

The Problem of Post-Hearing Delay in Maritime Arbitrations: "When Did You Say We Would Receive the Arbitrators' Award?"

Robert M. Jarvis

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**THE PROBLEM OF POST-HEARING DELAY IN MARITIME
ARBITRATIONS: "WHEN DID YOU SAY WE WOULD RECEIVE
THE ARBITRATORS' AWARD?"**

ROBERT M. JARVIS*

| | | |
|------|---|----|
| I. | INTRODUCTION | 20 |
| II. | AN OVERVIEW OF MARITIME ARBITRATIONS | 23 |
| | A. <i>Charter Parties and Arbitration</i> | 24 |
| | B. <i>The Historical Role of the Cities of London and New York with Regard to Maritime Arbitrations</i> | 29 |
| | 1. <i>The City of London</i> | 29 |
| | 2. <i>New York City</i> | 33 |
| III. | THE NATURE OF MARITIME ARBITRATIONS AND THE PHENOM- ENA OF DELAY | 35 |
| | A. <i>The Causes of Arbitrator Delay Following the Reception of Evidence</i> | 37 |
| | 1. <i>Concentration of Arbitral Duties</i> | 37 |
| | 2. <i>Arbitral Overcommitment</i> | 39 |
| | 3. <i>Formal Opinions</i> | 40 |
| | B. <i>Mechanisms Currently Addressing the Problem of Arbi- trator Delay</i> | 43 |
| | 1. <i>Informal Mechanisms</i> | 43 |
| | a. <i>Arbitrator pressure</i> | 43 |
| | b. <i>Party pressure</i> | 44 |
| | 2. <i>Contractual Mechanisms</i> | 47 |
| | a. <i>Time limits</i> | 47 |
| | b. <i>Partial final awards</i> | 51 |
| | 3. <i>Judicial Mechanisms</i> | 53 |
| IV. | THE IMPACT OF DELAY | 54 |
| V. | SOLUTIONS TO THE PROBLEM OF ARBITRATOR POST-HEARING DELAY | 56 |
| | A. <i>Proposed Rules</i> | 56 |
| | 1. <i>Arbitrator Schedule Disclosure</i> | 56 |
| | 2. <i>Time Limits</i> | 57 |

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| | |
|--|----|
| 3. <i>Written Opinions</i> | 58 |
| 4. <i>Expedited Arbitration</i> | 58 |
| B. <i>Discussion of Proposed Rules</i> | 58 |
| C. <i>Implementation</i> | 61 |
| VI. CONCLUSION | 62 |

I. INTRODUCTION

Arbitration has recently become a favorite topic among court reformers.¹ They view arbitration, along with other forms of extra-judicial dispute resolution techniques,² as providing a speedy and inexpensive alternative to the interminable delays and costs which have come to characterize court proceedings.³

Arbitration is not a new idea for the marine industry⁴ which has relied

1. See, e.g., Meyerowitz, *The Arbitration Alternative*, A.B.A. J., Feb. 1985, at 78; *Alternatives to Litigation: A Symposium*, 48 ALB. L. REV. 569 (1984); Rayner, *Arbitration: Private Dispute Resolution as an Alternative to the Court*, 22 U.W. ONTARIO L. REV. 33 (1984); Goldstein, *Alternatives for Resolving Business Transaction Disputes*, 58 ST. JOHN'S L. REV. 69 (1983). The attraction to arbitration has been spurred in part by the belief that courts are overworked, and in part by the belief that the cost of civil litigation is too high. It is thought that arbitration reduces both delay and cost because arbitration proceedings do not follow strict rules of evidence and arbitration awards are, for the most part, not subject to judicial review. See Roth, *When to Ignore the Rules of Evidence in Arbitration*, LITIGATION, WINTER 1983, at 20; Wiener, *Is Arbitration an Answer?*, 15 NAT. RESOURCES LAW. 449 (1982).

2. Other types of alternate dispute resolution (ADR) mechanisms which exist, in addition to arbitration, include conciliation, mediation and the use of mini-trials. Conciliation and mediation are most often used in the area of family law. See, e.g., Zumeta, *Mediation as an Alternative to Litigation in Divorce*, 62 MICH. B.J. 434 (1983); Bethel & Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 VERMONT L. REV. 15 (1982); Parkinson, *Conciliation in Matrimonial Disputes*, 14 BRACON L.J. 30 (1981). For a critical analysis of mediation, see Cooke, *Mediation: A Boon or a Bust?*, 28 N.Y.L. SCH. L. REV. 3 (1983). For a discussion of some of the ethical problems which can be encountered in an ADR system, see Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L. Q. 107 (1982). An excellent general discussion of ADR mechanisms is contained in G. WILNER, *DOMKE ON ARBITRATION* § 1:02 (Rev. ed. 1984).

3. It is generally thought that the American court system is unique when it comes to delays and costs. Apparently this is not so, because arbitration has become popular throughout the world. For a collection of relevant articles, see *International Commercial Arbitration*, 4 PACE L. REV. 519 (1984); *Special Feature: Arbitration*, 17 INT'L LAW. 661 (1983). For interesting articles dealing with the arbitration systems of particular countries, see Ottolenghi, *Arbitration Institutions in Israel*, 38 ARB. J. 53 (1983); Horrocks, *Alternatives to the Courts in Canada*, 20 ALTA L. REV. 326 (1982); Lockett, *Dispute Settlement in the People's Republic of China: The Developing Role of Arbitration in Foreign Trade and Maritime Disputes*, 16 GEO. WASH. J. INT'L L. & ECON. 239 (1982); and Seppala, *French Domestic Arbitration Law*, 16 INT'L LAW. 749 (1982).

4. It is difficult to define the marine industry, since any definition is at once both under-

on arbitration to resolve disputes⁶ since at least the 17th century.⁶ Those familiar with maritime law and practice view the current widespread enthusiasm for arbitration with a touch of bemusement. The cause of this bemusement is not cynicism. Rather, admiralty lawyers and their clients⁷

inclusive and over-inclusive. The term is used here in a broad sense, although not in the broadest possible sense. Thus, while all phases of commercial shipping, including shipbuilding, marine insurance, charter parties, average adjusting, and salvage, are meant to be included, the term is not used so as to encompass what is commonly called "pleasure boating," which includes waterskiing and yachting. Nor are quasi-maritime vehicles such as seaplanes and hovercrafts, which sometimes, but not always, engage in water-borne activity, included.

The distinction between commercial and non-commercial shipping activity is not merely a semantic one. Rather, the dichotomy becomes extremely important when attempting to decide whether a particular cause of action may be heard in federal court under the court's admiralty jurisdiction, which is now codified at 28 U.S.C. § 1333 (1982). At one time a raging debate was fought in the law reviews over the question of whether pleasure boat mishaps could be heard in the federal courts under the admiralty jurisdiction. See, for example, Comment, *The Boating Boom: Admiralty Jurisdiction Inland*, 23 WASH. & LEE L. REV. 169 (1969); and a collection of articles published in 37 TEMPLE L.Q. 375 (1964). The seminal article, however, was Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CALIF. L. REV. 661 (1963). In 1972, the United States Supreme Court appeared to have decided the matter in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). In *Executive Jet* the Court held that claims arising from an airplane accident which had occurred on navigable waters were not cognizable in admiralty because the wrong complained of did not bear a significant relationship to "traditional" maritime activity.

The *Executive Jet* doctrine was, however, rejected in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982). There the Court ruled that a pleasure boating accident should not have been dismissed by the district court. Over a bitter dissent, Justice Marshall explained that the need to subject all vessel owners to similar duties and liabilities was of paramount concern, and that such uniformity in the admiralty law could only be achieved if all shipping claims were heard by federal, as opposed to state, courts. The belief that admiralty law should be uniform has caused considerable controversy since the time of the Revolution. The matter is discussed in Jarvis, *Richardson v. Foremost Insurance Company: A New Opportunity for Industry to End State Regulation of Coastal Oil Pollution?*, 19 GONZ. L. REV. 265, 280-84 (1984).

5. The types of maritime disputes which have been submitted to arbitration include ship building contracts, ship repairing, ship sale and purchase, ship financing, and charter parties. For a discussion of the many different types of marine arbitrations that are held, see Berlingieri, *International Maritime Arbitration*, 10 J. MAR. L. & COM. 199 (1979).

6. Bischoff, *Maritime Arbitration*, in 3 INTERNATIONAL COMMERCIAL ARBITRATION: PART II DOCUMENTS & COLLECTED PAPERS 14, 14-17 (C. Schmitthoff ed. 1980). As Bischoff points out, earlier records are scarce due to the destruction of most of the libraries of the Mediterranean world.

7. It should be pointed out that there is no particular type of maritime client which either does or does not suffer from arbitration delay. This is due to the fact that today's plaintiff, or claimant, was yesterday's defendant, or respondent. To illustrate the point, consider the position of a shipowner. On Monday he might be a claimant, seeking demurrage from a charterer (demurrage is a penalty which a charterer must pay if it uses the owner's vessel for a period longer than that contracted for). On Tuesday, however, the shipowner might be a respondent in a claim by a cargo owner or receiver that the vessel damaged the cargo by improperly

have learned, usually through bitter firsthand experience,⁸ that the arbitration process is often neither quick nor cheap.

A maritime arbitration becomes a slow and costly proceeding for many reasons. The claimant's lawyer often faces intransigence from opposing counsel.⁹ At times, lawyers fail to pursue diligently the arbitration, thereby delaying their client's cause. At other times, lawyers prosecute a claim in an overzealous manner, resulting in considerable extra expense to their clients.¹⁰ None of these phenomena are unique to admiralty arbitrations, since they can, and do, occur in other types of proceedings as well.¹¹

One cause of delay, however, appears to be unique to arbitrations, particularly maritime arbitrations. Parties to maritime arbitration routinely endure delay in receiving the decision of the arbitrators once all of the evidence has been submitted and all of the post-hearing memoranda of law have been filed. Non-admiralty arbitration disputants also face this di-

stowing it, thereby allowing it to become exposed to excessive heat or water. Thus, unlike some other fields of law where plaintiffs and defendants are fairly easy to identify on a continuing basis, no such generalizations are possible in admiralty.

8. For an interesting discussion written by an admiralty lawyer which details some of the frustrations of the arbitration process, in contrast to the frustrations suffered when litigating the same types of claims, see Textor, *Petroleum Shortage Disputes: The Difference Between the Legal and Arbitration Approach*, 1983 LLOYD'S MAR. COM. L.Q. 392.

9. It is usually the defendant's lawyer who seeks to slow down the pace of a matter, since the defendant will usually not gain anything (except, perhaps, the peace of mind that comes from the conclusion of any pending legal action) from a speedy end to the arbitration. However, if the defendant asserts counterclaims against the plaintiff, then the positions may become reversed, especially if the counterclaims exceed the value of the plaintiff's claims. For a discussion of what happens to maritime arbitration when the claimant allows the proceedings to languish, see Lewis, *When Arbitration Proceedings Become Stale*, 1983 LLOYD'S MAR. COM. L.Q. 289.

It is, of course, the ethical duty of a lawyer to improve the administration of justice. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1969). It is also the ethical duty of a lawyer to further his client's cause. See *id.* Canon 7. These two demands place the lawyer in an impossible situation: by delaying legal proceedings, he helps his client but fails in his obligation as a court officer. By pushing forward, he fulfills his duty to the tribunal but not to his client. The problem does not admit of an easy answer.

10. For an unusual case in which the admiralty lawyers settled a case in the early stages, but then had to go to court when the client objected to paying the bill, see *Walker & Corsa v. Tunisian Office National Des Cereales*, 1985 A.M.C. 936 (S.D.N.Y. 1985). What distinguishes this case from the ordinary case in which a client does not pay is the motivation for non-payment. Overjoyed by their success in negotiating such a favorable settlement for their client, the lawyers decided to add a "bonus" to the agreed hourly fee. The client was willing to pay the fee but not the bonus. In court the lawyers argued that it was a standard practice of admiralty firms to add such bonuses if they achieved a particularly good result. After listening to expert testimony, the court found that no such practice existed among admiralty firms.

11. A comprehensive review of the problem is contained in *Special Issue on Dispute Processing and Civil Litigation - Part 1*, 15 L. & Soc'y REV. 401 (1980).

lemma to an extent,¹² but the delay they experience is rarely as long as that suffered by parties to admiralty arbitrations.

Post-hearing delay is prevalent in maritime arbitrations for two primary reasons. First, most maritime arbitrations do not proceed under rules which limit the time the arbitrators have before rendering their opinion. Second, most maritime arbitrations render a final award containing a lengthy written explanation for the decision.¹³ These two factors together—the luxury of not being under a strict deadline, and the pressure of producing a written award—cause maritime arbitrators to delay rendering their awards for periods which are much longer than those of other commercial arbitrators.

This article first provides an overview of maritime arbitration. Secondly, it details the problem of post-hearing arbitrator delay in the rendering of most maritime awards. Thirdly, it reviews the present mechanisms currently addressing the problem and suggests that current methods are inadequate to reduce this delay effectively. Fourthly, it addresses the impact of post-hearing delay. Finally, it will suggest steps that should be taken to remedy the situation.

II. AN OVERVIEW OF MARITIME ARBITRATIONS

The maritime industry is an international industry. As such, almost every maritime transaction will eventually cut across national boundaries¹⁴ and bring together people from different backgrounds, customs and legal systems.¹⁵ While almost all types of maritime transactions are subject to

12. See, e.g., *La Societe Nationale v. Shaheen Natural Resources Co. Inc.*, 585 F. Supp. 57 (S.D.N.Y. 1983); *Ash Apartments v. Martinez*, 656 P.2d 708 (Colo. 1982); *Brandon v. Hines*, 439 A.2d 496 (D.C. App. 1981); *M. B. Guran Co., Inc. v. Amsdell*, 459 N.E.2d 581 (Ohio App. 1983).

13. Some maritime arbitrations are held with rules which both impose time limits for the rendering of awards and dispense with the need to issue a written award. For the most part, however, these types of maritime arbitrations are limited to specific types of disputes, such as salvage disputes. For an excellent primer on salvage law, see Sheen, *Conventions on Salvage*, 57 TUL. L. REV. 1387 (1983). See also *infra* note 92.

14. Certain forms of shipping, such as coastwise shipping, may not cut across national boundaries and cultures. An example of coastwise shipping would be a voyage between the Port of New York and the Port of Miami. Most countries have enacted what are called "cabotage" laws, which restrict such shipping to domestic shipowners. The distinction between coastwise shipping and foreign trade shipping is further reviewed in *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392, 395 (1901) and *Anderson v. Pacific S.S. Co.*, 225 U.S. 187, 200 (1912). For a recent discussion of cabotage see Note, *The Weakening Grip of United States Cabotage Law*, 4 FORDHAM INT'L L.J. 391 (1980-81).

15. See Sommer, *Maritime Transactions*, in ARBITRATION-COMMERCIAL DISPUTES, INSURANCE AND TORT CLAIMS 181 (A. Widiss ed. 1979). Sommer states at 181:

resolution through arbitration,¹⁶ the bulk of reported maritime arbitrations¹⁷ involve issues relating to the negotiation, performance and conclusion of charter parties. As a result, this article focuses on the issue of post-hearing arbitrator delay in the rendering of charter party awards.¹⁸

A. Charter Parties and Arbitration

A charter party is a contract by which an owner¹⁹ leases his ship to a person or entity interested in having the use of an entire ship for a stated period.²⁰ Charter parties are negotiated through brokers.²¹ A concluded

It is not unlikely to have a Liberian flag vessel chartered through a London broker to a Bermudian corporation, as charterer, who employed a Swiss broker, for a voyage of that vessel from Rotterdam to Houston. The fixture telex may state, as an example, "details NYPE," resulting in an agreement to arbitrate at New York.

