SMA the ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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In this issue

President's Message

By LeRoy Lambert, SMA President

As you will read in the **Spotlight on the SMA** (p. 17), SMA members had an active Spring as we continue to spread the word about the SMA and its ability to deliver cost-effective and efficient alternative dispute resolution to the maritime industry.

Now in its 60th year, the SMA held its Annual General Meeting on May 10, 2023, to hear the reports of Committee Chairs and to elect officers. Vice-President Meehan and I are honored and privileged to have been elected to serve as President and Vice-President of the SMA for another term. Lucienne Bulow, Sandra R. M. Gluck, Daniel J. Schildt, and Robert G. Shaw were elected to two-year terms as Governors. They join Austin Dooley, David Gilmartin, David W. Martowski, and George J. Tsimis on the Board. I appointed Louis Epstein and Daniel M. Gianfalla to serve one-year terms. Jack Warfield will serve as Treasurer. George Tsimis will serve as Secretary.

Molly McCafferty and Soren Wolmar were term-limited and not eligible to stand for election, and we thank them again for their years of service.

At the AGM, the members approved an increase in annual dues, which were last increased in 2014. The members also approved a new structure for fee payments made from the Escrow Account.

The following members have been appointed Committee Chairs for the coming year:

Ad Hoc ICMA Committee	*David W. Martowski*
Ad Hoc Offshore Wind Committee	*George J. Tsimis*
The Arbitrator	*Sandra R. M. Gluck*
Audit	*Michael J. Hand*
Award Service	*Bengt E. Nergaard*
By-Laws and Rules	*Louis Epstein*
Education	*Austin L. Dooley*
Friends & Supporters	*Müge Anber-Kontakis*
Insurance	*Robert A. Milana*
Luncheon	*Molly McCafferty*
Marketing	*Sandra R. M. Gluck*
Mediation	*Robert A. Milana*
Membership	*William H. Quinn*
Professional Conduct	*Svend H. Hansen, Jr.*
Salvage	*Thomas F. Fox*
SMA/MLA Liaison	*Dick Corwin*
Technology	*Daniel J. Schildt*
Yachts	*Charles B. Anderson*

If you are not serving on a Committee and would like to become active on one, I encourage you to do so by contacting the Committee Chair.

Officers and Board are looking forward to the 2023-24 year as we continue working with all members and stakeholders to grow opportunities in alternative dispute resolution in the maritime industry and adjacent spaces.

See you in September! Onward!

LeRoy Lambert
President

Admiralty Law: Off to Sea the Wizard*

By James E. Mercante, Partner, Rubin, Fiorella, Friedman & Mercante LLP, New York

The Supreme Court has an affinity for admiralty cases. Why else would the Court agree to take on a seemingly simple marine insurance dispute involving a yacht owner and his United Kingdom based marine insurance company? Because the Supreme Court recognizes what is at stake is fundamental to the foundation of federal maritime law.

The Supreme Court has entertained a wide variety of maritime cases with such issues including a Limitation of Liability defense brought by the owners of the TITANIC; a cargo dispute in a *"maritime case about a train wreck"*; *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.,* 543 U.S. 14 (2004); and cases involving the scope of marine terms such as *"vessel"*, *"seamen"* and *"safe berth."* See James E. Mercante, *Supreme Court Dips Into Admiralty,* New York Law Journal, Admiralty Law, Volume 261 (June 27, 2019).

Perhaps admiralty is a welcome deviation from the rocks, reefs and shoals the Supreme Court must navigate in hard-core and politicized cases involving civil rights, abortion, gun control, criminal law and politics. But the Court obviously recognizes that deciding admiralty cases, like the instant marine insurance dispute, is of absolute necessity to resolve the tension between the application of federal admiralty law versus state law in maritime disputes.

With a New York choice-of-law clause in a marine insurance policy at issue, admiralty is underway to the United States Supreme Court. This is a marine insurance dispute, the likes of which the Supreme Court has not seen in over six decades since *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310 (1955).

On March 6, 2023, the Supreme Court granted the petition for a writ of certiorari filed by Great Lakes Insurance in a coverage dispute with its insured Raiders Realty Co. Raiders Realty owned a yacht insured with Great Lakes for $550,000. The yacht ran aground resulting in extensive hull and machinery damage. Grounding is a peril of the sea covered in any marine insurance policy. But, due to an alleged misrepresentation in statements prior to binding coverage and alleged breach of express warranties that only came to light after the loss, the insurer rejected the claim and elected to void the policy from its inception. The insured had failed to timely recertify or inspect the yacht's fire-extinguishing equipment contrary to the insured's statement that it had been done. A misrepresentation of material information in the process of applying for a policy permits a marine insurer to rescind the contract pursuant to the policy terms in addition to the breaches of warranty.

Great Lakes then filed a declaratory judgment action in the Eastern District of Pennsylvania where the insured resides, invoking federal admiralty jurisdiction and sought a declaration that the policy should be voided. This would nullify the grounding damage claim. The insured swung back with three extra-contractual liability claims arising under Pennsylvania state law for breach of fiduciary duty, insurance bad faith, and breach of Pennsylvania's Unfair Trade Practices Law. The District Court enforced the policy's choice of law clause calling for the application of New York law and dismissed the insured's Pennsylvania law-based counterclaims. The clause states that, *"It is hereby agreed that any dispute arising hereunder shall be adjudicated according to the well-established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice, but where no such well-established entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York."*

Great Lakes' motion to dismiss the insured's extra-contractual claims (with their roots in Pennsylvania state law) was based on the fact that (i) a marine insurance policy's choice-of-law provision is enforceable under maritime law; (ii) the clause expressly calls for the application of "entrenched" principles of federal admiralty law and where there is none, then substantive laws of the State of New York are to apply; and (iii) New York's substantive law precludes 'bad faith' claims against a marine insurer.

The District Court did not take the bait that it should decide whether or not applying New York law would contravene some public policy of Pennsylvania law. *Great Lakes Insurance SE v. Raiders Retreat Realty Co.,* 521 F. Supp.3d 580 (E.D. Pa. 2021). The appeal to the Third Circuit ensued.

The Third Circuit vacated and remanded the decision stating that the District Court should have considered whether Pennsylvania state law has a "strong public policy" to protect citizens insured in its state and by its state laws. *Great Lakes Insurance SE v. Raiders Retreat Realty Co.,* LLC 47 F.4th 225 (3rd Cir. 2022). If such public policy exists in Pennsylvania, then it would be "thwarted" by applying New York law. The Third Circuit's reference to a "strong public policy" test, with not one word that federal admiralty law might have any countervailing interest, would give the states an unconditional veto over choice of law clauses. It appears that the Third Circuit's mistake was also in its reliance upon case law applicable to *forum* selection clauses. *See M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972). On the other hand, choice of *law* clauses are routinely enforced in maritime law.

The Supreme Court wisely stepped in because any answer the District Court would give on remand would necessarily implicate an analysis of what 'state' law should apply, i.e., Pennsylvania or New York. This very analysis would butt up against the overwhelming precedent that choice of law clauses are enforceable under maritime law and subject to federal choice of law rules. Since the Court's 1955 decision in *Wilburn Boat,* choice of law clauses have enabled the marine insurance industry to reliably judge risk (and premium to charge) based upon the application of law chosen by the parties to govern their relationship *before* any conflict has arisen. *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.,* 585 F.3d 236 (5th Cir. 2009).

