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In this issue

President's Message

By LeRoy Lambert, SMA President

It has been a busy and constructive fall for the SMA.

At our October Luncheon, we heard from Jack Cammarota of McQuilling Renewables. McQuilling, along with so many others, is actively involved in negotiating the many contracts which are required to build and maintain the numerous offshore wind projects now underway and soon to be started. It is important that domestic players learn and realize the advantages of SMA arbitration and mediation of the disputes which will inevitably arise. In this regard, during discussion of the emerging offshore wind market at the November SMA-MLA Liaison Committee meeting, members of the bar on the committee focused on arbitration clauses in those contracts. I also attended a networking reception in New Orleans on November 29 hosted by the Business Network for Offshore Wind, held in connection with the annual International Workboat Show. I cannot emphasize enough the importance of each member now being seen in this space, while contracts are being made and joint ventures formed, to let the industry know about alternative dispute resolution by the SMA.

In November, Brian McEwing of Reeves McEwing summarized recent cases holding that shipowners/operators may include arbitration clauses in employment contracts with their seafarers which incorporate state law. As a result, seafarer injury claims may be subject to arbitration if the arbitration clause incorporates state law, is properly worded, and the provisions highlighted to the seafarer. We look forward to case law developments in this field, for sure.

The Spotlight on the SMA section (at p. 23) provides details on our many other efforts this Fall to spread the word about the SMA: the MLA in San Diego, the Fort Lauderdale Mariners Club, the International Bar Association, Marine Money in New Orleans and the FMC.

We will build on these, and other developments, in 2023 and thank you for your support.

This is the last issue of The Arbitrator with Dick Corwin as an editor. On behalf of the Board of Governors and membership and, I am sure, the readership, I thank Dick for his tireless efforts as editor since February 2017, adding his name to a long-list of esteemed members who served in this important role for the SMA.

It was great to see so many of you at our Holiday Luncheon on December 14th, and I wish you and your families all the best for the holiday season.

LeRoy Lambert
President

SMA Members all smiles at the December 14 Holiday Luncheon; left to right, Charles Anderson, Müge Anber-Kontakis, David Martowski and Peter Wiswell.

Nipping Counterparty Non-Performance Disputes in the Bud: The Application of the Doctrine of Adequate Assurances in SMA Arbitrations

By George J. Tsimis, Director, GJT Marine Consultants LLC, SMA Member and Board Member

A little known yet significant feature of arbitration under the Rules of the SMA is a party's ability to invoke the doctrine of adequate assurances when faced with the prospect of a non-performing counterparty. This doctrine, which is available to vessel owners and charterers alike, provides a performing party to a voyage or time charter with the ability to request its counterparty to provide an assurance of performance, which, if ignored or not complied with in a timely manner, can result in the repudiation of the contract. In the context of a long-term time charter or a typical voyage charter—where delays due to inadequate or no performance at all can result in significant exposures with no end in sight—the availability of this tool can significantly shorten the time for a performing party to extricate itself from the contract, enter into a new fixture, mitigate its losses and get back to business.

Under the doctrine of adequate assurances, a party may suspend its own performance and seek adequate assurance of performance from its counterparty if reasonable grounds for insecurity arise with respect to the counterparty's ability to perform. The issue of whether there are reasonable grounds for one party's insecurity is a threshold question of fact and is determined by commercial standards akin to a reasonable person standard. Once this burden of proof is met, the fact finder may then rule on whether the termination of the contract was appropriate and whether the non-breaching party is entitled to its reasonable damages.

Once the demand for adequate assurances has been formally presented, the other party must respond within a reasonable time, the failure of which results in repudiation of the contract. *See* NY UCC §2-609(4); *Daelim Trading Co. v. Giagni Enters.*, No. 10-cv-2944, 2014 WL 6646233 (S.D.N.Y. Nov. 12, 2014).

The circumstances as to when the failure to give such assurances may be treated as a repudiation are summarized as follows in Section 251, paragraphs (1) and (2), of the Restatement (Second) of Contracts:

> *§251. When a Failure to Give Assurance May Be Treated as a Repudiation*
>
> (1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under Section 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.
>
> (2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

New York State law officially recognizes the doctrine of adequate assurances in its own New York Uniform Commercial Code § 2-609, and although this right was initially limited in New York to situations involving the sale of goods, the New York Court of Appeals has adopted the UCC rule of adequate assurance as part of the common law of contracts. *Norcon Power Partners, L.P., v. Niagara Mohawk Power Corp.,* 92 N.Y.2d 458, 464-466 (N.Y. 1998). This point is significant because SMA arbitrations can oftentimes be governed by an express New York choice of law provision.

Without the doctrine of adequate assurances, a party demanding performance from its counterparty would have the unenviable and gargantuan task of satisfying the stringent and exacting burdens of proof associated with other legal contractual doctrines such as impossibility, frustration of purpose, commercial impracticability, or force majeure to excuse performance and justifiably extricate itself from an existing contract with a non-performing party. Under English law, which does not recognize the doctrine of adequate assurances, this is the norm, and parties facing non-performing counterparties must often ride out the storm for protracted periods—months or sometimes years—until the contract runs its course, leaving the performing party with little room to maneuver and likely to incur significant losses for the remainder of the contract term.

Numerous SMA panels have applied the doctrine of adequate assurances to parties' performance of charter party contracts, including, *inter alia*, situations where a charterer fails to make timely payments of hire; where a charterer is unable to load a cargo or find a receiver for loaded cargo; and when a vessel owner is unable to provide its vessel for the contemplated voyage due to ongoing or serious engine or other mechanical or structural deficiencies of the vessel. This article will review several SMA awards applying the doctrine of adequate assurances and then compare the results in those SMA awards with a recent London arbitration proceeding involving a charter party dispute subject to English law where the doctrine was inapplicable and unavailable.

The KM IMABARI Award (Failure to Load Cargo)

The decision of *Pan Oceanic Maritime Inc. v. RSU-SA LLC ("The KM IMABARI")*, SMA 4081 (June 10, 2010) (Siciliano, Mordhorst, Arnold) is most illustrative of the doctrine's application in a traditional charter party context. In the *KM Imabari* the vessel was presented for loading a cargo of iron ore in Mexico for carriage to China, and charterer failed to issue any loading instructions for over two months. Owner sent a letter to charterer demanding immediate and unequivocal assurances that the cargo would be supplied promptly and that Charterer acknowledge and agree to immediately pay the outstanding detention. Owner made two additional requests for adequate assurances in letters to the Charterer, stating that if Charterer failed to give such assurances in the coming days then Owner would treat the charter as repudiated. Charterer did not respond to these requests. Owner terminated the charter, citing Charterer's failure to assure performance, and withdrew the vessel. Owner subsequently found substitute employment in mitigation of its damages.

The panel in *KT Imabari* noted that "the doctrine of adequate assurance is grounded in the principle that a party to a contract is entitled to reasonable comfort that its contract partner is both willing and able to carry out its obligations" and that "the consequences for a party's failure to give such assurances are stated in Section 251, paragraphs (1) and (2) of the Restatement (Second) Contracts." The panel further recognized that "this doctrine has also been relied upon by arbitrators *i.e.,* in the cases of the OPAL STAR and the FOREST ENTERPRISE."

The panel concluded that, based on the circumstances of the case and arbitral precedent, Charterer breached a fundamental obligation under the charter, namely, to provide a cargo to be loaded onto the vessel, and Charterer's refusal to respond to Owner's numerous demands for assurances further sealed its fate. The panel added: "[C]harterer's failure to provide the requested adequate assurance allowed [o]wners to treat the charter as having been repudiated and to withdraw the vessel."[1] The panel then awarded the owner damages for freight differential ($361,915.33) and detention ($983,804) plus interest and costs. The panel also summarily rejected the charterer's alleged damages claims.

The application of the doctrine of adequate assurance has since been applied by at least two other SMA panels to the context of a charterer's failure to load a cargo or find a receiver to take delivery of already loaded cargo. *See the Matter of the Arbitration between Transportacion Maritima Mexicana, S.A. de C.V. and Alia Global Logistics, S.A. de C.V. ("The M/T KING GREGORY")*, SMA 4429 (Nov. 1, 2021) (Lambert, Tsimis, Schildt, Chair) (panel awarded disponent owner's unpaid freight of $295,000 plus interest and attorney's fees and costs against charterer which failed to load a cargo of jet fuel in Coatzacoalcos, Mexico, for carriage to Houston,[2] ruling: "As in the *KM Imabari,* [charterer] failed to present a cargo of jet fuel, *could not provide any adequate assurances of performance to [disponent owner],* and eventually acknowledged in correspondence its obligation to pay owner's damages." *See also the Matter of the Arbitration between Seatrade Transport Int'l, Inc. and SCAC Transport Canada, Inc. ("The ISLAND GEM")*, SMA 2560 (Apr. 14, 1989) (Arnold, Hamilton, Palmer, Chair) (panel granted the disponent owner's relief to terminate the charter after the vessel waited 8 days at loadport, after making several demands for assurances of performance, and after advising charterer "we have accepted your refusal to give loading instructions and to give any assurance that vessel would load in La Spezia as repudiation of the [charter]").

The OPAL STAR Award (Non-Payment of Hire)

The doctrine of adequate assurances has also been applied to SMA awards dealing with situations involving disputes over the payment of hire under a long-term contract. In the *Matter of the Arbitration between Orange Maritime Pte., Ltd. and O.N.E. Shipping, Inc. (The "M/T OPAL STAR")*, SMA 3650 (Nov. 9, 2000) (Bulow, Martowski, Siciliano, Chair), the parties, on November 3, 1997, entered into a 5-year time charter party with an option for another 3 years for a product tanker that was still under construction. On June 3, 2000, as the vessel was nearing the final phase of its construction and six months prior to delivery to Charterer, Owner, in the face of reports regarding financial difficulties being experienced by companies related to Charterer, requested Charterer for fresh assurances that it was capable of timely performing its obligations under the charter and requested that Charterer provide two months' hire in advance as security and as evidence of its good intentions and financial capability. At that time, the chemical tanker market had declined significantly since the execution of the charter, adding to Owner's concerns regarding Charterer's intention to perform. In response to Owner's demand, Charterer reaffirmed its intention to perform the charter and declined to deposit cash security as being unnecessary, premature and unreasonable.

