

# SMA THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

Volume 50 / No. 2

March 2020

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## President's Message

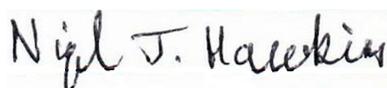
We recently completed a project to give ourselves a new look which we will use across the various means by which we communicate with others. You will notice our new look in this "ICMA Issue" of The Arbitrator.

The SMA has supported ICMA since its inception in 1972. We are proud that SMA members are attending in Rio de Janeiro and are presenting papers.

Closer to home, we had another successful luncheon on February 12. Our speaker was Gina Venezia, of Freehill Hogan and Mahar, who spoke to us about sanctions which have become an important topic for maritime and related industries.

Luncheons are a great opportunity to meet fellow members as well as service providers who support the SMA and on whose support we depend. The March luncheon will be held on the 18th and Chris Nolan of Holland & Knight will be our featured speaker. John Weale, the chair of the BIMCO Gencon Revision Committee, will be our speaker for our April 8 luncheon.

Members of the Board of Governors and SMA committees are arranging small group, one-on-one, meetings with end-users and brokers in the Tri-State area and beyond. We perform a good service with able members, and therefore there is no reason why parties, US and non-US, should not have their disputes heard and decided, or mediated, by SMA members.



Nigel J. Hawkins  
President



# ICMA Over the Years

**by David Martowski,  
SMA, New York**

By way of brief background,<sup>1</sup> ICMA was launched in 1972 by its founding father, Cedric Barclay, President of the London Maritime Arbitrators' Association. He and fellow London arbitrators Clifford Clark and Donald Davies, the Presidents of the New York SMA and Paris Chambre Arbitrale Maritime, were attending a meeting of international commercial arbitrators in Moscow. They were invited by Soviet maritime arbitrators to informally discuss maritime arbitration, and, as it turned out, this constituted ICMA's first meeting.

The idea soon spread, and through the support of Cedric Barclay's contacts in the Greek shipping community the next Congress held in Athens in 1974 was attended by international maritime arbitrators, lawyers and shipping executives from twenty nations. ICMA Congresses followed over the years in Santa Margarita, London (twice), New York (twice), Monte Carlo, Casablanca, Madrid, Hamburg (twice), Vancouver (twice), Hong Kong (twice), Paris, Auckland, Singapore and most recently, in 2017, Copenhagen.

The Congresses provide an unusual opportunity for delegates to deliver papers and discuss a variety of timely subjects and issues involving international maritime arbitration and for the presentation of the Cedric Barclay Memorial Lecture in honor of ICMA's founding father.

Our common interest is resolving disputes in the most global of industries, and the papers and discussions that follow transcend national and political issues, often paving the way for more uniformity.

ICMA is run by a Steering Committee consisting of one permanent member each from London and New York, the immediate past host, and the host of the coming venue. I succeeded Manfred Arnold who served as the New York Committee member for many years, and Clive Aston, then President of the London Maritime Arbitrators' Association, succeeded Bruce Harris as the London Committee Member. I chaired the Committee of ICMA XX with our colleagues, Philip Yang of Hong Kong, immediate past Topics & Agenda Committee Chair of that

Congress, and Peter Schaumburg-Muller of Copenhagen. The Committee Chair is rotated between the two permanent members from London and New York.

The Steering Committee's main functions are to appoint a chairperson of the Topics & Agenda Committee for each ICMA, select the next speaker for the Cedric Barclay Memorial Lecture and select the venue for the next ICMA.

ICMA XX held in Copenhagen on September 25-29, 2017, was a great success attended by 250 delegates from 35 countries. Australia's Peter McQueen chaired the Topics & Agenda Committee which selected 120 papers for presentation. Bruce Harris, former President of the London Maritime Arbitrators' Association, presented the Cedric Barclay Memorial Lecture, summarizing the challenges he had seen in London arbitral practice over the years. The working sessions were kicked off by John Kimball who presented "New York Arbitral Highlights" – as he will do again this year in Rio. Brazil, Dubai and Malaysia submitted outstanding bids to host ICMA XXI and the Steering Committee's decision was a difficult one. Rio was announced as our next venue at the Closing Ceremony, and I passed on the Committee's Chairmanship to Clive Aston.

The current Steering Committee is composed of Chairman Aston, me, Previous Host Committee Chairman Peter Schaumburg-Muller of Copenhagen, and Camila Vianna Cardoso, who also chairs the Rio de Janeiro Host Committee.

Camila and her Host Committee have assembled an outstanding Congress which will be attended by 200 delegates from 29 countries. Justice Ellen Gracie Northfleet, Former President of Brazil's Federal Supreme Court, will present the Cedric Barclay Memorial Lecture at the Opening Ceremony on Monday, March 9th. London's Daniella Horton Chairs the Topics & Agenda Committee, which has selected 108 papers for presentation – including several by New York delegates.

The Steering Committee has received bids from Dubai and Singapore to host ICMA XXII to be held in 2023 and will render its decision at our Closing Ceremony on Friday, March 13th.

You are sure to find ICMA a stimulating and enjoyable professional and social experience in wonderful and vibrant Rio, as well as an unusual oppor-

tunity to meet and share notes with the leading international maritime arbitrators, attorneys and shipping giants of our time.

Enjoy!

1 Thanks to Manfred Arnold.

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## Sanctions Considerations for Maritime Arbitrators\*

*by John R. Keough and Thomas P. Myers,  
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The United States has generally imposed economic sanctions against countries and groups to discourage malign or terrorist activities, ranging from continuing human rights violations to the pursuit of nuclear armament.<sup>1</sup> In recent months, the U.S. has increased the force and scope of its sanctions regimes and has targeted the shipping sector in particular, directing a “maximum pressure” campaign on enforcement of Iran and Venezuela sanctions. As foreign policy and sanctions focus more closely on the maritime and shipping supply chains, maritime arbitrators in New York, generally considered “U.S. Persons” within the meaning of U.S. sanctions law, face a growing risk that U.S. sanctions could apply in disputes to which they are appointed—and could even expose the arbitrator to sanctions.<sup>2</sup>

Such exposure imposes the burden on those arbitrators to recognize the risk and to consider the due diligence and other requirements necessary to comply with the relevant sanctions. This Note seeks to raise awareness of that issue by summarizing some potential pitfalls and by offering helpful considerations.<sup>3</sup>

The sanctions regimes thus pose traps for the unwary, including the substantial risks that banks may not process arbitrators’ fee payments or awards or that the provision of an arbitral service could confer a significant value or material benefit in violation of sanctions. Sanctions considerations may also arise in maritime disputes where the arbi-

trators are invited to interpret a sanctions exclusion clause in a charterparty, or where sanctions call into question or prohibit the conduct of the arbitration by contractually appointed New York arbitrators.

