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President's Message

By: Nigel J. Hawkins, SMA President

My last report to you in *The Arbitrator* came in March 2020, just before ICMA in Rio and the first lockdown. After the initial shock, the SMA Board of Governors and the membership gathered itself, assessed the challenges and, one by one, met them.

The in-person Annual General Meeting in May was postponed, provisionally, to September, but that eventually also proved impossible. The Board took the decision to proceed by e-mail with the "off-year" elections to fill the terms of four Governors whose two-year terms were expiring. The election was held in June. 47 members voted and elected Robert Meehan, David Martowski, David Gilmartin and Michael Northmore to two-year terms. As provided in the By-Laws, I appointed Dick Corwin and Daniel Schildt to one-year terms.

In the fall of 2019, the Board had asked the Marketing Committee to investigate and report on "rebranding" the SMA to give it a modern and uniform look across all its means of communication with others. After considerable study, the Marketing Committee made its recommendation. The question was eventually put to the membership. By a vote of 31-30, the membership voted in favor of proceeding with the rebranding recommended by the Marketing Committee. The Board accepted that result in August and voted unanimously to proceed, and we have done so.

Maritime Arbitration in New York – OnLine Zoom Program

Twelve CLE Hours through the MLA

Four Thursday sessions of 3 hours each (February 25, March 4, 11 and 18)
Details on page 12

I had back surgery in August and decided to focus on my recovery. The Board agreed that Vice-President Lambert would become Acting President and that Secretary Soren Wolmar would become acting Vice-President while continuing to act as Secretary.

By September, it was clear that an in-person Annual General Meeting was not feasible, and yet we had several corporate matters, other than the election, with which we were obliged to deal. With the assistance of Dan Schildt, Chair of our Technology Committee, and Patty Leahy, our tireless Office Manager, we held a virtual AGM meeting at which 42 members participated.

Patty also completed nine years with us in 2020. Thanks, Patty!

We added members with experiences and contacts in agencies, terminals, and finance, as well as insurance and mediation. We are making steady progress in all these areas. Every time you see a ship at a berth, there is an agreement between the terminal and the ship which allows it to be there. There is a contract between an agent and ship for that call. Our goal should be to have an SMA arbitration clause in every one of those contracts. Others have identified ship construction and repair contracts. Bunker suppliers are increasingly putting New York arbitration clauses in their general terms and conditions. We have met with brokers to emphasize the importance of including an SMA arbitration clause in the fixture. Fender benders and collisions occur in the US. The London solicitors have a form they use to bring to London disputes arising out of collisions which occur anywhere in the world. The SMA-MLA Liaison Committee is considering such a clause for New York.

Under the leadership of Molly McCafferty, our Luncheon Chair, we held three virtual “Bring Your Own Luncheons” in November, December, and January. We will continue this through March, at least. Thanks, too, to Dan Schildt, our Technology Committee Chair.

- In November, Rob Milana organized and moderated a panel discussion, “Mediation: The Good, the Bad, and the Ugly.” 68 participated, including several from other parts of the country and world.
- In December, Tom Joyce of Mitsubishi Financial Group provided a bracing 40-minute gallop through the many economic issues that the USA

and the world face in 2021 and beyond. 51 persons participated, again including several from other parts of the country and world.

- In January, Ross Gould, a Business Network for Offshore Wind vice-president, presented the latest from that industry. 54 persons participated.

There are many exciting projects underway involving hundreds of suppliers and contracts.

- On February 10, Todd D. Lochner and Eugene E. Samarin of the Lochner Law Firm in Annapolis will present on Yacht Sales - Perils & Pitfalls. Todd and Eugene have been working closely with Mike Fackler and Michael Northmore to increase our visibility with the Yacht Brokers Association of America. Some 15 members are now listed as mediators.
- On March 10, Andrea Jansz, General Counsel of Resolve Marine Group, will be our speaker. Topic to be determined.
- When Patty sends the announcement for an upcoming luncheon, be sure to register using the link on the announcement or register directly using the link on the website.
- Thank you to Molly, the organizers, and to all the presenters!

There is much reason for optimism, despite all the challenges we faced and continue to face. We welcomed seven new members: Dan Gianfalla, Muge Anber-Kontakis, Harold Aspis, Harold Boyer, John Dudley, Matt Gros, and Kevin Roach. Their bios are on the website. Please take time to contact them directly to discuss ways to help them spread the word to their contacts about the SMA.

Since the lockdown, panels have held numerous virtual hearings – evidentiary, organizational, and to hear argument. Last year we asked members to report appointments to Patty. We have also asked SMA members and members of the bar to report appointments. 246 appointments were reported in 2020. We issued 34 awards, up from 21 in 2019. Of those awards, two were confidential. While our rules provide for publication of awards, parties are free to stipulate that the award will be kept confidential, and parties are welcome to do so.

