



# THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

VOLUME 33

JULY 2002

Number 4

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## FORWARD

This is the second issue of THE ARBITRATOR to be produced entirely in virtual format. Some members were concerned about possible loss of readership when we decided to eliminate the hard copy edition. We invited all previous subscribers to provide e-mail addresses to facilitate their continued receipt of this publication.

There has been a drop off of some traditional subscribers, but these have been largely offset by new subscribers, thanks to a great extent to the folks at Maritime Advocate Online, who mentioned our intent to go digital. Our thanks is also extended to David Martin-Clark who continues to provide excellent press for the SMA and its work product, the Award Service. David has provided us with a clever description of his Case Notes website, which we gladly reproduce herein for our readers.

We continue our effort to provide timely articles of interest to the maritime arbitration

community. In this issue we touch on two unsettled topics: the inclusion of the Clause Paramount in charter parties and, perhaps less thorny but no less perplexing, the issue of what is a vessel.

We have visited the Clause Paramount issue in the past. In the enclosed article we believe Ray Connell covers the subject in a comprehensive and lucid fashion.

In our last issue we took a light-hearted glance at the gender of ships. In this issue Wade Hooker and Terry Stoltz take a serious view of what is a vessel, citing examples where a floating object is a vessel and a self-propelled ship is not.

We have also included up to date information regarding the SMA Board of Governors and Committee assignments.

Finally, don't you just hate the forwarding of jokes over the Internet? We've included a couple to stay in tune with the times.

We hope you enjoy this issue and that you will continue to benefit from your subscription to THE ARBITRATOR. Please tell your colleagues and associates about us. We would love to expand our subscription list.

## PRESIDENT'S CORNER

Congratulations to the Society's newly-elected Governors - Henry Engelbrecht, Svend Hansen, Klaus Mordhorst and Tony Siciliano. Soren Wolmar and Austin Dooley have been appointed Secretary and Treasurer, respectively, and the Board is off to a running start with a full agenda!

On April 17th a Houston seminar on "Dispute Resolution: The New York Arbitration

Alternative” was sponsored by Poten & Partners, Inc., Teekay Shipping (USA), Inc., the SMA and New York law firms Burke & Parsons, Cichanowicz Callan Keane Vengrow & Textor, Freehill Hogan & Mahar, Haight Gardner Holland & Knight, Healy & Baillie and Nourse & Bowles. The event was inspired by Jim Textor and primarily targeted the New York firms' energy clients who were involved or had an interest in New York arbitration. More than eighty attendees heard presentations on the history, legal background and framework of arbitration; the inner workings of the New York maritime process - from panel appointment through award issuance; flexibility illustrated by emergency hearings, documents only, deposition and telephonic testimony and mediation; recovering attorneys' fees; similarities and differences between SMA, AAA and LMAA procedures; and energy-focused discussions of New York tanker awards, vetting and Oilvoy clauses, and a mock arbitration that proved to be the event's highlight. Poten's Jeff Goetz gave a stimulating luncheon address on the current and short-term prospects of the tanker market against international geo-politics. The success of the seminar was measured by question and answer sessions that were robust and candid. A reception followed which provided an opportunity for participants and attendees to share additional thoughts over a cup or two of nectar. Bar-SMA participants included Peter Gutowski, Ray Burke, LeRoy Lambert, Jim Textor, Jay Pare, Jack Greenbaum, Keith Heard, Tom Fox, Tony Siciliano, Lucienne Bulow, Don Szostak, Soren Wolmar, Joe Homicki and yours truly.

I stated in this column soon after assuming office a year ago that my priorities would concentrate on an active and cohesive membership, a close working relationship with our maritime bar and vigorous promotion of the Society here and abroad. Participation in February's Panama Maritime VI World Conference, the Houston seminar and more such future events are designed to promote and highlight what the New York maritime arbitral community has to offer and I encourage you to get onboard.

David Martowski

## CHARTER PARTIES AND THE “CLAUSE PARAMOUNT”

*By Raymond A. Connell, Esq.*

At the close of the nineteenth century, the United States Congress enacted the Harter Act, 46 U.S.C. §190, et seq. (1893), to protect American shippers from comprehensive limitation of liability clauses found in bills of lading issued, primarily, by British liner companies carrying American goods to England. Among other things, the Act makes it unlawful to insert in bills of lading any clause (1) relieving the carrier from liability for loss or damage arising from negligence, fault or failure in the proper loading, stowage, custody, care, and delivery of cargo, or (2) lessening or weakening the obligation to exercise due diligence to make the vessel seaworthy, or to carefully handle, stow, care for, and deliver the cargo. 46 U.S.C. §§ 190, 191. Clauses placed in bills of lading in contravention of §190, “shall be null and void and of no effect.” 46 U.S.C. §190.

Provided the carrier exercises due diligence to make the vessel in all respects seaworthy, the carrier is exonerated for damage or loss resulting from errors in navigation and management of the vessel, and from a variety of other causes unrelated to fault, e.g., “dangers of the sea or other navigable waters.” 46 U.S.C. §192.

The Harter Act is compulsorily applicable to carriage of goods “from or between ports of the United States and foreign ports.” 46 U.S.C. §190.

In an attempt to ensure Harter Act protection was afforded by the courts of the country of destination for American exports, shippers insisted bills of lading issued in the United States include a provision expressly stating the bill of lading “is subject to all terms and provisions of, and exceptions from, liability contained in [the Harter Act]....” See Selvig, *The Clause Paramount*, 10 Am.J.Comp.L. 205, 206-07 (1961) (explaining the historical background of Harter Act incorporation into bills of lading).

