MINUTE ENTRY
SEAR, J.
JANUARY 31, 1991

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SEMBAWANG SHIPYARD, LTD.	*	CIVIL ACTION
VERSUS	*	NO. 88-5005
M/V CHARGER (FORMERLY KNOWN AS GLOBE CHARGER), HER ENGINES, BOILERS, ETC., AND CHARGER, INC.	*	SECTION "G"

MEMORANDUM AND ORDER

Background

The November 13, 1990 minute entry sets out the relevant background to this in rem and in personam action. The November 13 Order granted the motion of defendant Charger, Inc. ("Charger") to lift stay and quash service of process. Plaintiff Sembawang Shipyard, Ltd. ("Sembawang") had filed a motion to confirm the Singapore arbitration award. However, I ruled that Sembawang had not served Charger within the 120-day time limit set forth in Fed.R.Civ.P. 4(j), and had not shown good cause or excusable neglect for this failure. The action was dismissed without prejudice.

On November 20, 1990, Sembawang filed a motion to reconsider the November 13 Order. The motion sets forth a variety of arguments, including that Charger's appearance as owner of the vessel, dated November 14, 1988, pursuant to Supplemental Rule for Certain Admiralty and Maritime Claims E(8), did not restrict its appearance to the in rem action, and that Charger waived its defenses of insufficiency of service of process and lack of in personam jurisdiction by not raising them by motion prior to arbitration. Charger responds that its claim of ownership successfully restricted its appearance to the in rem action only, and that its defenses in the action in personam need not have been raised prior to going to arbitration.

Analysis

Supplemental Rule C(6) provides for the filing of a claim by the owner of property that is the subject of an action in rem. Supplemental Rule E(8) states:

> RESTRICTED APPEARANCE. An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment whether pursuant to these Supplemental Rules or to Rule 4(e), may be expressly restricted to the defense of such claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

Charger filed a "Claim" on November 14, 1988, that reads as follows:

> NOW COMES Charger, Inc., appearing specially herein through its undersigned attorneys, duly authorized, and shows that it is the sole owner of M/V CHARGER, proceeded against in this action, and is entitled to restitution of same and the right to defend this action.
>
> This appearance is restricted to the defense of the claims set forth in the pending complaint only, and is made with full reservation of all objections and defenses which may be available to the vessel, none of which shall be deemed to have been waived.

In the first paragraph, Charger seeks to establish its right to defend the action, and in the second, what its appearance means. Charger's statement that it is "appearing specially herein," without more, does not satisfy Rule E(8)'s requirement that an appearance to defend against an admiralty action in rem, and not

against other claims, "be expressly restricted to the defense of such [in rem] claim." This is not a matter merely of semantics: Charger's statement that it is "appearing specially herein" has no obvious meaning, even when viewed against the possibility that Supplemental Rule E(8) offers of making a restricted appearance. This ruling does not place form over substance, because under Supplemental Rule E(8) substance is required to be reflected in form -- the express restriction of an appearance to the defense of an in rem claim only.

In the second paragraph, Charger restricts its appearance "to the defense of the claims set forth in the pending complaint only." The pending complaint was filed against both the vessel M/V CHARGER in rem and Charger in personam. Once again, the Claim fails to satisfy the requirement of Rule E(8) that a restricted appearance "be expressly restricted to the defense of such [in rem] claim."

Charger's Claim also states that its appearance is "made with full reservation of all objections and defenses which may be available to the vessel." A reservation of in rem defenses is distinct from an appearance restricted to an in rem action. A reservation rather than restriction of defenses may imply that the appearance is general, and other defenses are not reserved. Charger's Claim waived its defenses to the in personam action.

Alternatively, Charger waived its objections to the sufficiency or propriety of service of process. Charger's Answer filed May 5, 1989 raised defenses including lack of personal jurisdiction and insufficiency and "impropriety" of process and

service of process. On June 29, 1989, Charger filed a motion to dismiss for lack of in rem jurisdiction. In that motion Charger asserted conclusorily that in personam service had not been perfected, but did not seek to dismiss the in personam action. Sembawang perfected service on August 16, 1989. In my minute entry of August 22, 1989, I recognized both in rem and in personam jurisdiction over Charger, and ordered the entire dispute sent to arbitration. An arbitrator was not selected until October 19, 1989, and the arbitration commenced sometime between then and July 16, 1990. Although the federal action was stayed, Charger was free after my ruling of August 22, 1989, as it had been before, to raise an objection to the propriety and sufficiency of service of process. Instead, Charger submitted to and participated fully in arbitration that had been ordered to resolve the in rem and in personam claims. Only when arbitration was complete did Charger make a motion to quash service of process and contest in personam jurisdiction. By its actions, however, Charger waived this defense, and can not now use it to avoid the arbitral award.

In Yorsh v. Good Samaritan Hospital, 84 F.R.D. 143 (S.D.N.Y. 1979), the movant had interposed the defense of impropriety of service of process in his answer, but failed to offer proof of such until nearly two years later. According to the court, "This unwarranted delay produces an unfair hardship on plaintiffs . . . . The movant is clearly guilty of laches and to a degree worthy of condemnation." Id. at 144. Charger had ample opportunity to object to service of process both before and after this court found

in personam jurisdiction on August 22, 1989. Personal jurisdiction and service of process issues should properly have been, and were, resolved prior to sending the dispute to arbitration for a decision on the merits. Charger failed timely to contest service of process, instead waiting until after arbitration in which it fully participated. Therefore, Charger waived a defense that in personam service of process was not timely perfected. "[I]mproper service or lack of personal jurisdiction can be waived if not timely asserted." Broadcast Music, Inc. v. M.T.S. Enterprises, 811 F.2d 278, 282 (5th Cir. 1987).

