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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENTS' CORNERS

By: Jack Warfield

On May 9th of this year at the Society of Maritime Arbitrator's Annual General Meeting Robert Shaw was elected as our new president. I am very pleased that Robert has stepped up to take on the mantle of leadership of the SMA. As many of you know, Robert is a most impressive individual both professionally and personally. I was most fortunate to have had Robert as my Vice President these past two years. The SMA will be in very good hands!

This is an exciting time for the SMA with many new initiatives in various phases of development, but first I would like to reflect a bit on the past four years.

I had the highs of our 50th Anniversary celebration at the New York Yacht Club, the New York & London Perception and Reality seminar at the Harvard Club, the honor of representing the SMA at the BIMCO AGM in Dubai, and the "7 Days in May" mock arbitration production during MLA week and the lows of the loss of our Board of Governor Robert Flynn, the loss of our office lease downtown, the suspension of our tax exempt status, and myriad difficulties caused by our absentee accounting firm. I believe overcoming these obstacles did make the SMA stronger and more resolute – the expression that problems are just unsolved opportunities proved true for us.

What has been most gratifying is the new energy I feel in the organization. Like the baseball Yankees, we have a great balance of good seasoned longtime members with new enthusiastic members. I look at the initiatives by Dick Corwin's Marketing Committee, the work being done by Charlie Anderson's Friends and Supporters Committee to raise the funds to support our marketing efforts, the inroads being made by the new Insurance Committee under the leadership pf Michael Northmore, and the expansion of our

brand and offerings with the new Mediation Committee lead by Mike Fackler.

There are many people to thank for growing and strengthening our organization these last few years. I look at the new verve Molly McCafferty has brought to the Luncheon program, now a must attend event, and owe a special thanks to Rich Decker for stepping in when asked to take over the redesign and update of our Website. Then there is LeRoy Lambert who took over as Editor of the Arbitrator as well as being a key member of F&S. My predecessor, past President Austin Dooley couldn't stay away – he stepped in to Chair the Education Committee and has greatly broadened the offerings for new and prospective members. Likewise Jack Ring took over as Membership Committee Chair and has greatly streamlined the new member procedure.

And I do not overlook my Board of Governors for their continued support, counsel, and wisdom and my key officers Secretary Soren Wolmar who keeps us all organized and informed and Bob Meehan as Treasurer who has done a major overhaul of our financial reporting as well as oversight of the integration with our new accountants

Finally, I just want to thank the membership for allowing me the honor and privilege of being your president.

By: Robert G. Shaw

I am grateful for the opportunity to serve the SMA as its president.

THE ARBITRATOR

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I would like to thank my immediate predecessor, Jack Warfield, for his leadership. Jack has made many contributions to the organization. I look forward to the new officers and board building on the steps taken during Jack's presidency to secure the SMA's future as a leading international arbitral and mediation provider.

I am sorry to advise you of the death of Joseph Winer on March 6, 2017. Before beginning his career in ship management, Joe sailed in various positions including as a Chief Engineer. He had many professional engineering degrees and qualifications, and was a Vice-President of American President Lines. He was an SMA member for more than 35 years. He was an active arbitrator, energetic consultant in marine engineering and a good friend to many SMA members. We will miss him and extend our condolences to his family.

[**Editors' Note**: For many users of maritime and commercial arbitration, "finality" of an arbitration award is a key virtue and the issuance of the award ends the dispute. Not always, however, as the next four articles show.]

ENFORCEMENT OF FOREIGN JUDGMENTS AND FOREIGN ARBITRAL AWARDS IN THE UNITED STATES

By: William R. Bennett III, Partner, and Lauren B. Wilgus, Associate, Blank Rome LLP, New York

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Our clients regularly seek our assistance in recovering foreign arbitral awards and foreign judgments from debtors and/or their alleged alter egos in the United States. Each case has its unique facts that dictate the level of effort that we must make to bring about a successful outcome. For example, obtaining a recovery from an alleged alter ego may require a Rule B attachment followed by significant factual discovery; while obtaining a recovery from a debtor

with assets and business connections in the United States may require less effort. Regardless of the facts that may be unique to each matter, the basic framework to seek a recovery, discussed herein below, is the same.

The United States has been a signatory of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") since 1970; however, it is not currently party to any international treaty for the recognition of foreign judgments. Unlike foreign arbitral awards, which are governed by the New York Convention, no treaty outlines the circumstances under which U.S. courts may recognize foreign judgments. In the United States, for instance, only the principle of comity, the common law, and individual states' laws allow U.S. courts to recognize and enforce foreign judgments.

Is Personal Jurisdiction Required in New York?

Foreign Judgments

As a preliminary matter, it is important to distinguish between "recognition" and "enforcement" of foreign judgments. To "recognize" a foreign judgment is in essence to domesticate it, thus making it equal to any other U.S. court judgment. "Enforcement" of a judgment requires the aid of the courts, which, depending on the facts of the case, may or may not be afforded along with recognition of the judgment.

