SMA THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

Volume 52 / No. 2 May 2022

In this issue

President's Message

By LeRoy Lambert, SMA President

On May 10, we held our first in-person Annual General Meeting since May 2019. Some 30 members attended and enjoyed lunch and each other's company. Several more listened in by Zoom.

Listening to the Committee Reports, I became persuaded that we emerged from the pandemic a stronger and more united organization. We have identified many opportunities for growth. Committee members are fanning out to realize them.

We welcomed new member Captain James Desimone (see p. 17). After a career at sea, Captain Desimone came ashore and most recently headed New York City's Staten Island Ferry operations. His bio is on the website, and we are thrilled to have him as a member. Welcome aboard, Jim!

We remembered two members who passed away this past year, Ron Carroll and Jerry Georges.

The members approved changes to our By-Laws and elected four Governors for 2022/23. Austin Dooley, a past President, was elected and rejoins the Board. David Gilmartin was re-elected and will remain as Treasurer. David Martowski, also a past President, was re-elected,

and George Tsimis was elected after serving the past year as one of my two appointees. I am pleased to advise that Robert Shaw, a past President, and Sandra Gluck have agreed to serve one-year terms as my appointees for 2022/23. These six members join the four incumbents, Lucienne Carasso Bulow, Molly McCafferty, Dan Schildt, and Soren Wolmar. Soren will continue as Secretary. I continue as President, and Bob Meehan continues as Vice-President. Leaving the Board are Dick Corwin, Michael Northmore and Anne Summers. I thank them for their service on the Board.

Nigel Hawkins completed his one-year ex-officio term as Immediate Past President. Personally and on behalf of the Board and all Members, I thank Nigel for his many years of service as a member and his leadership and example as Governor, Vice-President and as President.

I have completed the appointment of the Committee Chairs for 2022/23. The list of committees and chairs is at p. 18 and will be on the SMA website.

Thank you to Patty Leahy for her tireless efforts on behalf of the SMA.

A special thanks to our Friends & Supporters. Your financial support has been a crucial factor in our efforts to raise our profile and spread the word about the SMA. Thank you!

Chris Nolan, Chair of the MLA ADR Committee, and I are in regular contact and working together on several fronts to promote ADR and, in particular, to mark the 100th anniversary of the passing of the Federal Arbitration Act. Thanks to Chris, his team, and his committee members for all they are doing to promote ADR, including the monthly Zoom "coffee breaks" the third Friday of each month. The next one is Friday, June 17 at 11:30am Eastern: https://us06web.zoom.us/j/6939528652?pwd=dXZoMjJOS2dMT2hFcVVWVEE1bE9Udz09

We have amended our Rules and the Salvage Rules. Read about the amendments at p. 2. Special thanks to Lucienne Bulow for her leadership during what turned out to be a two-year process.

We will next meet in September for our traditional members-only luncheon to kick off the 2022/23 year.

Vice-President Meehan and I are privileged to continue to lead the SMA and thank all the members for their support and good will.

Have a great summer and see you in September!

LeRoy Lambert
President

Amendments to SMA Rules and Shortened Arbitration Procedure

By Lucienne Carasso Bulow, Chair, By-Laws and Rules Committee and Past SMA President, and LeRoy Lambert, SMA President

During the pandemic, the SMA By-Laws and Rules Committee reviewed and amended the SMA Arbitration Rules and Shortened Arbitration Procedure, and the Salvage Committee reviewed and revised the Salvage Rules. We tackled some long-standing issues to bring the Rules into conformity with present practices and build them for the future while not forgetting our past. We used the SMA-MLA Liaison Committee as a sounding board and received input from other members of the bar, in particular from lawyers active in salvage cases. We also solicited and received input from end-users, and we reviewed the rules of other arbitral organizations, both in the US and abroad. Of course, we also had a spirited back and forth among our committee members.

The Rules are amended as of June 1, 2022, and govern arbitrations arising under agreements entered into on or after that date which provide for the SMA Rules to apply.

In the amendments to the Rules, we spelled out and clarified practices that have become customary, with the possible exception of the changes to Section 11 which will affect non-SMA members serving as arbitrators in arbitrations conducted under the SMA Rules. We highlight below the main changes. The amended Rules and Salvage Rules will be posted on the SMA website.

NOTE: As a result of these amendments becoming

effective on June 1, 2022, the Rules and Salvage Rules found in the 8th edition of the "Blue Book" (published 2020) are NO LONGER IN EFFECT. We will publish another "Blue Book" in due course. Meanwhile, however, users should rely on the version of the Rules and Salvage Rules which will be found on the SMA website.

Virtual Hearings

Prior to the pandemic, Section 23 provided: "In those circumstances it deems appropriate, the Panel has the discretion to direct that the testimony of witnesses be taken by video conference or such other electronic means." This was the basis for and allowed us to hold virtual hearings during the pandemic. We have now stated more clearly the option of conducting virtual hearings and use of virtual services.

We have added text to the Preamble which states that all references to "hearings include in-person as well as virtual or telephonic proceedings involving the Arbitrator(s), the parties and any other participants called for and presided over by the Panel."

We have added text to Section 7 ("Site of the Arbitration") stating that a Panel "after consultation with the parties may direct that Hearings (or any one of them) be held virtually, i.e., by conference call, video conference, or other communications technology with participants in one or more places."

Discussions with Appointing Counsel/Party about Selection of Third Arbitrator

Parties to an arbitration have the expectation that their case will be heard by a fair and unbiased panel. Most arbitrations under the SMA Rules are heard by three-person panels, with each party appointing an arbitrator and the two so chosen selecting a Chair. The identity of the Chair is of course important. Many US and international commercial arbitration organizations (including the AAA-ICDR) allow the party and its appointed arbitrator to have an open discussion about the identity of and persons under consideration to serve as Chair. Most arbitration clauses found in our charterparties, however, state that the third arbitrator is to be chosen by the two party-appointed arbitrators. As result, the SMA Code of Ethics, by which each SMA member agrees to abide upon becoming a member, has reflected that restriction.

As non-SMA arbitrators did not have the same restriction as SMA members, there was a perception of unfairness. To eliminate this perception and keep an even playing field, we amended Section 11 of the Rules to clarify what the appointing lawyer/party may discuss with the party appointed arbitrator about the identity of a Chair, **no matter** whether the appointed arbitrator is an SMA member or not. If the SMA Rules apply, any person serving as arbitrator must abide by the provisions of Section 11:

> No Arbitrator serving under SMA Rules shall confer with the Arbitrator's appointing party (or its counsel or representative) regarding the selection of the third Arbitrator except as provided herein. At the time of an Arbitrator's appointment, the Arbitrator may ask the appointing party (or its counsel or representative) to identify the parties; to describe the nature of the dispute and the amount(s) involved and, if known, to disclose the names of the other party's counsel or representative and appointed Arbitrator; to provide a copy of the arbitration agreement and the contract containing it; to advise whether the parties' arbitration agreement calls for the third Arbitrator or Umpire to have any particular experience or credentials and to advise whether the arbitration is expected to require formal hearings or to proceed solely on documents and written submissions.
>
> An appointing party (or its counsel or representative) may alert its appointed Arbitrator to the names of any potential third Arbitrator(s) or Umpire(s) to whom the appointing party claims to have a disqualifying objection, the nature of which is to be disclosed. The appointed Arbitrator may take into account any such objections when choosing the third Arbitrator or Umpire with the other party-appointed Arbitrator. Unless the parties' arbitration agreement clearly provides otherwise, no party-appointed Arbitrator shall have any other communication with the parties or their counsel or representatives concerning selection of the third Arbitrator or Umpire.

The amendment also allows the parties to adopt a less restrictive rule in their arbitration agreement; however, if the arbitration agreement incorporates the SMA Rules, amended Section 11 states what may and may not be discussed about the third arbitrator.

