

In this issue

President's Message	1
Non-Signatories' Rights in Maritime Arbitration and a Recent U.S. Supreme Court Decision	2
Broad Foreign Arbitration Clauses Are Enforceable in the U.S.	8
May a "Non-Signatory" of an Arbitration Agreement Require a Signatory to Arbitrate Its Claims?	10
Manfred Arnold Looks Back	13
SMA Award Service.... At-a-Glance	16
Spotlight on the SMA	19
Ronald T. Carroll	20
In Closing	20

President's Message

By: LeRoy Lambert, SMA President

It is my pleasure to write this President's Report following my election as SMA President in May 2021. Thank you. I look forward to serving you as President, joined by Vice-President Bob Meehan, Secretary Soren Wolmar, Treasurer Dave Gilmartin, our capable Board of Governors and a committed slate of Committee Chairs whose names are on the website <https://www.smany.org> and elsewhere in this issue.

I take this opportunity to thank Nigel Hawkins for his many years of service to the SMA and, in particular, for Nigel's just completed two years of service as President. The Board is pleased to continue to have Nigel's counsel as Immediate Past President. Thank you, Nigel!

I expected to greet many of you at the September Luncheon, but the pandemic and prudence dictated that we hold off resuming until further notice. As New York reopens and the ranks of the vaccinated grow, we are cautiously optimistic that luncheons will resume in November.

On October 13, 2021, at 12:30, we will resume our Zoom luncheons. Paul Mazzarulli, the representative in the Americas of the Baltic Exchange, will provide, "An Introduction to the Baltic Exchange." Please register with Patty Leahy. Thanks to Molly McCafferty for lining up speakers.

From time to time *The Arbitrator* focuses on a particular topic – three articles (see pp. 2-13) dig deep into the issue of when a non-signatory can compel a signatory to arbitrate – and *The*

Arbitrator from time to time will focus on an SMA member. Manfred Arnold, who became an SMA member in 1971 (see p. 13), provides insights from his decades of maritime arbitral experience. Committees are hard at work identifying opportunities for the membership, and this issue includes “Spotlight on the SMA” high-lighting activities and initiatives of the SMA and its members (p. 19).

There is much reason for optimism, despite all the challenges we faced and continue to face. Panels have held numerous virtual hearings – organizational, evidentiary, and to hear argument. Reminder to all members to report any appointments to Patty Leahy (if you are not a member then we nevertheless ask that you, too, email Patty Leahy when you receive an appointment or are selected as chair in a SMA Rules based arbitration).

Unfortunately we lost longtime SMA member Ron Carroll (p. 20), and, early this month, after a long illness, Stanley McDermott died. Stanley was a lawyer’s lawyer with an international reputation. He handled arbitrations under SMA Rules and those of other organizations in the United States and the United Kingdom; he was a credit to the profession, to his native New Orleans and to his adopted New York.

During the past 18 months SMA members have proved more than able to adjust to the new “virtual” reality. Our use of and comfort with virtual hearings enables us to market ourselves more effectively and cost-efficiently: we need not travel, arrange logistics or organize a function for a large group. Two persons can arrange a virtual meeting with a company lasting 45 minutes. Newer members can partner with more experienced members to take our message to existing and new end-users. Thanks to our Friends & Supporters for their support!



LeRoy Lambert
President

Non-Signatories’ Rights in Maritime Arbitration and a Recent U.S. Supreme Court Decision*

By James Textor, Counsel,
Eversheds Sutherland (US) LLP, New York

GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC

This article will discuss the rights of a non-signatory to international arbitration agreements with emphasis on time and voyage charter party contracts, U.S. Supreme Court and federal court decisions, and Society of Maritime Arbitrators (SMA) awards for interpretation of charter party arbitration clauses and maritime claims.

In the U.S., domestic equitable estoppel doctrines are sometimes referred to as “reverse estoppel.” Equitable estoppel is a judicially created doctrine rooted in concerns for equity and good faith that the signatory should not be able to avoid arbitration if the signatory somehow benefitted from the terms of the underlying agreement.

In the U.S., the enforceability of *domestic* arbitration agreements is determined by the Federal Arbitration Act of 1925 (“FAA Chapter 1”). The enforceability of *international* arbitration agreements is determined by the U.N. Convention on Recognition and Enforcement of Foreign Arbitration Awards of 1958, also known as the New York Convention (“FAA Chapter 2”). Under U.S. law, there are certain circumstances in which a signatory to a *domestic* arbitration agreement can be forced to arbitrate by a non-signatory. However, there have been disputes as to whether a non-signatory to an *international* arbitration agreement has those same rights. The U.S. Supreme Court has now settled the matter: In certain circumstances, the non-signatory does have those rights and can compel a signatory to arbitrate.

On June 1, 2020, having granted *certiorari* due to a conflict among four federal appeals courts, the U.S. Supreme Court issued a unanimous opinion (authored by Justice Thomas) in *GE Energy Power*

*Conversion France SAS v. Outokumpu Stainless USA LLC*¹ regarding non-signatory rights to an arbitration agreement based on the relationship between the U.S. domestic equitable estoppel doctrine under FAA Chapter 1 (9 U.S.C. §§ 1-16) and enforcement of an international arbitration agreement under FAA Chapter 2 (9 U.S.C. §§ 201-208). The Supreme Court ruled that the New York Convention does not conflict with the U.S. domestic equitable estoppel doctrine that permits enforcement of arbitration agreements by non-signatories.

Outokumpu, as the owner/operator of a steel mill in Alabama, entered into a contract with Fives ST for the purchase and installation of cold rolling units to manufacture stainless steel at the Alabama plant. The contract contained a list of subcontractors that Fives could use to supply the necessary unit components. The contract contained a commercially broad “all disputes” arbitration clause with venue in Dusseldorf, Germany, and incorporated International Chamber of Commerce Rules under German law.

Subsequently, Fives entered into a contract with GE Power Conversion France as one of the listed vendors in the contract with Outokumpu to manufacture and install the units. Several years later, the units failed.

In Alabama state court, Outokumpu sued GE France, which successfully removed the dispute to the U.S. District Court for the Southern District of Alabama under Section 205 of the FAA (9 U.S.C. § 205). Although a non-signatory to the Outokumpu/Five contract, GE France filed a motion to compel arbitration in Germany on the basis of the Alabama equitable estoppel doctrine. The district court granted the motion because the unit manufacture contract specifically listed GE France as a subcontractor.

On appeal, following authority from the U.S. Court of Appeals for the Ninth Circuit, the U.S. Court of Appeals for the Eleventh Circuit reversed and held that under FAA Chapter 2, GE France, as a non-signatory, could not compel Outokumpu to arbitrate in Germany under the doctrine of equitable estoppel. GE France appealed to the U.S. Supreme Court. The Supreme Court reversed, relying on its own precedent that a non-signatory to a domestic arbitration clause may invoke FAA Chapter 1 and that nothing in FAA Chapter 2 prohibits the application of U.S. domestic equitable estoppel doc-

trine to enforce international arbitration agreements.

The Supreme Court observed that the New York Convention is “simply silent” on the issue of non-signatory enforcement and that “silence is dispositive.” The Supreme Court concluded that the U.S. domestic equitable estoppel doctrine permitted under FAA Chapter 1 does not conflict with FAA Chapter 2. The Supreme Court cited a portion of FAA Chapter 2 which states as follows:

FAA Chapter 2, Arbitration agreements in writing shall be enforceable, save upon grounds as exist at law or in *equity* for the revocation of any contract. [emphasis added]

The Supreme Court made two interesting rulings. First, citing existing Supreme Court precedent, the Court held that FAA Chapter 1 permits a non-signatory to rely on traditional state law principles, including equitable estoppel, for enforcement of arbitration agreements. Second, citing *Williston on Contracts* (4th edition 2001), the Supreme Court stated that arbitration agreements may be enforced by non-signatories through contract doctrines such as assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver, and estoppel.

The Supreme Court remanded to the Eleventh Circuit to determine whether U.S. (not German) equitable estoppel principles apply to the GE France motion to compel. The Supreme Court made no evidentiary ruling regarding the application of the equitable estoppel doctrine to the facts of the case.

Justice Sotomayor issued a very interesting concurring opinion noting that (1) the New York Convention does not prohibit the application of the domestic equitable estoppel doctrine to permit non-signatories to enforce arbitration clauses, (2) “it is admittedly difficult to articulate a bright-line test for determining whether a particular domestic non-signatory doctrine reflects a consent to arbitrate,” and (3) equitable estoppel must strictly adhere to “the fundamental FAA principle that arbitration is a matter of consent,” citing *Stolt-Nielsen v. Animal Feeds International Corp.*²

If a non-signatory to the arbitration agreement can show that it has a sufficiently strong connection to the signatory, the non-signatory will now have standing to enforce that international arbi-

tration agreement in U.S. courts, just as it would with respect to domestic arbitration agreements. Chapter 2 of the FAA does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by non-signatories.

