SMA THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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In this issue

President's Message

By LeRoy Lambert, SMA President

We wrapped up the 2023-24 year at our Annual General Meeting in May. And what a year it was, the SMA's 60th anniversary! In case you forgot —

At our September members-only meeting, we welcomed four new members. That meeting was followed by well-attended, informative luncheons from October through April, including the second annual joint luncheon in February with the CMA.

The highlight was the December luncheon, a look back and forward, with the "SMA at 60" presentation memorably narrated by **David Martowski.**

SMA members participated in the ASBA Annual Cargo Conference in Miami; the 10th Anniversary of the New York International Arbitration Center in New York; the Marine Insurance Americas Conference in Fort Lauderdale; the MLA Fall meeting in San Francisco; the University of Miami Law School International Arbitration Institute; the Fort Lauderdale Mariner's

Club Insurance Seminar; jointly with BIMCO, the CMA, ASBA, and NYMAR a seminar on GENCON 2022 and a reception in Stamford; ICMA in Dubai; the Marine Money Jones Act and US Flag Conference in New Orleans; the Tulane Energy Law Center Conference in New Orleans; the 30th Annual HACC-NACC Shipping Conference in New York; the Fordham International Law Journal's Symposium on "Maritime Law in the Modern Era" in New York; the CMA Shipping Conference in Stamford; the 30th Biennial Admiralty Law Institute at Tulane; the MLA Spring Meeting in New York; the Tradewinds Shipowners' Forum in New York; Marine Insurance Americas conference in New York; a "Lunch and Learn" presentation on "SMA Dispute Resolution: Who We Are, What We Do, and How We Can Help You" at the Virginia Port Authority in Norfolk; presentation on "SMA Dispute Resolution" at Skuld North America; and, as this issue is going to press, the Silver Bell Awards Dinner in New York.

Thanks to our Friends and Supporters, the SMA co-sponsored several of the events listed above. Thank you, Friends and Supporters!

The SMA Education Committee, chaired by **Austin Dooley,** held another successful "Maritime Arbitration in New York Seminar," led by **Professor Jeffrey Weiss** at New York Maritime College in which nine persons from across the maritime industry participated. The Arbitrator provided timely and relevant articles about arbitration.

We also concluded a partnership agreement with Jus Mundi which will allow wider and easier internet access to our SMA awards. We expect this new service will be rolled out in the fall of 2024.

Vice-President Meehan and I thank the outgoing Board of Governors, Committee Chairs, and all members for their support. Special thanks to **David Martowski** and **Dave Gilmartin** who rotated off the Board. We look forward to working with the 2024-25 Board of Governors, Committee Chairs, and members to continue spreading the word about SMA arbitration in New York and the US.

Wishing all members a relaxing and enjoyable summer break. See you at our September 11th members-only luncheon!

LeRoy Lambert
President

Reflections on the 125th Anniversary of the Maritime Law Association, Its Arbitration & ADR Committee, and the SMA

By Christopher Nolan, Partner, Holland & Knight LLP, New York and Chicago, MLA Arbitration & ADR Committee Chair

On the occasion of the Maritime Law Association's 125th anniversary, the fine editors of *The Arbitrator* asked this Chair of the MLA's Committee on Arbitration and ADR to comment on the committee's past and path forward. For context, the MLA's website describes the mission statement for the committee as follows: "[r]eviews current developments in arbitration and mediation in the United States and abroad; analyzes the effect of domestic legislation and international law on arbitration practice; encourages increased utilization of alternative dispute resolution methods in maritime contexts; has proposed mediation guidelines; maintains a close relationship with the Society of Maritime Arbitrators." There's no tie closer to the SMA than sharing these reflections in The Arbitrator!

Milestones allow a moment in time to reflect on the journey to that particular moment of hopeful prosperity. With this spirit in mind, the officers of the Committee extended an invitation to all concerned to join us on Wednesday, May 1, 2024, at the offices of Holland & Knight at 787 7th Avenue, New York, NY 10019. Our ninety-minute session featured two panels: (1) former committee chairs; and (2) current and former Presidents of the Society of Maritime Arbitrators. Following the invitations, we were fortunate to have the five preceding MLA ARB & ADR Committee Chairs accept the invitation, which spanned four decades of leadership:

Don Kennedy, Esq.
Jay Paré, Esq.
Keith Heard, Esq.
Leo Kailis, Esq.
Peter Skoufalos, Esq.

We were also fortunate to have the following current and past SMA Presidents join us:

1997-2001 – Lucienne C. Bulow
2001-2005 – David W. Martowski
2009-2013 – Austin L. Dooley
2013-2017 – James J. Warfield
2017-2019 – Robert G. Shaw
2021-Present – LeRoy Lambert (with Molly McCafferty filling in for LeRoy)

Following this message, the record will reflect via photographs the filled room of 70+ attendees who listened to an august group share their experiences. The meeting was commenced by MLA President Barbara Holland noting the vibrancy of the monthly meetings of this committee and the contributions of the committee to the Association, particularly with respect to the SMA liaison subcommittee led by Tom Belknap, Esq., on behalf of the maritime bar, and Dick Corwin, on behalf of the SMA arbitrators and mediators.

Our panelists addressed the many initiatives over the decades which bettered the shipping industry at large. This included scholarship found in the MLA archives, the SMA website via changes to rules and by-laws, and general engagement in order to promote the fine work of arbitrators, mediators, and legal practitioners in the United States. The MLA's full report of this meeting and its works is reflected in our prepared statements at the general meeting of the MLA on Friday, May 3, 2024, which is recorded and available here (at hour 1 minute 4, with the remarks of Secretary Casey O'Brien): https://us06web.zoom.us/rec/share/Eo_FDxHSMAiUnEpWPl3vIYH6vxWKTUXTln-NG0Kj5D0KcY8ydSnkjsqNbo1_o_RgS.5Ata4rE-BL_fHQMXF

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With the focus on the committee and its past, I wish to take a moment to address its future. In 2025, the committee will be celebrating 100 Years of Maritime Arbitration, with the Federal Arbitration Act of 1925 hitting the centennial. Join us on the third Friday of each month, from 11:30 a.m. to 12 p.m. for our coffee break Zoom sessions open to all and featuring a distinguished speaker in the industry. This work of the committee would not be possible without the dogged efforts of the committee leadership: Lindsay Sakal, Vice-Chair; Casey O'Brien, Secretary; Ifigeneia Xanthopoulou, MLA Young Lawyers' Committee Liaison. We are very proud to have the most diverse and engaging committee leadership in the MLA.

Thank you for the opportunity to address the work of the committee and we hope you will join us as an MLA member.

Barbara Holland, MLA President, and Chris Nolan, ARB ADR Committee Chair


MLA ARB ADR Committee attendees


The ARB ADR Committee Past Chairs Panel and Current Committee Leadership


The SMA Current and Past Presidents Panel

Drop What You're Doing and Get a Choice of Law Clause: Reflections on the Supreme Court's Recent Decision in *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*

(Wilburn Boat)

By Michael I. Goldman, Partner, The Goldman Maritime Law Group, Boston and Fort Lauderdale[1]

Pandemonium has been the state of marine insurance since 1955.[2] It was in that fateful year that the United States Supreme Court issued its decision in the case of *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*[3], spoiling the uniformity which had existed in federal admiralty law up to that time, and crippling the organic evolution of federal admiralty law since then. With that decision, the marine insurance industry in the United States ceased to be guided by a body of common law uniformly applied. Without the uniform application of federal admiralty law, state law prevailed, and the curse of Babel descended on the marine insurance industry.[4]

Pre-*Wilburn Boat,* federal admiralty law had been a source of certainty. Post-*Wilburn Boat,* the only certainty was confusion. Pre-*Wilburn Boat,* underwriters had gauged their exposure with the confidence of knowing that the same legal principles would apply to varying risks. Post-*Wilburn Boat,* the same risk on Lake Michigan might be subject to wholly different legal rules depending on whether the policy was delivered in Wisconsin, Illinois, Indiana, or Michigan. Pre-*Wilburn Boat,* federal admiralty law had illumined the legal perils of the international marine insurance market. Post-*Wilburn Boat,* the international marine insurance industry was without a guiding star.

But with the Supreme Court's decision in the *Raiders* case, there is now the chance to restore certainty, confidence, and light.

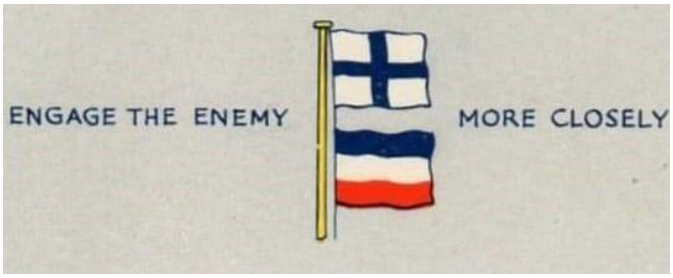
The *Wilburn Boat* case arose in a legal world defined by certainty.[5] The underlying issue concerned an express warranty whereby the insured warranted that the vessel, really a houseboat, would not be used for any commercial purpose. As the lower court decision shows, the federal (and state) courts in the United States were in no doubt that the private pleasure warranty at issue was governed by the same uniform federal rule as all other express warranties in policies of marine insurance. Prior to 1955, federal and state courts had applied federal admiralty law to a whole host of varied issues in marine insurance; interpretation of an "Inchmaree" clause[6], the implied warranties of seaworthiness[7], and proximate cause[8], to name just a few.

To put it simply, no one doubted that "[t]he rights and liabilities under the policies of insurance are therefore to be measured by the standards of the maritime law."[9]

For precisely this reason, it came as a great surprise when the Supreme Court announced to the world that, contrary to the way federal and state courts had been applying federal admiralty law since the ratification of the Constitution, "it does not follow... that every term in every maritime contract can only be controlled by some federally defined admiralty rule."[10] Therefore, everything not already the subject of a federal rule was left to the states.

Since 1955, marine insurers can only be certain that federal admiralty law will apply when they can show that the clause or issue at stake is already the subject of a published decision. For instance, there is ample precedent holding that *uberrimae fidei* ("utmost good faith") has been a part of fed-

eral admiralty law since at least 1828.[11] Therefore, marine insurers can rely on the enforcement of the doctrine throughout almost all of the United States. On the other hand, clauses and issues lacking a pre-1955 pedigree, such as named operator warranties, have been governed by state law.[12] Therefore, marine insurers must contend with the fact that these clauses and issues are subject to more than fifty different rules of interpretation and enforcement.



[13]

(Choice of Law Clauses Before *Raiders*)

In response to this wholly unsatisfactory situation, this state of constant uncertainty, marine insurers began inserting choice of law clauses in their policies.

The specific choice of law clause which was the subject of the *Raiders* case was first applied by Great Lakes in two cases, declaratory judgment actions, both filed in the District of Puerto Rico. In the first case, the district court enforced the clause and held that coverage was validly denied due to the vessel owner's breach of the policy's time for suit provision.[14] In the second case, Great Lakes sought to enforce the same warranty at issue in the *Raiders* case, a warranty requiring that the vessel's fire extinguishers and fire suppressions system would be properly maintained.[15] In both cases, the election of New York law was enforced, Puerto Rican law notwithstanding, but in neither case was the basic enforceability of the clause challenged.

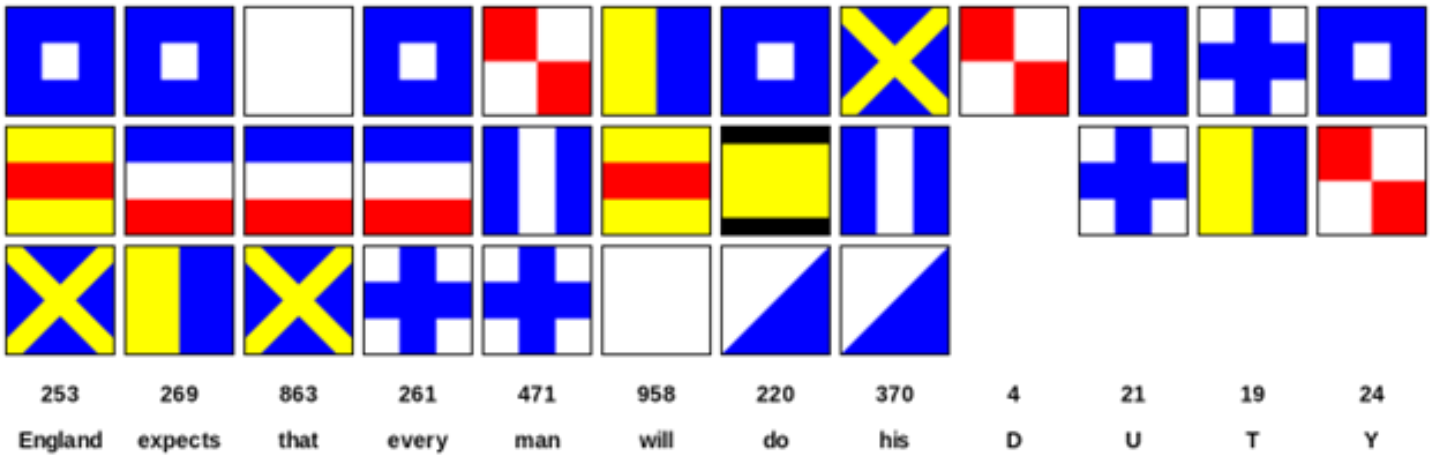
The next year, 2009, came the Fifth Circuit's pivotal decision in the *Durham Auctions* case.[16] *Durham Auctions* concerned a vessel which sank, allegedly due to damage from Hurricane Rita. When the claim was investigated, it was discovered that, at the time that the application for the policy of marine insurance was submitted to the insurer, the insured did not truthfully disclose material facts concerning the vessel's purchase price and loss history. Under federal admiralty law, the insured's misrepresentation of these material facts would ordinarily result in the policy being rendered void *ab initio* ("from inception") under the doctrine of *uberrimae fidei,* even if there had been no specific question on the application directed to these issues.[17]

However, for reasons passing understanding, the rule in the Fifth Circuit since 1991 has been that *uberrimae fidei* is not an "entrenched" rule of federal admiralty law.[18] Therefore, absent such a rule, *Wilburn Boat* commands that Mississippi law would apply to this issue. Under Mississippi law, a misrepresentation could only be material when the application specifically inquired into the issues which were allegedly misrepresented.[19] Applying Mississippi law, the district court held that the misrepresented facts were not material because of the absence of such specific questions on the application.