We have proved ourselves more than able to adjust to this new “virtual” reality. Our use of and increasing comfort with virtual hearings enables us to market ourselves more effectively and cost

efficiently: we do not need to travel, arrange logistics, or organize a function for a large group. Two persons can arrange a virtual meeting with a company. Newer members can partner with more experienced members to take our message to existing and new end-users.

Much of this simply would not have been possible without contributions from our Friends & Supporters. 2021 invoices are being sent out now. Thank you for your past support. We look forward to continuing to increase opportunities for you and SMA members in 2021 and beyond.

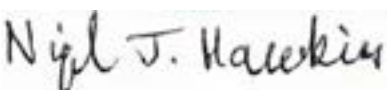
Long-time member Manfred Arnold has retired from the SMA. When we are able to do so we will have a suitable event to celebrate his remarkable career and thank him for his contributions to the SMA and maritime arbitration. Gerry Mannion also decided to retire, and we thank him for his support.

Unfortunately, I must also advise that four members passed away since March 2020. All of them contributed much to the SMA, for which we are grateful, and all will be missed:

- Peter W. Hartmann
<https://obits.lohud.com/obituaries/lohud/obituary.aspx?pid=196085447>
- Rajnikant Jadhav (see article later in this issue)
- Basil Santini
<https://www.legacy.com/us/obituaries/newsday/name/basil-santini-obituary?pid=195669617>
- C. Eugene Spitz
<https://obits.nj.com/obituaries/starledger/obituary.aspx?pid=196495457>

Nothing in this industry would happen without seafarers. Seafarers in 2020 endured unbelievable hardships. Many were literally trapped on ships for months and now even more than a year as I write this. In recognition of their sacrifices and those of their families, the SMA contributed \$2,000 to the Seamen's Church Institute to assist the SCI in tending to the needs of seafarers in New York and New Jersey.

Thank all you for your patience, support, and good will in 2020. Stay safe and all the best in 2021.



Nigel J. Hawkins
President

There are Consequences

by Robert C. Meehan, SMA Member and Partner, Eastport Maritime

Concluding a charter party is often a celebratory occasion. The owner employs his vessel, the charterer finds carriage to fulfill his sale and purchase obligations, and hopefully both make money. At the outset, the parties have reasonable expectations of performance. As an active tanker broker in the chemical (parcel) trade, it seems half our time is spent concluding the charter, with the remaining half spent mediating the challenges arising from it. One confounding issue concerns the consequences of any breach, and the extent to which the contract permits the injured party to be compensated for the resulting damages. Absent a specific charter party clause, are the parties responsible for indirect or consequential damages?

The landmark case dealing with consequential damages is *Hadley v Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854). In short, plaintiffs (Hadley) were millers, grinding grain into meal and flour. A crankshaft at Hadley's mill had broken and Hadley arranged to have a new one made. Hadley contracted with defendants (Baxendale) to transport the broken crankshaft, which would be used as a template for the manufacture of a new crankshaft, to an engineering company at Greenwich. Hadley was told that if the crankshaft was delivered to the carrier by noon, it would be delivered at Greenwich the next day. However, the carrier negligently delayed delivery of the crankshaft at Greenwich, and as a result delivery of the new crankshaft was also delayed. This resulted in the mill being idle and Hadley losing business. Hadley sued for lost profits resulting from Baxendale's late delivery. The jury found for Hadley, awarding damages. Baxendale appealed, contending that the damages awarded were too remote. The question addressed on the appeal was whether a defendant in a breach of contract case could be held liable for damages that the defendant was not aware would be incurred from such breach.

The Exchequer Court held that a non-breaching party is entitled to damages arising naturally from the breach itself or those that are in the reasonable contemplation of the parties at the time of contracting. Although Baxendale's breach was the actual cause of Hadley's lost profits, it could

not be said that under ordinary circumstances such loss arose naturally from this type of breach. Further, Baxendale had no way of knowing that its breach would cause a longer shutdown of the mill, resulting in Hadley's lost profits, since Hadley had never communicated these special circumstances to Baxendale. Nor would these circumstances have been reasonably contemplated by Baxendale.

According to *Hadley v. Baxendale*, damages flowing from a contract breach fall into two categories or "limbs". The first limb involves direct losses – damages that arise as a direct and natural result of the breach, and in the "ordinary course" of events. A breaching party is liable for losses if they were reasonably foreseeable. The second limb, referred to as indirect or consequential losses or damages, are those which arise as a result of a special circumstance. A breaching party is liable for such losses if they were in the contemplation of the parties at time of entering into the contract, or in shipping terms, at fixing. Examples of direct damages are demurrage and dead freight, whereas indirect damages could be losses stemming from decreased plant production due to delayed feedstock delivery, or losses stemming from having to accept a lower (or pay a higher) product price due to late delivery. Liability for these types of indirect or consequential damages is often disputed, and frequently resolved through arbitration.