Thus, the central issue for the Supreme Court to decide is whether the law of the forum state should be considered at all in the analysis. The writ speaks to this and suggests that the Third Circuit must be reversed because "no state government can ever express a strong public policy which tells the federal government which clauses are, or are not, enforceable in a maritime contract." *See* Petition for Writ of Certiorari, *Great Lakes Insurance SE v. Raiders Retreat Realty Co.,* 2022 WL 17361673, *6 (2022) (No. 22-500). Without a choice of law clause in a maritime contract, chaos prevails because neither the courts nor the litigants have any idea what law will eventually be applied. The marine insurance industry has employed the choice of law clause to affect some modicum of predictability. *Id.*

To use boxing as an analogy, when the contestants entered the ring in the *"Thrilla in Manilla"* or *"Rumble in the Jungle"* to dispute the heavyweight championship, the parties had agreed and knew well in advance what rules would govern, and the foreign location of the bouts had no bearing on it.

The majority of the federal courts, including those in New York, enforce such clauses so long as the chosen law has sufficient connection to the parties or transaction and the chosen law does not conflict with the fundamental purpose of maritime law. *See, American S.S. Owners Mut. Protection and Indem. Ass'n v. Henderson,* 2013 WL 1245451 (SDNY 2013); *Farrell Lines Inc., v. Columbus Cello-Poly Corp.,* 32 F. Supp.2d 118 (SDNY 1997).

Importantly, the mission of the U.S. Maritime Law Association, founded in 1899, has been to *"facilitate justice"* in the administration of maritime law and to *"promote uniformity in its enactment and interpretation."* This will avoid a patchwork of inconsistent results arising from a state-by-state approach. Yet it appears the Third Circuit's decision cedes control of choice of law clauses in maritime contracts to the states.

This is the Supreme Court's opportunity to salvage a bright line federal rule permitting parties to a maritime contract to rely upon choice of law clauses that will be enforced by the courts. This is the only way to avoid parties running aground in mostly unchartered waters and laws of the 50 states. Moreover, a federal maritime rule adopted by the Supreme Court will have the desired impact of promoting uniformity of laws in this maritime nation. Say no more!

International Arbitration: A Possible New Avenue for Discovery in the United States*

By James H. Hohenstein and Sheryl K. Parkinson, Partners, Hohenstein & Parkinson, LLP, New York

Introduction

In international commercial proceedings, the ability to obtain discovery of documents and the testimony of witnesses located in the United States is starkly different depending on the nature of the international proceeding.

For matters pending in a foreign court, a U.S. statute (28 U.S.C. § 1782) provides a relatively efficient way for discovery in the U.S. to be obtained.

That same U.S. statute cannot be used where the dispute is pending in a private international arbitration. Further, while the U.S. Federal Arbitration Act (9 U.S.C. §§ 1-16) has a provision regarding discovery, the effectiveness of that provision in the context of a subpoena issued in an international arbitration has been unclear.

However, a recent decision by a federal appellate court in California presents a possible new procedural avenue for obtaining discovery in the U.S. for use in a foreign private arbitration.

Background

28 United States Code § 1782

The caption of this statute is "Assistance to foreign and international tribunals and to litigants before such tribunals" and directs in pertinent part that:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal... The order may be made...upon the application of any interested person...[1]

It is well-established that a "foreign or international tribunal" includes commercial litigation involving private parties in a non-U.S. jurisdiction. It is equally clear that "any interested person" includes the parties to such litigation. As such, the statute has been routinely applied to obtain discovery in the U.S. for use in non-U.S. litigation proceedings.

For a number of years, it was unclear whether "foreign or international tribunal" encompassed private international arbitrations. Various U.S. federal intermediate appellate courts had rendered different holdings on the issue creating what is colloquially known as a "split in the circuits."[2]

The "split in the circuits" has been resolved by the U.S. Supreme Court. In *ZF Automotive US, Inc. v. Luxshare, Ltd.,* __ U.S. __, 142 S. Ct. 2078 (2022), the Court held that a private commercial arbitral panel was not a "tribunal" under the statute. *Id.* at 2091.

The U.S. Arbitration Statutes

The U.S. arbitration statutes are found in Title 9 of the United States Code and consist of three chapters. Chapter 1 (9 U.S.C. §§ 1–16) is captioned "General Provisions" and is popularly known as the Federal Arbitration Act ("FAA"). Chapter 2 (9 U.S.C. §§ 201 – 208) is captioned "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" and is the U.S. statutory enactment of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "Convention").[3] Chapter 3 (9 U.S.C. §§ 301 – 307) is captioned "Inter-American Convention on International Commercial Arbitration."[4]

The FAA includes a discovery provision:

> The arbitrators…or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case…Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 7.

In contrast to the discovery devices and procedures available to parties in U.S. federal litigation, there are a number of limitations in FAA § 7, e.g., only the arbitrators can issue the summons and the evidence must be presented in a hearing before the arbitrators.[5] Indeed, such differences were part of the rationale of the Supreme Court's decision in *Luxshare:*

> Extending § 1782 to include private bodies would also be in significant tension with the FAA, which governs domestic arbitration, because § 1782 permits much broader discovery that the FAA allows. Among other differences, the FAA permits only the arbitration panel to request discovery…while the district courts can entertain § 1782 requests from foreign or international tribunals or any 'interested person,' 28 U.S.C. § 1782(a)…Interpreting § 1782 to reach private arbitration would therefore create a notable mismatch between foreign and domestic arbitration.

142 S. Ct. at 2088 (other citations omitted).

Turning to Chapter 2 of Title 9, it is important to note that under § 203 that an action or proceeding related to an arbitration agreement "falling under" the Convention is subject to the original jurisdiction of the U.S. district courts.[6] There is also a specific venue provision in the Chapter, § 204, which allows that actions brought under § 203 "may" be brought in any U.S. federal court "which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought…" Further, in accordance with § 208: "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."

Having discussed the statutory framework, we will now turn to the discussion of the recent California decision of interest.

***Jones Day v. Orrick, Herrington & Sutcliffe, LLP,* 42 F.4th 1131 (9th Cir. 2022)**

A recent decision of the U.S. Court of Appeals for the Ninth Circuit provides analytical support for the notion that the arbitrators participating in an arbitration falling under the Convention can use FAA § 7 to obtain discovery in the U.S. from third parties, even if the *situs* of the arbitration is outside the U.S.

In *Jones Day*, a partner (a German national) of that law firm based in its Paris office left and joined the law firm of Orrick, Herrington & Sutcliffe, LLP. The Jones Day partnership agreement provided for mandatory arbitration of disputes among its partners which arbitration was to be governed by the FAA. Washington, D.C. was the location of the arbitration designated in the agreement. Jones Day requested that the arbitrator issue a subpoena on Orrick for documents Jones Day asserted were material to the dispute. Initially, the subpoena required compliance in Washington, D.C. but Orrick refused to comply. The local court dismissed the enforcement action on jurisdictional grounds. *Id.* at 1134.

Jones Day took further action:

> Jones Day then requested that the arbitrator sit for a hearing in the Northern District of California and issue a revised subpoena requiring two Orrick partners residing in the Northern District to appear at a hearing in San Jose, California. The arbitrator granted Jones Day's request and issued the arbitral summonses. Orrick refused to comply with those summonses, so Jones Day filed this action to enforce them in the District Court for the Northern District of California.
>
> The District Court denied Jones Day's petition, concluding that it lacked authority to compel compliance with the summonses under FAA § 7, which it construed as providing that the district where the arbitrator sits is the only district in which a district court may compel attendance. *See* 9 U.S.C. § 7. Reasoning that 'it is undisputed that Washington D.C. is the seat of the underlying arbitration,' the district court rejected Jones Day's argument that an arbitrator can 'sit' in more than one location, and that for the purposes of the hearing in San Jose, the arbitrator would be sitting in the Northern District. Because it dismissed Jones Day's petition on venue grounds, the district court declined to decide whether Chapter Two of the FAA conferred subject matter jurisdiction over actions to enforce an arbitral summons to a third party.

