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## *President's Message*

**By: Nigel J. Hawkins, SMA President**

I am pleased to report on our activities since my last report to you in January.

Our "Bring Your Own Lunch" Zoom meetings continued. In February, Todd D. Lochner and Eugene E. Samarin of the Lochner Law Firm, Annapolis, Maryland, gave a talk on "Yacht Sales - Perils & Pitfalls." The SMA Rules are a feature of Yacht Sale and Purchase Forms. We had 46 attendees from North America and Europe. Our March meeting featured Andrea Jansz, General Counsel of Resolve Marine Group in Fort Lauderdale, Florida, who spoke about the many facets of commercial salvage. On that occasion we had 53 attendees. At our final meeting of the season in April, the speakers were Petter Heier, Chief Executive Officer of Grieg Green assisted by Magnus Hammerstad, both located in Oslo. The topic for the April meeting was the recycling of ships or, as we used to say in times past, the scrapping of ships. We had 52 attendees from North America, Europe, and Asia. All these meetings generated questions which were handled very well by the speakers.

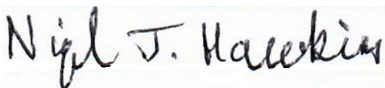
Although the SMA prefers "in person" meetings, the ZOOM format enabled us to continue our meetings. We are studying the practicability of hybrid meetings in the future where we can combine "in person" and "online" participants when the meetings resume in October. Many thanks to Molly McCafferty who is responsible for lining up our speakers.

Austen Dooley organized a successful arbitration ZOOM seminar in March with twelve participants who came from North America and Europe. Professor Jeffrey Weis was the very capable instructor who has been leading these seminars for many years. This is usually an annual event, but the SMA hopes to host another arbitration seminar this October/November. See

Austin’s full report at page 10 below, which also contains remembrances of the early years by Tony Siciliano.

This year the SMA has recorded ten awards to date. Your membership has reported 31 appointments this year and we trust these two numbers will increase at a faster pace for the balance of the year.

*I have been honored to serve as President of the SMA these last two years and can say that the SMA has a very strong group of Governors who can come to the aid of their fellow Governors when circumstances require. I wish the SMA all success in the future.*



Nigel J. Hawkins  
President

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## 2021 Annual General Meeting

The SMA Annual General Meeting took place on May 11, 2021, via Zoom.

LeRoy Lambert was elected to serve as President and Robert C. Meehan as Vice-President for 2021-23.

The following persons were elected to the Board of Governors for two-year terms: 1) Lucienne Carasso Bulow, 2) Molly G. McCafferty, 3) Daniel J. Schildt and 4) Soren Wolmar. Those elected join the following Governors serving out their 2020-22 terms: 5) David W. Martowski, 6) David Gilmartin and 7) Michael J. Northmore.

Bob Meehan becoming Vice-President created a vacancy in the class of 2020-22 Governors. In accordance with the By-Laws, the Board designated 8) Anne P. Summers to fill that term and President Lambert appointed 9) Dick Corwin and 10) George J. Tsimis to the Board. President Lambert appointed, and the Board approved, David Gilmartin as Treasurer and Soren Wolmar as Sec-

retary. Immediate Past President Hawkins remains on the Board as an *ex officio* member for 2021-22.

Congratulations to the new Officers and Board!

Tom Fox was term limited and not eligible to stand for another term. Tom is a former Vice-President and long-time member of the SMA, and has for years led the SMA in the resolution of recreational boat salvage disputes. A special thanks to Tom for his service to and support of the SMA.

Thank you as well to President Hawkins for his service during an especially difficult period.

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## SMA Award Service ... At a Glance

**By Robert C. Meehan, Partner, Eastport Maritime, SMA Vice-President**

A distinguishing feature of SMA arbitration is that unless the parties request otherwise, all awards are published. Since its beginning in 1963, the SMA has issued more than 4,400 awards, including thirty-two in 2020. This column will become a regular feature in The Arbitrator, highlighting selected recent awards with a view toward providing insight into the diversity and outcomes of the myriad disputes decided by SMA arbitrators, as well as the broad range of their authority and the remedies available under the SMA Arbitration Rules. The award summaries are not intended to be comprehensive in scope but rather to promote discussion and invite further investigation by the reading of the awards themselves. Details are at <https://www.smany.org/award-service-main.html>. Please contact Patricia Leahy ([pleahy@smany.org](mailto:pleahy@smany.org)) if you are interested in subscribing to the SMA Award Service. The awards are also accessible on Lexis and Westlaw. For details on how to search on Lexis, go to <https://www.smany.org/lexis-nexis-search.html>.