### I. Intersection of Sanctions and Maritime Arbitration

Although the U.S. government aims that sanctions impact those who are targeted or in the targeted country, the collateral impact of sanctions stretches far wider—both to persons and entities associated indirectly with the targets and to geographic areas outside the sanctioned regions. This sweeping reach of U.S. sanctions mandates that all persons who engage in transactions or similar activities that touch designated or blocked parties must be mindful of the sanctions risks and avoid running afoul of them. Maritime arbitrators often address disputes flavored with an international scope of diverse businesses and principals in the shipping sector, often with layered, obscure and complex structures. Given this playing field, maritime arbitrators in New York would be prudent to become familiar with the impact that U.S., as well as EU and UN, sanctions programs have on their work.

The U.S. Department of State imposes and implements sanctions under various legal authorities, and the Office of Foreign Assets Control (“OFAC”) of the U.S. Department of the Treasury administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals.<sup>4</sup> In recent months, U.S. sanctions officials have publicly stressed that they are targeting the maritime sector, including marine insurers, flag registries, ship owners, managers and charterers. Sanctions compliance or enforcement can often disrupt vessel or cargo operations, resulting in delays for vessels and in other chartering issues. Moreover, U.S. sanctions programs can include secondary sanctions, which apply to non-U.S. persons, including third parties engaging with targeted entities. Further, the burden of complying with sanctions rests with the individual parties, as the prohibitions apply regardless of whether the party knowingly violates sanctions.<sup>5</sup> Managing such sanctions risk, therefore, requires that arbitrators gain and maintain awareness of the potential scope and application of such sanctions.<sup>6</sup>

Arbitrators must consider the risk of potentially violating sanctions. An arbitrator may be subject to OFAC enforcement action where the arbitrator is considered a U.S. person, or be subject to designation or secondary sanctions if considered a non-U.S. person. Arbitrators provide a service, value and a benefit to the parties involved. Where arbitrators render that service to a party subject to U.S. sanctions, they risk contravening the sanctions, which generally prohibit directly or indirectly providing services or benefits to sanctioned persons. The sanctions often allow the provision of specified legal services to, or on behalf of, persons blocked by a sanctions program, “provided that receipt of payment of professional fees and reimbursement of incurred expenses *must be specifically licensed*.” (emphasis added).<sup>7</sup> The limitation on such “legal services” includes matters related to arbitration.<sup>8</sup> For example, the Venezuela sanctions include the following as such limited “legal services”:

1. Provision of legal advice and counseling on the requirements of and compliance with the laws of the United States or any jurisdiction within the United States, provided that such advice and counseling are not provided to facilitate transactions in violation of this part;
2. Representation of persons named as defendants in or otherwise made parties to legal, **arbitration** or administrative proceedings before any U.S. federal, state, or local court or agency;
3. Initiation and conduct of legal, **arbitration**, or administrative proceedings before any U.S. federal, state, or local court or agency; . . .<sup>9</sup>

Additionally, some sanctions specifically prohibit the enforcement of arbitral awards.<sup>10</sup>

Sanctions risk can arise in maritime arbitration in the following respects, among others:

1. one of the entities or persons in the dispute is listed as a Specially Designated National (“SDN”) under a sanctions regime, including a shipowner, charterer, manager, cargo shipper, intermediate cargo owner or cargo consignee or end-receiver;

2. one of the parties is connected to a sanctioned person, such as: (i) a sanctioned person owning, controlling or having an interest in a party; (ii) the party owning, controlling or having an interest in a sanctioned entity; or (iii) the party affiliated with or covering a sanctioned entity or person, or a relevant insurer, reinsurer or insured;
3. the subject matter of the dispute falls within the scope of a sanctions sectoral regime, including the use of the U.S. financial system for payments;
4. one of the parties is a citizen of a country subject to a sanctions regime; and/or
5. an arbitrator, mediator, expert or neutral party is a citizen of a country subject to a sanctions regime.

If an arbitrator recognizes a red flag in such a scenario, suggesting that sanctions risk exists in a dispute before that arbitrator, prudence would counsel that the arbitrator or the arbitration panel exercise due diligence to explore the sanctions status of the parties. Where the arbitrator(s) believe there is a risk of sanctions, the arbitrator(s) should consider—and may direct the parties to address—whether OFAC would issue a specific license to permit the arbitration and the parties to proceed without the risk of sanctions, or whether they should seek guidance from OFAC on whether the sanctions apply. Applications for OFAC licenses or guidance can take some time and may add costs to the proceeding. However, a failure to recognize such potential hazards at the outset of an arbitration can cause significant disruption to enforcement of an award, payment of the award or payment of arbitration fees.<sup>11</sup> Although OFAC reviews certain license applications with a presumption of denial, some sanctions programs provide an exception to the presumption for the provision of legal services.<sup>12</sup>

## II. Potential Trouble Spots

Where an arbitration commences with sanctioned parties, practical and legal obstacles could undermine or delay the proceedings, or risk sanctions exposure to the arbitrators. If the dispute arises from a place subject to broad country-based sanc-

tions, for example, the parties could find they are unable to obtain documentary evidence or witness testimony without running afoul of sanctions, or at least without incurring a significant additional cost.

