

## Delay in Maritime Arbitrations - Post-Hearing and Otherwise an Arbitrator's View

Donald E. Zubrod

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# **DELAY IN MARITIME ARBITRATIONS - POST-HEARING AND OTHERWISE AN ARBITRATOR'S VIEW**

DONALD E. ZUBROD\*

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\* Donald E. Zubrod is President of Tropic Drilling Company of Houston, Texas and a corporate officer of Admanthos Shipping Agency, Inc. in New York. He is a former president of the Society of Maritime Arbitrators, Inc. and presently serves on its Board of Governors. He is Co-Chairman of the S.M.A./M.L.A. Joint Liaison Committee and United States representative on the Documentary Committee of The Baltic and International Maritime Committee (BIMCO), Copenhagen. The views expressed herein are the author's sole personal observations, and are not necessarily those of the S.M.A., its membership, or any other person.

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## I. INTRODUCTION

Volume 9, Number 1, 1985 of the MARYLAND JOURNAL OF INTERNATIONAL LAW AND TRADE published an article authored by Robert M. Jarvis, Esq. entitled *The Problem of Post-Hearing Delay in Maritime Arbitrations: "When Did You Say We Would Receive the Arbitrators' Award"?*<sup>1</sup>

Certain propositions put forward by Mr. Jarvis in his discourse are incontrovertible. Others merit discussion from the perspective of maritime arbitrators. A few call for outright refutation.

Mr. Jarvis's treatise focused mainly upon the problem of post-hearing delay, the lapse of time between receipt by arbitrators of the parties' final submissions and issuance by those arbitrators of their awards. He touched only lightly upon the many other factors which contribute to delay.

Accordingly, the thrust of this presentation is twofold. First, it will discuss in depth Mr. Jarvis's assertions concerning post-hearing delay. Second, it will address the many other elements in the arbitral process which cause or contribute to delay.

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1. Jarvis, *The Problem of Post-Hearing Delay in Maritime Arbitrations: "When Did You Say We Would Receive the Arbitrators' Award?"*, 9 MD. J. INT'L. L. & TRADE 19 (1985) [hereinafter cited as Jarvis].

## II. DELAY

### A. *Definitions*

#### 1. *Unavoidable Delay*

Webster's Seventh New Collegiate Dictionary defines "delay" as "hinder for a time."<sup>2</sup> The causes of arbitral delay assume various forms. Some of these causes must be accepted because they are unavoidable. Examples include the temporary unavailability of crucial witnesses, the illness of an arbitrator during or after the proceedings, the parties' attempts to negotiate a settlement — and very little else!

#### 2. *Avoidable Delay*

Unless one or both of the parties chooses to cause delay deliberately, or unless the arbitrators do not promptly deliberate and issue their award, virtually all other causes of delay are avoidable.

### B. *Consequences of Delay*

#### 1. *Financial Considerations*

Formerly, the financial interest of a claimant in maritime arbitration was basically protected. (Since arbitrators consistently award interest along with their judgments, the aggrieved party is rendered financially whole for the time he spends out-of-pocket while the dispute is arbitrated.) But this is no longer the case. Serious fiscal difficulties have plagued the shipping industry for many years, and insolvency has become commonplace. An award against a bankrupt disputant is obviously worthless. Accordingly, time is of the essence in today's arbitrations: delay can cause the financial ruin of a party.

In recent years, maritime arbitration procedures have become more formalized, and therefore, more expensive. An arbitration involving much witness testimony and many hearings may now be almost as expensive as a court trial, given the high cost of presenting expert testimony, travel expenses and the time required to complete the proceedings. In addition, arbitrators, who are lawyers or commercial men, expect the parties to compensate them for their services, while judges do not.

The desirability of using arbitration as an extrajudicial method of dispute resolution in maritime circles is constantly juxtaposed with the desirability of using litigation to resolve disputes. Not too long ago, the

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2. WEBSTER'S SEVENTH COLLEGIATE DICTIONARY 218 (20th ed. 1972).

backlog of lawsuits in federal and state courts was a conspicuous disadvantage of choosing to litigate. Arbitration became an attractive alternative as far as the time factor was concerned. But in recent years the courts have significantly decreased their backlog and the amount of time parties must wait before they go to trial. (Perhaps the increased use of arbitration to resolve disputes has contributed to this improved state of affairs.) On the other hand, for the reasons discussed herein, maritime arbitrations have been characterized by an increasing tendency to protract. Now, in some jurisdictions, claimant disputants may actually prefer to litigate. Thus, the delay common to most arbitrations reduces the competitiveness of arbitration alongside litigation in the marketplace.

## 2. *Loss of Confidence*

Attorneys and arbitrators must try to revise and improve the present system of maritime arbitration if they wish to retain the wavering confidence of those who now prefer arbitration over litigation, and to win the confidence of those who may be considering arbitration as a means of resolving contractual differences.