16. Although most maritime disputes which are submitted to arbitration are contractual in nature, one does find reports of tortious maritime incidents being resolved through arbitration. See Berlingieri, *supra* note 5, at 235.

17. Some types of maritime arbitrations are never publicly reported. This is especially true for salvage awards. The reason for this privacy is not entirely clear, although it can be seen in other types of maritime transactions as well. Thus, almost all charter parties state that their details are to remain strictly confidential. Just how strong the desire for privacy is in the maritime industry is illustrated by a recent report which indicated that shipowners had been able to collect \$1.5 million between 1982 and 1984 from defaulting charterers simply by threatening to disclose their non-payment to INTERTANKO, an industry trade group. See Hubbard, *Intertanko Combats Defaulters*, Lloyd's List, Jan. 5, 1985, at 1.

18. Where possible, however, the article will discuss other forms of maritime arbitration awards.

19. The use of the term "owner" here is not meant to be limited to the actual registered owner of the vessel. If, for example, the registered owner charters the vessel to a party (Charterer A), and that party then re-charters (known in the trade as sub-chartering) the vessel to another party (Charterer B), Charterer A stands in the shoes of both a charterer, vis-a-vis the registered owner, and an owner, vis-a-vis Charterer B. Thus, Charterer A is called a disponent owner. There can be an infinite number of sub-charters, and if such sub-charters exist, it is said that there is a string charter, with duties and liabilities flowing both up and down the chain. See further Bauer, *Responsibilities of Owner and Charterer to Third Parties — Consequences Under Time and Voyage Charters*, 49 TUL. L. REV. 995 (1975).

20. A vessel can be chartered for one of three time periods. If the party wishes to have the ship for only a specific number of voyages, usually one or two, a *voyage charter* will be concluded. If the charterer wishes instead to have the use of the vessel for a period of time, a *time charter* will be executed. Finally, if the charterer wishes to take complete control of the vessel for a long period of time, usually five to twenty years, a *demise charter* will be signed. Demise charters are fairly rare; their principal use is as a financing mechanism. An excellent discussion of the different kinds of charters available is contained in SCRUTTON ON CHARTER PARTIES AND BILLS OF LADING, (A. Mocatta, M. Mustill & S. Boyd 19th ed. 1984).

21. For a recent case which discussed the authority of brokers to negotiate charter parties, see *Golden Chase S.S. Inc. v. Valmar De Navegacion, S.A.*, 1984 A.M.C. 2040 (5th Cir. 1984).

charter party is known as a fixture.²²

Specialized charter parties have been developed for many types of cargo.²³ Thus, for example, there are charter parties for the carrying of ore,²⁴ grain,²⁵ oil²⁶ and scrap metal.²⁷ Although these charter parties are tailored to reflect the special problems which can be encountered while carrying a particular cargo,²⁸ there are similarities among them as well. In particular, each form of charter party in use today calls for the resolution of any disputes arising under the charter party²⁹ through arbitration.

22. For a further discussion of chartering practice, see P. GRAM, *CHARTERING DOCUMENTS* (1981).

23. Innumerable charter parties have been drafted. A comprehensive collection of charter parties is contained in 2B and 2C E. BENEDICT, *BENEDICT ON ADMIRALTY* (M. Cohen & M. Norris 7th ed. 1973 & Supp. 1984). Over one hundred charter forms are reproduced there. In the average admiralty lawyer's practice, however, one will only use a handful of forms.

24. Charter parties are referred to in the trade by what are often colorful acronyms. In addition, most commodities have given rise to more than one type of charter. Thus, 2B E. BENEDICT, *supra* note 23, at § 12-1 to § 12-101, lists fifteen separate charters for the carrying of ore. These charters include CEMENCO (for the carrying of cement), GENORECON (for the carrying of general ores), and BULK FORM (for the carrying of bulk ores). In addition, charter party names often reflect their national origin. Thus, there is SCANORECON (an ore charter party developed in Scandinavia), NIPPONORE (a Japanese ore charter party) and SOVORECON (a Soviet ore charter party). While some charter parties have gained worldwide acceptance, others have remained local. Perhaps the best known form of charter is the NYPE, or New York Produce Exchange, charter. For an entertaining, as well as illuminating, discussion of the history of the NYPE, see Healy, *Commentary on 1981 Revision of the New York Produce Exchange Form Time Charter*, 13 J. MAR. L. & COM. 521 (1982).

25. 2B E. BENEDICT, *supra* note 23, at § 8-1 to § 8-79, lists eight different kinds of grain charter parties. Unlike the charter parties covering other types of commodities, most grain charter parties now in use are of comparatively recent origin. Of the eight listed in BENEDICT, two were drafted in the 1960s and five were drafted in the 1970s.

26. Oil charter parties are a distinct breed of charter parties, having been drafted or amended in the wake of the 1973 Arab Oil embargo. They address the special environmental threat posed by oil, and also deal with the risks posed by the supertankers which are used to carry the oil. For two excellent descriptions of the problems which are faced in the marine transportation of oil, see N. MOSTERT, *SUPERSHIP* (1974) and R. M'GONIGLE & M. ZACHER, *POLLUTION, POLITICS AND INTERNATIONAL LAW* (1979).

27. The scrap metal charter party is known as GENJAPSCRAP. Despite its most enchanting name, this very specialized charter party is rarely seen in practice. An even more specialized form is INCHARPASS, which is a passenger charter party.

28. Specific types of cargo can pose unique problems. See *supra* note 26. Consider, for example, the carrying of coal. Coal is a very dangerous cargo, because it has the capacity to overheat and ignite if not correctly stowed. Despite centuries of dealing with this problem, "hot coal" incidents, as they are known, continue to plague vessels. For two recent examples of such incidents, see *Tai Ping Ins. Co. v. M/V Warschau*, 731 F.2d 1141 (5th Cir. 1984) and *Ente Nazionale Per L'Energia Elettrica v. Baliwag Navigation, Inc.*, 1984 A.M.C. 2858 (E.D. Va. 1984).

29. The issue of whether a given dispute arises under a charter party, thus activating the

The basic pattern of arbitration envisioned by these clauses may be summarized as follows. When one of the parties believes itself aggrieved, it can institute arbitration proceedings by choosing an arbitrator and serving a demand for arbitration on the other side. Once served, the other side is required to name its arbitrator. Thereafter, the two arbitrators named by the parties select a third arbitrator, who is designated as the Chairman of the arbitration panel.³⁰ Once the panel is complete, the parties attend hearings,³¹ submit their evidence, and file memoranda of law if they so desire. Later, the arbitrators render their award. Although most parties voluntarily abide by the award of the arbitrators, an award can be turned into a judgment of the court.³² This is done by bringing a confirmation proceeding. Judges routinely grant requests to confirm arbitration awards,³³ and once an award is confirmed, it can be enforced in most other countries.³⁴

charter party's arbitration clause, provides fertile ground for disagreement. In the United States, the question whether a particular dispute is covered by the charter party is submitted to the federal courts. They, in turn, have interpreted arbitration clauses very broadly. *See, e.g., United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1950) (construing a non-maritime arbitration agreement) and *Caribbean S.S. Co. S.A. v. Sonmez Denizcilik v. Ticaret A.S.*, 598 F.2d 1264 (2d Cir. 1979) (construing a maritime arbitration agreement). A notable exception to this policy occurs when arbitration is demanded under a bill of lading which is said to incorporate the terms of the charter party. *Compare Son Shipping Co. v. DeFosse & Tanghe*, 199 F.2d 687 (2d Cir. 1952) and *Cia Platamon de Navegacion S.A. v. Empresa Colombiana de Petroleos*, 478 F. Supp. 66 (S.D.N.Y. 1979).

30. The position of Chairman is a crucial one. The Chairman is entrusted with the responsibility of making, after consultation with the other members of the panel, all of the procedural decisions which affect the arbitration. In addition, the Chairman has the responsibility for seeing to the administrative tasks of the panel, such as the setting of hearing dates and the transcribing of the award. For a further discussion of the role of the Chairman, see Sommer, *supra* note 15, at 201-02. In English practice the Chairman is usually designated an umpire, and votes only to break ties between the other members of the panel. McIntosh, *The Practice of Maritime Arbitrations in London: Recent Developments in the Law*, 1983 LLOYD'S MAR. COM. L.Q. 235, 241.

31. Not all arbitrations include the holding of hearings. If the only evidence to be submitted consists of documents, in contrast to the presentation of witnesses, the parties may agree to proceed "on submission." The elimination of hearings shortens the arbitration process and reduces the ultimate cost. Healy, *An Introduction to the Federal Arbitration Act*, 13 J. MAR. L. & COM. 223, 232-33 (1982) [hereinafter cited as Healy, *Federal Arbitration*].

32. Sommer, *supra* note 15, at 208-12 contains a useful summary of the judicial means available to enforce an arbitration award.

33. Some admiralty lawyers have argued that judges have become so used to confirming arbitration awards that it is now almost impossible to defeat such confirmations. *See Kimball, Vacating Maritime Arbitration Awards: Is it Really Possible?*, 13 J. MAR. L. & COM. 71 (1981); *Wilko v. Swan*, 346 U.S. 427 (1953) (emphasizing that under the Federal Arbitration Act there are only four grounds available to vacate); *see also infra* note 170.

34. Extraterritorial enforcement of a maritime arbitration award is achieved through the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Of course, the above description is a highly streamlined version of the maritime arbitration process. In practice, there are many variations, depending upon the type of charter party involved. Some arbitration clauses, for example, require the arbitrators to be "commercial men,"³⁶ while others place no restriction on who may serve as an arbitrator.³⁶ Other clauses may provide that a party which does not receive a response to its arbitration demand within a specified period of time, usually twenty days, may name an arbitrator for the other side with the same effect as if the party had named the arbitrator itself.³⁷ In contrast, clauses which do not so provide have been held not to authorize such unilateral action.³⁸ Arbitration clauses may stipulate that parties may recover the costs of the arbitration if they are successful, including attorneys' fees,³⁹ while more standard clauses do not so provide.⁴⁰ Other variations also exist.⁴¹

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done at New York* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (entered into force June 7, 1959). A thorough discussion of the New York Convention is presented in Thomas, *International Commercial Arbitration Agreements and the Enforcement of Foreign Arbitral Awards — A Commentary on the Arbitration Act 1975*, 1981 LLOYD'S MAR.COM. L.Q. 17.

35. The term "commercial men" has become something of a term of art. As is pointed out in Healy, *Federal Arbitration*, *supra* note 31, at 232, "most of the 'commercial men' who serve as arbitrators are executives with steamship operating companies and agencies, grain, oil and other companies which frequently charter ships, and chartering brokerage firms." At times, however, the courts have been called upon to decide whether a particular arbitrator is a commercial man. In *Pando Compania Naviera, S.A. v. Filmo S.A.S.* [1975] 1 Lloyd's L.R. 560, the charter party required the arbitrators to be commercial men. One party appointed as its arbitrator a full-time arbitrator who had once practiced law. The court held that despite his earlier vocation as a lawyer, the arbitrator should be considered to have become a commercial man when he stopped practicing law and took up his position as a full-time arbitrator. For a case where the court found that an arbitrator was not a commercial man and invalidated the arbitration, see *Rahcassi Shipping Co. S.A. v. Blue Star Line, Ltd.*, [1967] 2 Lloyd's L.R. 261.

36. As Healy, *Federal Arbitration*, *supra* note 31, at 232, points out, "Most of the tanker forms, however, allow the appointment of either commercial men or lawyers, and at least one form provides that the arbitrators appointed by the parties are to be commercial men, while the third arbitrator is to be an admiralty lawyer." There are times, however, when the three arbitrators who have been chosen are all lawyers. For a recent example of such an arbitration, see *Universe Tankships, Inc. v. Burmah Oil Tankers Ltd.*, S.M.A. No. 2016 (Arb. at N.Y., June 15, 1984). That arbitration was conducted pursuant to a Texaco time charter party which required all three arbitrators to be admiralty lawyers.

37. For an example of this type of charter party, see clause 24 of the EXXONVOY 1969 charter party. The charter party is reproduced in 2C E. BENEDICT, *supra* note 23, at § 17-54 to § 17-65.

38. *In re Utility Oil Corp.*, 10 F. Supp. 678 (S.D.N.Y. 1934).

39. *See, e.g.*, clause 29 of the STB VOY form of charter party. The charter party is reproduced in 2C E. BENEDICT, *supra* note 23, at § 17-165 to § 17-176.

40. The question of whether arbitrators can grant attorneys' fees in the absence of a

Besides providing for arbitrations, charter parties also provide a venue for such proceedings. Invariably, the charter party will state that the arbitration is to be held in either London or New York.⁴²

clause which specifically grants such power to the arbitrators has now been judicially decided. In *Transvenezuelan Shipping Co. S.A. v. Czarnikow-Rionda Co.*, 1982 A.M.C. 1458 (S.D.N.Y. 1981), the court held that arbitrators did not have the authority to grant attorneys' fees unless they were explicitly empowered to do so. *See also Sammi Line Co., Ltd. v. Altamar Navegacion S.A.*, No. 84-9196 (S.D.N.Y. Feb. 20, 1985). Parties, however, may grant such authority to the arbitrators during the course of an arbitration proceeding, and such authority will be valid even if the arbitration clause did not initially provide for the awarding of attorneys' fees. Kimball, *Arbitration: Arbitrators Do Not Have Power to Award Attorneys' Fees Unless the Arbitration Agreement So Provides*, 13 J. MAR. L. & COM. 370 (1982).

41. Perhaps the most important variation is the situation in which arbitration is commenced where there is a string charter. As discussed, *supra* note 19, a string charter involves numerous parties, each of which may attempt to "pass through" its liability to the party above or below it in the string. Since each string charter is concluded by a separate charter party, and since each charter party allows the contracting party to name one arbitrator, the possibility exists for both multiple arbitrations and consolidated arbitrations consisting of a panel which has more than three arbitrators.

Multiple arbitrations are rare, however, as consolidation is favored by both courts and parties. Although in theory consolidated panels could consist of as many arbitrators as there are string charters, in practice some parties will discover that their interests are united with those of another party. Such parties will then agree to waive their individual rights to name an arbitrator and proceed to select one arbitrator among themselves. Thus, the largest panel which normally hears cases is made up of five arbitrators. It is easy to appreciate how much more unwieldy a five man panel is than a three man panel, since the schedules of two additional arbitrators must be accommodated. For a further consideration of consolidated arbitrations, see *Vigo Steamship Corp. v. Marship Corp. of Monrovia*, 26 N.Y.2d 157 (1970), *cert. denied*, 400 U.S. 819 (1970). Recently the Ninth Circuit Court of Appeals upset what had been the longstanding practice with regard to the judicial consolidation of arbitrations. *See Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984), *cert. denied*, 53 U.S.L.W. 3404 (U.S. 1984). In contrast to consolidated arbitrations, the parties will sometimes agree to let a single arbitrator decide the case. This procedure is frequently used in London. For a discussion of the use of single arbitrators in England, see McIntosh, *supra* note 30, at 236. In New York few arbitrations are heard by single arbitrators. *See infra* note 79.

