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New York Arbitration at the Millennium:
The Dynamism of a Flexible Forum

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The current worldwide shipping recession has cast doubt on the survival of some ship owners, operators, charterers and others in the industry. Yet as we approach the dawn of the new millennium, history tells us that there remains a vibrant market for international trade and commerce. Interdependence of all nations is likely to increase and trade will flourish. Since airplanes still cannot approach the cargo volume of containerships or bulk carriers, shipping will likely remain the primary source of economical, large-volume transportation for generations to come.

For decades, commercial disputes in the shipping industry routinely have been referred to arbitration in New York, broadly recognized as one of the premier centers for maritime arbitration. While other cities have developed as centers for maritime arbitration, there is a natural demand for New York arbitration due primarily to its traditional role as a center of commerce, financing and legal development. Although many shipping companies have moved their headquarters out of New York for a variety of reasons, the city has retained its importance as an arbitral center. At this historical juncture, predating the start of a new millennium, it is logical to focus serious discussion on the elements of New York arbitration, how it has changed through the years and to look through the crystal ball to see what the future portends.

How it Works

There is no single set of rules by which all New York arbitrations are governed. The choice of arbitration over courthouse resolution is one to which the contracting parties must consent. Accordingly, the arbitration process is actually decided by the contractual agreement of the parties. That is, by choosing the arbitral forum, the parties generally adopt that forum's rules. The rules of institutional arbitration fora, such as the American Arbitration Association (AAA) differ from those of the International Chamber of Commerce (ICC). The choice of the forum

is determinative of how the arbitration will proceed. The Society of Maritime Arbitrators (SMA), however, as an *ad hoc* forum, gives the parties the flexibility to opt not to be bound by the rules of the SMA. For purposes of this article, we will refer to the rules of the SMA, founded in 1963, specifically to resolve commercial shipping disputes. These rules are constantly being re-evaluated, having gone through four revisions, the last of which was in 1994.

Under any set of rules, the parties' consent to arbitration can occur at one of several points: **First**, prior to the existence of an actual dispute, the parties can negotiate an arbitration agreement. Such an agreement could be included as an arbitration clause within a contract. **Second**, the parties can make an arbitration agreement after a controversy arises. This could happen in either a contract or tort situation. When this post-dispute agreement to arbitrate occurs, the parties draft an arbitration submission agreement by which their consent to arbitration is manifested. Standard arbitration clauses call for each party to appoint one arbitrator and for these two to agree on a third arbitrator to chair the panel and, in effect, to act as the tiebreaker. In some cases, the parties will designate a sole arbitrator; other agreements call for the two arbitrators to try to decide the dispute before resorting to a third person. Prompt hearings to decide important immediate disputes can be arranged, by agreement of the parties, on short notice.

Once the arbitrators are appointed and the panel is approved by the parties, the arbitrators take an oath to act fairly and judiciously. **It should be noted that the procedure is not complicated by the requirement of pre-hearing formal detailed pleadings, as required in other jurisdictions.** The chair then sets a schedule for hearings and the submission of legal papers by each side. The parties can submit any evidence they deem relevant and the arbitrators and parties are not restricted by any rigid preset rules of evidence — the goal is the plain, clear, efficient and economical presentation of facts and law to the panel.

Arbitrator's Powers

An arbitrator has substantial powers over the conduct of the case; in many ways, this power is greater than that of most judges. In an article written several years ago, John

Poles of Poles, Tublin, Patestides & Stratakis, discussed "nine recurring areas in which the powers of a New York maritime arbitrator are exercised." These recurring areas served as an important definition of the nature of arbitration in New York, and focused on the following: (1) adjournments and admissibility of evidence; (2) discovery; (3) the power to impose sanctions; (4) expert knowledge of the arbitrator; (5) third party consultations and investigations; (6) punitive damages; (7) *functus officio* and award finality; (8) arbitrator immunity from liability; and (9) arbitrator's security for their fees. **(Security for arbitrator's fees should be carefully distinguished from the substantial and often onerous security deposits for legal costs which are required in other arbitration jurisdictions.)**

The typical SMA arbitration may consist of one or more hearings, at which the parties may offer any evidence which they deem relevant, with minimal or no interference from the arbitrators. The parties may present their claims and counterclaims themselves (*pro se*) or be represented by attorneys. Witnesses may or may not be called to testify under oath and, if called, must submit to cross-examination. Unless the parties agree otherwise, a court reporter is customarily employed to record the proceedings. At the conclusion of the presentation of evidence, the parties exchange written briefs and reply briefs, or they may present their final arguments in a Final Oral Argument instead of exchanging briefs (or in addition to post-arbitration briefing).

