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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

INDEX TO THIS ISSUE

PRESIDENT'S CORNER

By: Jack Warfield, SMA President

As we move through the holidays and into 2015, I would like to update you on a few things.

- We were invited to participate in the ASBA Cargo Conference in Miami this past September. I served on a Panel with Michael Chalos, Neil McLaughlin, and Fotis Giannakoulis entitled "A Look to the Future." We were given the opening to make a presentation outlining the history, benefits, and advantages of New York arbitration. A number of Latin American attendees were very receptive to New York as an alternative and suggested the SMA put together a program in either New York or Miami to strengthen our relationship with Latin American interests. Let me give a special thank you to our friends at ASBA for this opportunity.
- November saw the culmination of the initial project of a new confluence of maritime interests – the NY Consortium. This 'virtual' organization consists of the SMA, the MLA,ASBA, and NYMAR.An afternoon seminar was held at the Harvard Club entitled "New York & London – Perception and Reality Today." With New York and London representatives from maritime finance, legal, and arbitration, a lively, professional, cordial, and sometimes pointed discussion of the similarities and differences of each venue in each of the disciplines was held. Industry 'users' (cargo, owners, and brokers) then questioned the panels on their talking points and assumptions. We were most fortunate that Chief Judge Loretta Preska of the U.S. District Court for the Southern District of New York agreed to be the moderator for the entire affair. Judge Preska was masterful - her style and grace created an atmosphere of dignity that set the tone for the entire afternoon.
- That same evening, also at the Harvard Club, the event continued with an elegant dinner dance, giving us all the chance to mingle in a convivial atmosphere. We also had the pleasure of honoring the two 'Lions' of New York Arbitration, Manfred Arnold and Jack Berg. These are really two towering figures in the community of maritime arbitration – recognized and respected internationally. There is no question their reputations and accomplishments do much to enhance the global stature of the SMA. Note: There was standing room only at the afternoon seminar and the dinner dance was a sellout – next year sign up early!
- Our Holiday Luncheon was held Wednesday December 10th at the 3 West Club at 3 West 51st Street. As always, this was a great time – no speaker, just an abundance of wholehearted comraderie. Thanks to all who came and supported this event.
- In February Klaus Mordhorst again will be chairing the SMA course "Maritime Arbitration in New York."

This year we plan to expand the size and scope of the program. As has been the practice, CLE credits will be available. Check our website www.smany.org for details or email the office at info@smany.org – ideal for charterers and owners who want to learn more about the process, as well as lawyers and those aspiring to be arbitrators.

From earlier mailings and announcements, you will have seen that there is a joint effort by the stakeholders in New York arbitration (the industry, the bar and the arbitrators) to create a fundraising vehicle for the promotion and marketing of New York arbitration. The decision to establish this account was approved by the SMA Board of Governors, passed by the MLA/SMA Liaison Committee, and then announced on November 13th at the NYMC Seminar.

The contribution for firms (companies and law firms) is $1,250 and $300 for individual members including sole practitioners. Checks should be made payable to the Society of Maritime Arbitrators, Inc. (designate on the memo line "for the F&S account"). These will be restricted funds, with a segregated bank account administered by the SMA with the fiscal oversight of an MLA representative. As we are a tax-exempt organization under Section 501 (c) 3 of the IRS Code, these payments are tax-deductible.

I thank all of you, friends, supporters and readers of *The Arbitrator* for your steadfast support. – If you require more information, please contact me or the SMA office.

All the best for the holiday season and 2015!

Jack Warfield

THE ARBITRATOR

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ELITE LOGISTICS V. HANJIN SHIPPING: AN UNCONSCIONABLE ARBITRATION CLAUSE?

By: Keith W. Heard, Partner, Burke & Parsons LLP, New York

The doctrine of unconscionability has been part of the common law for several centuries. Traditionally, a bargain or agreement was said to be unconscionable if it was "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Hume v. United States*, 132 U.S. 406, 415 (1889), quoting from *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750).

In addition to case law, the doctrine currently finds expression in section 2-302 of the Uniform Commercial Code and in section 208 of the Restatement (Second) of Contracts, which reads as follows:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Neither the Code nor the Restatement provides a definition of "unconscionable" but an oft-quoted formulation appears in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C.Cir. 1965) – a case many of us first encountered in law school – where the Court of Appeals wrote that "[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."

In the 1960's and 70's, Courts employed the doctrine of unconscionability rather frequently to block enforcement of one-sided contracts of adhesion in consumer finance and other transactions. The doctrine has not been used as widely since then but it remains part of the law, available for application in an appropriate case. Unconscionability is primarily a state law concept, although this does not necessarily prevent it from being applied in a maritime case. *See, Harrington v. Atlantic Sounding Co., Inc.*, No. 06-CV-2900, 2007 WL 2693529 (E.D.N.Y. Sept. 11, 2007), *rev'd.* 602 F.3d 113 (2d Cir. 2010).

