MARITIME LAW ASSOCIATION OF THE UNITED STATES
COMMITTEE ON ARBITRATION AND ADR

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Editor's Comment:

We are also pleased to offer with this newsletter a review of notable arbitration cases that we hope will be of value to Committee members in particular and to the Association's membership in general. In addition to recognizing the efforts of the Committee's leadership, including Vice-Chair Chris Nolan and Secretary Lindsay Sakal, the Committee would like to thank Daniela Oliveira and Imran Shaukat, the Committee's Young Lawyers Liaisons, for their invaluable contribution to this newsletter.

Peter Skoufalos

SOCIETY OF MARITIME ARBITRATORS AWARD OF NOTE

***Commodities & Minerals Enterprise Ltd.*, SMA 4296 (Jan. 5, 2017):**

In *Commodities & Minerals Enterprise Ltd.*, a tribunal of the Society of Maritime Arbitrators Inc. ("SMA") ordered a partial award of pre-judgment security in the amount of $62,730,279.98 for claims arising from a series of iron ore contracts between Commodities & Minerals Enterprise Ltd ("CME") and CVG Ferrominera Orinoco CA ("FMO"). The award is nearly $50 million more than the previous largest award issued by an SMA tribunal.

The underlying dispute concerns CME's claim against FMO for damages in the amount of approximately $212,262,096.46, plus interest and attorney's fees, pursuant to a Transfer System Management Contract ("TSMC"). The TSMC contained an arbitration clause, invoking SMA arbitration, which authorized the Panel to "order any and all preventative measures as it deems fit …" Moreover, SMA Section 30 states that, "[t]he Panel, in its award, shall grant any remedy or relief which it deems just and equitable."

Relying on the authority implicit in SMA Section 30 and numerous court and SMA decisions applying the general maritime law of the United States, the tribunal reasoned that it had authority to grant an award of security, "when there has been a strong showing that a claim is likely to succeed on the merits and enforcement of an eventual judgment will be difficult." *Id.* at ¶44. As a governmental entity in a challenging home venue, the potential enforcement issue loomed large. And previous conduct of not meeting the establishment of escrow funds raised concerns for the Panel. In addition, the Panel noted that the Foreign Sovereign Immunities Act ("FSIA"), "does not apply to arbitration and does not bar an arbitration panel from ordering an agency of a foreign sovereign to post pre-judgment security." *Id.* at ¶54. The latter concerned a defense raised by FMO.

FIRST CIRCUIT

a. Looking Through the Complaint for Jurisdictional Purposes

***Ortiz-Espinosa v. BBVA Securities of Puerto Rico,* 852 F.3d 36 (1st Cir. 2017):**

In *Ortiz-Espinosa v. BBVA Securities of Puerto Rico*, the District Court held that the "look-through" approach to federal question jurisdiction applies to FAA §§ 9-11 petitions to confirm, vacate, modify, or correct arbitration awards.

The action arose from disputes between a group of investors and their investment brokers, after the investors' accounts suffered large losses. The brokerage agreement provided for arbitration of disputes before the Federal Industry Regulatory Authority ("FINRA"). The investors asserted several claims under state and federal law including violations of the Securities Act and the Securities Exchange Commission. Those claims were ultimately denied and the investors sought relief from the Puerto Rico Court of First Instance requesting that the court vacate or modify the arbitration award. In that petition, rather than invoke the Federal Arbitration Act (FAA), claimants sought relief under the Puerto Rico Arbitration Act ("PRAA"). The defendants removed the case to federal court in the United States District Court for the District of Puerto Rico. "Defendants based their claims of federal jurisdiction on a look-through approach, asserting that the underlying claims were based on federal securities laws, and that the district court would have had jurisdiction if the claims had been filed in district court." Id. at *41.

Recognizing the Supreme Court's decision in *Vaden v. Discovery Bank*, 556 U.S. 49, 62 (2009), holding that a "court may 'look through' a §4 [compel] petition to determine whether it is predicated on an action that 'arises under' federal law," the First Circuit, reasoned that "Congress could not have intended jurisdiction over §§ 9-11 petitions only to exist in diversity or perhaps in admiralty." *Ortiz* at 46. This practical approach to jurisdiction provides a unitary jurisdictional approach, allowing for Federal Court Jurisdiction when a petitioner could have filed in federal court under the FAA but doesn't. In support of its holding, the court further noted that, "[a]llowing a federal court to compel arbitration in a federal question case but then later denying a federal forum for confirming, modifying, or vacating the award would lead to strange consequences [and] . . . create potential inconsistency between the federal pre-award decision and the later state court decision involving the question of whether the arbitrators exceeded their powers by deciding issues that are not properly subject to arbitration." *Id.* 46-47.

While the FAA automatically applies to maritime contracts, non-maritime or mixed contracts arising under federal law may also be removed to federal court for relief under FAA §§ 9-11. There is a circuit split on the interpretation of this issue so it may well be resolved by the Supreme Court.

***Cert Granted: Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017):**

In last year's issue, we addressed the First Circuit decision in *Oliveira v. New Prime, Inc.*, holding that the applicability of FAA §1 exemptions (seamen, railroad employees, other

classes of workers engaged I foreign or interstate commerce) was a question of arbitrability, for district courts to decide (rather than arbitrators) and that transportation-worker agreements that establish or purport to establish independent-contractor relationships are contracts of employment within the meaning of the §1 exemption. There is a circuit split on this issue. Cert. was granted on Feb. 26, 2018.

D.C. CIRCUIT

a. "Complete Arbitration Rule" Applied to Deny Vacatur of Interim Award

***Berkowitz, et al. v. Republic of Costa Rica*, 2018 WL 52118 (D.D.C. Jan. 23, 2018):**

In *Berkowitz*, a father and his two sons ("Petitioners") sought vacatur or annulment of an interim award issued by the International Centre for Settlement of Investment Disputes (the "Tribual") in favor of the Republic of Costa Rica ("Costa Rica"). In the arbitration, Petitioners alleged that they were deprived of their residential real estate property investments, in violation of the Dominican Republic–Central America Free Trade Agreement ("CAFTA"), when Costa Rica allegedly expropriated their beachside properties. Pursuant to Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, Petitioners filed a Petition to Vacate the Interim Award in the United States District Court for the District of Columbia, on the ground that the Tribunal exceeded its authority in issuing the Interim Award. In denying the Petition, the Court held that because substantive tasks remained unresolved after the Tribunal's issuance of the Interim Award, the "complete arbitration rule" precluded the petitioners from appealing the Interim Award in the district court.

