SMA THE ARBITRATOR

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In this issue

President's Message

By LeRoy Lambert, SMA President

In this issue of *The Arbitrator,* we focus on the 22nd International Congress of Maritime Arbitrators (ICMA), which took place in Dubai on November 5-10, 2023.

I and Board members **Robert Shaw** and **George Tsimis** were privileged to represent the SMA. Some 150 delegates from around the world were in attendance, including New York lawyers **Tom Belknap** of Blank Rome and **George Chalos** of Chalos & Co. **Robert Shaw** presented a paper on the situation when neither party proves its claim/counterclaim. **George Tsimis** presented a paper on the doctrine of adequate assurances, a doctrine which does not exist under the law of England and other common law jurisdictions. **Tom Belknap** updated the delegates on recent SMA awards. **George Chalos** presented a paper on whether vetting clauses were warranties. We are pleased to feature these papers as well as "ICMA Over the Years", prepared by **David Martowski,** SMA Member and Chairman, ICMA Steering Committee.

From left: Robert Shaw, LeRoy Lambert, George Tsimis

Maritime arbitration in New York is alive and well!

Jean-Remi de Maistre, the CEO and Co-Founder of Jus Mundi, the on-line repository for international arbitration awards, also made a presentation at ICMA. You will recall that the SMA and Jus Mundi have partnered to make the SMA awards available on the Jus Mundi website. We expect to "go live" in the third quarter of 2024. Based on a recent demonstration, the awards will not only be searchable by key words, arbitrators, counsel, and parties, they will also be subject to an AI program which can summarize contentions and results.

The Jus Mundi presentation at Dubai provoked spirited comments about the perennial issue of confidentiality of arbitration awards. Whatever the merits of confidentiality may have been in the past, end-users today increasingly expect transparency and accountability as the compliance culture continues to expand throughout business organizations. Given the amounts involved in disputes today and the amount of fees which can be incurred, executives and risk managers must do their due diligence and then justify and memorialize their decision before embarking on litigation or arbitration. In 1914, in his book *Other People's Money—and How Bankers Use It,* U.S. Supreme Court Justice Louis Brandeis wrote, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

As you will see from the "Spotlight on the SMA" (p. 27), your SMA has been busy! On December 13, 2023, we celebrated the SMA's 60th anniversary with a special "SMA at 60" presentation at our annual holiday luncheon. There are numerous events coming up where the SMA will participate as a sponsor or an SMA member will make a presentation. We will continue our efforts to become better known in the coastwise, offshore supply, and inland waterway markets. Mark your calendars for the MLA's Spring Meeting in New York, May 1-3!

The SMA's Officers and Governors are committed to making 2024 the best year ever for the SMA, but we cannot do it without the support of members and stakeholders across the industry. Let's keep it going!

LeRoy Lambert
President

ICMA Over the Years*

By David Martowski, Chairman, ICMA Steering Committee, and Governor, Society of Maritime Arbitrators, Inc.

Welcome to ICMA XXII!

By way of brief background, ICMA was launched in 1972 by its founding father, Cedric Barclay, President of the London Maritime Arbitrators Association. He and fellow London arbitrators Clifford Clark and Donald Davies, the Presidents of the New York SMA and Paris Chambre Arbitrale Maritime, were attending a meeting of international commercial arbitrators in Moscow. They were invited by Soviet maritime arbitrators to informally discuss maritime arbitration and as it turned out, this constituted ICMA's first meeting.

The idea soon spread and through the support of Cedric Barclay's contacts in the Greek shipping community, the next Congress held in Athens in 1974 was attended by international maritime arbitrators, lawyers and shipping executives from twenty nations. ICMA Congresses followed over the years in Santa Margarita, London (twice), New York (twice), Monte Carlo, Casablanca, Madrid, Hamburg (twice), Vancouver (twice), Hong Kong (twice), Paris, Auckland, Singapore, Copenhagen and most recently in 2020, Rio de Janeiro.

The Congresses provide a unique opportunity for delegates to deliver papers and discuss a variety of topical subjects and issues involving international maritime arbitration, beginning at each Congress with the presentation of the Cedric Barclay Memorial Lecture in honor of ICMA's founding father.

Our common interest is resolving disputes in the most global of industries and the papers and discussions that follow, transcend national and political issues, often paving the way for more uniformity.

ICMA is run by a Steering Committee consisting of one permanent member each from London and New York, the immediate past host, and the host of the coming venue. The Committee Chair is rotated between the two permanent members from London and New York.

The Steering Committee's main functions are to appoint a chairperson of the Topics & Agenda Committee for each ICMA, select the next speaker for the Cedric Barclay Memorial Lecture, and select the venue for the next ICMA.

ICMA XXI held in Rio de Janeiro from March 8-13, 2020, was a great success. 110 papers were chosen from around 200 submissions (including a large Brazilian contingent) which corresponded to 5 plenary sessions and 16 concurrent sessions. 95 papers were ultimately presented (some virtually) as a result of the COVID cancellations. Justice Ellen Gracie Northfleet, Former President of Brazil's Federal Supreme Court, presented the Cedric Barclay Memorial Lecture at the Opening Ceremony on Monday, March 9th. All who attended still speak with the fondest memories of a Congress that was remarkable for its organization, friendly atmosphere and excellent selection of papers. Thanks must go out to all involved locally on hosting such a memorable event.

Dubai and Singapore submitted outstanding bids to host ICMA XXII and the Steering Committee's decision was a difficult one. Dubai was announced as our next venue, the first Congress to be held in the Middle East, at the Closing Ceremony and Clive Aston passed on the Committee's Chairmanship to me.

The current Steering Committee is composed of me, Clive, previous Rio Host Committee Chair Camila Vianna Cardoso, and Rania Tadros, who chairs the Dubai Host Committee.

Rania, Richard Briggs, DIAC and Meeting Planners comprising the Dubai Host Committee have assembled an outstanding Congress and London's Daniella Horton again chairs the Topics & Agenda Committee, which has selected excellent papers for presentation. The Hon. Sir Bernard Eder, Former Barrister and English High Court Judge, will present the Cedric Barclay Memorial Lecture.

The Steering Committee has received bids from Rotterdam and Singapore to host ICMA XXIII to be held in 2025/26 and will render its decision at our Closing Ceremony on Friday, November 10th.

You are sure to find ICMA a stimulating and enjoyable professional and social experience in wonderful and vibrant Dubai, as well as a unique opportunity to meet and share notes with the leading international maritime arbitrators, attorneys and shipping giants of our time. Enjoy!

* This paper was originally submitted to ICMA XXII in Dubai between November 5-10, 2023, and is republished here with permission from its author, ICMA, and the Dubai International Arbitration Centre.

How Should Arbitrators Decide Claims and Counterclaims Arising from the Same Incident if on the Evidence Neither Party Meets its Burden of Proof?*

By Robert G. Shaw, Governor, Society of Maritime Arbitrators, Inc.

1. Claims and counterclaims arising from the same incident where neither party meets its burden of proof present challenges for triers of fact.
2. A recently reported award of maritime arbitrators in New York, in The YAMUNA SPIRIT, SMA No. 4454 (2023),[1] a charter party dispute, provides a case study.[2]
3. The dispute arose from a series of oil sheens that, on the undisputed evidence, amounted to no more than 40 gallons or approximately one barrel of AXL crude oil out of over 600,000 barrels that the ship discharged to a shore terminal near San Francisco.
4. The owner and operator of a suezmax tanker, (the "Owner"), and the owner and operator of the terminal, which was also the charterer of the ship (the "Charterer"), were both prominent and well-established publicly listed issuers, headquartered in North America.
5. The arbitrators found that each party "presented compelling evidence that it had systems in place to prevent leaks and of conscientiousness about their obligation to prevent oil pollution."[3]
6. Technical teams from each of the US Coast Guard, three California state agencies, the ship's classification society, the Owner, and the Charterer, all investigated the source of the

sheens during more than seven days while the ship was at the discharging berth at the terminal.

7. None of those on-site investigation teams found a source of the leakage of the sheens.

8. Neither party accepted it was the source. Each contended that, therefore, the other party must have been the source. Neither party, however, pointed to a source that the panel was able to find, on the preponderance of the evidence was the source from which the sheen had leaked.[4]

9. There were seven hearings, with five fact and four expert witnesses.

10. There was no evidence that either party incurred any tort or statutory claims of third parties or any penalties or fines in relation to the sheens.

11. Despite the relatively small amount of the sheens, and the conclusions of the investigation teams of the US Coast Guard and the state agencies, that the source of the leakage could not be established, the parties claimed in the arbitration damages from each other (of less than, $800,000 in the case of the Charterer, and, $500,000 in the case of the Owner). These arose mainly from their costs related to the investigation and clean-up.

12. Charterer presented as an expert, a marine engineer who expressed the opinion that the ship's cargo sea-chest was the only possible "pathway" for oil to have escaped from the ship and that since the terminal was not the source of the sheens, the source must have been leakage from the sea-chest.

13. Owner submitted evidence of testing of the sea-chest, including tests carried out before discharging began. These recorded that the sea-chest was secure. Charterer questioned the credibility of those records.

14. Charterer also asked the panel to draw adverse inferences from what it alleged was Owner's failure, among other things, (i) to make crew members available for interviews while the ship was at the terminal, (ii) to present any crew members to testify before the panel at the hearings (iii) to keep full records of testing of the sea-chest and (iv) to produce a video of a divers' inspection of the ship's hull during the sheen investigations.

15. Owner did not advance an argument as to how the sheens leaked from the terminal's equipment. However, an incident report of the California Department of Wildlife and Fisheries suggested as a possible explanation, that there could have been a valve somewhere in the terminal pipeline leading to the shore tanks. The incident report speculated, without pointing to any evidence, that the valve could have been inadvertently left slightly ajar at the end of an earlier inspection and then closed tight at some point during the inspections that were made to try and determine the source of the sheens. The report further speculated that there might not have been any realization at any time that the valve had not previously been fully closed.

16. Laboratory analysis of samples of the sheens, and related expert evidence presented on behalf of both parties, showed a match between the samples and the crude carried on the ship. They did not however, in the panel's view, establish whether the sheen leakages came from the ship or the terminal's pipeline connecting from the pier to the shore tanks.

17. Following the submission from the parties of post-hearing Main and Reply memoranda of law, the panel asked the parties to submit supplemental memoranda addressing the following questions on burdens of proof:

    (i) What burden of proof standard would be appropriate for this matter?

    (ii) How that standard would apply here where each party had argued that the only source of the oil in the water was or were spills from "equipment" of the other party?

    (iii) What result should apply under U.S. law if the panel were to find that neither party had established by a preponderance of the evidence that its theory was the more likely explanation as to the cause of the oil spilling into the water?