### M/Y CLUB M [SMA 4301 - January 27, 2017]

*MARSALV – SMA Salvage Rules – Salvage or Assistance – Amount of Award*

This arbitration involved the grounding of a motor yacht and whether services provided to free

her constituted salvage or towage assistance. The parties appointed a sole arbitrator and agreed to proceed on documents alone in accordance with the Rules for Recreational and Small Commercial Vessel Salvage Arbitration of the Society of Maritime Arbitrators (“SMA Salvage Rules”).

The owner of the M/Y CLUB M (“the Yacht”) hired an experienced captain and two relief captains as crew to drive his boat from Beaufort, N.C. to Florida. Shortly into the voyage, while transiting the Intracoastal Waterway, the Yacht ran aground on a sandy shoal. About an hour after the grounding, the Captain and crew concluded that waiting for the flood tide and reversing the engines was not an option and requested towage assistance from Sea Tow. The Yacht was freed from the shoal by Sea Tow employing a combination of prop-blasting and towing. The Yacht’s Captain signed a MARSALV No Cure-No Pay Agreement. Sea Tow subsequently invoiced the owner in the amount of USD 393,000, representing 12% of the Yacht’s value. Owner declined payment and this arbitration followed.

At issue was whether the Yacht was in “marine peril” and whether the owner was bound by the MARSALV agreement signed by the Captain. The sole arbitrator ruled that Sea Tow was entitled to a salvage reward, finding that the owner was bound by the MARSALV Agreement and that Sea Tow’s services were not simple towage but met the three elements necessary for a salvage award: the existence of a marine peril; service voluntarily rendered when not required as an existing duty from a special contract; and success in whole or part.

### **M/V ROMANTIC [SMA 4299 – January II, 2017]**

#### *BPVoy4 – Safe Port/Berth – Hold-In Tugs – Consolidation*

In this consolidated arbitration, the owner of the M/V ROMANTIC (“the Vessel”) sought recovery from the charterer of the cost of four hold-in tugs employed during loading at IMTT St. Rose; and the charterer sought indemnity from the sub-charterer in the event that charterer was found liable to the owner. It was uncontested that given the river conditions on the Mississippi at the time of loading, four hold-in tugs were required in order for the port and berth to be safe. The owner claimed that the charterer breached its obligations under the safe port/berth provisions of the Head Charter by

refusing to pay for and not reimbursing the owner for the cost of the tugs.

The Vessel, a 150,000-Mt DWT tanker, was voyage chartered on a BPVOY4 charter party (“Head Charter”) to load up to a full cargo of DPP, with loading range of 1 to 3 SP/STS USG EXCL FLORIDA NNOBI Baton Rouge. The Head Charter included other load options in the Caribbean and South America. The charterer subsequently re-let part of the space to another, although the sub-charter (“Sub-Charter,”\ collectively “the Charters”) specifically identified the load port as “ISP/STS St Rose,” which was within the range negotiated in the Head Charter.

Both Charters included Clause 5.1 of the BPVOY4 printed form which provided in material part: “... *Charterers shall exercise due diligence, to ascertain the that the Vessel can always lie safely afloat at such port, but Charterers do not warrant the safety of any port and shall be under no liability in respect thereof except for loss or damage caused by Charterers’ failure to exercise due diligence.*” The Charters also provided an “all-inclusive” freight rate and that WORLDSCALE terms were not applicable to the voyage.

The Panel unanimously ruled that the owner was responsible for the cost of the hold-in tugs, finding that the “all-inclusive” freight rate of the Head Charter covered and included assist tug and any hold-in tug costs at the load port/berth of IMTT St. Rose; “...and to give effect to this and make this even clearer, Worldscale terms were made not applicable to the [Head] Charter.”

The Panel further stated that given its findings on the “ALL INCLUSIVE” issue, it was not required to determine the meaning of a charter which provides for “1 or 2 SP/SB” in its main terms but also includes an un-amended Clause 5.1 of the BPVOY4 form requiring only that a charterer exercise due diligence.

#### **Monthly Luncheons**

We are cautiously optimistic that in-person luncheons can resume in September. Given the success of the Zoom luncheons in allowing persons from outside the New York area to attend, we are exploring ways to make it a hybrid event. Mark your calendars! The provisional schedule (all Wednesdays) is:

- September 15 (members only)
- October 13
- November 10
- December 8
- January 12
- February 9
- March 9
- April 13



# Thorny Issues Raised by Third-Party Discovery in Arbitration\*

*By Edward M. Spiro and Christopher B. Harwood, Partners, Morvillo Abramowitz Grand Iason & Anello PC, New York\*\**

In an arbitration, third-party discovery—i.e., seeking documents or testimony from non-parties—can raise thorny legal issues, particularly where the non-parties and the arbitrator are located in different jurisdictions. Practitioners seeking to enforce arbitral subpoenas need to consider personal jurisdiction and procedural requirements through the lens of both the Federal Arbitration Act (FAA) and the Federal Rules of Civil Procedure (FRCP). Senior U.S. District Court Judge Jed S. Rakoff for the Southern District of New York recently conducted a nuanced analysis of these issues in *Broumand v. Joseph*, 2021 WL 771387 (S.D.N.Y. Feb. 27, 2021), a subpoena enforcement proceeding where the out-of-state respondents successfully resisted arbitral subpoenas.