By way of factual background, in 1991, the Costa Rica Ministry of Natural Resources, Energy and Mines issued an executive decree (the "Decree") in which it declared the Costa Rican government's attempt to establish a national park to protect leatherback turtles that were being affected by development near the country's beaches. The Decree established a marine park that extended 125 meters inland from the high tide mark. *Id.* at *1. In 1995, the Costa Rican Congress passed Law No. 7524 (the "Park Law"), which "authorized the state to acquire, either through direct purchase or expropriation, any private properties or portions thereof that are located within the boundaries of the Park." *Id.* at *2. However, the Park Law "established the eastern boundary of the Park at 125 meters *west* of the mean high tide mark, rather than 125 meters east of the mean high tide mark." *Id.* (emphasis in original). Consequently, the Park Law essentially created an offshore marine park, thereby conflicting with the intention of the Decree that contemplated an inland park. *Id.*

In 2003, Brett Berkowitz began the process of acquiring land along the west coast of Costa Rica. Prior to purchasing the lands, Berkowitz met with the Minister of the Environment and Energy, and allegedly received assurances that the Costa Rican government "did not intend to expropriate the land in question, they did not have the funds for it, and the Government and Ministry did not intend to prevent development of the private property bordering the public zone…" *Id.* at *4. In 2005, however, the Costa Rican government adopted Resolution 2238-2005-SETENA, which set the Park's eastern

boundary 125 meters inland and the mean high tide mark. *Id.* Subsequently, Costa Rica began initiating judicial proceedings to expropriate lots within the Park, including lots owned by Petitioners.

At the conclusion of a five-day hearing, the Tribunal issued its Interim Award on jurisdiction finding that it: (1) lacked jurisdiction to hear claims with regard to one of Petitioners' properties; (2) had jurisdiction to hear claims with respect to two of Petitioners' properties; (3) and needed more briefing on whether it had jurisdiction to hear claims regarding Petitioners' two remaining properties. *Id.* at *1. After issuing the Interim Award, the Tribunal "invited the parties to propose corrections within 30 days, as provided for in Article 38 of the United Nations Commission on International Trade Law Arbitration Rules ("the UNCITRAL Arbitration Rules"), G.A. Res. 68/109, art. 38, U.N. Doc. A/RES/68/109 (Dec. 16, 2013)." *Id.* at *3. Rather than proposing corrections, Petitioners filed their Petition in the United States District Court for the District of Columbia, seeking to vacate or set aside the Interim Award.

Subsequent to the Petition, the Tribunal notified the parties that although it issued an interim decision on the grounds of jurisdiction, the Tribunal remained "seised of the dispute between the Parties," that the decision of the Tribunal "was expressly designated to be an 'interim' award, not a 'final' award," and that the interim award "contemplated further proceedings involving all Claimants, including both the [Petitioners] and Respondent." *Id.* at *7. Accordingly, the Tribunal notified the parties that they "remained subject to the arbitral jurisdiction of the Tribunal even after the Interim Award issued." *Id.*

The Court concluded that the Interim Award expressly contemplated "consultation with the Parties" regarding "further proceedings" to allow the Tribunal to decide remaining issues. *Id.* at *8. Applying the "complete arbitration rule,"[1] the Court concluded that the Tribunal had substantive tasks remaining regarding the dispute between the parties, and therefore the award was not an appealable final judgment. *Id.* Accordingly, the Court denied the Petition to Vacate the Interim Arbitration Award.

SECOND CIRCUIT

a. Materiality Key to Challenge of Award on Ground of Fraud

***Odeon Capital Group LLC v. Ackerman*, 864 F.3d 191 (2d Cir. 2017):**

[1] Under the "complete arbitration rule," for an arbitration to be final, "the arbitrators must have decided not only the issue of liability of a party on the claim, but also the issue of damages." *See United Transp. Union v. Trailways, Inc.* 1987 WL 8730, *1 (D.D.C. Mar. 12, 1987). The subjective belief held by arbitrators about the finality of an award is a key factor in determining whether the award is final. *See Am. Postal Workers Union v. U.S. Postal Serv.*, 422 F. Supp.2d 240, 246 (D.D.C. 2006) (noting that an award will be considered final when it is " 'intended by the arbitrator to be his complete determination of every issue submitted to him' " (quoting *McKinney Restoration Co. v. Ill. Dist. Council No. 1.*, 392 F.3d 867, 871 (7th Cir. 2004)). *Id.* at *7.

Section 10(a)(1) of the Federal Arbitration Act permits vacatur of an arbitration award "where the award was procured by corruption, fraud, or undue means." In affirming the district court's confirmation of an award and denial of a petition to vacate, the Second Circuit discussed the standard for vacatur when based on the ground of fraud. Noting that a challenge based on fraud must plead that "the fraud materially related to an issue in the arbitration," the Court devoted the balance of its decision to the appropriate standard for evaluating materiality.

Here, Ackerman, a bond trader, prevailed on various claims arising out of his employment with Odeon. After the tribunal, in a non-reasoned award, granted Ackerman's claim for unpaid wages, Odeon moved to vacate the award on various grounds and Ackerman cross-moved to confirm. Odeon then moved to amend its petition to add a challenge based on fraud, arguing that Ackerman perjured himself before the tribunal. The district court denied the motion to amend, holding that Odeon could not demonstrate that the alleged perjury was material to the award. The Second Circuit agreed that, without a reasoned award, "there was simply no basis in the record to find that Ackerman's testimony … played any role in the arbitrators' award on his unpaid wages claim." The mere fact that Ackerman was the sole witness on the wage claim was not a sufficient basis to find that any "untruth" could serve as a basis for vacatur, noting that Section 10(a)(1) requires that the award must have been "procured by … fraud."

The Court, however, disagreed with the district court's denial of Ackerman's request for attorney's fees. While noting the "prevailing American rule," the Second Circuit held that Ackerman's request for attorney's fees nevertheless had a statutory basis in the New York Labor Law (Section 1981 (1-a)). Thus, the district court abused its discretion in relying solely on its equitable power to deny an award of attorney's fees.

b. Subject Matter Jurisdiction under the New York Convention

***Albaniabeg Ambient Sh.p.k. v. Enel S.p.A.*, 169 F. Supp. 3d 523 (S.D.N.Y. 2016):**

This case examines whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.* (the "Convention") confers subject matter jurisdiction on a federal court to enforce a foreign judgment pursuant to Article 53 of the New York CP.L.R.

Procedurally, the judgment enforcement action was commenced in N.Y. State Court pursuant to a motion for summary judgment in lieu of a complaint. The defendant then removed the state court action to federal court, citing Section 205 as a basis for federal subject matter jurisdiction. Whereas Section 205 expressly recognizes a party's right to remove an action from a state court to a federal court where the underlying agreement or award falls under the Convention, it does not by itself confer subject matter jurisdiction. Instead, a party seeking recognition or enforcement of an award or agreement falling within the Convention must look to Section 203.