18. The arbitrators also asked the parties to draw to their attention any reported U.S. cases discussing the application of the "balance of probabilities" in analogous circumstances.[5]

19. The supplemental memoranda reiterated

each party's submissions that (i) it was not the source of the sheens and (ii) therefore, the other party or its equipment must have been the source and (b) adverse inferences should or should not be drawn from alleged non-production of, or inadequacies of evidence, to tip the burden of proof in a party's favor.

20. The arbitrators had asked for the supplemental memoranda to reduce the risk of their making errors in deciding whether the parties had met their burdens of proof.

21. These may be called Sherlock Holmes and "ranking of probabilities" errors.

22. In Sir Arthur Conan Doyle's novel "The Sign of Four," Sherlock Holmes, investigating the circumstances of a murder, said:

> *How often have I told you* [Dr.Watson] *that, when you have eliminated the impossible, whatever remains, however improbable, must be the truth?*

23. *Rhesa Shipping Co., v. Edmunds,* [1985] 1 WLR 948,[6] is an English case, which went on appeal to the House of Lords. It involved a disputed claim on an insurance policy following the unexplained sinking of a ship. Lord Brandon considered that the trial judge, Bingham J., had fallen into an error of thinking implicit in Sherlock Holmes' admonition.

24. The shipowner had argued that a hole in the ship's hull, in the absence of evidence to support a contrary theory, must have been the result of impact with an unidentified submarine. The insurers argued the hole was the result of wear and tear. Bingham J., after considering the evidence found that (i) "wear and tear" was not the cause, (ii) the submarine theory was extremely improbable but possible and (iii) therefore, on the balance of probabilities, impact with a submarine was the cause of the sinking.

25. Referring to Sherlock Holmes' formulation, Lord Brandon remarked:

> *It is no doubt, on the basis of this well-known but unjudicial dictum that Bingham J. decided to accept the shipowners' submarine theory, even though he regarded it, for seven cogent reasons, as extremely improbable.*

26. The House of Lords in reversing the trial judge held the shipowner had failed to meet its burden of proof as claimant as to the probable cause of the sinking given the cause for which it had argued was extremely improbable.

27. In *The YAMUNA SPIRIT,* the arbitrators rejected the Charterer's argument that the sea chest was the only possible pathway for any leakages given the absence, as the Charterer submitted, of any other viable explanation. They did so because, as they found, the evidence did not support the possibility that a leakage from the sea chest took place. This included what they found to be credible evidence that:

- The sea chest's valves had been pressure tested a few days earlier at the ship's last port of call.
- Safety check lists of the terminal and signed for the ship at the terminal recorded that the valves were shut and sealed.
- Inspections of the ship's pump room during the call reveal no signs of leaks.
- Records of checks of the sea chest after the call at the terminal showed no signs of leaks.

28. The fact that other pathways were not found for the escape of the sheens, did not in the panel's view (contrary to Sherlock Holmes', entertaining but "unjudicial" precept) mean that the Charterer had met a burden of proof of showing that the sea chest must have been the pathway.

29. If there are competing theories as to the cause of an event, and all on the evidence are found improbable but one is less improbable, applying Lord Brandon's reasoning, neither side should prevail as each has still failed to meet its burden of proof.

30. Thus, ranking of probabilities as to each cause and then selecting the one with the highest probability even though it has *not* been proved on the preponderance of the evidence as more likely than not to have occurred, is an understandably tempting but erroneous methodology for reaching a conclusion.

31. *Fosse Motor Engineers v. Condé Nast,* [2008] EWHC 2037 (TCC), another English case, arose

from a fire with various possible causes. The court rejected the ranking methodology stating:

> *What is not acceptable, at the very least in a case like the current one, is to identify that there are, say (as here) five possible causes, rank them each in percentage terms as possibilities and then select the possibility with the highest percentage as the probable cause.*

32. In short, the burden of proof remains on each party to show on the evidence that what it contends was more likely than not to have happened. The burden is not met by showing that an improbable theory of cause is less improbable than the other party's theory.

33. The arbitrators in *The YAMUNA SPIRIT* did not make any relative finding that one of the parties had advanced a more plausible theory of cause than the other but analyzed in detail the evidence they had submitted in reaching their conclusions that neither party had met its burden of proof.[7]

34. Parties expect commercial arbitrators (and judges) to find for one party or the other and in most cases most triers of fact will be able to reach a conclusion on what was the likely cause of an event. Cases where neither party meets its burden of proof are rare.

35. Triers of fact generally should guard against their straining (even unconsciously) to find for one party in the rare case where neither has met its burden of proof in any degree because of a concern not to appear to be "fence-sitting".

36. Baroness Hale in *Re B* [2008] UKHL 35, a protection proceeding in the UK that arose from alleged child abuse, commented on the trial judge's conclusion, after had he reviewed the evidence, that he could not find "on the balance of probabilities" that abuse had or had not happened.

37. She said among other things that:

> *"31. [I]f the judiciary in this country regularly found themselves in this state of mind, our civil and family justice systems would rapidly grind to a halt. In this country we do not require documentary proof. We rely heavily on oral evidence, especially from those who were present when the alleged events took place. Day after day, up and down the country, on issues large and small, judges are making up their minds whom to believe. They are guided by many things, including the inherent probabilities, any contemporaneous documentation or records, any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses. The task is a difficult one. It must be performed without prejudice and preconceived ideas. But it is the task which we are paid to perform to the best of our ability.*
>
> *32. In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof."*

38. Baroness Hale qualified her *dicta* as "generally speaking" and as applicable to cases where the trier of fact can decide what happened without relying on burdens of proof.

39. In the exceptional case, however, where the evidence presented does not satisfy either party's burden, arbitrators should be careful not allow anxiety over potential accusations of "fence-sitting", to "incline" them to find for one party even though neither has met its burden of proof. This extends to care in deciding whether adverse inferences should be drawn from alleged non-production of evidence or evidence whose reliability is questioned.

40. *The YAMUNA SPIRIT* contains a detailed explanation of the arbitrators' reasons for declining the Charterer's requests to give reduced or no weight to certain disputed evidence that the Owner had submitted and to make various adverse inferences from alleged deficiencies in the Owner's evidence production.[8]

41. The Charterer argued that weighing the evidence and drawing the adverse inferences as it

contended would mean it had met its burden of proof on the preponderance of the evidence.[9]

42. It is beyond the scope of this paper to discuss the arbitrators' reasons for weighing each item of disputed evidence in detail. Based in part on their knowledge of shipping industry practice, they found, among other things, that (i) the Owner's records of the testing of sea-chest were credible, (ii) it had been open to the Charterer to take measures at the time for interviews of crew members but it did not do so, (iii) it was understandable that the Owner would not have given unrestricted access to the crew, (iv) since Owner had sold the ship, it was also understandable that the Owner would have been less able to have former employees testify at the arbitration hearings and (iv) in any event, the Owner had presented as fact witnesses two senior members of its technical management who were on board the ship at the time of the inspections.

1 David W. Martowski, Robert G. Shaw and Dick Corwin, all members of the Society of Maritime Arbitrators, Inc. ("SMA"), composed the panel, which Mr. Corwin chaired.
2 Under the SMA Rules, awards in SMA proceedings held under the Rules, are published in the SMA Award service, unless the parties agree that they should be kept confidential. Published SMA awards are available for review on Westlaw and Lexis. The SMA also provides, on application, copies of individual awards. There are currently nearly 4,500 published SMA awards. The SMA began collecting and publishing awards shortly after its founding in 1963.
3 SMA No. 4454 (2023), at page 2.
4 The American law term "preponderance of the evidence" means that a fact is shown on the evidence as "more likely than not", or on "the weight of the evidence", to have occurred. The broadly equivalent term in English law is "balance of probabilities". Use of the different terms began to appear in American and English cases in the 19th century. It is possible that they had their origins in instructions to juries in civil trials. In practice their application in most cases is materially the same, although potential differences have been the subject of comparative law analysis. See, for example, Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof, 67 FLA L. REV.,* 5619 (2016) and the other scholarly articles it cites.
5 The arbitrators were, among other things, interested to hear from the parties whether any American courts or arbitrators had applied the term "balance of probabilities" to facts analogous to those of the present dispute. They made the request because they were aware of certain English cases which addressed burdens of proof where there was no direct evidence of the cause of a casualty. In the absence of the parties' briefing the English authorities (and given the New York choice of law clause in the governing charter), the panel did not address or rely on them in reaching its conclusions in the award.
6 *Rhesa Shipping* and the other English cases referred to below are discussed in Davies, *Proof on the Balance of Probabilities: What This Means in Practice, PRACTICAL LAW,* October 22, 2009.
7 Pages 37-39 of the award summarize the arbitrators' reasons for finding that neither party had met its burden of proof on the preponderance of the evidence.
8 See numbered paragraphs 13 and 14 above.
9 SMA No. 4454 (2023) at pages 34-36

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Nipping Counterparty Non-Performance Disputes in the Bud: the Application of the Doctrine of Adequate Assurances in SMA Arbitrations and a Snapshot Comparison with English Law*

By George J. Tsimis, Secretary, Society of Maritime Arbitrators, Inc.

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

from the contract, enter a new fixture, mitigate its losses, and get back to business.

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

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

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

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

New York State law officially recognizes the doctrine of adequate assurances in its own New York Uniform Commercial Code § 2-609, and although this right was initially limited in New York to situations involving the sale of goods, the New York Court of Appeals has adopted the UCC rule of adequate assurance as part of the common law of contracts. *Norcon Power Partners, L.P., v. Niagara Mohawk Power Corp.,* 92 N.Y.2d 458, 464-466 (N.Y. 1998). This point is especially significant because SMA arbitrations are generally seated in New York, and are often governed by New York law, either by an express choice of law provision in the underlying contract, or where New York law may supplement U.S. general maritime law when it lacks an established rule or when there is no conflict between them.

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

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

The KM IMABARI Award (Failure to Load Cargo)

The decision of *Pan Oceanic Maritime Inc. v. RSU-SA LLC ("The KM IMABARI"),* SMA No. 4081 (June 10, 2010) (Siciliano, Mordhorst, Arnold, Chair) is most illustrative of the doctrine's application in a traditional charter party context. In The *KM Imabari,* the vessel was presented for loading a cargo of iron ore in Mexico for carriage to China and charterer failed to issue any loading instructions for over two months. Owner sent a letter to charterer demanding immediate and unequivocal assurances that the cargo would be supplied promptly, and that Charterer acknowledge and agree to immediately pay the outstanding detention. Owner made two additional requests for adequate assurances in letters to the Charterer, stating that if Charterer failed to give such assurances in the coming days, Owner would treat the charter as repudiated. Charterer did not respond to these requests. Owner terminated the charter, citing Charterer's failure to assure performance, and withdrew the vessel. Owner subsequently found substitute employment in mitigation of its damages.

