



# THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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## PRESIDENT'S MESSAGE

By: Robert G. Shaw, SMA President

Since the last issue of *The Arbitrator*, we have undertaken the following activities:

- At the invitation of Thomas Miller Americas, we participated at a seminar for UK Club shipowner and charterer members on a panel that involved a discussion of both SMA and LMAA proceedings.
- We presented at a meeting of the FD&D club managers of the International Group at The American Club's office in New York. The officers and board of governors then hosted drinks afterwards at the Anglers' Club.
- We presented to leading ship brokers interested in learning more about SMA arbitration and dispute resolution.
- We presented at the MLA fall conference in Miami both on the SMA Rules generally and the SMA Salvage Rules.
- We organized a panel presentation at the Capital Link conference at the Metropolitan Club in late October on arbitration of disputes under ship financing contracts.
- In conjunction with NYMAR and with the support of many firms and persons in the community, we held a celebratory dinner of thanks and "roast" of Clay Maitland on November 1 at the Union League Club. Clay has been a champion of the SMA and of New York's maritime services. Led by Roastmaster, his Honor Judge John G. Ingram, a series of Clay's "friends," much aided by Clay, had 200 guests laughing throughout the evening.
- The SMA's Friends and Supporters now include more than 20 law firm/corporate and individual members. Their support has been critical in helping us inform our existing and potential users of the SMA and its dis-

pute resolution services, including the production and distribution of the flash drives containing the issues of the Digest and the updating of the SMA website.

- Our speakers' luncheons continue to be open to the public and well attended.
  - In September, André Pereira da Fonseca, a lawyer from Abreu Advogados in Lisbon, Portugal, summarized the chapter entitled "SMA Arbitration" which he wrote for the book *International Arbitration in the United States*, published last year by Kluwer Law International.
  - In October, Bob Clyne, Senior Vice-President, General Counsel and Corporate Secretary of ABS spoke on "Class: Today and Tomorrow."
  - In November, Tony Pruzinsky of Hill Rivkins LLP presented "The Benefits of Discovery in SMA Arbitration: A Practitioner's View."
  - In January, Stephanie Cohen presented on "Cybersecurity and the Maritime Arbitrator."
  - February's speaker was Ian Duthie, who is the head of the newly opened office in New York of the North of England P&I Club. His topic was "2020 Vision."

In addition to our luncheons on March 13 and April 16 (note the date change), we look forward to the following events:

- We have moved the venue for our annual two-day arbitration seminar to Stamford. The dates are February 28

and March 1. The course will again be led by Professor Jeffrey Weiss of New York Maritime College. Details are at <http://www.smany.org/course.html>.

- On April 11, 2019, we will host a seminar in Houston entitled: "Arbitration: A Better Solution." The seminar will focus on the role of rule-based U.S. arbitration for cost-effective and efficient resolution of maritime disputes, highlighting the unique features and benefits of the SMA Arbitration Rules for any venue. The program will include interactive participation, a mock arbitration, and will explore current and future trends affecting shipping and trade. Thanks to the extraordinary support of law firms and end-users, there will be no charge, lunch is included, and cocktails will be served after the program. The day starts at 8:30 am and ends at 6:00 pm. Location is the Sam Houston Hotel, 1117 Prairie Street, Houston.

I am pleased to welcome the following members to the SMA: Larry Marr, Anne Summers, Louis Epstein, Sandra Gluck, George Tsimis, James Drakos, and George Shirvell. Their professional bios appear in the members' roster on the SMA website.

I regret having to report the deaths of two of our long-time and much valued members: John J. Devine on September 12, 2018, and Charles L. Measter on January 9, 2019. Obituaries can be found at <https://obitree.com/obituary/us/new-jersey/hightstown/barlow--zimmer-funeral-home/john-devine/3609925> and <http://www.legacy.com/obituaries/charleston/obituary.aspx?n=charles-measter&pid=191271402>. Our sympathies to their families, friends, and colleagues. They will be missed.

To all of you who have contributed to these various programs and initiatives, I express the thanks of the SMA.

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**EDITOR'S NOTE:** The following article originally appeared online on the website of Practical Law™, a unit of Thomson Reuters, [https://content.next.westlaw.com/w-016-7695?isplc=us&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://content.next.westlaw.com/w-016-7695?isplc=us&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1). The site may be accessed for a fee. It has been modified for publication here and is reprinted with our thanks and with the permission of Practical Law™ and Thomson Reuters as well as its authors. The article contains helpful cross-references to other articles on the Practical Law™ website, e.g., "Prac-

## THE ARBITRATOR

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

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tice Note, *Joining Non Signatories to an Arbitration in the US* (W-011-3186) and Article, *Joining non-signatories to an arbitration* (6-275-4952).” In this article, such cross-references have been dropped into footnotes. The reader may access these Notes via the website where the original article appears and where the cross-references appear as a hyperlink. As will be seen, the article and the hyperlinks are a valuable resource for the novice as well as the seasoned user of SMA arbitrations.

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## SMA ARBITRATION: A STEP BY STEP GUIDE

By **Bruce G. Paulsen, Partner, and Jeffrey M. Dine, Associate, Seward & Kissel LLP, New York**

This article provides a step-by-step guide to arbitration under the Maritime Arbitration Rules of the Society of Maritime Arbitrators, Inc. (SMA) effective March 14, 2018 and common practices in SMA arbitrations. The SMA Rules apply to arbitration of both domestic and international disputes.

Maritime arbitration today is a specialized matter, focusing generally on maritime contracts, such as charterparties (ship lease agreements), and matters arising out of the operation of ships, such as delay and demurrage charges and cargo damage as well as commodities and other areas not necessarily directly related to shipping.

### *Introduction to the SMA*

Founded in 1963, the SMA is a non-profit organization the members of which are maritime arbitrators. Under the SMA Rules, the default locale for any arbitration is New York (SMA Rules § 7). Therefore, the SMA promotes maritime arbitration in New York with its selective membership; by providing a code of ethics applicable to its members; and rules and other materials for maritime arbitration and other forms of alternative dispute resolution.