In the United States, a foreign judgment cannot be directly enforced without a prior court action "recognizing" that judgment as a domestic one. The procedure for gaining recognition and enforcement of a foreign judgment first requires the judgment creditor to bring an action against the debtor in a U.S. court. For maritime cases, U.S. admiralty courts have jurisdiction over the enforcement of judgments of foreign admiralty courts. For non-maritime cases, the judgment creditor would proceed under state law. In either case, state law controls the question of enforceability of the foreign judgment. In New York, for example, the Uniform Foreign Money-Judgments Recognition Act applies under C.P.L.R. Article 53. As the New York Court of Appeals has explained:

> Article 53 was designed to codify and clarify existing case law on the subject and, more importantly, to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here.

Article 53 sets forth substantive requirements that must be met before a foreign money judgment will be recognized in New York. Those primarily concern whether the foreign country's court had personal jurisdiction over the judgment debtor and subject matter jurisdiction over the case; whether it was an impartial tribunal utilizing procedures compatible with due process of law; and whether enforcing the foreign country money judgment would be unfair, work a fraud, or violate New York's public policy.

Notably, in New York, "a party seeking recognition of a foreign money judgment need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts."

Foreign Arbitral Awards

When a party seeks confirmation of an arbitral award under the New York Convention, "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." These grounds are very narrow and go to the fairness of the proceedings rather than the correctness of the outcome, which is generally unappealable.

In contrast to enforcement of foreign judgments, most courts in the United States require personal jurisdiction over the defendant in order to enforce a foreign arbitral award. Thus, a movant must establish the requisite jurisdiction by asserting either traditional personal jurisdiction over the defendant based upon its contacts with the jurisdiction or *quasi in rem* jurisdiction over the defendant's property.

To establish *quasi in rem* jurisdiction, a movant must: 1) identify specific property over which the court has jurisdiction; and 2) demonstrate that the exercise of jurisdiction will not offend due process. In order to adequately identify specific property, the movant must "point to [] specific assets of [defendant's] within the jurisdiction." In other words, "the *sine qua non* of basing jurisdiction on defendant's assets in the forum is the identification of some asset."

A movant may also establish a basis for jurisdiction over a defendant under Fed. R. Civ. P 4(k)(2), which provides:

> For a claim that arises under federal law, a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.

Under this provision, a defendant sued under federal law may be subject to jurisdiction based on its contacts with the United States as a whole, when the defendant is not subject to personal jurisdiction in any state.

Can a Petitioner Enforce a Foreign Arbitral Award or Judgment against a Debtor's Alter Ego in New York?

Enforcement of a Foreign Arbitral Award against Alter Egos

In *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama, S.A.*, 312 F.2d 299 (2d Cir. 1963), the U.S. District Court for the Second Circuit, which includes New York, indicated that a proceeding to confirm an arbitral award against a corporation is not an appropriate occasion to determine whether another party is liable under an alter ego theory. In *Orion*, the petitioner sought to hold a parent entity liable for an arbitration award entered against a subsidiary, claiming the parent was the alter ego of the subsidiary "shell" company. In explaining why such a determination should not be made in the context of a confirmation action, the Second Circuit explained:

> This [confirmation] action is one where the judge's powers are narrowly circumscribed and best exercised with expedition. It would unduly complicate and protract the proceeding were the court to be confronted with a potentially voluminous record setting out details of the corporate relationship between a party bound by an arbitration award and its purported 'alter ego.'

There are two exceptions to *Orion* that limit its reach. The first applies where "the complaint specifies two grounds for subject matter jurisdiction," such that the enforcement action can "be construed as a separate action [from the confirmation action] to enforce the arbitration award against nonparties to the arbitration."

The second exception to *Orion* applies where "a claim of piercing the corporate veil . . . would not unduly complicate the action of the court with respect to the arbitration award." The Second Circuit has approved of this exception in a limited circumstance—where the determination to be made is whether a nonparty to the arbitration is the successor to the arbitration party.

Accordingly, unless a movant can establish one of the *Orion* factors applies, a New York court will likely not allow a movant to confirm an arbitral award and enforce it against alleged alter egos in the same proceeding.

Enforcement of a Foreign Judgment against Alter Egos

Alternatively, in New York, parties that are **alter egos** of each other may be treated as one and the same for the purpose of enforcing a judgment. In New York, the law is well-established that if defendants are found to be alter egos of each other, then jurisdictional contacts of each entity will be imputed by law upon the others.

Alter Ego Jurisdiction

New York courts will find that an alleged **alter ego** is doing business in New York "when the subsidiary is acting as an agent for the parent, or when the parent's control is so complete that the subsidiary is a 'mere department' of the parent." Determining whether an entity is a "mere department" requires "a fact-specific inquiry into the realities of the actual relationship between the parent and subsidiary." In particular, a court must consider:

> (1) common ownership, (2) financial dependency of the subsidiary on the parent corporation, (3) the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities, and (4) the degree of control over the marketing and operational policies exercised by the parent.

Conclusion

The procedural steps that are required to obtain a recovery of a foreign arbitral award or foreign judgment are not overly complex. However, the efforts to make a successful recovery from a judgment debtor can be quite significant, especially if the judgment debtor has stopped doing busi-

ness, is insolvent, or has no assets to attach; which is often the reason why our clients seek our services to recover on the foreign arbitral award or foreign judgment. Those matters often require patience, team work, and ingenuity to bring about a successful result.

