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

NEWSLETTER – MAY 2015

Editor: Leo G. Kailas

I first wanted to report on several important developments relating to arbitration and ADR. This Committee, our Subcommittee, the Liaison Committee of the MLA and the Society of Maritime Arbitrators of New York "SMA") (chaired by Donald Murnane), and the New York Maritime Consortium have been working on several initiatives to promote maritime arbitration in the United States. Last November we had a highly successful program at the Harvard Club comparing New York and London arbitration, and the myths and realities associated with both processes. Judge Loretta Preska, Chief Judge of the United States District Court for the Southern District of New York was the moderator for the event which included comparative presentations on Finance, Litigation and Arbitration by leading arbitrators, lawyers and bankers from both sides of the Atlantic.

During the Spring MLA meeting many Committee members including, Manfred Arnold, Klaus Mordhorst, Liz Burrell, Keith Heard, Donald Murnane and the Committee Chair worked with the MLA, NYMAR, SMA, ASBA and the New York Consortium to sponsor a Mock Arbitration relating to a casualty in New York harbor involving a cargo of highly refined paraffin wax. The title of the program, "Seven Days in May: Resolving Your Arbitration Insecurities", is a play on the request of the parties for security after the explosion on the vessel causes several crew deaths and injuries and results in damage to the paraffin wax cargo and an adjacent cargo of ethanol. The program (which as of this writing has not yet taken place) also provided CLE credit to all attendees.

In addition, a large contingent of Committee members will participate in the ICMA XIX Meeting in Hong Kong that will take place between May 11 and May 15. Among those presenting papers will be Committee members Manfred Arnold and Don Murnane ("The Case for Apportioned Fault in Safe Berth/Port Cases Under US Law"), David Martowski ("Consolidation of Disputes under Section 2 of the SMA Rules"), Anthony Pruzinsky ("The Application of Mandatory Law to Determination of Rights in Maritime Arbitration"), and John Kimball ("An Overview of Recent New York Arbitration Awards of Significance").

I feel honored to be working with the large group of talented maritime professionals on this Committee who are devoted to the promotion of the maritime practice through programs and scholarship. Those efforts are reflected in the Case Notes below which were overseen by our Committee Secretary, Chris Nolan, and the Young Lawyers Committee of the MLA.

Thank you to Committee Vice-Chair Peter Skoufalos and Committee Secretary **Chris Nolan** for taking the laboring oar on the project, and our YLC drafters including: YLC Committee liaison **Lindsay Sakal, Scott Gunst, Kristi Hunter, Justin Mitchell, John Scarborough, Imran Shaukat, Carlos Tamez, Christie Walker, and Matthew Waters.**

I. Second Circuit

a. Carmack Redux: The Second Circuit decided what is hoped to be the final iteration in ***Sompo Japan Insurance Company of America v. Norfolk Southern Railway Company and Nipponkoa Insurance Company v. Norfolk Southern Railway Company*, 762 F.3d 165 (2d Cir. 2014).**[1] The Court affirmed the district court's ruling that a rail carrier can enforce an exoneration clause in an ocean carrier's through bill of lading.

This action arose from a train derailment in 2006 which damaged cargo being transported from Asia to various locations in the United States pursuant to through bills of lading issued by Yang Ming and Nippon Express. Plaintiffs Sompo Japan Insurance Company of America ("Sompo") and Nipponkoa Insurance Company ("Nipponkoa") were the subrogees of the destroyed cargo.

In the original litigation of this action, the plaintiffs asserted claims under Carmack, applying it to the rail leg of a continuous international shipment originating in a foreign country. As such, the defendant railroads did not raise any affirmative defense such as the exoneration clauses in the Yang Ming and Nippon Express through bills of lading. Several state law causes of action that had also been pled were dismissed as preempted by Carmack. These decisions were appealed by the defendants. Pending appeal, the U.S. Supreme Court decided ***Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.* 561 U.S. 89 (2010)**, holding Carmack did not apply to shipments originating overseas under a single through bill of lading. Following the ruling in *Kawasaki,* the cases were remanded to the district court to determine the reinstated state law claims as the Carmack claims could no longer be sustained.

Upon return to the district court, the defendants argued for the first time that the exoneration clauses in the Yang Ming and Nippon Express through bills of lading applied and that therefore the issuing ocean carrier was solely responsible, with respect to the cargo interest, for any loss or damage.

Plaintiffs argued that the exoneration clauses could not be relied upon as the defense was untimely raised. The district court entered motions for summary judgment finding Yang Ming's exoneration clause was enforceable, however Nippon Express' was not because it was too ambiguous.