## Background

In *Broumand*, the underlying arbitration involved the petitioner's claim that two individuals diverted assets from a New York corporation in which the petitioner had an interest. The arbitrator issued subpoenas for documents and testimony to two non-parties who were officers of the corporation. The arbitrator was sitting in New York and the respondents were domiciled in Virginia and California. The arbitrator directed that the "hearing" would proceed via videoconference. After the respondents ignored the subpoenas, the petitioner filed a petition to compel their compliance.

## Personal Jurisdiction

Judge Rakoff's analysis began with the first hurdle for an arbitral subpoena issued to an unwilling third party—personal jurisdiction. To establish personal jurisdiction, a petitioner must show: (1) procedurally proper service; (2) a statutory basis for service; and (3) that service comports with the requirements of due process. Judge Rakoff focused on the second and third requirements.

FRCP Rule 4(k)(1)(A) provides that service may be effected on a person who is subject to service in a court of general jurisdiction in the state where the district court sits. Under New York's long-arm statute, a court has general jurisdiction over a nonresident who has systematic contacts with New York such that she is essentially at home in the state. A court has specific jurisdiction over a nonresident who has transacted business in New York and the claims at issue relate to that activity. Judge Rakoff held that the respondents' ongoing contractual relationships with a New York entity were insufficient to establish general or specific jurisdiction. The respondents did not negotiate or execute their contracts in New York, the contracts did not require them to submit payments or notices into New York, and the contracts did not have a New York choice of law provision.

Judge Rakoff recognized, however, that the FAA provides an independent basis to establish personal jurisdiction. Section 7 of the FAA states that an arbitral subpoena "shall be served in the same manner as subpoenas to appear and testify before the court." In *Dynegy Midstream Services v. Trammochem*, 451 F.3d 89 (2nd Cir. 2006), the Second Circuit held that this provision incorporates by reference the service requirements for third-party subpoenas in the FRCP, Rule 45(b)(2). When *Trammochem* was decided, Rule 45(b)(2) limited the service of out-of-district subpoenas to 100 miles from the place of compliance. In 2013, Rule 45(b)(2) was amended to permit nationwide service.

Judge Rakoff considered whether the FAA incorporates Rule 45(b)(2)'s limitations as of the time that the FAA was passed, the so-called "static" approach, or Rule 45(b)(2)'s limitations at the time a subpoena is enforced, the so-called "dynamic" approach. In *Managed Care Advisory Group v. CIGNA Healthcare*, 939 F.3d 1145 (11th Cir. 2019), the U.S. Court of Appeals for the Eleventh Circuit held that a statute that refers to a "general subject"—as opposed to a specific title or section—adopts the currently effective law on the subject. Based on the FAA's general directive that subpoenas "be served in the same manner as subpoenas to appear and testify before the court," the Eleventh Circuit held that the FAA adopts the dynamic approach to Rule 45(b)(2)'s service requirements. Judge Rakoff followed the Eleventh Circuit's approach. In accordance with the current version of Rule 45(b)(2), Judge Rakoff held that the FAA authorizes nation-

wide service of process, and therefore the petitioner established a statutory basis to assert personal jurisdiction over the respondents.

### Due Process

For the exercise of jurisdiction to comport with due process, the respondents must have sufficient contacts with the forum and the exercise of jurisdiction must be reasonable. As noted above, the respondents lacked sufficient contacts with New York. However, Judge Rakoff ruled that the minimum contacts analysis properly is based on the respondents' connection with the United States—not New York. Although no Second Circuit decision was on point, Judge Rakoff followed the approach of other circuit courts which have held that when (1) a case arises under federal law and (2) the statute authorizes nationwide services of process, personal jurisdiction turns on the served party's contacts with the United States.

Judge Rakoff noted that the out-of-circuit authority was not directly on point because the FAA is not a grant of federal jurisdiction. A party asking a federal court to enforce an arbitral subpoena must provide an independent basis for jurisdiction—for example, a federal question in the underlying arbitration or the diverse citizenship of parties in the subpoena enforcement proceeding. The basis for jurisdiction in *Broumand* was the diversity of citizenship of the parties—not a federal claim. Nonetheless, Judge Rakoff held that the national contacts approach still applied because the court was vindicating the federal policy favoring arbitration. Although the respondents had insufficient contacts with New York, they plainly had sufficient contacts with the United States. In addition, given the minimal burden of testifying by videoconference, Judge Rakoff held that the exercise of personal jurisdiction over the respondents was reasonable.

