

## In this issue

President's Message	1
Changes to Sections 2 and 10 and to Appendix B of the SMA Rules	2
In Memoriam - Jack Berg	4
When Did the Jones Act Become the "Jones Act"?	6
Transportation Spotlight: The Supreme Court's Jettison of <i>Chevron</i> Deference in <i>Loper Bright</i> is a Sea Change for the U.S. Maritime Sector	8
A Trio of Arbitration Cases: Clarifying the Scope of the Federal Arbitration Act	11
DC Circ. Int'l Arb. Ruling Leaves Award Holders in Legal Limbo	14
Russian Supreme Court Denies Enforcement of Award Based on the Allegedly Unfriendly Nationalities of Arbitrators	17
Arbitration. Sanctions. Seventh Circuit Affirms Confirmation of Award that Awarded Legal Fees Even Though Agreement Provided that Each Side Would Pay Its Own Counsel Costs	19
D.C. Circuit Allows Challenge to Counsel's Authority to Enforce International Arbitration Award	19
Spotlight on the SMA	20
Save the Date - 2025 SMA Seminar	23
In Closing	24

## President's Message

*By LeRoy Lambert, SMA President*

Since my last report in the June 2024 issue of *The Arbitrator*, we have been busy and are off to a great start for 2024-25, my fourth and final year as President. I am joined again by Bob Meehan as Vice-President, George Tsimis as Secretary, and Jack Warfield as Treasurer. Also serving as Governors are Müge Anber-Kontakis, Lucienne Carasso Bulow, Austin Doolley, Louis Epstein, Dan Gianfalla, Sandra Gluck, Molly McCafferty, Dan Schildt, and Robert Shaw. Patty Leahy continues as our Office Manager.

SMA Committee Chairs are also set:

The Arbitrator	Sandra Gluck, Louis Epstein, George Tsimis
ASBA/BIMCO Liaison	Soren Wolmar
Awards Service	Bengt Nergaard
Audit	Michael Hand
By-Laws and Rules	Louis Epstein
Marketing	Sandra Gluck
Education	Austin Dooley
Friends and Supporters	Müge Anber-Kontakis
ICMA	David Martowski
Insurance	Rob Milana
Luncheon	Müge Anber-Kontakis
Mediation	Rob Milana
Membership	Gil Landy
SMA-MLA Liaison	Molly McCafferty
Offshore Wind	George Tsimis
Professional Conduct	Svend Hansen
Technology	Dan Schildt
Yachts	Charles Anderson

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.

All of us were saddened to learn of the death of Jack Berg in June. Tony Siciliano and Louis Epstein pay tribute to him and his legacy in this issue. Thank you, David Martowski, for your remarks at Jack’s memorial service in July on behalf of the SMA.

At our October Luncheon, we welcomed Mike Mitchell as an SMA member. Mike has been a fixture of the maritime industry his entire career in various roles, and we welcome him and his experience into the ranks of SMA membership.

Please read the “Spotlight on the SMA” section (pp. 20-22) to find out about all the steps we have taken since my June report to promote the SMA and see the events which will be happening this fall.

Jus Mundi continues to download SMA Awards in accordance with the partnership agreement we concluded with them last year which will allow wider and easier internet access to our SMA awards. We expect this new service will be rolled out in late 2024.

We are arranging to meet with end-users over the course of the year to be sure that they are aware of the advantages of SMA arbitration and to learn from them how the SMA can improve its level of service to all users.

As always, thank you to those who have contributed to our Friends and Supporters program. We could not do it without you!

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.



*LeRoy Lambert*  
President

---

## Changes to Sections 2 and 10 and to Appendix B of the SMA Rules

***By Louis Epstein, Chairman of the SMA Bylaws and Rules Committee***

The SMA Board of Governors has approved changes to the text of Sections 2 and 10 and to Appendix B of the SMA Rules, effective October 1, 2024. The changes are shown below in redline:

### **A. Amendment to Section 2**

Section 2 of the SMA Rules, entitled Consolidation, contains, in its second paragraph, provisions regarding the selection of arbitrators in consolidated cases. Effective October 1, 2024, the second paragraph of Section 2 shall be amended to read as follows:

Whenever consolidation is required by this Section, the parties are free to agree upon a sole arbitrator, failing which the dispute(s) are to be submitted to a consolidated panel consisting of three arbitrators, one selected by the primary claimant, one by the ultimate

defending party, and the third selected by the remaining intermediate or “pass-along” party or parties. If, for any reason, the consolidated panel has not been constituted within 30 days of a party requesting consolidation, then at the request of any interested party, the unfilled Arbitrator position(s) shall be completed by and at the discretion of the then President of the Society of Maritime Arbitrators, Inc. or in the event of a conflict, by and at the discretion of the SMA’s then Vice-President from the SMA’s current roster of members. Time limits specified in Rule 10 shall not apply to disputes subject to this clause. **The arbitrator selected to serve in accordance with this section by or on behalf of the remaining intermediate or “pass along” party or parties shall serve as Chair of the Panel.**

This change makes clear that, when there is a consolidated arbitration, the third arbitrator selected in accordance with Section 2 shall serve as Chair of the Panel.

## B. Amendment to Section 10

Effective October 1, 2024, Section 10 of the SMA Rules, which concerns the appointment of arbitrators, shall be amended to read as follows:

If the arbitration agreement specifies **the number of arbitrators and** a method by which Arbitrators are to be appointed, that method shall be followed and in the event of a conflict, its terms shall prevail over this section of the Rules. **Otherwise, the Arbitration shall proceed before a three-person Panel.**

**When by agreement or in accordance with this Section 10, the Arbitration will proceed before a three-person Panel, one arbitrator shall be appointed by each of the parties and the two arbitrators so chosen shall appoint the third arbitrator, who shall be Chair of the Panel.**

When requested by a party, the SMA shall submit its then current roster of members from which arbitrators may be appointed.

If a party fails to appoint its Arbitrator within the time frame specified in the arbitration agreement, **the party demanding arbitration may resort to Section 5 of the Act.** or if no such time frame is specified, the party demanding **the** arbitration shall give **to** the other **party**

written notice that the appointment of its Arbitrator is made pursuant to Section 10 of these Rules which requires the other **party** to appoint an arbitrator within twenty days of receipt of that notice, failing which the party demanding arbitration may appoint a second Arbitrator with the same force and effect as if that second Arbitrator were appointed by the other party. Any thus chosen second Arbitrator shall be a disinterested person with the same qualifications, if any, required by the arbitration agreement. **If the arbitration agreement provides for three Arbitrators;** The two arbitrators so chosen shall appoint the third arbitrator who shall be Chair of the Panel.

Notwithstanding anything contained in this section to the contrary, if the party demanding arbitration seeks to compel the appointment of a second Arbitrator sooner than the stipulated twenty days, it is free to proceed under the Act.

These changes to Section 10 clarify that if the arbitration clause in a contract incorporates the SMA Rules by reference but does not specify the number of arbitrators or the method by which the arbitrator(s) will be selected, the proceeding will be heard by a three-person panel, each party to appoint an arbitrator and the two so chosen to appoint a chair. They also clarify that, whether or not the arbitration agreement specifies a time frame for the appointment by the respondent of its arbitrator, the claimant may set a time limit of twenty days for such appointment, failing which the claimant may appoint a second arbitrator.

## C. Amendment to Appendix B

There have been a number of developments in the law since this form of subpoena that appears at Appendix B to the Rules was first used. *See generally* the recently updated report by the International Commercial Disputes Committee and the Arbitration Committee of the New York City Bar entitled “A Model Federal Arbitration Summons to Testify and Present Documentary Evidence at an Arbitration Hearing” (March 2024) (the “Report”) which may be found at this link:

[https://www.nycbar.org/wp-content/uploads/2015/05/20221270\\_ModelFederalArbitrationSummons.pdf](https://www.nycbar.org/wp-content/uploads/2015/05/20221270_ModelFederalArbitrationSummons.pdf).

This is an update of a report done in 2015 to reflect the most recent case law. Among other things, it deals with the requirements for subpoenas to witnesses located outside the judicial district of the seat of the arbitration, providing that such subpoenas should direct the appearance of the witness at a hearing to be held before one or more of the arbitrators at a location within the judicial district where the witness resides or is employed and should indicate that compliance may be compelled or non-compliance punished by a federal district court at that location.

The “Note” that appears at the end of Appendix B has been revised as follows to refer parties to the Report for guidance.

**NOTE: Report to Arbitrator(s) in Room No. \_\_\_\_\_ Parties should submit to the arbitrators for issuance a form of subpoena that complies with Section 7 of the Federal Arbitration Act and are referred for guidance to “A Model Federal Arbitration Summons to Testify and Present Documentary Evidence at an Arbitration Hearing” (March 2024) which may be found at this link: [https://www.nycbar.org/wp-content/uploads/2015/05/20221270\\_ModelFederalArbitrationSummons.pdf](https://www.nycbar.org/wp-content/uploads/2015/05/20221270_ModelFederalArbitrationSummons.pdf).**

## Conclusion

The new October 1, 2024 version of the Rules has been posted on the SMA website at the following link:

[www.smany.org](http://www.smany.org)

While the changes to Sections 2 and 10 and to Appendix B reflect how parties and arbitrators have interpreted and acted under the prior rules, the Board of Governors concluded that these amendments provided needed clarity, particularly at a time when SMA Rules are being adopted and used in more maritime and commercial sectors.