PEMEX AND US ENFORCEMENT OF FOREIGN ARBITRATION AWARDS NULLIFIED IN THEIR "HOME" COURTS

By: Julie Bédard, Lea Haber Kuck, Timothy G. Nelson (New York), Partners, Skadden, Arps, Slate, Meagher & Flom LLP

[This article originally appeared in Skadden Arps "Insight" www.skadden.com/insights/pemex-and-us-enforcement-foreign-arbitration-awards-nullified-their-home-courts and is reprinted here with permission.]

One of the benefits of using arbitration to resolve international disputes is the availability of worldwide mechanisms to enforce an arbitral award. For example, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention) state that a "winning" party may take an award rendered in a signatory country and enforce it in the courts of any other signatory country where the losing party's assets are located. Moreover, these treaties provide only very narrow grounds upon which a court may refuse enforcement of a foreign award. Such grounds include violation of fundamental due process, the absence of an arbitration agreement or a breach of international public policy.

The New York Convention also empowers a court to decline enforcement of an award that had been "set aside ... by a competent authority of the country in which, or under the law of which, that award was made." The Panama Convention has a similar provision. A "set aside" sometimes occurs where the "losing" party resided in the country where the award was made and/or was affiliated with that country's government and persuaded its own local courts to annul the award, leading to claims that it used its "home court advantage."

Historically, the attitude of U.S. courts toward foreign set-aside decisions has varied. Several courts have taken the view that, where an award was annulled in the place where arbitration occurred, the award can no longer be enforced in the United States. A few U.S. decisions have taken a different view. In 2016, in *COMMISA v. PEMEX*, the U.S. Court of Appeals for the Second Circuit held that, under the right circumstances, U.S. courts may enforce international arbitration awards even when foreign jurisdictions annul them.

Enforcement in US Courts

PEMEX arose from a dispute between private enterprise COMMISA, a Mexican subsidiary of the Texas-based corporation KBR Inc., and state-owned Mexican petroleum company PEMEX concerning two contracts to build oil platforms in the Gulf of Mexico. Those contracts provided for arbitration of disputes in Mexico. In 2009, an arbitral tribunal awarded COMMISA over $350 million in damages for breach of the construction contracts. In 2011, however, a Mexican court set aside the award, on the grounds that Mexican administrative law did not permit arbitration of claims against a state instrumentality.

Undeterred, COMMISA sought enforcement of the award in U.S. courts. In 2013, a New York federal judge held that the award should be enforced because the Mexican court judgment had offended "basic notions of justice" by retroactively applying administrative laws in such a manner that rendered the case nonarbitrable. The Second Circuit affirmed the lower court's decision on August 2, 2016.

The Second Circuit's ruling is in sharp contrast with previous rulings on the issue, including in *TermoRio S.A. E.S.P. v. Electranta S.P.* (D.C. Cir. 2007), in which the U.S. Court of Appeals for the District of Columbia Circuit held that, absent "extraordinary circumstances," awards that were set aside by the courts of the country in which they were made should not be enforced in the United States. That case involved annulment by the Colombian courts of an international arbitration award rendered in that country.

Several recent U.S. decisions have followed the *TermoRio* approach. In *Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Rep.* (S.D.N.Y. 2014), a New York federal court denied enforcement of an arbitration award rendered in Kuala Lumpur that was subsequently set aside by Malaysian courts. And in Getma

Int'l v. Rep. of Guinea (June 9, 2016), the U.S. District Court for the District of Columbia denied enforcement of an award rendered by a regional West African arbitral tribunal that had been set aside by Ivory Coast courts on the grounds that the arbitrators allegedly were paid above ordinary scale.

In *PEMEX*, the Second Circuit held that under the Panama Convention's enforcement framework, a U.S. court "must enforce an arbitral award rendered abroad unless a litigant satisfies one of the seven enumerated defenses [in Article V of the Convention]; if one of the defenses is established, the district court may choose to refuse recognition of the award" (emphasis in original). Here, one of those defenses was established, prima facie, because the award had been set aside in the courts of the place in which it was made.

Although the Panama Convention provided "discretion" as to whether to give effect to the Mexican court's ruling, the Second Circuit held that this discretion "is constrained by the prudential concern of international comity," which treats the judgment of a foreign court as conclusive "unless ... the enforcement of the foreign judgment would offend the public policy of the state in which enforcement is sought — which requires the US court to analyze whether the foreign set-aside decision violated fundamental notions of what is decent and what is just" (citation and internal quotations omitted; emphasis in original).

The Second Circuit held that the Mexican court's decision in setting aside the award violated these principles. In particular, it found that: (1) the Mexican court had allowed an "eleventh hour" sovereign immunity defense to succeed, even though PEMEX had not timely raised this defense during the arbitration; this "shattered" COMMISA's "investment-backed expectation in contracting" and "impair[ed]" a "core" precept of contract law; (2) the Mexican court's decision allowed Mexico's statutes to be enforced on a "retroactive" basis so as to shield PEMEX from arbitration; (3) the set-aside decision deprived COMMISA of any effective forum for seeking relief; and (4) the net effect of the decision was to expropriate assets, without compensation. Thus, the lower court's decision affirming the award, and entering judgment against PEMEX, was affirmed.

