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In this issue

President's Message

By LeRoy Lambert, SMA President

Since the last issue in December 2022, we've been busy!

At our January luncheon, Joe Hughes of the American Club reminisced about 40 years in the maritime insurance industry. In February, the CMA and SMA co-sponsored the luncheon. Some 70 attendees listened raptly to a presentation by Pat McShane of Frilot LLC and Tim Couvillion of Couvillion Group about the largest oil spill we've never heard of. A remarkable story remarkably well told! We look forward to more joint events in the future. In March, SMA member Rob Milana, and I discussed the opportunities and challenges of a virtual mediation when the parties and lawyers were spread across four time zones with no one time convenient to all the participants.

The Admiralty Committee of the New York City Bar Association is a storied part of New York (and the nation's) maritime legal history. In January, Charles Anderson and I presented at the Committee's monthly dinner about the publication of the third edition of *Shipping and the Environment* (2023) and the fifth edition of *Voyage Charters* (2022). Thanks to George Cornell, the Chair of the Committee, for the invitation.

On February 7, the 29th Hellenic American/Norwegian American Joint Shipping Conference took place in Manhattan. Board Member George Tsimis moderated a panel on sanctions. The panel included SMA member Louis Epstein, General Counsel at Trammo, whose business has put him in the eye of the commercial storm brought about by Russia's invasion of Ukraine. Supporting them from the audience were SMA Board member Molly McCafferty and myself.

On February 15, I was pleased to represent the SMA at the Tetley Lecture at Tulane. The speaker was Anne Liversedge, General Counsel at Teekay Tankers, and Chair of the Intertanko Documentary Committee. Her lecture was titled "The Latest 'Big' Thing(s) in Shipping - the In-House View" and was a tour de force review of current issues facing shipping.

On March 3-4, the Admiralty Committee of the Torts and Insurance Practice Section of the American Bar Association held its second "Admiralty Disruption" Conference in New Orleans. The SMA was a co-sponsor. I was a panelist on a panel addressing supply chain issues and how alternative dispute resolution can assist to keep the supply chain "unkinked." Molly McCafferty joined other heads of the U.S. offices of P&I Clubs to discuss issues facing P&I insurers. Thanks to Holland & Knight partner, Chris Nolan, Co-Chair of the MLA ADR Committee, for his support.

On March 9, George Tsimis, Dan Gianfalla, and I attended a seminar organized and hosted by Blank Rome on Offshore Wind. The seminar was further proof, if any were needed, that many maritime contracts will be required for the numerous projects now underway.

The CMA Shipping Conference took place on March 21-23 in Stamford, Ct. The SMA was a sponsor of the Conference and the SMA logo was on the hotel keycard received by each guest who stayed at the venue. Make the SMA your "key" to dispute resolution!

Reminder! The SMA Annual General Meeting will take place on May 10, 2023. The President, Vice-President, and four Governors are to be elected for two-year terms. Pursuant to the By-Laws, a Nominating Committee has been constituted made up of Dave Martowski, Austin Dooley, and Molly McCafferty, with Dave serving as Chair.

LeRoy Lambert
President

BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2022*

By Eleanor Midwinter, Partner, and Emmy Ameloot, Senior Associate, Wikborg Rein LLP, London

In anticipation of possible cases of future pandemics and epidemics, BIMCO redrafted its 2015 Infectious or Contagious Disease Clause for Time Charter Parties, providing more clarity for shipowners and charterers when it comes to risk and costs obligations as a consequence of disruption and delay.

Infectious diseases can have significant implications on shipping operations. Those of us in the industry can easily think of vessels that have been quarantined, refused admission at a port or otherwise delayed, and the practical effect this has on the dealings between owners, charterers and others in the supply chain.

Covid-19 has been the latest outbreak in a list of contagious diseases that includes the Ebola virus in 2015 and SARS in 2003. The likelihood is that equally serious strains of disease will occur from time to time going forward.

BIMCO 2015 Contagious Diseases Clause

BIMCO published its first set of clauses for time and voyage charterparties in 2015 following the Ebola endemic in West Africa. However, the time charter clause version 2015 proved inadequate to address the severe practical and commercial realities of the global COVID-19 pandemic. A key issue was that the owners' obligations under the charterparty were overlooked. The clause also did not address the situation where a vessel had to wait to enter a port. Due to these types of shortcomings, the clause was not readily accepted in the market, and often led to disputes about on/off-hire quarantine situations and stand-offs where counterparties would refuse to proceed unless compensated.

The 2022 updates

The industry therefore welcomes BIMCO's initiative in publishing an updated clause for time charterparties in 2022 which recognises the commercial reality that trade needs to continue during a pandemic, albeit with disruptions and delays. The clause accordingly provides a more balanced risk and costs allocation between owners and charterers, better reflecting the parties' respective obligations under the charterparty. The focus lies on preventative measures and ensuring that the contract continues to run.

Owners' measures to protect the crew

Appropriate measures have been introduced which oblige the owner to take all reasonable measures to prevent the vessel and crew from being exposed to infectious disease during the course of the charterparty. While this should go without saying, the issue of crew safety remains an ongoing issue which it is right to address explicitly.

The BIMCO Guidance Notes specify that these "measures" should include equipment such as Personal Protective Equipment ("PPE"). Additionally, the master should have the right to refuse to board people who might infect the crew. The owners' obligation is limited to taking all reasonable measures that are "applicable and available". It follows that if certain PPE equipment cannot be delivered to the ship, the owners are not under an obligation to provide the PPE. As with all such limitations, what is reasonable will depend on the circumstances and it is unlikely that a failure in planning prior to undertaking a voyage would be an acceptable excuse.

A good practical measure is for the parties to agree on a threshold for the owners' obligations in situations where the appropriate PPE is very expensive. This should help with balancing costs in, for example, scenarios where charterers may order the vessel to riskier countries, or where charterers' plans for the vessel change at short notice. The clause envisages that the parties note the agreed level that will be borne by owners, after which the charterers shall bear the costs.

Off-hire and the allocation of liability for delays

In the 2022 clause, the on/off-hire quarantine situations are now clearly spelled out. This removes the need to fall back to other clauses in the charterparty which may not be well suited to accommodate for Covid-type circumstances.

The basic position is that when a vessel is quarantined, refused admission at a port or otherwise delayed, the vessel remains on hire during such time. Thus, the charterers must continue to pay hire and will also be liable for any direct losses incurred by the owners. However, if the quarantine, refused admission or delays are caused by the owners' acts or omissions or arise due to the vessel's activity prior to the charterparty, the vessel will be off-hire for the time lost. Thus, the charterers are not required to pay hire for such time and the owners will also be liable for any direct losses the charterers incur as a result.

This better reflects the nature of the parties' respective obligations under time charterparties, in particular, that the risk of port calls that place the crew at risk of infectious diseases is largely driven by charterers' orders, whereas risks associated more generally with the running of the vessel are driven by owners. For a time charter trip, the liabilities and responsibilities can naturally be amended by the parties to recognise that the owners will usually know in advance the ports at which the ship will call.

The owners' right to refuse the charterers' orders

This clause provides a sensible framework for managing orders that may place the vessel and crew at risk of infectious diseases.

The starting position is that a vessel is not obliged to proceed to, continue to, or to remain at a place where in the owners' reasonable judgment there is a risk from a disease to the crew which cannot be prevented by taking preventative measures. The owners will need to make an assessment whether the risk of exposure can be avoided by taking preventative measures. This assessment should be made in their "reasonable judgment".