[1] This is the only decision in the newsletter which did not address arbitral issues. But as the final chapter in a lengthy and noteworthy litigation, we include a summary here.

All parties filed motions to reconsider. Upon reconsideration, the district court found that the exoneration clauses were enforceable, except with respect to one shipment where an indemnification provision, not the exoneration clause, was at issue. Both sides appealed.

On appeal, the Second Circuit affirmed the district court's ruling in both cases and found the defendants were entitled to enforce the exoneration clauses in the ocean carriers' bills of lading. The Court found that the defendants did not waive the defense during the first round of summary judgment motions, as it was entirely irrelevant at that time because the plaintiffs' claims were premised entirely on Carmack liability. Rather, for all practical purposes, the remand was the first opportunity for the defendants to assert this defense. Similarly, there is no prejudice to the plaintiffs since any time and money wasted in pursuing the Carmack claims was the result of the plaintiffs' own decision to pursue litigation under the Carmack framework.

The judgment in Nipponkoa's favor finding contractual indemnification arising out of the destruction of its insured's cargo was also disputed. The defendants argued that at the time Yang Ming assigned its claims to Nipponkoa, Yang Ming had not incurred damages for which it was entitled to indemnification. Nipponkoa responded that the defendants waived or were estopped from making these arguments.

The Second Circuit agreed with Nipponkoa finding that the defendants' argument was waived as it was not raised until the second motion for reconsideration. Despite the defendants' efforts, the difference in arguments it made in the two motions for reconsideration could not be minimized. Therefore, a viable argument no longer existed.

Additionally, while the defendants may have been entitled to strict compliance with payment requirements before a contractual indemnification claim could be filed, they failed to timely raise this argument. The defendants' earlier actions also contradicted this argument, as the defendants did not originally object to Nipponkoa proceeding with the assignment from Yang Ming, but rather indicated it would look into resolving the claim directly with Nipponkoa.

Thus, the Court sustained its holding that the argument to reverse Nipponkoa's judgment against the defendants was waived. The Court also permitted the affirmative defense of the exoneration clauses found in the ocean carrier's bills of lading.

b. Forum Selection Clause Prevails: In ***Atlantic Container Line AB v. Volvo Car Corporation*, 2014 WL 4730152 (S.D.N.Y. Sept. 22, 2014)**, the Southern District of New York denied Volvo Car Corporation's ("VCC") and Volvo Cars of North America, LLC's ("VCNA") motions to dismiss based on lack of personal jurisdiction against Atlantic Container Line ("ACL"), the owner of the M/V Atlantic Cartier, and its lead hull insurer, Norwegian Hull Club ("NHC"). The district court found the forum selection clause in favor of New York Courts contained in the relevant sea waybill applicable, even though VCC was also subject to an arbitration clause in favor of Sweden contained in the transportation agreement between VCC and the non-vessel operating common carrier that issued the sea waybill. VCC also moved to dismiss claims premised on *forum non conveniens* and failure to state a claim.

By way of background, Walleniun Wilhelmsen Lines AS ("WWL"), a non-vessel operating common carrier was party to an Implementing Agreement to charter space on ACL's vessels. Subsequently, WWL entered into a Transportation Agreement with VCC which contained a compulsory arbitration clause for Stockholm Chamber of Commerce. VCC transported its cargo under two WWL sea waybills from Sweden to New York and Baltimore. While ACL was not named on the sea waybills, the sea waybills contained a Himalaya clause stating that "[t]he parties to this bill of lading intend to extend its terms and conditions, including all defenses and limitations, to all parties who participate in its performance…" and also contained a definition of "Carrier" that included "vessels used in the carriage, their owners, and operators." The sea waybills additionally contained a forum selection clause in favor of the U.S. District Court for the Southern District of New York.

While in transit to the United States, a fire started on board the vessel which was believed to have originated from VCC's Cargo. As such, this action was initiated by the plaintiffs against the defendants, as shipper and consignee under the relevant sea waybills, in the Southern District of New York, seeking relief under COGSA, among other claims, for repair to the vessel, damage to third parties' cargo, costs for inspections and surveys of the cargo and loss of revenue. Defendants moved to dismiss the complaint for failure to state a claim, lack of personal jurisdiction due to the forum selection clause in the Transportation Agreement in favor of arbitration in Sweden, and *forum non conveniens* seeking to transfer the matter to Sweden. Certain claims were dismissed as against VCNA, the district court finding that as the consignee, it could not have known the dangerous nature of the cargo.

