SMA THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

Volume 52 / No. 3 September 2022

In this issue

President's Message

By LeRoy Lambert, SMA President

The Officers and Board are looking forward to the 2022-23 year and working with all to create the long rumored "new normal," including in person meetings, and, perhaps more importantly, the desire for and joy in seeing each other in person. We kicked off with our usual September "members only" luncheon on September 14 at our usual venue, the 3 West Club; please join us on Wednesday, October 12, as we resume in person luncheons with speakers on the second Wednesday of every month through April (see p. 32).

In addition to our monthly luncheons, the committees and individual members are working hard to spread the word about SMA dispute resolution. Read all about it in the "Spotlight on the SMA" column at p. 31 below. In addition to the items in the Spotlight, Rich Decker and his Insurance Committee continue to promote SMA dispute resolution within the domestic

marine insurance market and enjoy the continuing support of AIMU in doing so.

We are now just over a year away from the ICMA XXII Congress which will be held in Dubai November 4-10, 2023. As always, the organizers will solicit papers and presenters. Preparing and presenting a paper is an excellent way for our members to reach out to other organizations and individuals concerning the SMA, the SMA Rules and the SMA's Code of Ethics and to raise members' visibility within the international maritime arbitration community. Dave Martowski is our liaison and will provide information about the deadlines as they become available.

Not only are the SMA's new Arbitration Rules in effect but the SMA's new Salvage Arbitration Rules also are now in effect. They are on the SMA website www.smany.org. A new "Blue Book" will be issued in due course, but meanwhile be sure to refer to the Rules on the website.

The SMA website is being revamped. When completed, we will be able to keep it updated ourselves without the need for (and cost of) an outside consultant. Many thanks to Dan Schildt, chair of the Technology Committee, and to Patty Leahy, the SMA's Office Manager, for seeing this through.

I would like to extend a warm welcome to SMA member George Tsimis who joins Dick Corwin, Louis Epstein and Sandra Gluck as a co-editor of The Arbitrator, beginning with this issue.

Reminder to all: join Chris Nolan, Chair of the MLA Arbitration & ADR Committee, and Chris's team for the monthly Zoom "coffee breaks" on the third Friday of each month.

As we move forward towards the "new normal," the words of tennis great Arthur Ashe seem particularly apt: "Start where you are." Let's get started!

LeRoy Lambert
President

Does a Right to a Physical Hearing Exist in International Arbitration?

The United States*

By James Hosking, Yasmine Lahlou, Partners, and Marcel Cardoso, Legal Consultant, Chaffetz Lindsey LLP, New York

Parties' Right to a Physical Hearing in the *Lex Arbitri*

Does the lex arbitri *of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: **No.**

Neither the Federal Arbitration Act (FAA) nor state laws on international arbitration provides for the right to a physical hearing.

International arbitration in the U.S. is primarily governed by the FAA. While the FAA does not explicitly provide for a right to an arbitration hearing at all, the drafters certainly contemplated that hearings are an integral part of the arbitral process.[1] The FAA is however silent as to how hearings should be conducted, including as to whether any hearing must be physical. This is hardly surprising given that Chapter One of the FAA remains largely as enacted in 1925, when the drafters were unconcerned with the possibility of holding hearings other than in-person.

At the state level, a few States have adopted some form of the UNCITRAL Model Law on International Commercial Arbitration as their international arbitration statutes. That is the case for California, Texas, and Florida, who thus have provisions similar to Articles 18 (equal treatment of parties), 19 (determination of rules of procedure), 20 (place of arbitration), and 24 (hearings and written proceedings) of the Model Law.[2] The latter, in particu-

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lar, provides that failing the parties' agreement to the contrary, the tribunal shall have discretion to determine whether an oral hearing shall take place or if the case will be decided solely on the basis of written submissions and documentary evidence. One important qualification on this discretion, present in all three states mentioned above, is that "unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold oral hearings at an appropriate stage of the proceedings, if so requested by a party." This provision, however, does not require the hearing to take place physically. Coupled with the provisions granting the tribunal discretion to determine where to take testimony and hear oral argument (based on Article 20 of the Model Law), it means it is unlikely that courts applying those statutes would find that parties are entitled to a physical hearing.

Twenty-two States have adopted the Revised Uniform Arbitration Act (RUAA), drafted by the Uniform Law Commission to promote uniform treatment across different jurisdictions. Inspired by the FAA and the UNCITRAL Model Law, the RUAA provides that arbitrators may conduct arbitration proceedings as they consider appropriate for a fair and expeditious disposition of the proceeding, limited to parties' agreement, and that failure to postpone a hearing when good cause is shown or to hear material evidence can lead to vacatur.[3] It also provides that "*if* an arbitrator orders a hearing, the arbitrator shall set a time and place,"[4] a literal reading of which would suggest the tribunal is not obligated to hold a physical hearing. However, the RUAA's application to international arbitration will be very limited.[5]

New York's arbitration statute, on which the FAA was originally modelled[6] and which is codified in Article 75 of the New York Civil Practice Law and Rules (CPLR), deals with arbitration broadly and does not expressly grant a right to a physical hearing. The few provisions dealing with the issue simply establish that "[t]he arbitrator shall appoint a time and place for the hearing and notify the parties," that the tribunal "may adjourn or postpone the hearing," and that "[t]he parties are entitled to be heard, to present evidence and to cross-examine witnesses."[7] Nothing in the language of the statute implies that this conduct of the proceeding must happen in person.

If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction's lex arbitri *(e.g., a rule providing for the arbitration hearings to be "oral"; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

Short answer: **Likely not.**

There is no such reported case in the U.S. More specifically, it is unlikely that U.S. courts would read the requirements of granting the parties an oral hearing—to the extent that such provision exists either in the arbitration agreement or in the relevant state's law—as requiring a physical hearing. The main issue is not whether the hearing is physical or remote, but whether it is conducted in such a way as to grant the parties a fundamentally fair proceeding, which includes a full opportunity to present material evidence.[8] U.S. courts have generally held that, failing the parties' agreement to the contrary, either expressly or by reference to arbitration rules, the arbitrators have broad discretion to decide whether or not to hold evidentiary hearings, as well as the format the hearing should take.[9] As such, an arbitrator's discretion should include the power to order remote hearings so long as the parties' due process rights are protected.

In the only arbitration-specific decision to date arising out of challenges presented by the COVID-19 pandemic, a district court in Illinois relied on long-standing FAA case law to deny a preliminary injunction that sought to bar an arbitration hearing from proceeding remotely. The petitioner argued, inter alia, that the applicable arbitration rules—those of the Financial Industry Regulatory Authority (FINRA)—required a physical hearing as they contained provisions entitling the parties to "attend all hearings," "in the event a hearing is necessary," at the "time and place" designated by the director of the institution.[10] The court reasoned that "[u]nder the Federal Arbitration Act, 'procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator to decide.' [...] Whether FINRA can or should conduct a hearing remotely is a question of procedure that FINRA, not the court, must decide."[11] The court also found that, even if the requirements for the injunction had been met, the balance of equities would dictate against granting the order.

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That is because the injunction would force either a physical hearing—which FINRA was currently not holding due to the pandemic—or an indefinite postponement, immeasurably hurting the opposing party's interest. Thus, the balance of equities lead to the conclusion that holding a remote hearing was the least harmful way forward. Lastly, the court found there was no proof that holding a remote hearing would harm petitioner's right to present its case. On the contrary, the court drew from its own positive experiences with remote proceedings to say that "[r]emote hearings are admittedly clunkier than in-person hearings but in no way prevent parties from presenting claims or defenses."[12]

UNCITRAL Model Law jurisdictions—such as California, Texas and Florida—expressly require the conduct of oral hearings if requested by a party but there is no statutory provision or case law requiring that the parties, the witnesses and the tribunal be physically present in the same room.[13] The FAA and the New York CPLR, on the other hand, do not have a specific provision expressly requiring oral arbitration hearings. However, the CPLR does provide that "parties are entitled to ... cross-examine witnesses."[14] And an arbitrator's refusal to hear material evidence or postponing a hearing "when sufficient cause [is] shown" is one of the grounds for vacatur under §10(a)(3) of the FAA.[15] These are exceptional cases, however, and courts have been clear that a tribunal's procedural decisions will be respected unless they lead to a *fundamentally unfair* proceeding.[16]

Parties' Right to a Physical Hearing in Litigation and its Potential Application to Arbitration

In case the lex arbitri *does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*

Short answer: **Maybe, but to the extent such right exists it is subject to significant exceptions.**

Pursuant to Section 203 of the FAA, disputes arising out of international arbitrations are deemed to "arise under the laws and treaties of the United States" and, as such, are subject to the original jurisdiction of the federal courts.[17] This analysis will therefore focus on the Federal Rules of Civil Procedure (FRCP), which will be applied by federal courts in actions related to the enforcement of an agreement to arbitrate or an arbitration award to the extent that those procedures are not covered by the FAA.[18]

The FRCP requires that "witness testimony must be taken in open court."[19] However, "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."[20] This permission has often been used even before the COVID-19 pandemic to allow witnesses to testify by video or telephone when travel to the place of trial would be unfeasible or lead to unnecessary costs, when the complexity of the case justified testimony by contemporaneous transmission, as well as when the evidence was cumulative.[21]

Although a few decisions have found "trial by videoconference is certainly not the same as conducting a trial where witnesses testify in the same room as the factfinder,"[22] technological advances have made U.S. courts more supportive of using such technology.[23] This trend has been dramatically accelerated by the impact of the COVID pandemic, in which entire trials have been conducted by videoconference.[24]

It has been said that "the drafting history (of Rule 43(a)) shows that the purpose of requiring testimony to be taken in open court was a matter of functionality rather than physicality."[25] The notes of the Advisory Committee overseeing drafting the FRCP make clear that this rule was meant to abolish the practice from patent and trademark actions of using affidavits rather than live testimony,[26] as well as the use of edited depositions, which, in addition to being inaccurate and incapable of being tested by cross-examination, did not allow the factfinder to observe a witness's demeanor and assess their credibility.[27] Thus, courts have said "[t]he primary purposes of Rule 43(a) are to ensure that the accuracy of witness statements may be tested by cross-examination and to allow the trier of fact to observe the appearance and demeanor of the witnesses."[28]

The possibility of "contemporaneous transmission" was added to Rule 43 in a 1996 amendment. The Advisory Committee stressed the importance

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of live testimony in the U.S. legal tradition, which gives factfinders "[t]he opportunity to judge the demeanor of a witness face-to-face," as well as reasoning that "[s]afeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured."[29] These are the factors that federal courts have considered when assessing whether "appropriate safeguards" are in place to make remote testimony possible.[30] Lastly, while older decisions have stressed that "remote transmission is to be the exception and not the rule [under Rule 43(a)],"[31] more recent decisions have found that "advances in technology minimize these concerns" as they "permit[] the jury [or, in a bench trial, the Court] to see the live witness along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, [and] his calmness or consideration."[32]The same general approach appears in state court decisions,[33] although the policy concerns underlying the preference for live testimony have explicitly been found to be properly addressed in evidence given via Skype – even before the COVID-19 pandemic.[34]

Therefore, although it is certain that courts have the right to hear live testimony from witnesses, it is less clear that this needs to be done in a physical hearing. The reference to requiring testimony in "open court" may be read as calling for a public proceeding rather than a physical one.[35] It is thus unclear whether a right to a physical hearing currently exists in the general rules of civil procedure. To the extent that it does, it contains a significant exception allowing for remote hearings in special circumstances. Further, the case law specifically endorses the use of technology such as that deployed in remote arbitral hearings.

If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?

Short answer: **No**.

U.S. courts have repeatedly confirmed that arbitrators are not bound to follow judicial rules of procedure.[36] In any event, as noted in answer to sub-paragraph b.3, it is unclear whether a right to a physical hearing currently exists in the general rules of civil procedure. To the extent that such a right does exist, it is limited by the showing of good cause and adoption of appropriate safeguards, all of which are properly addressed by procedures that are already common practice in international arbitration. These include hearing live testimony through video platforms (allowing arbitrators to identify the witness, observe demeanor and assess credibility), having a party representative present at the location where the witness is giving her testimony or using a 360° camera (ensuring the witness is not being coached during testimony), and making cross-examination bundles available to the witness, either in hard copies, electronically or by simply sharing the screen (ensuring the right to cross-examination is not hindered).

Thus, to the limited extent that a right to a physical hearing may apply to litigations conducted under the FRCP, such a right does not extend to arbitration, neither as a legal nor as a practical matter.

Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal

To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?

Short answer: **N/A**

Not applicable.

To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?

Short answer: It depends.

The U.S. Supreme Court has consistently ruled that "arbitration is a matter of contract"[37] and arbitration agreements must be enforced according to their terms.[38] That is so even if the contractual terms lead to inefficient proceedings.[39] This is true whether the agreement at issue involves substantive or procedural matters.[40] Therefore, if the arbitration agreement requires a physical hearing, either expressly or by reference to arbitration rules,[41] an arbitral tribunal could not order a remote hearing contradicting the parties' agreement. An order under such circumstances could

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well lead to vacatur for excess of authority.[42]

That is so, however, only if the arbitration agreement makes clear the parties' intent to have a physical hearing in any circumstances. U.S. courts apply vacatur provisions narrowly and will not review the arbitrator's construction of the contract except in exceptional circumstances.[43] If the arbitration agreement is silent or ambiguous on whether a hearing will be physically held, the arbitral tribunal has discretion to determine to hold one remotely.[44] The tribunal's decision on whether to hold a hearing or not and its conduct during the hearing will generally be respected, unless it was fundamentally unfair.[45]

Setting Aside Proceedings

If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?

Short answer: **Yes.**

As mentioned above, neither the FAA nor the reviewed state laws on international arbitration provide for the right to a physical hearing. Assuming, however, that such a right was recognized in a specific case, a party would have to object during the arbitration to preserve the issue for a subsequent petition to vacate the award. U.S. courts typically refuse petitions to set aside or to challenge enforcement if the resisting party did not raise the impugned arbitral conduct during the arbitration.[46]

To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se *a ground for setting aside (e.g., does it constitute* per se *a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

Short answer: **N/A**

As mentioned above, neither the FAA nor the reviewed state laws on international arbitration provide for the right to a physical hearing. Assuming, however, that such a right was recognized in a specific case, parties seeking to vacate an award generally must not only establish the violation of a right *per se,* but that such violation actually prejudiced its case as to deprive it of a fundamentally fair hearing.[47]

In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?

Short answer: **Highly fact-dependent but, of itself, likely not.**

A failure to conduct a physical hearing could constitute a basis for setting aside the award but only if the hearing was organized and conducted in such a way as to deprive a party from a fundamentally fair proceeding, or if the parties had actually agreed to hold a physical hearing.