Going forward, for international disputes (i.e., international disputes under the New York Convention) involving non-signatory arbitration rights and FAA Chapter 2, clients and counsel should evaluate both U.S. and foreign law regarding the application of the equitable estoppel doctrine.

For international maritime arbitration practice in the U.S., this Supreme Court ruling is very important.

Non-Signatory Rights with respect to Charter-party Arbitration Clauses

For general commercial practice and based on well-established legal precedent, such as the decisions *JLM Industries Inc. v. Stolt-Nielsen S.A. and Choctaw Generation LTD. v. American Home Assurance Co.* from the U.S. Court of Appeals for the Second Circuit, the signatory may be estopped from avoiding arbitration when “the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.”³ For maritime arbitration practice, especially at the federal appellate level, there is very little legal precedent.

For the estoppel equitable doctrine in maritime practice (and cited by many U.S. courts), *Astra Oil Company Inc. v. Rover Navigation, Ltd.*⁴ is the leading U.S. maritime appellate decision involving non-signatories.⁵

Astra Oil Company had a petroleum cargo sales contract with a third-party buyer containing an agreed discharge port range and discharge window. AOT, as voyage charterer, fixed the vessel on the well-known ASBATANKVOY 1977 form with the standard Clause 24 providing for arbitration of “any and all differences and disputes of whatsoever nature arising out of this charter.” AOT and Astra Oil were affiliated merchant traders controlled by the same corporate parent. Title to the cargo always remained with Astra Oil and not with AOT. On behalf of AOT, an Astra Oil employee fixed the voyage charter party.

For the voyage to the U.S., Astra Oil issued voyage instructions to the owner and vessel. During the

voyage, the vessel experienced engine problems resulting in a two-week delay at sea. At the first U.S. discharge port, the U.S. Coast Guard conducted a vessel inspection and issued a Notice of Detention after observing deck plate cracks, which resulted in further discharge delays and the cancellation of the third-party sales contract.

For the deck cracks, the owner issued a general average demand with a threat of cargo arrest. Astra Oil issued a late delivery claim, a threat of vessel arrest, and a request for a P&I Club Letter of Undertaking (“LOU”). Through counsel, Astra Oil and the owner exchanged security; the Club LOU included a specific New York City arbitration provision contained in the underlying voyage charter. Astra Oil posted general average security to release the owner’s lien on the cargo. Also, based on the voyage charter, Astra Oil issued a Letter of Indemnity (“LOI”) to the owner to discharge the cargo without production of the original bill of lading, which did not properly incorporate the charter party terms.

As per the charter party arbitration clause, Astra Oil and AOT timely commenced SMA New York City arbitration proceedings. On the eve of the first witness hearing, the owner challenged (1) the standing of Astra Oil, as non-signatory, to appear in the arbitration proceedings to advance its late delivery claim and (2) the arbitrability of the Astra Oil claim. The panel issued a ruling to stay the arbitration proceedings pending a court ruling. The U.S. District Court for the Southern District of New York issued a ruling denying the Astra Oil motion to compel, as the voyage charter party did not permit a claim for late delivery.⁶

Based on the equitable estoppel doctrine and maritime evidence, the U.S. Court of Appeals for the Second Circuit panel, which included now-Justice Sotomayor (then sitting as a judge on that court), reversed and granted the non-signatory Astra Oil’s motion to compel, ruling that the owner was estopped from refusing to arbitrate Astra Oil’s claim under the charter party arbitration clause.⁷ The court then cited very current commercial precedent from its own circuit – namely the *JLM Industries* and *Choctaw Generation* cases cited above – for the applicability of the equitable estoppel doctrine.

Based on a review of the maritime evidence, the Second Circuit ruled that (1) vessel breakdowns and deck cracks caused vessel delays, resulting in Astra Oil third-party sales contract damages, which were “intertwined” with the owner’s breach of the charterparty vessel speed and seaworthiness warranties; (2) Astra Oil and AOT are operationally and commercially affiliated entities; (3) the owner accepted voyage orders from Astra Oil; and (4) the owner and Astra Oil exchanged pre-discharge security to release the vessel and cargo, in which case the owner treated Astra Oil as a signatory to the charter party including the incorporated arbitration agreement.

The *Astra Oil* ruling from the Second Circuit is very fact and maritime-evidence specific, especially the pre-discharge attorney mutual security exchanges and specific LOU arbitration terms, which are cited in the decision.

SMA Awards

Subsequent to *Astra Oil*, there were two SMA awards that decided the rights of non-signatories to tanker voyage charter parties on the well-known ASBATANKVOY 1977 form: *Stena Bulk AB v. Citgo Asphalt Refining Co.*, MV GOLDMAR SMA No. 3902 (2005) (Messrs. Arnold and Berg, and dissenting, Martowski), and *Stolt-Nielsen Transp. Group BV v. Radcliffe Steamship Co.*, MV HYDE PARK SMA No. 3934 (2006) (Messrs. Mordhorst and Siciliano, and, dissenting, McCormack).

In the GOLDMAR arbitration, Stena Bulk, as disponent owner, fixed the vessel to Citgo for a voyage on the ASBATANKVOY 1977 form. Stena had time chartered the vessel from Stelmar as the registered owner. Citgo arranged to transport a petroleum cargo for discharge at a Petroleos de Venezuela, S.A. (“PDVSA”) terminal in Venezuela.⁸ During the vessel shift to the berth, a terminal breasting fender collapsed into the sea. In the arbitration, Citgo alleged that the vessel struck the fender, and Stena alleged that the fender was inherently defective, which caused the collapse. The vessel remained at anchor for about eleven days.

Under the voyage charter party, Stena advanced a demurrage claim against Citgo, and Citgo issued counterclaims for fender damage repair, reimbursement for demurrage payments to other vessels, and indemnity for the PDVSA claim against Citgo. As vessel owner, Stelmar posted a P&I Club

LOU to PDVSA for its fender damage claim against Stelmar, with jurisdiction in Venezuela.

In the arbitration proceedings, Citgo advanced an application that the panel consolidate all disputes which the panel denied because the voyage charter party did not include the SMA Rules, including SMA Consolidation Rule 2. However, the panel majority granted the application of Citgo to allow PDVSA, as a non-signatory, to appear in the arbitration proceedings. Citing *Astra Oil*, the panel majority noted that (1) Citgo is a subsidiary of PDVSA with a “close corporate and operational relationship,” and (2) the PDVSA fender damage claim is “intertwined” with Stena’s demurrage claim and Citgo’s counterclaims arising out of the dock damage.

The reasoned dissenting opinion cited *Astra Oil*, and the arbitrator noted that although Citgo is a subsidiary of PDVSA, there were no facts similar to *Astra Oil*. Specifically, the PDVSA fender damage claim against Stelmar was not closely intertwined with the voyage charter party between Stena and Citgo.

The HYDE PARK award involved Stolt-Nielsen, as the well-known chemical parcel tanker owner/operator with various subsidiary corporate-affiliated entities which appear in time and voyage charters, and a Stolt-Nielsen corporate-affiliated chartering entity as non-signatory, which appeared in an arbitration to present its claim against the signatory vessel owner.

In 1996, Stolt Parcel Tankers Inc. (SPTI), as charterer, entered into a long-term time charter with Halcot Shipping Corporation (HSC), as the vessel owner, for a vessel renamed the HYDE PARK. As per the time charter terms with SPTI, HSC scheduled a vessel dry-docking for nine days with vessel redelivery to SPTI around an agreed date. For dry dock repairs, the vessel would remain off-hire.

Anthony Radcliffe Steamship Company Limited (ARSC), as an SPTI trading arm corporate affiliate and as disponent vessel owner, entered into a voyage charter for the HYDE PARK with Kolmar Petrochemicals AG (Kolmar), as charterer, for a voyage with agreed laydays around the completion of the expected vessel dry dock repairs and vessel redelivery date to SPTI. The shipyard repair took longer than anticipated by two (2) weeks as a result of which the vessel missed the agreed voyage char-

ter party laydays. Under the voyage charter, Kolmar advanced a late-delivery claim against ARSC. Under the time charter, SPTI tendered defense to HSC, which denied the tender, and then Kolmar and ARSC entered into a settlement which SPTI paid on behalf of ARSC.

Under the head time charter, STPI and ARSC commenced arbitration proceedings against HSC to recover the indemnity settlement amount paid to Kolmar. HSC challenged the standing of ARSC as a non-signatory to appear in the arbitration proceedings, and HSC attempted to distinguish *Astra Oil* as not applicable. Relying on *Astra Oil*, HSC alleged that ARSC, as the non-signatory, had a mandatory burden to demonstrate that the signatory treated the non-signatory as though it were a party to the underlying time charter party.