When called upon to construe a bill of lading covering goods damaged on a voyage from Baltimore to Liverpool, terms of which incorporated the Harter Act, Lord Esher set the standard by which courts would also treat mandatory legislation

designed to govern bills of lading, where such legislation is incorporated into charter parties:

[W]hat we have to do is to construe the bill of lading, reading into it as if they were written into it the words of the Act of Congress. If this is done, it will have this effect: that some provisions will appear twice over, because they have put words extremely like those of the Act into the bill of lading, and then introduced the whole of the Act. That would, of course, do no harm, but it is clumsy to the last degree. [*Dobell & Co. v. The S.S. Rossmore Co., Ltd.*, [1895] 2 Q.B. 408, 412 (C.A. 1895)]

On the international level, the Hague Convention signed at Brussels in 1924 sets out a series of rules (the “Hague Rules”) to govern the rights and obligations of shippers and carriers under ocean bills of lading, or similar documents of title. On the one hand, the Convention requires the carrier to “properly and carefully” load, handle, stow, keep, care for, and discharge the goods carried. Article III(2). On the other hand, the carrier is relieved from the implied warranty of seaworthiness in favor of the lesser obligation, “before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy,” and, it is excused from liability for a series of named events, including negligence in the navigation and management of the vessel. Articles III(1), IV(1) and (2).

If Articles III(1) and (2), and IV(1) and (2) are “the heart” of the Convention, its teeth are in Article III (8):

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening of such liability otherwise as provided in this convention, shall be null and void and of no effect.

Article III(6) provides:

“In any event, the carrier and the ship shall be discharged from any liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.”

In 1936, the United States implemented the Convention by enactment of the United States Carriage of Goods by Sea Act (“COGSA”), now found at 46 U.S.C. App. §§1300-1315. Generally speaking, the American version of the Hague Rules kept to the original text, but there were some departures. Among other things, §1300 subjects to COGSA’s provisions both inbound and outbound bills of lading; §1305 expressly states COGSA “shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter;” and, §1312 requires “every bill of lading or similar document of title which is evidence of a contract for the carriage of goods from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of [COGSA].”

The application of the COGSA to inbound, as well as to outbound, bills of lading represented a significant geographic expansion of the Hague Rules. The limitation of COGSA’s application to bills of lading and similar documents of title to the exclusion of charter parties made explicit what, in any event, was the case under the Hague Rules, the application of which was limited to bills of lading. Unless domestic legislation provided otherwise, bills were not required to contain a statement the carriage was governed by legislation implementing the Rules, but it was common practice to include such a statement in bills of lading, even when the carriage itself would not otherwise be subject to the Rules.

It is the Statement, required by §1312 to be placed in outbound bills of lading that has come to be known as the “USA Clause Paramount.” COGSA does not expressly provide a remedy for failure to include a Clause Paramount in outbound bills, but one authority is of the view that where an outbound bill of lading subject to COGSA fails to

contain the required Clause Paramount, “it may not seem too drastic to hold the carrier estopped from claiming the benefit of the statute, or of the exceptions in his illegal bill, while permitting the cargo to claim whatever benefit the statute gives....” Gilmore, The Law of Admiralty, 186 (2d ed. 1975). Where a charter requires inclusion of a Clause Paramount in bills of lading, and Charterers fail to do so, they will be responsible for any prejudice to Owners on claims by cargo interests brought under the bill. See, e.g., Lux Challenger v. Blue Anchor Line, 1992 A.M.C. 841 (Arbitration at New York, 1991) (J. Berg, sole arbitrator).

The practice of conjoining legislation governing bills of lading and charter parties followed enactment of the Harter Act. See The Agwimoon, 24 F.2d 864 (D.Md. 1928), The Westmoreland, 86 F.2d 96 (2d Cir. 1936); The Tregenna, 121 F.2d 940 (2d Cir. 1941). It has been suggested the Clause Paramount found its way into charters as a consequence of brokers adopting the practice of adding to the charter by attachment, or by verbatim transcription, the same Clause Paramount required to be included in bills of lading. See Shoенbaum, Admiralty and Maritime Law, 361-62 (1987). “No matter what the reason: ‘The parties to a charter party frequently have no specific idea why it contains or should contain a paramount clause.’” Selvig, The Paramount Clause, 10 Am. J. Comp. L. 205, 209-10 (1961).

The simple form of “USA Clause Paramount” reads:

This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights and immunities or an increase of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

In 1958, the House of Lords addressed the question whether the U.S.A. Clause Paramount,