The list of grounds for vacatur is set out in §10 of the FAA. [48] As mentioned in answer to sub-paragraph a.2 above, §10(a)(3) provides that an award can be set aside when the tribunal is guilty of misconduct, including in refusing to hear material evidence and/or postpone the hearing when good cause is shown. U.S. courts give great deference to an arbitral tribunal's decision on procedural issues,[49] recognizing that "to vacate on the ground of arbitrator misconduct, pursuant to § 10(a)(3), a mere difference of opinion between the arbitrator and the moving party about the correct resolution of a procedural problem is insufficient."[50] The FAA sets a high threshold, and an arbitrator will only be found to have committed misconduct if she acted in bad faith or committed an error so gross "as to amount to affirmative misconduct."[51]

In actions under §10(a)(3) of the FAA, U.S. courts will often look at potential procedural irregularities through the prism of "fundamental fairness."[52] A fundamentally fair hearing is one that "meets the minimal requirements of fairness," namely adequate notice, an impartial decision-maker and a hearing on the evidence.[53] Even then, courts have upheld awards decided on documents only, without an evidentiary hearing.[54] Instead, fundamental fairness requires that a party be given a "full and fair opportunity to present evidence."[55] Thus, U.S. courts are unlikely to second guess a tribunal's decision to hold a remote hearing so long as the

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parties were given a fair opportunity to present material evidence.[56] Likewise, vacatur will not be granted when a party or a witness cannot testify in person at a physical hearing but was able to give testimony via telephone or video.[57]

Also potentially relevant is vacatur for excess of the arbitrator's authority under §10(a)(4) of the FAA. This is said to be the most common ground invoked to vacate an award.[58] Although it is more commonly used when the arbitrator is alleged to have misapplied the material provisions of the contract, it could also be invoked in relation to the interpretation of the arbitration agreement itself.[59] However, U.S. courts construe this section very narrowly so that vacatur based on this ground would at a minimum require evidence of the parties' clear agreement to hold a physical hearing[60] and the tribunal's subsequent disregard thereof.

Recognition/Enforcement

Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?

Short answer: **Likely not.**

It is unlikely that the breach of a right to a physical hearing, if such right is deemed to exist under the particular circumstances of the case, would lead a U.S. court to exercise its discretion to refuse enforcement.

When presented with an Article V defense to recognition and enforcement, U.S. courts will conduct a *de novo* review[61] of the issues raised by the party. However, in reviewing awards, courts largely adopt a "pro-enforcement bias," conducting an extremely narrow reading of the provisions.[62]

It is broadly accepted that Article V(1)(b) "essentially sanctions the application of the forum state's standards of due process."[63] This does not mean that the parties should have been given the full set of procedural rights afforded to litigants in U.S. courts, but rather that they have been afforded a "fundamentally fair" proceeding.[64] Most relevant, courts will look at whether the party was given "the opportunity to be heard 'at a meaningful time and in a meaningful manner'."[65] Thus, in one of the seminal U.S. cases applying the New York Convention, the court enforced an arbitral award over the objection that the tribunal's refusal to postpone the hearing to accommodate a witness' schedule deprived the petitioner of its right to present its case.[66] The court reasoned that by choosing arbitration, the parties "relinquish [their] courtroom rights ... in favor of arbitration with all of its well known advantages and drawbacks," that postponing a hearing to accommodate the witness would be too disruptive, and that the logistical problems involved in scheduling a cross-border arbitration weighed against adjournment.[67] Subsequent case law, including embracing the advent of video technology unthinkable when this decision was issued almost 50 years ago, has confirmed the court's general approach to such defenses to enforcement.[68]

Generally speaking, U.S. courts will not focus on whether a right to a physical hearing existed at the seat, but will apply U.S. notions of due process[69] and assess whether the challenging party was given "an adequate opportunity to present its evidence and arguments."[70]

With respect to a defense premised on Article V(1)(d), two main considerations arise in the present context. First, in considering the "law of the country where the arbitration took place," U.S. courts will look at the *arbitration* law rather than the *civil procedure* law of the seat,[71] which for awards issued in the United States is the FAA.[72] That means that any right to a physical hearing stemming from the seat's general rules of procedure may not lead to a successful V(1)(d) defense. Second, mere lack of compliance with the procedural rules is not sufficient, of itself, to justify non-enforcement. Rather, U.S. courts require the party resisting enforcement to show that non-compliance caused it substantial prejudice.[73] U.S. courts give great deference to the tribunal's interpretation of the parties' agreement and of the law of the seat, and will generally enforce the award unless this high threshold of substantial prejudice resulting from the arbitrator's procedural decision is shown.[74] Thus, a party seeking to resist enforcement in the U.S. under Article V(1)(d) because the tribunal failed to hold a physical hearing has the substantial burden of proving, first,

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that such a right existed in the *arbitration* law of the seat or was clear from the parties' agreement, and second, that the tribunal's failure to order a physical hearing caused it substantial prejudice.

The public policy defense in Article V(2)(b) is also construed narrowly, and enforcement is only denied when it would violate "the forum state's most basic notions of morality and justice."[75] Courts in the U.S. have found that "'public policy' and 'national policy' are not synonymous,"[76] and to justify non-enforcement the public policy "must be 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests'."[77] The mere fact that a policy is embodied in some clearly expressed rule of statutory or common law is not itself sufficient to demonstrate an expression of the forum's most basic notions of morality and justice., since "[a]ll laws, be they procedural or substantive, are founded on strong policy considerations."[78] Thus, even if the U.S. had a national policy requiring physical hearings, it is unlikely that it would rise to the level required by Article V(2)(b) to justify refusal of enforcement.[79]

By way of illustration, a foreign arbitral award has been enforced in the U.S. over a party's argument that the tribunal's refusal to hold an oral hearing violated U.S. public policy.[80] Petitioner argued that the applicable UNCITRAL Arbitration Rules entitled it to an oral hearing, and that the award, issued solely on documents despite petitioner's express request to hold an oral hearing, was contrary to the U.S.'s notion of fundamental fairness and justice. The tribunal had issued a procedural order ordering parties to submit all documentary evidence and witness statements for persons who wished to testify by a given deadline. Petitioner did not submit any witness statement at that time, and simply stated "[w]e remain at the Arbitrators' disposal for any oral hearing they might wish to call in this case." Petitioner requested an oral hearing two weeks later, which the tribunal ultimately refused, finding that petitioner had waived such right by not making a request by the deadline expressed in the procedural order. The U.S. court found that, irrespective of waiver, "under the rules and procedures established by the Tribunal, [petitioner] would have had no evidence to present at the hearing"[81] as it did not present witness statements. Under those circumstances, "[petitioner] ha[d] failed to meet its burden to prove that the arbitral process violated [the U.S.'s] basic notions of fundamental fairness and justice."[82]

Similarly, an award has been enforced despite being based on witness statements from witnesses who were unavailable for cross-examination, allegedly in contravention of the parties' agreed-upon procedures, when petitioners failed to request an adjournment to hear the witnesses at a later hearing.[83]

Thus, it is unlikely that a right to a physical hearing, to the extent that it might exist in any relevant jurisdiction, would qualify as one of the U.S.'s most basic notions of morality and justice so as to justify refusal of enforcement under Article V(2)(b).

COVID-Specific Initiatives

To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?

Short answer: **N/A**

For many years federal court filings have been made electronically, which practice has continued throughout the pandemic. Further, U.S. courts have been using videoconferencing and similar forms of technology for over 20 years, although the number of remote proceedings has significantly increased in the wake of the COVID pandemic.[84] Given the autonomy retained by each court, proceedings vary from one court to the other. The 7th Circuit, for example, is hearing cases scheduled through December 31, 2020 by telephone or video communication, with audio live-streamed to YouTube.[85] And many states have issued orders suspending or extending deadlines and tolling statutes of limitations.[86] Also, several courts have installed, or are in the process of installing, video platforms and providing training to judges and court personnel, as well as issuing guidelines and instructions for attorneys.[87] Overall, the U.S. court system has been supportive of adopting remote proceedings, and the technological advances and necessity of the current circumstances have only strengthened such perception.[88]

Likewise, U.S.-based arbitral institutions and arbitration centers have issued directives and protocols promoting adoption of procedures for remote hearings and seeking to assist parties with the

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practical aspects of advancing arbitration cases during the pandemic.[89]

1 FAA § 4 (providing that after an order compelling arbitration, "[t]he hearing and proceedings ... shall be within the district in which the petition for an order directing such arbitration was filed); FAA § 10(a)(3) (allowing courts to vacate an award "[w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown[.]"

2 See CA Civ. Pro §1297.181, 1297.191-193, 1297.201-203, 1297.241-242; Tex. Civ. Prac. & Rem. §172.101, 172.103-104, 172.106, 172.111; FL ST §684.0029, 684.003, 684.0031, 684.0035. As there are limited circumstances in which state law would apply, these statutes are rarely invoked and there is little caselaw. See generally Alexandra DOSMAN and Clara FLEBUS, "The Federal Arbitration Act and State Arbitration Acts: Impact of Federalism on International Arbitration in the U.S" in Laurence SHORE, Tai-Heng CHENG , et al., eds., *International Arbitration in the United States* (Kluwer Law International 2017), at pp. 31-54 (2017); David LINDSEY, James HOSKING and Jennifer GORSKIE, "United States" in *World Arbitration Reporter,* at p. USA-7-8 (explaining the interplay between the FAA and state law and citing cases); AMIRFAR, REID and POPOVA., "National Report United States" in ICCA *International Handbook on Commercial Arbitration* (henceforth *Handbook*) p. 5 (explaining the relationship between federal and state arbitration law and stating that "an arbitration concerning a commercial transaction will rarely, if ever, fall outside the scope of the FAA."); Ina C. POPOVA and Duncan PICKARD, "Country Report: The United States of America" in Franco FERRARI , Friedrich Jakob ROSENFELD, et al., eds., *Due Process as a Limit to Discretion in International Commercial Arbitration* (Kluwer Law International 2020), p. 429 at p. 430-31 (stating that "[u]nless parties explicitly choose to have a state international arbitration statute govern their dispute, these statutes will rarely impact an international arbitration given the supremacy of federal law, which largely governs that area" and citing cases).

3 RUAA, Section 15(a) and Section 23(3); RUAA, Section 15, Uniform Law Commission's Comment 1.

4 RUAA, Section 15(c).

5 "The subject of international arbitration is not specifically addressed in the RUAA," and the statute will only apply where the parties chose a RUAA state law as the applicable law, the State has no international arbitration statute in place and the dispute commences in state courts and is not removed to federal courts. RUAA, Preparatory Note to the 2000 Revision.

6 D LINDSEY, J. HOSKING and J. GORSKIE, "United States," fn. 7 above, at p. USA-1.

7 NY C.P.L.R. §7506(b) and (c).

8 See *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79 (2002) (finding that procedural issues are for the arbitrators, not the judges, to decide). See also *ST Shipping & Transp. PTE, Ltd. v. Agathonissos Special Mar. Enter.*, 2016 WL 5475987, at *4 (S.D.N.Y. June 6, 2016) ("there is no brightline rule requiring arbitrators to conduct oral hearings. ... 'The key issue is whether the arbitral panel 'allow[ed] each party an adequate opportunity to present its evidence and argument.'"). See also AMIRFAR, REID and POPOVA., "National Report United States of America" in *Handbook,* p. 43 ("the Federal Arbitration Act (the FAA) [...] imposes minimal procedural standards on arbitrations subject to the statute. Courts applying those grounds recognize, however, that arbitrators have virtually unlimited discretion to handle procedural issues as they deem fit, subject only to the provisions of any applicable rules, the agreement of the parties, and each party's fundamental right to be heard"; Paula F. HENIN and Rocío Ines DIGÓN, "Enforcing New York Convention Awards in the United States: Chapter 2 of the FAA" in Laurence SHORE , Tai-Heng CHENG , et al., eds., *International Arbitration in the United States,* (Kluwer Law International 2017) p. 553 at p. 581 (stating that "U.S. courts afford significant deference to the decisions of arbitral tribunals pertaining to the management of the proceedings, including evidentiary rulings and restrictions on the conduct of oral hearings" and citing cases).
See also the discussion in answer to sub-paragraph d.9 below.

9 See *Graham v. Scissor-Tail, Inc.,* 28 Cal. 3d 807, 822 (1981) (finding there was no right to an oral hearing when the by-laws on which the arbitration was based contained a waiver on taking oral testimony and presenting oral arguments); Gary B. BORN, *International Commercial Arbitration, 2d ed.* (Kluwer Law International 2014) at pp. 2134-35 ("In the United States, the FAA's statutory text is silent regarding procedural matters, but U.S. judicial decisions and other authority uniformly confirm the parties' freedom to agree upon the arbitral procedures, subject only to very limited requirements of procedural fairness.") and p. 2148 (stating that in the U.S. "arbitrators possess broad powers to determine arbitral procedures, absent agreement on such matters by the parties" and citing cases) See, adopting seemingly an opposite opinion, Restatement (Third) U.S. Law Int'l Comm. Arb., §4.19, Reporters' Notes, Comment c, Proposed Final Draft (2019).

10 *Legaspy v. Financial Industry Regulatory Authority, Inc.,* 2020 WL 4696818, at *2-3 (N.D. Ill)(August 13, 2020), motion for preliminary injunction pending resolution of appeal denied (7th Cir. 14 August 2020). As the subject arbitral hearing had already taken place, a subsequent appeal became moot and was dismissed without prejudice by request of the parties. While this is a domestic arbitration case, the courts' deference to arbitrators on issues of procedure is similar whether the arbitration is international or domestic.

11 Ibid.

12 Ibid.at *4.

13 See statutory provisions listed in fn. 7 above.

14 NY C.P.L.R. §7506(c). This right can be waived. NY C.P.L.R. §7506(f).

15 9 USC §10(a)(3).

16 See discussion on fundamental fairness in subparagraph d.9.

17 9 USC §203.

18 Fed. R. Civ. P. 81(a)(6)(B) ("These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures: ... (B) 9 U.S.C., relating to arbitration"). See also *Champ v. Siegel*

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Trading Co., 55 F.3d 269, 276 (7th Cir. 1995) ("the Federal Rules fill in only those procedural gaps left open by the FAA.") There are also rules of civil procedure promulgated in each State; however they are broadly analogous to the FRCP.

19 Fed. R. Civ. P. 43(a).

20 Ibid. Also, Fed. R. Civ. P. Rule 78(b) allows the court to proceed without oral hearings.

21 See, e.g., *Lopez v. NTI, LLC,* 748 F. Supp. 2d 471 (D. Md. 2010) (allowing testimony by videoconference when witness resided outside the U.S. and travel costs would be a needless expense); I*n re Vioxx Prod. Liab. Litig.*, 439 F. Supp. 2d 640, 643 (E.D. La. 2006) (allowing testimony by videoconference, *inter alia,* given the complex nature of a multi-district litigation and when defendant exerted control over the witness but refused to voluntarily produce it for purely tactical reasons); *Thomas v. Anderson,* 912 F.3d 971 (7th Cir. 2018) (refusing testimony except by video when evidence was cumulative).