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, recognized and enforced under 9 U.S.C. § 201, provides:

> Award of arbitrators; confirmation; jurisdiction; proceeding Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C. § 207. Article V.1. of the Convention provides, "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that . . ." and lists a variety of bases for non-enforcement. 9 U.S.C. § 201. Charger presents no other argument for refusal or deferral of the arbitral award. Accordingly,

The motions of Sembawang to reconsider and to confirm the Singapore arbitral award are GRANTED.

MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
SEAR, J.
NOVEMBER 9, 1990

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SEMBAWANG SHIPYARD, LTD.	*	CIVIL ACTION
VERSUS	*	NO. 88-5005
M/V CHARGER (formerly known as GLOBE CHARGER), her engines, boilers, etc., and CHARGER, INC.	*	SECTION "G"

MEMORANDUM AND ORDER

Background

Plaintiff Sembawang Shipyard, Ltd. ("Plaintiff") filed a complaint in this Court on November 11, 1988 against M/V Charger and Charger, Inc. ("Defendants"). This action was instituted to enforce a maritime lien, that Plaintiff alleged had arisen after it performed work on Defendants' ship, the M/V Charger, pursuant to a contract. Plaintiff asserted in rem jurisdiction and seized the ship in New Orleans. Defendants appeared specially to deny the claim of in rem jurisdiction; however, on August 16, 1989 I recognized in rem jurisdiction over the vessel. Plaintiff's complaint also alleged in personam jurisdiction over the Defendants. Service of process was attempted on Defendants through Stamford Tankers, Inc. ("Stamford"), three weeks after the complaint was filed. However, when service was attempted, Plaintiff was informed that Stamford no longer occupied that address. In personam service was not effected on Defendants through Stamford until August 16, 1989, nine months after the complaint had been filed.

Subsequently, on August 22, 1989, I granted a stay in the proceedings pending arbitration of Plaintiff's claims in Singapore, as called for in the contract between Plaintiff and Defendants. I retained jurisdiction over the action to enter a decree upon the arbitration award, pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, recognized at 9 U.S.C. § 207. Arbitration proceeded in Singapore and an award was made in favor of Plaintiff.

The parties are now back here. Defendants have filed motions to lift stay and to quash service of process. They allege that the service of process effected on August 16, 1989 was improper because the date was beyond the 120-day time limit set out in Fed. R. Civ. P. Rule 4(j). Defendants also allege that service was improper because Stamford is not a recognized agent for service of process under Rule 4(d)(3). Plaintiff on the other hand claims that Stamford is a proper agent and that it did not properly serve Defendants within the 120-day time limit because Stamford had failed to leave a forwarding address. Finally, Plaintiff has filed a motion to confirm the Singapore arbitration award.

Analysis

Jurisdiction was retained pursuant to 9 U.S.C. § 207, pending arbitration in Singapore. That arbitration is complete. Accordingly, the stay is lifted in order to resolve the outstanding issues.

Rule 4(j) states:

> Summons: Time Limit for Service. If service of the summons and complaint is not made upon a defendant

within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

According to Plaintiff, service was first attempted by mail three weeks after the complaint was filed. However, service was sent to an address with which Stamford no longer had any connection. Plaintiff asserts that it did not discover Stamford's new address until approximately nine months after the complaint had been filed. Thereafter, Plaintiff mailed service to Stamford's new address, where it was received on August 16, 1989.

According to Rule 4(j), Plaintiff must show good cause why service was not made within the 120-day time period. The Fifth Circuit, in Winters v. Teledyne Movible Offshore, Inc., 776 F.2d 1304 (1985), set out the standard for determining "good cause" under Rule 4(j). "Without attempting a rigid or all-encompassing definition of 'good cause,' it would appear to require at least as much as would be required to show excusable neglect . . . and some showing of 'good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified' is normally required," Winters, 776 F.2d at 1306, quoting 10 Wright & Miller, Federal Practice and Procedure § 1165 (1982). Plaintiff has not shown good cause why service was not made within the 120 day time period. Plaintiff has failed to offer any explanation why taking nine months to discover Stamford's new address constitutes "excusable neglect." The burden is on Plaintiff to demonstrate good cause, and there has been no showing of a "reasonable basis for noncompliance" with Rule 4(j). Service was improper under Rule 4(j), and Defendants' motion to quash service of process is GRANTED. Accordingly,

Pursuant to Rule 4(j), this action is dismissed without prejudice.

MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

IN THE MATTER OF AN ARBITRATION

Between

SEMBAWANG SHIPYARD LTD.

.. Claimants

And

CHARGER INC.

.. Respondents

FINAL AWARD OF ARBITRATOR

AWARD of G. PANNIR SELVAM of Drew & Napier, 24 Raffles Place, #27-01 Clifford Centre, Singapore 0104, the Arbitrator to whom there was referred for decision, in pursuance of Clause 10 of the Standard Conditions of Contract between SEMBAWANG SHIPYARD LTD. and CHARGER INC. , a dispute between SEMBAWANG SHIPYARD LTD. ("the Claimants") and CHARGER INC. ("the Respondents") arising under a shiprepair agreement entered into in or about the month of July, of the year 1987

Having heard oral evidence and considered the contentions, documentary evidence and arguments of the Claimants and the Respondents respectively, and of Counsel on their behalf, that were submitted and addressed to me at the hearing before me I AWARD AND ADJUDGE:

1. That the Respondents do pay to the Claimants the sum of S$611,194.00 being the outstanding balance of the repair price with agreed interest thereon at 12% per annum (or S$201.006 per day) for the period from 27th August, 1987 till date of payment.

2. That the Respondents do pay my fees and charges in the sum of S$12,500 provided that if the Claimants shall in the first instance have paid the costs of this Award they shall be entitled to immediate reimbursement from the Respondents of the sum so paid.