On appeal, the Fifth Circuit reversed the district court's decision and ordered the district court to apply New York's more demanding rule.[20]

For our purposes, the most important thing about the Fifth Circuit's decision was the test it established for the enforcement of choice of law clauses. The Fifth Circuit held that choice of law clauses in marine insurance contracts which elect a specific state's law to fill gaps in federal admiralty law would be enforced so long as (1)(a) the parties had a substantial connection to the chosen state or (1)(b) a reasonable basis for the chosen state and (2) the law of the chosen state was not contrary to any "fundamental purpose" of federal admiralty law.[21] At no point did the Fifth Circuit ever consider what interest Mississippi might have in blocking the marine insurer's election for the more favorable law of New York.

Various marine insurers have relied on this precise choice of law clause to enforce all manner of express and implied terms, such as named operator warranties[22], survey compliance warranties[23], and fire extinguisher warranties[24], as well as to dismiss state law bad faith claims.[25]



(Raiders)

The *Raiders* case concerned the exact same fire extinguisher warranty as the one at issue in *Pagan-Sanchez.*[26] The fire extinguisher warranty expressly required the vessel owner to maintain the vessel's portable fire extinguishers and fire suppression system in good working order, ***including inspection and tagging as necessary.***[27] Following a loss in which the vessel ran aground, Great Lakes investigated the loss, discovered that the fire extinguisher warranty had been breached, and brought a declaratory judgment action to have the policy voided based on the insured's breach of the duty, under New York law, to "strictly, literally" comply with the policy's express warranties.

In response to the declaratory judgment action, the insured filed a counterclaim which included counts arising under Pennsylvania's bad faith law, such as 42 Pa. Cons. Stat. §8371. Just as it had in many other cases, Great Lakes moved to enforce the election for New York law and to have the Pennsylvania state law claims dismissed. First, the district court recognized the most fundamental issue, that federal choice of law rules must control the enforcement of choice of law clauses in marine insurance policies.[28] Second, the district court utterly rejected the insured's contention that the Supreme Court's decision in *The Bremen* (analyzed *infra*) required that choice of law clauses controlled by federal admiralty law had to yield to the "strong public policy" of the States.[29] Therefore, the district court enforced the choice of law clause and dismissed the claims arising under Pennsylvania law.

On appeal, the insured made the exact same argument which the district court rejected, that the Supreme Court's decision in *The Bremen* required that federal choice of law rules yield to the "strong public policy" of a state.[30] But, unlike the district court, the Third Circuit swallowed this argument hook, line, and sinker.

To understand the Third Circuit's decision, it is necessary to divert briefly and discuss *The Bremen*.[31] *The Bremen* actually concerned a forum selection clause, not a choice of law clause, in a towage contract, not a marine insurance contract. Interestingly, due to the peculiarities of English law, by choosing the London Court of Justice, the forum selection clause effectively functioned as a choice of law clause.

When the oil platform being towed was damaged, suit was brought before the federal court in Florida, rather than the London High Court of Justice.

Although the district court and the Fifth Circuit declined to enforce the forum selection clause, the Supreme Court reversed. The Supreme Court held that forum selection clauses would, henceforth, be *prima facie* enforceable, unless contrary to a "strong public policy."[32] Therefore, since the election for the London High Court of Justice was not contrary to any "strong public policy" of federal admiralty law, the forum selection clause was enforced. The vital thing to note, and the point that confused the Third Circuit in *Raiders*, is that the Supreme Court's decision was clearly referring to the "strong public policy" of federal admiralty law and the federal courts.

Nonetheless, in its decision reversing the district court, the Third Circuit in *Raiders* completely missed the point of *The Bremen*. Instead of looking

to the "strong public policy" of federal admiralty law, the Third Circuit held that every state and territory had the power to declare a "strong public policy" and nullify choice of law clauses in marine insurance policies. The Third Circuit's flawed reasoning in support of its decision consisted of one single sentence, "we consider it altogether reasonable that a 'strong public policy of the forum state in which suit is brought' could, as to that policy specifically, render unenforceable the choice of state law in a marine insurance contract."[33]

The Third Circuit held that every state and territory had an unchallengeable veto over the enforcement of choice of law clauses in marine insurance policies, notwithstanding the fact that federal choice of law rules control marine insurance policies. The Third Circuit did not even deign to recognize that, not only would its decision destroy the legal uniformity for which admiralty law and jurisdiction exists, but giving the states a veto over choice of law clauses was irreconcilably offensive to the very notion of federalism.

Fortunately, the Supreme Court utterly rejected the Third Circuit's anti-Constitutional decision. The Supreme Court's decision is very simple:

- First, the Constitution's grant of admiralty jurisdiction to the federal courts included the mandate to fashion "a system of maritime law coextensive with, and operating ***UNIFORMLY*** in, the whole country."[34]
- Second, "[l]ongstanding precedent establishes a federal maritime rule: Choice-of-law provisions in maritime contracts are presumptively enforceable."[35]
- Third, "the presumption of enforceability for choice-of-law provisions in maritime contracts facilitates maritime commerce by reducing uncertainty and lowering costs for maritime actors. Maritime commerce traverses interstate and international boundaries, so when a maritime accident or dispute occurs, time-consuming and difficult questions can arise about which law governs. By identifying the governing law in advance, choice-of-law provisions allow parties to avoid later disputes—as well as ensuing litigation and its attendant costs."[36]
- Fourth, "[a]s a matter of federal maritime law, choice-of-law provisions in maritime contracts are presumptively enforceable[,]" except (1) "when the chosen law would contravene a controlling federal statute", (2) when the chosen law would "conflict with an established federal maritime policy", or (3) "when [the] parties can furnish no reasonable basis for the chosen jurisdiction."[37]
- Therefore, notwithstanding any objection from Pennsylvania and its alleged "strong public policy", the choice of law clause at issue in *Raiders* was enforceable because Great Lakes had furnished a "reasonable basis for the chosen jurisdiction"; that New York's law was "well developed, well known, and well regarded."[38]

The Supreme Court perfectly explained the wisdom of this rule: "A federal presumption of enforceability would not be much of a presumption if it could be routinely swept aside based on 50 States' public policy determinations. The ensuing disuniformity and uncertainty caused by such an approach would undermine the fundamental purpose of choice-of-law clauses in maritime contracts: uniform and stable rules for maritime actors."[39]


[40]

(Conclusion)

It is almost certainly too late to wholly undo *Wilburn Boat*. That ship has sailed. But, armed with the *Raiders* decision, marine insurers can now pick a single state's law to fill in the gaps left by federal admiralty law. Even if the chosen state's law is not as favorable as federal admiralty law once might have been, at least there is the reliability that comes from applying only one state's law, rather than fifty states' laws. Moreover, based on the Supreme Court's decision, marine insurers can specifically elect New York's favorable law because it is "well developed, well known, and well regarded."[41] Applying New York law, marine insurers can

now trust that the demands of *uberrimae fidei* will apply to applicants, that express warranties will be subject to the rule of "strict or literal" compliance, and that they will not be subject to the varying standard of every state's unique bad faith statute.

1 Counsel of record in the case of *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC,* 601 U.S. 65, 144 S. Ct. 637, 641 (2024). A member of the New York and Massachusetts bars, Mr. Goldman's practice at The Goldman Maritime Law Group is devoted exclusively to the representation of marine insurers and underwriters in coverage disputes with insureds. He holds degrees from Boston College Law School and the University of Massachusetts Amherst. Mr. Goldman lectures frequently to underwriters and claims personnel in the marine insurance industry in the United States and the United Kingdom, most recently to the American Institute of Marine Underwriters. He was a featured speaker at the 2024 Tulane Admiralty Law Institute and he will be speaking at this year's Fort Lauderdale Mariners Club Seminar. Along with this article, Mr. Goldman has published numerous articles on various subjects in marine insurance.

In addition, the story of *Raiders* cannot be told without recognizing the indispensable work of Jeffery Wall, Esq. and Morgan Ratner, Esq. of the law firm of Sullivan & Cromwell LLP, who performed magnificently leading the team that represented Great Lakes Insurance SE before the Supreme Court, including at oral argument on October 10, 2023.

2 "Mean while the winged Haralds by command
Of Sovran power, with awful Ceremony
And Trumpets sound throughout the Host proclaim
A solemn Councel forthwith to be held
At Pandæmonium, the high Capital
Of Satan and his Peers[.]"
Paradise Lost, by John Milton (1667).

3 348 U.S. 310; 1955 A.M.C. 467 (1955).

4 "The plant must spring again from its seed, or it will bear no flower – and this is the burden of the curse of Babel." Percy Bysshe Shelley, *A Defence of Poetry and Other Essays* (1821).

5 *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 201 F.2d 833, 836; 1953 A.M.C. 284 (5th Cir. 1953).

6 *Ferrante v. Detroit Fire & Marine Ins. Co.,* 125 F.Supp. 621; 1954 A.M.C. 2026 (S.D.Cal. 1954).

7 *Continental Ins. Co. of City of New York v. Patton-Tully Transp. Co.,* 212 F.2d 543; 1954 A.M.C. 889 (5th Cir. 1954).

8 *Calmar S.S. Corp. v. Scott,* 209 F.2d 852, 856; 1954 A.M.C. 558 (2d Cir. 1954).

9 *Compania Maritima Ador, S.A. v. New Hampshire Fire Ins Co of Manchester, N.H.,* 120 F.Supp. 577, 579; 1954 A.M.C. 1149 (S.D.N.Y. 1954).

10 *Wilburn Boat,* at 314.

11 *McLanahan v. Universal Ins. Co.,* 26 U.S. 170; 1998 A.M.C. 285 (1828). *Uberrimae fidei* imposes the strictest obligation on the vessel owner to voluntarily disclose all those facts material to the underwriter's judgment to accept the risk, even if not asked. However, for reasons beyond understanding, the Fifth Circuit has held that *uberrimae fidei* is no longer a part of federal admiralty law. *Albany Ins. Co. v. Anh Thi Kieu,* 927 F.2d 882; 1991 A.M.C. 2211 (5th Cir. 1991). Fortunately, no other appellate court has been convinced by the Fifth Circuit's poorly reasoned decision. *QBE Seguros v. Morales-Vázquez,* 986 F.3d 1 (fn. 1) (1st Cir. 2021); *New York Marine and General Ins. Co. v. Continental Cement Co., LLC,* 761 F.3d 830, 2014 A.M.C. 2063 (8th Cir. 2014).

12 *Openwater Safety IV, LLC v. Great Lakes Insurance SE,* 435 F.Supp.3d 1142 (D.Colo. 2020).

13 The last signal of Vice-Admiral Horatio Nelson at the Battle of Trafalgar on October 21, 1805. The signal shown on p.6 *infra,* "England expects that every man will do his duty", was sent as the Battle of Trafalgar was about to commence.

14 *Great Lakes Reinsurance (UK), PLC v. Western Soil, Inc.,* 2008 WL 11503975 (D.P.R. 2008).

15 *Lloyd's of London v. Pagan-Sanchez,* 539 F.3d 19; 2008 A.M.C. 1990 (1st Cir. 2008).

16 *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.,* 585 F.3d 236; 2010 A.M.C. 185 (5th Cir. 2009).

17 *Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp.,* 159 F.3d 412, 420; 1999 A.M.C. 1 (9th Cir. 1998).

18 *Albany Ins. Co. v. Anh Thi Kieu,* 927 F.2d 882; 1991 A.M.C. 2211 (5th Cir. 1991). Since 1991, every appellate court to consider the issue has held that the Fifth Circuit was wrong. *Great Lakes Insurance SE v. Smith,* 2022 WL 3585661 (9th Cir. 2022), *QBE Seguros v. Morales-Vázquez,* 986 F.3d 1 (1st Cir. 2021), *Quintero v. Geico Marine Insurance Company,* 983 F.3d 1264 (11th Cir. 2020), *Atlantic Specialty Insurance Company v. Coastal Environmental Group Inc.,* 945 F.3d 53 (2d Cir. 2019), *St. Paul Fire & Marine Ins. Co. v. Abhe & Svoboda, Inc.,* 798 F.3d 715; 2015 A.M.C. 2113 (8th Cir. 2015), *AGF Marine Aviation & Transport v. Cassin,* 544 F.3d 255; 2008 A.M.C. 2300 (3d Cir. 2008). C'est law guerre.

19 *Great Lakes Reinsurance (UK), PLC v. Durham Auctions, Inc.,* 2008 WL 872278, p. 5 (S.D.Miss. 2008).

20 *Durham Auctions,* at 241.

21 *Id.,* at 243-44.

22 *Great Lakes Reinsurance (UK), PLC v. Rosin,* 757 F. Supp.2d 1244; 2011 A.M.C. 223 (S.D.Fla. 2010).