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

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

The application of the doctrine of adequate assurance has since been applied by at least two other SMA panels to the context of a charterer's failure to load a cargo or find a receiver to take delivery of already loaded cargo. *See the Matter of the Arbitration between Transportacion Maritima Mexicana, S.A. de C.V. and Alia Global Logistics, S.A. de C.V. ("The M/T KING GREGORY"),* SMA No. 4429 (Nov. 1, 2021) (Lambert, Tsimis, Schildt, Chair) (panel awarded disponent owner's unpaid freight of $295,000 plus interest and attorney's fees and costs against charterer that failed to load a cargo of jet fuel in Coatzacoalcos, Mexico for carriage to Houston,[2] and ruling: "As in The *KM Imabari,* [charterer] failed to present a cargo of jet fuel, *could not provide any adequate assurances of performance to [disponent owner],* and eventually acknowledged in correspondence its obligation to pay owner's damages." *See also the Matter of the Arbitration between Seatrade Transport Int'l, Inc. and SCAC Transport Canada, Inc. ("The ISLAND GEM"),* SMA No. 2560 (Apr. 14, 1989) (Arnold, Hamilton, Palmer, Chair) (panel granted the disponent owner's relief to terminate the charter after the vessel waited 8 days at loadport, after making several demands for assurances of performance, and after advising charterer "we have accepted your refusal to give loading instructions and to give any assurance that vessel would load in La Spezia as repudiation of the [charter]").

The OPAL STAR Award (Non-Payment of Hire)

The doctrine of adequate assurances has also been applied to SMA awards dealing with situations involving disputes over the payment of hire under a long-term contract. In *the Matter of the Arbitration between Orange Maritime Pte., Ltd. and O.N.E. Shipping, Inc. (The "M/T OPAL STAR"),* SMA No. 3650 (Nov. 9, 2000) (Bulow, Martowski, Siciliano, Chair), the parties, on November 3, 1997, entered into a 5-year time charter party with an option for another 3 years for a product tanker that was still under construction. On June 3, 2000, as the vessel was nearing the final phase of its construction and six months prior to delivery to Charterer, Owner, in the face of reports regarding financial difficulties being experienced by companies related to Charterer, requested Charterer for fresh assurances that it was capable of timely performing its obligations under the charter and requested that Charterer provide two months' hire in advance

as security and as evidence of its good intentions and financial capability. At that time, the chemical tanker market had declined significantly since the execution of the charter, adding to Owner's concerns regarding Charterer's intention to perform. In response to Owner's demand, Charterer reaffirmed its intention to perform the charter and declined to deposit cash security as being unnecessary, premature, and unreasonable.

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

The panel reviewed the principles of the doctrine of adequate assurances as set forth in §251 of the Restatement (Second) of Contracts and determined that the facts and circumstances supported Owner's request for adequate assurance of Charterer's willingness and ability to perform its obligations. However, the panel deemed Owner's June 3, 2000 request for security to be premature given the fact that the Charterer's obligation to pay hire did not commence until December 8, 2000. The panel noted, in pertinent part:

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

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

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

The FOREST LINK Award (Vessel's Seaworthiness)

SMA panels have also applied the doctrine of adequate assurance to disputes regarding the vessel's structural condition and seaworthiness. In *the Matter of the Arbitration between Transportes Maritimos Centroamericanos S.A. and Paper Sea A.S. (The "M/V FOREST LINK")*, SMA No. 3745 (July 25, 2002) (Arnold, Siciliano, Blake, Chair), Charterer sought expedited relief from the panel claiming that the facts and circumstances warranted the termination of a long-term time charter for the vessel due to alleged lack of proper maintenance and repairs by Owner. In February and March 2002, the vessel experienced two sea water ingress incidents that damaged cargo on board, and which necessitated repairs to the vessel's cargo holds and hull in Gulfport, Mississippi. Over the next several months, Owner conducted its own repairs which, according to Charterer's surveyor, were insufficient and were not performed in compliance with the requirements of class or the U.S. Coast Guard. The delays caused by the repairs led to Charterer placing the vessel offhire and, on June 6, 2002, serving Owner with a demand to unconditionally consent to the termination of the charter, or alternatively to furnish "adequate assurance" that it was prepared to carry out the needed repairs to the vessel and return it to a seaworthy condition. Owner countered that the sole remedy was

for charterer to place the vessel offhire and that the charter did not contain a provision allowing for such a premature termination of the fixture.

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

On July 6, 2002, the panel held an expedited hearing and concluded that Charterer "had not yet demonstrated its claimed right to terminate the charter party." The panel went on to explain that "[t]he case of the FOREST LINK is readily distinguishable from that of the FOREST ENTERPRISE in that the former vessel has only been offhire since April 14, 2002. An offhire period of three months is neither unprecedented nor sufficient to frustrate the underlying purpose of the charter party." The panel went on to note that Owner had performed some repairs and that the charter was silent with respect to any provision that specified when Owner needed to complete any corrective repairs or that implied the remedy of cancellation. It also noted that Charterer had substitute tonnage for the FOREST LINK and would be able to claim such increased costs and damages in the arbitration. The panel then ordered Owner to adopt and adhere to a repair protocol and time schedule which, if Owner failed to comply with the provisions thereof, Charterer will be free to renew its application for the panel to immediately terminate the charter party.

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

The SEA MASTER and English Law (Doctrine of Adequate Assurance Inapplicable)

A. Factual Background

In June 2016, the handy-sized bulk carrier, M/V SEA MASTER ("the Vessel"), was voyage chartered by its owner ("Owner") to Agribusiness ("Charterer") to carry various bulk food cargoes from Argentina to Morocco. The Vessel arrived at the designated loadport on April 27, 2016, and issued its notice of readiness. Charterer did not have any cargo to load, and the Vessel waited and sat idle for several weeks until June 21, 2016, at which point demurrage had accrued and created a significant outstanding amount due to Owner under the charter party totaling $414,515.63. The Vessel loaded three parcels of cargo, including 26,700 metric tons of corn in bulk, 7,000 metric tons of soybean meal, and 7,000 metric tons of soybean pellets. The Vessel then sailed for Morocco on June 24, 2016 and arrived at Agadir on July 14th.

At Agadir, the Vessel discharged much of the corn shipment and then sailed for Casablanca, arriving there on July 21st. Owner anticipated discharging the balance of its cargo as per the terms of the governing bills of lading. Between July 27th and August 25th, the Vessel discharged the rest of the corn shipment and the soybean meal shipment. However, the 7,000 metric tons of soybean pellets remained on board and Owner requested instructions from Charterer to complete the fixture and free up its vessel for the next fixture. Unfortunately, Charterer issued no instructions, and it became clear that it was experiencing significant financial difficulties and likely unable to perform the rest of the fixture.

At this point, Arab Bank in Switzerland ("the Bank"), which had financed the purchase of a cargo of the soybean meal cargo (as well as the other two shipments), began to interject itself into the transaction and the discharging activities. The Bank advised Owner that it was holding the original bills of lading for and that the bills were consigned "To Order" to facilitate the Bank's control of the sales proceeds. The Bank also appointed a protective agent at Casablanca and thereafter issued various instructions to Owner's local agents for the vessel regarding where to deliver the remaining cargo on board and to whom such delivery should be made.

For the next two months, instructions were issued to Owner to carry the soybean pellet shipment to

Algeria and then Lebanon pursuant to four separate buyers, three of which had cancelled and walked away from the sales contracts with Charterer and the Bank. The Bank paid for the negotiated freight to sail from Morocco to Lebanon and deliver the remaining cargo after agreeing with Owner to the issuance of new bills of lading to allow for delivery at a different port of discharge. Finally, on February 20, 2017, the cargo was discharged from the Vessel and the voyage charter was concluded.

By that time, Owner's demurrage claims and other losses plus interest and costs exceeded $2 million, and what had been expected to be a simple voyage charter became a financially disastrous odyssey around the Mediterranean Sea with the vessel used as long-term floating storage and no relief in sight for Owner.

Because Charterer had defaulted and was not financially viable to answer these claims, Owner and the Bank had their various disputes referred to London arbitration.[4] The Bank also asserted cargo claims of its own for the alleged misdelivery of a portion of the cargo discharged in Morocco,[5] which the Bank thereafter sought to secure by way of a vessel arrest action in New Haven, Connecticut, and spawned proceedings before the U.S. District Court of Connecticut.

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

B. Six Years Later, Five Arbitration Awards and Two Court Decisions

Legal proceedings regarding the disputes between Owner and the Bank spanned a period of six years, four arbitration awards, three decisions by the English Courts, and an arrest proceeding in U.S. Federal Court in New Haven, Connecticut to secure the bank's alleged cargo claims. These rulings can be summarized as follows:

1. *The First Award* – The Tribunal ruled that it lacked jurisdiction over Owner's counterclaims for demurrage and detention damages because the Bank was not an original party to the replacement or "switch" bills of lading. As such, the tribunal did not rule on whether the Bank was bound by the arbitration agreement. The tribunal further ruled that Owner's claims for quantum meruit and reasonable remuneration would not have succeeded on the merits.
2. *The Court's First Decision*[6] – the Commercial Court upheld a challenge to the First Award under Section 67 of the Arbitration Act 1996 and held that the tribunal had wrongly declined jurisdiction. The Court decided that the Bank's admitted acquisition of rights of suit under the switch bill meant that it was bound by the arbitration agreement in the switch bill.
3. *The Second Award* – The tribunal decided that there was no issue estoppel with respect to whether or not the Bank was a party to the switch bill of lading.
4. *The Third Award* – The tribunal rejected Owner's counterclaims for demurrage and detention damages, and agreed with the Bank's contention that only Charterer could be held liable for delay in discharge and the period during which cargo remained on board the vessel.
5. *The Court's Second Decision* – Owner appealed the tribunal's rulings in the Third Award and the Commercial Court rejected Owner's arguments.[7]
6. *The Fourth Award* – The tribunal denied the Bank's misdelivery claim against Owner and concluded that the Bank failed to meet its burden of proving the loss. The tribunal also formally dismissed Owner's reasonable remuneration and quantum meruit counterclaims.
7. *The Fifth Award* – The tribunal held that the demurrage and detention damages claims were claims that arose out of or in connection with the switch bill of lading. As such, the tribunal granted the Bank's anti-suit injunction application and ruled that Owner's counterclaims had been dismissed

in the Fourth Award. Owner appealed this ruling and argued that the tribunal had no jurisdiction, and further argued that the First Award had settled the issue of whether Owner's counterclaims were arbitrable and fell outside of the scope of the arbitration agreement.