*In June of 2024, Jack Berg, long-time SMA member and former SMA President passed away. He was a valued colleague and mentor to many SMA members, lawyers, and others in the maritime industry. Tony Siciliano and Louis Epstein pay tribute below to Jack’s life and career. Well done, Jack. Rest in peace.*

## In Memoriam – Jack Berg

***By A. J. Siciliano, Member and Past President of the SMA***

The SMA has lost another icon. On June 16, 2024, my fellow Brooklynite Jack Berg passed away at the age of 96. Mourning his passing were Jack’s daughter Susan, son Peter, six grandchildren, six great grandchildren and his devoted companion of the last 18 years, Linda Salamon. Predeceasing Jack were his brothers Paul and Irving and after a long and difficult illness his wife Doris in 2005.

Jack grew up in Sea Gate, a gated largely Jewish enclave adjacent to Brooklyn’s famed Coney Island beach and in the shadow of the intimidating Parachute Drop and Wonder Wheel attractions. Jack’s Sea Gate home was but a short walk to the many amusements that dotted Surf Avenue as well as Nathan’s Famous hot dogs, incomparable French fries and amazing potato knishes.

A graduate of the U.S. Merchant Marine Academy (1949) and NYU Law School (1958), Jack sailed as a deck officer for both American Export Lines and MSTs but distinguished himself ashore with 31 years of devoted service to Continental Grain

Company and especially as one of SMA's most renowned and respected arbitrators.

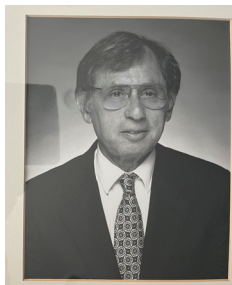
Jack was admitted into SMA membership in 1967, just three years after the Society's formation. I have no doubt it was his sterling reputation (together with that of the late Lloyd C. Nelson) that enabled the fledgling SMA to gain restrained acceptance by and a tenuous footing within a skeptical New York maritime community.

Jack's service to SMA is beyond measure. Not only did he serve SMA as a long-time member of its Board of Governors and President (1975-1979) but Jack proved to be a truly exceptional and prolific arbitrator. Second only to the late Manfred Arnold, during his 57 years as an SMA arbitrator, Jack amassed an astounding 885 published awards dealing with the most challenging and controversial subjects of the day. Those of us who had the privilege to share a panel with Jack will undoubtedly remember the disarmingly easy manner with which he would challenge counsel or pose searching questions to fact and expert witnesses. Irrespective of whether you agreed or disagreed with his position, Jack was a masterful inquisitor to observe and his instructive exceedingly well-written awards and dissents a joy to read.

It would be a profound understatement to say that Jack was gifted with high intelligence. But such was not uncommon in the Berg family. In 1980 Jack's older brother Paul Berg received the Nobel prize in biochemistry. With a sheepish grin, Jack would fondly recount an encounter at Paul's Nobel Prize award ceremony. After a perfunctory introduction to a group of dignitaries, one of them exclaimed, "Oh, you're Jack Berg the famous arbitrator". Clear evidence that Jack's arbitral fame was international.

Always soft-spoken and always gentlemanly, Jack leaves us with an unequalled legacy of personal integrity and professional excellence.

Godspeed dear colleague and friend.



## Remembering Jack Berg

*By Louis Epstein, SMA Member*

I first met Jack Berg back in the late 1980s, when I was an associate at Reid & Priest, a New York law firm. I was co-counsel with Jerry Aksen, a partner in the firm, in an international arbitration on behalf of our client, then known as Transammonia. One of the claims in the case concerned something called demurrage, which neither Jerry nor I knew very much about. So Jerry introduced me to his friend Jack Berg, who was kind enough to review a draft submission that I was preparing.

Jack was a graduate of the U.S. Merchant Marine Academy at Kings Point. After graduation he went to sea, ultimately serving as first mate on ocean going vessels. He then worked at Continental Grain Company and attended NYU Law School at night. In his spare time, he began an illustrious career as a maritime arbitrator.

Jack was a brilliant arbitrator. He served as President of the Society of Maritime Arbitrators from 1975-1979 and, as someone recently calculated, was a panelist on some 885 published awards.

In 1991, Jack retired from his day job at Continental Grain where he had worked for 31 years. At Jerry Aksen's suggestion, Fred Lowenfels, my predecessor as General Counsel at Trammo, agreed to provide Jack with space in Trammo's New York office. The downside was that (a) Jack had to withdraw from an arbitration in which he had been appointed by Trammo (Trammo lost that arbitration -- The Prosperity, SMA Award No. 2880 (1992) (Zubrod, Siciliano, Hukins); and (b) Trammo could never appoint Jack again.

I joined Trammo the next year as an in-house lawyer and was assigned an office next to Jack.

Jack remained with Trammo for nearly 30 years, during which time he continued his work as one of the leading maritime arbitrators. In lieu of rent, he shared with us the encyclopedic knowledge gained during his career. Whenever questions arose about vessels or insurance or pretty much any other subject, we were able to rely upon his wisdom. Among many other things, he helped us to draft the Trammo chartering terms that we still use with the ASBATANKVOY charterparty.

Jack was a beloved friend and mentor. He was a gifted teacher – always warm and supportive not only to me and the other lawyers in our legal department but to many others in our company.

In short, Jack was a wonderful human being.

We will miss him terribly.

---

## When Did the Jones Act Become the “Jones Act”?

*By Charlie Papavizas\**

Everyone knows what the “Jones Act” is even though it has two distinct meanings, right? It is either the law about merchant mariner recoveries or the law restricting U.S. domestic maritime commerce to U.S. flagged vessels. That may be the case today, but that was not the case in 1920 or in the immediate years after 1920 when the “Jones Act” was the term applied to the whole of the Merchant Marine Act, 1920 and those two contemporary “Jones Acts” were relatively obscure sections in that Act. The evolution of the nomenclature is murky but plainly at some point it became possible to say, “the Jones Act is hurting Puerto Rico,” and everyone knew which “Jones Act” was being referenced. Let’s try and trace how the Jones Act became that “Jones Act.”

The United States has reserved its domestic maritime trade to U.S. nationals since at least 1817 (and U.S. nationals were preferred since 1789). That reservation became a U.S. flagged vessel vs. U.S. ownership reservation in 1898. The 1817 law was also amended several times before 1920 largely to deal with U.S. domestic trade utilizing Canadian ports and Canadian conveyances and especially trade with the Alaskan territory. In fact, the main change to that 1817 law included in the Merchant Marine Act, 1920 was to close a loophole whereby cargoes could be shipped by land and water to Alaska from the continental United States through Canada.

The great bulk of the 1920 Act concerned what to do with the enormous fleet of vessels engaged in U.S. international trade which the United States had built and was still building to prosecute World War I.

In fact, the very last vessel ordered by the United States for the war was delivered in May 1922.

The 1920 Act as a whole was called then and thereafter the “Jones Act” in honor of Senator Wesley Livsey Jones, a Republican Senator from the State of Washington and then the Chairman of the Senate Commerce Committee. Sen. Jones was chiefly responsible for getting the 1920 Act through Congress with a multitude of ideas that would have been too controversial to get the necessary support in prior years. For example, the 1920 Act contained a provision requiring the United States to discriminate in favor of U.S. flagged vessels in setting international tariff rates (a provision that was never implemented).

The 1920 Act immediately became known as the “Jones Act” even though there already was another well known “Jones Act” at the time, which was a 1917 law granting citizenship to Puerto Rico residents (different Jones). So, when President Harding, in his first annual message to Congress delivered in December 1921 referred to the “Jones Act” he meant it to be synonymous with the Merchant Marine Act, 1920. Neither section 33 of that Act dealing with merchant mariner injuries nor section 27 which amended the 1817 Act were treated as being significant in that message or generally in the 1920’s or 1930’s – with one notable exception.

That exception concerned Alaska. Senator Jones was persuaded in the 1920 Senate debate when closing the loophole to add a proviso permitting certain transportation via Canadian vessels and Canadian railways between two points in the United States – but Alaska was expressly excluded. So, cargoes could be shipped from U.S. Great Lakes ports to Canada by Canadian vessels, and then by Canadian rail across the continent to Seattle provided certain conditions were met – but not to Alaska either directly or indirectly.

Alaskans were outraged by the exclusion. Alaska had come to depend on Canadian carriers which offered cheaper rates than U.S. carriers. James Michener, in his novel *Alaska*, captured the Alaskan attitude when he quoted a fictional Anchorage grocer saying – “That damned Jones Act is strangling us.” The Alaskan territorial government claimed the Alaska exclusion was “a vicious discrimination against and a great injustice and injury to our people.”

The territorial government took it to the point of suing the United States claiming that the exclusion violated the U.S. Constitution's "Port Preference Clause." That clause guarantees equal treatment under law among U.S. ports. The U.S. Supreme Court dismissed the case in 1922 finding that the clause only protected states and not territories like Alaska. In its opinion, the Court did not refer to section 27 of the 1920 Act as the "Jones Act" but rather just as "section 27."

Nevertheless, the seeds were planted in Alaska for calling the U.S. domestic trade reservation the "Jones Act." Territory of Alaska newspapers have many references to the "Jones Act" particularly starting in the 1940's when Alaska boomed during the war and ocean rates increased substantially. "Council to Ask Repeal of Jones Act" and "Repeal of Jones Act is Wanted" were typical headlines. One enterprising painting company placed an advertisement in 1947 in the *Anchorage Daily Times* entitled "Amend the Jones Act, Or Shall We Have Another TEA PARTY." No one had to explain which "Jones Act" was being complained about.

The Alaskan terminology did not, however, immediately catch on with the rest of the country. President Franklin Roosevelt issued an executive order on December 12, 1941 permitting the waiver of any navigation law in furtherance of the war effort and section 27 of the 1920 Act was considered such a law. When waivers of the domestic trading law were then issued, however, they were called "coastwise law" or "navigation law" waivers in federal government documents – not "Jones Act" waivers as they were in Alaska.

