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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT'S CORNER

By: Jack Warfield, SMA President

Once our Annual General Meeting finishes in May, things slow down for the summer then pick up again come September with our first Members Only luncheon. This year has not been that different – at least not on the surface. During this 'down' period, however, there were a number of pieces being put in place to get our year off and running.

- Last May, the New York Maritime Consortium (ASBA. NYMAR, New York area MLA, and the SMA) held a mock arbitration at the Scandinavia House before an audience of about 175. Following the very positive reviews, we decided to take the show on the road. On October 22, prior to the CMA monthly luncheon, the edited video was presented with Keith Heard of Burke & Parsons providing the continuity and texture to highlight key aspects. This basically was a teaser to the full blown 'live' performance to be held at the CMA Shipping 2016 next March at the Hilton Stamford Hotel. Though a number of people deserve recognition for their contribution to this effort, two who stand out are Keith Heard and Don Murnane for the many hours they put into creating, writing and rewriting the script for "7 Days in May – Resolving your Arbitration Insecurities."
- At our September Members Only luncheon, the membership overwhelmingly voted to reduce the required number of years of commercial experience to be considered for SMA membership from ten to five.
- I would like to recognize several of our members for individual contributions to the SMA. This past June Robert Shaw flew to London to make a presentation on the SMA to the Defense Group Forum. In September David Martowski made a presentation about the SMA to the Brazilian Bar Association Maritime Law and Port Conference in Rio de Janeiro. Thank you to both of them for contributions to promoting the SMA.
- Molly McCafferty our new Luncheon Chair with her first luncheon behind her lined up William Juska of Freehill Hogan & Mahar who discussed "Iran Sanctions: Past, Present, Future" on Wednesday, November 11. It was a very timely, topical, and informative talk from an engaging presenter. Join us for our Holiday Luncheon on December 9!
- I am pleased to announce that new member Charlie Anderson of Skuld has agreed to Chair the Friends & Supporters Committee. After spending several hours with him discussing his ideas and initiatives he plans I think we all have a lot to look forward to from this Committee.
- We will be holding our next SMA course "Maritime Arbitration in New York" February 25 and 26, 2016, at 3 West Club. This is an excellent opportunity for brokers, charterers, insurers, and owners to get an in-depth understanding of the practice and process of maritime arbitration. For lawyers there will be up to 12 hours of CLE credit available. Further information is available on our website www.smany.org or call Patty at our office, 212-786-7404. We are very fortunate that Klaus Mordhorst has again agreed to chair this event.

- As many of you know Pat Martin has served as the SMA counsel for a number of years. He approached me last March with a request that after the current year he would like to step down. I am pleased to announce that John Koster formerly (now retired) of Healy & Bailie and Blank Rome has agreed to assume this role. We would like to express our appreciation to Pat Martin (a friend to all) for the years of dedicated service he has provided our organization.

ARBITRATING SEAMEN'S PERSONAL INJURY CLAIMS[1]

By: James E. Mercante, Partner, Rubin, Fiorella & Friedman LLP, New York

An injured seaman typically enjoys a trial by jury despite admiralty's more traditional 'bench' trial. However, arbitration of a seaman's injury claim is in a whole different boat. While arbitration to resolve domestic and international commercial maritime disputes is quite common in New York with the Society of Maritime Arbitrators, Inc. ("SMA"), seamen's injury claims are rarely arbitrated.[2]

The seaman's right "to bring a civil action at law, with the right of trial by jury, against the employer" was codified in the Jones Act. 46 U.S.C. §30104. Pursuant to the Jones Act, a seaman may demand a jury trial despite Rule 38(e) of the Federal Rules of Civil Procedure ("Admiralty and Maritime Claims"), which specifically states that "these rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h)." The Jones Act was enacted by Congress in 1920 in response to several U.S. Supreme Court cases which had precluded seamen from recovering against their employers for negligence of the master or owner of the vessel.

Seaman Status

The scope of who qualifies as a 'seaman' has been expanded over the years. The test for 'seaman' status was articulated by the U.S. Supreme Court in *Chandris v. Latsis*, 515 U.S. 347 (1995). What is required is "an employment-related connection to a vessel in navigation," and the worker must contribute either to the function of the vessel (or an identifiable group of vessels) or the accomplishment of its mission that is substantial in both its duration and its nature. Thus, under this test, anyone from the ship's captain, mate, steward, engineer, or deckhand, qualifies as a seaman, even a photographer or hairdresser aboard a cruise ship.[3]

A seaman's employment contract, especially for those employed aboard a cruise ship, often contains a clause requiring arbitration to resolve disputes arising out of or related to employment. The Federal Arbitration Act (FAA) and case law interpreting it create a strong federal policy in favour of arbitration.[4] Section 2 of the FAA states that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Indeed, according to the U.S. Court of Appeals for the Second Circuit, the FAA reflects a legislative recognition of "the desirability of arbitration as an alternative to the complications of litigation."[5] However, maritime personal injury attorneys frown upon arbitration because of its binding nature, i.e., being stuck with the arbitrator's ruling with no right to appeal, and no jury.

An arbitration clause contained in a seaman's pre-employment contract is barred by Section 1 of the FAA, 9 U.S.C. §1. Section 2 of the FAA specifically enforces arbitration agreements contained in 'maritime transactions' or 'commerce.' But, Section 1 limits the nature of "maritime transactions" that are subject to arbitration and specifically carves out an exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

In *Circuit City Stores v. Adams*, 532 U.S. 105, 121 (2001), the Supreme Court explained that, at the time of the FAA's enactment, Congress had already enacted various statutes governing the resolution of seaman disputes. Thus, the court concluded that "it is reasonable to assume

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that Congress excluded 'seaman' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers."