23 *Great Lakes Insurance SE v. Aarvik,* 2019 WL 201258 (S.D. Fla. 2019).

24 *Pagan-Sanchez, supra.*

25 *Great Lakes Reinsurance (UK), PLC v. Sea Cat I, LLC,* 653 F.Supp.2d 1193; 2010 A.M.C. 703 (W.D.Ok. 2009).

26 *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC,* 521 F.Supp.3d 580 (E.D.Pa. 2021).

27 *Id.,* at 583.

28 *Id.,* at 584.

29 *Id.,* at 588.

30 *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC,* 47 F.4th 225 (3d Cir. 2022).

31 *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1; 1972 A.M.C. 1407 (1972).

32 *The Bremen,* at 15.

33 *Raiders,* at 233.

34 *Raiders,* at 69 [emphasis added], *quoting, Norfolk Southern Railway Co. v. Kirby,* 543 U.S. 14, 28; 2004 A.M.C. 2705 (2004) [internal quotations omitted].

35 *Id.,* at 70.

36 *Id.,* at 72 [internal quotations and citations omitted].

37 *Id.,* at 76.

38 *Id.*, at 77.
39 *Id.*
40 "V" for Victory.
41 *Id.*, at 77.

Through the Lens of an SMA Arbitrator: the IBA Guidelines on Conflicts of Interest

By Dick Corwin, SMA member, SMA Chair of SMA/MLA Liaison committee and member of the Professional Conduct committee

A baseline for arbitrators, and indeed for arbitral organizations, is to encourage confidence in the arbitration process. Impartiality of the arbitrators and absence of conflicts of interest are key to instilling such confidence.

The foreword to the 2024 updated IBA Guidelines on Conflicts of Interest ("Guidelines" Guidelines on Conflicts of Interest in International Arbitration) notes that the Guidelines were considered a "solid soft law instrument reflecting standards expected to apply to impartiality and independence of arbitrators, as well as disclosures in specific circumstances." The Introduction states that the "Guidelines apply to all international arbitration [but] do not override any applicable . . . arbitral rules, codes of conduct . . . chosen by the parties."

Through my lens as an SMA arbitrator, I here compare impartiality and conflicts of interest as covered in the Guidelines and in the SMA Rules ("SMA Rules" https://smany.org/wp-content/uploads/2023/06/SMA-ARBITRATION-RULES-6-1-2022.pdf) and the SMA Code of Ethics ("SMA Code" https://smany.org/pdf/2022/CODE-OF-ETHICS-FOR-SMA-ARBITRATORS.pdf).

Impartiality

The Guidelines require that every arbitrator "be impartial and independent of the parties at the time of accepting an appointment . . . and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated."

The SMA Rules (Section 11) and the SMA Code require that "each Arbitrator [in the conduct of an arbitration] shall exercise care to remain absolutely impartial and always abide by principles of honesty and fair dealing." Because partiality in arbitration would be improper, some might say that the SMA Code, by requiring that "[e]ach arbitrator . . . observe the highest standards of personal and professional conduct, free from . . . the appearance of impropriety," requires not just impartiality, but the higher standard of "free from the appearance of partiality."

Conflicts of Interest

The Guidelines require that one must refuse appointment as an arbitrator (or withdraw as an arbitrator) if "any doubt as to the [one's] ability to be impartial or independent" exists[1] and set out situations illustrating Non-Waivable Red List conflicts which would raise doubt as to impartiality in the mind of a reasonable third person (for example, an arbitrator is an employee of a party, will have an economic interest in the award via a controlling influence in an entity, has a "significant financial or personal interest in one of the parties" or regularly advises a party or a party's affiliate deriving "significant . . . income therefrom").

The SMA Code sets out "red lines" (rather than non-exhaustive illustrative situations) requiring that one not serve as an arbitrator in circumstances "where the Arbitrator or the Arbitrator's current employer or an affiliate has a direct or indirect interest in the outcome of the arbitration." The SMA Rules (Section 8) set out red lines as well:

> [Section 8] No person shall serve as an Arbitrator who has or who has had a financial or personal interest in the outcome of the arbitration or who has acquired from an interested source detailed prior knowledge of the matter in dispute.
>
> [Section 9] No Arbitrator shall accept an appointment or sit on a Panel, where the Arbitrator or the Arbitrator's current employer has a direct or indirect interest in the outcome of the arbitration.

That the SMA Code and SMA Rules refer not only to the arbitrator, but also to the arbitrator's employer and (in the Code) to affiliate/s of the arbitrator's employer having not just a direct, but also an indirect interest in an award, seems to cast a wider "you may not serve" net than do the Guidelines as the Guidelines Non-Waivable Red List conflict situations use the qualifier "significant" in situations involving personal interest in a party or "income" from a party and do not refer to affiliates in the context of economic interest of the arbitrator.

Disclosure

The SMA Rules and SMA Code require all Arbitrators to make disclosures. Following completion of the Panel, the SMA Rules (Section 9) require disclosure of "any circumstance which could impair [an arbitrator's] ability to render an unbiased award based solely upon an objective and impartial consideration of the evidence presented to the Panel" with the disclosure to include:

> close personal ties, business relations, or financial interests of the Arbitrator or his associates or relatives or the Arbitrator's current employer, with any one of:
>
> (i) the parties to the arbitration;
> (ii) affiliates or associated companies of the parties;
> (iii) counsel for the parties;
> (iv) the other Arbitrators on the Panel;
>
> Such disclosure shall also include the involvement of the Arbitrator in other arbitrations involving the parties. . . .

I believe the generality of the Section 8 categories as to which arbitrators are obliged to disclose in SMA arbitrations results in the arbitrators submitting expansive disclosures erring on the side of disclosing more information than a narrow reading of the categories requires.

Erring on the side of wide disclosure parallels what the Guidelines state concerning disclosures: "Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure."

The Guidelines also state that "[t]he stage of the arbitration must not influence the arbitrator's decision as to whether facts or circumstances should be disclosed" and refer to "the arbitrator's ongoing duty of disclosure . . . ."

Although neither the SMA Rules nor the SMA Code state an obligation to disclose during the arbitration, disclosures typically include a sentence such as "I reserve the right to add to or to amend this disclosure as particulars of the dispute are received during the course of this proceeding." From time to time, arbitrators supplement their initial disclosure should information provided during the arbitration indicate further disclosure to be appropriate (for example, when testimony reveals the identity of a company not previously known to be affiliated with a party or when a party designates an expert with whom an arbitrator may in the past have had a professional relationship – and such disclosures are sometimes made during a hearing).

The Guidelines contain not only a "non-waivable Red List" but also (a) a "waivable Red List" (situations which dictate that a person not serve as an arbitrator but which may be disclosed providing an opportunity for the parties, other arbitrators and administering organization (if any) to expressly agree the person may serve as an arbitrator), (b) an Orange List (situations which an arbitrator should disclose – if a party does not timely object then the arbitrator is deemed accepted) and (c) a Green List (situations without a conflict of interest and which need not be disclosed).

The SMA Rules do not provide examples of situations illustrating the border between "must disclose" and "need not disclose." The generality of and absence of a time limit in section 9 of the SMA Rules causes arbitrators to look well back into their past to consider all and sundry relationships they may have had, and may have, with the panel arbitrators, the parties or affiliates / associated companies of the parties and to disclose ("close personal ties, business relations, or financial interests"). Difficult to say is whether the generality of the approach of the SMA Rules is better than the more prescriptive "waivable Red," Orange[2] and Green Lists of the Guidelines. For me, perhaps due to my familiarity with and use of the SMA Rules, the SMA approach is preferable as arbitrators relying upon the Lists may tend not to consider what may be outside the Lists and may view the Lists as the touchstone for what is to be – and need not be[3] – disclosed (despite the Guidelines instruction that "doubt as to whether [to] disclose certain facts or circumstances should be resolved in favour of disclosure"). Nevertheless, from my perspective, SMA, indeed all, arbitrators will find

the Lists included with the Guidelines to be at least thought-provoking.

The Guidelines require not only arbitrators but also parties to make disclosures:

> A party shall inform an arbitrator, the Arbitral Tribunal, the other parties . . . of
>
> (i) any relationship, direct or indirect, between the arbitrator and
>
> - the party;
> - another company of the same group of companies;
> - a person or entity having a controlling influence on the party in the arbitration;
> - a person or entity over which a party has a controlling influence; or
> - any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration; and
>
> (ii) any other person or entity it believes an arbitrator should take into consideration when making disclosures . . . .

Although the SMA Rules do not require a party to make a disclosure, because the SMA Rules require arbitrators to disclose "close personal ties, business relations, or financial interests" with "affiliates or associated companies of the parties," the arbitrators (before submitting an initial disclosure) may, and at times do, request the parties to identify "affiliates or associated companies of the parties." Rather than rely upon arbitrators on their own initiative to request such information, placing the onus to do so on the parties via a rule, as the Guidelines do, seems a better approach.

In closing, worth noting is that although guidelines, rules, or codes concerning disclosures encourage confidence in the arbitration process and the impartiality of arbitrators, we should ask who suffers the consequences of an arbitrator failing to fulfill disclosure requirements without a process to enforce such guidelines, rules, or codes. The response is the arbitral process and, perhaps, one or more of the parties to the arbitration. This leads to the further question whether arbitral parties will question the utility of disclosure guidelines, rules, and codes without accountability falling upon the person who did not properly disclose.[4]

1. "Doubts are justifiable if a reasonable third person" with knowledge would conclude "there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching the arbitrator's decision."
2. Nearly every "Orange" situation suggesting disclosure of past activities is limited: "within the past three years."
3. Section 9 of the SMA Rules would require that several of the "Green" need-not-be- disclosed situations be disclosed in an SMA arbitration.
4. The SMA Code requires SMA "Arbitrators [to] abide by the Rules of the Society of Maritime Arbitrators, Inc." and provides a process to ensure accountability: "Each member of the SMA shall be held accountable for the member's conduct as an Arbitrator. . . the member shall be given a hearing before the Committee on Professional Conduct . . . The member shall have the right of explaining or denying the alleged complaint to the Committee, which shall make such recommendations to the Board of Governors . . . All members agree to abide by the decision of a majority of the Board without right of appeal in any other forum whatsoever."

IBA Publishes Updated Guidelines on Conflicts of Interest in Arbitration*

By Christian Leathley, Partner, and Elizabeth Kantor, Professional Support Lawyer, Herbert Smith Freehills, London

The International Bar Association ("IBA") has released updated guidelines on Conflicts of Interest in International Arbitration. The Guidelines are a "soft law" instrument intended to assist in unifying the approach to conflicts of interest relating to arbitrators in international arbitration. Whilst they are not binding without party agreement, they are considered to promote best practice and are widely adopted internationally for assessing conflicts of interest and disclosures.

Whilst the spirit of the updated 2024 Guidelines remains unchanged, this update introduces some important changes to both the "General Standards" and the list of practical application of those standards set out in the second half of the Guidelines. In particular, additional examples of circumstances which would require disclosure by arbitrators are now included in the "Orange list". We have summarised the significant changes below.

Changes to "General Standards"

Duration of obligation of independence and impartiality

The guidance has been amended to clarify that the obligation of impartiality and independence in General Standard 1 does not extend to the time period during which the award may be challenged before any relevant courts or other bodies. The reference to "bodies" may include, for example, the ICSID ad hoc committee. This amendment promotes certainty, as arbitrators and parties can be comfortable that this obligation ends once the tribunal has rendered its final award (although it is worth noting that the obligation does extend to include the time permitted for any correction or interpretation under the relevant rules).

Objective versus subjective conflicts of interest

The amendments to General Standard 2 seek to draw a distinction between circumstances on the non-waivable red list (in which cases the arbitrator should decline or refuse to act) and circumstances that fall within the waivable red list, for which an arbitrator can make a disclosure instead. The changes to the waivable and non-waivable red list clarify that an arbitrator who advises one of the parties but does not derive significant financial income from that engagement may make a disclosure under the waivable red list.

Disclosures by arbitrators

There are a number of additions to General Standard 3, some of which are "elevations" of wording that was originally in the explanatory guidance. In particular:

- to note in 3(a) that an arbitrator should take into account all facts and circumstances known to them when considering whether to make a disclosure. In other words, theirs is a subjective rather than objective assessment of the facts and circumstances.
- to clarify that if an arbitrator should make a disclosure but is prevented from doing so by professional secrecy rules or other practice or conduct rules, then they should not accept the appointment or resign. This has been elevated from the guidance to the general standard 2(e).
- to note that a failure to make a disclosure does not necessarily mean that a conflict of interest exists or that a disqualification should ensue 3(g). On this last point, it is worth noting that national courts could reach an opposite conclusion on this point. For example, as a matter of English law, a failure to disclose can give rise to justifiable doubts as to an arbitrator's impartiality, and so expose them to removal under section 24 of the Arbitration Act 1996 (see for example, paragraph 3.72 of the Law Commission's final report on reforms to the English Arbitration Act).

Parties' duty to enquire

General Standard 4 contains new wording to clarify that a party shall be deemed to have learned any facts or circumstances that could constitute a potential conflict of interest if reasonable enquiry would have uncovered them. This provision essentially introduces the concept of constructive knowledge in the context of party waiver of potential conflicts of interest.