What is reasonable will always require objective analysis of the relevant circumstances. In this case, that may include factors such as the availability

of PPE, reports about the infection levels at the relevant port, the specific vulnerability of any individuals on board, and the level of expected ship/shore interaction during the port call. The owner should not exercise its judgment capriciously or arbitrarily, for example, a blanket refusal due to additional administration, but it is entitled to have regard to its own interests when considering what is reasonable.

If the owners decide to reject the employment orders, the following scenario ensues:

i. The owners must issue a written notice to the charterers on the risk of exposure with supporting evidence. The clause defines the "risk of exposure" as a risk of exposure to a disease which arises or substantially increases at a port or place nominated by the charterers. It is important to note that the risk could exist prior to entering into the charterparty, it does not necessarily need to be a new or worse risk.

ii. The owners must request new voyage orders, which the charterers must issue within a reasonable time.

iii. Pending receipt of the new voyage orders, the vessel may proceed to the nearest safe waiting place.

iv. During this period, the vessel shall remain on hire and the charterers must indemnify the owners for any costs, expenses or liabilities incurred by the owners in relation to claims from holders of bill of ladings as a consequence of the vessel waiting for and/or complying with the alternative voyage orders.

In longer term charterparties, the parties may wish to add bespoke provisions. For example, charterers may wish to obtain pre-approval for certain ports absent a change in circumstances to provide them with comfort that they can trade the vessel with some certainty.

Deviation

The clauses stipulate that any acts done/not done in accordance with its provisions shall not be deemed a deviation, but considered due fulfilment of the charterparty. This in particular supports the related provisions above regarding charterers' orders.

Incorporation provision

The charterers are under an obligation to incorporate the clause into all sub-charters, bills of lading, waybills or other documents evidencing contracts of carriage that are issued in relation to this charterparty. That is to ensure consistency through the chain of charterparties and bills of lading.

Conclusion

The 2022 clause significantly limits the owners' rights to refuse the charterers' orders to call at ports compared with the 2015 version. However, in return, the liability for the risk of delay will in most instances fall on the charterers, barring any actions/omissions attributable to the owners.

As noted in BIMCO's Guidance Notes, before agreeing the standard clause (or making substantive amendments), the parties should check with their P&I Club that the indemnity contained in the clause will not prejudice P&I cover, and before any contractual deviation takes place, they should check that Club cover will continue uninterruptedly, especially if bills of lading have been issued.

* This article was originally published by Wikborg Rein on its website on December 30, 2022 and is reprinted here with permission: https://www.wr.no/en/news/bimco-infectious-or-contagious-diseases-clause-for-time-charter-parties-2022/

BIMCO CII Clause Finally Released: Does It Make Any Sense Of CII?*

By Valentina Keys, Senior Associate & Nick Walker, Partner, Watson Farley & Williams LLP, London

On 17 November 2022, BIMCO unveiled its long-awaited CII Operations Clause for Time Charter Parties (the "Clause").[1] The Clause is intended to serve as a practical "tool" towards compliance with new international carbon intensity requirements for vessels which came into effect on

1 January 2023. The Clause is intended to be used as a starting point for ship owners and charterers when negotiating long-term charterparties and aims to enable transparency, cooperation and data sharing between the parties so that best possible operational efficiency can be achieved.

What Is CII?

The new International Maritime Organisation's ("IMO's") Carbon Intensity Indicator ("CII") certification will capture a wide range of ship types above 5,000 GT. The CII certification regime forms part of the amendments made under the International Convention for the Prevention of Pollution from Ships ("MARPOL") Annex VI which came into force on 1 November 2022 (the "Regulations").[2] From 2024, ships will receive their first CII Rating ranging from A to E (with A being the highest, E being the lowest and C or above being deemed compliant) based on their emissions from 2023. D or E rating for three consecutive periods will trigger the requirement for a Corrective Action Plan (CAP) to be implemented by the non-compliant vessel. Furthermore, the A to E ratings under CII will be recorded in the ship's Ship Energy Efficiency Management Plan (the "SEEMP").

How Does the Clause Work?

The Clause provides a base from which the parties can begin to agree practical steps towards compliance with CII. In addition to having obligations to cooperate and work together in good faith with a view to sharing best practice on how to achieve the best possible operational efficiency on the vessel, the parties also have duties to collect and share quality data on the vessel CII performance. The Clause also offers a contractual mechanism for the parties to activate if and when the emissions data shows that the vessel's CII rating is falling. In this instance, a four staged process would apply:

Step 1 – Advance Warning

The owner is contractually obliged to alert the charterer to the potential deterioration of the CII rating of the vessel from the "Agreed CII" (i.e. the CII rating introduced by Bimco that both parties can agree to contractually which is not the same as the "Required CII")[3] by giving the charter "advanced warning".

Step 2 – Written Plan

If the vessel's performance continues to deviate from the "Agreed CII" and there is a reasonable likelihood that the charterer may fail to meet its obligation to "operate and employ the Vessel (including the planning of voyages and supply and selection of fuel) in a manner which is consistent with the Regulations" then the owner is required to write to the charterer and request a written plan, within two working days, detailing any proposed commercial operation of the Vessel for at least the next voyage. This will enable the owner to consider whether such operations would lead to non-compliant performance.

Step 3 – Owner review

If the written plan does not solve the declining performance issue, then the owner can request that another written plan be provided by the Charterer, but the owner must make this request within two working days of receipt of the Charterer's written plan.

Step 4 – "Adjusted Written Plan"

The Clause mandates the parties to work together to agree within another two working days an "adjusted written plan" for the next voyage or voyages which brings the Attained CII in line with the Agreed CII.

How Will It Work in Practice?

The Clause provides a means for the parties to work together to prepare a written plan that would help meet CII. However, the Clause does not, and perhaps cannot, guarantee that the parties will agree a written plan that would actually work. Nor does it provide a path for the parties to follow if plan fails to deliver the "Agreed CII" rating within a specified period.

The Clause assigns the burden of complying to the charterers on the basis that the charterers have day-to-day control of the vessel during the charterparty period and, in most cases, make decisions in relation to choice of fuel, route and speed. However, whilst provision is included for the owners to claim damages arising out of charterers' breach of the Clause, it is clear that regulatory responsibility for compliance is not passed on in the Clause. Perhaps constrained by its underlying purpose

to be fair and balanced, it does not go as far as to avail the owners of all responsibility for CII. Ultimately, the owners would still be the responsible party under the Regulations because in the event of any enforcement action, prosecution and fines the regulators would take action against the owners rather than the charterers. On top of this and similar to the Regulations themselves, the Clause is silent on the critical question of who will pay for CII and the potentially far reaching consequences of any operational changes that would have to be made to maintain a compliant CII rating.

Owners with ships that repeatedly fail to meet CII will likely become exposed not only to potential enforcement action but also to reputational, financial, insurance and other commercial risks as well as potential impact on Class. It is therefore important they take these risks into consideration when negotiating CII provisions with a firm view to finding workable ways to avoid all of them.

Charterers' Perspective

There seems little incentive for any charterers to agree to the Clause in full because it requires considerable interference with their freedom to operate the vessel as it deemed necessary to meet commercial needs and deadlines. Whilst charterers may find data monitoring and data sharing requirements commercially acceptable, they are less likely to agree to making any operational changes, especially in instances where the voyages are 18 months or less, or where their trading route would be somehow limited or interrupted.