Clever Arguments

To sidestep the strict rule against arbitration clauses in an employment contract, some parties have reached agreements to arbitrate after an injury occurs. This was accepted by the Second Circuit in 2010 in *Harrington v. Atlantic Sounding Co*., which involved a post-injury agreement to arbitrate signed by a seaman in return for cash advances against his claim.[6] The court concluded that a post-accident arbitration agreement is enforceable because it is not a "contract of employment" between the parties and thus not captured by the FAA's 'seamen's exemption.'

Prior to *Harrington*, at least two other courts in New York determined that a seaman's agreement to arbitrate an injury claim after the injury occurs in exchange for certain consideration, was not barred by the Federal Arbitration Act.[7]

Many other courts are following suit and enforcing arbitration agreements in a seaman's post injury contract by distinguishing 'post-injury' contracts from contracts of employment. Typically, the quid pro quo for agreeing to post-accident arbitration is the employer or vessel owner's advancement of certain payments to the seamen such as wages.

In the U.S. Court of Appeals for the Fifth Circuit, one vessel owner argued that a seaman employed solely upon a stationary oil rig in the Gulf of Mexico was required to arbitrate his injury claim pursuant to the terms of the employment contract, because he was not engaged in "interstate commerce," as set forth in the FAA. The Fifth Circuit did not take the bait. The court held that every seaman's employment contract is exempt from arbitration, regardless whether or not the seaman is engaged in interstate commerce.[8]

Another exception to the FAA's exemption for seamen employment contracts are international agreements entered into between a foreign seaman and a foreign employer or shipowner. Such personal injury arbitrations are enforceable pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention).[9] While the Second Circuit has not weighed in on this subject, the Southern District of New York aired its opinion in an injury case involving a Romanian citizen employed aboard a cruise line as a steward.[10] The foreign seaman's agreement to arbitrate was contained in the employment contract but, because it was international in scope and thus governed by the Convention (not the FAA), it was enforceable.[11]

Recently, in *Rutledge v. NCL (Bahamas)*, a female photographer employed aboard a foreign flag cruise ship challenged a pre-employment arbitration clause with respect to certain of her claims. The Southern District of Florida held that the foreign seaman's claims for negligence, unseaworthiness and failure to pay maintenance and cure fell squarely within the vessel owner's arbitration provision and compelled arbitration of same. Due to the international scope of the contract, it was not governed by the FAA's seaman's arbitration exemption.

However, the seaman had also asserted separate claims against her employer for sexual harassment and sexual assault. Referring to the wording of the arbitration clauseat issue, the court determined that nothing about sexual harassment or sexual assault allegations 'relate to,' 'arise out of or were 'connected with' her duties aboard ship. As a result, the court concluded that claims stemming from sexual harassment and sexual assault did not sufficiently relate to employment as a ship's photographer and would exist even if plaintiff were not an employee, such as a guest aboard the ship.[12] Thus, the court extracted these claims from those that were arbitrable.

To further challenge arbitration, seamen have attempted to invoke their age-old status as "wards of the admiralty." This was the issue presented in *Schreiber v. KC Transp. Corp.*, 9 N.Y.3d 331 (N.Y. 2007). The "ward of the admiralty" doctrine was adopted in 1823 by Justice Joseph Story in *Harden v. Gordon*, 11 F. Cas. 480, 485 (D. Me. 1823). Interestingly, today's seamen may not warrant this antiquated protection. As one court noted, seamen today are as "intelligent and responsible as most others." *Schreiber* at 340.

The court in *Schreiber* acknowledged that the "ward of the admiralty" doctrine has shown signs of erosion, and determined that such status does not outweigh the policy favoring arbitration.

The seaman claimed that the burden should shift to the vessel owner/employer to establish the enforceability of the arbitration clause. The argument was that an arbitration agreement is invalid unless it is shown to be fair to the seaman and untainted by deception or duress by the vessel owner. Nonetheless, the *Schreiber* court concluded that the burden does not shift by virtue of 'ward of the court' status but, rather, the burden always remains on the party challenging the enforceability of an arbitration agreement to show grounds for its revocation.[1]

Due to the transient nature of the occupation, a seaman's employment contract often calls for jurisdiction or

arbitration overseas, thus making it difficult for U.S.-based admiralty attorneys to represent a foreign seaman locally under such parameters.

Accordingly, while arbitration clauses may be disfavored among the maritime personal injury bar, undoubtedly a clause requiring arbitration in the United States would be preferable to one that requires arbitration, for example, in the Philippines (home of a majority of merchant seamen).

Conclusion

Arbitration of commercial maritime disputes is a seaworthy forum particularly before a tribunal of marine experts such as the SMA. However, personal injury arbitrations called for in a seaman's pre-employment contract are still barred by the FAA. As demonstrated herein, some vessel owners are creating arbitration opportunities by advancing new arguments to avoid statutory preclusions and to replace antiquated notions with current realities.

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1. This article originally appeared in *The New York Law Journal*, April 1, 2015. The author acknowledges with thanks the assistance of his associate, Kristin E. Poling, in the preparation of this article.

2. Members of the SMA are required to have commercial shipping backgrounds and expertise. The SMA will also arbitrate marine-related personal injury claims. *See, e.g., Great Elephant Corp. v. CPC Corp*. No. 4197, 2012 WL 6968924 (S.M.A.A.S.) (Dec. 14, 2012); *APM Terminals N. Am. v. Horizon Lines*, No. 4169, 2012 WL 1143462 (S.M.A.A.S.) (Feb. 28, 2012).

3. *Maharamas v. American Export lsbrandtsen Lines*, 475 F.2d 165 (2d Cir. 1973).