Some Evolutionary Changes

A. Procedurally

1. Shortened Arbitration

The New York SMA arbitration forum has shown great flexibility over the years. It has proven to be responsive to the needs of commercial shipping businesses. When the calls came for an economical "small claims" type of arbitration, the SMA responded with the Shortened Arbitration Procedures, in 1989, revised in 1991. Functionally, the parties agree to include a Shortened Arbitration Procedure clause in the agreement. As suggested by the SMA, the Shortened Arbitration clause generally is written as follows: *"Should the sum claimed by each party not exceed U.S. $____, the dispute is to be governed by the "Shortened Arbitration*

Procedure" of the Society of Maritime Arbitrators, Inc., (SMA) of New York, as defined in the Society's rules for such procedure." The Shortened Arbitration Procedure is then triggered when the amount in dispute is less than the amount previously set by the parties as the Shortened Procedure threshold.

Under the Rules for Shortened Arbitration Procedure, the parties try to use a sole arbitrator. If they cannot agree on one, then the selection of their arbitrators and the chairman of the panel proceeds pursuant to an abbreviated schedule. The dispute is usually resolved by means of documents only, although one hearing may be permitted. Finally, the panel's reasoned award must be issued within 30 days from the close of the proceedings, and the fee of each arbitrator is limited to US$1,000 plus expenses.

This procedure, if chosen, allows simple and less momentous disputes to be resolved quickly and economically.

2. Conciliation

In addition to arbitration, experience indicated the need of another dispute-resolving vehicle; therefore, the SMA offers conciliation of maritime disputes. The conciliation procedure can be employed either as a prelude or an alternative to arbitration or litigation. Conciliation is a non-binding process, whereby an amicable solution to a dispute is sought. A single conciliator is appointed who reviews written explanations of the dispute and tries to arrange a settlement. Once signed by both parties, a Settlement Agreement is binding, enforceable and can be converted into a Federal Court Order.

These procedures, although not satisfactory for the resolution of all disputes or fit the purposes of all parties, show a system flexible enough to respond to the changing and diverse needs of the maritime community. In addition to its flexibility, the system provides for enough stability to assure reliability, consistency and economic practicality in its decisions.

B. Substantively

1. Punitive Damages

About ten years ago, several New York arbitrations yielded decisions awarding punitive damages in maritime disputes. At the time, the concept was unheard of, and the decisions sparked howls of protest from many

in the community who disputed the legitimacy of punitive awards in commercial disputes. Indeed, New York State law continues to prohibit the award of punitive damages by arbitrators. Nonetheless, maritime arbitrations typically are governed by Federal law, which allows arbitrators more leeway.

Generally, however, SMA panels have remained extremely reluctant to award punitive damages. This reluctance stems, in part, from the fact that punitive damages are generally disallowed at law in contract disputes unless the conduct complained of is also a tort. There must be a strong showing of bad faith supported by clear evidence of wrongdoing to support a tort claim meriting punitive damages -- a threshold that is burdensome to meet. Even in SMA proceedings evidencing obvious misconduct, SMA panels are still wary of awarding punitive damages.

Similarly, while arbitration panels have the authority to award RICO (the Racketeer Influenced and Corrupt Organizations Act) treble damages, they are loathe to award such relief. In fact, since the first consideration of RICO damages in 1990, only three panels have granted a claimant RICO damages. Although the awards in which punitive and/or RICO damages were given are too few to constitute a pattern, it is noteworthy that RICO and punitive damage awards were given in cases where the owner had been determined by the SMA panel to have converted the charterer's cargo for his own benefit, which practice the arbitrators found particularly loathsome.

Ultimately though, there have been no punitive or RICO damage awards by SMA arbitrators since 1990, and the initial fear that the floodgates had been opened seems to have been unfounded.

2. Punitive Damages and Choice of Law

An interesting wrinkle in the award of punitive damages by arbitrators developed in the mid-1990's. The U.S. Supreme Court held in *Mastbuono v. Shearson Lehman Hutton* (1995) (a non-maritime case) that punitive damages could be awarded by arbitrators trying federal questions even in jurisdictions in which state law does not allow arbitrators to award punitive damages. Specifically, the court said that where a federal question is involved (many maritime cases, or cases arising under the Federal Arbitration Act), it

allows arbitrators to award punitive damages. The Federal question preempts a state law if that state's law holds punitive damages are inarbitrable. The Supreme Court carved out a large exception to New York substantive law which has traditionally stated that arbitrators applying the laws of the State of New York cannot by law award punitive damages.