### Geographic Constraints

Judge Rakoff next considered whether the arbitral subpoenas were consistent with the 100-mile geographical limitation in FRCP Rule 45(c). Rule 45(c) provides that a subpoena may compel a third party to testify within 100 miles of her residence or place of employment. Judge Rakoff analyzed two issues: whether arbitral subpoenas are required to comply with the 100-mile limitation, and if so, whether remote testimony can be used to circumvent the limitation.

Although the Second Circuit has not addressed whether Rule 45(c)'s 100-mile limitation applies to arbitral subpoenas, it has analyzed whether other restrictions in Rule 45 apply to arbitral subpoenas. In *Washington Nat'l Ins. v. OBEX Grp.*, 958 F.3d 126 (2d Cir. 2020), the respondents moved to quash arbitral subpoenas under Rule 45(b)(d)(3) because the subpoenas purportedly requested privileged information, and were duplicative, overbroad, and burdensome. The district court exercised its discretion not to address these objections in the context of an arbitral subpoena.

The Second Circuit affirmed and held that the requirements in Rule 45 are not incorporated wholesale into the FAA. Section 7 provides that if a person fails to comply with an arbitral subpoena, the district court in the district where the arbitrator is sitting may “punish said person ... for contempt in the same manner provided by law for securing the attendance of witnesses ... in the courts of the United States.” (emphasis added). The Second Circuit held that this language does not impose Rule 45's obligations on a district court enforcing an arbitral subpoena. It merely indicates that arbitral subpoenas should be enforced in the same manner as subpoenas in civil litigation—i.e., through contempt proceedings. The Second Circuit reasoned that requiring district courts to rule on privilege, burdensomeness, and related objections would frustrate the strong federal policy favoring arbitration. Requiring district courts to address those issues would turn a federal court into a “full-bore legal and evidentiary appeals body” every time a party seeks third-party discovery in arbitration.

The *Broumand* respondents argued that the arbitral subpoenas were unenforceable because they exceeded the 100-mile limitation in Rule 45(c). Notwithstanding *OBEX*, the petitioner conceded that the 100-mile limitation applied to arbitral subpoenas. Judge Rakoff acknowledged the tension between *OBEX*'s teaching that a district court need not address privilege and burdensomeness objections to an arbitral subpoena under Rule 45, and the court's application of the geographic requirements in the same rule to the arbitral subpoenas in *Broumand*.

Judge Rakoff drew two distinctions between *Broumand* and *OBEX*. First, the petitioner in *Broumand* conceded that the Court could “simply decline to enforce the subpoena, without technically quash-

ing or modifying it,” as the petitioner requested in *OBEX*. Second, Judge Rakoff stated that there was “a colorable argument that the ruling in *OBEX* should not apply” to objections based on the 100-mile limitation. Judge Rakoff reasoned that, unlike a privilege or burdensomeness objection, the 100-mile limitation is “straightforward” to apply and does not entangle a district court in the merits of the arbitration.

Although the petitioner acknowledged that his subpoenas exceeded the 100-mile limitation, he argued that the subpoenas were enforceable because the respondents could testify by videoconference. Judge Rakoff noted that several out-of-circuit district courts have approved the use of remote testimony as a way around the 100-mile limitation. Nonetheless, the Court rejected these precedents because the text of Rule 45(c) “speaks, not of how far a person would have to travel, but simply the location of the proceeding at which a person would be required to attend.” Judge Rakoff added that any other reading would render the 100-mile limitation a nullity and “bestow upon any arbitrator ... the unbounded power to compel remote testimony from any person residing anywhere in the county.” Accordingly, Judge Rakoff granted the respondents’ motion to dismiss the petitioner’s enforcement proceeding based on the 100-mile limit in Rule 45(c).

### Presence Requirement

Judge Rakoff concluded by holding that the so-called “presence” requirement of the FAA provided an independent basis to reject the subpoenas. Section 7 states that “the arbitrators ... may summon in writing any person to attend before them ... as a witness and in a proper case to bring with him” any “record” which “may be deemed material to the case.” The FAA does not explicitly authorize document subpoenas. Nonetheless, the Second Circuit (and other circuits) have authorized a workaround by holding that an arbitrator may require a witness to attend a preliminary hearing before the arbitrator for the sole purpose of producing subpoenaed documents. To compel an unwilling subpoena recipient, the arbitrator must be present at the hearing.

The petitioner argued that, given the extraordinary circumstances posed by the COVID-19 pandemic, an arbitrator can satisfy the presence

requirement by videoconference. Judge Rakoff ruled that petitioner’s “policy concerns ... cannot trump the plain meaning of Section 7 of the FAA.” The purpose of the presence requirement is to “force an arbitrator to think twice before issuing an arbitral subpoena,” and “[a]llowing arbitrators to subpoena nonparties for discovery without requiring the arbitrators to convene and preside over a physical hearing would largely undermine that calculation.”