In *Elite Logistics Corp. v. Hanjin Shipping Co., Ltd.*, No. 12-56238 (9th Cir. Sept. 19, 2014), the Ninth Circuit Court of Appeals, in a 2-to-1 decision, affirmed an order by the U.S. District Court for the Central District of

California denying defendant Hanjin's motion to compel arbitration on the basis that the relevant arbitration clause was unconscionable under California law.

The facts of the case are set forth in the District Court's order, *Elite Logistics Corp. v. Hanjin Shipping Co., Ltd.*, No. 11-02961 (C.D.Cal. June 21, 2010). Elite is a trucking company that provides overland transportation for some of Hanjin's intermodal container shipments. The District Court observed that "Hanjin only contracts with [land] carriers who are signatories to a standard contract, the Uniform Intermodal Interchange and Facilities Access Agreement ('the Agreement')," which was drafted by the Intermodal Association of North America ("the Association"), a trade organization located in Maryland. Elite had signed the Agreement.

In April 2011, Elite filed suit against Hanjin, alleging that the shipping line unlawfully levied late pick-up and late drop-off fees on weekends and holidays, in violation of California Business and Professions Code § 22928. In fact, the case was one of four similar federal court actions Elite filed against ocean carriers, including Mitsui O.S.K., Mediterranean Shipping Company, Yang Ming Line and, of course, Hanjin. Another company, Unimax Express, Inc., filed similar actions against APL, COSCO and Evergreen. Two of Elite's lawsuits and one filed by Unimax were dismissed for lack of subject matter jurisdiction (insufficient damages to support diversity jurisdiction). The defendant ocean carriers filed motions to compel arbitration in the other four actions, including Hanjin in the instant case. Elite opposed the motion on the grounds that the arbitration clause in the Agreement was unconscionable and, therefore, unenforceable.

Hanjin argued the issue was controlled by the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), which limited state law-based unconscionability challenges to class-action waivers in arbitration agreements. The District Court rejected this argument, however, noting that the Supreme Court nevertheless pointed out in *Concepcion* that "agreements to arbitrate may be invalidated by generally applicable contract defenses, such as fraud, duress, or *unconscionability*." *Id.* at 1746 [emphasis added].

The District Court next considered what law should apply to the Agreement, which contained a Maryland choice-of-law clause. The Court noted that California state courts "generally respect choice-of-law provisions within contracts that have been negotiated at arm's length." Opinion at 5. However, citing Ninth Circuit and California state precedents, the District Court also noted that "[c]hoice-of-law provisions will not be enforced [under California state law] if 'the chosen state has no substantial relationship to the parties or the transaction and there is no reasonable basis for the parties choice' or 2) the chosen state's law is contrary to the fundamental public policy of a state that has a materially greater interest in the issue at hand and whose law would otherwise apply." *Id.* at 5-6.

The Court concluded that "Maryland has no relationship to the parties or the transactions at issue here." *Id.* at 6. Although the Association that drafted the Agreement was located in Maryland, the Association itself was not a party to the case. On the other hand, all of the transactions at issue occurred in California and Elite's claims arose under California state law. Thus, the District Court concluded that California law applied.

Addressing Elite's unconscionability argument, the Court began its analysis by noting that to succeed on a claim of unconscionability, a party must show "(1) an absence of meaningful choice" on its part and "(2) contract terms which are unreasonably favorable to the other party." *Id.* at 6. The first element is known as procedural unconscionability and the second as substantive unconscionability. The Court pointed out that "[b]oth procedural and substantive unconscionability must be present for a contract to be declared unenforceable, but they need not be present to the same degree." *Id.* at 7. In fact, the Court noted, "California courts apply a 'sliding scale' analysis in making this determination. '[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa'," quoting from *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114 (2000), a case in which the California Supreme Court refused to enforce agreements by employees to arbitrate wrongful termination claims.

The District Court concluded that the contract Elite was required to sign was marred by procedural unconscionability. The Court determined the Agreement was a contract of adhesion and that there was no evidence Elite participated in its negotiation or drafting. Although Hanjin argued that Elite voluntarily entered into the Agreement, the Court concluded that "Elite had no choice but to join the Agreement if it wished to conduct business as an intermodal carrier." Opinion at 7. In other words, according to the Court, Hanjin had presented the arbitration agreement to Elite on a "take it or leave it basis," rendering the agreement procedurally unconscionable. *Id.*

Substantive unconscionability focuses on the unilateral nature of contract terms. As the Ninth Circuit put it in an earlier case, "[w]here an arbitration agreement is concerned, the agreement is unconscionable unless the

arbitration remedy contains a 'modicum of bilaterality.'" *Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003) (quoting *Armendariz*, 24 Cal.4th at 117). Turning to the case before it, the District Court found that "the burdens of the arbitration procedures fall inordinately on the invoiced party." Opinion at 8. For example, the Court noted that "[i]f Elite believes it has been improperly charged, it must provide written notice of the dispute to Hanjin within thirty days, at pain of forfeiting any defense to such charges, regardless of whether the charges are proper." *Id.* The problem with the thirty-day period, in the Court's view, was that it "operates as a statute of limitations shorter than the four-year claim period available under California law, and works solely to Hanjin's benefit." *Id.*