The SMA Code of Ethics has been amended accordingly.

Arbitrator Oaths

While existing Section 19 provided for oaths in cases conducted on documents alone, the form of oath in Appendix A was premised on in-person hearings at which the court reporter would administer the oath to the arbitrators. Appendix A now includes a form of oath for use in documents-only arbitrations. Some members and end-users queried the need for oaths, but the Committee concluded the oath added solemnity to the proceeding and that the requirement should be kept.

Section 30: Scope of Award

In several decisions, SMA arbitrators have granted declaratory relief and injunctive relief under the wide powers given to arbitrators at law and in Section 30, but we have now added "declaratory relief" and "injunctive relief for the protection and conservation of property" to codify our power to grant such applications.

Sealed Offers of Settlement

Sealed Offers of Settlement have long been used in SMA arbitrations, but no Rule has ever addressed the practice. Both the Federal Rules of Civil Procedure (FRCP) Section 68 and New York State Civil Practice Law and Rules (CPLR) Section 3221 provide that sealed offers of settlement can be made by Defendants. California Civil Procedure Rule 998 allows such a procedure to be used by both plaintiffs and defendants. Sealed offers are widely used in London and Singapore, where both claimants and respondents may make use of it.

After much discussion, we expanded Section 31 to include a provision for Sealed Offers of Settlement in Section 31(a), (b), (c) and (d). The practice of sealed offers allows a party to try to minimize the legal expenses that it will have to pay if it loses or if the arbitration award is less advantageous to it. Under our Section 31, either the Claimant or the Respondent may make an offer of settlement which is delivered to the Panel Chair or Sole Arbitrator in a sealed envelope to be opened only after the Panel has made its decision. The Sealed Offer can have a consequence for allocation of legal and arbitrator fees when one of the parties makes an offer with a deadline and the other party rejects it. The offeror can put the offer in a sealed envelope and give it to the Panel Chair or Sole Arbitrator to be opened only after the Panel reaches its decision. If the rejected offer is more advantageous to the rejecting party than what it obtained in the Award, Section 31(d) allows the tribunal to take into account in awarding attorneys' and arbitrators' fees and costs the amount of such fees and costs that could have been saved if the sealed offer had instead been accepted by the deadline.

By codifying the Sealed Offer procedures, we address this practice. The changes do not require a party to use the procedures. As before, a party may choose to do so, but now, if they do so choose, the new provisions govern.

Section 37: Arbitrator(s)' Fees

In Section 37, we have made clear, consistent with present practice, that liability for arbitrator(s)' fees is the joint and several responsibility of the parties. We have also elaborated on charging fees when a case is settled. It is customary that in the event that a case is settled, the arbitrator(s) may charge for the time spent on the case.

New Section 38: Arbitrator Immunity

We added a new Section 38 entitled "SMA and Arbitrator(s)' Immunity" consistent with other domestic and international arbitration rules which have similar provisions.

Escrow Terms

In Appendix C dealing with Escrow Terms, we added language to allow foreign parties to opt out of collecting interest so that, for tax purposes, if they wish their escrowed funds not to earn any income in the U.S. then they now can do so.

Shortened Arbitration Procedure; Increased Amounts

On the Shortened Arbitration Procedure, we clarified that the fixed fee only covers the issuance of one award. We have encountered situations where the arbitrator was required to issue two awards, but the arbitrator's fee was limited to $3,500. If a second award in the arbitration is required, the arbitrator will be able to charge an additional $2,500.

We have also increased the maximum arbitrator fixed fee from $3,500 to $5,000. If there is a counterclaim, the maximum fixed fee is $6,000.

The limit on attorney's fees to be awarded is increased from $4,500 to $6,000.

Amendments to the Salvage Rules

The changes to the Salvage Rules by the Salvage Committee under the Chairmanship of Captain Thomas F. Fox include:

In Rule I, "claimant" has been changed to "party" to avoid arguments about who is the claimant.

In Rule V, the arbitrator(s)' fees and expenses under the Salvage Rules are now consistent with those in the Shortened Arbitration Procedure:

> V. Arbitrator(s) Fee(s) and Expenses
>
> (a) A sole arbitrator's fee shall not exceed $5,000. In a tripartite proceeding, the fee of each arbitrator shall not exceed $3,750, except that the chairman shall be entitled to an additional compensation of up to $1,250. These fees are based upon submissions made pursuant to Section III a) and c) and no hearings. In addition, the arbitrator(s) shall be entitled to reimbursement for the expenses of the arbitration at cost. Alternatively, the arbitrator(s) may charge $100 in lieu of an accounting of such expenses.

Rule III(d) remains unchanged, and the arbitrators retain the discretion to modify the procedures if a hearing is warranted or there are multiple submissions "beyond those set forth in III(a) and (c). In such case, the fee limits in Rule V do not apply.

In Rule VII, given the increased values of yachts and recreational vessels, we have raised the claim amount that will be adjudicated under the Salvage Rules from $100,000 to $250,000.

The Marsalv form has been amended to be consistent with Rule VII of the Rules:

MARSALV 2022

5. Arbitration Rules: All disputes arising out of this Agreement are subject to the applicable rules of the Society of Maritime Arbitrators, Inc. in effect at the time this Agreement was executed, agreed or otherwise deemed to have come into force. However, claims in excess of US$250,000 shall be subject to the Maritime Arbitration Rules of the Society of Maritime Arbitrators, Inc. in effect at that time. All disputes of US$250,000 or less will be subject to the Society of Maritime Arbitrators' Salvage Arbitration Rules, unless the Parties specifically agree in writing otherwise. This form is effective as of June 1, 2022.

Earlier editions of Marsalv are no longer in effect and should not be used.

Compelling Signatories to Arbitrate with Non-Signatories*

By John Fellas**

This article is about non-signatories to arbitration agreements. The issue I address concerns a difference in the approach taken by U.S. courts when a non-signatory seeks to rely on an arbitration clause *against a signatory* versus when a *signatory* seeks to rely on an arbitration clause against a *non-signatory*. When it comes to one particular non-signatory theory — the "intertwined claims" estoppel theory (about which more below) — U.S. courts hold that a non-signatory may rely upon an arbitration clause *against a signatory,* but not the other way around.

In *Thomson-CSF, SA v. Am. Arb. Ass'n*, 64 F.3d 778 (2d Cir. 1995), the U.S. Court of Appeals for the Second Circuit articulated the approach of the courts in this way: "the circuits have been willing to estop a *signatory* from avoiding arbitration with a non-signatory when the issues the *non-signatory* is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed" (emphasis in original) — the inference being that courts would not estop a non-signatory from avoiding arbitration with a signatory on an intertwined estoppel theory. But no U.S. case has fully articulated the rationale for this theory or fully explained why these two situations should be treated differently. That is what I propose to do here.

Theories for Binding Non-Signatories

It is well-known that there are various different theories for holding that those who did not sign an arbitration agreement may be bound by, or permitted to rely upon, such agreement. Most of these

theories are not specific to arbitration but apply more generally to all types of contracts, and, as the Second Circuit put it in *Thompson-CSF,* "arise out of common law principles of contract and agency law." The court could have added principles of corporate law to this list. Thus, non-signatories have been permitted to rely upon, or have been held to be bound by, arbitration agreements under principles of contract law (e.g., incorporation by reference, assignment, assumption, the third party beneficiary doctrine), agency law (e.g., where an agent with actual or apparent authority can bind a non-signatory principal), or corporate law (e.g., where a subsidiary can bind a non-signatory parent corporation based upon a piercing of the corporate veil).

In addition to these principles, the doctrine of estoppel has also been relied upon by courts in the non-signatory context. And in *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless,* U.S. 140 S. Ct. 1637 (2020), the Supreme Court recently held that the New York Convention does not preclude a non-signatory from relying upon domestic law doctrines of estoppel to enforce an arbitration agreement.