22 *In re RFC & ResCap Liquidating Tr. Action,* 444 F. Supp. 3d 967, 970 (D. Minn. 2020).

23 *In re Vioxx Prod. Liab. Litig.,* 439 F. Supp. 2d 640, 642 (E.D. La. 2006) ("there has been an increasing trend by federal courts allowing and by legal commentators advocating for the use of contemporaneous transmission of trial testimony.") (listing cases). See Charles Alan WRIGHT and Arthur R. MILLER, *Federal Practice and Procedure* (Thomson Reuters 2020) §2414 ("federal courts have shown consistent sensitivity to the utility of evolving technologies that may facilitate more efficient, convenient, and comfortable litigation practices")

24 See, *e.g., Argonaut Ins. Co. v. Manetta Enterprises, Inc.*, 2020 WL 3104033 (E.D.N.Y. June 11, 2020).

25 *Gould Elecs. Inc. v. Livingston Cty. Rd. Comm'n,* 2020 WL 3717792, at *2 (E.D. Mich. June 30, 2020). See C. WRIGHT and A. MILLER, *Federal Practice and Procedure,* fn. 23 above, at §2414 ("The subdivision [43(a)] reflects a preference for oral testimony in open court that is in large part a reaction to the abuses of taking testimony by deposition in the historic equity practice.")

26 Fed. R. Civ. P. 43(a), Advisory Committee's Note (1937).

27 *Gould Elecs. Inc. v. Livingston Cty. Rd. Comm'n,* 2020 WL 3717792, at *2 (E.D. Mich. June 30, 2020) (citing treatises).

28 *In re Adair,* 965 F.2d 777, 780 (9th Cir. 1992) (citing *Carter–Wallace, Inc. v. Otte,* 474 F.2d 529, 536 (2d Cir.1972)).

29 Fed. R. Civ. P. 43(a) Advisory Committee's Note (1996).

30 See, e.g., *Flores v. Town of Islip,* 2020 WL 5211052, at *2 (E.D.N.Y. Sept. 1, 2020) (stressing the improvement of testimony given via Zoom and similar video platforms over telephone testimonies in relation to credibility assessment).

31 *Lopez v. NTI, LLC,* 748 F. Supp. 2d 471, 479 (D. Md. 2010).

32 *In re RFC & ResCap Liquidating Tr. Action,* 444 F. Supp. 3d 967, 970 (D. Minn. 2020) (quoting In re Vioxx Prods. Litig., 439 F. Supp. 2d 640, 644 (E.D. La. 2006).

33 *Bonamarte v. Bonamarte,* 263 Mont. 170, 174 (1994) (listing the reasons for requiring a witness's personal appearance in court).

34 See *City of Missoula v. Duane,* 380 Mont. 290 (2015).

35 See *Gould Elecs. Inc. v. Livingston Cty. Rd. Comm'n,* 2020 WL 3717792, at *3 (E.D. Mich. June 30, 2020) (reviewing the meaning of "open court" in the criminal context and its application to civil cases).

36 *Commercial Solvents Corp v. Louisiana Liquid Fertilizer Co,* 20 F.R.D. 359, 362 (S.D.N.Y. 1957) ("For matters of procedure relating to the hearings before the arbitrators we refer not to the Rules of Civil Procedure but to the Commercial Arbitration Rules of the American Arbitration Association which the parties agreed should control."); *EBR Holding Ltd. v. Hollywood Woodwork, Inc.,* 2005 WL 8155311, at *6 (S.D. Fla. October 17, 2005) ("arbitrators have discretion over discovery matters and are bound neither by the Federal Rules of Civil Procedure that govern discovery nor by courts' interpretations of discovery rules.").

37 *Rent-A-Center, West, Inc. v. Jackson,* 561 U.S. 63, 67 (2010).

38 *Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612, 1621 (2018).

39 See *Polimaster Ltd. v. RAE Sys., Inc.,* 623 F.3d 832, 840–41 (9th Cir. 2010) (citing *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 217–21 (1985) (enforcing an agreement that would have the claims and counterclaims heard in different forums)).

40 *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.,* 403 F.3d 85, 91 (2d Cir. 2005) (internal citations omitted) ("While we acknowledge that there is a strong public policy in favor of international arbitration, we have never held that courts must overlook agreed-upon arbitral procedures in deference to that policy.") See also G. BORN, *International Commercial Arbitration,* fn. 3 above, pp. 2134-35 (stating that U.S. courts uniformly confirm the parties' freedom to agree on procedural matters, subject only to "very limited requirements of procedural fairness, and citing cases) and p. 2182 (highlighting the limited scope of judicial review of arbitral procedures in the U.S. and citing cases).

41 *Chem-Met Co. v. Metaland Int'l, Inc.,* 1998 WL 35272368, at *2 (D.D.C. March 25, 1998) (vacating an award where the arbitrator granted "summary judgment" without an evidentiary hearing on the basis that the arbitration rules "impl[y] that, unless the parties enter a Section 37 waiver, the arbitrators must hold an oral evidentiary hearing in every case.") (The arbitration was conducted under a prior version of the AAA Commercial Arbitration Rules no longer in force.)

42 9 U.S.C. §10(a)(4).

43 See *Stolt–Nielsen S.A. v. Animalfeeds International Corp.,* 559 U.S. 662, 671 (2010) ("to obtain that relief [set aside under section 10(a)(4) of the FAA], they must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error—or even a serious error."). See also Andreas A. FRISCHKNECHT, Yasmine LAHLOU, Gretta WALTERS et al., *Enforcement of Foreign Arbitral Awards and Judgments in New York* (Kluwer Law International 2018) at p. 191 (stating that New York courts give "the narrowest of readings to the [FAA's] authorization to vacate awards" and citing cases); Marike R. P. PAULSSON, *The 1958 New York Convention in Action,* (Kluwer Law International 2016), pp. 173-74 (citing U.S. caselaw confirming the narrow interpretation of the Article V grounds).

44 See I*n re Arbitration between Griffin Indus., Inc. & Petrojam, Ltd.,* 58 F. Supp. 2d 212, 215 (S.D.N.Y. 1999) (upholding an arbitral award when the tribunal found an oral hearing was not required under the applicable procedure).

45 See answer to sub-paragraph d.9.

46 See, e.g., *Teamsters Local Union No. 764 v. J.H. Merritt and Co.,* 770 F.2d 40, 42–43 (3d Cir. 1985); *Nat'l Wrecking*

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Co. v. Int'l Bhd. of Teamsters, Local 731, 990 F.2d 957, 960 (7th Cir. 1993). See Andreas A. FRISCHKNECHT , Yasmine LAHLOU and Gretta WALTERS, *Enforcement of Foreign Arbitral Awards and Judgments in New York,* (Kluwer Law International 2018), pp. 121, 167-68; AMIRFAR, REID and POPOVA, "National Report United States of America" in *Handbook,* p. 83 (citing cases for the proposition that "procedural objections not made to the tribunal will be deemed to have been waived").

47 *Laws v. Morgan Stanley Dean Witter,* 452 F.3d 398, 399 (5th Cir. 2006). A. FRISCHKNECHT, Y. LAHLOU, G. WALTERS et al., *Enforcement of Foreign Arbitral Awards and Judgments in New York,* fn. 43 above, at p. 127; see also Paula F. HENIN and Rocío Ines DIGÓN, "Enforcing New York Convention Awards in the United States: Chapter 2 of the FAA" in Laurence SHORE, Tai-Heng CHENG, et al., eds., *International Arbitration in the United States* (Kluwer Law International 2017) at p. 582 ("some—but not all—courts have also required a showing that the resisting party was actually prejudiced by the alleged procedural unfairness."). This is the case for the 2d Circuit (*Phoenix Aktiengesellschaft v. Ecoplas, Inc.,* 391 F.3d 433, 434 (2d Cir. 2004)), and the 5th Circuit (*Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004)), as well as the district courts in the District of Columbia (*Compagnie des Bauxites de Guinee v. Hammermills, Inc.,* 1992 WL 122712 (D.D.C. May 29, 1992)), Florida (*Jankula v. Carnival Corp.,* 2019 WL 8060595 (S.D. Fla. July 8, 2019)), Pennsylvania (*Calbex Mineral Ltd. v. ACC Res. Co., L.P.,* 90 F. Supp. 3d 442 (W.D. Pa. 2015)) and Washington (*Purus Plastics GmbH v. Eco-Terr Distrib.,* Inc., 2018 WL 3064817, (W.D. Wash. June 21, 2018)).

48 For years courts in the U.S. have diverged on whether the grounds for vacatur listed in §10 of the FAA are exhaustive. In *Hall Street Associates, LLC v. Mattel, Inc.,* 552 U.S. 576 (2008), the Supreme Court ruled that "the answer is yes, that the text compels a reading of the §§10 and 11 categories as exclusive" (at 586). However, even after the *Hall Street* decision, a circuit split remains on whether "manifest disregard of the law," which does not appear in the text of the FAA, could still be used to set an award aside. More recently, the Restatement (Third) U.S. Law of Commercial Arbitration (2019) has also taken the position that the grounds in FAA §10 are exclusive, and that any attempt to expand those grounds, either by agreement or by choice of state law, is invalid (See comment §4-21(a) and (b)). See also A. FRISCHKNECHT, Y. LAHLOU, G. WALTERS et al., *Enforcement of Foreign Arbitral Awards and Judgments in New York,* fn. 43 above, p. 193-96 (2018); Jennifer L. PERMESLY and Yasmine LAHLOU, "Recognition and Vacatur of Foreign Arbitral Awards in the United States" in Laurence SHORE , Tai-Heng CHENG, et al., eds., *International Arbitration in the United States* (Kluwer Law International 2017) p. 471, at pp. 495-98. This issue goes beyond the scope of this report. However, where an award is challenged on the basis of failure to hold physical hearings, the relevant grounds for vacatur would be limited to §§10(a)(3) and 10(a)(4) of the FAA.

49 See *Lumbermens Mut. Cas. Co. v. Broadspire Management Servs., Inc.,* 623 F.3d 476, 480 (7th Cir. 2010) (quoting *Howsam v. Dean Witter Reynolds,* 537 U.S. 79, 84–85 (2002)). See also D. LINDSEY, J. HOSKING, J. GORSKIE, "United States," fn. 7 above, p. 35 (stating that, under the FAA, the arbitral tribunal is generally free to determine the style and characteristics of an oral hearing, subject to due process requirements).

50 *Dorward v. Macy's Inc.,* 588 Fed.Appx. 951, 953 (11th Cir. 2014). See also); I. POPOVA and D. PICKARD, "Country Report: The United States of America," fn. 7 above, p. 437 (citing cases in which U.S> courts have found that failure to postpone a hearing qualified as misconduct).

51 *United Paperworks Int'l. Union, AFL-CIO v. Misco, Inc.,* 484 U.S. 29, 40 (1987).

52 See, e.g., *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust,* 729 F.3d 99, 104 (2d Cir. 2013) ("We have held that misconduct occurs under this provision only where there is a denial of "fundamental fairness").

53 *Generica Ltd. v. Pharmaceutical Basics, Inc.,* 125 F.3d 1123, 1130 (7th Cir. 1997).

54 See, e.g., I*n re Arbitration between Griffin Indus., Inc. & Petrojam, Ltd.,* 58 F. Supp. 2d 212, 219–20 (S.D.N.Y. 1999).

55 *Fowler v. Ritz-Carlton Hotel Co., LLC,* 579 F. App'x 693, 698 (11th Cir. 2014). See also A. FRISCHKNECHT, Y. LAHLOU and G. WALTERS, *Enforcement of Foreign Arbitral Awards and Judgments in New York,* fn. 46 above, pp. 126-27 (citing U.S. cases on procedural fairness).

56 See, e.g., *Robbins v. Day,* 954 F.2d 679, 685 (11th Cir. 1992) overruled on other grounds; *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 948 (1995).

57 *Bisnoff v. King,* 154 F. Supp. 2d 630 (S.D.N.Y. 2001) (rejecting motion to vacate when one of the respondents was given the opportunity to appear via telephone or have his deposition videotaped in advance); *Trademark Remodeling, Inc. v. Rhines,* 2012 WL 3239916, at *5 (D. Md. August 6, 2012) (finding that allowing a witness to testify by telephone did not establish misconduct); *Al-Haddad Commodities Corp. v. Toepfer Int'l Asia Pte., Ltd.,* 485 F. Supp. 2d 677, 686 (E.D. Va. 2007) (finding that cross-examination of a witness conducted by telephone did not render the proceeding fundamentally unfair).

58 *Raymond James Fin. Servs., Inc. v. Fenyk,* 780 F.3d 59, 64 (1st Cir. 2015) ("Perhaps the most common basis—and the rationale invoked by the district court in this case—is "where the arbitrators exceeded their powers.")

59 See, e.g., the discussion on the interpretation of arbitration agreements in relation to class arbitration. *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662 (2010).

60 See *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 475 (1989) ("in construing an arbitration agreement within the coverage of the FAA, "as with any other contract, the parties' intentions control[.]"); *Stolt–Nielsen S.A. v. Animalfeeds International Corp.,* 559 U.S. 662, 671 (2010) ("'It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable.' *Citation omitted.* In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator "exceeded [his] powers," for the task of an arbitrator is to interpret and enforce a contract[.]")

61 *Polimaster Ltd. v. RAE Sys., Inc.,* 623 F.3d 832, 836 (9th Cir. 2010) ("We review *de novo* whether a party estab-

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lished a defense to enforcement of an arbitration award under the New York Convention.") See also Restatement (Third) U.S. Law Int'l Comm. Arb.§ 4.7, comment b (2019).

62 *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA),* 508 F.2d 969, 973 (2d Cir. 1974); *Polimaster Ltd. v. RAE Sys., Inc.,* 623 F.3d 832, 836 (9th Cir. 2010) ("Polimaster's burden [of showing the existence of a New York Convention defense] is substantial because the public policy in favor of international arbitration is strong, cit. omitted., and the New York Convention defenses are interpreted narrowly.") See also A. FRISCHKNECHT, Y. LAHLOU, G. WALTERS et al., *Enforcement of Foreign Arbitral Awards and Judgments in New York* fn. 46 above,pp. 111-13; P. HENIN and R. DIGÓN, "Enforcing New York Convention Awards in the United States: Chapter 2 of the FAA," fn. 2 above, p. 575; M. PAULSSON, *The 1958 New York Convention in Action,* fn. 43 above, pp. 13-15.(citing U.S. caselaw on the development of the convention's "pro-enforcement bias," an expression coined by U.S. courts).