The Court concluded its analysis of whether the terms were substantively unconscionable as follows:

> Other terms of the Provision also operate solely to Hanjin's benefit. While both parties could theoretically initiate an arbitration, the burden is always on the invoiced party to initiate a dispute. (Agreement § H.1.) Though an invoiced party may receive any number of invoices in a given thirty-day period, it may not dispute more than five invoices in a single arbitration. (Agreement Ex. D ¶ 6.) When an invoiced party believes it has been wrongly charged and proceeds to arbitrate five or fewer charges, it must submit all of its arguments to the arbitration panel first. The invoiced party must articulate its arguments with a clarity bordering on prescience, for it has no right to discovery and will have no opportunity to rebut the invoicing party's response (notwithstanding the possibility that the arbitration panel "may" initiate a conference call).
>
> Finally, even if the invoiced party receives a favorable determination, the arbitration panel lacks the power to enjoin the invoicer's wrongful conduct, leaving the invoicer free to repeat the offense. In the case of an ongoing violation, the invoiced party's only option is to initiate a separate dispute every thirty days, ad infinitum. Under these circumstances, the arbitration procedures lack even a modicum of bilaterality, and the Provision is, therefore, substantively unconscionable.

In truth, some of these requirements do not seem to this author to be "unconscionable" but that is how the District Court viewed them. In any event, having found both procedural and substantive unconscionability in the arbitration clause, the Court concluded it was unenforceable and denied Hanjin's motion to compel.

Although the Ninth Circuit's decision is more recent and arguably more noteworthy, it adds little to the District Court's ruling, except for a dissent by Judge Milan Smith. The Ninth Circuit agreed with the District Court's determinations – and for the same reasons – that the arbitration agreement was procedurally and substantively unconscionable under California law, and it rejected Hanjin's argument that the District Court failed to apply the principles of the Federal Arbitration Act. With respect to the FAA issue, the Ninth Circuit wrote as follows (Ninth Circuit Opinion at 6):

> [T]he FAA does not preempt California's procedural unconscionability rules. *Chavarria v. Ralphs Grocery, Co.*, 733 F.3d 916, 926 (9th Cir. 2013); see also *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 188 (Cal. 2013)(confirming that "state courts may continue to enforce unconscionability rules that do not 'interfere[] with fundamental attributes of arbitration'") (quoting *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1748 (2011)). Although the FAA may preempt state laws having a "disproportionate impact "on arbitration, it "cannot be read to immunize all arbitration agreements from invalidation." *Chavarria*, 733 F.3d at 927. Insofar as an application of state substantive unconscionability rules do not discriminate unfavorably against arbitration, they do not offend the FAA. *Id.*

In a dissenting opinion, Judge Smith contended that the panel majority failed to acknowledge that in *AT&T Mobility v. Concepcion*, "the Supreme Court held that the Federal Arbitration Act preempts certain state law contract defenses that have a disproportionate effect on arbitration clauses." Dissent at 1. However, Judge Smith did not elaborate as to why he believed the defense of unconscionability has a disproportionate effect on such clauses and, to this writer, it is not at all obvious why that might be so.

The dissent also pointed out that, after *Concepcion* was decided, the California Supreme Court reconsidered how the concept of unconscionability applies to arbitration clauses under California state law in *Sonic-Calabasas A. Inc. v. Moreno*, 311 P. 3d 184 (Cal. 2013), a decision that came out after the District Court issued its ruling in the instant case. According to the dissent, "[i]n *Sonic-Calabasas,* the California Supreme Court explained that in order to hold that an arbitration clause is void under California law, we must engage in a *fact-intensive* inquiry

as to both procedural and substantive unconscionability." Dissent at 2. In particular, when considering substantive unconscionability, a court must find that the arbitration clause "is unreasonably favorable to one party, considering in context 'its commercial setting, purpose, and effect.'" *Id.* at 3 (quoting from *Sonic-Calabasas* at 205*)*. The dissent noted that, in *Sonic-Calabasas,* "the California Supreme Court emphasized that under California law discovery is generally necessary to assess whether an arbitration clause is unconscionable." Dissent at 2.

The dissent concluded that the District Court "did not have enough facts before it to engage in the analysis that the California Supreme Court requires" and that the lower court had erred in not permitting the parties to engage in factual discovery before refusing to enforce the arbitration clause. *Id.* at 3. In particular, the dissent expressed concern that, in the absence of discovery, "the factual record is not adequately developed" and it was not possible to determine "(1) whether the arbitration provision was the result of 'oppression or surprise due to unequal bargaining power;' or (2) whether the provision 'is unreasonably favorable to one party, considering in context 'its commercial setting, purpose and effect.'" *Id.* (quoting from *Sonic-Calabasas* at 205*)*. Thus, the dissent believed that a remand was necessary for the District Court to develop a factual record that would enable it to engage in the analysis required under California law as a result of the decision in *Sonic-Calabasas*.

The Ninth Circuit's decision is marked "NOT FOR PUBLICATION" and a footnote warns that "[t]his disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3." However, Circuit Rule 36-3(b) states that "[u]npublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with FRAP 32.1." In addition, Rule 32.1(a) of the Federal Rules of Appellate Procedure provides as follows:

> A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been; (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007.