Owner's request was treated by the panel as the equivalent of seeking a declaratory judgment that Charterer's refusal to furnish two months security violated the doctrine of adequate assurances, thereby entitling Owner to treat that refusal as an anticipatory breach of the charter. Such a ruling would have permitted Owner to forego further performance and delivery of vessel at the port designated in the charter and to the standard demanded by Charterer, which Charterer insisted had been Owner's pretext for commencing arbitration and seeking such relief.

The panel reviewed the principles of the doctrine of adequate assurances as set forth in §251 of the

Restatement (Second) of Contracts and determined that the facts and circumstances supported Owner's request for adequate assurance of Charterer's willingness and ability to perform its obligations. However, the panel deemed Owner's June 3, 2000 request for security to be premature given the fact that the Charterer's obligation to pay hire did not commence until December 8, 2000. The panel noted, in pertinent part:

> We agree with Owner that the amount of its June 3, 2000 security request was reasonable, but we are troubled by Owner having made that demand so far in advance of the original and narrowed laydays. As commercial persons, we are aware that, despite a significant improvement in that sector over the last several months, the market is still below the daily charter hire rate agreed to be paid by Charterer. ... Notwithstanding our personal views of what the likely market value of the OPAL STAR will be in December 2000, the panel is not inclined to deprive the Charterer of the possibility of a further market upturn so close to the vessel's expected delivery dates.

The panel then declined to rule that Charterer's failure to provide security entitled Owner to treat the charter as having been repudiated. Instead, the panel exercised its discretion under the SMA Rules and, in Solomonic fashion, ordered Charterer (1) to deposit no later than December 8, 2000 two months hire in its lawyer's escrow account to act as security until an order is issued; (2) that if Charterer fails to make such deposit, Owner may treat the charter as having been repudiated by Charterer and fix the vessel elsewhere; and (3) if Charterer makes the required deposit, Owner is directed to tender the vessel at a place, time and condition as required by the charter or as may otherwise be agreed between the parties.

This decision is illustrative of how the doctrine of adequate assurances may be utilized not just by a party to an agreement, but also by an arbitration panel to create an equitable result and to bring finality to a sticky situation which otherwise would have had a long-term effect on both parties' ability to move forward with its business.

The FOREST LINK Award (Vessel's Seaworthiness)

SMA panels have also applied the doctrine of adequate assurance to disputes regarding the vessel's structural condition and seaworthiness. In *the Matter of the Arbitration between Transportes Maritimos Centroamericanos S.A. and Paper Sea A.S. (The "M/V FOREST LINK")*, SMA 3745 (July 25, 2002) (Arnold, Siciliano, Blake, Chair), Charterer sought expedited relief from the panel claiming that the facts and circumstances warranted the termination of a long-term time charter for the vessel due to alleged lack of proper maintenance and repairs by Owner. In February and March 2002, the vessel experienced two sea water ingress incidents that damaged cargo on board, and which necessitated repairs to the vessel's cargo holds and hull in Gulfport, Mississippi. Over the next several months, Owner conducted its own repairs which, according to Charterer's surveyor, were insufficient and were not performed in compliance with the requirements of class or the U.S. Coast Guard. The delays caused by the repairs led to Charterer placing the vessel offhire and, on June 6, 2002, serving Owner with a demand to unconditionally consent to the termination of the charter, or alternatively to furnish "adequate assurance" that it was prepared to carry out the needed repairs to the vessel and return it to a seaworthy condition. Owner countered that the sole remedy was for charterer to place the vessel offhire and that the charter did not contain a provision allowing for such a premature termination of the fixture.

Charterer insisted its request to terminate the charter was appropriate and, in support of its position, Charterer cited the OPAL STAR award discussed above, as well as the FOREST ENTERPRISE award where the panel had unanimously held that the same time charterer was entitled to cancel a long-term time charter with the same vessel owner.[3]

On July 6, 2002, the panel held an expedited hearing and concluded that Charterer "had not yet demonstrated its claimed right to terminate the charter party." The panel went on to explain that "[t]he case of the FOREST LINK is readily distinguishable from that of the FOREST ENTERPRISE in that the former vessel has only been offhire since April 14, 2002. An offhire period of three months is neither unprecedented nor sufficient

to frustrate the underlying purpose of the charter party." The panel went on to note that Owner had performed some repairs and that the charter was silent with respect to any provision that specified when Owner needed to complete any corrective repairs or that implied the remedy of cancellation. It also noted that Charterer had substitute tonnage for the FOREST LINK and would be able to claim such increased costs and damages in the arbitration. The panel then ordered Owner to adopt and adhere to a repair protocol and time schedule and that, if Owner failed to comply with the provisions thereof, Charterer would be free to renew its application for the panel to immediately terminate the charter party.

As in the OPAL STAR, the panel crafted relief for the parties which balanced the equities but also gave the parties a road map towards a resolution of their disputes. While not as clearcut as a non-payment of hire or failure to produce a cargo for loading situation, the panel utilized the doctrine of adequate assurances as a pretext for designating a deadline for performance which if not met crystallized the parties' respective rights, remedies and exposures.

The SEA MASTER and English Law (No Doctrine of Adequate Assurance)

In June 2016, the SEA MASTER was voyage chartered by its owner to Agribusiness ("Charterer") who financed the purchase of a cargo of soybean meal with Arab Bank in Switzerland ("the Bank") which was to be carried from San Lorenzo, Argentina to port(s) in Morocco. Owner had expected the voyage to last no more than a couple of months. Instead, the vessel discharged a part cargo in North Africa and then, because of financial problems, Charterer was unable to find a buyer for the remaining cargo and also refused to pay demurrage which continued to accrue. The vessel remained partly loaded for almost a year and sailed to several potential discharge ports, until it ultimately discharged the remaining cargo in Lebanon once the Bank agreed to the issuance of new bills of lading to allow for delivery at a different port of discharge. By that time, Owner's demurrage claims and other losses plus interest and costs exceeded $2 million, and what had been expected to be a simple voyage charter became a financially disastrous odyssey around the Mediterranean Sea with the vessel used as long-term floating storage with no relief in sight for Owner.

Because Charterer had defaulted and was not financially viable to answer these claims, Owner and the Bank had their various disputes referred to London arbitration. The Bank also asserted cargo claims of its own for the alleged misdelivery of a portion of the cargo discharged in Morocco,[4] which the Bank thereafter sought to secure by way of a vessel arrest action in New Haven, Connecticut, spawning proceedings before the U.S. District Court of Connecticut.

In the months following the discharge of part cargo in North Africa, Owner had been unable to cancel the charter under English law and seek an order from a local court or tribunal to sell the remaining cargo on board because Owner could not satisfy the high burden of establishing frustration of the voyage charter. As a result, Owner tried to protect its interests by seeking ways to tie in the Bank to the demurrage obligations of Charterer under the new bills of lading and recoup its significant losses.

Six years after the SEA MASTER had been chartered, the parties are still in litigation in both London, where four arbitration awards have been issued with two related appeals to the High Court of Justice,[5] and in Connecticut, where motions by both parties are still pending in federal court. Had the matter been subject to SMA arbitration in New York and Owner been able to invoke the doctrine of adequate assurances, Owner could have demanded assurances from Charterer early in the voyage charter performance and avoided these protracted legal proceedings, which have likely cost millions of dollars for both parties and which have aggravated an already financially disastrous voyage charter for Owner.

Conclusion

The doctrine of adequate assurances, and a statutory remedy under New York law, especially as applied by SMA panels over the past several decades, provides counterparties to charter parties, contracts of affreightment, bills of lading, bunker supply contracts, and other maritime and commercial contracts with a more powerful arsenal to either prompt a recalcitrant party to perform its contractual obligations or to plot a course towards legitimately and appropriately terminating the

contractual relationship. Furthermore, the availability of this right obviates the need for a party seeking to terminate a charter party or otherwise enforce the fundamental and unequivocal terms of its agreement (such as payment of hire, producing a cargo for loading, or maintaining the vessel's seaworthiness) to establish that the venture has been frustrated. This burden is significantly more onerous and costly than a request for adequate assurances of performance, and any endeavor to prove such a claim would undoubtedly lead to more protracted legal proceedings and much greater expense to the parties.

In jurisdictions such as England where the doctrine of adequate assurances is not recognized, the parties should consider opting to include a specific contractual provision that mirrors the UCC language in this respect to safeguard the parties' respective rights to invoke the doctrine when circumstances warrant it. However, this might prove to be more challenging in contract negotiations subject to English law because the demanding party would need its counterparty's consent to include such a provision even though there is no obligation to agree to such measures.

The SMA decisions reviewed above illustrate how this doctrine may be utilized by parties and arbitrators alike to provide clarity to certain disputes and to resolve them. This right to demand assurances of performance therefore protects a bedrock expectation of most contract parties – that each can expect to receive due performance so long as each party timely meets its own obligations. Nevertheless, this review highlights how the use of the doctrine of adequate assurances is a mechanism that both practitioners and arbitrators alike should welcome and consider under appropriate circumstances.