It seems obvious that the remedy for avoiding contractual misunderstandings is proper communication of the parties' requirements at the beginning of the negotiation. The negotiation process is all about managing risk, where one party may begrudgingly accept, delete, or amend a charterparty provision hoping it will not apply. Generally, the parties' negotiations address liability by clauses that exclude or limit responsibility in whole or in part (for example, berth occupancy, weather delays, pumping delays and force majeure clauses). However, it is impossible to identify every potential eventuality and circumstance that may result in one or both parties incurring loss or damage. Indirect, or consequential damages stemming from a breach are usually not communicated at fixing because the parties have reasonable expectations of performance, not breach. It is not until the adventure begins that one party may decide to deviate from its contractual obligation or extend the contract's implied meaning. It would therefore follow that generally the consequences of many

breaches are neither foreseen nor contemplated by the parties at the time the contract is concluded.

One common type of breach, as relevant today as in *Hadley v. Baxendale*, involves delays. While delays are an inherent risk of the shipping business assumed by both parties at the onset, they are usually easily avoided if each party adheres to its part of the bargain. However, sometimes delays are the result of a deliberate act by one of the parties reacting to changes in the voyage or market since concluding the contract. Delaying arrival due to re-rotating a vessel beyond what is permitted in the agreement or failing to load or discharge the vessel in a timely manner owing to financial considerations are occurrences that typically result in consequential damages. What happens when one party deviates from its obligation, or extends its implied meaning?

In *The Berge Bragd*, SMA 3478 (1998), the vessel was fixed to carry crude oil from 1-2 ports in the ME Gulf to various discharge options in the western hemisphere. The charterer claimed against the owner for lost profits due to late delivery of the cargo. The parties relied on two material provisions: a 'speed-up clause,' where charterer agreed to pay additional freight for the vessel to transit at a higher speed; and a bunker clause, allowing the vessel to deviate to obtain fuel at any port, in or out of the regular course of the voyage. Loading was uneventful. Upon completion, the charterer exercised its speed-up option. The vessel then proceeded to bunker to capacity for the voyage and head toward the US Gulf for orders, presenting ETA US Gulf of February 23, at 2200 hours. At this time, half of the cargo was to deliver against a contractual obligation in the US Gulf, and the balance was unsold. Nine days prior to the vessel's estimated arrival in the US Gulf, the charterer sold the remaining cargo for discharge at Curacao, although the sale was subject to the buyer's reconfirmation. About one week prior to the vessel's arrival at Galveston, the owner notified the charterer of its concern about the lack of clear discharge instructions as well as bunker availability in the US Gulf, suggesting that the vessel bunker off Aruba inbound. The following day, February 18, the owner again notified the charterer about its concern of running out of bunker fuel, insisting that the charterer respond by return with the discharge program, whereupon the charterer responded, "*Confirming telcon*,

Charterers advise Owner/Master/vessel must not repeat not delay the vessel's present ETA offshore Galveston of 2300 23rd February by bunkering at Aruba inwards. Charterer will do utmost to facilitate Owner's request to discharge vessel within Owners required timeframe." Early on February 19, as the vessel was approaching Aruba, and with continued uncertainty about her discharge program, the owner diverted the vessel to Aruba for bunkers, informing the charterer accordingly. The vessel completed bunkering and sailed for Galveston the same day, giving ETA Galveston of 0600 February 24. Coincidentally, the charterer's buyer confirmed its purchase for the balance of the cargo on the same day, February 19. The vessel arrived at Galveston at 0400 February 24, discharged the cargo, then proceeded to Curacao to discharge the remaining cargo.

The charterer claimed against the owner for lost profits due to late delivery of the cargo resulting from the owner's deviation to Aruba for bunkers. The owner requested a summary dismissal of the claim on the ground that the charterer's damages were consequential and therefore unrecoverable even if proven, and that the claim should be dismissed as a matter of law. The charterer alleged that it needed to get the oil to the US Gulf by February 23, maintaining that owner was so informed because the charterer had exercised its speed-up option. The owner objected to any inference that the exercise of the speed-up clause equated to requisite notice to the owner of the consequences of a late arrival, stating that irrespective of whether it breached the charter, the damages claimed were unforeseeable at the time the vessel was fixed.¹ The panel granted the owner's motion to dismiss the charterer's claim, rejecting the premise that the owner could be liable for lost profits from a third-party contract unknown to either party at the time of the vessel's fixture. *"The panel is unwilling to accept such a form of 'blanket' foreseeability by which owner would be held liable for lost profits under an as yet unborn third-party contract."*

The *Aralda*, SMA 1883 (1983) dealt with a similar issue, but with a different outcome. The *Aralda* was fixed to load a full cargo of crude oil from Venezuela to the US Gulf, intention Corpus Christi, against a laycan of 28/31 December. When fixed, the vessel was described as "trading" with an ETA load of December 28. While en route to load, the vessel diverted to Aruba to change ownership and

name, after which the vessel proceeded to Venezuela where it arrived on December 31. The late arrival resulted in completion of loading on January 1, 1980, when higher posted product prices were initiated for the new year. The freight rate also increased as of January 1. The charterer claimed damages resulting from the higher product cost, and ocean freight. The owner declined liability on the basis that the damages were consequential in nature, and not within the parties' contemplation at fixing. The panel placed weight on the ETA load at fixing, and although the vessel arrived within laycan, ruled that the owner had breached the charter by failing to proceed with utmost dispatch. Additionally, as the disponent owner of the *Aralda* was a major oil Company, the panel held that the owner knew, or should have known, that the later arrival would result in a higher price paid for the crude, as well as a higher freight market.