However, Section 203 has been interpreted by the Second Circuit narrowly, "limiting it to actions to compel, confirm, or vacate and arbitral award" and "several other measures … in aid of an arbitration." Here, the plaintiff's action did not seek to confirm or vacate an arbitration but, instead, sought enforcement of an Albanian court judgment. The Court concluded that "[n]either the Second Circuit nor any court in this District has found Section 203 subject matter jurisdiction in such circumstances." Moreover, the fact that the defendant raised certain defenses related to arbitration—e.g. that the judgment was obtained in violation of a binding arbitration agreement—was not sufficient to invoke federal subject matter jurisdiction under Section 203 and the Convention. Thus, an action to enforce a foreign judgment is not converted to an action or proceeding under the Convention simply because the party resisting enforcement raises a prior arbitration or agreement to arbitrate as a defense in the enforcement action. Accordingly, the action was remanded to state court. The Court also denied plaintiff's request for attorneys' fees and costs, finding that defendant's removal of the action was not "objectively unreasonable" in light of the paucity of published decisions concerning Section 205 removal and subject matter jurisdiction.

c. Court's Role in Unopposed Petition to Confirm

***Maersk Line Ltd. v. National Air Cargo Group, Inc.*, 2017 U.S. Dist. LEXIS 165196 (S.D.N.Y. Oct. 4, 2017):**

Where one party fails to oppose a petition to confirm, the Court will review the petition to confirm as one for summary judgment based on the petitioner's submission. This does not amount to a "rubber-stamp" of the Award, as demonstrated in this case where the Court modified the panel's award of 9% post-judgment interest, finding that 28 U.S.C. § 1961, which links post-judgment interest to the rate of Treasury bills, controlled.

Underlying the dispute was a contract to transport goods from the U.S. to foreign destinations. At the conclusion of the contract, Maersk remained unpaid for amounts that were largely undisputed. After arbitration was commenced, Maersk filed a dispositive motion at the request of the panel and was awarded the principal amount of its claim, plus pre-award interest, arbitrator compensation and expenses and post-judgment award. Maersk then moved the Court for summary judgment and confirmation of the award. Noting that it must grant the motion where there is no genuine dispute as to material facts, the Court largely confirmed the award, but concluded that the selection of state law did not supplant the statutorily defined post-judgment interest rate applicable to federal judgments through 28 U.S.C. § 1961. While parties may depart from § 1961's interest rate, the New York State choice of law did not amount to the "clear and unambiguous language" that is required to replace the federal statute.

d. No Stay of Action to Appeal a Finding of Waiver of Arbitration

***Lifetree Trading PTE., Ltd. v. Washakie Renewable Energy LLC 2017 U.S.* Dist. LEXIS 178581 (S.D.N.Y. Oct. 27, 2017):**

Plaintiff commenced an action against the defendant in 2014 alleging breach of a $90 million biofuel contract. A year later the parties moved for partial summary judgment, which the Court granted with respect to dismissal of certain claims against the defendant and denied the plaintiff's motion on liability. As the Court's decision notes, two years of discovery followed. Thereafter, the defendant's entire defense was revealed to be a "pure fabrication" resulting in a finding of liability against the defendant, along with the imposition of sanctions. However, the Court concluded that there was a genuine dispute of material fact concerning damages, denied summary judgment on damages and set a trial date. On the day prior to the final status conference before trial, defendant moved to compel arbitration. The Court denied the motion on grounds of waiver and then considered whether a stay of the action was warranted pending an interlocutory appeal of the Court's refusal to stay the action in favor of arbitration.

In refusing to stay the action pending the appeal, the Court analyzed the four factors guiding the Court's determination, focusing on whether defendant has made a strong showing that it is likely to succeed on the merits. Here, defendant was unlikely to overcome the finding of waiver where (i) it had participated in the litigation for three years; (ii) the litigation was substantially advanced, with trial of the action imminent; and (iii) defendant had engaged in prejudicial (and sanctionable) conduct. Further, defendant had twice submitted to the Court's jurisdiction by admitting in its Answer that the parties' contract was subject to the Court's jurisdiction and by demanding a jury trial. Under these circumstances, a stay of the court action pending an appeal was inappropriate and the defendant's motion was denied.

e. Right of Intervenors to Oppose Award Confirmation

***Eddystone Rail Co., LLC v. Jamex Transfer Services, LLC* 2018 U.S. Dist. LEXIS 20177 (S.D.N.Y. Feb. 7, 2018):**

To what extent do non-parties to an underlying arbitration have standing to intervene in a federal action to challenge the award? Finding that the non-parties had failed to demonstrate a substantial interest in the arbitration, the Court concluded that the proposed intervenors could not overcome the "general rule" embodied in the FAA that a court may vacate an arbitration award only "upon the application of any party to the arbitration." (U.S.C. § 10(a). In doing so, the Court distinguished this case from its earlier holding in *Ass'n of contracting Plumbers of City of N.Y., Inc. v. Local Union 2 United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus*, 841 F.2d 461 (2d Cir. 1988), where the Court found that the proposed intervenors had a "substantial interest" in the underlying arbitrations and could, therefore, intervene as of right under Fed. R. Civ. P. 24(a). The Court noted that its holding in *Contracting Plumbers* was an "exception" that had "limited application" where, for example, foreclosing the non-party from challenging an award would have jeopardized the non-party's "very existence."

In contrast, the proposed intervenors in *Eddystone* could not show such a substantial interest because their principal goal in challenging the award was to avoid potential alter ego liability in a subsequent enforcement action. The Court found that such a "defensive

strategy" was "somewhat removed from the type of interest" recognized in *Contracting Plumbers*. Separately, the Court also found that the proposed intervenors in *Eddystone* lacked standing as non-parties to the arbitration pursuant to Article III of the U.S. Constitution in that the relief they sought was different than that sought by a party with standing. Here, the proposed intervenors could not demonstrate an injury in fact without an alter ego finding first being made in the enforcement action. Further, the Court examined whether Rule 24(a)(2)—providing intervention as of right—could assist the proposed intervenors. However, the Court concluded that the proposed intervenors could not show an interest in the property or transaction relating to the subject matter of the award confirmation proceedings. This was because the proposed intervenors' claim was dependent upon a court ruling in an ancillary proceeding (i.e. the separate enforcement action) and was thus too attenuated to allow intervention. Finally, the Court concluded that allowing permissive intervention pursuant to Rule 24(b) would thwart the "straightforward" nature of award confirmation proceedings by allowing non-parties to introduce collateral issues into what is intended to be a summary proceeding.

f. Non-Signatories Can Rely on Equitable Estoppel to Stay Action

***Bankers Conseco Liver Insurance Co. v. Feuer,* 2018 U.S. Dist. LEXIS 43828 (S.D.N.Y. March 15, 2018):**

Plaintiff and defendants' corporate vehicle entered into two separate reinsurance agreements containing nearly identical arbitration clauses. Alleging that the defendants had misappropriated funds from an investment trust created by plaintiff for purposes of implementing the reinsurance agreements, plaintiff, on the same day, commenced arbitration against the corporate signatory and the present action against the corporation's principals. The individual defendants sought a stay of the court action pending a resolution of the arbitral proceedings.