Id.

In reversing the District Court's decision, the Ninth Circuit found the following:

- The petition to compel compliance with the subpoena is an action or proceeding falling under the Convention. *Id.* at 1135.
- The arbitration agreement itself falls under the Convention. *Id.*
- "Neither the Convention nor Chapter Two contains any language excluding the use of petitions to enforce arbitral summonses. There is no language in either that limits the tools that may be utilized in international arbitrations in ways domestic arbitrations are not so limited. The only limitation is set forth in § 208, which as the Supreme Court noted in *GE Energy [Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC,* ___ U.S. ___, 140 S. Ct. 1637, 1644-45, 207 L.Ed.2d 1 (2020)], disallows only those processes provided for in domestic arbitrations under Chapter One that conflict with Chapter Two or the Convention. 9 U.S.C. § 208...Far from conflicting with the Convention, judicial enforcement of an arbitrator's summons only aids in the arbitration process. We therefore conclude that 'Section 7 [of the FAA] is a nonconflicting provision in Chapter 1 that residually applies through Chapter [ ] 2.' Restatement (Third) U.S. Law of Int'l Comm. Arb. § 3.4(e) (Am. Law Inst., Prop. Final Draft (April 24, 2019))("Restatement Prop. Final Draft") (citing 9 U.S.C. §§ 203 and 208). *Id.* at 1136.
- "We hold that a federal court has original jurisdiction over an action or proceeding if two requirements are met: (1) there is an underlying arbitration agreement or award that falls under the Convention, and (2) the action or proceeding relates to that arbitration agreement or award....Thus, under 9 U.S.C. § 203, the district

court had subject matter jurisdiction to enforce the petitions to comply with the arbitral summonses." *Id.* at 1138-39 (citations omitted).

- Concerning venue, § 204 is a "permissive" venue statute, and when read in conjunction with the general federal venue statute, meant that the Northern District of California was a proper venue to enforce the summonses. *Id.* 1140-42.
- As such, "we reverse and remand with instructions to enforce Jones Day's petitions to compel Orrick and its partners to comply with the arbitral summonses." *Id.* at 1142.

In summary, Jones Day is an important jurisdictional decision. Prior to its issuance "no federal court of appeals had explicitly held that an action to enforce an international arbitral subpoena constitutes an action 'falling under the Convention' for the purpose of federal subject matter jurisdiction under §203 and that such a subpoena may be enforced under § 7 of the FAA."[7]

Conclusion

The holding in *Jones Day* is centered on the international nature of the underlying arbitration.

While the contractually-designated place of arbitration in *Jones Day* was Washington, D.C., there should not have been any difference in the outcome if the designated place of arbitration was a non-U.S. location, assuming the "falling under" factors had been met.

As a practical matter, if the arbitrators in a non-U.S. location determined that a subpoena directed against a third party in the U.S. was appropriate, at a minimum it would mean that those arbitrators (or at least one of them in a multiple arbitrator situation) would need to be present in the U.S. district in which the subpoena target is resident and the evidence would need to be presented to the arbitrators in a live physical hearing.[8]

Some cautionary notes:

- While there is academic support for the procedure described here,[9] as far as can be ascertained, the procedure has yet to be tested in litigation.
- Given the differing treatment of various arbitral discovery issues in the U.S. federal courts, prior to the commencement of any such procedure, careful consideration of the specific holdings in the target jurisdiction would need to be reviewed.
- It is fair to assume that the target of the subpoena (as in *Jones Day*) will resist any enforcement action, which as in that case, could include appellate proceedings: the timeline of such proceedings could well be a year or more.

All that said, if the evidence located in the United States is crucial and the matter of sufficient importance to justify moving the arbitrators to the target jurisdiction, the *Jones Day* procedure is a viable action and worthy of being asserted and tested in the U.S. courts.

* This article was originally published on May 3, 2023 by Hohenstein & Parkinson as a Legal Alert on its website and is reprinted here with permission: https://www.hplawnyc.com/publications/. Information contained in this Legal Alert is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem, and it should not be substituted for legal advice, which relies on a specific factual analysis. Moreover, the laws of each jurisdiction are different and are constantly changing. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. If you have specific questions regarding a particular fact situation, we urge you to consult the authors of this publication or other competent legal counsel.

1 28 U.S.C. § 1782(a).
2 *Compare Servotronics, Inc. v. Boeing Co.,* 954 F.3d 209, 216 (4th Cir. 2020) (UK arbitral panel was a "tribunal"); *Abdul Latif Jameel Transp. Co. v. FedEx Corp.,* 939 F.3d 710, 722 (6th Cir. 2019) ("tribunal" encompassed privately contracted-for arbitral body) with *Servotronics, Inc. v. Rolls-Royce PLC,* 975 F.3d 689, 696 (7th Cir. 2020) (statute did not apply to private foreign arbitration); *Republic of Kazakhstan v. Biedermann Int'l,* 168 F.3d 880, 883 (5th Cir. 1999)(private international arbitration body not a "tribunal"); *National Broadcasting Co. v. Bear Stearns & Co.,* 165 F.3d 184, 191 (2d Cir. 1999) ("tribunal" does not include private commercial arbitration).
3 21 U.S.T. 2517, T.I.A.S. No. 6997.
4 Chapter 3 is not relevant to the issue addressed in this Legal Alert.
5 The details and precedent concerning the interpretation and use of FAA § 7 are beyond the scope of this Legal Alert.
6 "For an arbitration agreement to be covered by the Convention, four requirements must be met: (1) there must be an agreement in writing to arbitrate the dispute; (2) the agreement must provide for arbitration in the territory

of a Convention signatory; (3) the agreement must arise out of a commercial legal relationship; and (4) at least one party to the agreement must not be an American citizen." *Stemcor USA Inc. v. CIA Siderurgica do para Cosipar,* 927 F.3d 906, 909-10 (5th Cir. 2019)(citations omitted). Moreover, there is no requirement that <u>any</u> party to the arbitration agreement be a U.S. citizen. *See, e.g., Rhone Mediteranee Compagnia Francese Assicurazioni e Riassicurazoni v. Achille Lauro,* 712 F.3d 50, 52 (3d Cir. 1983) (all parties to the contract falling under the Convention were Italian).

7 T. Meshel, "Enforcing international arbitral subpoenas in the United States", *Arbitration International,* 2023, XX, 1, 11 (advance access to publication, 16 March 2023).

8 This statement is based on various court precedents holding that the physical hearing requirement is not met by way of a videoconference hearing. *See, e.g., Broumand v. Joseph,* 522 F.Supp.3d 8, 23-24 (S.D.N.Y. 2021) (a videoconference does not meet the physical hearing/geographic limits requirements of arbitral subpoenas).

9 T. Meshel, *supra* at 16-18.

Corporación AIC v. Hidroeléctrica: Which Rules Govern Annulment of International Awards and Does It Matter?*

By Rowland Edwards, Associate & Philip Vagin, Senior Associate, Zeiler Floyd Zadkovich LLP, New York

The recent decision by the 11th Circuit Court of Appeals in *Corporación AIC, SA v. Hidroeléctrica Santa Rita S.A.,* 2023 WL 2922297 (11th Cir. 2023) introduces a profound shift in the grounds available for vacating so-called "non-domestic" arbitral awards. This article examines the 11th Circuit's departure from its previous precedent and explores the implications of this ruling for parties involved in international arbitrations seated in Florida, Georgia and Alabama.