Relationships

General Standard 6 looks at what relationships may constitute a conflict of interest or require disclosure. The explanatory guidance confirms that a catch-all rule is not considered appropriate but that the particular circumstances of each relationship and relevance to the subject matter of the dispute must be considered on a case-by-case basis. The updated guidelines include the following significant clarifications and/or changes:

- that an arbitrator is considered to bear the identity not just of their law firm but also their employer. This acknowledges that many arbitrators may not work for law firms and might be employees of companies.
- it notes the need to take into account the organisational structure and mode of practice of the law firm or employer in considering whether a potential conflict of interest exists.
- a new 6(c) has also been added to confirm that any legal entity or natural person over which a party has a controlling influence may be considered to bear the identity of such party.

The explanatory guidance confirms that the Rules Committee had in mind third-party funders and

insurers who might be considered to bear the identity of a party, and parent companies, states and state entities who may be considered to be controlling influences. With respect to States, the explanatory note recognises that their organisation typically comprises separate legal entities such as regional or local authorities or autonomous agencies, which may be independent and therefore not necessarily covered by the "controlling influence" criteria.

Duty of the parties and the arbitrator

The changes to General Standard 7 extend the obligation to inform an arbitrator of any relationship between the arbitrator and a party to include persons or entities over which a party has a controlling interest. This change is therefore consistent with the changes to General Standard 6. There is also a new catch-all provision to extend the duty to inform to include any other person or entity that a party believes an arbitrator should take into consideration.

Expansion of the Orange list

There are some significant new additions to the list of circumstances which require disclosure in the Orange List. Disclosure is now required where:

- Two arbitrators have the same employer. This seeks to cover situations where arbitrators do not work in law firms (see 3.2.1).
- An arbitrator has been appointed by one of the parties or an affiliate or by the same counsel or law firm, to assist in mock-trials or hearing preparations on two or more occasions within the past three years. This amendment is also repeated in the context of an arbitrator who has been appointed to do so by the same counsel or law firm (although in that context it is on three or more occasions) (see 3.1.4 and 3.2.10).
- An arbitrator currently serves or has acted within the past three years as expert for one of the parties or appointed by counsel in unrelated matters (see 3.1.6 and 3.2.9, the latter providing for appointment as an expert on more than three occasions).
- An arbitrator and counsel for one of the parties currently serve together as arbitrators in another arbitration (see 3.2.12).
- An arbitrator and their fellow arbitrator(s) currently serve together as arbitrators in another arbitration (see 3.2.13).
- An arbitrator is instructing an expert appearing in the arbitration proceedings for another matter where the arbitrator acts as counsel (3.3.6). However, an addition to the Green List confirms that there is no need for disclosure where an arbitrator has previously heard testimony from an expert who appears in the proceedings.
- Where an arbitrator has publicly advocated a position on the case on social media or on online professional networking platforms (the guidance already referred to positions advocated in a published paper or speech) (see 3.4.2).
- Where an arbitrator holds a position in an administering institution and participates in decisions relating to that arbitration (3.4.3).

Comment

Given the widespread acceptance of the IBA Guidelines in international arbitration, this is a welcome development. The update is particularly topical in the UK given the English Law Commission's recent proposal to codify the arbitrator's continuing duty of disclosure in the new Arbitration Bill which is currently before parliament.

The updates reflect changes to modern legal practice, including the fact that arbitrators may not always work at law firms and may in fact be employees. They also reflect the fact that third parties play an increasing role in arbitration whether owing to company structure, funding or insurance.

For more information, please contact Christian Leathley, Partner, Liz Kantor, Professional Support Lawyer, or your usual Herbert Smith Freehills contact.

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Keeping Fraud Out of Maritime Arbitration: Lessons from a Recent Case

By Steffen Pedersen, Independent Maritime Arbitrator and Mediator, Member of ArbDB Chambers[1]

On Leap Day, 29 February 2024, judgment was handed down in the English High Court in the case of *Contax Partners Inc BVI v Kuwait Finance House (KFH-Kuwait) & Ors* [2024] EWHC 436 (Comm). The case concerned an extraordinary attempt to enforce a fake arbitration award based upon a fabricated arbitration agreement. This article examines the case and discusses its lessons for maritime arbitration.

Background

At the center of the case was an arbitration award dated 28 November 2022 purportedly made under the auspices of the Kuwait Chamber of Commerce and Industry Commercial Arbitration Centre ("KCAC") ("Award"). It awarded the Claimant ("Contax BVI") damages of €53m against three Defendants (all part of the Kuwait Finance House group, "KFH") in relation to liquidation of gold investments.

The Award was based on a purported arbitration agreement dated 31 August 2021 ("Arbitration Agreement").

The Application to Enforce the Award

On 21 June 2023[2] an application was made under s. 66 of the Arbitration Act 1996 for the enforcement of the Award in London ("Application"). It was a paper application made without notice through the e-filing system of the English High Court. The Application was ostensibly made by Contax BVI through its representative, H&C Associates.[3]

Included with the Application was:

(i) the Award (in English, its original language);

(ii) a witness statement of a Mr. Adesanu[4] stating the Defendants had tried to appeal the Award in Kuwait, but the Kuwaiti Commercial Court of Appeal had endorsed the Award ("Appeal Decision");

(iii) a witness statement of Mr. Fantechi, the Managing Director and controlling mind of Contax BVI, which alleged, *inter alia,* that the Arbitration Agreement had been signed on 31 August 2021. This witness statement exhibited, *inter alia:*

a. the Arbitration Agreement;
b. the Award;
c. the Appeal Decision (in English, its original language);
d. the registration certificate and list of directors of Contax BVI;
e. Mr. Fantechi's passport.

The Decision on the Application

The judge assigned to scrutinize the papers, Butcher J, whilst not finding the papers easy to understand, was not *"on the lookout for fraud and did not suspect it."* Accordingly, he granted leave to enforce the Award on 9 August 2023 (the "August Order"). Enforcement was allowed to proceed 28 days after service of the August Order on the Defendants, if no application was made to set the August Order aside by then.

Service of the August Order & Third Party Debt Orders

The August Order was purportedly served by H&C Associates on a London-based company within the KFH group (but not the Defendants).

No steps were taken to set aside the August Order and an application was made on 15 September for Third Party Debt Orders ("TPDO") against Citibank, HSBC, Barclays Bank and JP Morgan in London. The application was seemingly signed by Mr. Fantechi and alleged a total debt of over GBP70m.

The method of service of the August Order did not cause any concern for the court and the application for TPDOs was approved (by Master Stevens) on 1 October.

The TPDO orders were certified as served on the banks by a certificate of service dated 9 October, signed by a Johan van Huysteen[5] of H&C Associates.

On 27 October, the TPDO on Barclays Bank was made final and Barclays was directed to pay Contax BVI GBP3,176,376.30.

The Defendants Get Involved

The Defendants became aware of the proceedings some time after their bank accounts were frozen. They took swift action. On 2 November, they applied without notice to prevent payment being made pending the hearing of an application to set aside the August Order.

In their application the Defendants argued that:

(i) the August Order was never properly served; and,
(ii) there never was an arbitration in the first place. Supporting this allegation was a claim that Mr. Fantechi had denied any knowledge of the supposed arbitration.

The same day, Henshaw J made an order staying enforcement until an application to set aside the August Order could be heard ("Henshaw Order").

U.S. Connection

On 6 November, a notice was filed indicating that Contax BVI would be acting in person going forward. A contact e-mail address for service was given as contaxpartus@gmail.com together with a physical address in Boston, MA.

An application was then made to set aside the Henshaw Order. This application was signed by 'A Georgiou' purportedly acting as *"Authorised Officer for an on behalf of Contax Parnters [sic] Inc."*

On 9 November, the Defendants informed Contax BVI, via the Gmail account, that they would apply to set aside the August Order. The formal application to do so was made on 10 November ("Set Aside Application").

The Set Aside Application and Contax BVI's application to set aside the Henshaw Order were listed to be heard together on 17 November, before Butcher J (who had, of course, made the initial August Order).

Two days before the 17 November hearing, an e-mail was sent to the court from the Gmail account. It was signed 'Shloumo Ezzra', and said the sender was based in the U.S. and since 5 November had been acting in person. It sought an adjournment on the basis that they were seeking to appoint English counsel.

The court said that it would hear the adjournment application on 17 November with the two other applications.

The 17 November Hearing

The hearing proceeded remotely. A law firm appeared for Mr. Fantechi but no one appeared representing those who were e-mailing through the Gmail account.

In a witness statement, Mr. Fantechi claimed he had first been made aware of the arbitration on 1 November when the 3rd Defendant's legal department contacted him.

Butcher J ordered the TPDOs set aside on the basis of improper service ("17 November Order").

However, as the Defendants had not been given copies of all documents relied on initially for the August Order, including the Arbitration Agreement, they were provided this documentation and given until 24 November to put in further evidence. Contax BVI was given the opportunity to serve a reply to any evidence produced by the Defendants. The hearing of the Set Aside Application was set down for 30 January 2024.

The Defendants put in further evidence showing, *inter alia,* that:

(i) the Award and Appeal Decision were not genuine as by Kuwaiti law they would have to be in Arabic, not English. Furthermore, the names of the judges purportedly sitting in the Appeal Decision case were not those of appeal judges in Kuwait;
(ii) the alleged signatory to the Arbitration Agreement from KFH denied signing it and knew nothing about it.
(iii) Mr. Fantechi confirmed, in addition to the evidence already provided by him on 17 November, that his passport produced with the Application was genuine, but it had been misappropriated, likely from an application made to open an online bank account at Revolut.

Contax BVI served no evidence in reply, but on 22 November 'A Georgiou' e-mailed an application to set aside the 17 November Order.

On 29 January 2024, the night before the hearing on the Set Aside Application, 'Shloumo Ezzra' e-mailed two witness statements to the court from contaxpartus@gmail.com, and stated that counsel would appear at the hearing on 30 January.

The 30 January 2024 Hearing

Two barristers appeared at the hearing for Contax Partners LLC ("Contax Partners"), not the Claimant, Contax BVI. They explained that Contax Partners was a recently incorporated entity in Wyoming which had been assigned the rights of Contax BVI under an assignment agreement. A copy of the deed of assignment was produced, ostensibly signed by, *inter alia,* Mr. Fantechi.

The Defendants asked for the August Order to be set aside on two grounds:

(i) that the arbitration was commenced without authority (Mr. Fantechi denied authorizing it); and / or,

(ii) that the Arbitration Agreement and Award did not exist.

The witness statements provided by 'Ezzra Shloumo' contained allegations as to how and why the assignment was concluded, including Mr. Fantechi's involvement in the process. The counsel appearing said that, in the circumstances, clearly someone had to be lying, not least about Mr. Fantechi's involvement and so cross-examination should be allowed before a decision on the Set Aside Application.

The 29 February Judgment

Having heard the parties, Butcher J decided to stick the knife into his own August Order and set it aside.

He did so as he found the Award was fake. A number of factors led him to this conclusion:

(i) the wording of the Award was copied nearly verbatim from a 2023 English High Court judgment;

(ii) the Award did not comply with Kuwaiti law (it was not in Arabic, was not signed by all the arbitrators, and did not recite the Arbitration Agreement);

(iii) the Appeal Decision was not in Arabic as it had to be by Kuwaiti law;

(iv) individuals named in the Award denied having taken part;

(v) the KCAC confirmed there had been no arbitration;

(vi) lastly, a large number of documents were named in the Award but none were produced.

In Butcher J's view a fake award could never be enforced as the consent that arbitration is based upon is lacking. So, the August Order clearly had to be set aside. It is hard to argue with that reasoning.

However, Butcher J also held that the ambiguous involvement of Mr. Fantechi, who appeared to disown the Award but at the same time was alleged to be behind a number of actions taken by Contax BVI in pursuing it, made the question of authority to commence the arbitration a triable issue. Hence, he would have ordered a full hearing on that issue had the Award not been found to be fake.

In the final paragraph of his judgment Butcher J concluded:

> *"...there are a considerable number of unanswered, but serious, questions and in particular as to* ***who was responsible for the fabrications which I have found to have been made,*** *and whether there is culpability (and if any whose) as to the way in which the application for permission to enforce the purported Award was presented to the court."* (emphasis added)

Comment

On the one hand, the case proves that the system actually works as the Award was not enforced.

On the other hand, enforcement was avoided only by swift action from the Defendants. Hence the case clearly raises serious questions and concerns, as Butcher J observed. For one, how could a fabricated award advance so far through one of the world's leading legal systems, resulting in bank accounts being frozen for several weeks[6], and GBP3.1m nearly being misappropriated?

More fundamentally, who was behind it all? It is unclear from the case whether H&C Associates,

Johan van Huysteen or Mr. Adesanu were actively involved in the fraud, or if their identities (and presumably e-mails) were appropriated to perpetrate it. They seem never to have appeared in person. 'Ezzra Shloumo' and 'A Georgiou' are presumably fictitious. The only humans appearing in-the-flesh on behalf of the perpetrators of the fraud were the two barristers at the 30 January 2024 hearing. Whatever KYC they did on those instructing them may well be the only lead available as to the identity of the fraudsters. We can always hold out hope...

What is clear, however, is that this type of fraud has immense potential to disrupt not just innocent defendants, but also third parties, such as banks, and possibly courts. If this can be achieved entirely anonymously in courts, the arbitration system could equally serve as a platform for serious exploitation and disruption.

Worryingly, it seems to be already happening. Simple google research reveals a number of cases involving fake arbitrations. Right here in the U.S., an organization by the name of 'Sitcomm Arbitration Association' has allegedly been involved in faking arbitrations and awards in several states[7]. In Switzerland, a British lawyer was recently sentenced to 3 years in prison for his role in faking an arbitration[8]. Meanwhile, in India, a brazen land grab was attempted using an award from a fake arbitration institute in 2022[9]. Let's not forget the *Nigeria v P&ID*[10] case either...