## III. TYPES OF DELAY

### A. *Party Inspired*

Let us first consider the varieties of arbitral delay which flow from the actions of the parties, specifically in the representation of the parties by their attorneys.

#### 1. *Procedural Problems*

An arbitration cannot proceed more rapidly than its slowest participant does, be it a party, an attorney, or the arbitrators, individually or collectively. Once a panel has been selected, the panel chairman customarily so informs counsel for both disputants and announces the readiness of the panel to begin the arbitration. Quite often, one or both parties will request the panel to set a date and hour for an initial hearing. More likely, however, the panel of arbitrators will hear nothing from the parties for weeks, months, even years. This is a normal and acceptable procedure when one of the disputants has simply requested arbitration as a means of leverage in ongoing settlement discussions. But unfortunately, this is not always the case.

Frequently, the parties are at an irreconcilable impasse when arbitration is initiated. The unnecessary passage of time without activity from counsel for the parties often occurs because the claimant does not

have his case in a state appropriate for presentation. This can be due to the unavailability of key witnesses in the immediate future (a frequent problem when shipboard personnel are involved) or it may be the result of the time-consuming difficulties associated with obtaining documentation from clients, particularly those domiciled abroad. Of course, a conscientious attorney must await receipt from his client of everything he considers essential to the success of his presentation in the arbitration. The panel, in turn, must wait until the parties are ready to proceed. An able panel chairman will periodically press the parties for their state of preparedness for the initial hearing.

## 2. *Adjournments*

For any dispute requiring more than one hearing, which is usually the case, future hearings must be scheduled at the initial hearing. Customarily, one or more further hearings are firmed up anywhere from days or even months down the road, and everyone scrupulously enters them into their personal calendars. Nevertheless, with what appears to be increasing regularity, counsel for the parties request adjournment. We will examine here those requests made by counsel for the parties.

Sometimes a witness scheduled to appear on a certain date is suddenly not available for that hearing. Because he had nothing else prepared for that hearing, counsel requests an adjournment and the resetting of a date. This is not an unreasonable request for it was inspired by a matter beyond the attorney's control; the consequences, however, are usually most unfortunate. If the cancellation of the hearing has occurred on short notice, one can expect considerable delay in rescheduling the adjourned hearing on a date open to all three arbitrators, counsel for the parties, and their witnesses. Arbitration panels are sometimes asked for adjournments because the attorney dealing with the dispute is called to trial, with the same inexpedient result.

## 3. *Overloading Arbitrators*

In his presentation, Mr. Jarvis points almost diagrammatically to the recognized reality that a relatively small group of practicing arbitrators are asked to arbitrate much more frequently than the others who are qualified and available within and outside the Society of Maritime Arbitrators, Inc. (S.M.A.).<sup>3</sup> This burdening of a few is now the primary cause of delay on the maritime arbitral scene in New York. Even though in recent years a number of formerly avocation arbitrators

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3. Jarvis, *supra* note 1, at 35.

have become available on a full-time basis, the problem of disputants consistently appointing the same arbitrators over and over again has not disappeared.

Arbitrators have no control over this situation, except to the extent that they can voluntarily decline appointments; the parties and their attorneys, who decide whom to select, do have control over it. On many occasions over the years I have discussed this aspect of maritime arbitration with admiralty attorneys at both personal and professional levels. I understand that they want to attain the best possible chance of success for their clients. But my experience as an arbitrator for some twenty-five years suggests that they should appoint less prestigious but equally competent arbitrators in order to alleviate the current problem of delay and its disagreeable consequences. Long-term benefits accrue when many qualified individuals are allowed to gain actual arbitral experience. The busiest of our maritime arbitrators are now also the oldest. Age may bring wisdom, but it also brings retirement. Concentration of the bulk of arbitral activity in the hands of the oldest arbitrators does not allow those who someday must assume their burdens to acquire any experience. Parties and their counsel ought to avail themselves of the many qualified young individuals, particularly within the S.M.A., who can arbitrate.

#### 4. *Unnecessary Testimony*

Traditionally, one of the advantages of maritime arbitration was the simplicity of the proceedings in comparison with what is to be expected from a courtroom trial. Witnesses at arbitrations used to testify only about facts. Occasionally, expert testimony was required for areas outside the normal expertise of commercial men in the maritime trades. Now, however, there is a trend for disputants unnecessarily to bring witnesses before arbitral panels to testify about matters which have been or will be established by available documentation. And where expert witnesses are concerned, we often encounter "can you top this" presentations of rebuttal witnesses — almost *ad infinitum*. Counsel is entitled to leave no stone unturned in the diligent defense of a client's interests, but sometimes they call too many witnesses. Such excessiveness contributes to the delay and expense of the proceeding.

Quite frequently, a witness on direct examination is asked questions which waste considerable time and which are almost presumptuous because they assume one or all of the arbitrators is totally ignorant of the subject matter. When this happens, time is lost and cost is increased, unnecessarily.