drafted for inclusion in a bill of lading, but nonetheless physically attached to a consecutive voyage charter on a “Tank Vessel Voyage Charter-Party” form, affected rights and liabilities of parties to the charter. In what is recognized as the leading case on the subject, a unanimous court in Anglo-Saxon Petroleum Co., Ltd. v. Adamastos Shipping Co., Ltd. (The Saxon Star), [1958] 1 Lloyd’s L.Rep. 73 (H.L.), held that it did: “If the Paramount Clause is to have any meaning or effect at all ‘This bill of lading’ must be held to be a misnomer for ‘This charter party’....” [1958] 1 Lloyd’s L. Rep. at 90 (Reid, L.). However, when it came to the consequences of incorporation for the claim involved, i.e., economic loss sustained as a result of a series of delays attributable to unseaworthiness, some of which occurred in trading without the United States, and some of which occurred on ballast voyages, the Lords divided (3-2). The majority found (1) COGSA as incorporated into a charter for worldwide trading applied to all voyages, loaded and unloaded, without regard to §1300’s geographical limitation to voyages to and from ports in the United States; and, (2) when incorporated into a charter, the reference in §1304(1) and (2) to “loss or damage,” is not limited to physical loss or damage to goods - it includes other classes of damage, such as economic loss suffered as a consequence of delays which forced a reduction in the number of voyages capable of being performed within the charter period. The practical consequence for Owners was that their obligation to provide a seaworthy vessel was not governed by an absolute warranty of seaworthiness, but rather, by the lesser “due diligence” standard of §1304(1) brought into the charter by the Clause Paramount.

American courts have also reformed the “U.S.A. Clause Paramount” so that its introductory phrase “This bill of lading...” is read as “This charter-party....” See Sun Company, Inc. v. S.S. Overseas Arctic, 27 F.3d 1104 (5<sup>th</sup> Cir. 1994); Shell Oil Co. v. M.T. Gilda, 790 F.2d 1209 (5<sup>th</sup> Cir. 1986); United States v. Wessel, Duval & Co., 115 F. Supp. 678 (S.D.N.Y. 1953).

Despite the willingness of courts to reform language of the standard “USA Clause Paramount”

to facilitate incorporation into a charter party, an intention to incorporate must nonetheless be clearly stated. A charter provision requiring “Bills of lading are to include” a Clause Paramount, the terms of which are quoted, but which makes no reference to incorporation into the charter, is insufficient to bring COGSA terms into the charter. Associated Metals & Minerals Corp. v. S.S. J. Jasmine, 983 F.2d 410 (2d Cir. 1993). Previously, the Second Circuit in The Stolt Lion, 617 F.2d 907, 913 n.7 (2d Cir. 1980) had avoided addressing the question of proper incorporation where the charter provision required “All bills of lading issued hereunder shall have effect subject to the provisions of COGSA....,” but it took note of Standard Oil Co. of Calif. v. United States, 59 F.Supp. 100, 102-03 (S.D. Calif. 1945), aff’d, 156 F.2d 312 (9<sup>th</sup> Cir. 1946), where such a clause was deemed an effective incorporation of COGSA terms into the charter. In the writer’s view, The S.S. J. Jasmine represents the better view. A charter provision containing a clause requiring “All bills of lading” issued thereunder to contain a Clause Paramount, is an attempt to ensure Charterer’s compliance with §1312, and to ensure that on any suit by endorsees of negotiable bills, Owners and their vessel, inter alia, have the protection afforded by §§1303 and 1304. There is no basis for rewriting this clause under guise of a Saxon Star style reformation for the purpose of drawing COGSA terms into the charter itself.

A charter provision incorporating only a portion of COGSA, will be deemed an intention to exclude unmentioned portions. See Ralston Purina Co. v. Barge Juneau, 619 F.2d 374 (5<sup>th</sup> Cir. 1980); In re Sulphur Queen, 460 F.2d 89, 102-03 (2d Cir. 1972) (incorporation of only select sections of COGSA did not require application of burden of proof rules which would govern had COGSA been fully incorporated). A simple statement that: “Paramount Clause [is] deemed to be incorporated in this charter party” has been enforced as a reference to the Hague Rules: “It seems to me that when the ‘Paramount Clause’ is incorporated, without any words of qualification, it means that the Hague Rules are incorporated.... I mean, of course, the accepted Hague Rules, not the Hague-Visby Rules, which are

of later date.” The Agios Lazaros, [1976] 2 Lloyd’s L. Rep. 47, 50 (C.A.) (Denning, M.R.). More recently, the court in The Bukhta Russkaya, [1997] 2 Lloyd’s L.Rep. 744 (Q.B.) found charter party incorporation of “the general clause paramount” referred to a clause published by BUIMCO in 1994, which provided for incorporation of the Hague Rules as enacted in the country of shipment, but, if none, of the Rules as enacted in the country of destination, but, if none, of the 1924 Convention; but, if the Hague-Visby Rules are made compulsorily applicable by the legislation either of the country of shipment, or of the country of destination, of the 1924 Convention as amended by the Hague-Visby Rules. On a voyage from Japan to Mauritania, where Hague-Visby was not in force, the unamended Hague Rules governed, despite the fact the charter contained English choice of law and London arbitration provisions, and Hague-Visby had been in force in the U.K. since 1977.

Where a U.S.A. Clause Paramount is properly incorporated into the charter, COGSA terms do not have “statutory rank,” but the incorporated text “is converted into a binding consensual obligation.” United States v. M.V. Marilena P, 433 F.2d 164, 170 (4<sup>th</sup> Cir. 1969). The same standard that had been adopted by the court in Dobell & Co. v. The S.S. Rossmore Co., Ltd., [1895] 2 Q.B. 408 (C.A. 1895) with respect to incorporation of the Harter Act into American export bills of lading.

The consequence of incorporation is simply stated:

[T]he terms of the specific contract and the Hague Rules are fused together. The combined terms interact between themselves. There is no line of demarcation or difference in quality or effect save that if the incorporated clause is also a paramount one the Hague Rules will not merely supplement the specific contract but will operate also to modify any incompatible clauses in it. [The Agios Lazaros, [1976] 2 Lloyd’s L. Rep. 47, 59 (C.A.) (Shaw, L.J.)]