With respect to jurisdiction, however, the defendants argued that the plaintiffs were not subject to the forum selection clause as they were not a party to the sea waybills. The district court disagreed, noting ACL met the definition of "Carrier" per the sea waybill terms and conditions, and that the Himalaya clause effectively extended the terms and conditions to ACL as a party who participated in the performance of the sea waybill. To find otherwise would frustrate the intent of the parties as ACL was an intended beneficiary of the sea waybill's broad Himalaya clause.

The defendants next argued the forum selection clause was unenforceable as it was not reasonably communicated to the shipper or consignee and therefore unjust and unreasonable. The district court referred to the four part test in ***M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)*** to determine the enforceability of a forum selection clause and found that a party to a contract is presumed to know its terms. The defendants' argument that the forum selection clause was "buried in the boilerplate terms of the non-negotiated waybill" was unconvincing. Moreover, the Transportation Agreement between WWL and VCC incorporated all contractual documents including WWL's waybill, which contained the forum selection clause. Additionally, even though the Transportation Agreement between WWL and VCC contained an arbitration clause, the Transportation Agreement only applied as to WWL and VCC and not ACL, who was not a party to it. Therefore, with respect to the claims of the plaintiffs against the defendants, the forum selection clause in the sea waybill, not the arbitration clause in the Transportation Agreement, should apply.

The defendants then argued New York is not a proper or convenient forum. The district court found it is not enough to rebut the presumption of enforceability of the forum selection clause by arguing difficulty, expense or burden. Rather, the defendants must demonstrate "it would be 'impossible' to litigate in the chosen forum." While a typical analysis determines the level to defer to plaintiff's choice of forum, this analysis is altered by a valid and enforceable forum selection clause. See, ***Atlantic Marine Construction Co., Inc. v. U.S. Dist. Court for the Western District of Texas*, 134 S.Ct. 568 (2013); *Phillips v. Audio Active Ltd*. 494 F.3d 378, 383-84 (2d Cir. 2007)**. The district court applied the *Phillips* test and found that New York had an interest in deciding the case, despite the defendants' argument for arbitration in Sweden.

As noted above, the district court found there was personal jurisdiction over the defendants in New York. It dismissed three counts of the complaint only as to VCNA. All other claims persisted as against VCC and the matter proceeded in New York subject to New York law.

c. Security for London Arbitration Counterclaims Recognized: In ***Aracruz Trading, Ltd. v. Kolmar Group AG*, 2015 WL 269141 (D. Conn. Jan. 21, 2015)**, the District of Connecticut awarded defendant Kolmar Group AG ("Kolmar") security against its counterclaims which would be decided in a London Arbitration.

Kolmar, the owner of cargo of butadiene, a natural gas that was compressed and liquefied, entered into charter parties with the plaintiffs, ship owners of two vessels used to transport Kolmar's cargo from India to China and South Korea. The cargo arrived at its respective discharge ports with excessive amounts of an element in the butadiene. The cargo was rejected by the buyer, pending blending the transported butadiene with sound batches of the butadiene which either arrived from another vessel or were already present at the port. The blending was successful for one shipment and not for the other; however the buyers accepted the cargo at a reduced price.

The charter party provided that all claims must proceed by arbitration in London, subject to English Law. The plaintiffs claimed demurrage for the delays in discharge and blending at the port. Kolmar asserted counterclaims for the contamination of the butadiene during the ocean voyage. These claims were to be determined by the London arbitration. In the interim, plaintiffs commenced litigation against Kolmar in the United States to obtain security for their claims for demurrage.

The district court entered an order authorizing the issuance of process of attachment for plaintiffs and plaintiffs were furnished a bank guarantee in the amount of their demands. In response to plaintiffs' claims for demurrage, Kolmar asserted counterclaims for damages and expenses arising out of plaintiffs' alleged deficient performance under the charter party. Kolmar sought countersecurity pursuant to Admiralty Rule E(7)(a) for its counterclaims. Plaintiffs resisted these efforts, and moved to dismiss Kolmar's counterclaim against them. The Court was confronted with four motions: two by plaintiffs to dismiss Kolmar's counterclaims, and two by Kolmar to compel security.

Rule E(7)(a) states the a plaintiff, "must give security for damages demanded in the counterclaim unless the court for cause shown, directs otherwise." The rule does not define "cause shown," resulting in judicial interpretation. One example of such judicial interpretation of the phrase by the Second Circuit can be found in ***Result Shipping Co., Ltd. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394 (2d Cir. 1995)**. In *Result Shipping*, the Second Circuit found that only a frivolous counterclaim is not entitled to countersecurity. Citing this authority the district court held that, "Rule E(7) entitles an admiralty or maritime counterclaimant to reciprocal countersecurity unless its claim can fairly be characterized as manifestly and blatantly frivolous," which could not be said of Kolmar's counterclaims. The district court found Kolmar's claims were "straightforward, lucid, complete, and well-pleaded," and that Kolmar need not present the merits of the counterclaims at this stage.