The SMA maintains a website with its rules, roster of members, and other information, [www.smany.org](http://www.smany.org).

The SMA provides only limited administration of arbitrations, assisting with issues of consolidation and maintaining escrow accounts to secure the arbitrators’ fees.

The case proceeds for the most part as an ad hoc arbitration. The SMA maintains a roster of arbitrators (appointment from which is not mandatory under the rules); publishes awards unless the parties opt out; and administers accounts for security for the Panel’s estimated fees and expenses deposited in arbitration when requested.

The appointment of arbitrators and the governance of arbitration proceedings are otherwise up to the parties and the arbitrators.<sup>1</sup>

The SMA Rules provide that arbitrators must issue reasoned awards, which are published (unless the parties opt out of publication) (SMA Rules § 1).

Published awards are available on Westlaw and LEXIS. Some important awards are also published in *American Maritime Cases*. There is therefore a body of SMA awards that, although not precedential, are persuasive authority in SMA arbitration and that are cited in court cases as well.

### **SMA Arbitration**

The SMA Rules apply to an arbitration when the dispute resolution clause in the relevant contract provides for arbitration under the SMA Rules; the dispute resolution clause provides for ad hoc arbitration, but the sole arbitrator or appointed arbitrators are SMA members and either accept appointment based on the SMA Rules or are appointed on the basis that the SMA Rules apply to their appointment under the parties’ agreement; or, regardless of the provisions of the arbitration clause, the parties later agree to arbitration under SMA Rules.

The current SMA Rules apply only to contracts entered into on or after March 14, 2018. Prior versions of the rules, which apply to earlier contracts, are also available on the website (see Amendments to the Rules).

The SMA has also put forward a Shortened Arbitration Procedure, which is intended to apply to disputes below a value threshold set by the parties. The parties may agree to alter or modify the application of the SMA’s arbitration rules (SMA Rules § 1).

### **SMA Conciliation and Mediation**

The SMA issued Rules for Conciliation in 1998 (SMA’s Conciliation Rules). The SMA’s Conciliation Rules follow the UNCITRAL Conciliation Rules.

The SMA also has Rules for Mediation, published in 1999.

Mediation and conciliation are related alternative dispute resolution processes, which seek settlement of the parties' dispute by agreement. In mediation, the mediator is more likely to act as a facilitator that works to help the parties develop and negotiate settlement proposals. In conciliation, the conciliator(s) may take a more authoritative role in shaping the settlement, which can include making proposals for settlement.<sup>2</sup>

## Salvage

The SMA has specific Salvage Arbitration Rules. SMA arbitration is provided for in the US Open Form Salvage Agreement (MARSALV), which is commonly used in the US, particularly for recreational vessels.

The Salvage Arbitration Rules provide for a highly expedited procedure that is generally based solely on documentary and written submissions.

## Preliminary Steps/Considerations for the Parties

Maritime arbitrations generally arise from breakdowns in contractual relationships (such as charterparties) or incidents (such as cargo damage) that are usually well-known to the parties and/or the subject of notice and claims to insurers.

However, SMA arbitrators are, on occasion, called on to issue provisional relief on an expedited basis.

## Review the Arbitration Clause and Applicable Arbitration Law

The first step for the claimant preparing to initiate arbitration or the respondent considering how to anticipate or react on receipt of a notice of demand for arbitration is to locate the relevant arbitration clause and review its provisions.

Arbitration agreements can be incorporated by reference from other documents.<sup>3</sup> Bills of lading, for example, may incorporate the terms of an underlying charterparty (see, for example, *Cont'l Ins. Co. v. Polish Steamship Co.*, 346 F.3d 281, 283 (2d Cir. 2003)). Whether the arbitration clause in the charterparty binds the parties to the bill of

lading or other incorporating agreement may depend on the specific language of the charterparty clause and the law applicable to the agreement (see *Import Export Steel Corp. v. Miss. Valley Barge Line Co.*, 351 F.2d 503, 505-06 (2d Cir. 1965); *Int'l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 138 F. Supp. 3d 629, 635 (S.D.N.Y. 2015)). Non-parties may be bound to the arbitration clause on theories including agency, estoppel, and alter-ego, and counsel should consider these issues where appropriate.<sup>4</sup>

Maritime contracts frequently are based on industry standard forms, with standard choice of law and dispute resolution provisions.

Standard forms or the SMA model arbitration clause<sup>5</sup> is generally sufficient to refer all disputes between the parties to SMA arbitration. Language that does not follow standard terms may be less clear than the SMA model arbitration clause or standard contract forms and create the risk of jurisdictional challenges or procedural confusion.

Because claims arbitrated under the SMA Rules generally arise under federal maritime law rather than state law, the contract may choose "US maritime law" or similar formulations rather than the law of a particular US state to govern the substance of the dispute. Careful attention should be paid to determining the legal regime governing the arbitration (see, for example, *Commodities & Minerals Enter. Ltd. v. CVG Ferrominera Orinoco*, 2018 WL 4583484, at \*6 (S.D. Fla. July 18, 2018) (relying on a semicolon in the arbitration clause to reject a jurisdictional challenge to arbitral tribunal)).

## Jurisdiction

The SMA Rules do not provide that the arbitral tribunal (called a Panel in the SMA rules) has authority to determine its own jurisdiction.<sup>6</sup> However, SMA Panels are empowered to determine all issues of law or fact necessary to decide the issues before them (*Fed. Commer. & Navigation Co. v. Kanematsu-Gosho Ltd.*, 457 F.2d 387, 389 (2d Cir. 1972)). Parties may include language giving the arbitrators authority to determine their jurisdiction in the arbitration agreement.