1 *Id.*
2 This dispute arose during the pandemic when the jet fuel market plummeted due to the worldwide lockdown and cessation of nearly all commercial air travel by the world's airlines.
3 In *The FOREST ENTERPRISE,* SMA No. 3743 (July 15, 2002) (Siciliano, Mordhorst, Martowski, Chair), which was decided 10 days before the FOREST LINK award discussed above, the panel determined that charterer was entitled to cancel the charter party after the vessel had remained offhire in Malta and in disrepair for nearly one full year following an engine room flooding incident. In doing so, the Panel noted that charterer had sent owner a notice of demand for consent to terminate the charter party and/or demand for adequate assurances of performance, and owner "failed to meaningfully respond" to that notice.
4 The Bank's alleged cargo claims were eventually dismissed by the London arbitration tribunal.
5 The London tribunal initially ruled that it had no jurisdiction to hear owner's demurrage claims against the Bank and receivers, which were premised upon the replacement bills of lading. Owner appealed and in *Sea Master Shipping Inc. v. Arab Bank (Switzerland) Ltd. ("The SEA MASTER")* [2018] EWHC 1902 (Comm), the Commercial Court reversed that ruling and remanded the dispute to the tribunal for decision. The tribunal subsequently ruled that the bank and receivers were not obligated to pay demurrage under the bill of lading, and owner appealed claiming that implied terms in the bill of lading supported its demurrage claims. In *Sea Master Shipping Inc. v. Arab Bank (Switzerland) Ltd.* [2020] EWHC 2030 (Comm), the Commercial Court rejected owner's arguments.

The Supreme Court's Ill-Advised Recasting of the Federal Policy in Favor of Arbitration*

By John Fellas**

In *Morgan v. Sundance, Inc.,* 142 S.Ct. 1708 (2022), the Supreme Court addressed a common issue that arises in arbitration — whether by pursuing litigation instead of invoking an arbitration agreement to which it is a party, that party might waive its right to arbitrate. In *Morgan*, the Court resolved a circuit split on the proper test for waiver in the arbitration context. Some circuit courts had held that there was a higher standard to establish the waiver of a contractual right to arbitrate than that applicable to other contractual rights. When it comes to all other contractual rights, the law focuses solely on the party alleged to have waived its right, asking whether it had intentionally relinquished that right. In the arbitration context, by contrast, some circuit courts also focused on the other party, asking whether it had been prejudiced by the actions of the waiving party. This heightened standard makes it harder to establish a waiver of the right to arbitrate. Circuit courts adopting this standard justified it by reference to the federal policy in favor of arbitration; if it is harder to establish waiver, more cases end up in arbitration.

In an opinion by Justice Elena Kagan, a unanimous Court resolved the circuit split, holding that the question of whether a party has waived its right to arbitrate should be "[s]tripped of its prejudice requirement." The Court based this decision on recasting the federal policy in favor of arbitration to prohibit federal courts from "invent[ing] special, arbitration-preferring procedural rules," and to require them, instead, "to place such agreements upon the same footing as other contracts. . . . Or in another formulation: The policy is to make 'arbitration agreements as enforceable as other contracts, but not more so.' . . . The federal policy is about treating arbitration contracts like all others, not about fostering arbitration."

Because the federal policy in favor of arbitration has been invoked to justify numerous decisions in the field of arbitration law, this sweeping declaration could have far-reaching consequences, potentially calling into question many important arbitration doctrines that rest on that policy. In this article, I argue that the Court's broad declaration is misguided. The notion that an arbitration agreement should be treated just like every other contract — the equal footing principle — is an inadequate ideal for arbitration. Some "arbitration-preferring procedural rules," as Justice Kagan calls them, are essential to the efficacy of arbitration precisely because "arbitration contracts" are not "like all others."

The Federal Policy in Favor of Arbitration

While the equal footing principle underlay the Federal Arbitration Act (FAA) at the time of its enactment in 1925, (H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)), almost 60 years later, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1 (1983), the Supreme Court announced the federal policy in favor of arbitration for the first time. Since then, that policy has been routinely invoked by courts to justify decisions throughout the field of arbitration law. However, no definitive judicial consensus has ever emerged as to what that policy is or its underlying rationale. At the heart of the federal policy in favor of arbitration lies a normative vacuum. The result is that that policy is often unmoored from any clear rationale that might guide its application, and that it has sometimes been applied crudely to "foster arbitration," meaning, essentially, that more arbitration is good, less arbitration bad. It is that type of rudimentary approach that underlies certain decisions in the field, such as those adopting the prejudice-requirement for waiver. And it is understandable that the Supreme Court might wish to proscribe such a simplistic approach. But in rejecting all arbitration-favoring rules in favor of the equal footing principle, the Court threatens the efficacy of arbitration.

In asserting that "[t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration," the *Morgan* Court advanced a false dichotomy: either the federal policy is a crude one — "about fostering arbitration" — or it is "about treating arbitration contracts like all others." Since, according to the Court, the former view must be rejected, only the latter can remain. While there is no clear consensus on the meaning of the federal policy, many courts, including the Supreme Court, have advanced a conception of that policy that is not captured by the *Morgan* dichotomy. Such courts have relied upon the federal policy to justify specific arbitration-favoring rules, which conflict with the equal footing principle, in order to secure the efficacy of arbitration. Indeed, this conception of the federal policy found expression in *Moses* itself. Before discussing this conception in any detail, I turn to consider why the equal footing principle is an inadequate ideal for arbitration.

Why the Equal Footing Principle is Insufficient

One essential feature of any contract is that a party to it has the right to seek relief from the courts if the other breaches it. Indeed, the fact that a party has such a right is an important reason why the other party is likely to comply with its contractual obligations. In this way, the ability of a party to seek relief from the courts is essential to the efficacy of contracts; it explains in large part why parties comply with their contractual obligations.

What is true of contracts in general is also true of arbitration agreements. For example, if one party refuses to comply with its obligation to arbitrate, the other can ask a court to compel it do so. But the fact that court involvement is essential to the efficacy of contracts creates a very particular predicament for arbitration agreements. One way of understanding an arbitration clause, after all, is as an agreement by which the parties renounce in advance a right they would otherwise have to

resolve a dispute in court; their intent is to resolve that dispute by arbitration *instead* of in the courts. Yet if one party does not live up to its obligations under an arbitration agreement or refuses to comply with an arbitration award, sometimes the only solution is for the other party to invoke the very judicial process it sought to avoid by agreeing to arbitrate in the first place.

It is for this reason that the equal footing principle is an insufficient ideal for arbitration. The equal footing principle demands that arbitration agreements be treated like any other contract. But arbitration agreements are not like any other contract. When it comes to any other contract, it goes without saying that I would prefer to avoid the expense and inconvenience of court proceedings to enforce it— e.g., when someone fails to deliver goods for which I have paid or when someone fails to use contractually-required best efforts to promote a product I have licensed to them. But my seeking judicial assistance in such circumstances is not fundamentally inconsistent with the bargain I struck. By contrast, when I go to court to enforce an arbitration agreement or award, it is. And herein lies arbitration's predicament. On the one hand, I may have no choice but to go to court to compel a party to comply with its obligations under an arbitration agreement or an award. On the other, my invocation of the judicial process to enforce my arbitration rights is fundamentally at odds with my rationale for having entered into an arbitration agreement in the first place. When parties enter into an arbitration agreement, their intent is to resolve any disputes in arbitration *instead of* in the courts. But when a party has to go to court to enforce its right to arbitrate, the precise court involvement required to give effect to the parties' intent in some fundamental sense subverts it.

The critical point is that the court involvement essential to the efficacy of all contracts, if it is too intrusive, time-consuming or costly, can undermine arbitration altogether. Who in their right minds would agree to arbitrate if full-bore litigation were an inevitable part of it? Rather than agreeing to resolve their disputes by arbitration *instead of* litigation, parties would be signing up to resolve their disputes by arbitration *in addition to* litigation. The federal policy, properly understood, is premised on the view that if we are committed to having a workable arbitration process at all, some arbitration-favoring rules are essential in order to avoid time-consuming litigation relating to arbitration. Indeed, this understanding of the federal policy animated the Supreme Court's decision in *Moses*, where it announced that policy in the first place.

Moses v. Cohen

Moses involved lawsuits in two courts (state and federal) in connection with a pending arbitration. The specific question raised by *Moses* was a narrow one — whether a federal court can stay an action before it in favor of a pending state court action addressing the same objection to arbitrability. The Supreme Court held that the district court's decision to stay the action before it and thus refuse to consider Mercury Construction Corp.'s motion to compel arbitration "was plainly erroneous in view of Congress' clear intent, in the Arbitration Act, *to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."* The Court went on to note that Sections 3 and 4 of the FAA both *"call for an expeditious and summary hearing, with only restricted inquiry into factual issues. . . . The stay thus frustrated the statutory policy of rapid and unobstructed enforcement of arbitration agreements."*

It is against this background that we should understand the Supreme Court's often-quoted declaration of the federal policy in favor of arbitration in *Moses*:

> The basic issue presented in Mercury's federal suit was the arbitrability of the dispute between Mercury and the Hospital. Section 2 [of the FAA] is a congressional declaration of *a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, 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.

The federal policy, properly understood, justifies special arbitration-favoring rules that have as their purpose minimizing court involvement in arbitration — rules that, in many circumstances, limit court involvement to an "expeditious and summa-

ry hearing, with only restricted inquiry into factual issues" with the aim of moving "the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," thus advancing the "statutory policy of rapid and unobstructed enforcement of arbitration agreements." Indeed, such rules abound throughout arbitration law, even though they conflict with the equal footing principle. For reasons of space, I offer only two examples: (i) the rule that ambiguities about the scope of an arbitration agreement should be construed in favor of arbitration; and (ii) the separability doctrine.

Ambiguities About Scope

One rule that rests on the federal policy in favor of arbitration provides that ambiguities about the scope of an arbitration clause should be resolved in favor of arbitration. This principle found expression in *Moses*, and was given more explicit content in *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468 (1989), where the Court stated that "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." This core doctrine of arbitration law cannot be squared with the equal footing principle. After all, central to the equal footing principle is, as Justice Kagan put it, that "arbitration agreements are as enforceable as other contracts, but not more so."

