $98,765 in overtime for welders and shipfitters renewing structural steel in the cargo holds and tunnels that was outstanding of record.

The owner claimed that the shipyard had expressed confidence that adequate labor was available to complete the repairs in time for the vessel to meet her canceling deadline in New Orleans. The owner further claimed that he had forbidden the use of any overtime work. The shipyard claimed that the scope of the steel renewals could not possibly be ascertained in the initial survey on arrival of the vessel and that overtime had to be worked to meet the sailing date demanded by the owner. The completion date was met and the vessel arrived New Orleans the day before the cancellation.

Now, what was really going on here was a classic case of unrealistic expectations, intentionally ambiguous orders and a knowing creation of a future dispute! *In the course of the arbitration, one of the witnesses testified that while he was standing in the starboard wing tunnel of No. 4 hold, he could see the forepeak bulkhead through wasted steel on the tunnel side plating!* The vessel was in shipyard for only nine days, meaning that only six or seven days were available for full production. Under the threat of falling out of Class and missing his canceling date, the owner hoped to avoid American repair prices and patch up a seriously deteriorated hull structure at low cost under relaxed regulatory control.

The shipyard, knowingly short of labor, hoped to keep the customer happy by completing on time with the judicious use of overtime. The vessel was not arrested but sailed on time, leaving behind a substantial bill for overtime which the owner had, in classic ambiguity, both prohibited and authorized in daily demands for a completion date which could not be met on straight time. No shortage of words, pleas and threats here but there was no contractual understanding.

The Central Park War

On January 16th, 1991 the consolidated military forces of several nations acting under a U.N. Resolution attacked the forces and military installations of Iraq which had unlawfully invaded the kingdom of Kuwait. The United States had a great majority of the personnel in the combined operation and the number was repeatedly stated (by both doves and hawks) to be about half a million soldiers, sailors and marines from the U.S. and overseas garrisons.

Now the air war, which involved several thousand missions daily and the preparations for the ground war which involved thousands of vehicles and hundreds of ships to carry them, captivated the interest of the country 24 hours a day through on-site television reports and constant references to the commitment of half a million men to fight in a country larger than California and with a population greater than New York State.

The mind set and vision created by these quantifications was one of endless hordes sweeping across the entire face of the Middle East. Not so, for

if perceived in human scale with the entire half million American force encamped in one place like a Boy Scout Jamboree, they would fit, including their pup tents, in half of New York's Central Park between Central Park South and 86th Street, leaving plenty of room for the mess cooks and the Marine Band to play Semper Fidelis in the old 72nd Street Band Shell. A great war or a Boy Scout jamboree?

Gin & Bitters on Bligh's Reef (Punishment of the Innocent)

At nine minutes past midnight on March 24, 1989, the Exxon Valdez, loaded with Alaskan crude oil, struck Bligh's Reef in Prince William Sound and spilled approximately 258,000 barrels of North Slope crude oil into the sound and the North Pacific Ocean. While "barrels" is the industrial and maritime measure of this commodity. The press usually multiplies it by 42 to obtain "gallons", a more dramatic figure, and a measure more easily envisioned by motorists.

The master of the Exxon Valdez and its crew have been endlessly and unjustifiably excoriated for the past decade as though they intentionally spilled the oil in an act of willful negligence, and as though the oil reached the beaches of the world from Malibu to Martha's Vineyard, from Perth to Portofino, from Bondi to Brooklyn, and from Valparaiso to Vina del Mar. Not so!

The oil drifted and dispersed over a relatively small part of the 6,600 mile Alaskan coast which, incidently, comprises over 50% of the U.S. Continental coastline. As large as the Alaskan coastline is, however, it is still only two percent of the world's 372,00 miles of coastline. If we had stayed awake in tenth grade geometry and read only two paragraphs of Heinrich Helmholtz (1821-1884), we would know that if the world were in human scale - that is, with a diameter the height of the Washington Monument (555 feet), then the Exxon Valdez, in the same scale, would be three-sixteenths of an inch long which is the size of an average household ant! A catastrophic oil spill indeed!