As a threshold matter, the arbitrators(s) must consider whether holding proceedings and rendering arbitral services alone would constitute a violation of sanctions. Further, where an award would require a party to pay a sanctioned entity, questions arise whether:

1. the award, or the arbitrators' activity in hearing the evidence and issuing the award, would contravene the sanctions;
2. the sanctions prevent payment or enforcement by, for example, any U.S. person; and
3. a license by OFAC might be required to allow such payment. Even if the paying party is not a U.S. person, an award denominated in U.S. dollars arguably could cause a sufficient nexus with U.S. jurisdiction to raise a sanctions risk for the arbitrator and paying party. Such transactions would pass through the U.S. financial system and thereby expose the financial institution to sanctions risk. A sanctions risk could arise where the relevant sanctions prohibit causing a U.S. person, such as a U.S. financial institution or insurer, to violate sanctions.

In cases where the sanctioned party loses in arbitration, enforcing the award may prove impractical if no property or accounts are subject to attachment or execution within the jurisdiction of U.S. courts.<sup>13</sup>

Finally, the sanctions may prevent or delay an arbitrator's recovery of fees from a matter involving a sanctioned party. OFAC may determine that arrangements to exclude direct payment to the arbitrator from the sanctioned party were made with the purpose of evading sanctions or that the arbitrator has provided a benefit to the sanctioned party.

A recent arbitration and its subsequent litigation highlight these issues. In *United Media Holdings, NV v. Forbes Media, LLC*, No. 16 CIV. 5926 (PKC), 2017 WL 9473164, at \*1 (S.D.N.Y. Aug. 9, 2017), the U.S. District Court for the Southern District of New

York observed the difficulty that the parties had in conducting the arbitration due to the involvement of a sanctioned party. Although an OFAC license was sought prior to the start of the arbitration, OFAC did not grant a license in time, and the arbitration was repeatedly interrupted by sanctions concerns: initially, by the repeated withdrawal of the sanctioned party's representation, and later by the suspension of the arbitration by the American Arbitration Association until a license was granted. *Id.* at \*2-\*4. After the parties were granted a license and the arbitration concluded, the sanctioned party requested the court to vacate the arbitral award on several grounds, including that it was illegal and against public policy for the arbitrator and counterparty to participate in the arbitration due to their sanctions status. *Id.* at \*11. The court found that "the existence of OFAC licenses covering the arbitration proceedings, the issuance of the Award [and] enforcement of the Award" authorized the parties to participate in the arbitration. *Id.*

### III. Who, me?—Specific Concerns for Maritime Arbitrators

The recent uptick in enforcement actions by the State Department and OFAC targeting maritime operators shines new light on the risk of sanctions to consider by maritime arbitrators who are U.S. citizens or are otherwise subject to U.S. jurisdiction.<sup>14</sup>

On January 27, 2020, highlighting its campaign of vigorous enforcement of sanctions in the shipping sector, OFAC announced a settlement with Eagle Shipping International (USA) LLC ("Eagle Shipping"), a Marshall Islands company with its headquarters in Stamford, Connecticut; Eagle Shipping agreed to pay \$1,125,000 to settle its potential civil liability for 36 apparent violations of the Burmese Sanctions between 2011-2014.<sup>15</sup> OFAC's announcement pointed out that the potential fine could have exceeded \$9 million.<sup>16</sup> The subsidiary of U.S.-based vessel owner Eagle Bulk Shipping reported apparent violations of sanctions by carrying sand to Singapore for known SDNs in Myanmar during 2011-14. OFAC noted the egregiousness of the apparent violations, given that Eagle Shipping continued transporting the sand even after OFAC had denied their license application to do so.

Likewise, on September 25, 2019, the Secretary of State determined that COSCO Shipping Tanker (Dalian) Co., Ltd. (“COSCO Shipping”) met the criteria for imposition of sanctions under Executive Order (“EO”) 13846 and listed that company and another COSCO entity as designated entities whose assets are blocked.<sup>17</sup> The blocking of such a major tanker operator caused disruption across the industry and exposed some of the challenges faced by the shipping sector. Many of the challenges arose from the lack of clarity in the scope of the listing, due to the opaque structure of the COSCO Shipping group of companies. In this respect, COSCO Shipping does not differ from many maritime operators. The ultimate beneficial ownership of and interest in vessels, shippers, receivers, and cargo are rarely disclosed and often difficult to ascertain.

This shadow area presents a challenge for arbitrators at the initial stages of an arbitration, where an inability to discern and identify the involvement of a sanctioned entity can cause many of the challenges described above.<sup>18</sup>

Twenty-five years ago, the federal district court in New York upheld an arbitration agreement in a charterparty, despite finding the charterparty invalid from inception for violating U.S. sanctions. *Belship Navigation, Inc. v. Sealift, Inc.*, No. 95 CIV. 2748 (RPP), 1995 WL 447656, 1996 A.M.C. 209 (S.D.N.Y. July 28, 1995). In *Belship Navigation*, a U.S. company had chartered a Cuban-owned vessel and, upon making the first hire payment, was alerted that their bank blocked the payment due to the sanctioned status of the vessel owner. Both parties agreed the charter was void *ab initio* under the Cuban sanctions. The charterer declared the charterparty void, and the arbitration agreement in the charterparty thus void as well. However, the disponent owner succeeded in enforcing the arbitration agreement in the charterparty to resolve the matter, despite the sanctions application.<sup>19</sup> The court rejected the contention that enforcement of the arbitration agreement would conflict with the New York Arbitration Convention,<sup>20</sup> and found enforcement was not contrary to public policy.

The court reasoned that the Convention permitted nations to refuse enforcement of an arbitration award, but not the arbitration agreement, and observed:

Although “national policy” prohibits dealing with Cuba, the “public policy” exception in the [New York Arbitration] Convention “was not meant to enshrine the vagaries of international politics under the rubric of ‘public policy.’” Instead, ‘public policy’ is best served by promoting the “supra-national” goal of the Convention, promoting the enforcement of international arbitration agreements. A “parochial refusal” to enforce an arbitration agreement would frustrate this purpose, therefore, a court should compel arbitration even if the arbitrator could make a ruling that an American court could not. “Public policy” should be invoked to bar enforcement only when enforcement “would violate the forum state’s most basic notions of morality and justice.”