Generally, when a contract is ambiguous, courts consider extrinsic evidence to determine the parties' intent. *See, e.g., Wells v. Shearson Lehman,* 72 N.Y.2d 11 (N.Y. 1988). If courts truly were to follow the equal footing principle, that is how they ought to approach the interpretation of an ambiguous arbitration agreement — they ought to consider extrinsic evidence in order to determine the intent of the parties. But, when it comes to arbitration agreements, courts bypass that approach, and simply put a thumb on the scale in favor of arbitration.

In a concurring opinion in *Armijo v. Prudential Ins. Co. of America,* 72 F.3d 793 (10th Cir. 1995), Judge Jenkins criticized the ambiguities rule precisely because it conflicted with the equal footing principle: "I am troubled by the direction the case law under the Arbitration Act has taken. What I believe was originally intended only to put arbitration agreements on the same footing as other contracts is now seen as a strong federal policy favoring arbitration agreements." He went on to assert that "the rule that doubts about the scope of arbitrable issues should be resolved in favor of arbitration, like other rules of construction, should be applied only as a last resort, after the court or trier of fact has considered extrinsic evidence of the parties' intent and found it inconclusive."

But it is clear that the rule that ambiguities as to scope should be construed in favor of arbitration is essential to the efficacy of the arbitration process. Without such a rule, a court faced with an ambiguous arbitration clause might have to resort to extrinsic evidence to determine its meaning. This, in turn, might require a factual inquiry into the parties' negotiating history in order to ascertain their intent when entering into the contract. Instead of an "expeditious and summary hearing, with only restricted inquiry into factual issues" undertaken in order to move the "parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible" — as contemplated in *Moses* — a party could get bogged down in an evidentiary hearing in the courts before an arbitration proceeding could even get off the ground.

The Separability Doctrine

The separability doctrine operates by shielding an arbitration clause from an attack to the validity of the underlying agreement containing that clause. Under that doctrine, defects in the underlying agreement — for example, that it is invalid because it was induced fraudulently or because it is illegal — do not necessarily impact the arbitration clause contained within it because that clause is presumed to be a separate contract. Without the separability doctrine, every time a party claimed, whether as tactic to derail an arbitration or in good faith, that a contract containing an arbitration clause was invalid, logically, it would be putting the validity of the arbitration clause in issue, and therefore the authority of the arbitrators to resolve any dispute pursuant to it. It would follow, therefore, that no arbitration could go forward until a court ruled on whether the contract (and thus the arbitration clause within it) was valid. Thus, every case where the validity of a contract (with an arbitration clause) is challenged in court could potentially get bogged down in litigation before an arbitration can even get going, frustrating "the statutory policy of rapid and unobstructed enforcement of arbitration agreements," as the

Court put it in *Moses*. The separability doctrine avoids this result, and it is no surprise that it has been adopted throughout the world.

In *Prima Paint Corp. v. Flood Conklin Mfg. Co.,* 388 U.S. 395, (1967), where the Supreme Court first adopted the separability doctrine, Justice Abe Fortas, writing for the majority, offered the following rationale for doing so: "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, *be speedy and not subject to delay and obstruction in the courts."*

In his dissent in *Prima Paint,* Justice Hugo Black criticized the separability doctrine precisely because it conflicted with the equal footing principle — asserting that, by adopting that doctrine, the Court approved "a rule which indeed elevates arbitration provisions above all other contractual provisions." He went to stress this point in the following way:

> *The avowed purpose of the Act was to place arbitration agreements "upon the same footing as other contracts." The separability rule which the Court applies to an arbitration clause does not result in equality between it and other clauses in the contract*. I had always thought that a person who attacks a contract on the ground of fraud and seeks to rescind it has to seek rescission of the whole, not tidbits, and is not given the option of denying the existence of some clauses and affirming the existence of others.

Justice Black was correct to note that the separability doctrine conflicts with the equal footing principle. Under that doctrine, arbitration clauses are endowed with a special defense to a validity challenge to a contract that is unavailable to any other term of that contract. Thus, when it comes to contracts in general, a challenge to the validity of the contract is a challenge to every term within it. Therefore, the adoption of a special rule holding that arbitration clauses may be immune to a challenge that would impact other clauses in the contract "does not," as Justice Black stressed, "result in equality between it and other clauses in the contract."

The majority in *Prima Paint* did not explicitly invoke the federal policy in favor of arbitration. However, in adopting the separability doctrine, Justice Fortas relied on a rationale that many decisions, such as *Moses*, have since asserted animates such policy — avoiding time-consuming litigation relating to arbitration: that "the arbitration procedure, when selected by the parties to a contract, *be speedy and not subject to delay and obstruction in the courts."* Indeed, in *Moses*, the Supreme Court retrospectively explained the decision in *Prima Paint* in terms of the federal policy. Thus, the *Moses* Court noted: "the policy of the Arbitration Act requires a liberal reading of arbitration agreements.... As a result, some issues that might be thought relevant to arbitrability are themselves arbitrable — *further speeding the procedure* under §§ 3 and 4 [of the FAA]. *See, e.g., Prima Paint Corp. . . ."* And, at another point, the Court in *Moses* noted: "[a]lthough our holding in *Prima Paint* extended only to the specific issue presented, the Courts of Appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."

Conclusion

The equal footing principle is an insufficient ideal for arbitration because an arbitration agreement differs fundamentally from any other contract. In the case of other contracts, the court involvement necessary to ensure their efficacy — e.g., where a party seeks specific performance — is an undesirable inconvenience. In the case of arbitration agreements, that court involvement, while it may be necessary, undermines the parties' rationale for having entered into an arbitration agreement in the first place and can, if too intrusive, time-consuming or costly, threaten the efficacy of arbitration altogether. If arbitration were typically accompanied by cumbersome litigation, parties would avoid entering into arbitration agreements entirely. The federal policy in favor of arbitration emerged as a corrective to the equal footing principle that originally animated the enactment of the FAA, and, properly understood, seeks to secure the efficacy of arbitration through the adoption of arbitration-preferring doctrines that cannot be squared with the equal footing principle, such as the rule about ambiguities as to scope or the separability doctrine. Without these and other arbitration-preferring doctrines that courts have justified on the basis of the federal policy in favor of arbitration, arbitration would be unworkable.

The Supreme Court is ill-advised to jettison them.

** John Fellas is an arbitrator with Fellas Arbitration and an adjunct professor of law with New York University School of Law. He can be reached at fellas@fellasarbitration.com

Ninth Circuit Gives District Courts Teeth to Enforce Arbitral Subpoenas in International Arbitrations Under the New York Convention

By Anusha E. Pillay, Senior Counsel, Collier Walsh Nakazawa LLP, Seattle

The recent Ninth Circuit opinion in *Day v. Orrick, Herrington & Sutcliffe, LLP*[1] examines the issue of whether an action to enforce an arbitral summons in an ongoing international arbitration under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") *"falls under"* that convention. The Ninth Circuit joined the Second, Fifth, and Eleventh Circuits in holding that a federal district court has jurisdiction over the action or proceeding to enforce the arbitral summons if: the underlying arbitration agreement or award falls under the Convention, *and* the action or proceeding "relates to" that agreement or award.

The case arises from a partnership dispute between Jones Day and its former partner, a German national, who was based in the firm's Paris office and left Jones Day to join the firm of Orrick, Herrington & Sutcliffe ("Orrick"). Under Jones Day's partnership agreement, all partnership disputes are subject to mandatory arbitration in Washington D.C. and are governed by the Federal Arbitration Act ("FAA").

Jones Day twice attempted to enforce an arbitral subpoena and summons for a representative of Orrick to appear and produce documents, first in the Superior Court of the District of Columbia and then in the Northern District of California. Both attempts were denied:

- The Superior Court dismissed the petition, finding that it lacked jurisdiction over San Francisco-based Orrick and holding that Section 7 of the FAA required Jones Day to file its arbitral subpoena enforcement action in a U.S. district court.
- The Northern District of California denied the petition on venue grounds, construing FAA Section 7 to read that attendance may only be compelled in the district in which the arbitrator sits — in this case, Washington D.C.

On review of the district court's dismissal, the Ninth Circuit first held that a petition to compel enforcement of an arbitral summons constituted "[a]n action or proceeding" under 9 U.S.C. §203, such that the district court had subject matter jurisdiction over the petition.[2] That issue was not in dispute.

Rather, the crux of the dispute was whether a petition to enforce an arbitral subpoena "falls under" the New York Convention pursuant to Section 203, which states, in pertinent part:

> An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.[3]

Orrick took the position that there was no express procedural mechanism to enforce arbitral subpoenas under the New York Convention or Chapter Two of the FAA, and construed "falling under" narrowly as limited to items "listed or classified as" or "included in," citing, e.g., Webster's New World Dictionary. Therefore, Orrick argued, actions or proceedings that "fall under" the New York Convention are limited to those expressly enumerated in Chapter Two of the FAA: orders to compel arbitration, appointments of arbitrators in accordance with an arbitration agreement or orders confirming an arbitral award.

The Ninth Circuit disagreed with Orrick's interpretation of Section 203. In construing the meaning of "falling under," the Ninth Circuit examined the Supreme Court decision in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020); both the New York Convention and Chapter Two of the FAA; and dictionaries from the time Congress enacted section 203 in 1970.

First, the Ninth Circuit determined that by permitting the enforcement of arbitration agreements against non-signatories via equitable estoppel, the Supreme Court in *GE Energy* "rejected the notion that the New York Convention must list every 'judicial tool' for it to 'fall under the Convention.'"[4] Based on *GE Energy*, the Ninth Circuit reasoned, neither the Convention nor Chapter Two contains any language that would exclude the use of arbitral summonses or otherwise limits the judicial tools that may be used in international arbitrations. At most, Section 208 precludes domestic arbitral procedures that *conflict* with Chapter Two of the New York Convention. To the contrary, "[f]ar from conflicting with the Convention, judicial enforcement of an arbitrator's summons only aids in the arbitration process."[5]

The court held that, where the federal district court in the district embracing the place of arbitration lacks personal jurisdiction over the party against whom the enforcement is sought, the enforcement action may be brought in any district court deemed appropriate under the general venue statute, 28 U.S.C. §1391. This is because Section 204 supplements other venue rules instead of supplanting them.

