SPRING 2022
NEWSLETTER

MLA RB & ADR

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

A Word from the Chair

WELCOME FROM CHRISTOPHER NOLAN

It is my pleasure to share with you our Spring 2022 newsletter. Not only does it provide a useful recap of our efforts during the last year, but the key cases around the country to be mindful of. In the year ahead, we will continue to gather for our popular monthly Coffee Break programs on the third Friday from 11:30-12 p.m. Eastern.

We always welcome suggested topics and speakers that will appeal to our diverse audience of practitioners, arbitrators, mediators, and in-house counsel and claims persons.

For the May 2022 meeting, as it is our first in-person Spring meeting in two years in light of COVID-19, we look forward to re-connecting and continuing to plan for our 100 Years of Maritime Arbitration seminar in Spring 2025. Trust me, it will be here before you know it, so planning is imperative now to justify the efforts to the MLA Officers.

Onward and upward!

- Chris

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

Chris Nolan, Chair
Lindsay Sakal, Vice-Chair
Casey O'Brien, Secretary
Ifigeneia Xanthopoulou, Young Lawyer Liaison

COFFEE BREAKS

BRIEF RECAP OF WHAT'S BEEN ON YOUR MINDS

Nov 21

Reflections on the Fall Meeting

- *Becoming a Proficient Arbitral Practitioner,* Liz Burrell: using MLA committees, mentorship, SMA luncheons, The Arbitrator, NYC Bar resources, opportunities and other tips developing your arbitration practice.
- *ADR through the FMC*, Carrol Hand: processes and perspectives on mediation, arbitration, and claims guidance from the FMC.
- *State of Maritime Arbitration Union in the U.S.*, LeRoy Lambert, Ray Waid, John Woods, David Martowski; recent efforts of and developments in the SMA, HMAA, MIAS and compared to international forums and rules.
- Updates in case law & decisions--see the Fall 2021 Newsletter!

Dec 17

Arbitration & ADR: The Greek Shipowner's Perspective

- **Moderator: Ifigeneia Xanthopoulou; Speakers: Vicky Liouta and Dan Tadros**
- Greek shipowners often select London or Singapore for arbitration, always with insurers' prior approval (P&I, H&M).
- Greek shipowners hesitate still in using mediation in Greece, as it is a mostly unknown to them process; when mediation does take place, it is in London mostly.
- But, arbitration & mediation are slowly starting to gain ground.
- Greek shipowners do utilize court-mandated settlement conferences, mediations, and arbitration in the United States.
- Cost and efficiency are two major driving factors on Greek shipowners' minds when it comes to selecting an ADR path.

Jan 21

Arbitral Immunity- an Arbitrator's Perspective

- **Moderator: Chris Nolan; Speakers: Louis Epstein**
- *Shamrock Fisheries, LLC v. Manning,* 21-cv-10689-ADB, 2021 U.S. Dist. LEXIS 233861, at *2 (D. Mass. Dec. 7, 2021) and the implications of non-parties suing arbitrators.
- Established case law on arbitral immunuty- *Landmark Ventures, Inc. v. Cohen,* 2014 WL 6784397 (S.D.N.Y. Nov. 26, 2014).
- Few ways for arbitrators to recuperate atty fees, other than counterclaim, or obtaining Professional Liability Insurance. However, with claim, and premium increases, costs will inevitably result in increased rates. Also once PLI is common, it may nvite litigation (pot of money).
- SMA is looking into funding insurance.

February 18

Status of Discovery in Arbitration

- **Moderator: Casey O'Brien; Speakers: Molly McCafferty and Anthony Pruzinsky**
- Rules help!
- E-discovery is a behemoth and limitations are needed- be clear if don't need metadata. Fear industry will be slow to adapt to this and will still seek more than needed.
- NY dispute resolution says production of electronic docs should only be what is kept in ordinary course of business- to discourage a contractor being hired to do e-discovery.
- It's tough but doable to get subpoenas issued to third parties.
- Think outside the box in getting information from foreign witnesses (other law suits)
- Remember, arbitration is by contract- agree to things in your best interest, meet early.

March 18

Mediation on the P&I Mind: Perspectives and Trends of ADR

- **Moderator: Lindsay Sakal; Speaker: Jennifer Porter**
- Background on structures of Thomas Miller and how ADR varies depending on East or West Coast.
- COVID-19 trend towards remote is here to stay.: **PROS**: access to foreign witnesses; more economical; ability for handlers to appear confidentially; more flexibility in selecting mediators. **CONS**: both sides are less involved in remote environment; harder to wear other side down; Plaintiffs are not as burdened and may not feel they got their "day in court"; no "hallway chats," which were productive.
- Would like to see: 1. Attorneys better at handling technology without assistants; 2. stipualtions and informal agreements to use neutral evaluations or private arbitration.