The panel majority issued a partial final award, ruling that both SPTI and ARSC were proper parties to the arbitration and had standing to pursue the indemnity claim against HSC. Based on written submissions, the panel observed that ARSC was a “trading arm” subsidiary within the Stolt-Nielsen family of companies and an affiliate of SPTI. Also, based on Second Circuit precedent, the panel majority ruled that the SPTI and ARSC indemnity claim was “intertwined” with the head time charter. Further, with reference to *Astra Oil*, the panel majority did not accept the HSC contention that ARSC as non-signatory, was required to demonstrate that the signatory treated the non-signatory as though it were a party to the underlying time charter party. Based on its interpretation of Second Circuit commercial precedent and *Astra Oil*, the panel majority ruled that the signatory’s treatment of the non-signatory as a party to the underlying contract is but one factor for the panel to consider, but is not an essential one. The panel noted that if this factor is present, together with the two requisite criteria of a close corporate and operational relationship between the non-signatory and its related signatory and the “intertwinedness” of the claims to be arbitrated, it would be difficult if not impossible for the unwilling signatory to avoid arbitration.

The dissenting arbitrator issued a reasoned dissent that there was insufficient proof of the corporate relationship between SPTI and ARSC, and, based on *Astra Oil*, the indemnity claim was not “closely intertwined” with the time charter party.

Subsequently, in *Halcot Navigation L.P. v. Stolt-Nielsen Transportation Group, BV*,⁹ HSC commenced legal proceedings in the U.S. District Court for the Southern District of New York to vacate the partial final award, and Stolt-Nielsen cross-moved to confirm the award. In a lengthy decision, the district court denied the motion to vacate and granted the motion to confirm.

HSC alleged that the panel had no jurisdiction to decide the standing issue of ARSC and the arbitrability of the ARSC indemnity claim for the settlement paid by SPTI. HSC alleged that it appointed the second arbitrator without prejudice to challenging the standing of ARSC, but did not challenge the standing of SPTI. Therefore, based on well-established FAA Chapter 2 precedent, HSC argued that whether ARSC could assert its claim in arbitration was a matter for the court to decide, not the arbitrators.

In response, Stolt-Nielsen argued that HSC waived its right to object to proceeding with the arbitration against ARSC because HSC voluntarily submitted the issue of ARSC’s standing and arbitrability issues to the panel. Based on submissions, the district court agreed, noting that HSC “never objected to the arbitration panel determining the arbitrability issues it raised. In fact, [HSC] urged the panel to do so.”¹⁰ Based on HSC correspondence to the panel, and written submissions and briefs to the panel challenging the standing of ARSC, the district court noted that HSC waived its right to object in the arbitration proceeding to a partial final award, and the ARSC claim was certainly “intertwined” with the time charter. The district court ruled as follows:

The Voyage Charter between Anthony Radcliffe and Komar is, in essence, a sub-contract under the Time-Charter, and the claim arises out of Halcot’s alleged failure to comply with terms of the Time Charter.¹¹

As a further basis to confirm the partial final award, the district court discussed the panel majority’s reference to *Astra Oil* and whether the non-signatory has the affirmative burden to demonstrate that the signatory treated the non-signatory as if it were a party to the charter party. The district court agreed with the panel majority that the Second Circuit has “not introduced a conduct requirement into the equitable estoppel

test post-*Astra Oil*.¹² Also citing *Astra Oil*, the district court ruled that there is no minimum quantum of “intertwined-ness” to support a finding of estoppel.¹³ Going forward, for the maritime bar in post-*Astra Oil* arbitration and legal proceedings involving the estoppel rights of non-signatories, this district court ruling, when read with the *Astra Oil* decision, is useful precedent for arguing that non-signatory rights are now well established.

Conclusions

For non-signatory international arbitration agreement enforcement in U.S. courts, FAA Chapter 2 (i.e., the New York Convention) is now aligned with FAA Chapter 1’s domestic equitable estoppel doctrine.

As we see from the cases discussed above, the equitable estoppel inquiry in arbitration is very fact specific. There is no bright-line test to determine whether a particular domestic non-signatory equitable estoppel factor reflects a consent to arbitrate. In her concurring opinion in *GE Energy Power Conversion*, Justice Sotomayor urged lower courts to adopt a case-by-case analysis in determining whether applying the domestic non-signatory doctrine would violate the FAA’s consent requirement.

The U.S. courts’ equitable estoppel decisions do not comment on whether the subject arbitration clause is broad (i.e., any and all disputes) or narrow (i.e., restricted to only contract parties and/or to specific disputes). For the non-signatory to succeed, lawyers drafting arbitration clauses are well advised to draft them broadly; a narrow arbitration agreement would be problematic.

For time and voyage charter party contracts, especially in the bulk liquid cargo trade, most charterers (especially merchant traders) have industry-standard corporate affiliation rider clauses which allow all affiliated non-signatories to have recourse to the arbitration clause to proceed against the signatory. For tanker time and voyage charter party forms, the well-known SHELLTIME 4 and ASBATANKVOY 77 forms do not include corporate affiliated terms in the printed terms. The EXXONMOBILVOY 2005 form at printed Arbitration Clause 35(b), lines 652-54, contains corporate affiliation terms. At least for maritime arbitration practice, in response to a challenge by the owner to the standing of the charterer’s non-signatory affil-

iated entity to appear in the arbitration proceedings, the panel should enforce the charter party as agreed with the corporate affiliation terms without the non-signatory commencing legal proceedings.

Based on, admittedly, only two SMA Awards with majority decisions that contain reasoned and lengthy dissents, arbitration panels appear to be following the *Astra Oil* decision, and the arbitrators have performed a detailed factual analysis of the applicable arbitration clause and the non-signatory’s claim to comply with the “intertwined” requirement.

Finally, at least for the bulk liquid tanker trade, the bills of lading typically allow the master to incorporate the charter party terms on the bill’s face, which is a separate basis for the maritime non-signatory to benefit from the underlying arbitration agreement. However, except for the parcel tanker chemical trade, the master and vessel agent typically do not properly clause the face of the bills of lading with the underlying charter party terms. This remains an industry issue.

- 1 140 S. Ct. 1637, 207 L. Ed. 2d 1 (2020).
- 2 559 U.S. 662, 684, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010).
- 3 *JLM Indus.*, 387 F.3d 163, 177 (2d Cir. 2004); *Choctaw Generation*, 271 F.3d 403, 406 (2d Cir. 2001).
- 4 344 F.3d 276, 2003 AMC 2514 (2d Cir. 2003). The author represented *Astra Oil* in the SMA arbitration and federal court litigation proceedings including argument before the Second Circuit.
- 5 See, *TimeCharters*, 7th Ed. 2014, Sec. 2A, 43-44, citing *Astra Oil*.
- 6 *Astra Oil Co. v. Rover Navigation, Ltd.*, No. 01 Civ. 11296 (LTS) (HBP), 2002 WL 31465582 (S.D.N.Y. Nov. 6, 2002).
- 7 *Astra Oil Co. v. Rover Navigation, Ltd.*, 344 F.3d 276 (2d Cir. 2003).
- 8 PDVSA is the national oil company of Venezuela.
- 9 491 F. Supp. 2d 413, 2007 AMC 1660 (S.D.N.Y. 2007).
- 10 *Id.* at 417.
- 11 *Id.* at 422.
- 12 *JLM Industries Inc.*, supra at 177-78.
- 13 *JLM Industries Inc.*, supra at 178.

* This paper, which was originally presented by Mr. Textor to the October 29, 2020 meeting of the Committee on Arbitration and ADR of The Maritime Law Association of the United States (“MLA”) and was published in an earlier form in the Fall 2020 issue of the MLA Report. The paper, since revised by the author, is printed with permission of the MLA.

Broad Foreign Arbitration Clauses Are Enforceable in the U.S.*

By Charles G. De Leo and Ryan L Little,
Partners, De Leo & Kuylenstierna PA, Miami

The U.S. Court of Appeals for the 11th Circuit (one of several U.S. regional federal courts of appeal) in a recent decision involving a commission claim made pursuant to a mega-yacht sales contract has reinforced the enforceability of broad arbitration clauses in international contracts subject to the New York Arbitration Convention and the applicability of such arbitration clauses to non-signatories in certain circumstances under the U.S. doctrine of equitable estoppel. The Court rejected efforts by the claimants to avoid the arbitration clause by framing their claims in tort rather than contract. The greater familiarity of the U.S. federal courts versus state courts in matters concerning arbitration makes it advisable when possible to remove such claims if filed first in a state court. This decision upholds the removability of claims subject to the New York Convention. The decision is styled *Northrop and Johnson Yacht-Ships Inc. v. Royal Van Lent Shipyard BV and Feadship America Inc.* and is reported at 2021 U.S. App. LEXIS 8797.