Regarding amounts, the district court found that it was of no consequence that Kolmar demanded counterclaim security in a total amount greater than plaintiffs obtained in their earlier Rule B attachment. Countersecurity must be provided for damages demanded by the defendant, and is not limited to the amount of security provided by the defendant to secure plaintiff's claims. Thus, the district court granted Kolmar's motion directing plaintiffs to post security for Kolmar's counterclaims.

Citing to *Voyager Shipholding*, the district court did not exercise its discretion to stay the London arbitration pending plaintiffs' posting of security. However, if plaintiffs failed to post security, then upon application by Kolmar, the district court would consider vacating the plaintiffs' attachments previously obtained to "place the parties on an equality as regarding security." Thus the district court denied plaintiffs' motion to dismiss and granted Kolmar's motion to post countersecurity for the claims which were subject to London arbitration.

d. Proper Interest Rate with ICSID Arbitration: In **Mobil Cerro Negro, Ltd., et al v. Bolivarian Republic of Venezuela, 14-CV-8163 (S.D.N.Y., March 4, 2015)**, the District Court denied a motion to vacate a judgment enforcing a $1.6 billion award, with a 3.25% interest rate, issued by the International Centre for Settlement of Investment Disputes (ICSID) against Venezuela. Venezuela sought to modify the 3.25% interest rate set by the ICSID Convention, which was adopted by Congress, replacing it with the lesser rate provided in 28 U.S.C. § 1961.

The Court found it lacked authority to undertake such a review, as the award was unambiguous. Courts are required to recognize all aspects of ICSID awards and pursuant to the convention "have no clear charter to undertake any substantive review of such awards," unlike other regimes which do provide for limited substantive review by the Courts. The Court also found that applying a US interest rate would result in different rates applying in different countries. The uniform imposition by all countries of the ICSID rate avoids this potentially discordant outcome. Second, §1961 is a general statute which is trumped by a specific statute §1650a, the enabling statute for ICSID. *See* ***RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2068 (2012)**. Third, § 1650a is a later-enacted statute which interprets an earlier-enacted statute. *See* **Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529**

U.S. 120, 143 (2000). Fourth, where possible a US statute is to be construed to not conflict with international agreements.

Venezuela's reliance on cases arising under the FAA, where §1961 was considered, was misplaced. The ICSID provides the FAA shall not apply to enforce awards rendered under the ICSID, and unlike the FAA, the ICSID does not permit substantive review. And Venezuela elected to arbitrate before the ICSID and cannot now selectively apply rules from other arbitral regimes.

e. **Arbitrability Scope**: The Southern District of New York dismissed a declaratory judgment action initiated by Vincent W. Sedmak and McKenna Long & Aldridge LLP ("McKenna") seeking to enjoin a pending arbitration brought before the International Center of Dispute Resolution ("ICDR") by the Defendant, Ironshore Specialty Insurance Company ("Ironshore") in **McKenna Long & Aldrige LLP, et al. v. Ironshore Specialty Insurance Company, 2015 WL 144190 (Jan. 12, 2015 S.D.N.Y.)**.
Ironshore issued a Policy, at the request of Sedmak for Eidos, to protect the principal on a $20 million loan to fund patent enforcement litigation. The Policy contained an arbitration agreement. The loan was used to pay McKenna over $11 million in legal fees and Sedmak a salary of over $3.7 million. Another $2 million was transferred to a company owned by Sedmak. Ironshore argued Sedmak lacked authority to do so and this was a misuse of the funds. Eidos and the Lender requested that Ironshore pay the remaining principal.

Ironshore initiated arbitration seeking a decision that it owed nothing, or to reduce the amounts owed. It then moved to compel arbitration, which was granted and affirmed on appeal. McKenna and Sedmak initiated a declaratory judgment action and filed summary judgment seeking a determination that Ironshore's claims were not arbitrable and could not be compelled, and a declaration that any award Ironshore may obtain from ICDR was not enforceable against it.

The Court first assessed the arbitrability of the action finding there was no clear agreement to arbitrate arbitrability as the agreement in the Policy was not signed by McKenna or Sedmak, nor were they named as insureds or loss payees. The Court then considered the four of five theories for enforcing an arbitration agreement against a non-signatory. The Court considered: incorporation by reference, agency, veil-piercing/alter-ego and direct-benefit estoppel. Each theory was explored in details, providing substantive analysis of the basis for each test. The Court concluded there was no triable issue that McKenna and Sedmak were directly benefited from the Policy, and third-party beneficiaries of the Policy, knowingly accepting benefits stemming from the Policy. The Court therefore denied plaintiffs' motion for summary judgment seeking a declaration that Ironshore's claims were non-arbitrable and also dismissed Counts I and II of both McKenna and Sedmak's actions as against Ironshore.