## Coordination with Insurers or Other Parties

Coordination with the client and its insurer is important from the outset, even in cases that, in other contexts, may

not have insurance ramifications. Counsel should also consider cooperation, coordination, and possible consolidation among similarly aligned or intermediate parties (see Consolidation).

Counsel should be aware that shipping companies typically have sophisticated insurance programs. Events leading to maritime arbitration may be covered by insurance policies, such as protection and indemnity, hull and machinery, and kidnap and ransom, as well as by freight, demurrage, and defense policies that provide coverage for fees and costs in contract or other cases and are specific to the industry.

### Consolidation

Parties should consider whether the arbitration is subject to mandatory consolidation or whether they should request consolidation.

The SMA Rules provide for mandatory consolidation of arbitrations in certain circumstances (SMA Rules § 2). Consolidation allows for the litigation of pass-through claims between consignors, charterers, and owners.

Any party can request consolidation if a dispute or multiple disputes arise under two or more contracts that select arbitration under the SMA Rules and the disputes concern either a common question of fact or law or, to a substantial degree, the same transactions or series of transactions. (SMA Rules § 2.)

The parties may agree on a sole arbitrator or, if they do not, then choose a Panel of three arbitrators as follows:

- One selected by the primary claimant.
- One selected by the ultimate defending party.
- One selected by the remaining intermediate or “pass-along” party or parties.

The parties have 30 days after the request for consolidation to choose the arbitral tribunal. After 30 days, a party may request that the president (or, if a conflict occurs, the vice president) of the SMA select the remaining arbitrators from the SMA’s roster. SMA Rules § 2.

If the parties disagree about whether consolidation is required, the SMA president (or vice president if a conflict occurs) determines the question as a threshold issue. The president or vice president may charge a fee for making the determination. SMA Rules § 2.

The SMA Rules bar class or group arbitration (SMA Rules § 2).

### Punitive Damages and Attorneys’ Fees

SMA Panels generally recognize that, absent a provision in the parties’ agreement to the contrary, Panels have the authority to award punitive damages. However, Panels are often reluctant to do so (see, for example, *In re Arbitration Between Odffell Seachem AS, as Owners of the M/V NCC Arar and Vinmar Int’l BV/Vinmar Int’l Ltd.*, 2004 WL 5658886, at \*4 (S.M.A. Apr. 21, 2004)).<sup>7</sup>

SMA Panels are empowered to, and routinely do, award attorneys’ fees (SMA Rules § 30.)

### New York Notice of Arbitration

New York Civil Practice Law and Rules (CPLR) 7503(c) sets out a procedure for a claimant to serve the demand for arbitration or notice of intention to arbitrate. If the notice or demand is served under CPLR 7503(c), the respondent must bring any application to stay arbitration within twenty days after service. This includes an application on the grounds that a valid agreement was not made or complied with or that the claim is time barred.<sup>8</sup>

Case law is conflicting on whether CPLR 7503(c) applies to arbitrations otherwise governed by the Federal Arbitration Act (FAA) (see *Rite Aid of New York, Inc. v. 1199SEIU United Health Care Workers East*, 2017 WL 10295970, at \*4 (S.D.N.Y. July 10, 2017) (collecting cases on both sides and finding CPLR 7503(c) not preempted by the FAA)). Therefore, claimants bringing an arbitration seated in New York should consider serving the demand or notice under CPLR 7503(c). Respondents receiving such a demand or notice should consider adhering to the timing requirements of CPLR 7503(c).

### Check Limitations Periods

The claimant should check whether any of its potential claims are time-barred. Limitations (or, in admiralty, laches) periods may be set by:

- Federal law.
- Applicable or borrowed state law.
- The parties’ agreement.

Respondents should undertake a reciprocal analysis of the claims and consider whether a court application to stay the arbitration is available and appropriate.

### Maritime Attachment and Arrest

A claimant may commence an action for arrest or attachment of a vessel or other property under the Federal Rules of Civil Procedure Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (the “Supplemental Rules”).<sup>9</sup>

The federal district court may refer the parties to arbitration but retain jurisdiction to enforce the ultimate award over the seized property or, in certain circumstances, in personam (9 USC § 8). Panels operating under the SMA Rules also may issue orders relating to security that may be both:

- Confirmed as partial final awards under the FAA.
- Judicially enforced.

See *SH Tankers Ltd. v. Koch Shipping Inc.*, 2012 WL 2357314, at \*6-7 (S.D.N.Y. June 19, 2012).<sup>10</sup>

### Preparing the Case

The issues underlying maritime arbitrations are fact-intensive and often technical. That is particularly true for matters related to cargo or vessel operations. Parties should assess the issues as early as possible to prepare an effective statement of claim or anticipated defense. The relevant parties’ insurers or port agents may conduct initial fact and evidence gathering.

Early expert involvement, for example, in cases of cargo contamination or damage, may also be important to framing the case, narrowing issues, and settlement.

### Communications

Absent other agreement by the parties, the demand for arbitration and the claimant’s notice of appointment of its arbitrator must be given by written notice (SMA Rules §§ 6, 10). Notice of their appointment to the arbitrators may be given orally but should be confirmed in writing (SMA Rules § 12).

Parties and counsel must limit the subject matter of communications with potential arbitrators before appointment to avoid charges of bias or conflict. Before

appointment, an arbitrator may only “inquire as to the general nature of the dispute and the names of the parties and their affiliates involved.”<sup>11</sup>

After the Panel is constituted, all communications between a party and the Panel must be conducted with the Chair of the Panel and be shared among all parties (SMA Code of Ethics § 6; SMA Rules § 23).

Selection of the SMA Rules in the arbitration agreement is consent to service for purposes of both the arbitration and any court proceeding to confirm the award. A party may serve documents by mail to a party or its counsel at their last known address or by personal service. SMA Rules § 35.

Communications among parties and arbitrators are typically by email. As a matter of convenience and courtesy to the arbitrators (and with their assent), parties also often send hard copies of documents, such as:

- Pleadings.
- Briefs.
- Evidentiary documents.
- Case law and other cited sources.