### Conclusion

*Broumand* serves as a cautionary note to practitioners seeking third-party discovery in an arbitration. Counsel should be cognizant of the interplay between the FAA and FRCP 45, and, if the discovery sought from a recalcitrant witness is worth the expense, consider arranging for arbitrators to travel in order to comply with geographic limits and to preside over physical hearings

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\*\* Bios are at <https://www.maglaw.com/lawyers/edward-spiro> and <https://www.maglaw.com/lawyers/christopher-harwood>. Curtis Leitner, counsel at Morvillo Abramowitz, assisted with the preparation of this article.

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## Mediation of Disputes Arising Out of Maritime Contracts: An Idea Whose Time Has Finally Come?\*

**By LeRoy Lambert, President, SMA**

Question presented: *Mediation of Disputes Arising Out of Maritime Contracts: An Idea Whose Time Has Finally Come?*

My answer: “I don’t know if its time has come or not.”



I present here some reasons why/why not and also identify opportunities for all of us – lawyers and arbitrators and mediators—to expand our opportunities. My view is based on my 25 years in private practice, 11 years at the Standard Club, and, more recently, serving as arbitrator and occasional mediator.

Today, virtually every maritime/commercial case in the courts is mediated before a third-party mediator. No maritime/commercial case goes to trial without first being mediated.

Most disputes, whether subject to litigation or arbitration, settle. That was true before mediation became the rage and remains the case now.

Before mediation became the rage, lawyers settled cases through dialogue, occasionally with a nudge from the judge. The timing varied, depending on factors specific to the dispute, but, sooner or later, there was an “unmediated” dialogue about settlement.

With respect to maritime contractual disputes subject to resolution by arbitration in New York, I believe this traditional method of “unmediated” settlements remains the model. In maritime arbitrations in London, during my 11 years at the club, I began to see mediations, especially in high value cases, but still, in my experience, mediation is not the norm there, either, for maritime contractual disputes subject to arbitration.

As to the universal acceptance of mediated settlements in litigated disputes and why lawyers lost the knack of settling cases between themselves, I started compiling a list, but the list took on a life of its own. One factor may be that the lead up to a trial is more structured than many arbitrations. Once discovery is over, the parties know their respective cases, and then, if not before, the judge sends the parties to mediation. Plus, the judge, often as not, is just as happy, if not happier, to have the case go away without a trial.

Anyway, while interesting for many of us old-timers, I decided it was not worth spending further time on trying to understand why mediation became the norm for litigated disputes. Mediation in those cases is here to stay.

So, here, my focus is on charter party/contract of affreightment disputes, historically the bread and butter of New York and London maritime arbitra-

tion. That’s the world where mediation has not taken root.

Why?

Maritime arbitration already is – indeed, it was the original – “alternative dispute resolution.” Those in a specialized field are, in effect, asking respected and trusted peers to review the facts in the light of the law, the contractual terms, and practice in the trade and to declare which party is right.

In fact, when you hear descriptions of the early days of the SMA or those preceding its formation, it shares as much with the evaluative mediation model as it does with arbitration today (which has become more like litigation): “Hey, Joe. Bill and I have a dispute. Let’s have lunch. I’ll bring my documents. Bill will bring his. We’ll explain it to you. You tell us what you think. We’ll agree to live with the result we come to by the end of lunch.”

But this was in a post WWII period when business was good with many new participants. Deals and charters were plentiful.

Industry consolidation has reduced the number of players and the number of disputes. I am not persuaded that there are as few disputes as the numbers might indicate. But I do believe consolidation has caused a decline in the number of disputes which parties are WILLING to take to and through an arbitration. There aren’t as many “customers.” There aren’t as many shipowners/operators. Return business is key. As is said of marriage, going to arbitration with a contractual partner is not to be done unadvisedly or lightly; but reverently and soberly.

In addition to pressure brought on by consolidation, I believe internal compliance looms large. A modern organization, at every level, has procedures which purport to control, if not eliminate, risk and unforeseen/unprovided for consequences. Internal and external auditors have risen up to check and report to management whether boxes are ticked. If a dispute between two responsible, solvent companies that are parties to a contract reaches the appointment of arbitrators, that dispute has already run a gauntlet of compliance markers. While these markers may not be designed to dissuade persons from proceeding, that is often the result.

Here's a typical example, a composite of many matters I handled at the club. Remember, too, that many charterers and traders have entries with a club today. A P&I club is not just for owners – P&I club claims executives see things from both sides.

