

## Delay in Maritime Arbitrations: a Rejoinder to Mr. Zubrod

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# DELAY IN MARITIME ARBITRATIONS: A REJOINDER TO MR. ZUBROD

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## I. INTRODUCTION

In 1985 I wrote an article which examined the problem of delay in the rendering of awards in maritime arbitrations held in New York City.<sup>1</sup> As the article stated, its purpose was not to examine all of the causes of delay.<sup>2</sup> Instead, it sought to isolate and describe one particular cause of delay: the failure of arbitrators to deliberate and issue their awards in a timely fashion.<sup>3</sup>

The article noted that as the time between the closing of evidence and the rendering of the award has grown unreasonably long, many maritime parties have decided to arbitrate in cities other than New York.<sup>4</sup> The article detailed the causes and consequences of delay,<sup>5</sup> and

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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].

2. *Id.* at 36.

3. *Id.* at 36-37. As the article explained, only arbitrator-inspired delay was studied. *Id.*

4. *Id.* at 44-45.

5. *Id.* at 37-42 and 54-56. The article noted that delay in the rendering of the award has two adverse consequences. First, parties lose confidence in the system, are reluctant to enter into arbitration in the future, and may forego meritorious claims or settle them for less than would be the case if a properly-functioning arbitration system was in place. Second, some arbitration awards become valueless by the time they are

predicted that the number of maritime arbitrations held in New York City would continue to decrease unless steps were taken to shorten the time taken to issue awards.<sup>6</sup>

Following the release of the article in July, 1985, copies began to circulate throughout the New York maritime bar. Later, copies began circulating among members of the Society of Maritime Arbitrators, the principal maritime arbitration body in New York City. The article and its recommendations became the subject of much debate, and on March 12, 1986, I appeared before the Society at its monthly luncheon to discuss further the problem of delay.<sup>7</sup>

At that luncheon, the Society's Executive Board announced that henceforth the Society would encourage its members to render their awards within 120 days of the closing of the evidence.<sup>8</sup> Although this was a longer period than either the forty-five days advocated by my article,<sup>9</sup> or the ninety days which once had been required by the Society's rules,<sup>10</sup> the Executive Board's announcement was an important first step in solving the problems of delay.<sup>11</sup>

Since the Executive Board's action, members of the Society have begun to follow the 120-day guideline in arbitrations commenced after March, 1986. Moreover, the subject of post-hearing delay has become a major focus of attention in New York maritime circles. Thus, in many ways, my article has achieved its goal of reducing delay.

Despite the progress achieved to date, delay continues to plague New York maritime arbitrations. In his article, *Delay in Maritime Arbitrations - Post-Hearing and Otherwise: An Arbitrator's View*,<sup>12</sup> Donald E. Zubrod argues that much of the delay is party-inspired.<sup>13</sup>

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issued because the losing party has become judgment proof while the award was delayed.

6. *Id.* at 44 n.109 and accompanying text.

7. An edited version of the speech appears in Jarvis, *Problems with and Solutions for New York Maritime Arbitration* [1986] LLOYD'S MAR. & COM. L. Q. 535 [hereinafter cited as *Problems*].

8. *Id.* at 538 n.18.

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

10. *Id.* at 48 n.125.

11. The Executive Board also stated that it would at some future date review its 120-day suggestion to determine whether the recommendation should be modified or be made mandatory. *Problems*, *supra* note 7, at 538 n.18. In January, 1987, the Society announced that it had amended Section 27 of its Rules to incorporate the 120-day guideline. However, the amended rule specifically states that a failure by a Panel to issue an award within the prescribed time "shall not be grounds for challenge of the Award." See Zubrod, *supra* note 12, at \_\_\_\_ n.13.

12. 10 MD. J. INT'L L. & TRADE 2 (1986) [hereinafter cited as Zubrod].

13. *Id.* at \_\_\_\_.

Mr. Zubrod does agree that some delay is arbitrator-inspired.<sup>14</sup> He takes issue, however, with the suggestions put forth in my previous article for resolving arbitrator-inspired delay. In this brief rejoinder, I seek to explain why Mr. Zubrod's criticisms of my proposals are unsound, and why New York maritime arbitration does need to adopt my proposals.