Another example of late arrival, although in this instance with the owner as claimant, is *The Seadancer*, SMA 4131 (2011). In this case, the owner argued that the charterer wrongfully detained the vessel at discharge by using the vessel as floating storage in breach of charter party terms. The result of this breach was the vessel missing its canceling date on her lucrative subsequent voyage.

The *Seadancer* was fixed for loading crude and/or fuel oil from the Baltic for various discharge options in Europe or US East Coast, US Gulf of Caribbean. The loading was uneventful. Shortly after sailing, the owner began to market the vessel as open in the US Gulf on December 23. The owner received the charterer's voyage orders to lighter offshore at Corpus Christi, after which it was to proceed to a berth to discharge the balance of the cargo. Two days after receiving the charterer's voyage orders, the owner confirmed the vessel's subsequent charter at a significantly higher rate. The vessel arrived at Corpus on December 22, and commenced lightering the following day, completing on December 24. The charterer maintained there was no place for the balance of the cargo ashore, and the vessel remained at anchor for 11 days before final discharge was completed on January 7. During this waiting period, the owner notified the charterer that the delay could affect the vessel's next employment, holding the charterer responsible for detention and lost earnings if the vessel's next employment was canceled.

The owner contended that it was misled about the vessel's availability after discharge and that owner relied on this misinformation to fix its next voyage. Moreover, the owner contended that the charterer deliberately parked the vessel following the initial lightering, considering her as inexpensive storage despite its knowledge that the floating storage rider clause had been deleted during the negotiations. The charterer contended that the owner began marketing the vessel almost immediately after departing the load port, that the voyage orders were not final and that the owner could not have relied on them. The charterer maintained that the owner's sole remedy was for demurrage and detention, which the charterer paid. The owner argued that U.S. law allows for the recovery of lost profits in the circumstances of a breach causing delay and that sophisticated parties cannot hide behind the *Hadley v. Baxendale* foreseeability rationale to avoid the consequences of a breach resulting in a delay to a vessel. The charterer disagreed, relying on the *Hadley* decision as well as the recent House of Lords' decision in *Transfield Shipping Inc. v. Mercator Shipping Inc.* [2008] UKHL 48 ("*The Achilles*")², which stated in relevant part "A charterer cannot reasonably be held to have accepted the risk of a future follow-on fixture not in existence at the time the parties entered into their contract. Such a risk would be unknowable and unquantifiable."

The panel unanimously opined that the charterer deliberately delayed the *Seadancer* discharge to take advantage of product pricing, and then directed its attention to whether the charterer was responsible for the owner's lost revenue resulting from the canceled subsequent employment, or whether payment of demurrage and detention adequately compensated the owner for its damages. The majority ruled in favor of the charterer, stating that *Hadley v. Baxendale* remains the guiding light under both English and US law in determining what damages may be recovered in the case of a breach of charter. The majority stated that only those damages within the contemplation of the parties or foreseeable at the time the charter was entered into may be recovered; and held that the charterer could not have foreseen at the time the charter was concluded on November 21 that the owner would have fixed the vessel on a follow-up charter one week before its arrival at the discharge port and before a firm discharge schedule had been prepared.

The dissenting opinion concluded that the owner's lost profits arose naturally from the charterer's intentional breach of the charter party provision disallowing use of the vessel as floating storage, thus satisfying the first limb of the *Hadley* foreseeability test, and stated: "*I submit that it cannot be correct to excuse a wrongdoer's intentional breach of a contractually barred activity solely because the wrongdoer ignored, misjudged, or did not entirely recognize the extent of damages its purposeful misdeed would cause.*" *The Seadancer, supra.*

Although there are numerous decisions addressing consequential damages, differences remain in the interpretation of losses which arise naturally from a breach. Moreover, it deserves mention that every dispute involves different charter party terms and events, whether they be intentional or beyond the parties' control. One thing is arguably clear: vessel delays are a normal occurrence; and that for a vessel not to encounter delays is the exception, not the rule. The common thread running through the cases discussed above is debate as to whether there was an actual breach, and whether the damages flowed as a direct consequence of the breach. Many regard reliance on the foreseeability limb of *Hadley v. Baxendale* as flawed. When concluding a contract, most parties contemplate performance, not breach. Perhaps a better approach would be to analyze the parties' awareness of consequential damages at the time of breach rather than at the time of fixing.