II. Fourth Circuit

Court Vacates Arbitration Decision that Limited an Injured

Seaman's Relief for Maintenance and Cure

In ***Aggarao v. MOL Ship Mgmt. Co.*, 2014 WL 3894079 (D. Md. Aug. 7, 2014)**, the District of Maryland refused to recognize or enforce a Philippine arbitration decision that limited a seaman's maintenance and cure remedy on the grounds that the decision violated U.S. public policy.

Aggarao was assigned to raise floor panels on the M/V ASIAN SPIRIT in preparation for loading motor vehicles at the Port of Baltimore when he was crushed between a pillar and a mobile deck lifting machine and sustained serious injuries. Aggarao had previously entered into a Philippine Overseas Employment Contract ("POEA Contract"), whereby his exclusive remedy against the vessel interests was via arbitration in the Philippines. The POEA Contract provided that the employer would be liable for the full cost of medical treatment, as well as board and lodging, "until the seafarer was declared fit to work or to be repatriated." If the seafarer refused repatriation, he would have no right to maintenance and cure.

Aggarao commenced arbitration against his employer in the Philippines. As a threshold matter, the arbitrator determined that Philippine law, rather than U.S. maritime law, applied to Aggarao's claims. With regard to Aggarao's claim for maintenance and cure, the arbitrator explained that because Aggarao refused to be repatriated after the company-designated physician determined that Aggarao was fit to be repatriated, the vessel interests could not "be required to bear the burden of [his] maintenance and cure in the United States."

The district court refused to confirm the Philippine arbitration decision. The district court first applied the Supreme Court's Lauritzen-Rhoditis seven-factor test and determined that U.S. maritime law, and not the law of the Philippines, applied to Aggarao's claim. After establishing that U.S. maritime law applied, the court reasoned that the arbitration decision "transgressed this country's strong and longstanding policy of protecting injured seafarers and providing them special solicitude." Relying on ***Asignacion v. Schiffahrts*, 2014 AMC 713 (E.D. La. Feb. 10, 2014)**, the district court concluded that the arbitration decision violated the U.S. policy of protecting and providing for injured seamen, and therefore would not be recognized or enforced.

III. Fifth Circuit

a. Imputing Waiver of Right To Arbitrate: In ***Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 757 F.3d 416 (5th Cir. 2014),** in a matter of first impression, the Fifth Circuit held that actions of a party's co-defendants could not be attributed to a that party for purposes of imputing waiver of the right to arbitrate where the co-defendant had not substantially invoked judicial process thereby causing "detriment or prejudice" to the other co-defendants.

Al Rushaid Parker Drilling, Ltd. and related entities filed suit in state court against several National Oilwell Varco co-defendants including NOV Norway under various contracts that took the form of purchase orders in response to price quotations. The matter was removed to federal district court. While other NOV co-defendants answered the lawsuit, NOV

Norway demanded arbitration and filed a motion to compel arbitration of all claims against all defendants and to stay proceedings in favor of arbitration.

NOV Norway's motion cites an arbitration provision incorporated in a specific price quotation issued by NOV Norway to the plaintiff. The quotation refers to terms and conditions which provide that, "[a]ll disputes arising out of or in connection with the contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce." The district court denied NOV Norway's motion to compel reasoning that NOV Norway's co-defendants had substantially invoked the judicial process to plaintiffs' detriment through substantial discovery and motion practice. While NOV Norway did not participate in discovery or motion practice, the district court reasoned that, (1) the co-defendants were jointly owned and controlled and were represented by the same counsel, (2) that NOV Norway benefitted from discovery, and (3) that NOV Norway benefited from the judicial process by refusing informal service. NOV Norway sought interlocutory review by the Fifth Circuit pursuant to Title 9 U.S.C. section 16(a)(1)(C).

The Fifth Circuit cited its own precedent, holding that a party may waive a contractual right to arbitrate where it substantially invokes the judicial process, thereby causing "detriment or prejudice" to the other party, but also noted that, "[t]here is a strong presumption against finding a waiver of arbitration."