IMPORTANT SECOND CIRCUIT DECISION ON ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARD

By: Laurence Shore (New York), Partner, and Conor Doyle (New York), Associate, Herbert Smith Freehills New York LLP

[This article originally appeared in Herbert Smith Freehills' "Arbitration Blog" www.hsfnotes.com/arbitration / www.hsfnotes.com/arbitration/2017/03/21/important-second-circuit-decision-on-enforcement-of-international-arbitration-awards and is reprinted here with permission.]

In a significant recent judgment, *CBF Industria De Gusa S/A v. AMCI Holdings, Inc.* (2d Cir. 2017), the influential U.S. Court of Appeals for the Second Circuit (the Second Circuit) considered an arbitral award's preclusive effects and its ability to bind third parties. In the same decision, the Second Circuit also issued valuable guidance to the lower courts on the correct procedure and terminology for the enforcement of New York Convention awards issued abroad.

The Second Circuit handed down its initial opinion in January. However, in a rare move, the Court released a revised opinion earlier this month [March, 2017] to "correct" its conclusion on a point of law in the first opinion. This post, unlike much of the online commentary of AMCI Holdings, refers exclusively to the Second Circuit's later opinion.

Background

The appellants, a group of Brazilian companies (collectively, CBF) entered into a series of contracts with Primetrade AG, a Swiss company, for the purchase and sale of pig iron. After a deadly shipping accident in 2005, Primetrade transferred its assets, including the contracts with CBF, to another Swiss Company (SBT), which "began operating with the same officers and directors as Primetrade AG and at the same offices."

In 2007, a company called AMCI International Gmb (AMCI) acquired SBT and its U.S. subsidiary. The following year, CBF entered into additional purchase and sale contracts with SBT (the Contracts), that notably did not purport to bind any assigns or successors-in-interest. The

Contracts each contained an agreement providing for ICC arbitration in Paris.

In 2008, as commodity prices fell by as much as a third, SBT defaulted on its purchase obligations under the Contracts. CBF submitted the resulting dispute to an ICC arbitration in November 2009 (the Arbitration). CBF later alleged that SBT stalled the Arbitration proceedings in their infancy while it fraudulently transferred its assets to a shell company formed and operated by the principals of SBT (Prime Carbon). In April 2010, SBT, by then virtually asset-less, filed for bankruptcy in Switzerland.

In March 2011, SBT's bankruptcy administrator informed the ICC tribunal that the company had insufficient funds to participate in the Arbitration and conceded CBF's claims against the company. In November 2011, the tribunal issued a final award in favor of CBF for the amount of $48 million plus interest and costs (the Award). The Award did not grant relief reaching the assets of Prime Carbon or any other third party, as the tribunal held that CBF "did not introduce sufficient evidence . . . to demonstrate the existence of fraud in the bankruptcy proceedings."

SDNY Enforcement Action

In April 2013, CBF commenced an action in the U.S. District Court for the Southern District of New York against various individuals and corporate entities alleged to be the "alter egos" and "successors in interest" of SBT (the Appellees). In the ensuing proceedings (the Enforcement Action), CBF sought both to enforce the Award and to assert various state law fraud claims relating to the underlying dispute.

The District Court dismissed the Enforcement Action, in relevant part, because: (i) the Award had not been first confirmed by a court of competent jurisdiction; and (ii) the fraud claims were barred by the doctrine of issue preclusion (sometimes called "collateral estoppel") because the ICC tribunal had denied similar claims asserted in the Arbitration.

The Second Circuit Reverses

On appeal, the Second Circuit vacated the District Court's judgment on two grounds: (i) the lower court erred by requiring an award debtor to bring a confirmation action at the seat prior to enforcement in a secondary jurisdiction; (ii) CBF's fraud claims were not barred by the doctrine of collateral estoppel. The Court's analysis is devoted in large part to three matters of considerable interest and import for practitioners:

1. No Requirement to Confirm Award at Seat, and Other Guidance to Lower Courts

The Second Circuit identified and reversed the obvious and puzzling error behind the District Court's refusal to enforce a foreign arbitral award for failure to achieve confirmation at the seat. The Second Circuit explained that the New York Convention was devised largely to "eradicate" the old double exequatur requirement, which mandated confirmation at the seat as a precondition to the enforcement of arbitral awards abroad. Under the Convention, as implemented by Chapter Two of the Federal Arbitration Act, CBF needed only to commence a summary, single-step proceeding to achieve recognition and enforcement of the Award in a U.S. court. Accordingly, the District Court had erred by requiring confirmation at the seat as a condition of enforcement.