Estoppel Doctrines

There are at least two distinct types of estoppel doctrine that apply in the non-signatory context: the "direct benefits" estoppel theory and the "intertwined" estoppel theory. The direct benefits theory bears the hallmark of any estoppel doctrine — prohibiting a party from taking inconsistent positions or seeking to "have it both ways" by "rely[ing] on the contract when it works to its advantage and ignor[ing] it when it works to its disadvantage." *Tepper Realty Co. v. Mosaic Tile Co.,* 259 F.Supp. 688, 692 (SDNY 1966).

The direct benefits doctrine reflects that core principle by preventing a party from claiming rights under a contract but, at the same time, disavowing the obligation to arbitrate in the same contract. As the Second Circuit stated in *MAG Portfolio Consult, GMBH v. Merlin Biomed Grp. LLC,* 268 F.3d 58, 61 (2d Cir. 2001), "where a company 'knowingly accepted the benefits' of an agreement with an arbitration clause, even without signing the agreement, that company may be bound by the arbitration clause."

By contrast, the intertwined estoppel theory looks not to whether any benefit was received by the non-signatory, but rather at the nature of the dispute between the signatory and the non-signatory, and, in particular, whether "the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped [signatory] party has signed." *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.,* 198 F.3d 88, 98 (2d Cir. 1999). But this account of the intertwined estoppel theory raises an immediate question: what does it have to with estoppel?

As noted, the intertwined estoppel theory runs only one way; it operates only to estop a *signatory* from avoiding arbitration with a non-signatory. But it is hard to see why the estopped signatory is doing anything that should trigger the estoppel doctrine as it is traditionally understood. After all, the *signatory* is not in any way taking inconsistent positions or trying to have it both ways. If anything, it is the *non-signatory* who is trying to have it both ways.

Take a case where signatory A enters into an arbitration agreement with signatory B, and non-signatory X invokes the intertwined estoppel theory seeking to compel A to arbitrate. In resisting arbitration with non-signatory X, signatory A is not trying to have it both ways at all; A is not trying to take the benefit of one part of its contract with B yet disavowing the rest. To the contrary, A is being perfectly consistent, and sticking precisely to the terms of the contract it entered into, saying in essence: "When I entered into an arbitration agreement, I agreed to arbitrate with signatory B, but never with non-signatory X, and I maintain that contractual position." Indeed, if anyone can be charged with trying to have it both ways, it is non-signatory X. Non-signatory X, who never agreed to arbitrate with A, now claims the benefit of the arbitration clause — and *only* the arbitration clause — contained in a contract to which it is not a party, in order to compel A to arbitrate.

But this only deepens the puzzle. After all, signatory A seeks only to adhere to the terms of its arbitration agreement, which did not include any agreement to arbitrate with non-signatory X. By contrast, non-signatory X claims the benefit of an arbitration clause in a contract it never entered while, at the same time, not purporting to assume any obligations under that contract. Why is it that it is *signatory A* who should be *estopped* from arbitrating with non-signatory X?

Rationale for the Intertwined Estoppel Doctrine

The answer is that, despite it being labelled an "estoppel" theory, the intertwined estoppel doctrine applies despite the absence of the core features that typically trigger estoppel. Rather than being concerned with preventing a party from having it both ways, the true rationale underlying the intertwined estoppel theory is to preserve the efficacy of the arbitration process. It is no surprise, therefore, that the intertwined estoppel doctrine is not one of general application but, rather, has been developed by U.S. courts solely for the arbitration context.

That the intertwined estoppel theory has as its central aim the preservation of the efficacy of the arbitration process is clear when one looks at the typical fact pattern of an intertwined estoppel case. The theory normally finds its occasion when signatory A and signatory B have a dispute — as to which one or other party may have commenced arbitration proceedings — and signatory A commences a lawsuit against non-signatory X in circumstances where *that dispute* is intertwined with the dispute between A and B. Non-signatory X then responds by asking the court to compel A to arbitrate, relying upon the arbitration clause in the agreement between A and B.

Without the intertwined estoppel doctrine, signatory A to an arbitration agreement could easily sidestep its arbitration agreement with signatory B by commencing a lawsuit against a non-signatory party who has some relationship with B — for example, an agent or employee or officer or board member of a corporation — in connection with the same dispute that is subject to the arbitration agreement. The Seventh Circuit expressed this precise concern in *Hughes Masonry v. Greater Clark Cty. Sch. Bldg.*, 659 F.2d 836, 841 n.9 (7th Cir. 1981) (emphasis added):

> we believe Hughes [the signatory], in the peculiar circumstances before us, is estopped from denying J.A. [the non-signatory] the benefit of the arbitration clause with regard to claims that are as intimately founded in and intertwined with the underlying contract obligations as Hughes' claims appear to be here. The outcome urged by Hughes would have the tail wagging the dog, since *it would allow a party to defeat an otherwise valid arbitration clause simply by alleging that an agent of the party seeking arbitration has improperly performed certain duties under the contract* and thereby committed tort that is so integrally related to the subject of arbitration between the principal parties as to constitute a bar to such arbitration.

Similarly, in *J.J. Ryan Sons v. Rhone Poulenc Tex.,* S.A, 863 F.2d 315 (4th Cir. 1988), the Fourth Circuit permitted a non-signatory parent corporation to compel a signatory to arbitrate for the same reason (emphasis added):

> When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement ... . *If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.*

The same rationale animated the court's decision in *Arnold v. Arnold Corp.,* 920 F.2d 1269, 1281 (6th Cir. 1990). In that case, a signatory to a stock purchase agreement with a corporation commenced a lawsuit against certain non-signatory officers and board members of that same corporation, as well as against the non-signatory broker-dealer that assisted in the stock purchase agreement. The Sixth Circuit affirmed the district court's decision to grant the non-signatories' motion to compel the signatory to arbitrate precisely to preserve the efficacy of the arbitration process. If the signatory "can avoid the practical consequences of an agreement to arbitrate by naming nonsignatory parties as [defendants] in his complaint, or signatory parties in their individual capacities only, the effect of the rule requiring arbitration would, in effect, be nullified." (citation omitted).

It is submitted, therefore, that the rationale for the intertwined estoppel theory has little to do with estoppel as it is traditionally understood but, rather, is to ensure that parties to arbitration agreements do not undermine their effectiveness by commencing collateral litigation about disputes subject to arbitration. After all, when parties commit themselves to arbitration, they are agreeing to resolve a dispute by arbitration *instead of* litigation.

If parties to arbitration agreements were permitted to avoid their obligation to arbitrate by suing a

non-signatory on a claim intertwined with a dispute governed by an arbitration agreement, this would undermine the viability of the arbitration process. What would be the point in agreeing to resolve a dispute by arbitration if full-bore collateral litigation were an inevitable feature of it?

Why the Intertwined Estoppel Theory Operates as a One-Way Street

While this account of the rationale for the intertwined estoppel theory makes sense as a matter of policy, it brings us back to the fundamental question that we raised at the outset: why does the intertwined estoppel doctrine operate as one-way street, estopping only signatories, but not non-signatories? After all, if a signatory should be compelled to arbitrate with a non-signatory when the dispute between them is intertwined with a dispute subject to arbitration, why not the other way around?

The reason lies in the foundational principle of arbitration, namely, that it "is a matter of consent, not coercion." *Volt Info. Scis., Inc. v. Bd. of Trs.,* 489 U.S. 468, 479 (1989). When it comes to consent, there is a fundamental difference between, on the one hand, a court's decision to compel a signatory to arbitrate with a non-signatory and, on the other, a decision to compel a non-signatory to arbitrate with a signatory.