April 11

Drafting Arbitration Agreements

- **Moderators: Francie Trimble and Jonas Patzwall; Speaker: Robins Brice**
- Live Meeting at Holland & Knight, Houston - our first Coffee Break in person.
- Emphasis on the role of associates in effectuating an arbitration agreement plan of partners and what role clients play in the process.
- Robins addressed the key role of arbitrators, with emphasis on the Houston Maritime Arbitration Association.

KEY CASE SUMMARIES

***Broumand v. Joseph*, 522 F.Supp.3d 8 (2021)**
Summarized by Kenderick M. Jordan, *Marwedel, Minichello & Reeb*

Petitioner, Stafford Broumand, is a party to an ongoing arbitration in New York. The Arbitrator issued subpoenas to Respondents, residents of California and Virginia, to appear in NY, but thereafter ruled they could appear by teleconference. Respondents ignored the subpoenas, resulting in the subject petition to compel the compliance therewith, pursuant to 9 U.S.C. § 7. Respondents moved to dismiss the petition pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction, and 12(b)(6) for failure to state a claim, asserting that the subpoenas were invalid. The Court would grant the motions of respondents to dismiss the petition, finding that, although the Court has personal jurisdiction over respondents pursuant to federal law, not under New York's long-arm statute, the petition failed to state a claim on which relief can be granted.

In finding personal jurisdiction, the court reasoned that a federal statutory basis for such jurisdiction was created under Section 7 of the Federal Arbitration Act ("FAA"), which permitted nation-wide service of subpoenas in accordance with the 2013 amendment to Fed. R. Civ. P. 45(b)(2). The court further held that the subpoenas did not violate due process, because: (1) under a due process analysis, the relevant contacts required to enforce a subpoena pursuant to the FAA were contacts with the United States as a whole, and not a particular state forum; and (2) the subpoena was not unreasonable, as it required the respondents to appear by videoconferencing and not in person. Although the petitioner made a *prima facie* showing of personal jurisdiction over the respondents, the court ultimately granted the respondents' 12(b)(6) motion, holding that the subpoenas were unenforceable on two grounds. First, the court took a strict reading of Fed. R. Civ. P. 45(c)'s 100-mile geographical limit, and reasoned that even if the hearing was conducted virtually, the actual, physical locations of the hearing and the respondents' residence violated that geographical limitation. Second, the court held that the subpoenas were invalid, because such a subpoena pursuant to the FAA could not compel the production of documents from a nonparty without that nonparty's attendance at the evidentiary hearing (and the court already explained such presence was in violation of Rule 45(c)).

***Shamrock Fisheries, LLC v. Manning*, No. 21-CV-10689-ADB, 2021 WL 5811743, at *1 (D. Mass. Dec. 7, 2021)**
Summarized by Blake E. Bachtel, *Royston Rayzor*

Plaintiffs, consisting of nine fisheries (eight collectively referred to as "Quinn Entitles" and the ninth, Blue Harvest Fisheries, LLC ("Blue Harvest")) filed suit in Bristol County Superior Court, later removed to the District of Massachusetts, against a three-man Arbitral panel, alleging they prevented a multi-million dollar deal. They seek declaratory judgment and injunctive relief alleging that the Panel's ruling in an arbitration involving other entities (Carlos Rafael and his affiliated fishing companies (the "Rafaels"), BASE, Inc. ("BASE"), and VII Northeast Fishery Sector Inc. ("Sector VII") blocked their ability to close on intended transfers of vessels and fishing permits among the Plaintiffs.

This underlying arbitration related to a settlement between the National Oceanic and Atmospheric Administration ("NOAA") and Rafaels, whereby the Rafaels were ordered to divest of commercial fishing permits in a NOAA-approved sale. One of these sales was to Quinn Entities. However, another company, BASE, initiated arbitration saying it had a right of first refusal to all the assets which would have been part of that deal. Rafael then still closed on the deal to

(continued)

Quinn Entities, and the next month the Panel (the defendants of the present action) ordered that no sales proceed. At the time of this award, Quinn and the trustee managing Rafael's sales were parties to the arbitration.

The deal that is the subject of the case, *i.e.* the transfer between Plaintiffs, involves assets mortgages and security interests held by the Rafael Trustee. The trustee interprets the Panel's award as barring him from consenting to any transfers. The Plaintiffs argue they need the deal to close before fishing season begins, or they will experience serious and irreparable financial harm. Therefore, they seek to enjoin the Panelists from interfering with the Trustee's exercise of fiduciary duty, and to instruct the Trustee to do as necessary to let the transaction close.