42. Despite the fact that most charter parties in use today call for arbitration in either London or New York, the reader should not assume that arbitration in the two cities is identical, subject only to variations in local customs. Instead, there are significant differences between the two cities, and great care must be used to insure that a charter party calling for arbitration in one city is not altered to provide for arbitration in the other, unless equal attention is given to a number of other factors. For an excellent study of the problems which can result from haphazard substitution, see Cohen, *A Venue Problem with the Arbitration Clauses Found in Printed Form Charters*, 7 J. MAR. L. & COM. 541 (1976). Some of the differences pointed out in this study were ameliorated with the passage of the 1979 amendments to the English Arbitration Act of 1950. Arbitration Act, 1950, 14 Geo. 6, ch. 27, *amended by*, ch. 3, 1975 *and* ch. 42, 1979. For a discussion of the changes, and how they affect English arbitration practice, see Smedresman, *The Arbitration Act, 1979*, 11 J. MAR. L. & COM. 319 (1980).

B. *The Historical Role of the Cities of London and New York with Regard to Maritime Arbitrations*

1. *The City of London*

Arbitration in London has long been an accepted part of international trade.⁴³ London arbitration has generally fallen into three distinct classes: commodities, maritime and insurance.⁴⁴ Of course, since marine ventures often involve the carriage of insured commodities, there has been a great deal of overlap among these three classes.⁴⁵

London's prominence as a center of maritime arbitration requires some historical explanation. Prior to the Norman invasion of 1066, England was a commercially backwards country.⁴⁶ Following their conquest, the Normans achieved a degree of central organization that had been unknown in Europe since the days of the Roman empire. Despite this success, English commercial law did not begin to develop until after the 13th century.⁴⁷ English maritime trade did not emerge until the 16th century,⁴⁸ although seafaring had been known since at least 3000 B.C.⁴⁹ Once England began its maritime trade, however, it soon became a world leader. By the beginning of the 20th century, more than 50% of the world's tonnage⁵⁰ travelled

43. Ellenbogen, *English Arbitration Practice*, 17 LAW & CONTEMP. PROB. 656 (1952).

44. Smedresman, *supra* note 42, at 319.

45. A further cause of overlap is the fact that the vessel carrying the goods will have been insured, usually through an English marine underwriting firm such as Lloyds of London or through one of the mutual societies of shipowners, known as Protection and Indemnity Associations (P. & I. Clubs). Although Clubs exist outside of England (there are, for example, American and Japanese Clubs), the most important Clubs are based in England. For a discussion of the Clubs, see R. M'GONIGLE & M. ZACHER, *supra* note 26, at 374-81.

46. Bischoff, *supra* note 6, at 15.

47. *Id.*

48. Bischoff, *supra* note 6, at 15. As G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* (2d ed. 1975), explain at § 1-2, sea commerce began to gain importance in modern history during the 9th and 10th centuries. By the early 14th century, Venice, the leading sea power of the day, had over 3,000 ships afloat.

49. A short but useful discussion of the origin of shipping is contained in G. GILMORE & C. BLACK, *supra* note 48, at § 1-2.

50. Non-mariners sometimes treat the terms tonnage and registered vessels alike, when in fact they represent completely different concepts. The former relates to the size of the vessels in a nation's fleet, while the latter states the number of vessels in the fleet. This difference between the terms has sparked international lawsuits. In January 1959, the General Assembly of the Intergovernmental Maritime Consultative Organization (IMCO, now known as IMO), which is a United Nations agency concerned with shipping matters, began to elect members to its Maritime Safety Committee. IMCO decided to exclude Panama and Liberia from the Committee. The Constitution of IMCO required that eight of the fourteen nations selected to serve on the Committee be the "largest shipowning nations." This provoked a controversy over

under the British flag.⁵¹

More important than the number of ships flying the British flag, however, was the number of fixtures which were being concluded in London. Until the advent of modern communications, especially the telex,⁵² made them unnecessary, the principal means which existed for the making of a fixture was the exchange. An exchange was a place where brokers and others could meet to find out who had ships to hire out and who was interested in hiring vessels.⁵³ Exchanges existed for specific types of commodi-

what was intended by the term "shipowning nation." Although Panama and Liberia had few shipowners, they had, respectively, the third and eighth largest number of registered vessel tons. The matter was finally settled by the International Court of Justice ruling in favor of Panama and Liberia, who were then seated on the Committee. See Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1960 I.C.J. 150. On how Panama and Liberia could have so few shipowners and so many registered tons, see *infra* note 51.

51. Bischoff, *supra* note 6, at 17. It is difficult today to talk about a country's sea power on the basis of the number of ships which are "flying its flag" (*i.e.*, registered under its laws) at a given moment. This is due to the fact that many shipowners have, since the 1930s, found it advantageous to register their ships in States other than their own. A ship which is so registered is said to be flying a "Flag of Convenience" (FOC), since the principal reason to register under a FOC is to take advantage of the lax safety rules and low taxes which are afforded by FOC states. The leading FOC states have been Panama, Liberia and Honduras, collectively known as PanLibHon. For an excellent book on PanLibHon and FOCs in general, see R. CARLISLE, *SOVEREIGNTY FOR SALE* (1981). In 1980 the joint Anglo-French Condominium of the New Hebrides became the independent Republic of Vanuatu. In 1981, it became the newest FOC State, determined to offer shipowners the most favorable terms available. For an excellent article on Vanuatu's position as an FOC State, see Hubbard, *Registration of a Vessel under Vanuatu Law*, 13 J. MAR. L. & COM. 235 (1982).

The conversion of a vessel's flag from that of its home State to that of an FOC State often causes a hostile reaction from marine workers, who fear a loss of jobs. This problem has become a significant one in England, where several lawsuits have arisen over the issue. For a discussion of some of these lawsuits, see Ewing, *Union Action Against Flags of Convenience — The Legal Position in Great Britain*, 11 J. MAR. L. & COM. 503 (1980). The American position on such union activity was settled by the Supreme Court in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). In that case the Court held that the National Labor Relations Act did not apply to FOC vessels. This decision was a fatal blow to American unions, who had been attempting to organize the crews of FOC ships. The Court's holding that the Act did not apply to such union activity meant that shipowners were free to seek injunctions against such activity. As a result, only sporadic, and inconsequential, union activity has been taken against FOC vessels calling at American ports.

52. For an interesting discussion on the use of the telex in the negotiating of international contracts, see Lewis, *The Formation and Repudiation of Contracts by International Telex*, 1980 LLOYD'S MAR. COM. L.Q. 433.

53. Despite the advent of technology, the basic operation of ship chartering remains the same. One party has a ship which it wishes to hire out, while another party is in need of a ship. Thus, Bischoff, *supra* note 6, at 28 n. 13, speaks of interested parties concluding charters during "meetings" held by teleprinters.

ties⁵⁴ as well as for general cargoes.⁵⁵ The most important "general cargo exchange" became the Baltic Exchange in London, which began as the Baltic Coffee House in the 17th century.⁵⁶ Although exchanges existed in cities other than London, none rivaled London in terms of importance or influence.⁵⁷

Apart from the number of ships flying the Union Jack and the existence of the exchanges, three other factors propelled London's rise to prominence as an international center for the resolution of maritime disputes. First, the English Parliament recognized at an early date the importance of arbitration by passing an Arbitration Act in 1698.⁵⁸ This Act applied to all commercial matters, including maritime ventures.⁵⁹ Second, there was an absence of revolution and sudden upheaval in England, in contrast to the more tumultuous conditions which existed in other countries, such as France.⁶⁰ Finally, because so many ships were English and so many fixtures were being concluded in London on English contract forms, it was logical that when arbitration was called for London became the situs.⁶¹

54. *Id.* at n. 14.

55. *Id.* As explained by Bischoff and others, chartering involving specific types of cargo, such as timber, would usually be left to the provincial exchanges, while general cargoes would be chartered in the exchanges of major cities such as London. Presumably due to their greater geographical proximity to the source of the specific cargo, the provincial exchanges were in a better position than the city exchanges to keep in touch with movements in their particular markets.

56. *Id.* The Baltic Exchange also developed several types of charter parties which were widely used by its members and others. In keeping with the type of cargoes fixed at the Exchange, these charter parties were for use with general cargoes. An example of a charter party produced by the Baltic Exchange which is still in circulation today is the BALTIME 1939 form, a copy of which is reproduced in 2B E. BENEDICT, *supra* note 23, at § 7-2 to § 7-7. For a complete account of the Baltic Exchange from its founding through 1976, see H. BARTY-KING, *THE BALTIC EXCHANGE — THE HISTORY OF A UNIQUE MARKET* (1977).

57. Bischoff, *supra* note 6, at 17.

58. For a discussion of the Arbitration Act of 1698, (Arbitration Act, 1698, 9 Will. 3), together with the Acts which have succeeded it, see RUSSELL ON THE LAW OF ARBITRATION 2-3 (A. Walton 19th ed. 1979).

59. Bischoff, *supra* note 6, at 17.

60. *Id.* The relative peace enjoyed by Britain, in contrast to the events taking place on the Continent, provided the background for Charles Dickens' immortal *A TALE OF TWO CITIES*.

61. The continual choice of London as the situs for maritime dispute settlement has achieved both judicial notice and approval. In *Pando Compania Naviera S.A. v. Filmo S.A.S.*, [1957] 1 Lloyd's L.R. 560, Justice Donaldson remarked that "a domestic arbitration service has grown up in London which serves the shipping and commodity trades on a world-wide basis." In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the United States Supreme Court upheld a forum selection clause in a towage contract which called for the resolution of all disputes in London. Although the clause called for disputes to be resolved by the English Commercial Court rather than in arbitration, there can be no doubt that the Supreme

Hence, by 1900 London had become virtually synonymous with maritime arbitrations. Even when an arbitration was not held in London, many foreign arbitrators would rely on English law and practice to settle the dispute submitted to them.⁶³

Following World War I, many maritime arbitrations began to be held in New York, and London began to lose its monopoly on such proceedings. Nonetheless, London continues today to be the site of many maritime arbitrations, and some marine issues, such as salvage, continue to be heard almost exclusively in London.⁶⁴ In recognition of this fact, the London Maritime Arbitrators' Association (LMAA) was formed in the early 1960s⁶⁴

Court was making a policy choice heavily influenced by England's reputation as a center for admiralty dispute resolution. In particular, it should be noted that the contract was between two corporations, one German, the other American, and called for the towage of an American oil rig from Louisiana to the Adriatic Sea. The rig was damaged during a storm in the Gulf of Mexico, after which she was towed to Tampa, Florida. Legal proceedings were begun in Florida. The Fifth Circuit found these factors to be decisive and invalidated the selection of London. As noted, the Supreme Court upheld the choice of London, by a vote 8-1. The lone dissenter was Justice Douglas. For a discussion of the case, see Black, *The Bremen, COGSA, and the Problem of Conflicting Interpretation*, 6 VAND. J. TRANSNAT'L L. 365 (1973).

62. Bischoff, *supra* note 6, at 17. The influence which English maritime decisions has enjoyed in foreign cities has continued to be very great even in recent times. In America, Justice Oliver Wendell Holmes opined that, ". . . Of course, it is desirable, if there is no injustice, that the maritime law of this country and of England should agree." *The Eliza Lines*, 199 U.S. 119, 128 (1905). It thus came as something of a shock when a panel of New York arbitrators flatly stated that they were not bound by English charter party law. *Inter-ocean Shipping Co. v. Nippon Yusen Kaisha*, 1974 A.M.C. 2161 (Arb. at N.Y., Sept. 6, 1974).

63. Salvage arbitration is centered almost exclusively in London because London arbitration is called for in the Lloyd's Salvage Agreement. The Lloyd's Salvage Agreement was first drawn up in 1892 by the insurance underwriters at Lloyd's, and since 1908 has been the only form recognized by that body. It is undisputed that the Lloyd's form is the most popular form of salvage contract today. *See, e.g.*, the remarks of the House of Lords in *The Valverde*, 1938 A.C. 173, 197, 202. It was recently pointed out that 250 salvage arbitrations pursuant to the Lloyd's form are held each year, or about one every working day. *See* O'May, *Lloyd's Form and the Montreal Convention*, 57 TUL. L. REV. 1412, 1412 n.1 (1983). One problem, at least for commentators, is that the awards rendered under the Lloyd's form are confidential, and thus not available to the public. This limitation has been somewhat eased, however, by the publication of G. BRICE, *MARITIME LAW OF SALVAGE* (1983). Although he does not reveal any of the awards, Mr. Brice is in an excellent position to comment on salvage awards because he is one of the Lloyd's Salvage Adjusters. While other forms of salvage contract exist, their use is limited. For a survey of these other forms, see Miller, *Lloyd's Standard Form of Salvage Agreement — "LOF 1980": A Commentary*, 12 J. MAR. L. & COM. 243, 244 (1981). For two recent, and therefore rare, American salvage cases, see *B. V. Bureau Wijsmuller v. United States*, 1976 A.M.C. 2514 (S.D.N.Y. 1976) and *In re Oil Spill by the Amoco Cadiz*, 659 F.2d 789 (7th Cir. 1981). As is obvious, both of these disputes were litigated rather than arbitrated.

64. As Bischoff, *supra* note 6, at 17, explains, the Baltic Maritime and Shipping Exchange originally kept a list of arbitrators and organized a panel as the need arose. This proce-

with a membership of approximately fifty-five.⁶⁵ Most maritime disputes are submitted to LMAA arbitrators, although London maritime arbitrations are sometimes heard by non-LMAA arbitrators.⁶⁶ Interestingly, however, only a few LMAA arbitrators are active,⁶⁷ resulting in most maritime arbitrations being heard by the same handful of arbitrators.

2. *New York City*

New York City did not become an important international center for the hearing of maritime disputes until this century. This was probably due to two factors. First, American flag tonnage prior to 1900 was negligible.⁶⁸ Second, the United States tended to follow a policy of isolation with respect to the rest of the world, with the notable exception of South America,⁶⁹ until the advent of World War I. Following World War I, the United States emerged from the war with a surplus of tonnage,⁷⁰ and as a new world leader.⁷¹

These two factors alone would not have been enough for New York to wrest from London a substantial number of maritime arbitrations. A third

dure apparently became inadequate and led to the creation of the LMAA. The LMAA's current address is: The Honorable Secretary LMAA, 8th Floor, Brettenham House, Lancaster Place, London, WC2E 7EN, United Kingdom.

65. *Id.* For a useful account of maritime arbitrations in London today, see McIntosh, *supra* note 30.

66. Bischoff, *supra* note 6, at 17.

67. *Id.*

68. G. GILMORE & C. BLACK, *supra* note 48, at § 11-4, have written of this period that:

By 1900, the British steams were supreme in most important trades, and the American merchant marine was utterly insignificant. Postal subsidies and other half-hearted aid could do no more than keep it from disappearing entirely.

69. Early in its history the United States became deeply concerned with South America. This concern led to the Monroe Doctrine of 1823, by which American served notice that it would not tolerate interference by outside powers in the affairs of that region. Except for this pronouncement, the United States was not active in world affairs.

