



THE ARBITRATOR

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SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT’S MESSAGE

By: Robert G. Shaw, Outgoing SMA President

I am happy to report that at the SMA’s Annual General Meeting on May 14 the members elected Nigel Hawkins to succeed me as president and LeRoy Lambert to succeed Nigel as vice president.

Nigel and LeRoy have both had distinguished careers in maritime commerce. Nigel was a shipbroker and a senior shipping company executive with experience working in London, Tokyo and New York. LeRoy practiced maritime and commercial law in New York before joining the senior management of one of the International Group of P&I clubs. Their short “bios” appear on the SMA website.

Among their many distinctions, Nigel has been a leading participant in the revisions of the NYPE and ASBATANKVOY forms and LeRoy has been a co-author of “Voyage Charters,” published by Informa and now in its 4th edition. I am sure they will uphold the standards of the SMA and promote its mission.

I have in earlier issues of The Arbitrator published over the last two years summarized the activities of the SMA’s officers, board, and committees. I will not repeat all the efforts that have been made to improve and, I hope, better inform all existing and potential ADR participants on the arbitration and mediation services provided under the SMA rules and on the credentials of the SMA’s members.

Since the last issue in February, we held a two-day arbitration seminar in Stamford with Professor Jeffrey Weiss of the New York Maritime College and we organized and hosted in Houston a one-day seminar on “Arbitration: a Better Solution.” Over 70 executives from shipowners, charterers, insurers and related enterprises and professions attended. The afternoon session included a mock arbitration that dealt among other things with consolidations of proceedings and orders of pre-award security under the SMA Rules. The seminar was made

possible with the financial support of many law firms with arbitration practices, P&I clubs and other industry participants for which we are very grateful.

Work continues on providing users with direct access on the SMA's website to the index and digest of nearly 4,300 awards that have been published since the founding of the SMA. The published awards that are available through Lexis and Westlaw are a resource unique to the SMA. With the index and digest, they will become even more accessible as a guide to the avoidance and resolution of maritime and commercial disputes.

I regret to report the death of Michael van Gelder, a true stalwart of the SMA. Tony Siciliano, Lucienne Bulow, and Klaus Mordhorst prepared an obituary which appears later in this issue.

It has been a pleasure for me to serve as the SMA's president over the last two years. I have been privileged to enjoy throughout the participation of the entire board of governors and committee members. I thank all of them for their collegiality, enthusiasm and dedication to the mission of the SMA and look forward to seeing the momentum continue.

By: Nigel Hawkins, Incoming SMA President

I follow in illustrious footsteps and look forward to serving the membership in continuing to search for ways to increase the reach and effectiveness of the SMA.

The SMA has a diverse membership which will help to effect the above. I therefore look forward to the assistance of the membership of the SMA in this endeavor and am sure that this will result in New York continuing to be

one of the leading arbitral centers of the world. The SMA pioneered the use of the shortened arbitration procedure; likewise, the SMA was innovative in the ordering of security in arbitrations. The SMA will therefore continue to study further innovations which will assist the maritime and commercial community.

I thank Robert Shaw for his leadership and especially his calm and steady hand at the tiller of the SMA. Finally, I look forward to working with my fellow Governors and all members in the years ahead.

**GATEWAY ISSUES RELATING TO
ARBITRABILITY UNDER THE FAA
AND THE CURRENT STATUS OF
ARBITRATION RULES DELEGATING
ISSUES OF ARBITRABILITY**

By: Jay Paré, Partner, McLaughlin & Stern, New York

The cases below discuss the frequently confusing subject of whether a court or arbitrators will decide threshold issues of arbitrability under the Federal Arbitration Act, 9 U.S.C., §1 et seq. ("FAA"). As will be noted, this subject has come up repeatedly before the United States Supreme Court (the "Court"), and there is frequently sharp disagreement among members of the Court.

1) *Who Decides Issues of Fraud in the Inducement of a Contract Containing an Arbitration Clause?*

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)

Prima Paint bought Flood and then discovered it was insolvent and claimed rescission. Flood sought to arbitrate under the arbitration clause in the contract. Prima claimed that the contract was invalid because of fraud in the inducement and urged there was no right to arbitrate.

The Court ruled that the attack concerning arbitration goes to the "contract as a whole" and not to the arbitration clause itself, saying the arbitration clause is a "severable" agreement from the rest of the contract and it is entitled to enforcement. The Court ruled that issues of fraudulent inducement and its effect are for the arbitrators to decide.