*Id.* (internal citations omitted).

Although the court enforced the arbitration clause, the court’s ruling raises more questions beyond the procedural issue resolved in that case: Would a court enforce any arbitration award issued in the case? If such issues arose today, would an arbitrator or a party consider whether OFAC would seek to enforce sanctions penalties against any of the parties (or the arbitrators) for violating Cuban sanctions by proceeding with the arbitration, or by seeking to enforce an award?

As maritime arbitrators and practitioners alike recognize, maritime disputes pose unique challenges to arbitrators considering sanctions risks; a dispute may involve numerous interested parties, such as a dispute arising from a chartered vessel carrying goods which could involve ultimate beneficial owners, registered owners, ship mortgage interests, bareboat charterers, time and voyage charterers, sub-charterers, NVOCCs, shippers, receivers, consignees, insurers and reinsurers. If any one of these parties, the vessel(s) or the cargo is subject to sanctions, the arbitrator(s) face a risk of sanctions and would be well-advised to consider the red flags, due diligence requirements and compliance factors.

In short, the prudent maritime arbitrator should consider the need to perform adequate due diligence and to identify all the parties involved at the outset of an arbitration. By doing so, the arbitrator may gauge the sanctions risks which may arise

ahead and may chart the course of proceedings to take measures managing such risks. The echo of OFAC's recent admonition in the *Eagle Shipping* settlement rings with equal force to maritime arbitrators:

This case demonstrates the importance for companies operating in high-risk industries (e.g., international shipping and trading) to implement risk-based compliance measures, especially when engaging in transactions involving exposure to jurisdictions or persons implicated by U.S. sanctions. **It is essential that companies engaging in international transactions consider and respond to sanctions-related warning signs, such as information that goods originated from or were supplied by a person or entity subject to U.S. economic and trade sanctions.**<sup>21</sup>

- 1 Gary Hufbauer & Barbara Oegg, CIAO Case Study: A Short Survey of Economic Sanctions, INST. INT'L ECON., (Aug. 2001), [https://www.files.ethz.ch/isn/6866/doc\\_6868\\_290\\_en.pdf](https://www.files.ethz.ch/isn/6866/doc_6868_290_en.pdf).
- 2 Indeed, the risk may arise for maritime arbitrators outside the U.S., say in London or Singapore, to the extent secondary sanctions would apply to non-U.S. persons. A consideration of such risks in detail, however, is beyond the scope of this Note. The risk exists, and thus warrants care by maritime arbitrators in the major venues of maritime arbitration across the world.
- 3 The Note is not intended to offer a comprehensive analysis or authoritative legal advice.
- 4 Detailed information on current sanctions programs is provided by OFAC. See Office of Foreign Assets Control - Sanctions Programs and Information, DEP'T OF THE TREASURY, <https://www.treasury.gov/resource-center/sanctions/Pages/default.aspx>.
- 5 See Anna Yukhananov & Warren Strobel, U.S. sanctions net snares the innocent, burdens business, REUTERS (June 21, 2014), <https://www.reuters.com/article/us-usa-sanctions-list/u-s-sanctions-net-snares-the-innocent-burdens-business-idUSKBN0EW10A20140622>.
- 6 To aid such education, OFAC has published a guidance on due diligence and compliance, available at [https://www.treasury.gov/resource-center/sanctions/Documents/framework\\_ofac\\_cc.pdf](https://www.treasury.gov/resource-center/sanctions/Documents/framework_ofac_cc.pdf).
- 7 See, e.g., 31 CFR § 591.506 "Provision of certain legal services authorized" (The cited regulation applies to the Venezuela sanctions program, but most sanctions programs include similar provisions).
- 8 Providing any unauthorized legal services would require a specific licence:  
 "(b) The provision of any other legal services to persons whose property and interests in property are blocked pursuant to [Venezuela sanctions], not otherwise authorized in this part, requires the issuance of a specific license.

(c) Entry into a settlement agreement or the enforcement of any lien, judgment, arbitral award, decree, or other order through execution, garnishment, or other judicial process purporting to transfer or otherwise alter or affect property or interests in property blocked pursuant to [Venezuela sanctions], is prohibited unless licensed pursuant to this part." *Id.* (emphasis added)."

- 9 *Id.* (emphasis added).
- 10 See, e.g., 34 CFR § 591.407 "Settlement agreements and enforcement of certain orders through judicial process" (prohibiting "the entry into a settlement agreement or the enforcement of any lien, judgment, arbitral award, decree, or other order through execution, garnishment, or other judicial process purporting to transfer or otherwise alter or affect" property blocked pursuant to the Venezuela sanctions) (emphasis added).
- 11 See, *infra*, Sec. 2 discussion of *United Media Holdings, NV v. Forbes Media, LLC*, highlighting the challenges faced in arbitration.
- 12 See, e.g., OFAC FAQs: Venezuela Sanctions, no. 554, U.S. DEP'T OF THE TREASURY (Feb. 12, 2018).
- 13 See, e.g., *Commodities & Minerals Enter. Ltd. v. CVG Ferrominera Orinoco, C.A.*, No. 1:16-CV-00861 (ALC), 2019 WL 4464391, at \*2 (S.D.N.Y. Sept. 18, 2019) (court upheld attachment, and rejected contention that sanctions applied to the Venezuelan party).
- 14 OFAC FAQs: Basic Information on OFAC and Sanctions, no. 11, U.S. DEP'T OF THE TREASURY (Jan. 15, 2015).
- 15 Enforcement Information for January 27, 2020, OFAC, [https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20200127\\_eagle.pdf](https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20200127_eagle.pdf).
- 16 OFAC observed in its "Analysis and Conclusions": "The statutory maximum civil monetary penalty amount in this matter was \$9,000,000. OFAC determined, however, that Eagle Shipping voluntarily self-disclosed the Apparent Violations, and that the Apparent Violations constitute an egregious case. Accordingly, under OFAC's Economic Sanctions Enforcement Guidelines ("Enforcement Guidelines"), the base civil monetary penalty amount applicable in this matter was \$4,500,000 . . . . The settlement amount of \$1,125,000 reflects OFAC's consideration of the General Factors under the Enforcement Guidelines." (emphasis added).
- 17 Press Statement from Michael Pompeo, Sec'y of State, The United States Imposes Sanctions on Chinese Companies for Transporting Iranian Oil (Sept. 25, 2019) (<https://www.state.gov/the-united-states-imposes-sanctions-on-chinese-companies-for-transporting-iranian-oil/>); Exec. Order No. 13846, 83 Fed. Reg. 38939 (Aug. 8, 2018).
- 18 On January 31, 2020, OFAC de-listed COSCO Shipping from the SDN and blocked entity lists.
- 19 The court further observed: "Any award that [the disponent owner] might recover through arbitration would be placed in a 'blocked' interest bearing account until relations with Cuba improve to the point where the funds may be released to [the disponent owner]. Allowing arbitration to proceed will hardly violate the United States' 'most basic notions of morality and justice.'" *Id.* at \*6. The court did not address how an "award," if not funds, would be "placed" in such an account.