8. *The Commercial Court decision*[8] – The Court sustained the tribunal's Fifth Award and held that the First Award did not decide whether Owner's counterclaims for reasonable remuneration and quantum meruit came within the scope of the arbitration agreement. The Court then agreed with the tribunal's ruling that the counterclaims fell within the ambit of the arbitration agreement which contained the inclusive wording of "arising out of or in connection with the contract contained in or evidenced by the Bill of Lading." The Court then concluded that Owner's claims against the Bank as the bill of lading holder for use of the vessel and storage charges during the voyage was clearly a dispute "arising out of or in connection with" the switch bill of lading. As a result, the Court denied Owner's appeal and dismissed the jurisdictional challenge to the tribunal's rulings in the Fifth Award.
9. *The Connecticut Federal Court Proceeding* – Owner sought summary judgment for its claims for unjust enrichment and quantum meruit. In response, the Bank moved the tribunal in London for declaratory relief and an anti-suit injunction. The antisuit injunction was ultimately granted (see Fifth Award above) and the Connecticut proceeding was thereafter voluntarily dismissed by the parties after they concluded a settlement.

Nearly seven years after the SEA MASTER had been chartered, the parties finally concluded their litigation in both London, where four arbitration awards have been issued with three related appeals to the High Court of Justice, and in Connecticut, where the parties ultimately settled their disputes and stipulated to the dismissal of the proceedings in U.S. Federal Court.

Had the matter been subject to SMA arbitration in New York and Owner been able to invoke the doctrine of adequate assurances, it could have demanded assurances from Charterer early in the voyage charter performance -- either during Charterer's inability to load a cargo at the loadport in Argentina, or at Casablanca when Charterer failed to issue instructions to discharge the soybean pellet shipment -- and avoided these protracted legal proceedings, which have likely cost millions of dollars for both parties and which have aggravated an already financially disastrous voyage charter for Owner.

CONCLUSION

The doctrine of adequate assurances, as a statutory remedy under New York law, and as a legal principle recognized and applied by SMA panels over the past several decades, provides counterparties to charter parties, contracts of affreightment, bills of lading, bunker supply contracts, ship repair contracts, and other maritime and commercial contracts with a versatile tool to either prompt a recalcitrant party to perform its contractual obligations or to plot a course towards legitimately and appropriately terminating the contractual relationship. Furthermore, the availability of this right obviates the need for a party seeking to terminate a charter party or otherwise enforce the fundamental and unequivocal terms of its agreement (such as payment of hire, producing a cargo for loading, or maintaining the vessel's seaworthiness) to establish that the venture has been frustrated. This burden is significantly more onerous and costly than a request for adequate assurances of performance, and any endeavor to prove a frustration claim would undoubtedly lead to more protracted and expensive legal proceedings for the parties.

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

The SMA decisions reviewed above illustrate how this doctrine may be utilized by parties and arbitrators alike to provide clarity to certain disputes

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

1 *Pan Oceanic Maritime Inc. v. RUSA LLC ("The KM IMABARI"),* SMA No. 4081 (June 10, 2010) (Siciliano, Mordhorst, Arnold, Chair)
2 This dispute arose during the 2020 global pandemic when the jet fuel market plummeted due to the worldwide lockdown and cessation of nearly all commercial air travel by the world's airlines.
3 In *The FOREST ENTERPRISE,* SMA No. 3743 (July 15, 2002) (Siciliano, Mordhorst, Martowski, Chair), which was decided 10 days before the FOREST LINK award discussed above, the panel determined that charterer was entitled to cancel the charter party after the vessel had remained offhire in Malta and in disrepair for nearly one full year following an engine room flooding incident. In doing so, the Panel noted that charterer had sent owner a notice of demand for consent to terminate the charter party and/or demand for adequate assurances of performance, and owner "failed to meaningfully respond" to that notice.
4 The bills of lading for the shipments carried by the vessel all incorporated the English law and arbitration clause in the charter party.
5 The Bank's alleged cargo claims were eventually dismissed by the London arbitration tribunal.
6 *Sea Master Shipping Inc. v. Arab Bank (Switzerland) Ltd.* [2018] EWHC 1902 (Comm).
7 *Sea Master Shipping Inc. v. Arab Bank (Switzerland) Ltd.* [2020] EWHC 2030 (Comm).
8 *Sea Master Shipping Inc. v. Arab Bank (Switzerland) Ltd.* [2022] EWHC 1953 (Comm).

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Sire, Hire, Price Majeure and a Global Pandemic: Are Vetting Clauses a *Warranty* or a *Due Diligence* Obligation?*

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Introduction

Vetting is a fact of life in the tanker industry and vessel owners must comply with vetting requirements or their ships will not carry cargoes. US arbitrators are often asked to decide charter party disputes wherein the application of facts and the interpretation of vetting clause obligations prominently feature. With market fluctuations, changing supply and demand, and subjective inspections, the universe of disputes is diverse.

More recently, with the global pandemic causing shutdowns, travel bans and, at times, unavailability of inspectors and inaccessibility to vessels and terminals, the Oil Companies International Marine Forum (OCIMF) extended the period for access to SIRE reports, implemented a remote inspection procedure, and encouraged the industry to follow a pragmatic approach. Notwithstanding, arbitrators have been tasked with interpreting and applying vetting obligations and often must weigh the clinical application of seemingly rigid contractual terms against equitable considerations to reach an award.

I. THE OCIMF/SIRE INSPECTION PROGRAM

The Ship Inspection Report Programme (SIRE) administered by (OCIMF), is a voluntary association of oil companies with an interest in the shipment and terminaling of crude oil, oil products, petrochemicals and gas. OCIMF was formed in 1970 in response to growing public concern about marine pollution. It was granted consultative status at the International Maritime Organization (IMO) in 1971 and continues to present oil industry views at the IMO. Today, OCIMF is widely recognized as

the voice for safety of the oil industry. Membership includes every oil major in the world along with the majority of national oil companies.

In the wake of the EXXON VALDEZ grounding and oil spill incident, the "SIRE Programme" was launched in 1993 to address concerns about sub-standard shipping and has become a unique tanker risk assessment tool for ship operators, charterers, terminal operators and government bodies concerned with ship safety.[1] At the heart of the SIRE system is a large database of timely and objective technical and operational information about tankers and barges. "SIRE is a tanker risk assessment tool—a large database of up-to-date information about tankers and barges used by OCIMF members and programme recipients. It is a uniform, standardized, objective inspection process that systematically examines tanker operations."[2]

The SIRE Programme requires a comprehensive inspection protocol that is predicated by a Vessel Inspection Questionnaire (VIQ) and a SIRE Inspection Report. To initiate a SIRE Inspection, an OCIMF member company ("oil major") must commission a vessel inspection and appoint an accredited SIRE inspector to attend on board the vessel, generally at the request of her owner and/or operator. The inspector accesses the vessel particulars from the SIRE database and the VIQ and then conducts an on-board inspection of activities ranging from, *inter alia,* cargo handling to pollution prevention measures. Thereafter, the inspection report is uploaded to the SIRE database. The owner/operator will have an opportunity to respond and/or to "close out" items raised by the inspector in the report (if any), before it is accepted by the commissioning oil major.

Traditionally, inspection reports are maintained on the database index for a period of twelve (12) months from the date of receipt and are maintained within the database for two (2) years. SIRE access is available, at a nominal cost, to OCIMF members, bulk oil terminal operators, port authorities, canal authorities, oil, power, industrial or oil trader companies which charter tankers or barges as a normal part of their business.

A. The Types of SIRE Inspections Available

It is commonly understood that it is preferable to have a SIRE inspector attend and inspect the vessel during discharge operations, in order to see all of the Vessel's cargo systems in action. That said, there are several different types of SIRE inspections identified by OCIMF, including (1) discharge (cargo) inspections; (2) loading (cargo) inspections; (3) idle or bunkering inspections, when discharging and loading inspections are not available; (4) inspections at anchor, (5) during ballasting, and/or (6) even when underway at sea. During the pandemic, OCIMF added remote inspections as a further potential inspection option. The OCIMF guidelines make clear that these types of different inspections are available, as the operation of the vessel during the time of the inspection is to be recorded as one of the following:

1.15 Vessel's operation at the time of the inspection:

Loading	Discharging	Bunkering	Ballasting	Deballasting	At anchor	Idle	At sea
River transit	Repairs afloat	In drydock	STS loading	STS discharging	Cooling Down	Gassing-up	

Note: If the vessel is conducting any other operation than that listed, such as desloping, etc., the vessel's operation is to be recorded as "Idle" and the activity being performed recorded in comments.

Id.

B. Vetting Approvals, Charter Requirements, and the SIRE Program

There is no requirement under the OCIMF guidance for any particular type of SIRE inspection over any of the others listed above to be considered "proper" or "valid." Rather, the OCIMF system merely works within the parameters of whether an inspection report is still "live" or not.[3] Said another way, if a charterer intends to demand a "discharge SIRE" inspection as part of the vetting approval and inspection requirements, it can and should use specific language during contract negotiation and drafting. Otherwise, a clause which simply has a requirement for SIRE inspection(s) within a prescribed time period may be satisfied through compliance with any of the available SIRE inspections identified and acknowledged by OCIMF. It has long been understood: "[w]hile the SIRE system and VIQ constitute an established international standard that the industry finds acceptable, individual vetting criteria differ from major to major, and there is no guarantee that even with an exemplary SIRE report, a ship will receive approval." Martowski, D., *Vetting Clauses,* 26 Tul. Mar. L. J. 123, 143 (2001). "Each major

independently exercises its own judgment and may decline approval because of the vessel's ownership or management, credit-worthiness, safety record, history, past experience, change in class, or other reasons considered relevant." *Id*.

C. SIRE Inspections and A Worldwide Pandemic

Due to the difficulties in completing in-person SIRE inspections during the COVID-19 pandemic, the period in which inspection reports were permitted to be treated as "live" reports on the database index was increased to eighteen (18) months. On March 20, 2020, OCIMF issued "OCIMF COVID-19 Update Bulletin #6-SIRE/COVID Inspections and Reports" to provide additional guidance on inspections and the use of inspection reports during the pandemic, which stated: "OCIMF continues to encourage stakeholders to apply a pragmatic approach during this period of impact and for operators and inspection submitting members to maintain close communication. * * * Recipients of reports . . . are encouraged to consider this new reality [COVID-19 pandemic] and take a "pragmatic approach" when reviewing reports against the current COVID-19 background. The "pragmatic approach" encouraged, included but was not limited to:

- Age of the Report – can an older report than normally required be accepted?
- What are the additional risks if an older report is used?
- Can these risks be mitigated through other means – e.g. additional data from the operator or from other sources?