4. The Federal Arbitration Act (FAA) was enacted in 1925 and codified in 1947 as Chapter 1 of Title 9 of the U.S. Code. Pub. L. No. 80-392, 61 Stat. 669 (1947) (codified as 9 U.S.C. §§1-16).

5. *Genesco v. T. Kakiuchi & Co*. , 815 F.2d 840, 844 (2d Cir. 1987).

6. *Harrington v. Atlantic Sounding Co*., 602 F.3d 113, 122 (2d Cir. 2010).

7. *Barbieri v. K-Sea Transp. Corp*., 566 F.Supp.2d 187, 194, 2008 A.M.C. 2176, 2185 (E.D.N.Y. 2008); *Schreiber v. KC Transp. Corp.*, 9 N.Y.3d 331 (N.Y. 2007),

8. *Brown v. Nabors Offshore Corp*., 339 F.3d 391 (5th Cir. 2003).

9. The Convention which addressed international arbitration agreements, was signed in 1958 and codified in 1970 as Chapter 2 of Title 9 of the U.S. Code. Pub. L. No. 91-368, 84 Stat. 692 (1970) (codified as 9 U.S.C. §§201-208).

10. *Dumitru v. Princess Cruise Lines*, 732 F.Supp.2d 328 (S.D.N.Y. 2010).

11. *Id*. at 346; see also *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005) (arbitration provision contained in employment contract of Filipino crew member aboard cruise ship was governed by the Convention and thus not shielded by exception contained in FAA).

12. *Rutledge v. NCL (Bahamas)*, #14-23682 dated Feb. 3, 2015 (S.D.Fla. 2015). See also *Doe v. Princess Cruise Lines*, 657 F.3d 1204 (11th Cir. 2011) (holding that plaintiffs claims against the cruise lines - stemming from rape of plaintiff, a bar server, were not subject to arbitration).

13. Id.

FOOTBALL "DEFLATEGATE" OR ARBITRATION DISCOVERY "FLOODGATE"?

By: Don P. Murnane Jr., Partner, Freehill Hogan & Mahar, New York

On September 3, 2015, U.S. District Court Judge Richard Berman issued his 40 page Decision and Order overturning NFL Commissioner Roger Goodel's arbitration "Award or Final Decision" of July 28, 2015, imposing a four game suspension on New England Patriots' quarterback Tom Brady.[2] The Commissioner's Award determined that "Mr. Brady knew about, approved of, consented to, and provided inducements and rewards in support of a scheme by which [Patriots employees] tampered with game balls" used in the first half of the Patriots' January 18, 2015 AFC Championship Game against the Indianapolis Colts."

Judge Berman's decision vacating the Award relies heavily on case law and practices in the labor relations and collective bargaining field including a doctrine known as "law of the shop" which requires employees to be given advance notice of prohibited conduct and the specific discipline that can result from such rules infractions. What may have broader application to arbitration practices in general, however, is that portion of the decision which finds that Mr. Goodel, acting as sole arbitrator, violated the Federal Arbitration Act's ("FAA") Section 10 (a)(3) prohibition against "refusing to hear evidence pertinent and material to the controversy...".

Judge Berman ruled Commissioner Goodel was guilty of arbitral misconduct under Section 10 (a)(3) in denying two of Mr. Brady's arbitral "discovery motions" which sought to compel testimony and documents, including

notes of witness interviews conducted by the NFL's "independent" investigators, attorney Ted Wells of Paul, Weiss, Rifkin, and NFL General Counsel, Jeff Pash. During the arbitration, Mr. Goodel granted Brady's motion to compel the testimony of Mr. Wells but denied the motion as to Mr. Pash on the ground that Pash did not have firsthand knowledge of the events at issue and his role was limited to facilitating Mr. Wells' access to witnesses and documents. Mr. Goodel also denied Mr. Brady's motion for production of the NFL investigators' notes and other documents citing to the NFL Collective Bargaining Agreement Article 46 which requires: "… the parties shall exchange copies of any exhibits upon which they intend to rely on no later than three (3) calendar days prior to the [arbitration] hearing." In Commissioner Goodel's view as sole arbitrator: "the collective bargaining agreement provides for tightly circumscribed discovery and does not contemplate the production of any other documents in an Article 46 proceeding other than under these terms."

Citing to various judicial decisions, Judge Berman wrote: "The Court is fully aware of the deference afforded to arbitral decisions…" and that "an award is subject to attack only on those grounds listed in 9 USC § 10 of the FAA." Relying, however, on a lower court ruling by Judge Keenan from 1996[3], Judge Berman noted "[t]he deference due an arbitrator does not extend so far as to require a district court to countenance, much less confirm, an award obtained without the requisites of fairness or due process."

The Court's holding consists of three main parts:

First, that the "law of the shop' had been violated by the NFL because Brady had not been given notice: (1) that he could be disciplined for having "general awareness of ball deflation by others" and (2) that he could be suspended as opposed to only fined monetarily for such infraction;

Second, Mr. Goodel's denial of Brady's motion to compel testimony from Mr. Pash prejudiced Brady and was "fundamentally unfair and in violation of 9 USC § 10(a) (3) [refusal to hear evidence warrants vacatur]" because, among other things, "NFL precedent demonstrates that… players must be afforded an opportunity to confront their investigators" and "a fundamentally fair hearing requires that the parties be permitted … to cross-examine adverse witnesses.";

Third, Mr. Goodel's denial of Brady's request for the investigator's notes of interview had further prejudiced Brady and was also "fundamentally unfair and in violation of 9 USC § 10(a) (3)" because "Brady was denied the opportunity to examine and challenge materials that may have led to his suspension and which likely facilitated Paul, Weiss attorney's cross examination of him." As to this last basis for overturning the Award, the court was clearly disturbed by the fact that "Paul, Weiss acted as both alleged 'independent' counsel during the Investigation and also (perhaps inconsistently) as retained counsel to the NFL during the arbitration." Paul, Weiss "was able to use [the notes] in direct and cross examinations of Brady and other arbitration witnesses, share them with NFL officials during the arbitral proceedings; and, at the same time withhold them from Brady." Judge Berman, citing to another district court decision authored by Judge Owen in 1997[1], commented: "[t]he absence of statutory provision for discovery techniques in arbitration proceedings does not negate the affirmative duty of arbitrators to insure that relevant documentary evidence in the hands of one party is fully and timely made available to the other party … . [A] failure to discharge this simple duty would constitute a violation of FAA § 10(a)(3), where a party can show prejudice as a result."