However, recognizing persistent "confusion" in the area, the Second Circuit used the opportunity to clarify "the components of and process for [the enforcement of] a nondomestic arbitral award." The Court's efforts are valuable in three respects. First, it provides a useful summary of the differences between domestic, nondomestic, and foreign awards and the varying extent courts' oversight with respect to each category. Second, the Court clarified that the meaning of "confirmation" under Chapter Two of the FAA is co-extensive with "recognition and enforcement" under the New York Convention. This is distinct from the meaning of "confirmation" under Chapter One of the FAA, which denotes the process whereby a U.S. court converts an award over which it has primary jurisdiction into a judgment of its own. Third, in summarizing these first principles, the Court referred extensively to the draft Restatement (Third) of the U.S. Law of International Commercial Arbitration. This is an important signal that, at least in the Second Circuit, the forthcoming Restatement will achieve its desired status as a highly-persuasive authority in the field of international arbitration.

2. Law of the Enforcing Forum Determines Award's Veil-Piercing Effects

Appellees were not named in the Award, a fact giving rise to difficult questions of veil-piercing at the enforcement stage. The Second Circuit confirmed that the enforcement of a New York Convention award against

purported affiliates or alter egos of the respondent falls to be decided under the law of the secondary jurisdiction. Accordingly, the liability of Appellees for satisfaction of the Award would be determined under the applicable law in the Southern District of New York. The Second Circuit remanded the case back to the District Court for further legal and factual inquiries on the question of veil-piercing and alter ego liability.

3. Issue Preclusion Limited by Fraud Accusations

It is well settled that the doctrine of issue preclusion is applicable to issues resolved by a prior arbitration. However, the doctrine's application is not automatic and is constrained by principles of equity. Here, CBF claimed that it was denied a full and fair opportunity to litigate the fraud claims before the ICC Tribunal (a traditional requirement of issue preclusion) because the Appellees deliberately misled the Tribunal as to the extent of their fraud. Accordingly, the Second Circuit held that the grant of issue preclusion was inappropriate and that CBF should be afforded the opportunity to conduct discovery on its fraud claims.

Conclusion

Although the case did not break any new legal ground, *AMCI Holdings* contains notable learning on two important questions in the field of international arbitration. First, drawing heavily from the draft Restatement, the Second Circuit set forth its preferred analytical framework for the enforcement of international arbitration awards. Award creditors contemplating enforcement actions in the New York federal courts would thus do well to appreciate the distinctions between domestic, nondomestic, and foreign arbitral awards. Second, the case illuminates an important limit on the application of issue preclusion to arbitration awards: due to principles of equity, the doctrine does not automatically apply where the prior award is alleged to be tainted by the invoking party's fraud.

[**Editors' note:** Readers finding the above article concerning *CBF Industria De Gusa S/A v. AMCI Holdings, Inc.* (2d Cir. 2017) of interest may wish to read an "Insight" article from Hill Dickinson LLP (London) concerning *Sinocore International Co Ltd -v- RBRG Trading (UK) Ltd* [2017] EWHC 251 (Comm) concerning enforcement of a foreign arbitral award in the U.K. wherein "the High Court considered the grounds for refusing to enforce an award under the New York Convention on the basis of public policy. In this instance, the defendant argued that the original arbitration claim was based on fraudulent bills of lading and the award should not therefore be enforceable." See http://www.hilldickinson.com/insights/articles/sinocore-international-co-ltd-v-rbrg-trading-uk-ltd-2017-ewhc-251-comm.]

VACATING AN ARBITRATION AWARD REMAINS DIFFICULT

By: Vincent DeOrchis (New York), Partner, Montgomery McCracken Walker & Rhoads,LLP

[This article originally appeared in the Montgomery McCracken Walker & Rhoads,LLP "Alerts and Resources" www.mmwr.com/alert-resource/vacating-arbitration-award-remains-difficult/ and is reprinted here with permission.]

ICC Chemical Corp. v. Nordic Tankers Trading A/S

The issue of whether an arbitration award in the U.S. can be set aside because the arbitrators were in "manifest disregard of the law" has been pulled along in the wake of recent case law, in spite of the U.S. Supreme Court's 2008 decision in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), which suggested that the principle of "manifest disregard of the law" was dead. In a very recent published opinion from the federal court in New York, titled *I.C.C. Chemical Corp. v. Nordic Tankers Trading,* the lower court was confronted with a motion to vacate an arbitration award based on manifest disregard. The federal judge rejected the application, finding that the arbitrators had not been in manifest disregard of the law when they held that a that a shipowner was not liable for 36 tons of contaminated foot samples of Paraxylene that were tested three times and failed each time for being off spec, at which point the charterers cancelled the charter.

The federal judge noted that the majority of the Panel was justified in their conclusion because the majority had found that the Charterer failed to conduct the necessary tests to determine if the product was contaminated before loading. The majority was also critical of the inspector's procedures.

Charterer sought to vacate the award for manifest disregard of the law because the Panel did not require the shipowner to first prove due diligence to make the vessel seaworthy. The federal judge disagreed, holding that the Panel did make a finding that the Owner made every effort possible to present a clean and suitable vessel, and that the burden was on Charterer, as the shipper, to show the cargo was fit.