No doubt there are more examples out there. Thankfully, though, it does not appear that fraud has yet reached the shores of maritime arbitration (at least not to my knowledge!). Let's hope it remains that way. To ensure it does, we need to heed the lessons of *Contax*.

Lessons for Maritime Arbitration

In contrast to institutional arbitrations, or court cases, maritime arbitrations are relatively informal. They are often on documents-only[11] and many cases involve the infamous 'non-responding Respondent'[12]. Arbitrators in uncontested documents-only arbitrations will be in the very position that Butcher J faced when making the August Order: no human interface, just e-mails and pdfs. If he could be fooled so, surely, could an arbitrator.

Against that background it is possible to highlight two major points of interest arising from the case.

Proper Service

It is unclear why Master Stevens deemed service of the August Order proper. If service directly on the Defendants had been effected this might have prevented the fraud going further than the August Order. This serves as a timely reminder, if needed, that ensuring proper service is effected, and proven, is crucial.

As noted, maritime arbitrations are mostly conducted entirely on e-mail. In some cases, documents might be sent by courier. Pdfs containing confirmations of receipt by courier must be as easy to falsify as e-mails. With ever more powerful AI being fed ever more information, over time what is feasible in terms of falsification will only increase.

Fail-safe solutions to mitigate such risk might be hard to find. Insisting on proof of service from an independent third party, through a courier company's tracking website perhaps, might be one solution. Ensuring that there are no faked or hi-jacked e-mails might be more challenging. Appropriate measures taken will of course depend on the individual case. But the burden of requiring extra proof would be clear: loss of efficiency, increase in costs and inconvenience. Some of the key selling points of arbitration.

Knowing Who is Acting

The other major issue highlighted by *Contax* is knowing who is actually acting.

It is a wake-up call that a court proceeding can advance so far without anyone knowing who was actually running it. This is a symptom, it is submitted, of conducting matters through an electronic system open to all, with seemingly limited human-user confirmation, or interaction in-the-flesh. That sounds very much like a typical maritime arbitration scenario.

If lawyers or representatives are involved, this adds a layer of protection and comfort (especially if it is one of the usual suspects, or a P&I Club). However, this is not necessarily enough as the involvement (if it was indeed real) of H&C Associates in *Contax* showed. Also, anyone can represent a party in arbitration, so the usual suspects are not always involved. Indeed, these days arbitrations are run by people from everywhere across the world, not just by established maritime firms[13].

It is difficult to see what can be done to avoid the risk that fraudsters are in fact pulling the strings without insisting on independently verifiable proof of authority, or maybe more. Again, cost and time efficiency, and convenience, are the victims.

Potential Risk

Given the issues outlined above, and the relatively informal nature of maritime arbitration, it is not difficult to imagine that a maritime arbitration could be commenced, run, and a genuine, but ultimately fraudulent, award procured. Genuine in the sense that the actual arbitration proceeding took place and an actual arbitrator published an actual award. Fraudulent in the sense that there was no actual agreement, underlying contract or dispute.

That is a worrying scenario which goes a few steps further along the road from what happened in *Contax*. If an award is genuine, in the sense described above, then the innocent defendant would face a tougher task in challenging its enforcement, and setting it aside, than the Defendants in *Contax* did. In *Contax,* enforcement was paused when Henshaw J was presented with evidence that Mr. Fantechi, as the Claimant, knew nothing about the Award, which must have set alarm bells ringing. What if the award is not a fabrication?

In challenging enforcement, the innocent defendant would have to prove that there was no arbitration agreement in the first place, or that no notice was received. Of course, an arbitrator normally makes findings in respect of jurisdiction (proper commencement, and the arbitration agreement) in his or her award. Those findings would have to be challenged. This may very well at best be a triable issue, as *Contax* showed, prolonging the pain not to mention increasing costs and the obvious litigation risk.

As to setting aside, it is for the courts in the seat to set an award aside, not the courts in other countries where enforcement may be sought. So, in *Contax* Butcher J did not purport to definitively declare the Award invalid[14]. He only refused to enforce it on the basis he was persuaded it was fake. Any definitive declaration of invalidity would normally be for the Kuwaiti court[15]. On that note, arbitrations can of course be seated in any place, and who knows what the outcome of a challenge to a genuine but fraudulent award might be in different parts of the world. A challenge might not succeed.

Conclusion

The potential havoc that fraud in arbitration can wreak is all too clear. Its spread needs to be checked.

Most people, like Butcher J, would likely not suspect fraud and so not be on the lookout for it. The biggest takeaway from *Contax* is perhaps that we should be more alert. By keeping our collective antennas up, and a steady lookout, we can do our bit to ensure that cases like *Contax* remain rarer than Leap Day.

Such vigilance is a price worth paying. All bona fide participants in maritime arbitration are in the same boat and have a vested interest in ensuring that the process is used to provide an effective dispute resolution service for the maritime industry, and not a tool for fraud or disruption. Ensuring this is crucial, because if trust in maritime arbitration is eroded, it will cease to be practiced as we know it, if not altogether.

1 Profile: https://www.linkedin.com/in/steffen-s-pedersen-b165b97
2 All dates hereafter are in 2023 unless stated otherwise.
3 This is not a law firm registered at the Solicitors Regulation Authority ("SRA") and so is not authorized to conduct litigation.
4 He is registered at the SRA as a solicitor, working at H&C Associates, and a law firm.
5 Not registered as a solicitor at the SRA.
6 The TPDOs were served on 9 October and only set aside on 17 November. And that is with the Defendants acting very swiftly upon learning their accounts were frozen!
7 https://www.coloradopolitics.com/courts/federal-judge-rejects-attempt-to-extract-300-million-from-loveland-through-bogus-arbitration/article_295d2bb4-43e5-11ec-ad8f-3f6cef0daeaa.html.
8 https://globalarbitrationreview.com/article/four-convictions-upheld-in-geneva-over-fake-arbitration.
9 https://timesofindia.indiatimes.com/city/chennai/hc-nixes-sale-deed-registered-at-fake-arbitration-centre/articleshow/88983434.cms#google_vignette.
10 *Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm). Although very on point, consideration of this case is beyond of the scope of this article.
11 For example, approximately 80% of all awards in LMAA Arbitrations are said to be on documents-only.
12 A frequent occurrence in Asia, at least.
13 This is my experience in London, Hong Kong and Singapore arbitrations, at least.

14 Although it might be argued that there was nothing to set aside in any case given it was a fake award.
15 Indeed, to highlight this point, in *Contax* the inclusion of the Appeal Decision was possibly designed to give some comfort to the judge considering enforcement that the Award was final and genuine by showing that the court of the seat had affirmed it.

Arbitration in the Courts*

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

Eleventh Circuit refuses to vacate award based on arbitrators' non-disclosure of professional experience with co-arbitrators and counsel.

***Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama,* 78 F.4th 1252 (11th Cir. 2023).**

[Editor's note: On March 25, 2024, the Supreme Court denied Grupo Unido's petition for certiorari. *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama,* 144 S. Ct. 1096 (2024)]

Federal Arbitration Act (FAA) § 10 provides that arbitral awards issued in the U.S. may be vacated "where there was evident partiality or corruption in the arbitrators." A movant may prove evident partiality by showing either (1) an arbitrator has an actual conflict of interest or (2) an arbitrator failed to disclose information that would lead a reasonable person to believe that a conflict exists. Like all grounds for vacating an award, the evident partiality prong is strictly construed. To warrant vacatur, the "alleged partiality must be direct, definite and capable of demonstration rather than remote, uncertain and speculative." Challenges based on evident partiality rarely succeed.

Certain international arbitrators are in such high demand that they may serve together as co-arbitrators, and experienced counsel may appear before them in more than one case. In some cases, parties have argued that an arbitrator's failure to disclose such relations warrants vacatur of an award for arbitrator bias. This was the case in *Grupo Unidos,* where the Eleventh Circuit Court of Appeals confirmed that the failure to disclose such professional contacts, without more, does not demonstrate evident partiality warranting vacatur of an award.

The dispute in *Grupo Unidos* arose from a five-year arbitration between Grupo Unidos por el Canal, a consortium of European companies hired to design and construct a new set of locks to expand the Panama Canal, and the Canal's operator, Autoridad del Canal de Panama. After extensive proceedings – which included over 3,500 pages of pleadings, 78 fact witnesses, 63 expert witnesses, over 3,500 exhibits, a 20-day merits hearing, and 1,290 pages of post-hearing briefing – the three-arbitrator panel issued a partial award of more than $238 million in favor of the Autoridad.

Following the partial award, Grupo Unidos sought a series of additional disclosures from the arbitrators. After the arbitrators made the additional disclosures and issued a Final Award, Grupo Unidos moved to vacate the award for evident partiality based on four of these disclosures: (i) a co-arbitrator's nomination of the tribunal's president to serve as president of another tribunal in an unrelated arbitration while the Panama Canal arbitration was pending; (ii) an arbitrator's service as co-arbitrator with counsel for the Autoridad in an unrelated arbitration while the Panama Canal arbitration was pending; (iii) an arbitrator's service on a tribunal with one of the Autoridad's counsel in an unrelated arbitration that ended before the Panama Canal arbitration commenced; and (iv) an arbitrator's service on the tribunal in an unrelated case where one of the Autoridad's counsel represented a party.

The Eleventh Circuit refused to vacate the award based on these nondisclosures. The court considered it "well-taken" that "arbitrators should err on the side of greater, not lesser, disclosure." But to vacate the award on these facts, the court "would need to hold, in essence, that mere indications of professional familiarity are reasonably indicative of possible bias."

In the first three instances, the court held that a reasonable person would not suspect bias based on the non-disclosure of co-service on arbitral tribunals in unrelated proceedings, because there were sound and impartial reasons for the various appointments. This included, among other things, these individuals' extensive expertise and experi-

ence in resolving complex construction disputes. The court concluded that "such familiarity due to confluent areas of expertise does not indicate bias."

The court likewise held that the remaining failure to disclose that a party's counsel's appearance before one of the arbitrators in a prior, unrelated arbitration did not demonstrate evident partiality. According to the court, repeated appearances by experienced counsel before experienced arbitrators were common and anticipated, and such "repeated appearances establish only familiarity, and familiarity does not indicate bias."

In sum, the court observed that it was "little wonder, and of little concern," that leading arbitrators and counsel in a small professional community "would cross paths in their work."

Read the court's full decision here.

Southern District of New York Confirms Award Enjoining Parallel Arbitration:

Agreement and AAA Commercial Rules granted arbitrators broad authority to grant injunctive relief, including the power to enjoin parallel arbitrations seeking to circumvent the arbitration agreement and undermine the panel's authority.

Telecom Business Solution, LLC v. Terra Towers Corp., et al., No. 22-CV-1761, 2023 WL 5748199 (S.D.N.Y. Sept. 6, 2023).

One way parties may attempt to circumvent an unfavorable award is by initiating parallel proceedings before a court or arbitral tribunal they expect will rule in their favor. The question then arises of whether arbitrators are empowered to enjoin parallel proceedings to thwart such gamesmanship and preserve the integrity of the arbitration. In *Telecom Business Solution,* the SDNY was asked to confirm an award ordering the respondents to terminate parallel arbitration proceedings directly aimed at undermining the ongoing arbitration.

The case arose from a dispute between the shareholders of Continental Towers LATAM Holdings Ltd. regarding the sale of the company. Specifically, the minority shareholders alleged that the majority shareholders had prevented the sale of the company by wrongfully restricting the minority shareholders' right to sell their shares. They therefore invoked the arbitration clause in the shareholders' agreement and initiated an arbitration in New York under the Commercial Rules of the American Arbitration Association, seeking an award requiring the sale of the company. The tribunal ultimately issued a unanimous first partial final award ordering the sale of Continental Towers, which was later confirmed in the SDNY. This was followed by a second partial final award that imposed sanctions on the majority shareholders, including staying their counterclaims until they complied with the tribunal's order to complete the sale of Continental Towers.

Rather than comply with the awards, the majority shareholders took their fight abroad. A few months following the second partial final award, wholly-owned subsidiaries of Continental Towers initiated arbitrations in Peru and Guatemala, asserting claims mirroring the majority shareholders' stayed counterclaims in the New York arbitration. The Guatemala tribunal even issued an injunction purporting to enjoin the minority shareholders from, among other things, undertaking "transactions that change the equity interests that [the majority shareholders] hold in certain of [Continental Towers'] subsidiaries," directly conflicting with the New York tribunal's ordering of the sale of Continental Towers. The minority shareholders therefore moved for an anti-arbitration injunction from the New York tribunal to enjoin the South American arbitrations.

The New York tribunal found that, because the majority shareholders were the real parties in interest in all three arbitrations, the South American arbitrations were a transparent attempt to circumvent the New York tribunal's orders. The New York tribunal therefore issued a third partial final award ordering the majority shareholders to terminate the parallel arbitrations.

The minority shareholders then petitioned the SDNY for expedited confirmation of the third award. The majority shareholders cross-moved for vacatur.

The court rejected the majority shareholders' vacatur motion, and confirmed the award. The court rejected the respondents' contention that the injunction exceeded the arbitrators' authority, holding that the arbitrators had the authority to issue the anti-suit injunction. The arbitrators' scope of authority "generally depends on the intention of

the parties to an arbitration, which is determined by the parties' agreement." The shareholder agreement granted the tribunal broad authority to decide "any controversy, claim or dispute arising out of or in connection" with the shareholders' agreement, and authorized the arbitrators to award specific performance and injunctive relief. The agreement further provided that the arbitration would be conducted under the AAA Rules, which likewise granted the arbitrators authority to issue injunctive relief. The arbitrators had found that the shareholders' parallel arbitration violated the arbitration clause and the implied covenant of good faith, and awarded the anti-suit injunction as the appropriate remedy. The court held that it was well within the arbitrators' authority, as defined by the agreement, to order an anti-suit injunction to remedy these breaches.