Owners' Perspective

Despite the owners being given unprecedented contractual powers to force charterers to make operational changes that would improve the CII rating or at least maintain it, the Clause does not absolve the owners from their responsibility to maintain a CII compliant vessel.

Conclusions and Recommendations

The Clause contains a mechanism for the owners to claim against the charterers for breach of any obligations under it but, given the many ambiguities and contradictions in the Regulations, the Clause may come to be seen as a starting point from which both parties can begin their negotiations, amending and augmenting the Clause to meet their specific requirements.

Prudent charterers would be well advised to draw up their own CII clause that meets their specific requirements and list of key priorities that for them are non-negotiable, particularly in instances where they charter ships with a borderline rating of C or lower.

Similarly, prudent ship owners, who stand to benefit from the Clause marginally more than the charterers, should expect considerable push back from charterers but also be mindful of the fact that ultimate responsibility for compliance with CII will remain with them.

There is no easy fix contractually (and the difficulties BIMCO have faced in drawing up a balanced and fair Clause are testament to this); just as there is no easy way to decarbonise either. Everyone can perhaps at least agree that the maritime industry faces a challenging year ahead where bespoke, rather than one size fits all solutions, will be required.

1 https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/cii-operations-clause-2022

2 MARPOL Annex VI "Regulations on the Carbon Intensity of International Shipping" and Resolution MEPC.328(76) implementing the CII and subsequent amendments to the Ship Energy Efficiency Management Plan (SEEMP) https://wwwcdn.imo.org/localresources/en/OurWork/Environment/Documents/Air%20pollution/MEPC.328(76).pdf

3 "Required CII" is defined in the Clause as the rating for each calendar year of the charter period, the middle point of CII Rating level C equivalent to the required annual operational CII set out in Regulation 28.6 of the Regulations.

* This article was originally published by Watson Farley & Williams on its website on December 5, 2022 and is reprinted here with permission: https://www.wfw.com/articles/bimco-cii-clause-finally-released-does-it-make-any-sense-of-cii/

EDITORS' NOTE: As predicted in the article above, BIMCO's issuance of the CII Clause has sparked considerable debate amongst vessel owners, operators and charterers alike. A group of 23 shipping companies, including MSC, Maersk, CMA-CGM, Hapag-Lloyd, Norden, Stena Bulk, Oldendorff, and Trafigura – many of which are

both owners and charterers – issued an open letter calling BIMCO's CII Clause "imbalanced and unusable." The primary complaint in the letter was that the clause disproportionately places the obligation to comply with the IMO's Carbon Intensity Index (CII) upon charterers. The letter further contended that the CII Clause will likely result in the use of a wide variety of unbalanced bespoke clauses, or that no clause will ever be agreed. BIMCO responded to the letter and voiced its commitment to monitor developments and work with the industry to help it better understand the CII regulation. It remains to be seen how useful this new clause ultimately proves to be, especially in the existing climate where new regulations are promulgated each year and the pressure for the entire shipping industry to decarbonize continues to increase.

Focus on SMA Members

In the September and December 2022 issues of *The Arbitrator,* we noted the publication of the 5th edition of *Voyage Charters* (co-authored by SMA members **David Martowski** and **LeRoy Lambert**, along with Julian Cooke, Tim Young, Michael Ashcroft, Andrew Taylor, John Kimball, and Michael Sturley) and the 3rd edition of *Shipping and the Environment* (co-authored by SMA member **Charles Anderson,** Colin de la Rue and Jonathan Hare).

For this issue, we asked SMA members **Charles Anderson ("CA"), LeRoy Lambert ("LL")** and **David Martowski ("DM")** to share their experiences as co-authors of these publications, and to describe how the publications have evolved over time:

Charles B. Anderson

SHIPPING AND THE ENVIRONMENT (3rd Ed. 2023):

Can you briefly describe your involvement as a co-author of ***Shipping and the Environment****?*

CA: *Shipping and the Environment* is now in its third edition. The idea for the first edition, published in 1998, came as a result of a large oil spill from a tanker in New York harbor in June 1990, shortly before passage of the Oil Pollution Act of 1990 (OPA-90). Colin de la Rue and I were representing the vessel's owners and P&I Club and we felt that a book dealing with both the new U.S. legal regime as well as the international oil pollution conventions would be a valuable reference guide for practicing lawyers, underwriters, ship owners and operators and others involved in responding to a pollution incident worldwide.

When did you start working on the new edition? Were there any particular developments or changes to which the new edition was intended to respond?

CA: The second edition was published in 2009 and covered new areas such as bunker spills, ballast water management, air emissions and the growing trend towards criminalization of pollution incidents. The third edition followed in January 2023 with a third co-author, Jonathan Hare, the former general counsel of Skuld. The explosion and fire aboard the *Deepwater Horizon* in 2010 led to an entirely new chapter on the offshore sector which includes an in-depth analysis of the disaster, as well as industry practice, insurance aspects and the contractual allocation of risks. The *Costa Concordia* and *Golden Ray* groundings led to greatly expanded chapters on salvage and wreck removal. Emerging areas such as carbon emissions, sanctions, terrorism, cyber risks and the shipment of waste and recycling of vessels are also covered in considerable detail.

We understand that Chapter 1, which previously set out the background to compensation for oil spills, now offers an introduction to all environmental aspects of shipping.

CA: The chapter begins by describing three features of marine environmental affairs that set them apart from other fields of maritime law and practice: their relatively modern origins, the extent of public interest, and the prominent role of international law. This leads to an outline of relevant international law and practice, including an introduction to the main international organizations and important issues of treaty law. The bulk of the chapter recounts the story of how the subject has developed from the early days of oil tanker transport into the wide-ranging field it has become today. This is presented partly as a reference source, where the background can be explored to specific laws discussed in later chapters, and partly as a narrative of landmark incidents and political developments, together with advances in technology and industry practice, that have shaped the current legal landscape. Concluding with an overview of global issues in the modern age, the chapter addresses the needs of a broad international readership.

You've mentioned that many of the revisions or new material in this edition cover developments resulting from significant incidents. Can you describe how these incidents shaped the new edition?

CA: The highly charged political climate created by the *Erika* and *Prestige* incidents caused major changes in European legislation to eliminate substandard shipping and improve compensation arrangements which are discussed in detail in the book. Final judgments in those cases also raised various issues including the effect of channeling provisions and conduct barring immunity and limitation of liability as well as liabilities under national laws for ecological and moral damages. For nearly 20 years after the passage of OPA-90, there were no major spills in the U.S. comparable to the *Erika* and *Prestige* incidents in France and Spain. That era ended dramatically and tragically with the loss of the *Deepwater Horizon* drilling rig in April 2010. Litigation arising from the *Deepwater Horizon* has produced a significant body of case law dealing with a wide range of issues such as punitive damages and the right to a jury trial, federal and state law conflicts, economic loss, and contractual indemnities.

A unique aspect of the book are chapters dealing with the liability of particular parties such as charterers and cargo owners, ship managers and operators, ship financiers, owners of colliding ships, salvors, pilots and maritime authorities. In these chapters, special attention is given to recent cases such as the *Athos 1*, where charterers were held strictly liable for pollution arising from breach of a safe berth warranty, and the *Cosco Busan,* which resulted in the criminal prosecution of the ship's pilot for an allision causing pollution in San Francisco Bay.