It seems odd that the Ninth Circuit would treat such an important case in a rather peremptory manner and issue a decision that is "NOT FOR PUBLICATION" but that is what happened.

With respect to the case itself, we must now wait to see if Hanjin will file a Petition for Writ of Certiorari with the U.S. Supreme Court and, if so, whether the Court will grant the petition. I believe both of these events may well happen and I would not be surprised if the Supreme Court reverses the Ninth Circuit's ruling.

The Supreme Court is strongly pro-arbitration and this does not seem to be an especially egregious case crying out for a ruling to prevent arbitration from taking place. First of all, the commercial contract at issue here is between two companies. It is not a case in which a company with overwhelming bargaining power imposed its will on an individual consumer or employee that the Court might find to be more deserving of its protection. Secondly, while Elite apparently had no choice but to sign the Agreement in order to do business with Hanjin, some of the terms in the arbitration clause attacked by the District Court do not seem that dissimilar from those found in other commercial contracts, although the 30-day time limitation as well as the limitation on the number of invoices that can be disputed in any one arbitration do seem rather oppressive. Interestingly – and as the District Court itself acknowledged (Opinion at n. 3) – the Los Angeles Superior Court rejected the unconscionability defense and compelled arbitration in two other, similar cases that arose under the Agreement, one of which was actually filed by Elite, as plaintiff.

In the state court cases, where the motions to compel were decided in one combined ruling, the court seemed to minimize the cases' importance by describing them collectively as "a dispute about parking fees for ocean shipping containers." State court decision at 1. The state court provided more information about the industry-form contract than the federal District Court did in its decision. For example, the state court observed that:

> Companies involved with ocean shipping containers sign on to the UIIA contract when they enter this industry. They sign on as a general and industry-wide matter, and not individually with one other particular company.

Id. at 2. Interestingly, the state court pointed out that two trucking company plaintiffs had acceded to the uniform contract *before* either of the defendants. Thus, in the state court cases at least, it could not reasonably be argued that the ocean carriers had insisted on the truckers' accession to the contract as a *quid pro quo* for doing business together.

In its legal analysis, the court began by concluding that the Supreme Court's decision in *Concepcion* pre-empted the truckers' reliance on the state law defense of unconscionability – exactly contrary to the federal District Court's interpretation of *Concepcion's* effect in *Elite v. Hanjin*.

Turning to the arbitration clause, the state court concluded it was not unconscionable. The court said the truckers' argument that the clause's 30-day notice provision was unconscionable under California law was "no longer good law" after *Concepcion. Id.* at 5. Analyzing the substance of the clause, the court determined that "[a] provision that affords Elite a month to review its invoices and prepare any claims does not shock the conscience. This one-month time frame is businesslike, not shocking." *Id.* at 6. The court was also not convinced that arbitrators hearing the truckers' claims were prevented from providing injunctive relief under California law.

Going further, the court concluded that, given the narrow focus of the contract's dispute resolution procedures – limited to charges "arising from Maintenance and Repair, Per Diem or Lost/Stolen Equipment invoices" – "the constraints in the dispute resolution process are not objectively unreasonable." *Id.* at 7-8.

One of the most interesting aspects of the state court's decision lies in the fact that the truckers asked the court to defer ruling on the motion to compel until after they had an opportunity to conduct discovery on the circumstances of the negotiations of the industry-form contract, prior proceedings between the ocean carriers and truckers, and "the judicial character of the arbitration process." *Id.* at 9. The court denied this request, concluding that "[t]his discovery would be expensive and time-consuming" and "unwarranted and unnecessary." *Id.* at 9.

The denial of the truckers' request for discovery is ironic in light of the statement by the Ninth Circuit dissent in *Elite v. Hanjin* that the federal District Court should have *allowed* discovery before refusing to enforce the arbitration clause. However, this paradoxical situation may be explained by the fact the Ninth Circuit dissent was relying on the California Supreme Court's decision in *Sonic-Calabasas* that came down after the lower state court issued its ruling. In truth, sorting out the various rulings and decisions involved in these cases tends to make one's head spin.

The bottom line is that, in two similar cases, a California state court ruled that the arbitration clause in the industry-form contract at issue was not unconscionable whereas the federal District Court and the Ninth Circuit majority reached the opposite conclusion in *Elite v. Hanjin*.

It will be interesting to see what happens if *Elite v. Hanjin* gets to the Supreme Court. If, upon review, the Supreme Court concludes there is no substantive unconscionability, it will not matter that the arbitration clause was contained in a contract of adhesion. *See, e.g., Communications Maintenance v. Motorola*, 761 F.2d 1202, 1210 (7th Cir. 1985)(since there was "no substantive unconscionability we do not reach the issue of whether there was procedural unconscionability").

In the meantime, those who draft arbitration clauses would be well-advised to take heed from this case that there may indeed be limits to the extent an arbitration clause can favor one party over the other.