Read the court's full decision here.

* The above two items were originally published by Chaffetz Lindsey LLP Arbitration in the Courts, Volume 12 (December 2023), available at this link: https://www.chaffetzlindsey.com/report/arbitration-in-the-courts-december-2023vol-12/. They are reprinted here with permission.

A Career Ending Collision at Sea*

By James Mercante, Partner, Gallo Vitucci Klar LLP (including the former operations of Rubin, Fiorella, Friedman & Mercante LLP)

It is said that a collision at sea will ruin your whole day. It can also be fatal and ruin careers. One such collision punctuates this in a big, expensive, and tragic way. 10 Navy sailors died and 31 were injured. The two ships sustained millions in damage. The careers of the Commanding and Executive Officer aboard the Navy warship ended on that fateful voyage; true to the adage that it takes years to build a reputation and minutes to destroy it.

The 9,000-ton guided-missile destroyer U.S.S JOHN S. McCAIN collided in the Singapore Strait with a 39,000 ton oil and chemical tanker ALNIC. What resulted was a textbook case of maritime law involving issues of collision liability, apportionment of fault, federal admiralty procedure, choice of law, ship owners' Petition for Exoneration from or Limitation of Liability, and the preclusion against service members suing the military.

A five day bench trial was held before the Honorable Paul A. Crotty, Southern District of New York in November 2021. The massive case was split into two trial phases: *Phase I* being the trial to apportion liability between the tanker owner and the United States; *Phase II* to adjudicate the death and injury claims. Judge Crotty's *see-worthy* 49-page decision dated June 15, 2022, admirably navigates through the collision facts in minute by minute granular detail worthy of a movie script. *In the Matter of the Complaint of Energetic Tank, Inc as Owner of the M/V ALNIC MC, for Exoneration from or Limitation of Liability, 607 F. Supp 3d 328 (SDNY 2021).* It's hard to fathom a more comprehensive collision analysis. Indeed, the Navy took notice of this decision and has incorporated portions of Judge Crotty's collision analysis in its Bridge Resource Management training course taught to Surface Warfare Officers.

The awards for injury and death will be determined by a jury in *Phase II,* which trial has yet to begin. ALNIC's appeal of Judge Crotty's apportionment of fault ruling was just argued in the Second Circuit on January 18, 2024 before Judges Walker, Carney and Park. The decision is pending.

Casualty Facts

The August 21, 2017 collision occurred in one lane of a traffic separation scheme within the Singapore Strait. As the trial testimony revealed, the McCAIN was cruising alongside and overtaking the oil tanker. Thus, the tanker had the right of way under navigation rules. McCAIN lost steering and veered left suddenly into the path of the tanker. ALNIC's bow pierced the McCAIN's port side which flooded the McCain's compartments with seawater within seconds. I*n re Energetic Tank,* 607 F.Supp 3d at 329. Prior to impact, the tanker Captain was staring in the cross-hairs of a U.S. Navy warship cutting right across its bow. But the Captain apparently froze. Judge Crotty determined from the fact and expert testimony that the tanker kept steaming ahead in the direction of the McCAIN without timely reducing speed, stopping or taking the ship off

'Auto-Pilot'. With the tanker still on Auto-Pilot, ALNIC's bow was forced to its left due to the impact. The ship auto-corrected to the right and sheared through the McCAIN's hull killing 10 unwary Navy sailors asleep in their bunks. The injury claimants argued that the ship should have been placed in manual steering within a traffic separation scheme. This is not a foreign concept. The Board of Commissioners of Pilots in New York (on which the author serves) have a Policy and Procedure that requires all vessels navigating in pilotage waters to be manually steered 'by an alert and attentive member of the vessel's crew'. This includes cruise ships arriving in New York.

ALNIC's Limitation Action

The Admiralty proceeding was commenced in New York by the tanker owner (Energetic Tank) filing a Petition for exoneration from liability or to limit its liability to $16,768.00, which was the post-casualty value of the ALNIC. 46 U.S.C. §30501. A Limitation Action is a standard maritime defense afforded to any vessel owner, including a foreign ship owner who is either sued here or invokes United States as the jurisdiction. The tanker was Liberian-flagged and managed by a company based in Greece. In 1914, the U.S. Supreme Court made clear in litigation involving the sinking of the TITANIC, that a foreign vessel owner is entitled to the same statutory maritime defenses afforded to a U.S. owner. *Ocean Steam Navigation Co. v. Mellar,* 213 U.S. 718 (1914); *See also,* James E. Mercante, *In the Wake of The Titanic: An Unsinkable Law,* New York Law Journal, April 12, 2012. A Limitation Action allows all claims to be asserted in one proceeding against the vessel owner (like an interpleader). Here, the claims included damages to both ships, multiple personal injuries and 10 fatalities. The military personnel were precluded by U.S. Supreme Court precedent (*Feres Doctrine*) from bringing suit against the United States for injuries arising out of or in the course of activity incident to miliary service. *Feres v. United States,* 340 U.S. 135 (1950). To add insult to injury, the Commanding Officer was court-martialed and found guilty of dereliction of duty. The Executive Officer and other senior ranking officers were disciplined, effectively ending Navy career paths. The Navy issued a scathing report that was admitted in evidence.

The Target-Joint and Several Liability

The Petitioner (owner of ALNIC) fought vigorously at trial to prove the McCAIN was 100% at fault. This was the only outcome that would sit well with the tanker owner because the military personnel were barred from suing the United States, and therefore took aim at the tanker. But, more importantly, under the maritime law of joint and several liability, ALNIC was well aware that had it been found even 1% at fault, the service member injury and death claimants would recover the entirety of the judgments from the tanker owner. This scenario became a stark reality when Judge Crotty ruled ALNIC to be 20% at fault while the McCAIN's fault was 80%. Interestingly, ALNIC's fault included its post-impact omissions, which is rarely seen. After the crash, ALNIC failed to timely stop engines, and took no action to switch to manual steering. The McCAIN's faults were legion, including loss of steering, crew ignorance of the high tech steering controls, multiple navigation rule violations, no danger signal sounded, unaware that one screen touch could have stopped the ship.

Pyrrhic Victory

The parties stipulated to the damages sustained to the two ships with the high-tech Naval warship McCAIN suffering $185 million in damages. The ALNIC damages were only $442,445. Thus while 20% apportionment of fault may seem like a win for ALNIC, it was far from it. Under joint and several liability, the tanker owner was obligated to pay 20% of McCAIN's $185 million in damages amounting to nearly $37 million dollars. The United States (which had the larger allocation of fault) was obligated to pay the tanker 80% of its damages, only $354,000.

Accordingly, with the tanker owner also now facing the totality of the injury and death awards, the ALNIC interests argued that despite the *Feres Doctrine's* direct lawsuit preclusion, ALNIC should be entitled to contribution and/or indemnity from the United Sates for its 80% allocation of fault. The District Court rejected this argument and ALNIC took this legal issue up on appeal together with the apportionment of 20% fault. Findings of fact as to apportionment of fault in a collision case are subject to the difficulty to surmount 'clearly erroneous' standard of proof on Appeal. Judge

Crotty cited precedent that there is "no formula for apportioning liability." The allocation requires consideration of matters not readily amenable to precise analysis but that percentages be accompanied by "sufficient explanation to provide a reviewing court with some general understanding of the basis for the decision." 607 F.Supp. 3d at 360.

Limitation Action

The District Court also considered ALNIC's defense of Limitation of Liability to the tanker's value. The Act protects the vessel owner from unlimited vicarious liability for damages caused by on board negligence of the captain or crew. *Tanden v. Captain's Core Marina of Bridgeport, Inc.,* 752 F.3d 239, 244 (2d Cir. 2014). The Court ruled that petitioner having failed to prove at trial that it (as owners of the tanker) lacked privity or knowledge of the acts and omissions that led to the collision, ALNIC's petition to limit its liability was denied. *See* 607 F.Supp 3d at 371. Lack of proper crew training and crew competence were shoreside management issues.

Choice of law was and remains important in this case. The District Court applied the federal maritime law of the United States in its collision liability analysis. But, despite the ALNIC having chosen to file its petition here and all claims are by U.S. citizens, the Court vowed to apply the law of Singapore to the injury and death claimants' remedies. *In the matter of Energetic Tank, Inc.* 2020 WL 114517 (SDNY 2020). This issue was argued on appeal as well and awaits ruling, with claimants suggesting that U.S. law should apply as well to damages.

There has been a call on for quite some time for Naval Surface Warfare Officers to qualify and obtain licenses issued by the U.S. Coast Guard (like Merchant Mariners) to operate ships. The McCAIN and similar Navy ship collisions perhaps makes this a Mayday call. Meanwhile, the sailor families await their day in court and fair compensation for their loss.

SMA Awards At a Glance: Charter Party Disputes with a COGSA Twist

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

In this issue, SMA Awards at a Glance will examine the thorny topic of the Carriage of Goods By Sea Act as it has been applied in three SMA arbitration awards. Between 1921 and 1924, representatives of the shipping industry convened to establish a uniform treatment of the shipper/carrier relationship in the context of common carriage. The result was the 'International Convention of the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature', now the 'Hague Rules'. In 1936, the U.S. established the Carriage of Goods by Sea Act ("COGSA"), which, with minor differences, incorporated the Hague Rules *verbatim*.

At the heart of COGSA are 17 defenses to cargo damage and loss that exonerate the Carrier. Examples include acts of God, perils, dangers and accidents of the seas, inherent vice of the goods, fire, acts of war, strikes, and lockouts. In exchange for being able to avail itself of these defenses, the Carrier undertakes before and at the beginning of the voyage to exercise due diligence[1] to make the ship seaworthy, to properly man, equip, and supply the ship, and to make the cargo spaces fit for the safe carriage and protection of the cargo. The Carrier is liable for cargo loss and damage arising from its failure to use due diligence, and this duty to exercise due diligence is non-delegable. The Carrier cannot rely on others, such as Surveyors, Classification Societies, or Ship Management companies to discharge its duty to exercise due diligence.

COGSA applies to every Bill of Lading for the common carriage of goods between U.S. and foreign ports. COGSA, by its terms, does not apply to the private carriage of cargo; accordingly, COGSA does not apply to charter parties, 46 U.S.C. Section 1305. Congress declined to enact a statute regulating the terms of charter parties because it has generally considered the bargaining power of charterers and vessel owners to be equal, unlike the edge held by vessel owners and charterers over shippers in the context of the common carriage of

goods. However, charterers and vessel owners may and often do incorporate COGSA into charterparties either expressly or by virtue of a Clause Paramount which explicitly provides for incorporation, or which have been so construed.[2]

The following discussion will review three SMA awards where the panels had to grapple with COGSA-related issues ranging from whether it was appropriate to apply COGSA's one year time bar (M/V STADE) to charter party clauses that shift to charterers the cost and/or responsibility for loading and discharge operations that normally falls upon vessel owners under COGSA (M/V MARLENE GREEN) to the shifting burdens of proof between a charterer and vessel owner in establishing/rebutting a claim for cargo damage in a case where COGSA's Section 3(6) – providing that failure to give notice of damage within three days of discharge gives rise to a presumption that the cargo was delivered in sound condition – is applicable (M/V SITEAM EXPLORER).

M/V STADE
(SMA 4443, 29 Apr 2022)
Partial Final Award
John F. Ring, Jr., A. J. Siciliano, Robert G. Shaw (Chair)

GENCON - Partial Final Award - Unseaworthiness - Deficient Stowing Plan - Damages - Third -party Defendants - Time Bar - Motion to Dismiss

Edlow International Company, ("Charterer"), the transportation manager for the National Atomic Company of Kazakhstan (hereinafter "KAP"), chartered two vessels to carry a cargo of non-fissile, class 7, yellow cake uranium (hereinafter "cargo") in 114 TEU containers: the first vessel for the voyage from St. Petersburg to Nyborg, the second vessel for the on-carriage of the containers from Nyborg to Nhava Sheva, India. Charterer presented 114 TEU containers to KAP , who then loaded each with 36 drums of cargo. To ensure that the drums were not loaded on top of one another, KAP provided dunnage between them when stacking during loading. The drums, packing, and containers fully satisfied and exceeded applicable international requirements for cargo carriage. Charterer chartered the M/V *MIKHAIL DUDIN,* a general cargo vessel, to load the cargo at St Petersburg for discharge at Nyborg. This voyage was uneventful and not part of this arbitration. On November 16, 2016, Charterer entered into a voyage charter party on an amended 1994 GENCON form ("Charter") with J. Poulson Shipping A/S, ("Poulson") as Agents to Owner and Leisure Shipping A/S, ("Owner"), the disponent Owner of the M/V STADE (hereinafter "the Vessel"), also a general cargo vessel, to on-carry the cargo from Nyborg to Nhava Sheva, India. This Charter party was the subject of this arbitration.

During the voyage to India, the Vessel encountered heavy seas, causing the collapse of containers in one of the bays in hold #1, damaging them, and spilling some cargo. When the Vessel arrived at Nhava Sheva, various Indian governmental authorities required clean-up and remediation steps to be taken before permitting discharge of the cargo. It took almost 18 months to obtain all approvals before the Vessel was allowed to discharge. During this time, KAP had paid Edlow, who in turn paid the Owner, for the voyage freight, demurrage, detention, clean-up, remediation, and other associated costs. In the arbitration, Charterer claimed damages exceeding $20 million including a claim of more than $5 million for lost earnings arising from Charterer's loss of KAP as a customer.