63 *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA),* 508 F.2d 969, 973 (2d Cir. 1974). See also *Generica Ltd. v. Pharm. Basics, Inc.,* 125 F.3d 1123, 1129–30 (7th Cir. 1997); G. BORN, *International Commercial Arbitration,* fn. 3 above, at p. 2176 (stressing that U.S. courts considering the fairness of international arbitral proceedings apply the constitutional requirements of due process, which "guarantees 'an opportunity to be heard at a meaningful time and in a meaningful manner'") and at.p. 3501-02 (citing cases).

64 *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 364 F.3d 274, 299 (5th Cir. 2004). See also Jennifer L. PERMESLY and Yasmine LAHLOU, "Recognition and Vacatur of Foreign Arbitral Awards in the United States" in Laurence SHORE , Tai-Heng CHENG, et al., eds., *International Arbitration in the United States* (Kluwer Law International 2017) p. 471, at pp. 482-83 (explaining U.S. courts' interpretation of "fundamental fairness" and citing cases); D. LINDSEY, J. HOSKING and J. GORSKIE, "United States," fn. 7 above, pp. USA-83-84 (citing cases on U.S. courts' understanding of fundamental fairness, and stressing that is does not include the full set of procedural rights guaranteed by the FRCP).

65 *Iran Aircraft Indus. v. Avco Corp.,* 980 F.2d 141, 146 (2d Cir. 1992)). See also I. POPOVA and D. PICKARD, "Country Report: The United States of America," fn. 7 above, pp. 439-40 (stating that U.S. courts "generally defer to arbitrators' case management techniques 'unless such ruling create serious procedural inequalities'," as well as that the party resisting enforcement need not only prove an improper denial of a procedural opportunity, but that such denial resulted in significant prejudice to its rights and citing cases).

66 *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA),* 508 F.2d 969 (2d Cir. 1974).

67 Ibid. at 975.

68 See *China Nat. Bldg. Material Inv. Co., Ltd. v. BNK Intern. LLC,* 2009 WL4730578, at *7 (W.D. Tex. December 4, 2009) (party's hurdle to attend a hearing in Hong Kong due to alleged health issues was not sufficient ground for refusal of enforcement as the party was given the option of attending and giving testimony by video-conference); *Eaton Partners, LLC v. Azimuth Capital Mgmt. IV, Ltd.,* 2019 WL 5294934 (S.D.N.Y. October 18, 2019) (enforcing an award despite the party's objection that the tribunal refused to postpone the hearing when a witness became unavailable but was given the option of appearing by video, among other factors).

69 See *Generica Ltd. v. Pharm. Basics, Inc.,* 125 F.3d 1123, 1130 (7th Cir. 1997) ("an arbitral award should be denied or vacated if the party challenging the award proves that he was not given a meaningful opportunity to be heard *as our due process jurisprudence defines it."* Emphasis added.).

70 *Slaney v. The Int'l Amateur Athletic Fed'n,* 244 F.3d 580, 592-93 (7th Cir. 2001); *P.T. Reasuransi Umum Indonesia v. Evanston Ins. Co.,* 1992 WL 400733, at *3 (S.D.N.Y. December 23, 1992) (enforcing an award rendered without a hearing despite the party's request for one when the lack of live testimony did not prejudice its opportunity to present its case). Note, however, the potentially contradictory conclusion sanctioned by the Restatement (Third) U.S. Law of Int'l Comm. Arb. § 4.13 (2019) (advocating that if a tribunal has complied with the requirements of the arbitration agreement, but in so doing violated a mandatory rule of the seat's arbitration law, a U.S. court should deny recognition or enforcement if the conditions for such relief are otherwise met).

71 A. FRISCHKNECHT, Y, LAHLOU and G, WALTERS, *Enfocrcement of Foreign Arbitral Awards and Judgments in New York,* fn. 43 above, p. 141.

72 *In re Arbitration between InterCarbon Berm., Ltd. v. Caltex Trading & Transp. Corp.,* 146 F.R.D. 64, 72 (S.D.N.Y. 1993) (challenge to an award issued in New York was reviewed under the FAA).

73 *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 364 F.3d 274, 296 (5th Cir. 2004) (enforcing an award as the consolidation of separate contracts with different procedures to appoint arbitrators did not prejudice the party); *P.T. Reasuransi Umum Indonesia v. Evanston Ins. Co.,* 1992 WL 400733, at *3 (S.D.N.Y. December 23, 1992) (enforcing an award despite the tribunal's failure to follow the AAA rules procedure regarding notice since the party was not prejudiced by such action). See also AMIRFAR, REID and POPOVA., "National Report United States of America" in *Handbook,* p. 83 (stating that "generally, however, U.S. courts will not vacate an award on the basis of procedural technicalities unless they substantially prejudice the rights of the complaining party" and citing cases).

74 See, e.g., *Caja Nacional de Ahorro Y Seguros in Liquidation v. Deutsche Rueckversicherung AG,* 2007 WL 2219421, at *5 (S.D.N.Y. August 1, 2007).

75 *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA),* 508 F.2d 969, 974 (2d Cir. 1974).

76 *Belship Navigation, Inc. v. Sealift, Inc.,* 1995 WL 447656 at *6 (S.D.N.Y July 28, 1995).

77 *Yukos Capital S.A.R.L. v. OAO Samaraneftegaz,* 963 F. Supp. 2d 289, 299 (S.D.N.Y. 2013) (quoting *United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 43 (1987))

78 *A. Halcoussis Shipping Ltd. v. Golden Eagle Liber. Ltd.,* 1989 WL 115941 at *2 (S.D.N.Y. Sept. 27, 1989).

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79 Illustrating how high this threshold is, a U.S. court rejected an Article V(2)(b) defense based on an alleged "side-switching" prohibition, barring experts to testify against parties that had previously retained them, when the party did not prove the existence of this public policy through laws or precedent. See *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH,* 141 F.3d 1434, 1445 (11th Cir. 1998).
80 *Jorf Lasfar Energy Co., S.C.A. v. AMCI Exp. Corp.,* 2006 WL 1228930, at *3 (W.D. Pa. May 5, 2006).
81 Ibid. at *3.
82 Ibid.
83 *AO Techsnabexport v. Globe Nuclear Servs. & Supply, Ltd.,* 656 F. Supp. 2d 550, 560 (D. Md. 2009), aff'd sub nom. AO Techsnabexport v. Globe Nuclear Servs. & Supply GNSS, Ltd., 404 F. App'x 793 (4th Cir. 2010).
84 See fn. 24, 25, 30 and 32 above. See also *Ciccone v. One W. 64th St., Inc.,* 2020 WL 5362065, at *5 (N.Y. Sup. Ct. Sept. 4, 2020) ("[F]ederal trial courts across the country [...] have consistently determined that given the pandemic, it is necessary, appropriate, and fair to hold bench trials entirely by videoconference."), order amended and superseded, (N.Y. Sup. Ct. 2020) (also noting that the technology for video-conferencing is "straightforward and easy to use," thus rejecting objections based on counsel's technical capability to participate virtually) ; *Xcoal Energy & Resources v. Bluestone Energy Sales Corp.,* 2020 WL 4794533 (D. Del. August 18, 2020); *Centripetal Networks, Inc. v. Cisco Sys., Inc.,* 2020 WL 3411385 (E.D. Va. April 23, 2020); and *Sunoco Partners Mktg. & Terminals L.P. v. Powder Springs Logistics, LLC,* 2020 WL 3605623 (D. Del. July 2, 2020) (establishing rules for the trial that require all witness to testify by video and limit the number of representatives for each party that can be present in the courtroom).
85 United States Court of Appeals for the Seventh Circuit. "Order Regarding COVID-19" (August 3, 2020).
86 See, e.g., State of New York. "Executive Order No. 202.48 Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency" (July 6, 2020).
87 See, e.g., Southern District of New York. "Skype for Business Instruction Guide for Attorneys" (April 30, 2020).
88 See Andreas FRISCHKNECHT, "United States," in *IBA Impact of COVID-19 on Court Operations & Litigation Practice,* at pp. 110-13.
89 See AAA-ICDR, "Virtual Hearing Guide for Arbitrators and Parties" and "Model Order and Procedures for a Virtual Hearing via Videoconference"; CPR, "Annotated Model Procedural Order for Remote Video Arbitration Proceedings"; ABA-ILS "COVID-19 Quick Reference Guide"; and SVAMC "Coronavirus Advisory." See James HOSKING and Marcel Engholm CARDOSO, "Practical Considerations for Holding a Remote Arbitration Hearing," N.Y.S.B.A., 13(2) N.Y. Disp. Res. Lawyer (2020) at p. 17 (collecting protocols and related resources).

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Virtual Arbitration Hearings: Pros, Cons, and Lessons Learned

By Alan M. Weigel, of Counsel, Blank Rome LLP, New York

During the COVID-19 pandemic, lawyers, clients, and arbitrators all struggled to find the correct balance between having cases heard and staying safe. Many legal personnel turned to virtual conferencing applications like Zoom to conduct meetings, depositions, mediations, arbitrations, and other proceedings from a distance.

"It's not the same as a live courtroom" is something that has often been said about video evidence offered at trial. And it plainly isn't. The same can be said about virtual arbitration hearings.

Two years ago lawyers, arbitrators, witnesses and anyone else involved in arbitrations well may have asked "What's Zoom?" But now, like so many other aspects of our recent experience, remote hearings are part of the "new normal"—and it's widely accepted that they're here to stay because the experience of remote hearings has been largely positive, and the negative impacts are probably not enough to discourage their continued use. The efficiencies found in remote hearings, such as more convenient scheduling, eliminating the time and expense of travel and the easy sharing of often voluminous documents all support the future of hearings going digital.

That doesn't mean, however, that virtual and in-person hearings do not have differences. Removed from the in-person setting, arbitrators can be stripped of their positions of authority – making hearings more relaxed, difficult to police and vulnerable to undue influence. Given the myriad complexities at play and the fact that remote hearings won't be going anywhere soon (if ever), it's important for arbitrators and advocates to consider their pros and cons and adjust accordingly to minimize the negative impacts.

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Pros of the Remote Hearing

The process can be efficient

It is easier to schedule an exact time for a hearing. With no need to travel, the parties save travel expenses and time. There is no need to reserve a conference room in an office and less need to worry about security, parking and other inconveniences. Removing the need to travel and to take as much time away from work as for a traditional hearing makes attendance easier for witnesses, making them relatively easier to marshal. And because witnesses can be on call ready to attend remotely, it is not as significant an inconvenience to a witness if counsel takes longer than expected with questioning or finishes with a witness more quickly than expected.

Hearings can be paperless

Introducing voluminous exhibits can be easier and can help keep everyone on the "right" page using the share screen features available with most teleconferencing software, rather than requiring panel members to page thru multiple tabbed binders themselves.

The virtual setting often puts witnesses at ease

The remote environment can make it harder for cross-examiners to use the traditional techniques designed to unnerve witnesses. Aggressive cross-examination is not as effective in a remote setting. If it's easier to give evidence, the parties likely will receive better answers, which should help the panel's understanding of the case.

Technology can help assess a witness's viewpoint The ability to "zoom" in on those undergoing examination can make it easier to spot telling facial expressions such as nervous tics, hesitation betraying a lack of confidence in an answer, or a pause showing careful consideration. (Although sometimes too much is shown when witnesses come too close to the camera.) Several surveys have found that a counsel's ability to question witnesses or determine the validity of a witness's testimony was generally not adversely affected by remote hearings.

Cons of the Remote Hearing

Remote hearings can take longer

One study found that remote hearings take about one-third longer than in-person hearings. Technical issues, including trouble logging onto video-conferencing platforms, connectivity problems related to limited bandwidth, the difficulties with sharing screens, or uploading documents and exhibits, are the primary reasons remote hearings take longer. Resolving these issues, usually caused because counsel have not prepared sufficiently in advance, often fall onto legal staff who aren't trained to address them, adding stress and time to the proceeding.

Equally, the so-called "digital divide," referring to those without consistent access to technology or without the knowledge needed to operate that technology, continues to pose problems and add delay to remote hearings.

Security issues

Personal records and other confidential information are often introduced at arbitration hearings. There is a greater risk that this information can be hacked when you're in a video conference. And when using an online service like Zoom, anyone with a password can watch. This is especially critical when it comes to sequestering witnesses. With an in-person hearing, the panel can order that a witness stay outside the hearing room until it's time to testify. It is harder to enforce this rule when you are conducting hearings virtually.

Witness control issues

The whole process often appears too relaxed and slightly artificial, and witnesses may not approach a virtual hearing with the same seriousness as an in-person one. Although many witnesses give evidence from an office, often they are at home, as is the panel. There is a concern that the gravitas of the occasion might be lost by conducting hearings in this way.

It may be more difficult for a panel to control a virtual hearing room than a physical one. Panel members can't see what's going on outside of the view of the camera lens. Thus, in a virtual hearing setting, it can be hard to tell if a witness is being

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coached through text messages or some other dishonest method.

In a conference room with all parties present, an uncooperative witness, a witness who loses their temper, or a witness giving unsolicited testimony would be met with immediate action by the panel or lawyers. Virtually, however, it's not so easy to calm or stop a witness who wants to get something off their chest. Arbitrators removed from their natural position of authority in the in-person hearing room can be less inclined to interject on procedural grounds, which can detract from the value of cross-examination to the tribunal.

Physical evidence examinations are difficult

Expert witnesses often rely on physical evidence to support their testimony concerning their conclusions, with the experts for each party often drawing different conclusions based upon looking at the same thing and describing differently what they see. At a hearing where the arbitrators, witnesses, and counsel are together with the physical evidence "on the table/floor" (depending upon size of the physical evidence - a test tube, a smear on a slide, a bolt, a paint chip, etc.), everyone present would be able to examine and ask questions regarding the precise aspect of the physical evidence on which they are focusing. Examining photos of the physical evidence on screen can be a poor substitute.

Witness credibility determinations

The flip side to being able to turn down the volume and zoom in to examine facial expressions is missing the other classic ways of observing the credibility of a witness, such as watching their hands. Little things like this can make it harder to determine if certain witnesses are credible and underscore just how important it is to see some witnesses in person and to watch the totality of how that witness reacts under questioning.

"Zoom fatigue."

Any engagement with the arbitration process, whether as an advocate, witness, or panel member is demanding. Advocacy and testimony before a screen, whether giving or receiving, is even more so. The amount of eye contact we engage in on video calls, as well as the size of faces on screens is unnaturally excessive. Seeing yourself during video calls constantly in real-time is fatiguing. Video calls dramatically reduce our usual mobility. And in video calls, we have to work harder to send and receive communications. This all results in participants taking less interest as a remote hearing stretches into multiple hours.