3. That the Respondents do pay to the Claimants their costs of this reference to be taxed unless agreed and do bear their own costs of this reference.

Dated this 16th day of July, 1990.

..

G. PANNIR SELVAM

IN THE MATTER OF AN ARBITRATION

Between

SEMBAWANG SHIPYARD LTD.

.. Claimants

And

CHARGER INC.

.. Respondents

OFF THE RECORD REASONS FOR AWARD

DATED 16TH JULY, 1990 BY G. PANNIR SELVAM

Introduction:

1. Sembawang Shipyard Ltd (the Claimants) are a company incorporated in Singapore and at the material time were shiprepairers. They carry on business at their repair yard in Singapore.

2. In 1987 the Claimants accepted the chemical carrier 'GLOBE CHARGER' (the Vessel) at their yard and effected repairs and rendered services to her. The repairs and services in the main consisted of drydocking, hull cleaning and painting, tank-coating and related services. The repair work on the Vessel commenced on the 3rd August, 1987 and ended on the 27th August, 1987. In respect of the repairs and services the Claimants charged a total agreed sum of S$978,000 and received payment in the sum of S$366,606 leaving a balance of S$611,394.

3. When the repairs were completed the Claimants could not exercise their common law possessory lien on the Vessel because they had agreed to deferred payment of the charges in eight (8) equal three (3) monthly instalments commencing 27th November, 1987. The right of detention was thus impliedly waived.

4. The amount of S$366,606 received by the Claimants represented the first three (3) instalments. To enforce payment of the outstanding balance account the Claimants arrested the Vessel in admiralty in Louisiana, U.S.A. The registered owners of the Vessel at the time the repairs were effected (Charger Inc) challenged the arrest. The proceedings in which the Vessel was arrested have been placed in abeyance pending the result of the arbitration before me.

INTERNATIONAL ARBITRATION REPORT

The Claimants' Case:

5. The Claimants seek an award against the registered owners of the Vessel who are the Respondents. Their case is that they entered into the contract with the Respondents through the agency of Midland Marine Corporation representing the Claimants (Claimants' agents) and Globe Tankers Services Inc. (Globe Management) who were the Respondents' agents.

6. The negotiation for the repair agreement is well documented in the form of telexes. These the Claimants say amply established that they contracted with the Respondent Registered Owners and no one else.

7. The Claimants further called witnesses who stated that the Claimants intended to contract solely with the Respondent Registered Owners.

8. When the Claimants concluded the contract for the repairs they were experiencing bad times. It was an owner's market. The Respondents were in a stronger position vis-a-vis the Claimants. The Respondents were also suffering from a bad freight market. In these circumstances during initial negotiations the Claimants

were asked for deferred payment terms of the repair bill. The Claimants agreed without any hesitation. The Claimants' terms for the deferred payment were as follows (emphasis supplied):

> "We would require full payment to be made within twenty-four months from date of completion of repairs in eight equal three monthly instalments.
>
> However, that on default of payment of any of the instalments, the whole of the amount then outstanding shall become due and payable forthwith. If Vessel should be sold or lost or its management transferred to another company within the above period, the payment terms shall be withdrawn and cancelled and the whole amount then outstanding shall become due and payable forthwith. Without prejudice to the above interest will be charged on late payment at an interest rate of one percent per month."

9. The Claimants said that their intention to impose the obligation of payment on the Respondents is borne out by the reference to "if the Vessel should be sold" and "if ... its management transferred to another company".

10. The Claimants stated that the fourth instalment fell due on 27th August 1988. It was not paid. Accordingly they invoked the provision for immediate payment of the unpaid portion of the repair bill and the interest provision of 1% (one percent) per month. The said interest at a daily rate of S$201.006 may be represented as follows :

($611,394 x 1 x 12) divided by 365 = $201.006
100

The Respondents' Case:

11. The Respondents, Charger Inc., the Registered Owners of the 'GLOBE CHARGER' by their original Points of Defence in effect accepted the Claimants' position that there was a contract between the Claimants and the Registered Owners. The quantification of the claim was denied with the usual demand for strict proof of the claim. No positive case was advanced.

12. At the hearing of the arbitration the Respondents amended their Points of Defence and put forward two alternative cases. They called two witnesses to expand on the defences.

13. The first alternative was that the 'GLOBE CHARGER' was owned by Charger Inc., a Liberian corporation. She was time chartered to Globe Transport and Trading Inc. (Globe Chartering). The Respondents for reasons connected with the mortgage of the Vessel appointed Globe Management as manager and general agents of the Vessel. Globe Management besides being owners' agents also acted as agents of the time charterers. Both the Globe Chartering and Globe Management were run by the same officers operating from Connecticut, U.S.A.

14. In early 1987 the 'GLOBE CHARGER' needed to undergo drydocking to comply with class requirements. The Vessel was expected to be in South East Asia. By reason of this fact it was decided to drydock the Vessel at the Claimants' yard in Singapore. At this time the Respondents, however, were experiencing cash-flow problems. They were only making interest payments on the mortgage loan and hoping for better days in the chartering market.

INTERNATIONAL ARBITRATION REPORT

15. The Vessel besides having to undergo drydocking also required tank-coating. This would entail a substantial outlay which the Respondents could not afford. The Mortgagees would not risk any further advances. This ruled out owners incurring any expenses for tank-coating. In any event under the terms of the charterparty Globe Chartering was responsible for effecting tank-coating to the Vessel. By reasons of these matters the Respondents gave authority for Globe Management to commit this within a limit of US$250,000. This was consistent with the Claimants' original quotation of S$497,642 for drydocking and repairs which was accepted by the Respondents. In other words the Respondents' responsibility was confined to this amount. Tank-coating was not part of the original quotation which was accepted by the Respondents.