Examining its sister circuits' reasoning, the court clarified that removal jurisdiction and original jurisdiction is coextensive — not in all cases — but certainly in the context of Chapter Two.[6] Consistent with this holding, the Second and Eleventh Circuits have held that Section 203 gives district courts jurisdiction to vacate an arbitral award, a proceeding not enumerated in Chapter Two.

Likewise, the signatories of the New York Convention intended to ensure that countries thereunder recognize and enforce arbitration agreements and arbitral awards, which necessarily includes ancillary actions to facilitate the arbitration process, including the issuance and enforcement of arbitral subpoenas.

The Court further examined the appropriate venue for such enforcement actions, holding that nothing in the specific venue provisions contained in Section 204 of the FAA indicates that Congress intended it to be exclusive or restrictively applied. Rather, the FAA's venue provisions are permissive and supplement the general venue provisions of 28 U.S.C. § 1391(a). In this case, under Section 1391, the Northern District of California was the proper venue as Orrick's principal place of business.

In summary, the decision in *Orrick* effectively empowers the United States district courts to enforce an arbitral subpoena in any international arbitration subject to the New York Convention.

1 42 F.4th 1131 (9th Cir. 2022).
2 Because the Northern District dismissed the petition on venue grounds, it did not rule on this issue.
3 9 U.S.C. § 203 (emphasis added).
4 *Orrick,* 42 F.4th, at 1135.
5 *Id.* at 1136.
6 *Id.* at 1137 (citing *Stemcor USA Inv. v. CIA Siderurgica do Para Cosipar,* 927 F.3d 906 (5th Cir. 2019)).

Defective Passage Plans, General Average, and the U.K. Supreme Court Decision of The CMA CGM LIBRA

By Jonathan S. Spencer, Average Adjuster, The Spencer Company*

On November 10, 2021, the U.K. Supreme Court handed down its judgment in the "CMA CGM LIBRA" *[2021] UKSC 51.* That court upheld earlier decisions by the High Court and the Court of Appeal that the vessel's defective passage plan rendered it unseaworthy, thereby rejecting the vessel owner's claim for cargo's contribution to general average. This article looks at the decision from the perspective of its impact on general average, generally, as well as certain insurance considerations and potential solutions to streamline complex general average incidents involving large container vessels.

The Event

On May 17, 2011, the CMA CGM LIBRA, a 2009-built, 11,356 TEU container carrier, sailed from Xiamen, China, laden with 5,983 containers for Hong Kong. While leaving Xiamen, the Master departed from the buoyed freeway and the vessel grounded. Professional salvors refloated it, and the owners declared general average.

General average is a mechanism of maritime commerce that has existed for millennia, by which, when one or more parties to a common maritime adventure incur sacrifice or expenditure to save the adventure from peril, it is contributed to by all the parties to the adventure in proportion to the value of the property saved. The average adjusters determined the CMA CGM claim to be some $13 million, of which cargo interests' proportion was approximately $9 million. Over 90% of the cargo interests paid their contribution as stated, but the defendant cargo insurers refused arguing that the ship was unseaworthy because of the vessel owner's use of a defective passage plan for the voyage in question. The cargo insurers prevailed in the first instance before the High Court of Justice, then in the Court of Appeal, and ultimately in the Supreme Court. The evidence presented had demonstrated that it was well known to the vessel owner that Xiamen was a difficult port to navigate in and out of; and that an inadequate passage plan, prepared before the ship had sailed, was causative of the grounding, thereby rendering the ship unseaworthy at the commencement of the voyage.

The Effect of Unseaworthiness on General Average

General average exists independently of fault and, to illustrate this point, the vessel owner argued that the grounding had been caused by negligent navigation of the vessel and not by poor passage planning. Almost all claims are subject to a system of adjustment, incorporated into the contract of carriage, called the York Antwerp Rules (YAR), which are administered and updated from time to time by the Comité Maritime International, an international maritime law organization. Rule D of successive versions of YAR provides:

> Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault.

When a ship is unseaworthy at the commencement of the voyage, the carrier may be found to have breached its duty under The Hague rules, or The Hague Visby rules, or COGSA, as applicable, to exercise due diligence. Such a finding of unseaworthiness—as in the CMA CGM LIBRA matter— absolves cargo from contributing to general average.

The Interplay of Insurance in General Average

Standard marine insurance policies, whether they cover the vessel's hull and machinery, cargo, containers, or time charterers' bunkers, pay the proportion of general average attaching to the insured property. However, where a cargo owner has an unseaworthiness defense to paying general average, that defense extends to its insurer.

When general average is unrecoverable for that reason, the ship owner will look to its P&I club. The applicable rule is similar from club to club. For example, the relevant American Club rule regarding a vessel owner's covered risks provides in pertinent part:

> General average...chargeable to any other party to the marine adventure for which the Member may become liable or be unable to recover from such party solely by reason of a breach of the contract of carriage....

However, P&I cover for a vessel owner's unrecoverable general average contributions is subject to certain provisos, most critically that in almost all circumstances the vessel owner should have obtained adequate general average security before the cargo is ultimately discharged. Such security usually takes the form of either a bond signed by the cargo owner, a guarantee from the insurer, or a cash deposit from an uninsured cargo owner. This is where things can become cumbersome, especially in the context of a containership casualty triggering a general average event. A modern ultra large container ship might be carrying upwards of 20,000 TEUs, some of which might be less-than-container-loads with multiple owners. As a result, general average security collection can encompass tens of thousands of interests, of which 25%-30%

might be uninsured. Sometimes, it is clear from the outset that cargo will have an unseaworthiness defense, and the vessel owner might ask its P&I club to dispense with the requirement that security be collected. P&I clubs, historically, have held the line on the security collection requirement, then requiring cargo to assert unseaworthiness, and thousands of hours of work and tens of thousands of dollars of expense can be expended in the process, making it an archetypal exercise in futility.

A Possible Solution

More than a decade ago, a London underwriter began to develop an insurance product called Landmark Consortium, which would be available to vessel owners and would pay the proportion of general average and salvage charges attaching to cargo and containers and eliminate the need for any form of security collection. It was based on an agreed valuation of $30,000 per container for general average and salvage contribution purposes, greatly simplifying the adjustment process. Of key importance to its potential success, the International Salvage Union was prepared to accept this valuation when rendering services under salvage contracts. The insurance premium would have amounted to approximately one dollar per box per voyage, but vessel operators could not be persuaded to support the product, preferring to resort to the conventional general average mechanism should a casualty arise. However, it has remained under active consideration by the potential underwriters and might be found viable, as container ships grow ever larger and the industry becomes increasingly aware of how cumbersome the current adjusting regime continues to be.

A vehicle that currently exists is the general average absorption clause, an engagement in the hull insurance policy by which hull underwriters agree additionally to pay the proportion of general average attaching to interests other than the ship. However, the sub limit of insurance typically available under the absorption clause is inadequate to address the magnitude of claims that can arise on a very large container carrier.

Conclusion

As with any case, the CMA CGM LIBRA decision is fact specific. However, it does appear that, under English law, any failure of the master and crew before the commencement of the voyage in preparing an adequate passage plan now constitutes an unseaworthy condition, and that an error in navigation defense will not be available.

* Jonathan S. Spencer began his career in London in 1977 with an international average adjusting company, moved to New York in 1978 and in 1984 became a Full Member, by examination, of the Association of Average Adjusters of the United States. Fluent in Spanish, he deals extensively with the Latin American shipowning and insurance market as well as North American, European and Asian shipowners. Further details available at http://www.jssusa.com/credentials/

Impact of International Sanctions on Arbitral Proceedings*

By James Rogers and Katie McDougall, Partners, Norton Rose Fulbright LLP, London

Introduction

The extensive sanctions imposed following the Russian invasion of Ukraine have led to many companies reassessing business relationships.

Companies have ceased performing their contractual obligations, and in many cases have taken steps to terminate contracts, often making decisions quickly in a high-pressure situation. This environment has not always allowed companies the time fully to consider their contractual termination rights prior to exercise, or sanctions risk has been seen to outweigh disputes risk, and there is consequently the potential for a significant volume of commercial disputes to arise in the near future. In many cases the parties will have provided for such disputes to be determined by arbitration.

Sanctions legislation will impact on the parties' ability to conduct an arbitration (e.g. in the contractual jurisdiction) and to enforce any award.

This article considers some key issues in relation to the termination of commercial contracts and

identifies some of the logistical and legal difficulties parties will have to face when seeking to arbitrate a dispute impacted by sanctions legislation.

The right to terminate – sanctions clauses, force majeure clauses and frustration

Parties seeking to extricate themselves from contractual relationships because of new sanctions should carefully examine their contracts to identify when the right to terminate or suspend performance arises. Apart from obvious sanctions related provisions, illegality or force majeure clauses may provide the right to terminate. The specifics of such clauses will be key, and we would recommend parties take sanctions advice if there is any ambiguity as to the applicability of the clauses. Whether a force majeure clause can be relied on in the context of sanctions legislation is a matter of contractual interpretation and the particular wording used in the clause. Some clauses may expressly refer to the imposition of sanctions as a force majeure event whereas others will specifically exclude this. Some force majeure clauses use broader class-based language, and the different types of force majeure events specified in the clause are likely to be of importance in determining whether the clause covers the introduction and/or impact of sanctions.

In the absence of express contractual provisions, the doctrine of frustration in English common law (or the equivalent concept in other legal systems) could apply to terminate the contract if the sanctions legislation makes the contract impossible to perform or makes performance radically different from what was contemplated.