When a court grants non-signatory X's motion to compel arbitration of a dispute with signatory A (who signed an arbitration agreement with signatory B), there is some element of consent on both sides. First, even though X never signed an arbitration agreement with A, through its motion to compel, X is expressing its consent to arbitrate a dispute with A that is intertwined with the dispute that A agreed to arbitrate with B. Second, while signatory A did not specifically consent to arbitrate with non-signatory X, it did consent to arbitrate a dispute with B that is intertwined with its dispute with X.

Consider the reverse situation, however, where signatory A seeks to compel non-signatory X to arbitrate a dispute that is intertwined with a dispute covered by A's arbitration clause with B. While A — through both its arbitration agreement with B and its motion to compel — expresses its consent to arbitrate both a dispute with B and an intertwined dispute with non-signatory X, X has never expressed any consent to arbitrate with anyone.

Thus when a non-signatory seeks to compel a signatory to arbitrate, there is some element of consent on both sides. By contrast, when a signatory seeks to compel a non-signatory to arbitrate, there is only consent on one side — by the signatory. In *Thomson-CSF,* the Second Circuit affirmed the district court's decision to deny a signatory's motion to compel a non-signatory to arbitrate on an intertwined estoppel theory precisely because "[a]t no point did Thomson [the non-signatory] indicate a willingness to arbitrate with E S [the signatory]. Therefore, the district court properly determined these estoppel cases to be inapposite and insufficient justification for binding Thomson to an agreement that it never signed."

Conclusion

It is worth stressing, however, that the intertwined estoppel doctrine sits uneasily with the foundational principle of arbitration noted above — namely that arbitration "is a matter of consent, not coercion." Yes, it is the case that signatory A agreed to arbitrate a dispute with signatory B. And it is also the case that the dispute non-signatory X seeks to arbitrate with signatory A is factually intertwined with the dispute that A agreed to arbitrate with B.

However, the inescapable fact remains that A never specifically agreed to arbitrate any dispute with non-signatory X. Notwithstanding the absence of this robust form of consent, in applying an intertwined estoppel doctrine, the primary aim of the courts is to preserve the efficacy of the arbitration process, by ensuring that a party who entered into an arbitration agreement does not avoid its obligation to arbitrate by commencing collateral litigation against a non-signatory to that agreement.

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U.S. Supreme Court Considers Whether Domestic Discovery Applies to International Arbitration Proceedings*

By Ollie Armas, Partner and Global Head of International Arbitration Practice, Sam Zimmerman, Senior Associate, Mike Jacobson, Counsel, David Michaeli, Counsel, Katherine Wellington, Senior Associate, Dana Raphael, Associate, Hogan Lovells US LLP

On March 23, 2022, the Supreme Court heard arguments on the challenges to whether international arbitrations, including private commercial arbitration and investor-state arbitration, qualify as "foreign or international tribunal[s]" under 28 U.S.C. § 1782. We summarize what has happened so far and what are the possible implications related to discovery in international arbitrations.

What has happened

The Supreme Court heard two hours of oral argument on March 23, 2022 in consolidated cases *ZF Automotive US v. Luxshare* and *AlixPartners LLP v. Fund for Protection of Investor Rights in Foreign States.* At issue is whether international arbitrations, including private commercial arbitration and investor-state arbitration, qualify as "foreign or international tribunal[s]" under 28 U.S.C. §1782, the federal statute enabling U.S. federal district courts to order discovery assistance for litigants before such tribunals. The U.S. Courts of Appeals for the Second, Fifth, and Seventh Circuits have held that private commercial arbitration does not qualify for discovery assistance under §1782, while the Fourth and Sixth Circuits have extended the statute to private arbitration. But the Courts of Appeals agree that investment treaty arbitrations are eligible for §1782 discovery, so the Supreme Court's decision to review AlixPartners came as somewhat of a surprise.

Section 1782 does not define the phrase "foreign or international tribunal." In their briefing, the petitioners (ZF Automotive and AlixPartners) said the phrase refers to tribunals created by foreign governments that exercise governmental authority. Private commercial and investor state arbitrations do not fit that definition, so petitioners say they may not obtain discovery under §1782. The respondents (Luxshare and the Fund) urged the Court to read the text broadly to encompass private arbitrations. The Biden Administration, which submitted an amicus brief and argued in support of ZF Automotive and AlixPartners, urged the Court to adopt a bright line rule excluding any kind of arbitration from §1782 discovery.

Key points from oral argument

Oral argument began by focusing on the statutory text. Chief Justice Roberts and Justice Kagan were skeptical that the language "foreign tribunal" naturally requires government affiliation, suggesting that it could also include tribunals established under the law of another country. The petitioners responded that the Court should read "foreign tribunal" as a whole rather than chopping the phrase into individual words. The petitioners explained that the statute's focus on governmental adjudicators was evident from its purpose of enhancing cooperation with foreign countries, including quasi-judicial agencies. Deputy Solicitor General Edwin Kneedler, arguing for the government, agreed that the statute was meant to facilitate cooperation with foreign governments and is most naturally read as referring to courts or bodies exercising official governmental authority.

The Justices also highlighted the difference between the two types of arbitration at issue: private commercial arbitration and treaty-based investor-state arbitration. Chief Justice Roberts noted that investor-state arbitration seemed "quite different," because the arbitral panel was created by the government. Kneedler explained that the government saw the two as "functionally the same," because a foreign state is like a private actor when it agrees to private arbitration and private tribunals lack sovereign power. Justice Sotomayor asked whether an arbitral panel selected by an international body like the World Trade Organization, which has a dispute settlement plan between states, would qualify as a governmental tribunal where states submit to its jurisdiction. AlixPartners conceded that such an entity would qualify as governmental. Kneedler likewise acknowledged that §1782 might apply where foreign states establish a formal standing body with arbitrators selected by the governments but said that situation was not at issue here.

The argument also focused heavily on the issue of comity. The litigants disagreed as to whether discovery access in arbitrations would promote reciprocal access for U.S. litigants before foreign tribunals. The respondents argued that comity is not purely transactional and is also about respect for foreign tribunals. In any event, they pointed out that reciprocating countries like the U.K. are major locations for international arbitrations. Kneedler disagreed, arguing that U.S. involvement in foreign arbitrations risked undermining international comity by creating the potential for friction and controversy on issues that did not involve the United States.

Several Justices questioned how investor-state arbitration undermines comity, given that foreign states agree to such arbitration by treaty. Justice Sotomayor and Justice Kavanaugh repeatedly pressed that issue, and Justice Barrett questioned whether countries' expectations are relevant in determining the status of an arbitral body. Kneedler argued that foreign governments adopt treaty-based arbitration to simplify and depoliticize dispute resolution by removing issues from one state's court system. He said U.S. intrusion into private disputes undermines these goals. The respondents disagreed and asserted a broader view of comity, one they said the Supreme Court had previously recognized as advanced by international arbitration.

The advocates and Justices also focused on potential asymmetry in discovery for domestic and international arbitration. In petitioners' view, granting broad discovery access in international arbitration was incongruous with the rules limiting discovery in domestic arbitration, undermining comity and encouraging foreign litigants to seek U.S.-based discovery. In response to concerns that a broad reading would encourage abuse of §1782, Justice Breyer asked whether discovery could be limited to requests by the foreign arbitrator. The respondents agreed that was one way to prevent abuse; they also argued that parties and tribunals could limit or prohibit discovery by agreement or arbitration rules. The petitioners disagreed, arguing that §1782 allows applicants to request discovery before proceedings begin, meaning that courts would be left to guess the preferences of hypothetical arbiter panels.