The judge confirmed that seeking vacatur of an arbitrator's decision must clear a "high hurdle." More importantly, the district court noted that an arbitrator's rationale for an award need not be explained, and the award will be confirmed so long as the grounds can simply be inferred from the facts in the case. "Only a barely colorable justification for the outcome reached by the arbitrators is necessary to confirm an award."

The district court also accepted as a general principle that, "where a dispute centers on contaminated cargo, the shipping party bears the burden of showing its cargo was not contaminated prior to loading; however, where the dispute regards fitness of a vessel, the burden is on the vessel owner to show its due diligence in presenting a fit vessel.

ST Shipping & Transport PTE, Ltd. v. Agathonissos Special Maritime Enterprise

The *ICC Chemical Corp.* decision was followed a month later by the decision in *ST Shipping & Transport PTE, Ltd v. Agathonissos Special Maritime*, in which another Charterer, *ST Shipping*, sought to vacate an award in favor of an Owner for demurrage following delays from a collision. The Charterer complained that the Panel made a decision although they had "incomplete discovery and evidence on the record" as to whether the delays were in fact attributable to the collision.

The federal judge, citing the "high bar" needed to vacate an arbitration award, noted that "only the most egregious error which adversely affects the rights of the party constitutes misconduct" to support vacatur, and that even" erroneous exclusion of evidence does not provide a basis to set aside an award absent harm to the moving party." Indeed, the federal judge went on to note that the Panel did not refuse the evidence, but rather *ST Shipping* never offered any evidence, nor did *ST Shipping* ever request an opportunity to cross examine the other side's witness or even object to their testimony. Given the fact that an SMA Panel can hear evidence solely on the documents submitted, an arbitration panel has no obligation to provide a hearing.

In conclusion, while American law does permit some very limited grounds for vacating an arbitration award, pursuing such an argument on the basis that the Panel was in "manifest disregard of the law" requires a very tough and high standard of demonstrating that the Panel did not just make a mistake or committed misconduct. The moving party must demonstrate that the misconduct amounted to "a denial of fundamental fairness of the arbitration proceeding," which federal judges were very cautious in determining.

ENGLISH COURT SAYS HAGUE RULES "UNIT" DOES NOT INCLUDE BULK CARGO

By: Michael J. Ryan, Esq., Of Counsel, Hill Betts & Nash, New York

On October 14, 2016, Judge Sir Jeremy Cooke (sitting as a Judge of the High Court) rendered his decision on the issue of whether the term "unit," as contained in The Hague Rules of 1924, included bulk cargo. The Honorable Sir Jeremy Cooke held that it did not. *Vinnlustodin HF v. Sea Tank Shipping AS (The Aqasia)* [2016] EWHC 2514 (Comm); [2016] Lloyd's Rep. Plus 75).

The case involved a claim for damage to a cargo of fish oil carried onboard a tanker vessel pursuant to a charter party on the "London Form" (an older tanker voyage charter form which has been replaced in common usage by Intertankvoy 76). The "London Form" provided, in Clause 26, "The Owners in all matters arising under this Contract shall also be entitled to the like privileges and rights and immunities as are contained in Sections 2 and 5 of the Carriage of Goods by Sea Act 1924 and in Article IV of the Schedule thereto…"

Article IV, R.5 of the Hague Rules provides "...Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper and inserted in the bill of lading…."

The charter party provided for the carriage of some 2,000 tons of fish oil in bulk (5% more or less in charterer's option) from Iceland to Norway. The vessel sailed to Norway and loaded a further cargo of fish oil, part of which was loaded into three tanks with fish oil loaded at Iceland. On arrival at the discharge port, some 547.309 metric tons of the cargo loaded into the same tanks were found damaged.

Claim was made by the owner of the cargo as well as its underwriter ("out of an abundance of caution"). Although the matter was subject to arbitration, the parties agreed that the Commercial Court should have jurisdiction to determine a preliminary "Limitation Issue."

The disponent-owner/defendant claimed it was entitled to limit liability to the sum of £54,730.90 (i.e., to £100 per metric ton of cargo damage pursuant to Article IV Rule 5 of the Hague Rules). Cargo claimants took the position that no limitation applied and the value of the goods lost was $367,836.

Some 92 years earlier, the Hague Rules were instituted in 1924. They were the result of efforts to attain international uniformity with respect to bills of lading issued in maritime commerce.

Charter parties were specifically excluded; however, provision was made that the Rules would apply to any bill of lading issued… "under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same" (Hague Rules, Article I(b)).

Article V of the Hague Rules also provides (in pertinent part):

> The provisions of this Convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this Convention….

The Hague Rules also provide for a limitation of £100 to any "package or unit."

Some 12 years after the Hague Rules were instituted, the United States Carriage of Goods by Sea Act (COGSA) was passed; however, it passed with some modifications. £100 became $500 and "package or unit" became "… for goods not shipped in packages, per customary freight unit." This latter modification was stated by the US State Department to represent merely a "clarification" with respect to the Hague Rules, and did not constitute any change in substance; in other words, essentially the same as "per package or unit."

So much for that.

In the United States, under decisional law, the term "customary freight unit" ultimately came to be the unit used with respect to calculating the freight charged.

