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A WORD FROM THE CHAIR

WELCOME FROM CHRISTOPHER NOLAN

It is my pleasure to share with you my first newsletter as chair; revamped and packed with informative items for the modern maritime arbitral practitioner, arbitrator, and mediator. My promise to committee membership during these next four years is opportunity, inclusiveness, and unabashed promotion of the American maritime arbitral & ADR experience. In order to achieve this, your committee leadership is dedicated to enhancing our interaction and communication through this semi-annual newsletter, monthly Coffee Breaks, LinkedIn posts, and substantive in-person meetings. If you have an idea for a program or issue of import, let us know and we'll look to implement them with you. And if you have a colleague or friend who is not a member of our committee just yet, hound them until they join. Or tell us and we'll help! I am most grateful to our committee leadership for their efforts since our appointment in May 2021 - during a pandemic no less. We are grateful for the foundation of our previous chairs, especially immediate past chair Peter Skoufalos, and we'll do our level best to keep the momentum. Onward and upward!

- Chris

Chris Nolan, Chair
Lindsay Sakal, Vice-Chair
Casey O'Brien, Secretary

Ifigeneia Xanthopoulou, Young Lawyer Liaison

Encourage a colleague to become a member of the MLA and the Arbitration and ADR Committee:
<https://mlaus.org/join-the-mla/>

COFFEE BREAKS

BRIEF RECAP OF WHAT'S ON YOUR MINDS

May 21

Kick off Coffee Break

- Introduction to Monthly Coffee Break
- Maritime 100
- Newsletter revamp

June 18

What are maritime practitioners getting right and wrong in their presentations to maritime arbitrators?

- **Moderator: Chris Nolan; Speakers: David Gilmartin, David Martowski, Robert Meehan, Jack Ring, A.J. Siciliano, Anne Summers, Lucienne Bulow, Leroy Lambert**
- Attempt to resolve discovery disputes without panel.
- Oral argument is more effective and enlightening—then follow up with a written report.
- Facilitate hearings via video and save costs.
- Video is better than documents, but a live hearing is best.
- Avoid lengthy intervals between submissions.
- Submission should include copies of authorities cited.
- Clearly note the date of submission- it helps arbitrator(s) to organize material.
- Always paginate.
- If the case settles, inform the arbitrator(s) and thank them for their services.

July 16

Is there more to ADR than Arbitration and Mediation?

- **Moderator: Lindsay Sakal; Speakers: Lucienne Bulow**
- Negotiation, conciliation, early neutral evaluation, mini-trials are mechanisms, though not widely used in maritime industry
- SMA developed conciliation rules in '88 to appeal to Chinese market, but never got conciliation work.
- Given conciliation does not allow counsel, it was dead on arrival
- Mediation Rules developed in late 90's and was more modern
- Early Neutral evaluation useful to inform parties strength of case before going to Mediation or Arbitration.
- Presently, conciliation and mediation look similar, some treat them as the same.
- Poll: 33 responses: 12% have used conciliation; 25% know of distinction between Mediation and Conciliation; 25% have done Early Neutral Evaluation; 27% mini-trial or summary jury trial.

August 13

**Arbitration Associates
Anonymous: Fresh
perspectives on
Maritime Arbitration
from our "Less
Seasoned"
Practitioners**

- **Moderator: Casey O'Brien; Speakers: Carole Rouffet, Jonas Patzwall**
- Associate's typical roles in Arbitrations are research/writing for submissions, coordinating exhibits, witness preparation, or observing/supporting hearings are the most common ways in which associates participate in arbitrations.
- Most associates are keen to take on a larger role like taking lead during hearings/oral arguments.
- Early career challenges for associates: don't know which sources to refer to; lack of set rules and structure as that offers guidance; without a solidified network it can be difficult to select appropriate arbitrators for each case; unaware of how to navigate communications with the arbitrator(s); vigilance in not revealing privileged exchanges to/from your client and opposing counsel; striking the right tone- often err on over formality.

September 17

**Transforming
Arbitration through
Technology?**

- **Moderator: Chris Nolan; Speakers: LeRoy Lambert, George Tsimis, Dan Schildt**
- Arbitrators are considering the best way to compile documents in one docket type format
- The pandemic has shown arbitrators can be nimble to meet the needs of maritime practitioners whether this requires emergency relief or use of Zoom.
- Communicating with practitioners as to timing for awards and the overall arbitral experience, like a municipality does when signing up for a permit, is achievable and desirable.