## II. RESPONSES TO MR. ZUBROD

My earlier article advocated four basic changes.<sup>15</sup> Summarized briefly, these changes were as follows: A) the disclosure by each arbitrator of his future schedule; B) the imposition of strict time limits for the rendering of an award; C) the elimination of written opinions unless such opinions were requested by both parties; and, D) the institution of an expedited arbitration system for emergency cases.

Mr. Zubrod has called these proposals "totally unfeasible," and has sought to discredit them by labelling them "unreasonable" and "impractical."<sup>16</sup> With respect, it is suggested that the proposals are workable and would be easy to implement and administer. To prove this, the proposals are reviewed below, together with Mr. Zubrod's criticisms and my replies.

### A. Arbitrator Schedule Disclosure

Under the first proposal, arbitrators would be required to disclose their schedules within fifteen days of their appointment. If an arbitrator's disclosure indicated that he would be unable to decide the case in a timely fashion, the opposing party would be able to demand that the nomination be withdrawn and a new arbitrator appointed. Three such challenges would be allowed, with further challenges permitted if leave of court was obtained.

The purpose of this proposal is to ensure that arbitrators can devote sufficient time to a matter. Mr. Zubrod contends that the proposal is flawed because arbitrators cannot deduce how much time a particular case will require at the time of their appointment. Mr. Zubrod therefore argues that the rule places an arbitrator under an unfair handicap.

Of course, the rule does no such thing, for it does not ask the arbitrator to evaluate whether he has enough time to hear the matter.

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14. *Id.* at \_\_\_\_.

15. Jarvis, *supra* note 1, at 56-61.

16. Zubrod, *supra* note 12, at \_\_\_\_.

Rather, the rule places that burden on the parties and their attorneys. This is particularly appropriate since at the outset of an arbitration parties and their attorneys are usually in a good position to make an estimate of the amount of arbitrator-time a case will require. In most instances, the attorneys will already know what facts are in dispute, and will probably have learned through settlement negotiations what arguments the other side is likely to raise, and can gauge, usually with significant accuracy, how many witnesses will have to be called, how many documents will have to be submitted into evidence, and how many hearings will be needed.

Mr. Zubrod objects to placing such control in the hands of the parties because to do so, he says, would introduce "an element of courtroom legality"<sup>17</sup> into the arbitration process. It is difficult, if not impossible, to comprehend how the rule adds "courtroom legality" to the arbitration. Perhaps what Mr. Zubrod meant is that the rule puts arbitrators under the scrutiny of the parties, thereby making the arbitrators accountable to the parties. If so, such accountability is to be applauded. It not only assures current parties of a speedy resolution, it encourages potential parties to use the system. By preventing parties from selecting an already overburdened arbitrator in hopes of slowing down the arbitration,<sup>18</sup> the system is able to function as intended.

The rule is also easily administered. Since arbitrators are already required to disclose possible bias or interest in the outcome,<sup>19</sup> the disclosure of the arbitrator's schedule can be made at the same time. Thus, the rule adds little, if any, additional work for the arbitrator. Indeed, if the rule is adopted, it is likely that arbitrators would come to appreciate it, for it would provide an easy means of allowing an arbitrator to review at a glance his upcoming schedule and commitments.<sup>20</sup>

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17. *Id.* at \_\_\_\_.

18. As pointed out in my earlier article, there is a certain advantage for an arbitrator to develop a reputation for being able to slow down a panel, in order to gain time for the party which appointed him. Jarvis, *supra* note 1, at 43 n.107.

19. *Id.* at 45-46.

20. Indeed, the London Maritime Arbitrators Association recently adopted a system which has many of the same characteristics as the one I proposed. See London Maritime Arbitrators Association, The L.M.A.A. Terms 1987 (1986) [hereinafter cited as 1987 Terms]. Under these terms, London maritime arbitrators are required to set a hearing within a set period of time after the case is ready to be submitted by the parties. For example, a dispute which is estimated to require between three and five days of hearings must have a hearing date set for it within six months of the time that the arbitrators are advised that the case is ready to proceed. *Id.* at the Fifth Schedule. Moreover, an arbitrator unable to offer a date within the required period must withdraw from the arbitration unless the parties agree to forego the Terms. *Id.* See gener-

### B. *Time Limits*

At one time, of course, the rules of the Society of Maritime Arbitrators required awards to be rendered in a set time. This system was replaced in 1983 by the current rule, which simply requires arbitrators to render their award as soon as practicable. As explained above, however, Society members now are being encouraged (but are not required) to render their awards within 120 days. This is in stark contrast to London maritime arbitrators who, under their recently amended Terms, are now being encouraged to render their awards within forty-two days.<sup>21</sup>