When applied as here, there is an inherent tension between FAA § 10(a) (3) and the ADR goal of streamlining "discovery" and expediting dispute resolution. Outside the collective bargaining realm, Judge Berman's decision would appear to be in contrast to some court decisions which emphasize that "litigation style discovery" has no place in commercial arbitration where sophisticated parties are free to agree in advance to limit what is discoverable and, in so doing, streamline the ADR process. Arbitration is generally understood to serve as a simpler, more efficient alternative to court litigation. The parties are entitled to a full and fair hearing without facing the costs or other obstacles often present in a traditional judicial setting. In particular, the disclosure and document exchange procedures available in arbitration are typically not equivalent to the procedures available in United States federal court litigation. Guidelines issued by the American Arbitration Association and its international arm, the International Centre for Dispute Resolution, confirm this distinction and offer certain guiding principles for disclosure procedures before an arbitral tribunal. *See* ICDR Guidelines for Arbitration Concerning Exchanges of Information. The Guidelines direct the tribunal to "manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy." They counsel avoidance of "unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly."

The NFL collective bargaining agreement which contained the agreement to arbitrate referred to specific rules

for discovery and evidence and apparently required only that "… the parties shall exchange copies of any exhibits upon which they intend to rely on no later than three (3) calendar days prior to the [arbitration] hearing." This rule is not unlike that contained within the SMA Rules (Sixth Edition) at Section 21 ("Order of Proceedings") which states: "Copies of any documents, exhibits and accounts intended to be introduced at a particular hearing should be supplied to the other party or opposing counsel and to the Panel members at least ten business days prior to the date of that hearing." The SMA Rules state (in Section 1) that: "…these Rules…shall be binding on the parties and constitute an integral part of that agreement."

Judge Berman's decision, however, engrafts a further broad "affirmative duty" obligation of the arbitrator to "insure that relevant documentary evidence in the hands of one party is fully and timely made available to the other party…" and that an arbitrator's failure to do so is a basis to challenge and overturn the arbitrator's award under FAA § 10(a) (3).

A portion of the preamble to the SMA Rules entitled "WHY ARBITRATION IN NEW YORK UNDER SMA RULES" states as to "Cost-efficiency": "the parties do not have to submit to lengthy, far reaching and expensive discovery". With respect to "Evidence", Section 23 of the SMA rules makes clear that while "the parties may offer such evidence as they desire", they are only required to produce "such additional evidence as the Panel may deem necessary to an understanding and determination of the dispute." A Panel's determination as to what it "deems necessary" inherently involves a degree of discretion and is a far cry from an obligation to "insure that relevant documentary evidence in the hands of one party is fully and timely made available to the other party."

Judge Berman also specifically mentioned in his opinion that under 9 U.S.C § 10(a)(2) "the Court may also vacate an arbitral award "where there was evident partiality." Judge Berman ultimately refused to decide at this time the issue of whether Commissioner Goodel should have recused himself from serving as sole arbitrator on the ground that he had, as Brady contended, "publicly prejudged" the matter when he expressed thanks in the press to the NFL investigators for a "thorough and independent investigation". Judge Berman's decision does not expressly focus on that portion of FAA § 10 (a)(3) which allows for vacatur based upon "any other misbehavior by which the rights of any party have been prejudiced" despite his factual determination that Brady was indeed prejudiced during the arbitral process in several respects.

In what may be a good rule of thumb that Commissioner Goodel could have benefited from, seasoned arbitrators, mindful of FAA §10(a)(3)'s proscriptions, have traditionally adopted a "take it for what it's worth" approach to evidentiary disputes in arbitration focusing instead on the weight of evidence as opposed to strict legal determinations of discoverability or admissibility. SMA Rules Section 21 specifies that "Rules of evidence used in judicial proceedings need not be applied" and, under Section 23, "the Panel shall be the judge of the relevancy and materiality of the evidence offered."

These Rules, in combination with the Panel's power under Section 21 to order production of "additional evidence as the Panel may deem necessary to an understanding and determination of the dispute" (under penalty of drawing an adverse inference from non-production), provide a degree of discretion to the Panel in reaching the balanced twin goals of SMA arbitration, namely, efficiency and fairness.

EDITORS NOTE: No doubt disappointed and disgruntled parties to maritime and commercial arbitrations will take heart from some of the more sweeping pronouncements about due process by Judge Berman, but it should be remembered that the dispute was a labor arbitration, not a maritime arbitration, and a highly publicized one at that.

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1. *National Football League Management Council v. National Football League Players Association*, Nos. 15 Civ. 5916 and 5982 (S.D.N.Y. September 3, 2015)

2. *Kaplan v. Alfred Dunhill of London, Inc*., No. 96 Civ.259 (JFK), 1996 WL 640901, at *7 (S.D.N.Y. Nov. 4, 1996).