In response, the Panelists filed a motion to dismiss, arguing they are protected by arbitral immunity and are not proper parties to the suit, given they are not interested in the outcome. The Court agreed that judicial immunity applies, but cannot shield an arbitrator who acts in the absences of "any colorable claim of jurisdiction." Looking at case law, the Court found that, in those cases, there was no connection between the Arbitrators' acts and the substance of the arbitration, *i.e.* accepting a bribe. The Court surmised, "In essence, Plaintiffs argue that the Panelist Defendants misinterpreted the scope of their authority and came to the wrong legal conclusions when they issued the Interim Award, and should be enjoined from doing so in the future. This conduct is plainly within the scope of the arbitral process and is protected by arbitral immunity." *Id.* at p. 9. The Court also found that the order only ordered Rafaels to instruct its trustee not to sell assets, it does not express jurisdiction over or impose penalties on non-parties if they do not comply. They Court also found that Defendants were not real parties in interest. Importantly, on the issue of the injunction, the Court found that the Plaintiff failed to properly brief the request to the Court to enter an order instructing the Trustee about what he can properly do. In sum, the Judge declined to grant a preliminary injunction and instead granted the Defendants' motion to dismiss.

***Shamrock Fisheries LLC et. al., v. Base Inc. et. al*., Civil Case No. 2173CV00891 (Mass. Super. Ct. March 30, 2022)**

Summarized by Ellen E. McGlynn, *Collier Walsh Nakazawa LLP*

The Massachusetts Superior Court caught and released yet another fishy dispute.[1] Following an arbitration between Carlos Rafael ("Rafael"), Shamrock Fisheries LLC ("Shamrock"), Base, Inc. ("Base") and others, Shamrock attempted to gain resolution through the courts on identical issues already heard by the arbitration panel. Specifically: (1) whether Shamrock was prejudiced by entering the arbitration late, and (2) whether joinder of the parties was proper. The arbitration panel had held that Shamrock's delay was the result of its own doing, and ruled that joinder into the ongoing arbitration led to consistent and efficient results; severance would do the opposite.

Unsatisfied, Shamrock complained to the Massachusetts Superior Court on the *same* two issues. In a lengthy explanation, the court declined to overrule the panel. It cited strong public policies in support of arbitration in both Massachusetts and at the federal level. The court cited a myriad of federal cases upholding the appropriateness of an arbitrator (or panel) to make procedural decisions. It emphasized that, where the arbitration agreements provide for the application of AAA rules, and the arbitration panel applies those rules (including procedural issues that relate to sequence, prerequisites, time limits, notices, laches, estoppel and others), those issues are procedural in nature and are appropriate for arbitrators to decide, *not the courts*. The court also rejected Shamrock's remaining arguments on the basis of *res judicata* and denied their request to sever the arbitration and select new panelists. As a result, the court overwhelmingly avoided Shamrock's request to interfere with an arbitration panel's procedural rulings, and allowed the arbitrators to continue swimming freely, and without judicial restraint.

[1] The underlying case relates to the sale of groundfish vessels and permits.

***Badgerow v. Walters*, 142 S. Ct. 1310 (2022)**

Summarized by William E. Crouse, *Frost Brown Todd LLC*

The U.S. Supreme Court decided whether jurisdiction for arbitral awards is determined by the same "look-through" approach to the "underlying substantive controversy" for requests to confirm, vacate, or modify arbitral awards under the FAA Sections 9 and 10. Petitioner, Denise Badgerow, initiated an arbitration proceeding against her employers, the Respondent, Walters et al., alleging she was unlawfully terminated. The Arbitrators dismissed her claims, and Petitioner sued in Louisiana state court to vacate the arbitral award. Respondent removed the case to the federal district court. The district court applied the "look-through" approach based on the principle of uniformity, and the language found in Section 4 to Sections 9 and 10. The Court of Appeals for the Fifth Circuit affirmed the district court ruling. Certiorari was granted. The U.S. Supreme Court reversed and remanded the judgement of the Court of Appeals for the Fifth Circuit, holding that FAA Section 4 has statutory instructions directing a look-through approach to the "underlying substantive controversy" to determine jurisdiction. Sections 9 and 10 do not have these same statutory instructions. Without that statutory instruction, a court may look only to the application actually submitted to it in assessing its jurisdiction.

UPCOMING COFFEE BREAKS

Jun 17

- **Topic**: AAA/ICDR Maritime Arbitral Considerations.

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.

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