Even in the absence of a clear contractual or legal termination rights, parties may still seek to terminate contracts to mitigate the risk of breaching sanctions legislation given the stringent penalties that may follow.

As a result, parties may find themselves in disputes over the interpretation of contractual provisions and facing claims for repudiatory breach of contract. They may turn to arbitration to resolve such disputes. The arbitration proceedings may in turn be affected by sanctions, as explored below.

Impact on Arbitration

When a state or international body introduces sanctions legislation, it must generally be complied with by all persons within the state/body's territory and all nationals of the state/body, wherever those nationals may be. Some sanctions legislation has extraterritorial effect. An arbitration may therefore be impacted by the sanctions regimes applicable owing to:

- the nationality or residence of a party or arbitrator;
- the location in which any relevant business was to be conducted;
- the sanctions applicable to the seat of the arbitration; and
- any legislation that has extraterritorial affect.

The Arbitration Process

Appointment and payment of arbitrators

Sanctions which operate to prevent the provision of services to sanctioned entities may potentially prevent an arbitrator from acting or accepting payment in an arbitration.

This is likely to arise where one of the parties is a sanctioned entity and the arbitrator is a national or resident of a sanctioning state. For example, a non-U.K. arbitrator will need to comply with U.K. sanctions when the arbitration is seated in London. A U.K. national sitting as an arbitrator will need to comply with U.K. sanctions whether the arbitration is seated in London or abroad. Extraterritorial sanctions may also be relevant. Parties and institutions seeking to appoint an arbitrator should be mindful of existing restrictions and any such restrictions that are likely to arise in the foreseeable future.

Many sanctions regimes provide a carve-out to the asset-freeze restrictions for the purpose of providing legal services or payment of legal fees. Such carve-outs usually require an application to the relevant authority for the grant of a licence before any payment can be made. These applications to pay an arbitrator's legal fees may delay the start of arbitral proceedings as the processing of licences is likely to take several weeks. Further, applications may not always be successful. Both the sanctioned

entity making the payment and the arbitrator receiving the payment will need a licence. This gives rise to the possibility that multiple licence applications to different national authorities will be required and applications may be required on more than one occasion during the arbitration if the licence is only for the payment of a specific amount.

Even where a licence application has been successful, *a sanctioned entity may face practical barriers to paying an arbitrator.*

For example, the recent sanctions aimed at Russian banks and the removal of certain banks from the SWIFT payment system may lead to significant difficulties in processing payments involving Russian entities.

Similar issues will arise in relation to a sanctioned entity seeking to pay its legal representatives and the fees of arbitral institutions.

Appointment of legal representatives

Many international agreements are governed by English or U.S. law. Sanctions may impact on the parties' ability to instruct legal representatives qualified in these jurisdictions. For example, U.S. law firms are prevented from acting in arbitrations involving U.S.-sanctioned entities under blocking sanctions unless prior authorisation has been sought from the Office of Foreign Assets Control (OFAC), and consent may not be given.

Aside from legal restrictions, international law firms may take their own decision that they will not accept instructions from certain entities or involving certain trade for reputational or other risk related issues.

Arbitral institutions

An arbitral institution based in a particular jurisdiction will need to comply with the legislation of that state/international body. Many leading institutions have previously indicated that they will administer arbitrations involving sanctioned entities. However, as set out above, they will usually need to obtain licences, take additional administrative steps and conduct their own due diligence on the parties. This all adds complexity and time to the arbitration process.

It remains to be seen if arbitral institutions will continue to adopt the same approach to arbitrations involving Russian sanctioned entities following the Ukrainian invasion.

The LCIA Rules are one of the few sets of institutional rules that address sanctions.

Article 24A.10 of these Rules provides the LCIA with the right to refuse to act on any instruction and/or make any payment if it determines (at its sole discretion and without the need to state reasons) that doing so may involve a breach of sanctions or may otherwise expose the LCIA to enforcement action from any law enforcement agency.

If an institution is unable to administer an arbitration, it would be open to the parties to choose a different institution outside of the jurisdiction. However, that requires a degree of cooperation that is often absent after disputes have arisen, and, in that situation, the issues outlined above in relation to the appointment and payment of arbitrators and transfers of funds may still arise (as well as general satellite disputes with respect to jurisdiction).

Witnesses

Individuals impacted by sanctions may not be able to travel to appear in arbitration hearings in person. While they may be able to appear by video link, if they are significant witnesses this may give rise to concerns about the integrity and procedural fairness of the proceedings. Counsel's general availability to deal with the witness may also be impacted, depending on the sanctions imposed.

Enforcement issues

Even where the parties are able to complete the arbitration process, sanctions may impact on the enforcement of any award.

Under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a national court may refuse to enforce an arbitral award where to do so would be contrary to "public policy." Sanctions legislation may be held to constitute public policy. For example, sanctions put in place by the U.N. and the E.U. could constitute international public policy and a national court may refuse to recognise and enforce an award on that basis.

Practical difficulties may also arise in enforcing an award against a party which is subject to an asset freeze or blocking sanctions (the most draconian form of sanctions implemented by the U.K., E.U. and U.S.). The possibility of applying to the authorities to release frozen funds to satisfy judgment debts has been previously discussed by the English courts in relation to certain Syrian sanctions. Any licence application may only be permitted where limited exceptions apply under the regulations and would be subject to certain conditions and a consideration by the relevant authorities of the particular facts.

Impact of Russian exclusive jurisdiction law

Sanctions can also give rise to jurisdictional issues in any given arbitration.

A particularly pertinent example of this is the amendment to the Russian Arbitrazh Procedure Code which came into force in June 2020. The effect of the amendment is that Russian commercial courts can claim exclusive jurisdiction over disputes involving a sanctioned Russian entity (or a non-Russian party which becomes subject to Russia-related sanctions).

The amendment enables a Russian entity to commence proceedings before the Russian courts or, if arbitration proceedings have already started abroad, the Russian entity can apply to the Russian courts for an anti-suit injunction. This means that an arbitration agreement entered into by a Russian sanctioned party providing for arbitration with a seat in a sanctioning country is potentially unenforceable in Russia. Further, the enforcement in Russia of any foreign arbitral award is unlikely.

Key takeaway

Any party involved in a potential dispute arising from the multitude of new sanctions introduced with respect to the invasion of Ukraine should consider the above issues. Any arbitration team should be led by, or include, sanctions specialists.

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SMA Award Service ... At-a-Glance

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

Economic sanctions are imposed against a country or its officials, and sometimes private citizens, to discourage bad behavior and/or to enforce economic punishment for, among other things, violating human rights, waging war, sponsoring terrorism, proliferating weapons of mass destruction, or otherwise endangering international peace. Sanctions can be implemented by a single country or by a group of countries or international organizations.

On November 1, 2018, President Trump issued E.O. 13850 which established a framework to block the assets of, and prohibit certain transactions with, any person determined by the Secretary of the Treasury to operate in sectors of the economy or to engage in corrupt transactions with the Maduro government. On January 28, 2019, the United States, through the Department of Treasury's Office of Foreign Assets Control ['OFAC'], designated Venezuelan state-owned oil and natural gas company PDVSA as operating in the oil sector of the Venezuelan economy. As a result, all property and interests in property of PDVSA were blocked and U.S. persons (U.S. citizens or residents, U.S. corporations and persons present in the United States) were generally prohibited from engaging in transactions with PDVSA.

As part of its enforcement efforts, OFAC placed PDVSA on its list of Specially Designated Nationals ("SDNs") — individuals and companies which are owned or controlled by, or acting for or on behalf of, sanctioned individuals or companies. The assets of SDNs are blocked and U.S. persons are generally prohibited from dealing with them.

The two awards reviewed in this edition of *The Arbitrator* deal with disputes arising in an arbitration involving Venezuela sanctions.

M/T ALKIMOS (SMA 4388, July 3, 2020)
(Sandra Gluck, David W. Martowski, Robert G. Shaw)

ASBATANKVOY – Partial Final Award – U.S. Sanctions on Venezuela – Refusal to Perform

This Award granted owner's motion for a partial final award determining that owner validly invoked the charterparty sanctions clause and was entitled to demand that charterer provide alternative voyage orders.[1]

The M/T ALKIMOS (the "Vessel") was chartered to load up to a full cargo of gasoline, loading from one safe port Cristobal, for discharging at one safe port/s-t-s Curacao or in charterer's option one safe port/s-t-s Aruba. The material charterparty provisions were as follows:

> *GA/ARB New York*
>
> *STS TRANSFER*
>
> *B. DISCHARGING – Charterers shall have the option to discharge the cargo, or part of it, to vessels or barges, at berth and/or at anchorage, weather permitting and subject to the Master's approval, not to be unreasonably withheld.*
>
> *SANCTIONS CLAUSE*
>
> *Any trade in which the vessel is employed under this charterparty which could expose the vessel, its owners, managers, crew or insurers to a risk of sanctions imposed by the United States, or the EU, shall be deemed unlawful and owners shall be entitled, at their absolute discretion, to refuse to carry out that trade. In the event that such risk arises in relation to a voyage the vessel is performing, the owners shall be entitled to refuse further performance and the charterers shall be obliged to provide alternative voyage orders.*

Upon the Vessel's arrival at Cristobal to load, charterer declared that discharge was to be via an STS cargo transfer at Aruba. Shortly after receipt of this information, owner notified the charterer that owner would not participate in any illegal trading, adding that if the intention was to transship the cargo for eventual discharge in Venezuela, owner would not participate in the transshipment. Owner then requested details of the transshipment vessel, stating that any vessel so nominated would be subject to strict anti-sanctions scrutiny. One day after the Vessel sailed for Aruba, the charterer notified the owner of the name of the transshipment vessel, a vessel considerably larger than the M/T Alkimos. Before the Vessel arrived at Aruba, the charterer advised that the transshipment would not take place at Aruba, but at a designated point that was outside Aruba port limits. Owner requested a copy of the transshipment charterparty, and after receipt, voiced its concern that the document was insufficient as it did not reference M/T Alkimos charterer, only the consignee; nor was there any mention of the owner of the transshipment vessel.