ESTIMATED TIME OF ARRIVAL: THE IMPORTANCE OF GOOD FAITH

By: Robert Meehan, SMA Member

A vessel's estimated time of arrival (ETA) at load and discharge ports is one of the more critical details in negotiating charter parties. Vessels that arrive later than expected invariably create problems for the charterer and most charterers manage these risks by making informed decisions based on the information presented.

There is an obligation on the part of the owner to ensure that the ETA is reasonably arrived at. The ETA could be deemed as misrepresentation on the part of the owner for being overly optimistic, or simply gambling that the vessel would not encounter delays at prior ports. Vessels may encounter delays beyond the ETA presented by the owner.

When advice of a delay is received, it is often accompanied by a comment that the delay was beyond the control of the owner, the inference being that, because the vessel remains within laydays/cancelling (Iaycan), the owner has met its obligation. While there is certainly a relationship between ETA and laycan, the terms or responsibilities are mutually exclusive.

This was illustrated in the award in *The Venus V*, SMA 2153 (1985), where the panel stated (citations omitted):

> Cancellation dates and "expected ready dates" are not equivalent terms, although they relate to the same general subject. If the vessel misses her lay/cancelling date, the charterer may cancel the charter. Neither good faith nor any other reason excuses the owner's failure to timely tender the ship… . An expected ready date however is a representation to be made and adhered to in good faith and invites reliance… . The fulfillment of owner's obligation to deliver the vessel is not answered by the cancellation date, and the cancellation date cannot be used as the measure of the owner's representation of the expected ready date.

The arbitrators held the owner in breach by missing the vessel's ETA, even though the vessel arrived within laycan.

Timing alone can sometimes determine whether one vessel is fixed over another and some conclude that the opportunity for abuse is proportionate to the importance of securing the cargo.

Take, for example, the award in *The Virginia Rhea,* SMA 2087 (1985), in which the panel held that the owner had misrepresented the ETA load as he knew his vessel was seriously delayed at the prior port. The panel stated: "It bears pointing out that, by and large, the marketplace will reward owners who are willing to represent a certain "ready to load" date in the contract (e.g., by a better freight rate than competing owners may obtain who prefer to play it safe and merely negotiate laydays without representing any "ready to load" date)."

Misuse of the ETA is not limited to helping secure a cargo, but can also prove to be instrumental in avoiding a cargo being cancelled. With the option to cancel exercisable only 'after' the vessel fails to arrive, advance knowledge of any delay is vital, leading to further reliance on an accurate ETA.

Although owners usually assure the charterer that they are doing everything possible to improve the timing, the charterer is basically without recourse other than to accept that the ETA presented is accurate. On those occasions when the vessel arrives outside laycan, an extension is generally granted. At this point the charterer has little choice but to extend.

An example of one charterer losing faith in the ETA, opting to risk premature cancelling, can be found in the *Amalia del Bene,* SMA 3533 (1999). After the owner failed to reply to numerous requests by the charterer to qualify the ETA load, the charterer, realising that the vessel would miss the cancelling, entered the market to secure earlier tonnage. The charterer claimed against the owner for the higher freight paid to the earlier vessel. The sole arbitrator found for the charterer, stating that the owner had misrepresented the vessel's ETA load.

The decision by a charterer to cancel in favour of an earlier vessel is not one easily arrived at. In the end, the timing of the original vessel may improve to the extent that the owner actually meets its obligation to arrive within laycan. As such, a hastily arrived-at decision to charter in earlier tonnage, anticipating a missed laycan, could expose the charterer to full deadfreight or other possible claims by the original owner.

Many disputes centring on owners' misrepresentation of vessel ETAs involve full cargos loading and discharging at one port. The straightforward nature of such voyages means that it is easy for the charterer to monitor the timing to establish whether a breach of charter party terms has occurred.

Qualifying whether the owner misrepresented the ETA becomes more challenging in the parcel trades, where the charterer has contracted only part of the vessel space. The parcel trades afford the owner various options not found in other trades, most notably the option to seek completion cargo from other ports, including the option to rotate between the ports as well as the option to substitute a different vessel to perform the voyage.

The inclusion of these options strains the owners' ability to accurately forecast the vessel timing, with the result that the ETA presented can sometimes be nothing more than an educated guess.

Alternatively, the owner can correct any delay by opting to rotate the vessel to a port earlier, or by exercising its option to substitute an earlier vessel to perform the voyage. The charterer, to successfully cope with these options, will require frequent updates on the whereabouts of the vessel, including advice on the expected rotation. Incorporating language obligating the owner to say, for example, noon reports, or requIring timely advice every time the ETA changes by more than 24 hours (or 12 hours when in port) is not considered unreasonable.

Once established, the provisions not only serve to warn the charterer of a pending delay but also, by qualifying any delay, can act to minimise the charterer's risk should it decide to charter in alternative tonnage. Lastly, provisions can serve to benchmark the party's obligations, lending support to any possible claim if things turn sour.

Provisions aside, the owner, having firsthand knowledge of the status of the vessel, controls all—or, with current technology, most—of the information regarding any delay. If the owner fails to timely relay such information, opting to act in bad faith, any provision can serve to substantiate the charterer's claim if one is submitted.