- A person in the operations / chartering department gets exercised about a dispute. An unusual fact, a novel interpretation, an unexpected defense, the prospect of an unexpected increase in revenue, dramatic market shifts, ambiguities which arise because the parties did not pay attention to rival rider clauses – the causes are varied.
- Due to industry consolidation, however, the potential dispute is likely with a party who is or it is hoped will be a return charterer or a quality owner/operator who otherwise provides good service. Indeed, many companies act as owners AND charterers. Lines are blurred. If the wording of that clause helps me here, it may hurt me there. Is there a way to work it out without involving in-house legal or an insurer? Leaving it ambiguous may be in my interest.
- But the dispute is not resolved. The operations/chartering person remains exercised. Practically all charter parties have a broker. Brokers have always been there, and are there today, to head off a dispute. Brokers are, in reality, “early intervention” mediators. They know the trade, they know the clauses, they know the parties, they know the degree to which the parties need each other. They have the motive and opportunity to head off a dispute, and often do.
- But, here, the brokers are not able to work any magic. The dispute is escalated to the inhouse lawyers and/or the risk manager who has no real desire to incur the costs of litigation or arbitration.
- And, here, let's pause to give ourselves credit. The SMA has issued over 4400 awards. Books such as *Time Charters* and *Voyage Charters* and the many English law treatises are invaluable resources for inhouse counsel or outside lawyers. A pool of experienced lawyers and defense club managers who know the law is readily available. A good chance exists that the issue giving rise to the dispute which has made it this far has occurred before. Advice is given to the operations/chartering person. Armed with “the answer,” the operations/chartering person

reengages with his or her valuable contractual party. The brokers, too, re-engage.

- Alas, the other side still sees it differently and has consulted with its lawyer who has provided a different answer. Or perhaps one party or the other decides it's had enough, time to show who's boss and bring its good customer or service provider to heel.
- From a P&I Club/Defense Club perspective, the decision to support a member in the defense or prosecution of a claim is under PERIODIC review pegged to milestones in a case.
- “Okay,” the club sighs, “it's a genuine issue. You are a good member. You've paid your premium. Let's appoint an arbitrator and see if that prompts a settlement.” Or, “Fine, they've appointed an arbitrator, we'll appoint one.” Oh, oh. Now a chair is selected and the chair asks “how do the parties wish to proceed?”
- No one is blinking. Costs are about to be incurred. The defense club reminds that most cases settle. Maybe it reaches out to the club behind the other side. Or perhaps the CEO has heard that you want to arbitrate with a key customer or you are jeopardizing the relationship with one of the few ship operators who can handle your needs. Maybe your CEO just got an earful from the CEO of the other side at an industry cocktail reception or dinner. Your CEO calls you in to explain. You explain; the CEO decides to give you some rope.
- So, despite having been pummeled by all these stick wielders, the dispute exits THIS gauntlet. The dispute survives. Each side remains persuaded that it is right and resolves to prove that it is right.
- Once the arbitration starts, things do not always go as planned. A fact one assumed to be true turns out to be open to serious question. The other side finds a decision or award which your side had not taken into account or interpreted differently. A witness does not do well. The expert waffles.

At each of the points above, an opportunity for settlement presents itself. And, as noted, experienced lawyers may be able to reach a settlement directly, as they do under the traditional model. At the same time, however, each of these points presents an opportunity for mediation by a third-party mediator.



However, some may have a concern that mediation somehow competes with arbitration, that alternative dispute resolution is a zero-sum game. I suggest we reflect upon the experience in other areas where mediation now thrives – both mediators (who in this case will also be SMA arbitrators) and lawyers are as busy as ever. I believe a good case can be made that to the extent those involved in arbitration of maritime contractual disputes fail to offer/embrace mediation, they are losing opportunities, not gaining them.

Plus, while most cases settle, many still go through a trial and an appeal. The same, I suggest, will happen to arbitration. Not every mediation will succeed.

Moreover, and despite much of what I have said above, my experience is that many disputes are out there, big, small, medium, interesting, dull, you name it: those disputes are out there. However, a fear – sometimes grounded, but often not – of incurring costs disproportionate to the value of the claim, including the opportunity costs of employee time dealing with it, can result in poorly considered decisions about resolution of claims, whether as to timing or amount.

What then to do?

If I am correct that legitimate, interesting disputes are – for whatever reason – not being presented to arbitrators and/or mediators, then, if the disputes won't come to us – lawyers and arbitrators – we should go to the disputes. We should find ways to be involved in resolving such disputes. If our end-users need capable short order cooks, not gourmet chefs, we need to show we can be short order cooks. The greater, after all, does include the lesser.

The SMA Shortened Arbitration Procedure is one way the SMA has responded to this need. I have done several and have enjoyed the process. The SMA Shortened Procedure gives the parties the satisfaction of having presented a discrete, interesting dispute and of getting an answer for a known cost. This Shortened Procedure eliminates the fear of disproportionate costs: <https://www.smany.org/arbitration-S-rules-sep-15-2010.html>.