The Court first determined whether a contract was formed between the parties, concluding that federal law and not state-law principles controlled that determination. Under federal law, the doctrine of equitable estoppel can be invoked by non-signatories to compel arbitration where "the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." The "intertwined-ness" test is subject to a two-part analysis: (i) whether the signatory's claims arise under the same subject matter of the agreement and (ii) whether the non-signatory has a 'close relationship' to a signatory of the agreement.

Here, the Court concluded that the plaintiffs' court claims arise from the same subject matter as the reinsurance agreements. Moreover, the agency relationship between the individual defendants and their corporate vehicle created the necessary "close relationship" to satisfy the second prong of the intertwined-ness analysis. Finally, the Court was unable to find defendants' hands to be unclean such as to preclude their reliance on the equitable doctrine of estoppel. Accordingly, a stay of the action was appropriate pending arbitration of the dispute falling under the reinsurance agreements.

g. ***Who Decides Waiver of Arbitration—Court or Tribunal?***

***Sygenta Crop Protection, LLC v. Insurance Co. of North America*, 2018 U.S. Dist. LEXIS 53224 (S.D.N.Y. Mar. 29, 2018):**

Eighteen years earlier, after protracted litigation, an insured and its insurer ("INA") entered into a settlement agreement that released the insurer from liability under the policy for any "environmental claims" that might be made against the insured. The settlement agreement was subject to New York Arbitration pursuant to the rules of the American Arbitration Association ("AAA"). Two months after the settlement agreement was concluded, the insured notified INA that the insured had been named as a defendant in various lawsuits brought by non-employee contractors claiming harm from exposure to asbestos ("Asbestos Claims"). Although INA issued a reservation of rights letter, it only denied coverage 18 years after it was notified of the Asbestos Claims and 9 years after the insured made a formal demand for payment under its policy. INA cited the parties' earlier settlement agreement as a basis for declining coverage. INA then commenced arbitration under the settlement agreement seeking a declaration of non-liability and the insured commenced an action seeking to stay the arbitration pursuant to 9 U.S.C. § 3 of the FAA. Had INA waived its right to assert the settlement agreement as a defense under the policy? Judge Cote concluded that the issue was one for the arbitrators to decide and thus stayed the action in favor of arbitration.

In reaching its decision, the Court distinguished "questions of arbitrability" from "gateway procedural issues," with waiver falling into the latter category. Whereas, arbitrability is presumptively an issue for the Court, gateway procedural disputes go to the issue of whether an arbitration clause in an otherwise undisputed arbitration agreement "applies to a particular type of controversy." Nevertheless, the Second Circuit in its 2017 decision in *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017), had reaffirmed that waiver of arbitration through participation in litigation, could be decided by the district court. Here, however, the insured's waiver argument was not premised on INA's "litigation conduct." Therefore, absent a contrary intent to shift determination of gateway issues to the court, the presumption remained that the issue of waiver based on INA's conduct, should be decided by the arbitrators.

Finally, the Court considered whether N.Y. Insurance Law § 3420 provided the insured a defense outside the scope of the parties' arbitration agreement. The Court framed this argument as a "question of arbitrability" because it was directed to the merits of the parties' dispute, as opposed to a procedural defense. Reviewing New York state and federal court decisions, the Court noted that parties to an arbitration may through "clear and unmistakable" language authorize arbitrators to decide arbitrability issues. In addition, parties can reflect their intent to delegate arbitrability by incorporating the rules of an arbitration association that empowers arbitrators to decide such questions. In applying these principles, the Court concluded that the broad language of the arbitration clause, as well as the incorporation of AAA rules, required the arbitrators to decide arbitrability issues as well as gateway procedural disputes.

h. Preliminary Injunction to Stay Arbitration against Putative Alter Egos Denied

***Royal Wine Corp. v. Cognac Ferrand SAS*, 2018 N.Y. Misc. LEXIS 703 (Sup. Ct. N.Y. Cty 2018):**

The defendants in this action had entered into a 5-year contract to import non-Kosher products into the North American market. The agreement also required the importer to enter into an endorsement agreement with the rap artist Snoop Dogg. The agreement was subsequently terminated by the exporter due to the importer's insolvency and the importer commenced arbitration to collect a termination fee. The exporter denied liability and also asserted various counterclaims. The exporter prevailed on its counterclaims in the liability phase of the arbitration, but a second arbitration to determine damages was stayed after the importer filed for bankruptcy.

After the bankruptcy action was concluded, the exporter again commenced a second arbitration asserting the same counterclaims made in the first arbitration. However, the exporter also asserted alter ego claims against the plaintiff, Royal, as well as the importer's principals. Royal was a minority shareholder of the importer, holding less than 2.5% of its shares.

Royal then commenced the present action seeking to stay the second arbitration on various grounds and seeking a determination of its alter ego status. Finding that Royal was not a signatory to the arbitration agreement between the importer and exporter, the Court held that Royal lacked standing to stay the second arbitration simply. Effectively, Royal was seeking to assert the importer's defenses while at the same time denying that it was the importer's alter ego. The Court found that Royal "may not have it both ways: if Royal is an alter ego of [the importer], it may not avoid the arbitration clause; if it is not an alter ego of [the importer], it has no right to interfere with the arbitration." Royal, therefore, could not establish the necessary elements for a preliminary injunction.

FIFTH CIRCUIT

a. Consent Award Sufficient to Confer Subject Matter Jurisdiction

***Transocean Offshore Gulf of Guinea VII Ltd. v. Erin Energy Corporation*, 2018 WL 1251924 (S.D. Tex. Mar. 12, 2018):**

In *Transocean Offshore Gulf of Guinea VII Ltd.*, Petitioners moved the United States District Court for the Southern District of Texas to enforce arbitral awards and for entry of final judgment under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). Petitioners' motion stemmed from a consent award entered by the London Court of International Arbitration. *Id.* at *1. Erin Energy Corporation ("Respondent") moved to dismiss Petitioners' motion for lack of subject-matter jurisdiction.