70. G. GILMORE & C. BLACK, *supra* note 48, at § 11-5. In order to address the problems caused by this surplus of tonnage, the United States Congress enacted the Merchant Marine Act of 1920, 41 Stat. 988 (codified at 46 U.S.C. §§ 861-889 (1982)) and increased the powers of the United States Shipping Board. Both of these matters are discussed at length in Chapter XI, 958-996, of G. GILMORE & C. BLACK. *See generally* H. BESS & M. FERRIS, *U.S. MARITIME POLICY: HISTORY AND PROSPECTS* (1981). (Chapters 2 and 3 trace maritime history from the Colonial period to 1936. Chapters 4 and 5 discuss the period from the Merchant Marine Act of 1936 through 1970.)

71. Isolation did, however, return for a time in the late 1930s, when some Americans, notably Charles Lindbergh, urged Americans to avoid entering the Second World War in a movement known as the "America First" campaign. *See* W. MANCHESTER, *THE GLORY AND THE DREAM* 219-24 (1973).

factor which contributed to the development of New York City as an international maritime arbitration center was the passage of the Federal Arbitration Act by the United States Congress on February 12, 1925.⁷²

Prior to the passage of the Act, the American federal judiciary had been extremely hostile to arbitration, because it felt that contracts to arbitrate were against public policy.⁷³ Maritime arbitration became more prevalent once Congress gave its imprimatur on arbitration,⁷⁴ specifically mentioning maritime disputes in the Act.⁷⁵ Today, the volume of maritime litigation, especially charter party litigation, in contrast to arbitration, is small.⁷⁶ A notable exception, however, involves suits by seamen and other marine workers for injury or death.⁷⁷

In 1963 the Society of Maritime Arbitrators, Inc. (SMA) was founded

72. Federal Arbitration Act, Feb. 12, 1925, c. 213, 43 Stat. 883 (codified at 9 U.S.C. §§ 1-14 (1982)). The Act has been written about extensively. The leading discussion is found in *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942).

73. See the discussion contained in G. ROBINSON, *HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES* 201-04 (1939).

74. The constitutionality of the Federal Arbitration Act was upheld in *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932).

75. Maritime transactions are referred to in Section 1 of the Federal Arbitration Act, where they are defined to include charter parties, bills of lading, wharfage agreements, the furnishing of supplies to vessels, collisions and all other matters which, if submitted to a federal court, would come within the court's admiralty jurisdiction. The recent problems which have been experienced in deciding whether a given matter is within the court's admiralty jurisdiction are discussed *supra* note 4. By contrast, admiralty jurisdiction in England is very limited, owing to the historical jealousies which existed between the common law courts and the admiralty court. The matter is fully discussed in F. WISWALL, *THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800* (1970). For a discussion of the recent changes which were made in England's admiralty jurisdiction, see Jackson, *Admiralty Jurisdiction — The Supreme Court Act 1981*, 1982 LLOYD'S MAR. COM. L.Q. 236 (discussing the Supreme Court Act, 1981, ch. 54).

76. G. GILMORE & C. BLACK, *supra* note 48, have written at § 4-1, that: "[A]rbitration . . . has largely taken the place of litigation. It is only infrequently, today, that a court is called on to construe a charter." Charter party issues, however, do occasionally reach the Supreme Court. The most recent decision of the Court involving a true charter question is *Massachusetts Trustees of Eastern Gas & Fuel Assoc. v. United States*, 377 U.S. 235 (1964).

77. A number of acts passed by Congress in the 1920s specifically provided that suits by seamen and other marine workers could be heard in federal court by a jury, in contrast to the usual rule in admiralty which denies the right to a jury trial. Thus, there has been no rush by seamen to embrace arbitration, who apparently believe (probably correctly) that they stand to collect larger damages from juries than maritime arbitration panels. Recall, *supra* note 35, that many maritime arbitrators today are executives of shipowning companies. A useful discussion of the various Congressional Acts, known respectively as the Jones Act, 46 U.S.C. § 688 (1982), the Death on the High Seas Act, 46 U.S.C. §§ 761-768 (1982), and the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982), is contained in G. GILMORE & C. BLACK, *supra* note 48, at Chapter VI.

in New York City, modelled along the lines of the LMAA.⁷⁸ The Society today has approximately 120 members, although as with the LMAA, only a handful of members are active.⁷⁹

III. THE NATURE OF MARITIME ARBITRATIONS AND THE PHENOMENA OF DELAY

Arbitration is generally perceived as flexible, informal, speedy and inexpensive. Certainly New York maritime arbitrations are both flexible and

78. The Society maintains an office at 26 Broadway in New York City. A published history of the Society does not appear to be available, although a discussion of the Society's founding and purposes can be found in Zubrod, *Maritime Arbitration in New York*, ARB. J., Dec. 1984, at 16: see also Bauer, *Manifest Disregard of the Law*, 1979 LLOYD'S MAR. COM. L. Q. 142, 146-47.

79. In 1984, the SMA published 111 awards. Of these 111, 105 were heard by three man panels, 4 were decided by 2 man panels, and 2 were decided by sole arbitrators. Thus, 325 arbitrator slots were generated by these 111 arbitrations. According to the 1984-85 Roster of the SMA, there were 124 SMA arbitrators in 1984. If each SMA arbitrator heard exactly as many arbitrations as every other SMA arbitrator, each SMA arbitrator would have heard 2.62 arbitrations in 1984. In reality, however, no such division of labor occurred. Instead, as pointed out *infra* note 105, the hearing of arbitrations was concentrated among a select group of SMA arbitrators, as shown in the following table:

| <u>Arbitrator</u> | <u>Number of Awards Published in 1984*</u> |
|-------------------|--|
| J. Berg | 37 |
| H. Cederholm | 31 |
| M. Arnold | 23 |
| L. Nelson | 23 |
| M. Van Gelder | 19 |
| F. Crocker | 13 |
| D. Zubrod | 10 |
| K. Mordhorst | 8 |
| J. Simms | 8 |
| A. Boulalas | 7 |
| S. Busch | 7 |
| A. Nichols | 6 |
| F. Sauer | 6 |

* The number of arbitral appointments accepted in any given year is, however, much greater than the number of awards published. In addition, some of the 111 awards represent Partial Final Awards which await final disposition.

It should also be pointed out that these figures tend to understate the level of concentration among SMA members since some of the published awards were issued by non-SMA members. Thus, the number of slots available to SMA arbitrators in 1984 was somewhat less than the 325 discussed above.

informal.⁸⁰ Few would describe current maritime arbitration, however, as being either speedy or inexpensive.⁸¹ There are several reasons for this.⁸² For present purposes, however, the only cause of delay and cost which this article will discuss is the *arbitrator* delay which occurs once the arbitrators have received all of the evidence the parties wish to submit and the hearings are declared closed.⁸³ Arbitrator delay is easier to identify and analyze than

80. Healy, *Federal Arbitration*, *supra* note 31, notes at 232 that, "Ordinarily, New York maritime arbitrations are conducted very informally." Maritime arbitrations appear to be somewhat more formal in London. McIntosh, *supra* note 30, at 241, describes an English arbitration as being only superficially informal. He does note, however, that barristers do not wear robes before the arbitrators, in contrast to their court appearances.

81. A recent study of New York maritime arbitrations found that there was almost universal agreement that arbitrations tended to suffer from delay. See Iwasaki, *A Survey of Maritime Arbitration in New York*, 15 J. MAR. L. & COM. 69 (1984). The survey, however, is flawed because of its limited statistical base. Iwasaki solicited responses from 65 lawyers and 3 professors, but only received 25 responses.

The problem of delay has also plagued London arbitrations. For a discussion of delay prior to the commencement of arbitral proceedings, see Thomas, *Power of Court to Extend Time for Commencing Arbitration Proceedings*, 1981 LLOYD'S MAR. COM. L. Q. 529. For a discussion of delay once the arbitration has begun, see Lewis, *supra* note 9, and cases cited therein.

82. Indeed, many arbitrations are begun solely as a negotiating ploy, in an attempt to force the other side to enter into serious settlement negotiations. Healy, *Federal Arbitration*, *supra* note 31, at 232. Thus, it is not uncommon to find arbitrations which have been "held in abeyance" for years. Lewis, *supra* note 9. The problem of stale claims is, of course, not unique to arbitrations, for it also occurs in litigation. The problem will often be dealt with sooner in litigation than in arbitration, however, because arbitrators are under no pressure to "clear up" their dockets by reducing backlog. In contrast, since judges are public officials, they are under tremendous pressure to keep their cases moving along so that their dockets are up-to-date. The matter is taken up in a series of articles entitled *Recent Civil Court Research and Change*, 8 JUST. SYS. J. 258 (1983). In addition to pursuing arbitration without sincere motives, lawyers and arbitrators add to the problems of delay and cost during the proceeding by requesting and granting extensions for the filing of briefs and early adjournments for hearings.

83. The problem of post-hearing delay in the rendering of maritime arbitration awards has not, it seems, previously been dealt with in the literature on maritime arbitrations. This is surprising, since there is apparent agreement that delays in obtaining awards is significant. In the 1984 study of New York maritime arbitration, 72% (18 out of 25) of the admiralty lawyers who responded to the study indicated that they had experienced delay in "scheduling hearings and obtaining awards." Iwasaki, *supra* note 81, at 71-72. Of course, the value of this statistic is limited in that the survey question grouped the two problems into one question, when, in fact, the problems are distinct. The former problem speaks to delays occurring during the evidence-gathering stage of the arbitration (which includes the presentation of witnesses and writing of legal memoranda), while the latter problem begins to arise only after the evidence-gathering stage has been completed. This is not to suggest that post-hearing arbitrator delay is greater than arbitrator delay during the proceeding; indeed, perhaps this is why the Iwasaki study grouped the two concepts together.

The analogous problem of post-hearing delay in labor arbitration, however, has been writ-

other types of delay because the responsibility of rendering the award is solely the arbitrator's.

A. The Causes of Arbitrator Delay Following the Reception of Evidence

1. *Concentration of Arbitral Duties*

One reason for delay in the rendering of awards is the changing nature of the maritime arbitral profession. In earlier times, the profession enjoyed wide participation from the entire group of individuals who had sufficient expertise to serve as an arbitrator; in fact, serving as an arbitrator was seen as an obligation incumbent upon each person in the industry.⁸⁴ Today, however, the total number of individuals who comprise the profession has decreased. Furthermore, of those who accept appointments, many are relatively inactive, accepting only one or two appointments a year. The total number of active arbitrators, accepting more than two appointments a year, constitutes a relatively small percentage of the profession and a very small percentage of the total number of individuals who qualify to serve as maritime arbitrators. In addition, only a handful of the available arbitrators are ever appointed by parties.⁸⁵ The interaction of the foregoing factors has resulted in a concentration of arbitral duties in the hands of relatively few people.

An additional aspect of this concentration of arbitral duties in the profession is the trend of a growing number of individuals to make arbitration their full-time profession. This trend has increased in recent years due to the business failures of large numbers of shipowners and related companies that have resulted in substantial unemployment among maritime industry specialists. These specialists then seek arbitration as an alternative source of employment in the industry.⁸⁶ Paradoxically, this increase in full-time arbi-

ten about, although not in an exhaustive way. See, e.g., R. W. FLEMING, *THE LABOR ARBITRATION PROCESS* 74-77 (1965); Mittenthal, *Making Arbitration Work: Alternatives in Designing the Machinery*, *ARB. J.*, Sept. 1981, at 35, 37; Elkouri, *Informal Observations on Labor Arbitration Today*, *ARB. J.*, Sept. 1980, at 41, 44.

84. The belief that serving as an arbitrator is a duty to be borne still exists in most industries. In Houston, *Textile Transactions*, in *ARBITRATION: COMMERCIAL DISPUTES, INSURANCE AND TORT CLAIMS* (A. Widiss ed. 1979), for example, it is said at 147 that:

In accordance with its historical development, the GAC [General Arbitration Council of the Textile Industry] provides a very large panel of textile arbitrators, business persons active in the industry, who undertake their duties as a contribution to the orderly marketing of textiles. They therefore act without compensation.

85. See *supra* table at note 79.

86. The problem of loss of jobs in the marine sector has been particularly intense in the

trators, working without the added pressure of other employment, has not increased the speed with which awards are rendered. It is difficult to explain this, although tentative conclusions may be proffered. First, although there is an increasing number of full-time arbitrators, as was noted in the preceding paragraph, only a handful of the available LMAA and SMA arbitrators are ever appointed.⁸⁷ Thus, although a full-time arbitrator may have more time to hear arbitrations, he must hear more of them. Second, since arbitrators no longer have the pressure of other employment, they are free from any constraints limiting their time to consider the cases which they have before them. While this may result in more thoughtful awards, it also increases the amount of time it takes to render an award.

United States, and threatens to grow worse. A 1984 study prepared by Georgetown University warned that the United States flag merchant marine would shrink to a third of its present size within just six years unless the Congress took immediate steps to reverse present trends. Morison, *Dim Shipping Future Forecast Unless Promotional Moves Made*, *The Journal of Commerce*, Dec. 20, 1984, at A1.

Although a number of bills which would aid American shipowners has been introduced into the 99th Congress, which convened in January, 1985, most of these bills envision only marginal amounts of aid. In addition, almost all of the bills which have been introduced originated in previous Congresses, where they were unable to win passage. Morison, *Legislators Face Slew of Ship Bills*, *The Journal of Commerce*, Jan. 4, 1985, at 1.

In contrast to the lack of work in the shipping industry, there is work available as an arbitrator. Although no statistics appear to be compiled on how many new maritime arbitrations are begun in New York each year, it has been stated that there are between 2,000 and 4,000 new maritime arbitrations begun each year in London (counting only those maritime arbitrations heard by the LMAA). Hacking, *A New Competition — Rivals for Centres of Arbitration*, 1979 *LLOYD'S MAR. COM. L.Q.* 435, 437. Presumably New York has similar statistics.

Serving as a maritime arbitrator can prove to be very lucrative. As pointed out in Sommer, *supra* note 15, at 202, a large maritime arbitration can generate arbitrators' fees of up to \$100,000. It is impossible to tell what the average fee charged is, however, because awards published by the SMA usually exclude the statement of fees. In a recent case, *Manchester Liners, Ltd. v. Compania Espanola de Laminacion, S.M.A. No. 1935* (Arb. at N.Y., Jan 5, 1985), the panel, in an uncontested arbitration, published an award that included fees which came to \$2,500 or \$850 per arbitrator. Following the standard practice, the fees were charged solely against the party which refused to participate in the hearings, but were made payable in the first instance by the party which did appear in the hearings. Because arbitrators do not keep (or do not reveal them if they do keep them) time sheets indicating how much time they spent in hearing and deciding a particular arbitration, it is not possible to say how many hours the arbitrators worked in order to earn the fees that they set for themselves. It should be pointed out that the fees charged for an uncontested arbitration are presumably smaller than those charged for a contested arbitration, as an uncontested arbitration requires less time for an arbitrator.

87. See *supra* table and discussion at note 79.

2. *Arbitral Overcommitment*

A second cause of delay is the acceptance by both full-time and non full-time arbitrators of more appointments than they can adequately schedule.⁸⁸ Arbitrators overcommit themselves for reasons that are probably not unique to the arbitration profession. The attractive remuneration that an arbitration generates, however, is one particular incentive to accepting more arbitrations than is reasonable, given an arbitrator's then existing workload.⁸⁹ This financial incentive is probably stronger where the arbitrator is full-time, and thus lacks an alternative source of steady income.