Procedural history and underlying claims

The claims were originally filed in Florida state court by yacht broker Northrop and Johnson Yacht-Ships Inc. against Dutch yacht builder Royal Van Lent Shipyard BV and its U.S. distribution agent Feadship America Inc. Royal Van Lent and Feadship removed the claims to the federal court in Miami alleging the applicability of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). They also maintained that all claims asserted, including contractual and tort allegations, were subject to the Dutch arbitration clause contained in the commission agreement between the brokerage company and the yacht builder. The lower federal court agreed and granted the motion to dismiss and compel arbitration. The claimants then appealed to the Court of Appeals for the 11th Circuit which reviewed the lower court decision *de novo*.

Court of Appeals decision

In a unanimous opinion issued on 26 March 2021 the Court of Appeals affirmed the lower court. The opinion first noted that the underlying commission agreement contained an arbitration clause which provided that:

Any **dispute arising** out of or in connection with this Agreement shall be finally settled in accordance with The Arbitration Rules of the Netherlands Arbitration Institute (NAI).

The opinion restated that U.S. court decisions interpreting the New York Convention have generally held that the Convention requires the courts of signatory nations to give effect to private arbitration agreements and to enforce arbitral awards made in other signatory nations and that such claims are removable from the state to federal court further noting that both the U.S. and The Netherlands are signatories to the Convention.

Issues on appeal

The broker Northrop on appeal again challenged whether there was an agreement to arbitrate, which issue became the focus of the Court's analysis. Northrop argued that the Commission Agreement governed only the commission due to Northrop for the sale of a first yacht and not the commission due for the construction of a second yacht and that the latter formed the basis of the suit such that its claims arose outside the scope of the arbitration provision. Northrop also argued that Feadship America could not invoke the arbitration provision as a non-signatory to the Commission Agreement.

Jurisdictional requirements to apply the New York Convention

In upholding the lower court decision, the Court of Appeals first restated the general rule that arbitration agreements fall under the Convention when four jurisdictional prerequisites are met:

1. that there is an agreement in writing within the meaning of the Convention;
2. that the agreement provides for arbitration in the territory of a signatory of the Convention;
3. that the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and

4. that a party to the agreement is not an American citizen or that the commercial relationship has some reasonable relation with one or more foreign states.

Strong presumption in favor of arbitration

The Court of Appeals then generally noted that under the New York Convention and Supreme Court and 11th Circuit precedent applying the Convention, there is a strong presumption in favor of freely negotiated contractual choice-of-law and forum selection provisions and this presumption applies with special force in the field of international commerce. The Court then went on to state that U.S. courts have consistently held that provisions that cover “all disputes arising out of or in connection with an agreement” such as in this case are meant to be read broadly. The Court concluded that the arbitration provision in question did cover all of Northrop’s claims and that even the tort claims of quantum merit, tortious interference and unjust enrichment went to the heart of the agreement between the parties and fell squarely within the scope of the arbitration provision. The Court held that Northrop could not try to avoid the express terms of the agreement it signed by bringing equitable tort claims rather than breach of contract claims.

Applicability to certain non-signatories under equitable estoppel

The Court of Appeals also rejected Northrop’s argument that the lower court had erred when it allowed Feadship America to invoke the arbitration provision because it was not a signatory to the Commission Agreement. The Court restated that under U.S. law a non-signatory to an arbitration agreement may nevertheless compel arbitration under the doctrine of equitable estoppel either when the plaintiff-signatory must rely on the terms of the written agreement in asserting its claims or when the plaintiff-signatory alleges substantially interdependent and concerted misconduct by the signatories and non-signatories and such alleged misconduct is founded in or intimately connected with the obligations of the underlying agreement. The Court of Appeals noted that the U.S. Supreme Court recently in 2020 in the case of *GE Energy Power Conversion France SAS Corp. v. Outokumpu Stainless USA LLC* held that the New York Convention does not prohibit the application of domestic

equitable estoppel doctrines. The Court then held that Feadship America was entitled to invoke the Commission Agreement’s arbitration provision under the second theory of equitable estoppel given that the broker had alleged supposed interdependent and concerted misconduct between Royal Van Lent and Feadship America that allegedly violated express obligations in the Commission Agreement.

Conclusions

We believe this Court of Appeals decision is important because it reinforces the enforceability of broadly drafted arbitration clauses and reiterates that a party may not try to avoid such broadly drafted arbitration clauses by attempting to cast their complaint in tort rather than contract.

The decision is also important in that it applied a recent U.S. Supreme Court case holding that the New York Arbitration Convention does not prevent a U.S. court from applying the doctrine of equitable estoppel to compel arbitration in certain circumstances as to a non-signatory to the underlying agreement.

The decision also reinforces the advisability of removing such actions within 30 days of service from the state to federal court pursuant to the New York Convention and then moving the federal court to compel arbitration.

* This article originally appeared in *Gard Insight*, April 22, 2021 (<https://www.gard.no/web/updates/content/31575701/broad-foreign-arbitration-clauses-are-enforceable-in-the-us>). It has been modified slightly and is reprinted here with permission.

May a “Non-Signatory” of an Arbitration Agreement Require a Signatory to Arbitrate Its Claims?

By Edward A. Keane, Partner, Mahoney & Keane, LLP, New York

Shakespeare’s venerable expression “hoist with his own petard”¹ may have fallen out of favor, but the concept is alive and well in U.S. arbitrations, where a signatory to an arbitration agreement of its own making may find itself unwillingly “hoisted” into an arbitration with a non-signatory to that contractual undertaking.

Through a series of intermediate contracts, Integr8 Fuels, Inc., a bunker supplier, became embroiled in an arbitration it sought to avoid with a sub-bareboat charterer, Daelim Corp. The award that arbitration produced further clarified the right of a non-signatory to an arbitration agreement to force arbitration with a signatory. The facts and various legal issues raised in a long running dispute that spanned several countries and legal forums are found in a detailed Partial Final Award and Final Award in *Daelim Corp. v. Integr8 Fuels, Inc.* SMA Award #4389 (Lambert, Loh, Tsimis, Chair (2020), # 4420 (Lambert, Loh, Tsimis, Chair) (2021)). While both awards wrangle with a number of knotty questions, the discrete issue of when a non-signatory claimant may use the doctrine of equitable estoppel to prevent a signatory from avoiding arbitration of its claims are dealt with in the Partial Final Award.

The arbitration panel’s estoppel analysis relies heavily on *Astra Oil Co. v. Rover Navigation, Ltd.*, 344 F.3d 276 (2d Cir. 2003), the leading maritime case on that issue. The Daelim Partial Final Award stated its reasoning, finding equitable estoppel was appropriate, as follows, at page 24:

To the extent we need to go further than the above and address the estoppel issue, we unanimously conclude that Integr8 is estopped from denying that it is obliged to arbitrate these disputes with Daelim.

In *Astra Oil Co. v. Rover Navigation, Ltd.*, 344 F.3d 276 (2d Cir. 2003), in an opinion written by then Judge (now Justice) Sotomayor, the Second Circuit considered a dispute involving a ship owner and a charterer with a New York arbitration clause. The ship encountered delays during the voyage which caused an affiliate of the charterer to suffer damage. The affiliate, a non-signatory to the charter, sought to join the arbitration between the charterer (its affiliate) and the ship owner. The district court held that the ship owner was not required to arbitrate with the affiliate and the affiliate non-signatory thereafter appealed.

Judge Sotomayor framed the issue as whether the claim of the non-signatory is “closely intertwined” with the contract to which the signatory ship owner was a party. Finding that the affiliate’s claims arose under the duties created by the charter containing the arbitration clause, the Second Circuit reversed the district court and granted the petition to compel arbitration. The Second Circuit and the Southern District as well as New York maritime arbitrators have considered this intertwined test on various occasions. See e.g., *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004) (a signatory was estopped from refusing to arbitrate with a non-signatory because the issues the non-signatory were seeking to arbitrate were sufficiently intertwined with the agreement to which the signatory was a party); *Choctaw Generation Ltd P’Ship v. American Home Assurance Co.*, 271 F.3d 403,404 (2d Cir. 2001); *In re Arbitration between Halcot Navigation Ltd P’Ship & Stolt-Nielsen Transp. Group*, 491 F. Supp. 2d 413,421 (S.D.N.Y. 2007). In *Thomson-CSF, S.A. v. American Arbitration Association*, 64 F.3d 773 (2d Cir. 1995), the Second Circuit noted that courts have been willing to estop a signatory (Integr8 here) at the insistence of a non-signatory (Daelim here) in a variety of circumstances, citing, inter alia, *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757-58 (11 th Cir. 1993), cert. denied, 115 S. Ct. 190 (1994). In *Sunkist*, the court noted a factor to be considered in deciding whether the signatory is estopped from denying it is obliged to arbitrate is where “the claims were ‘intimately founded in and intertwined with the underlying contract obligations.’” *Sunk-*

ist, 10 F.3d at 757 (quoting *McBro Planning & Dev. Co. v. Triangle Elect. Contrs. Co.*, 741 F.2d 342,344 (7th Cir. 1984).