How does the new edition deal with ship recycling?

CA: The third edition has been substantially revised and expanded to reflect the increased focus on ship recycling. The application of instruments governing shipment of waste (including the Basel Ban Amendment which entered into force in 2019) is discussed in the context of ship recycling, including an overview of recent cases in which shipowners have been held liable. There is an examination of the EU Ship Recycling Regulation 2013 and the Hong Kong Convention, whose provisions some shipowners and yards are seeking to comply with in anticipation of entry into force. The chapter concludes with an overview of environmental, legal, commercial and reputational considerations, particularly in the light of divergent approaches by the EU and IMO.

How is limitation of liability for bunker oil spills and wreck removal dealt with?

CA: There is a more detailed examination of linkage between the Bunker Convention and the London Limitation Convention (LLMC) and problems arising from inconsistent implementation in contracting states. There is also a special chapter dealing with limitation of marine environmental liabilities which are not subject to their own limitation rules, notably bunker oil pollution and wreck removal and problems arising from inconsistent implementation of LLMC in national laws, and an expanded discussion of conduct barring limitation.

The chapter on wreck removal includes references to cases such as the *Costa Concordia, Rena* and *Golden Ray,* and consideration of factors contributing to the rapidly increasing cost of removal operations and resulting concerns of insurers. The examination of the provisions of the Wreck Removal Convention has been expanded in the light of its

entry into force in 2015. The section on dumping addresses issues which have arisen as a consequence of maritime casualties, including disposal of spoilt cargoes.

How are changes in the area of criminal liability for pollution treated in this edition?

CA: The book provides a comprehensive discussion of criminal liability for marine pollution, including guidelines for the fair treatment of seafarers in light of the *Erika, Prestige, Hebei Spirit* and other major oil spills, and discussion of the relationship between national laws and international rules and standards established by MARPOL. There is also an updated discussion of Oily Water Separator (OWS)-related criminal actions, which unfortunately continue despite very active enforcement efforts by the U.S. Coast Guard.

LeRoy Lambert

David W. Martowski

VOYAGE CHARTERS (5th Ed. 2022):

*Can you briefly describe your involvement as a co-author of **Voyage Charters**?*

LL: *Voyage Charters* was conceived in the late 1980s, following the publication and success in 1978 of *Time Charters,* which presented a clause-by-clause analysis of the NYPE time charter form, first under English law and then under U.S. law. John Kimball, then of Healy & Baillie and now of Blank Rome, was the author of the U.S. sections of *Time Charters,* which by then was in its second edition. The publishers, then Lloyd's of London Press, approached John and other English authors to write *Voyage Charters* as a companion to *Time Charters* for the Lloyd's Shipping Law Library. I was an associate at Healy & Baillie when John asked me to work on the book. He had already lined up David Martowski as a co-author. The English authors were barristers Julian Cooke and Tim Young (then QC, now KC) and solicitor Andrew Taylor (then of Richards Butler, now Reed Smith).

DM: In 1990, John Kimball invited me to author the U.S. legal chapters of the *Asbatankvoy* Section II of a new book to be entitled *Voyage Charters.* I had joined Kirlin's as an associate in 1968 and had tanker experience, as the firm represented Esso International and its chartering affiliate, Standard Tankers (Bahamas) ["STB"]. My senior partner and mentor, Walter Hickey, was responsible for drafting and revising the *Essovoy* and *Exxonvoy,* predecessors of the *Asbatankvoy* form. I carried Walter's bag at AAA and SMA arbitrations involving Esso/STB – primarily claims for cargo shortage and contamination, demurrage and the constructive total loss of its chartered vessel, the *Mary Ellen Conway.* I moved on to represent other oil and chemical charterers and specialized tanker owners carrying molasses and vegoil. Coincidentally, in 1990, I began writing a law review article on tanker practice and enthusiastically accepted John's invitation.

*What were the challenges of writing **Voyage Charters?***

LL: There are numerous dry bulk charter forms and they differ from voyage charter forms used for the transportation of liquid bulk. We also had to decide whether issues should be discussed "as issues" or, following *Time Charters,* on a "clause-by-clause" basis. It was decided to use the 1976 Gencon form and the Asbatankvoy form and to divide the book into two sections, the first, "clause by clause" based on the Gencon clauses; the second, based on the Asbatankvoy clauses. This had the advantage of allowing a reader to go directly to a clause under which the dispute arose. However, this decision also increased the risk that many issues would be discussed twice. In fact, there was considerable overlap between *Time Charters* and *Voyage Charters* with respect to contract formation, identity of parties, arbitration clauses, and other issues. Where there was such overlap on U.S law, we cross-referenced *Time Charters.*

Eventually, David Martowski took responsibility for the Asbatankvoy section, while John Kimball and I divided the Gencon sections, with me being the laboring oar for the chapters on freight, cesser clause, and the laytime and demurrage chapters.

We then reviewed each other's work and inserted appropriate cross-references between the Gencon and Asbatankvoy sections.

While English law had *Scrutton on Charterparties and Bills of Lading,* as well as two treatises on laytime and demurrage, *Summerskill on Laytime* and Schofield's *Laytime and Demurrage,* the leading treatise for U.S. law was Poor's *American Law of Charter Parties and Ocean Bills of Lading (5th Ed.)* published in 1968. Charter party disputes continued to reach the English courts for decision, while in the U.S. such disputes had increasingly been decided by SMA arbitrators, which was founded in 1963. So, as to the U.S. law sections, especially on laytime and demurrage, we had many cases and awards to organize and summarize.

DM: The immediate challenge of drafting the *Asbatankvoy* section was to plan and strictly adhere to a disciplined schedule for organizing, researching and drafting a legal reference that would serve the international maritime bar, judiciary, arbitrators, and the industry's commercial users. John provided invaluable guidance and research support drawn from his experience as a law professor and author of *Time Charters*. Words cannot express the sheer panic I initially felt staring at 65 chapters' pages – blank, but for the text of each *Asbatankvoy* clause appearing as the heading! What we ambitiously anticipated would be a yearlong project, stretched out to a 4-year task. I was traveling internationally 3-4 months during those years and reviewed/digested hard copy bundles of hundreds of awards and legal decisions on assorted planes and trains crossing Europe, Latin America and Asia.

My main challenges were reconciling the interpretation of several *Asbatankvoy* clauses – particularly Clauses 5 through 9 – described by judge, arbitrator, commercial man and practitioner alike as "maze-like" and as "sometimes inconsistent and perhaps even irreconcilable", as well as the many awards addressing time bar, tank cleaning and inspection, cargo retention clauses, the customary trade allowance and, of course, the newly enacted United States Oil Pollution Act of 1990. And let me not forget the controversial issue of theft and use of cargo as bunkers, and claims for punitive and RICO treble damages.

How has Voyage Charters evolved since the first edition was published in 1993?

LL: In the fall of 2022, the fifth edition of *Voyage Charters* was published, 29 years after publication of the first edition in 1993. The structure has remained the same through the second, third, fourth, and now the fifth editions in 2022. We have done our best to add cases and awards as appropriate.

The 1993 first edition contained a third section, "The Hague and Hague-Visby Rules." This was written by the English authors. It came about because many voyage charter forms incorporate those Rules. It was decided to keep it as part of the book with a corresponding U.S. law section to be added in a later edition. That finally occurred in the fourth edition when we added Professor Michael Sturley as a co-author. He wrote the U.S. law sections which now run parallel to the English law sections in "The Hague and Hague-Visby Rules" portion. Professor Sturley updated this part as well in the fifth edition.