### 5. *Protracted Witness Examination*

Certain attorneys do not know when to stop questioning a witness, especially when cross-examining. Often this is because the witness has come from abroad and may not be available for further testimony later. At other times the record is unnecessarily burdened simply because the attorney does not recognize that the witness has nothing further to contribute to developing the facts of the dispute. Here again, cumulative testimony wastes time and money.

### 6. *Brief Overkill*

Briefs are an integral part of the arbitral process. They synthesize the sometimes voluminous written and oral submissions before the panel. The legal and arbitral precedents cited in briefs are useful to arbitrators who have not been schooled in the law — *i.e.*, virtually all commercial men. Reply briefs, when requested, respond to perspectives and arguments contained in the main briefs of opposing counsel. A well-considered and organized brief is a powerful tool in the hands of the experienced attorney. Unfortunately, as the years go by, the briefs become longer and longer, even when the issues are not overly complex. The unfavorable consequence of superfluous briefs is the additional time required for attorneys to write them and for arbitrators to read them; this translates into another reason for delay.

### 7. *Excessive Documentation*

Much of the documentation submitted in an arbitration is clearly necessary for the presentation of claims and defenses. Some of it is not. Often, important, even critical, documents are submerged in a flood of essentially irrelevant paper which arbitrators must wade through to ensure that they overlook nothing of consequence. Again additional time is required, causing further delay and expense.

### 8. *Shunning the Sole Arbitrator*

Only very occasionally is a sole arbitrator asked to dispose of a maritime dispute in New York, and this is most unfortunate. Since each of the three arbitrators in our tripartite system is supposedly unbiased toward the party appointing him, one wonders why more parties don't use the efficient and economical sole arbitrator more frequently. Certainly disputes involving modest amounts call for a sole arbitrator rather than a full-blown tripartite panel. The parties could save a lot of time and money if they used a sole arbitrator when appropriate.



### 9. *Dilatory Briefing*

Occasionally, over a year elapses between the closing of hearings and the submission of briefs — even when the panels pressure counsel to complete and present their briefs. Because arbitrators do not prepare to deliberate until briefs are in hand, they have a difficult time associating the written final arguments with the faces of those who testified and remembering the events of the proceedings themselves. In such circumstances, it sometimes becomes necessary to review the usually voluminous transcripts. Counsel's dilatoriness in submitting briefs thus creates additional delay in the adjudication of the dispute.

### 10. *Unfounded Appeals*

Attorneys, perhaps unwittingly, give arbitration a bad name in another way. Although an unsuccessful appeal of an award by a losing party has no effect upon the pattern of delay of an individual arbitration, it does affect the overall reputation of arbitration for dispute resolution when compared to litigation. This is true not only in New York, but also in London where rights of appeal of arbitral awards exist by statute<sup>4</sup> and the losing party frequently appeals. The legitimate grounds for requesting that an award be vacated<sup>5</sup> are very narrow and limited, and overturns of arbitration decisions have been few and far between. Nonetheless, many unsuccessful disputants try to vacate awards on well-trampled grounds which have never before succeeded. The author has no intention of telling attorneys how to run their show, but he suggests that repeated appeals of arbitration awards on obviously specious grounds hurt the image of arbitration in its competitive status with litigation. When this happens, the interests of both arbitrators and admiralty attorneys are adversely affected.

### B. *Arbitrator Induced*

#### 1. *Procedural Problems*

Arbitrators contribute to delays in the arbitral process by requesting the parties and co-arbitrators for adjournments. They do this because of illness or overriding personal considerations, including unanticipated business demands. But it is the author's experience that

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4. Arbitration Act, 1950, 14 Geo. 6, ch. 27, *amended by* ch. 3, 1975 and ch. 42, 1979.

5. 9 U.S.C. §10 (1982). 9 U.S.C. §11 (1982) provides for the modification or correction of arbitral awards.

arbitrator-induced hearing adjournments delay arbitrations only rarely.

## 2. *Immoderate Acceptance of Appointments*

In his study of post-hearing arbitral delay, Mr. Jarvis points to the rather obvious fact that a relatively small group of individuals continue to share most of the maritime arbitration appointments in New York.<sup>6</sup> His analysis of the awards issued during 1984 highlighted the fact that seven arbitrators, all commercial men and members of the S.M.A., occupied 156 of the 325 slots created by 111 arbitrations.<sup>7</sup> The significance of his statistics, however, is neither as conclusive nor as simple as it superficially appears. In these financially difficult times for shipping, many unopposed arbitrations are initiated and many unopposed awards are issued. Such awards are normally rendered fairly quickly because there is often no hearing and they require relatively little expenditure of time and effort on the part of the arbitrators involved. Mr. Jarvis's statistics include many awards of this type. Second, many of the 325 awards published in 1984 were the culmination of perhaps years of prior effort which just happened to be concluded during 1984. In such instances, analyzing award releases in a specific year does not accurately measure the extent of the activity of a particular arbitrator. Therefore, a purely numerical analysis of awards can be deceptive insofar as the participation of individuals in maritime arbitration in a given year is concerned.