The interplay between COGSA (or the Hague Rules) and the provisions of the charter to which it is appended, is not so easily resolved:

The courts have not found it easy to make sense of the Hague Rules in the context of a charter-party since clearly those rules were not designed to be incorporated in such a contract. [The Standard Ardour, [1988] 2 Lloyd's L. Rep. 159 at 163 (Q.B. 1987) (Saville, J.)]

From Charterers' perspective, the Clause Paramount is of benefit since charter provisions attempting to exonerate Owners from liability as a COGSA carrier, are incompatible with incorporation of COGSA terms, rendering the exoneration provisions "null and void." Bunge Corp. v. Republic of Brazil, 353 F.Supp. 64 (E.D.La 1972); but see The Granville, 1961 A.M.C. 2229 (Arbitration at Oslo, 1961) (Clause Paramount did not deprive Owners of benefit of exoneration provisions of Baltimore 1939 standard printed Clauses 9 and 13).

Therefore, the presence of a Clause Paramount has rendered a charter party Refrigeration Clause purporting to exonerate Owners from liability for negligent operation of refrigeration equipment, "null and void." Horn v. Cia de Navigacion Fruco, S.A., 404 F.2d 422 (5<sup>th</sup> Cir. 1968), cert. denied, 394 U.S. 943 (1964). It has overridden a "trade custom" of granting Owners a .05% allowance on shortage claims. Sun oil Co. of Pa. V. M.T. Carisle, 771 F.2d 805 (3d Cir. 1985). It has displaced charter clauses purporting to relieve the vessel from liability "for any consequences arising out of shipping more than one grade of cargo." Standard Oil Co. of California v. United States, 59 F.Supp, 100 (S.D. Calif. 1945), aff'd, 156 F.2d 312 (9<sup>th</sup> Cir. 1946). It has even been found to defeat an obligation to arbitrate in a foreign forum where the country whose version of the Rules are incorporated, deems foreign jurisdictional clauses contained in bills covering goods loaded at, or carried to, ports within its jurisdiction, void. Wilson v. Compagnie des Messageris Maritimes, [1954] 2 Lloyd's L. Rep. 544 (Austl.) (applying §9 of the Australian Sea Carriage of Goods Act, 1924); see also, The Amazonia,

[1990] 1 Lloyd's L. Rep. 236 (C.A. 1989); contra, Associated Metals & Minerals Corp. v. S.S. Michaelis Angelos, 234 F.Supp. 236 (S.D.N.Y. 1964).

There are limits to the Clause's paramountcy. Where the presence of a Clause Paramount creates a conflict with specially negotiated charter party provisions, especially where they apply to a limited and clearly defined circumstance, it is the Clause Paramount, "a clause ... taken off the peg, or as is so often said about these clauses, picked out of a drawer and applied to the charter-party," which must yield. The Mariasmi, [1970] 1 Lloyd's L. Rep. 247 (Q.B.) (typed provision added to Gencon form placing responsibility on Owners for expenses resulting from lack of readiness to load was unaffected by Article 4(2) exception for negligent navigation brought into charter by Clause Paramount); see also The Westmoreland, 86 F.2d 96 (2d Cir. 1936) (charter party incorporation of Harter Act did not impose upon an unconditional typed provision stating: "Cargo to be loaded on skin of vessel at charterer's risk," a condition that Owners must exercise "due diligence" to make "the skin" seaworthy for stowage of cargo); The Tregenna, 121 F.2d 940 (2d Cir. 1941) (specific printed charter party provision unconditionally exempting carrier from liability for negligent stranding was not qualified by incorporation of Harter Act, which by §3 conditioned exception to liability for negligent navigation upon exercise of "due diligence" to make vessel seaworthy.).

When The Saxon Star was before the Court of Appeal, one of the justices observed: "It is a strange thing to find a shipowner relying on a paramount clause to exempt himself from liability. Historically, its purpose was to make him liable." [1957] 1 Lloyd's L. Rep. 271, 277 (C.A.) (Denning, L.J.). Actually, Owners have put the Clause Paramount to good use. As occurred in The Saxon Star, where the presence of a U.S.A. Clause Paramount was successfully employed to cut down the implied warranty of seaworthiness to an obligation to exercise due diligence to make the vessel seaworthy, Owners have enlisted the aid of

the Clause Paramount to take advantage of COGSA (or Hague Rule) exceptions to avoid charter party liabilities ranging far beyond physical loss or damage to cargo.