However, the Fifth Circuit held that the co-defendants' actions could not be imputed to NOV Norway and that NOV Norway had not substantially invoked judicial process. The Court found that NOV Norway promptly took steps to arbitrate by sending an arbitration demand, filing an answer arguing litigation was impermissible because of the arbitration clause, and moving to compel arbitration. Although NOV Norway's co-defendants answered the lawsuit, NOV Norway did not invoke the judicial process and accordingly did not waive its right to arbitrate, unless the co-defendants' actions could be attributable to it.

The Court also found that the district court, in holding that the actions of NOV Norway's proponents could be attributed to it, did not apply agency and contract law to determine whether an affiliate's agreement to arbitrate can bind a non-signatory or analyze whether the alter-ego or successor-corporation doctrine would impute the affiliate's actions to the corporation. Attributing the actions of NOV Norway's co-defendants to NOV Norway simply because it benefitted from those actions would cast an unduly wide net and it would be unreasonable to deny NOV Norway's right to arbitrate merely because it benefited from the litigation.

The Court also held that imputing actions of a party's co-defendants on the grounds that the entities are jointly owned or controlled or share legal counsel contravenes the fundamental principle of corporate separateness.

Finally, the Court found there was no evidence that NOV Norway or its affiliates had sought to cause delay and expense or had abused corporate form.

Accordingly, the Fifth Circuit vacated the district court's denial of NOV Norway's motion to compel arbitration and ruled that claims against NOV Norway were subject to the arbitration clause of the price quotation. The Fifth Circuit declined to compel any of the other parties to arbitrate their disputes or to stay proceedings. The issue was instead remanded to the district court for its reconsideration.

b. Broadly Written Arbitration Provision Contained Within Seaman's Expatriate Employment Agreement Applied to Claims Arising from Personal Injury: In ***FD Frontier Drilling (Cyprus), Ltd., et al. v. Didmon,* 438 S.W. 3d 688 (Tex. Ct. App. 2014)**, the Texas Court of Appeals reversed and remanded for further proceedings, holding that the trial court erred in refusing to compel arbitration pursuant to an arbitration clause contained in a seaman's expatriate employment agreement.

The Appellee and original plaintiff, Steve Didmon, was employed as a subsea engineer on a vessel in foreign waters. Didmon signed an Expatriate Employment Agreement ("EEA") with Frontier Cyprus. According to the EEA, Didmon agreed to arbitrate "any dispute arising out of, or in connection," with the EEA. One day later Didmon signed an Alternative Dispute Resolution (ADR) Agreement which included tort claims arising out of his employment.

Nevertheless, Didmon brought suit against his employer in the state court in Texas alleging Jones Act and general maritime law claims for his personal injuries. The defendants removed the case to federal court to enforce the arbitration provisions of the Convention on Recognition and Enforcement of Foreign Arbitral Awards pursuant to 9 U.S.C. § 201.

The defendants then filed a motion to dismiss or stay pending arbitration based on the ADR Agreement. The U.S. district court found that the ADR Agreement was unenforceable against Didmon because it was not signed by the defendants. The defendants argued that their logo on the document equaled subscription to its terms. However, the Court looked at the plain meaning of "subscribe" and found that it required a signature, not a logo, and remanded the case back to state court.

On remand the defendants argued that the arbitration clause in the EEA Agreement, not the ADR Agreement required arbitration. The trial court denied defendants' motion to dismiss or stay pending arbitration and this interlocutory appeal ensued.

On appeal, the Court looked to both Supreme Court and Fifth Circuit opinions which have held that similar arbitration clauses have expansive reach. The parties agreed that the EEA contained a valid arbitration agreement. The issue on appeal was whether the EEA was broad enough to encompass Didmon's personal injury claims.

The Court reasoned that broadly written arbitration clauses are not limited only to claims which arise under the agreement but all disputes between the parties which have a significant relationship to the agreement. The Court went further and reasoned that where the facts alleged within a plaintiff's complaint are intertwined with the agreement which contains the arbitration clause, then plaintiff's claims are arbitrable.

The Court found that Didmon's personal injury claims had a significant relationship to the EEA, and his claims could not stand alone without reference to the EEA. Specifically, the Jones Act provides a cause of action for a seaman injured in the course of his employment by the negligence of his employer. Therefore, the Court of Appeals held that the arbitration clause of the EEA was applicable to Didmon's claim.

IV. Eighth Circuit

Scope of Arbitral Authority

In **Seagate Technology LLC v. Western Digital Corporation, et al., No. A12-1944 (Minn. Oct. 8, 2014)**, the Supreme Court of Minnesota was asked to consider if the Court of Appeals had properly reinstated an arbitration award, finding the arbitrator did not exceed his authority or refuse to hear material evidence.