Mr. Jarvis defined "arbitral overcommitment" as the acceptance by both full-time and part-time arbitrators of more appointments than they can schedule adequately.<sup>8</sup> Full-time arbitrators, (*i.e.*, those of us who no longer have industry employers or who have elected to become available as full-time arbitrators in favor of self-employment within the trade) are increasing in number. The number of arbitrators in this category will probably increase even more in the near future. Full-time arbitrators, whether or not they depend on the compensation to be derived from arbitration, should not be required to examine more closely their available time before they accept appointments, as Mr. Jarvis suggested they should.<sup>9</sup> On the contrary, their full-time availability, a relatively new phenomenon, makes it possible for the more complex and time-consuming disputes to be resolved in a more orderly fashion. For example, parties can take advantage of the full-time availability of ar-

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6. Jarvis, *supra* note 1, at 35.

7. *Id.*

8. *Id.* at 39.

9. *Id.* at 56-57.

bitrators to have consecutive, full days of testimony. This allows claimants and respondents to present their claims and defenses quickly, without the protracted hearing-to-hearing procedures part-time arbitrators provide. Part-time arbitrators are usually only available to arbitrate when they skip lunch or work late. Thus, the full-time arbitrator has an advantage over the part-time arbitrator when it comes to the scheduling of hearings. Excessive delay in arbitrations conducted before full-time maritime arbitrators should no longer be a problem, as long as the many part-time arbitrators are still available for appointments.

This does not necessarily hold true for industry-employed maritime arbitrators who now share the bulk of arbitral appointments and who will continue to do so. Here, the possibility of overcommitment undeniably exists, but only among a handful of persons who are blessed not only with the considerable talent which has secured them their positions and reputations, but also with the experience and skills which make them attractive to disputants. Because these popular individuals have only non-working hours available for arbitrating, their schedules are tight and their appointment books are always full. This article has already mentioned the ability of parties and their counsel to reduce the delay which results from the appointment of already overbooked arbitrators.<sup>10</sup> It would be inappropriate and certainly injudicious for this author to comment upon the desirability of such individuals exercising self-discipline.

### 3. *Inappropriate Chairman Selection*

In the typical maritime arbitration, the chairman plays a critical role in many respects totally independent of the fact that he is the choice of the party-appointed arbitrators to serve as the "third man," the inherent "swing" vote in the event that he does not reach the same conclusions in whole or in part of his colleagues. A maritime arbitration chairman also bears the responsibility of representing the collective interests of the panel before the parties in the arbitration. This includes, among other things, scheduling hearings, confirming the schedule in writing, coping with procedural matters between hearings, and acting as spokesman for the panel during hearings. The extent of the chairman's experience in handling these matters directly affects the pace of the proceedings. The seasoned chairman rides close herd on the parties and assesses their state of preparedness at the initial hearing. Thereafter, he schedules further hearings as promptly as possible. An able chairman recognizes that the panel has inherent statutory powers

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10. See *supra* at \_\_\_\_.

to expedite arbitration procedures,<sup>11</sup> and he exercises them when the parties start dragging their feet.

Since the actions of the panel's chairman can greatly influence the pace of the proceedings, it is of singular importance that when the appointed arbitrators choose the chairman, they take into consideration not only the particular expertise he can contribute to an evaluation of the dispute, but also his ability to represent the panel as chairman. This is particularly so when the dispute is expected to be complex, or when it involves a substantial sum of money. Although acquainting arbitrators with details of the dispute prior to the composition and acceptance of the panel is not allowed, the panel generally has an inkling beforehand of the substance of the controversy. Sometimes, the chairman is quite knowledgeable in the area of the dispute but either he has little or no chairmanship experience, or he is just not cut out for that role. Such a chairmanship appointment only invites delay. Appointed arbitrators have a responsibility to the parties to elect a chairman who can cope with the procedural needs of the adjudication. They can help to decrease delay by choosing an able panel chairman.

### *C. Post-hearing Delay*

Unfortunately, post-hearing delay exists. Arbitrators, however, can work to decrease this type of delay.

#### *1. Failure to Schedule Deliberation Promptly*

The primary cause of post-hearing, or "post-briefing," delay is the failure of the arbitrators to schedule promptly a time to deliberate. They can make no progress toward the release of the award until they agree when and where they will convene to share their views and conclusions. Once a date for this procedure has been established, the arbitrators have a deadline to aim for in their preparations for the deliberation. Absent this fundamental step, the award will indefinitely be in a state of abeyance.