In The Satya Kailash, [1984] 1 Lloyd's L. Rep. 588 (C.A. 1983), OCEANIC AMITY was chartered under an NYPE form to lighten SATYA KAILASH. Owners of SATYA KAILASH were Charterers of OCEANIC AMITY. During lightening damage was sustained by SATYA KAILASH as a consequence of contact with OCEANIC AMITY attributed to negligent navigation of the Master. In defense, Owners of OCEANIC AMITY asserted the Negligence in Navigation exception of COGSA's §1304(2), incorporated into the NYPE by Clause 24, the "Clause Paramount." Guided by Adamastos Shipping Co., Ltd. v. Anglo-Savon Petroleum Co., Ltd., [1958] 1 Lloyd's L. Rep. 73 (H.L. 1958), and by Australian Oil Refining Pty. Ltd. v. R.W. Miller & Co. Pty., Ltd., [1968] 1 Lloyd's L. Rep. 448 (Austl. 1967), the court upheld the defense. The immunities set out in §1304(2) were applicable to the full range of performance contemplated by the charter - "Under the charter-party Oceanic Amity was chartered to lighten grain from a mother ship. It follows that loading grain from the mother ship was a contractual activity to be performed by Oceanic Amity under the charter; and we can see no reason why, in principle, the benefit of the immunities contained in [§1304(2)] should not be available to [Owners of OCEANIC AMITY] in respect of damage caused to the appellants [Owners of SATYA KAILASH/Charterers of OCEANIC AMITY] in performance of this activity..." [1984] 1 Lloyd's L. Rep. 596. See also, The Marivic, S.M.A. #1732 (Arbitration at New York, 1982) (U.S.A. Clause Paramount bars Charterers' claims for consequential damages resulting from negligent navigation); The Aliakmon Progress, [1978] 2 Lloyd's L. Rep. 499 (C.A.).

In the United States, application of §1303(6)'s one-year limitation period to claims asserted under a charter containing both an arbitration provision, and a Clause Paramount, is for arbitrators to determine. Son Shipping Co. v.

DeFosse & Tanghe, 199 F.2d 687 (2d Cir. 1952). New York arbitrators have barred cargo claims where the arbitration demand comes subsequent to expiration of the one-year limitation period. The Uranus, 1977 A.M.C. 586 (Arbitration at New York, 1976) (2-1 award); The Prairie Grove, 1976 A.M.C. 2589 (Arbitration at New York, 1976). Quite properly, the one-year limitation period has not been applied to bar indemnity claims. The Lacerta, S.M.A. #3515 (Arbitration at New York, 1999). To fall within the purview of the time bar provision, the claim need not relate only to physical loss or damage, e.g., claims for financial loss caused by late delivery of the goods, or by slow discharge, have been deemed claims "in connection with the goods," subject to COGSA's one-year limitation period. See The Stolt Sydness, [1997] 1 Lloyd's L. Rep. 273 (Q.B. 1996); The Stena Pacific, [1990] 2 Lloyd's L. Rep. 234 (Q.B. 1989). Despite application of COGSA exceptions to aspects of charter party performance beyond physical loss or damage to cargo, courts have tended to restrict the one-year time bar to claims for loss or damage to, or in connection with, the goods: "It seems to me, therefore, that as a matter of construction, that is to say as a matter of trying to ascertain the intentions of the parties from the words they have chosen to use, they can only have intended the time limit to apply to claims for loss or damage relating to the goods carried or perhaps to be carried..." The Standard Ardour, [1988] 2 Lloyd's L. Rep. 159 (Q.B. 1987) (claim for loss arising out of delay in issue or release of bill of lading was not subject to COGSA's one-year limitation period).

In a more general sense, perhaps the best guide to proper construction was stated by Judge Learned Hand over sixty years ago when considering a charter incorporating the Harter Act:

[I]t is idle to invoke the canon against redundancy in the interpretation of such a maritime document such as this. Courts have again and again observed the curious, often fantastic incongruities in charter-parties, bills of lading and insurance policies, composed as they so often are, of a motley patchwork of verbiage thrown together

apparently at random, often in an unfamiliar diction three hundred years old. Particularly in such a document meant to do service in varying situations each word of such a discordant medley need not be made to count as we seek to make all words count of carefully prepared contracts drawn for a particular occasion.... [I]nterpretation is always a question of the ensemble....” [The Tregenna, 121 F.2d 940, 945 (2d Cir. 1941)]

In New York, determination whether COGSA, or Hague Rule, terms brought into the charter by the Clause Paramount supplement, or override, more conventional charter party provisions, or, as the courts in the United Kingdom put it, are “insensible” to resolution of the dispute at hand, is a call to be made by commercial arbitrators, especially members of the Society of Maritime Arbitrators. The ingenuity of attorneys, and the myriad fact patterns of charter party disputes may not bode well for ease of resolution, but it should ensure the interest of arbitrators charged with the responsibility of making sense out of “the ensemble” created by joinder of the charter party, and the Clause Paramount.

*Mr. Connell is a Member of the New York Law Firm McMahon & Connell, P.C.*

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## The Case Notes Website - the Inside Story

*by David Martin-Clark*

In the last edition of THE ARBITRATOR, Lucienne Bulow wrote an article on her award in the case of Anchor Shipping Co. v. Alianca. In doing so, she referred to a note of the case that I had prepared and published on the website DMC’s CaseNotes @www.onlinedmc.co.uk. That prompted your editor, Don Szostak, to invite me to write an article for this edition of The Arbitrator on the challenges that running a website single-handed can present, and why I have taken them on!

So, here it is, in the shape of an imaginary interview between your editor and me, conducted in early June 2002.

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**Don Szostak:** *Well David, apart from seeing you at the ICMA XIV event in New York last October, the last time that we worked together was when I was a Director of the UK PandI Club and you were the Senior Partner in Millers. How come that I now find you editing a legal case notes website?*

**David Martin-Clark:** A long story, but one easily cut short! When I retired from ‘active service’ in Millers on my return from the Hong Kong office in May 1999, I wanted - in addition to my on-going work as a consultant - to develop other career paths, that would help me recycle myself around the shipping, transport and insurance industry that I knew and loved.