The term "customary" went by the wayside, particularly in the Second Circuit Court of Appeals which considered "customary freight unit" to mean the "unit used to describe the freight, looking at the bill of lading and tariff, regardless of how the ultimate freight may have been calculated." As an example, this led to a lump sum freight (although calculated on metric tons) becoming the unit, limiting recovery on a bulk shipment of peanut oil to $500 based upon the lump-sum charged. *E.g.*, *Vigilant Ins. Co. v. M/T Clipper Legacy*, 656 F.Supp.2d 352 (S.D.N.Y. 2009).

Decisions in Canada, Australia, and New Zealand took the term "unit" to apply to a "shipping unit" which they understood to be a "physical unit of goods" (as opposed to a unit of measurement). *See*, *e.g.*, *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.*, 1974 S.C.R. 933; 2 Lloyd's Rep. 469, 475 (Can. 1973).)

In 1968, the Visby Amendments were passed which made certain modifications to the Hague Rules, resulting in the "Hague-Visby Rules." Of particular significance, the limitation set forth in Hague for "package or unit" was modified to read (in relevant part):

> Unless the nature and value of such goods had been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or two units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher.

In *The Aqasia*, the Honorable Sir Jeremy Cooke stated this to mean (emphasis added): "The…latter Convention (the Hague-Visby Rules) provided for limitation 'per package or unit or per kilogram of gross weight of the goods lost or damaged,' <u>which undoubtedly means that bulk cargoes can be subject to limitation (by reference to the weight of the lost or damaged goods) as well as individual packages or objects</u>."

The United States chose not to adopt the Hague-Visby Rules.

It is submitted that the term "freight" can mean either the goods themselves which are being transported, or the amount charged or paid for such transportation. *See*, *e.g.*, definition of "freight" in English/Oxford Dictionaries; definition of "freight" by Merriam-Webster Dictionary; definition of "freight" in the Cambridge English Dictionary (extracted from Google).

If the Department of State was correct in 1936, the term "customary freight unit" should actually be taken as the shipping unit of the goods themselves, as opposed to emanating from the calculation or statement of freight charged. Be that as it may, it is most unlikely (indeed, remote) that at this point in time, there will be any change of significance to the meaning of the term "customary freight unit" in COGSA as now rendered in the decisional law of the United States.

The Rotterdam Rules contain a provision somewhat similar to the Hague-Visby Rules concerning limitation on cargo or goods; however, while the Rotterdam Rules have been signed by the United States, they have only been ratified by three nations thus far, and the United States is not one of them. As stated before, the United States did not take up the Hague-Visby Amendments.

Thus, a bulk cargo, depending upon the voyage and ports involved, could face the issue of a limitation being based upon weight (Hague-Visby); or the unit as stated to be the amount of freight "charged" (U.S. COGSA: lump sum, metric ton, etc.), or none at all (given the *Aqasia* holding that the Hague Rules unit limitation is not applicable to bulk cargo).

So much for uniformity!

As indicated previously, it is submitted the issue of what should constitute a "unit" has a basis for question. However, it would be most unlikely for the right case with the right facts to arise whereby a party would now take the issue up for clarification. Likewise, proper treatment of the issue would involve more than the space for the present article allows.

Statistically, vessels dedicated to the carriage of bulk cargo (to include grain, ore, coal, oil, chemicals, etc.) represent the majority of the total tonnage carrying commodities by water. It would seem to be safe to say that the international carriage of goods by water involves bulk shipments more than any other type of commodity.

In the *Aqasia*, the disponent-owner (carrier) sought some protection by reference and incorporation of certain Hague Rules ("Sections 2 and 5"). The successor form (Intertankvoy 76) contains a similar provision that is somewhat more expansive to include the Hague Rules in toto. It also includes the United States Carriage of Goods by Sea Act, where applicable, but essentially the application of COGSA would likely mean application of the current interpretation of "customary freight unit" as relating to freight charges, which, could favor the carrier (considering a lump sum freight). Under the Hague Rules, per the *Aqasia* decision, there would be no limitation for bulk cargo.

It is submitted the purpose of the Hague Rules initially was to reach uniformity so far as possible and they were the result of negotiated efforts on the part of all sides to come up with a set of rules which were acceptable to all.

What to do?

The Hague Rules, COGSA, and the Hague-Visby Rules (even the Rotterdam Rules) make exception with respect to charter parties. Obviously, if the charter includes a boiler plate form as now contained in most charter party forms by way of Clauses Paramount (where the particular regimes are also made part of the charter party), it is submitted that nothing will have changed the treatment of customary freight unit or unit. Indeed, in the instance of bills of lading being issued, particularly where a negotiable bill of lading is involved, application of the applicable regime would be mandatory.

If nothing else, the owner and the charterer should at least be aware of the bumps and depressions (perhaps mountains and valleys?) which face both.

Ponderments:

- Where no bills of lading are issued, as opposed to blanket incorporation of particular regimes (as now found in current forms), could a contractual provision be fashioned in a charter party to cover the inclusion of bulk cargoes?
- Where no bills of lading are issued, would inclusion of most of the Hague-Visby Rules as contractual provisions accomplish the same?