The investigation early revealed that the master had been drinking, had previously been professionally treated for the disease of alcoholism and was not on the bridge when the vessel grounded. The investigation apparently overlooked the major seminal fact that every agent, superintendent, Coast Guard inspector, surveyor, manager, or corporate officer to whom the master answered must have known that the master had a serious problem and failed to take action. But nowhere in this *culture of cozy friendship* was there a mouse brave enough to bell the cat!

Professor Paulos Redux

Recently on Martha's Vineyard I was fortunate to hear an address by David Baltimore, Nobel Laureate and President of the California Institute of Technology. Dr. Baltimore reviewed his past five years as president of CalTech and some interesting highlights of his experience in the life sciences and the world of Alfred Nobel. He gave us front row opinions on the future of human and therapeutic cloning that gave rise to no concern in a sophisticated audience.

In the question and answer period that followed, Dr. Baltimore (who taught for many years at M.I.T.) was asked, "Given equal credentials, which would you hire as a research assistant, a graduate of CalTech or a graduate of M.I.T. ?" With diplomatic aplomb, he answered "Either one would be fine, for they would both be superior to the graduates of any other institution in their critical ability to comprehend and assess numerical and quantitative data or thinking."

In the tenth grade at George Washington High School in 1935, Miss Cunningham taught us that words were tools we would need to think with and that maths were tools we would need to reason with. I'm grateful that I was listening.

Mr. Elden is a management consultant, arbitrator and mediator in New York. He has been involved in arbitral proceedings since 1959 (SMA 911). He is former Chairman, Board of Governors of the California State Maritime College and is a Licensed Chief Engineer Steam and Motor Vessels (Issue No. 15). He is author of Ship Management, a Study in Definition & Measurement (1962), to be republished in 2002, Cornell Maritime Press.

Misdelivery in the Absence of Original Bills and Exemption Clauses

By William Leung

One of the key provisions of the bill of lading, so far as the shipper is concerned, is the promise not to deliver the cargo other than in return for an original bill of lading. The requirement to deliver the goods only against presentation of an original bill of lading is therefore one of the main objects of the contract. A shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. If the shipping company did not deliver the goods to any such person, they are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. If they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them, they are therefore liable in conversion unless likewise so protected. This principle protects the shipper from fraud and also protects the shipowner.

A shipowner is not bound to deliver goods except in exchange for the bill of lading. He is not bound to take on trust that he knows the consignee and that no intermediate rights had been created. Neither the owner, his agent, nor the master can be called upon to accept a banker's or any other guarantee of an indemnity, though such a thing is not unknown.

In practice, if the bill of lading is not available, delivery is effected against an indemnity. Where the bill of lading is lost, the remedy, in default of agreement, is to obtain an order of the Court upon tendering a sufficient indemnity. The loss of the bill of lading is not to be treated as a defense.

The court's approach to exemption clause has always been that clear words would be required for the parties to be held to have contracted out of it. The clause should be constructed so as to enable effect to be given to one of the main objects and intents of the contract, namely that the goods would only be delivered to the holder of an original bill of lading. As a matter of construction, it is permissible to limit the ambit of a particular clause in the light of that fact. In ***Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd.*** [1959] 2 Lloyd's Rep. 114; [1959] A.C. 576, the manufacturer shipped from England to Singapore bicycle parts under a bill of lading requiring the goods to be delivered "unto order or his or their assigns", with the exemption clause therein provided that:-

> **"....the responsibility of the carrier....**

whether as carrier or as antodian or bailee of the goods … shall be deemed… to cease absolutely after the goods are discharged from the ship."

This is a classical standard "before and after" clause devised by the shipowner trying to claim exemption from potential liability from shipowners. Lord Denning said:

> *"The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough to absolve the shipping company from responsibility for the act of which the Rambler Cycle Company complains, that is to say, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause upon its true construction absolved the shipping company from an act such as that, it seems that by parity of reasoning they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them into the sea…. There is, therefore, an implied limitation on the clause, which cuts down the extreme width of it; and, as a matter of construction, their Lordships decline to attribute to it the unreasonable effect contended for…But their Lordships go further.*
>
> *If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract…, has, as one of its main objects, the proper delivery of the goods by the shipping company, "unto order or his or their assigns," against production of the bill of lading.*
>
> *It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else,*