Alaska's animus towards the "Jones Act" subsided somewhat when Alaska became a state in 1958. When that happened, the word "excluded" in the section 27 Canadian rail proviso was changed to "included." That proviso, by the way, remained largely obscure until relatively recently when U.S. Customs and Border Protection fined a service transporting frozen fish from Alaska to New England via foreign vessels and including a short Canadian railway to nowhere. CBP alleged that the service did not in fact fit within the proviso's parameters.

It was not until the 1960s that mentions of the domestic trading law as the "Jones Act" started to appear generally in publications like the *New York Times* and in federal government documents like the *Federal Register* and Congressional reports.

By the late 1970s, federal courts in the District of Columbia in the case of *American Maritime Association v. Blumenthal* concerning the shipment of Alaskan crude to the U.S. Virgin Islands were comfortable calling section 27 of the 1920 Act the "Jones Act" without further explanation. At some point between the 1940's and the 1970's, the transformation from "Jones Act equals Merchant Marine Act, 1920" to "Jones Act equals Section 27" of that Act had occurred.

There was also no doubt which "Jones Act" was being talked about when the "Jones Act Reform Coalition" was formed in the 1990's although its counter-part – the "Maritime Cabotage Task Force" – shied away from the term in its name. Even today, the MCTF is the "American Maritime Partnership" and does not include the "Jones Act" in its name.

For the last few decades, the terminology has reached the point where the 1920 Act as a whole has been almost wiped out of the collective memory. The provisions Senator Jones worked so hard to get into law have been forgotten. Instead, pundits now conflate the 1920 Act with the domestic trading restriction (or the merchant mariner injury recovery provision) including falsely stating that the United States started reserving its domestic trade to its citizens starting in 1920. The loss of the distinction between the "Jones Act" as it was in 1920 and the "Jones Act" of today is a shame for the legacy of Senator Jones. Perhaps the only saving grace is that everyone has also forgotten the Merchant Marine Act, 1928 which was, you guessed it, also called the "Jones Act" or "the Jones-White Act."

\* Charlie Papavizas, a partner in the Washington, D.C. office of Winston & Strawn LLP, has written numerous articles regarding the Jones Act and his book, "Journey to the Jones Act-U.S. Merchant Marine Policy 1776-1920," was released in April 2024 and is widely available with on-line book sellers.

# Transportation Spotlight: The Supreme Court’s Jettison of *Chevron* Deference in *Loper Bright* is a Sea Change for the U.S. Maritime Sector\*

By Sean Pribyl, Chris Nolan, and Michael Cavanaugh, Partners, Holland & Knight LLP

As the old adage goes, you cannot change the direction of the wind, but you can adjust your sails to reach your destination. This may prove more poignant than ever as the U.S. Supreme Court just issued an opinion that signals a sea change for the maritime sector.

The industry is now well aware of the June 28, 2024 ruling by the U.S. Supreme Court in *Loper Bright Enterprises v. Raimondo*, in which the Court overruled the 40-year-old *Chevron* doctrine. *Chevron* served as a central doctrine of administrative law as it granted significant deference to U.S. agencies’ interpretations of federal statutes, which they administer and enforce. The *Chevron* doctrine touches on the full reach of U.S. federal regulations, and thus, any maritime stakeholder subject to such regulations could be impacted by the Supreme Court’s decision. Maritime stakeholders should take note particularly within the areas of:

- The Jones Act;
- The Act to Prevent Pollution from Ships (“APPS”);
- OPA 90; and
- COLREGS

## The Chevron Doctrine Left in the Wake

Under *Chevron* deference—named for the 1984 case *Chevron U.S.A. Inc. v. Natural Resources Defense Council*—the prior Supreme Court required courts to defer to certain agency interpretations of ambiguous statutes and regulations. Essentially, the *Chevron* doctrine meant that courts would grant deference to an agency’s interpretation of

an applicable law if the agency’s interpretation was generally rational or reasonable and was given in a form that would have the force of law, deferring to agency interpretations where the relevant statutory text was ambiguous.

Over a robust dissent, the Court found that *Chevron* conflicts with the Administrative Procedure Act (“APA”) and “makes clear that agency interpretations of statutes – such as agency interpretations of the Constitution – are not entitled to deference,” a view in keeping with the framers’ intent. Now, judges will rely on their own interpretation of the law as they are called upon to make rulings in all aspects of administrative-based admiralty and maritime matters. In so doing, courts will be able to overturn regulations more easily by exercising their independent judgment in deciding whether an agency has acted within its statutory authority.

## The Rising Tide of Implications of the “*Loper Bright*” Decision on the Maritime Sector

With *Loper Bright*, the Supreme Court has created potentially far-reaching ramifications to federal regulators in the maritime industry. While the full impact of the Court’s decision is yet-to-be-realized until challenges play out in courts, agencies such as the U.S. Coast Guard (“USCG”), U.S. Maritime Administration (“MarAd”) and U.S. Customs and Border Protection (“CBP”) should be braced for challenges for years to come as decisions by these agencies are based, at least in part, on statutory interpretations. Some examples of agency-related determinations that may now face additional scrutiny include:

### The Jones Act Coastwise Trade

The most prominent maritime law that may become subject to scrutiny under *Loper Bright* could be Section 27 of the Merchant Marine Act of 1920 (P.L. 66-261), commonly referred to as the “Jones Act,” which requires that vessels transporting cargo from one U.S. point to another U.S. point be U.S.-flag, U.S.-built and owned and crewed by U.S. citizens. The Jones Act aims to protect U.S. shipyards, domestic vessels and U.S. merchant mariners from foreign competition.

The Coast Guard is the lead agency tasked with enforcing the Jones Act’s U.S.-build requirement for vessels, U.S. ownership of the vessels and U.S.

crewing requirements. The Coast Guard enforces these requirements through issuance of a “coastwise endorsement,” thereby designating a vessel as “coastwise qualified,” if the vessel meets all these construction, ownership and control requirements.

The Coast Guard has for decades promulgated a series of interpretative “determination letters” on responses to requests seeking confirmation that regulatory standards to establish U.S. build are met, as well as responses to requests seeking confirmation that work performed outside of the U.S. on U.S.-built vessels will not result in the loss of coastwise eligibility. Other determinations include responses seeking citizenship determinations and vessel eligibility.

Separately, CBP has primary responsibility for determining what constitutes “transportation” under the Jones Act and whether the origin and destination of a voyage are “U.S. points.” CBP issues its interpretations of the Jones Act through Customs Bulletins and Decisions, as well as CROSS Rulings, on which industry relies in assessing operational parameters and investment in the U.S. market. CBP’s interpretative rulings have been subject to scrutiny in several facets, including the Passenger Vessel Services Act (“PVSA”). For example, CBP has determined that a cruise ship carrying passengers between two U.S. ports does not have to be coastwise qualified provided it has visited a distant foreign port on a specific voyage, and issued interpretations of so-called “voyages to nowhere” for vessels that do not call on any other ports besides the one at which they embark and disembark passengers. CBP also determines which persons are “passengers” and may not be carried by a non-U.S. vessel between U.S. ports, as opposed to crew and contractor personnel, who may be carried in such trades under certain circumstances.

In the offshore energy sector, CBP has issued interpretations of the Jones Act that affect offshore supply vessels (“OSV”) and other construction and installation vessels used to supply or construct energy platforms. Determinations related to the Jones Act compliance in the servicing of the offshore sector have included, for example, whether: an OSV is transporting supplies or workers to an oil rig; a vessel is “lightering;” a vessel is installing equipment; a vessel is laying cable or pipeline; an OSV is transporting supplies and rig workers or just carrying its own crew and equipment; a vessel is involved in installing rig equipment or conduct-

ing surveying; and a vessel operates as a “flotel.” And, because the coastwise laws apply to offshore wind on the U.S. Outer Continental Shelf (“OCS”), CBP has issued rulings applying the Jones Act to the offshore wind industry, to clarify how offshore wind work can be performed in compliance with the law and to include installations at pristine sites on the OCS. Regarding the energy trade, CBP has issued important interpretations related to whether merchandise is transformed (manufactured or processed) into a new and different product at an intermediate foreign port.

The Coast Guard, and a sister agency, MarAd, have, during these same decades, made a substantial number of rulings as to whether a specific corporate, partnership or trust ownership structure involving both U.S. and foreign directors, managers, board members and equity ownership will qualify as a “U.S. citizen” generally for eligibility to register the vessel under the U.S. flag, and also whether such vessel meets additional management, control and a 75% equity ownership requirement to be coastwise eligible. Key statutory interpretations govern what constitutes ownership or control, especially in the case of vessels owned by publicly-traded corporations or trusts, and whether any specific transaction may have constituted a foreign sale of the vessel affecting future coastwise eligibility. Even with the *Chevron* deference in place, there have been many court challenges to these interpretations by the Coast Guard and MarAd.

An oft-raised question under the Jones Act is whether the Act can be waived to allow foreign-flag vessels to operate in an otherwise prohibited trade. Based on current interpretations, such Jones Act waivers are rare, generally limited to emergency use of available foreign vessel where U.S. shipping is not available in sufficient time or quantity to resupply refinery feedstocks, or reach badly-affected remote ports following a hurricane or extreme winter storm event, but generally are available only in the interest of “national defense.” The final issuer of any Jones Act waiver is either the Secretary of Defense (who has virtually sole discretion to grant a waiver on national security grounds) or the Secretary of Homeland Security, although if a DHS waiver application has sufficient “interest of national defense,” MarAd is consulted regarding the availability of qualified U.S. flag capacity to meet the national defense requirements. Under the *Loper Bright* framework, new challenges

to the interpretation of what amounts to “interest of national defense” in the waiver context could conceivably arise.