- 1 There seems to have been no discussion regarding the owner having the right to bunker the vessel at any time during the voyage, which would seem to contradict the owner having breached the charter party.
- 2 *The Achilles* involved a timecharterer's late redelivery to the headowner, resulting in the vessel's late delivery for her subsequent timecharter. To maintain the subsequent charter, the owner had to renegotiate a lower hire rate to reflect changes in the market since the original fixture. The owner claimed for the difference in hire over the entire new timecharter period. The House of Lords overruled the arbitral and lower court decisions, awarding only the difference in hire rate for the period of the late delivery.

Luncheon Reminders

February 10 Todd D. Lochner and Eugene E. Samarin of the Lochner Law Firm in Annapolis: Yacht Sales - Perils & Pitfalls

March 10 Andrea Jansz, General Counsel of Resolve Marine Group: Topic to be determined

Register using the link on the SMA emailed announcement or directly register using the link on smany.org

Arbitration and Mediation Opportunities in the Commercial Marine Insurance Industry

by *Richard J Decker, SMA Member and Chair of the SMA Insurance Committee*

Having spent over 40 years in the marine insurance industry and having been a member of the SMA for 5+ years, I believe the global marine insurance business has an opportunity through alternative dispute resolution to improve the product and services it offers to clients and at the same time to become more competitive.

Important is to view the marine insurance business in the context of the broader maritime world which marine insurers not only serve but in which marine insurers themselves work. Marine insurance clients and business partners are a vast array of different businesses. They include international vessel owners, port and terminal operators, ship builders and repairers, importers and exporters (which include all the goods that move in trade in the global economy), charterers, charter brokers, tug and barge operators, fishing fleets, merchant seaman, Protection and Indemnity clubs, yacht owners, marinas, salvors, offshore energy companies, admiralty attorneys, marine insurance brokers, and the list could go on.

Many of these businesses have a tradition and history of alternative dispute resolution. For example, arbitration clauses are the rule, not the exception, in charter party agreements, salvage contracts and many other commercial maritime agreements. For commercial market marine insurers, however, providing for alternative dispute resolution in their contracts is the exception and not the rule, and few commercial market marine insurers have directly engaged in the alternative dispute resolution process. We at the SMA have been working hard to engage marine insurers in a dialogue to raise awareness of the arbitration and mediation process, solicit feedback to help tailor the processes to encourage the use of ADR and offer the support needed whenever and wherever asked.

While there are many advantages to arbitration to settle disputes between parties to a contract, they can be summarized under three distinct headings. (i) Arbitration will render a decision in far less time than typical litigation, (ii) arbitration will be more cost effective than litigation, and (iii) disputes in arbitration will be judged by experts in the field.

Let me expand on each of these:

Timeliness:

- Unlike litigation where the courts set the schedule, in an arbitration procedure under SMA rules the parties and arbitrators set the schedule. When a dispute arises a claimant will initiate arbitration proceedings by writing to the other party and appointing an arbitrator. The responding party usually has 20 days to respond and appoint a second arbitrator. The two appointed arbitrators choose a third panel member, and the panel will then set the schedule.
- The rules of evidence are more flexible in an arbitration procedure. Section 23 of the SMA arbitration rules states, in part:

The parties may offer such evidence as they desire and shall produce such additional evidence as the panel may deem necessary to an understanding and determination of the dispute. The Arbitrator(s) may subpoena witnesses and/or documents (including those in electronic form) at their own initiative or at the request of a party. The panel shall be the judge of the relevancy and materiality of the evidence offered.

This allows for a faster, more comprehensive and less costly presentation of the evidence.
- When an arbitration hearing is closed the panel has a collective duty to issue their award within 120 days.
- Arbitration awards are final. They cannot be appealed or vacated (except on very limited grounds) so no further time or cost will be incurred by the parties.

Cost effective:

- Although arbitrators are paid, the scheduling parameters and control by the arbitrators noted above obviously save not only time but money. When insurance companies are presented with

a claim they have an obligation to reserve the loss on their books and include it as part of their statutory results. These reserves will stay on the books until the claim is resolved and then adjusted for the actual payment. In litigation that can take years (versus months in arbitration). So, in arbitration the time is much shorter. Additionally, that a reserved loss appears on the insured's loss record as an outstanding claim, until resolved, introduces undesirable uncertainty for both the insurer and the insured.

- Insurance companies are always looking to reduce costs and become more competitive. Over the years many companies have reduced their claim staff and put an emphasis on closing claims as quickly as possible. Many have made the judgement that small claims are not worth the time or money to investigate and are simply paid with minimal information. SMA rules contain a "Shortened Arbitration Procedure" with the dispute decided by a sole arbitrator rather than a panel. The process is on documents alone and without a formal hearing. We believe insurers have disputes that could be more effectively handled as shortened arbitrations rather than simply being paid off quickly.
- Arbitrators also have the authority to award additional costs, as they deem appropriate, to fairly adjudicate the dispute. These can include attorney fees or interest.
- And, as noted above, arbitration awards are final and cannot be appealed or vacated (except on very limited grounds) so no further time or cost will be incurred by the parties.