> *to someone not entitled at all, without being liable for the consequences. The clause must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract: see* ***Glynn v. Margetson & Co.****[1893] A.C. 351 at Pg. 357****; G. H. Renton & Co. Limited. v. Palmyra Trading Corporation of Panama****.[1956] 1 Q.B. 462 at Pg. 501;[1955] 2 Lloyd's Rep.722 at Pg. 741.*
> *To what extent is it necessary to limit or modify the clause? It must at least be modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery… deliberately disregarded one of the prime obligations of the contract. No Court can allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause..."*

Most of the delivery clauses in modern container bills of lading give wide rights to the carrier to deal with the goods where they have not been collected. These may well use the language of a "cesser" of liability and purport to excuse for a wider variety of events than the standard "before and after" clause. The express clauses often give the right to store the goods and to charge the costs of storage to the cargo interests. In some cases the costs of storage may be set out in the carrier's tariff. In addition to the storage costs, there may well be demurrage claims. Where there is no documentation available, for example, because the bill of lading is delayed in the banking system or no bill of lading has ever been issued, the costs incurred by the carrier (including unpaid freight) could well exceed the value of the goods themselves. The carrier may be faced with claims for delivery from a number of potential claimants in circumstances where it is not clear to whom delivery should be made. In such cases the carrier may decide to interplead and claim relief from the court. In general, the carrier would be entitled to claim that the costs of preserving the cargo and the legal costs of the interpleader relief. The carrier may retain any fund held by the carrier when, for example, where the cargo was sold. The carrier may also require such amount of sums to be paid as a condition of releasing the cargo, for example, to allow the cargo to be sold so as to minimize any future costs. It seems that where a carrier seeks interpleader relief, it can never be at risk of damages for conversion.

The provisions in the contract should be constructed as not excluding the responsibility of the shipowners where they or their agents misdeliver the goods regardless of whether they did so in deliberate and conscious disregard of the rights of the cargo owners.

The question is thus whether the words in any of the clauses relied upon are sufficient to excuse misdelivery of the goods after discharge.

In ***The 'Ines'*** [1995] Lloyds' Rep. 144, the exemption clause provides:

> ***"3. PERIOD OF RESPONSIBILITY***
> *Goods in the custody of the carrier or his agent… before loading and after discharge… are in such custody at the sole risk of the owners of the goods and thus the carrier has no responsibility whatsoever for the goods prior to the loading on and subsequent to the discharge from the ocean vessel… …*
>
> ***5. FORWARDING, SUBSTITUTE OF VESSEL, THROUGH CARGO AND TRANSSHIPMENT***
> *… the Carrier to be at liberty to… store the goods… on shore…*
> *The responsibility of the carrier shall be limited to the part of the transport performed by him in a vessel under his management and no claim will be acknowledged by the carrier for damage or loss arising during any other part of the transport…*
>
> ***7. RECEPTION OF THE GOODS***
> *(a) The Receiver… must be ready to take delivery of the goods as soon as the vessel is ready to unload…*
> *(b) Receiver cannot demand delivery of goods direct from ship without special agreement…*
> *(c) General local clause Landing… of the goods to be arranged by Carrier's agents for the risk and expense of the Shipper whether delivery is taken overside or in the quay."*

The defendants' shipowner submitted that the effect of those clauses was that the responsibility

of the carrier was to cease on discharge of the ship and that any loss caused by any event occurring thereafter is not recoverable. In particular, they said that by Clause 3 the carrier was to have no responsibility whatsoever for the goods subsequent to their discharge from the ocean vessel. It follows, they submitted, that they were not liable to the plaintiffs cargo owners on the facts of this case because the misdelivery occurred some days after discharge when the goods were delivered without production of an original bill of lading. They rely upon a number of authorities and say that the only circumstances in which the carrier would have been liable would have been where he acted either in deliberate disregard of the rights of the plaintiffs cargo owners or dishonestly.

