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"NEW YORK MARITIME ARBIRATION"

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With its air of faraway places, the maritime industry can sometimes seem romantic. But while the exploits of Captain Hornblower may still set the pulse racing, modern times have evolved a more workable, if less spectacular, method for resolving maritime disagreements. Maritime arbitration has long since proven its worth as an alternative to litigation for the hearing of disputes.

Certainly the judicial climate for arbitration has never been more favorable than it is today. The Supreme Court recently indicated that an agreement to arbitrate should be accorded the same deference as any other type of forum selection clause. 1/ Moreover, the courts have made it apparent that they will not interfere with the arbitral process, barring extraordinary elements such as fraud, duress, or partiality on the part of the arbitrator.

Shipping, like any other specialized industry, is especially appropriate for the use of arbitration. Experience in the many facets of the trade is often required merely to understand a maritime dispute, much less render a decision on its merits. The experience of seasoned arbitrators will often lead a Panel to

practical points which had not occurred to either of the respective counsel in their arguments. Since the trade is so specialized, either side to a controversy gains a distinct benefit in being able to present his case to an experienced arbitrator who does not have to be given a basic education in the prevailing customs and practices of the trade, or in its jargon.

The Society of Maritime Arbitrators was formed in 1963 in order to provide a procedural framework within which maritime arbitrations could be conducted before panels of experienced men. 2/ Arbitrators who are members of the Society have diverse backgrounds in such fields as surveying, engineering, finance, brokerage, stevedoring, construction, repairs, sales, insurance, terminal and vessel operations, and ship ownership and chartering.

The Society was conceived as a professional organization of commercial arbitrators for the purpose of lending a more organized approach to the maritime arbitration process in New York. The establishment of Society of Maritime Arbitrators' Rules was and still is an attempt to structure a procedural framework. The Society of Maritime Arbitrators is active in the dis-

semination of arbitral news and events and promotion of workshops and seminars, together with monthly lunches with a guest speaker on a current subject of interest. Another of its major goals has been the establishment of a close professional relationship with the London Maritime Arbitrators Association and the Arbitration Committee of the Maritime Law Association. The Society recently hosted a convention for the Congress of International Maritime Arbitrators. There is a close working relationship that exists between the commercial arbitrators and The Bar, all of which facilitates the smooth working of the process.

As part of its function, the Society of Maritime Arbitrators issued a set of Rules, last revised July 1, 1983, which would govern the conduct of its proceedings. The Rules begin with an incorporation of the provisions of the Federal Arbitration Act. 3/ Federal law governs these arbitrations exclusively, not only because the Rules contain such a statement, but also because the Federal Courts have exclusive jurisdiction of admiralty matters in any event. 4/ The ability to invoke the power of the Federal Courts invests the arbitration process with an added degree of credibility. Any lack of seriousness loses its appeal when you stop and consider that somewhere down the road might lie a Federal judge who does not share your sense of humor.

The obligation to arbitrate is purely a creature of contract. 5/ More often than not, charter parties (which are contracts for the hire of a vessel, usually on either a voyage or a time basis) contain a clause in which the respective parties agree to arbitrate any disputes arising under the charter. The specific terms of the arbitration clause may, and often do, vary as to the site of the arbitration, the number of arbitrators, and the method in which they are to be chosen. Normally, however, the arbitration clause calls for arbitration in New York, before a Panel of three commercial men, one chose by those first two. 6/ On such points, the specific language of the clause will be controlling. Some arbitration clauses have even been known to provide that admiralty attorneys be nominated as arbitrators, and there is an increasing tendency to use attorneys if the arbitration clause does not specify commercial men.

It should be noted that while most maritime arbitrations involve charter parties, other disputes involve ship sales agreements, shipbuilidng contracts and the administration of liner conference agreements are also arbitrated.

In some instances, the scope of the obligation to arbitrate can expand to encompass parties who were

not even signatories to the governing charter party. For example, where an ocean bill of lading is made subject to the terms of a charter party containing an arbitration clause is broadly phrased, the eventual holder of that bill of lading, as well as the owner and charterer, may be bound to arbitrate disputes arising from the ocean carriage. 7/

Any party can set the procedural wheels in motion by serving the other party with a demand for arbitration in writing. 8/ Such a demand may be by letter, telegraph and/or telex, and usually informs the recipient not only of an intention to arbitrate, but also of the identity of the arbitrator named by the demanding party. Parties may contract to whatever method of appointment they wish, but if no such provision is made, selection may be made from a list of sitting arbitrators, which may be obtained from the Society of Maritime Arbitrators. 9/

When a party is served with a demand for arbitration he has three available options: appoint an arbitrator, do nothing, or seek a stay of the arbitrator on his behalf, the two arbitrators so chosen then have a reasonable time in which to appoint a chairman of the Panel. 10/ If an appointment of a chairman is not made

within that period, the parties may, if they desire, have the Federal Court appoint the remaining panel member upon application pursuant to Section 5 of the Federal Arbitration Act.