The Arbitration involved an employment contract which contained a confidentiality clause. When the employee left Seagate to work for Western Digital, Seagate alleged trade secrets were misappropriated by both the employee and Western Digital. Western Digital invoked the arbitration clause and during arbitration, Seagate sought sanctions against Western Digital for fabricating evidence suggesting that certain trade secrets had been made public. The arbitrator awarded sanctions against Western Digital, a total award of $630 million, and precluded evidence disputing the validity of the trade secrets.

A motion was brought in state court to vacate this award. The Trial Court found the failure to hear all evidence was improper, a decision Seagate appealed. On appeal, the award was reinstated. The Supreme Court affirmed the Lower Court's decision. It found that pursuant to the language of the arbitration agreement, which permitted the arbitrator to "grant injunctions or other relief", punitive sanctions were authorized. They were also permitted by the AAA Employment Rules which incorporated the arbitration agreement. Moreover, the arbitrator had the discretion to fashion this remedy and did not exceed his authority provided by statute.

The Court also addressed whether the arbitrator's imposition of sanctions precluding any evidence or defense on a claim warranted vacatur. The Court found that the arbitrator heard all the evidence but failed to use it when constructing the award. A Minnesota statute addressed situations involving limitations to presenting evidence, not use or weight given evidence when constructing the award. It concluded the complaints of the employee and Western Digital were outside the scope of the statute and therefore the arbitrator's conduct was proper.

V. Ninth Circuit

The FAA Does Not Preempt State Law

In ***Elite Logistics Corp. v. Hanjin Shipping Co., Ltd.*, 589 Fed. Appx. 817 (9th Cir. 2014),** the majority on a three-judge panel of the Ninth Circuit affirmed the district court's order denying defendant Hanjin's motion to compel arbitration. The Court found no error in the district court's determination that the arbitration provision in a contract between Hanjin and motor carrier Elite Logistics was unconscionable according to California law. The Court also agreed that the Federal Arbitration Act ("FAA") did not act to preempt state law in this case.

The underlying dispute concerned fees charged by Hanjin to trucking company Elite Logistics for late pick-up and drop-off of containers on weekends and holidays, as described in ***Elite Logistics Corp. v. Hanjin Shipping Co., Ltd.*, 2012 WL 2366403 (C.D. Cal June 21, 2012)**. The fees were charged in accordance with the Uniform Intermodal Interchange and Facilities Access Agreement (the "Agreement"), which is a standard contract drafted by the Intermodal Association of North America that Hanjin required its trucking-carrier counterparties to sign. The Agreement contained an arbitration provision that required, among other things, notification of disputed charges within thirty days of receipt, thus operating as a statute of limitations shorter than the four-year claim period available under California law and working solely to Hanjin's benefit.

The Ninth Circuit affirmed the district court's conclusion that the Agreement was unconscionable under California law, which requires showings of both procedural and substantive unconscionability. On the procedural side, the Court found sufficient record evidence to support the conclusion that the Agreement was a contract of adhesion under California law. The trucking company had no meaningful opportunity to negotiate the arbitration provision and could not have conducted business as an intermodal carrier without signing the Agreement. With regard to substantive unconscionability, the Court cited several one-sided features of the Agreement that inured solely to Hanjin's benefit, including the thirty day notice of claim provision, lopsided evidentiary burdens in arbitration, and insufficient authority in the would-be arbitration panel to enjoin wrongful conduct by Hanjin. As for application of the FAA, the panel found that the FAA does not preempt California's procedural unconscionability rules, citing recent decisions of the Ninth Circuit, the California Supreme Court, and the United States Supreme Court in ***AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1748 (2011)**. The Court also found no state substantive unconscionability rules that offended the FAA by discriminating unfairly against arbitration.

In opposition, one dissenting judge took the view that the majority misapplied *AT&T Mobility LLC v. Concepcion* and that it did not follow the correct standard for unconscionability jurisprudence set forth subsequently by the California Supreme Court in ***Sonic-Calabasas A. Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013)**. In his dissenting opinion, the district court should have engaged in a more fact-intensive inquiry before making determinations about the substantive and procedural unconscionability of the parties' agreement to arbitrate.