Owner was also concerned that the M/T Alkimos freight was not paid by the charterer, but by a company not party to the charterparty, and that the nominated transshipment vessel had made a series of calls to Venezuela over the past year, including a recent call at an anchorage at Amuay, Venezuela. Further, charterer's declaration that the cargo was destined for St. Eustacius was inconsistent with advice owner had received from the Aruba harbormaster that the cargo was destined for Trinidad.

Charterer responded by asserting that the U.S. sanctions did not apply to non-U.S. persons; that owner had no evidence that the cargo was destined for Venezuela; and that the trading history of the transshipment vessel was not a valid basis for owner's concern. Charterer further noted that neither the transshipment vessel, her owners, nor the consignee were listed as SDN's by OFAC, inviting owner to obtain an emergency clearance from OFAC as well as offering to assume liability for the STS operation.

The panel found that based on the evidence presented, there was a discernible risk that the STS could lead to a violation of U.S. sanctions against Venezuela. The panel noted that the language of the charterparty sanctions clause was central to this dispute, and that it gave owner "an absolute discretion" to demand and receive alternative voyage orders during the performance of a voyage if the voyage orders could "expose the vessel, its owners, managers, crew or insurers to a risk of sanctions imposed by the United States, or the EU." The trading history of the transshipment vessel, charterer's failure to provide relevant details of the transshipment charterparty, and the absence of clear answers to owner's concerns was

sufficiently supportive of owner's right to invoke the sanctions clause and demand alternative orders. The panel also noted that the OFAC regulations do not explicitly state that only U.S. persons can be placed on the SDN list.

The panel issued a Partial Final Award finding that owner had validly invoked the sanctions clause and was entitled to demand alternative voyage orders from the charterer.

M/T ALKIMOS (SMA 4403, September 30, 2020) (Sandra Gluck, David W. Martowski, Robert G. Shaw)

Voyage Charter Party and Bill of Lading - Interim Award – Pre-Award Counter Security

This Interim Award was issued in connection with the request by the charterer and cargo consignee ("Respondents") that the panel issue an order granting them counter security following the panel's earlier Partial Final Award described above. It offers an interesting insight into the dispute resolution process on claims not often encountered, as well as highlighting one of the several features unique to SMA arbitration, in this case the authority to grant security.

Owner eventually instructed the M/T ALKIMOS to proceed to Houston. and began an in rem suit in the U.S. District Court for the Southern District of Texas, Houston Division (hereafter "Houston Court") to arrest the cargo. Owner moved for an interlocutory sale of the cargo with the proceeds, less legal expenses, to act as security for owner's claims for demurrage, delay, and damages stemming from charterer's alleged failure to provide alternative voyage orders.

The Respondents moved to vacate the arrest of the cargo and opposed any interlocutory sale. Respondents also requested that the Houston Court order owner to post counter security for their claims, arguing that owner breached the charterparty by diverting the vessel to Houston and arresting the cargo. The Houston Court held that owner's cargo arrest and diversion of the vessel to Houston were justified by owner's apprehension that charterer's voyage instructions could give rise to a violation of U.S. sanctions regulations. The Houston Court also denied Respondents' motion for counter security "as moot," without further explanation.

The Houston Court issued an Interlocutory Order of sale of the cargo, at which time Respondents filed another motion for counter security, indicating that while they could attempt to arrest the vessel, this would needlessly complicate matters, and greatly increase litigation costs and damages. Again, the Houston Court denied Respondents' motion.

The Respondents also sought to have the SMA Panel issue an award for counter security. Drawing upon a number of SMA awards on this issue, the panel summarized the principal considerations that must be taken into account in determining whether to order that security be posted, notably, that the party seeking an order for security must show a probability of prevailing on the merits of the dispute, that efforts had been made to obtain security by other means such as judicial arrest of the vessel, as well as evidence that a favorable decision would go unpaid if security were not granted.

The panel denied the motion, while noting that it was open to reconsideration of the application if, as the arbitration proceeded, further evidence suggested an increased likelihood of Respondents prevailing on the issues.

Conclusion

SMA panels will likely encounter future sanctions-related disputes such as those addressed in the two ALKIMOS decisions discussed above. In the aftermath of the Russian invasion of Ukraine in February 2022, the U.S. Government, along with the United Kingdom and the European Union, have implemented countless new sanctions regulations against Russia to undermine its ability to finance and continue that conflict. Many of these sanctions have targeted Russia's shipping industry, as well as its oil and energy industries, and have disrupted international trade and worldwide supply chains for these commodities. The recent implementation of the G7 Price Cap on Russian oil, and the prohibition on the maritime transport of Russian-origin crude oil to third countries (such as India and China), as well as related insurance, financial, technical or brokerage assistance, will generate numerous charter party and other contractual disputes that may require future SMA panels to grapple with sanctions related issues.

1 The case also dealt with issues involving consolidation and whether the proceedings would be held in accordance with SMA Arbitration Rules. However, this article will only address the issue of sanctions.

The SMA ... in the Courts

By Louis Epstein, SMA Member and Co-Editor of the Arbitrator

***Commodities & Minerals Enterprise Ltd. v. CVG Ferrominera Orinoco, C.A. (the M/V General Piar):* Update**

In the March 2022 issue of The Arbitrator, we discussed the oral argument held on February 1, 2022, in the Second Circuit in *Commodities & Minerals Enterprise v. CVG Ferrominera Orinoco, C.A.,* No. 20-4248, an appeal from the confirmation by the federal district court of the SMA award. The SMA Award in question was issued in *Arbitration Between Commodities & Minerals Enterprise Ltd. ("CME") v. CVG Ferrominera Orinoco, C.A.* ("CVG") ("MV *General Piar*"), SMA 4358 (Siciliano, Wentz, Kimball) (2018), subsequently corrected in SMA 4363 (2019), awarding to the claimant CME $12,655,594.36 in damages against the respondent CVG. On December 10, 2020, the United States District Court for the Southern District of New York issued an order granting CME's petition to confirm the Award. *Commodities & Mins. Enter., Ltd. v. CVG Ferrominera Orinoco, C.A.*, No. 1:19-CV-11654-ALC, 2020 WL 7261111 (S.D.N.Y. Dec. 10, 2020). CVG appealed to the Second Circuit on various grounds.

As we noted then, the focus of the oral argument was the alleged failure of CME to serve CVG, a Venezuelan government owned enterprise, in accordance with the requirements of the Foreign Sovereign Immunities Act ("FSIA"), specifically 28 U.S.C. § 1608(a)(2), which provides:

> (a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:
>
> * * *
>
> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents;

No summons was served with the petition to confirm which, according to CVG, meant that the court below lacked jurisdiction to confirm the award and, therefore, that the decision below had to be reversed. CME contended that although the statute required service of a summons with a complaint, there was no requirement to serve a summons with a petition to confirm an arbitration award.

On October 3, 2022, the Second Circuit affirmed the decision of the district court confirming the Award. *Commodities & Mins. Enter. Ltd. v. CVG Ferrominera Orinoco, C.A.*, 49 F.4th 802 (2d Cir. 2022). The court rejected CVG's contention that service of a summons was required:

> We hold that a summons is not required to properly effect service when seeking confirmation of a foreign arbitral award against a foreign instrumentality. We reach this conclusion for two principal reasons: (1) the FAA itself defines the documents to be served, and cross-references other provisions (including Rule 4 and the FSIA) only to fill gaps in the permissible manner of serving those documents; and (2) it would make no sense to import the FSIA's requirement of service of a "summons and complaint" into the FAA because motions to confirm arbitral awards are not commenced by the filing of a complaint.
> 49 F.4th at 813.

The court then concluded that the provisions of Section 35 of the SMA Rules, which were incorporated in the charterparty, constituted a "special arrangement for service" under §1608(b) of the FSIA and that service of the petition in accordance with Section 35 (by mail to CVG's last known address) was sufficient to obtain personal jurisdiction over CVG for the confirmation proceeding. *Id.* at 815.

After disposing of the jurisdictional issues, the Second Circuit went on to consider and reject CVG's challenges on various grounds to the confirmation of the award:

- First, the court rejected CVG's contention that the arbitration agreement was not "valid" because it was not authorized under Venezuelan law, holding that whether the arbitration agreement was "valid" must be determined under the law designated by the parties in their choice of law clause – i.e. U.S. maritime law – and that CVG had not borne

its burden to show that the arbitration agreement was invalid under U.S. law. *Id.* at 817.

- Second, the court rejected CVG's contention that, in calculating damages, the Panel exceeded its authority by improperly allocating past payments that CVG made to contracts other than the General Piar charter. The court held that this was "nothing more than a quarrel over how much [CVG] owes in damages" and affirmed the district court's conclusion that the calculation of damages under the charterparty fell squarely within the scope of the arbitrators' authority. *Id.* at 818.
- Third, the court rejected CVG's contention that the General Piar charter was procured through corruption and therefore enforcement of the award would violate public policy. The court observed that the corruption allegations had been carefully considered by the arbitrators who concluded that the charter was not the product of corrupt acts and that the court would not relitigate these factual determinations. *Id.* at 819.

Finally, CVG challenged the award by the district court of the attorney's fees and costs incurred by CME in the confirmation proceedings. The Second Circuit vacated the portion of the judgment awarding attorneys' fees and costs, holding that such an award was not justified where there had been no showing that CVG's arguments were made in bad faith. *Id.* at 820.