A party who simply ignores a demand for arbitration does so at his peril. The demanding party's remedy can usually be found under Section 4 of the Federal Arbitration Act, in the form of a petition to compel arbitration. Given the current judicial temper favoring arbitration, circumstances will be stringent indeed before a court will release a party from its contractual obligation to arbitrate. If a defaulting party persists even in the face of a court order compelling arbitration, an arbitrator may be appointed for it, and an award may be entered upon the presentation of the claimant's case. 12/

If, however, a party believes that the arbitration demand is not valid, his proper recourse is an application in the Federal Court, pursuant to Section 3 of the Federal Arbitration Act for an Order staying the arbitration proceedings. As noted earlier, courts will very rarely overturn an agreement to arbitrate, but the procedure at least insures that the party protects himself from the

dangers of being found in default. As with pregnancy, there is no such thing as being slightly in default.

Once all the Panel members have been chosen, the Panel customarily schedules a first hearing, usually at lawyer's offices. It is at this first hearing that the parties make a formal submission of the dispute, which is often embodied in a Submission Agreement signed by both parties or their attorneys. At the very least, the Submission Agreement must contain a statement of the matter in dispute, the amount of money involved, and the remedy sought. As a practical matter, Submission Agreements also contain a provision in which the parties agree that any Award made by the Panel may be made a judgment of the United States District Court. Since it is an unfortunate fact that successful claimants must sometimes resort to provisional remedies to enforce a favorable Award, this provision can be especially useful. 13/

At the first hearing, the arbitrators make a disclosure as to the nature and extent of any dealings which they may have had with any of the parties to that arbitration, or their counsel. After disclosure, all parties have the opportunity to challenge the sitting

of any or all of the arbitrators. There are virtually no disqualifications of arbitrators purely on the basis of business dealings, so long as they do not involve the matter currently in dispute before the Panel. It is such a close-knit industry that it is rare to encounter an arbitration where both parties and arbitrators have not dealt with one another at some time in their respective careers. 14/

Following the respective disclosures, if there are no challenges, the oath is administered to the arbitrators by the reporter, and the first hearing commences, usually with the presentation of argument, proofs and exhibits on behalf of the claimant. Under the Rules of the Society, testimony from anyone other than a live witness is usually presented to the Panel in the form of a sworn affidavit. 15/ Thereafter, the respondent is given the opportunity, usually at a second hearing, to present all relevant material in support of his case.

There is no set discovery procedure in arbitration as there is in litigation, but it should be noted that the Panel, of its own volition or at the request of any party, has the powers to subpoena the production of documents, exhibits and/or witnesses. A failure to honor such a subpoena is punishable in civil contempt, in

accordance with Section 7 of the Federal Arbitration Act. The lack of a fully developed procedure for discovery, however, is softened somewhat by the fact that exhibits presented to the Panel need not strictly conform to the rules of evidence, as would be required in a court of law.

Most parties elect to be represented by counsel in a maritime arbitration, but lawyers new to the field should be warned against the pitfalls of treating the hearing room as if it were a courthouse. More often than not, the Panel members are not lawyers, and will not be prone to give style points for lawyerly finesse. The "when did you stop beating your wife" school of cross-examination which draws gasps from the crowd on "Perry Mason" may prompt nothing more than boredom or irritation from a Panel of commercial men. While there is no doubt that the arbitration process retains an adversarial flavor, the pugnacious advocacy so commonly observed at the courthouse will not always serve your client's best interests in the hearing room.

The number of hearings conducted before the Panel will vary according to the complexity of the dispute being considered. In addition, the Rules of the Society,

like the courts, provide for a procedure in which parties may present a matter to a Panel purely on the basis of a written submission. 16/ This last procedure has proven especially useful where there is no disagreement as to the facts, and where the interpretation of the relevant charter party provisions will be dispositive of the dispute.

After the hearings have been conducted, the Panel may, and often does, request all parties to submit written briefs in support of their respective positions. The hearings are deemed to be closed whenever the panel chooses, following submission of evidence and briefs. 17/ The arbitrators are required to render the Award as expeditiously as possible, but no time limit is set in the Rules of the Society. 18/

The most distinctive feature of maritime arbitration is the Award. Unlike most forms of arbitration in this country, the Panel in a maritime arbitration issues an Award which explains the reasoning behind its decision. This feature eliminates one of the chronic criticisms of arbitration, namely, that it provides an expedient result, but not without a certain cost to predictability. Since charter parties are usually based upon certain forms which have been in use for some time, it is important to the maritime industry to obtain a consistent interpretation of their provisions. Charter parties are usually

not negotiated by lawyers, so it is doubly important that both sides have a proper understanding of their rights and liabilities when they are striking their bargain.