*So that brought you to electronic publishing?*

**David:** Well, yes and no. First and foremost, I wanted to develop a practice as a mediator and arbitrator. To that end I obtained accreditation from CEDR - the Centre for Effective Dispute Resolution - the leading mediation agency in the UK, and I joined the London Maritime Arbitrators Association. Initially you begin there as a Supporting Member, progressing to full membership after you have gained the requisite experience.

*We still haven’t got to electronic publishing!*

**David:** Not quite. You see, I realised that, to be effective as a mediator and arbitrator in the disciplines in which we work, I had to keep up-to-date with the law. To me, that means reading the cases, as the decisions appear. If I read the cases, I need to make a note of them. So it was not a huge lateral leap to think of writing up my notes in such a way that I could share them with others who might be interested to read them.

*OK, your initial motivation was very practical then. But why a website? Why not authorship of a more traditional type?*

**David:** The possibilities of electronic publishing had begun to attract me strongly in my later years at Millers. I guess also that something of the excitement of the dotcom boom got to me. I was stimulated too, by the output and outreach that other e-zine editors had achieved, such as Chris Hewer at Maritime Advocate online and Sam Ignarski, a former colleague both in the TT Club and in Hong Kong, with BowWave.

*But isn't building a website quite demanding technically? Did you have the skills to do it yourself?*

**David:** Yes and No, and No! The prospect of learning an application such as Microsoft's FrontPage was at first quite daunting. Then one weekend in April last year, I screwed up my courage, went to the local computer store and bought the software and the manuals. After two days of trial and error, and pressing every key and combination of keys that my laptop had to offer, I had a basic site ready for uploading to the web.

*Are you saying that you were able to master the technology in the space of 48 hours?*

**David:** To say 'master' would be a gross overstatement! But I had learnt enough to launch the site, with just one case note, the Hill Harmony, the House of Lords decision on the right of charterers to give routing instructions to the master. The shock waves of that case were still reverberating around the London legal and shipping community, so it seemed a good place to start.

*Are you maintaining the site yourself?*

**David:** Yes, with the help of one or two good friends, when I get really stuck.

*And what types of cases are you annotating?*

**David:** Initially I divided the site into four sections, Shipping & Transport, Insurance, Professional Indemnity and Electronic Commerce - all sectors of

which I had had experience in Millers. But I quickly found that I could not manage all of them. So I put first the Electronic Commerce section and then the Professional Indemnity sections on hold - officially I describe them as 'under development'. What it really means is that they are 'under developed' and will remain so until I find the time, the energy, or maybe, a partner, to bring them back to life.

*You are concentrating now on the Shipping & Transport and Insurance sections, then?*

**David:** Yes, that's it. There are about 50 Shipping & Transport case notes on the site, and about 20 Insurance cases. I am up-loading on average, I would say, two case notes a week.

*And who reads them?*

**David:** That I cannot answer with great accuracy, because I have not yet invested in the software that would track all visitors to the site. But the case notes are not aimed primarily at the legal profession; rather, they are aimed at industry professionals, the type of person I used to meet every day in the Miller business, people working in shipping, transport and insurance companies who needed to be up-to-date with the law but who would probably never read a law report in their lives. And then there are the students of course, the coming generation.

*But with so many cases on the site already, how can I find what I want? How do you index the site?*

**David:** The indexing is very simple. When the number of cases in any section becomes unwieldy, I sub-divide them into topics. So, for example, the Shipping & Transport section is divided into 'Carriage of Goods', 'Time Charters', 'Voyage Charters', 'Admiralty' and so on. The site also has a good search facility, which I downloaded from Google.

*OK, I see, but if your target audience is largely lay, I mean, non-legal, does that affect the way in which you write up the cases?*

**David:** Yes, indeed! Firstly, I try and avoid all legal jargon and certainly all Latinisms. I am still having difficulty finding a synonym for ‘obiter’! Secondly, I describe the parties by name, rather than by their role in the litigation. That way we can avoid confusion between who are the appellants and who the respondents! Thirdly, I aim to describe the facts in sufficient detail for the reader to make the connection with his or her daily work. I want them to say “Hey, we were in that position last month!” And, lastly, if the case turns on the construction of a contract, I will quote the relevant provisions in full, so that the case note makes sense on its own, without the need to refer elsewhere.

*And do you comment on the cases?*

**David:** I am getting braver in that regard! Yes, I will now comment on the cases, particularly if they seem to be taking the law into new territory - such as the recent English Court of Appeal decision in the Happy Ranger case.

*Did I see some notes on SMA awards on the site?*

**David:** Yes, indeed you did. When I was in New York last October, the Board of the SMA agreed that I might summarise their awards and publish notes of them to the site. I am delighted with this arrangement and enjoy the flow of interesting decisions that comes to me down this channel. In return, I have created a special page on the website, dedicated to the SMA, with hyperlinks to your own website. I only wish I could do the same with the LMAA awards, but that nut is - for various good reasons - more difficult to crack!

*And what about the other firms with web pages on your site, where do they fit in?*

**David:** You mean the other ‘International Contributors’? Yes, there are several of them now, all from common law jurisdictions, such as Singapore, Australia and, of course, the USA, and there are more in the pipeline. The great thing about the Contributors is that they broaden the reach and

interest of the site, by bringing to it decisions from their own jurisdictions. They also help me a lot, as many of them prepare the first draft of the case note for me.