Eliminating this type of post-briefing delay is within the sole control of the arbitrators. Although scheduling the date of deliberation is a collective responsibility, the chairman, as part of his procedural responsibilities, should stay on top of the situation and do whatever is necessary to do it. This is very simple. Once the briefs have been received from the parties (including reply briefs if they have been requested), he should immediately establish the deliberation date. Even the busiest of

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11. 9 U.S.C. §7 (1982).

arbitrators has open dates available for deliberation, although it might be some six weeks hence. Once the deliberation date is set, one cause of post-briefing delay is eliminated.

Only rarely, in instances of highly complex disputes, is more than a single deliberation required. Areas of thought and conclusion not totally resolved during the deliberation may have to be addressed in the draft stages of the award, but the arbitrators have taken a big step toward the release of the award once they have deliberated.

## 2. *Award Writing*

The writing of the award following deliberation is a conspicuous culprit of post-briefing delay, and it is within the control of the arbitrators.

A number of factors can influence the progress of completion of the award once the panel has ended its deliberations. Traditionally, the chairman composes an initial draft which is circulated to the other panel members for their corrections and suggested modifications. Failure of the chairman to submit his draft to his colleagues within a reasonable time after deliberation happens with disturbing frequency. The only means of rectifying this situation is for one or both of the other panel members to monitor the progress (or lack of it) of the chairman in providing the draft and to prod him to greater efforts when necessary. In the extreme cases when the chairman fails to write this initial draft, the other panel members have drafted the award and submitted it to him for consideration. Writing the award and issuing it in a timely fashion to the parties is the individual and collective obligation of the entire tribunal.

Another solution to the award writing delay problem is for the panel to divide the writing of the three basic components of the award (facts, arguments, and decision and discussion) among the tribunal. This method is often quite effective because panel members of more advanced legal background can write the parts of the award dealing with the law; technically-oriented arbitrators can write about the technical material; and those who by occupation are knowledgeable about damages can explain the damages which may be granted as part of an arbitral award. A concerted effort on the part of all the arbitrators will decrease the time lag between the submission of the briefs and issuance of the award.

Mr. Jarvis and others have suggested that the fully reasoned award be either altogether dispensed with, or limited in scope.<sup>12</sup> One of

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12. Jarvis, *supra* note 1, at 58.

the more important distinctions between the way maritime arbitration is practiced in New York and the way it is done in other jurisdictions, notably London, is New York's tradition of including within the awards the reasons for the conclusions. The maritime bar has tacitly, and at times expressly, approved New York's practice of issuing reasoned awards. The reasoned awards create a body of law which one can readily research through the S.M.A.'s Award Service or through the LEXIS computerized library. Although there is something to be said for brevity and conciseness of awards, issuing reasoned awards is desirable and beneficial to parties, their attorneys and even arbitrators themselves. Adjudicators benefit from understanding the reasoning from which conclusions have been drawn. It is also important to the arbitral system that the whys and wherefores of arbitrators' decisions become part of a written public record.

#### IV. RESOLVING THE PROBLEMS

##### A. *Party Attributable*

###### 1. *Broader Distribution of Appointments*

Arbitrators have neither direct nor indirect control over whether they are appointed. Parties and their attorneys decide whom to appoint, and they should refrain from appointing the popular arbitrators over and over again. This will allow other competent, available individuals to move up the arbitration ladder.

###### 2. *Procedural Alternatives*

Streamlining arbitration hearing procedures would shorten the arbitral process. Relevant documentation could replace the redundant testimony of some fact witnesses. The panel could forbid counsel to present unnecessary expert witnesses. It could even dispense with the formal arbitration hearing. Could not a *written* exchange of claims and counterclaims (and supporting documentation) replace the hearing? And are briefs really necessary? Are not the issues so narrow, well-defined, and easily understood that oral argument alone enables the panel to understand the controversy and to proceed to deliberation without formal briefs? If briefs are necessary, could they not be in the form of informal letters to the arbitrators? The ways to simplify arbitration procedures, and therefore reduce delay and expense, are many.

###### 3. *Toward Conciseness*

Briefs should help, not confuse, the arbitrators. Citing a lot of

cases which are not on point overwhelms the arbitrators and confuses the issues. Court decisions handed down in 1896 usually bear no relationship to the facts of today's cases which involve contemporary commercial maritime activity. They are of little or no practical assistance to arbitrators. Looking up these irrelevant citations wastes the arbitrators' time and contributes to delay.

#### 4. *Sole Arbitrators*

Only two to three percent of maritime arbitrations in New York take place before a sole arbitrator. Using a sole arbitrator is probably the best way to obtain an award quickly and relatively inexpensively. The reason the maritime bar gives for not using a sole arbitrator is frequently the parties' inability to agree on one. Waiving the privilege of appointing an arbitrator in favor of agreeing upon a sole arbitrator supposedly prejudices the client's interests. This is simply not the case. After all, the parties have no control over the election of the third arbitrator, the chairman. Would they not sometimes be just as well off if they agreed upon a competent and neutral sole arbitrator? This is particularly true in disputes where the amounts at stake are modest, *i.e.*, not exceeding \$50,000. In such circumstances, it is almost extravagant, in terms of time and cost, to go the tripartite route. Admittedly, using a sole arbitrator requires a modicum of cooperation between the parties, to say the least. Regrettably, maritime arbitration has not particularly distinguished itself in that regard.