## Environmental Compliance Under the APPS and OPA 90

Another area of scrutiny post-*Loper Bright* involves potential challenges to legal frameworks related to interpretation of the Oil Pollution Act of 1990 (“OPA 90”) and the authorities under the Act to Prevent Pollution from Ships (“APPS”), the domestic implementing statute of the International Convention for the Prevention of Pollution from Ships (“MARPOL”). Under OPA 90, challenges may arise to the authority Congress granted the Coast Guard to determine what removal costs should be paid for by the Oil Spill Liability Fund and OPA 90’s provision for recovery of pure economic loss, as well as other factors impacting a responsible party. Courts have found ambiguity in certain provisions of OPA 90, an important consideration as OPA 90 defines situations where liability may be unlimited for a responsible party. USCG interpretations of OPA 90 have also focused upon whether there is flexibility under OPA to allow P&I Clubs any policy defenses with respect to oil pollution liability as well as Congress’ intent related to direct action against insurers. Courts have also reviewed suits brought by marine pollution insurance carriers challenging decisions by the USCG National Pollution Funds Center (“NPFC”) and an insurer’s OPA claim for reimbursement for oil spill removal costs.

Besides OPA 90, the United States maintains an aggressive enforcement posture—somewhat unique in this regard globally—in its enforcement of vessel waste oil discharges under the APPS. Indeed, several federal district and appellate courts have addressed relevant issues under the APPS regarding the United States’ environmental criminal enforcement authority, such as the scope of the Coast Guard’s statutory authority to impose financial conditions on a foreign-flag vessel for departure clearance after the vessel was detained at a U.S. port under 33 U.S.C. § 1908(e), a provision that allows the USCG to request CBP to withhold customs clearance for a vessel if reasonable cause exists to believe that the vessel, its owner or the operator violated APPS. Notably, that statute does not expressly refer to “ship managers,” an entity that in recent years the Coast Guard has interpreted to be subject to APPS’ departure clearance se-

curity agreements. Courts will now be tasked with reviewing future challenges to the Coast Guard’s exercise of its discretion under the APPS as regulated maritime industry entities may test the limits of the *Loper Bright* framework.

## Marine Safety and Security

Additionally, the Coast Guard has a primary role in regulating matters of maritime security and safety. In the context of marine casualties, courts have reviewed the agency’s interpretation of the Safety Management System when determining the cause of marine casualties, as well as navigational decisions of pilots and crew under the 1972 International Regulations for Preventing Collisions at Sea (“COLREGS”). Looking ahead, regulatory uncertainty with novel technologies, such as those related to alternative fuels and air emissions under the Clean Air Act, reduced crewing on autonomous vessels, and outer space launch and reentry operations may create uncertainty in statutory interpretations. Moreover, future challenges could emerge in the context of the Coast Guard’s efforts to regulate cybersecurity at facilities, on vessels and in the OCS, as well as compliance with multiple International Maritime Organization Conventions that substantially affect U.S. ocean commerce, such as the International Ship and Port Facility Security Code. But these are just a handful of examples of the types of maritime-related issues that may be litigated with different or new results under *Loper Bright*. The real-world impact of the decision, however, remains uncertain.

## Conclusions

The shipping industry has often looked to the courts for further consideration of key agency decisions impacting vital maritime interests. *Chevron* deference resulted in little traction being gained in those judicial reviews. The Supreme Court’s *Loper Bright* ruling will lead to revisiting important industry questions and taking careful coordination with stakeholders to bring the appropriate challenges and shape rulemaking.

\* \* \*

\* This article first appeared in Law360 on July 15, 2024 and is republished here with permission. <https://www.law360.com/articles/1857638/after-chevron-a-sea-change-for-maritime-sector>

# A Trio of Arbitration Cases: Clarifying the Scope of the Federal Arbitration Act\*

**By Ben A. West, Partner, Frost Brown Todd LLP, Dallas, Texas and J. Austin Hatfield, Associate, Frost Brown Todd LLP, Louisville, Kentucky**

*Bissonnette v. LePage Bakeries Park St., LLC*, 144 S. Ct. 905 (Apr. 12, 2024)

*Smith v. Spirizzi*, 144 S. Ct. 1173 (May 16, 2024)

*Coinbase, Inc. v. Suski*, 144 S. Ct. 1186 (May 23, 2024)

Nearly 100 years ago, the Federal Arbitration Act (FAA) was enacted on the straightforward principle that “arbitration agreements are enforceable.” Since its enactment, the meaning and scope of the FAA continues to evolve. Fortunately for parties and practitioners who regularly find themselves compelled to arbitrate, the U.S. Supreme Court issued a trio of helpful opinions in its 2023-24 Term.

These opinions were all unanimous and short (10 pages or fewer). The common thread among them was the Supreme Court’s focus on the plain text of the FAA and its rejection of legal tests regarding arbitration that are not based in statutory language.

## ***Bissonnette v. LePage Bakeries Park St., LLC*, 144 S. Ct. 905 (Apr. 12, 2024).**

In *Bissonnette v. LePage Bakeries Park Street, LLC*, two distributors for a nationwide bakery sued the bakery, claiming violations of state and federal wage laws. The distributors were franchisees, both of whom purchased the rights to distribute the bakery’s products in specific geographic territories. The franchising agreements contained arbitration provisions.

When the distributors filed suit, the bakery moved to dismiss the distributors’ lawsuit and compel arbitration. Under Section 1 of the FAA, however, “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” are exempt from

the FAA. The Supreme Court has interpreted this exemption as applying to “transportation workers.” The distributors argued that they fell within this exemption and thus should not be compelled to arbitrate.

Citing authority from the U.S. Court of Appeals for the Second Circuit, the bakery argued that the distributors were not covered by the exemption because they were not “transportation workers” engaged in the “transportation industry.” The bakery relied on the “much broader scope of responsibility” contemplated under the distributor agreements, which required the distributors not only to collect and distribute the bakery items, but also to identify new retail outlets, advertise the goods, set up promotional displays, stock shelves, replace expired products, and maintain customers’ inventories through new orders. Citing these additional duties, the district court agreed with the bakery and compelled arbitration; the Second Circuit affirmed, holding that the distributors were “in the bakery industry” and so were not exempt under Section 1.

In a unanimous opinion authored by Chief Justice Roberts, the Supreme Court reversed, holding that Section 1 requires only that employees be “transportation workers,” not that they work in the “transportation industry.” The Court relied on its recent opinion in *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 (2022), where it held that for purposes of Section 1, workers are defined “based on what a worker does for an employer, ‘not what [the employer] does generally.’”

In doing so, the Supreme Court rejected the Second Circuit’s focus on the nature of the industry itself. In the Court’s view, this test had been “fashioned ...without any guide in the text of § 1 or [Supreme Court] precedents,” and “would often turn on arcane riddles about the nature of a company’s services.” The Supreme Court also noted that the practical implication of adding an “industry” requirement would be to require extensive discovery and even a mini-trial for every motion to compel arbitration. Attaching such a complex hurdle to motions to compel would conflict with the FAA’s stated purpose of avoiding litigation.

### **Key Takeaways:**

- Under Section 1 of the FAA, employees who are considered “transportation workers”

are exempt from arbitration agreements in their employment contracts, regardless of whether the businesses the employees work for are in the “transportation industry.”

- Vertically integrated businesses selling goods in interstate commerce may have some employees who are exempt from arbitration, even if the business itself is not in what would be considered the “transportation industry.”
- The class of workers constituting “transportation workers” who are exempt from arbitration should not substantially increase due to this holding. The Supreme Court noted that to qualify as a “transportation worker,” the employee “must at least play a direct and ‘necessary role in the free flow of goods’ across borders.” It is not sufficient for the employee merely to “load or unload goods” that may have moved in interstate commerce.

### ***Smith v. Spizzirri*, 144 S. Ct. 1173 (May 16, 2024).**

In *Smith v. Spizziri*, delivery drivers sued their former employer in state court for violations of federal and state employment laws. After removing the case to federal court, the employer moved to compel arbitration and dismiss the suit without prejudice. The delivery drivers conceded that their claims were arbitrable but requested the district court to stay the suit rather than dismiss it entirely. The district court chose to dismiss the suit without prejudice, citing Ninth Circuit precedent. The Ninth Circuit affirmed, relying on the court’s inherent power to dismiss inactive suits without prejudice.

In a unanimous opinion authored by Justice Sotomayor, the Supreme Court reversed. Under Section 3 of the FAA, when a suit is subject to arbitration, a court “shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement[.]” Relying on Section 3’s mandatory language, the Supreme Court held that the use of the word “shall” created an “obligation impervious to judicial discretion,” and thus a stay, rather than dismissal, is required.

The Court reasoned that the plain meaning of the statute’s language expressly “overrides any discretion a district court might otherwise have had

to dismiss a suit when the parties have agreed to arbitration.” The imposition of a stay rather than dismissal also “comports with the supervisory role that the FAA envisions for the courts,” allowing for the parties to return to court for assistance with arbitration-related matters, such as appointing an arbitrator, issuing subpoenas, and enforcing an arbitration award.

### ***Key Takeaways:***

- Under Section 3 of the FAA, when a case is subject to arbitration and a party requests a stay of trial pending that arbitration, the district court must issue the stay and lacks discretion to simply dismiss the case. But this mandatory language is applicable only when a party requests a stay.
- The Supreme Court acknowledged that district courts still retain authority to dismiss arbitration-related suits “if there is a separate reason to dismiss, unrelated to the fact that an issue in the case is subject to arbitration,” such as a lack of jurisdiction.
- Requesting a stay allows the parties’ arbitration to continue under the district court’s supervision, providing them with a “return ticket” to federal court if arbitration “breaks down or fails to resolve the dispute.”
- This ruling may promote efficiency at arbitration. For example, if parties have already expended resources on necessary tasks, such as issuing subpoenas or enforcing an arbitration award, returning a case to federal court may eliminate the cost and complications of having to file a new lawsuit should the need arise.