Clearly, though, early presentation to a mediator can meet this need, too, for example, at the time the parties realize that they have a genuine difference of opinion and/or the monetary swing is too great not to test the will of the other side.

Equally, mediation can assist parties at the subsequent critical points identified in the scenario described above, even after an arbitration has commenced. The SMA has recognized this.

- In 1999, the SMA adopted Mediation Rules. The Mediation Rules were revised in 2016: <https://www.smany.org/mediation-rules.html/>.
- The SMA has a standing Mediation Committee, chaired by Rob Milana.
- 22 SMA members have experience as mediators; 19 have completed courses and obtained credentials; most of those 19 attended a course which then chair Mike Fackler developed with and through the City Bar Association focusing on maritime claims.
- Other SMA members are brokers, who, as noted above, are in fact skilled in the art of bringing parties to an agreement.
- To the lawyers reading this: most SMA arbitrators know you; you know us. Your clients may as well. Taking a pause in the case with a trusted mediator cannot hurt, can it?
- Presenting a case to an SMA mediator in its early, middle, or final stages also documents that the lawyer tried to resolve the dispute. It covers you with your client and your client's insurer. If you are inhouse, then it covers you with your management and CEO. If nothing else, presenting your dispute to an SMA mediator allows the parties to see the amount the other is willing to pay/accept. Knowing that, the parties and their insurers can make an informed decision both on the merits as well as whether the costs, and the risk of recovering them or being forced to pay them, make it worthwhile to proceed.

If you are at any of these key points, consider recommending mediation before an SMA mediator. In my experience, I can't imagine a club declining to agree to support the costs. And if a settlement does not materialize on the first go at mediation, then the mediator will be around after more information is developed to again assist.

Although my focus here has been on maritime contractual disputes, SMA mediators are available to assist as mediators in all types of maritime cases: cargo, collisions, dock damage as well as contractual disputes arising out of contracts which may not have an arbitration clause: repair contracts, terminal contracts, agency contracts. Why choose

a stranger who does not know your maritime business?

\* The text of this article, slightly revised here for publication, was presented by Mr. Lambert on April 29, 2021, via Zoom, to the members of the ADR Committee of the Maritime Law Association of the United States.

## SMA's 2021 Online Educational Seminar: Maritime Arbitration In New York

**By Austin L. Dooley, Dooley Seawather Analysis, Inc., SMA Member/Former SMA President, Chair, SMA Education Committee**

This past February and March, the SMA offered its educational seminar “Maritime Arbitration in New York” as an online program. There were 12 participants from as far away as Costa Rica, London, and sunny Long Beach, California. Some actually took part while traveling and/or working; one was surveying cargo on a barge in the Mississippi River and another from the bridge of ship docked in the port of Long Beach. The London attendee was marooned there by COVID and could not return home to Florida. Others joined in from offices and homes in Louisiana, Florida, and Texas as well as NYC and Long Island. Perhaps the most enviable login location was near the beach in Costa Rica.

The program lectures were given by S.U.N.Y. Maritime College Professor Jeff Weiss. On each of four consecutive Thursday afternoons (NY time), attendees logged in to the SMA's Zoom account for a three hour lecture. Without missing a single step, Jeff was able to transition from the traditional in-person conference room seminar to the live on-line zoom meeting. The online and “internetification” of the program allowed the attendees to view a digital library of material from past SMA awards and publications. This library was available throughout the seminar and served as a key reference for the group's discussion of SMA rules and practices, as well as issues of maritime law that impact legal practices in New York arbitration. Detailed online lecture outlines were provided

days before the meetings so that background material could be reviewed prior to each meeting. In addition, the Zoom software allowed for lively and effective online discussions during the lectures.

With great help from the MLA's CLE committee chair Brian Eisenhower of Hill Rivkins, the two attorneys participating in the program were able to certify for 12 hours of CLE credit.

The SMA arbitration educational course has a long history. I asked Past SMA President Tony Siciliano about the early life of the program over the course of the Society's 56 years. Tony reported:

WOW! That's a good question. My best recollection is that casual sessions were held after work at a downtown restaurant called 'Bustos'. Back then, those casual sessions were only available to newly admitted members. That may have been a good approach because our founding members often interrupted the sessions with urgent calls to the bar to replenish their glasses.

Tony gave the names of several SMA early and founding members to the list of instructors as well as the help received from the World Trade Institute (an organization set up to enhance the level of understanding of international commerce and maritime business in the 1970's and '80's). I took the course in the early 1980's when it was conducted by the SMA under the WTI umbrella.