KEY CASE SUMMARIES

***Pacific Gulf Shipping Co. v. Vigorous Shipping & Trading S.A.*, 992 F.3d 893 (9th Cir. 2021)**

Plaintiff Pacific Gulf Shipping Co., in possession of an arbitral award against Adamastos Shipping, sought to collect from Vigorous Shipping & Trading S.A. and Blue Wall Shipping Ltd. on the grounds that they were either successors or alter egos of Adamastos. The District Court dismissed the successor liability claim and granted summary judgment to Vigorous and Blue Wall on the alter

ego claim. The Ninth Circuit affirmed, holding that Pacific Gulf had Article III standing based on the concrete, particularized injury of incurring arbitration costs. It also found that the District Court correctly dismissed Pacific Gulf's claim based on successor liability because the law requires a transfer of all or substantially all of the predecessor's assets to the alleged successor before successor liability will be imposed upon that alleged successor, which the plaintiff failed to plea. Finally, it found, looking at the record as a whole, that there was insufficient evidence to support a finding that either Blue Wall or Vigorous was operated as an alter ego of Adamastos. Thus the District Court correctly entered summary judgment in favor of the defendants.

***Erdogan v. Nouvelle Shipmanagement Co.*, 2021 U.S. Dist. LEXIS 116983 (E.D. La. 2021)**

Plaintiff, a Turkish national, sued the owner and manager of the vessel, as well as Gard, the P&I insurer, alleging that he sustained injuries while working on M/V YASA NESLIHAN in the Mississippi River. Gard moved to compel arbitration and stay the litigation on the grounds that the insurance contract covering the vessel (*i.e.*, the Certificate of Entry and Gard's Rules, which were incorporated by reference in the COE), included an arbitration clause requiring the plaintiff arbitrate his claim in Oslo, Norway. Plaintiff opposed the motion, arguing that he was not bound by the arbitration clause in the insurance contract. The United States District Court for the Eastern District of Louisiana granted Gard's motion to compel arbitration and stay litigation, holding that the insurance contract satisfied the four criteria of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards; that the pertinent Gard Rule clearly required non-signatories like the plaintiff to arbitrate any claims arising out of the insurance contract; third, that plaintiff's claims fell within the scope of the broad arbitration clause at issue.

***Sanchez v. Smart Fabricators of Tex., L.L.C.*, 997 F.3d 564 (5th Cir. 2021)**

The United States Court of Appeals for the Fifth Circuit took this case *en banc* "to attempt to define... a more definitive test, consistent with Supreme Court caselaw, to distinguish seamen entitled to benefits under the Jones Act from other maritime workers generally covered under the Longshore and Harbor Worker's Compensation Act." In a unanimous decision, the Court overturned the appellate decision and affirmed the district court's decision that a land-based welder directed by his employer to work on two discrete short-term transient repair jobs on two vessels was not a Jones Act seaman, because he was not engaged in sea-based work that satisfied the requirement that he be substantially connected to a fleet of vessels in terms of the nature of his work. Critically, the Court held that the following additional inquiries should be considered in determining seaman status: (1) Does the worker owe his allegiance to the vessel, rather than simply to a shoreside employer? (2) Is the work sea-based or does it involve seagoing activity? (3) (a) Is the worker's assignment to a vessel limited to performance of a discrete task after which the worker's connection to the vessel ends, or (b) does the worker's assignment include sailing with the vessel from port to port or location to location? The *Sanchez* decision will impact the determination of seaman status for offshore oil and gas workers.

***Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 999 F.3d 257 (5th Cir. 2021)**

The Fifth Circuit was asked to determine if International Energy Ventures Management ("IEVM") waived its right to arbitration through its extensive pursuit of litigation and second, who did the parties agree would decide that issue. It reversed and remanded to the district court to deny IEVM's motion to compel arbitration and enter judgment for United Energy Group ("UEG"). IEVM, a consulting firm, sought fees owed on a \$775 million deal it brokered for UEG. The parties then entered into a second agreement with an arbitration clause applying AAA rules, affirming those debts. When UEG again failed to pay IEVM, IEVM embarked upon what would be seven years of litigation, bouncing between state and federal court and two arbitrations. This culminated in the district court finding the last arbitrator had exceeded its authority to decide whether IEVM had waived its right to arbitration through litigation and, without citation, found that UEG could not show sufficient prejudice to hold IEVM to its waiver. The district court vacated both arbitration awards and granted the motion to compel arbitration.