Expertise:

- First and foremost, the arbitrators are chosen by the parties in dispute. In the most common situation (a three person panel arbitration) each party chooses one arbitrator and those two select and agree on the third arbitrator who acts as chair of the panel. Over the last several years the SMA has attracted and trained members with specific expertise in the marine insurance business. The SMA has a dedicated insurance committee, which I have the honor to chair, to focus the SMA on bringing the benefits of ADR to the commercial marine insurance business. I would encourage you to visit the SMA website, www.smany.org, to review the entire member-

ship's skills and in particular the members of the insurance committee to validate my point.

As we are all challenged in 2020 with restrictions resulting from the Covid - 19 pandemic, important to note is that the SMA membership is available, authorized, and equipped to hold "virtual" hearings. This capability further reinforces the SMA's ability to provide timely and cost-effective services in dispute resolution.

Although arbitration has not been used on a regular basis in the marine insurance business to settle disputes, there has been a noticeable increase in the use of mediation in maritime disputes heard by courts. My former colleagues in the business attribute this increase to the increasing backlogs in the court system. As parties in dispute file lawsuits to adjudicate their differences, the courts are suggesting, and in some instances requiring, the parties to mediate their dispute already in litigation. We at SMA recognized this trend and for the last few years have been preparing to become leaders for maritime mediation services as well as arbitration. I encourage you to visit the SMA web site to review the SMA's dedicated section on mediation. Many SMA members have mediation experience and many have been formally trained to conduct mediations. The individual biography of each member on the web site will indicate if they have been so trained.

Having a maritime mediation conducted using SMA members brings the same benefits of timeliness, cost and expertise we outlined above for the arbitration process.

Over the last few years, under the chairmanship of Michael Northmore, the insurance committee has spent countless hours talking to underwriting management, claim management, recovery management, insurance brokers, reinsurers, admiralty attorneys and insureds to understand why the commercial marine insurance market does not employ arbitration in contract disputes on a regular basis. There was so little negative reaction that we concluded that a lack of familiarity with or tradition of arbitration in the commercial marine insurance business is the main issue. Still, specific concerns were expressed which included:

- Limited grounds to appeal decisions.
- Brokers viewing the resolution of disputes as one of their primary functions.

In response, the SMA has drafted a model clause to be added to marine insurance contracts which makes the arbitration a *voluntary* option rather than a mandatory requirement. Its voluntary nature allows the parties to fashion, or tailor, the arbitration procedure/scope to their liking, and this directly responds to the specific concerns identified (above). The clause:

Alternative Dispute Resolution – Mediation / Arbitration Clause:

The parties to this insurance contract may agree to seek an amicable settlement of any dispute arising under this contract by mediation under the Mediation Rules of the Society of Marine Arbitrators, Inc. (SMA) of New York (www.smany.org) then in force.

If the parties do not agree to mediate or if a mediation does not result in a settlement, then the parties may agree to refer the dispute to arbitration before three commercial arbitrators under the Arbitration Rules of the SMA then in force (“SMA Arbitration Rules”), one to be appointed by each of the parties and the third by the two so chosen, and their decision or that of any two of them shall be final and binding. Alternatively, the parties may refer the dispute to one commercial arbitrator under the SMA rules for Shortened Arbitration Procedure then in force (“SMA Shortened Rules”) whose decision shall be final and binding.

The United States District Court for the Southern District of New York may enter a judgment upon any such award made pursuant to the SMA Rules or the SMA Shortened Rules. The governing law provision in the policy shall apply irrespective of the dispute resolution alternative applicable / chosen above.

We believe the arbitration process for dispute resolution is beneficial to all parties. Having the wording in the contract will alert the disputing parties to the option of arbitration or mediation. Over time, the success or failure of the process and its continuing application in the marine insurance business will depend on the experience of all parties.

Important to note is that the marine insurance business already is involved in arbitration to solve disputes in several areas. Some examples follow.

Cargo underwriters who insure cargo moving under charter parties and pay their insured for a cargo loss are subrogated to the cargo’s claim against vessel owners (provided the circumstances of the loss warrant making a claim); having assumed the rights of cargo against the vessel owner and because charter party agreements include mandatory arbitration provisions, the cargo underwriters then make their subrogated claim in arbitration. Also, becoming more common is for yacht policies to include mandatory arbitration. Several underwriters have already included the clauses, others are considering it, and the admiralty law community is encouraging it. Finally, most salvage contracts include mandatory arbitration clauses. If underwriters incur salvage claims and a dispute occurs then they will be required to employ arbitration.

The SMA believes real opportunity exists for the Marine Insurance community to improve both their products and their services through mediation and arbitration. We would welcome the opportunity to hear feedback from those in the marine insurance and maritime law communities to help the SMA further refine its offering to the commercial marine market. We encourage you to visit the SMA web site at www.smany.org to help you further understand our mission and membership.