16. In the event the total repair charges in the original bill by the Claimants viz S$1,076,892 was subsequently reduced to S$978,000. This amount exceeded the limit of US$250,000. Globe Management according to the Respondents had no authority to effect such repairs and accordingly the Respondents were not answerable to satisfy the claim. That in outline was the first alternative case.

17. The second alternative case advanced by the Respondents was that the Claimants entered into the repairs with Globe Management and relied on the creditworthiness of Globe Management and/or Globe Chartering and not the Respondents. Nonetheless the Respondents made a concession that part of the works carried out by the Claimants conferred some benefit on the Respondents. According to them S$483,525 was attributable to "owners part of the repairs." The remaining part was attributable to charterers and was the responsibility of Globe Management or Globe Chartering and not the Respondents.

18. An appendage to this line of argument was that the Claimants requested a letter of authority from the Respondents to negotiate a reduction of the Claimants' original invoice for S$1,076,892. The Respondents duly furnished such a letter by authorising an employee of Globe Management, Ragnar G.A. Siesener ("Siesener"), to commit the Respondents to a sum not exceeding US$250,000. The Claimants accepted without protest the letter of authority prior to the signing of the "Synopsis of Accounts" on the 27th August 1987. They were, therefore, bound to limit the Respondents' account to US$250,000. Since the

Respondents' liability was limited to S$483,525 and the sum of S$366,750 had already been paid the Respondents are liable to pay the balance of S$116,775 only. (The amount of money actually received by the Claimants according to them was only S$366,606 and not S$366,750).

19. As a parting shot the Respondents said that the claim should be against Globe Management and/or Globe Chartering. The Respondents, however, did not hide the fact that both Globe Management and Globe Chartering were in liquidation. Neither the Claimants nor the Respondents were likely to receive anything from the estates of these corporations.

Findings:

20. The following truths can be elicited without any difficulty from the documents and oral evidence.

21. Negotiation for the repair of the 'GLOBE CHARGER' by the Claimants began on the 29th May 1987 when Midland Marine Corp., N.Y., the Claimants' agents, sent a quotation for the repair of the 'GLOBE

CHARGER' on behalf of their principals, Sembawang Shipyard Ltd. The quotation was contained in a telex addressed to Globe Tanker Services, Inc. The quotation made clear reference to "owner" and made no reference to any other party by name or description. A price indication of S$497,642 was made evidently for "drydocking and repairs" only. It did not include the price for tank-coating, which was a further amount of S$431,200. The telex communication went on to elaborate certain specified areas of responsibilities of "owners".

22. The same telex communication containing the quotations further included the following items (emphasis supplied) :

"11.(A) To full gritblast 12 off cargo tanks based on total 7000 SQM and apply with 3 coats of owners supply phenolic paint SD431,200.

11.(B) Price for the supply of paint based on the following

1st coat PH373 Primer at 125 MCRS DFT - 1915 litres.

INTERNATIONAL ARBITRATION REPORT

Page missing

VOL. 6, #1, 1/91 - SEMBAWANG v. CHARGER

Claimants were waiving their possessory lien it was important they preserved their right to arrest the Vessel in case of default. For this purpose it was essential that they contracted with the Owners and made them personally liable for the discharge of the repairs and services. This is what they did by making the reference to change of ownership in the deferred payment provision.

27. The Claimants adduced oral evidence at the hearing by Mr. Jerry Koh who was in 1987 the Business Manager of the Claimants. He stated that Globe Management acted as owners' representatives and he knew that Globe Management was manager of the Vessel. In his mind, the Claimants were contracting with the owners of the Vessel and not Globe Management. He explained this position by relying on the instalment terms referred to above. He further stated that his intention was to give credit to the entity which owned the Vessel. The Vessel was the Claimants' collateral. Globe Management was merely the Manager. The witness had no knowledge of its creditworthiness. I accept his evidence without hesitation. He impressed me as a truthful and convincing witness.

28. What happened on the 27th August, 1987 or after Sissener arrived in Singapore on 25th August, 1987? He said in evidence that he carried with him a letter of authority limiting his mandate to commit the Respondents to no more than US$250,000. He stated that Globe Management received a telex from the Claimants asking the person who came to negotiate the final bill to bring a letter of authority from the Respondent Owners. No such letter from the Claimants was produced by him. If in fact the Claimants asked for such a letter it must unquestionably mean that the Claimants envisaged the Owners i.e. the Respondents as the contracting party and not Globe Management.

29. Sissener was unable to identify by name or otherwise the person he met and negotiated the bill. He said he handed over the letter of authority to the person with whom he negotiated the bill. He then finalised the bill on the 27th August 1987 and left Singapore on the same day. He said he was in a rush as he had to leave for Europe. In his negotiations Sissener managed to persuade the Claimants to agree to a reduction of their original bill from $91,076,892 to S$970,000.

INTERNATIONAL ARBITRATION REPORT

30. The Claimants denied having sent a telex asking for a letter of authority from the owners. They also denied that a letter of authority was in fact received by any of the officers who met Sissener when he was in Singapore to negotiate the final invoice.

31. The evidence before me fails to convince me that the Claimants asked for or were given a letter of authority. Further, even if such a letter was produced to the Claimants they were entitled to reject or ignore the limitation contained in it. I have no hesitation in accepting their evidence.