#### 5. *Pinch Hitters*

The final area of delay to which the parties contribute is their repeated requests for adjournments of scheduled hearings because counsel is suddenly unavailable for some reason. Almost invariably, when the panel chairman suggests that another member of the firm substitute for him, the party responds that no one else is familiar with the case or with the activity planned for that hearing. This sometimes happens even when two or more partners have worked on the case. Attorneys should be more willing to substitute for one another.

### B. *Arbitrator Occasioned*

#### 1. *Appointment Self-Discipline*

It is well-known that a relatively small group of arbitrators dominate the New York and London maritime arbitral scenes. Because arbitrators serve only by appointment by the parties or as third arbitrators upon the agreement of the appointed ones, these very busy

arbitrators, both full-time and industry-employed, feel that the delays stemming from their overcommitment are not their fault; after all, they have no control over the appointments. Of course extremely popular arbitrators could exercise a degree of self-restraint and not accept more appointments when their calendars are such that the additional cases would inevitably suffer delay.

## 2. *The 120-Day Limit*

The S.M.A. has recently taken a significant positive step by addressing the problem of post-hearing delay which Mr. Jarvis discussed in his treatise. On December 9, 1986, the S.M.A. announced that it had amended Section 27 of its Rules: arbitrators *must* render an award within 120 days of receipt of the final submissions of the parties.<sup>13</sup> An earlier directive had firmly recommended to the membership that a deliberation date be scheduled immediately following receipt by the panel members of parties' final submissions.<sup>14</sup> Additionally, the party-appointed arbitrators can decrease delay only by selecting a qualified panel chairman.<sup>15</sup>

## V. RESPONDING TO THE "JARVIS" REPORT

### A. *Proposed Rules*

As part of his report, Mr. Jarvis proposed a rule (which presumably could only be promulgated as part of the S.M.A. Rules) which would require an arbitrator, at the time he discloses his possible biases to the parties, counsel, and fellow arbitrators, also to disclose the amount of time he will be able to devote to that arbitration.<sup>16</sup> If the party who did not choose that arbitrator feels that the arbitrator will not be able to decide the matter in a timely fashion, that party may demand that the appointing party select a new arbitrator. Up to three such challenges would be permitted; further challenges would be allowed if leave from the court is obtained.

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13. Section 27 of the S.M.A. Rules of September 15, 1984 now reads as follows: "*Time.* It is the obligation of the Panel to issue its Award promptly after the last evidence or brief has been received from the parties, but not later than 120 days therefrom. The onus of implementation of this goal shall be on the Chairman unless disability prevents his accomplishing it, in which case the other panel members shall take necessary steps to meet the desired time limit. Failure of the Panel to abide by this provision shall not be grounds for challenge of the Award."

14. See Appendix.

15. See *supra* at \_\_\_\_.

16. Jarvis, *supra* note 1, at 57.



The above proposal is totally unfeasible for a number of reasons. First, prior to the formal constitution of the panel, parties may disclose to arbitrators only the general nature of the dispute and the identities of all the parties and their counsel. It is impossible to tell from such limited information the complexity of a dispute and the amount of time which will be required to hear and adjudicate it. Further, not only does allowing parties to challenge arbitrators on any grounds other than those already established by statute and tradition invite procedural abuse, but it also introduces an element of courtroom legality which commercial arbitration was created to avoid.

### B. *Written Opinions*

Mr. Jarvis has also proposed that "written opinions" (by which term I assume he means the inclusion by arbitrators of their reasoning processes within their awards) be dispensed with, unless both parties agree otherwise.<sup>17</sup> This author suggests that the majority of maritime attorneys now engaged in arbitration would object to abolishing "reasoned" awards. The library of over 2,200 awards, available through the S.M.A. Award Service, indexed by a digest, and also accessible through LEXIS, is a valuable tool when attorneys advise clients and evaluate their disputes. Reasoned awards are essential to the well-being of the entire maritime arbitral system. Furthermore, these reasoned awards induce disputants to arbitrate in New York rather than in London and elsewhere.

### C. *Time Limits*

Mr. Jarvis has also suggested a strictly enforced time limit of forty-five days within which awards must be issued after the submission of briefs, unless the parties agree to a longer or shorter period of time.<sup>18</sup> If the parties require a written opinion, ninety days would be allowed. Arbitrators would not be permitted to request extensions of time. The dire consequences of an award not being released within the imposed time limitations have not been recognized. These consequences are that the award can be vacated upon the application of the losing party, thereby causing a senseless waste of time, effort, and money.