Notes of Decisions from Across the Pond¹

by Anestis Dimitriadis, Claims Executive, The Standard Club, Piraeus; and Christina Adamopoulou, Claims Assistant, The Standard Club, London

1. **Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38**

The Supreme Court handed down judgment in *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38, unanimously confirming the Court of Appeal’s decision to grant injunctive relief restraining proceedings in Russia in apparent breach of the parties’ agreement to arbitrate their disputes in London.

The primary issue was the law applicable to an arbitration agreement absent an express choice.

At first instance, the High Court concluded that there was no need to determine the law applicable to the arbitration agreement, refusing to issue the anti-suit injunction sought by the claimant, Enka, on the basis of *forum non conveniens* ([2019] EWHC 3568 (Comm)).

The Court of Appeal reversed that decision, issuing the injunction on the basis of the arbitration “seat” or “place” approach. It considered that the parties’ choice of an English seat meant that they had impliedly chosen English law as the law that governed the arbitration agreement. This, the Court of Appeal determined, might even be the outcome based on a proper construction of the contract as a whole, where the parties had included an express choice of law provision in their agreement.

Chubb appealed to the Supreme Court, arguing that the parties had chosen Russian law to govern their contract and, consequently, the arbitration agreement; and that, as a result, the Russian courts should decide whether the Russian proceedings which Enka sought to restrain were in breach of the arbitration agreement.

The Supreme Court disagreed and, on majority, adopted the “seat” approach. The court concluded that the choice of seat represented the choice of a system of law by the parties that they considered to be most closely connected with the arbitration agreement, which was agreed to be seated in London. The court considered that this approach is also in line with international law and legislative policy and cited specifically Article V(1)(a) of the New York Convention, which refers amongst other things to proof that an arbitration agreement is not valid “under the law of the country where the award was made” as a ground to refuse recognition or enforcement of an arbitral award.

Adopting the “seat” approach was considered as providing legal certainty. A general rule of English law as to the law governing arbitration agreements was important as it would “enable the parties to predict easily and with little room for argument which law the court will apply by default.”

The minority of the Supreme Court came to the same conclusion, but following a different approach, the “main contract” approach. While there was no express provision in the contract referring to the governing law, Lord Burrows and Lord Sales representing the minority, vocally expressed the

view that the implied choice of law of the main contract should not be overlooked in favour of the choice of a place of arbitration. An analogy was made with an exclusive jurisdiction clause: “It would be surprising if, at least normally, the proper law of the jurisdiction clause is anything other than the same as the proper law of the main contract.” The same, said the minority, should apply to arbitration agreements.

Editors’ Note: *Under US law and practice, the result would likely be the same where the parties choose New York arbitration but do not expressly choose a particular law. E.g., The Oak Pearl, SMA 2338 (1986) (Mordhorst, Berg, Nelson) (“The presence of a New York arbitration clause in a charter party unquestionably permits the arbitrators to apply New York law, in the absence of express provisions to the contrary.”).*

2. Nautica Marine Limited -v- Trafigura Trading LLC [2020] EWHC 1986 (Comm)

The court considered whether a contract is formed when it is “subject to a supplier’s approval.”

The claimant owner, Nautica, of the vessel *Leonidas* and the defendant, Trafigura, had between 8 and 13 January 2016 conducted negotiations for a voyage charter for the purpose of the carriage of crude oil from the Caribbean to the Far East. These negotiations were initially subject to charterers’ “Stem/Suppliers’/Receivers’/Management Approval,” all of which were subsequently lifted, except for the “Suppliers’ Approval Subject.” The dispute concerned whether the charterparty had been concluded as a result of those negotiations. Important is to note that Trafigura offered, and Nautica agreed, to lift all of the subjects with the exception of the suppliers’ approval subject, in return for a reduction of the demurrage rate and an extension of the deadline for lifting that ‘subject’ to 17:00 HT that day. Owners argued that this agreement led to the conclusion of the contract and that the Suppliers’ Approval Subject was a typical approval, which depended on a third party and which the charterers should have taken reasonable steps to obtain.

The central issue was whether the Suppliers’ Approval Subject was (1) a “pre-condition” to contract (which had the effect of preventing a contract coming into existence altogether), or (2) a “performance condition” (a condition which does not prevent a binding contract coming into existence,

but which if not satisfied means that performance does not have to be rendered)?