What this means

It is difficult to forecast what the Court will decide, although the Court seemed most likely to hold that private commercial arbitration is not eligible for §1782 discovery. On the issue of investor-state arbitration, several Justices were candid about the difficulties presented, and most of the argument was devoted to that issue. Justice Breyer was concerned about the prospect of subsequent litigation asking the Court to determine whether particular arbitrations qualify as governmental and thus eligible for §1782 discovery, should the Court adopt petitioners' view of the statute. Justice Gorsuch asked whether the Court should err in the direction of allowing the political branches to first decide if §1782 extended to arbitration. Justice Kagan said that "of all the parties," the government is "the expert in international comity," and the Court is likely to afford significant weight to the government's view that investor-state arbitration falls outside the scope of §1782. Justice Alito asked no questions, and Justice Thomas was absent from argument while recovering from an illness.

The Supreme Court is likely to rule on this matter by June 2022.

* This article was originally published in Hogan Lovells Engage on March 25, 2022, and is reprinted here with permission. https://www.engage.hoganlovells.com/knowledgeservices/viewContent.action?key=Ec8teaJ9VaolNw7QHhjrx8xgHJM-KLFEppVpbbVX%2B3OXcP3PYxlq7sZUjdbSm-5FIetvAtgf1eVU8%3D&nav=FRbANEucS95NML-RN47z%2BeeOgEFCt8EGQ0qFfoEM4UR4%3D&email-tofriendview=true&freeviewlink=true

Federal Jurisdiction Limited When Confirming or Setting Aside Domestic Arbitration Awards*

By Marisa Marinelli, Partner, and Arantxa Cuadrado, Associate, Holland & Knight LLP

Highlights

- Federal jurisdiction may not be available for petitions to confirm or vacate a domestic arbitration award when the only basis for jurisdiction is that the underlying dispute involves a federal question.

- The Supreme Court held that the "look through" approach is limited to petitions under Section 4 and refused to extend it to petitions under Sections 9 and 10 of the Federal Arbitration Act (FAA).

In a recent decision involving arbitration, the U.S. Supreme Court held that federal courts do not have subject-matter jurisdiction to confirm or vacate a domestic arbitration award under Sections 9 and 10 of the Federal Arbitration Act (FAA) when the only basis for jurisdiction is that the underlying dispute involves a federal question. In so doing, the court eschewed extending the "look through" provision of Section 4 of the FAA, which allows a court to look at the subject matter of the underlying dispute when determining whether it has jurisdiction to hear a motion to compel arbitration, to a motion to confirm or vacate an award. The case is *Denise A. Badgerow, v. Greg Walters, et al.,* No. 20–1143, 2022 WL 959675 (U.S. Mar. 31, 2022).

Background

Denise Badgerow, an associate financial advisor with a Louisiana financial service company, initiated a Financial Industry Regulatory Authority (FINRA) arbitration proceeding against the three principals of the corporation after her termination. Badgerow sought damages for tortious interference of contract and for violation of Louisiana's whistleblower law. The FINRA panel dismissed all of her claims with prejudice.

Badgerow then filed a petition in Louisiana state court to vacate the arbitration award. The defendants removed the action to federal court, and Badgerow filed a motion to remand, asserting that the federal court lacked subject-matter jurisdiction over the petition to vacate. The district court held that it had subject-matter jurisdiction over the petition to vacate, denied remand and denied vacatur of the FINRA arbitration award. The U.S. Court of Appeals for the Fifth Circuit affirmed, and Badgerow petitioned for a writ of certiorari before the Supreme Court.

The "Look Through" Approach

The issue before the Supreme Court was whether the district court had jurisdiction over the petition to confirm or vacate the FINRA arbitration award because the parties' underlying substantive dispute would have fallen within the federal court's jurisdiction, or conversely, whether the federal court was prohibited from "looking through" to the underlying dispute to establish federal subject-matter jurisdiction over a petition to confirm or vacate an arbitration award under Sections 9 and 10 of the FAA.

The controversy arose because, in an earlier decision, the Supreme Court approved the "look through" approach in the context of FAA Section 4 and held that, in determining whether federal subject-matter jurisdiction exists for purposes of a motion to compel arbitration, a federal court may "look through" the petition to compel arbitration to the underlying dispute between the parties. See *Vaden v. Discover Bank,* 556 U.S. 44, 50 (2009). *Vaden*, though, is based on language unique to Section 4 of the FAA, which provides that it is proper to bring a motion to compel to any federal district court that, "save for [the arbitration] agreement, would have jurisdiction [over] a suit arising out of the controversy between the parties." The Supreme Court found this language allows district courts to "look through" the Section 4 petition and base its jurisdiction on the substance of the underlying dispute.

In contrast, *Badgerow* considered Sections 9 and 10 of the FAA. The Supreme Court noted that these sections "contain none of the statutory language on which *Vaden* relied." It declined to "redline the FAA, importing Section 4's consequential language into provisions containing nothing like it" and noted that "Congress could have replicated Section 4's look-through instruction in Sections 9 and 10," or it "could have drafted a global look-through provision, applying th[at] approach throughout the FAA. But Congress did neither." The Supreme Court refused to "pull[] the look-through jurisdiction out of thin air" and "find[] without textual support, that federal courts may use th[at] method to resolve … Section 9 and 10 applications." Absent an independent basis for federal court jurisdiction (e.g. diversity of citizenship), the court found there was no basis for federal court jurisdiction.

Impact of the Decision

The Supreme Court's decision resolves a circuit split as to the circumstances in which a federal court may exercise federal question jurisdiction over applications to confirm, vacate or modify arbitral awards under Sections 9 through 11 of the FAA. The U.S. Courts of Appeals for the Third and Sev-

enth Circuits had held that the "look through" jurisdiction analysis did not apply to such petitions. See *Magruder v. Fid. Brokerage Servs. LLC,* 818 F.3d 285, 288 (7th Cir. 2016); *Goldman v. Citigroup Global Mkts., Inc.,* 834 F.3d 242, 255 (3d Cir. 2016). The U.S. Courts of Appeals for the First, Second, Fourth and Fifth Circuits, however, had held that the "look through" approach did apply to petitions under Sections 9 through 11 of the FAA. See *Quezada v. Bechtel OG & C Constr. Servs., Inc.,* 946 F.3d 837, 843 (5th Cir. 2020); *McCormick v. Am. Online, Inc.,* 909 F.3d 677, 682 (4th Cir. 2018); *Ortiz-Espinosa v. BBVA Sec. of Puerto Rico, Inc.,* 852 F.3d 36, 47 (1st Cir. 2017); *Doscher v. Sea Port Grp. Sec. LLC,* 832 F.3d 372, 382 (2d Cir. 2016).

Importantly, the court's decision in Badgerow does not apply in cases where the underlying arbitration award is subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). This is because the New York Convention independently establishes a federal district court's subject-matter jurisdiction over petitions to confirm or vacate an award where the award falls under the Convention – i.e., foreign awards or awards rendered in the United States that have an international component (see *Bergesen v. Joseph Muller Corp.,* 710 F.2d 928, 932 (2d Cir. 1983); *Zhang v. Dentons U.S. LLP,* 2021 WL 2392169, at *3 (C.D. Cal. June 11, 2021)). In contrast, the FAA does not provide an independent basis for federal subject-matter jurisdiction over petitions to confirm or vacate domestic arbitration awards. Thus, absent diversity jurisdiction (28 U.S.C. §1332(a)), a petitioner must show federal question jurisdiction under 28 U.S.C. § 1331 in order to bring the petition in federal court.