After examining the unique facts at hand, with *Astra's* guidance in mind, the panel ruled that under the expansive terms of Integr8's own contract (IGTC), "[b]y using the word 'Charterers' in the IGTC and including 'incidental' in its arbitration clause, Integr8 intended and consented to arbitrate with Daelim in New York and is estopped from contending otherwise, where, as here, Daelim has demanded arbitration." *Daelim*, Partial Final Award at 22.

The same award also noted that in satellite litigation Integr8 had asserted claims against others in the contracts chain involved that would eventually be visited upon Daelim. As a result, the panel held that "Integr8 cannot now credibly contend that 'charterer' does not include Daelim insofar as arbitrability is concerned. To the extent it is necessary to reach the estoppel issue, Daelim's claims here are sufficiently intertwined with the DL NAVIG8 Contract and estop Integr8 from denying it is obliged to arbitrate the disputes here upon the demand of Daelim." *Id* at 25.

Although the panel spoke to "arbitrability" immediately before turning to the estoppel issue, and fell back on *Astra's* catch-all "intertwined claims" analysis when directly addressing the estoppel question, it seems that the effort of Integr8 to claim, in one litigation, that non-signatories were bound by its contract terms while seeking to escape the arbitration provision of those terms in the subject arbitration, brought by a similarly positioned non-signatory, were perceived by the panel as elements of a classic estoppel situation and played a significant role in the unanimous panel's ruling on that issue. Indeed, the fact that the panel construed Integr8 as having taken contradictory positions as to the reach of its own arbitration clause can be seen as driving the estoppel decision more than any other factor.

For a broader statement of what may generally be considered important factors in assessing the estoppel issue, the best source in the maritime setting remains the *Astra* decision itself. There the court summarized some of the main factors it relied upon in estopping the signatory from avoiding the non-signatories demand for arbitration. They were:

We hold that *Astra* seeks to recover for its late delivery claim based on the breach by Rover of duties allegedly owed under the charter party itself. *Astra* does not assert claims against Rover based on the Sprague sales contract; rather, the price terms of that contract give rise to the damages *Astra* claims it has sustained. Accordingly, the petition to compel arbitration should have been granted based on (1) the undisputed evidence of a close corporate and operational relationship between *Astra* and AOT; (2) the fact that *Astra's* claims against Rover, for [which] *Astra* seeks arbitration, are brought directly under the charter party signed by Rover and AOT; and (3) the fact that Rover treated *Astra* as if it were a party to the charter party, by accepting direction from *Astra* during the voyage, by asserting a General Average demand against *Astra* (as well as AOT), and by accepting a General Average bond from *Astra* (on behalf of *Astra* and AOT). *Supra* at 281.

As in *Daelim*, one of the key elements, (3), is the treatment of the non-signatory, *Astra*, as a party to the contract when it suited the signatory, but not when it did not. Again, the fundamental elements on an estoppel are found in those facts. One can readily see how the unique facts of a dispute will ultimately govern the estoppel issue, but that whether classic estoppel elements are present remains a key consideration under any scenario.

The extent to which the *Astra* decision and its "intertwined claims" formulation deviates from time honored estoppel theories has been the subject of not altogether favorable further refinement in *Ross v. American Express Co.*, 547 F.3d 137, 144 (2d Cir. 2008). There, relying on a maritime case, *JLM Industries, Inc. v. Stolt-Nielsen S.A.*, 387 F.3d 163, 176-177 (2d Cir. 2004), the court explained some of the limits of the reach of the estoppel doctrine under consideration:

In a very recent opinion, in a passage which is highly relevant to the case now before us, we elaborated upon the proper utilization of the principle of estoppel in the arbitration context:

JLM Industries did not say or mean that whenever a relationship of any kind may be found among the parties to a dispute and their dispute deals with the subject mat-

ter of an arbitration contract made by one of them, that party will be estopped from refusing to arbitrate.... [I]n addition to the “intertwined” factual issues, there must be a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement. *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 359 (2d Cir. 2008)

It is also noted in *JLM Industries* that this Court “ha[s] had no occasion to specify the minimum quantum of ‘intertwined-ness’ required to support a finding of estoppel” and that “the estoppel inquiry is fact-specific.” 387 F.3d at 178

The recent U.S. Supreme Court case, *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, 140 S. Ct. 1637, 1642 (2020), further demonstrates the constraints on any freewheeling application of the estoppel doctrine. First, the majority decision made clear that it was only in cases of non-signatories seeking to estop signatories that the common law rule of equitable estoppel could be employed. “We hold only that the New York Convention does not conflict with the enforcement of arbitration agreements by non-signatories under domestic-law equitable estoppel doctrines.” *Id.* at 1648. Second, perhaps surprisingly, Justice Sotomayor, the very author of *Astra*, in a concurring opinion, emphasized that estoppel theory is to be closely chaperoned by the courts.

[T]he application of such domestic doctrines is subject to an important limitation: Any applicable domestic doctrines must be rooted in the principle of consent to arbitrate.

This limitation is part and parcel of the Federal Arbitration Act (FAA) itself. It is a “basic precept,” . . .

While the FAA’s consent principle itself is crystalline, it is admittedly difficult to articulate a bright-line test for determining whether a particular domestic nonsignatory doctrine reflects consent to arbitrate. That is in no small part because some domestic nonsignatory doctrines vary from jurisdiction to juris-

diction. With equitable estoppel, for instance, one formulation of the doctrine may account for a party’s consent to arbitrate while another does not. . . .

Article II of the Convention leaves much to the contracting states to resolve on their own, and the FAA imposes few restrictions. Nevertheless, courts applying domestic nonsignatory doctrines to enforce arbitration agreements under the Convention must strictly adhere to “the foundational FAA principle that arbitration is a matter of consent.” *Stolt-Nielsen*, 559 U.S., at 684.

*Id.*²

Accordingly, there is an unavoidable friction between the estoppel theory used, in part, by the panel in the *Daelim* Partial Final Award to hold a signatory to its arbitration agreement as to a non-signatory and the most basic of concepts to arbitration, the need for a consent to that alternative dispute resolution forum. *Daelim* resolved that friction, after considering the recent *GE Energy Power* decision, stating:

A majority of this Panel, sitting as commercial arbitrators, is convinced that Integr8, when it drafted and promulgated the IGTC on its website, intended and consented to arbitrate in New York under the SMA Rules with any party falling under the generic definitions drafted by Integr8, whether it be a “charterer” (such as *Daelim* here) or an “affiliate” (as OWP in the 2016 SDNY Action and the Setoff Arbitration). Integr8 has consented to arbitrate with *Daelim* under the IGTC. As Justice Sotomayor highlighted in her separate concurrence in *Outokumpu*, consent remains the key. In the circumstances here, we find and conclude that consent is established. *Id.* at 23.

In so ruling, the panel majority appears to have relied on contractual consent to arbitrate, as opposed to consent based on any theory of estoppel. That was reasonable given the contract terms at issue in *Daelim*, as understood by the panel. To find consent under an estoppel argument is difficult. There is no “bright line” test for determining when estoppel may be employed to satisfy the consent element integral to the Federal Arbitration Act and domestic legal doctrines. *GE Energy Power*. The “minimum quantum of ‘in-

tertained-ness' required to support a finding of estoppel" remains undefined by the courts. *Ross v. Amex, supra* at 144. Even whether federal or state law should control is an open question. Accordingly, how an estoppel founded on intertwined claims without express contractual consent, satisfies the *GE Energy Power* dictates, appears to be an issue still under development by the courts. However, notwithstanding those vagaries, as *Daelim* demonstrates, a non-signatory to an arbitration agreement can hoist a signatory upon its own arbitration agreement, with the appropriate factual petard at hand.

1 *Hamlet* Act 3, Scene 4

2 The question of the substantive law to be applied to the estoppel theory is an open issue. *GE Energy Power* remanded the question to the lower court at 1647. See, *Setty v. Shrinivas Sugandhalaya LLP* 986 F.3d 1139, 2021WL192820 (9th Cir. 2021) where the majority, over a vigorous dissent, held that Federal law controls. That opinion was then withdrawn by the court *en banc* on June 4, 2021 at 998 F. 3d 897. A new decision is now awaited.

Manfred Arnold Looks Back

50 Years after Joining the SMA

During the next four years, the MLA Alternative Dispute Resolution Committee, chaired by Chris Nolan of Holland & Knight in New York, will be marking and looking towards the 2025 100th anniversary of the Federal Arbitration Act. The SMA, formed in 1963, soon will be marking its 60th year and is pleased to partner with the MLA ADR Committee to recognize key developments in arbitration and to honor individuals who contributed to make New York a center for maritime arbitrations.