The judge held that the Suppliers' Approval Subject was a pre-condition to a contract, and the defendant charterers were not required to take reasonable steps to obtain its suppliers' approval. No binding contract was concluded, and the owners were not entitled to damages. In reaching this decision the judge relied on the following points:

1. A 'subject' was more likely to be classified as a pre-condition rather than a performance condition if the fulfilment of the subject involved the exercise of a personal or commercial judgment by one of the putative contracting parties. In the particular case, fulfilling the Suppliers' Approval Subject involved commercial choices as to who the relevant suppliers would be, and which terminals, and berths/tanks within terminals, from which cargo would be loaded.
2. Where a 'subject' was only resolved by one or both of the parties removing or lifting the subject, rather than occurring automatically on the occurrence of some external event such as the granting of a permission or licence, the 'subject' was likely to be a pre-condition rather than a performance condition.
3. The placement of the Suppliers' Approval Subject between pre-conditions (stem, receivers', and management approvals) suggested that it was also a pre-condition. Based on previous authority, stem and management approval subjects were held to be pre-conditions.
4. There was considerable uncertainty as to the exact meaning of the term which made it less likely that the subject was intended to create a contractual obligation of some kind.
5. It should not lightly be inferred that a pre-condition had been converted into a performance condition through subsequent negotiations.
6. No contract had been concluded and on the proper construction of the Suppliers' Approval Subject, there was no realistic chance of approval being forthcoming by

17.00 Houston time on 13 January 2016, even if the defendant had taken reasonable steps to obtain that approval.

Had the Suppliers' Approval Subject been a performance condition, the judge considered that Trafigura would have been under an implied obligation to take reasonable steps to obtain that approval and had failed to do so. The judge addressed, obiter, the assessment of damages in the context of a performance condition.

Editors' Note: *One US court reached the same result on similar facts, Phoenix Bulk Carriers v. Oldendorff Carriers GmbH & Co., 2002 U.S. Dist. LEXIS 21421, 2003 AMC 51 (S.D.N.Y. 2002) (because supplier never provided its approval by the extended deadline "the 'subject' was never lifted and therefore parties never formed a binding contract.")*

- 1 The editors have added a US law note after the summary of the two cases in the hope that the summaries and the US law notes will create discussion in our readership and perhaps even a longer article on either topic.

Rajnikant Daulatrao Jadhav

January 26, 1949 - September 4, 2020

President Hawkins noted in his report that SMA member, and co-editor of *The Arbitrator*, Captain Rajnikant (Raj) Jadhav passed away. Raj died on September 4th after a brief and brave battle with a rare cancer.

Born in India, Raj received a First Class Certificate/Diploma from Indian Mercantile Marine Training Ship "Dufferin" at the age of nineteen and then went to sea, sailing on tankers, bulk carriers, passenger ships and multipurpose vessels for over fifteen years with three years in command holding a Master Mariner (F.G.) Certificate /Unlimited License from the U.K. Board of Trade which he earned after receiving a B.S. degree from the Hull Nautical College/Humberside University, Yorkshire, England. Raj then, in succession, earned an M.Sc. degree from the State University of New York Maritime College, and, in 1989, a J.D. from Fordham University School of Law. He practiced maritime law with the firm of Chalos, English & Brown.

In 2000, Raj began a career as a ship broker and became an SMA member in 2015. Raj enjoyed and devoted time and effort working on behalf of the SMA as an SMA Board member, co-editor of *The Arbitrator*, and chair of the committee which organized a successful SMA conference in Houston in 2019. Raj was a professor (adjunct) at the U.S. Merchant Marine Academy at Kings Point, NY, where he taught in the Marine Transportation Department.

Raj will be remembered as a highly respected trailblazer and as a warm and generous colleague and friend. He will be missed.

New Co-Editor

With this issue Sandra Gluck joins us as co-editor. Welcome aboard, Sandra!

Thanks!

Thanks to those who responded to our ongoing call for articles of interest—and (as always) to Tony Siciliano in particular. *The Arbitrator* has a long history of providing timely and relevant articles and information to the maritime arbitration community in New York and around the world. We need your continued support! If you have articles and ideas to contribute to future editions, please let us know. Also, we welcome your feedback. Please do not hesitate to contact us, leroylambert72@gmail.com or dick.corwin@icloud.com or sandra.gluck@gmail.com. Thank you!

Maritime Arbitration in New York: Zoom Program of Twelve CLE Hours (via Maritime Law Association)

This seminar furthers and promotes the fair, just, ethical and cost-effective resolution of charter party and other maritime contract disputes by arbitration in New York. The interactive video sessions (with Professor Weiss and the SMA Education Committee) begin Thursday, February 25, 2021, and continue on successive Thursdays, March 4, 11 and 18.

Jeffrey Weiss, Esq., is a Professor of Maritime Law at New York Maritime College, with over 30 years of college and graduate-level teaching experience, and will again be the lead instructor.

This course is valuable to business professionals who use the arbitration process and who deal with issues arising under their company's contracts and charter parties. Attendees from shipowners, charterers, vessel operators, maritime claims adjusters, salvors, ship brokers, oil and chemical companies, insurers, traders and export/import companies will gain an understanding of current practices in New York maritime arbitration. The course is uniquely beneficial to newly admitted maritime attorneys or lawyers with fewer than two years of practice experience or those seeking a more comprehensive understanding of the process.

Cost: US\$1,175.00 **Note:** Responses and payment **due by 2/12/21** to Patricia Leahy, SMA Office Manager (pleahy@smmany.org)

Send Payment to: Society of Maritime Arbitrators, Inc., 157 New Hyde Park Road, Franklin Square, NY 11010
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