3. *Home Indem. Co. v. Affiliated Food Distribs., Inc*., No. 96 Civ. 9707 (RO) , 1997 WL 773712 at *4 (S.D.N.Y. Dec. 12, 1997)

ATTORNEYS' FEES IN THE AFTERMATH OF ARBITRATION

By Michael J. Ryan, Partner,
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The issue of arbitrators' ability to award attorneys' fees has crystallized over the past three decades. There is little question today that arbitrators may award attorneys' fees, if the issue is properly presented to them.

Initially, the principal obstacle was the so-called "American Rule" which holds that parties should each bear their own attorneys' fees unless such are provided for by 1) statutory authorization 2) contractual agreement or 3) in circumstances of bad faith.

Some examples where attorneys' fees have been allowed are:

Contracts with specific provisions allowing an award of attorneys' fees have been enforced.

Arbitration provisions broadly worded to include "any and all disputes" have been held to include consideration by arbitrators of awarding attorneys' fees.

Should the parties themselves request arbitrators to consider awarding attorneys' fees, such requests have been honored. (*Andorra Services, Inc. v. M/T EOS*, N.Y., Civil Action No. 06-373 (November 19, 2008).

The SMA amended its Rules in 1994 to authorize arbitrators to award attorneys' fees.

Generally speaking, today most parties subject to an adverse final arbitration award comply with the award without further ado; by paying the amount ordered or a post award agreed settlement. At the same time, there are instances (for varied reasons) where a winning party seeks to confirm an award as a judgment pursuant to Section 9 of the Federal Arbitration Act (FAA). A motion to confirm under Section 9 must be made within one year from the date of the award. A motion to vacate must be brought within 3 months pursuant to Section 10 of the FAA. It is a given that arbitration awards are usually given great deference and vacated only on limited grounds.

Neither Section 9 nor 10 of the FAA makes any mention of awarding attorneys' fees. Most arbitration provisions today give arbitrators the ability to award attorneys' fees; however, what happens with respect to attorneys' fees when the winner goes to Court to confirm an award, or opposes a motion to vacate that award?

In *Painewebber Inc. v. Bybyk*, 81 F.3rd 1193, 2nd Circuit (1996), the Circuit Court held that, when an arbitration agreement provided "for any and all controversies" to be submitted to arbitration, and contained no express limitation with respect to attorneys' fees, the arbitrators were empowered to consider applications for such fees.

Earlier this year, Judge Englemayer of the Southern District of New York considered a petition to confirm an arbitration award. The panel majority had granted attorneys' fees referring to the Second Circuit's holding in *Painewebber (supra*). The Court also found the award indicated the panel majority found the losing party had acted in bad faith, thus constituting an exception to the American Rule.

In that case, the petitioner, in its initial papers, requested the Court to grant attorneys' fees and costs incurred in pursuing the action; however, the Court noted in a footnote that petitioner did not pursue the application further in its brief, nor did it set out any legal basis for requesting such relief, nor did it provide any accounting of fees and costs incurred in the case. Accordingly, the Court declined to award such relief.

Earlier, in *Hess Corporation v. Dorado Tankers Pool, Inc*., 2015 AMC 1432, Judge Buchwald of the Southern District confirmed an award of attorneys' fees. The matter involved the Asbatankvoy form which includes a provision that "any and all differences and disputes of whatsoever nature arising out of this Charter party shall be put to arbitration." The provision went on to provide an award could include a "reasonable allowance for attorney's fees".

The charter agreement also contained a separate clause which provided that damages for a breach of the charter should "include all provable damages, and all costs of suit and attorneys' fees incurred in any action hereunder".

The Court allowed attorneys' fees and costs expended by the Charterer in pursuing its petition to confirm and in opposing Owner's motion to vacate. The Court noted that both parties agreed that such attorneys' fees were proper under the provisions of the charter party.

In the first case, no follow-up was made by the Petitioner on its request for attorneys' fees incurred on the matter before the Court. In the second, there was no dispute as to entitlement to attorneys' fees based on the wording of the charter party.

In *Loeb v. Blue Star Jets LCC*, 2009 WL 4906538 (S.D.N.Y.) Judge Scheindlin considered a motion for confirmation of an arbitration award and for attorneys' fees associated with bringing the petition.

The agreement included an arbitration clause calling for arbitration in New York City before a single arbitrator; however, it made no provision for the awarding of attorneys' fees, other than a provision providing that any action or breach of the agreement by the Petitioner ("Client")

would make the "Client" liable for damages, including attorneys' and legal expenses (a "fee shifting" clause).

The arbitrator found this provision was reciprocal pursuant to New York statute Section 5-327 of the General Obligation Law and awarded damages plus attorneys' fees. The Court confirmed the award made by the arbitrator and went on to award attorneys' fees and costs incurred as a result of the petition to confirm the award. The court based its finding on the "fee shifting" clause as being reciprocal and allowing any action arising out of a breach of the contract. Therefore, Petitioner was entitled to attorneys' fees arising out of the breach of the agreement by Respondent.

Where the agreement specifically provides for attorneys' fees and expenses incurred in proceedings other than the arbitration itself, courts have had little difficulty in awarding attorneys' fees and expenses. See for example: *Sailfrog. v. Theonramp Group, Inc*., 1998 U.S. LEXIS 23525 (Northern Dist. of Calif. 1998); *Elite, Inc. v. Texaco Panama Inc*., 777 F.Supp. 289 (S.D.N.Y. 1991); *Trans-Asiatic Oil Ltd. S.A. v. UCO Marine International Ltd*., 618 F.Supp. 132 (S.D.N.Y. 1985); *In re Arbitration Between Carina International Shipping Corp. and Adam Maritime Corp.,* 961 F.Supp. 559 (S.D.N.Y. 1997); Universal Computer Servs. v. Dealer Servs., 2003 U.S. Dist. LEXIS 12237 (E.D.N.Y. 2003).