### ***Coinbase Inc. v. Suski*, 144 S. Ct. 1186 (May 23, 2024).**

In *Coinbase Inc. v. Suski*, users of a cryptocurrency exchange, Coinbase, sued the exchange for issuing an unlawful cryptocurrency sweepstakes. A group of users filed a class-action complaint, alleging that the sweepstakes violated state and federal consumer-protection laws.

After suit was filed, Coinbase moved to compel arbitration under its Coinbase User Agreement, which all users were required to agree to upon join-

ing the exchange. The User Agreement included an arbitration agreement, which also included a delegation clause stating that an arbitrator, not the court, must determine whether a given dispute is subject to arbitration under the User Agreement's arbitration agreement. The users, however, sought to remain in court by relying on the Official Rules of the sweepstakes, which did not include an arbitration agreement but instead included a forum-selection clause, granting jurisdiction to California courts for disputes related to the sweepstakes.

The district court denied Coinbase's motion to compel, reasoning that the court must decide which contract—the User Agreement with an arbitration and delegation agreement or the Official Rules with a forum-selection clause—governed the users' dispute. The Ninth Circuit affirmed.

In an opinion authored by Justice Jackson, the (once again) unanimous Supreme Court affirmed, holding that the question of whether a subsequent contract between the same parties supersedes an earlier arbitration agreement containing a delegation clause is a question for the court, not the arbitrator. Recognizing the fundamental principle that arbitration is a matter of consent, the Court stated that the first question in every arbitration dispute is “what have these parties agreed to?” In answering that question, the Court recognized that parties could enter two types of agreements concerning arbitration.

The parties may enter into an arbitration agreement, proper, which is an agreement to send the merits of certain disputes to arbitration, i.e., disputes arising out of a certain contract. The parties may also enter into an “antecedent” delegation agreement, which is another type of arbitration agreement. Under an antecedent agreement, an arbitrator, rather than a court, must determine whether a dispute goes to arbitration in the first place, i.e., an arbitrator must determine whether a certain dispute is governed by the arbitration agreement itself.

Based on these two types of arbitration agreements, the Court recognized that parties usually have three types of arbitration-related contests. First, the parties could have a contest over the *merits* of the underlying dispute, e.g., whether one party breached a contract. Second, the parties could have a contest over whether the parties agreed to *arbitrate* the merits of that dispute (a

so-called “arbitrability” contest), e.g., whether the breach-of-contract claim is governed by the arbitration agreement. And third, the parties could have a contest over *who* decides the second question, e.g., whether the court or an arbitrator decides whether the breach-of-contract claim is governed by the arbitration agreement.

In *Coinbase*, the Court was presented with a new, fourth dispute: who decides the third contest when the parties entered into multiple agreements that conflict on the answer of who decides arbitrability. The Court held that the only way to resolve this fourth dispute is by determining which contract—and accompanying arbitration-related agreements or lack thereof—applies. By homing in on the conflict between the delegation clause in the User Agreement and forum-selection clause in the Official Rules, the Court concluded that the fourth-level dispute reverts to the original question of whether the parties agreed to send the dispute to arbitration in the first place—with the dispute being whether the court or an arbitrator decides that a dispute is subject to arbitration.

The Court ruled that *this* question has always gone to the court because arbitration—including arbitration merely to determine arbitrability—has always been a matter of the parties' consent, which the court must determine. The Court recognized that the FAA does not allow courts to presume that parties entered into an arbitration agreement, including a delegation agreement. So, where the parties had entered two contracts, with only the first including a delegation agreement that sends arbitrability disputes to an arbitrator, the court must decide whether the parties intended that delegation agreement to continue governing after the second contract. Framed that way, the dispute in *Coinbase* was not merely over whether the underlying sweepstakes claims were subject to arbitration—which would send the question to the arbitrator under the User Agreement's delegation clause—but, in light of the Official Rule's forum-selection clause, whether the parties agreed to delegate that question at all—which must be determined by a court.

This does not mean that parties will always end up in court. In his concurrence, Justice Gorsuch noted that—despite the Court's ruling here—parties could still craft a “master contract” that all disputes arising out of that master contract “or

future agreements,” including the question of arbitrability, “shall be decided by an arbitrator.” Thus, without some later amendment, such a provision would “seem to require a court to step aside.”

### Key Takeaways

- Where parties have agreed to only one contract, and that contract contains an arbitration agreement with a delegation clause, questions of arbitrability will generally go to arbitration.
- But when “parties have agreed to *two* contracts—one sending arbitrability disputes to arbitration, and the other either explicitly or implicitly sending arbitrability dispute to the courts—a court must decide which contract governs.”
- Per Justice Gorsuch’s concurrence, these complications may largely be avoided by entering into a contract providing that “all disputes arising out of or related to this or future agreements between the parties, including questions concerning whether a dispute should be routed to arbitration, shall be decided by an arbitrator.”

\* This article was originally published on September 26, 2024 on the website of Frost Brown Todd LLP and is republished here with permission. [A Trio of Arbitration Cases: Clarifying the Scope of the Federal Arbitration Act](#)

---

## DC Circ. Int’l Arb. Ruling Leaves Award Holders In Legal Limbo\*

**By Jeff Newton, Investment Manager and Legal Counsel, Omni Bridgeway**

August may be considered the doldrums of the legal calendar — a month with few if any hearings, vacations for judges and lawyers alike, and preparation for a new court term in the autumn.

On Aug. 16, however, the U.S. Court of Appeals for the District of Columbia Circuit discarded this script by issuing an opinion widely anticipated in the international arbitration and award enforce-

ment communities, involving numerous disputes between the Kingdom of Spain and renewable energy investors from other European nations.

In its ruling in *NextEra Energy Global Holdings BV v. Kingdom of Spain*, the D.C. Circuit provided a glimmer of hope that award holders might succeed in U.S. courts — at least from a technical legal standpoint.

At the same time, the court lit a path for foreign sovereigns to render any such victories economically meaningless.

### Background of Renewables Investors’ Disputes With Spain

The saga of Spain’s issues with energy investors began in the late 1990s, when the country aimed to capitalize on its abundant sunshine by offering subsidies and other inducements to entice foreign investors to construct renewable energy projects. Many investors did just that.

But after the global financial crisis of 2007 and 2008 ushered in an era of austerity and budgetary belt-tightening, Spain withdrew these carrots, rendering many of the already-initiated projects uneconomic. A series of arbitrations followed in the early 2010s under the Energy Charter Treaty, a multilateral investment treaty covering many energy-focused investments to which Spain and other European countries were a party.

To date, Spain owes more than €1.3 billion (\$1.45 billion) to investors pursuant to these awards rendered in the mid-to-late 2010s. Many such awards arose by way of proceedings under the auspices of the treaty establishing the International Centre for Settlement of Investment Disputes — the ICSID Convention — with others issued by arbitral institutions under United Nations Commission on International Trade Law arbitration rules.

Since 2019, several of these investors sought award recognition in the U.S. pursuant to the ICSID Convention, to which the U.S. is a key party, and the New York Convention, to which the U.S. is also a party, and which provides for the recognition of international arbitration awards more generally.

### Litigation in U.S. District Courts

But Spain resisted, relying on a line of cases from the European Union’s highest court, beginning

with 2018's *Slovak Republic v. Achmea BV*.<sup>1</sup> The Achmea court reasoned that investment treaty arbitrations between EU citizen claimants and EU countries – which, because they are arbitrations, are not overseen by national courts – interfered with the primacy and autonomy of EU law and the EU courts' role in applying EU law.

Thus, the court concluded, EU member countries, including Spain, were prevented by EU law from agreeing to arbitrate with investors from other EU countries. This bombshell decision was followed by 2021's *Republic of Moldova v. Komstroy LLC*, which applied this logic specifically to the Energy Charter Treaty's arbitration provisions.<sup>2</sup>

Think this is complicated yet? Wait, it gets better.

Spain, of course, cited Achmea and Komstroy for the proposition it never had the legal authority to offer to arbitrate with the EU investors in the first place, even though the arbitrations began years before Achmea and Komstroy were decided. It therefore took the position that the aforementioned awards were void *ab initio*.

Building on this argument that the awards were invalid, Spain stood on its status as a sovereign to argue that U.S. courts lacked jurisdiction to confirm the awards under the arbitration exception to sovereign immunity in the Foreign Sovereign Immunities Act.<sup>3</sup> But Spain didn't stop there.

In addition to raising this defense in U.S. court, Spain also resorted to the courts of Luxembourg and the Netherlands to obtain antisuit injunctions barring the resident award holders from seeking to enforce their awards in the U.S. Spain also raised the possibility of obtaining monetary judgments in European courts against the award holders to offset any amounts collected on the awards, rendering them financially moot.

In response, some of the award holders asked the U.S. District Court for the District of Columbia for anti-antisuit injunctions, to protect the U.S. courts' jurisdiction to enforce the awards under the treaties to which the U.S. is a party.

Some D.C. district judges agreed with award holders and issued the requested injunctions.<sup>4</sup> But another judge agreed with Spain's immunity defense and declined.<sup>5</sup> An interconnected morass of appeals to the D.C. Circuit ensued.

## The D.C. Circuit Opinion

The much-anticipated decision came down like a thunderclap on a summer Friday.<sup>6</sup> The D.C. Circuit issued two holdings.

First, it ruled that U.S. district courts do have jurisdiction to consider enforcing the awards under the arbitration exception to sovereign immunity in the FSIA. Second, it ruled that the district courts had abused their discretion in issuing anti-antisuit injunctions against Spain to protect their jurisdiction.