The dispute between the parties arose "over a contract for drilling equipment, personnel, and services in the waters off the coast of Nigeria." *Id.* at *1. Petitioners filed suit to enforce Respondent's payment of the amounts it owed under the arbitral consent award. Respondent argued that the consent award was not subject to the Convention and that the Southern District of Texas lacked subject-matter jurisdiction. *Id.* at *2. Specifically, Respondent argued that because the Convention was silent on its applicability to decisions that record the terms of a settlement between parties, such silence meant that the Convention was not intended to apply to consent awards. *Id.* Respondent further cited to the London Court of International Arbitration's rules "as evidence that consent awards are treated differently from other arbitral awards." *Id.*

Chief Judge Rosenthal, writing for the Court, first recognized that the Convention grants district courts subject-matter jurisdiction over actions to confirm arbitral awards to which the Convention applies. *See* 9 U.S.C. § 203. The Court next recognized that "if a party applies for an order confirming an arbitral award, the court—assuming jurisdiction—must confirm the award unless there are grounds for vacating, modifying, or correcting it. 9 U.S.C. § 207." *Id.* at *3.

Citing to *Albtelecom SH.A v. UNIFI Commc'ns, Inc.*, 2017 WL 2364365 (S.D.N.Y. May 30, 2017), "a case with analogous facts and legal issues," and finding that the Southern District of New York's analysis was "thorough and persuasive," the Court noted that the Southern District of New York "held that an award 'entered into by consent of the parties, as opposed to being based on an arbitrator's resolution of the factual and legal disputes,' [is] covered by and subject to the Convention." *Id.* at *4 (citing *Albtelecom*, 2017 WL 2364356 at *5). The Court concluded that Petitioners and Respondent "did not dismiss the arbitration. Rather, they opted to continue the arbitration proceedings even after they came to their own agreement. While the tribunal did not make findings or reach legal conclusions, it made an award that bound the parties, within its power." *Id.* Because the consent award was subject to the Convention, the Court concluded that it had subject-matter jurisdiction under 9 U.S.C. § 203 to confirm the arbitral awards. Concluding that there was no basis to vacate or modify the award, the Court granted Petitioners' motion to enforce the arbitral awards and denied Respondent's motion to dismiss for lack of subject-matter jurisdiction. *Id.* at *6.

b. No Grounds for Vacatur of Houston Maritime Arbitrators Association Award

***Ranger Offshore Mexico, S. de R.L. de C.V. v. Grupo Tradeco, S.A. de C.V.*, No. 4:15-CV-00635, 2018 WL 780707 (S.D. Tex. Feb. 7, 2018):**

In *Ranger Offshore Mexico,* a federal judge in the Southern District of Texas affirmed a Houston Maritime Arbitrators Association award in a dispute over unpaid chartering fees, finding that the arbitrators made no errors on attorneys' fees or procedural delays in their decision.

The dispute arose between Plaintiff Ranger Offshore Mexico (Ranger) and Defendant Tradeco over an agreement to charter the offshore vessel *MV Lewek Touca*n (the "Vessel") for Tradeco's use in a pipeline project. Due to project delays, the Vessel was never used on the intended project. Thereafter, the parties agreed to amend the Charter and suspend payment of charter hire for a period of time, after which Tradeco would resume payment. During this time, Grupo Tradeco also signed a guarantee agreeing to unconditionally pay any amount due to Ranger in connection with the Charter. Under the amendment, Tradeco agreed to issue six unconditional "Pagares," which are similar to promissory notes. After the suspension period ended and the Vessel was returned to Tradeco, Tradeco challenged the Vessel's seaworthiness and refused to accept its redelivery.

After several months of discovery and a nine-day hearing, the three-member arbitration panel issued a Partial Final Award in favor of Ranger and later a Final Award awarding Ranger $17,598,980.76 in damages and $1,963,222.10 in attorneys' fees.

In attempting to vacate the arbitration award, Defendants contended that the Panel exceeded its authority in its calculation of attorneys' fees because it awarded fees paid by Ranger Offshore, Inc. (ROI), Ranger's parent company. The Court found that the Panel did not exceed its authority because even though ROI paid for the attorneys' services, Ranger was the entity that incurred the costs of those services by retaining the attorneys to represent it throughout the arbitration.

Defendants also argued that the arbitration award was not final because the award was allegedly conditional on the enforceability of the Pagares which the Panel did not address. The Panel found that four of the six Pagares were never delivered to Ranger, and therefore unenforceable. As to the remaining Pagares, the Panel held that it did not have jurisdiction over the two Pagares that were delivered and did not include the amount they represented as part of the award. As a result, the outcome of the arbitration award was not conditional on the enforceability of the Pagares.

Lastly, Defendants argued that the award should be vacated because the Panel refused to postpone the arbitration hearing on the basis that two separate "Mexican Agreements" between the parties mandated that the arbitration take place in Mexico under Mexican law. In denying Defendants' motion to postpone, the Panel noted that the Defendants had participated in over a year's worth of pre-arbitration proceedings and discovery without ever questioning the validity of the Charter's arbitration clause. The Southern District of Texas found that there were several reasonable bases upon which the Panel denied defendants' request, including the amount of delay, the untimeliness of the request less than two months before the hearing, and that the parties had initially agreed that there were "no pending or anticipated parallel or duplicate proceedings." Moreover, the Court found that the "Mexican Agreements" were irrelevant to the issues before the Panel because the basis for the arbitration was Defendants' refusal to pay overdue amounts under the Charter, and the subsequent guarantee and amendment of same.

c. Manifest Disregard Standard not Ground for Refusing Enforcement under New York Convention

***OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, No. CV H-09-891, 2017 WL 4351758 (S.D. Tex. Oct. 2, 2017):**

The *OJSC Ukrnafta* case stems from a joint venture agreement ("JV") between the plaintiff OJSC Ukrnafta ("Ukrnafta") and Carpatsky Petroleum Corporation ("CPC"), Texas, along with a joint activity agreement ("JAA") and amendments thereto.

The agreement required that disputes be submitted to arbitration. The branch of CPC that entered into the agreements was a Texas corporation referred to as CPC-Texas. CPC then merged into a new Delaware entity referred to as CPC-Delaware. The agreement was amended in 1998 to require that arbitration take place in Stockholm, Sweden, by the Arbitration Institute of the Stockholm Chamber of Commerce and that the case would be conducted pursuant to the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules and the "material law of Ukraine."

CPC-Delaware referred a dispute to the Arbitration Institute of the Stockholm Chamber of Commerce pursuant to this provision on September 28, 2007. On Feb. 3, 2008, Ukrnafta filed a petition in the 190th Judicial District Court of Harris County Texas against CPC-Delaware, et al asserting that it signed the JV and JAA with CPC-Texas, which was a company incorporated in Texas. However, CPC-Texas merged with CPC-Delaware (which was the surviving entity), and Ukrnafta contended that CPC-Texas did not inform it that it was going out of business and wished to substitute a new company to take its place in the JAA. Ukrnafta contended that this failure to inform it of the change was inconsistent with the agreements between the parties and contrary to the requirements of Ukrainian law, which governs the agreements. Ukrnafta also contended that subsequent to the merger, CPC-Delaware signed amendments to the agreements, including the Amended JAA, using the CPC-Texas corporate seal. Ukrnafta asserted causes of action for negligence, fraud, misappropriation of trade secrets, tortious interference with existing contract and unjust enrichment and sought a declaratory judgment, permanent injunction and fees. CPC removed the case to the U.S. District Court for the Southern District of Texas pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitration Awards.