It was held by Clarke J. that Clause 3 "concerned with loss of or damage to the goods and may well include the case where the goods are stolen, but it is not concerned with misdelivery." It was also held that Clause 5 "does not seem to be concerned with misdelivery." There is however no hint in the wording of Clause 7 that carrier is to be entitled to deliver otherwise than in return for an original bill of lading or even that he is not to be liable if he does do. Thus Clause 7 also does not concern misdelivery. Although the plaintiffs were in breach of Clause 7 because they were not ready to take delivery as soon as the vessel was ready to discharge, any loss suffered by them was not caused by that breach but by the delivery of the goods without presentation of an original bill of lading.

In a recent Hong Kong case (handled by the author of this article, Mr. William Leung for the plaintiff) ***Center Optical (Hong Kong) Limited -v- Jardine Transport Services (China) Limited and Pronto Cargo Corporation (Third Party)***,[2001] Lloyd's Rep. 678, the goods consisted of two consignments of optical frames and sunglasses. Both consignments were shipped from Shanghai to Miami in mid-1998.

In March, 1998, the plaintiff suggested to the buyer that it should ship direct from Shanghai to Miami. This was agreed with the buyer suggesting the use of Jardine Freight Services (HK) Ltd. This company referred the plaintiff to Jardine Transport Services (China) Limited ("JTSC"), the defendant in Shanghai.

On May 25, 1998, JTSC issued the *Alligator Wisdom* bill which was in "Dynamic Container Line" ("DCL") form, named the plaintiff as shipper, the consignee as "To Order" and the notify party as "Center Optical HK Inc." The third party in the proceedings, Pronto, was named as "F/Agent." Shanghai in China was named as the load port and Miami in the United States was named as the port of discharge. The number of packages represented by this bill was stated to be 248 cartons and the bill itself was marked "freight collect."

The issuance of this bill led to a chain of sub-bills which named JTSC as shipper and Pronto as consignee and notify party. A like sequence occurred with regard to eight shipments of 348 cartons of sunglasses on *Hanjin New York*. On arrival at Long Beach, the seventh and eighth shipments were railed from Long Beach to Miami at which point the relevant containers were destuffed. Thereafter, facilitated by presentation in each case of the respective bills, Pronto were able to gain possession of these goods and via a power of attorney issued by Miami Center Optical, to clear these shipments through the United States' Customs.

On the evidence, the two shipments were released from storage by Pronto to Miami Center Optical without the production of the original DCL bills of lading in respect of each shipment. Attempts were made by the plaintiff to obtain payment for the goods from Miami Center Optical but without much success.

The defendant relied upon the definition of "port to port" shipment in Clause 1 of the bills, Clause 6(2) relating to "port to port" shipment and Clause 14 relating to delivery, to contend that obligations under the bills ceased on discharge or on storage of the goods after such discharge. The particular Clause 14 in question reads as follows:

"14. DELIVERY OF GOODS

If delivery of the Goods or any part thereof is not taken by the Merchant at the time and place when and where the Carrier is entitled to call upon the Merchant to take delivery thereof, the carrier shall be entitled without notice to remove from a

*Container the Goods or that part thereof if stuffed in or on a Container and to store the Goods or that part thereof ashore afloat, in the open or under cover at the sole risk and expense of the Merchant. Such storage shall constitute due delivery hereunder, and thereupon the liability of the Carrier in respect of the Goods or that part thereof shall cease.***"**

The learned Judge Stone J. held that the established English jurisprudence in this area, being to protect the integrity of the bill of lading as "the key to the floating warehouse," was to be followed.

Stone J. declined to hold that the plain wording of Clause 14 was sufficiently clear to "impinge upon the cardinal principle requiring delivery by the (ship) owner or his agent only against production of an original bill of lading" although he accepted that "this particular clause purportedly is drawn in terms of cesser of responsibility."

Conclusion

The Hong Kong Commercial Court has preserved the long well-established principle that a carrier has the prima facie fundamental obligation to deliver goods upon presentation of original bills of lading, failing which any misdelivery will be at the carrier's own risk and peril. Any exemption clause attempting to exempt the carrier's liability for deliberate or even conscious misdelivery whether without any original bill of lading or against a forged bill of lading will be construed strictly against the carrier. The attitude of the Hong Kong Court is unsympathetic to any exemption clause which may have the effect of allowing a carrier to be exempted from liability upon deliberate or conscious misdelivery of goods. This is in accordance to common sense in that the commercial value of a bill of lading to its holder has to be fully respected and protected by the law in order that both international trade and its financing may be facilitated.