The Fifth Circuit looked to the FAA to determine if the initial two arbitrators exceeded their powers, given the power and authority are established through agreement. Pointing to silence in the agreement, the court looked to the parties' intent. Citing a Ninth Circuit case, it found that "every circuit that has addressed this issue- whether a district court or an arbitrator should decide if a party waived its right to arbitration through litigation conducted before the district court- has reached the same conclusion," that it is a judicial matter. The Court highlighted that where issues implicate court's authority to control judicial process or resolve matters of judicial conduct, they should expect the Court to decide. UEG noted that parties can contract around these presumptions, pointing to the parties' agreement to arbitrate "any controversy" arising out of the agreement or its interpretation." Moreover, the AAA rules allow an arbitrator to rule on its own jurisdiction, etc. However, the Court disagreed stating "the fact that the language in an arbitration is broad enough to cover a particular issue does not mean the language is clear and unmistakable" - the presumption was not rebutted. It distinguished prior holdings noting that these rules did not expressly give the arbitrator authority to resolve waivers through litigation; that UEGs submissions to arbitrate did not constitute a waiver as the conduct was not clear and unmistakable intent to exclusively arbitrate; and just because the matter arose in arbitration, instead of in court, does not rebut the presumption of a judicial decision maker. In sum, the Fifth Circuit found the parties failed to contract around the general rule that litigation-conduct waivers be decided in court and that both arbitrators exceeded their authority. Turning to a substantial-invocation analysis- which requires an overt act showing desire to resolve arbitrable dispute through litigation-the Court found it clear that IEVM's procedural path invoked judicial resolution. It then found UEG was prejudiced by IEVM's actions focusing in a 2.5-3 year delay and extensive litigation and resulting expenses, swiftly dismissing IEVMs arguments that all litigation was on procedural issues and without extensive discovery.

Northrop & Johnson Yachts-Ships, Inc. v. Royal Van Lent Shipyard, B.V., 855 F. App'x 468 (11th Cir. 2021)

Also looking at how to apply a broad arbitration clause, the 11th Circuit was asked to evaluate the granting of a motion to compel arbitration for a dispute between Northrop and Johnson Yachts-Ships, Inc. ("Northrop"), a brokerage company, and Royal Van Lent Shipyards, B.V. ("Royal Van Lent") and Feadship America, Inc. ("Feadship America"), as agent for Royal Van Lent, for an unpaid commission on the construction of a second luxury yacht, Project F819. The Commission Agreement, between Northrop and Royal Van Lent provided Northrop was "to receive a commission of [€2,000,000] for the sale of [Project F809,]" the Commission Agreement provided that "[i]f the client will build one new yacht in the future with Royal van Lent Shipyard, [Northrop] is entitled to a minimum additional commission of [€1,200,000] ... on top of the standard negotiated commission." When the second yacht was sold, cutting Northrop out of the deal, Northrup sued in state court for its commission on the yacht known as Project F819. Royal Van Lent removed to Federal court. On appeal, the 11th Circuit conducted a limited inquiry to determine if the four jurisdictional requirements to compel arbitration were met. Northrop did not dispute that the Commission Agreement set forth the terms of Northrop's commission for the sale of Project F809' or that the arbitration provision would govern "[a]ny dispute arising out of or in connection with" the sale of Project F809. The question was whether the parties agreed in writing to arbitrate this dispute arising from the sale of Project F819.

The 11th Circuit relied upon its prior holdings "that a provision that covered 'all disputes arising out of or in connection with' an agreement was 'clearly meant to be read broadly'" to find that the agreement applied to Northrups claims. It asserted that the Commission Agreement governed commissions due Northrup, regardless of those arising from claims

of *quantum merit* and unjust enrichment claims. Northrop's other claim, that the defendants tortiously interfered by disclosing the terms of the Commission Agreement to its clients, also was found to fall squarely within the scope of the arbitration provision which provided that "[b]oth parties will keep this agreement strictly confidential as well as the final sales price of the yacht." Its holding affirmed that "[I]t is well established that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract.").

UPCOMING COFFEE BREAKS

Nov 19

- **Topic:** MLA Fall Meeting Recap

Dec 17

- **Topic:** Arbitration and ADR: the Greek shipowners' perspective

Jan 21

- **Topic:** Maritime Arbitration in 2022 and beyond.

Have questions, comments, or ideas for a future Coffee Break, topics?

Please email us at MLA.ArbitrationADR@gmail.com or contact anyone in our leadership.



MLARB & ADR

100 Years of Maritime Arbitration
1925 - 2025 • Federal Arbitration Act

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