Maritime disputes commonly involve international parties or components. An award issued in such a case would fall under the New York Convention, and federal courts would have jurisdiction to confirm or vacate such an award. *See e.g. Commodities & Minerals Enterprise, Ltd. v. CVG Ferrominera Orinoco, C.A.*, No. 1:19-cv-11654, 2020 WL 7261111 at *4 (S.D.N.Y. Dec. 10, 2020) (confirming international arbitration award issued in arbitration administered by the Society of Maritime Arbitrators and stating that "the Federal Arbitration Act provides federal jurisdiction over those arbitral awards that are governed by the New York Convention. See 9 U.S.C. § 203."); *Kondot S.A. v. Duron LLC,* 21 Civ. 3744 (ER), 2022 WL 523902 (S.D.N.Y. Feb. 22, 2022) (confirming maritime international arbitration award under the New York Convention and Chapter Two of the FAA). However, under *Badgerow,* federal courts do not have jurisdiction to confirm or vacate a domestic maritime award where the only asserted basis for jurisdiction is that the underlying dispute, if brought in federal court, would be subject to federal question or admiralty and maritime jurisdiction.

* An earlier version of this article appeared on the website of Holland & Knight LLP.

SMA Award Service.... At-a-Glance

By Robert C. Meehan, Partner, Eastport Maritime, SMA Vice-President

During any charter party negotiation, one provision that now attracts considerable attention deals with which party will be responsible for determining whether a port or berth is safe. The focus on this subject has been heightened, without doubt, by the recent *Athos* ruling by the highest court in the land. In practice, however, once a casualty has occurred and the safety of the port or berth is at issue, responsibility for the damage can seem elusive; was it the charterer sitting in an office in Manhattan, the owner having prior experience with the port or berth, or a seasoned vessel Master physically navigating the vessel? The short answer is: "each or all of them, depending on the facts." Below is a selection of three SMA cases in which the Panel was divided on questions of port or berth safety and the allocation of responsibility for damage to the vessel.

M/V STAR B, SMA No. 3813 (November 19, 2003) (Manfred Arnold, Tom Fox, John Ring)

NYPE – Grounded – Safe Port – SMA Rules [Section 26] – Pilot Error – Altered/False Logbooks – Good Navigation and Seamanship – Mutual Fault – Attorney Fees and Costs

The STAR B, a time-chartered vessel, loaded lumber and general cargo at Sao Francisco (Brazil)

for discharge at San Juan (Puerto Rico), Rio Haina (Dominican Republic), and Kingston (Jamaica). While enroute from San Juan to Rio Haina, due to congestion at Rio Haina, the charterer diverted the vessel to Santo Domingo (Dominican Republic) to complete her discharge. After arriving at Santo Domingo, the vessel drifted offshore for two days awaiting berthing after which, rather than having the vessel berth at Santo Domingo, the Charterer instructed the vessel to proceed to Boca Chica, a small port about 20 miles east of Rio Haina, to complete her discharge. The vessel arrived at Boca Chica, and, shortly after taking on board the pilot to enter the channel, the vessel went aground. After the grounding, the Master attempted to free the vessel using its own power, against the warnings of the local average adjuster. The vessel was subsequently freed the following day by a chartered tug. The Master then notified the charterer that Boca Chica was unsafe for the vessel. The charterer replied that if the Master refused to bring the vessel in, it would be placed off-hire. After consulting with the owner, the Master entered Boca Chica, discharged her cargo and departed without further incident.

Owner alleged that the charterer breached the charterparty safe port warranty, claiming that the grounding caused damage to the vessel's hull, stern tube and controllable pitch propeller requiring drydocking, as well as lost hire while effecting repairs. Owner contended that the charts, navigational publications and Notice to Mariners inadequately depicted the port approach, and questioned the experience and ability of the pilot.

Charterer maintained that the vessel grounded outside the buoyed channel, claiming that competent mariners routinely entered Boca Chica safely. Charterer further maintained that the charts and other navigational aids were accurate and reliable, that the pilot did not cause the grounding and that the grounding could have been averted by the exercise of prudent seamanship.

The panel stated there was sufficient evidence to support Owner's contention that Boca Chica was unsafe when the vessel arrived. The outermost port hand entrance buoy (No.1) was missing which was not highlighted by charts or the navigational publications or the Notice to Mariners. Also, the remaining buoys were unmarked. Further, the range markers were not properly maintained and were not lighted and thus were difficult to discern from seaward. The charts also failed to depict the proper relative buoy positions. Lastly, the pilot was unlicensed and had no formal training in handling vessels of the size of the M/V STAR B.

However, the panel noted there was also sufficient evidence to support charterer's argument that the grounding could have been averted by the exercise of good seamanship. The Master testified that he had not prepared a voyage plan and that no navigational fixes were charted because GPS positions and radar distances were not recorded. The Master testified that he had never used the GPS system while on board the vessel. The Master also testified that there were no local pilot notices or Notices to Mariners on board for the area although the Master was in possession of one of the main local charts which depicted a well-defined track with a marked course and distance for the vessel's next port upon departing Boca Chica as well as professionally recorded navigational fixes. The panel noted that those publications warned mariners that lights and buoys are unreliable in the Dominican Republic. Moreover, the panel found "most damning to the master's credibility" that "he both erased entries in the rough log and rewrote the log entries so that they would adhere to his version of events."

After considering all the evidence and the parties' arguments, the panel unanimously ruled that the port of Boca Chica was unsafe when the vessel called. Nevertheless, the panel majority denied owner's claim in full, relying upon an excerpt from "Scrutton on Charter Parties and Bills of Lading" to support their conclusion that the Master's "negligence [was] sufficiently serious to sever the causal connection between the order and the damage to the vessel." The panel majority awarded an allowance toward charterer's legal fees and costs and assessed the arbitrator fees in full against the owner.

The dissenting opinion disagreed, asserting that the breach of the charterparty warranties of a safe berth and port was a contributing cause of the grounding. The dissent quoted language from an earlier award that the dissenting arbitrator believed was applicable to the charterer and owner in this case:

> Both were guilty of taking a calculated risk which failed. Owners' right to rely upon the

> safe port, safe berth warranties of the contract does not extend to their ignoring obvious unsafe and dangerous conditions that in all probably could exist. Likewise, the giving of such a warranty is an assurance that these obvious unsafe and dangerous conditions don't and won't exist. The damages which were sustained were brought about by a mutual lack of appreciation to the dangers...[1]

The dissenting arbitrator expressed the view that rather than treating the Master's negligence as superseding negligence, the panel should have treated it as contributory negligence.

M/T MIMOSA, SMA No. 4338 (March 9, 2018) (Manfred Arnold, David Martowski, Charles Anderson)

SHELLTIME4 - Oil Spill – Safe Port/Berth – Due Diligence – SMA Rules [Section 21] - Attorney Fees and Costs

This third partial final award (PFA) in this arbitration makes for an interesting weekend read and follows two earlier awards. The initial PFA[2] was issued for the purpose of assisting discovery and the preservation of evidence, followed by a second PFA[3] where the panel granted charterer's application to file a motion to dismiss owner's claim pursuant to SMA Rule 21 on the ground that owner failed to carry its burden of proof that charterer had breached its duty of due diligence by nominating an unsafe berth without prejudice to the charterer's right to present its defense submissions and witness testimony if the Rule 21 motion were denied. This motion resulted in a third PFA (SMA No. 4338) which is the subject of this "at-a-glance."

The M/T MIMOSA was fixed on a short-term time charter for a period of minimum 30 days to a maximum of 120 days in charterer's option. The charterparty form was SHELLTIME 4 which requires that the charterer exercise due diligence to ensure the vessel is employed between safe ports and berths. The pertinent provision, Clause 4, reads in part: "Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage by their failure to exercise dull diligence as aforesaid." The time-charterer employed the vessel in its "tanker pool" along with vessels from other owners, subsequently fixing the MIMOSA for a voyage loading crude oil from Puerto Esmeraldas (Ecuador) for discharge at Quintero (Chile) at a single-point-mooring (SPM). The charterparty format for this voyage charter was ASBATANKVOY.