Charterer contended it suffered these damages because the Owner provided it with a deficient stow plan that rendered the vessel unseaworthy. The Charterer alleged that because of this unseaworthiness, containers shifted when the Vessel encountered heavy seas, causing some containers stowed in the bottom bay of hold #1 to buckle, leading to spillage of some cargo.

The Owner moved to dismiss Charterer's claims, contending that they were time-barred under the charter party's Clause Paramount as the vessel completed discharge at the end of April 2018, and the Charterer only initiated arbitration on January 27, 2021. The Charterer did not seek an extension of the COGSA one-year time bar. Further, the Owner stated the contract was a contract for private carriage under which the parties were free to allocate and did allocate responsibility for stowage and the risk of improper stowage to the Charterer. The Charterer had not alleged that the Vessel suffered from defects affecting her stability to the extent of giving rise to a breach of the Owner's seaworthiness obligation. Before concluding the charter party, Poulson represented to Charterer that it had special expertise in handling the cargo.

Poulson's Quality Assurance Manager emailed the cargo pre-stow plan to the Charterer and, together with the Vessel's Master and Chief Mate, instructed the crew on the loading arrangement, which met all applicable rules, including the SOLAS Convention, and exceeded the limits of the Vessel's Class and approved cargo securing manual. Moreover, the Owner added that the stow plan exceeded the limits of the securing manual by a factor of more than one-third in the two bays in hold #1. Lastly, addressing costs and expenses, Owner stated the Charterer had not shown it suffered any losses for the various costs and expenses, given its acknowledgment that KAP funded all the payments.

Charterer countered that the drums, packing, and containers it presented to the Owner fully satisfied and exceeded applicable international requirements for cargo carriage. The container preparation was consistent with the drums, packing, and containers used in earlier KAP shipments of yellowcake uranium to India under voyage charters with other vessels. Charterer further contended that the Owner's defective stowage of the cargo gave rise to a breach of its obligation to provide a seaworthy ship, and the charter party terms allocating responsibility for the stow to the Charterer did not excuse that breach. The Charterer maintained that the Clause Paramount only had the effect of having COGSA govern the Bills of Lading, not the Charter. The Charterer added that even if COGSA did apply to the Charter as a whole, Charterer's claims were not for physical loss or damage to the cargo but for "contingent indemnity" because KAP had asserted a claim against the Charterer for funding the clean-up operation. Therefore, according to Charterer, its claims were not covered by COGSA and COGSA's one-year time bar could not be applied. Rather, Charterer argued, its claims were for breach of contract which were governed by New York's six-year statute of limitations. Charterer also argued that Owner had misrepresented the adequacy of the stow at Nyborg and that this should equitably estop Owner from relying on the COGSA time bar such that if the time bar was applicable, it should be tolled. Finally, Charterer maintained that because its claim was for "contingent indemnity", the time for initiating proceedings would only begin to run from the time of its payment of the underlying liability to KAP.

The panel ruled that the charter party Clause Paramount did incorporate COGSA into the charter party and, by inclusion, its one-year time bar. The panel cited the relevant charter party provision that "[t]he Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States approved April 16, 1938, which shall be deemed *incorporated herein*." [Emphasis added]. The panel said the language 'incorporated herein' allowed no logical interpretation other than that 'herein' referred to the charter party and not the Bill of Lading.

The panel also ruled that although Charterer's claims were not for physical damage or non-delivery of the cargo, they were of a kind that, under established authority, including the M/V MARLENE GREEN (discussed *infra*), fell within the scope of COGSA. The claims were all directly connected with the problems that arose when containers holding the cargo had collapsed and spilled cargo, leading to the losses that Charterer claimed. All claims involved the issue of whether the Owner failed in its obligation to provide a seaworthy vessel to carry the cargo safely.

The panel also disagreed with the Charterer's assertion that the Owner's misrepresentation of the Nyborg stow (which, in deciding the motion, the panel assumed had occurred) had the effect of tolling[3] the COGSA time bar. The panel found that Charterer had not alleged or established any causal connection between the misrepresentation and its failure to initiate the arbitration and concluded that there was no reason to toll the time bar.

The panel accepted as a general principle that the applicable limitation period for an indemnity claim only begins to run from the time of payment of the underlying liability for which indemnity is sought, but was uncertain as to whether the principle should be applied in this case. In this regard, the panel noted that promptly after the Charterer paid the cleanup costs and expenses with funds advanced by KAP, it could have initiated a timely claim against the Owner to recover the amounts paid well before the one-year COGSA time bar had run. This would not have been an indemnity claim, but rather one that was based on the contention that Owner had exposed Charterer to the expenses and delays of the clean-up. The panel was not satisfied that this issue had been sufficiently addressed by the parties and ruled that if the

Charterer first established its standing that it had a liability to KAP that it had actually paid, the panel would consider the time bar issue in relation to the indemnity claim. The panel noted that Charterer's claim for lost earnings of over $5 million did not constitute a claim for indemnity and dismissed this claim by reason of the COGSA time bar.

The panel was undecided on whether the inadequacies of the stowage gave rise to a breach of Owner's obligation to provide a seaworthy vessel. The panel acknowledged that the charter party terms shifted the stowage responsibility and risk to the Charterer, but needed to consider additional evidence to review this issue before deciding.

M/V MARLENE GREEN (SMA 4009, 21 Aug 2008) Final Award Alexis Nichols (dissenting), Soren Wolmar, David W. Martowski (Chair)

CONLINLINE Booking Note - Free In/Liner Out (FILO) Terms - Altered Stowage Plan - Improper Stowage - Restowage Costs - Attorney Fees and Costs

This arbitration arose from a claim of the Owner of the M/V MARLENE GREEN (hereinafter "the Vessel") to recover re-stowage and related expenses in the amount of $46,879, plus interest. The dispute dealt with a Liner Booking Note (hereinafter "the contract") dated August 2, 2005, on the Conlinebooking Form, for the carriage of 7,000 RT of Range 5 pipe (hereinafter "the cargo") from Mobile, Alabama to Kuwait. The Charterer 'sub-chartered' the Vessel to US Steel (hereinafter "USSI") who hired its local agent, NSA Agencies (hereinafter "NSA"), and stevedores, Tri-State Marine (hereinafter "TSM"). The contract provided in material part as follows:

- FILO Terms (free in/liner out)[4]
- Dunnage/lashed/secured 3 free days
- Shinc/Fhinc Total load - Liner out to under hook[5]
- Rider Cl 23: Cargo to be loaded free in, lashed, dunnaged, secured/liner out to under ship's tackle.
- Rider Cl 32: Carrier shall comply with safe handling and securing requirements as per ship's Master

Owner's Supercargo boarded the Vessel upon its arrival at Mobile on August 22nd and presented TSM with a loading plan that called for a void space in the center of the No. 2 hold, allowing the Owner to load/stow a heavy lift and project cargo at the Vessel's next loading port, Houston. On behalf of USSI, NSA requested loading of all three sections of the No. 2 hold but was instructed by Owner's Supercargo to follow the stow plan as presented. TSM continued loading throughout August 22/27, leaving a 50-foot void space in the center of the No. 2 hold in accordance with the Owner's instructions.

On August 26, 2005, the U.S. Coast Guard Captain of the Port issued a Marine Safety Information Bulletin stating that Hurricane KATRINA was predicted to affect the Port of Mobile with gale-force to hurricane winds as early as August 29. The following day, the Vessel sailed for Houston and encountered Hurricane KATRINA's 12-foot seas and 100-mile-per-hour winds, causing it to roll and pitch heavily. On August 30, the Vessel arrived at Houston, where it was discovered the cargo in the No.2 hold had shifted in stow, causing some pipes to slip into the lower tiers, some to protrude unevenly, and some to land on the void space. Owner cleared the void space by discharging the affected pieces and reloaded them tightly and evenly. Owner appointed a cargo surveyor who reported that the cargo shifting in hold nos. 1 & 2 during the sea passage resulted from inadequate tightness of stowage. Owner claimed against Charterer for the re-stowage and related expenses.

The Owner contended that the contract reference to FILO terms and Rider clauses shifted the responsibility and expense for loading and stowage from the Owner to the Charterer. It argued that TSM, under Charterer's direction, supervision, and control, negligently stowed the cargo which was the proximate cause for restowing the cargo at Houston, and that the Charterer was therefore liable for all expenses incurred, including detention, lashing, stevedore standby time, materials, and surveyor fees. The Owner maintained that the Vessel's Master exercised no personal control over loading but acknowledged that its Supercargo advised the Master, Chief Mate, and TSM to 'nest the top 6 to 8 tiers' of cargo stowed in the No. 2

hold and to 'properly chock all tiers' on numerous occasions. The Owner added that TSM rejected this advice on the basis that the dunnage between all tiers and chocking of all tiers was a proven method of USSI and that it would not deviate from the practice.

The Charterer denied all liability, contending that it was the Supercargo's requirement of leaving a void space in the center section of the No. 2 hold to accommodate the heavy lift and project cargo which gave rise to the cargo shifting. Charterer added that the Supercargo apparently changed his mind while loading the No. 2 hold, instructing TSM to load cargo in the void space. TSM refused to do so because of concern for the safety of the stevedores who would have to work in the void space under cargo stowed in the forward and aft sections to a height of about 25 feet. NSA offered to discharge and reload all the cargo in the No. 2 hold, which Owner refused, wanting to get the Vessel underway to avoid Hurricane Katrina.

The panel majority noted that the Booking Note was a private contract of carriage governed by COGSA. The threshold issue was whether FILO terms and specific Rider clauses[6] were sufficient to shift the ultimate responsibility and expense for loading at Mobile from the Owner to the Charterer. Under common law and COGSA, the responsibility to load and stow and the consequences for improperly doing so normally fall on the Owner. It is well established that the parties to a private contract are free to shift the responsibility for loading and stowage from Owner to Charterer, even where the contract is governed by COGSA, provided the contract includes clear and explicit language. The panel majority also noted that while this dispute involved claims for cargo re-stowage expenses rather than for cargo damage, the claims should still be governed by COGSA.

The panel majority found that while the FILO terms clearly allocated the expense of loading and stowage to the Charterer, they fell short of shifting the responsibility for these operations to the Charterer. Accordingly, responsibility for improper stowage remained with Owner as required by COGSA. It was undisputed that the Owner's Supercargo provided a stowage plan calling for a void space in the center of the Vessel's no. 2 hold. The panel majority held that the Master and Supercargo should have foreseen that the Vessel would experience heavy rolling and pitching during its sea passage from Mobile to Houston. The Master's responsibility for the faulty stowage resulted in a finding of that the Vessel was unseaworthy, and the Owner's claim was denied.

The dissenting opinion disagreed that the COGSA rules applicable to cargo damage claims are interchangeable with those governing breach of contract disputes, and further noted that the majority offered no legal authority to support its view that a claim for re-stowing expenses should be governed by COGSA. The dissent also pointed out that USSI had full control of the loading and dictated the method of stowage. Equally important was the Owner's unwillingness to deviate from the USSI stowage. These facts demonstrated the Charterer's 'clear and explicit' intention to shift responsibility to the Charterer. Moreover, with respect to the applicable burdens of proof, the dissent noted that the Owner had presented a survey report by a surveyor who attended the Vessel at Houston and who disagreed that the void space played any part in the shifting of the cargo. It was therefore the Charterer's burden to disprove the findings of the surveyor, which the Charterer failed to do. For these reasons, the dissent concluded that the Owner's claim should be allowed with the full recovery of its costs.

M/T SITEAM EXPLORER (SMA 4216, 26 Aug 2013) Final Award Louis P. Sheinbaum (dissenting), A. J. Siciliano, Donald J. Szostak (Chair)

ASBATANKVOY - Cargo Contamination - Time Bar - COGSA - Notice of Claim - Burden of Proof - Due Diligence - Damages - Attorney Fees and Costs

This arbitration involved a subrogated cargo claim against the Owner for alleged cargo contamination. On June 10, 2008, the Owner entered into a charter party on the ASBATANKVOY form to carry 3,500 MTs of acrylonitrile (hereinafter "ACN" or "the cargo") from Houston to Ulsan. The performing vessel was the M/T SITEAM EXPLORER (hereinafter "the Vessel"), a sophisticated multi-grade IMO2 Chemical Tanker. The cargo was stowed in zinc-coated tanks.

The Vessel loaded the cargo in apparent good order and condition, supported by pre-loading and post-loading cargo sampling. The Vessel discharged the same quantity into shore tanks at Ulsan in the same apparent good order and condition, again supported by pre-discharge and post-discharge cargo sampling. At loading, the cargo was tested while in the Supplier's shore tanks and found to have a color rating of 5APHA, well below the Charterer's customary resale specification of 10APHA. The cargo was then barged to the Houston loading terminal to await the Vessel's arrival. The Vessel tendered its NOR on June 29, 2008, and its tanks 4BP and 8P were inspected by the Charterer's Inspector and found to be clean and fit to carry the cargo. Loading commenced on June 30, interrupted to allow for first foot samples to be drawn from the vessel tanks and tested. After receiving laboratory confirmation that the cargo was on-specification, loading resumed and was completed the same day. Cargo samples were again taken, showing a color rating of 6APHA. ACN needs to be stabilized to facilitate its transport and handling in liquid form to prevent premature polymerization. An Inhibitor Certificate is legally required to notify the vessel of the parameters for safely carrying the cargo. The cargo supplier provides the certificate indicating the type and quantity of the Inhibitor, the date the inhibitor was added, the duration of inhibitor effectiveness, and the temperature limit, if any, ending with any action to be taken if the voyage should exceed the time of product inhibitor effectiveness. In this instance, the cargo was inhibited with 37.56 ppm Methyl Hydroquinone ("MEHQ"), with an effective duration of ninety days, with a maximum temperature limit of 90 degrees Fahrenheit insofar as higher temperatures would eat away at the inhibitor's effectiveness.