Under my proposal, arbitrators would be required to render their awards within either forty-five or ninety days of the close of evidence, depending upon whether the parties had requested a written opinion explaining the basis for the arbitrators' decision. Arbitrators would be prohibited from either asking for or granting an extension of the time. In the event that the time limit was violated, the parties then would be free either to treat the arbitration as a nullity or to extend the arbitrators' time. In the event the award was not rendered on time and a party suffered damage as a result, the arbitrators would become personally liable for such damages.

Mr. Zubrod predicts that the adoption of this rule will result in a great deal of wasted effort if the arbitrators miss the deadline and then are prevented from rendering their award.<sup>22</sup> This, of course, is true. Mr. Zubrod's suggestion for dealing with this problem, however, is unsatisfactory. He suggests that users of the system depend upon the integrity and ability of the individual arbitrators to issue the award in a timely manner.<sup>23</sup>

The rendering of a timely award, however, has little to do with an arbitrator's integrity or ability. The fact is that arbitrators, like lawyers and clients, push off difficult tasks, leaving them for the last possible moment.<sup>24</sup> By setting a strict deadline, the rule accepts this fact and simply tries to ensure that the last possible moment will come sooner rather than later.

Mr. Zubrod also objects to making arbitrators liable if, through

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*ally Hughes, Arbitration Body Speeds Maritime Case Hearings*, Financial Times, Oct. 29, 1986, at 9, col. 1.

21. 1987 Terms, *supra* note 20, at Term 18.

22. Zubrod, *supra* note 12, at \_\_\_\_.

23. *Id.* at \_\_\_\_.

24. Jarvis, *supra* note 1, at 40 n.93.

their failure to issue a timely award, a party becomes aggrieved.<sup>25</sup> Mr. Zubrod argues that if such a rule were to be instituted, maritime arbitrators will simply refuse to continue as arbitrators. There is, however, no support for Mr. Zubrod's conclusion.

As my earlier article pointed out, if the rule were to be adopted, arbitrators would purchase malpractice insurance to insulate themselves from liability. Malpractice insurance has long been carried by lawyers, doctors, accountants, and other professionals,<sup>26</sup> and maritime arbitrators could easily finance such insurance by building the cost into their fees.

Perhaps what Mr. Zubrod had in mind was the unpaid commercial arbitrator who renders his service as a contribution to the community. Of course, maritime arbitrators in New York are handsomely rewarded for their services, often commanding fees on a par with that of the lawyers who handle the arbitration.<sup>27</sup> Indeed, many persons in New York have turned to arbitration for their primary income, and have gone so far as to style themselves as "professional arbitrators."<sup>28</sup> Given this state of events, it is not only easy for maritime arbitrators to afford malpractice insurance, it is entirely appropriate.

### C. *The Elimination of Written Opinions*

The third proposal calls for the elimination of written opinions explaining the basis of the award, unless both parties request such an opinion. Mr. Zubrod suggests that such "reasoned awards," as he termed them,<sup>29</sup> should be retained because: 1) maritime attorneys would object to their elimination; 2) London maritime arbitrators do not supply such reasons, thereby providing New York with an edge; and, 3) such awards provide important precedent.

Upon close inspection, none of these reasons are sound. First, whether maritime attorneys want or need such awards is irrelevant. The question is whether, in a given case, the parties need an award. Since, as Mr. Zubrod admits, the writing of an opinion is a laborious

25. Zubrod, *supra* note 12, at \_\_\_\_.

26. Jarvis, *supra* note 1, at 59 n.167.

27. *Id.* at 37 n.86. It should also be noted that unlike attorneys, arbitrators do not have the overhead expense of rent, staff, and library and word processing facilities.

28. *Id.*

29. By using the term "reasoned award," Mr. Zubrod implies that awards rendered without formal, written opinions are unreasoned. This argument is an oft-repeated one. See *id.* at 42 n.101. There never has been, however, any proof to support the argument and many, if not most, arbitration systems function without written opinions. *Id.* at 40 n.92 and accompanying text.

process which can delay the rendering of an award for months,<sup>30</sup> there may be much to lose by agreeing to wait for a written opinion. Not only can the losing party become judgment-proof while the award is being written, mistakes in the opinion often provide a basis for challenging the award in court.<sup>31</sup> When such a challenge is made, the winner of the award must expend additional time and money, and the resolution of the dispute is further delayed.