Facts

The case emerged from a Miami-seated arbitration between two Guatemalan companies. In March 2012, Corporacion AIC was contracted to build a hydroelectric power plant for Hidroelectrica in Guatemala. However, in October 2013, Hidroelectrica issued a *force majeure* notice, halting the project. Subsequently, Hidroelectrica commenced ICC arbitration, seeking to recover its advance payments to AIC. In response, AIC counterclaimed for damages, costs, and other expenses.

The arbitration in Miami, Florida, resulted in a divided panel ordering AIC to refund approximately $7.435 million in advance payments to Hidroelectrica, while permitting AIC to retain about $3.2 million that it had earned on the contract.

Following an unfavorable award, AIC sought to vacate (annul) it, alleging that the arbitrators exceeded their powers – a ground for annulment set out in Chapter 1 of the Federal Arbitration Act ("FAA"), but not mentioned in the New York Convention ("the Convention").

Types of Arbitral Awards in the U.S.

By way of background, U.S. law recognizes three types of arbitral awards (unlike many other countries).

The first type are **domestic awards,** which are issued in U.S.-seated arbitrations in disputes entirely between U.S. citizens and involving no foreign elements. The U.S. court may vacate (or annul) these awards and it can do so on the grounds set out in Chapter 1 of the Federal Arbitration Act ("FAA") at 9 U.S.C. §10.

The grounds in Chapter 1 are: (1) the award being procured by corruption, fraud, or undue means; (2) evident partiality or corruption in the arbitrators, or either of them; (3) the arbitrators being guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; (4) any other arbitrator misbehavior by which the rights of any party have been prejudiced; (5) the arbitrators exceeding their powers, or (6) so imperfectly executing them that a mutual, final, and definite award upon the subject matter submitted was not made.

In addition to expressly enumerated grounds for annulment, U.S. courts have the power to vacate domestic awards if there has been "manifest disregard of the law" by the arbitrators. This may allow the U.S. court to look into the merits of the underlying dispute submitted to arbitration.

Second, there are **foreign awards.** These are issued in arbitrations seated outside of the U.S. The U.S. court only exercises "secondary" jurisdiction for these awards – it cannot properly vacate (or annul) them. Rather, the U.S. court can only decide whether to recognize or enforce these foreign awards in the U.S. or not. It may do so on the grounds set out in the New York Convention. In turn, the Convention is incorporated into U.S. law through Chapter 2 of the FAA at 9 U.S.C. §201.

The Convention grounds are: (1) incapacity of the parties, (2) invalidity of the arbitration agreement, (3) failure to give proper notice, (4) inability to present one's case, (5) the award going beyond the scope of submissions, (5) composition of the tribunal not being in accordance with the parties' agreement, (6) award being vacated or not having become binding, (7) the dispute not being capable of submission to arbitration, and (8) public policy.

The grounds in the Convention are textually different from those in Chapter 1 of the FAA and should not in principle allow the award to be questioned on the merits if the arbitrators misapplied the substantive law governing the underlying dispute.

Lastly, there are **non-domestic awards.** Like domestic ones, these are also issued in U.S.-seated arbitrations, but the dispute there involves a foreign party or other foreign element. Prior to the judgment in *Hidroelectrica,* the U.S. appellate circuits were split on the question of which set of rules governs annulment of such awards – Chapter 1 of the FAA or the Convention.

In *Hidroelectrica,* both parties acknowledged that their arbitral award was non-domestic, as it was issued in the U.S. and involved a dispute between two non-U.S. corporations.

District Court Judgment

The District Court for the Southern District of Florida dismissed AIC's request, relying on prior 11th Circuit precedent from cases called *Industrial Risk* and *Inversiones.*

Industrial Risk, decided in 1998, established that when a party seeks to overturn a non-domestic award, a U.S. district court can only consider grounds set in Article V of the Convention. The purpose of the Convention is to encourage recognition and enforcement of international arbitral awards. The Convention specifies seven defenses against enforcement of **foreign** awards, considered exclusive under § 207 of the FAA. In the 11th Circuit after *Industrial Risk,* these defenses have been interpreted to also serve as the only grounds for vacating a **non-domestic** award. Over 20 years later, the *Inversiones* case upheld *Industrial Risk* as binding authority for the 11th Circuit.

Following both *Inversiones* and *Industrial Risk,* the District Court in *Hidroelectrica* ruled that grounds for vacating a non-domestic award are limited to those in Article V of the Convention. Consequently, the District Court did not investigate whether the arbitral tribunal had "exceeded its powers" (as this ground of review did not exist under the Convention).

The 11th Circuit Judgment

In response to the District Court's decision, the 11th Circuit granted a rehearing *en banc,* in which it overruled *Inversiones* and *Industrial Risk.* The Circuit Court ruled that the grounds for vacating non-domestic awards were to be found in Chapter 1 of the FAA, and not in the Convention.

In reaching this decision, the court reasoned that Chapter 2 of the FAA, which implements the Convention, does not offer grounds specifically for vacating (annulling) awards. The power to vacate belongs to courts in whose territory the arbitration was seated. The court overseeing such arbitrations then can exercise "primary" jurisdiction over them (including by being able to declare the award a nullity).

However, the Convention by itself does not deal with **vacating or annulling** awards by courts of the country where the award was originally issued. Rather, the Convention governs **recognition and enforcement** of awards issued in country A by courts of country B (which is a different process). The court in country B cannot annul or set aside a foreign award – it can only decide whether to recognize or enforce it or not. The court in this scenario exercises "secondary" jurisdiction over the award.

Since the Convention and by extension Chapter 2 of the FAA does not deal with annulment of awards, the 11th Circuit Court concluded that it is the grounds in Chapter 1 of the FAA that should govern non-domestic awards (as a fallback, default option).

Implications

The decision in *Hidroelectrica* aligns the 11th Circuit with the 2nd, 3rd, 5th, and 7th Circuits, which have all held in the past that the grounds for vacatur in Chapter 1 of the FAA apply to non-domestic awards. It confirms that domestic law serves as a gap-filler and that the New York Convention does not deal with annulment of awards. It also highlights the difference between recognition/enforcement and vacatur, acknowledging the distinct roles of primary and secondary jurisdictions in post-award judicial proceedings.

This alignment resolves the circuit split and brings more uniformity to the procedures for annulling U.S.-seated arbitral awards across the country. Arguably, it should bolster legal certainty and assure a more consistent treatment of arbitral awards issued within the U.S. While Chapter 1 of the FAA now provides uniform grounds for vacatur of **domestic** and **non-domestic** awards, the grounds enumerated in Article V of the Convention remain crucial for refusing recognition and enforcement of **foreign** awards.

There is the other side of the coin, though. The outcome in *Hidroelectrica* now means that an arbitration that is seated in the 11th Circuit and involves a foreign party does not benefit from the more internationally well-known (and arguably more limited) grounds for questioning the award under the Convention. Rather, the (arguably broader) U.S. domestic grounds for annulment apply, regardless of whether the U.S.-seated arbitration is purely domestic or involves a foreign element.

The distinction may be important because Miami and Atlanta are located in the 11th Circuit and are important hubs for international arbitration which have previously benefitted from the more limited grounds of judicial oversight. However, the practical result of the different rules applying remains to be seen.

It may turn out to be minimal: it has been suggested that despite textual differences, the grounds in Chapter 1 of the FAA (as construed by U.S. courts) and the New York Convention overlap to a large extent. It may, however, result in more awards being vacated and the 11th Circuit becoming a less popular place for international arbitration. In this connection, it would be interesting to see empirical research comparing the number and success rate of annulment applications before and after *Hidroelectrica* in Florida, Georgia and Alabama.