Good faith plays a dominant role in not only negotiating the contract but also in upholding one's obligation in performance of the contract. Abusing the validity accompanying any ETA advice could be deemed unlawful, exposing the owner to penalties. Intentional misrepresentation equates to common-law fraud which is established under US state law only on proof that a material misrepresentation of fact has occurred which is false, or known to be false, by the defendants and which has been made for the purpose of inducing the plaintiff to rely on it, if in fact the plaintiff did rely on those facts and the misrepresentation caused injury to the plaintiff.

The commonality in the performance of any contract is that each party simply requires the other to uphold their part of the bargain. Neither party is inclined to waste time or money in court seeking resolution of an issue already negotiated and presumed agreed. At the outset, disclosing any timing expectations or constraints highlights the needs of the parties and establishes whether the risk is worth taking. Once established, incorporating clauses serves to manage the risk and is therefore in the interests of both parties.

Although timing provisions are specific to the needs of any individual contract, one suggestion relating to management of the ETA load and discharge is to highlight, where possible, the vessel schedule.

For example, incorporating the vessel's scheduled ports before loading, whether planned or anticipated, provides the charterer with the option to qualify the validity of the ETA to a specific port and to benchmark the vessel's progress on subsequent updates.

After loading, ETA discharge can be managed by the charterer attempting to restrict the option of rotation/completion by including an appropriate provision in the wording. Finally, advancing the option to cancel is accomplished by incorporating a cancelling clause.

The successful incorporation of any clause restricting owner's flexibility is without doubt commensurate with market conditions. After all, the availability of options for the owner can be the deciding factor in whether or not a voyage is profitable.

Forgetting for a moment whether the market is firm or weak, the alternative of neglecting to address any timing requirements will increase the likelihood of a dispute later on and, equally important, will lessen the ability to successfully attain redress for that dispute. In the end, however, when the negotiation process begins, one cannot underestimate the importance that good faith plays in determining whether or not a voyage is successful and drama-free.

* An earlier version of this article appeared in Maritime Risk International.

RECENT NEW YORK PRE-JUDGMENT ATTACHMENT DEVELOPMENTS

By: Thomas H. Belknap, Jr., Partner, Blank Rome LLP, New York

Parties are continually testing the boundaries of the law relating to pre-judgment attachments and post-judgment execution, and so the law continues to evolve in this area with some pace. This note discusses some of the more interesting recent developments in this area of the law.

A. *Property Subject to Attachment Under State Law*

Maritime plaintiffs tend to think only of Rule B when they think of attachment in the U.S., but state law provides another basis to seek pre-judgment remedies. New York is no exception and allows for attachment of a defendant's property in a number of different circumstances. Grounds include where the defendant is a foreign corporation not qualified to do business in the state; where the defendant, with intent to defraud creditors, has hidden or disposed of property or removed it from the state; or where the action is to enforce a foreign judgment.

Another ground that commonly arises in the maritime context – of particular relevant here – is the attachment in aid of arbitration pursuant to C.P.L.R. § 7502(c). That provision allows a party to seek an attachment where it can show that "the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." Such an attachment may be sought irrespective of whether the arbitration arises under state law, the Federal Arbitration Act, or the New York Convention.

An attachment order issued under New York law can in some instances cast a wider net than one issued under Rule B – particularly where the defendant is subject to the jurisdiction of the New York courts. In *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303 (2010), the New York Court of Appeals, the State's highest court, noted the distinction between cases where attachment is sought solely to obtain security for a claim and cases where attachment is sought to obtain *quasi in rem* jurisdiction – *i.e.*, to litigate the merits of the dispute solely against attached property. In the latter category of case, due process concerns dictate that "the following black letter principle must be adhered to: 'where personal jurisdiction is lacking, a New York court cannot attach property not within its jurisdiction." *Id*. at 311.

But "where the court acquires jurisdiction over the person of one who owns or controls property, it is equally well settled that the court can compel observance of its decrees by proceedings *in personam* against the owner within the jurisdiction." *Id*. at 312. Where the court has jurisdiction over the defendant, in other words, it "has jurisdiction over that party's tangible or intangible property, even if the *situs* of the property is outside New York." *Id*.

Where that property consists of a debt, courts have held that "the obligation of the debtor … clings to and accompanies him wherever he goes." *Id*. at 315 (citing *Harris v. Balk*, 198 U.S. 215 (1905) (overruled on other grounds). Thus, if a garnishee owing money to the defendant can be served in New York, that debt can be attached even if the garnishee resides outside the state. The *Hotel 71* court determined that this same rule applies to "uncertificated ownership interests" and thus authorized the attachment of a defendants' interest in several limited liability companies located outside New York where the defendant had submitted to New York jurisdiction as a term of the guaranty under which he was being sued.