Second, the suggestion that New York holds an edge over London because of the publishing of opinions is debatable at best. When parties consider possible arbitration sites their attention focuses on such matters as the availability of qualified arbitrators and attorneys, the convenience of arbitrating in a particular city, and the financial costs involved.

In any event, Mr. Zubrod's concern is misplaced, since the proposed rule does not eliminate written opinions. Rather, it simply requires both parties to agree that a written opinion will be issued. The reason why the rule requires both parties to agree is obvious. Under the second of my four rules, if no opinion is required, arbitrators are given forty-five days to render their decision. If, however, an opinion is required, arbitrators are given ninety days. The additional forty-five days are given in recognition of the fact that drafting an opinion is a time-consuming activity. If one party to the arbitration sought to delay a final decision, it could do so by asking for a written opinion. Thus, the rule requires mutual consent to ensure that parties cannot use written opinions as an instrument of delay.

The third reason cited by Mr. Zubrod for written opinions has to do with their value as precedent. It should be recalled, however, that courts have routinely held that arbitrators have no duty to provide reasons for their decisions,<sup>32</sup> and that parties cannot complain when arbitrators refuse or fail to follow prior arbitration decisions.<sup>33</sup> Thus, it is unclear who, if anyone, benefits from written opinions. Although Mr. Zubrod suggests that such opinions are necessary for the arbitration system to function properly, the London maritime arbitration system has not suffered from the lack of such opinions. And while it is true that a recent poll has shown that many maritime lawyers believe that it is useful to refer to prior arbitration decisions,<sup>34</sup> there is no empirical

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30. Zubrod, *supra* note 12, at \_\_\_\_.

31. Jarvis, *supra* note 1, at 60 n.171 and accompanying text.

32. *Id.* at 40 n.94.

33. *Id.* at n.95.

34. *Id.* As my earlier article noted however, this poll suffers from numerous flaws in methodology. *Id.* at n.81.



support for this view.<sup>35</sup>

#### D. Expedited Arbitration

The final proposal would set up a system of expedited arbitration, under which arbitrators would be required to render their decision within seven days of the close of the hearings. Mr. Zubrod suggests that this proposal is unnecessary because the rules of the Society of Maritime Arbitrators already provide for expedited arbitration.

In fact, there is a need for the acceptance of my proposal because unlike the present expedited system, which requires both parties to request an expedited decision,<sup>36</sup> my proposal allows either party to request and receive an expedited decision. Of course, if the other party believes that there was no need for an expedited arbitration, it can attempt to prove a lack of need. If such lack of need is proven, the arbitrator then awards to the party which did not want the expedited procedure three times the cost it was put to in complying with the expedited procedure.

### III. CONCLUSION

The problem of delay is a serious one in maritime arbitrations. Fortunately, the New York maritime bar and arbitrator community have recognized this fact and have begun to take steps to reduce delay. Much, however, remains to be done.

The four proposals put forward in my earlier article would go far in reducing delay. Because my article and the proposals contained therein dealt only with arbitrator-inspired delay, Mr. Zubrod's article is useful because it identifies and suggests solutions to party-inspired delay.

It is when Mr. Zubrod discusses arbitrator-inspired delay that his article falls down. His suggestion for dealing with arbitrator-inspired delay is to rely simply on the present system. It has already been shown that the present system allows — indeed, encourages — arbitrator-inspired delay. If arbitrator-inspired delay is to be reduced to tolerable

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35. Although Mr. Zubrod suggests that citations to past decisions are useful, Zubrod, *supra* note 12, at \_\_\_\_\_, arbitration panels can and do regularly ignore such decisions because the principle of *stare decisis* has not been adopted in arbitration. Jarvis, *supra* note 1, at 40 n.95 and at 42, n.100.

36. Zubrod, *supra* note 12, at \_\_\_\_\_. Indeed, the requirement that both parties agree to expedited arbitration has been cited as a major failing of the present system. See Address by Lawrence G. Cohen, Society of Maritime Arbitrators Annual Seminar (Feb. 27, 1985).

levels, more of the same is not the answer. The answer lies in changing the system so that the potential for arbitrator-inspired delay is reduced.