An interesting and innovative feature of the Society of Maritime Arbitrators is the award system. All awards are collected under the Society's auspices and distributed to subscribers of the award service. Recently a digest and index to the various awards has been issued under a headnote system commonly used by the various law digests.

As noted earlier, an Award may subsequently be confirmed and made a judgment of the United States District Court. However, if a party is dissatisfied with an Award, he may move before the court to have it set aside. 19/ The most frequent grounds for such an application would be fraud or corruption in the procurement of the award, partiality of an arbitrator, or an error in law. In this regard, it should be noted that an error in law, however, egregious, is not grounds in itself for overturning an Award. The courts have demanded a showing of "manifest disregard" of the law before setting an Award aside. 20/ In other words, the decision must not only contain an error in law; it must

also state that it is aware of this error, and that it doesn't care anyway. Since most people do not care to exhibit their ignorance with such bravado, the chances of success on a motion to set aside an Award are usually less than good. However, the courts have not yet confronted the question of whether a lawyer sitting as an arbitrator might not be held to a higher standard of care on issues of law. The courts could well afford to show more flexibility in this area without endangering the institution of arbitration.

Once an Award has been confirmed as a judgment of the court, it may be enforced not only in this country, but also abroad pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 21/ This procedure is of more than passing interest in maritime arbitration, since it often happens that neither of the parties involved will be a domestic concern.

In the end, the efforts of the Society of Maritime Arbitrators have provided the industry with a practical alternative to litigation. Maritime arbitration reduces the cost of presenting a dispute, offers the services of seasoned arbitrators whose experience will often enable

them to get right to the jugular, and provides an evolving literature of precedent which will guide the future course of the industry. The lawyer's art of advocacy can and does play an important part in the institution. With the continued contributions of both industry and the bar, it seems certain that maritime arbitration will continue to evolve as a forum which provides a consistency of procedure and decision, while eliminating the technicalities and delays which originally prompted the quest for an alternative to the courts.

Footnotes:

1/ Scherk v. Alberto-Culver Co., 417 U.S. 94 S.Ct. 2449, 41 L.Ed. 2d 270, rehearing denied, 419 U.S. 885, 95 S.Ct. 157 (1974).

2/ All inquiries to the Society may be addressed to:

Society of Maritime Arbitrators, Inc.
26 Broadway
New York, New York 10004

3/ Maritime Arbitration Rules of the Society of Maritime Arbitrators, Inc., adopted May 12, 1964, revised July 1, 1974, revised September 15, 1983 (hereinafter "S.M.A." Rules).

4/ See, e.g., Rule 9H, Federal Rules of Civil Procedure.

5/ Midland Tar Distillers, Inc. v. M/T Lotos, 362 F. Supp. 1311 (S.D.N.Y.) 1973); Domke, Commercial Arbitration Section 1.01 (1968).

6/ For example, the arbitration clause of the New York Produce Exchange form charter party reads as follows:

> "That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The arbitrators shall be commercial men."

7/ Lowry & Co., v. S.S. Nadir, 223 F. Supp. 871, 66 A.M.C. 2195 (S.D.N.Y. 1963). Cf. Lowry & Co. Inc. v. S.S. La Moyne D'Iberville, 253 F. Supp. 396 (S.D.N.Y. 1966), appeal dismissed, 372 F2d 123 (2d Cir. 1967).

8/ S.M.A. Rules, Part III, Section 5.

9/ S.M.A. Rules, Part II, Section 3.

10/ S.M.A. Rules, Part IV, Section 10.

11/ 9 U.S.C. § 5.

12/ S.M.A. Rules, Part IV, Section 9.

13/ 9 U.S.C. § 9, S.M.A. Rules, Part VIII, Section 35.

14/ An interesting discussion of the disclosure requirements and the standards applied by the courts is to be found in the Matter of the Arbitration between Andros Compania Maritima, S.A. as Disponent Owners of the Kissavos and Marc Rich & Co., A.G. as Charterers, Opinion No. 865 (2nd Cir. June 7, 1978).

15/ S.M.A. Rules, Part V, Section 22.

16/ S.M.A. Rules, Part VI, Section 26.

17/ S.M.A. Rules, Part V, Section 24.

18/ S.M.A. Rules, Part VII, Section 27.

19/ 9 U.S.C. § 10.

20/ Office of Supply Government of Republic of Korea v. New York Nav. Co., Inc., 469 F2d 377 (2d Cir. 1972)

21/ 9 U.S.C. § 201 et seq.