32. It would be inconceivable for the Claimants to accept the Vessel, effect the repairs and when the works are about to be completed ask for a letter of authority or accept such a letter with a limit of half the amount of the bill rendered.. It is also inconceivable for Sissener to come with a letter of authority and ignore it altogether when he negotiated the amount which was close to twice the limit of his authority. If Globe Management and the Respondents were in agreement that there was a dichotomy between owners' repairs and charterers' repairs Sissener would have certainly separated the accounts. He did not do

so. Why not? The answer must be that at that time neither Globe Management nor the Respondents had in the forefront of their minds the differentiation of the two accounts. At the beginning itself there was an agreement for deferred payment in eight instalments over a period of two years. Globe Management and the Respondents wanted this because charter market was undergoing bad times and they awaited a turnaround. Each instalment was calculated at S$122,250. This amount was not divided between charterers and owners. Neither of them asked for a division. The Respondents accepted the instalment arrangement as a single liability and that liability rested on the Respondents.

33. In 1988 Globe Management and Globe Chartering were taken over by Stamford Tankers Inc. which was set up by the Respondents. Stamford Tankers Inc. acted with the authority of the Respondents. When Globe Management and Globe Chartering were out of action Stamford Tankers Inc. assumed the mantle as the managers of the Respondents. The second instalment was actually paid by Stamford Tankers Inc. Stamford Tankers Inc. asked for a variation of the deferred payment arrangement. In doing so Stamford Tankers Inc. could not have acted on its own behalf as the

instalments were not the personal responsibility of Stamford Tankers Inc. Stamford Tankers Inc. did not act for Globe Management or Globe Chartering who had ceased business. Inevitably Stamford Tankers Inc. acted only for the Respondents. In so acting Stamford Tankers Inc. did clearly bind the Respondents. This was the position till the end of 1988.

34. Then towards the end of 1988 the Claimants commenced proceedings in admiralty before the District Court of Louisiana. The proceedings were against the 'GLOBE CHARGER' which by then had been renamed by deleting "GLOBE" leaving "CHARGER" as the new name. The Respondents relied on the standard conditions of the Claimants and invoked the arbitration clause. It must be noted that in the original quotation the Claimants had referred to their Standard Conditions of Contract for Shiprepair. The Respondents by invoking the arbitration clause plainly were asserting a contract between themselves and the Claimants. If they were not parties to the contract with the Claimants they should have challenged the arrest of the Vessel on the ground that they were not liable to the Claimants and not admit a contract with them and call for arbitration pursuant to a provision in such a contract with the Claimants.

35. Then in March and April 1989 Stamford Tankers Inc. no doubt after consultation with the Respondents for the first time put forward the argument that the Respondents' part of the repairs came up to S$483,525 only.

The Law:

36. The law on the matters in issue may be summarised as follows.

37. As a general rule any agreement made by an agent in the name of his principal with the authority of his principal may be enforced by or against the principal where the contracting party at the time when the contract was made was aware of the principal's name or existence.

38. The authority of the agent can be actual, implied or apparent.

39. Any limit on the authority of the agent will only affect the position of the third party where the latter has notice (actual, implied or constructive) of such limitation.

INTERNATIONAL ARBITRATION REPORT

VOL. 6, #1, 1991 - SEMBAWANG v. CHARGER

40. In the absence of notice, however, the principal cannot escape liability for acts done by the agent which fall within the apparent scope of this authority.

41. The point is succinctly stated by Halsbury 4th Ed. 1973, Vol. 1 at Para 729 thus :

> "... As between the agent and his principal, an agent's authority may be limited by agreement or special instructions, but, as regards third persons, the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, and which is reasonably to be gathered from the nature of his employment and duties."

42. On the effect of limitation of authority the law is summarised by Halsbury 4th Ed. 1973, Vol.1 at Para 819 in the following terms :

> "... no act done by the agent in excess of the conditional or limited authority

> is treated as the act of the principal as regards such persons as have or ought to have notice of such excess of authority, or have had notice of an irregularity placing them upon inquiry as to whether the agent's authority was being exceeded. In the absence of notice, however, the principal cannot escape liability for acts done by the agent which fall within the apparent scope of this authority, by any particular instructions to his agent limiting his authority."

43. If the Respondents had fully appreciated and applied the above principle to the problem that confronted them they may not have presented their case in the manner they did.

Conclusions:

44. The appropriate time to determine the responsibility of the Respondents was when the contract was concluded and the Vessel entered the yard. That was in July 1987. For reasons already stated the

Claimants' intention was to contract with the Respondents and no one else. Globe Management in negotiating the contract acted on behalf of the Respondents thus they had actual authority. The Vessel being under time charter was still in the possession of the Respondents. By allowing the Vessel to enter the yard for repairs they represented to the yard that the Vessel was placed in the yard with their authority. In the circumstances the Respondents were the contracting party and accordingly liable for the full amount of the repairs.

45. The Claimants had no notice (actual, implied or constructive) of any arrangement between the Respondents and Globe Chartering or any limit imposed on the authority of Globe Management.

46. As the deferred payment terms were not adhered to and as there was a change of management of the Vessel the outstanding balance amount, S$611,394 became payable in full on the 27th August, 1988. Interest was also payable on that amount at 12% p.a. i.e. S$201.006 per day from the 27th August, 1988 till payment.

47. By contractual justice the Claimants were

entitled to recover the outstanding amount and interest from the Respondents.

48. The reasons stated herewin are not part of the Award made by me.

Dated this 16th day of July, 1990.

C. PANNIR SELVAM

F.1.1

VOL. 6, #1, 1/91 - SEMBAWANG v. CHARGER

INTERNATIONAL ARBITRATION REPORT

Text required

Sembawang 120

Review of Court Decisions

The following two cases deal with issues arising under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

INTERNATIONAL—U.N. CONVENTION—SERVICE—WAIVER—*IN REM* JURISDICTION—*IN PERSONAM* JURISDICTION—FEDERAL RULES OF CIVIL PROCEDURE—RESERVATION vs. RESTRICTION OF DEFENSES

Because of a party's failure to show why improper service necessitated a refusal to recognize and enforce an arbitration award, the court granted the opposing party's motion to confirm the arbitration award.