Lessons Learned

Remote hearings can be done, and can be done well. It takes considerable time and effort to set up, but with the right technology and support the process can be very efficient.

First, the panel must insist that parties, counsel and witnesses are in locations with robust internet connections. Each party must ensure its electronic equipment and internet connection – and that of its witnesses – is of appropriate quality and robustness for the anticipated duration of the proceedings. It is crucial to hold test meetings in advance for parties and witnesses giving evidence from their homes or offices to check their internet connection and ensure they can operate the remote hearing software. The panel or counsel should not be distracted by a poor-quality connection and witnesses should not be unsettled by being asked to repeat answers. Intervention by the panel may be necessary to ensure that hearings held remotely can run smoothly.

Second, parties and counsel need to be given guidance and training on how to appear on screen. Simple things like lighting, positioning, camera angles and sound quality are an integral part of an effective remote hearing. Witnesses also should be given guidance as to how they should present themselves to the screen and be given the same opportunity to present their evidence to the best of their ability.

Third, the panel must consider whether it is appropriate for a witness to give remote testimony alone and unsupervised, or whether witnesses should, at least, give evidence from their respective counsel's offices with the other side having the opportunity, should they so wish, to have an observer present while that evidence was being given.

Fourth, as was true even before the pandemic, document assembly and presentation are keys to the smooth running of a remote hearing. Yet, for many remote hearings, document assembly and

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presentation will be done electronically. Document presentation technology allows documents to be shared with all remote participants at the same time very effectively, but only so long as the presenters are proficient with the software. Training, practice, and rehearsal ahead of time are crucial, and increasingly so as the complexity of the exhibits increases. Counsel may need to engage technology assistants who can assist in preparing participants for their remote hearings and handle technology glitches when they occur.

Finally, on the hearing day, the panel should encourage participants to take frequent breaks to prevent "Zoom fatigue" and improve the panel's well-being.

The Future of Remote Hearings

Regardless of the pros and cons, the effectiveness, access and benefits of remote hearings mean that they will be with us for some time, and perhaps indefinitely. In this new environment, considering the various impacts is vital. It's important to remember too, that remote hearings are still relatively new and are evolving depending on the case, its participants, the technology used and other factors. For at least the foreseeable future, to conduct a successful remote hearing, all participants must understand and adapt to the differences from the traditional in-person arbitration hearing.

Mediation on Zoom

by Lucienne Carasso Bulow, member of the SMA Board of Governors, Past SMA President

Now that in-person meetings are back, is there still a place for Zoom or other virtual meeting services in arbitration and/or mediation?

The COVID-19 pandemic has taught us a great deal about technology. We have had board meetings, court hearings, committee meetings, family meetings, arbitrations and mediations on Zoom, Microsoft Teams, Google Chat or Cisco WebEx. I, for one, have attended weekly board meetings and many lectures, courses and seminars on Zoom.

In arbitration, we have heard witness testimony, asked questions of witnesses and heard arguments. As efficient as arbitrations have become when held remotely, there is always some dissatisfaction in not being in the same room with a witness, not being able to look into the witness's eyes and make sure that the witness is not being coached by an attorney. However, for mediation, there are no such reservations.

I recently served as a mediator in a complex, high-stakes dispute involving the consequences to just-in-time production in a plant due to the delay of several containers shipped on various ships from all over the world. The two parties and their lawyers were in three different states of the U.S. and other interested parties were in two different cities in Europe.

After receiving position papers and supporting documents from both parties and discussing them with counsel, we agreed to hold the mediation on Zoom. I acted as host and held the initial conference with all parties. I then placed the parties and their attorneys in breakout rooms: claimants in one breakout room and respondents in another. As the mediator, I then jumped from one room to the other discussing with the parties and their attorneys their position, and then went back and forth relating the latest offer or counteroffer. After eight hours, the parties were able to come to an agreement in one day and settled satisfactorily. If some of the parties were in the Far East instead of Europe, there probably would have been some difficulties in proceeding with the negotiations in one day because of the difference in time zones. Nevertheless, the case probably could have been settled in two days or by subsequent correspondence.

The parties were not only able to settle their case, but they also saved time, travel and hotel expenses as well as legal expenses.

As in all mediations, when the parties are invested in settling, mediation can be successful, and mediation on Zoom or on another virtual meeting service definitely is here to stay.

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Arbitration v. Mediation: Never the Twain Shall Meet?

By Harold B. Aspis, SMA Member

In 2021, I was appointed the sole arbitrator in a breach of contract dispute between the owner (lessor) and lessee of shipping containers. At the commencement of the arbitration (non-SMA), the administrator wrote to the parties asking if they would consider mediation. The parties responded that they did want the case to be heard before a mediator and they wanted the mediator to be me. Further, they requested that if the mediation did not succeed, they wanted the arbitration to proceed -- with me as the sole arbitrator. This was an interesting, if unorthodox, request.

We know that arbitrators and mediators play different roles. Arbitrators judge, mediators cajole. Arbitrators decide cases, mediators do not. Mediators try to assist the parties in reaching a settlement that they, the parties, not the mediators, have crafted. Mediators cannot impose their will on the parties. In mediations, the mediator often engages in 'shuttle diplomacy,' going back and forth between the parties, caucusing separately with each party in an effort to better understand the case and the strengths and weaknesses of each party's position. In the caucus, the mediator may be told things which he or she is bound to keep confidential. In a typical case, if the mediation efforts fail, the arbitration can then continue, but it would be unusual for the mediator to act as arbitrator. For example, SMA Rules for Mediation (2016) ("SMA Rules") reflect the more common practice: "If there is a mediation but it does not result in a settlement...the dispute shall be referred to arbitration before three commercial arbitrators under the Arbitration Rules of the SMA..." [(Model Mediation Clause of the SMA Rules).

How then could I proceed with a case in which I would be the mediator and then, if the mediation failed, the sole arbitrator? How could I fulfill my role as an impartial, fair, and independent mediator and as an impartial, fair and independent (potential) arbitrator while at the same time preserving the confidences of each party? After giving it some thought, I decided I could act as mediator and arbitrator if the following conditions were met:

1. The parties and their lawyers would have to consent to my acting as mediator and potential arbitrator. That was not a problem in this case; they approached me and asked me to take on that (potentially) dual role. I did not suggest to them that I wanted to be both mediator and arbitrator. Again, the SMA Rules are illustrative and typical of the practice generally in mediations: "The parties and the mediator undertake that the mediator will not act as an arbitrator ... unless all parties and the mediator agree otherwise in writing" (SMA Rules, Article 15(a)).
2. I, as the mediator, would not caucus separately with the parties. Each party was free, obviously, to break out at any time to confer with its counsel, outside the virtual meeting room, but for the rest of the time, the parties and their counsel would be in the virtual meeting room with the mediator. Neither party could tell me anything in confidence so that there would be no issue of my revealing the confidential information or position of a party.
3. The parties could end the mediation at any time if they thought the mediation would not be productive and then the arbitration would proceed with me as the sole arbitrator.

The parties thought the conditions were reasonable and appropriate, they accepted them and the mediation got underway. The mediation was held virtually (this was, after all, during the pandemic). The virtual format worked very well in this case in part because the Claimant and its lawyers were in New York and the Respondent and its lawyers were thousands of miles away. The Respondent was particularly appreciative that its representatives and lawyers did not have to spend the time and incur the expense of traveling to New York. The administrator was adept at creating zoom breakout rooms and the virtual hearing proceeded without any technical glitches. After several hours in the zoom hearing, the parties reached a settlement and fully complied with the settlement terms in a timely manner. After the hearing, the parties expressed their satisfaction at resolving the matter expedi-

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tiously and efficiently, and thanked me for my role as mediator and for coming up with a practical way of handling a mediation that, if it failed, would 'convert' to an arbitration.

It may well be that this model of mediation first, arbitration later with the same individual as mediator and arbitrator, can in the right circumstances and under the right conditions, become yet another tool in the ADR toolbox.

Sealed Offers of Settlement – Section 31 of the SMA Rules

By Lucienne Carasso Bulow, member of the SMA Board of Governors, Past Chair of By-Laws and Rules Committee and Past SMA President

The Arbitrator of May 2022 (V. 52, No. 2 "Amendments to SMA Rules and Shortened Arbitration Procedure") noted that after much discussion the By-Laws and Rules Committee expanded Section 31 of the Arbitration Rules to include a provision for Sealed Offers of Settlement in Section 31 (a), (b), (c) and (d). Work by the Rules Committee on these and other changes to SMA Rules has been ongoing for more than a year. We added these new sections because, although Sealed Offers of Settlement have long been used in SMA arbitrations, no SMA Rule has ever addressed the practice or guided parties and arbitrators in its application. Both the Federal Rules of Civil Procedure (FRCP) Section 68 and New York State Rules of Civil Procedure in Section 3221 provide that Offers of Judgment can be made by the defendant, but significantly, not by the plaintiff. It is that singular party restriction that new Rule 31 is intended to overcome. Doing so brings SMA arbitration in line with London and Singapore usage which permit both claimant and respondent to access the practice.

The practice of sealed offers allows the non-prevailing party to lessen its potential exposure to legal fees of the prevailing party. By making a strategically timed sealed offer of settlement, a party (Offeror) can limit its exposure to legal expenses provided the final decision reached by the Panel or Sole Arbitrator is less advantageous to its opponent (Offeree) than the unaccepted settlement offer.

Under Section 31 of the revised SMA Arbitration Rules, either party may make an offer of settlement which, if not accepted, produces the following scenario:

a) During the arbitration but prior to the date when the proceeding is declared closed pursuant to Section 25 of the Rules, the Offeror is to alert the Panel Chair or Sole Arbitrator that a binding Offer of Settlement has been made to but not accepted by the Offeree by the given deadline. The Offeror then delivers the offer to the Panel Chair or Sole Arbitrator in a sealed envelope which is not to be opened until after a final decision on the merits and amounts (if any) to be awarded to the prevailing party has been reached.

b) Only after the Panel or Sole Arbitrator has arrived at a final decision is the sealed envelope to be opened. If the rejected last offer is less advantageous to the Offeree, legal expenses will be assessed in accordance with the provisions of Section 30 of the Rules as customarily done. If, however, the decision is equal to or more advantageous to the Offeree than the unaccepted sealed offer, the legal expenses to be awarded to the prevailing party are reduced by the amount of legal and arbitration expenses both parties would have saved, had the offer been accepted. The Panel or Sole Arbitrator will take into account the terms and timing of the Settlement Offer.

c) The method to determine the amount of legal expenses saved is left to the discretion of the Panel or Sole Arbitrator to fashion. Apart from the legal expenses, it is important to understand that the Panel or Sole Arbitrator is bound by the final decision reached on all other issues which remains unchanged.

By codifying the Sealed Offer procedures, the SMA neither requires nor encourages parties to use the procedure. Rather, the strategic decision remains one to be made by the parties and their counsel. However, should either party choose to do so, it is hoped that the newly codified SMA Sections 31(a), (b), (c) and (d) provide some helpful guidance.

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High Court Discovery Ruling will Transform International Arbitration*

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

The U.S. Supreme Court issued a rare unanimous decision on June 13 in a pair of consolidated cases that will have broad ramifications for international arbitration.[1]

In *ZF Automotive US Inc. v. Luxshare Ltd.* and *AlixPartners LLP v. The Fund for Protection of Investors' Rights in Foreign States,* the court held that U.S.-based discovery assistance is available only for "governmental or intergovernmental adjudicative bodies," severely limiting U.S.-based discovery for most international arbitration.

Case Background

A federal statute, Title 28 of the U.S. Code, Section 1782, permits district courts to order domestic discovery "for use in a proceeding in a foreign or international tribunal." Since 1964, parties with disputes before international arbitration tribunals have used the statute to obtain discovery in the U.S., including to compel discovery of nonparties, particularly where the foreign tribunal lacked similarly broad powers.

At issue in *ZF Automotive* and *AlixPartners* was two different types of arbitration: purely private international commercial arbitration and investor-state arbitration.

Prior to the Supreme Court's decision, the federal courts of appeals had divided over whether a purely private international commercial arbitral panel qualified as a foreign or international tribunal under Section 1782 — and thus whether U.S.-based discovery was available for those proceedings.[2]

The U.S. Court of Appeals for the Second Circuit, the U.S. Court of Appeals for the Fifth Circuit and the U.S. Court of Appeals for the Seventh Circuit had held that U.S.-based discovery is not permitted in private international commercial arbitration, while the U.S. Court of Appeals for the Fourth Circuit and the U.S. Court of Appeals for the Sixth Circuit concluded that it was permitted.

The federal courts had largely agreed, however, that U.S.-based discovery was available under Section 1782 for investor-state arbitration, which is typically established by bilateral investment treaties, or BITs, between foreign states.

The Decision

The Supreme Court slammed the door on Section 1782 discovery in private arbitration, including treaty-based arbitration where the arbitral panel is not a governmental body. In a surprise opinion, the court held that U.S.-based discovery may be unavailable for both private international commercial arbitration and investor-state arbitration.

Writing for the court, Justice Amy Coney Barrett explained that the discovery statute "reaches only governmental or intergovernmental adjudicative bodies," which means that discovery is available only where countries have "imbue[d] the body in question with governmental authority."

Neither the private arbitration in *ZF Automotive* nor the investor-state arbitration in *AlixPartners* fit the bill.

Because no government created the private panel in ZF Automotive or prescribed its procedures, the Supreme Court held that it was not a governmental body within the scope of Section 1782. That bright-line rule prohibits Section 1782 discovery in purely private arbitration, likely resulting in dismissals of Section 1782 discovery petitions across the country. This aspect of the court's decision was not entirely unexpected.[3]

The court's identical treatment of investor-state arbitration, however, went against the consensus view of the lower federal courts as well as Chief Justice John Roberts' suggestion at oral argument that investor-state arbitration seemed quite different from private arbitration.[4]

Indeed, the court's opinion admitted that treaty-based, investor-state arbitration presented a harder question. But it ultimately concluded that the test is whether the foreign state intended "to imbue the body in question with governmental authority."

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That focus on intent builds on the court's 2014 decision in *BG Group PLC v. Republic of Argentina,* which views treaties as akin to contracts, and which analyzes the parties' intent when interpreting treaties.[5]

The arbitration at issue in AlixPartners involved a BIT between Russia and Lithuania. Examining that BIT, the court held that it did not confer governmental authority because the panel was formed purely to adjudicate investor-state disputes, its members were selected by the parties, and it was not affiliated with any governmental body.

The court's decision relied on three rationales.