- 20 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.
- 21 Eagle Shipping Enforcement, supra note 16 (*emphasis added*).
- \* This article originally appeared on the website of Clyde & Co., <https://www.clydeco.com/blog/sanctions/article/sanctions-considerations-for-maritime-arbitrators>, and is reprinted here with permission.

## Cruising for a Bruising?\*

by James E. Mercante,  
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*Sailing takes me away  
to where I've always heard it could be  
Just a dream and the wind to carry me  
And soon I will be free*

— “Sailing”  
by Christopher Cross

The passengers aboard the cruise ship MS WEST-ERDAM are singing a far different tune. That vessel has been turned away from five countries and at last report was seeking refuge in Cambodia due to the suspected outbreak of the Coronavirus on board.

Indeed, it seems on every channel these days, a cruise ship is in the news. There’s nothing like a good cruise to unwind, dream, be free and explore. But, like nearly everything else fun in life, sometimes things go haywire.

With the popularity and capacity of cruise ships, it is no wonder that viruses originating in one sliver of a country can spread so rapidly across the world. *Celebrity Cruises, Inc. v. Essef Corp.*, 2005 U.S. Dist. LEXIS 46721, 2006 AMC 528 (S.D.N.Y. 2005) (jury held in favor of passengers who contracted Legionnaires Disease originating from a hot tub aboard cruise ship, resulting in an outbreak onboard).

As a result of the spread of the Coronavirus, the world has been reintroduced to the word *quarantine*. Of course, quarantine is a word that originat-

ed in maritime history, like almost everything else (if you ask me). It comes from a seventeenth-century Italian word *quaranta giorni* meaning forty days—the period that all ships were required to be isolated before passengers and crew could go ashore during the Black Plague.

Three cruise ships have been quarantined for at least 14 days off the coast of Asia as a result of the Coronavirus. Passengers must remain in their cabins during quarantine. At least 61 people onboard these ships have tested positive for the Coronavirus. Closer to home, passengers reportedly showed signs of sickness aboard Royal Caribbean’s Anthem of Seas and were being quarantined and tested for the virus after the ship arrived in Bayonne, New Jersey, on February 7, 2020.

The U.S. Coast Guard issued a Marine Safety Information Bulletin on the Coronavirus, advising ship owners and operators to be aware of quarantine station points for any passengers reported sick.

### S.O.S.

In addition to such outbreaks, far and few between, cruise ships carry an array of scenarios resulting in maritime litigation.

Under maritime law, an owner or operator of a cruise ship owes a duty of exercising reasonable care to their passengers. The degree of care considered “reasonable” in any particular circumstance depends upon the extent to which the circumstances surrounding maritime travel are different from those encountered in daily life. The Second Circuit has stated that where an allegedly defective condition constituting the basis of a plaintiff’s complaint is not unique to the maritime context, the ship owner or operator could be held liable “only when it has actual or constructive notice of the condition.” *Lee v. Regal Cruises*, 1997 U.S. App. LEXIS 13763 (2d Cir. 1997) (holding that cruise ship operator was not liable for passenger’s fall from errant ice cubes and water on a staircase); *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 65 (2d Cir.1988) (reversing summary judgment and holding that cruise line is not liable for trip and fall down a staircase as a result of a protruding screw).

On July 7, 2019, an 18-month old girl died during a Caribbean cruise in a highly-publicized case when her grandfather held her over a railing in a children’s play area aboard the ship without real-

izing that there was no glass panel in front of him. The child fell more than 100 feet below to a concrete deck. A criminal investigation has resulted in charges brought against the grandfather. The cruise line has been sued civilly in Florida by the family.

In 2012, the COSTA CONCORDIA, an Italian cruise ship, ran aground and overturned off the coast of Tuscany when she struck a rock formation close to shore, allegedly because the Captain was saluting onlookers ashore or was otherwise distracted. The Captain was charged with manslaughter and sentenced to 16-years in prison as a result of sailing off course in such shallow waters. The Cruise Line apparently did not face any charges.

One of the most notorious maritime disasters occurred on April 15, 1912, when the ‘unsinkable’ TITANIC struck an iceberg and sunk during her maiden voyage from Southampton UK to New York City. The casualty resulted in over 1,500 deaths. The vessel owner filed a petition in the Southern District of New York to limit its liability under maritime law to the value of the remaining lifeboats. That case wound its way to the U.S. Supreme Court.

## Cruising for a Bruising

Cruise ship owners manage their vessels from a distance i.e. while ashore. Thus, the owner generally does not have notice of dangers that occur during the voyage. This, and lack of advanced notice to the onboard crew of certain hazards makes for some interesting rulings:

In 2020, *Broberg v. Carnival Corp.*, Nos. 19-10388, 19-12033 (11th Cir. Jan. 24, 2020) (Eleventh Circuit affirmed finding that the cruise line was not negligent for serving its passenger at least 16 drinks at different bars before she fell overboard. Court held that while passenger was intoxicated, Carnival Cruise Line’s crewmembers were not on notice that she was intoxicated to the point of being in danger).