*I guess that saves you a lot of time.*

**David:** It certainly does.

*You offer a mailing list facility with the site - I know that, as I am on it!*

**David:** Yes, it’s a simple alert facility. Whenever I up-load a new case note to the site, I send an email to the mailing list for the section concerned. This will tell them a little about the case and give a hyperlink reference to the relevant page of the site. If the recipient is interested, (s)he can access the case note there and then - or later, of course. If the case is of no interest, you simply delete the message!

*And does it cost to join the mailing list? I don’t remember being asked to pay when I joined.*

**David:** You are right. Joining the mailing list is absolutely free. So is access to the site itself, of course.

*What sort of person joins the mailing lists?*

**David:** As you would expect, all sorts - shipping professionals, insurance people, lawyers, P&I Club claims handlers, Club correspondents, students, academics, seamen and pilots - even the US Navy!

*And how many people are on the list today?*

**David:** Currently about 350. I am delighted with that number and it is growing daily.

*And where is all this leading?*

**David:** A good question. I don’t know exactly. At the moment, I am very happy just to see the number of hits on the site growing week by week and I enjoy meeting (in the electronic sense!) the people joining

the mailing lists. I am building a very interesting network of contacts, and there have already been a number of spin-offs. And, at the end of the day, the website could be the foundation for a book or two, who knows!

*Well, David, our time is up. Thanks for talking to us, and keep up the good work!*

**David:** Don, my thanks to you for inviting me to contribute to The Arbitrator in this way. It has been a pleasure talking to you. I value very much my relationship with the SMA and with my many friends among its members. See you soon.

*David Martin-Clark is a Shipping & Insurance Consultant, Arbitrator and Mediator. His Case Notes website can be accessed at [www.onlinedmc.co.uk](http://www.onlinedmc.co.uk).*

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### WHAT IS A VESSEL?

*By Wade S Hooker Jr., Esq. And Terry L. Stoltz, Esq.*

Identifying whether a structure is a vessel is important because the jurisdiction of a court in admiralty may depend upon the answer. Over the centuries, the concept of a vessel has been flexible to accommodate new types of waterborne structures and a variety of factual circumstances.

In many cases, the decision whether to characterize a structure as a vessel was fairly obvious. Thus, with the advent of mechanization, steamboats and motor vessels were embraced within the concept of a vessel. Barges are also vessels even if unmanned.

In other cases, the conclusion is the same but less obvious. Mobile offshore drilling units (MODUs) are vessels despite their main purpose of drilling for oil. Even a submerged oil drilling barge sitting temporarily on the ocean floor has been characterized as a vessel. Despite their size, jetskis and surfboards are also termed vessels.

However, not all structures that float will be vessels. A floating drydock is not a vessel. Nor in one case was an unpowered wharfboat. A seaplane is generally not considered a vessel, but is charged with following navigation rules while on water and if sunk may be deemed a vessel for salvage purposes.

The difficulties in determining whether a floating structure is a vessel is illustrated by two court decisions issued. Sometimes, as implied by these decisions, a structure can be categorized as a vessel for certain purposes and not a vessel for other purposes.

In one, *Hyundai Heavy Industries Co. v. M/V SAIBOS FDS*, 163 F.Supp.2d 1307 (N.D. Ala. 2001), the court grappled with the issue of when a vessel under construction becomes a vessel. During construction, maritime liens cannot attach to the hull, and suppliers of components and services are limited to their rights under local law. After the vessel has been completed and launched, however, any labor or components furnished to the vessel will constitute repairs or renovations and will be entitled to a maritime lien against the vessel.

In *M/V SAIBOS FDS*, the plaintiffs were sub-contractors for the construction of a pipe-laying vessel, responsible for supplying pipe-laying equipment. The construction contract called for construction in South Korea, but was later amended to provide that only certain components of the pipe-laying equipment would be supplied in Korea with the remaining components delivered and the equipment installed in Mobile. After construction of the hull in Korea, it underwent sea trials and was christened, delivered and accepted by the owner, was granted a certificate of interim class by Det Norske Veritas subject to installation of the pipe-laying equipment, and sailed under its own power to Mobile.

Nevertheless, despite all these characteristics of a vessel, the court denied the maritime lien claims of the equipment suppliers, holding that for such purposes the hull had not become a vessel since the pipe-laying equipment was essential for its operation and thus the hull would not be completed until such equipment was delivered and installed.

In contrast to these maritime lien claims, the case of *Bunge Corp. v. Freeport Marine Repair, Inc.*, 240 F.3d 919 (11<sup>th</sup> Cir. 2001), involved whether a waterborne structure was a vessel for purposes of applying an evidentiary presumption in the context of a maritime tort claim.

In *Bunge Corp.* a hull was under construction, but had not been subject to sea trials and had not even been rigged for steering. It had, however, been moored in navigable waters and during a storm had broken free of its moorings and allided with a grain-loading conveyor facility. The owner of the grain facility then brought action for

the ensuing damages against the manufacturer and owner of the hull.

Under the rule of *The Louisiana*, 70 U.S. (3 Wall) 164 (1866), when a moving vessel strikes a stationary object, there is a presumption of fault on the moving vessel. So the question in *Bunge Corp.* was whether the hull under construction was a "vessel" within the meaning of *The Louisiana* rule.

The court in *Bunge Corp.* found that the hull was a vessel by applying the two-part locality and nexus test to determine that there was admiralty jurisdiction. The locality test was satisfied because the hull had broken loose during the storm and drifted down a navigable waterway before striking the grain facility. The nexus test was also satisfied because a hull with no steering capability adrift on a navigable waterway is a potential disruption to commercial activity and the mooring (however imperfect) of a nearly complete hull bears a substantial relation to traditional maritime activity. Having found the hull was a vessel, the Court applied *The Louisiana* rule, even though it recognized that the hull might not be considered a vessel "elsewhere in admiralty jurisprudence."