Sembawang filed an action against the vessel M/V Charger and her owner, Charger, Inc., to enforce a maritime lien. Sembawang asserted *in rem* jurisdiction and seized the vessel. It also claimed *in personam* jurisdiction over the M/V Charger and Charger. Service of process was attempted three weeks after the complaint was filed. *In personam* service, however, was not effected until nine months after Sembawang had filed its complaint. The court action was stayed pending arbitration in Singapore, which resulted in an award in favor of Sembawang. When Sembawang moved to confirm pursuant to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), Charger moved to lift the stay and quash the service of process. Charger claimed that service was improper because the date on which it was effected was beyond the 120-day time limit required under rule 4(j) of the Federal Rules of Civil Procedure.

Because arbitration was complete, the court lifted the stay so that it could resolve the improper service issue. The court quashed the service of process, finding that Sembawang failed to show good cause as to why service was not made within the 120-day time period. It also refused to confirm the award and dismissed the action without prejudice. Sembawang moved for reconsideration and claimed, among other things, that Charger had waived its defenses of insufficiency of service of process and lack of *in personam* jurisdiction by not raising them prior to arbitration.

The court reviewed Charger's "Claim," which it filed as owner of property that is the subject of an *in rem* action. It concluded that Charger, by claiming a reservation of *in rem* defenses rather than claiming an appearance restricted to an *in rem* action, had implied that its appearance was general instead of restricted to the defense of the *in rem* claim. In so doing, Charger waived its defenses to the *in personam* action. Charger also waived any objection it had to the sufficiency or propriety of service of process when it failed to timely contest the service of process. Consequently, confirmation of the award was warranted under the Convention. **Sembawang v. Charger,** No. 88–5005 (E.D. La. Jan. 31, 1991).

INTERNATIONAL—PRELIMINARY INJUNCTION—U.N. CONVENTION—*FORUM NON CONVENIENS*—N.Y. C.P.L.R.

Preliminary injunctive relief is obtainable under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention) in actions to compel arbitration. Such actions, however, may be dismissed on *forum non conveniens* grounds where an adequate provisional remedy exists in the alternative forum.

Borden and Meiji entered into a trademark licensing agreement in which Borden licensed the use of its name and logo to Meiji for use on products manufactured and sold by Meiji in Japan. The agreement contained an arbitration provision. After the agreement expired, Meiji continued to manufacture and sell the products in the same packaging but without any use of the Borden trademark or logo. Contending that the packaging constituted an appropriation, Borden commenced an action to compel arbitration, alleging claims of breach of contract and wrongful destruction of goodwill. It also applied for preliminary injunctive relief. The court action was dismissed, however, on *forum non conveniens* grounds and Borden appealed.

The court disagreed with Meiji's argument that it lacked jurisdiction to entertain an application for preliminary injunctive relief in aid of arbitration. It determined that it had jurisdiction under section 206 of the Federal Arbitration Act. The court reasoned that entertaining such an application was consistent with the court's powers under that section, which Borden invoked when it moved to compel arbitration. It also stated that "[e]ntertaining an application for such a remedy, moreover, is not precluded by the Convention but rather is consistent with its provisions and its spirit."

As for the *forum non conveniens* issue, the court considered whether the lower court carefully analyzed the public and private interests enunciated in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947). Finding that the court's *Gilbert* analysis was comprehensive, and that it considered additional factors such as the enforceability of relief and the primacy of Japan's interest in the litigation, the court held that the order to dismiss was justified. The court also affirmed the lower court's order on the ground that Meiji made an adequate showing that an alternative remedy was available to Borden in the Japanese courts. In addition, the court rejected Borden's claim that New York's procedural rules precluded the district court from dismissing the action on *forum non conveniens* grounds. It reasoned that an agreement to be bound by arbitration which may or may not be held in New York is not the same as an agreement to submit to the jurisdiction of the New York state courts.

Recognizing that Borden's rights would be unduly

prejudiced if it were forced to wait years or months for a Japanese court to review its application for temporary relief, the court modified the lower court's order to permit Borden to reapply for a preliminary injunction if a Japanese court failed to rule within 60 days of Borden's submission of its application for temporary relief. **Borden, Inc. v. Meiji Milk Products Co., Ltd.,** 919 F.2d 822 (2d Cir. 1990).

These two cases involve issues concerning sections 3 and 11 of the Federal Arbitration Act.

CONSTRUCTION—FEDERAL ARBITRATION ACT—ENFORCEMENT OF ARBITRATION AGREEMENT—JUDICIAL DISCRETION

An arbitration agreement that conditions arbitration on a court's granting of a stay of a court action is not an enforceable agreement under section 3 of the Federal Arbitration Act (FAA).

Combustion Engineering and Miller Hydro Group were parties to a construction contract which did not contain an arbitration provision. Several disputes arose and the matters were the subject of intense litigation in both federal courts and Maine state courts. Kansallis–Osake–Pankki (KOP), mortgagor of the construction project, participated actively in the litigation to preserve its interest. Combustion and Miller subsequently entered into an arbitration agreement to resolve certain issues and dismiss the remaining issues. KOP refused to join in the agreement, which contained a provision stating that arbitration was conditional on the federal court granting the parties' joint motion to stay the federal court action.

The court disagreed with the parties' argument that a stay was required under section 3 of the FAA. It reasoned that application of the section presupposes the existence of an enforceable arbitration agreement, which was not present in this case because arbitration was conditioned upon the court granting the stay motion. Moreover, the court found that, even if the FAA was applicable in this case, it would not issue a stay because of the extensive litigation that had already occurred. Also at issue was KOP's expectation that the disputes be resolved in court, as evidenced by the lack of an arbitration agreement in the parties' original contract and KOP's refusal to join in the arbitration agreement. Accordingly, the parties' joint motion for a stay was denied. **Combustion Engineering, Inc. v. Miller Hydro Group,** 760 F. Supp. 9 (D. Me. 1991).