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RECENT AWARDS

Two recent SMA Awards have been summarized by David Martin-Clark:

Baltimore Form C Grain Bill of Lading - Cargo Damage

The first case concerned a claim by cargo insurers for heating and sweat damage sustained by a cargo of US yellow corn in the course of a voyage from a port in Louisiana to Japan.

The award addressed the issue whether or not, in a case where the carrier alleges inherent vice of the cargo, as here, cargo interests can make out a *prima facie* (at first sight) case against the carrier simply by evidencing a clean bill of lading on loading and damage on outturn. The panel found that, where the inherent vice is alleged to consist, as in this case, of a factor such as high moisture content, which is not apparent to the human eye, then clean bills of lading are not sufficient to establish a *prima facie* case against the carrier.

The panel also found, on the facts of the case, that the damage to the cargo had been caused by inherent vice. In this regard, the panel also noted evidence from the surveyors appointed by the Owners' P&I Club, that seven other ships had, during the previous six months, experienced similar damage with cargoes of US yellow corn. [See **TENG FEI HAI, SMA 3726**]

NYPE - Arbitrability

The second case concerned the issue whether charterers were able to bring a claim in arbitration over the alleged failure of the ship to vacate its final discharging berth in accordance with the charterers' instructions. The owners alleged that such a claim fell outside the scope of the charterparty arbitration clause and should, therefore, be brought before the court in tort.

In an award on a preliminary issue of jurisdiction, which the parties had determined that the arbitrator should decide, the arbitrator found that a claim which arose from an alleged breach of charter, occurring during the period of the charter, was within his jurisdiction, even if the event which gave rise to the damages claimed occurred after redelivery.

Normally under American law, questions regarding an arbitrator's jurisdiction are to be determined by the courts but in this case the parties agreed that the arbitrator should have the power to determine his own jurisdiction. This he duly did, holding that the charterers' claim was within the scope of the charterparty arbitration clause. [See **YARDIMCI, SMA 3731**]

Notice of Readiness and Laytime Commencement - *Happy Day* Revisited

In the October - 2001 issue, THE ARBITRATOR, under the heading "Notice of Readiness and Laytime Commencement" offered thinly veiled criticism of the result in the "*HAPPY DAY"* affair. The court of Appeal decision is in and confidence in the system has once again been restored. David Martin-Clark has summarized this decision:

> In this decision the Court of Appeal overruled the decision at first instance. It held that, (a) where a charterparty provides that a notice of readiness is to be given before laytime commences, (b) a notice of readiness is given that is invalid for prematurity, [namely, given before the ship had reached its contractual destination or had achieved the required state of readiness] (c) no reserve is made in respect of the invalid notice and (d) cargo operations begin without any further notice of readiness being issued, charterers were deemed to have waived reliance on the original invalid notice as from the time cargo operations began. Laytime would therefore commence in accordance with the regime provided in the charterparty, as if a valid notice had been served at that time. See **Glencore Grain Ltd. V. Flacker Shipping Ltd. "The Happy Day"** [Case No. DMC/SandT/19/02]

DMC casenotes can be activated at www.onlinedmc.co.uk.

ARBITRATORS' FEES

It was April 2000 that THE ARBITRATOR last addressed the subject of arbitrators' fees. At that time we briefly reviewed the difference between London and New York in the matter of collecting those fees. We now pose a few questions to our members regarding collection of panels' fees and expenses.

1) Should the panel insist on the escrow of arbitrators' estimated fees and expenses, as allowed under Section 37 of the SMA Arbitration Rules?
2) Presuming the answer to 1) to be "yes", at what stage should the request be made?
3) What should the panel do if one or both parties fail to abide by the panel's ruling to contribute to such an escrow account?
4) How should the arbitrators enforce an award of arbitrators' fees and expenses?
5) Should there be a commitment and/or a cancellation fee to cover contingencies such as settlement prior to an award or a stay in the process due to bankruptcy proceedings?

