**MLA ARBITRATION & ADR COMMITTEE MEETING**

**May 3,2017**

**MINUTES**

**Attendees:**

Anber-Kontakis, Muge; Aprans, Olaf; Bell, Michael K.; Brady, Keith; Bulow, Lucienne; Cardone, Tina; Clark, Peter D.; Cofman, Alan S.; Corwin, Richard; Daly, Blythe; D'Amico, Alex; DeOrchis, Vincent M.; Dooley, Austin; East, Lindsay; Fackler , Michael; Glenn, Robert; Gonzalez, Richard; Greenwold, Corey; Harrell, Chris; Harrison, Parker; Heard, Keith W.; Jaeger, Iwam; Kailas, Leo G.; Kleiner, James D.; Lambert, Leroy; LeBlanc, Phil; LoPes Pinto, Alessander; Manson, James; McCormack, Howard; Monahan, Michael; Mordhorst, Klaus C.;

Murnane, Don; Nolan, Chris; Northmore, Michael; Pare, Jay; Paulsen, Bruce; Poulos, Gregory; Pruzinsky, Anthony; Radzik, Edward C.; Rodriguez, Ivan; Ryan, Michael J.; Sakal, Lindsay; Schupp, Ben; Shirley, Jim; Shirvell, George; Skoufalos, Peter; Textor, Jim; Tsimis, George; White, J. Ralph; Wisniewski, J.; Wolman, Soren

**AGENDA POINTS WITH MINUTES RECAP**

1. The power/authority of arbitrators to raise issues or facts not developed by the

parties. Does that authority exist? Should it be exercised?

* Don Murnane addressed the power/authority issue by referencing Domke on Commercial Arbitration, the SMA Rules (note the preamble and Section 23 in particular); AAA Rules (note Rules 34 and 36) and the ICDR. David Martowski added insights concerning ICC arbitrations which have a very different structure.

a. What if an arbitrator has special knowledge/expertise that the other

arbitrators do not have? Should that arbitrator disclose/use that special expertise?

* David Martowski framed the issue by addressing different hypotheticals based on experience and certain SMA arbitrations. Lou Scheinbaum emphasized that arbitrations are creatures of contract. Arbitrators should be very reluctant to rely on argument outside the briefing or personal experience without the parties having an opportunity to respond.
* There was a consensus among the panel that the safest course of action for arbitrators who wish to rely on special expertise or new arguments / new case ruling in an award is to reopen briefing or call a hearing so the parties can address it.

2. Pre-Award Security in Maritime Arbitration. An SMA Panel in New York

recently awarded $63 million in Pre-Award Security in Commodities & Minerals

Enterprise Ltd. v. CVG Ferrominera, C.A. (John Kimball, Ch., A.J. Siciliano and George

R. Wentz, Jr.).

* Mike Frevola addressed the award from a practical and factual standpoint. First, addressing the key facts as to the dispute and the need for security. Second, the legal basis for awarding relief under SMA Rule 30 and legal authority.
* Jim Textor raised questions concerning the need for security and how this should impact issuance of a security award.

3. Lindsay East will discuss the impact of Brexit on London arbitration.

* It will take two years to argue on an appropriate exit and unlikely to reach consensus. The NY Convention will not be impacted. The LMAA is stabilized and sees no impact. Anti-suit injunctions are important in the UK and this may be buoyed as it was difficult to obtain in the EU.

4. Good of the order:

* Chair Leo Kailas gave his farewell remarks on the work conducted over the four years of his leadership and a hearty good luck to the new leadership. New Chair Peter Skoufalos thanked Leo for his service and addressed the opportunities ahead. He also welcomed the new leadership team of Vice Chair Chris Nolan, Secretary Lindsay Sakal, and YCL representative to the committee, Danielle Oliveira.
* Peter Skoufalos also made available a handout on 28 U.S.C. §1782, which allows

subpoenas to be issued to take testimony in aid of foreign arbitration. A copy of the handout has been added to the MLA committee website.