Overcommitment has particularly serious ramifications in light of the current, more "professionalized" maritime arbitration practice which demands more time at each stage of the proceedings. Arbitrators must find time to attend more hearings, review greater amounts of evidence, read an increased number of extensively cited legal briefs,⁹⁰ and draft and circulate

88. The willingness of arbitrators to accept cases, regardless of whether they have the time to hear them, was documented in the Iwasaki study, *supra* note 81. Of those responding, 79% had never had an arbitrator turn down an appointment, 16% had sometimes had an arbitrator turn down an appointment, and 5% had very often had an arbitrator turn down an appointment. It would be reasonable to presume that some appointments are turned down because a patent conflict exists, as where the party seeking the appointment turns out to be a subsidiary or affiliate of the company for whom the arbitrator works. See further note 112, *infra*. Consider also that an arbitrator can only accept appointments, but not initiate them. Thus, even if a full-time arbitrator is busy when a new appointment is tendered, he must plan for the future, when fewer appointments may be offered.

89. See discussion *supra* note 86. Elkouri, *supra* note 85, at 44, supports the proposition, in the context of labor arbitration, that an arbitrator may delay in issuing a decision because he may take on too many cases. He suggests several additional reasons for this behavior: (1) it can be extremely difficult for an arbitrator to determine precisely what the upcoming workload really is, therefore, as with airlines that expect cancellations, an arbitrator may overbook; (2) the arbitrator has a feeling of obligation not to reject a case after the parties have gone through the selection process; (3) lower grievance procedure steps taken by parties with whom the arbitrator has a continuous relation may fail and produce cases which the arbitrator is bound to accept; (4) there is pride in being asked to serve; (5) arbitrators may fear that they won't be asked again; (6) the arbitrator has a spirit of adventure and the case presents a particular challenge; and (7) the arbitrator is attracted by the prospect of increased income.

90. Arbitrators are often besieged today with three separate sets of legal briefs, assuming a conventional two party arbitration. The submission of legal briefs begins with a Preliminary Memorandum by the claimant, which is usually followed by a Preliminary Memorandum of the respondent. After the hearings are held, the parties normally submit both post-hearing briefs and post-hearing reply briefs. The Iwasaki study, *supra* note 81, at 82-85, found that 88% of the lawyers polled thought it useful to cite American admiralty cases, while an equal number found it useful to cite passages from leading maritime treatises. In addition, 96% of the lawyers found it worthwhile to cite English cases, and 80% believed it worthwhile to cite other arbitration awards. Thus, arbitrators are being forced to read what are often voluminous memoranda filled with legal citations. Reading such briefs is made more difficult because

longer opinions,⁹¹ than ever before.

3. *Formal Opinions*

The third cause of arbitrator delay in rendering awards in maritime arbitrations, in contrast to arbitrations in other fields,⁹² is that maritime arbitrators provide written decisions explaining their decisions.⁹³ Although courts have consistently held that arbitrators have no obligation to provide written explanations of their decisions,⁹⁴ and although arbitration awards have no precedential value,⁹⁵ the writing of lengthy opinions and the issuing

many panels are made up of arbitrators who are not lawyers. *See Healy, Federal Arbitration, supra* note 37, quote at 232. Therefore, they are not, at least in the early stages of their careers, familiar with legal writing. In contrast, most other non-admiralty arbitrators refuse to permit parties to submit post-hearing briefs. In *Houston, supra* note 87, at 176, it is said that:

Lawyers will appreciate that many textile cases close with oral statements that are greatly truncated, or even waived. Similarly, textile arbitrators seldom ask for, or need, or even permit written briefs after closing the oral hearing. A good statement for the arbitrators at the opening is also the final brief.

91. In a recent New York maritime arbitration, a Partial Final Award ran more than fifty pages. Because it was only a partial award it only disposed of some of the issues between the parties. *See Yuma Shipping Corp. v. Oswego Operations I Corp., S.M.A. No. 1844 (Arb. at N.Y., July 1, 1983).*

92. Arbitral awards in the construction and commodity brokerage fields, for example, rarely include written opinions. Of course, some types of maritime arbitrations do follow the practice of not writing opinions. A notable example are the salvage arbitrations which arise under the Lloyd's Salvage Agreement. O'May, *supra* note 63, at 1417 n.24, reports that:

The award itself is usually on a single sheet, signed by the arbitrator. It recites the salvage agreement, and states the figures found by the arbitrator for the salvaged values and the amount of the salvors' award. The award also states the date from which the interest shall run and the rate thereof.

Contrast this brevity with the opinion of the arbitrators in the *Yuma Shipping* case, discussed *supra* note 91.

With respect to opinion writing, labor arbitrators have tended to follow the practice of the maritime industry. *See generally, Petersen & Rezler, Arbitration Decision Writing: Selected Criteria, ARB. J., June 1983, at 18; Stark, Arbitration Decision Writing: Why Arbitrators Err, ARB. J., June 1983, at 30.*

93. Providing written opinions causes delay not only because it takes time to write and to explain a decision, but also because the pressure to write exacerbates the tendency to procrastinate. For a revealing discussion regarding procrastination and formal writing, see Hechinger, *About Education: Colleges Called Major Culprits in Thesis Delay*, N.Y. Times, March 8, 1983, at C1.

94. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960); *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 203 (1956).

95. In *Sun Oil Co. v. Western Sea Transport, Ltd.*, 1978 A.M.C. 1372 (S.D.N.Y. 1978), the court found that a New York arbitration panel had not committed error when it refused to follow the holding of a prior New York arbitration panel. Recall, however, that 80% of the admiralty lawyers polled in the Iwasaki study thought that the citing of previous maritime

of dissents has become a standard practice.⁹⁶

One reason for the increase in written, formal opinions is the increasing use of lawyers in arbitrations. Arbitration originally consisted of the parties presenting their claims and defenses directly to the panel, without lawyers. Over the years, however, as arbitration became a more formal process, the presentment function was taken over by lawyers.⁹⁷ This, in turn, led to the writing of both pre- and post-hearing briefs modelled after trial briefs.⁹⁸ This increased formality has caused arbitrators to adopt the prac-

arbitration awards did have a persuasive effect on the panel. *See* discussion, *supra* note 90. Some admiralty lawyers have gone so far as to suggest that maritime arbitration awards will someday be routinely cited by courts. Bauer, *supra* note 78, at 146, stated that:

Soon Judges will also cite these awards in their opinions. It has already happened, but it was an English Judge, not an American Judge, who cited an arbitration award of the S.M.A. in one of the cases involving the "arrived ship" question. *The Maratha Envoy*, [1977] 1 Lloyd's Rep. 217, reversed by the House of Lords, [1977] 2 Lloyd's Rep. 301.

Mr. Bauer was indeed prophetic. Two years after he wrote the above, several New York arbitrations were cited in *Apex Oil v. Hector Maritime Inc.*, No. ____ (S.D.N.Y.), *appeal dismissed*, 1981 A.M.C. 2972, 659 F.2d 1057 (2d Cir. 1981) (decision noted without opinion).

96. Many of these decisions gain wide circulation, at least among the members of the admiralty bar. If the arbitrators are members of the Society of Maritime Arbitrators, the award will be published by the Society and copies distributed to the subscribers to the Society's award service. If the award is of general interest it may also be published in *American Maritime Cases*, whether or not the arbitrators are members of the Society. *See* Healy, *Federal Arbitration*, *supra* note 31, at 233.

The availability of SMA awards recently increased dramatically. Beginning in 1984, all of the awards of the Society since 1965 became available through Lexis, the computer-assisted research service of the Mead Data Corporation; *see* Zubrod, *supra* note 78, at 20. The SMA data base is provided to all Lexis subscribers at no additional cost. Since many law offices and law schools have arranged for access to Lexis terminals, the awards of the Society have for the first time become generally available to lawyers outside the admiralty bar.

97. At one time the rules of some industries specifically prohibited the use of lawyers. For a case involving such a rule, *see* *Henry Bath & Son Ltd. v. Brigby Prod.*, [1962] 1 Lloyd's L.R. 389. Even today, a certain amount of hostility towards the use of lawyers in arbitration proceedings remains. Thus, Houston wrote, in discussing textile arbitrations: "[Textile arbitrators] desire to hear the unvarnished stories of the disputants without the intervention of a lawyer with litigation tactics." Houston, *supra* note 84, at 147.

98. *Supra* note 90. The reader should not conclude that the briefs submitted in the typical arbitration are as formal as those submitted in a court proceeding. In particular, since arbitrators do not follow rules of evidence, there is no need to brief such evidentiary issues as "hearsay." This does not mean that the arbitrators fail to appreciate the relative worth of a particular piece of evidence. As pointed out by Healy, "Documentary evidence is freely received, although when a document is plainly 'hearsay' evidence, or does not appear to be relevant or material, the arbitrators may remark that they are receiving it for what it is worth." Healy, *Federal Arbitration*, *supra* note 31, at 233. Like courts, arbitrators will also draw adverse inferences, especially if a party fails to produce a key witness. For an example of such adverse inference drawing by the arbitrators, *see* the *Yuma Shipping* arbitration, S.M.A. No.

tice of writing opinions.⁹⁹

Secondly, the attorneys want formal opinions. Lawyers are used to dealing with court opinions and *stare decisis*. Therefore, they have come to expect that arbitrators will provide an opinion that does more than simply state which side won and what damages, if any, that party is entitled to receive.¹⁰⁰

A third factor which has encouraged the writing of formal opinions is that the arbitrators themselves benefit from such opinions in at least two ways.¹⁰¹ First, the writing of a long opinion presumably entitles the panel to ask for larger fees for their services.¹⁰² Second, it is through the writing of an opinion, or a dissent, that arbitrators begin to build up the "track record" that is often so crucial in a party's decision on whom to select as its arbitrator.¹⁰³

1844 (Arb. at N.Y., July 1, 1983).

99. Even if an arbitrator does not wish to render an opinion, he may find party pressure to issue reasons for his award overwhelming. Consider the recent case of Mutual Shipping Corp. of New York v. Bayshore Shipping Co. of Monrovia, [1985] LLOYD'S MAR. L. NEWS 135 (available May 1, 1985, on LEXIS, Admrtly library, UK Cts file). In that case the arbitrator issued an award without stating his reasons. He then permitted the parties to see his "confidential reasons," which explained why he had decided the case as he did. It was expressly stated, however, that the confidential reasons did not form any part of the award. Upon seeing the reasons, it became obvious that the arbitrator had made a mistake. The losing party then sought to have the award vacated by the courts based on the confidential reasons. Although the award was not vacated, the resort to the courts further delayed the paying of the award by the losing party. See *infra* text following note 171.

100. Bauer, *supra* note 78, at 147, has praised the rendering of awards which provide reasons for the decision, and has argued that maritime arbitrators should follow the practice of *stare decisis*: "Previous arbitration decisions by the S.M.A. should be followed unless the reasoning is totally unacceptable to a later panel. . . . The rule of *stare decisis* should be applied in arbitrations as well as in the courts."

For a less enthusiastic view of precedent in arbitration, see Seitz, III, *The Citation of Authority and Precedent in Arbitration (Its Use and Abuse)*, ARB. J., Dec. 1983, at 58.

101. Those who favor written awards have argued informally that if an arbitrator is forced to reduce his views to paper, he will be less likely to "shoot from the hip" and thereby make what is likely to be a hasty and perhaps erroneous decision.

102. See *supra* note 86 explaining that arbitrators' fees are not charged on an hourly basis.

103. The establishment of a track record is vital if an arbitrator is to receive both repeat appointments and appointments from lawyers who have not previously appointed him. The Iwasaki study, *supra* note 81, at 91, found that "Most maritime counsel obtain personal information on a potential arbitrator from the awards rendered by him." Thus an arbitrator who does not write either awards or dissents deprives himself of the best means he has for ensuring his selection in future cases.

B. *Mechanisms Currently Addressing the Problem of Arbitrator Delay*

There are three mechanisms currently addressing the problem of arbitrator delay in the rendering of maritime awards. First, there are informal methods. Second, there are contractual mechanisms. Third, there are judicial methods.

1. *Informal Mechanisms*

The informal, essentially social, mechanisms which exist to deal with arbitrator delay can be sub-divided into two categories: a) the pressure which an arbitrator can bring to bear on his colleagues, and, b) the pressure which a party can bring to bear on the panel.

a. *Arbitrator pressure.* Several factors make it desirable for an arbitrator sitting on a slow-moving panel to prod his fellow arbitrators in moving the award along. First, arbitrators usually do not receive any compensation until the award is rendered.¹⁰⁴ Second, party-appointed arbitrators, in contrast to the Chairman who is chosen by the other arbitrators, desire to be selected by the party in future cases.¹⁰⁵ Thus, if the arbitrator has been appointed by a party which desires a speedy rendering of the award the arbitrator will attempt to do his best to carry out the desire of his appointers.¹⁰⁶ A third reason why an arbitrator will push his fellow arbitrators to render a speedy award is to burnish his image as an arbitrator who can get "fast results."¹⁰⁷

The pressure an arbitrator can bring to bear on other members of his arbitration panel is limited by a number of practical concerns. If an arbitrator pushes his fellow arbitrators too hard, he risks negative repercussions in four ways. First, in the short run, they might react by becoming hostile to the arbitrator and, unconsciously, to the position of the party which appointed that arbitrator. Thus, the fast-moving arbitrator must be careful

104. Recently, however, arbitrators have begun to ask that security for their fees be posted. Sommer, *supra* note 15, at 202. In addition, they have begun to send interim statements of their charges.

105. As noted in the Iwasaki study, *supra* note 81, at 91, "Maritime counsel's preference is concentrated on a few well-known arbitrators. . . ."

106. Although maritime lawyers have routinely stated that they believe that all of the arbitrators act in an impartial fashion once selected, *see, e.g.*, Iwasaki, *supra* note 81, at 71, some admiralty lawyers have expressed doubts. In the Iwasaki study, 17% (4 out of 25) of the lawyers and law professors responding stated that they thought that party-appointed arbitrators were seldom impartial. *Id.*

107. Of course, in light of what was said before, there is probably a certain value to a reputation of being an arbitrator who "knows how to keep things from happening."

lest the panel render a quick decision which is unfavorable to his appointer's position.

Second, in the long run, the fast-moving arbitrator risks not being appointed by his fellow arbitrators as a panel Chairman. Since the party-appointed arbitrators have complete freedom to select the Chairman,¹⁰⁸ it is ill-advised for an arbitrator, especially a full-time arbitrator who has no other source of income, to make enemies among other arbitrators.

A third factor mitigating against the attempts of the fast-moving arbitrator to speed the proceedings exists where he is either an admiralty lawyer or a person active in the maritime trades. If the fast-moving arbitrator is an admiralty lawyer and pushes the other members of the panel too much, he may risk losing any chance he or his firm had of receiving business from the other arbitrators. This is particularly true if the other members of the panel are active in the maritime trades and are regularly in a position to influence the choice of which lawyer will receive the company's legal work.