Id.

Four (4) months later, "OCIMF Covid-19 Update Bulletin #9 - A pragmatic approach to SIRE and COVID Inspections and Reports", was issued on July 16, 2020, and reiterated the guidance previously provided and stated that "OCIMF is currently in the process of developing a remote inspection regime." *Id*.

II. CHARTER PARTY VETTING CLAUSES – A HYPOTHETICAL CASE STUDY

Of particular relevance to the proper interpretation of vetting clauses is the comparison between the form clauses outlining Owners' general obligation to provide a vessel that is fit, tight, and staunch for her intended service, which is always contained in a standard time charter party and the specific amended language traditionally added through rider clauses for tankers carrying petroleum products.

A. Hypothetical Case Study

The express wording of the vetting clauses can significantly impact the rights and remedies of the parties, despite the perception that that the clauses are expressing a general level of anticipated vetting compliance. For example, in a Shelltime 4 Charter Party, the following clauses are included:

1. Clause 1(b): *she shall be in every way fit to carry crude petroleum and/or its products.*
2. Clause 1(c): *she shall be tight, staunch, strong, in good order and condition, and in every way fit for the service, with her machinery, boilers, hull and other equipment . . . in a good and efficient state;*
3. Clause 3(a): *Throughout the charter service owners shall, whenever . . . any event …requires steps to be taken to maintain or restore the conditions stipulated in Clauses 1 and 2(a), exercise due diligence so to maintain or restore the vessel.*
4. Clause 3(c): *If Owners are in breach of their obligations under Clause 3(a), Charterers may so notify Owners in writing and if, after the expiry of 30 days following the receipt by Owners of any such notice, Owners have failed to demonstrate to Charterers' reasonable satisfaction the exercise of due diligence as required in Clause 3(a), the vessel shall be off-hire and no further hire payments shall be due, until Owners have so demonstrated that they are exercising such due diligence.*

Rider clauses for the vetting requirements imposed by a Charterer include the following:

5. Rider Vetting Clause: *Owners acknowledge that to trade effectively, the Vessel must be accepted by major oil companies under the SIRE Vessel Inspection Program. Owners shall exercise due diligence to maintain the Vessel at a vetting*

standard that is acceptable to major oil companies that charter vessels similar to the Vessel.

6. Rider Vetting Clause: *Sire inspections shall be carried out at five (5) month intervals, plus or minus thirty (30) days.*

Now, assume that the Owners and Charterers had agreed to a six (6) month time charter party agreement, with an option to extend by another six (6) months. The vessel was timely and safely completing a spot voyage for the Charterers before the continuation of the parties' relationship and commencement of time charter. During the voyage, the vessel carried a petroleum cargo from the U.S. Gulf to South America without incident, delay, or claim, with a successful two (2) port discharge. The vessel was in ballast, headed back to the U.S. Gulf, and the time charter was to commence in direct continuation of the spot charter upon tendering notice of arrival at Cristobal, Panama. At the time the NOR was tendered, the Charterers declare that the vessel is not acceptable because the last SIRE inspection had occurred more than 180 days prior. Owners had attempted to arrange for a discharge SIRE inspection at either of the South American discharge ports, and in fact had an inspector arranged to attend, but ultimately was not permitted access at either terminal due to COVID restrictions.

A dispute ensues with each party reserving its rights. Ultimately, Owners carry out an idle SIRE inspection in Panama within the thirty (30) day window provided in charter party clause 3A, to maintain or restore the vessel to service condition, yet the Charterers declare the charter party cancelled. Owners reject the notice of cancellation and declare Charterers in breach. Under such a backdrop, the following questions come to the forefront: 1) is the obligation to arrange for a SIRE inspection *"at five (5) month intervals, plus or minus thirty (30) days"* a "warranty" or "due diligence" obligation; 2) are Owners allowed thirty (30) days to cure the SIRE inspection requirement; and 3) does an idle SIRE inspection or any inspection other than a discharge SIRE meet the charter party requirements?

B. Contract Interpretation in Maritime Contracts

It is axiomatic that, maritime contracts "must be construed like any other contracts: by their terms and consistent with the intent of the parties" *Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd,* 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004); see also 2 T. Schoenbaum, Admiralty & Maritime Law §11:2, pa 7 (6th ed. 2018) ("Federal maritime law includes general principles of contract law"). The primary objective in contract interpretation is to give effect to the intent of the contracting parties as revealed by the language they chose. *In re Donjon Marine Co., Inc. v. KiSKA Construction Corporation, Derrick-Barge CHESAPEAKE 1000,* SMA No. 3877 (Mar. 16, 2005). "When the language is clear and unambiguous, the parties' ***intent is to be determined from within the four corners of the written agreement*** without reference to extrinsic or collateral evidence." *Id.,* (emphasis added). A contract is unambiguous if "its language as a whole is clear, explicit, and leads to no absurd consequences, and as such it can be given only one reasonable interpretation." *Chembulk Trading LLC v. Chemex Ltd.,* 393 F.3d 550, 555 n.6 (5th Cir. 2004).

C. Review of the Specific Language in Vetting Clauses

Scholarly articles and Society of Maritime Arbitrators (SMA) decisions make clear that a vessel Owner's obligation to comply with contractual vetting requirements is to be determined by a comprehensive review and careful consideration of the specific language in each clause and the interactions between those clauses as part of the charter party. Martowski, D., *Vetting Clauses,* 26 Tul. Mar. L. J. 123, 126. In *The American Energy,* SMA No. 3141 (1995), the Panel found in favor of a Charterer that had cancelled a charter party because of Owners failure to comply with the vetting clause which stated: "Owners warrant that for the duration of this Charter the vessel will be kept in a standard acceptable to all major chemical producers and all major oil companies (e.g., BP, Shell, Exxon, etc.)." The Panel explained that "duration of this charter" precisely meant ***from delivery until redelivery.*** *Id.,* emphasis added. The fact that Owners had substantially complied with the clause was insufficient, because there was a requirement for the vessel to hold "all" approvals from the start of the charter party. Moreover, the clause expressly provided Charterer the right to cancel the charter party. *Id.,* at Addendum 2 ("Charterers to have the option to cancel this Time Charter within six (6) months after delivery into Time Charter by giving thirty (30) days advance notice.").

Similarly, in *The American Chemist,* SMA No. 3189 (1995), a Panel interpreting the same vetting clause held that the vetting obligation had been breached because Owners had failed to keep the vessel "in a standard acceptable to majors at the time of delivery ***and*** 'for the duration of the charter.'" *Id., but see, In re Stellar Hope,* SMA Award No. 3248, (1996) (where the Panel found in favor of the Owner where the time charter vetting clause provided: "Owners warrant that the vessel ***will be*** in all respects able to pass safety vetting inspections conducted by Charterers and cargo interests such as - not limited to - Shell, Mobil, Exxon, BP, Texaco, etc."). In the *Stellar Hope,* the Panel found that the future tense was a distinguishing characteristic not requiring vetting approvals to be in hand prior to delivery.

D. The Distinction between "Warranty" and "Due Diligence"

Under U.S. general maritime law, if a clause contains the term "warranty," then it is easy to adduce that the undertaking is a warranty obligation. However, where a clause does not expressly invoke the term "warranty," it is well settled as a matter of maritime contracts that "[s]tatements of fact contained in a charter party agreement relating to some material matter are called warranties," regardless of the label ascribed in the charter party. 22 Williston § 58.11, at 40-41 (2017); *see also Davison v. Von Lingen,* 113 U. S. 40, 49-50, 5 S. Ct. 346, 28 L. Ed. 885 (1885) (a stipulation going to "substantive" and "material" parts of a charter party forms "a warranty"); *Behn v. Burness,* 3 B. & S. 751, 122 Eng. Rep. 281 (K. B. 1863) ("With respect to statements in a [charter party] descriptive of . . . some material incident . . ., if the descriptive statement was intended to be a substantive part of the [charter party], it is to be regarded as a warranty").

Due Diligence is generally defined as that "degree of care that a reasonably prudent person would exercise in like or similar circumstances in the conduct of his own business." *L.R. MIMOSA,* SMA No. 4338, 2018 WL 1998 WL 1478292 (2018); *PETROJAM TRADER,* SMA No. 3493, 1998 WL 35281326 (1998), quoting *DEA BROVID,* SMA No. 1931 (1984) *("[Due diligence] is a relative standard of care rather than an absolute one that [a party] must be judged by.")*. In *California & Hawaiian Sugar Refining Corp. v. Wingo Tankers, Inc.,* 278 F. Supp 648, (E.D. La. 1968), a cargo case, the Court pointed out that whether due diligence has been exercised "is always a factual one, to be examined under the detailed circumstances of each particular case," and is "a purposefully broad concept, designed to enable the trier of fact to evaluate a variable on the basis of flexible criteria." *Id.*

The most recent U.S. Supreme Court decision to compare and contrast "warranty" vs "due diligence" obligations in charter party clauses came in the long running ATHOS I litigation. In that matter, the vessel suffered a casualty and oil pollution incident in the Delaware River in 2004 after striking an unknown and unmarked anchor in the Mantua Creek anchorage and approach to the vessel's destination at Paulsboro, New Jersey. *CITGO Asphalt Ref. Co. v. Frescati Shipping Co.,* 140 S. Ct. 1081, 1089, 206 L. Ed. 2d 391, 400, 2020 U.S. LEXIS 1925, 50 ELR 20075, 2020 AMC 109, 28 Fla. L. Weekly Fed. S 102 (2018). The legal issue specifically turned on the 'safe-berth clause' in the charter party. The U.S. Supreme Court explained that the clause at issue imposed a strict warranty requirement and not the less stringent due diligence duty of care. *Id.*, *15. The specific clause stated: "[t]he vessel shall load and discharge at any safe place or wharf, . . . which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer."[4] *Id.* The Court further found this language "***leaves no doubt*** that the safe-berth clause establishes a warranty of safety, on equal footing with any other provision of the charter party that invokes express warranty language" elsewhere in the charter party. *Id.* The Clause relates to an express obligation, undertaken by and within the control of the charterer of the ATHOS I. *Id.* And, "as a general rule, due diligence and fault-based concepts of tort liability have no place in the contract analysis." *Id.* at *16.