Manfred Arnold joined the SMA in 1971 while in the midst of a career in ship management, operations and chartering. Manfred had a long and illustrious tenure as an arbitrator. From 1988 to 1993 Manfred was president of the SMA and for many years co-chaired the MLA/SMA Liaison Committee. Manfred became an adjunct member of the Maritime Law Association of the U.S. "having rendered distinguished service in the advancement of the Maritime Law or its administration."

SMA President LeRoy Lambert recently had the opportunity to pose some questions to Manfred about his career as an SMA arbitrator.



Manfred Arnold, five-term president of the SMA and distinguished arbitrator

What brought you to the United States?

It's a bit of a story. I was enrolled at a preparatory school, starting at fifth grade. My parent's hope was for my career in academia. I wanted to become an artist. My father's view was that artists starve and I should focus on a career which would provide a secure income to fall back on, and then I could follow my dreams. We compromised and I attended a commercial/business school. At graduation, I was faced with a choice: banking or shipping. I chose shipping and was hired by a German shipowner. What made me select shipping was the lure that, if I did well, they would give me the opportunity to see the world. After two years, the firm planned to send me to Panama for further training, but that did not materialize. The German Government drafted me for a Reserve Officers Training Course (Logistics). Thereafter, the firm sent me to their New York Office for an initial period of one year. In 1963, when that term was over, there was an opportunity for me to move to Tokyo, which I accepted and where I stayed and worked until 1965. I met my future wife, Susan, in 1963 in New York and we were married in Tokyo in 1964. The New York Office then asked whether I would like to come back and continue working for them, which I accepted and where I stayed until 1973. Thereafter, I worked at a New York bank (for ship-loan bail-outs), at Cargill/Greenwich Marine (for special maritime projects) and then with a Chinese shipowner (ship management and trouble-shooting). I retired in 1985 to focus on my arbitration career.

What kept you in the United States?

Initially, it was the job, then the appreciation of the life in the U.S., and let's not forget the sense that for us it would be easier to establish a family in this country. In the bicentennial year, I became a citizen.

How did you get started doing maritime arbitrations?

I had heard about the SMA and became curious. I sat in as an observer in numerous arbitration hearings and attended the monthly luncheons. I vividly remember appearing before the SMA Membership Committee and being asked by the late Jack Reynolds "Why do you want to become an arbitrator?" My answer was "I don't want to become an arbitrator. I want to learn about mistakes principals to a charter-party make so that I can avoid them in my

job." He then said that I was acceptable and could become a member (even though I did not meet the required experience criteria). In 1973, I was selected as chair to my first arbitration by Lloyd C. Nelson and Michael A. van Gelder, and, using a platitude, the rest is history. I became more active in the affairs of the SMA, served for many years on the Board of Governors and chair of various committees, served a one-year term as vice-president under Jack Berg and, starting in 1988, served five terms as the Society's president.

How many awards have been issued in which you were a panel member or sole arbitrator?

There are two numbers; i.e. (1) 998 awards published by the SMA and (2) 19 awards for which the underlying contract provided for non-publication as well as awards rendered under the AAA or ICC Rules and other fora, for a total of 1,017 awards.

Any idea how many appointments you've received?

Recorded appointments to date total 2,981, and there might have been a few more (which possibly sounded too iffy to write down). The ratio between appointments and awards rendered is quite interesting and positive — nearly one appointment out of three resulted in an award.

What was your favorite award?

This is a difficult question to answer from the number of cases with which I was involved. As long as the case was interesting, well-argued by counsel and with compatible fellow arbitrators, it was a "favorite award." Recalling memorable awards is a bit easier. In 1988, I chaired a panel in the matter of the vessel TRIUMPH (dealing with a cargo short-delivery). The panel issued a Partial Final Award in charterers' favor for the value of the short-delivered cargo but deferred its ruling on certain issues. In 1990, the panel's Final Award, by majority, addressed the outstanding issues (whether or not the owners were privy to the modification as a pre-existing condition when (or after) they acquired the vessel or whether owners in fact arranged for those structural changes; charterers' claim for treble damages resulting from owners taking or converting charterers' cargo under the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C., secs. 1961-1968). The award was confirmed, appealed and confirmed and the Supreme Court denied cert. Since it was the first arbitration award under which RICO damages were

granted, it created quite a stir. It was feared that with this “precedent” the flood-gates would open and RICO would become the flavor of the day. Fortunately, this did not happen and, to the best of my knowledge, there is only one other RICO case in the records of the SMA. For me, the TRIUMPH case was an agonizing experience, because it was “uncharted territory” and it involved treble damages, compared with other cases where a party claims for “simple losses” sustained to make it whole and not recover more than its actual loss. (SMA awards #2508 and #2642). Then there was the case of an estate versus the South Street Seaport which was commenced under bareboat charters for two barges and ended up with an interpretation of tenant’s law (SMA #2325). I don’t want to forget a case in which I served as chair (it was a unanimous decision), but the losing party moved to vacate the award alleging that I had a “close undisclosed relationship” with one of the claimant’s employees (who was also a longtime member of the SMA). I felt devastated that someone questioned my integrity, but I lived with it. The end result was that the appeal was denied, and I was vindicated.

With whom did you enjoy most sitting on a panel?

This is a difficult question; there are quite a few, and picking specific names might offend others. If it is of real importance, one could go through the SMA Award Indices, and check with whom I have served on panels most often. I find it safer to mention the names of some, who are no longer with us, who I have admired for their integrity, knowledge, fairness, and civility: Frank Crocker, Lloyd Nelson and Donald Szostak.

Which lawyer or lawyers impressed you most and why?

I have the same reservation and caveat as for the above question. My choices would be: Glenn Bauer, Raymond Burke, Sr. and Nick Healy, Sr.

What was your most memorable moment during a proceeding (or during a deliberation)?

One probably would like to hear a war story, of which there are plenty involving the Admiralty Bar, however, I feel that war stories might be better told over a drink than published in print. I would prefer an episode which I still vividly remember. I don’t remember the name of the vessel involved or the SMA Award number, but I remember that Jack Berg and Don Szostak were co-arbitrators. At

the end of our deliberation, I found myself in the minority; I reserved “my right” to review my position again. I struggled when I started drafting my dissenting opinion. I started again without making any serious progress. Finally, I came to the conclusion that if I could not articulate my opinion to my own satisfaction, then there had to be something wrong with my thought process. I joined the majority and never regretted it.

You have retired from the SMA but continue arbitrating on documents-only cases, preferably as sole arbitrator. What’s keeping you busy now?

I now have more time for my various collections which range from Chinese Snuff Bottles to signed first editions, bibles, wines and marine art/artifacts (somewhere, there is also a much neglected stamp collection). I read a lot, do the NYT crossword puzzle at breakfast. What I most enjoy is retirement with Susan, my wife for 57 years. And then there are the grandchildren — what a delight. The oldest just started college and the others will be getting there soon (I really must be getting old).

What are the key changes you observed over the years you’ve been arbitrating?

The first that comes to mind is age. When I became a member of the SMA, I was one of the youngest members. With Jack Berg, I am now one of the oldest and tip my hat to him as a leader by example as to what an arbitrator should be. Clearly, young blood is good and necessary for the future of the SMA. The unfortunate factor is the number of cases is decreasing and the amounts at stake are increasing.

When selecting a chairperson, party-appointed arbitrators have to decide whether to appoint an “old hand” or a newcomer for his/her first or second case. It is a conundrum which affects the learning curve and the seasoning of newer arbitrators.

Certainly one change in New York arbitration has been the increasing influence of the general law in form and substance. I appreciate the reality that legal tenets can be “transplanted,” and indeed should be, but nevertheless it is a drastic change from when I started arbitrating. In those days, and even much earlier, arbitration was considered a “court of equity” -- entitlement to be made whole was an important factor, particularly because it was thought to be a commercial proceeding dealt with by commercial persons who had practical

experiences. More recently, some of the cases have more legal arguments and supporting citations than facts. There are benefits to both schools of thought, and one should carefully pick and choose to ensure that justice is done. I have been guided by trying to do the equitable thing as long as I could reconcile the result with the applicable law.

I want to make it clear that, as an arbitrator, I was quite happy and content to have a lawyer as a co-arbitrator or chair because I had the benefit of input from the commercial and legal side.

Another change is the use of witness statements. I was used to counsel presenting a witness and extracting the direct testimony, which, on occasion, was entertaining. More recently, I sat on a case with Jack Berg and Judge Martin as the chair. Judge Martin insisted on witness statements. The panel benefitted from this procedure since it was a complex case, and it gave the panel the opportunity to review the statement and potentially prepare questions for when the witness was produced for cross-examination. I understand more and more direct testimony is being presented by way of witness statements. It's never too late to learn new and effective things.