Fourth, the arbitrator who is also an admiralty lawyer must be careful since he is likely to come before his fellow arbitrators on future panels in which he acts as counsel for one side or the other. Likewise, if the fast-moving arbitrator is himself engaged in the maritime trades, as, for example, a manager of a shipowning company, he must be careful not to antagonize the other members of the panel. If he does, he runs the risk that if those arbitrators are on a future panel in an arbitration involving his company, either as the other side's appointee or as the Chairman, they might subconsciously be hostile to his company's position.

b. *Party pressure.* Parties, as well as arbitrators, can exert pressure to increase the speed with which a panel renders an award. The boldest approach is to require that the arbitration be held in a city other than London or New York. Tokyo, Houston and San Francisco, among others have begun to actively cultivate the hearing of maritime arbitrations in their cities.¹⁰⁹ However, a number of factors work against such cities being chosen,

108. Of course, the party-appointed arbitrators must be careful to abide by the terms of the charter party. Thus, as noted, *supra* note 36, at least one charter party states that the chairman must be an admiralty lawyer. In addition, recall the *Rahcassi* case, discussed *supra* note 35, where the appointment of a non-commercial chairman invalidated the arbitration because the arbitration clause required all of the arbitrators to be commercial men.

109. These cities may seem attractive because they do not have a backlog of arbitrations. Some cities have begun to publish "how-to" guides promoting themselves and their maritime arbitration facilities. See, e.g., STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION IN SWEDEN (2d ed. 1984).

at least at the present time.¹¹⁰

A less bold step is for the party wishing a speedy award to select an arbitrator who either is known to be fast-moving, or who has very few other arbitral commitments. This method usually fails to work in practice, however, for at least three reasons. First, parties and their lawyers prefer to pick an arbitrator with whom they feel comfortable and who has a track record for results rather than for speed.¹¹¹ Indeed, there are arbitrators today who are almost always appointed either by Owners or by Charterers, because their sympathies are thought to lie in one direction or the other. This perceived need for certainty causes the same arbitrators to be selected over and over again, even when it is recognized that these arbitrators have extremely heavy caseloads.

Secondly, when a party does pick an arbitrator who is able to decide a matter quickly, its attempt to insure a speedy award can be frustrated by the other side selecting an arbitrator who already has extensive arbitral commitments. Although parties are free to object to the selection of a particular arbitrator because of bias or corruption,¹¹² no grounds exist for an

110. The three major factors that militate against cities other than New York or London rising to prominence in arbitration are: 1) the long standing tradition of having maritime disputes resolved in either London or New York, a tradition which is embedded in the pre-printed arbitration clauses of all commonly used charter parties; 2) the lack of practical experience in conducting arbitrations; and 3) the lack of an infrastructure which can provide the necessary panels of arbitrators. For an interesting general article on the matter, see Hacking, *supra* note 86.

For a discussion of the increasing importance of arbitration in Japan, and the growing acceptance of Japan as a site for arbitrations involving international commercial transactions, see generally Akroyd, *Arbitration in Japan*, in 3 INTERNATIONAL COMMERCIAL ARBITRATION: PART III DOCUMENTS AND COLLECTED PAPERS 126 (C.Schmitthoff ed. 1980); M. OHASHI, MARITIME ARBITRATION IN TOKYO — ITS LEGAL ASPECTS (1979). Akroyd points out that Japan has had an infrastructure for maritime arbitrations for some time, and that infrastructure is now being used for arbitrations which involve foreign as well as domestic disputes:

The first of such institutions had been the Japan (formerly "Kobe") Shipping Exchange arbitration. Under the influence of Common Law oriented maritime custom, it has increasingly tended to take on disputes of beyond a merely domestic significance. Accordingly, it has published an international panel of paid arbitrators, disclosing their names, professional positions and curricula vitae.

Akroyd, *supra* note 110, at 133.

111. The selection of arbitrators who are known to have sympathies in one direction or another usually precludes the possibility of conducting an arbitration before a sole arbitrator, which is almost always a speedier and less expensive process. See *supra* notes 41 and 79.

112. The seminal case on the question of arbitrator bias is *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). In that non-admiralty case, the Court held an arbitration award defective because the Chairman failed to disclose that he had engaged in repeated and significant business dealings with one of the parties. Admiralty arbitrators have been held to be under the same obligation to disclose possible biases. See *Sanko S.S.*

objection due to an arbitrator's lack of time to hear a case.¹¹³

Thirdly, a party must be careful lest it becomes too strident in its demand for a speedy decision. Not only does the party risk becoming an irritant to the panel in the present and future arbitrations, but its call for a speedy decision will often be seen as acquiescence in whatever award is eventually rendered. A particularly glaring example of this problem is provided in the recent case of *Ove Skou, Copenhagen v. Cia. de Navegacao Lloyd Brasileiro*.¹¹⁴ In that case the evidence had been submitted to the panel in November, 1982. In November, 1983, counsel for Ove Skou (OSC) wrote to the panel to inquire when the award would be rendered. The award was issued a short time later. Counsel for OSC then sought to have the award vacated because one of the arbitrators had failed to provide a disclosure statement to the parties or to participate in the deciding and signing of the award.¹¹⁵ In ruling against the requested vacation, the court found that by writing the November, 1983 letter, OSC had waived its right to complain about defects in the procedure which resulted in the award.¹¹⁶

Co., Ltd. v. Cook Indus., Inc., 495 F.2d 1260 (2d Cir. 1973). *But see infra* note 163 and accompanying text.

113. Other objections based on time, however, are recognized. *See infra* note 148. It should be further noted that arbitrators never disclose, and parties never ask, whether an arbitrator has sufficient time to adjudicate the matter. While it is understandable that the party wishing to slow down the arbitration would not ask whether the arbitrators had the time to hear the case, it is also understandable that the party which wants a speedy arbitration will not ask. Writing in a related context, Sommer stated that:

During the disclosure statements, and on being asked whether the panel is "satisfactory," the practitioner is sometimes placed in the awkward position of having to object or remain silent. Obviously, if he does not object, the point may be foreclosed. If he does object, and the arbitrator does not withdraw or there is no evidence available of undue bias, lack of objectivity, or partiality, the effect of the objection may be to alienate the arbitrator or panel.

Sommer, *supra* note 15, at 203-04.

114. No. 84-1097 (S.D.N.Y. July 3, 1984) (available May 1, 1985, on LEXIS, Admrtly library, Us Cts file).

115. An additional ground, that not all the arbitrators were present at the one hearing which was held, was originally pressed but later dropped. *Id.*

116. The court stated:

OSC's final letter to the panel, written a full year later, sought a prompt resolution of the claim, but made absolutely no mention [of the problems which had been encountered during the arbitration]. In light of OSC's year-long silence, followed by its letter suggesting acquiescence in [the problems], this Court must view OSC as having waived its objection.

Id., slip. op. at 7.

2. *Contractual Mechanisms*

In addition to the informal pressures which are available, there are contractual methods available to parties to speed up an arbitration.¹¹⁷ In particular, two methods deserve mention: 1) inclusion by parties of specific time limits by which the arbitrators must render their decision; and 2) the provision for issuance of so-called Partial Final Awards.

a. *Time limits.* Arbitrations are held either on an *ad hoc* basis or under the aegis of an arbitral institution.¹¹⁸ In an *ad hoc* proceeding, parties may proceed according to rules stipulated in their charter parties. This method, however, is rarely used. Instead, the parties customarily agree at the first hearing to have the arbitration proceed with reference to the rules of a particular arbitral body.¹¹⁹ Most maritime arbitrations are held on such a basis under the LMAA or the SMA, which have developed published sets of rules which provide a framework by which the arbitration is to proceed.¹²⁰

Most non-maritime arbitral institutions, such as the American Arbitration Association (AAA), have a specific rule which requires the arbitrators to render their award within a set period of time.¹²¹ This time can either be

117. One author, writing on labor arbitration, suggests that such contractual mechanisms are "too fraught with danger" to be of any benefit and that the best insurance of speed of decision is "care of the selection of the arbitrator." C. M. UPDEGRAFF, *ARBITRATION AND LABOR RELATIONS*, 277 n.6 (1970).

118. For a comprehensive listing of arbitral institutions around the world which hear maritime arbitrations, see Berlingieri, *supra* note 5.

Ad hoc arbitrations conducted under the aegis of organizations such as the LMAA and SMA can be distinguished from institutional arbitrations conducted by the AAA in the following general ways: (1) parties choosing the AAA will so designate in the contract, whereas parties choosing the SMA or LMAA will wait until the beginning of hearings to designate applicable rules; (2) the AAA provides an entire organization to implement the arbitration, whereas the SMA and LMAA provide only the formal structure in the form of rules, which the parties and arbitrators themselves must implement; (3) under an AAA arbitration the AAA actively intervenes in the selection of the arbitrators, whereas under an LMAA or SMA arbitration, the parties choose their arbitrators.

119. See Sommer, *supra* note 15, at 202.

120. See LONDON MARITIME ARBITRATORS' ASSOCIATION, *LONDON MARITIME ARBITRATORS' ASSOCIATION: LIST OF MEMBERS* (1984). The SMA adopted its first set of rules on May 12, 1964, and has amended them from time to time. The most current version was revised on September 15, 1983, following consultation with the Arbitration Committee of the Maritime Law Association of the United States. The Rules are contained in a booklet entitled *RULES FOR ARBITRATION PROCEDURES* (Society of Maritime Arbitrators, Inc. 1983).

121. AMERICAN ARBITRATION ASSOCIATION, *COMMERCIAL ARBITRATION RULES § 41 as amended and in effect April 1, 1982* (provides that award is to be made no later than 30 days from the date of the closing of hearings).

measured from the point when arbitration was instituted,¹²² or from when the dispute is deemed submitted to the arbitrators for final decision.¹²³ In contrast to this widespread practice, however, both the LMAA's¹²⁴ and SMA's¹²⁵ current rules state only that the arbitrators are to render their

122. Berlingieri, *supra* note 5, at 246.

123. *Id.*

124. In the LMAA booklet, *supra* note 120, the LMAA offers "notes on rendering the award" which provide: "After the Hearing, whether it is on *documents only* or *attended*, the tribunal takes the necessary time to carefully consider its decision and to record it in an award." *Id.* at 11. Evidence of the unwillingness of English arbitrators to take responsibility for post-hearing delay is found in page 12, where it is stated that "[t]he speed of an arbitration almost entirely depends upon the parties themselves." Finally, in the section entitled "Code of Conduct," the LMAA notes the requirement that an arbitrator must find time to attend hearings, without mentioning any duty he may have to attend to the rendering of the award at the close of the hearings. *Id.* at 13.

125. At one time the SMA did have a time limit in its rules. Old rule 32 provided that the arbitrators would render their award within ninety days of the close of the hearings. In the 1983 version of the rules however, old rule 32 was replaced by new rule 27, which states that: "The Arbitrator(s) shall render the Award as expeditiously as reasonably possible." It is still possible today, however, to find some SMA arbitrations proceeding under the old rules. When this is the case, however, the normal procedure is for the parties to expressly waive the application of rule 32. *See, e.g.,* Transocean Gulf Oil Co. v. Occidental Crude Sales, Inc., S.M.A. No. 1950 (Arb. at N.Y., Mar. 29, 1984).

In a most recent case, *Zapata Products Tankers, Inc. v. Genopet Oil and Petroleum S.A.*, No. 84-7248 (S.D.N.Y. Feb 7, 1985), an arbitration was heard and an award issued pursuant to the old rules. The award, however, was rendered after the expiration of 90 days. On appeal, Zapata claimed that old rule 32 was waived, while Genopet claimed that the rule was not waived. On May 2, 1981 Zapata had sent a letter to counsel for Genopet stating "Enclosed please find a copy of the Maritime Arbitration Rules which this office agrees to follow in [this case]." The hearings were closed June 2, 1983. The award was rendered 15 months later, on September 5, 1984. Neither the proceedings nor the award made any reference to the Rules or to any procedural requirements. Genopet sought to have the award vacated.

Judge Sweet ruled that the award should be confirmed, stating:

[T]here is nothing in this record to indicate that the arbitrators were bound by the Rules or that the Rules were made applicable by the arbitration clause, the agreement of the parties or if made known to the arbitrators, or by the membership of the arbitrators in the Association which formulated the Rules, or in the Rules themselves. No authority is cited to establish the applicability of the Rules as a general proposition. The unacknowledged letter from Zapata's counsel cannot be extended beyond its terms, even assuming, as I do, that in the absence of contravention it constituted an agreement between the parties as to the procedure which they would follow during the arbitration. Therefore there was no requirement that a decision be rendered by the arbitrators within ninety days of final submission. No protest was made by Genopet on the basis of a violation of the Rules until after the unfavorable decision had been reached.

Zapata, slip. op. at 4.

The *Zapata* case was heard by Judge Robert W. Sweet, who faced a similar question in *Kamakazi Music Corp. v. Robbins Music Corp.*, 522 F. Supp. 125, 135 (S.D.N.Y. 1981), *aff'd*, 684 F.2d 228 (2d Cir. 1982). The *Kamakazi* case involved the singer Barry Manilow

awards in a timely fashion.

The SMA's and LMAA's lack of stipulated time limits may, in part, be due to the fact that traditionally, courts have construed stipulated time limits strictly. The courts generally held that if an arbitrator did not render an award within the time allowed, he thereafter lost the ability to render the award, because his authority to act as arbitrator had expired.¹²⁶ An important caveat, however, was that the party which sought to avoid the award bore the burden of complaining about the expiration of the time limit.¹²⁷ If it failed to do so, it was said to have waived its right to claim that the award rendered was untimely. If an award was deemed by a court to have been rendered after expiration of the time limit, the award became a nullity. The party which had sought to uphold the award was then left with no recourse. Not only could it not claim against the other party,¹²⁸ but also, due to the doctrine of arbitral immunity, which parallels judicial immunity,¹²⁹ it could not sue the arbitrator.¹³⁰

Two recent cases, involving arbitrations held pursuant to AAA rules, suggest, however, that judicial attitudes toward stipulated time limits and arbitrator immunity may be changing. In the earlier of the two cases, *Baar v. Tigerman*,¹³¹ a California lower state court addressed both issues: whether the award was timely; and whether the arbitrator could be held

and the thirty-day rule of the American Arbitration Association. Judge Sweet ruled that the award was timely. For more on the rules of the AAA, *see infra* notes 132 through 137 and accompanying text.

126. The cases which have developed this law consist in the main of non-admiralty state decisions. *See, e.g.*, *T.W. Poe & Sons v. University of North Carolina*, 248 N.C. 617, 104 S.E.2d 189 (1958).

127. *C.F. Wooding Co. v. Middletown Elk's Home*, 177 Conn. 484, 418 A.2d 904 (1979).

128. Presumably it could start a new arbitration if the applicable time bar had not run. For other problems which result in having to begin a new arbitration, *see infra* text following note 153.

129. Arbitral immunity is based on the recognition of arbitrators as quasi-judicial officers, who, as such, are exempt from any civil liability for failure to exercise care or skill in the performance of their arbitral duties; however, liability attaches for improper acts when committed in a capacity other than that of arbitrator. The underlying principle of arbitrator immunity, as with judicial immunity is the preservation of the integrity and independence of the tribunal. *See generally*, R. L. BRITTON, *THE ARBITRATION GUIDE* 61-63 (1982); Friedman, *Correcting Arbitrator Error: The Limited Scope of Judicial Review*, *ARB. J.*, Dec. 1978, at 9.

130. *See, e.g.*, *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962); *Cahn v. Int'l Ladies Garment Union*, 311 F.2d 113 (3d Cir. 1962); and *Tamari v. Conrad*, 552 F.2d 778 (7th Cir. 1977).