Some might interpret the D.C. Circuit's first holding – that the arbitration exception to sovereign immunity was triggered – as a boon to the award holders. After all, it seems to suggest that Spain's *ex post facto* reliance on the Achmea and Komstroy decisions was rejected.

Unfortunately for the award holders who have been embroiled in this dispute for a decade, the D.C. Circuit offered no such clarity. To the contrary, the court only held that the district courts had jurisdiction to determine whether the awards should be recognized, and emphasized that the ruling “does not mean they must or should do so.”<sup>7</sup>

In this regard, the court carefully and explicitly avoided “address[ing] the merits question whether that Treaty's arbitration provision extends to EU nationals and thus whether Spain ultimately entered into legally valid agreements with the companies.”<sup>8</sup>

It appears that these award holders must slog through the time and expense of another round of summary judgment briefing in district court, await the district court's judgment, and then wade through another appeal before the D.C. Circuit will weigh in on this question.

The D.C. Circuit's second holding,<sup>9</sup> vacating the anti-antisuit injunctions issued against Spain, was purportedly based on the fact that the district courts' “analysis overlooked the fact that anti-suit relief was sought against a foreign sovereign and the [limited] nature of the United States' ICSID obligations.”<sup>10</sup>

The court explained that “neither the [ICSID] treaty nor the statute [implementing it in the U.S.] requires the United States to remove obstacles in other countries that might make it harder for foreign investors to find their way to our courts.”<sup>11</sup>

While the majority cautioned that its holding did “not categorically foreclose anti-suit injunctions against foreign sovereigns,” this will make it difficult for award holders to take heart that American judges will defend their treaty rights to seek recognition of arbitration awards in U.S. courts.<sup>12</sup>

## Implications

The D.C. Circuit’s decision will reverberate through the fields of investor-state dispute settlement and international arbitration for years to come.

The ruling left award holders in a sort of legal limbo, with awards that have not been rejected but have not been confirmed either. This is curious, since the decision seems to contain all the ingredients that should have resulted in the awards being confirmed.

First, the D.C. Circuit reasoned that the issue of whether EU citizens were subject to arbitration was, in essence, a question of whether the “arbitration provision applies to these disputes” — that is, a question of arbitrability.<sup>13</sup> Second, the court also explained that “[b]oth arbitration regimes — ICSID and UNCITRAL — delegate to the arbitral tribunal the power to decide threshold issues of arbitrability.”<sup>14</sup>

Indeed, the arbitral panels in each of these consolidated cases heard, and rejected, Spain’s argument. And it historically has been an article of faith in American arbitration law that, where issues of arbitrability are committed to the arbitrators, the panel’s decision on that question is the end of the matter.<sup>15</sup>

If all of these things are true, then why wasn’t the arbitral panels’ rejection of Spain’s jurisdictional argument dispositive? And why did the D.C. Circuit so assiduously avoid this conclusion?

Only time — and another round of district court opinions and appeals — will tell if this reluctance betrays some as-yet-unknown rationale for rejecting recognition of awards in these somewhat unique circumstances. And time is not on the investors’ side.

Having spent a decade or more litigating to vindicate their rights, the investors are likely disappointed to be compelled to endure yet another round of litigation to answer questions that have

been squarely teed up for more than three years already.

And what if those questions are, ultimately, resolved in the investors’ favor, and the awards against Spain are confirmed? The D.C. Circuit’s rejection of the anti-antisuit injunctions against Spain practically invites recalcitrant foreign sovereigns to interfere in proceedings pending in American courts.

This was made starkly clear in the majority’s observation that nothing in U.S. law requires “the United States to remove obstacles in other countries that might make it harder for foreign investors to find their way to our courts.”<sup>16</sup>

In partial dissent, U.S. Circuit Judge Florence Pan observed that, in a broad sense, “[a]llowing Spain to extinguish the Investors’ rights and claims by obtaining foreign injunctions that forbid the Investors from ever confirming their awards is manifestly unfair” and would render the actual recognition of awards in U.S. courts a “hollow victory.”<sup>17</sup>

But such a result does particular violence to the investor-state dispute settlement framework of the ICSID convention. Indeed, Judge Pan’s partial dissent also reasoned that “Spain’s strategy of interfering with the Investors’ ability to confirm their awards undermines the whole process envisioned by the ICSID Convention,” which is aimed at “guaranteeing investors a neutral arbiter in disputes with sovereign nations.”<sup>18</sup>

The U.S. Supreme Court may yet reverse this decision. But in the statistically likely event that the Supreme Court does not intervene, some implications of this decision are readily apparent.

One can reasonably expect unhappy sovereign debtors to get creative in manufacturing leverage against award holders using proceedings in friendly jurisdictions, largely unconcerned about drawing the ire of American judges.

Ironically, by emboldening award debtors to engage in such chicanery, this precedent may create more instances where U.S. courts are forced to confront uncomfortable situations pitting comity concerns against the treaty obligations of U.S. courts to provide a forum for the recognition of arbitration awards.

Indeed, American courts may, in the coming years, be asked to recognize non-U.S. judgments pro-

cured by sovereigns in friendly jurisdictions seeking to set off the value of awards recognized by U.S. courts.

Ensnaring American courts in more such litigation may not have been the goal of a D.C. Circuit seeking to elevate comity concerns over American treaty obligations, but this may come to be the decision's practical effect. The complete implications of this decision on sovereign-related litigation in American courts will only be revealed with time, but practitioners and litigants alike will surely be wrestling with this precedent for years to come.

- 1 ECLI:EU:C:2018:158 (March 6, 2018).
- 2 ECLI:EU:C:2021:655 (Sept. 2, 2021).
- 3 28 U.S.C. § 1605(a)(6).
- 4 NextEra Energy Global Holdings BV v. Kingdom of Spain, 656 F. Supp. 3d 201 (D.D.C. 2023); 9REN Holding SARL v. Kingdom of Spain, No. 19-cv-1871, 2023 WL 2016933 (D.D.C. Feb. 15, 2023).
- 5 Blasket Renewable Investments LLC v. Kingdom of Spain, 665 F. Supp. 3d 1 (D.D.C. 2023).
- 6 NextEra Energy Global Holdings BV et al. v. Kingdom of Spain, Nos. 23-7031, 23-7032, 23-7038 (D.C. Cir. Aug. 16, 2024 (slip op.) (hereinafter "Nextera").
- 7 *Id.* at slip op. p. 28.
- 8 *Id.*
- 9 The court divided two to one on this issue, with Judge Pan partially dissenting.
- 10 *Id.* at slip op. p. 41.
- 11 *Id.* at slip op. p. 38.
- 12 *Id.* at slip op. p. 41.
- 13 *Id.* at slip op. p. 25.
- 14 *Id.* at slip op. p. 13.
- 15 See *Henry Schein Inc. v. Archer & White Sales Inc.*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 524, 529, (2019) (where the parties' agreement "delegates the arbitrability question to an arbitrator... a court possesses no power to decide the arbitrability issue ... even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless").
- 16 *Nextera*, slip op. at p. 38.
- 17 *Id.* at partial dissent slip op. pp. 19, 21.
- 18 *Id.* at partial dissent slip op. p. 17.

\* This article first appeared in Law360 on August 26, 2024 and is republished here with permission. <https://www.law360.com/articles/1873176/dc-circ-int-l-arb-ruling-leaves-award-holders-in-legal-limbo>

## Russian Supreme Court Denies Enforcement of Award Based on the Allegedly Unfriendly Nationalities of Arbitrators\*

*By Mr. Igor Gorchakov, Partner, A&O Shearman, Dubai, UAE, Ms. Nadja Harraschain, Associate, A&O Shearman, Frankfurt, Germany, and Mr. Tim Dlugosch, Associate, A&O Shearman, Munich, Germany*

### Introduction

The Russian Supreme Court has denied the enforcement of an arbitral award issued by a tribunal seated in London, on the grounds that the arbitrators' nationalities were "unfriendly". This is the latest example of Russian courts interfering with arbitrations connected with countries which have imposed anti-Russian sanctions.

### Arbitration proceedings, sanctions against Russia and Russian retaliatory measures

In late 2020 or early 2021, C. Thywissen GmbH, a German buyer, initiated London-seated arbitration proceedings against Novosibirsk (NS) Bread Products, a Russian seller, for breach of a contract to supply linseed. An arbitral tribunal was constituted, comprising Ukrainian, British and Danish arbitrators. The Russian party had failed to nominate an arbitrator, so the Federation of Oils, Seeds and Fats Associations ("FOSFA") appointed the Ukrainian arbitrator on its behalf.

In February 2022, Russia invaded Ukraine. Following the invasion, countries including Ukraine, the UK and Denmark imposed restrictive measures on Russia. In retaliation, the same countries were designated as "unfriendly countries" by Russian decree No. 79 of 28 February 2022.

In November 2022, the tribunal rendered an award against NS Bread Products, which C. Thywissen GmbH submitted to the Russian courts for recognition and enforcement.

## Russian Supreme Court Rejects Enforcement of Award because of Nationalities of the Arbitrators

The first and second instance courts granted C. Thywissen GmbH's request, but the Supreme Court overturned those decisions on public policy grounds, relying on Art. V(2)(b) of the New York Convention and Articles 234-244 of the Russian Arbitrazh (Commercial) Procedure Code (APC).

Two aspects of the Supreme Court's reasoning stand out due to their wider implications for parties involved in international arbitration proceedings against Russian parties.

First, the Supreme Court stated that the composition of the arbitral tribunal violated the principle of objectivity and impartiality. In the eyes of the Supreme Court, the fact that the members of the tribunal were nationals of "unfriendly countries" creates a presumption that the principle was violated, unless there is evidence to the contrary.