On April 4, 2009, CPC filed a motion to stay pending a decision by the Swedish arbitration tribunal, which was granted by the court. The case effectively remained stayed until Feb. 1, 2017 due to ongoing appeals of the arbitration in Sweden. At which time, CPC sought to confirm the arbitration award under the New York Convention and dismiss Ukrnafta's claims.

CPC argued that the District Court had secondary jurisdiction over the case and could determine only whether the award should be enforced within its jurisdictional boundaries and that the tribunal's findings were entitled to deference because Sweden was the primary jurisdiction.

Ukrnafta first made a procedural argument which the court found to have no real impact on the matter. Ukrnafta also argued that the award should not be enforced under Article II of the Convention, which requires that the agreement to arbitrate is in writing, because Ukrainian courts had found that the agreement was signed by an entity that no longer exists and was thus void. Ukrnafta further argued that the court should refuse to enforce the award under Article V of the New York Convention for the following reasons: (1) the arbitration agreement is invalid; (2) Ukrnafta did not have an opportunity to present its case; (3) the award was beyond the scope of the purported agreement to arbitrate; (4) the arbitration was not in accordance with the agreement of the parties; and (5) enforcement of the award would be contrary to public policy. Ukrnafta additionally asserted that the court should set aside the award because the tribunal manifestly disregarded the parties' agreement or the law. Ukrnafta's final argument was that dismissal of Ukrnafta's claims was not appropriate because Ukrnafta's claims were not the same as the issues addressed in the arbitration.

In reply, CPC argued that the Ukrainian courts' rejection of the award is not subject to deference as Ukraine constitutes a secondary jurisdiction. CPC argued that the court could consider the defenses only under Article V of the Convention and that Ukrnafta failed to prove any of its defenses. Lastly, CPC argued that all of Ukrnafta's claims should be dismissed as barred by res judicata and collateral estoppel.

A district court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition of enforcement ... specified in the [New York] Convention." Only courts in countries with "primary jurisdiction" can annul the award. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Karaha II)*, 364 F.3d 274, 287 (5th Cir. 2004). Courts in the countries in which or under the laws of which the arbitration took place have primary jurisdiction. *Id.* "Other countries with jurisdiction to enforce an award have what is referred to as "secondary jurisdiction." *Id.* "[A] court with secondary jurisdiction is limited to deciding whether the award may be enforced in that country." *Id.* Courts with primary jurisdiction may evaluate "a request to annul or set aside the award," but courts with secondary jurisdiction may only refuse enforcement under the specific grounds enumerated in Article V of the Convention." *Id.* at 288. A court of secondary jurisdiction "may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of law or fact." *Id.*

On the issue of whether the agreement was in "writing" under Article II of the Convention, the Court found that it had secondary jurisdiction and thus could only refuse to enforce under one of the grounds outlined in Article V (not Article II).

The Court then rejected all of Ukrnafta's Article V arguments against enforcement of the award. First, the Court found that there was a strong presumption that the procedural law of the place of arbitration applies and buttressing that presumption was the fact that at least one of the Swedish court opinions indicated that the parties agreed that Swedish procedural law applied. Thus, the Court found that the procedural law of Sweden applied and that Sweden was therefore the only primary jurisdiction. Because the award had not

been set aside by Sweden, the court could not refuse to enforce the award under Article V(1)(e). The Court also found that Ukrnafta had sufficient notice of the issues in the case and had ample opportunity to present evidence to the panel. In addition, the court held that it was up to the arbitral tribunal to determine if the agreement was valid, which it did, and thus the court could not refuse to confirm the award under Article V(1)(d) of the convention. Ukrnafta final Article V argument was that the award was contrary to public policy because it would require illegality in the performance of a contact that the Ukraine courts had ruled was null and void. However, the court rejected this argument finding that the relevant inquiry was the public policy of the *enforcing country*, in this case the U.S., which strongly favors the enforcement of awards.

The Court also found that the manifest disregard standard did not apply because it "is not among the exclusive bases for non-enforcement listed in Article V of the Convention" and that Ukrnafta failed to show that the tribunal deliberately disregarded what it knew to be the law to reach a particular result.

On the last issue of the res judicata and collateral estoppel effects of the arbitral finding on Ukrnafta's claims against CPC, the court found that the issue was not sufficiently briefed by the parties for the court to make a case-by-case determination and thus denied the request without prejudice to refiling.

NINTH CIRCUIT

a. Employment Contract Requires Arbitration

***Jean Luc Van Wyk v. Princess Cruise Lines, Ltd.; Carnival PLC; and Carnival Corp.*, 2:17-cv-9113 (C.D. CA, Mar. 13, 2018):**

Plaintiff, Jean Luc Van Wyk, was hired as the assistant photo manger on the Emerald Princess. His employment contract ("Contract") stated "all disputes of any kind or nature whatsoever … shall be resolved by binding arbitration in Bermuda." On July 25, 2017, while underway, he was directed by the Vessel's security team to photograph the scene of a murder that took place in a cabin. This resulted in nearly 100 graphic photos of a bloody scene. He immediately began suffering from severe emotional distress, anxiety and panic. He reported these symptoms and was given one day off, during which time he was required to print color copies of the photos which further aggravated his condition. It was not until November 2017 that he was provided proper maintenance and health care. Plaintiff filed suit in December 2017 pursuant to maintenance and cure, among other causes of action.

In response, the Defendants filed this motion to compel arbitration. In deciding the motion, the Court looked to 1) whether it was a valid agreement to arbitrate and 2) whether the agreement encompassed the dispute at issue. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.2d 1126, 1130 (9th Cir. 2000). Plaintiff did not argue the arbitration clause was invalid but instead that it deprived him of the right to recover for maintenance and cure because Bermuda does not have a comparable claim. The Court disagreed finding Bermuda adopted a law providing for the functional equivalent of

maintenance and cure and that the Contract provided for a substantially similar remedy through medical care, daily stipend during treatment and continued wages. Finally, the Court looked to *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (quoting *Mitsubishi Motors*, 437 U.S. at 637 n. 19), which allows Courts to "invalidate on 'public policy' grounds, arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's *right to pursue* statutory remedies." However, because maintenance and cure is a common law, not statutory, remedy, they found this doctrine of "effective vindication" does not apply.