These questions have recently become more relevant if we are to believe the scuttlebutt heard in New York arbitration circles about the number of arbitrators who have been "stiffed." Considerable discussion has transpired about adopting tougher collection procedures, and even not going forward

without first receiving payment on account from the parties. Two cases before the New South Wales Supreme Court earlier this year, while not entirely on point for a variety of reasons, offer some precautionary insight into this matter.

The first case concerned a situation where the respondent proposed arrangements for payment of the arbitrators' fees including a non-refundable booking fee at a set daily rate for the period for which the hearings were scheduled. The tribunal, in turn, required payment of agreed upon per diem rates for all hearing time set aside and the lodgement by the parties of the full estimated amount in an escrow account as security for fees, costs and expenses. There ensued what amounted to a negotiation between the panel and the parties with the panel declining to proceed prior to obtaining agreement as to cancellation fees and payment thereof. The respondent eventually agreed with the arbitrators. The plaintiff, however, would not agree and took the position that the panel was applying undue pressure and were concerned that the tribunal, having had its proposals rejected would see the plaintiff as having taken a stand against their interests and that in the hearing of the matter the plaintiff might suffer in the arbitrators' assessment of the case. The plaintiff believed that the arbitrators were prepared to place their own interests in securing the parties' agreement to pay a cancellation fee before their obligation to properly discharge their duties as arbitrators. The plaintiff requested the arbitrators to offer their resignations, which request was denied. The plaintiff then resorted to the Court with the request that the panel be dismissed because of misconduct. The judge ordered the removal of the arbitrators, having been satisfied that each of the arbitrators misused his position in applying pressure to the parties to agree to a cancellation or commitment fee and that constituted misconduct in terms of the relevant statutes. The judge stated:

> " . . . *This case demonstrates the wisdom of an arbitrator reaching agreement with the parties as to his or her remuneration upon appointment. Here the arbitrators had not done so and their concern to have agreement upon a cancellation or commitment fee ultimately assumed such importance in their minds that they allowed themselves to be swayed by this concern to the detriment of their duty to maintain the appearance of acting in the interests of bringing down a just award.*"

As a concluding observation, it is interesting to note that the tribunal comprised a retired judge and a member of the bar.

[See **ICI Pty Ltd v Sea Containers Ltd [2002] NSWSC 77**]

The second case is less complex. A sole arbitrator, after having been appointed and accepted by the parties, requested security into his company's trust account prior to proceeding. The crux of the matter had more to do with the allocation, i.e., who paid how much of the ordered security rather than should security be paid. The judge's ruling on the propriety of the order is enlightening:

> "*There seems little dispute between the parties that the arbitrator's point of view that he would not do any work for these parties without security was a reasonable one. The real difficulty is that the arbitrator should have made this stipulation before his appointment, not afterwards.*"

[See **McKensey v Hewitt [2002] NSWSC 145**]

Both of these cases suggest that arbitrators should proceed gingerly to secure their fees, not abuse the considerable powers which they wield, and whenever possible, establish their fees, or the basis upon which they will be charged, sooner rather than later in the process.

HUMOR
EAT WHAT YOU WANT

From Andrew Tobias, *Demystifying Finance*

"I became famous in our family (with just one sibling, it was hard to be an unknown) for the simple observation to my indecisive cousin – age five at the time, like me, and unsure of a piece of

Thanksgiving dinner – 'Michael! If you want the ham, eat the ham. If you don't want the ham, *don't* eat the ham. But let'th not asCUTH it all the time!' It is vaguely in that vein that this bit of internetiana could be read, forwarded by **Eric Loeb**. You may already have seen it:

The Japanese eat very little fat and suffer fewer heart attacks than the British or Americans.

The French eat a lot of fat and also suffer fewer heart attacks than the British or Americans.

The Japanese drink very little red wine and suffer fewer heart attacks than the British or Americans.

The Italians drink excessive amounts of red wine and also suffer fewer heart attacks than the British or Americans.

CONCLUSION: Eat and drink what you like. Speaking English is apparently what kills you."

QUOTE FOR THE QUARTER

ALL CLEAR

It took me forty years on earth
To reach this sure conclusion
There is no Heaven but clarity,
No Hell except confusion.

ALL CLEAR: Jan Struther, *A Pocketful of Pebbles*, Harcourt, Brace & Company, New York, 1946

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