The Gencon 1976 form was revised in 1994. The second edition of *Voyage Charters,* published in 2001, contained a separate section organized by clauses in the 1994 Gencon. Since few disputes under the 1994 form had been decided, the Gencon 1994 section was skeletal. This remained the case in the third and fourth editions. For the fifth edition, we deleted the 1994 Gencon "clause by clause" section and wove its content into the text discussing the Gencon 1976 form. The Gencon 2022 form has meanwhile been issued!

I believe that the fourth edition, published in 2014, was the first which was available electronically and searchable. The fifth edition is available in that format as well.

DM: *Voyage Charters* and the *Asbatankvoy* Section have evolved over the past 30 years in lockstep with current legal and commercial developments in the international shipping and tanker industries. The U.S. Supreme Court's decision resolved the split between the opinions of the United States Courts of Appeal for the Fifth Circuit and the Second and Third Circuits in *Citgo Asphalt Refining Company v. Frescati Shipping Company, Ltd.* ("Athos I") as to whether a safe port clause in a charter constituted a warranty. Other legal and commercial developments included much larger and safer ships; computerized loading, measurement, blending, testing and discharging opera-

tions often triggered miles away from ship and terminal; stricter enforcement of environmental state and national laws; delays, damage and disruption caused by hostilities, terrorism and civil strife; OFAC and trading sanctions; tanker and terminal vetting; increased use of confidentiality agreements and requests for confidential awards; more bunker quality and payment disputes; more demands for 'drumhead' emergency hearings; requests for injunctive relief enjoining a party from liquidating its assets wherever located and anti-suit injunction enjoining suit in a foreign court; a record number of requests for pre-award ordering of security when appropriate; and more requests for consolidation.

I'm confident that new issues regarding cybersecurity and AI will provide much fodder for the 6th edition. In closing, I must add that *Voyage Charters* has been a delightful team effort over the years with the best – John, LeRoy and Michael, and our London friends and colleagues, Tim, Michael, Julian and Andrew.

Arbitration in the Courts Report*

By Yasmine Lahlou, Partner, Andrew Poplinger, Partner, Marcel Engholm Cardoso, Associate, and Alex Lupsaiu, Associate, Chaffetz Lindsey LLP

Functus Officio gets a new exception:

Second Circuit holds that district courts remand of unreasoned award to arbitrator does not violate the functus officio doctrine.

Smarter Tools, Inc. v. Chongqing SENCI Import & Export Trade Co., Ltd., No. 21-724, (2d Cir. January 17, 2023).

The *functus officio* doctrine – Latin for having "completed one's office" – dictates that "once arbitrators have fully exercised their authority to adjudicate the issues submitted to them, their authority over those questions is ended, and the arbitrators have no further authority, absent agreement of the parties, to redetermine those issues." Its principal purpose is to prevent "re-examination of an issue by a nonjudicial officer potentially subject to outside communication and unilateral influence." But courts have developed a number of exceptions to the doctrine, permitting arbitrators to revisit their awards to make non-substantive modifications, lest the doctrine waste tremendous efforts and resources.

In *Smarter Tools v. SENCI,* the Second Circuit Court of Appeals held that the doctrine warranted another exception – permitting remand to the arbitrator to provide the requisite reasoning for his award.

The underlying arbitration arose out of a series of contracts between Smarter Tools Inc. (STI) and Chongqing SENCI Import & Export Trade Co. Ltd. (SENCI) for the supply of gas-powered generators. After STI failed to pay the purchase price for a number of generators, SENCI commenced arbitration before the Arbitration Association's International Centre for Dispute Resolution ("ICDR") to recover the outstanding amounts. STI counter-petitioned, claiming that it was SENCI who had breached the contract by delivering generators that failed to comply with California Air Resources Board (CARB) standards. The arbitrator ultimately issued an award in favor of SENCI, finding that the parties' contract did not specify that the generators had to comply with CARB standards. However, although the parties had agreed that the arbitrator would issue a reasoned award, the arbitrator's award contained scant reasoning.

STI petitioned the United States District Court for the Southern District of New York to vacate the award, arguing the arbitrator had exceeded his authority by issuing an unreasoned award. The district court agreed, finding the award contained no rationale for rejecting STI's counterclaims. But, rather than vacate the award, the court remanded the case to the arbitrator "for clarification of his findings." The arbitrator issued an amended award granting the same relief and providing further reasoning and explanation for his findings. STI again moved to vacate the award on the ground that remand was improper because the arbitrator was *functus officio* after issuing his original award. SENCI cross-moved to confirm the award. The district court confirmed the award and STI appealed.

On appeal, the Second Circuit noted that it was an "open question" as to "whether a court may remand for an arbitrator to produce a reasoned award," but it was a "permissible choice" under these circumstances because "[i]t simply makes no sense to redo an entire arbitration proceeding over an error in the form of the award issued." Remand to provide further reasoning was analogous to well-recognized exceptions to *functus officio,* such as permitting arbitrators to clarify an ambiguous award. As with such other exceptions, the arbitrator was not changing his merits determination and therefore remand would not "undermine the functus office doctrine's purpose" of protecting against the risk the arbitrator would change his ruling "after issuance due to outside influence by an interested party."

The court also rejected STI's argument that the arbitrator had exceeded his powers by issuing an unreasoned award, and the lower court's only option under the Federal Arbitration Act (FAA) was to vacate the award under Section 10(a)(4). Awards are presumptively valid and vacatur is narrowly construed, and here "the question was whether the arbitrator's original award was reasoned; there was no question that the arbitrator here had the power to reach the issues addressed." Accordingly, the failure to issue a reasoned award "best fits under Section 11 of the FAA," which permits a court to "make an order modifying or correcting the award ... where the award is imperfect in matter of form not affecting the merits of the controversy." The award's failure to provide the requisite reasoning rendered it "imperfect in matter of form," and remand to the arbitrator to produce an award comporting to the parties' agreement best "effects the intent" of the parties and "promotes justice" between them.

Read the court's full decision here.

* * *

Ninth Circuit holds that FAA Chapter 1 grounds are available to vacate New York Convention awards seated in the U.S.:

Confirming the award, the court reinforced that an arbitrator's mere error of law does not warrant vacatur under FAA, §10(a)(4).

HayDay Farms, Inc. v. FeeDx Holdings, Inc., 55 F.4th 1232 (9th Cir. 2022).

The Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) is codified in Chapter 2 of the FAA, 9 U.S.C. § 201 *et seq.* It governs not only awards issued outside of the U.S., but also "non-domestic" awards – those awards issued by tribunals seated in the U.S., but involving one or more foreign parties or having some other reasonable relation with one or more foreign states. *HayDay v. FeeDx* concerned whether the grounds for vacating domestic awards under Chapter 1 of the FAA apply to non-domestic awards governed by the Convention. This was a question of first-impression for the Ninth Circuit Court of Appeals, which has jurisdiction over appeals from U.S. district courts in several western states, including California. The Ninth Circuit joined the Second, Third, Fifth, Sixth, Tenth and D.C. Circuits in finding that Chapter's 1's vacatur standards (set forth in FAA, § 10) apply to non-domestic awards. (The Eleventh Circuit is the only federal appeals court to have addressed the issue and found chapter 1 inapplicable to nondomestic awards, although the Eleventh Circuit is now in the process of reconsidering the issue. *See Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.*, 50 F.4th 97, 98 (11th Cir. 2022).)