VI. Eleventh Circuit

a. Crew Member and Cruise Ship CBA Venue Battle: In ***Vera v. Cruise Ships Catering and Serv. Int'l, N.V.*, 2014 U.S. App. LEXIS 23004 (11th Cir. Dec. 3, 2014)**, Ralph Vera

("Vera") sued his employer for Jones Act negligence, unseaworthiness, maintenance and cure, and failure to treat. The district court entered an order compelling arbitration based on a provision in Vera's collective bargaining agreement. On appeal, Vera challenged the district court's order alleging that the arbitration agreement failed to meet the jurisdictional prerequisites for enforcement and was void for public policy reasons. The Eleventh Circuit reviewed Vera's allegations under the standard set out in ***Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005)**, for claims arising under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). Under *Bautista*, an arbitration agreement requires enforcement under the Convention if the following prerequisites are that: (1) the agreement is "in writing within the meaning of the Convention"; (2) "the agreement provides for arbitration in the territory of a signatory of the Convention"; (3) "the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial"; and (4) one of the parties to the agreement is not an American citizen.

First, regarding the jurisdiction prerequisite argument, Vera challenged the written agreement under *Bautista* because his employment contract did not contain an arbitration clause and he did not sign the collective bargaining agreement. In its analysis, the Court noted that Vera signed his employment contract, which incorporated by reference the collective bargaining agreement, and which contained an arbitration clause that encompassed any questions concerning the terms and conditions of the collective bargaining agreement. Vera's complaint included allegations found in the terms and conditions of the collective bargaining agreement. As such, the Court found the jurisdiction prerequisite of a written agreement was satisfied.

Second, regarding the public policy argument, the Court found that Vera alleged the subject argument at the wrong stage of litigation. Specifically, based on the principles found in *Bautista*, at the arbitration enforcement stage, the Court can only review allegations such as the agreement being null and void, inoperative, or incapable of performance under the Convention. Therefore, because Vera's argument on jurisdictional prerequisites and public policy failed, the Eleventh Circuit found that the arbitration agreement required enforcement.

b. Crew Member Employment Contract Arbitral Scope: In a similar case, ***Trifonov v. MSC Mediterranean Shipping Co. SA*, 590 Fed. Appx. 842 (11th Cir. 2014)**, Nikolay Trifonov ("Trifonov") appealed a district court's order compelling him to arbitrate claims of Jones Act negligence, unseaworthiness, maintenance and cure, and failure to treat. Trifonov's employment contract incorporated by reference his collective bargaining agreement, which had an arbitration clause. The Eleventh Circuit again proceeded to analyze whether the agreement was enforceable under the Convention based on *Bautista*.

However, in this case, Trifnovo argued that under the Federal Arbitration Act ("FAA"), the arbitration agreement was not enforceable because the FAA expressly excludes seaman employment contracts from the definition of commerce. Therefore, Trifnovo argued, if his employment contract was not commercial, it was not enforceable under the Convention. The Court quickly found that Trifnovo's argument failed because *Bautista* previously concluded that

seaman contracts are commercial in nature regardless of the FAA's seaman exemption. Next, Trifnovo argued that the arbitration agreement was not enforceable based on public policy considerations. The Court likewise rejected the public policy argument finding it was premature to bring the same at this stage of the proceeding. Last, Trifnovo argued that Jones Act claims are generally not subject to removal. In response, the Court conceded that Jones Act claims are typically not subject to removal. But, the Court then found that Jones Act claims are subject to arbitration under the Convention and the Convention authorizes removal of claims relating to enforcement of an arbitration agreement. Accordingly, the Eleventh Circuit upheld the district court's order compelling arbitration.

c. Can an Arbitration Clause be Unconscionable? In ***Vitalii Pysarenko v. Carnival Corp. d/b/a Carnival Cruise Lines,*** **No. 14-20010-civ,** the Southern District of Florida ruled in 2014 that the arbitration clause in a cruise line's seaman contract is not "unconscionable," does not deprive the seaman of the statutory remedies to which he is entitled, and falls under the Convention of the Recognition and Enforcement of Foreign Arbitral Awards, not the Federal Arbitration Act ("FAA").

The plaintiff, Mr. Pysarenko, was a seaman working for Carnival Cruise Lines who suffered an injury and subsequently sued his employer for damages, even though his contract contained an arbitration clause. Pysarenko did not challenge the validity of the contract or of the arbitration clause, but instead raised three affirmative defenses: (1) the seaman's contract was unconscionable; (2) the seaman's contract deprived him of remedies to which he was entitled under U.S. law; and (3) the FAA explicitly excludes seaman's contracts.

The district court affirmed the binding precedent of the Eleventh Circuit, which it interpreted as subsuming seaman's employment contracts under the Convention of the Recognition and Enforcement of Foreign Arbitral Awards, notwithstanding the FAA. The court compelled arbitration and ruled in favor of the defendant on each of Pyrarenko's three affirmative defenses. The court thus reaffirmed the Eleventh Circuit's rule that a seaman's contract is not subject to attack solely on the basis of an arbitration clause.