Where the agreement is not clear or says little or nothing as to attorneys' fees to be awarded outside the arbitration proceeding, courts have had difficulty awardingQ
Q such fees.

In *Crossville Med. Oncology P.C. v. Glenwood Systems,* LLC, 2015 U.S.App. LEXIS 7313 (decision marked "NOT RECOMMENDED FOR FULL-TEXT PUBLICATION"), the Sixth Circuit found the arbitration clause did not "anticipate an award of post-arbitration attorneys' fees for subsequent proceedings and litigation." The Court referred to the Seventh Circuit decision of *Menke v. Monchecourt*, 17 F 3d 1007 (1994): "Absent statutory authorization or contractual agreement between the parties, the prevailing American Rule is that each party in federal litigation pays his own attorneys' fees." *Menke*, supra, at 1009. The Circuit Court affirmed the District Court's denial of a motion for attorneys' fees.

Courts have acknowledged, as in *Crossville*, that while the Federal Arbitration Act does not specifically grant the ability to award attorneys' fees, neither does it prohibit attorneys' fees being awarded in legal proceedings subsequent to arbitration. It seems courts, refuse to grant attorneys' fees for subsequent hearings, in cases where they are unable to find a "jurisdictional peg" on which to hang that hat.

In *Own Capital LLC v. Celebrity Suzuki of Rock Hill*, 2011 U.S. Dist. Lexis 84824, the U.S. District Court for the Eastern District of Michigan (Southern Div.) essentially said "Go back to arbitration" where the agreement referred to "all disputes" as being referred to arbitration.

It is questionable whether referring a matter back to arbitration is commercially or realistically sound. Clearly, a final award renders the arbitrator or panel functus officio. To go back to arbitration would mean the start of a completely new arbitration to consider attorneys' fees and expenses; and then what? Another motion to confirm? Back to arbitration again?

It would seem the more realistic solution to recover fees and expenses in post arbitration efforts should start with the agreement itself by way of proper provisions specifically speaking to awarding attorneys' fees and legal expenses, not only by arbitrators, but also in any other proceedings instituted subsequent to the arbitration award itself.

Obviously, such provisions in a charter party cut both ways vis-à-vis the parties. At the same time, attorneys' fees and legal expenses incurred by way of efforts to enforce or confirm an award or, on the other hand, to vacate the award, can be significant.

Lastly, and obviously, attorneys' fees and legal expenses must be requested of arbitrators or the court and substantiated if they are to be considered.

ROLE OF THE CHARTERER'S INSPECTOR

By James M. Textor, Partner, Cichanowicz, Callan, Keane, Vengrow & Textor, New York

In SMA arbitrations involving the interpretation and review of the well-known ASBATANKVOY Cleaning Clause No. 18 and the role of the retained independent cargo inspector when inspecting cargo tanks, SMA Panels have required that the cargo surveyor is experienced and in fact independent of the shipper/voyage charterer.

In Vorras Maritime Corp. v. Agrico International,[2] a voyage charter on the ASBATANKVOY form, involved a urea ammonium nitrate ("UAN") cargo to be loaded on an apparent products tanker with epoxy coated cargo tanks. As a matter of first impression, the Panel evaluated the role of the attending SGS field inspector as the Clause No. 18 "independent surveyor" when he rejected the cargo tanks

for "loose rust". The UAN FOB sales contract required that the vessel's cargo tanks would be "clean and dry, free of smell, rust scales of previous cargoes and load ready to inspector's entire satisfaction." Prior to the survey, the Charterer conveyed to SGS the FOB sales contract cargo tank requirement.

Based on his on board attendance, the SGS field inspector observed "loose rust." The SGS field inspector then asked his office if the Charterer would be willing to waive the "free of rust scales" UAN sales contract requirement. The Charterer refused, thereby, the vessel shifted to the anchorage and the vessel performed additional cleaning. The SGS field surveyor eventually passed the cargo tanks and the vessel loaded/discharged the UAN cargo without any contamination damage. The Owner claimed the extra cargo tank cleaning costs and demurrage at anchor for the extra cleaning time.

Pursuant to Clause No. 18, the Owner alleged that the attending SGS inspector was not "independent" as the Charterer had provided to SGS the UAN FOB sales contract cleanliness requirement resulted in "SGS rather than making the decision on its own, adopt[ing] a special standard unilaterally imposed by its principal".

The Panel stated, as follows (emphasis added):

> All witnesses who testified at the hearings agreed that, short of sandblasting the interiors of the tanks, it would have been impossible to remove all visible rust so as to make them 'rust free'. What can be removed by scraping and brushing is 'loose rust scales', i.e., particles which, either by themselves or because they contain remnants of prior cargoes, might contaminate a future cargo.
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> UAN is used as a fertilizer and its sale value can be affected if it is contaminated by other substances. On her previous voyage the VORRAS had carried naphtha, a cargo which is considered sufficiently compatible with UAN so that no special cleaning would be required to avoid contamination problems.
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> The result of having non-contaminating loose rust scales in tanks containing UAN was described in purely practical terms: If present in sufficient quantity, the rust scales could clog the discharge lines of the vessel or of the fertilizer application equipment subsequently used by farmers. Under normal circumstances, however, the heavier particles would sink by gravity to the bottom of the tank and therefore not affect the remainder of the cargo. The witnesses all agreed that determination of a tank's suitability for the carriage of UAN is ultimately a 'judgment call' as to which reasonable men might come to different conclusions.
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> The Panel has no doubt that it would be a dereliction of a Charterer's inspector's duty to allow his own judgment as to a cargo tank's suitability for loading to be usurped by instructions from the party appointing him. However, in view of the admittedly subjective judgment involved in determining that condition, we are not prepared to find such a breach on the facts of this case. Mr. Rivers, the SGS surveyor, had had considerable prior experience in the inspection of tanks for the carriage of UAN; he testified credibly that the cleanliness requirements of the Agrico sale contract reflected the same inspection standards that he applied to UAN shipments generally. Mr. Sanchez, the surveyor retained by shipowner, had no previous experience with this type of cargo. While there is admittedly a considerable degree of leeway in determining whether a particular section of a tank's interior is covered by 'loose' rust as opposed to "hard" rust, we think that Clause 18 of the charter party left this determination to the Charterer's inspector and that his on-the-spot judgment should not be overruled by arbitrators except on a clear showing that judgment was not properly exercised. Despite hearsay testimony to the contrary, we conclude that the SGS surveyor's references to a possible 'waiver' of the cleaning requirements by Agrico did not rise to that level.