### Time Limits

- The SMA Rules contain only a few time limits:
- The respondent must appoint its arbitrator within 20 days of receipt of notice arbitration, unless the claimant seeks to compel an earlier appointment (SMA Rules § 10).
- Appointment of arbitrators in a consolidated proceeding: 30 days SMA Rules § 2.
- Pre-hearing statements of claim: must be served by the claimant at least 20 business days before the first hearing; and must be served by the respondent not more than 10 business days after the claimant’s submission. (SMA Rules § 21.)
- Copies of documents, exhibits, and accounts to be introduced at a hearing must be produced at least ten business days before hearing (SMA Rules § 21).
- Identification of fact and expert witnesses, including a brief description of their testimony must be provided at least one week before the hearing date (SMA Rules § 21).

- Arbitrators are asked to issue an award within 120 days from closure of the proceeding, but this time-limit is not mandatory (SMA Rules § 28).

All time limits under the SMA Rules can be altered by an agreement between the parties and the consent of the Panel or the Panel on a showing of good cause (SMA Rules § 34).

The Panel generally sets additional time limits in an early conference with the parties.

### Expediting Matters

The SMA Rules allow for the parties to agree to proceed on documents only (SMA Rules § 27).

The SMA has a Shortened Arbitration Procedure, which is generally for claims of smaller value. Contractual parties may include a provision in their arbitration agreement that the Shortened Arbitration Procedure applies to claims below an amount specified.

The Shortened Arbitration Procedure provides:

- Procedures for party agreement to or SMA appointment of a single arbitrator (SMA Rules for Shortened Arbitration Procedure (SMA Shortened Procedure Rules §§ 1-2).
- An expedited schedule that requires: the arbitrator to create a schedule within 15 days of the arbitrator's appointment that sets the date for the claimant's submission of its initial statement of claim and all supporting documents; the respondent to submit its response and any counterclaim within 20 days of the submission of the statement of claim; the claimant to submit its response to any counterclaim within 20 days of the respondent's submission; and the arbitrator to issue the award within 30 days of the final replies or the arbitrator's declaration that the proceeding is closed (SMA Shortened Procedure Rules §§ 3, 8).

Unless the arbitrator deems it necessary, there is no discovery (SMA Shortened Procedure Rules § 4-5).

The parties may be represented by counsel or commercial advocates. The arbitrator may award legal expenses or time and expenses, but the expense award may not exceed \$4,000 (SMA Shortened Procedure Rules § 7). The arbitrator's fee and expenses may not exceed:

- \$3,500.

- \$4,500 if there is a counterclaim.

SMA Shortened Procedure Rules § 9.

### The Arbitrators

#### The Roster of Arbitrators

The SMA maintains a roster of arbitrators. The SMA roster is published on its website and the SMA furnishes its current roster on request as well (SMA Rules § 10).

The parties are not limited to those arbitrators unless they are using the Shortened Arbitration Procedure (see SMA Shortened Arbitration Procedure Rules § 1 see also Expediting Matters). The SMA's Model Arbitration Clause also requires selection from the SMA roster.

Some standard maritime charterparties specify that the arbitrators be commercial persons. Under that definition, an arbitrator whose only experience is practicing law does not qualify (*see W.K. Webster & Co. v. Am. President Lines, Ltd.*, 32 F.3d 665, 668 (2d Cir. 1994)).

The arbitrators on the SMA roster meet the commercial persons requirement and have at least five years of commercial experience in the shipping industry. About one-quarter are lawyers who have met this requirement.

Under the SMA Code of Ethics,<sup>12</sup> SMA arbitrators must be impartial whether or not they are party-appointed (SMA Code of Ethics § 7).

#### Number of Arbitrators

The number of arbitrators depends on the arbitration clause and the rules governing the arbitration.

The SMA's Model Arbitration Clause provides for three arbitrators. Each party appoints one arbitrator. Those two arbitrators then select the third arbitrator. The SMA's model clause is consistent with the standard New York dispute resolution clause, published by BIMCO.

In the absence of a contrary agreement, the SMA Rules provide for arbitration by two arbitrators (SMA Rules § 10). If the two party-appointed arbitrators cannot agree on the result of the dispute, they appoint an umpire. The umpire is empowered to assume the decision-making function and effectively act as the sole arbitrator (SMA Rules § 20).

A single arbitrator conducts the arbitration under the Shortened Arbitration Procedure (see Expediting Matters).

### Selecting the Arbitrators

Absent a contrary provision in the arbitration agreement, the claimant gives notice of its arbitrator in its demand for arbitration (SMA Rules § 6). In making an appointment, counsel often search arbitrators' prior SMA awards, which are published and available on Westlaw and LEXIS.

If a party fails to appoint its arbitrator within the time set in the agreement, the other party may seek judicial assistance in appointing arbitrators under Section 5 of the FAA (SMA Rules § 10). Similarly, if the party-appointed arbitrators fail to appoint the third arbitrator "within a reasonable time," the court may make the appointment (SMA Rules § 11). Notably, the party-appointed arbitrators are not permitted to communicate with their appointing party concerning the selection of the third arbitrator (SMA Code of Ethics § 5).

While SMA members are frequently appointed in arbitrations under the SMA Rules, if the arbitration agreement does not require it, the parties may choose other arbitrators and may use party appointment or other methods of appointing arbitrators, such as the American Arbitration Association (AAA)'s arbitrator selection service, in their arbitration agreement. Appointment of an arbitrator from the SMA roster is required under the Shortened Arbitration Procedures and by the SMA's Model Arbitration Clause. See The Roster of Arbitrators.

If a party-appointed arbitrator becomes unable to serve, the appointing party promptly names a replacement. The panel chair continues to serve in that capacity unless the two party-appointed arbitrators choose a replacement before the hearing begins or, if the arbitration is on documents alone, before the first submissions or documents are received by the Panel (SMA Rules § 13).