3. Judicial Review

The threshold for overturning arbitration awards, quite correctly, has always been very high. U.S. Courts tend not to disturb awards, because they like to see that alternative legal forums are viable in order to relieve the growing pressures on the court system. In the past, courts would only review arbitration awards for reasons of public policy, fraud, duress, undue influence, excess of authority, and manifest disregard for the law.

Recently, however, some courts have been willing to more carefully review arbitration awards where the arbitration clause required the arbitrators to lay out the specific findings of fact and conclusions of law by which they reached their decision. Such arbitration clauses have been viewed by several Circuit Courts as expanding the grounds for judicial review beyond those enumerated by state or federal statutes. Typically, these courts have overturned the arbitrators' decision if the arbitrators either misapplied the law or their findings of fact were not based on "substantial evidence."

But not all courts have enforced arbitration clauses that expand judicial review. Instead, District Courts that have confronted the issue are currently split on whether an arbitration clause expanding judicial review should be enforced or whether the clause itself impermissibly directs a court to exercise powers beyond those granted by federal or state statute.

4. *Judicial Review and Maritime Cases*

With respect to maritime cases, the Third Circuit Court of Appeals, in 1996, affirmed a lower court's refusal to enforce an arbitration panel's decision. In that case, a tanker helmsman tested positive for drug use and was subsequently dismissed. The arbitrator granted the helmsman's request for reinstatement. However, the Court of Appeals held that courts may deny enforcement of arbitration awards that contravene a well-

defined public policy -- in this case the important public policy in protecting safety and environmental interests. Although no maritime arbitration awards have been overturned since the Third Circuit case, it seems likely arbitral awards may be subject to closer scrutiny in the future.

5. Human Infrastructure

In the early 1950's, New York maritime arbitration was excoriated as being dominated by a small cadre of arbitrators who allegedly contrived to keep most arbitrations within their exclusive control. This criticism evolved into an often-repeated mantra, to the effect, that New York maritime arbitration rested exclusively with a group commonly characterized as "the Twelve Apostles." Whether or not the criticism was justified or true has become moot because the evolutionary process has, in fact, resulted in a published roster of approximately 120 qualified arbitrators representing a cross-section of the industry. It is important to note that along with the present availability of a significant number of arbitrators, there has been a gradual introduction of the dynamics of youth.

Some Future Trends

Predicting the future has always been a precarious undertaking. But some reasoned assumptions about further changes can be made with an acceptable degree of certainty.

One change which has affected almost everyone is the breathtaking acceleration of the speed of communications. First the fax, then voice mail and now e-mail and the Internet have changed the way the commercial world communicates.

Every major shipping related business, from owners to P & I Clubs to class societies to law firms, has a web site and e-mail capability. Information about companies and individuals and factual disputes is available instantaneously at the double-click of a computer mouse. This fast proliferation of communication technology has also changed the manner in which the legal world operates. Court decisions are put on the Internet and are available, at no charge, directly from the courthouse. Asset searches can be performed directly from one's desk and documents are transmitted by e-mail, revised and re-transmitted.

This technological revolution is likely to manifest itself in the world of maritime

arbitration in several ways. It is likely that written briefs will be submitted to arbitrators and opposing parties by e-mail. Also, the Panel's decision will be transmitted to the parties the same way. The panel will also communicate with the parties and each other by e-mail, allowing for prompter resolution of issues such as arbitrator appointments, briefing and hearing schedules and discovery. Video conferencing allows testimony from far corners of the world to be presented to the Panel instantaneously on the computer screen or on video tape.

Currently, SMA awards (which are reasoned and, unique to SMA, published quarterly) are available on the LEXIS computer research service, for a fee. Ultimately, we anticipate that the SMA will keep pace with available technology by putting the awards on its own website where the awards can be read, searched and downloaded into one's own computer. Although the law does not mandate that previous decisions be followed as precedents, these decisions are, in fact, cited in subsequent cases to edify and provide for a reasonable degree of reliable consistency.

Aside from technological advances, the future may see some limited expansion of judicial review of arbitration awards ("Judicial Review" discussed *supra*), with the likelihood of more awards being vacated or modified by the court system.

Finally, it is extremely difficult to predict whether the retrenchment in the award of punitive and RICO damages may be short-lived. It is possible that, in an increasingly competitive marketplace, arbitrators may feel pressured to "send a message" to those who reprehensibly, obviously and repeatedly abuse the system for financial gain.

Overall, the technological revolution should lend itself toward quicker and more economical resolutions of arbitrable disputes. These changes will fit in with the flexibility and the innovativeness manifested by SMA arbitration. We anticipate that the dynamic, less rigid, user-friendly reality of New York, as a prime center of maritime arbitration, should gather more popularity and significance as the future unfolds.