COMMERCIAL—FEDERAL ARBITRATION ACT—AWARD—DESCRIPTION OF PARTY—ARBITRATOR MISCONDUCT—UNSOLICITED EVIDENCE—AUTHORITY OF COURT TO MODIFY

Because the award at issue did not contain any description of the persons involved, there was no error that would warrant its modification under section 11 of the Federal Arbitration Act (FAA).

BLO productions and Columbus Festival Ballet (C lumbus) entered into a contract to present a ballet in C lumbus, Ohio. The contract contained an arbitration pro sion. A dispute arose over an alleged breach of the parti agreement and BLO sought relief against Columbus and president, Sylvia Watson. The arbitrator found Columb liable to BLO in the full amount sought. As for Watson, t arbitrator found that she had no liability with respect BLO's claims. BLO sought modification of the award fro the arbitrator on the ground that it contained a mistake the description of Columbus. Although BLO identified C lumbus in its complaint to the arbitrator as an Ohio corp ration, a sole proprietorship and a partnership, it argued the modification request that Watson and other members Columbus should be liable for any damages because the was nothing in the record indicating that Columbus was corporation rather than a non-incorporated organizatio The arbitrator denied the request and reaffirmed his awar BLO moved to confirm the portion of the award imposin liability on Columbus and to modify or vacate the portio of the award relating to the non-liability of Watson.

The court stated that it had the authority to modify a arbitrator's award under section 11 of the FAA when ther is "an evident material mistake in the description of an person, thing or property referred to in the award." It de clined to exercise that authority in this case. The court de termined that the arbitrator could not have erred in describ ing Columbus because the award did not contain description of Columbus. As for vacating that portion o the award regarding the liability of Watson, the cour found no error that would warrant vacatur. Since Watso only executed the agreement on behalf of Columbus as it president, the court ruled that the arbitrator clearly con strued the contract and acted within the scope of his authority in rendering his award. The court also rejected BLO's claim that the arbitrator was guilty of misconduct when he accepted unsolicited evidence from Watson after the close of the hearing in regard to BLO's request to the arbitrator for a modification of his award. It found that BLO also improperly submitted evidence from Watson after the close of the hearing and that the arbitrator's order was simply a reaffirmation of the earlier award, notwithstanding the fact that both parties submitted unsolicited evidence. Accordingly, BLO's motion to confirm in part was granted but its motion to vacate in part was denied. **Ohio Center for the Dance Columbus Festival Ballet v. BLO Productions, Inc.,** 760 F. Supp. 677 (S.D. Ohio 1991).

The following three cases deal with claims arising under the Age Discrimination in Employment Act and the Labor Management Relations Act.

COMMERCIAL—AGE DISCRIMINATION IN EMPLOYMENT ACT—EMPLOYMENT DISCRIMINATION—ENFORCEMENT OF ARBITRATION AGREEMENT—ARBITRABILITY

The Court enforced an arbitration agreement in a securities representative registration, thereby rendering Age

INTERNATIONAL
ARBITRATION REPORT

January 1991 Vol. 6, #1

LATE DELIVERY OF COMPLAINT LEAVES AWARD UNCONFIRMED

A Singapore shipyard's failure to serve a complaint to enforce a maritime lien against Charger, Inc. and its ship until nine months after the complaint was filed does not constitute "excusable neglect," U.S. Judge Morey L. Sear has ruled. The judge also dismissed Sembawang Shipyard Ltd.'s motion to confirm an arbitral award (Sembawang Shipyard, Ltd. v. M/V Charger, et al., No. 88-5005, E.D. La.; **Text of Memorandum and Order in Section F**; Also See October 1989, Page 10).

Charger, Inc. claimed Sembawang's serving of the complaint was "improper" because it was past the 120-day deadline under Rule 4(j) of the Federal Rules of Civil Procedure.

Sembawang said it attempted to serve Charger with the complaint through Stamford Tankers, Inc. three weeks after the action was filed. The shipyard said the complaint was mailed to an address Stamford no longer occupied.

Stamford was established by Charger in 1988. The firm took over for Globe Tankers Services, Inc. (Globe Management) and Globe Transport and Trading Inc. (Globe Chartering). Globe Management served as agent for the M/V Charger and Globe Chartering. The ship was time chartered to Globe Chartering.

New Address Eluded Sembawang

Sembawang said it did not locate Stamford's new address until nine months after the complaint was served. The complaint was mailed to Stamford's new address where it was received on Aug. 16, 1989.

Judge Sear said Sembawang had failed to "demonstrate good cause" for not serving Stamford with the complaint within the four month period provided by Rule 4(j). He added the shipyard had not offered a reasonable answer for not complying with the rule.

Sembawang also asked the court to confirm an arbitral award that directed Charger to pay Sembawang $611,394 plus 12 percent interest from Aug. 27, 1987 to the date the payment is made, according to an award issued on July 16, 1990. In addition Charger was instructed to cover the arbitrator's fee which totaled $12,500 (**Text of Award in Section F**).

An attorney representing Sembawang said a motion for reconsideration was filed with the court in November. As of Jan. 30 there had been no ruling on the motion.

Judge Sear's order was issued on Nov. 13, 1990

Sembawang had filed suit to enforce a maritime lien against Charger and the ship on Nov. 11, 1988. The suit was for work Sembawang performed on the vessel under a repair agreement with Globe Management.

Judge Sear had ruled on Aug. 16, 1989 that the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) gave him jurisdiction over the lien. The judge also stayed the proceedings pending arbitration of Sembawang's claims in Singapore.