Each party should ensure that sufficient funds are available to cover any deposit of arbitration costs, including arbitrator fees, that may be required during arbitration (SMA Rules § 37).

### Challenging an Arbitrator

Arbitrators may not have:

- A financial or personal interest in the outcome of the dispute.
- Acquired from an interested source detailed prior knowledge of the matter in dispute.

SMA Rules § 8.

Each party or its counsel must provide the arbitrators with a statement of interested parties so that the arbitrators may identify grounds for voluntary withdrawal (SMA Rules § 21). Before the first hearing or initial submissions, arbitrators must disclose potential conflicts, including close business or personal ties with parties, affiliates of the parties, counsel, and other arbitrators on the Panel (SMA Rules § 9; SMA Code of Ethics § 4). On receipt of the arbitrators' disclosure statements, the parties may challenge any or all the arbitrators or accept the Panel (SMA Rules § 9).

An arbitrator subject to a challenge may voluntarily withdraw. If the arbitrator declines to withdraw, the challenger retains its right to challenge the award after it is issued (SMA Rules § 9; see Enforcing or Challenging the Arbitration in Court).

After a withdrawal, the party that appointed that arbitrator appoints a replacement. If the chair withdraws, the parties' arbitrators select a new chair (SMA Rules § 13).

### Arbitrator Compensation

Each arbitrator determines his or her fee. The amount of the fee should take into account:

- The complexity of the matter.
- The urgency.
- The time spent.

SMA Rules § 37. Arbitrators and the parties may agree on an hourly or hearing day rate for the arbitrator at the time of appointment.

At any time, the Panel may require the parties to post security for its estimated fees and expenses. Posted security is held in an interest-bearing account administered by the SMA unless otherwise agreed to by the arbitrators. Arbitrators are entitled to payment for work performed for arbitrations that settle. SMA Rules § 37.



## *Commencing the Arbitration*

### **Claimant: Notice of Arbitration and Commencement of Arbitration**

Arbitration is initiated when the claimant serves written notice to the other party of its demand for arbitration and naming its arbitrator. Under the SMA Rules, the claimant may be any party to an agreement for arbitration (SMA Rules § 6).

The claimant's demand for arbitration describes:

- The nature of the dispute.
- The damages at issue.
- The remedy it seeks.

There is no required form for the demand for arbitration. The demand is often a letter. The use of numbered paragraphs and a caption makes it easier for the parties to respond point by point as the pleadings progress. While a demand for arbitration need not be detailed, the claimant should take the opportunity to provide a full narrative of the facts giving rise to the dispute.<sup>13</sup>

### **Serving the Notice of Arbitration**

The notice of demand for arbitration should be served as required by the parties' agreement. In the absence of an agreement, the default SMA rule provides for service by mail to the party or its counsel or personal service (SMA Rules § 35; Communications).

### **Respondent: Appointment of Arbitrator**

The respondent has twenty days to name its arbitrator (SMA Rules § 10; see Time Limits). Claimant may seek judicial relief for speedier appointment if needed.

### **Representation**

A party may be represented in the arbitration by counsel or other representative (SMA Rules § 14).

### ***Enforcing or Challenging the Arbitration in Court***<sup>14</sup>

Parties may seek court intervention to:

- Compel or stay arbitration.

- Enforce or oppose enforcement of security or other preliminary relief.
- Seek confirmation or vacatur of the final award.

The enforcement of maritime industry arbitration agreements and awards has some particular considerations.

The FAA expressly applies to maritime contracts as defined in the FAA (9 USC §§ 1-2), although the scope of maritime contracts is not well-defined. However, the FAA does not provide a basis for federal subject matter jurisdiction. Therefore, for a purely domestic arbitration that does not fall with Chapter 2 of the FAA, federal subject matter jurisdiction must exist under one of the following:

- Diversity (28 USC § 1332).
- Federal question jurisdiction (28 USC § 1331).
- Other statute.

If there is no federal jurisdiction for the underlying dispute, matters relating to the dispute must be heard in state court.

The following types of disputes fall within federal jurisdiction:

- A dispute regarding a maritime contract (28 USC § 1333).
- International arbitrations that fall under the Convention for the Recognition and Enforcement of Foreign Arbitral Awards, 21 UST. 2517 (the "New York Convention") (9 USC §§ 201-208), which covers commercial relationships that: are not entirely between US citizens; involve property located outside the US; are performed or enforced abroad; or have "some other reasonable relation with one or more foreign states" (9 USC § 202).

Therefore, proceedings to compel arbitration or to confirm or vacate an award under the New York Convention or FAA Chapter 2 may be brought in federal court or removed to federal court at any time before trial (9 USC §§ 203, 205).<sup>15</sup>

### ***Pleadings***

The sequence of pleadings is typically determined in an early conference among the parties and arbitrators. Parties are permitted to amend or add to their claims until the close of proceedings (SMA Rules § 6).

### ***Emergency and Interim Measures***

The SMA Rules empower the Panel to “grant any remedy or relief,” including specific performance and security (SMA Rules § 30). The panel may require security for:

- Claims.
- Counterclaims.
- Costs.

See, for example, *In the Matter of the Arbitration between Agrowest, S.A., Dos Valles S.A. and Comexa S.A. and Maersk Sealand*, 2009 WL 1752031 (S.M.A. May 26, 2009).

The SMA Rules do not include a procedure for preliminary relief. However, a Panel can be empaneled on short notice and can act swiftly. The claimant can seek a court order requiring the respondent to appoint its arbitrator before its time to do so expires under the SMA rules (SMA Rule § 10).

### ***Prehearing Procedure***

The SMA Rules prescribe few requirements for pre-hearing and hearing procedures, so the parties and arbitrators have significant latitude in deciding matters, such as:

- The timing of pleadings or other submissions.
- The extent of discovery.
- How to organize the hearing.