Second, the Supreme Court held that the lower courts had not attached sufficient weight to the fact that the Russian party was likely to experience difficulties in finding and paying representatives to participate in proceedings in the UK because of the restrictive measures imposed on Russia.

### Commentary

The Supreme Court's decision to deny enforcement of the award based, among other things, on the arbitrators' nationalities is a striking step and marks a concerning broadening of the public policy exception under the New York Convention.

We had already seen a trend of Russian courts issuing orders to stop arbitration proceedings brought against sanctioned parties where the arbitration agreement stipulates a foreign seat, relying on Article 248 of APC.

This decision indicates the Russian courts are now also willing to shield Russian parties from enforcement under the New York Convention. In view of recent Russian cases, this should not be viewed with surprise, even if it is unwelcome. The Supreme Court's reasoning in part resembles that of previous anti-suit injunctions under Article 248 of the APC, where courts assumed that a Russian party would face obstacles to access justice in a country deemed "unfriendly" for having adopted

restrictive measures against Russia or its nationals and/or entities. In this case, the Supreme Court referred to the relevant decrees that declared certain countries as "unfriendly" and inferred from the arbitrators' nationalities a lack of impartiality and objectivity. In doing so, it seemed to place the burden of demonstrating impartiality on the party seeking enforcement, without elaborating on how this burden could be discharged in practice.

FOSFA perhaps acted injudiciously in this case in appointing a Ukrainian arbitrator on behalf of a Russian party. Nevertheless, this development is troubling for any party that may wish to enforce an award against Russian assets. The Supreme Court did not clarify whether the whole tribunal, the majority, the chair or a single arbitrator had to be from an "unfriendly" country to trigger such grounds for refusal. It therefore cannot be excluded at this stage that other Russian courts would deem one "unfriendly" national among the tribunal sufficient. Parties who may wish to enforce in Russia should therefore be cautious when selecting arbitrators or agreeing on the method of their appointment and bear in mind that the list of "unfriendly" countries may vary over time.

Judgment: *C. Thywissen GmbH v NS Bread Products*

\* This article was originally published on August 15, 2024 in A&O Shearman Insights and is republished here with permission. <https://www.aoshearman.com/en/insights/ao-shearman-on-arbitration/russian-supreme-court>

## Arbitration. Sanctions. Seventh Circuit Affirms Confirmation of Award that Awarded Legal Fees Even Though Agreement Provided that Each Side Would Pay Its Own Counsel Costs.<sup>1</sup>

*American Zurich Ins. Co. v. Sun Holdings, Inc.*, No. 23-3134, \_\_ F. 4th \_\_ (7th Cir. June 3, 2024) [[click for opinion](#)]

Sun Holdings, Inc. (“Sun Holdings”) purchased a workers’ compensation policy from American Zurich Insurance (“American Zurich”). Sun Holdings was required to reimburse American Zurich for the first \$250,000 of each claim. When American Zurich sent its bills, Sun Holdings refused to pay. American Zurich commenced an arbitration and “Sun offered one feeble excuse after another.” The arbitrators ordered Sun Holdings to pay the amount American Zurich claimed (approximately \$1.1 million plus 9% interest) and added about \$175,000 in attorneys’ fees as a sanction for defending frivolously.

Sun Holdings challenged the award, relying on the following two provisions in the contract: (i) “Each party shall pay its own costs of counsel and witnesses;” and (ii) “The arbitrators shall not limit, expand or modify the terms of this Agreement nor award damages in excess of compensatory damages under this Agreement.” Sun Holdings argued that the \$175,000 sanction produced damages in excess of the compensatory amount and violated the rule that each side bears its own attorneys’ fees. The Seventh Circuit rejected Sun Holdings’ argument that the \$175,000 award was punitive. The arbitrators found that the provision about parties paying their own counsel costs was merely a restatement of the American Rule on legal fees, under which each side pays its own lawyers. But the American Rule is not understood to forbid sanctions for frivolous litigation.

According to Sun Holdings, the statement that “[e]ach party shall pay its own costs of counsel and witnesses” is broader than the American Rule and prohibits all sanctions measured by the adversary’s legal expenses. The Seventh Circuit said that “perhaps” that is correct. But a court is not entitled to question whether arbitrators interpreted contractual language “correctly.” The court ruled: “We are satisfied that the arbitrators interpreted this contract when they concluded that its reference to legal fees did no more than adopt the American Rule. Whether the arbitrators were right or wrong is none of our business.”

The court then went further in commenting on Sun Holdings’ conduct, noting that its frivolous defenses were followed by a frivolous strategy in court, in which it effectively asked the court to contradict the arbitrators’ findings. The court said that Seventh Circuit precedent is clear that “woebegone contests” to arbitrators’ awards are sanctionable because, “anything less makes a mockery of arbitration’s promise to expedite and cut the costs of resolving disputes.” The court thus ordered Sun Holdings to show cause why sanctions, including an award of attorneys’ fees, should not be imposed for bringing a frivolous appeal.

<sup>1</sup> This case summary originally appeared in Baker McKenzie’s International Litigation & Arbitration Newsletter, July 2024 (David Zaslowsky and Jacob Kaplan, editors).

---

## D.C. Circuit Allows Challenge to Counsel’s Authority to Enforce International Arbitration Award<sup>1</sup>

*The D.C. Circuit has approved a backdoor challenge to the validity of an international arbitration award, finding that a challenge to counsel’s authority to enforce an award can never be forfeited.*

In 2020, Quinn Emanuel Urquhart & Sullivan LLP sought to enforce an international arbitration

award against Djibouti in favor of the Djiboutian company Doraleh Container Terminal (“DCT”) in the U.S. Court of Appeals for the D.C. Circuit. Djibouti opposed enforcement, claiming Quinn Emanuel lacked authority to represent DCT. After expropriating DCT during the arbitration, Djibouti appointed an administrator who attempted to revoke the law firm’s representation. The arbitral tribunal nevertheless found it could continue without deciding Quinn Emanuel’s authority and awarded DCT \$474 million.

The District Court rejected Djibouti’s argument that Quinn Emanuel lacked enforcement authority. It found that the New York Convention did not list lack of authority as a reason not to enforce a valid award. Plus, Djibouti could have raised this argument in the arbitration but did not, so the argument was forfeited.

Djibouti appealed, and the D.C. Circuit vacated and remanded with instructions to determine Quinn Emanuel’s enforcement authority. It found that although the New York Convention does not list lack of attorney authority as an exception to the general rule that awards must be enforced, the Convention requires enforcement “in accordance with the rules of procedure of [each] territory.” The D.C. Circuit cited century-old precedent for the principle that, in federal court, if a defendant “presents evidence showing sufficient ground to question” an attorney’s authority to initiate a case, the defendant’s request to review that authority must “always [be] granted.” Because such a challenge is antecedent to whether there is a case and controversy, it cannot be forfeited.

Judge Judith Rogers penned a forceful dissent. She emphasized that the international community’s “avowedly pro-arbitration regime” is designed to prevent local-court questioning of valid awards. She would have enforced the award and found that Djibouti’s challenge to Quinn Emanuel’s authority was simply a “disguise’ to avoid forfeiture.” Judge Rogers added that the dusty precedent unearthed by the majority did not require courts to “always” entertain authority challenges, but only when “necessary for the ends of justice.”

This D.C. Circuit decision raises the issue of whether a party’s internal ownership changes during arbitration proceedings may be used to block future enforcement of otherwise valid arbitral awards. To mitigate this risk, parties should resolve any

potential issue regarding their counsel’s authority during the arbitration.

- 1 This article first appeared in the August 22, 2024 issue of the Jones Day publication “Insights” which listed the following persons as authors: Sion Richards, James Egerton-Vernon, Melissa Stear Gorsline, Ricardo H. Puente, Sheila L. Shadmand, Maria I. Pradilla Picas. **The views and opinions set forth herein are the personal views or opinions of the author; they do not necessarily reflect views or opinions of the law firm with which they are associated.**

---

## Spotlight on the SMA

### Presentation to Law Clerks of Judges of the United States District Court, S.D.N.Y. on “Fundamentals of Maritime Law,” July 23, 2024

On July 23, SMA President **LeRoy Lambert** joined four colleagues from the Admiralty Committee of the Bar of the City of New York to make a presentation to the law clerks of the judges of the United States District Court for the Southern District of New York. The session was titled “Fundamentals of Maritime Law” and aimed at introducing the clerks to maritime law issues which, unfortunately, are not taught in most law schools today. **President Lambert** presented on Maritime Jurisdiction and Maritime Arbitration. David Loh of KMA Zuckert presented on Limitation of Liability, Celinda Metro of Watson Farley Williams on Maritime Arrest and Attachment, and Jack Hession of Nicoletti Hornig & Sweeney on Personal Injury/Jones Act Actions. Thanks to outgoing Chair George Cornell of the American Club and Hon. Mag. Judge Kathleen Parker of the SDNY for organizing and arranging this presentation. It is hoped that such presentations will become an annual event.

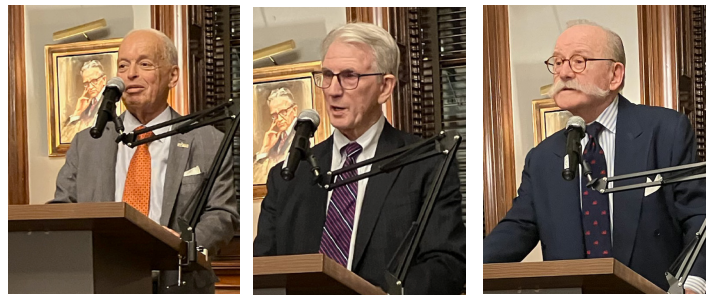
### New York International Arbitration Centre’s Grand Central Forum, N.Y., N.Y., Sept. 24, 2024

SMA member **Robert Shaw** participated in a debate organized as part of the New York International Arbitration Centre’s Grand Central Forum hosted at the New York offices of A & O Shearman on the topic of “Preliminary Dispositions in Arbitration.” SMA members **David Martowski, George**

Tsimis, Bob Meehan, Jack Warfield and Ilarion Marr attended.