When the S.M.A. Board of Governors chose to recommend a voluntary 120-day limitation for award issuance, it assumed that arbitrators would be able to complete their deliberations, write the award, and

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17. *Id.* at 58.

18. *Id.* at 57.

render it within that period of time. This depends upon the integrity and ability of arbitrators to adjust their schedules and priorities according to the dictates of this time constraint. Additionally, this is a voluntary action, rather than a mandatory one, as Mr. Jarvis would have it.<sup>19</sup> Once it becomes apparent that a particular arbitration is of sufficient complexity to require more than 120 days, the panel has the flexibility to modify the time limit under the existing S.M.A. procedure.

#### D. *"Expedited Arbitration"*

Mr. Jarvis refers to "Expedited Arbitration,"<sup>20</sup> a procedure under which the arbitrators would be required to render their decisions within one week of the close of hearings. This possibility already exists whenever both parties desire a prompt (or even immediate) decision, and cooperate in the obtaining of it. Many maritime arbitrations over the years have been resolved swiftly. In such cases, arbitrators make the decision on the spot and sometimes issue a brief written opinion, which is often followed up by an option with a more elaborate analysis. A panel will virtually always be able to service the disputants' need to resolve their problems immediately as long as the parties cooperate.

Mr. Jarvis accepts that contracting parties are not likely to consider his new procedural changes as part of the arbitration clause when they negotiate their contracts.<sup>21</sup> He suggests, therefore, that legislative action by national governments or arbitral bodies will solve the delay problem.<sup>22</sup> I respectfully submit that maritime arbitration here and abroad has functioned effectively for longer than most of us even remotely involved in it can remember. One of the reasons it has operated successfully is its ability to function outside (but alongside) the judicial systems, without unnecessary interference by the courts. In any event, the courts have consistently interpreted the Federal Arbitration Act<sup>23</sup> as having created a dispute resolution process to be left alone by the judiciary. The courts will simply not interfere unless there are obvious violations of the extremely narrow provisions of Sections 10 and 11 of the Act. It is not likely that either legislators or the judiciary would now consider modifying the statutory position of arbitration or its unique relationship with court procedures.

Finally, Mr. Jarvis proposes a rule whereunder the doctrine of the

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19. *Id.*

20. *Id.* at 58.

21. *Id.* at 61.

22. *Id.*

23. 9 U.S.C. §§1-14 (1982).

immunity of arbitrators from personal liability (derived from judicial immunity) would be waived, and arbitrators failing to meet a stipulated time limit for award issuance would become personally liable for all damages suffered by either party which are the consequences of the late award.<sup>24</sup> Once commercial arbitrators are required to assume personal liability for any aspect of arbitrating, they will no longer arbitrate.

## VI. THE ROLE OF THE PARTIAL FINAL AWARD

Finally, I would briefly like to update Mr. Jarvis's observations about Partial Final Awards.<sup>25</sup> Partial Final Awards have attracted considerable attention from the courts in recent years. On May 19, 1986, the Second Circuit affirmed the granting of a Partial Final Award to the owners of the *CAPTAIN CONSTANCE*.<sup>26</sup> It would thus appear that such awards are sustainable when a severable issue conforms with established minimum fundamental requirements. On the other hand, experienced arbitrators are reluctant to respond to a request by a party for a Partial Final Award (the granting of which is exclusively within the discretion of the arbitrators) unless it is necessary to remedy a clearly obvious and illegal withholding of freight. Absent such pressure, there is a distinct tendency on the part of some arbitrators to prefer to hear and decide all the issues at the same time, rather than fragment the proceedings.

## VII. CONCLUSIONS

A variety of causes of delay have been apparent for some time in maritime commercial arbitration. Some are avoidable; others are not. Delay tarnishes the image of arbitration as a desirable alternative to litigation for dispute resolution. It sometimes even causes substantial financial loss to a party who has won the arbitration: the party finds its award unenforceable because the losing party has experienced financial hardship during the period of delay.

By modifying their procedures, practicing attorneys could significantly reduce delay in arbitration. This would involve fewer requests for adjournments, a broader distribution of arbitration appointments, a more pragmatic approach to testimony and the examination of witnesses, more concise briefs, letter briefs in lieu of formal briefs when

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24. Jarvis, *supra* note 1, at 57.

25. *Id.* at 51-53.

26. 790 F.2d 280 (2d Cir. 1986).

the former will suffice, a reduction of extraneous documentation, and more frequent use of a sole arbitrator rather than an entire panel.

Arbitrators could contribute to quicker resolution of disputes by exercising self-restraint in acceptance of appointments as dictated by circumstances, agreeing upon panel chairmen who can and will move the proceedings along, and deliberating and issuing their awards within reasonable and acceptable time parameters. The recent 120-day directive from the S.M.A. Board of Governors to its membership should noticeably reduce arbitrator-induced delay.