The arbitration in *HayDay* arose out a series of contracts between Cayman corporation FeeDx and California corporation HayDay, which culminated in an exclusive global distribution agreement signed in 2014, under which FeeDx would purchase and distribute HayDay's forage crops and pay Hayday $8 million to expand its operations. Under a supplemental agreement, Hayday agreed to provide FeeDx at least 170,000 metric tons of crops per year at $360 per ton. After disputes arose between them, the parties entered into a settlement agreement under which HayDay would pay FeeDx $8 million in monthly installments, and once this amount was fully paid, the parties would mutually release all claims under their distribution agreement, with their respective obligations to buy

and sell HayDay's crops terminating in December 2016. Neither party performed the settlement. HayDay paid only $1 million of the $8 million due. FeeDx failed to continue purchasing HayDay's crops through December 2016. Arbitration ensued before a panel of three arbitrators seated in California before the American Arbitration Association's International Centre for Dispute Resolution.

Over four years, the arbitrators issued various partial awards finding that: (i) the settlement agreement supplemented rather than supplanted the distribution agreement; (ii) FeeDx had breached the settlement agreement by failing to continue purchasing crops through December 2016; (iii) FeeDx breached the distribution agreement prior to entering into the settlement; and (iv) the settlement agreement did not release HayDay's claims under the distribution agreement because FeeDx breached the settlement agreement. The Tribunal awarded HayDay approximately $21 million in lost profits. The tribunal rejected FeeDx's argument that HayDay's damages should be reduced by the remaining $7 million it owed under the settlement agreement, finding that FeeDx's breach of the settlement agreement excused HayDay's payment obligation.

FeeDx petitioned the United States District Court for the Central District of California to vacate the award under Section 10(a)(4) of the FAA on the grounds that the arbitrators had exceeded their authority. The district court agreed in part and vacated $7 million from the award, finding that the arbitrators' refusal to reduce HayDay's damages by the $7 million outstanding under the settlement agreement violated California law precluding a party from receiving a windfall on a breach of a contract claim. FeeDx appealed the court's refusal to vacate the entire award; HayDay appealed the partial vacatur of the award.

On appeal, the Ninth Circuit first addressed the threshold question whether the vacatur grounds in Section 10 of Chapter 1 of the FAA applied to Convention awards in arbitrations seated in the U.S. The court held that Section 10 applied. In doing so, it adopted the Second Circuit's oft-cited decision in *Yusuf v. Toys "R" Us,* 126 F.3d 15 (2d Cir. 1997), which held that Article V(1)(e) of the Convention – permitting an enforcing court to refuse enforcement of an award that "has been set aside or suspended by a competent authority of the country in which ... [it] was made" – necessarily contemplates that the courts at the seat may apply the seat's domestic arbitration laws to vacate a Convention award.

Turning to the merits, the court reversed the lower court's partial vacatur. Section 10(a)(4) permits vacatur of an arbitration award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." The court held that Section 10(a)(4) permits only an "extremely limited" review of the award, and an arbitrator exceeds its authority in two circumstances – (i) when the arbitrator manifestly disregards the applicable law or (ii) his or her decision is completely irrational. An arbitrator manifestly disregards the law only when there is "some evidence in the record other than the result, that the arbitrators were aware of the law and intentionally disregarded it." An award is "completely irrational" only where it "completely ignores controlling terms of the parties' contract." If the arbitrator even "arguably construes the contract," the court "must defer to the arbitrator's decision." Neither standard is met by showing that the arbitrator merely "committed an error–or even a serious one."

The court agreed with the lower court that the arbitrator likely erred in deciding that FeeDx was not entitled to credit for HayDay's failure to make the $7 million payment, which resulted in a "seemingly unfair damages award that likely violates" California law. Nevertheless, this error, without more, was insufficient to meet the stringent standard for vacatur. To hold otherwise would frustrate the FAA, which reflected Congress's decision to "carefully limit" judicial review of arbitration awards to protect the contractual choice to "forego the procedural rigor and appellate review" of judicial proceedings in favor of expediency and finality of arbitration.

Read the court's full decision here.

* * *

SDNY holds that Section 1782 does not authorize discovery for use before ICSID tribunal:

ICSID panel does not qualify as a "foreign or international tribunal" under Section 1782 because it is not "imbued with governmental authority."

In re Webuild S.p.A., 22-mc-140(LAK) (S.D.N.Y. Dec. 19, 2022).

28 U.S.C. § 1782 authorizes U.S. courts to order persons in the United States to give testimonial or document discovery "for use in a proceeding in a foreign or international tribunal." Whether Section 1782 discovery is available in aid of foreign arbitrations had split federal appellate courts. In June 2022, the Supreme Court took up this issue in *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022). The Court held that neither commercial arbitration tribunals nor ad hoc investor-state tribunals qualified as foreign or international tribunals under the statute. In so holding, the Court explained that a "foreign tribunal" is "imbued with governmental authority by one nation," and an "international tribunal" is "imbued with governmental authority by multiple nations." Neither the commercial tribunal nor *ad hoc* investor-state tribunal before it fit either definition.

Webuild applied *ZF Auto* to determine whether Section 1782 permitted discovery for use before an International Center for Investment Disputes (ICSID) tribunal. The case arose after an Italian investor arbitrating claims against Panama under the Italy-Panama bilateral investment treaty (BIT) before an ICSID tribunal obtained an ex parte order pursuant granting it Section 1782 discovery from a non-party U.S. company for use in the arbitration. The non-party moved to vacate the order and quash the ensuing subpoena.

The court granted the motion and quashed the subpoena, finding that under *ZF Auto,* the ICSID tribunal did not constitute "a foreign or international tribunal" within the statute because Italy and Panama did not "imbue it with governmental authority." The court noted that although *ZF Auto* "did not provide a test for lower courts to apply, it did set forth several factors that it considered in determining that such an intent did not exist." In a methodical opinion, the court explained how, under each of the factors set forth in *ZF Auto,* the ICSID tribunal here was analogous to the private commercial and ad hoc investor-state panels *ZF Auto* found not to be governmental or intergovernmental authorities.

The court highlighted the following attributes demonstrating that the ICSID tribunal was not akin to a governmental body: (i) "ICSID does not have standing or pre-existing arbitration panels," but rather it convenes tribunals in response to requests from the parties; (ii) the Panama-Italy BIT did not create the ICSID tribunal, but merely provides the set of rules that govern the tribunal's formation; (iii) the ICSID tribunal "functions independently of and is not affiliated with either" Italy or Panama, with arbitrators chosen by the parties, who lack "any official affiliation" with either state; (iv) the ICSID tribunal is funded by the parties and "does not receive any government funding;" (v) the ICSID tribunal's proceedings are confidential and not public; and (vi) the panel derives its authority from the "parties' consent to arbitrate," rather than any state law.

Accordingly, the court held that "Italy and Panama did not intend to imbue the ICSID Panel with governmental authority," and therefore the ICSID panel was not a "foreign or international tribunal" under Section 1782. In October 2022, the United States District Court for the Eastern District of New York likewise held that an ICSID tribunal empaneled pursuant to the Malta-China BIT did not constitute a "foreign or international tribunal" for purposes of Section 1782. *See In re Alpene, Ltd.*, 2022 WL 147008 (E.D.N.Y. Oct. 27, 2022). It remains to be seen whether other federal courts will likewise hold that Section 1782 discovery is not available for use in ICSID arbitrations.