The vessel arrived at Quintero and moored to the SPM in compliance with port regulations, in part requiring a tug attached to the vessel stern to maintain a safe distance from the SPM and prevent the vessel from swinging and damaging the flexible cargo hoses.[4] Approximately seven hours into the discharge operation a second tug arrived to replace the existing tug which was assigned to another job. Shortly into the tug changeover, things began to unravel rapidly, beginning with the vessel starting to turn quickly, prompting the tug to tighten the line to the vessel's stern. The vessel then began to shift astern causing the two hawsers securing the vessel's bow to the SPM to part, resulting in increasing the tension to the bolts and flanges connecting the cargo hoses and causing them to detach from the SPM. During this time, the vessel's crew promptly closed the vessel's manifold, serving to contain the oil spilled on board the vessel to the vessel's deck, but the ruptured cargo hoses resulted in a significant amount of oil spilling into Quintero Bay, estimated to be about 39 metric tons. The entire episode beginning with transferring the towline from the first to the second tug and ending with the cargo hoses detaching from the SPM lasted about 22 minutes.

The gist of owner's claim was that charterer breached its duty of due diligence to nominate a safe berth at Quintero. Charterer denied liability, presenting a counterclaim for lost profits for loss of the use of the vessel resulting from the oil spill.

The oil spill necessitated the involvement of the Chilean Government Authorities who ordered the Naval Prosecutor to initiate "Investigación Sumaria Administrativa" (ISA) proceedings to determine the cause of the incident and identify responsible parties for the oil spill. The proceedings lasted over two years. In addition, owner engaged two expert witnesses to testify on vetting practices in the petroleum industry and vessel navigation.

The ISA investigation concluded that essentially all personnel involved in the tug transfer operation were culpable. The Master for not properly instructing the watch officer on the tug changeover and not properly supervising the operation, the local pilot and Second Officer for failing to remain on

the bridge overseeing the operation, and the tug pilot for pulling too hard on the stern line heightening the parting of the lines and disengagement of the hoses to the SPM. The ISA investigation also determined the SPM operator was at fault for not properly maintaining the SPM mooring system and not considering procedures to minimize the risk of spills during tug changeovers. Further, the ISA held that the mooring hawsers were noncompliant in length and rupture force with the Operator's own Maneuverability Study conducted years earlier.

Owner's expert vetting witness testified that electronic vetting is a "best industry practice" citing the Marine Terminal Information System (MTIS) program of the OCIMF[5] which was created in 2011 and contains information about the physical properties, operations, and management systems of numerous terminals worldwide, including the SPM in question. He pointed out that 47 of the 50 data fields were missing information and observations which would have alerted charterer of the need to make further inquiries had charterer implemented a vetting process.

The panel found that the owner failed to carry its burden of proof that charterer breached its obligation to exercise due diligence in nominating a safe berth. The panel majority concluded that based on the testimony and evidence presented, there was ample evidence of negligent conduct on the part of the Master, vessel personnel and pilot. The majority also noted that the only testimony supporting owner's position was that of owner's expert vetting witness, but found that no evidence was presented indicating that the OCIMF database contained sufficient information concerning the SPM to have allowed charterer to accurately assess its safety. Further, when reviewing the vessel operations at the SPM for the 3 years prior to the vessel incident, owner's vetting expert admitted he was unaware of the occurrence of any event that that would have converted the SPM from a declared safe berth to an unsafe berth. The panel majority also noted that owner could have insisted on a charterparty provision for pre-nomination terminal vetting but elected not to and that owner belatedly was attempting to impose on charterer an elevated level of due diligence. The panel majority therefore granted charterer's motion to dismiss owner's claim, holding that owner had not carried its burden of proving that charterer breached its duty of due diligence in nominating the SPM facility. The dissenting opinion disagreed, asserting that the owner successfully presented a prima *facie case* that the SPM was unsafe and that had the charterer been required to present its case, then owner would have been afforded the opportunity to examine other witnesses through whom it may have strengthened its position and proved its contentions.

M/V SEMINOLE PRINCESS, SMA No. 4239 (August 28, 2014) (Charles Measter, James Warfield, Thomas Fox)

NYPE Time – Grounding – Safe Port – Masters Negligence - Attorney Fees and Costs

The M/V SEMINOLE PRINCESS was fixed on a time-charter trip for a full cargo of wheat from Adelaide, Australia, for discharge at Makassar, Sulawesi, Indonesia, and Port Kelang, Malaysia. The fixture was on an amended NYPE Time Charter format which included language that the voyage would be "via safe ports, safe berths, always afloat."

The vessel loaded without incident, and after arriving at the first discharge port, Makassar, proceeded to the entrance channel via the NW Approach and ran aground on an uncharted reef. Attempts at refloating the vessel over several days using the main engine and the assistance of a tug proved unsuccessful, and the vessel was only refloated after discharging about six percent of its total cargo into a lightering vessel. A surveyor from the vessel's Classification Society inspected the vessel and issued an Interim Certificate, imposing Conditions of Class covering the damage, requiring the damage be rectified within one month of the grounding (later amended to within one year of the grounding to coincide with the vessel's next scheduled drydock). The charterer negotiated a second voyage with same load and discharge options, which was performed without incident, following which the vessel proceeded to her scheduled drydock to effect repairs.

The crux of this dispute centered on whether it was proper for the Master to have taken the NW Approach rather than the WSW/Buoyed Approach. Charterer asserted that Makassar was a safe port and that the Master was grossly negligent when he took the vessel through the NW Approach. Char-

terer's expert witness highlighted that one of the main charts for the NW Approach described it as very narrow, surrounded by blue-shaded areas before emerging into a more open area within the reef system. The expert witness stated: "one thing I want to bring up is that mariners, when they see blue on a chart, that means stay away, and the Master went right across the blue." Furthermore, two pertinent sections of one of the local pilotage publications, "Admiralty Sailing Directions: Indonesian Pilot" ("Sailing Directions"), highlighted the changing coral formations at the entrance to the NW Approach – which the Sailing Directions cautioned was best transited with local knowledge – which would have alerted the vessel's officers to the potential dangers lurking at that entrance. Charterer also pointed out that the "Sailing Directions" stated that pilots would only take vessels through the WSW/Buoyed Approach. Lastly, Charterer stated that over a little more than four-year period, it sent close to 100 vessels into Makassar, the majority being the size of the M/V SEMINOLE PRINCESS, all of which entered and departed via the WSW/Buoyed approach without incident. The Charterer added that after the SEMINOLE PRINCESS was refloated, the vessel also entered and departed via the WSW/Buoyed Approach.

The vessel's Master testified that the NW Approach had a recommended track, with almost a direct line to the port as opposed to the WSW/Buoyed Approach which required several sharp turns. Further, the charts indicated that the NW Approach offered more than sufficient depth to accommodate the vessel as well as an abundance of available landmarks; and that, although the WSW/Buoyed Approach had a buoyed channel, the charts warned that the buoys were unreliable, convincing the Master to use the NW Approach. The Master further stated that local knowledge was not required with respect to entering via the NW Approach, disputing that taking a pilot would have prevented the casualty. Owner maintained that the uncharted reef in the NW Approach rendered Makassar an unsafe port in breach of charterer's warranty of providing a safe port. Owner further argued that should the panel conclude that the charterer and Master shared responsibility for the casualty, which owner strongly denied, the damages should be apportioned in accordance with their comparative fault.

The panel majority found that the proper exercise of prudent navigation and good seamanship by a Master who had not previously called Makassar should have resulted in his having chosen the WSW/Buoyed approach, adding that the Master's avoidance of this Approach based on the unreliability of buoys in that channel was not credible. The Master's apparent sole reliance on the warnings and advice of the charts and "Sailing Directions" led directly to the vessel's grounding at the entrance to the NW Approach. Addressing owner's comparative fault argument, the panel majority found that the NW Approach was unsafe for the vessel, that Makassar was a safe port and that the Master could have avoided the grounding through more prudent voyage planning and the exercise of good seamanship by choosing the WSW/Buoyed approach. Thus, there was no basis to consider comparative fault. The panel majority held that all of charterer's claims had succeeded and denied owner's counterclaim.