Focus on Members

The SMA continues to broaden and widen its membership with new members coming from different professional backgrounds. The number of members with marine engineering experience (now more than 10% of the membership) has continued to expand with the addition of four members over the last several years have. Here are thumbnail sketches of those four members (the SMA roster of members https://smany.org/member-roster/ has more detail and includes the SMA's other members with backgrounds in marine engineering and naval architecture).

Alan E. Colletti is a graduate of the U.S. Merchant Marine Academy, has a Juris Doctor degree from St. John's University School of Law, sailed as a U.S. Coast Guard licensed engineer aboard U.S. Flag vessels and has experience with the construction and supervision of high speed aluminum commuter vessels. He acted as a marine consultant (forensic investigations) and surveyor with a marine engineering and naval architecture firm and is a member of the ABS Special Committee on Ship Operations. A former Vice President of Operations and Partner at United States Shipping Partners LLC, Al has experience in vessel operations (VLCC's, Product Tankers, ITB's, ATB's, tugs and barges) including engineering, maintenance, vessel construction and repair specifications as well as management and settlement of disputes in shipyards.

J. (Jamie) N. Greenlees, a Webb Institute graduate with an M.B.A. (U. of Pennsylvania's Wharton Graduate School), is a registered Professional Engineer (New York). Jamie is a Bulk Liquid Marine Transportation expert. He is a U.S. Navy Reserve Engineering Duty Captain (Ret.). His capstone position, with the world's largest energy company, was Global Commercial and Operations Advisor for Chemical and Special Products. His expertise includes commercial and logistics functions, including negotiating / implementing / managing contracts for vessel charters, floating storage/terminaling, cargo trades, as well as crude/feedstock processing agreements, and supply chain management. He drafted tanker charter party forms including additional / special clauses for floating storage and parcel carriers and specialized vessels.

Jon P. Wing graduated from the Maine Maritime Academy in marine engineering and is a licensed marine engineer (his background includes management training while with Bethlehem Steel's Baltimore Ship Repair facility and graduate management studies at Johns Hopkins University). He is a Maritime Consultant for proposal and contract preparation, strategy, dispute resolution, chartering, shipbuilding and repair for large commercial

vessels. During 25 years with Lockheed Martin (retired as a Vice President, Maritime Systems and Sensors), Jon managed and oversaw all maritime related contract and dispute activity, worked with outside counsel and experts in the presentation of Lockheed Martin maritime claims and had multiple career positions of increased responsibility in contracts, finance and program management.

Michael T. Monahan graduated from the U.S. Merchant Marine Academy and is a registered Professional Engineer (New York and Florida) and Chartered Engineer specializing in Naval Architecture and Marine Engineering and has worked extensively in both disciplines. Michael is a Surveyor of Ships (U.K. REG, Cayman Islands) and Commander, U.S. Navy (Retired) and has worked as a shipboard engineer (3 years), in Vessel Operations (20 years) and with ABS (23 years). He is President of Aereon Marine, Inc. and Horizon Naval Architects, Inc. and his background includes new construction and repair contracts, specifications and disputes arising therefrom, and he has expertise in commercial ship operations, maintenance and repair, design, construction, cargo systems/operations, and vessel regulatory compliance.

Spotlight on the SMA

SMA Monthly Luncheons[1]

Jan. 11, 2023 - Our first speaker's luncheon of 2023 will feature **Joseph Hughes,** Chairman, Shipowners Claims Bureau, Inc., Managers of American Steamship Owners Mutual P&I Association, Inc., who will offer "A Personal Retrospective of Marine Insurance in London, Scandinavia and the U.S. since the 1970s, and Some Prognostications for the Years Ahead."

Our fall luncheon calendar included:

October 12, 2022 – **Jack Cammarota** of McQuilling Renewables & Blue Ocean Transfers spoke about "The Logistics of Offshore Wind."

November 8, 2022 - **Brian McEwing** of Reeves McEwing presented on arbitration clauses in seafarer employment agreements.

Please see **President Lambert's** remarks concerning these presentations in the "President's Message" at p. 1.

SMA Online Seminar Program, March 2023

The SMA will offer its comprehensive online seminar "Maritime Arbitration in New York" on March 3, 10, 24 and 31, 2023. The four session program will qualify for CLE credits. For more information, please see the flyer posted on the SMA's LinkedIn (https://www.linkedin.com/company/society-of-maritime-arbitrators-new-york/) and website "Events" page (www.smany.org).

SMA at the U.S. Maritime Law Association (MLA) Fall Meeting, October 2022

In late October, member of the Board of Governors **George Tsimis** and **President LeRoy Lambert** joined some 200 attendees at the Fall Meeting of the MLA at the Hotel del Coronado in San Diego. The meeting was held in conjunction with the Pacific Admiralty Law Seminar. The sessions were informative, highlighted by two presentations of Rear Admiral Melissa Burt of the United States Coast Guard on sexual assault cases and cybersecurity. The members of the MLA are key stakeholders in the maritime alternative dispute resolution enterprise, and we at the SMA thank them for their support across all fields, including most recently, the support of Todd Lochner, head of the MLA Recreational Boating Committee, who has assisted the SMA in becoming more known by the Yacht Brokers Association of America.

SMA at the Federal Maritime Commission

On December 7, **SMA Vice-President Bob Meehan,** and **SMA members George Tsimis,** and **Müge Anber-Kontakis** met with FMC Commissioner Carl Bentzel and FMC Counsel John Young to explore ways that the SMA could assist the FMC and provide arbitration services to resolve the backlog of demurrage, detention and other disputes filed by

SMA Members Robert C. Meehan (V.P.), Müge Anber-Kontakis and George J. Tsimis with FMC Commissioner Carl Bentzel in Washington, DC.

claimants pursuant to the Ocean Shipping Reform Act of 2022.

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

Charles Anderson, chair of the SMA Yacht Committee, and SMA members **Michael Monahan** and **James DeSimone** attended the 32nd Fort Lauderdale Mariners Club Insurance Seminar. There were over 500 attendees, drawn from a cross-section of the major players in the yacht industry, including insurers, brokers, maritime lawyers, yacht owners and managers, and surveyors. The SMA was pleased to be a sponsor this year as we continue our efforts to become recognized in this industry. Our sponsorship and attendance affords us the opportunity to discuss advantages of SMA arbitration and mediation.

SMA at the International Bar Association (IBA) Conference, Miami, Oct. 30-Nov. 4, 2022

SMA President Lambert moderated a panel discussion on "Conflicts of Interest in Maritime Arbitration". Panelists were Corina Song of Singapore, James McGowan of Hong Kong, Taco Wiersma of Amsterdam, Ingolf Kaiser of London, and Camila Mendes Vianna Cardoso of Rio de Janeiro. The panel presented scenarios concerning which there was lively discussion and, then, via an interactive poll app., the attendees voted on the scenarios.

SMA member Müge Anber-Kontakis, currently serving as the Diversity & Inclusion Officer of the IBA's Maritime and Transport Law Committee, moderated a panel discussion entitled "Containers Rule the World." Panelists were Co-chair Raphael Brunner, MME Legal AG, Switzerland, FMC Commissioner Carl Bentzel, Washington, D.C., Hugo Cruz Maestri, A.P. Moller Maersk Group, Rio de Janeiro, Brazil, Meagah Argentieri, Thomas Miller (Americas) Inc., New Jersey, Henri Njjar, Richemont Delviso, Paris, France. The session addressed regulatory, legal, insurance and practical aspects of containers, including demurrage and detention; the shortage of containers and how to overcome it; safety issues and different types of containers; and challenges concerning pre- and on-carriage/intermodality.

SMA at the Marine Money Conference, New Orleans, Nov. 30, 2022

The SMA was pleased to support the first Marine Money Conference in New Orleans on November 30. **SMA President Lambert** attended along with 213 attendees from the Gulf of Mexico offshore and inland waterway industry. The program can be viewed at this link: https://www.marinemoney.com/events-2-0-2/2022-marine-finance-forum-%E2%80%93-new-orleans. Key takeaway: there are not enough U.S.-flag ships to service the projects now underway and soon to be commenced. The industry is responding by contracts to repurpose existing offshore supply vessels, by forming joint ventures, and by contracting to share vessels to serve projects located near each other. In other words, there will be contracts. Where there are contracts, there will be disputes....

UPDATE

The 3rd Edition of Shipping and the Environment, co-authored by **SMA member Charles Anderson,** Colin de la Rue and Jonathan Hare, with a Foreword by IMO Secretary-General Kitack Lim, referenced in the September issue of The Arbitrator as an upcoming publication, has now been published. https://www.routledge.com/Shipping-and-the-Environment-Law-and-Practice/Rue-Anderson-Hare/p/book/9780367198282

SAVE THE DATE

February 7, 2023

The Hellenic American & Norwegian American Chambers of Commerce 29th Annual Shipping Conference: "Navigating Geopolitical Currents in a Time of Crisis," New York
https://www.hellenicamerican.cc/hacc-nacc-shipping-conferece

March 27, 2023

Marine Society of NY's 253rd Annual Dinner, New York
https://www.marinesocietyny.org

November 5 -10, 2023

ICMA in Dubai
http://www.icma2023.com

1 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.

In Closing

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

To our 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.

With this issue, we bid a fond "adieu" to our esteemed colleague and tireless co-editor, Dick Corwin. His dedication, discipline and unfailing good humor have always been an inspiration and will be sorely missed! Thank you, Dick!

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

THE ARBITRATOR

Dick Corwin, Co-Editor
dick.corwin@icloud.com

Louis Epstein, Co-Editor
louis.epstein@trammo.com

Sandra Gluck, Co-Editor
sandra.gluck@gmail.com

George J. Tsimis, Co-Editor
gtsimis@gjtmarine.com

Society of Maritime Arbitrators, Inc.
127 West 30th Street, 9th Floor
New York, NY 10001
(212) 786-7404

E-mail: info@smany.org

Website: www.smany.org

LinkedIn: https://www.linkedin.com/company/society-of-maritime-arbitrators-new-york/

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