### **Waiver of Objection of Noncompliance with the Rules**

If a party knows of a breach of the SMA Rules but continues with the arbitration without officially objecting to the Panel, the party waives any right to object (SMA Rules § 33).

### **Oath**

After the parties accept the Panel, each arbitrator takes an oath to “faithfully and fully hear and examine the matter in controversy and make a just Award” (SMA Rules § 19 & Appendix A).

### **Location of the Hearing**

Unless another place is set in the parties’ arbitration agreement, the place of the hearing is New York City, at

a location chosen by the Panel (SMA Rules § 7; see also Discovery and Subpoenas).

### **Discovery and Subpoenas**

The parties agree to the scope of discovery, subject to the Panel’s power to require the parties to produce matter “necessary to an understanding and determination of the dispute.” The Panel decides any disputes. SMA Rules § 23.

The Panel has the power to subpoena witnesses or documents on its own initiative or at the request of a party (SMA Rules § 23). The Panel may only issue subpoenas for a “hearing,” which includes a preliminary hearing solely held for the purpose of the subpoena.<sup>16</sup>

The Panel may convene in a location other than the site of the arbitration for the purpose taking evidence from a non-party. The Panel may issue a subpoena ordering the production of documents or witnesses at the alternative location. For purposes of judicial enforcement of the subpoena, the panel remains seated at the alternative location. SMA Rules § 7.

### ***Hearing Procedure***

#### **General Procedure**

The chair designates the time and place of the first hearing. Before the hearing:

- Each claimant should submit a pre-hearing statement of claim at least twenty business days before the first hearing unless otherwise agreed.
- Each respondent should submit a pre-hearing statement of defense and any counterclaim no more than ten business days after the claimant’s submission.
- Copies of any documents, exhibits, and accounts to be introduced at a particular hearing should be provided to the opposing side and the arbitrators at least ten business days before the hearing.
- Witnesses, fact and expert, should be identified and their testimony briefly described at least a week before the scheduled hearing date.

SMA Rules § 21.

The claimant presents its case first and must meet its burden of proof. If it does not, the Panel need not take

evidence from the respondent, unless the respondent has brought counterclaims. The Panel decides which party is the claimant if it is unclear (SMA Rules § 21).

## Evidence

Court rules of evidence do not apply unless specified by the parties. The Panel determines the relevance and materiality of the evidence presented by the parties. SMA Rules § 21.

The parties choose what evidence to present. The Panel may require parties to produce any additional evidence it deems necessary. All evidence submitted to the Panel is to be shared by all parties. SMA Rules § 23.

The Panel may receive evidence by affidavit. If a party objects to the affidavit, the Panel gives the affidavit the appropriate weight based on the objection. SMA Rules § 24.

The Panel has the power to subpoena witnesses and documents, on their own or at the request of a party. The party may order the deposition of witnesses unable to testify in person. See Discovery and Subpoenas.

The Panel may take testimony by video conference or other electronic method. However, a party may object to the taking of remote testimony. If a party objects, the Panel hears and rules on the objection. SMA Rules § 23.

## Arbitration on Documents

The parties may agree in writing to submit their dispute to arbitration solely on documents. In arbitration on documents, the Panel takes its oath in writing and makes its conflict disclosures to all parties in writing. (SMA Rules § 27; see Arbitrator Conflict Disclosure.)

The parties should agree to the schedule for submissions. If they cannot agree, the Panel then sets the schedule. SMA Rules § 27.

## Adjournments

The arbitrators must adjourn a hearing on the joint request of all parties. Otherwise, the arbitrators may adjourn a hearing for good cause. SMA Rules § 18.

## Defaulting Parties

If, after receiving notice, a party fails to appear or obtain an adjournment, the arbitration may proceed in the absence of the defaulting party (SMA Rules § 22).

Panels generally make repeated efforts to encourage a defaulting party to appear. Where a party fails to appear, the Panel makes its award based on the appearing party's submissions. See, for example, *In the Matter of the Arbitration between Monjasa DMCC and Metro Building Materials FZE, as Owner of the M/V Bao Flourish*, 2017 WL 4990591, at \*2 (S.M.A. Sept. 15, 2017).

## Interpreter

The party presenting a witness requiring an interpreter must provide an independent interpreter. The presenting party pays for the interpreter, subject to a later allocation of the cost (SMA Rules § 16). The interpreter's oath is set out in Appendix A to the SMA Rules.

## Stenographer

Unless the parties agree otherwise, all hearings are transcribed. The cost of transcription is shared among the parties, subject to a final apportionment by the arbitrators (SMA Rules § 15).

## Attendance at Hearings

Persons with a direct interest in the arbitration may attend the hearings. The arbitrators may exclude witnesses during the testimony of other witnesses. SMA Rules § 17.

## Expenses

The party producing or requiring the production of the witness must pay witness expenses, although the Panel may reallocate expenses (SMA Rules § 36).

For expenses incurred at the request of the arbitrators, the parties bear them equally, subject to later allocation. These expenses include:

- Travel and out-of-pocket expenses of arbitrators.
- Expense of producing witnesses, including subpoenaed witnesses, requested by the Panel.
- The expense of other proofs requested by the Panel.

Travel and lodging expenses of party-appointed arbitrators located outside the place of arbitration are borne by the party appointing that arbitrator. SMA Rules § 36.

### **Closing the Proceedings**

At the end of the submission of evidence, the parties may either submit post-hearing briefs or present oral closing arguments (SMA Rule §§ 21, 25).

Post-hearing briefs are submitted on an agreed schedule. If the parties cannot agree, the Panel sets the schedule. SMA Rules § 25.

The Panel may also direct the parties to submit supplementary briefing or to appear for oral argument on any issue (SMA Rules §§ 21, 26).

The chair declares the proceedings closed on the completion of all submissions (SMA Rules § 25). However, even after the close of proceedings, the arbitrators may require the parties to provide additional clarification and may order additional hearings. The hearings also may be reopened on application of a party for good cause shown. SMA Rules § 26.