The decision in *Mishcon de Reya NY LLP v. Grail Semiconductor, Inc.*, 2011 WL 6957595 (S.D.N.Y. 2011), helps illustrate how a New York court's attachment power may be effectively used. There, the parties entered an agreement by which plaintiff was to provide certain legal services to defendant. The agreement provided for arbitration of disputes in New York. Disputes arose, and plaintiff commenced arbitration and also sought an attachment in aid of arbitration. The property to be attached was a patent owned by the defendant. The defendant opposed the attachment on the ground that the court lacked jurisdiction over the property since, under New York law, a patent is located where its owner is domiciled – here California.

The court rejected this argument, relying on *Hotel 71*, and concluded that the attachment was valid because the court had jurisdiction over the defendant on the basis of its having agreed to arbitrate disputes under the agreement in New York. Importantly, the *Grail* court rejected the defendant's narrow interpretation of *Hotel 71* to suggest that the defendant had to be physically located in New York in order to be subject to attachment of its property outside the State. To the contrary, the court held, the defendant merely needs to be subject to jurisdiction here. *Id*. at n.7.

B. ***Attachment of New York Correspondent Accounts***

We have seen a number of recent cases where the plaintiff has sought to attach U.S. dollar funds maintained by a defendant at a foreign bank with a correspondent banking relationship with a New York bank. The premise of the attachment is that that foreign defendant has an attachable property interest in its "share" of its bank's funds maintained with the correspondent in New York.

Thus far, however, we are aware of no decision accepting this argument, and several have rejected it. In *Toisa Ltd. v. PT Transamudra Usaha Sejahtera*, 13 cv 1407 (Sept. 20, 2013)(JMF), the court issued a ruling from the bench concluding that a defendant has no attachable interest in a correspondent's New York account. That ruling relied on a similar conclusion reached by the district judge in *Lauritzen Bulkers A/S v. JIT Int'l Corp. Ltd.*, 13 cv 3982 (Aug. 9, 2013)(WHP), which considered such an attempt essentially analogous to EFT attachments, which had been barred in *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 59 (2d Cir. 2009).

In *Toisa* the plaintiff sought to rely on *Cargill Financial Services Int'l, Inc. v. Bank Fin. and Credit Ltd.*, 896 N.Y.S.2d 317 (1st Dep't 2010), in support of its position that a defendant had an attachable interest in correspondent funds. *Cargill* involved a claim against a foreign bank itself, and the plaintiff attempted to attach its correspondent account in New York. The court found that the evidence supported such an attachment but ruled that the district court had not abused its discretion in vacating the attachment since the evidence also established that the funds were held "for the benefit" of third-party customers who used the account to transact foreign business in U.S. currency. This ruling, the plaintiff in *Toisa* argued, supported the conclusion that those third-party clients must themselves have an attachable interest in the funds. The *Toisa* court rejected this argument, however, concluding that a correspondent bank's holding funds "for the benefit" of customers was not the same as saying they had a property interest in them. Instead, the *Toisa* court relied on earlier rulings in *Sigmoil Resources, N.V. v. Pan Ocean Oil Corp.*, 234 A.D.2d 103 (1st Dep't 1996), and *Sidwell & Co., Ltd. v. Kamchatimpex*, 166 Misc. 2d 639 (Sup. Ct., N.Y. Cty 1995), which had rejected similar attempts to attach funds in a correspondent bank's account. As the *Sigmoil* court noted:

Neither the originator who initiates payment nor the beneficiary who receives it holds title to the funds in the account at the correspondent bank. *Id*. at 104.

C. ***Koehler and the Separate Entity Rule***

Courts have uniformly held that New York attachment rules do not permit a party to obtain a pre-judgment attachment of a defendant's foreign bank account merely because the bank happens to have a branch in New York. Under the so-called "separate entity rule," courts treats each branch of a bank as a separate entity for attachment purposes even if they are all part of the same corporate entity. See *Allied Maritime, Inc. v. Descatrade SA*, 620 F.3d 70, 74 (2d Cir. 2010)(citing cases).

Many thought that the separate entity rule was done away with in post-judgment execution cases after the New York Court of Appeals' decision in *Koehler v. Bank of Bermuda*, 12 N.Y. 3d 533 (2009), which held that a judgment creditor could obtain an order directing a garnishee to turn over property located outside New York so long as the garnishee is subject to jurisdiction here. The cases considering this issue since *Koehler*, however, have been split. Compare *JW Oilfield Equipment, L.L.C. v. Commerzbank AG*, 764 F. Supp. 2d 587 (S.D.N.Y. 2011)(holding separate entity rule did not apply in post-judgment turnover action) with *Shaheen Sports, Inc. v. Asia Inc. co., Ltd.*, 2012 WL 919664 (S.D.N.Y. 2012) (holding separate entity rule does apply).

The issue has now been settled, however, by the decision of the New York Court of Appeals in *Motorola Credit Corporation v. Standard Chartered Bank*, 24 N.Y.3d 149 (N.Y. 2014). The separate entity rule precludes a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a debtor's assets held in foreign branches of the bank.

Maritime creditors in the United States may still obtain security through the traditional remedies of maritime attachment and arrest, and also, if the dispute is subject to arbitration in New York, by an order from the arbitrators in an appropriate case.