First, the court examined the text of Section 1782. Although the court acknowledged that the word "tribunal" broadly encompasses not just formal courts but also private adjudicatory bodies, it concluded that the modifiers "foreign" and "international" meant that the phrase "foreign or international tribunal" referred to an "adjudicative body that exercises governmental authority."

Citing the U.S. government's brief, the court explained that the phrase "foreign leader" most naturally refers to an official government leader, so foreign tribunal should likewise be understood as a body "imbued with governmental authority by one nation." And, as the complement to foreign tribunal, an international tribunal is "imbued with governmental authority by multiple nations."

Second, the court looked to history. For more than a hundred years, the discovery statute and its predecessors applied only to foreign courts. Congress later broadened the scope to foreign and international tribunals, but the statute's animating purpose remained the same: international comity.

The court concluded that providing discovery assistance to foreign and international governmental bodies "promotes respect for foreign governments and encourages reciprocal assistance," but aiding "purely private bodies" did not — a point that the U.S. government had heavily emphasized at argument, and whose view Justice Elena Kagan indicated the court would afford significant weight.[6]

Third, the court justified the decision under the Federal Arbitration Act, which significantly limits the availability of discovery in domestic arbitration. Extending Section 1782 to reach private international arbitration would thus result in significant tension with the FAA and "create a notable mismatch between foreign and domestic arbitration."

The Impact

The decision leaves the status of other arbitral bodies involving treaties or intergovernmental elements in flux.

Under the court's decision, U.S.-based discovery is unavailable for investor-state arbitration resembling the investor-state arbitration in *AlixPartners.*

The court reserved the possibility, however, "that sovereigns might imbue an ad hoc arbitration panel with official authority," meaning that Section 1782 might entitle parties to discovery assistance depending on "whether the nations intended that the ad hoc panel exercise governmental authority."

The court offered little guidance for courts evaluating whether that has occurred. At oral argument, *AlixPartners* and the U.S. government conceded that an arbitral panel selected by an international body like the World Trade Organization might qualify as governmental, but that issue remains open.

Lower courts will be left to determine the status of various arbitral bodies including, for instance, disputes between states before tribunals established by the World Trade Organization, free trade agreements, investment treaties or standing investment courts created by European Union agreements. The lack of clarity raises the specter of case-by-case litigation, a concern that Justice Stephen Breyer voiced at argument.

The court likewise failed to address international commercial arbitrations involving state or state-owned parties, including investor-state arbitrations before the International Centre for Settlement of Investment Disputes which was unavailable in the BIT underlying this case.

Although ICSID investor-state arbitration involves a private party who appoints one of the arbitrators, a factor the court viewed as suggesting a lack of governmental authority, ICSID arbitrations are governed by an intergovernmental institution under the auspices of the World Bank as well as by an additional treaty between participating countries — the ICSID Convention.

The Supreme Court did not address ICSID investor-state arbitrations, despite far greater indicia of

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sovereign authority and amicus briefs specifically addressing the issue.[7]

The court's decision will increase the importance of selecting the forum and adjudicative body to resolve potential disputes.

The decision may result in increased gamesmanship for both private parties and foreign governments entering into international contracts and treaties.

The decision places substantial significance at the outset on international arbitration practitioners' strategy in selecting the forum and adjudicative body to resolve potential disputes.

Investors should evaluate forum selection clauses in the treaties' arbitration clauses to best decide which treaty and which forum to use. Parties seeking to preserve the option of obtaining domestic discovery may prefer foreign courts and other bodies imbued with governmental authority, or U.S.-based litigation, while those wishing to avoid broad discovery may prefer a foreign arbitration clause.

For foreign states that support Section 1782 arbitration for transparency or other reasons, the court's decision may be a reason to choose the infrequently used state-to-state arbitration clauses in investment treaties to facilitate discovery. States may also attempt to use the court's language when negotiating new treaties to clarify their intent to imbue arbitral panels with sovereign authority to qualify as international or foreign tribunals within Section 1782.

However, some states may support the court's limitation of U.S. discovery, which many states view as overly burdensome and out of line with their own legal systems. It is yet to be seen whether U.S. courts would accept statements of intent where other evidence indicates a dearth of sovereign power.

Ultimately, the court's decision severely curtails court-enforced discovery proceedings, particularly against nonparties in international arbitration. That result will significantly transform the landscape of international commercial arbitration, although the full ramifications remain to be seen.

* This article, originally published in *Law360* on June 17, 2022, is reprinted here with permission and is a follow-up to The Arbitrator, V. 52, No. 2, May 2022 article "U.S. Supreme Court Considers Whether Domestic Discovery Applies to International Arbitration Proceedings" by the authors.

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SCOTUS Displays Short Memory in Rejecting the Prejudice Requirement for Waivers of the Right to Arbitrate*

By James F. Bogan III and C. Allen Garrett Jr., Partners, Kilpatrick Townsend & Stockton LLP, Atlanta

In *Morgan v. Sundance, Inc.*, — S. Ct. —, No. 21-328, 2022 WL 1611788 (May 23, 2022), the Supreme Court rejected the arbitration-specific rule requiring a finding of prejudice for a waiver of the right to arbitrate – a rule long in place in most circuits to promote the pro-arbitration policy of the Federal Arbitration Act (FAA) – on the ground that an arbitration contract should be treated like any other contract. The *Morgan* decision, while seemingly straightforward, ignores a number of Supreme Court decisions that do ***not*** treat arbitration contracts like ordinary contracts, but instead have imposed arbitration-specific rules of contract interpretation favoring arbitration.

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In *Morgan,* an hourly Taco Bell employee (Robyn Morgan) had signed an agreement with restaurant owner Sundance, Inc., to arbitrate any employment disputes when she applied for the job. She later filed a collective action in federal court under the Fair Labor Standards Act, alleging that Sundance engaged in a scheme to deny Taco Bell employees overtime pay.

Instead of seeking to compel arbitration, Sundance moved to dismiss the suit as duplicative of a parallel action filed by other Taco Bell employees. The district court denied that motion. Sundance then filed an answer to Ms. Morgan's complaint, asserting a number of affirmative defenses but none based on the arbitration agreement. Soon thereafter, the parties in both collective actions (including Ms. Morgan) participated in a joint mediation. The other collective action settled but Ms. Morgan's suit did not. Sundance and Ms. Morgan then began discussing a schedule for rest of the litigation.

Only at this time – almost eight months after Ms. Morgan filed her action – did Sundance move to stay the litigation and compel arbitration. In resolving that motion, the district court applied the Eighth Circuit's test, which provided that "a party waives its contractual right to arbitration if it knew of the right; 'acted inconsistently with that right'; and – critical here – 'prejudiced the other party by its inconsistent actions.'" 2022 WL 1611788, at *3 (quoting *Erdman Co. v. Phoenix Land & Acquisition, LLC,* 650 F.3d 1115, 1117 (8th Cir. 2011)).

The Southern District of Iowa found prejudice and denied Sundance's motion. *Id.* On appeal, the Eighth Circuit disagreed and ruled that the case should be arbitrated, reasoning that formal discovery had yet to be initiated and that the parties had yet to contest the merits of the case. Judge Colloton dissented, concluding that Sundance's actions forced Ms. Morgan to oppose an unnecessary motion to dismiss and to participate in an unsuccessful mediation. See *Morgan v. Sundance, Inc.,* 992 F.3d 711, 715 (8th Cir. 2021) (Colloton, J., dissenting). He further questioned the Eighth Circuit's prejudice requirement, observing that "'[o]utside the arbitration context, ... prejudice is not needed for waiver.'" *Id.* at 716 (citations omitted).

The Supreme Court granted certiorari to resolve a circuit split, with nine circuits (including the Eighth) requiring prejudice to facilitate the FAA's pro-arbitration policy, while two circuits – consistent with waiver law outside the arbitration context – had rejected the prejudice requirement. 2022 WL 1611789, at *3 & nn.1-2. Siding with the minority view, the Supreme Court, in an opinion authored by Justice Kagan, jettisoned the prejudice requirement.

The parties debated the role state law should play in resolving the waiver issue, and also whether to evaluate the issue in terms of "waiver, forfeiture, estoppel, laches, or procedural timeliness." *Id.* at *3. Observing that the federal courts "have generally resolved cases like this one as a matter of federal law, using the terminology of waiver," the court "assume[d] without deciding they are right to do so." *Id.* The court considered the sole issue of whether federal courts "may create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's 'policy favoring arbitration.'" *Id.* (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

Justice Kagan first observed that, as a general matter, waiver "is the intentional relinquishment or abandonment of a known right." *Id.* at *4 (quoting *United States v. Olano,* 507 U.S. 725, 733 (1993)). Outside the arbitration context, "the court focuses on the actions of the person who held the right; the court seldom considers the effects of those actions on the opposing party." Id. The prejudice requirement, the court said, was nothing more than "a bespoke rule of waiver for arbitration." *Id.*

Reviewing the history of the prejudice requirement, Justice Kagan traced the requirement back to a 1968 arbitration decision by the Second Circuit (*Carcich v. Rederi A/B Nordie,* 389 F.2d 692, 696 (2nd Cir. 1968)), noting that the Second Circuit's reasoning had since "spread" over the years to most of the other circuits. *Id.*

But the FAA's pro-arbitration policy, Justice Kagan explained, "does not authorize federal courts to invent special, arbitration-preferring procedural rules." *Id.* The reason, according to Justice Kagan, is that an arbitration contract is like any other contract:

- "The policy is to make 'arbitration agreements as enforceable as other contracts, but not more so.'" *Id.* (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404, n. 12 (1967)).

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- "Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation." *Id*.
- "If an ordinary procedural rule – whether of waiver or forfeiture or what-have-you – would counsel against enforcement of an arbitration contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Id*.

Justice Kagan then cited Section 6 of the FAA to support her rejection of the prejudice requirement. Section 6 requires that any motion filed under the FAA "shall be made and heard in the manner provided by law for the making and hearing of motions." *Id*. According to Justice Kagan, Section 6's directive to resolve motions "in the manner provided by law" "is simply a command to apply the usual federal procedural rules, including any rules relating to a motion's timeliness. Or put conversely, it is a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration." *Id*.

Accordingly, the court held that a finding of prejudice is not an element of arbitration waiver, remanding the case to the Eighth Circuit to evaluate the issue "[s]tripped of its prejudice requirement" and to resolve the simple issue of whether "Sundance . . . knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right?" *Id*. at *5.

This seemingly straightforward decision raises a number of issues that suggest it may have a far broader impact on arbitration law generally.

First, Justice Kagan repeatedly referred to the waiver issue as "an arbitration-specific procedural rule." See, *e.g., id*. at *2 (emphasis added). But where one party claims waiver based on the other parties' conduct (as opposed to claiming waiver based on a violation of a rule of procedure), the waiver issue would appear to constitute a *substantive* – rather than procedural – rule concerning the loss of a contractual right to arbitrate. Indeed, Judge Colloton's dissent to the Eighth Circuit's decision below ultimately cited two substantive contract law treatises for the proposition that "'in ordinary contract law, a waiver normally is effective without proof of consideration or detrimental reliance.'" 992 F.3d at 716 (quoting *Cabinetree v. Kraftmaid Cabinetry, Inc.,* 50 F.3d 388, 390 (7th Cir. 1995) (citing E. Allan Farnsworth, Contracts § 8.5 (2d ed. 1990)), and citing 3A Arthur Linton Corbin, Corbin on Contracts § 753 (1960)).

Second, and more importantly, Justice Kagan's characterization of an arbitration agreement as being no different from any other contract ignores a number of Supreme Court decisions, including decisions as recent as *Lamps Plus, Inc. v. Varella,* 139 S. Ct. 1407 (2019). There, the court ruled that a party cannot be required to participate in a class arbitration unless the parties' arbitration agreement *explicitly authorizes* class arbitration. Indeed, the *Lamps Plus* court announced a new federal default rule for arbitration contracts displacing the "neutral" state contract rule of contra proferentem, stating: "[T]he FAA provides the default rule for resolving ambiguity here, ..." *Id*. at 1418.

Borrowing the words of Justice Kagan, the *Lamps Plus* rule properly can be labeled a "bespoke" rule of contract interpretation for arbitration. And the *Lamps Plus* rule was preceded by other "bespoke" arbitration rules. The Supreme Court has long ruled ambiguities concerning the scope of an arbitration agreement must be resolved in favor of arbitration. And the Court repeatedly has held courts must decide "gateway" issues of arbitrability, unless the parties "clearly and unmistakably" assign those issues to the arbitrator. See *id*. at 1416-17 (discussing presumption that parties "have not authorized arbitrators to resolve certain 'gateway' questions, such as 'whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy"). Both of these unique federal rules of arbitration contract interpretation reflect the pro-arbitration policies underpinning the FAA.

Moreover, even if the specific articulation of the "prejudice" requirement can be traced to the Second Circuit's 1968 Carcich decision, the Supreme Court itself categorically has ruled that, "as a matter of federal law, any doubts concerning the scope of arbitrability issues should be resolved in favor of arbitrability, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone,* 460 U.S. at 24-25 (emphasis added). Although *Morgan* cited to this exact portion of the opinion in *Moses H. Cone,* it made no effort to reconcile its ruling to the Supreme Court's

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1983 decision expressly holding "waiver" to be subject to the presumption favoring arbitration, despite the fact that at least three of the Court of Appeals decisions cited in *Morgan* as recognizing the prejudice requirement themselves relied on *Moses H. Cone's* treatment of "waiver" as an issue subject to the federal presumption favoring arbitration. See 2022 WL 1611788, at *3 n.1 (citing, *inter alia, Joca-Roca Real Estate, LLC v. Brennan,* 772 F.3d 945, 948 (1st Cir. 2014), *PaineWebber Inc. v. Faragalli,* 61 F.3d 1063, 1068-69 (3d Cir. 1995), and *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.3d 494, 497 (5th Cir. 1986)).

Finally, Justice Kagan's reliance on the plain-vanilla language of Section 6 of the FAA – "in the manner provided by law" – does not resolve these questions. If Section 6 truly means what *Morgan* says it means, then there should be no basis for the "bespoke" rules of contract interpretation announced in the *Lamps Plus, Moses H. Cone,* and numerous other Supreme Court decisions.

On its face, the *Morgan* decision appears to constitute an increasingly rare unanimous Supreme Court decision addressing a highly-specific aspect of federal arbitration law. But the central premises of its reasoning – particularly the unexplained treatment of waiver as a federal "procedural" rule – as well as the failure to address *Moses H. Cone's* seemingly directly contrary ruling that the federal presumption in favor of arbitration applies to "waiver," suggest that Morgan ultimately may generate more questions than it answers.