In 2018, *Caron v. NCL (Bah.), Ltd.*, 910 F.3d 1359 (11th Cir. 2018) (affirming dismissal of negligence suit brought by passenger against cruise line where the passenger drank too much, entered a crew-only area and fell down an open hatch).

In 2011, *Smolnikar v. Royal Caribbean Cruise Line, Inc.*, 780 F. Supp.2d 1308 (S.D. Fla. 2011) (Summa-

ry judgment granted to cruise ship in action by passenger who slammed into a tree at high speed during a zip-line shore excursion. Court held that cruise line had no reason to know of the alleged absence of padding on the tree at the end of the zip line, and had no duty to conduct its own inspection of the zip line course).

## Crews on the cruise

Indeed, under the radar screen of ‘reasonable care,’ ship owners are often not found culpable for dangerous conditions or negligence that occurs onboard, even if caused by their own crew members.

*York v. Commodore Cruise Line*, 863 F. Supp. 159 (S.D.N.Y. 1994) (cruise ship owner and operator held not liable for failing to install locks on cabin door when crewmember gained entry to cabin and raped passenger inside).

*Dawsey v. Carnival Corp.*, 2018 U.S. Dist. LEXIS 180312 (action brought by passenger who sustained fractured hip as a result of bamboo massage; cruise operator not liable for negligent hiring of masseuse) (S.D. Fla. 2018).

*Desiderio v. Celebrity Cruise Lines, Inc.*, 1999 U.S. Dist. LEXIS 9699, 1999 AMC 2723 (S.D.N.Y. 1999) (action brought by passengers against cruise ship operator and captain; complaint was dismissed when Court found that defendants were not negligent in setting sail from New York to Bermuda despite the likelihood that ship would encounter an approaching hurricane).

*Yusko v. NCL (Bahamas) Ltd.*, No. 1:19-cv-20479, 2020 U.S. Dist. Lexis 1126 (S.D. Fla. Jan. 3, 2020) (ship owner held not liable for passenger injured onboard when flung to the floor by her crewmember-dance partner because the cruise line was not on notice of the risk given the absence of prior similar accidents).

## Time and Place for Everything

In New York and elsewhere, forum selection clauses and time limitation clauses are not only common but also enforceable in passenger tickets:

*Palmer v. Norwegian Cruise Line & Norwegian Spirit*, 741 F. Supp. 2d 405 (E.D.N.Y. 2010) (one-year limitations provision in the passenger ticket was enforced and summary judgment granted in law-

suit brought by passenger who was injured when wooden slats on cruise ship bed collapsed while passenger was asleep).

*Commander v. American Cruise Line*, 389 F. Supp. 3d 180 (N.D.N.Y. 2019) (New York man whose thumb was severed aboard cruise on waterways in Oregon and Washington State required to litigate action in Connecticut under passenger ticket's forum selection clause).

In *Lurie v. Norwegian Cruise Lines, Ltd.*, 305 F. Supp. 2d 352 (S.D.N.Y. 2004) a husband and wife living in New York took a cruise around Hawaii. Ironically, the wife was a paralegal at a law firm hired to defend the cruise line operator in a class action brought by crewmembers suing for alleged unpaid overtime work. Because of her affiliation with the firm, while the couple was onboard the cruise, the crewmembers locked the wife and her husband in a room and refused to let them disembark. The husband and wife brought suit in New York for false imprisonment and despite that the cruise never sailed in Florida waters, the action was transferred to the Southern District of Florida pursuant to a forum selection clause contained in the passenger ticket.

In *Vega v. Norwegian Cruise Lines*, 2007 U.S. Dist. LEXIS 44642 (E.D.N.Y. 2007), a passenger domiciled in New York saw an ad for a cruise in New York and purchased tickets for that cruise through a New York travel agent. The cruise departed from a terminal in New York City and returned to the same New York City terminal at the end of the voyage. The New Yorker broke her leg onboard and brought suit in New York. The Court transferred the matter to the Southern District of Florida pursuant to a forum selection clause contained in the passenger ticket. The New York court explained: "a forum is not necessarily inconvenient because of its distance from pertinent parties or places if it is readily accessible in a few hours of air travel".

A cruise is typically a wondrous seafaring adventure. But sometimes "the ship hits the fan" and the "dream" that Christopher Cross sings about in *Sailing* can become a nightmare. Fortunately, courts sitting in admiralty are steered by well-settled maritime law and precedent to adjudicate most any challenging situation.

\* This article originally appeared in the *New York Law Journal*, Vol. 263, No. 33 (February 20, 2020) and is reprinted here with permission.

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## Ship Brokers and Dispute Resolutions<sup>\*</sup>

*by Soren Wolmar,  
QuinnCannon Associates, Inc.,  
ASBA and SMA Director, New York*

Today, ship brokers are increasingly called upon to resolve disputes between their principals, the owners and charterers. At a time when the industry is going through profound changes and is faced with new challenges, web based trading platforms and recap/charter party editors, it is important to provide additional value to the process and in particular services that are not easily performed by a computer. There is an increasing resistance among the principals to go through agonizing, time consuming and expensive legal proceedings. Some principals will call their broker before they call their lawyer. Most disputes are over such issues as laytime, demurrage and dispatch calculations, but there are also contemporary issues while the voyage is still in progress, like safe berths, cargo specifications etc. In such cases, brokers are often in a unique position to identify an issue before it becomes a major problem. This is a value added service brokers could be providing.

Dispute resolution can be rewarding for the broker, if all works out well. But, the ship broker must also recognize the potential downside. First, assisting with dispute resolution can be very time consuming and the broker might rather use his time to conclude another fixture. Second, if the mediation attempt doesn't go well, it could alienate his customer. The broker could even lose a customer as a result. If a case is unfolding in such a way, the broker must recognize the point where all parties would be better off if he steps away from the process. In such cases, the Society of Maritime Arbitrators (SMA) offers some useful tools, Mediation and Shortened Arbitration Procedure. These are alternatives to full arbitration or court proceedings, and they are significantly less costly and can be executed quickly.