This holding is consistent with the SMA arbitration decisions in *Petrojam Trader, American Energy,* and A*merican Chemist, i.e.* where a clear and firm obligation is included in a contract, the trier of fact may not read in a differing duty of care. *Id.* When a clause invokes the explicit terms "warranty" or "due diligence," the analysis to be undertaken appears to be fairly straightforward. However, what standard is to be applied when a vetting clause is silent on the use of "warranty" or "due diligence," and instead merely recites to the periodicity in which a SIRE inspection must be carried out?

For example, "Sire inspections shall be carried out at five (5) month intervals, plus or minus thirty (30) days." *See* Point II.A.6, supra. Many charter parties contain a similar requirement or language, such as: "Owners will arrange... for a SIRE inspection... at intervals of six-months..." M/T DELAWARE TRADER, SMA No. 4266 (2007) (citing Shelltime 4 Charter Party standard clause).

Does such language create an express obligation and warranty by the Owner to have a SIRE inspection completed every 180 days, no matter what? Does it require that the most recent SIRE inspection will have had to be carried out within 180 days prior to commencement of the charter party? Is it a due diligence standard requiring the Owner to exercise a prudent and reasonable degree of diligence to comply? Does the particular "type" of SIRE inspection performed, (discharge, loading, idle, bunkering, ballasting, deballasting, at anchor, at sea), have any impact on the question of compliance? If there is not a completed inspection within the timeframe, does the charter party permit Charterers to reject the vessel and cancel the agreement? Are the Charterers' motivations, including a changing market or "price majeure" relevant to the analysis?

III. "PRICE MAJEURE" AND ECONOMIC MOTIVATIONS

The tanker market can be unpredictable and volatile. It is reasonably foreseeable that an opportunistic party may seek to terminate an unfavorable charter party when the market moves in their favor. An example is readily found in the spot rate fluctuations during the period of June 2020 to October 2020. In the summer of 2020 spot rates for tankers engage in the Atlantic trade were the equivalent of up to $20,000 per day; whereas by October of 2020 similar hire rates for handysize vessels were down to $5,000 - $7,000 per day.

No matter how blatant a "price majeure" motivation may be, SMA decisions have generally looked to and relied upon the parties' agreements to the exclusion of extraneous financial factors. As the Panel held in the *AMERICAN ENERGY:*

> We agree with Owners' argument that Sunrise's real motive in cancelling the charter party was a matter of economics. But the motive is not the question or point to be considered. If Sunrise did not have the right to cancel the vessel, the motive is of no concern, and vice versa. Contracts are negotiated and entered into for economical reasons. Why should a charterer try to maintain a fixture in a declining freight market if he has a contractual right to cancel the fixture and avoid the losses?

Id., SMA No. 3141 (1995); *see also, The HAROLD HUDNER,* SMA No. 3619 (2000) which in turn cites with approval the DIAMOND PARK/EMERALD PARK, SMA No. 3576 (1999) (where the Panel wrote: "The panel is cognizant of the fact that, in a relatively low or depressed freight market, a charterer with high time charter rate obligations might try to minimize his financial exposure and similarly, in the reverse, an owner would try to maximize his earnings. It must be clearly understood that there is nothing wrong with these concepts provided the justifications are rooted in the applicable charter party."). Simply put, whatever a party's economic advantages or disadvantages, the right to terminate or cancel a charter party is rooted in analysis of the merits of the contractual right to do so (or not).

IV. EQUITY

The U.S. Supreme Court has recognized, "equity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief." *Vaughan v. Atkinson,* 369 U.S. 527, 530, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962); *see also Lewis v. S. S. Baune,* 534 F.2d 1115, 1120 (5th Cir. 1976). In *Swift & Co.,* the U.S. Supreme Court stated that it "find-[s] no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction." *Swift & Co. v. Compania Caribe,* 339 U.S. 684, 691-692, 70 S. Ct. 861, 94 L. Ed. 1206 (1950). As U.S. general maritime law is viewed through a lens of doing what is equitable, where there is judgment call as to whether a party exercised due diligence (or not), arbitrators may draw on the rich history of U.S. jurisprudence assessing the equitable positioning of the respective parties.

Such an approach comports with the growing recognition of a duty of good faith and fair dealing in American contract law to enable both parties to realize the fruits of their agreement. See, Restatement (Second) of Contracts §205. "Every maritime contract imposes an obligation of good faith and

fair dealing between the parties in its performance and enforcement." *F.W.F. Inc. v. Detroit Diesel Corp.,* 494 F. Supp. 2d 1342, 1359 (S.D. Fla. 2007) *aff'd,* 308 F. App'x 389 (11th Cir. 2009) (citing the Restatement). Under this implied obligation, "neither party shall do anything to injure or destroy the right of the other party to receive the benefits of the agreement." *Id.* "Accordingly, [i]f the party to a contract evades the spirit of the contract, willfully renders imperfect performance, or interferes with performance by the other party, he or she may be liable for breach of the implied covenant of good faith and fair dealing." *Overseas Philadelphia, LLC v. World Council of Credit Unions, Inc.,* 892 F. Supp. 2d 182, 190 (D.D.C. 2012) (internal quotation marks omitted).

CONCLUSION

Sophisticated maritime actors can and should memorialize the terms of their carefully negotiated agreements clearly, comprehensively, and unambiguously. The rights and obligations of contracting parties should be well-stated and easy to understand. This is especially so when talking about charter party vetting requirements. While vetting criteria may vary from oil major to oil major, a Charterers' expectations of a Vessel, and her Owner's obligations, should be affirmative and not leave room for differing interpretations. More to the point, a well drafted charter party should not include vetting clauses which leaves the parties uncertain whether the terms are a warranty obligation or a due diligence endeavor.

1 *See,* OCIMF Publication entitled "Ship Inspection Report Programme (SIRE)", https://www.ocimf. org/programmes/sire/.

2 *CITGO Petroleum Corp. v. Seachem,* 2014 U.S. Dist. LEXIS 170843, *3 (SDTX 2014).

3 *See,* OCIMF Publication entitled "Ship Inspection Report Programme (SIRE)"https://www.ocimf. org/programmes/sire/.

4 Compare to the time charter clause in the DEA BROVIG and PETROJAM TRADER SMA arbitrations which stated that "Charterers shall exercise ***due diligence*** to insure that the Vessel is only employed between and at safe ports, place, berths, docks, anchorages submarine lines where she can always lie safely afloat . . ." *See* SMA No. 1931.

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Recent Developments in U.S. Maritime Arbitration*

By Thomas H. Belknap, Jr., Partner, Blank Rome LLP, New York

This paper highlights some recent legal developments relevant to maritime arbitration in the United States although, as will be seen below, not all of the developments specifically involve maritime cases. This fact serves as a good reminder that maritime arbitration in the United States is but a subset of a broad and well-developed body of law relating generally to international and commercial arbitration.

1. **Recent Supreme Court Decisions** – Although the United States Supreme Court has not recently decided a case specifically addressing maritime arbitration, it continues to be active in deciding matters relevant to maritime and international commercial arbitration. Some of the more recent notable decisions are discussed below.

   a. *Coinbase, Inc. v. Bielski,* 143 S. Ct. 1915 (2023) – The Supreme Court held that a district court must stay its proceedings while an interlocutory appeal on the issue of arbitrability is pending. Notably, an interlocutory appeal on this issue is generally only available where the district court has denied a petition to compel arbitration, and not when such a motion has been granted.

   b. *ZF Automotive US, Inc.,* 142 S. Ct. 2078 (2022) – The Supreme Court held that a party may not use 28 U.S.C. § 1782 to obtain discovery in aid of foreign arbitration because a foreign arbitral panel is not a "foreign tribunal" within the meaning of the statute. This resolved a circuit split in which some circuits had found that such discovery was available, and others found not. Notably, discovery in aid of foreign proceedings is still often available in support of foreign court proceedings and can be a powerful discovery tool.

c. *Morgan v. Sundance, Inc.,* 142 S. Ct. 1708 (2022) – The Supreme Court held that a district court need not find "prejudice" as a condition to finding that a party has waived its right to stay litigation or compel arbitration under the Federal Arbitration Act; waiver of an arbitration clause should be construed just as any other contract provision. This is in keeping with the general principle that while arbitration is to be favored, contract terms relating to arbitration should not be given special treatment or be construed differently from other contractual terms.

d. *Badgerow v. Walters,* 142 S. Ct. 1310 (2022) – The Supreme Court held that in applications to compel arbitration under § 4 of the Federal Arbitration Act, a federal court must "look through" the complaint to the subject matter of the action to decide whether it has subject matter jurisdiction. Thus, for instance, if the dispute involves a maritime contract, that fact will give the federal court subject matter jurisdiction to decide the petition. On the other hand, where a party seeks to challenge or confirm an arbitration award under § 9 or 10 of the FAA, the court may not consider the subject matter of the underlying dispute but may only analyze whether subject matter jurisdiction exists over the enforcement action – *i.e.*, of a contractually agreed arbitral award. As a result, absent diversity jurisdiction, federal courts will rarely have subject matter jurisdiction to enforce arbitral awards under the FAA, even where the underlying dispute arose under a maritime contract. That said, where the dispute concerns an award governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (aka the New York Convention), federal subject matter jurisdiction will still exist on the basis that the Convention is a "treaty obligation" of the United States.

e. *CITGO Asphalt Refining Co. v. Frescati Shipping Co. Ltd.,* 140 S. Ct. 1081 (2020) – the Supreme Court held that, absent language otherwise, the obligation to nominate a safe berth is both a duty of, and a warranty by, the charterer, and not merely an obligation to exercise due diligence.

f. *Henry Schein, Inc. v. Archer & White Sales, Inc.,* 139 S. Ct. 524 (2019) – The Supreme Court held that where parties have clearly and unmistakably delegated to the arbitrators the question of arbitrability of a particular dispute, the court may not ignore that delegation and decide the dispute even where it finds that the party's assertion of arbitrability is "wholly groundless."

2. Arbitrability – The question of who as between the court and the arbitrators should decide the question of arbitrability continues to be a hot topic. The basic rule in the United States is that the courts decide threshold issues of arbitrability unless the parties have "clearly and unmistakably" delegated that duty to the arbitrators. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 (1995). Some arbitration rules, such as the AAA Rules, expressly delegate issues of jurisdiction to the arbitrators, and courts have broadly found that such delegation meets the "clear and unmistakable" test. The Rules of the Society of Maritime Arbitrators do not contain such a provision; accordingly, the question whether the parties have agreed to arbitrate is usually left for the courts in maritime arbitration, though the below cases reveal some possible exceptions to this rule.

a. *Arb. Between CF Clip Tenacious LLC and Sompo Japan Nipponkoa Insurance, Inc.*, SMA No. 2243 (2021) – While acknowledging that the question whether the parties agreed to arbitrate is ordinarily left for the courts unless the parties have "clearly and unmistakably" delegated that question to the arbitrators, the panel found that both parties had submitted the question of arbitrability to the arbitrators and, consequently, "the question is squarely the panel's to answer."

b. *Arb. Between Transportacion Maritima Mexicana, SA and Alia Global Logistics SA*, SMA No. 4429 (2021) – Petitioner sought award under ASBATANKVOY charter in which the parties had not struck out either London or New York as the place of arbitration. Respondent declined to participate in arbitration. The panel found that the charter evinced a clear intention to arbitrate and noted that respondent never objected to New York as the forum nor sought to bring the arbitration to a different forum. Also, New York was more closely associated with the dispute, which concerned transportation of a cargo from Mexico to the United States. Accordingly, the panel found that respondent waived its right to object to arbitrating in New York and, by failing to object, agreed that the intent of the parties was to arbitrate in New York.