* This article was originally published in "Kilpatrick Townsend Class Action Blog" on May 31, 2022, https://kilpatricktownsend.com/Blog/classaction/2022/5/scotus%20displays%20short%20memory%20in%20rejecting%20the%20prejudice%20requirement%20for%20waivers%20of%20the%20right%20to, and is reprinted here with permission

From Multiple Time Zones to Intermediary Brokers: A Comparative Study of Demurrage Time Bar Decisions in England[1] and the U.S.

By Leigh Harvis-Nazzario, Summer Associate, 2022, Link Martyn PLLC

Charterers incur detention and demurrage when they fail to load or discharge their vessels within the time periods prescribed by their charter agreements. But owners cannot simply expect charterers' checks to appear in the mail. Owners are bound by charter party time bar provisions requiring that they submit demurrage claims and supporting documents to charterers within a specified number of days or risk their claims being time barred.

This article presents a comparative overview of how arbitrators and courts have applied time bar provisions across the pond and here in the United States, by examining recent cases involving such issues as multiple time zones, intermediary brokers, flexibility in contractual changes, and good faith.

While there are many similarities between the two legal systems, some nuances may produce radically different results, depending on whether the claim is litigated or arbitrated in England or the U.S.

When dealing in multiple time zones, both U.S. and English decisions look to local time for demurrage claim notification deadlines unless expressly provided otherwise in the charter party.

Coal in Owners' stockings from The English High Court

In *The Maria,* the English High Court faced the question of what time zone should be applied to the triggering event (in this case, the discharge of

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crude oil) to determine whether Owner's demurrage claim was time barred.[2] The vessel was chartered to carry crude oil from Brazil to Long Beach, California. Under the charter agreement, Owners had thirty days from cargo discharge to submit a claim for demurrage.

Discharge was completed on Christmas Eve, December 24, 2019, Pacific Standard Time (PST). Due to the time zone differential, this was already Christmas Day, December 25, 2019, Central European Time (CET), where both Charterers and Owners were headquartered. Owners submitted their demurrage claim on January 24, 2020, CET.

If local time applied, the deadline for Owners to submit a demurrage claim would have been January 23rd PST, thirty days from the completion of discharge in California, time barring Owner's demurrage claim. The question for the Court was whether local time (PST) or CET applied.

The Court found in favor of Charterers, holding that the discharge date is determined by the time zone where the discharge occurred. In this case, it was PST. Owner's demurrage claim was, therefore, time barred.

The Court reasoned that using local time "... gives rise to a single, clear and easily ascertainable date and time of completion of discharge. It tends to promote certainty and reduce the risk of confusion."[3] Further, the date of discharge is "... generally the starting point for the time limit under the Hague-Visby rules for cargo claims."[4] Absent an express provision in the contract, the date of the triggering event will be determined based on local time where the triggering event occurred.[5]

U.S. arbitrators Would Likely Also Favor Local Time

Although there are no published U.S. arbitration awards that address applicable time zones for demurrage claims, arbitrators in the U.S. are likely to approach the issue of applicable time zones similarly to the High Court in *The Maria.* In *Probulk Carriers Limited v. Pacific Commerce Line,* S.M.A. No. 2817 (1991) (Berg; Boulalas; Engelbrecht), the arbitrators addressed which time zone was appropriate for calculating hire in a time charter and found that "[a]rbitrators in this jurisdiction have been, in the main, consistent in supporting the local time argument in the absence of express language to the contrary."[6]

In this arbitration, Charterers made voyages between Pacific and U.S. ports. Owners argued that hire was payable "'per day, or pro rata for part of a day', which they say means elapsed time under the time charter as distinct from times derived from artificial zonal time formulae." Owners argued that GMT was "the constant measure of time" and was "the only fair and sensible basis upon which to calculate the on-hire period." Charterers argued, to the contrary, that New York arbitral precedent clearly supported their local time interpretation. The arbitrators found in favor of Charterers, reasoning that if it was Owners' intention to calculate time in GMT, this should have been stated in their contract.

Therefore, it is likely that local time will be applied by both U.S. and English courts and arbitrators unless an exception is expressly written in the contract.

Intermediary brokers untimely communicating demurrage claims

English arbitrators have held demurrage claims not time barred when intermediary brokers have failed to timely submit demurrage claims.[7] In the U.S., arbitrators have also found an owner's demurrage claim time barred where an intermediary broker failed to submit the claim in time.[8]

In *LMLN 151 London Arbitration 8/85,* Owners sent their claim to the Charterers' broker, requesting that they forward it to Charterers.[9] The broker sent the claim two days after the deadline. Charterers rejected the claim, arguing that it had not been presented in time. The arbitrators found that the broker was Charterers' agent and, therefore, had the authority to receive the documents on behalf of Charterers, so the claim was not time barred. The arbitrators also noted that even where only one broker acted as an intermediary between Owner and Charterer, the result would be the same.[10]

If the agreement had called for New York arbitration, the result might have been different if a single intermediary broker was involved. In *SeaRiver Maritime Inc. v. Enron Clean Fuels Co.,* S.M.A. No. 3377 (Arnold; van Gelder; Bauer, 1997), the parties conducted all communication through a single broker. The arbitrators held that the broker acts in a dual capacity. When transmitting documents from Owner to Charterer, the broker acts as Owner's

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agent. Conversely, when the broker transmits documents from Charterer to the Owner, he acts as Charterer's agent. In this case, Owner's claim was time barred because the broker (acting as Owner's agent) failed to submit the Owner's supporting documents to Charterer in time.

While U.S. and English decisions are both flexible in their treatment of demurrage claim time bars, the U.S. considers the parties' good faith.

U.S. and English courts and arbitrators are flexible in their approach to time bar provisions, and outcomes vary based on the facts of each case. Both consider the parties' intent and whether documentation issues, like a missing signature, will cause a claim to be time barred.

English Courts have eased into a relaxed approach

English courts and arbitrators have gradually taken a more relaxed approach to demurrage time bar claims.[11] For example, owners are not barred from making factual corrections and changes to legal labels in demurrage claims.[12] *London Arbitration 18/91 LMLN 308 (1991)* broadened this view when the arbitrators held that the amount of the claim can also be altered after the fact.[13] However, an owner cannot enforce a claim where supporting documents were not presented in time.[14]

This more relaxed approach has not always been followed. In *The Sabrewing,* the English High Court took a stricter view, holding that a demurrage claim was time barred in the absence of a signature by a responsible officer on the pumping logs.[15] The interpretation was later challenged in *The Eternity,* finding that the drafters of the provision would not have intended a claim to fail because a part of the document was not signed.[16] *The Sabrewing* was again challenged in *The Abqaiq,* when Owners sought to relabel and recalculate their demurrage claims.[17] The Civil Division of the Court of Appeal held that the question to consider in cases such as these is whether "'Charterers are put in possession of the factual material which they require in order to satisfy themselves a claim is well-founded or not.'"[18]

The U.S. considers good faith and commercial practicality in demurrage claims

Arbitrators in the U.S. may also take a more flexible approach to demurrage claims, considering "good faith" and "commercial practicality."

Like English courts, U.S. arbitrators may allow owners to modify demurrage claims without running afoul of time bar provisions. In an arbitration regarding a minor change to a demurrage claim amount, the arbitrators held that claims become stale long after a voyage occurs and memories fade.[19] "From a commercially practical point of view, the clauses were not intended to bar any and all minor modifications of initial presentations or minor adjustments which may be proved by documents submitted within the prescribed 120 days."[20]

Arbitrators may also consider the parties' good faith. If there are sufficient documents to support a demurrage claim and the owner made a good faith attempt to submit "all supporting documents," the demurrage claim may not be time-barred. In *National Shipping v. M/V Mantina, S.M.A, No 2801 (Bauer; Cederholm; Nichols, 1991)*, Owners mailed a letter to Charterers via a broker, which included an invoice for demurrage and all supporting documents, including the pumping logs, or so the Owner thought. Charterers denied that the pumping logs were included. The arbitrators considered whether the documents that Charterers received constituted substantial performance, holding "[t]he Owner appears to have made a good faith attempt to submit 'all' supporting documents but somewhere there was a slip twixt the cup and the lip... "[e]nough documents were received to support a claim for demurrage even if the amount of that claim was subject to dispute."[21]

Arbitrators may also hold that an owner's claim is not time barred if there is bad faith or the requirements to formalize a claim are ambiguous. In *Koyo Kaiun v Liquistream Americas, S.M.A, No 4346 (Martowski; Ziccardi; Siciliano, 2018)*, while Owners submitted the required documentation, Charterers did not object until the time bar took effect. The arbitrators held that Charterer's unresponsiveness "...smacks of bad faith and constituted a breach of the implied covenant of good faith and fair dealing...." and that " "pursuant to New York law that implied covenant includes 'a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other to receive the fruits of the contract.'" [22]

Implied duty of good faith is not established under English law

Comments from the English High Court highlight the ongoing discussion regarding the duty of good

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faith. High Court Justice Leggatt said, "I respectfully suggest that the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent it still persists, is misplaced." Lord Justice Moore-Bick took a contrary view stating, "the recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences," warning that "there is . . . a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement."[24]

English courts' view of the doctrine of good faith is an issue to watch as it applies to cases involving demurrage claim time bars.

Conclusion

This review of U.S. and English arbitral and judicial treatment of demurrage time bar provisions demonstrates that care should be taken in drafting and complying with these provisions. While there are many similarities between English and U.S. interpretations of these provisions, pitfalls lie in such nuances as applicable time zones, broker communication, flexibility in contracting, and good faith. The approaches to these issues are also fluid, as evidenced by the English courts' evolution towards a more relaxed approach to time bar provisions.

1 The views expressed in this article concerning English law are based upon the research of the author, currently a student at Rutgers Law School (Class of 2023)
2 *The Maria* [2021] EWHC 2565 (Comm) (https://www.bailii.org/ew/cases/EWHC/Comm/2021/2565.html).
3 *Id.*
4 *Id.*
5 *The podcast, Case by Case, featured a discussion of The Maria and why the High Court dedicated so much space to the subject of time zones. Ultimately, the podcasters concluded that this relatively simple matter of "what day it is" actually unravels to be quite complicated and even philosophical.* Luke Zadkovich & Calum Cheyne, *From Time to Time, How to Count Time for a Demurrage Time Bar,* CASE BY CASE (Oct. 7, 2021), https://anchor.fm/zeiler-floyd-zadkovich/episodes/13-From-Time-to-Time---How-to-count-time-for-a-demurrage-time-bar-e18egmk.
6 *Probulk Carriers Limited v. Pacific Commerce Line,* S.M.A. No. 2817 (Berg; Boulalas; Engelbrecht, 1991).
7 *Demurrage Documentation: Don't Miss the Boat,* ITIC (Sept. 30, 2003), https://www.itic-insure.com/our-publications/intermediary/demurrage-documentation-dont-miss-the-boat-2826.
8 *Id.; See also SeaRiver Maritime Inc. v. Enron Clean Fuels Co.,* S.M.A. No.3377 (Arnold; van Gelder; Bauer, 1997).
9 *Demurrage Documentation: Don't Miss the Boat, supra* note 7.
10 *Id.*
11 *Demurrage Time Bars - An Overview,* EVERSHEDS SUTHERLAND (Jan. 17, 2014), https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Transport/Demurrage_Time_Bars_An_Overview.
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.; See also Waterfront Shipping v Trafigura AG* (The Sabrewing) [2008] 1 Lloyd's Rep 286.
16 Mark Seward, *Demurrage Timebars - The Tide is Turning on "Sabrewing,"* STEAMSHIP MUTUAL (Jan. 1, 2009), https://www.steamshipmutual.com/publications/articles/eternity0109.
17 *Demurrage Time Bars - An Overview, supra* note 11.
18 *Id.*
19 *Tankoil Carrier v. M.V. Demetra,* S.M.A., No 2822 (Abbott; Engelbrecht; Berg, 1991).
20 *Id.*
21 *National Shipping v. M/V Mantina,* S.M.A., No 2801(Bauer; Cederholm; Nichols, 1991).
22 *Id.*
23 Christopher Braithwaite, et al., *Towards an Implied Duty of Good Faith Under English Law,* JONES DAY (May 2013), https://www.jonesday.com/en/insights/2013/05/towards-an-implied-duty-of-good-faith-under-english-law#_edn1.
24 *Is There a General Principle of Good Faith under English Law?*, FENWICK ELLIOT (last visited Aug. 18, 2022), https://www.fenwickelliott.com/research-insight/annual-review/2016/principle-good-faith-english-law.

SMA Award Service ... At-a-Glance

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

Laytime is the time allowed a charterer by the vessel's owner to load and discharge the charterparty-contracted cargo. Demurrage is the penalty assessed by the vessel owner when the charterer exceeds the allowed laytime. At first glance these two contractual provisions seem straightforward. However, behind this general statement lies a complex legal subject whose interpretation depends mainly on the charterparty clauses. Brokers begin their careers analyzing demurrage claims, quickly realizing that likely 90-days after the cargo is

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discharged, they will generally be the bearer of bad news to their charterer clients by having to relay that any profits were eviscerated by a demurrage claim. Brokers are trained to understand demurrage in the belief that the best way to avoid problems in the first place is to understand how they arise. One is then positioned to draft clauses—or better understand those already drafted—to avoid future disputes.

Charterparty terms and conditions provide for when laytime begins as well as exceptions to time counting. Oftentimes, parties' intentions are not clearly memorialized in the charterparty; or the parties may not appreciate that clauses should not be read in isolation, and that care must be taken to check whether a particular clause relates to or is affected by other clauses in the charterparty. Two examples of this common oversight can be found in the disputes which are the subject of the Awards discussed below.

There is little doubt that many maritime disputes which come before arbitrators for resolution involve laytime and demurrage. Considering the frequency and diversity of demurrage claims, this column will focus on SMA demurrage awards from time to time in upcoming issues.

MTM SANTOS (SMA 4356, January 11, 2019) (LeRoy Lambert, Louis P. Sheinbaum, David W. Martowski)

ASBATANKVOY – Demurrage – Ice – Master's Judgment – Interest – Attorney Fees & Costs

This dispute involved demurrage stemming from delayed berthing at discharge owing to ice conditions. The issues were how the charter party assigned the berthing risk and obligation, and whether the vessel's Master exercised proper judgment in deciding whether/when to berth.

The MTM SANTOS [hereinafter 'vessel'] was fixed on the Asbatankvoy charterparty format on January 16, 2017, to carry 15,000-Mt caustic soda from Brazil for 1-2 safe ports, 1 safe berth each, out of Genoa/Ravenna, Izmit, Nikolayev, Visag, and/or Jubail/Ras Al-Kahir. During the charterparty negotiations, Charterer emphasized the likelihood of declaring Nikolayev, adding that as the ice season[1] was already in effect at this port, an ice-breaker tug escort would be required for vessels that were not ice-classed.