The SMA recently updated its mediation rules and has over 20 trained mediators among its members. Mediation is a voluntary and informal procedure where the parties decide the outcome, rather than having a decision made for them by a court or arbitration panel. A neutral mediator with industry expertise is appointed by the parties. The parties agree to a procedure time table and exchange of documents, as needed. The mediator can meet with the parties jointly, individually or both and will offer suggestions for settlement to the parties. The result of the mediation is not legally binding until a settlement agreement is signed. At such time, it is enforceable, with the necessity of legal enforcement unlikely as the parties have just agreed to the terms for settling the case. Mediation is often completed in a very short period of time and can be kept completely confidential. If unsuccessful, normal legal avenues can be pursued and are not affected by the mediation attempt.

The Shortened Arbitration Procedure is designed to minimize costs while expediting the process. It calls for the use of a single arbitrator and has a specific procedure if the parties cannot agree on one. It stipulates that the proceedings shall be based on documents only, as opposed to hearings, which are time consuming and costly. It sets forth a time schedule of the proceedings and stipulates the fees for both the arbitrator and the compensation of legal costs for the prevailing party. The Shortened Procedure is normally incorporated in a general arbitration clause as applicable for disputes below a certain dollar amount.

Mediation and the Shortened Arbitration Procedures are much more in line with today's business environment in the world of ship chartering than traditional full blown arbitration and court proceedings. Many ships are now commercially managed by pools consisting of hundreds of vessels. Charterers have merged into large entities representing huge amounts of cargo. Charterers and owners meet each other in the market place on an almost daily basis and have adopted a much more pragmatic and less emotional attitude to problems, which have been part of the market for decades, if not centuries. Ship brokers often act as "first responders" in an arising dispute and are successful in resolving the dispute in more than 99% of the cases. For the remaining less than 1%, the SMA offers these two perfect solutions.

The full rules for Mediation and Shortened Arbitration Procedure can be found on the SMA website: [www.smany.org](http://www.smany.org).

\* This article originally appeared in ASBA News, February 2018. It has been modified slightly and is reprinted here with permission.

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## ICMA and the SMA: 48 Years Strong

*[Editors' Note: The SMA has been part of ICMA since ICMA's origins in 1972 on the Moscow subway. We asked attendees of ICMA's past to reminisce and reflect upon this key event for the maritime arbitral community.]*

*From the "In Memoriam" article about Michael A. van Gelder (1922-2019) written by Lucienne Bulow, A. J. Siciliano, and Klaus C. J. Mordhorst (The Arbitrator, September 2019)*

Michael was also instrumental in initiating the International Congress of Maritime Arbitrators (ICMA). In 1972, while riding the Moscow underground, Michael, Cedric Barclay (the famed London maritime arbitrator and future president of the LMAA), Clifford Clark (also a future president of the LMAA), Roger Jambu-Merlin (then president of the Chambre Arbitrale Maritime de Paris), and Russian professors Sergei Lebedev and George Maslov, agreed to stage the very first ICMA in Moscow.

Michael was a frequent attendee and welcomed contributor to subsequent ICMAs. His stature as an international advocate for maritime arbitration was brought home at the ICMA XII which took place in Paris in June 1996. There the Paris delegation presented a surprised and emotional Michael with a commemorative citation in recognition of his many contributions to the promotion of international maritime arbitration.

*From Manfred and Susan Arnold*

I miss ICMA! Correction—we miss ICMAs; Susan and I have greatly enjoyed more than twenty-odd

years of ICMA's. Through it, we have seen a great part of the world, met many interesting people and made many friends. ICMA's were not only excellent intellectual and industry-related events, but the social aspects and cultural experiences played a great part; they were akin to family reunions.

ICMA's became part of my life as an attendee and as a long-time member and chair of the Steering Committee. My first ICMA was in Greece (1974)—a couple of years after becoming an SMA member. ICMA II was a memorable experience from start to finish. At that time, the late Cedric Barclay was the “Godfather” of international maritime arbitration. I understand that he succeeded in obtaining not only a very attractive delegates’ package with the Greek congress organizers but also a most amazing travel deal with the then Olympic Airways (no doubt, the founder of the airline, Mr. Onassis, who was also a legendary ship-owner, knew a bit about arbitrators and arbitration). The New York delegates benefitted from this arrangement. We met up with our English colleagues at the Royal Lancaster in London, and then the English contingent and the New York group boarded a private charter flight to Paris where the French delegation joined us for the trip to Greece. We all enjoyed the same luxury for the return. There was even a bit of dancing in the aisles!

Susan and I attended ICMA IV in London (1979), New York V in 1981, Madrid VIII in 1987, Hamburg IX in 1989, Vancouver X in 1991, Hong Kong XI in 1994, Paris XII 1996, Auckland XIII in 1999, New York XIV in 2001, London XV in 2004, Singapore XVI in 2007, Hamburg XVII in 2009, Vancouver XVIII in 2012 and Hong Kong XIX in 2015. Unfortunately, for health reasons, we missed Copenhagen XX in 2017 and also will not be able to attend ICMA XXI in Rio in March of this year. But we will be there in spirit – long live ICMA – it certainly will be in our memories. Sincere thanks to all who made it happen, and we root for those who keep ICMA’s ideals and events alive.

*From Lucienne Bulow*

The first ICMA I attended was in London in 1979. I was one of the few women who attended. It was an intellectually stimulating event, and I loved its international aspect. I had the honor of meeting London arbitrators who were serving on the panels of cases I was handling on behalf of my employers. That

Congress gave me the chance to become acquainted with London arbitrators such as Cedric Barclay, Donald Davies, John Potter, Michael Mabbs, Bruce Harris and others as well as to strike friendships with arbitrators and lawyers from all over the world. This is the most precious gift of ICMA: making friends from all over the world who share a similar interest in maritime affairs and arbitration.

At the Congress in London in 1979, the program listed events planned for “Wives.” George, my husband, became known as “the famous wife.” As a sign of the times, at the next Congress in 1981, held in New York at the Vista Hotel adjacent to One World Trade Center, Michael van Gelder was President, and the program listed the events for “Accompanying Persons.” I have attended many ICMA's since then. I am sorry that I am missing this one but wish all my friends a stimulating Congress and a lovely time.