Read the court's full decision here.

* * *

"Service of Suit" Clause complements rather than supersedes agreement to arbitrate:

Parties' agreement to submit to jurisdiction of court of competent jurisdiction merely ensured a judicial forum for enforcing the agreement to arbitrate and the arbitrator's awards.

Upper Room Bible Church, Inc. v. Sedgwick Delegated Auth., No. 22-340 (E.D. La. Dec. 16, 2022).

Insurance contracts, particularly those issued by foreign insurers, often include both an arbitration

clause requiring that all disputes be resolved in arbitration, and a "service of suit" clauses providing that the foreign insurer will submit to the jurisdiction of local courts. *Upper Bible Room* confirmed that the two clauses can co-exist without vitiating the right to arbitrate.

Upper Room Bible Church was seeking coverage from a group of insurance companies under two policies of commercial property insurance for property damage allegedly sustained from Hurricane Ida and Tropical Storm Nicholas. After the insurers denied these claims, Upper Room brought suit in the United States District Court for the Eastern District of Louisiana. The insurers moved to compel arbitration based on the arbitration clause in the policies requiring that "all matters in difference between the Insured and the Companies ... shall be referred to an Arbitration Tribunal."

Upper Room opposed the motion, arguing that the policies' arbitration clause was superseded by a separate policy endorsement stating that the "insurance shall be subject to the applicable state law to be determined by the court of competent jurisdiction as determined by the provisions of the Services of Suit Clause (USA)." The "Service of Suit Clause," in turn, stated, "in the event of failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon ... will submit to the jurisdiction of a Court of competent jurisdiction within the United States." Upper Room therefore argued that the endorsement reflected the parties' intent that all coverage disputes be resolved in court, rather than through arbitration.

The court disagreed and granted the motion to compel arbitration. Drawing on twenty years of precedent rejecting similar arguments, it noted that "courts have consistently held that endorsements and service of suit clauses like those in Upper Room's policy do not nullify otherwise valid arbitration agreements." Rather, the arbitration and service of suit provisions were in harmony, and the service of suit clause was properly construed "as complementing the arbitration clause by providing a judicial forum for compelling or enforcing arbitration."

Read the court's full decision here.

This report is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

* This report was originally published by Chaffetz Lindsey LLP on its website on February 7, 2023 and is reprinted here with permission: https://www.chaffetzlindsey.com/report/arbitration-in-the-courts-february-2023vol-9/

SMA Award Service ... At-a-Glance

By Robert C. Meehan, Manager Chemical Dept., McQuilling Partners, and SMA Vice-President

One of the unique features when arbitrating under the SMA Rules is the authority given to the arbitrators to issue pre-award security, ensuring that any eventual award does not become meaningless. Section 30 of the SMA Rules states, in material part, that "[t]he Panel shall grant any remedy or relief which it deems just and equitable, including, but not limited to, specific performance, declaratory relief, injunctive relief and the posting of security for part or all of a claim or counterclaim in an amount determined by and in a form acceptable to the Panel." Any determination of an application for security is usually issued as a partial final award, and the panel's ruling is not considered a determination of the dispute's merits.

The arbitrator's power to issue an order for pre-award security is also recognized in U.S. jurisprudence.[1] However, the arbitrator's decision to order pre-award security is not taken lightly. The circumstances involving any request and the considerations by SMA panels in determining whether to order the posting of security are well documented and available for review in the SMA award service. While each security request is judged solely on its merits, the panel reviews specific criteria in deciding, including (1) the likelihood of success on the merits by the requesting party, (2) the opposing party's conduct and financial position, (3) the

availability of and attempts to obtain security by other means, and (4) whether there are requests for counter-security.

Below are examples of recent SMA decisions regarding the posting of pre-award security.

CARGILL INC. v TRIORIENT LLC M/V *JOSCO HUIZHOU* (SMA 4405, October 5, 2020) (David Martowski, Bengt Nergaard, Louis Epstein)

The parties negotiated a charter party on February 10, 2020 to load a cargo of iron ore concentrate from Mexico to China. The vessel arrived at the loadport within laycan, tendering its Notice of Readiness on March 3, but sat there idle. On May 11, 2020, the owner requested the charterer's urgent advice on the status of the cargo, reserving its right to declare the charterer in repudiatory breach of the charter. On May 18, the owner notified the charterer that it was immediately terminating the charter party and cited the charterer's repudiatory breach of its terms. On July 10, the owner submitted to the charterer its fully documented claim for damages amounting to almost $1.5 million, primarily for demurrage, but also for loss of earnings on a subsequently missed fixture and underwater hull cleaning costs. No payment was received. On July 29, the owner commenced arbitration by naming its arbitrator, requesting the charterer appoint its arbitrator within 20 days. Charterer failed to respond, prompting the owner, under Section 10 of the SMA Rules, to exercise its right to appoint a second arbitrator. The two so chosen then appointed the third arbitrator. On September 24, 2020, the Owner submitted a motion for pre-award security for its claim under Section 30 of the SMA Rules in the amount of $1.6 million, as well as a separate motion for a final award on default for the total amount of its claim.

Based on its submissions, the panel believed that the owner had established a *prima facie* case and that its claim would likely succeed on the merits. Charterer failed to appoint an arbitrator or respond to the owner's demand for arbitration. The owner presented supporting documents based on public information, arbitration awards, and court decisions lending support to serious concerns about the charterer's financial ability to satisfy a final award. For instance, two earlier arbitration awards and two court decisions dealt with charterers' failure to provide cargo as contracted for under the charter party. The panel granted the owner's application and, pursuant to Section 30 of the SMA Rules, ordered the charterer to post security in the amount of $1.6 million. This ruling remained in effect pending the panel's final determination of the merits of the owner's claim.

PLAYA SHIPPING CORP. v CITGO PETROLEUM CORP. *M/T MAMBO* (SMA 4418, March 16, 2021) (Louis Epstein, William Quinn, Lucienne Carasso Bulow)

This partial final award deals with the owner's application for security from charterer for the owner's claims for demurrage and excess port expenses. The parties concluded two charter parties, one on December 13, 2018, and the other on January 8, 2019. Both charter parties involved a single voyage of CPP [clean petroleum products], loading from the U.S. Gulf for discharging at Venezuela. Both resulted in demurrage in the aggregate of about $159,000. Further, the January charter party provided that the charterer be responsible for discharge port charges exceeding $85,000, which they did by about $179,000. In sum, the owner's claims totaled $336,399.47.

The charterer did not dispute the facts, and acknowledged that it owed the demurrage and excess port expenses. However, the charterer asserted that it was prevented from making such payments due to U.S. economic sanctions imposed on Venezuela. One pertinent provision was the requirement to pay debts to a Venezuelan entity within 90 days with which the charterer claimed it attempted to comply. However, the owner's bank rejected such attempts, flagging them as potential U.S. law violations. Invoices over 90 days constituted extending credit to Venezuelan entities, which is prohibited under the sanctions. Any payment after 90 days would require a license issued by the Office of Foreign Assets Control ("OFAC") of the U.S. Treasury Department to be lawful. [2] Charterer asserted that under the OFAC regulations, the burden to obtain a license lies with the creditor, in this case, the owner. The delayed payment, therefore, rested with the owner, as initiating payment without a license would violate U.S. imposed sanctions. Charterer also highlighted pertinent charter party terms excusing it from any obligation if the act violates U.S. law. The owner dismissed the charterer's argument because the charterer was one of the named Venezuelan companies exempt from the sanctions and, as a result, the charterer's contention that any transfer would violate U.S. sanctions was misplaced.