Mr. Jarvis's suggestions for dealing with post-hearing delay, in the form of the proposed rules which would reduce post-hearing delays,<sup>27</sup> are neither reasonable nor practicable. Permitting what are virtually peremptory challenges by attorneys of the fitness of individual arbitrators to serve because of their alleged lack of available time, would introduce a formal courtroom atmosphere into arbitration proceedings. Allowing arbitrators only forty-five days within which to render an award is unreasonable, and will result in the vacating of awards when compliance with the time limit inevitably becomes impossible. Legislation stripping arbitrators of their immunity from personal liability will not expedite the issuance of awards — it will only limit the number of available arbitrators. No rational arbitrator would risk incurring such liability. Dispensing with reasoned opinions in arbitration awards as a means of accelerating the release of the award is also undesirable. These opinions are heavily relied upon by attorneys who counsel disputants.

Finally, Partial Final Awards are permissible in certain circumstances, and are useful when freights are withheld without justification. But their usefulness for other reasons is questionable in the minds of many arbitrators.

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27. Jarvis, *supra* note 1, at 56-58.

*APPENDIX*

The President of the S.M.A. sent the following letter.

**SOCIETY OF MARITIME ARBITRATORS, INC.**

26 Broadway - Suite 1200  
New York, N.Y. 10004  
212-483-0616

Telex: RCA 232723  
ITT 421814  
WU 126724

March 14, 1986

TO: THE MEMBERSHIP, SOCIETY OF MARITIME ARBITRATORS, INC.

FROM: CHARLES F. NISI, PRESIDENT

RE: DELAYS IN ISSUANCE OF AWARDS SUBSEQUENT TO BRIEFING

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Over recent months I have addressed letters to the Membership on the subject of urgent necessity for reduction in the lamentable delays which have been occurring from date of receipt by panels of final submissions from the parties until issuance of the awards.

Continuing open criticism on this issue from the maritime bar and from users of the New York Maritime arbitral system both domestic and abroad caused your Board of Governors to conscientiously consider the implications of the problem at its meeting on March 11. Following is the unanimous consensus and directive of the Board pertaining to this aspect of arbitral delay:

1. The Board recognized and affirmed it is the obligation of all S.M.A. members to render their awards in a timely manner. Over the years, merchants have looked favorably upon resolution of their maritime disputes in New York because of rapidity of decision with accompanying relatively low cost alongside litigation.

2. The Board as your representative is firmly of the opinion the time has come to monitor and take necessary action in an area in which New York Maritime Arbitrators, including S.M.A. Members, exercise control — the parameters of time within which awards are released following completion of briefing by counsel for the parties. If New York Maritime Arbitrators are to continue to contribute to the needs of our industry, we must produce acceptable results within the briefest possible span.

3. In conformity with this objective, the Board directs its Membership to limit the period within which awards are to be rendered to a maximum of 120 days from the date of final submissions by the parties.

When the Rules were last amended in 1983 the 90 day proviso was in retrospect unfortunately dispensed with. Reinstatement of 120 days is designed to permit some flexibility to those arbitrators encountering other urgent and unanticipated commitments which may temporarily interfere with completion of the award. Society Members who may be overburdened with heavy arbitration schedules and/or unavoidable business commitments may wish to consider declining new appointments to enable compliance with the intent of this directive.

4. As soon as practicable the existing Rules will be amended to include the 120 day stipulation. Acceptance of S.M.A. Rules by the parties will automatically trigger the 120 day limitation. Meantime, it is mandated by the Board that all S.M.A. Members voluntarily confirm on the record at the initial hearing of an arbitration their joint agreement to issuance of their award within 120 days of receipt of final submissions, with the only acceptable grounds for a request by the Panel for extension of time being physical disability or other events definable as Force Majeure category.

5. For the present and even after the Rules have been amended with the 120 day proviso, there will be situations involving tripartite Panels where our Members may be sitting with non S.M.A. Commercial Men and/or Members of the Bar. It will be incumbent upon our Members to in such situations do their best to institute the 120 day time limitation for the proceeding.

6. It is intended the Code of Ethics of our Society also be amended to specifically stipulate violation of the 120 day limitation will be considered a breach of the Code. Until then, Members should bear in mind failure to observe this considered directive of the Board may subject transgressors to proceedings before the Ethics Committee.

For all of us involved in the arbitral process — arbitrators, attorneys, businessmen who use the system, the continuing goal must be upgrading of the quality of the service provided on the New York scene. If arbitration in New York is to remain competitive with existing international centers and others around the world eager to enter the arbitration market we must immediately and positively respond to widespread allegations of delay with which we are presently confronted, within an area where a degree of self-disciplinary control can and must be exercised. We are hopeful this seriously considered action will not alone contribute to the improvement of New York's image in Maritime Arbitration. Perhaps its fallout will extend to those areas of delay in Maritime Arbitration over which arbitrators themselves have no direct control.

Your attention and compliance with the above is warmly and earnestly requested.

CHARLES F. NISI,  
President