Moving on to the second element, Plaintiff argued that when the parties agreed to arbitration, neither party could possibly have imagined he would photograph a murder scene. The Court, however, found the arbitration clause was sufficiently broad, covering "any and all disputes", that it covered his activities. As such, the motion was granted and entire action dismissed.

b. Non-Signatory Could not Compel Arbitration Under New York Convention

***Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017):**

Relying on statutory construction that non-signatories cannot compel arbitration, the Ninth Circuit affirmed the district court's order denying the vessel owner's motion to compel arbitration against the wife of a seaman who died in a sinking fishing vessel.

Dongwon Industries Co. Ltd ("Dongwon") supplied crew and supervised maintenance and repairs on F/V Majestic Blue, owned by Majestic Blue Fisheries, LLC. F/V Majestic Blue set sail with a known rudder leak and three weeks later flooded and sank. Chang Cheol Yang died after re-boarding the vessel to look for the Captain. The widows of both Mr. Yang and the Captain filed wrongful death actions premised on inadequate repairs and incompetent crew. The Captain's widow successfully litigated her case, but Mrs. Yang's case was delayed by the Defendants seeking to enforce an arbitration clause signed by "Dongwon 'on behalf of MAJESTIC BLUE FISHERIES, LLC.'" The District Court compelled arbitration against Majestic but denied Dongwon's motion.

To compel arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention Act"), 9 U.S.C. §201 *et seq.*, you must prove "an agreement in writing" *Balen v. Holland Am. Line Inc.*, 583 F.3d 647,654-44 (9th Cir. 2009). The Convention Act implements a Treaty, by the same name, which defines "agreement in writing" to "include an arbitral clause in a contract or an arbitration agreement, signed by the parties…" Convention Treaty, art. II(2). Dongwon argued "signed by the parties" modified only "arbitration agreement" and not "arbitral clause." The Court disagreed looking to canons of construction relating to punctuation and comma placement; how foreign versions of the Treaty were crafted; legislative history; and other Circuit's interpretation, to conclude that "signed" applied to both the agreement and the clause. In making this finding, the Court relied on *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, 186 F.3d 210, 215-18 (2d Cir. 1999) but also dismissively concluded

that only a party to the agreement may litigate its enforcement, and Dongwon was not. Convention Treaty, art. IV(a), V(1)(a), VI.

Dongwon also looked to federal arbitration law to compel arbitration. However, seaman employment contracts are expressly exempted under the Federal Arbitration Act, 9 U.S.C. §1 *et seq*. *See also*, *Rogers v, Royal Caribbean Cruise Lines*, 547 F.3d 1148, 1152-53 (9th Cir. 2008). Despite this, Dongwon asked the Court to permit a non-party to invoke arbitration under the FAA if state contract law allows enforcement of the agreement. *Kramer v. Toyota Corp.*, 705 F.3d 1122, 1128 (9th Cir 2013). This approach was rejected by the Court holding that, to the extent the FAA provides for arbitration of disputes between non-signatories or non-parties, it conflicts with the Convention Treaty and does not apply. Furthermore, no state law provided Dongwon a basis to arbitrate based on its claims of equitable estoppel, agency or alter ego. First, equitable estoppel did not apply to claims that are independent of the employment agreement containing the arbitration provision. *Kramer*, 705 F.3d at 1131. Alter-ego and agency theories also fail as Dongwon failed to raise these arguments in the District Court and furthermore affirmatively represented that the two companies were "separate and distinct." Moreover, public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement. *Comedy Club, Inc. v. Improv. W. Assocs.*, 553 F.3d 1277, 1287 (9th Cit. 2009)

c. Marine Insurance Policy Arbitration Clause Delegates Arbitrability Issues to Arbitrators

***Galilea, LLC v. AGCS Marine Insurance Company*, No. 16-35474 and 35475 (9th Cir. Jan. 16, 2018):**

The Ninth Circuit affirmed in part and reversed in part the district court orders finding an arbitration provision in the maritime insurance policy enforceable despite law in the forum state precluding its application.

Taunia and Chris Kittler ("Kittlers") were the sole members of Galilea, LLC ("Galilea") which purchased a yacht. They sought insurance coverage through Pantaenius America Ltd ("Pantaenius") who acted as agent for various underwriters. Galilea submitted a hand-signed application to Pantaenius in which three underwriters were listed and included an arbitration clause. One day after submitting the application, Pantaenius issued an insurance binder and the next day it issued the formal policy, effective in a specific "cruising area." The final contract differed from the application in that it identified federal maritime law and applied New York law to any gaps, and changed the scope of arbitrable disputes from "any disputes arising out of or relating to the relationship" to "any and all disputes arising under this policy." A month later, the Yacht ran ashore in Colón, Panama which, according to Pantaenius, was south of the cruising area. Galilea disputed their denial of coverage saying the application and policy did not reflect their actual agreement and Pantaenius and the Underwriters misrepresented the scope. In response the Underwriters initiated arbitration in New York. Galilea responded

filing suit in Montana; Underwriters filed a separate action in S.D.N.Y to enforce the arbitration clause. The decision dealt with "gateway" questions of arbitrability.

The first question was whether a document constitutes a contract. While questions as to the validity of a contract can be decided by an arbitrator, challenges to the existence of the contract go before a court. *Kum Tat Ltd. V. Linden Ox Pasture, LLC*, 845 F.3d 979, 983 (9th Cit. 2017). The Court concluded the application did not evidence mutual assent and was not a contract. The application contained a choice of law and forum selection clause for New York. Therefore evaluating it under New York law, in order for the language to be incorporated into the insurance policy, it must be physically attached to the policy or directly incorporated therein. *Smith v. Pruco Life Ins. Co. of N.J.*, 710 F.3d 476, 479-80 (2nd Cir. 2013) (internal citations omitted). Neither of these steps was taken.

The Court then evaluated if Montana law would apply to the dispute. Galilea argued Montana public policy overrides arbitration provisions and is not preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. §1-16. See, McCarran-Ferguson Act, 15 U.S.C. §1012 (shielding state insurance laws from federal preemption). Looking to *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313 (1955), the first determination is whether there is an established federal maritime law principle and where there is an absence, or a need for uniformity, state law will control. In this case, there was a clear federal law, the FAA, which expressly provided for enforcement of arbitration provisions in maritime contracts. Galilea next sought to apply Montana's Uniform Arbitration Act which nullified arbitration clauses in insurance policies unless the contracts were between insurance companies. The Court took a step back reiterating that, based on choice-of-law, New York law, if any, would apply. The only connection to land-locked Montana was that the owners of Galilea were Montana residents. It then circled back noting first, this is a maritime insurance policy; second, there is federal maritime law which applies here – the FAA; third, since there is federal law, state law is not necessary. Last, the Court dismissed Galilea's argument to apply *M/S Bremen v. Zapata Offshore Co. (The Bremen,* 407 U.S. 1 (1972) stating it did not discuss federal maritime rules about choice of law but rather forum selection clauses. Additionally, its argument to apply state law in the interest of public policy was not relevant. The Court assessed "[i]t does not make sense to apply the federal maritime choice-of-forum rule to *The Bremen* to invalidate *another* established federal maritime rule specifically addressing the appropriate forum – here, arbitration – because of a conflict with a forum *state's* public policy. Within federal admiralty jurisdiction, conflicting state policy cannot override squarely applicable federal maritime law."