### **Awards**

#### **Scope of Awards**

The Panel has broad authority to grant any remedy or relief that it deems just and equitable, including, but not limited to, specific performance and the grant of security (SMA Rules § 30).

An award includes the allocation of arbitration expenses and fees. Notably, the arbitrators may award reasonable attorneys' fees and costs or expenses. Parties' reply briefs should include an affidavit describing their attorneys' fees. SMA Rules §§ 30, 36.

If the parties settle the dispute, they may request that the Panel set out the terms of settlement in an award (SMA Rules § 31).

#### **Form and Timing of Award**

Unless otherwise agreed:

- The decision of the arbitrators is by majority vote. If the arbitration clause requires two party-appointed

arbitrators and an umpire, the umpire is appointed if the party-appointed arbitrators fail to agree. SMA Rules § 20.

- SMA awards are reasoned. Awards are signed by the arbitrator, umpire, majority, or all arbitrators (if unanimous). Dissents are signed by the dissenter and are included with the majority's award. SMA Rules § 29.

The Panel should issue an award within 120 days of the close of proceedings, although the Panel's failure to issue an award within that time does not affect the award's validity (SMA Rules § 28; Time Limits).

The arbitrators retain jurisdiction to correct "obvious" clerical or arithmetic errors (SMA Rules § 30).

### **Delivery**

Delivery of the award may be by mailing to the parties or counsel at their last known address, or by personal service (SMA Rules § 32).

### **Publication of the Award**

Unless the parties otherwise agree, awards are published in print by the SMA (SMA Rules § 1) and are available on Westlaw and LEXIS.

### **Amendments to the Rules**

The typical SMA arbitration provision states the arbitration is governed by the SMA Rules that are in effect at the time the arbitration agreement is made. The SMA Rules have been amended from time to time since they were first enacted in 1994.

The principal change from the 2016 SMA Rules to the 2018 SMA Rules was a clarification in Rule 30. The rule now expressly provides that SMA Panels have the authority to issue awards of security for claims and counterclaims, a power that had been implicit.

The 2016 Rules revised provisions in the 2013 Rules for hearing location (SMA Rules § 7) to allow for nationwide service of subpoenas. Other changes included:

- Modest extensions of pre-hearing submission deadlines (SMA Rules § 21).
- Clarification of the circumstances and method of appointing an umpire (SMA Rules § 20).

- Clarification that any interim allocation of expenses is subject to a final allocation by the Panel (SMA Rules § 36).

The 2013 Rules introduced the detailed consolidation procedure (SMA Rules § 2). Other minor changes included clarification that the Panel may:

- Take testimony by video conference or other electronic means (SMA Rules § 23).
- Require post-hearing briefing and a final oral hearing after presentation of all evidence (SMA Rules § 21).

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1. For parties seeking fully administered arbitration, see Practice Note, Introduction to US Arbitral Institutions and Their Rules (1-500-5006).

2. For more information on alternative dispute (ADR) mechanisms available to parties to a dispute, see ADR Mechanisms in the US: Overview (1-617-5663).

3. See Practice Note, Arbitration Clauses Incorporated by Reference Under US Law (W-002-2351).

4. See Practice Note, Joining Non-Signatories to an Arbitration in the US (W-011-3186) and Article, Joining non-signatories to an arbitration (6-275-4952).

5. 8-520-9057

6. See Practice Note, Arbitrability Issues in US Arbitration: Determination by a Court or Arbitrator (W-005-0556).

7. For a discussion of punitive damages generally, see Practice Note, Punitive Damages in US Arbitration (W-000-1641).

8. See Practice Note, Compelling and Staying Arbitration in New York State Supreme Court: Considerations when Staying Arbitration (6-592-6785).

9. See Practice Note, Maritime Attachment and Vessel Arrest in the US (W-001-8160)). This is a common practice in maritime cases.

10. For more information on judicial enforcement of arbitral orders regarding provisional remedies, see Practice Note, Interim, Provisional and Conservatory Measures in US Arbitration: Enforcing Preliminary Relief Awarded by Arbitrators in Court (0-587-9225).

11. SMA Code of Ethics § 4 (W-017-842); see also Practice Note, Selection of party-nominated arbitrators: Acceptable topics at interview: grey areas (3-203-6680).

12. W-017-842.

13. See Article, Top Ten Mistakes Litigators Make in US Commercial Arbitration: File a Bare Bones Demand for Arbitration (W-008-5473).

14. See Practice Notes, Compelling and Enjoining Arbitration in US Federal Courts (6-574-8707); Interim, Provisional and Conservatory Measures in US Arbitration (0-587-9225); Enforcing Arbitration Awards in the US (9-500-4550); Vacating, Modifying, or Correcting an Arbitration Award in Federal Court (W-000-6340).

15. For further information, see Practice Note, Understanding the Federal Arbitration Act: Court Intervention in Support of Arbitration (0-500-9284).

16. See Practice Note, Compelling Evidence from Non-Parties in Arbitration in the US: Document Discovery under the Federal Arbitration Act (1-586-9513).

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## SCOTUS ISSUES DECISION DENYING ARBITRATION WHERE THE CONTRACT CONCERNS A CONTRACT OF EMPLOYMENT OF A WORKER ENGAGED IN INTERSTATE COMMERCE

By Jack Vayda, Partner, McLaughlin & Stern,  
LLP, New York

The U.S. Supreme Court welcomed 2019 with a decision which reinforced the vigor and strength of the Federal Arbitration Act but tapped the brakes on its expansion. *New Prime Inc. v. Oliveira*, 586 US \_\_\_ (January 15, 2019).

Mr. Oliveira worked as a truck driver under an operating agreement that called him an independent contractor and contained a mandatory arbitration provision and a “delegation clause” which gave the arbitrators the power to decide the threshold issue of arbitrability. Mr. Oliveira filed a class action alleging that New Prime denied its drivers lawful wages. New Prime sought to compel arbitration. The lower courts found that the contract fell within one of the Section 1 exceptions to the Act and arbitrability. They denied the petition to compel arbitration. The Supreme Court affirmed in a decision which is among the more “readable” modern Supreme Court decisions.