131. 140 Cal. App. 3d 979 (1983). The case is also discussed in Note, *Arbitration — Arbitrator Potentially Liable for Failure to Render A Decision*, 67 *MARQ. L. REV.* 147 (1983).

liable if the award was untimely. In *Baar*, the AAA¹³² was asked in 1975 to arbitrate a number of disputes arising under a limited partnership agreement. Between November, 1976 and March, 1980, an AAA arbitrator held 43 days of evidentiary hearings and ten days of closing arguments. On July 17, 1980 the parties submitted their final briefs, and on July 18, 1980, the AAA deemed the matter submitted to the arbitrator. Under the rules of the AAA, an arbitrator has thirty days from the time the arbitration is submitted to him to decide the disputes. Thus, the arbitrator had until August 17, 1980 to render his decision.

The arbitrator did not submit his award by August 17, 1980, and proceeded to miss further extensions of time granted to him by the parties and the AAA. The arbitrator finally lost his authority to make the award at all. Outraged, the parties which had sought the arbitration filed suit against both the arbitrator and the AAA, claiming breach of contract and negligence. The arbitrator and the AAA demurred on the grounds of arbitral immunity, and the trial court dismissed the cases. On appeal, the dismissals were reversed and the suits were reinstated.

Citing the qualitative differences between judicial and arbitral settlement, the Appeals Court decided that the judicial immunity precedent had only limited applicability to the case. Since arbitration is essentially a private contractual arrangement, rather than a public function, the intent of the parties must be respected and it stressed the need to uphold and enforce the arbitrator's distinct contractual obligations. Therefore, while the Court recognized the need to protect the arbitrator while acting in a quasi-judicial capacity, it noted that an arbitrator ceases to be judge-like in his actions if he fails to render a timely award. Thus, the Appeals Court ruled that the plaintiffs had at least made out a cause of action for breach of contract, since the arbitrator and the AAA had promised to render an award within thirty days.

In the second of the two cases, *Koch Oil, S.A. v. Transocean Gulf Oil Co.*,¹³³ the Second Circuit Court of Appeals addressed only the issue of timeliness. The defendant argued that the award rendered by the AAA arbitrators was untimely because the arbitrators filed it after their authority under the arbitration agreement, which called for an award within 30 days of the close of hearings, had expired. Briefs had been submitted by both parties to the arbitrators on September 23, 1983; by October 5, 1983, the

132. For a discussion of the AAA and its emerging international importance, see Straus, *International Arbitration Under the Rules of the American Arbitration Association*, in 3 INTERNATIONAL COMMERCIAL ARBITRATION: PART III DOCUMENTS AND COLLECTED PAPERS 9 (C. Schmitthoff ed. 1980).

133. 751 F.2d 551 (2d Cir. 1985).

arbitrators declared the hearings closed.¹³⁴ The arbitrators deliberated, and the last arbitrator signed the award on November 2, 1983. The AAA received the arbitrators' award on November 8, 1983, while the defendant received its copy of the award on November 10, 1983. On November 8, 1983, however, the defendant had sent a letter to the AAA. The defendant advised that it would not be bound by the arbitrators' decision, since the award had not been rendered and received in a timely fashion.

The AAA rejected the defendant's position,¹³⁵ and the matter was taken to court. The District Court ruled that regardless of whether the award was untimely, it was still a proper award because the defendant had been unable to demonstrate that it had suffered any prejudice by the short delay which had been experienced in receiving the award.¹³⁶ On appeal, the Second Circuit confirmed the award, but not for the same reason as the District Court. Instead, the Second Circuit found that by agreeing to be bound by the AAA's rules, the parties had implicitly agreed to be bound by all of the AAA's rules. Thus, while rule 41 of the AAA required arbitrators to file their awards within thirty days, rule 53 stated that the AAA had the power to interpret its own rules. Since the AAA decided that the award was timely because it had been signed by all three arbitrators on November 2, 1983, which was less than thirty days from the close of the hearings on October 5, 1983, the defendant had no basis on which to claim that Rule 41 had not been complied with.¹³⁷ It could therefore be argued that timeliness is measured and enforced from the date of the arbitrators' signature, not from the parties' receipt of the award. The Court left open the question whether an arbitrator would be liable for the failure to render a signed award within thirty days.

b. *Partial final awards.* The second contractual mechanism which exists to speed the rendering of awards is the issuing of Partial Final Awards. Arbitrators using this device render an interim award which disposes of some, but not all, of the issues in a case. The arbitration then continues, until a Final Award is issued which disposes of the remaining issues.

Both parties and arbitrators have conflicting views on the value and desirability of Partial Final Awards. On the one hand, they are seen as a way to insure that the claimant is able to collect its money in a timely fashion. Defenders of the practice argue that without such a device claim-

134. *Id.* at 553.

135. *Id.*

136. *Id.*

137. *Id.* at 554-55. Finding the decision of the AAA to be dispositive, the Court did not reach the issues of waiver or prejudice due to delay.

ants would lose the use of their money, and run the risk of the respondent becoming bankrupt prior to the issuance of the Final Award.¹³⁸ On the other hand, there are those who argue that a Partial Final Award is merely a band-aid remedy which does not address the real problem of arbitrator delay.¹³⁹ In addition, a Partial Final Award can work to the detriment of the respondent who has counterclaims he wishes to set off against the damages sought by the claimant. If the Partial Final Award does not factor in these set-offs until the Final Award stage, the respondent may suffer all of the problems which the claimant would have suffered if a Partial Final Award had not been issued.

Partial Final Awards have received an equally mixed response from the courts. Although courts are hesitant to second guess the procedures followed by arbitrators,¹⁴⁰ they have reviewed a number of Partial Final Awards. At times the courts have held that a Partial Final Award could be confirmed before the Final Award stage,¹⁴¹ at other times they have held that a Partial Final Award could not be confirmed.¹⁴²

Recently, however, the tide seems to have turned against Partial Final Awards. While it was once thought nearly impossible to vacate an arbitration award without a showing of extreme bias, corruption or fraud,¹⁴³ two recent Partial Final Awards were vacated despite the fact that no bias or corruption was present.¹⁴⁴ In the first case, *Sea Dragon, Inc. v. Gebr. Van Weelde Scheepvaartkahtoor*, a district court vacated a Partial Final Award, stating that the courts will not enforce an arbitration award that is incomplete, ambiguous or contradictory. The court suggested that the proper disposition of such a case was to remand the award for clarification, unless the court deemed such an order fruitless under the facts of the case;

138. O'May, *supra* note 63, at 1422 and *infra* notes 155-62 and accompanying text.

139. Address by R. Glenn Bauer, Esq., *Society of Maritime Arbitrators' Monthly Luncheon* (Sept. 12, 1984) (available in office of *Maryland Journal of International Law and Trade*). It was said there that "The time and energy spent by arbitrators in rendering an interim award or partial final award might be better spent in trying to speed up their completion of the arbitration so that a final, binding and enforceable award can be rendered."

140. Kimball, *supra* note 3, at 80-82.

141. The leading decision holding that a Partial Final Award is subject to judicial confirmation is *Eurolines Shipping Co., S.A. v. Metal Transport Corp.*, 491 F. Supp. 590 (S.D.N.Y. 1980).

142. *See, e.g., Michaels v. Mariform Shipping, S.A.*, 624 F.2d 411 (2d Cir. 1980).

143. Kimball, *supra* note 33.

144. *Sea Dragon, Inc. v. Gebr. Van Weelde Scheepvaartkantoor*, 574 F. Supp. 367 (S.D.N.Y. 1983) and *Liberian Vertex Transports, Inc. v. Associated Bulk Carriers, Ltd.*, 1984 A.M.C. 2846 (S.D.N.Y. 1984). Coincidentally, both cases were decided by Judge Kevin T. Duffy.

which it did in the case at bar.¹⁴⁵

In the second case, in dismissing the appeal of an order refusing to confirm a Partial Final Award in *Liberian Vertex Transports, Inc. v. Associated Bulk Carriers, Ltd.*,¹⁴⁶ the Second Circuit Court of Appeals cited with approval the dissenting opinion of one of the arbitrators, who had written that:¹⁴⁷

To segregate this issue into what appears to be disputed and undisputed portions, always an imprecise art in the early stages of an arbitration, is, I submit, inconsistent with prior arbitration practice and can only result in needlessly fragmenting these proceedings. There can be no finality in the disposition of this issue until all claims pertaining to it are adjudicated.

3. *Judicial Mechanisms*

The final mechanism which exists to combat arbitrator delay is to resort to judicial aid. In the United States a party suffering from delay in an arbitration can seek court aid, but such aid will only be given if the delay is caused by the other party.¹⁴⁸ At no time will the courts intervene if the cause of the delay is an arbitrator, except, of course, if a specific time limit has been incorporated into the arbitration clause.¹⁴⁹

This situation is treated differently in England.¹⁵⁰ Under section 13(3) of the Arbitration Act of 1950 as amended,¹⁵¹ a dilatory arbitrator can be

145. *Sea Dragon, Inc.*, 574 F.Supp. 367.

146. 738 F.2d 85 (2d Cir. 1984).

147. *Id.* at 86.

148. Thus, for example, section 4 of the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982), provides relief to a party aggrieved by the failure of the other side to appoint its arbitrator in a timely fashion. The remedy is to move the court for an order appointing an arbitrator for the party causing the delay. Likewise, section 12 of the Act requires that a party wishing to vacate an award begin such an action within three months of the rendering of the award. 9 U.S.C. § 12 (1982).

149. *Supra* text following note 125 through note 133.

150. The following discussion is drawn from M. MUSTILL AND S. BOYD, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 196-97* (1982).

151. Arbitration Act, 1950, 14 Geo. 6, ch. 27, amended by ch. 3, 1975 and ch. 42, 1979; see generally, Steyn, *Arbitration and the Courts: Arbitration Systems in England and Wales*, *ARB. J.*, Dec. 1980, at 9.

Two 1980 cases illustrate the English courts' construction of section 13 (3). In *Succula Ltd. v. Harland & Wolf Ltd.* [1980] 2 Lloyd's L. R. 381, the court said it would not intervene when there was no delay and the arbitrators had done nothing because the parties had not asked them to do anything. *Id.* at 388. In *Pratt v. Swanmore Builders Ltd.* [1980] 2 Lloyd's L.

removed by a court. If an arbitrator is removed, he loses his right to be compensated for his services, and a replacement is made.¹⁵² As has been pointed out, however, this remedy is less than satisfactory.¹⁵³

[These statutory sanctions] may suffice when the delay occurs at the outset, since an arbitrator appointed by way of replacement may be able to make up the lost time. But delay at a later stage may result in serious financial loss. If evidence has been taken or argument adduced, the parties will have to pay for the process to be repeated. An important witness may die or his recollection may be dimmed during the period of delay, so that the party who had intended to call him may find his case seriously weakened. The delay . . . will postpone the moment at which the award is made, and at which the claimant can collect the sums to which he is entitled; the recovery of interest may not be an adequate remedy.

Despite these problems, the English courts will not enforce the duty to proceed diligently by ordering specific performance. Instead, the arbitrator is simply removed.¹⁵⁴ Thus, English arbitration disputants are only slightly better off than their American counterparts.

IV. THE IMPACT OF DELAY

What impact delay has on parties considering arbitration is a difficult question to answer,¹⁵⁵ since no empirical data has been collected on the matter. It seems likely, however, that delay has at least two effects.

First, parties lose confidence in the system and are probably more reluctant to enter into arbitration as a result of delay. Instead of entering into arbitration, it is likely that many parties are agreeing to accept settlements

R. 504, the court removed the arbitrator pursuant to the misconduct provision of section 23 (1). The court did not remove the arbitrator under section 13 (3), stating that the delay in the arbitration resulted from misconduct and not from failure to use reasonable dispatch. *Id.* at 512.

152. M. MUSTILL AND S. BOYD, *supra* note 150, at 196.

153. *Id.* at 197.

154. *Id.*

155. The specific impact of delay will necessarily depend on the particular industry involved. Mittenthal, *supra* note 83, at 37, provides a glimpse of the impact delay in rendering labor arbitration awards has:

When [delay occurs] a variety of pressures are created. Most of them land on the union representative who is beleaguered by grievants who are understandably anxious to hear the answer to their complaint. Delay is corrosive, undermining the confidence of the parties in both the arbitrator and the arbitration process.

of their claims, in order to receive at least a part of what is owed them.¹⁵⁶ This willingness to settle must be presumed to be occurring more frequently in the maritime industry than in other industries because of the generally depressed state of world shipping¹⁵⁷ and the severe cash flow problems which have become common among shipping companies.¹⁵⁸ Although some savings of cost are realized through the settlement of a claim,¹⁵⁹ on the whole, the amount received for bona fide claims is less than what the claim would bring in arbitration.¹⁶⁰

A second impact of delay is that some arbitration awards become valueless by the time they are issued because the losing party has either filed for bankruptcy or become judgment proof.¹⁶¹ Because of the anemic condi-

156. Some commentators have argued, however, that "[Although] [a]rbitration statutes generally do not set time limits [for the rendering of awards,] it is unlikely that a statutory fettering of the parties' freedom would facilitate the use of arbitration." G. WILNER, *supra* note 2, at § 29:01. It should be pointed out, however, that the foregoing was written in the context of arbitrations in general, and not with reference to the special problems of the shipping industry. Those problems are explained in detail *infra* notes 157, 158 and 162. Of course, since an agreement to settle terminates the arbitration prematurely, thus leaving no record, it is impossible to quantify the extent to which settlement is occurring in the maritime field.

157. Problems in the shipping industry have become particularly acute in the last few years. In December, 1983, the international community was shocked when Hellenic Lines, a Greek company with numerous ships, was forced into bankruptcy. For a thorough account of the collapse of Hellenic Lines, see Hayman and Glass, *The Hellenic Inheritance*, SEATRADE, Dec. 1983, at 3. The shipping world suffered an even greater shock in December, 1984, when the Swedish shipping company Saleninvest announced that it too was bankrupt. The filing for bankruptcy by Saleninvest is the largest bankruptcy in Sweden since the dark days of the 1930s. For accounts of that bankruptcy, see *Sweden's Saleninvest Announces Bankruptcy*, Journal of Commerce, Dec. 20, 1984, at 1A, and *Saleninvest Ramifications Start to Unfold*, Lloyd's List, Dec. 22, 1984, at 1.

158. Because of the weakness of the shipping industry, banks have become very hesitant about lending to shipping companies. This, in turn, has led to a serious cash squeeze among shipowners. The problem is examined in Oakes, *Nailed to the Mast*, SEATRADE, Apr. 1983, at 3, and Porter, *Heavily Indebted Shipping Sector Faces Slowdown in Bank Lending*, Journal of Commerce, Jan. 7, 1985, at 1A. As a result, shipowners are often faced with the need to accept even paltry settlements, simply to help meet their payrolls.

159. The most significant cost which is saved, of course, is attorneys' fees. Other costs which are either reduced or avoided include arbitrators' fees, expert witness fees, and the loss of time of personnel, who would be required to help the attorneys prepare the case instead of working on their normal tasks.

160. It is a standard practice among the admiralty bar, for example, not to include interest when calculating how much of a settlement to offer. Interest, however, can be very significant, since arbitrators have been known to calculate interest at a rate as high as 20%. See, e.g., *Waterman S.S. Corp. v. Chih Hua Wang*, S.M.A. No. 1579 (Arb. at N.Y., Jul. 31, 1981).

161. The collapse of the Hellenic Lines shipping company, described *supra* note 157, came at a time when many arbitrations were being prosecuted against the company. A complete listing of these claims can be found among the records of the Hellenic Lines Bankruptcy

tion of marine companies, and the unique corporate structures which pervade the industry,¹⁶² maritime arbitration awards in particular need to be rendered in a timely fashion.