The dissenting opinion stated the NW Approach was considered a safe approach according to the "Sailing Directions" and charts, while acknowledging that the Master could be criticized for failing to engage a local pilot. The dissent concluded that the Master and charterer shared responsibility for the grounding, the Master for failing to utilize a pilot and charterer by nominating a port with a charted Approach that had an uncharted reef. Had this port had only one safe entrance, then a case could be made that the Master's negligence was the sole cause of the casualty. As there were four entrances to the port, and the one chosen by the Master turned out to be unsafe because of an uncharted obstruction, charterer's negligence was also implicated in the casualty.

1 "OCEANIC FIRST," SMA No. 1054 (1976)
2 SMA No. 4245 (2015). The panel directed owner to produce to charterer on a confidential basis all ISA documents.
3 SMA No. 4304 (2017)
4 The SPM is a flat cylindrical buoy body approximately 12M in diameter and 5.3M high. The SPM has a roller bearing assembly to permit the moored tanker to rotate freely around the SPM. The vessel is secured to the SPM with two double mooring hawsers with a chafe chain attached to the end of each hawser. Regulations also require the use of at least one 50-ton bollard pull tug tied to the vessel stern to maintain a safe distance from the SPM and prevent the vessel from swinging and damaging the flexible cargo hoses. Partial Final Award at p. 6852

5 The Oil Companies International Marine Forum (OCIMF) was formed in April 1970 in response to the growing public concern about marine pollution, particularly by oil. In the 52 years since, OCIMF has grown to become a leading authority on safety for the global marine industry and today has over 100 member companies and consultancy status at the International Maritime Organization (IMO).

Focus on SMA Members

The SMA is pleased to welcome **Captain James C. DeSimone** as a member. Captain DeSimone has held senior management positions in the maritime industry, having served for more than sixteen years as Deputy Commissioner & Chief Operating Officer of the Ferry Division of the New York City Department of Transportation, from which he retired in 2020.

Prior to assuming that position, Captain DeSimone was engaged in management in the high-speed ferry and towing and transportation sectors of the industry as well as serving in the administration of the State University of New York Maritime College at Fort Schuyler. During his sea-going career, Captain DeSimone sailed in all shipboard capacities up to and including Master and served as Port Captain.

Captain DeSimone holds various professional degrees, including an MBA and a Professional Certificate in Chartering from the Association of Shipbrokers and Agents. He is a U.S. Coast Guard licensed Master of Steam or Motor Vessels of Any Gross Tons upon Oceans. Captain DeSimone has been honored during his career to receive a number of professional awards including the U.S. Coast Guard Meritorious Public Service Award and the degree of Doctor of Science ("honoris causa") from the State University of New York.

Spotlight on the SMA

SMA at the Admiralty Law Institute, Tulane University – March 30-April 1, 2022

SMA President **LeRoy Lambert** participated on a Panel discussing "Arbitration of Seafarer Claims."

SMA Luncheon - April 13, 2022

The SMA's monthly luncheon featured a well-received presentation by **Mike Leahy**, Managing Director, and **Claudia Botero-Gotz,** Senior Lawyer, of Gard (North America), Inc. on "Container Ship Fires and Cargo Misdeclarations."

SMA at the GNOBFA (The Greater New Orleans Barge Fleeting Association) River and Marine Industry Seminar, New Orleans – April 27-29, 2022

SMA member (and chair of the SMA Mediation Committee) **Robert Milana** participated on a Panel addressing the pros and cons of mediation.

SMA at the MLA ("Maritime Law Association") Spring Meeting – May 4-6, 2022

SMA members participated both in person and virtually at the recent MLA Spring Meeting held in New York City on May 4-6, 2022. The SMA enjoys a long-standing relationship with the MLA, exemplified by the MLA-SMA Liaison Committee which works to identify significant issues and operates as a sounding board for both organizations. President **LeRoy Lambert** spoke about "Professionalism in the Practice of Maritime Law: Reflections on 37 Years of Being a Maritime Lawyer" to a well-attended meeting of the MLA's In-House Counsel Committee. He also presented to the Practice and Procedure Committee on the topic of arbitration of Jones Act seafarer injury claims under post-injury/advance wage agreements containing arbitration provisions. **LeRoy Lambert, Lucienne Bulow, David Martowski, Tom Fox, David Gilmartin, Charles Anderson** and **Jim Shirley** were among the SMA members who attended the MLA's Arbitration and ADR Committee meeting where the discussion focused on topics and papers about the 100th

anniversary of the Federal Arbitration Act in 2025. At the MLA's Salvage Committee meeting and the MLA's General Meeting, SMA member **Tom Fox** reported on the status of changes to the SMA's Salvage Rules and MARSALV and advised that the MLA would be notified once the changes were completed and ratified. SMA members **Charles Anderson** (chair of the SMA Yacht Committee), **Michael Fackler, LeRoy Lambert** and **Michael Monahan** attended the MLA's Recreational Boating Committee meeting. SMA member **Lucienne Bulow** attended the Offshore Industries meeting as well as the meeting of the Carriage of Goods Committee, where discussion centered on difficulties discharging vessels on the U.S. West Coast and resulting supply chain problems.

SMA at China Maritime Arbitration Commission (CMAC)'s June 17, 2022, China High-Level Dialogue on Maritime and Commercial Arbitration (CHDOMACA)

The one-day virtual conference will focus on the latest trends in China's arbitration practice and will feature leading maritime and commercial arbitration experts from China and abroad to discuss and exchange views on the development of the current arbitration system. The SMA will participate with two or three speakers via videotaped presentation in the first session, "Hot Topics in Maritime and Commercial Arbitration." The event can be viewed online with simultaneous language translation. For further information, please see http://www.cmacnewsletter.cn/en/index.php?id=107

SMA Committee Chairs for 2022/23

SMA President Lambert has announced the following Committee Chairs for 2022/23:

The Arbitrator
Co-Editors:
Dick Corwin
Louis Epstein
Sandra R. M. Gluck

ASBA and BIMCO Liaison
Soren Wolmar

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In Closing

We thank every one who contributed to this issue of **The Arbitrator** – cannot be done without you.

To all readers: Have an article or an idea for an article to contribute for a future edition? If so then please let us know! Also, we welcome feedback which will help us to ensure that **The Arbitrator** provides timely and relevant articles and information to the maritime arbitration community in New York and around the world.

And thanks to Tony Siciliano and to all readers who keep our membership abreast of maritime news items and developments.

And please follow the SMA via LinkedIn: https://www.linkedin.com/company/society-of-maritime-arbitrators-new-york/

Thoughts or suggestions? Please let one of us know: dick.corwin@icloud.com; sandra.gluck@gmail.com; or louis.epstein@trammo.com.

Manfred W. Arnold

We were saddened to learn that SMA Past President Manfred W. Arnold died on May 18, 2022.

Manfred's obituary is at https://www.legacy.com/us/obituaries/name/manfred-arnold-obituary?id=34907746 (and see "Manfred Arnold Looks Back" https://smany.org/pdf/Vol51_No3_Oct2021.pdf).

Manfred was a key figure in the SMA and in ICMA for decades and a valued colleague and mentor. Our deepest sympathy to his wife Susan and daughters Heidi and Kirsten. The family has requested privacy, and we ask that their wishes be respected.

THE ARBITRATOR

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THE ARBITRATOR (ISSN# 1946-1208) is issued 3-4 times a year; published by The Society of Maritime Arbitrators, Inc., 127 West 30th Street, 9th Floor, New York, NY 10001. The publication is posted on our website and the subscription is free. To join our mailing list, please register your email address at https://www.smany.org.