Charger Responsible for Repair Bill

G. Pannir Selvam concluded Sembawang had entered the repair agreement with Charger and not Globe Management.

When the vessel was drydocked at the Sembawang yard it was found that the boat also needed a tank-coating. Charger could not afford the tank-coating, therefore under the terms of the charter party Globe Chartering became responsible for the work. Charger instructed Globe Management to use no more than US$250,000 to cover the operation. Selvam noted the tank-coating was not part of the original price of $497,642 Charger and Sembawang agreed to for drydocking and repairs.

Citing a telex from Sembawang's agent to Globe Management, which contained a quotation for the repairs to the M/V Charger, Selvam noted that the tank-coating "made a specific reference to the 'owners.' No reference was made to Globe Management or Globe Chartering by name or description."

The arbitrator added that the cost of the tank-coating was quoted at $431,200 in the same telex, thus Charger could not claim it was unaware of the price or that Globe Management "had no authority to commit them." The price Charger was quoted by Sembawang totaled $928,842 which "was far in excess of US$250,000," according to Selvam.

The arbitrator noted that Globe Management did not attempt "to clarify" that the tank-coating work was to be billed to Globe Chartering's account and not Charger's. "The Respondents also failed to take any corrective action if they thought that the Claimants were in error. The Respondents were content to leave matters in the hands of Globe Management and let the Claimants perform the agreed works," Selvam said.

'Letter of Authority'

Selvam also dismissed a claim by a witness that Sembawang requested the party negotiating the final bill for Charger produce a letter of authority. The witness, who negotiated the final bill with Sembawang, said he carried a letter of authority "limiting his mandate to commit the Respondents to no more than US$250,000." He said Globe Management had received a telex from Sembawang requesting that the party negotiating the bill bring a letter of authority from Charger.

Sembawang said it never sent a telex requesting such a letter from the owners.

Based on the evidence presented the arbitrator concluded Sembawang never requested or received such a letter. "It would be unconceivable for the Claimants to accept the Vessel, effect the repairs and when the works are about to be completed ask for a letter of authority or accept such a letter with a limit of half the amount of the bill rendered."

Stamford took over Globe Management and Globe Chartering in 1988. Selvam said the company was acting "with the authority" of Charger. Stamford paid the second installment of the repair bill. When Sembawang completed the repairs it agreed to allow Charger to pay the bill on a deferred payment plan in eight installments every three months beginning on Nov. 27, 1987.

Change in Payment Plan Requested

When Stamford sent the second installment it asked to have the agreed payment plan changed. The arbitrator said the request was made by Stamford on behalf of Charger. Selvam noted Stamford was not acting on its own since Stamford was not personally responsible for the repair bill.

Meanwhile, Sembawang filed suit against Charger to enforce a maritime lien in a Louisiana federal court in 1988. Charger then invoked the arbitration clause contained in Sembawang's Standard Conditions of Contract for Shiprepair. "The Respondents by invoking the arbitration clause plainly were asserting a contract between themselves and the Claimants," the arbitrator concluded. He added if Charger was not a party to the contract it should have challenged the suit "on the ground that they were not liable to the Claimants and not admit a contract with them and call for arbitration . . ." provided for in the Sembawang contract.

"As a general rule any agreement made by an agent in the name of his principal with the authority of his principal may be enforced by or against the principal where the contracting party at the time when the contract was made was aware of the principal's name or existence," Selvam said. He noted any limits on an agent's authority will only affect the agent where the party has been notified of such a limitation. Without such notice the principal "cannot escape liability for acts done by the agent which fall within the apparent scope of this authority," the arbitrator said.

Determination of Responsibility

Selvam concluded the "appropriate time" to determine Charger's responsibility was when the contract "was concluded" and the ship "entered" the Sembawang yard. "That was in July 1987," the arbitrator said. Selvam noted Sembawang's intention was "to contract" with Charger and "no one else."

He continued: "Globe Management in negotiating the contract acted on behalf of the Respondents thus they had actual authority. The Vessel being under time charter was still

in the possession of the Respondents. By allowing the Vessel to enter the yard for repairs they represented to the yard that the Vessel was placed in the yard with their authority. In the circumstances the Respondents were the contracting party and accordingly liable for the full amount of the repairs."

Sembawang was not notified of any "arrangement" between Charger and Globe Chartering or "any limit imposed" on the the authority of Globe Management, Selvam concluded.

Sembawang is represented by C. Gordon Starling, Jr. of Gelpi, Sullivan, Carroll & Laborde in New Orleans and Peter Skoufalos and Tofe Nanna of Chalos, English & Brown in New York City. Counsel for Charger is James L. Schupp, Jr. of Terriberry, Carroll & Yancey also of New Orleans.

ILA COMMITTEE SEEKS CONTRIBUTIONS TO STUDY

The International Law Association's (ILA) Committee on International Commercial Arbitration is inviting all interested parties to contribute relevant commentaries, pleadings, awards and court decisions to its study on the use of transnational rules in international arbitrations.

The committee is researching where arbitrators may have used transnational rules in preference to any single national system, the committee chairman told **The Report**. Professor Emmanuel Gaillard explained the study will target the rules of interpretation of contracts, estoppel, duty to cooperate in long term contracts, excuses for nonperformance, damages and the awarding of interest. In addition, the study will review issues relating to the enforceability of awards that are based on transnational rules, Gaillard said.

During the ILA's conference, which was held in Brisbane last August, the committee met for the first time and began discussing the project. A resolution inviting the committee to pursue the study was adopted during the conference (See July 1990, Page 22).

Two Part Study

The study has been split into two parts. Part one will address the enforceability of awards based on transnational rules and part two of the study focuses on specific transnational rules.