3. **Timebar** – There is little dispute that questions of timebar are for the panel to decide and, in appropriate cases, an arbitration panel will not hesitate to grant a motion to dismiss a timebarred claim.

   a. *M/V BETTY K IX,* SMA No. 4413 (2020) – In a consolidated arbitration over off-spec bunkers, owner claimed against charterer and charterer sought indemnity from bunker supplier. Supplier moved to dismiss the indemnity claim as being time barred under its terms and conditions. Charterer opposed the motion, seeking discovery as to communications between the supplier and owner. The panel, on the facts, found the time bar provision enforceable and found that charterer "has not made a case (factual, legal, equitable or under laches) for the Panel to allow the requested discovery or delay its decision on the time bar issue any further, or until the entire consolidate arbitration proceeding is concluded." Accordingly, the motion to dismiss was granted.

4. **Pre-Award Security** – It is well-established that an arbitration panel has broad authority to direct a party to post pre-award security. Arbitrators have developed a test that considers the likelihood of success on the merits, the responding party's conduct and its financial condition and will, in appropriate circumstances, issue a partial final award directing the posting of security which can be enforced in the courts. Following are some of the more recent awards on this point.

   a. *Arb. Between Cargill Inc. and Triorient LLC,* SMA No. 4405 (2020) – In considering an application for pre-award security, the Panel reviewed its authority under SMA Rule 30 and prior awards and cases and considered relevant factors including likelihood of success, respondent's conduct, and respondent's financial condition. It found a likelihood that petitioner would prevail on the merits, that respondent had failed to appear, and that publicly available evidence indicated that respondent was unable or unwilling to pay claims similar to those asserted; accordingly, the panel ruled respondent should post a bond for $1.6 million and that the panel's award was final as to pre-award security and may be entered as a judgment in any court of competent jurisdiction.

   b. *Arb. Between CLDN Cobelfret Pte Ltd and Triorient LLC, SMA Nos. 4402 and 4408 (2020)* – In a first partial final award (SMA No 4402), the Panel extensively considered its authority to require a party to post pre-award security and, on consideration of factors, directed respondent to post security in the amount of $2.5 million. When respondent failed to comply, petitioner sought a second partial final award enjoining respondent from transferring assets unless and until security was posted in the ordered amount. The panel held that SMA Rule 30 authorized it to enter such an injunction, if warranted, and held that such an injunction was appropriate on the facts of this case. (SMA No. 4408).

   c. *The HANZE GENDT,* SMA No. 4419 (2021) – After weighing "well-established criteria" for requiring pre-award

security – to wit, (a) whether the moving party has established a likelihood of success on the merits, (b) the opposing party's financial condition, and (c) whether there are any other means of securing the claim – the panel directed the respondent to post a bond in the amount of $2 million.

5. **Declaratory/Injunctive Relief** – Rule 30 of the SMA Rules gives the arbitrators broad authority to fashion appropriate relief, and arbitration panels regularly issue declaratory judgments and grant injunctive relief where appropriate. Arbitrators can also grant emergency relief. Following are some recent awards showing the breadth of the arbitrators' powers in this respect.

   a. *Arb. between Evergreen Shipping Agency and Global Shipping Agencies SA,* SMA No. 4393 (2020) – The panel, noting that it is well-settled that arbitration panels may grant declaratory relief as part of their authority to "fashion remedies that they believe will do justice between the parties," issued an award declaring respondent liable for petitioner's reasonable and documented damages arising out of its claims and permitting petitioner to submit evidence substantiating any portion of its damages claim once it crystallizes.

   b. *M/V HANZE GENDT,* SMA No. 4395 (2020) – Vessel owner sought emergency declaration from panel that it was justified in canceling charter in light of charterer's repudiation. The panel, concluding that "it is historically well-established that arbitrators hearing disputes held in accordance with the SMA Rules have authority to decide emergency applications," granted the requested relief.

   c. *Arb. Between Star Tankers, Inc. and Citgo Petroleum Corp.,* SMA No. 4399 (2020) – The parties did not dispute that $134,186.72 was due under an ASBATANKVOY charter; however, Citgo contended it could not make payment because of U.S. sanctions against its corporate parent, PdVSA, which required an OFAC license. The Panel awarded the amount in dispute and directed Citgo to "cooperate with the commercially reasonable requests of claimant for assistance in obtaining the license from OFAC and then make the funds transfer as soon as said license is procured by claimant." The panel further awarded claimant $5,000 for its "time, trouble, fees and expenses in connection with applying for such license."

   d. *Arb. Between Stolt Tankers B.V. and Kennedy Hunter N.V.,* SMA No. 4424 (2021) – Petitioner sought final award declaring agency agreement terminated and enjoining respondent from pursuing parallel legal proceedings in Belgium in violation of the parties' agreement to arbitrate. The panel found that because the parties were the same in both actions and the holding in the arbitration was dispositive of the claims in the Belgian action, and because other equitable principles weighed in petitioner's favor, its request for an anti-suit injunction should be granted.

6. **Maritime Arbitration Issues**

   a. **Payment of Freight** - M/V ANGLO BARINTHUS, SMA No. 4397 (2020) – The panel reaffirmed that the obligation of charterer to pay freight "is a separate, independent claim, not subject to any offset, and, being wholly independent of other issues, can be disposed of separately."

   b. **Adequate Assurance of Performance** - M/V HANZE GENDT, SMA No. 4395 (2020) – Following earlier arbitral awards and Section 251 of the Restatement (Second) of Contracts, the panel found that a party faced with uncertainty about the other party's willingness or ability to perform under a charter may demand that the other party provide "adequate assurance of performance" and may treat a failure of the other party to provide such assurance as a repudiatory breach.

c. **"Binding" Findings of Joint Surveyor** - M/V SPIRIT OF WASHINGTON, SMA No. 4386 (2020) – The panel found charterer's refusal to comply with joint surveyor's findings, where charter stipulated they would be "binding," was a breach of the charter; the panel was authorized by the arbitration clause to find breach but was not authorized to hear a challenge to the surveyor's findings.

d. **Burden of Proof** - M/V YAMUNA SPIRIT, SMA No. 4454 (2023) – The panel found that neither vessel owner nor terminal met its respective burden of proof to prove by a preponderance of the evidence that it was "more likely than not" that oil sheen emanated from the other party's equipment; consequently, each party's claim against the other was denied.

7. Sealed Offers – The issue of sealed offers was a topic of much discussion over the past couple of years, culminating in an amendment to SMA Rule 31 to include a provision concerning the making of – and the implications of – a sealed offer of settlement. So far, the workings of amended Rule 31 are untested, at least according to published awards as of the time of this writing.

a. *Arb. Between Daelim Corp. and Integr8 Fuels,* SMA No 4420 (2021) – "On November 11, 2020, Integr8 submitted a sealed offer, the terms of which Integr8 presented to Daelim. The Panel opened it after completing its deliberations and agreeing this Final Award. The sealed offer was no better that the Award issued herein and hence is of no consequence in this matter, although the Panel endorses the use of such sealed offers generally."

b. SMA Rule 31 – Amended in June 2022 to add the following provisions concerning "sealed offers"

> (b) At any time after presentation of initial submissions to the Panel, but in no event later than the date the proceeding is declared "closed" per Section 25, either party may present the other with a Settlement Offer binding itself to either pay or accept a fixed sum (including accrued interest) or in the case of a claim for injunctive relief or specific performance, to perform, not perform or discontinue performing a specified activity or contract obligation and stating a date by which such offer must be accepted.
>
> (c) If the Settlement Offer is timely accepted and the arbitration is discontinued in accordance with the terms of the Settlement Offer, the terms of the settlement may provide for an Award upon Settlement in accordance with Section (a). If the Settlement Offer is timely accepted but the parties do not agree on the amount and allocation of legal and arbitrator fees and expenses, the parties shall submit the dispute to the Arbitrators who shall determine the amount and allocation of such fees and expenses in accordance with Section 30, also taking into account the terms and timing of the Settlement Offer, and issue an Award with respect to the amount and allocation of such fees and expenses.
>
> (d) If the Settlement Offer is refused, the Offeror may notify the Panel that a binding Settlement Offer was made but declined by the Offeree. The details of the last Settlement Offer shall then be delivered in a sealed envelope to the Chair or Sole Arbitrator who shall not open the envelope until such time as the Panel or Sole Arbitrator has arrived at a final decision. Should the rejected Settlement Offer be equal to or more favorable to the Offeree than the Panel's Award, the Panel shall, subject always to the provisions of Section 30 and taking into account the terms and timing of the Settlement Offer, award the reasonable legal fees and expenses as well as

such arbitrator fees and expenses that would have been saved had the offer been accepted at the date by which acceptance was required.

8. ***Functus Officio*** – Arbitration panels routinely issue partial final awards which are themselves separately enforceable in the courts even while the remainder of the arbitration proceeding moves forward. Questions often arise as to the arbitrators' power to revisit a partial final award once it has been issued, and the below recent cases highlight the basic rule and possible scope for exception.

   a. *Arb. Between Daelim Corp. and Integr8 Fuels,* SMA No 4420 (2021) – Containing extensive discussion confirming panel's broad authority to issue partial final awards even where the governing arbitration rules do not expressly so state and holding that "since the panel has rendered its decision with respect to the claims that were the subject of the Partial Final Award, it lacks jurisdiction to reconsider those issues."

   b. *M/V BETTY K IX,* SMA No. 4414 (2021) – Following partial final award dismissing claim as time barred, party challenged award to district court on grounds of alleged bias, which application was denied. Prevailing party on motion subsequently sought an award of attorneys' fees both in connection with the motion to dismiss and in opposing the petition to vacate. Losing party argued the panel was *functus officio* and lacked jurisdiction to consider the fee application in respect of fees incurred in connection with the petition to vacate. The panel found that it was not *functus officio* since other aspects of the dispute were still ongoing; however, it declined to award fees incurred in defending the petition to vacate for reasons discussed more fully below.