Robert Shaw



Clay Maitland

John Kimball

David Martowski

**Book Launch Reception for Publication of the 2d edition of “Navigating Maritime Arbitration,” edited by David Martowski and John Kimball, Association of the Bar of the City of New York, October 16, 2024**



On October 16, 2024, the SMA was delighted to co-sponsor, together with the Admiralty and Arbitration Committees of the Association of the Bar of the City of New York, the MLA, NYMAR, and Jus Mundi, a reception marking the publication of the 2d edition of “Navigating Maritime Arbitration”, edited by SMA member **David Martowski** and **John Kimball**, a partner at Blank Rome LLP. The book includes chapters “authored by a wide range of experienced arbitrators and attorneys who are recognized as being among the leading experts in maritime arbitration...” A table of contents listing the chapters, their authors and details about how to purchase the book can be found here: <https://arbitrationlaw.com/books/navigating-maritime-arbitration-experts-speak-second-edition-0> SMA members who attended included **Charles Anderson, Louis Epstein, David Gilmartin, Anne Summers, George Tsimis** and **Soren Wolmar**.



From Left: **Allison Skopec** of Holland & Knight LLP and NYC Bar Association Admiralty Committee Chair, SMA member **George Tsimis**, and **Gretta Walters** of Chaffetz Lindsey LLC and NYC Bar Association Arbitration Committee Chair

**Fall Meeting of the Maritime Law Association of the United States, New Orleans, La., Oct. 23-26 2024**

[https://mlaus.org/wp-content/uploads/2024/08/MLA\\_2024Conf\\_Brochure\\_8.30.24.pdf](https://mlaus.org/wp-content/uploads/2024/08/MLA_2024Conf_Brochure_8.30.24.pdf)

The SMA will be a sponsor of the fall meeting of the MLA which will take place in New Orleans. SMA members **LeRoy Lambert, Lucienne Bulow** and **George Tsimis** plan to attend.

**“2025 and Beyond: Emerging Issues in the Maritime Industry,” Maritime College, State University of New York, October 25, 2024**

[https://static1.squarespace.com/static/52d43a62e4b07e1353e784d5/t/670c42bae021cc3d-454c9b23/1728856762680/10\\_25\\_24\\_BSH\\_Symposium\\_announcement.pdf](https://static1.squarespace.com/static/52d43a62e4b07e1353e784d5/t/670c42bae021cc3d-454c9b23/1728856762680/10_25_24_BSH_Symposium_announcement.pdf)

SMA members **Müge Anber-Kontakis** and **Bob Meehan** will participate on a panel considering “Recent Developments in Maritime Arbitration and Mediation Forums”.

**Fort Lauderdale Mariners Club Insurance Seminar,  
The Westin Resort, Ft. Lauderdale, FL, Oct. 28-29,  
2024**

<https://www.ftlmc.org/mariners-insurance-seminar>

The SMA will be a “US Open” sponsor and “Commanders Club” seminar sponsor; SMA member **Charles Anderson** will attend.

**2024 Marine Finance Forum, Four Seasons Hotel,  
New Orleans, La., Nov. 14, 2024**

<https://www.marinemoney.com/events-2-0-2/2024-marine-finance-forum-%E2%80%93-new-orleans>

The SMA will be a sponsor of this event.

**SMA MONTHLY LUNCHEONS\*:**

**October 9, 2024:** Our well-attended luncheon featured speaker **Mark Friedman**, Senior Managing Director of Evercore, who presented on the topic “The US Capital Markets & International Shipping: An Overview.” We were also pleased to welcome **Michael Mitchell** into the SMA’s membership ranks.



Mark Friedman



Michael Mitchell (left) and Gil Landy,  
Chair, SMA Membership Committee

**November 13, 2024** – Our luncheon will feature **Evanthia Coffee** and **Claudia Botero-Goetz**, Senior Lawyers at Gard (North America) Inc., who will discuss “Sanctions from the Marine Insurer’s Point of View.” The luncheon will be held at the New York City offices of K&L Gates LLP, 599 Lexington Avenue, New York, N.Y. 10022. We take this opportunity to thank K&L Gates for making their offices available. For further details, please see the SMA website, [www.smany.org](http://www.smany.org).

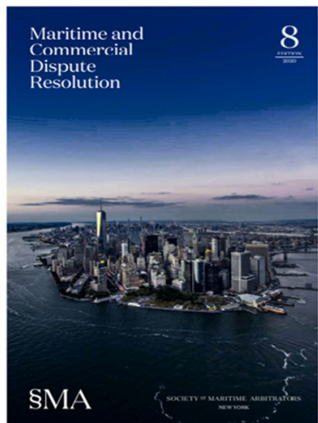
**December 11, 2024** – Our annual holiday luncheon will take place at the 3 West Club, 3 West 51st Street, New York, N.Y. 10019. At the luncheon, we will recognize and honor **Raymond Burke, Jr.** for his achievements over the course of his career in maritime law and for his support of the SMA.

**\*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](mailto:pleahy@smany.org)**

## SAVE THE DATE!

### 2025 - SMA SEMINAR: MARITIME ARBITRATION IN NEW YORK

Will take place as an ONLINE PROGRAM in  
January/February 2025



# SMA

SOCIETY OF MARITIME ARBITRATORS

*New York based SMA, a professional non-profit organization, is an internationally recognized leading forum for the arbitration and mediation of maritime and commercial disputes. The mission of the SMA is to establish commercially effective legal procedures for Alternative Dispute Resolution. The SMA trains and provides the maritime industry with experienced commercial professionals who resolve disputes in an impartial, timely and cost-efficient manner.*

**THE SEMINAR PROGRAM:** The SMA will offer its online comprehensive seminar on “Maritime Arbitration in New York” in Jan/Feb 2025. Dates and meeting times are:

ONLINE VIDEO SESSIONS	MEETING TIME
FRIDAY, JANUARY 31	1300 EST TO 1600 EST
FRIDAY, FEBRUARY 7	1300 EST TO 1600 EST
WEDNESDAY, FEBRUARY 12	1300 EST TO 1600 EST
FRIDAY, FEBRUARY 28	1300 EST TO 1600 EST

The seminar program is offered to further and promote the fair, just, ethical and cost effective resolution of charter party, bill of lading, and other maritime and commercial disputes by arbitration in New York. Jeffrey Weiss, Esq., Professor of Maritime Law at New York Maritime College will be the lead instructor.

The seminar covers subjects essential to those involved in the arbitration process whether they are arbitrators, participating parties or attorneys. Topics include Arbitration Overview, Commencing the Arbitration, the Federal Arbitration Act (FAA) and SMA Rules, the Arbitration Award, Partial Final Awards, Final Awards, Majority Decisions, Dissenting Opinions, Confirmation, Vacatur and Enforcement of Awards, Panel Member and Ethical Considerations, Discovery in Aid of Arbitration, Hearing Procedures, Security in Aid of an Award, Evidentiary Considerations in Arbitration, the Federal Rules of Evidence, Laches, Time Bar, Defaults, Mediation and Consolidation of Arbitrations.

**THE MEETINGS:** The program will consist of four interactive video sessions (via Zoom) of 3 hours with Professor Weiss and the SMA Education Committee. The 12 hours of instruction will be offered on three Fridays and a Wednesday starting January 31, 2025. Course materials and outlines will be distributed by internet in advance of each meeting.

**COMPLETE DETAILS ARE POSTED ON THE SMA WEBPAGE:  
[WWW.SMANY.ORG](http://WWW.SMANY.ORG)**

## 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](mailto:sandra.gluck@gmail.com); [louis.epstein@trammo.com](mailto:louis.epstein@trammo.com); or [gtsimis@gjtmarine.com](mailto:gtsimis@gjtmarine.com).

Please also follow the SMA via LinkedIn.

### THE ARBITRATOR

**Louis Epstein, Co-Editor**

[louis.epstein@trammo.com](mailto:louis.epstein@trammo.com)

**Sandra Gluck, Co-Editor**

[sandra.gluck@gmail.com](mailto:sandra.gluck@gmail.com)

**George J. Tsimis, Co-Editor**

[gtsimis@gjtmarine.com](mailto:gtsimis@gjtmarine.com)

Society of Maritime Arbitrators, Inc.

127 West 30th Street, 9th Floor

New York, NY 10001

(212) 786-7404

E-mail: [info@smany.org](mailto:info@smany.org)

Website: [www.smany.org](http://www.smany.org)

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

© 2024 The Society of Maritime Arbitrators, Inc.

This publication was created to provide you with current information concerning maritime arbitration; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

THE ARBITRATOR (ISSN# 1946-1208) is issued 3-4 times a year; published by The Society of Maritime Arbitrators, Inc., 127 West 30th Street, 9th Floor, New York, NY 10001. The publication is posted on our website and the subscription is free. To join our mailing list, please register your email address at [www.smany.org](http://www.smany.org).

GENERAL PHOTOCOPY NOTICE: You may reproduce any portion of the publication provided that proper attribution is included. If the portion you intend to reproduce is from a reprinted article then you must also obtain permission from the author(s) of that article.

The views expressed in the articles in this publication are those of the authors alone and do not represent views of the editors or the Society of Maritime Arbitrators, Inc.