* **Editors' Note** – The 11th Circuit's *Hidroelectrica* decision – before rehearing – was referenced on page 12 of our March 2023 issue in the "Arbitration in the Courts Report" summary of the Ninth Circuit case of *HayDay Farms, Inc. v. FeeDx Holdings,* Inc., 55 F.4th 1232 (9th Cir. 2022). In the decision, the Ninth Circuit held that the FAA Chapter 1 grounds are available to vacate New York Convention awards seated in the U.S.; with its latest decision after rehearing the case, the 11th Circuit has joined the Ninth, Second, Third, Fifth, Sixth, Tenth and D.C. Circuits.

Deductions from Hire: Did Hire Remain Payable, in the Absence of Owners' Agreement, When Vessel Was Allegedly Off-Hire at the Instalment Date?*

By Monika Humphreys-Davies, Associate, Stephenson Harwood Middle East LLP, Dubai

Earlier this year the English Commercial Court had an opportunity to consider the construction of a clause dealing with deductions from hire in *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2023] EWHC 105 (Comm), which was an appeal from a partial final arbitration award on a question of law. The Court found that non-payment of hire amounted to a deduction from hire if the vessel was allegedly off-hire at the instalment date where a charterparty clause provided that no deductions from hire, including for off-hire or alleged off-hire, may be made without the shipowners' consent. Albeit fact specific, as charterparties more frequently contain provisions limiting charterers' rights to withhold hire payments, this is a welcome analysis of how such provisions are interpreted by the Courts.

Facts

Bulk Trident Shipping Ltd ("**Owners**") chartered their vessel ANNA DOROTHEA (the "**Vessel**") to Fastfreight Pte Ltd ("**Charterers**") for a trip time charter for the carriage of a bulk cargo from East Coast India to China pursuant to a charterparty dated 13 April 2021 on an amended NYPE 1993 form (the "**Charterparty**").

Charterers agreed to pay hire at the rate of US$20,000 per day, every five days in advance. Clause 11 (Hire Payment) provided, *inter alia*:

> *"... Notwithstanding of the main terms and provisions hereof no deductions from hire may be made for any reason under Clause 17 or otherwise (whether/ or alleged off-hire underperformance, overconsumption or any other cause whatsoever) without the express written agreement of Owners at Owners' discretion. Charterers are entitled to deduct value of estimated Bunker on redelivery. Deductions from hire are never allowed except for estimated bunker on redelivery..."* ("**Line 146**")

Clause 17 of the Charterparty was the off-hire clause which allowed certain expenses and costs to be deducted from hire, but only after an agreement with Owners on the figures had been reached.

Clause 23 of the Charterparty granted Charterers a lien on the Vessel for all monies paid in advance and not earned and required any advance and overpayment to be returned at once.

The Vessel loaded a cargo of iron ore pellets in India for carriage to China and was ordered by Charterers to sail to Linqiao for discharge. She arrived off the discharge port on 4 May 2021, but was not able to obtain a berth. The cargo was not discharged and the Vessel not redelivered to Owners until 28 August 2021.

Other than for a period of five days, Charterers did not pay any hire for the Vessel between 4 May 2021 and 28 August 2021, arguing that the Vessel went off-hire on 4 May 2021 and remained so thereafter because several crew members had Covid and that allowed them to place the Vessel off-hire under the terms of the Charterparty.

Owners disputed that the Vessel was off-hire for any of the period at issue and applied for a partial final award of hire in the sum of US$2,147,717.79, with their position being that if the off-hire was disputed by Owners then Charterers could not rely on periods of alleged off-hire to avoid paying hire, relying in particular on Line 146.

The arbitrators agreed with Owners' interpretation of the provision and made a partial final award, awarding Owners US$2,147,717.79 by way of hire. However, the Tribunal did so without prejudice to Charterers' right to counterclaim the whole or part of that sum back.

Charterers appealed the partial final award. Charterers' main argument was that the arbitrators had focused on the commercial objective of the clause, as opposed to the actual words used. Charterers argued that looking at the words used, Line 146 was an anti-set off provision preventing them from setting off amounts against accrued hire, but it did not restrict them from not making a hire payment where their obligation to pay hire had not accrued. Charterers focused their argument on the meaning of the word "deductions", which they said presupposes that a sum is due and that deductions can only be made where there is something to deduct from. In support of their position Charterers, among other things, also sought to rely on the judgment handed down in *The Lutetian,* [1982] 2 Lloyd's Rep. 140, where it was found that when the vessel was off-hire at the date on which a hire instalment would otherwise fall due, the obligation to pay hire was suspended.

Decision

Having considered the Charterparty terms and the facts, the Judge dismissed the appeal and agreed with the conclusion of the Tribunal that in this case, non-payment of hire amounted to a deduction where the Vessel was allegedly off-hire at the instalment date and the off-hire was disputed, given the wording of Line 146. As to Charterers' reliance on *The Lutetian,* that was distinguished as in that case there was no equivalent of a Line 146 nor was there any dispute as to whether the vessel was off-hire.

In giving his judgment, the Judge analysed the language used by the parties, as read in the context of the terms of the Charterparty as a whole and concluded that the restriction on "deductions" in Line 146 applied to any exercise of rights that would otherwise arise under or by reason of Clause 17 to reduce a hire payment based on the Vessel being off-hire.

This conclusion was further supported by the use of the word "alleged" to indicate that the clause was designed to cater for circumstances where there was a question mark over whether hire was payable and in those circumstances to require for any hire to be paid first and then any dispute or argument to be resolved about it later.

The Judge also noted that the set-off right restriction approach advanced by Charterers would have significantly undermined the purpose of Line 146 and would have the effect potentially quickly leading to cessation of hire payments on their due dates, making a restriction on offsets largely irrelevant.

In addition, the interpretation adopted by the Judge made sense in the commercial context so as prevent Owners from losing critical hire income, which would be needed to meet Owners' usual expenses of running and financing the Vessel, based on potentially questionable allegations that the vessel was off-hire. However, the Judge recognised that Owners did not have an unfettered discretion to decide whether or not the Vessel was off-hire – they had to exercise any discretion rationally and for contractually correct purposes – and under Clause 23 Charterers did have a cross-claim in debt for any overpaid hire, which was secured by a lien over the Vessel.

Comment

Whilst each case will turn on its own specific facts, as the outcome of this case clearly illustrates to anyone chartering in vessels on a time charter basis and wanting to have a right to make deductions from hire or a right to withhold payment of hire, clear and precise language would need to be used to achieve that effect and to ensure that the clause is actually triggered in the circumstances intended and in a desired manner.

The judgment also very helpfully summarises at paragraphs 21 and 23 the ordinary principles of contract interpretation and generally accepted principles in relation to payments of hire under time charterparties and is well worth a read by anyone involved in negotiating and drafting the payment of hire terms.

Please click here for a copy of the full judgment.

* This article was originally published on the Stephenson Harwood website's Commodities in Focus Weekly newsletter, Issue 26 on April 25, 2023 and is republished here with permission: https://www.shlegal.com/docs/default-source/news-insights-documents/2023/cif-weekly-issue-26.pdf?sfvrsn=c34bf65b_0

Blasket: Is Enforcement of Intra-EU Awards before U.S. Courts at Risk?*

By Nick Lawn, Partner, Van Bael & Bellis (London) LLP and Trajan Shipley, Associate, Van Bael & Bellis, Brussels, Belgium

Introduction

On 29 March 2023, in *Blasket Renewable Invs., LLC v Kingdom of Spain,* 21-CV-3249 (RJL) (March 29, 2023), Judge Richard Leon of the D.C. District Court dismissed an investor's action to enforce an intra-EU arbitral award against Spain for lack of jurisdiction under the Foreign Sovereign Immunities Act ("**FSIA**"). His decision was based in part on EU law including the decisions of the Court of Justice of the European Union ("**CJEU**") in *Achmea and Komstroy.*

This Client Alert provides a brief overview of the *Blasket* decision set in the wider context of other attempts to enforce intra-EU awards in the United States and considers whether intra-EU awards should now be treated as unenforceable in the United States.