Last, but not least, the Court found the parties delegated arbitrability issues to the Arbitrator. Although the FAA has a presumption against arbitrability of arbitrability, see *Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 920 (9th Cir. 2011), where sophisticated parties incorporate the AAA rules, which permit an arbitrator to rule on his/her own jurisdiction, it is clear evidence the parties intended to arbitrate arbitrability. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015). The court concluded that the fact the Kittlers formed an LLC under Nevada law, owned a yacht valued at over a

million dollars and Mr. Kittler owned a financial services company, evidenced their sophistication.

In sum, the Court concluded the insurance application did not have an enforceable arbitration agreement; the policy's arbitration clause fell under the FAA to which federal maritime choice-of-law principles, not Montana, applied; and finally that the parties agreed to resolve questions of arbitrability in arbitration. Thus, the Underwriter's motion to compel arbitration was granted in its entirety.

ELEVENTH CIRCUIT

a. Proper Venue for Arbitration is for Arbitrators to Decide

***Bamberger Rosenheim, Ltd., (Israel) v. OA Dev., Inc., (United States)*, 862 F.3d 1284 (11th Cir. 2017)*, cert. denied sub nom. Bamberger Rosenheim, Ltd. v. OA Dev., Inc.*, 138 S. Ct. 654, 199 L. Ed. 2d 587 (2018):**

Bamberger Rosenheim, Ltd., (Israel), involves an international arbitration dispute between Bamberger (also referred to as Profimex), an Israeli company, and OAD, an American real estate developer, arising from purported breach of the parties' Solicitation Agreement. The Solicitation Agreement included the following agreement to arbitrate:

> Any disputes with respect to this Agreement or the performance of the parties hereunder shall be submitted to binding arbitration proceedings conducted in accordance with the rules of the International Chamber of Commerce. Any such proceedings shall take place in Tel Aviv, Israel, in the event the dispute is submitted by OAD, and in Atlanta, Georgia, in the event the dispute is submitted by Profimex.

After relations between the parties deteriorated, Profimex commenced arbitration in Atlanta against OAD for breach of contract. In the same Atlanta arbitration, OAD submitted a counterclaim alleging that Profimex had defamed OAD in statements to Israeli investors. Profimex objected to the counterclaim's arbitration in Atlanta, arguing "that a 'dispute submitted by OAD' [must] be arbitrated in Tel Aviv, Israel." The arbitrator, however, determined that venue for the defamation counterclaim was proper in Atlanta, in part, because the "dispute" was submitted by Profimex. The arbitrator ultimately found Profimex liable on OAD's defamation counterclaim.

Profimex filed a petition to vacate the arbitrator's defamation award in federal district court, and OAD filed a petition to confirm the award. Profimex raised several grounds for vacatur and defenses against confirmation. However, the district court confirmed the arbitral award and Profimex appealed.

The dispositive issue on appeal was whether a question about the venue of an arbitration is itself arbitrable. The Court held "that disputes over the interpretation of forum selection clauses in arbitration agreements raise presumptively arbitrable procedural questions;"

however such clauses determine *where* an arbitration is conducted, "not *whether* there is a contractual duty to arbitrate at all." As a result, the Court deferred to the arbitrator's interpretation of the venue provision and the determination that the "dispute" was submitted by Profimex. The Court also rejected Profimex's argument that the international character of the dispute made venue more like a question of arbitrability than it would be in a domestic dispute.

b. Rule B Attachment and Georgia State Court Attachment Remedy Denied to Secure Potentially Favorable London Award

***SCL Basilisk AG v. Agribusiness United Savannah Logistics LLC*, 875 F.3d 609 (11th Cir. 2017**):

In *SCL Basilisk AG*, the United States Court of Appeals for the Eleventh Circuit affirmed the United States District Court for the Southern District of Georgia's denial of a request for posting of security that was not authorized by Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Action, Georgia law, or principles of maritime law.

The case arose out of a charter dispute between the plaintiffs-vessel owners and the charterer arising from the carriage of grain from New Orleans to Portugal and Morocco. On a claim unrelated to the dispute between the parties, the M/V SCL BASILISK was detained pursuant to a writ of attachment issued in the Eastern District of Louisiana at the request of a non-party. The plaintiffs incurred damages as a result of the delay caused by the attachment, and thereafter instituted arbitration proceedings against the charterer, as required by the charter agreement, in London. The plaintiffs then filed a "Petition and Application for an Order for Security in Aid of Foreign Arbitration Pursuant to O.C.G.A. § 9-9-30"[2] in the Southern District of Georgia, seeking $667,528.86 to secure a possible judgment in the pending arbitration in London.

In the petition, the plaintiffs identified each of the defendants as having registered agents in Georgia. *Id.* at 612. In denying the petition, the district court explained that while Supplemental Rule B allows entities to sue in personam and attach property as security for a claim, Supplemental Rule B requires that the plaintiff or the plaintiff's attorney sign and file an affidavit stating that the defendant cannot be found within the district. Because all defendants were "present in some fashion in this district," the plaintiffs could not meet the requirements of Rule B. *Id.* at 613. In denying the plaintiffs' claim under O.C.G.A. § 9-9-30, the district court noted that it could apply state law to supplement maritime law if the result did not "frustrate national interests in having uniformity in admiralty law." *Id.* at 613. The district court concluded that "section 9-9-30 did not have the expansive scope that the plaintiffs attributed to it. Instead, it simply permitted the court to grant remedies otherwise available under federal and Georgia law. It did not create new remedies." *Id.* at 614.

[2] O.C.G.A. § 9-9-30 states that "[b]efore or during arbitral proceedings, a party may request from a court an interim measure of protection, and a court may grant such measure, and such request shall not be deemed to be incompatible with an arbitration agreement."

The Court of Appeals for the Eleventh Circuit affirmed the district court. The Court of Appeals concluded that Rule B "cannot be used purely for the purpose of obtaining security: ... security cannot be obtained except as an adjunct to obtaining jurisdiction." *Id.* at 622 (citing *Nehring v. Steamship M/V Point Vail*, 901 F.2d 1044, 1051 (11th Cir. 1990). The Eleventh Circuit further concluded that O.C.G.A. § 9-9-30 does not grant courts authority "to create new substantive remedies; rather it confirms that a court's grant of interim relief, utilizing existing state remedies, is not inconsistent with submitting a merits determination to an arbitrator." *Id.* at 620.