For ASBATANKVOY cleaning Clause No. 18, the Panel's deference to the SGS field surveyor's on-the-spot judgment, was a matter of first impression.

In *Exmar, N.V v. Mitsubishi International Corp,.*[3] a voyage charter on the ASBATANKVOY form involving a VCM cargo contamination dispute, and the role of Saybolt as the Clause No. 18 independent surveyor for a voyage cancellation for failed cargo tanks, the Panel cited the MV VORRAS Award as authority and stated, as follows (emphasis added):

> The Panel has no doubt that it would be a dereliction of a Charterer's Inspector's duty to allow his own judgment as to a cargo tank's suitability for loading to be usurped by instructions from the

> party appointing him. However, in view of the admittedly subjective judgment involved in determining that condition, we are not prepared to find such a breach on the facts of this case. The Charterer's inspector … on-the-spot judgment should not be overruled by arbitrators except on a clear showing that that judgment was not properly exercised.
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> We agree that *Vorras* provides the controlling guidelines in this case. Thus, our task is to decide whether Exmar has, in the words of Vorras, clearly shown that Messrs. Saybolt did not properly exercise its on-the-spot judgment. For the reasons given below, we hold that Exmar has met its burden of proof.
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> First, we are troubled by the fact that rather than acting by himself, the Saybolt surveyor found it necessarily to continually consult with his supervisor and the Georgia Gulf (terminal) representative. While the discussions with the supervisor, if restricted to one or two instances, as in Vorras, might have been reasonable, the repeated and prolonged discussions between the Saybolt employees, together with the obvious deference accorded the supervisor, demonstrate that the Saybolt surveyor was not exercising "on-the-spot" judgment.
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> Even if we were to accept that the Saybolt surveyor's conversations were reasonable given the fact that the supervisor was his immediate superior within the corporate structure of Messrs. Saybolt, the presence of the Georgia Gulf representatives on occasion cannot be explained away in this fashion. The representative was not an employee of either Messrs. Saybolt or Mitsubishi, but was instead an employee of the terminal in Plaquemine where Mitsubishi's cargo was to be loaded. While it is unclear what result the representative had on the Saybolt surveyor, it seems clear, based on the record, that the net effect of his presence was to further reduce the surveyor's ability to make an independent judgment as to the events taking place around him.

The Panel found for the Owner and awarded to Owner its voyage cancellation damages and demurrage as the Panel ruled that the Saybolt field surveyor was not independent.

In *Orix Maritime Corp. v. Chemlube S.A.*,[4] a voyage charter on the ASBATANKVOY form involving a dispute for the condition of epoxy coated cargo tanks and the role of the independent cargo surveyor including a Rider Clause M-1 "Vessel to clean tanks, pumps and lines to Charterer's Surveyors' full satisfaction" and Rider Clause M-4 "Cargo to be loaded in suitable coated and/or stainless steel tanks", the Panel found the Saybolt surveyor as neither qualified nor authorized to judge the suitability/condition of the coating of the tanks. The Panel found for the Owner for its demurrage and deadweight claims.

The Panel stated, in part, as follows:

> It is the Panel majority's decision, with Mr. Forti dissenting, that the Cleaning Clauses 18 and M-1 should not be confused with Special Clause M-4, the latter being a warranty by the Owners, that the Vessel's tanks are suitably coated. In a similar manner, a vessel may be warranted as coiled, capable of heating to max 135 degrees F., capable of pumping within 24 hours or maintaining 100 psi at the rail, etc. If vessel is in breach of any one of said warranties, Owners are liable for those damages resulting from the breach. The warranty of Clause M-4 requires no reconfirmation by Charterer's inspector. Both under law and contract the Carrier is duty bound to safely carry the cargo to its destination and no inspector's approval can eliminate or lessen the Carrier's liability for safe carriage which cannot be delegated.
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> On the other hand, Clauses 18 and M-1 are the standard cleaning clauses, on the basis of which Owners bargained away their right to challenge the findings of Charterer's Surveyor, as to the cleanliness of vessel's cargo compartments based on the independence, mutual trust and respect all the parties placed on the Saybolt field inspectors. Insofar as the determination of the cleanliness of vessel's tanks is concerned, the Panel majority fully agrees with Charterers that the inspector's decision is final and it alone governs this issue.
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> The Panel majority however disagrees with Charterers, and finds that the Saybolt field inspectors were neither qualified not authorized to judge the suitability and condition of the coating of the tanks.
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> In fact, the Saybolt organization which employed the field inspectors, has a printed disclaimer in all

the tank inspection certificates, introduced into evidence in this arbitration, limiting the opinions rendered by its employees, when vessel's tanks are coated, to a statement only of the cleanliness of the coating. The disclaimer reads as follows:

If any vessel's tanks are coated, this statement of opinion covers only the cleanliness of the coating and offers no judgment regarding the suitability of the coating to protect or damage the cargo.