Background

In its 2018 judgment in *Achmea*, the CJEU held that investor-State arbitration clauses in intra-EU bilateral investment treaties ("**intra-EU BITs**") are incompatible with EU law and therefore inapplicable. In its later 2021 judgment in *Komstroy,* the CJEU extended that finding to intra-EU disputes under the Energy Charter Treaty ("**ECT**"). It also confirmed that EU law becomes applicable to proceedings for the recognition and enforcement of awards where the arbitration is seated in an EU Member State.

These judgments of the EU's highest court were also accompanied by the so-called Termination Agreement, an agreement for the termination of intra-EU BITs which was signed by 23 EU Member States. The Termination Agreement confirmed the binding effect of the *Achmea* decision and committed EU Member States to seek to annul any awards based on intra-EU investment treaties. Several national court decisions have also followed annulling intra-EU awards based upon the *Achmea/Komstroy* authority.

Partly as a result of this enforcement landscape, EU investors have increasingly resorted to the U.S. courts to seek enforce intra-EU awards. The U.S. courts have generally allowed enforcement by accepting jurisdiction and dismissing any claims to review or vacate the award.

U.S. courts' approach to enforcement of intra-EU awards

U.S. courts have regularly rejected arguments by EU Member States and the European Commission ("**Commission**") to vacate intra-EU awards on EU law grounds. This has made the U.S. an attractive jurisdiction for EU investors seeking to obtain compensation under arbitral awards in intra-EU cases.

For example, in *Micula,* the U.S. courts refused to vacate an ICSID award on a number of occasions. In 2015, the U.S. District Court for the Southern District of New York dismissed objections based on the EU's sovereign interests. In 2019, the U.S. District Court for the District of Columbia dismissed the relevance of EU law and the *Achmea* judgment for the purposes of enforcing the same award.

In enforcing intra-EU awards, U.S. courts have generally taken account of their obligation under Article 53 of the ICSID Convention not to review the award. They have also consistently asserted their jurisdiction to enforce awards under the FSIA. The FSIA grants States sovereign immunity in actions before U.S. courts but provides an exception for the confirmation of an arbitral award.

Diverging approaches towards EU law considerations

On 29 March 2023, in B*lasket Renewable Invs., LLC v Kingdom of Spain,* Judge Richard Leon of the DC District Court declined to enforce an intra-EU arbitral award on grounds that EU law rendered the arbitration agreement invalid.

The underlying dispute arose out of Spain's decision to repeal certain subsidies in the renewable energy sector. As a result, certain Dutch investors claimed that Spain had by its measures violated the ECT and issued UNCITRAL arbitration proceedings. The tribunal (consisting of Gabrielle Kaufmann-Kohler (Presiding Arbitrator), Charles N. Brower and Judge Bernardo Sepúlveda-Amor) in its award ordered Spain to pay compensation and the investors then sought to enforce the award in the United States.[1]

In its objections to enforcement, Spain argued that it was immune from enforcement under the terms of the FSIA. Spain argued that, in order for the FSIA's arbitration exception to apply, it was necessary for the investors to show that there was a valid arbitration agreement in existence between them. Based on EU law, Spain claimed no such arbitration agreement could exist and therefore the Court could not have jurisdiction.

Referring to and relying upon the *Komstroy* judgment, Judge Richard Leon reasoned that no valid arbitration existed between Spain and the investors based on the primacy of EU law over incompatible international agreements such as the ECT. The Judge also concluded that subsequent interpretative practice shows that EU Member States understood their obligations under the ECT's arbitration clause without prejudice to their EU law obligations.

The Judge held that, because Spain lacked legal capacity under EU law to make an offer to arbitrate to the EU investors, there was no valid arbitration agreement and the arbitration exception under the FSIA could not apply. As a result, it declined jurisdiction to enforce the award.

The decision illustrates the current split in U.S. case law in its approach to enforcing intra-EU awards. A month prior to the decision in *Blasket,* Judge Tanya Chutkan of the D.C. District Court held in *9REN Holding S.A.R. L. v. Kingdom of Spain,* 19-CV-0187 (TSC) (Feb. 15, 2023) and *NextEra Energy Global Holdings B.V. v. Kingdom of Spain,* 19-CV-01618 (TSC) (Feb. 15, 2023) that she *did* have jurisdiction under the FSIA to enforce intra-EU arbitral awards. For Judge Chutkan, the question of Spain's legal capacity under EU law to make an offer to arbitrate is one of arbitrability. As that is a merits issue, U.S. courts should defer to the tribunal's findings. Judge Leon, by contrast, considers it to be a question of the validity of the arbitration agreement, which should be resolved by deference to the applicable law, in this case the ECT interpreted in the light of EU law.

Conclusion

This is the first time that a U.S. court has refused to enforce an intra-EU arbitral award based upon the *Achmea/Komstroy* cases. This is clearly significant and a development which may signal that investors seeking to enforce intra-EU awards in the United States are going to face similar legal obstacles to those already present within EU jurisdictions, particularly where the courts feel bound to apply EU law in relation to the validity of the underlying arbitration agreement.

However, the *Blasket* decision remains an exception to the general trend in U.S. courts, as they typically tend to apply the arbitration exception under the FSIA and enforce intra-EU awards. Furthermore, *Blasket* is a first instance decision and is likely to be appealed to the U.S. Court of Appeals for the D.C. Circuit. The D.C. Circuit Court will then have a chance to clarify whether Judge Leon's approach was correct or should be rejected.

In sum, claimants in intra-EU disputes should continue to monitor the developments in the DC Circuit with extreme interest. It will be important to see how the case law develops and whether the *Blasket* approach or the *NextEra* approach is preferred. This may have a significant impact on whether investors (and their funders) continue to prosecute intra-EU investment claims.

1 *AES Solar and others (PV Investors) v. The Kingdom of Spain,* PCA Case No. 2012-14. The investors transferred their interest in the award to Blasket Renewable Investments LLC following oral arguments in the DC District Court, who acts now as plaintiff in the enforcement proceedings.

* This Client Alert was originally published on the Van Bael & Bellis website on 24 April 2023 and is republished here with permission: https://www.vbb.com/insights/blasket-is-enforcement-of-intra-eu-awards-before-us-courts-at-risk

Editors' Note: *Blasket, 9 REN* and *Nextera* are all on appeal to the U.S. Court of Appeals for the District of Columbia.

SMA Award Service ... At-a-Glance

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

Any charter party negotiation begins with the parties having reasonable expectations of performance. At the outset, both parties have requirements that do not necessarily align, with each party seeking the most favorable terms. The negotiation is primarily about managing risk, which often includes adding, deleting, or amending provisions concerning events for which a party is not responsible or only partly responsible. Negotiating from weakness or time pressure, overlooking provisions, or less than honorable behavior all contribute to the risk the parties assume in the final agreement. Once the voyage begins, however, circumstances often change, in ways that generally have not been fully considered or contemplated at the time the charter is concluded. A few examples include the vessel missing its laycan, the charterer failing to provide cargo, or the proper documents. In the face of such unanticipated events, the first step is for the parties to make reasonable efforts to remedy the issue. If these efforts do not succeed, the next step usually involves reviewing the contract terms and conditions to assess and determine the parties' respective responsibilities. Sometimes the outcome boils down to canceling the contract and testing your decision to do so in court or arbitration. Below are a few examples of SMA arbitrations addressing such choices.