Tony described the leadership roles of former SMA Presidents Fred Sauer and Don Zubrod in transitioning the course to a more formal program:

I believe it was Fred Sauer who was the chief proponent for a more formal and instructional format. Fred's efforts led to the World Trade evening sessions which lasted several weeks. The practice of limiting the sessions to only newly admitted SMA members was discontinued. Instead, the World Trade sessions were opened to persons aspiring to become members of SMA and anyone else interested in learning about the conduct of maritime arbitration in the port of New York. Don Zubrod went on to shape the World Trade lectures into the outstanding arbitral educational opportunity you remember. Don arranged for the group at each session to be addressed on matters maritime by leading arbitrators and members of the New York maritime bar.

Together with my dear friend, the late Michael van Gelder (Lord how I miss him!), I had the privilege of proctoring two seasons of such sessions. Michael and I would stage a Mock Arbitration using an actual but as yet unpublished case on which basis the attendees were graded. Using the actual briefs exchanged, each of us would play the roles of opposing counsel. Ah, what great fun it was !!!

Today's SMA program was re-organized about 16 years ago under the direction of the Board of Governors and has seen well over 100 people take the course. The venue has bounced around from the Yale Club to South Street Seaport to Midtown to Stamford. The SMA Education Committee members Jamie Greenlees and Klaus Mordhorst have been active in ensuring the success of the program as has Patty Leahy's administrative management. Also, Professor Jeff Weiss' professional skills and approach to the seminar has made it an ADR educational success. Of course, our late committee member Captain Raj Jadhav's participation is missed.

The SMA will run a second online session of the program in the fall of 2021. Details to be announced.

My sincerest thanks to Tony for his enriching content and editorial suggestions for this article.

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## Loose Ends

### Changes

LeRoy Lambert has been an editor of The Arbitrator since 2013. LeRoy is stepping down to focus on his duties as President of the SMA. Dick Corwin, Sandra Gluck and Louis Epstein will be the editors going forward.

### CMA Shipping 2021

This annual conference will be part of North American Shipping Week and will take place in Stamford on October 13-15. The SMA's Louis Epstein will make a presentation on *force majeure* clauses in international commercial contracts.



### CMA Golf Outing

The CMA's Spring Golf Outing was another success. Ninety-two golfers (23 foursomes) participated. The SMA was pleased to sponsor two holes. Participants included SMA Board of Governor Molly McCafferty who played in a foursome consisting of Molly, Mike Unger, head of Britannia's office in New York, Pierce Power of Martin Ottaway, and Nick Makar of the Marshall Islands Registry. Molly led them to a 5th place prize! Vice-President Meehan attended the dinner at which the SMA and other sponsors were recognized and thanked.

### Offshore Wind

Not long after the SMA had a January presentation from Ross Gould, a Business Network for Offshore Wind vice-president, concerning latest developments in the tri-state area, the U.S. Department of Interior announced a new priority Wind Energy Area in the New York Bight, with a lease sale expected for late 2021/early 2022. The U.S. Department of Transportation identified \$230 million for port infrastructure improvements and the Department of Energy is facilitating \$3 billion in loan support for the industry.

### Marine Insurance Americas

As part of the "Marine Insurance Americas" virtual event June 1-3, the SMA's Molly McCafferty is speaking as part of a panel discussion concerning "Social Inflation - Feeling the Pain, Fueling the Claim!," a session which will explore the ramifications of a perceived upward trend in the size of claims.



## MLA ADR Committee: “Maritime Arbitration at 100”

The MLA ADR Committee was formed in 1927, following the 1925 enactment of the Federal Arbitration Act, and the MLA and SMA have long worked together to promote maritime arbitration and mediation. The term of Peter Skoufalos (of Brown Cavalas & Fromm) as Committee Chair ended this month, and the SMA thanks Peter for supporting maritime arbitration and ADR as Chair and, indeed, throughout Peter’s career.

Chris Nolan (of Holland & Knight) now is Committee Chair, joined by Lt. Lindsay Sakal (of the U.S.C.G.) as Vice-Chair, Casey O’Brien (of Hill Rivkins) as Secretary, and Ifigeneia Xanthopoulou (of K&L Gates) as Young Lawyer Representative.

Mr. Nolan announced that during these next four years the Committee will work with stakeholders to celebrate and reflect upon “Maritime Arbitration at 100” with various subcommittees being formed and programs being planned. At 11.30 a.m. Eastern time the third Friday of each month the Committee is holding a Virtual “Coffee Break” lasting no more than 30 minutes. The June 18 Virtual “Coffee Break” will be a discussion of what maritime practitioners are getting right and getting wrong in their presentations to maritime arbitrators.

All of us at the SMA look forward to working with the MLA and the ADR Committee in connection with “Maritime Arbitration at 100.”

## 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: [dick.corwin@icloud.com](mailto:dick.corwin@icloud.com), or [sandra.gluck@gmail.com](mailto:sandra.gluck@gmail.com), or [louis.epstein@trammo.com](mailto:louis.epstein@trammo.com). Thank you!

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