9. **Attorneys' Fees** – It has been well-established for many years that U.S. maritime arbitrators are empowered to, and routinely do, award attorneys' fees to the prevailing party. The procedure for submitting a claim for attorneys' fees is simple and streamlined. Typically, after the final submission on the merits but before an award is issued the panel will direct both parties to submit their respective attorneys' fees claims, which will take the form of an attorney declaration either summarizing or submitting their fee statements issued in connection with the arbitration. In many instances, where one party is the clearly prevailing party, the panel will make a full award of fees; in others, where the outcome is less one-sided, the panel may reduce the fee award as it considers appropriate. In some instances, the panel may exercise its discretion to decline both parties' application where, for instance, neither party clearly prevailed.

   a. *Arb. Between Seals Co., Ltd and Integr8 Fuels, Inc.,* SMA No. 4436 (2022) – Parties to an arbitration concerning allegedly out-of-spec bunker fuel settled the claim but "without prejudice to Seals' claim for recovery of legal fees and costs." Seals proceeded to claim for ~$350,000 in attorneys' fees and costs. The panel acknowledged it had the power to award fees; however, because the panel had not ruled on any of the merits claims, no party had "prevailed." Therefore, the panel majority declined to award attorneys' fees. (The panel's ruling noted that, as of that time, the SMA Rules lacked a rule relating to sealed offers. The rules were subsequently amended in 2023 to add such a rule, including 31(b) which appears to have been directed at this case).

   b. *Absolute Nevada LLC v Grand Majestic Riverboat Co, LLC,* SMA No. 4384 (2020) – Petitioner sought award of attorneys' fees incurred in connection with preliminary injunction action pursued in federal district court for relief pending the outcome of the arbitration. The parties had stipulated to dismiss the court action shortly before the hearing. Respondent opposed on the basis that the injunctive relief was not necessary and no arbitration award had been issued by the panel. The panel rejected

respondent's argument and found that respondent "appreciated the lack of merit in its legal position and therefore entered into the stipulation with petitioner ... thereby resolving all requested relief by petitioner in its favor." Accordingly, the panel awarded petitioner its attorneys' fees and costs incurred both with respect to the court proceedings and the arbitration.

c. *M/V BETTY K IX,* SMA No. 4414 (2021) – Following partial final award dismissing claim as time barred, party challenged award to district court on grounds of alleged bias, which application was denied. Prevailing party on dismissal motion subsequently sought an award of attorneys' fees in connection with opposing the petition to vacate in the district court. The panel found that these fees were incurred "in defense of the case" within the meaning of SMA Rule 30 but declined to award fees in this instance on the ground, inter alia, that the application was not frivolous and vexatious but was made in good faith.

10. **Publication** – Under Section 1 of the SMA Rules, all arbitration awards are subject to publication "unless stipulated in advance to the contrary." In practice, parties rarely make such a stipulation in their arbitration agreement.

    a. *MN STADE,* SMA No. 4443 (2022) – The panel held that a provision in the charter that "negotiations and fixture" were to remain confidential does not impact the charter itself nor the parties' performance under the charter. It also does not override the SMA Rules, incorporated into the charter, which provide for publication of awards unless the parties stipulate otherwise. If the parties wish to override the publication provision in the SMA Rules, they should specify in their agreement that any award of the arbitrators is not to be published.

Conclusion

While at least one purpose of arbitration is generally to streamline legal proceedings, as can be seen above, sometimes thorny questions pertaining to the scope of the authority of the arbitrators can make things more complicated rather than less. In the main, however, the roles of the arbitrators and the courts in such matters have been well-defined, such that these threshold questions of jurisdiction and authority can usually be answered with reasonable confidence without intervention by the courts. And meantime, the powers of the arbitrators are broad and allow them great flexibility to "do justice" as required in any given case.

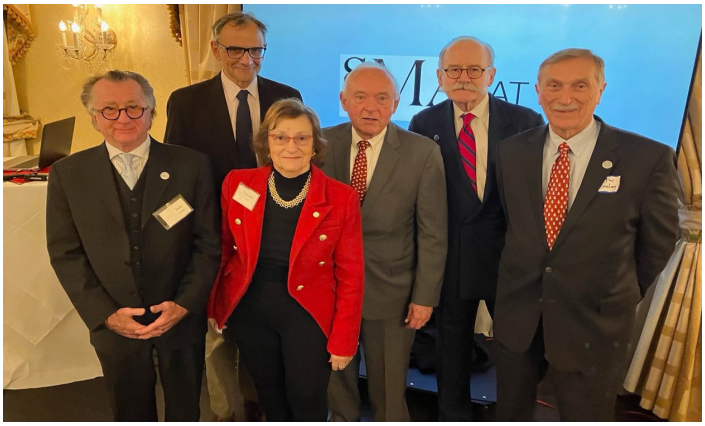
* This paper was originally submitted to ICMA and presented at ICMA XXII in Dubai between November 5-10, 2023, and is republished here with permission from its author, ICMA, and the Dubai International Arbitration Centre.

SMA at 60

SMA Holiday Luncheon, December 13, 2023

The SMA celebrated its 60th anniversary at its annual holiday luncheon on December 13, 2023.

SMA member and former President, Dave Martowski narrated a Powerpoint presentation (https://smany.org/wp-content/uploads/2023/12/SMA-at-60-presentation-12-13-23.pdf) featuring original documents and photos "from the archive" – including founding organizational meeting minutes and the first and second SMA Awards – as well as reflections on the SMA's challenges and achievements by current President, **LeRoy Lambert,** and past Presidents **Robert Shaw, Tony Siciliano** and **Lucienne Bulow.**



From left: SMA Vice-President Robert Meehan, SMA Past Presidents Robert Shaw, Lucienne Bulow, Jack Warfield, David Martowski, Austin Dooley

Spotlight on the SMA

SMA MONTHLY LUNCHEONS*:

January 10, 2024: Our January luncheon, for which Blank Rome generously provided space at their offices, featured Rick Geiger of Marsh USA LLC, who gave a presentation on current trends in the marine insurance market. The luncheon attracted 51 members of the local shipping community and proved to be a successful start to 2024.

February 14, 2024: The SMA and CMA are excited to jointly sponsor a luncheon at 3 West 51st St., New York, New York. Buckley McAllister, President, McAllister Towing, will speak about "Current Contractual Issues from the Work Boat Perspective."

For more details, including registration, please click on: https://smany.org/sma-cma-speaker-luncheon-wednesday-february-14-2024/

March 13, 2024: Brian Maloney and Bruce Paulsen of Seward & Kissel will discuss current sanctions regimes and their impact on the maritime industry. Seward & Kissel will generously provide space at their offices at One Battery Park Plaza, N.Y., N.Y. for this luncheon.

April 10, 2024: Anthony Whitworth, author of "The Saltwater Highway," will discuss his career in the international dry bulk market.

Second Annual Marine Finance Forum, "Dealmaking in the Jones Act and US Flag," New Orleans, La., **November 30, 2023**
https://storage.googleapis.com/marinemoney-1.appspot.com/files/media/2023-11/NewOrleans/NOLAprogram2023_final.pdf

The SMA was a co-sponsor of this event, which was attended by SMA President **LeRoy Lambert** and SMA member **George Tsimis.** Some 275 persons attended, representing the Jones Act/US flag trade, the offshore wind and supply vessel market, ship repair yards, and the inland waterway industry as well as finance and insurance professionals.

Tulane Energy Law Center Conference, "The Future for Offshore Wind in the Gulf and Nationally,", New Orleans, La., **January 19, 2024.**
https://web.cvent.com/event/99c34bda-fc49-4721-936e-239e5a4d91cc/summary

Attended by SMA President **LeRoy Lambert.** Over 200 attendees heard presentations by government officials, bureaucrats, and key industry leaders.

30th Annual HACC-NACC Shipping Conference, "Clean Energy in a Changing World," New York, N.Y., **February 6, 2024**
https://www.haccnaccshippingconference.com/

SMA member **George Tsimis** was the moderator of a panel on Offshore Wind.

Fordham International Law Journal's Symposium on "Maritime Law in the Modern Era," Fordham Law School, New York, N.Y., **February 23, 2024**

SMA members **Charles Anderson** and **George Tsimis** will both be participating on a Marine Pollution panel.

CMA Shipping Conference – Hilton Hotel, Stamford, Ct., **March 12-14, 2024**
https://www.cmashippingevent.com/en/home.html

The SMA will be a sponsor of this event. SMA member **Robert Shaw** will participate as a panelist on a panel addressing "The Future of Maritime Supply Chain Logistics: Inflation, Near Shoring and Non-stop Disruption." SMA member Molly McCafferty will participate on a panel addressing "OPA 90 Successes, Challenges and Views of the Future."

30th Biennial Admiralty Law Institute, Tulane University, New Orleans, La. **March 20-22, 2024**
https://law.tulane.edu/institutes/admiralty

SMA President **LeRoy Lambert** will moderate a panel on Marine Safety.

MLA's Spring Meeting and 125th Anniversary Celebration, New York, N.Y., **May 1-3, 2024.**
https://mlaus.org/11820-2/

The SMA is proud to be a sponsor of this meeting which will celebrate the MLA's 125th anniversary.

*** 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**

Save the Date!

March/April 2024
SMA Seminar - Maritime Arbitration in New York
https://smany.org/wp-content/uploads/2023/10/SMA-2024-SEMINAR-FLYER.pdf

March 25, 2024
The Marine Society of the City of New York
254th Annual Dinner
(honoring **Mr. Steinar Nerbovic,** President and CEO, Philly Shipyard, and **RADM Michael Alfultis,** President, SUNY Maritime College)

New York Marriott Downtown Hotel
85 West St., N.Y., N.Y.
www.marinesocietyny.org

May 1-3, 2024
MLA's Spring Meeting and 125th Anniversary Celebration
https://mlaus.org/11820-2/

In Memoriam

Patrick V. Martin, an esteemed member of the New York maritime legal community and former counsel to the SMA, whose professionalism and great sense of humor were always at the fore, passed away on December 20, 2023. The SMA offers its sincere condolences to Pat's family and to his many friends and colleagues.

https://www.dooleycolonialfuneralhome.com/obituaries/Patrick-V-Martin?obId=30177649

The SMA marks the passing on February 18, 2023 of **Donald L. Caldera,** a former SMA member whose storied career as a lawyer and business executive in the maritime sector spanned decades and continents.

https://www.dignitymemorial.com/obituaries/dallas-tx/donald-caldera-11165685

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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