M/V PRETTY LADY (SMA 4373, September 27, 2019) (David Martowski, John Ring, Molly McCafferty)

This arbitration dealt with owners claiming that the charterer wrongfully canceled the charter party. The MV PRETTY LADY [hereinafter "vessel"] was fixed to carry a full cargo [34,000 Mt] of DRI "A" [Direct Reduced Iron "A"], which is a hot iron ore molded briquette [hereafter "cargo"], from Venezuela to Turkey. The charterer was a commodity trader with extensive experience purchasing cargo from Venezuela and who, in this instance was awarded a tender for the subject cargo, loading from Paula, Venezuela. The charterer then sold the cargo to Turkish buyers, concluding a charter party with the owner to deliver the product. At the time of fixing, the vessel was off West Africa and sailed toward Venezuela to load after the parties concluded the charter.

Two days after concluding the charter party, as the vessel was sailing toward the load port, the cargo supplier canceled the sale. When the vessel arrived at the load port, the owner was notified of a potential problem with the cargo and was instructed by the charterer not to proceed up the Orinoco River to load. The vessel waited about one week while the charterer attempted to secure alternative cargo to meet its commitment. The charterer began negotiating an opportunity for another cargo from a different Venezuelan port, but as the negotiations progressed, the cargo availability dates continued to slip, with a cargo ultimately becoming available only one month later. When it became evident that even this cargo was not an option, the charterer canceled the charter party, citing a force majeure event. The owner then began to look at other options for the vessel to mitigate the damage, ultimately substituting the vessel for another, less profitable voyage from Venezuela to Brazil.

The owner claimed for lost revenue from the canceled voyage calculated by subtracting the mitigating voyage's net result from the original charter's expected result. The owner also claimed detention for the period that the vessel was idle before its substitute employment. In addition to the charterer's contention that a force majeure event prevented its performance, the charterer claimed that the vessel was unseaworthy, asserting that it was incapable of carrying the contracted cargo due to its heat.

During the proceedings, it turned out that the charterer's supply contract had been canceled because the charterer attempted to renegotiate better terms with its supplier. However, the charterer wanted to maintain the vessel because the charter rate was relatively cheap in a rising freight market and needed to supply cargo to its Turkish customer. The panel ruled in the owner's favor on all points. The panel did not find that the charter party's force majeure clause was applicable, stating that commercial and strategic decisions gone awry do not make for a force majeure event excusing the charterer's performance. Addressing the unseaworthiness claim, the panel noted that the charterer only raised this point for the first time in its Post-Hearing Memorandum and ruled that it failed to provide evidence supporting its claim.

M/T CLIPPER KARINA (SMA 4274, September 22, 2015) (Manfred Arnold, Lucienne Bulow, David Martowski)

This arbitration dealt with a dispute involving vessel tank cleaning which ultimately led to cancellation of the charter party. The MT CLIPPER KARINA [hereinafter 'vessel'] was fixed on December 15, 2011 for a part cargo of 10,000 Mt paraxylene ("PX"), loading at Beaumont, Texas, for discharge at one safe port/berth in Korea, Taiwan or the PRC. The vessel laycan was 28/31 December with an ETA load of December 30. In support of this ETA, the owner advised that the vessel was heading to Houston to discharge a cargo of lube oil, with an ETA of December 26. The owner expected to complete discharge on December 28 and, factoring in cleaning time, expected that it would be ready to load on December 30.

On December 28, the owner requested an extension of the cancelling date to January 5, citing that berth occupancy delayed the discharge at Houston. The owner revised the load-ready date at Beaumont to PM January 3rd/AM January 4th. The delay in loading to the new year caused problems for the charterer's supplier as the cargo would be assessed an inventory tax due to the product remaining in the storage tank at year-end. Also, the supplier faced possible containment issues raising the possibility of the need to lower PX production. The charterer commercially resolved the tax issue with its supplier and began to look at loading the product onto barges to alleviate any possible storage issues. The vessel encountered further delays prompting the owner to ask for another extension to January 7. The charterer granted both extensions.

The vessel berthed on January 6, tendered its NOR, and began loading the first foot of cargo for sampling. The samples failed and were yellow in color. After the supplier refused to blend additional cargo into the tank where the first foot had been loaded to dilute whatever had created the off-color result, the vessel was ordered off the berth to reclean, returning three days later for another wall-wash ("WW") test. All tanks failed again due to samples being off-color. At this time, the supplier again expressed its concern with containment issues, stating that January 14th was the critical date. The charterer began looking for barges.

The owner called its P&I Club and its surveyor to inspect the tanks, who also failed all tanks on appearance, particulate matter, and chlorides. Additional cleaning followed with another inspection performed three days later, only to fail again on color. At this time, the owner notified the charterer that the vessel had performed three extended tank cleanings, each time failing tank inspections and stated that further tank cleaning was futile. The owner urgently requested the charterer to cancel the charter party without recourse to either party and to discharge the off-spec first-foot of 36 Mt PX into trucks.

As a final attempt, the following day, the vessel cleaned the cargo tanks one last time, taking a methanol WW test, where the samples continued to be yellowish. The owner insisted that the charterer cancel the charter party to mitigate costs, which the charterer did, holding the owner responsible. The charterer then loaded the cargo into six barges to avoid containment issues and arranged subsequent loading onto a replacement vessel.

The charterer contended that the owner breached the charter party by failing to arrive within the laycan and to provide suitable tanks. The charterer held the owner responsible for all direct damages resulting from the owner's breach, including payment of the inventory tax representing 2% of the purchase price, barging costs, and additional freight charges. To reaffirm its claim, the charterer highlighted the owner's request to cancel the charter party, saying further cleaning would be pointless.

The owner countered by claiming damages for the charterers' wrongful cancellation of the charter party. The owner denied it breached the charter party, asserting that there was no evidence to suggest that the failure of the first foot sample was caused by any fault of the vessel. Instead, the owner asserted that the cargo "froze" in the shoreline resulting in the "yellowish color," noting that product loaded onto one barge was also yellow.

The owner added that if the supplier had agreed to load the additional product, as the owner requested, it would have successfully blended the cargo to specification. Further, the owner invoked Clause 48, entitled *Force Majeure Clause,* contending that its provisions provided a complete defense to any liability, as the tanks failed despite the owner's thorough exercise of due diligence to clean them to receive their intended cargo properly. The owner also requested that the panel draw a negative inference from the charterer's failure to produce the shore tank test results and line samples that the supplier analyzed.

The majority ruled that this was a burden of proof claim, where the charterer needed to show that the cargo supplied, supported by the surveyor's report, was on specification. The panel ruled in the owner's favor, stating the charterer could not meet this burden because proper shoreline sampling was not and could not be done. Furthermore, the panel noted that even if the vessel had arrived within the originally agreed laycan and it was possible to double the loading rate, the cargo would not have completed loading by year-end. The dissenting opinion[1] concluded that not only had the vessel arrived late, but, more importantly, it failed to pass inspection. The vessel was never clean enough to load its intended cargo. The dissenter held that the charterer did meet its burden of proof, providing independent evidence that the vessel tanks were unsuitable and that it ultimately mitigated its damages by chartering replacement barges and vessels to ship the cargo. Nor did the dissenter agree that the product loaded onto the barges was also off-spec, stating that the cargo loaded onto the six barges and ocean-going vessel was ultimately found to be on-spec.