DECISIONS OF NOTE FROM ACROSS THE POND

By: LeRoy Lambert, SMA Member

In *Gard Marine and Energy Limited v China National Chartering Company Limited and Daiichi Chuo Kisen Kaisha (2017) (The Ocean Victory)*, the UK Supreme Court considered whether the port at Kashima, Japan, was safe. The *Ocean Victory*, a Capesize bulker, grounded and broke apart attempting to depart the port. At the time, the port was experiencing "long waves" as well as severe northerly gales. The issue was whether the combination of these two events was an "abnormal occurrence." The High Court found it was normal, the Court of Appeal found it was not, and the Supreme Court agreed and found it was, with the result that the charterer was held not to have breached the warranty. While long waves and severe northerly gales often occurred individually, it was "abnormal" for the two phenomena to occur at the same time.

In *Navalmar UK Limited v Kale Made Hammadeeler Sanayi Ve Ticart AS [2017] EWHC 116 (Comm) (The Arundel Castle)*, the charter party recap provided that NOR could be tendered "on vessel's arrival at load/disch ports within port limits." The ship arrived off Krishnapatnam, India. Due to congestion, the port authority directed the vessel to anchor outside the port limits and wait. Clause 6(c) of the Gencon form allows NOR to be tendered "at or off the port," and the definition in Laytime Definitions for Charterparties includes "places outside the legal, fiscal or administrative area where vessels are ordered to wait for their turn no matter the distance from that area." The London arbitrators had to decide whether "within port limits" in the recap took the case outside the holding in *The Johanna Oldendorff*, where the court emphasized that "the port" included wherever the local port authority exercised its authority. Here, based on an apparently sparse record made by the parties, the arbitrators interpreted "within port limits" literally and denied the owner's claim. The court agreed and dismissed the appeal. A good reminder to mean what you say and say what you mean!

LOOSE ENDS

Monthly Luncheons: A Great Chance to Meet and Learn!

Molly McCafferty will again chair the luncheon series.

We had a great program last year and look forward to seeing you in October, November, January, February, March, and April. Molly is filling out the roster of speakers and is always looking for volunteers.

On October 11, Neil McLaughlin of Pangaea Logistics Solutions, Ltd., will speak on Ship Management in New York and the U.S.

Arbitration in New York and London - a New York lawyer and London Barristers present to Skuld

On May 22, 2017, Skuld held an in-house seminar for its defense team for a presentation comparing New York and London arbitration. John D. Kimball of Blank Rome represented New York and two English barristers made a presentation concerning London maritime arbitration. In his presentation, John was able to update Skuld on recent developments in the SMA, including the addition of a number of new members, and highlighted some of the unique advantages of New York maritime arbitration. Among many other topics, John spoke about recent arbitration awards in which New York arbitrators have granted requests for pre-judgment security and awarded attorneys' and arbitrators' fees. He also addressed the use of SMA arbitration clauses in non-maritime contracts and the advantages of the New York practice of publishing arbitration awards. All in all, it was an excellent opportunity to address claims handlers who specialize in charter party disputes and other defense club matters about some of the advantages of New York maritime arbitration conducted under SMA rules.

SMA-MLA Liaison Committee

The SMA and the MLA have long enjoyed a productive and interdependent relationship. The SMA-MLA Liaison Committee is a sub-committee of the MLA Arbitration

and Dispute Resolution Committee which was formed many years ago to provide a formal channel for the two organizations to "liaise" and address issues which arise in any such relationship. This year's committee consists of David Martowski and Don Murnane, Co-Chairs, along with Tom Belknap, Dick Corwin, David Gilmartin, Leo Kailas, LeRoy Lambert, Molly McCafferty, Klaus Mordhorst, and Jim Textor. Many thanks, too, to Manfred Arnold for his years of leadership and service on the Committee.

ICMA in Copenhagen

The International Congress of Maritime Arbitrators will take place 25-29 September in Copenhagen. David Martowski reports that some 18 persons from New York will attend and present 9 papers. Thanks to all for representing New York!

Friends and Supporters

Charles Anderson (Chair), Dick Corwin, LeRoy Lambert, and Peter Wiswell continue to lead this program. For New York to remain competitive and grow, we need all stakeholders to commit to assist the SMA to market and promote the advantages of arbitrating in New York under SMA Rules. Disputes are out there which SMA arbitrators can resolve correctly, expeditiously, and at reasonable cost compared to other venues and organizations.

Thanks!

Thanks to those who responded to our call for articles of interest, and a special thanks (yet again!) to Tony Siciliano who referred several to us. *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, leroy.lambert@ctplc.com or dick.corwin@icloud.com. Thank you.

THE ARBITRATOR

LeRoy Lambert, Co-Editor
leroy.lambert@ctplc.com

Richard A. Corwin, Co-Editor
dick.corwin@icloud.com

Society of Maritime Arbitrators, Inc.
One Penn Plaza, 36th Floor
New York, NY 10119
(212) 344-2400 • Fax: (212) 344-2402

E-mail: info@smany.org
Website: http://www.smany.org