Although the voyage to Ulsan was uneventful, the Vessel transited through tropical zones where sea temperatures approached but did not exceed 90 degrees F. On August 12, the vessel arrived and tendered its NOR at Ulsan, where the cargo was discharged into two storage tanks, comingled with ACN already stored in those tanks. The discharge operation was uneventful. The charterer's surveyor drew samples before discharge and from the storage tanks after discharge, the results of which revealed a color rating of 3APHA.

Charterer had shipped the ACN to Asia unsold, hoping for a quick turnaround and tidy profit. Unfortunately, the market price for ACN had dropped significantly, and when the vessel arrived at Ulsan, Charterer could not readily find a suitable buyer and was forced to keep the cargo in storage until the product could be sold. Rather than improving, the ACN market price continued its downward spiral. Mindful that the inhibitor effectiveness was reaching its maximum ninety-day period, on September 26, forty-two days after discharge, Charterer drew samples from the storage tanks. The results indicated that the ACN remained properly inhibited. Although the level increased to 40/41 ppm MEHQ, its color had 'yellowed' from a 3APHA to 13APHA, which was beyond Charterer's permitted color specification of 10APHA. At this point, the Charterer placed the Owner (hereinafter "Respondent") and its own cargo underwriter (hereinafter "Claimant") on notice of the claim. Pursuant to the terms of the Charterer's cargo insurance policy, it received a payment of $4,100,000 from Claimant, representing the net difference between Charterer's costs to acquire and transport the cargo and the 'salvage' sale proceeds for the 'distressed' cargo. The charter party was subject to COGSA, and by reason of that statute's $500 'package' or 'customary freight unit' assessment, Claimant sought to recover from Respondent, $1,173,747 plus interest, legal fees and costs. Respondent denied any responsibility for the alleged contamination.

COGSA Section 3(6) requires the cargo interest to provide the carrier with notice of loss or damage within three days after delivery. Failure to provide timely notice results in a presumption that the cargo was delivered in good order. This presumption can be overcome with evidence that the cargo was damaged in the carrier's custody. Because Charterer did not give notice of the ACN's damage until six weeks after delivery, Claimant had to overcome this presumption to establish its *prima facie* case.

Claimant's position was that the ACN was in good order when loaded on the Vessel but was contaminated with the previous cargo of pygas in the Vessel tanks. Claimant contended that its subsequent testing of the retained ACN load port samples did not exhibit any appreciable color change. In contrast, the ACN samples taken before and after discharge did show color change, thus providing ample evidence that the ACN was contaminated while in the custody of the Vessel. Claimant thus

insisted that it had met its burden to overcome the presumption of clean delivery imposed by COGSA's late notice provision and presented a *prima facie* case of vessel fault, thus shifting the burden to Respondent to establish one or more COGSA defenses.

Respondent argued that even if the ACN had absorbed some amount of pygas, extensive tank cleaning prior to loading would have reduced those residues to *de minimus* levels. Respondent maintained that Claimant had not shown that the cargo was damaged while in the Vessel's custody and had not produced proof that the cargo was in sound condition when loaded. Respondent questioned the ACN age and composition, the condition of the two barges that transported the cargo from the Supplier's tanks to the storage tanks from which the cargo was loaded, including the prior contents of those tanks. Respondent argued the yellowing was most likely caused by a combination of the Vessel transiting through tropical waters approaching 90 degrees Fahrenheit, compounded by the extended time the cargo sat in storage tanks. Thus, Respondent insisted that Claimant had not overcome COGSA's late notice presumption of a clean delivery. Moreover, Respondent claimed that Claimant's claim was time-barred.

The panel reviewed and considered the extensive briefs and oral arguments of the parties, deciding that Charterer had not unreasonably delayed notifying Respondent, nor had Respondent suffered any prejudice to justify dismissing the claim on the grounds of laches.[7] Moreover, the panel noted that language used in email communication between the parties amounted to an unqualified and unconditional agreement to extend Claimant's time to call for arbitration and ruled that the claim was not time-barred.

The panel held ten formal hearings, during which the Claimant presented the testimony of two of the Charterer's employees and three chemical experts. The Respondent offered testimony from the Vessel's Master and its own chemical expert. Each of the four experts submitted written and highly technical reports on the characteristics of ACN and their findings and conclusions. The panel noted the extensive scientific evidence presented yielded only speculation as to what caused the ACN to turn yellow. A deficiency with the MEHQ Inhibitor resulting from the vessel transiting through water temperatures close to 90 degrees Fahrenheit was raised as one cause, which conflicted with cargo samples taken from the Ulsan storage tank, indicating the inhibitor levels were intact and consistent with levels introduced at Houston. Inconsistencies were noted with product sampling where, in one instance, rather than 'retesting' existing samples, some were opened and co-mingled with other samples to create 'composite' samples. Seals on other samples were opened and resealed with seal numbers not consistent with the original documentation. Additionally, the panel noted the uncontested testimony of one cargo expert stating that "given sufficient time, all ACN will yellow." Consequently, the panel majority found that the Claimant had not shown, by a preponderance of evidence, that the alleged contamination took place while the ACN was in the Vessel's custody and, thus, Claimant had not overcome COGSA's statutory presumption of clean delivery imposed by its late notice of damage. The panel majority denied the Claimant's claim in its entirety.

The dissenting opinion stated that the Claimant's product test results established, by a preponderance of the evidence, that the ACN was delivered to the Vessel in sound condition and delivered by the Vessel in an unsound, damaged condition. Therefore, Claimant made its *prima facie* case of liability against the Respondent. The burden then shifted to Respondent to show the cause of the damage while on board the Vessel and to establish that the source of the cargo damage was an excepted cause under COGSA, which Respondent failed to do.

1 Pre-COSGA, the carrier was held to an 'absolute warranty' that the vessel was seaworthy. With COGSA, the absolute warranty was reduced to 'due diligence.'
2 *Nissho-Iwai Co. v. M/T Stolt Lion,* 617 F.2d 907 (2d Cir. 1980).
3 Equitable estoppel is based on principles of fair play, where a Court will not grant a judgment or other legal relief to a party who has not acted fairly, for example, having made false representations. The charterer claimed the Owner misrepresented the adequacy of the Nyborg stowage, effectively tolling (delaying) the COGSA one-year time bar.
4 'FILO [free in/'liner out] means that the Shipper/Charterer arranges the loading of the cargo and is not included in the freight rate, and the unloading of the cargo is arranged by the vessel and is included in the freight rate.
5 'Liner out to under hook' means the owner will arrange for discharge over the ship's side.
6 Rider Clause 23 – Cargo to be loaded free in lashed, dunnaged, secured/liner out to under ship's tackle.

Rider Clause 27 – Cargo to be stowed and segregated to the satisfaction of Master.
Rider Clause 32 – Carrier shall comply with safe handling and securing requirements as per ship's Master.

7 Laches is an equitable defense or doctrine where a Defendant invoking the doctrine is asserting that the Claimant has delayed in asserting its rights, and because of this delay, is no longer entitled to bring its claim.

Spotlight on the SMA

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** participated as panelists on a Marine Pollution panel, and **Dr. William Moore** was a panelist presenting on Sustainability and Decarbonization in Shipping.

CMA Shipping Conference, Hilton Hotel, Stamford, Ct., **March 12-14, 2024**

The SMA was a sponsor of this event. SMA member **Robert Shaw** participated on a panel addressing "The Future of Maritime Supply Chain Logistics: Inflation, Near-Shoring and Non-stop Disruption." SMA member **Molly McCafferty** was a panelist on a panel that discussed "OPA 90 Successes, Challenges and Views of the Future." SMA members **Anne Summers, Jack Warfield** and **George Tsimis** attended this event.

30th Biennial Admiralty Law Institute, Tulane University, New Orleans, La., **March 20-22, 2024**

Attended by SMA President **LeRoy Lambert** and SMA members **George Tsimis** and **Dr. William Moore. LeRoy Lambert** moderated a panel on Marine Safety. **Dr. William Moore** provided P&I Clubs' perspective on: "Classification Societies, Sustainability, and Greener Technologies."

Tulane Maritime Law Journal Annual Banquet Honoring Professor Robert Force, New Orleans, La., **April 6, 2024**

SMA President **LeRoy Lambert** paid tribute to Professor Robert Force, Niels F. Johnsen Chair of Maritime Law and Director Emeritus, Maritime Law Center, in remarks at The Tulane Maritime Law Journal annual banquet in New Orleans on April 6, 2024. Some 85 persons attended to honor Professor Force who is retiring after 54 years of teaching thousands of maritime law students at Tulane and publishing leading treatises and scores of articles on maritime law.

Tradewinds Shipowners' Forum USA 2024, New York Yacht Club, N.Y., April 17, 2024

The SMA was a Supporting Organization of this event. In attendance were SMA Vice-President **Bob Meehan** and SMA members **Müge Anber-Kontakis, George Tsimis,** and **Sandra Gluck.**

"ADR In the Aftermath of the Baltimore Bridge Collapse", ABA Section of Dispute Resolution Podcast, April, 2024

SMA President **LeRoy Lambert** was interviewed by host Aaron Gothelf. https://respod.podbean.com/e/adr-in-the-aftermath-of-the-baltimore-bridge-collapse/?token=bdebc1519a2eb22cf0d64c78878a4aca

Marine Insurance Americas, New York, N.Y. , **April 30, 2024**

SMA member **Molly McCafferty** participated on a panel, "How to Interpret the Rules and How to Settle Through Arbitration" which considered arbitrated cases that have come into the spotlight recently as well as current trends for both mediation and arbitration.

MLA Spring Meeting and 125th Anniversary Celebration, New York, N.Y., **May 1-3, 2024**

The SMA was proud to be a sponsor of this meeting which celebrated the MLA's 125th anniversary. As noted in the reflections of Christopher Nolan, Chair, MLA Arbitration & ADR Committee (pp. 2-3 *supra*), the Committee's meeting honored past and current Presidents of the SMA as well as past Chairs of the Committee.

SMA "Lunch and Learn" Presentation, "SMA Dispute Resolution: Who We Are, What We Do, and How We Can Help You," Virginia Port Authority, Norfolk, Va., **May 29, 2024**

Presentation by SMA members **LeRoy Lambert, George Tsimis, Molly McCafferty** and **Sandra Gluck** to local representatives of the containership community including CMA-CGM, Zim Lines, APL, and Maersk, as well as maritime lawyers, port and terminal operators, brokers and others from the local shipping community.

SMA Presentation to Skuld North America, New York, N.Y., **June 4, 2024**

SMA President **LeRoy Lambert** and SMA member **Charles Anderson** presented "SMA Dispute Resolution" to **Aase Naaman Jensen** and her team at **Skuld North America** in its Manhattan offices.

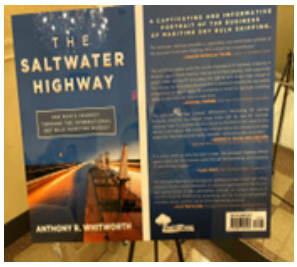
46th Annual Silver Bell Awards Dinner, New York, N.Y., **June 13, 2024**

The SMA is proud to again sponsor this event organized by The Seamen's Church. SMA member **Bengt Nergaard,** Maritime Counsel of Dorian LPG Ltd., will be in attendance as well as SMA President **LeRoy Lambert.**

SMA MONTHLY LUNCHEONS*:

March 13, 2024: Brian Maloney and Bruce Paulsen of Seward & Kissel were invited to speak about current sanctions regimes and their impact on the maritime industry. Seward & Kissel generously provided space at their offices at 1 Battery Place, N.Y., N.Y. for this luncheon.

April 10, 2024: Anthony Whitworth, author of the recently published "The Saltwater Highway: One Man's Journey Through the International Dry Bulk Maritime Market", discussed his career and future trends in the dry bulk market.



May 8, 2024: Annual General Meeting of the SMA

Austin Dooley, Daniel Gianfalla, Molly McCafferty and **George Tsimis** were elected as Governors for two-year terms, joining Governors **Lucienne Bulow, Sandra Gluck, Daniel Schildt** and **Robert Shaw. Louis Epstein** and **Müge Anber-Kontakis** were appointed Governors by President Lambert to serve one-year terms.

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

In Memoriam

The SMA marks the passing on May 20, 2024 of **John Schofield,** Full Member of the LMAA and author of the renowned treatise, *Laytime and Demurrage* (8th ed.). Described by LMAA President David Steward as a "shipping and commercial man through and through", he trained at the Britannia Royal Naval College, served on seagoing ships, and

qualified as a barrister of Gray's Inn. He served as an Assistant Director of A Bilbrough & Co Ltd, the managers of the London P&I Club before joining the London office of a group operating tankers, dry bulk carriers and passenger vessels. He joined the LMAA in 1989 as a Supporting Member, was elected a Full Member in 1993 and became a full-time arbitrator in 1999.

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: sandra.gluck@gmail.com; louis.epstein@trammo.com; or gtsimis@gjtmarine.com.

Please also follow the SMA via LinkedIn.

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