Following an uneventful loading in Brazil, the vessel headed toward Gibraltar awaiting the discharge declaration, although the intention remained Nikolayev. About eight days prior to arriving at Nikolayev, owner began receiving ice reports for the port, initially indicating adverse conditions prohibiting berthing. Owner then requested that charterer nominate another discharge port, which charterer refused, saying another vessel recently proceeded up the channel without incident. About three days before arriving at Nikolayev, the ice reports indicated the conditions were deteriorating, at which time owner placed charterer on notice for all delays and time associated with the ice conditions.

The vessel arrived and tendered its Notice of Readiness [NOR] on February 10th and waited at the customary anchorage for the berth to become available, which was not expected before February 15th. Owner notified charterer that it would allow the vessel to follow ice breakers provided charterer agreed to be responsible for the cost of repairing any damages to the vessel, including time spent on any repairs. Charterer declined. On February 15th, the day the berth was expected to become available, the Master notified charterers that due to the prevailing ice conditions he considered Nikolaev as too dangerous for the vessel, and requested charterer to nominate another port, free from ice. No other port was nominated, and the vessel remained at anchor. The berth did not become available until February 21st, but the Master did not proceed to the berth at this time, opting instead to remain at anchor until March 3rd, the day before the Ice Campaign ended, at which time the vessel followed ice tugs to the berth, and completed discharge on March 5th. The vessel sailed without escort tugs.

The dispute centered on the interpretation of two charterparty clauses, namely Rider Clause 43, and the Asbatankvoy printed Clauses 14[a] and [b], as follows:

> Clause 43; *"Vessel shall never be required to force ice nor follow ice breaker[s]. If owners agree to follow ice breakers, cost shall be for charterers account."*
>
> Clauses 14[a] and [b] in material part read as follows:
>
> 14[a] *In case of port of...discharge should be inaccessible owing to ice, the vessel shall direct*

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> *her course…for another port which is free from ice…"*
>
> 14[b] *"If on account of ice the Master considers it dangerous to enter or remain at any… discharging place for fear of the vessel being frozen in or damaged…the Master shall communicate to Charterer…who shall reply giving orders to proceed to another port as per Clause 14[a]…in either case, the charterer to pay for the time that the vessel may be delayed, at the demurrage rate stipulated in Part I."*

Owner claimed demurrage for all waiting time at discharge, noting that both parties understood the risk to the vessel calling Nikolayev during the ice season, as evidenced by Owner reserving its right to decide whether and when to proceed to the berth if the vessel had to follow ice breakers. Owner further asserted that the berth was unsafe, and that charterer failed to mitigate its damages by assuming the costs for delay and any damage to the vessel in proceeding to the berth earlier. Charterer countered that the vessel's NOR was invalid, as the vessel was never 'ready' to discharge until owner allowed it to proceed to the berth. Charterer recognized the significance of 'never' in Rider Clause 43, but argued that the Master failed to exercise proper judgment by not proceeding to the berth when it became available, as per Clause 14.

The panel majority ruled in owner's favor to the extent of counting the waiting time as/from the vessel tendering NOR up to February 21st, the date the berth became available. However, the majority subsequently ruled in charterer's favor by not counting the time the vessel remained at anchor as/from February 21st, when the berth became available, until March 3rd, the day before the Ice Campaign ended.

The panel opined that that parties did not amend Clause 14 of the Asbatankvoy rendering this clause applicable, the terms of which therefore had to be considered in conjunction with Rider Clause 43. Notwithstanding the force of 'never' in Rider Clause 43, when interpreted together with clause 14, the panel majority opined that owner was obligated to exercise its right not to follow ice breakers "reasonably, and not arbitrarily or capriciously" and that owner did not demonstrate that the Master exercised judgment, discretion or consideration in dealing with the ice conditions as required by Clause 14. The dissenting opinion held the word 'never' in the freely negotiated Rider Clause 43 trumped any language in the Asbatankvoy Clause 14, and as such, all waiting time at discharge should be counted in full.

STOLT AZALEA (SMA 4102, December 1, 2010) (Donald J. Szostak (Sole))

ASBATANKVOY - Shortened Procedure – Demurrage – Free Pratique – Substantial Readiness – Proration of Laytime/Despatch - Attorney Fees & Costs

This dispute dealt with the commencement of laytime and the requirement to obtain Free Pratique, delay caused by berth occupancy, and whether demurrage should be prorated when charterer's cargo was discharged simultaneously with cargo under a different charterparty.

The STOLT AZELIA [hereinafter 'vessel'] was fixed on the Asbatankvoy charterparty form on November 27, 2009 to carry 4,000-Mt of rubber processing oil from one safe port/berth Rayong for discharge at one safe port/berth Taichung plus one safe port/berth Jiangyin. There was no disagreement between the parties concerning the underlying facts set forth in the vessel's time sheets. At the load port, the vessel anchored on arrival awaiting berth availability, and was only granted Free Pratique 1.5 hours after the vessel berthed. At the first discharge port, the vessel tendered its Notice of Readiness on arrival at the Pilot Station and proceeded directly to the berth. Free Pratique was granted at the Pilot Station. At the second discharge port, the vessel anchored on arrival due to berth occupancy and, as the load port, was granted Free Pratique only 1.5 hours after berthing. Furthermore, at Jiangyin, the vessel discharged charterer's cargo simultaneously with cargo carried under a different charterparty.

Charterer argued that there was express language in the charterparty relieving it of responsibility for delay due to berth occupancy, specifically Asbatankvoy Clause 6, which provides in material part as follows: *"… However, where delay is caused to vessel getting into berth and after giving notice of readiness for any reason over which charterer has no control, such delay shall not count as used laytime."* Other arguments advanced by charterer included that the vessel did not tender valid notices of readiness at the load and second discharge ports as the vessel was not yet granted Free Pra-

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tique, and that any waiting time to berth and discharging time at the second port should be prorated with the other cargo on board the vessel which was carried under a different charterparty.

Owner countered that once laytime expired, charterer became liable for demurrage as per the agreed charterparty rate, and that berth congestion was not the type of delay over which charterer had no control. Owner also argued Free Pratique is a mere formality and not a condition precedent preventing the vessel from tendering its notice of readiness. Owner added the Asbatankvoy format contained no express requirement that the vessel be in Free Pratique prior to tendering a notice of readiness. Finally, owner argued that there was no specific clause in the charterparty prorating waiting time, or for simultaneous discharge, noting that these are specific terms which must be negotiated by the parties.

Utilizing the Shortened Arbitration Procedure permitted by the Rules of the Society of Maritime Arbitrators ("SMA"), the parties appointed a sole arbitrator who found for the owner on all issues. Addressing the 'beyond charterers control' wording in Asbatankvoy Clause 6, the arbitrator held that charterer's argument was a misreading of that clause; and that the last sentence, correctly interpreted, refers to the physical act of shifting the vessel to an otherwise available berth. Charterer presented no evidence that the vessel was delayed getting into the berth[s] after they became available.

Turning to Free Pratique, the arbitrator held it was accepted practice that in cases where neither the charterparty nor local port regulations require Free Pratique prior to tendering notice of readiness, laytime may commence before Free Pratique is granted. Even if such regulations did exist for the ports, it was also accepted practice that a valid notice of readiness could be tendered before Free pratique was granted, so long as the vessel did not cause any delay in obtaining the Free Pratique.

Addressing charterer's argument that demurrage should be pro-rated, the arbitrator highlighted abundant New York arbitration precedent covering this topic, that it should be expressly included among the terms negotiated by the parties at the inception of any charterparty negotiation. In this instance, the parties failed to negotiate and include a provision prorating demurrage over multiple cargoes.

Flexibility is one of the many advantages of arbitrating according to SMA Rules. One example is the SMA's Shortened Arbitration Procedure, which allows parties to arbitrate low-value disputes in a cost-effective, efficient manner. Demurrage claims often fall into this category. Moreover, the flexibility offered by the SMA Rules is well-suited to the wide variety of disputes involving laytime and demurrage. While maintaining consistency with past decisions is an important feature of SMA arbitration, the Rules allow arbitrators to consider the unique circumstances of each case so as to render a fair and equitable decision.

1 On January 6th, the Nikolaev Port Authorities announced the commencement of the Ice Campaign requiring non-Ice-Class vessels to proceed through the channel in ice convoys escorted by ice-breaker tugs, provided owner presented written official permission from its Classification Society.

Remembering Manfred W. Arnold

By A. J. Siciliano, SMA Member, former President of the SMA

May 18, 2022 is a date that will be long remembered by the SMA and the entire New York maritime arbitral community. It was then that our friend and colleague Manfred W. Arnold passed at age 83 leaving his devoted wife Susan, daughters Heidi and Kirsten and their families to ponder a future without him. Those of us privileged to have shared a panel or otherwise work closely with or alongside him know that Manfred was an exceptional individual with a wide variety of cultural and other interests. Apart from his legendary love of fast cars, fine wines, gourmet foods, Chinese snuff bottles and manually building stone walls at his summer home in the Poconos, Manfred would challenge himself with the Sunday New York Times crossword puzzle. Rumor has it that he did so in ink rather than the forgiving pencil we less intrepid mortals would use.

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Manfred was no stranger to the pages of *The Arbitrator*. Less than a year ago, readers were treated to President Lambert's interview with him in the October 2021 (Volume 51/Number 3/p.13) issue of this publication. Even if you have already read it, I encourage you to revisit that informative article which includes a fine photograph of Manfred: https://smany.org/pdf/Vol51_No3_Oct2021.pdf. There, in his own words, Manfred recounts his family's opposition to his early aspiration to become an artist and the circumstances that caused him to choose a career in the maritime industry which in turn led to his stellar achievements as a maritime arbitrator. He describes how he and Susan met in 1963 and were married a year later in Tokyo, where Manfred was then working. Shortly thereafter, the couple returned to New York where Manfred continued working for a German shipowner. He later became a "ship loan bail-out" officer for a New York bank, followed by a stint with Cargill before joining a ship management company as a sort of "troubleshooter." In 1985, Manfred became a full-time maritime arbitrator and, in his words, "the rest is history."

Manfred was admitted into SMA membership in 1971 and quickly rose through the ranks to become one of its leading arbitrators and spokespersons. Believe it or not, in those days Manfred was clean shaven. He did not sport his signature beard and mustache until years later. In 1988, Manfred was elected president of the SMA and remained in that position for five consecutive terms. As a member of the Board of Governors in those years, I witnessed the exceptional skill and foresight with which Manfred both guided the SMA and managed the often divergent views of its Boards of Governors. He had an uncanny ability to fit just the right person to fill a particular task.

Following a series of health issues and despite my urging him not to do so, Manfred found it necessary to resign from the SMA in 2021. During his 50 years of membership, Manfred rubbed elbows with many of the SMA's founders including its crusty first president Jack Reynolds and shared panels with nearly every subsequent SMA president as well as with distinguished members of the bar. Manfred proved to be the SMA's most prolific maritime arbitrator, issuing in excess of 1,000 published awards and dozens more that for one reason or another were not published. Although Jack Berg is close behind, Manfred's enviable case-count is unlikely to ever be equaled.

Manfred's many accomplishments extend beyond his role as a leading maritime arbitrator. Not to be overlooked are the several years Manfred devoted to the expansion of ICMA, his published writings and work as joint publisher of *The Maritime Advocate*. I am especially grateful for his life-long efforts to champion ADR, the SMA and its membership. More than anyone else, it was Manfred who, after years of effort by scores of others, finally made the Friends and Supporters program a funded reality.

At the risk of borrowing a few words from a fellow Long Islander (Walt Whitman), Manfred was "large" and he did "contain multitudes."

Rest in peace dear friend ... you've earned it

Spotlight on the SMA

SMA at the MLA Arbitration & ADR Committee's Monthly Coffee Break

August 19, 2022: Ifigeneia Xanthopoulou led a discussion with Jan Gisholt and SMA member **George Tsimis** on "Maritime Arbitration at the Halfway Mark of 2022."

September 16, 2022: SMA President **LeRoy Lambert** and **Lucienne Bulow,** Past Chair of the SMA's By-laws and Rules Committee, discussed the June 2022 SMA Rules revisions.

SMA at the New York Marine Transportation and Offshore Wind Forum, September 15, 2022

Dan Gianfalla, a member of the SMA's Offshore Wind Committee, attended the New York Marine Transportation and Offshore Wind Forum sponsored by The Coast Guard Foundation and the Maritime Association of the Port of New York and New Jersey.

SMA at Fort Lauderdale Mariners 32nd Insurance Seminar, October 24 - 25, 2022

SMA members **Charles Anderson, Michael Monahan** and **James DeSimone** will attend.

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SMA at the International Bar Association Conference, Miami, October 30 - November 4, 2022

SMA President **LeRoy Lambert** will moderate a panel on "Conflicts of Interest in Maritime Arbitration." Panelists will include leading lawyers and arbitrators from Singapore, Hong Kong, London and Rotterdam.

SMA member **Müge Anber-Kontakis,** currently serving as the Diversity & Inclusion Officer of the IBA's Maritime & Transport Committee, will be chairing a session titled "Containers Rule the World." Panel Members will include speakers from both industry and law, including FMC Commissioner Carl Bentzel.

SMA Rules at the University of Miami's International Arbitration program

A University of Miami Law School course on maritime arbitration with a focus on the SMA Rules will be offered November 14-18, 2022, and will be taught by University of Miami Law School Adjunct Professor John Kimball (Blank Rome LLP). The course is part of the University of Miami's International Arbitration program with students from around the world and highly qualified U.S. students.

SMA October and November Luncheon Speakers

Jack Cammarota, Marine Operations & Supply Chain Management and Development at McQuilling Renewables LLC, will, at the October 12th luncheon, discuss marine logistical components as they relate to offshore wind development, specifically transportation, installation and operational maintenance of wind farms.

At the November 9th luncheon, **Brian McEwing,** partner at Reeves McEwing LLP, is scheduled to speak concerning arbitration clauses in employment contracts.

If you are not receiving information about SMA luncheons and want to be added to the list, then please contact Patty Leahy, the SMA's Office Manager, at pleahy@smany.org.

Members Only SMA Luncheon, September 14, 2022

CONGRATULATIONS TO:

SMA members **Leroy Lambert** and **David Martowski,** co-authors of the 5th Edition of *Voyage Charters* by Julian Cooke, Tim Young, Michael Ashcroft, Andrew Taylor, John Kimball, David Martowski, LeRoy Lambert and Michael Sturley (published August 2022).

SMA member **Charles Anderson,** a co-author of the 3rd Edition of *Shipping and the Environment,* by Colin de la Rue, Charles Anderson and Jonathan Hare, with a Foreword by IMO Secretary-General Kitack Lim, expected to be published in November 2022.

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In Closing

We thank everyone 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/

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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 www.smany.org.

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