Thus, the courts provide a broad definition of a vessel for purposes of applying presumption rules in admiralty tort cases, while applying a narrow interpretation of when a hull under construction becomes a vessel for purposes of determining whether a party who had contracted to supply material or labor to the hull during its initial construction will have the benefit of a maritime lien on the hull.

*Messrs. Hooker and Stoltz are Partners in the New York Law Firm Burlingham Underwood LLP.*

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## US COURT RULES ON TITANIC Artifacts

A US court has decided that the salvor of the ill-fated White Star liner Titanic is not the owner of the wreck and related artifacts. According to the judgment the company RMS Titanic, Inc. only has salvage rights which do not include title to items recovered from the wreck. The ruling means the salvor cannot go ahead with its planned sale of artifacts. According to Dennis Bryant of US law firm Haight Gardner Holland & Knight the judgment was that the role of salvors was save the property for the owner, for which they become entitled to a reward from the owner or from the property.

*Story provided by Hong Kong Shipping News International*

## 39TH ANNUAL MEETING

At the 39<sup>th</sup> Annual Meeting of the SMA on May 8, 2002 the President announced the election of Henry E. Engelbrecht, Svend H. Hansen, Jr., Klaus C.J. Mordhorst and A.J. Siciliano as two year term Governors.

David W. Martowski and Donald J. Szostak continue as President and Vice President, respectively, serving the second year of their two-year terms. Austin L. Dooley and Soren Wolmar were appointed as SMA's Treasurer and Secretary, respectively.

SMA's Board of Governors for 2002/2003 is as follows (with their alternates in parentheses):

David W. Martowski (-)  
 Manfred W. Arnold\* (George Hearn)  
 Austin L. Dooley (Dean Tsagaris)  
 Henry Engelbrecht (Donald B. Frost)  
 Thomas F. Fox (Konstantinos Livanos)  
 Svend H. Hansen, JR. (Nigel Hawkins)  
 R. Stanley Kleppe (Gene Spitz)  
 Klaus C.J. Mordhorst (Jack Berg)  
 Katherine A. Pappas (David Letteney)  
 A.J. Siciliano (Robert Umbdenstock)  
 Donald J. Szostak (Paul Hedger)  
 Soren Wolmar\* (Jerry Georges)

\*By appointment of the President

The following Committee Chairs were appointed/reappointed:

Arbitrator - D.J. Szostak  
 Award Service - D. Letteney  
 By-Laws and Rules - K. Pappas  
 Education - M.W. Arnold  
 Liaison - A.J. Siciliano  
 Luncheon - R. Rosner  
 Membership - S. Kleppe  
 Professional Conduct - D. J. Szostak  
 Salvage - T. Fox  
 Public Relations - Svend Hansen  
 Ad-Hoc Digest - D.W. Martowski

## Ad-Hoc Liaison with BIMCO - S. Wolmar

Two additional Ad-Hoc committees have been established. Lucienne Bulow has been asked to spearhead an effort to revise the SMA publication "Maritime Arbitration in New York," the so-called "blue book." Ron Rosner will lead the search for alternative office space in New York City for the Society's administrative headquarters.

Tony Siciliano will continue to prepare the Headnotes for the Award Service and assist with the contents of the Arbitrator. Soren Wolmar will continue to provide the "In This Issue" section of the Award Service as well as the yearly Index.

**HUMOR****The Texas Three-Kick Rule**

A big-city California lawyer went duck hunting in rural Texas. He shot a bird, but it fell into a field on the other side of a fence. As the lawyer climbed over the fence, an elderly farmer drove up on his tractor and asked what he was doing. The litigator responded, "I shot a duck and it fell in this field, and now I'm going to retrieve it."

The old farmer replied. "This is my property, and you are not coming over here."

The indignant lawyer said, "I am one of the best trial attorneys in the U.S., and if you don't let me get that duck, I'll sue you and take everything you own."

The old farmer smiled and said, "Apparently, you don't know how we do things in Texas. We settle small disagreements like this with the Texas Three-Kick Rule."

The lawyer asked, "What is the Texas three-Kick Rule?"

The Farmer replied. "Well, first I kick you three times and then you kick me three times, and so on, back and forth, until someone gives up."

The attorney quickly thought about the proposed contest and decided that he could easily take the old codger. He agreed to abide by the local custom.

The old farmer slowly climbed down from the tractor and walked up to the city feller. His first kick planted the toe of his heavy work boot into the lawyer's groin and dropped him to his knees. His second kick nearly wiped the man's nose off his face. The barrister was flat on his belly when the farmer's third kick to a kidney nearly caused him to give up.

The lawyer summoned every bit of his will and managed to get to his feet and said, "Okay, you old coot now it's my turn."

The farmer smiled and said, "Naw, I give up. You can have the duck."

**QUOTE FOR THE QUARTER**

**Michael LeBoeuf:** "A university creative writing class was asked to write a concise essay containing the following elements: 1. Religion, 2. Royalty, 3. Sex, 4. Mystery. The prize-winning essay read: 'My God,' said the Queen, 'I'm pregnant. I wonder who did it?'"

**For THE ARBITRATOR**

Donald J. Szostak

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