M/T GOLDEN YOSA (SMA 4203, March 28, 2013) (A. J. Siciliano; Jack Berg; David P. Langlois)

This arbitration dealt with canceling a vessel charter party due to a commodity sale gone sideways. The initial buyer, Itec ("buyer"), purchased 1.2 million gallons of ethanol FOB Texas City for lifting within 8/31 August 2010. The parties finalized the deal on August 5, when concurrent with its purchase, the buyer re-sold the cargo to a counterparty, Bunge, ("counterparty") who nominated the MT GOLDEN YOSA [hereinafter "vessel"] to carry the cargo to the Philippines. The sale contract terms provided for the buyer to give the seller ten [10] days' notice of the vessel's arrival, with a five [5] day laycan. Although these terms would indicate a laycan commencement of August 16, the buyer asked if loading could be advanced to August 11 to comply with its charter party agreement. The seller noted no objection.

The seller claimed that the buyer failed to open a satisfactory "documentary" letter of credit [LOC], the consequence of which was that the buyer could not provide cargo to the buyer's counterparty. The purchase terms called for the buyer to present a "documentary" LOC to the seller, at a bank and in a form acceptable to the seller. The buyer's position was that the seller engaged in a pattern of unreasonable and bad faith demands that culminated in the wrongful termination of the purchase contract, whereafter the counterparty was forced to cancel the vessel's charter.

The buyer sent its "documentary" LOC to its seller when, at the outset, the seller began requesting additional documentation, starting with a request for a "standby" LOC as well. The buyer declined as this document would conflict with the terms of the agreed "documentary" LOC. The seller went on to add a credit risk requirement and, to speed the process along, suggested it speak to the buyer's counterparty and, if they deemed the counterparty an acceptable risk, to deal with the counterparty directly. The seller, in effect, proposed cutting the buyer out of the deal by offering to sell the cargo direct to its counterparty, agreeing to pay the buyer its "profit." The buyer declined.

All the while, the nominated vessel was waiting to load. The terminal had no loading instructions, nor was the buyer allowed to sample the product. The seller at this time said it could not maintain the designated loading window but would require the contract's full ten [10] days' notice of the vessel nomination, which meant that the earliest loading date would be on August 18. The seller added that it would consider earlier loading once the LOC was opened in an acceptable format.

The seller then insisted that the buyer present various documents relating to the bills of lading, which proved to be the final straw. After the buyer's multiple attempts to meet the seller's demands were rejected, the seller terminated the contract on August 17. The buyer then attempted to secure alternate cargo to load on the vessel but was unsuccessful. leaving its counterparty no choice but to cancel the charter party. The buyer also tried to source product in Asia to deliver to its counterparty in the Philippines but failed. Ultimately, the buyer's counterparty fixed a higher-priced vessel with Rotterdam product.

The buyer claimed against the seller for dead freight and demurrage resulting from the canceled charter party, higher freight costs from sourcing the cargo from Rotterdam, and lost profit. The seller did not challenge any damages claimed but countered that its liability should be capped at the buyer's "lost profit," referring to its earlier proposal to deal directly with the buyer's customer, paying the buyer any profits it would have earned.

On all counts, the panel ruled in the buyer's favor, saying it had timely satisfied its contractual obligation and the seller's many subsequent demands for changes must be treated as post-agreement requests and judged by the standards of good faith and commercial reasonableness. The panel concluded that the seller was not commercially reasonable in its dealings with the buyer and that its termination of the sales contract was improper and wrongful.

1. Charterer filed a motion on New York federal court to vacate the award, alleging that the panel manifestly disregarded the law by misallocating the burden of proof and requiring the charterer to show that the cargo was not contaminated rather than requiring the owner to show due diligence in providing a seaworthy ship. The court found no manifest disregard and confirmed the award. *ICC Chem Corp v Nordic Tankers Trading A/S,* 15-cv-9766-KPF (USDC S.D.N.Y. May 12, 2016).

Spotlight on the SMA

SMA at the MLA Arbitration & ADR Committee's "Coffee Break," April 21, 2023

SMA member **Louis Epstein** participated in a discussion of "The Evolving World of Subpoenas" and reviewed recent developments regarding their use in arbitration proceedings.

SMA at the MLA Spring Meeting, New York, May 4, 2023

SMA President **LeRoy Lambert** participated in a panel discussion on "The Use of Sealed Offers in Maritime Arbitration" at the spring meeting of the MLA's Arbitration and ADR Committee.

SMA/NYIAC Joint Session, "Resolving Disputes with a 'Salty Flavor': Current and Future Issues in International Maritime Arbitration," New York, June 7, 2023

SMA members **George Tsimis, Charles Anderson, Müge Anber-Kontakis, Sandra Gluck** and SMA President **LeRoy Lambert** participated in a Joint Session of the SMA and the New York International Arbitration Centre (NYIAC), held at the New York office of Holland & Knight, and organized by **Rekha Rangachari,** Executive Director of NYIAC, and moderator **Marisa Marinelli,** Partner, Holland & Knight.

SMA at the 45th Annual Silver Bell Awards Dinner, New York, June 8, 2023

The SMA was proud to be a sponsor of the Seamen's Church 45th annual Silver Bell Awards Dinner. SMA Vice-President **Robert Meehan** was in attendance.

SMA Monthly Luncheons:*

April 12, 2023: **Leanne O'Loughlin,** Regional Director Americas (UKP&I and UKDC) and President (Fairlead Group Private Investigations) Thomas Miller Americas, spoke about "IG P&I Club Review 2023/24 – Where do we go from here?"

May 10, 2023: Annual General Meeting of the SMA – Election of Officers and Governors of the SMA's Board of Governors. **LeRoy Lambert** re-elected as President and **Robert Meehan** re-elected as Vice-President for two-year terms. **Lucienne Bulow, Sandra Gluck, Daniel Schildt** and **Robert Shaw** elected as Governors for two-year terms, joining Governors **Austin Dooley, David Gilmartin, David Martowski** and **George Tsimis. Louis Epstein** and **Daniel Gianfalla** were appointed Governors by President Lambert to serve one-year terms.

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

SMA/NYIAC Joint Session, June 7, 2023

(from left) SMA Panel members and moderator Marisa Marinelli.

SMA Luncheon April 12, 2023

Leanne O'Loughlin, Regional Director Americas (UKP&I and UKDC)

(from left) Louis Epstein, LeRoy Lambert, Robert Meehan

ICMA XXII

ICMA XXII, the first ever ICMA Congress in the commercially bustling Middle East, will be held in Dubai on November 5-10, 2023 at the Jumeirah Emirate Towers – a luxurious hotel now receiving bookings.

The Hon. Sir Richard Eder, distinguished English Barrister and a former High Court Judge, will deliver the Cedric Barclay Lecture.

To date, 115 summaries of proposed papers have been submitted to the Topics & Agenda Committee from the following countries: 30 (U.K.); 11 (Brazil); 8 (Singapore); 7 (U.S., India), 6 (China, Australia); 5 (France, Germany, UAE); 3 (Netherlands, Japan); plus Canada, Denmark, Greece, Hong Kong, Indonesia, Italy, Malaysia, Nigeria, Spain and Turkey.

You will find registration details and rates at the ICMA XXII website www.icma2023.com and the Congress program will follow shortly.

As it is imperative that New York and the United States have an enthusiastic and robust presence at ICMA XXII, kindly consider attending this historic Congress which will draw the distinguished attendance of international arbitrators, jurists and users.

David Martowski and Daniel Schildt,
SMA Ad Hoc ICMA Committee

In Closing

We thank everyone who contributed to this issue of **The Arbitrator.** A special thanks to Tony Siciliano and all readers who keep our membership abreast of maritime news items and developments.

To our readers: We welcome all suggestions and feedback as to how **The Arbitrator** can best serve the needs of the maritime arbitration community in providing timely and relevant articles and information.

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

Please also follow the SMA via LinkedIn.

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