SMA PARTICIPATES IN BIMCO'S "DOUBLE JEOPARDY-TRIAL BY MEDIA, TRIAL BY LAW"

By: Robert G. Shaw, SMA Board of Governors

At its annual conference in Dubai in April and in London in November, BIMCO presented "Double Jeopardy - Trial By Media, Trial by Law." The two one-day events each involved a morning and afternoon session. "Trial by Media," in the morning, simulated with impressive realism the aftermath of a grounding of a bulk carrier in a river on the US west coast leading to a bunker spill.

Professionals drawn from London shipping solicitors (Holman Fenwick and Ince), the media (Tradewinds), P&I clubs, and an owner's and a charterer's representative, acting in video clips and in person, portrayed the series of incidents, decisions and mistakes that can be expected to arise when dealing with the consequences of a marine casualty and spill in an environmentally sensitive area.

The lack of media experience of the owner and charterer were credible and painful to watch, providing a primer on avoidable mistakes. The video clips of the lawyers advising their clients portrayed the steps required to deal in short order with underwriters, classification societies, salvors, media, and government and regulatory agencies and to gather and protect evidence.

The lesson of the morning session was that events can be expected to spin out of control if chains of command and communications are not well established with management before a casualty takes place.

The afternoon session of "Trial by Law" took the form of a mock arbitration between the owner and charterer on an unsafe port claim. The three member panel both in Dubai and London consisted of New York, London and Singapore arbitrators. SMA President, Jack Warfield, was a member of the panel in Dubai and SMA member, Robert Shaw, was a member of the panel in London.

The arbitration illustrated the difficulty of deciding issues of good seamanship and chains of causation when masters have been forced to make decisions in navigationally challenging conditions. The assumed facts were that the charterer had instructed the master to proceed up-river to a loading berth despite the master's and the owner's expressed concerns as to the adequacy of the draft. On receiving assurances from pilots and the port authority that the draft was adequate, the vessel proceeded and grounded. Nevertheless, the panels in both Dubai (by a majority) and in London (unanimously) found that the master had failed to exercise good seamanship in not calculating the squat effect of the river's current reducing available draft and that his negligence was sufficiently serious to be the effective cause of the grounding.

The presentations of London barristers, Chirag Karia, QC for the owner and Nevil Phillips for the charterer, and the explanations from the arbitrators of the reasons for their award provided a good summary of the legal principles that apply to unsafe port cases. Each arbitrator explained the applicable principles under the law of his own jurisdiction and on awarding contributions to the fees and expenses of the prevailing party.

Lindsay East of Reed Smith prepared the assumed facts of the casualty and served as the moderator. Both he and BIMCO deserve special congratulations for the high quality of the event which provoked many questions and retained the interest of a large audience.

IN MEMORIAM: MILTON NOTTINGHAM

SMA member Milton G. Nottingham passed away on 21 October 2014 at the age of 93. A long-time resident of Washington, D.C., Milton graduated from the United States Merchant Marine Academy in 1943, served as a deck officer in all theaters of WWII, and obtained his master's license in 1949. He was founder and chairman of Pacific Cargoes, Inc. and International Services Corporation. A past president of the USMMAA Alumni Association, he was instrumental in establishing it. http://www.legacy.com/obituaries/washingtonpost/obituary.aspx?pid=173026167.

VOYAGE CHARTERS, 4TH EDITION, 2014

The first edition was – hard to believe – in 1993. John Kimball of Blank Rome, former SMA President David Martowski, and your associate editor LeRoy Lambert have been there from the beginning. Professor Michael Sturley has now joined the US law team and added a section on COGSA. Details at http://www.routledge.com/books/details/9780415833608.

EDITORS' NOTES:

ICMA Shanghai – May 10-15, 2015

Another reminder that the ICMA conference is in Shanghai in May 2015. Through the centuries, Shanghai has been the maritime commercial center of China and is now, more than ever, where east meets west. It is fitting that the international maritime arbitration community recognizes this fact and will hold the next ICMA Conference there. The papers will be timely and topical, the attendees will be from everywhere, and the city and excursions will be memorable. Make your plans now to attend the ICMA Conference in Shanghai May 10-15, 2015 and to submit a paper, too. Details are at http://www.icma2015shanghai.com/html/submission. Do it now!

Friends and Supporters

The Friends and Supporters program promotes New York arbitration by creating a "war chest" to help the SMA and New York arbitration retain and grow its prominence as a center for the resolution of maritime disputes. The tax deductible contributions will be placed into a dedicated account, he control of which will be with the president of the SMA (or any other designated member of the Board of Governors) and a member of the Friends and Supporters group. Corporate membership is $1250 and individual membership is $300.

Thanks!

A special thanks to those who responded to our call for papers and articles of interest. *The Arbitrator* has a long history of providing timely and relevant articles and information to the maritime arbitration community in New York and around the world. We need your continued support! If you have articles and ideas to contribute to future editions, please let us know. Also, we welcome your feedback on each and every issue. Please do not hesitate to contact us, rshaw@mystrasventures.com or leroy.lambert@ctplc.com. Thank you.

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