The panel ordered the charterer to post security for the owner's claim. The panel first considered whether awarding security was appropriate, noting there was no doubt that the owner would succeed with its claim insofar as the charterer acknowledged it as valid. The panel also considered the likelihood of non-payment by the charterer as substantial, citing that the financial position of the charterer's parent company, PdVSA, was precarious, further strained by a recent court judgment of $1.2 billion against it, and the possibility that PdVSA could attach charterer's assets in the U.S. to satisfy the judgment.

The panel then considered if the Venezuela sanctions prohibited the panel from issuing security and the need for a license before any transfer. The panel disagreed with the charterer's contention that the U.S. imposed sanctions prohibited it from making any financial transfers. The panel pointed out that certain sanctions provisions specifically authorized transactions by the charterer or its subsidiaries that would otherwise be prohibited. Additionally, the owner's counsel presented a letter from OFAC in connection with another arbitration where the charterer had made the same claim. In that letter, OFAC stated that no specific authorization was required for the charterer to pay. The panel invited comments to the letter from both parties, and after review, the panel agreed that the OFAC letter strongly supported the owner's position.

The Panel then ordered that the charterer should post security in the full amount of the owner's claims plus interest, as well as legal fees and the Panel's fees associated with the application for security, totaling $397,554.22, and that such security would remain in effect pending final determination of the owner's claims.

1 "Arbitrators also have the power to direct one party, or both parties, to post security pending the outcome of the disputes on the merits. In *Sperry International Trade Inc. v. Government of Israel,* 689 F.2d 301 (2d Cir. 1982), the Second Circuit affirmed the arbitrators' order requiring the proceeds of a disputed $15 million letter of credit to be placed in escrow, noting that arbitrators "have power to fashion relief that a court might not properly grant." Id. at 306. In *Compania Chilena de Navigacion Interociania v. Norton Lilly & Co.,* 652 F. Supp. 1512, 1987 AMC 1565 (S.D.N.Y. 1987), the court held that maritime arbitrators did not exceed their legal authority by ordering respondent to post a $123,000 bond." "Prejudgment Security in International Disputes Subject to Arbitration", LeRoy Lambert and Thomas H. Belknap, Jr. Partners, Blank Rome LLP, New York, *The Arbitrator,* July 2008, at p. 16.

2 Executive Order 13808 ['EO 13808'] of August 24, 2017, which, among other things, prohibits extending credit for more than 90 days to certain Venezuelan government entities, including Petroleos de Venezuela SA (PdVSA).

Spotlight on the SMA

SMA at the Admiralty Committee of the New York City Bar Association, New York, January 10, 2023

SMA member **Charles Anderson** and SMA President **LeRoy Lambert** presented at the Committee's monthly dinner about the publication in 2023 of the third edition of *Shipping Law and the Environment* (of which Charles Anderson is a co-author) and the fifth edition of *Voyage Charters* (of which SMA President **LeRoy Lambert** and SMA member **David Martowski** are co-authors).

SMA at The Hellenic American & Norwegian American Chambers of Commerce 29th Annual Shipping Conference, "Navigating Geopolitical Currents in a Time of Crisis", New York, February 7, 2023

SMA Board member **George Tsimis** moderated a panel on sanctions which included SMA member **Louis Epstein,** General Counsel of Trammo. Also in attendance were SMA Board member **Molly McCafferty,** SMA President **LeRoy Lambert,** and SMA member **Müge Anber-Kontakis.**

SMA at the "Admiralty Disruption" Conference, New Orleans, March 3-4, 2023

The SMA was a co-sponsor of this conference, which was organized by the Admiralty Committee of the Torts and Insurance Practice Section of the American Bar Association. SMA President **LeRoy Lambert** participated as a panelist on a panel addressing supply chain issues. SMA Board member **Molly McCafferty,** together with U.S. office heads of other P&I Clubs, discussed issues of common concern to P&I insurers.

SMA at "Offshore Wind Seminar: Today's Legal Challenges and Tomorrow's Prospects," New York, March 9, 2023

SMA Offshore Wind Committee Chair **George Tsimis** and Committee members **Dan Gianfalla** and **LeRoy Lambert** attended this seminar, which was organized and hosted by Blank Rome.

SMA at the CMA Shipping Conference, Stamford, Ct., March 21-23, 2023

The SMA was a sponsor and the SMA logo was on the hotel keycard received by each guest who stayed at the Conference venue. SMA Board member **George Tsimis** participated in a Sanctions Roundtable where he discussed recent SMA decisions addressing disputes involving sanctions- related issues.

SMA Online Seminar Program, February-March 2023

The SMA was pleased to conduct its well-attended, comprehensive online seminar "Maritime Arbitration in New York" on February 24, March 3, March 10 and March 24, 2023.

SMA Monthly Luncheons:*

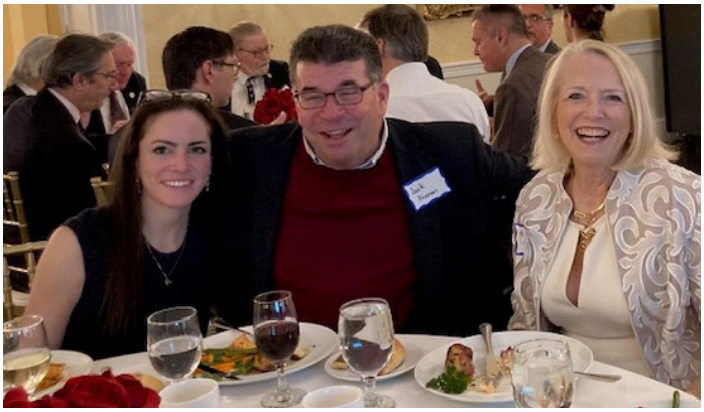
February 8, 2023: This luncheon, attended by some 70 guests, was co-sponsored by the CMA and the SMA and featured an exceptional presentation by **Patrick McShane** of Frilot LLC and **Tim Couvillion** of Couvillion Group about "The Largest Oil Spill You've Never Heard Of."

March 8, 2023: SMA member **Robert Milana,** and SMA President **LeRoy Lambert** presented "Mediation Around the World....In Less than 80 Days" concerning a virtual mediation with mediator, counsel and parties participating across four time zones.

April 12, 2023: Our next luncheon will feature **Leanne O'Loughlin,** Regional Director Americas (UKP&I and UKDC) and President (Fairlead Group Private Investigations) Thomas Miller Americas.

*** 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.**

SMA LUNCHEON – FEBRUARY 2023



*** SAVE THE DATE!**

The Twenty Second International Congress of Maritime Arbitrators **(ICMA XXII)** will take place in Dubai, U.A.E. **5 - 10 November 2023.**

http://www.icma2023.com

In Closing

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

To our readers: Do you have an article or an idea for an article for a future issue? 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. A special thanks to Tony Siciliano and all readers who keep our membership abreast of maritime news items and developments. Please follow the SMA via LinkedIn.

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

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