At Owner's request, Caleb Brett inspected the epoxy coated tanks which it found clean. Caleb Brett also noted a small coating failure in the epoxy tanks ranging from 1% to 3% in six of the tanks and 5% in one tank which however did not cause Caleb Brett sufficient concern to reject the tanks. The Caleb Brett tank inspection form has a printed disclaimer which reads as follows:

Suitability of tank coating for intended cargo must be guaranteed by vessel's owner or by suppliers of the coating.

Caleb Brett's coating disclaimer reinforces the belief of the Panel majority, that both Saybolt and Caleb Brett's field inspector's qualifications, to offer an opinion about the coating of a tank, is limited only to the cleanliness of the coating and offers no judgment regarding the suitability of the coating to protect the cargo.

Based on the Panel majority ruling that the independent cargo surveyors are not qualified nor authorized to judge cargo tank coating suitability and condition, the Panel granted Owner's claims. The Panel's discussion on the the role of the independent surveyor and his inability to inspect epoxy tank coatings likely turned very much on the particular facts of the case and it is therefore open to question whether other SMA Panels would follow this award.

In older SMA Awards involving the role of independent cargo surveyor for the determination whether ROB cargo was "liquid/pumpable" or "sediment/unpumpable" for the triggering of freight set-off Rider Clauses by Charterers for the value of pumpable ROB, the Panels were influenced in finding that surveyor were not "independent" by the fact that many of the surveying firms, especially in smaller ports had their offices located within customer petroleum terminals. In the case of Hess at its refinery in St. Croix, the independent surveyors had their offices in the terminal and Hess was their only client. Facts like these led some SMA arbitrators to find that the surveyor was not in fact independent.

In conclusion, when the shipper/charterer employs one of the well-known independent surveyor companies, i.e., Caleb Brett, SGS Redwood, Saybolt etc., and there is a dispute regarding the pre-load cargo tank cleanliness, SMA Panels will evaluate the training/expertise of the surveyor and whether in fact the attending field surveyor performed his/her duties independent of the entity which retained the surveying company. Because a petroleum surveying company claims to be "independent" does not mean the attending surveyor is in fact independent. In any subsequent arbitration proceeding, the Owner is certainly free to challenge the independence of the "independent surveyor."

1. *The Vorras,* SMA 2207 (1986)
2. *The Coral Temse*, SMA 2677 (1990)
3. *The Brage Vibeke*, SMA 3073 (1994)

ICMA HONG KONG – MAY 2015 AND COPENHAGEN SEPTEMBER 25-29, 2017[1]

By David Martowski, SMA Member, Governor, and Former President

By way of background, ICMA was launched in 1972 by its founding father, Cedric Barclay, President of the London Maritime Arbitrators' Association. He and fellow London arbitrators Clifford Clark and Donald Davies, the Presidents of the New York SMA and Paris Chambre Arbitrale Maritime, were attending a meeting of international commercial arbitrators in Moscow. They were invited by Soviet maritime arbitrators to informally discuss maritime arbitration and as it turned out, this constituted ICMA's first meeting.

The idea soon spread and through the support of Cedric Barclay's contacts in the Greek shipping community, the next Congress held in Athens in 1974 was attended by international maritime arbitrators, lawyers and shipping executives from twenty nations. ICMA Congresses followed over the years in Santa Margarita, London (twice), New York (twice), Monte Carlo, Casablanca, Madrid, Hamburg (twice), Vancouver (twice), Hong Kong (twice), Paris, Auckland and Singapore.

These meetings provide an unusual opportunity for delegates to deliver papers and discuss a variety of timely subjects and issues involving international maritime arbitration and presentation of the Cedric Barclay Memorial Lecture in honor of ICMA's founding father.

Our common interest in resolving disputes in the most global of industries and the papers and discussions that follow transcend national and political issues, often paving the way for more uniformity .

Most recently, ICMA XIX was held in Hong Kong this past May which was a great success attended by more than 200 representatives from the international shipping community. Lord Phillips of Worth Matravers, former President of the Supreme Court of the United Kingdom, presented the Cedric Barclay Memorial Lecture and the event included over 120 papers and a mock arbitration.

ICMA is run by a permanent Steering Committee consisting of one member each from London, New York, the immediate past host and the coming venue. I currently chair the Committee with my colleagues Clive Aston, President of the London Maritime Arbitrators' Association; Philip Yang of Hong Kong, immediate past Topics and Agenda Committee Chair of that Congress; and Peter Schaumburg-Muller of Copenhagen, the location of the next Congress in 2017.

The Steering Committee's main functions are to determine the venue for the next ICMA; appoint a chairperson for the Topics and Agenda Committee for each ICMA; and to select the next speaker for the Cedric Barclay Memorial Lecture.

The next XX ICMA Congress which will be held in Copenhagen on September 25-29, 2017 promises to be another spectacular event.

The Steering Committee extends a most cordial invitation for you to mark your calendars now and hopes you will join us in Copenhagen.

Friends and Supporters

The Friends and Supporters program is off to a great start. In addition to those listed in the April issue, the following firms have contributed $1250 as corporate members:

Skuld North America
Chalos & Co
Hill Rivkins
Holland & Knight

In addition, numerous individuals have contributed $300. The SMA is grateful for the support received and looks forward to adding to the list in the next issue. These tax deductible contributions are placed into a dedicated account, the 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. Please send your check to the SMA office, with the notation "Friends and Supporters."

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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1. Thanks to Manfred Arnold for providing the background.

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