V. SOLUTIONS TO THE PROBLEM OF ARBITRATOR POST-HEARING DELAY

Several factors cause post-hearing delay in maritime proceedings. Currently, only limited internal and contractual mechanisms exist to redress the causes of delay. The following rules are therefore recommended for adoption in arbitration agreements, arbitral body rules and legislative enactments.

A. Proposed Rules

1. Arbitrator Schedule Disclosure

A prospective maritime arbitrator is required to disclose within fifteen days of their appointment by either party or as panel Chairman, the amount of time he expects to be able to devote to the arbitration. This disclosure is in addition to the disclosure of possible bias which is already required.¹⁶³ If an arbitrator's schedule indicates that he will be

suit. The suit is currently being heard under the respective captions *In re* Transpacific Carriers Corp., No. 83-B11775 (Bankr. S.D.N.Y.) and *Morgan Guaranty Trust Co. v. Hellenic Lines, Ltd.*, No. 83-8560 (S.D.N.Y.). The dual proceedings have caused numerous jurisdictional disputes between the two courts. See, e.g., *Morgan Guaranty Trust Co. v. Hellenic Lines, Ltd.*, 585 F. Supp. 1227 (S.D.N.Y. 1984).

162. The shipping industry often utilizes what is known as the "one ship company." Although a shipowner owns ten ships, he will not normally set up a single company. Rather, he will incorporate ten separate companies, each with just one ship and no other assets. In this way, if one ship is arrested in order to satisfy the shipowner's debts, the other nine ships are beyond the reach of the creditors. Although it is possible to pierce the corporate veil to get at the other ships, such piercing is very difficult to achieve. Thus, if a ship has been arrested by many creditors, an individual creditor may find that there is nothing left for it to attach. In such a situation, the creditor may give up its claim, rather than undertake the expensive, and often futile, attempt to chase after one of the other ships. For a discussion of the problem, see Tettenborn, *The Time Charterer, the One-Ship Company and the Sister-Ship Action in rem*, 1981 LLOYD'S MAR. COM. L.Q. 507 and cases cited therein; see also *Walkovszky v. Carlton*, 18 N.Y. 2d 414, 276 N.Y.S. 2d 585, 223 N.E.2d 6 (1966) (the New York Court of Appeals refused to pierce the corporate veil where the holding company consisted of several companies with assets of one taxicab each). For two recent cases which did pierce the veil, albeit in somewhat unique circumstances, see *In re Oil Spill by the Amoco Cadiz*, 1984 A.M.C. 2123 (N.D. Ill. 1984); and *Astarte Shipping Co. v. Chi Yuen Navigation Co., Ltd.*, No. 84-5350 (S.D.N.Y. Feb. 5, 1985).

163. As was pointed out, *supra* note 112, the current disclosure requirements demand disclosure only of those relationships which might affect the arbitrator's ability to fairly decide

unable to decide a matter in a timely fashion, the opposing party may demand that the appointing party select a new arbitrator. A party is entitled to three such challenges, and further challenges are permitted if leave from the appropriate court is obtained.¹⁶⁴ A party shown to have selected arbitrators for the purpose of delaying the arbitration will be subject to costs.

2. *Time Limits*

- a. Arbitrators are required to render their awards within forty-five days of the close of hearings, subject to agreement of the parties to provide for a longer or shorter period of time, except that where the parties ask for a written opinion under rule 3, an arbitrator has ninety days to render an award. Arbitrators are prohibited from requesting extensions.
- b. The doctrine of arbitral immunity is hereby limited so that an arbitrator who fails to meet the applicable time limit will be liable for all damages suffered by either party.
- c. Once the applicable time limit has expired;
 - i. either party may deem the arbitration a nullity and the other party may begin a new arbitration within three months; or
 - ii. both parties may proceed with the current arbitration, subject to agreement on an extension of the time limit in which the arbitrator must render the award.

the matter. The courts, however, have enforced this duty only sparingly. Thus, in *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691 (2d Cir. 1978), the Court refused to vacate a maritime arbitration award because of the failure of two of the arbitrators to provide full disclosures. The Court reasoned that "The very intimacy of the group from which specialized arbitrators are chosen suggests that the parties can justifiably be held to know at least some kinds of basic information about an arbitrator's personal and business contacts." *Andros*, 579 F.2d at 701.

164. All maritime arbitrations are conducted under the authority of a contractually or statutorily designated court. *See, e.g.*, sections 4, 10, and 11 of the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982), and section 1045 of Book X of the WEST GERMAN CODE OF CIVIL PROCEDURE (ZPO 1978), *reprinted in* INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION: PART IV NATIONAL LEGISLATION § 3.1 (G. Gaja ed. 1978). Parties are free to state in the arbitration agreement which Court shall have jurisdiction with regard to the arbitral proceedings. Jurisdiction is invoked for purposes such as enforcing the award or having an arbitrator named on behalf of a party which refuses to participate in the arbitration. If the agreement does not name a Court, as is usually the case, then the statutory provisions will govern.

3. *Written Opinions*

Maritime arbitrators will not provide written opinions, unless both parties agree otherwise. If the parties do ask for opinions, arbitrators will have ninety days to render their decision.

4. *Expedited Arbitration*

Parties have the right to demand expedited arbitration. Arbitrators are required to render their opinion within one week of the close of hearings, but parties do not have the right to demand formal written opinions. The arbitrators are required to state whether, in their opinion, there has been an actual need for expedited arbitration. If the arbitrators find that the party requesting the expedited award has not proven the need for such an award, that party will be liable for three times the cost suffered by the other side, even if the party which asked for the expedited award prevailed on the merits of the issues before the panel.

B. *Discussion of Proposed Rules*

These four amendments would reduce maritime arbitrator delay in the following ways. The first provision would broaden the scope of arbitrator disclosure by forcing arbitrators to expose their other commitments. In this way a party would be able to judge whether or not an arbitrator had the time necessary to hear a matter fairly. If an arbitrator were not able to hear a matter in a timely fashion, the opposing party could require the appointment of a different arbitrator. Of course, such a procedure could be abused by a party always finding the nominee to be "too busy." Thus, after the rejection of a third nominee, court leave would be required before any further appointees could be refused. An objecting party would therefore have to use its challenges carefully, since if it were forced to go to court to receive judicial permission for further challenges it would be adding to the very delay it was seeking to avoid.

The second rule would require arbitrators to render their awards within forty-five days, in the absence of party agreement to a shorter or longer period of time. An agreement to abide by the rules of the AAA, for example, would take precedence and would therefore require the arbitrators to render their awards pursuant to the rules of that body. Assuming that the parties had made no separate agreement on the question of time limits, the arbitrators would not be allowed to ask for, or grant themselves, extensions of time. This is a vital provision, for few parties would risk the wrath

of a panel by denying its request for more time. In addition, because courts will usually not review the procedural aspects of arbitration, it is important that arbitrators not have the right *sua sponte* to grant extensions of time for the rendering of awards.

If an arbitrator were to fail to meet the forty-five day time limit, he would then become liable for damages unless the parties were to grant him an extension.¹⁶⁵ In order to be reasonable, however, the arbitrator would not become liable for all damages suffered by a party, but only for those which flowed directly from the failure to issue the award in a timely fashion. Were an arbitrator to miss the time limit and not receive an extension, he would not thereafter issue an award, since justice would hardly be served by having a reluctant arbitrator render an award.¹⁶⁶ If a party were unable to collect against the losing side because the losing side had become judgment-proof during the period between when the award should have been issued and when it was issued, the winning party would then have a cause of action against the arbitrator.¹⁶⁷

165. Note that both parties would have to grant the extension. If only one party was needed for an extension, the party which stood the greatest likelihood of losing would always grant the extension in order to delay the issuing of the award.

166. See M. MUSTILL AND S. BOYD *supra* note 150, at 197.

167. Two problems with this new right of action may require special solutions. First, what should be done when two arbitrators have faithfully performed their services, but the award is not issued due to problems with the third arbitrator? This, of course, was the situation in *Ove Skou*, No. 84-1097 (S.D.N.Y. July 3, 1984) discussed *supra* note 114. Blame could either be placed solely on the non-diligent arbitrator, or against the entire panel, or solely against the panel chairman, or against the panel chairman and the non-diligent arbitrator. None of these methods is clearly superior.

A second consideration which may require special attention is the possibility that the arbitrators may turn out to be judgment proof, at least where the award to be collected is very large. Hopefully, however, arbitrators would avoid the problem by buying arbitrator malpractice insurance. If purchased through groups such as the SMA or LMAA, such insurance would probably not be very expensive. Alternatively, each award could assess a nominal fee on both parties which would be used to buy arbitrator malpractice insurance for all arbitrators. Because arbitrators are currently clothed with immunity, arbitrator malpractice insurance does not exist.

Other professionals — such as lawyers, doctors, and clergy — have, however, come to rely on malpractice insurance. See, e.g., Note, *Lawyer Malpractice — The Duty to Perform Legal Research*, 32 FED. INS. COUN. Q. 199 (1982); Berlin, *Malpractice and Radiologists*, 28 MEDICAL TRIAL TECH. Q. 74 (1981); Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV. 163 (1981). Just recently, malpractice insurance became available to college and university professors, a group which had not previously carried such insurance. Offered through the American Association of University Professors, a yearly premium of \$50 purchases \$1,000,000 worth of protection. See Quade, *Prof Protection: Liability Insurance Available*, 71 A.B.A. J. 35 (May 1985). Thus, there is no reason why maritime arbitrators should not carry insurance. Such a requirement is especially equitable in light of the fact that,

The third rule would prohibit arbitrators from rendering written opinions to explain their decisions unless *both* sides agreed to have an opinion rendered. If the parties were to agree to have opinions rendered, the arbitrators would be given ninety days, instead of forty-five days, to issue an award, in order to provide sufficient time for the writing of the opinion. The prohibition on writing awards would reduce delay in two ways. First, arbitrators would be able to render more rapidly their awards because they would simply have to state who won and how much the losing side would have to pay.¹⁶⁸ Thus, there would be no need for drafting and circulating opinions among the panel members. Second, it is almost impossible to challenge an arbitration award which does not provide reasons.¹⁶⁹ Once an award gives an explanation for its decision, however, parties would be able to challenge the award on a number of grounds¹⁷⁰ which are not available if the award contains no explanation.¹⁷¹ Since an arbitration award is not paid

unlike some other types of arbitrators, maritime arbitrators are compensated for their services. *Supra* note 86.

168. As was explained in O'May, *supra* note 63, this is the procedure which is used in salvage arbitrations conducted pursuant to the Lloyd's Salvage Agreement. O'May notes that "The award will be published by the Committee of Lloyd's to all of the parties simultaneously, usually within two to three weeks of the hearing." O'May, *supra* note 63, at 1417.

The rendering of oral decisions has been suggested as a solution to post-hearing delay in labor arbitrations. See R. W. FLEMING, *supra* note 83, at 74-77; but see Mittenthal, *supra* note 83, at 37 (arguing that providing so-called "bench decisions" is an overrated solution and that written decisions serve a useful purpose).

169. Kimball, *supra* note 33, at 74-88.

170. Section 10 of the Federal Arbitration Act, for example, allows a party to challenge an arbitration award where:

1. it was procured by corruption, fraud or undue means;
2. there was evident partiality or corruption in the arbitrators;
3. procedural misconduct by the arbitrators resulted in prejudice to either of the parties;
4. the arbitrators exceeded their powers or failed to execute a sufficiently definite award.

9 U.S.C. § 10 (1982).

Parties have sometimes argued that a delay in rendering an award is sufficient proof of prejudice under the third paragraph of Section 10 (the procedural misconduct ground). The argument has always been raised, however, with regards to a vacation of the award, and not as a means of establishing arbitrator liability. See, e.g., *Kamakazi Music Corp. v. Robbins Music Corp.*, 522 F. Supp. 125, 135 (S.D.N.Y. 1981), *aff'd* 684 F.2d 228 (2d Cir. 1982); discussed *supra* note 125.

171. This point was elegantly made in *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 429 (2d Cir. 1974), where it was said that:

It seems rather anomalous, but had the arbitral majority failed to render a written opinion in this case, our ability . . . to review that decision would be greatly limited. Indeed, the AAA apparently discourages the practice of written arbitral opinions in order to insulate the arbitral process from any judicial review.

until all appeals have been exhausted, bringing an appeal is another way in which the winning side is kept from collecting on its award in a timely fashion.

The final rule would provide a means for expedited arbitration.¹⁷² In order to ensure that this procedure only be used when a legitimate need exists, a party which calls for expedited arbitration would be subject to treble costs if the panel were to find that there had been no need for the expedited procedure.

C. Implementation

Since arbitration is fundamentally an extrajudicial means of dispute resolution, limited only by agreement of the parties, the parties may agree in their charter party to proceed pursuant to the foregoing rules. It is unlikely, however, that parties will voluntarily insert such terms into their contracts. Their failure to do so will not be caused by a lack of recognition of the problem of arbitrator delay. Rather, parties simply do not expect, at the time the contract is concluded, to experience problems in the performance of the contract.¹⁷³ The negotiation that will take place will concern the terms of price and performance, not *detailed aspects* of dispute resolution procedure.

Thus, legislative action by national governments or arbitral bodies is clearly necessary to solve the problem. Until such action is taken, however, it is recommended that parties insist upon terms which deal specifically with the problem of post-hearing arbitrator delay.¹⁷⁴

172. Cf. the American Arbitration Association provisions for expedited arbitration. AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES §§ 54-58 (*As amended and in effect* April 1, 1982). Although both the LMAA and SMA have expedited arbitration procedures, those procedures can only be invoked if *both* parties agree. Therefore, where expedited arbitration is most needed—where one party is likely to become judgment proof—the existing procedures will not be used because the necessary consent will not be forthcoming. See *supra* notes 155-62.

173. If problems were expected at the time a contract was being negotiated, it seems unlikely that it would be entered into. Exceptions to this truism occur where the party which suspects that there will be trouble has no other choice but to enter the contract, either because no one else can deliver the services or goods which the other side can produce, or because the pressure of time makes recourse to a different party impossible.

174. As one commentator has said: "Just because parties have followed a certain procedure for 20 years does not mean they should continue to do so. When new problems suggest the need for new policies, a change should be made. Speed, economy, and justice can be built into any grievance machinery." Mittenthal, *supra* note 83, at 36.

VI. CONCLUSION

Persons and companies involved in the maritime industry are familiar with the problem of post-hearing arbitrator delay.¹⁷⁵ Unfortunately, they have attempted to remedy the problem only through piecemeal solutions.¹⁷⁶ While these solutions may work in a given situation, they do not provide any relief from the general problem of arbitrator delay. What is needed is an industry-wide reform of the arbitration system through legislation and arbitral society rule reform. Anything less will leave the problem as it is now: a potentially serious stumbling block to the orderly and timely resolution of maritime disputes.

175. Letter to the Editor from John G. Poles, *Quo Vadis Maritime Arbitration?*, N.Y.L.J. Mar. 2, 1983, at 2.

176. An example of a piecemeal solution can be found in *Marlucidez Armadora, S.A. v. Burmah Oil Tankers Ltd.*, S.M.A. No. 2024 (Arb. at N.Y., Sept. 26, 1984). In that case the arbitrators rendered an oral decision at the hearing, and announced that a formal opinion would be written when time permitted.