*From David Martowski*

While I am an ICMA newcomer relative to Jack Berg, Manfred Arnold and other seniors, I have attended Congresses in Hamburg (2), Vancouver (2), Auckland, New York, London, Singapore, Hong Kong and Copenhagen. And while all stand out for very different reasons, ICMA XIV held one month after 9/11 in the midst of a still-smoldering New York, will forever remain the most vivid for its robust camaraderie! We suffered 40% cancellations and had it not been for the loyal support of the LMAA and Londoners, we would surely have cancelled the event. As it developed, we had a shortfall of \$50K which was eventually absorbed by passing the hat amongst our members and the Maritime Bar. A very memorable event!

*From “Confessions of an ICMA Rookie” by LeRoy Lambert (The Arbitrator, August 2014)*

Although I had been involved in the maritime legal and arbitral community since 1984, I had not been to an ICMA Conference until the Vancouver event in May 2012. Thinking back, I am not sure the reason for my indifference. Bottom line—I never made the effort to investigate what it was about, why it would help me, and never pressed for funding to attend.

In May 2012, however, events happily coincided to permit me to attend the session in Vancouver. I

confess I enjoyed it greatly. The papers presented were routinely of the highest quality and provoked lively and thoughtful discussions. At breaks and at the social events, one had the opportunity to meet and discuss topical issues with arbitrators from around the world and learn both how arbitrations are done elsewhere as well as the substantive issues and disputes which arbitrators, parties, and lawyers are dealing with. There was a good mix of arbitrators and lawyers, with a few academics to provide perspective and spice, and even a few end-users. Vancouver is also hard to match for visual beauty, and the local maritime community was full of warm and gracious hosts.”

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## Loose Ends

### Stylianos (Steve) Coutsodontis (1925-2020)

We were saddened to learn of the passing in February of Steve Coutsodontis:

<https://tinyurl.com/tp97rbz>.

Steve had a long career in the maritime industry, serving as Executive Vice-President of Park Lane Energy Corp, a Partner and Vice-President of Seamaster Shipping, Inc., and working at Trans-Ocean Steamship Agency. A Master Mariner with 18 years of sea service and a Greek Navy reservist, Steve was born in the town of Ermoupolis on the island of Syros in the Aegean and was connected to many of the shipping families with links to that island. He was also an authority on the history of the Greek Merchant Marine.

In 1961, Steve was the master of the Captain Theo navigating through the Bahamas. The second officer spotted a young girl on a life float and Steve and his crew maneuvered the ship to rescue her, the sole survivor of a yacht wreck several days before. He received a Coast Guard commendation, <https://tinyurl.com/w3s3azx>. The girl's story prior to her rescue was astonishing; read about it at <https://tinyurl.com/s4oph4o> or in the book written by her, *Orphaned at Sea*, <https://tinyurl.com/wad-9cku>.

Steve was a member of the SMA for some 30 years. A respected arbitrator and panel member in 16 awards which went to a published decision, he

was a mentor to several SMA members and will be missed by all.

### Monthly Luncheons

See your fellow members, meet service providers and end-users, hear a great presentation on a topic of interest and relevance! March 18 and April 8. 3 West Club, 3 West 51st Street, New York, NY 10019. Email [pleahy@smay.org](mailto:pleahy@smay.org) to register to attend.

### Arbitration in New York Two-Day Seminar Moved to the Fall

For the 15th year, the SMA will offer its comprehensive two-day seminar on “Maritime Arbitration in New York.” The dates this year will be in the fall and announced later this spring. Location is 3 West Club, 3 West 51st Street, New York, NY 10019. Jeffrey Weiss, Professor of Maritime Law at New York Maritime College, with 35 years of college and graduate-level teaching experience, will again be the lead instructor joined by members of the SMA Education Committee. Lawyers who attend will receive New York CLE credits. We especially encourage law firms to send younger lawyers in order for them to learn about the arbitration process in a structured and systematic way and earn CLE credits in a course relevant to their practice. Prospective SMA members should also attend as should principals and brokers involved in dispute resolution.

### CMA Shipping Conference

March 31-April 2, 2020 (Tuesday-Thursday), Hilton Stamford Hotel, 1 First Stamford Place, Stamford, Connecticut, 06902. Join 2500 attendees over three days, visit booths of 150 exhibitors, celebrate the honoring of New York's Lois Zabrocky, CEO at International Seaways Ship Management, as Commodore! Register at <https://informaconnect.com/cma-shipping/purchase/select-package>.

### MLA Spring 2020 Meeting in New York

The MLA Spring Meeting will be in Manhattan, April 28-May 1. The Committee Meetings offer a wealth of information to keep you up to date on legal, regulatory, and commercial developments. Committee Meetings are open to all and cost nothing to attend. Meeting times and venues have not

yet been announced but will be posted on the MLA website, [www.mlaus.org/home](http://www.mlaus.org/home).

### Friends and Supporters

We are grateful for the new and renewed support shown by our Friends and Supporters in recent months. Let's keep it going!

### Thanks!

Thanks to those who responded to our ongoing call for articles of interest—and (as always) to Tony Siciliano in particular. The Arbitrator has a long history of providing timely and relevant articles and information to the maritime arbitration community in New York and around the world. We need your continued support! If you have articles and ideas to contribute to future editions, please let us know. Also, we welcome your feedback. Please do not hesitate to contact us, [leroy.lambert@ctplc.com](mailto:leroy.lambert@ctplc.com) or [dick.corwin@icloud.com](mailto:dick.corwin@icloud.com) or [r.jadhav.0005@outlook.com](mailto:r.jadhav.0005@outlook.com). Thank you!

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THE ARBITRATOR (ISSN# 1946-1208) is issued 2-3 times a year; published by The Society of Maritime Arbitrators, Inc., One Penn Plaza, 36th Floor, New York, NY 10119. The publication is posted on our website and the subscription is free. To join our mailing list, please register your email address at <http://www.smany.org>.

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