Also, the arrival and use of computers, the internet, iPads, and other manners of electronic communication has brought about many changes. In the "olden days," awards would be typed manually with the use of carbon paper for copies. Once the draft was out of the typewriter, white-out and erasing was no longer an option. After correcting typos and edits, the only viable solution was to start retyping and trying to create a new version. I remember a case which was chaired by a crusty and elderly (but imposing) gentleman of the SMA. On the day before I was to travel to India for a lengthy visit, I received the final award version. Since time was of the essence, I immediately started my review of the document and found around thirty errors and typos. Because of the time constraints, I saw no other solution but to have my wife retype the award. I signed it (a bit presumptuous on my part) and had it hand-delivered to the chairman. When I returned a month later, I learned that the award was signed by the rest of the panel, released to the parties and entered into the SMA Award Service. What I also learned was that the chairman commented "I thought that I spoke the Queen's English, and here is this young

whipper-snapper (and a foreigner to boot) who corrects my writing." I took him to lunch, apologized, and we were fine.

What did you enjoy most about being an arbitrator?

I wanted to, and did, learn more about the shipping industry, about pitfalls of the trade and ways to avoid them. I also had the expectation that with my experience I could pay back to the industry that had been good to me, and I know many SMA arbitrators feel the same way.

But there is also another side – being a successful arbitrator gave me a higher visibility in the shipping community. It led to more appointments, and it was always satisfying to check on the number of awards and compare them with other arbitrators. Clearly, ego played a role and arbitrating paid off financially and enhanced my reputation in the international arbitration community. When I became president of the SMA, I also became actively involved with ICMA. For many years, I chaired or was part of the Steering Committee.

When I mentioned this question to my wife, Susan, she insisted that the best result of my being a successful arbitrator was to attend the many ICMA conventions, which were challenging, exciting and led to many lasting friendships.

I would like to take this opportunity to express my gratitude to the members of the Bar and my friends and colleagues who supported me in my career. Life is good!

SMA Award Service... At-a-Glance

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

Cargo contamination is but one risk of shipping liquid cargoes, with the extent of the risk depending on such factors as vessel compliance with strict cleaning requirements, sensitivity of the cargo to prior cargo residues and other contaminants, susceptibility of the cargo to deterioration during the voyage, and the difficulties inherent in sampling and testing. If U.S. law is applicable under the bill of lading or charter party such as ASBATANKVOY

Clause 20(b)(i), the preeminent guide for assigning responsibility for cargo claims is the Carriage of Goods by Sea Act (COGSA). Once the charterer/bill of lading holder establishes its *prima facie* case that the cargo was delivered to the vessel in good condition and arrived in a damaged condition, the burden shifts to the carrier to prove that the carrier exercised due diligence to prevent the damage or that the damage was the result of one of COGSA's excepted causes. Below are a few examples of SMA arbitrations dealing with these shifting burdens of proof in cargo contamination disputes.

LPG/C IGLOO NORSE [SMA 4021, Dec. 18, 2007]

ASBATANKVOY – Cargo Contamination – Prima Facie Case – Burden of Proof – Contributory Negligence – Attorney Fees & Costs

The LPG/C IGLOO NORSE (“vessel”), a liquefied gas/chemical tank vessel, was fixed under the ASBATANKVOY form to carry polymer grade propylene from Houston to Antwerp. Immediately prior to the voyage in question, the vessel was employed in carrying raffinate I and butadiene, both C4 products. Tank preparation for loading was a sophisticated process involving first removing all liquid by introducing hot gas or by natural ventilation, blowing all piping and heat exchangers and other equipment until free of liquid and drained, inert gas purging by raising the tanks’ temperature above dew point to avoid condensation and contamination from the tanks’ surfaces, and blowing fresh air into and ventilating the tanks until reaching an oxygen content of 21%. Once the tanks were purged, the vessel would begin a cooling-down process to reach the required product carriage temperature.

The vessel loaded from a shore tank fed from a dedicated system used only to transport and store polymer grade propylene. Product samples from the shore tanks and lines were all on-specification. Product samples were also taken from the vessel’s cargo tanks at the “one-meter” level but were not analyzed.

Upon arrival in Antwerp, analysis determined the polymer grade propylene to be seriously contaminated with butadiene and C4’s. The cargo was rejected by both receivers as unusable. Various discharge options were considered as available storage in tanks ashore was limited, and ultimately

the damaged cargo was sold as salvage for delivery at Donges, France. Charterer claimed for the lost value of the polymer grade propylene and denied responsibility for discharge delays owing to the contamination and unavailable storage options ashore. Owner denied responsibility for the contamination, holding charterer responsible for the demurrage.

Owner contended it was not liable as charterer’s inspector approved the vessel’s tanks for loading and charterer failed to establish the good condition of the cargo at loading. Owner suggested that the contamination occurred or came from ashore through the propylene supplied by trucks for the gassing-up of the vessel’s tanks. Owner also criticized the charterer for failing to analyze samples drawn at the “one-meter” level which Owner argued would have disclosed contamination at an early stage.

Charterer contended that it had established its *prima facie* case and that owner had failed to show that the damage resulted from a cause within one of the COGSA exceptions. Charterer highlighted that the polymer grade propylene was loaded through the dedicated system and suggested the most likely cause of the contamination was from remnants of the vessel’s prior cargoes of raffinate I and butadiene due to the way in which the vessel’s tanks were prepared for loading.

The Panel noted that “[t]he cause of the contamination will never be known with any certainty and this Panel must determine the merits of Charterer’s claims by applying well-established and agreed burdens of proof to the evidence presented by both parties.” The Panel ruled in favor of the charterer, concluding that it carried its burden of establishing by a fair preponderance of evidence its *prima facie* case that sound product was delivered to the vessel at load and that the cargo arrived at Antwerp in a damaged condition. The Panel further found that owner had failed to prove that the damage was due to one or more of COGSA’s excepted causes. The Panel noted that charterer had no obligation to explain the cause of the contamination “. . . and that Charterer need not prove that Owner was at fault or how the damage occurred.”

The Panel found that the owner’s reliance on charterer’s inspector passing the cargo tanks was misplaced as this acceptance did not relieve the

owner of its non-delegable duty to tender cargo-worthy tanks. The Panel rejected the owner's argument that the charterer was required to test the product at the "one-meter" level, noting that the inspection company testified that it was not instructed to take "one-meter" samples; that it was not its practice to test the samples without specific instructions to do so from the shipper; that it performed inspections for between 95% and 97% of the propylene loaded in Houston, and that only one shipper regularly had these samples tested but only when selling directly to a customer.

M/T BOW TRAJECTORY [SMA 4355, December 13, 2018]

ASBATANKVOY – Cargo Off-Spec – Demurrage – Interest – Attorney Fees & Costs

The M/T BOW TRAJECTORY ("vessel"), a multi-parcel chemical tanker, was fixed under the ASBATANKVOY form to carry a part cargo of Mono Ethylene Glycol (MEG) from Port Neches to India. The vessel owner claimed demurrage for time used during delayed discharge of the MEG. The charterer disputed that demurrage was owed, asserting that the delay resulted from contamination of the MEG by oxygen because the vessel's inerting system was either not functioning properly or was inoperable during the transit. The owner argued that the product was on-spec at discharge, that the discharging delay was the result of insufficient storage space to receive the cargo and that receivers were responsible for any contamination.

The contamination issue involved the MEG UV transmission percentage. The charterer purchased and sold the MEG against a UV transmission percentage of 220-350nm (nanometer) at a minimum of 70%. At Port Neches, cargo sampled from the shore tank was found to have an 85.2% UV transmission percentage while composites from the vessel's tanks after loading had a UV transmission percentage of 78.9%. The charterparty provided for the charterer to blanket the cargo with N₂ upon completion of loading and for the owner to maintain the N₂ blanket during transport.

At the first discharge port, Hazira, tank samples were analyzed; the UV transmission percentage was below 70%. Owner argued that the inspectors did not have suitable laboratories to carry out the MEG testing and that their equipment was not

properly calibrated; and suggested it was likely that oxygen was introduced to the cargo when cargo hatches were opened during the sampling process. Owner also argued that the receivers paid for the cargo in full and never made a claim for cargo damage or deterioration in value. Charterer disagreed, asserting that the cargo was delivered to the vessel "on-spec" at load and was "off-spec" when it arrived at discharge due to the vessel's failure to maintain the nitrogen blanket during the voyage. The charterer also introduced evidence that the receivers had reconditioned the off-spec cargo by blending it with on-spec MEG.