The Court underscored that the “delegation clause” is itself a form of agreement to arbitrate so that it is only enforceable (by a court compelling arbitration and by the arbitrators) if the contract is the type covered by Section 2 of the Act (a “written provision in any maritime trans-

action or a contract evidencing a transaction involving commerce”) and, if so, not within any of the Section 1 exclusions (“contracts of employment of ... a worker ... engaged in ... interstate commerce”). In analyzing these sections, and particularly their words, the Court repeated and applied a core concept of the present majority of strict-constructionists. Specifically, the words in a statute (in this case “worker”) should be construed as they were used at the time Congress enacted the legislation.

This decision was eagerly awaited given the growing tension over corporate efforts to expand arbitration beyond the commercial realm in order to block claims of individuals and their class actions from being heard by courts and juries.

The Court “ducked” the invitation. It stayed far away from analyzing the status of an “independent” contractor and did not revisit denial of arbitration to a class action. But simultaneously it made clear that it would carefully scrutinize attempts to erode the statutory exemptions from arbitration.

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## NOTES ON DECISIONS FROM ACROSS THE POND

**By: LeRoy Lambert, SMA Member, New York**

The Supreme Court in the United Kingdom also considered a case of interest for the maritime industry, here, the burden of proof in an “inherent vice” cargo (coffee) damage case. *Volcafe v. CSAV*, [2018] UKSC 61 (<https://www.supremecourt.uk/cases/docs/uksc-2016-0219-judgment.pdf>). See <http://www.standard-club.com/news-and-knowledge/news/2018/12/web-alert-volcafe-v-csav-the-supreme-court-overturned-the-court-of-appeal-judgment-on-the-order-and-burden-of-proof-in-cargo-claims.aspx>.

The lower court held that once the claimants had shown that the coffee bags were delivered in a damaged condition, the onus was on the carrier to establish inherent vice or inevitability of damage and to disprove negligence. The court of appeal, however, held that once the carrier has shown a prima facie case for the application of the exception of inherent vice, the burden shifts to the

cargo claimant to establish negligence on the part of the carrier to show the inherent vice exception did not apply.

The Supreme Court, however, held if inherent vice is the defense, the carrier must show that it took reasonable care of the cargo but the damage occurred nonetheless and that whatever reasonable steps might have been taken to protect the cargo from damage would have failed in the face of its inherent propensities.

In the US, cases in the Second Circuit view the issue in terms of the shipper’s burden to state a prima facie case of good order at the time of loading. E.g., *American Tobacco Co. v. Goulandris*, 281 F.2d 1960. Cases in the Fifth Circuit, however, hold that the carrier must bring forth evidence proving inherent vice. The burden then shifts to the shipper to show negligence or fault on the part of the carrier. E.g. *Quaker Oats v. M/V Torvanger*, 734 F.2d 283 (5<sup>th</sup> Cir. 1984).

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## LOOSE ENDS

### *Houston: April 11, 2019*

As mentioned above in The President’s Message, the SMA and its Friends and Supporters are holding a day-long seminar in Houston on April 11, 2019, entitled: “Arbitration: A Better Solution.” The program will include interactive participation, a mock arbitration, and will explore current and future trends affecting shipping and trade. Thanks to the support of law firms and end-users, there will be no charge, lunch is included, and cocktails will be served after the program. The day starts at 8:30 am and ends at 6:00 pm. Location is the Sam Houston Hotel, 1117 Prairie Street, Houston. Please spread the word!

### *CMA 2019: April 2-4, 2019*

The annual three-day event in Stamford is later than usual this year, April 2-4, and Tuesday-Thursday rather than Monday-Wednesday. Venue remains the Hilton Stamford Hotel. This year’s Commodore will be John C. Hadjipateras, Chairman, CEO & President of Dorian LPG Ltd. See who is attending, speaking, and sponsoring, <https://maritime.knect365.com/cma-shipping>.

***MLA 2019 Meetings***

The MLA will meet in New York April 30 - May 3 and at the Gainey Ranch, Scottsdale, Arizona, October 29 - November 2, 2019. Bring water!

***Gencon 2019 (?)***

BIMCO, its Documentary Committee, and the indefatigable John Weale are working diligently to announce revisions to the Gencon by the end of this year.

***ICMA XXI in Rio March 8-13, 2020***

David Martowski, Permanent Member of the Steering Committee for the 21<sup>st</sup> International Congress of Maritime Arbitrators, reports that the date of ICMA XXI in Rio is 8-13 March 2020. Mark your calendars and plan to attend!

***“Navigating Maritime Arbitration: The Experts Speak” to be published soon!***

In addition to the guide republished from Practical Law™ in this issue, Jurisnet is soon to publish a book edited by John Kimball and David Martowski entitled “Navigating Maritime Arbitration: The Experts Speak.” The book has seventeen chapters, each written by different contributors. The chapters cover the basics of commencing, conducting, and challenging/enforcing awards as well as specialized chapters on tanker and terminal vetting, ship-building contracts, commodities arbitration under SMA Rules, and arbitration of natural resource damage claims. The book has been a true community effort. Thanks to John and David for their leadership and to the many persons who contributed chapters. Full description and presales available at <https://arbitrationlaw.com/books/navigating-maritime-arbitration-experts-speak>.

***Friends and Supporters***

For New York to remain competitive and grow, we need all stakeholders to commit to assist the SMA to market and promote the advantages of arbitrating in New York under SMA Rules. We are grateful for the new and renewed support shown by our Friends and Supporters in recent months. If you would like to join and/or renew your support, please

call Patty at the office or email her at [pleahy@smay.org](mailto:pleahy@smay.org). Let's keep it going!

***Thanks!***

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

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