After review of voluminous documentation and experts' reports submitted by the parties, the Panel ruled in favor of the owner, concluding that although the cargo was off-spec at the discharge ports the vessel was not responsible for the cargo's deterioration. The Panel gave particular weight to the cargo underwriter's expert's report which concluded that the deterioration in the cargo was "more likely due to improper sampling and handling of the samples in India..." The Panel noted that the vessel had a modern closed sampling system used by other receivers at discharge but that it was not utilized by the MEG receivers who instead opted for an open hatch method. The Panel also found that the tanks were administered wall wash testing with methanol as per the charter and passed inspection before loading and that the N₂ blanket was monitored by the vessel throughout the voyage, maintaining a positive pressure on the product.

The Panel found no evidence of any breach of contract by owner in the care of the cargo and that owner could not be held responsible for the deterioration of the product quality and, consequently, was not responsible for the delay during discharge. The Panel therefore concluded that laytime should count during periods when the vessel had to wait to discharge its cargo.

MARITIME LIRA [SMA 4369, May 31, 2019]

ASBATANKVOY – Demurrage – Cargo Contamination – Expenses – Attorney Fees & Costs

The M/T MARITIME LIRA ("vessel"), a multi-parcel chemical/oil products tanker, was fixed under an amended ASBATANKVOY form to carry a part cargo of Mono Ethylene Glycol (MEG) and/or Di Ethylene Glycol (DEG). The charterer instructed

the vessel to proceed to Point Comfort to load 3,000 metric tons of MEG².

The vessel arrived to load within laycan, and the charterer's inspector commenced the tank inspection process to determine suitability of the two epoxy coated tanks (prior cargo was cumene), beginning with performing a wall wash test. The tanks passed the wall wash inspection and the tanks were then purged with nitrogen. The vessel loaded "one-foot" samples of MEG into the tanks, which were analyzed and found to be off-specification for ultraviolet, water content and particularly the level of chlorides, which was 2.0 ppm. Charterer requested a re-sampling and re-testing of the first "foot," as well as testing of sampled product in the shore tank. The shore tank sample indicated a chloride level of 0.1 ppm.

Charterer instructed the vessel to load a second "foot" sample to blend the cargo back into specification. Owner declined permission to add a second "foot" unless the charterer agreed to bear the costs and consequences of doing so. Further sampling and analysis ensued as well as discussion of various options to resolve the matter, including transferring the cargo to a single tank and loading a new first "foot," discharging the first "foot" back to shore, or sailing the vessel with only the first "foot" on board. In the meantime, the vessel completed loading her other cargos and, with the parties remaining at an impasse, vacated the berth for the anchorage. The following day, the owner agreed to resume loading. The vessel re-berthed and loaded a second "foot" which, after sampling and testing, was found to have a chloride level half of what it had been in the first "foot" samples. Further testing was done to confirm that the addition of on-spec cargo would reduce the chloride level to 0.2 ppm or below. Loading continued without incident, and the vessel sailed.

Owner presented a claim for demurrage and shifting expenses, contending that the charterer was responsible for the delays and extra expenses incurred in loading because the cargo in the shore-line prior to loading the first "foot" was off-specification. Charterer denied the owner's claim in its entirety and sought recovery of its legal fees and costs, as well as the fees and costs of its expert.

The Panel unanimously found that the vessel was the most likely source for the excessive level of chlorides. Based on this finding, a majority deter-

mined that because the vessel was not ready to load its cargo, the owner had breached its obligations under the charter and was therefore not entitled to recover its claim for demurrage. The dissenting arbitrator would have counted time up until the owner's refusal to load the second "foot" sample because the cargo loaded as the first "foot" sample was carried to discharge and none of the charter party clauses disallowed this time. The Panel was unanimous in concluding that the owner should have allowed the second "foot" sample to be loaded when it was first suggested by the charterer, denied owner's claim for expenses resulting from shifting expenses and awarded charterer the extra expenses incurred for a consultant to attend the vessel to investigate the cause of the chloride contamination.

- 1 The UV transmission percentage provides a measure of the purity of the sample with respect to ultraviolet absorbing compounds. Such compounds will reduce the efficiency of polymer production from polyester grade MEG. If the percentage transmission is lower than the agreed minimum, it indicates that contaminants are present.
- 2 The DEG parcel loaded at Port Comfort was not at issue in the arbitration except in respect of the apportionment of laytime.

Spotlight on the SMA

The SMA will offer its popular, comprehensive seminar, **Maritime Arbitration in New York** as an online Zoom program in October and November 2021. The seminar provides 12 hours of CLE credits over four consecutive weekly three-hour live Zoom video sessions: October 22 and 29, November 12 and 19, 2021. Please see the program flyer for program and registration details. https://www.smany.org/pdf/Fall_2021-Maritime-Seminar.pdf

SMA member **Charles B. Anderson** will be a panelist at the Fort Lauderdale Mariners Club's 31st Marine Seminar "May the Force Majeure Be With You" which will be held at the Westin Fort Lauderdale Beach Resort in Fort Lauderdale on October 25-26, 2021. The Panel's intriguing topic will be: "How did God Make it into Millions of Marine Insurance Contracts?" For more information, please visit www.ftlmc.org.

SMA members **Molly G. McCafferty** and **Louis Epstein** will speak at the Connecticut Maritime Association's upcoming 36th Annual Expo & Conference which will take place at the Hilton Hotel in

Stamford, CT, on October 13-15, 2021. Molly McCafferty will present an update on conflicts, disclosures and ethics under SMA Rules. Louis Epstein will address “Force Majeure Clauses in International Commodity Sale Contracts: The Need for Detail.” For more information, please visit <https://informaconnect.com/cma-shipping>. #CMAShipping

SMA member **Robert A. Milana** will participate on a Panel addressing the pros and cons of mediation at the GNOBFA (The Greater New Orleans Barge Fleeting Association) 38th River and Marine Industry Seminar to be held at the InterContinental Hotel in New Orleans April 27-29, 2022. For more information, please visit <http://www.gnobfa.com/seminar.htm>.

SMA members can now participate in the MLA Arbitration & ADR Committee’s virtual (Zoom) 30 minute “Coffee Breaks,” a recent initiative by the Committee that takes place on the third Friday of each month at 11:30 a.m. (EDT). The “Coffee Breaks” offer a welcome platform for discussion of timely alternative dispute resolution topics including, for example, “Transforming Arbitration with Technology” which featured a discussion by SMA members **LeRoy Lambert, George Tsimis** and **Dan Schildt** with Committee Chair Chris Nolan at September’s “Coffee Break.” SMA members **Anne Summers, Tony Siciliano, Dave Martowski, Jack Ring, Bob Meehan, and Dave Gilmartin** contributed views for the inaugural “Coffee Break” discussion: “What are Maritime Practitioners Getting Right and Getting Wrong in their Presentations to Maritime Arbitrators?” back in July. To participate, please contact Committee Chair Chris Nolan (chris.nolan@hklaw.com) so that you can be added to the invitation list.

Ronald T. Carroll

We are saddened to report that Ron Carroll, a member of the SMA since 1990, died May 7, 2021. Ron graduated from the Massachusetts Maritime Academy and Tulane law School (where he later was a Scholar in residence) and at the time of his death was Professor Emeritus, Massachusetts Maritime Academy, where he had taught for many years. Ron had sailed as a First Assistant Engineer before coming ashore and for some years was Honorary Consul General of Panama for Massachusetts.

In Closing

Thanks to everyone who contributed to this issue of The Arbitrator. If you have articles and ideas to contribute to future editions, please let us know! We welcome your ongoing feedback to ensure that The Arbitrator provides timely and relevant articles and information to the maritime arbitration community in New York and around the world. Special mention and appreciation to Tony Siciliano and others who keep our membership abreast of newsworthy maritime items and developments. Please contact us with your thoughts and suggestions at: dick.corwin@icloud.com; sandra.gluck@gmail.com; or louis.epstein@trammo.com.

THE ARBITRATOR

Dick Corwin, Co-Editor

dick.corwin@icloud.com

Louis Epstein, Co-Editor

louis.epstein@trammo.com

Sandra Gluck, Co-Editor

sandra.gluck@gmail.com

Society of Maritime Arbitrators, Inc.

One Penn Plaza, 36th Floor

New York, NY 10119

(212) 344-2400 • Fax: (212) 344-2402

E-mail: info@smay.org

Website: <http://www.smany.org>

© 2021 The Society of Maritime Arbitrators, Inc.

This publication was created to provide you with current information concerning maritime arbitration; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

THE ARBITRATOR (ISSN# 1946-1208) is issued 3-4 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>.

GENERAL PHOTOCOPY NOTICE: You may reproduce any portion of the publication provided that proper attribution is included if the reproduction is published elsewhere.

The views expressed in the articles in this publication are those of the authors alone and do not represent views of the editors or the Society of Maritime Arbitrators, Inc.