Justice Black, in dissent, wrote that he was "by no means sure that forcing a person to forego his opportunity

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to try his legal issues in courts where, unlike the situation in arbitration, he may have a jury trial and right of appeal, is not a denial of due process of law.” He found it “fantastic” that, under the majority’s ruling, arbitrators would then be deciding narrow legal issues when they are not likely to be trained as lawyers and their rulings would not be subject to review. He also noted that the issue of the validity of the contract should be a matter of state law and, under the applicable state law, no contract existed and there should hence have been nothing to arbitrate. He further complained that the majority created new substantive federal law concerning arbitrability despite the clear legislative history showing that existing law was not to change in any way. Finally, Justice Black noted the following:

The only advantage of submitting the issue of fraud to arbitration is for the arbitrators. Their compensation corresponds to the volume of arbitration they perform. If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate. I think it raises serious questions of due process to submit to an arbitrator an issue which will determine his compensation. *Tumey v. Ohio*, 273 U.S. 510.

2) *Who Decides Whether a Contract with an Arbitration Clause Was Agreed To?*

Interocean Shipping Co. v. National Shipping & Trading Corp., 462 F.2d 673 (2d Cir 1972)

The parties negotiated for a fixture for a vessel which included an arbitration clause. One side claimed there was no final fixture and backed out. It also claimed that the broker had no authority to act for it and hence the broker could not conclude an agreement. The other side demanded arbitration. The court ruled that there was an issue as to whether there was an agreement to arbitrate and hence a trial must decide this. The court did not mention *Prima Paint*.

Par Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51 (3d Cir. 1980)

Invoices with arbitration clauses were sent reflecting sales and were signed by the production manager. Disputes arose and it was urged the invoices were not contracts and that the production manager had no authority

to agree. The court said that before a party can be ordered to arbitrate “and thus deprived of his day in court,” there should be “an express, unequivocal agreement to that effect.” In the event of doubt, this issue must be submitted to a jury. *Prima Paint* was not discussed.

Three Valleys Municipal Water District v E.F. Hutton & Co., 925 F.2d 1136 (9th Cir. 1991)

Customers made claim against their broker for loss of 6 million dollars. The broker sought to arbitrate under the arbitration clause in customer agreements. The customers urged that the person who purportedly signed the agreements on their behalf had no authority to do so. The court ruled that *Prima Paint* did not apply and distinguished that case as involving merely a “voidable” contract. It said “because an ‘arbitrator’s jurisdiction is rooted in the agreement of the parties . . . a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate. Only a court can make that decision.”

Sphere Drake Insurance Ltd. v. Clarendon National Insurance Co., 263 F.3d 26 (2d Cir 2001)

Disputes arose under reinsurance contracts where one side claimed rescission and urged, as to one contract, the agent exceeded his dollar authority and, as to five other contracts, that they were so unreasonable that it was clear they were not authorized and that the agent working on its behalf was double dealing. The contracts provided for arbitration of disputes “including but not limited to any controversy as to the validity of the Reinsurance...” The court ruled that, as to the one contract, there was sufficient evidence shown so as to put the making of that contract in issue. It said that this raises the issue of whether that contract is “void” and that this issue must be decided by the court. As to the other 5 contracts, the court said that under relevant state law the issue of whether the agent was double dealing only raised an issue as to whether those contracts were “voidable” and, hence, this issue was for arbitrators to decide. The court conceded that this distinction had a “metaphysical ring.”

3) *Who Decides the Scope of Issues Subject to an Arbitration Clause?*

AT&T Technologies, Inc. v. CWA, 475 U.S. 643 (1986)

AT&T fired 79 workers. The union demanded arbitration under a collective bargaining agreement. AT&T challenged the arbitration claiming that this particular dispute was not covered by arbitration. The District Court ruled the coverage issue was for the arbitrators to decide and the Seventh Circuit affirmed. The Court reversed, noting “[t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be ‘drastically reduced,’ however, if a labor arbitrator had the ‘power to determine his own jurisdiction.’”

It is now generally well accepted that doubts concerning the scope of an arbitration clause are resolved in favor of arbitration.

4) *When Are Issues of Arbitrability Delegated to Arbitrators?—The “Clear and Unmistakable” Rule*

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)

In this case, the MKI company had agreed to certain work out terms with First Options, a company that cleared trades on the Philadelphia Stock Exchange, in an agreement that contained an arbitration clause. MKI fell into default under the agreement, and First Options proceeded to arbitration against MKI. First Options also proceeded in the arbitration against Mr. and Mrs. Kaplan, who owned MKI, but who had not signed the agreement with the arbitration clause. The arbitrators found against both MKI and Mr. and Mrs. Kaplan personally who then challenged the award. The District Court found against the Kaplans, but the Third Circuit reversed and vacated the award against them. The Court granted cert and discussed standards of review which required discussion of the underlying arbitrability issues.

During the course of its opinion the Court said: “Courts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakable’ evidence that they did so.” It contrasted this presumption with the opposite presumption when it came to deciding issues of the scope of arbitration in those cases where there clearly is an agreed arbitration clause. The court concluded on the basis of the “record before us” that First Options cannot show the Kaplans clearly agreed to have the arbitrators decide arbitrability. The Court therefore found that the issue of whether the Kaplans had agreed to have the arbitrators decide issues of arbitrability was subject to a plenary review (and not just a deferential review of an award by arbitrators) and, hence, the decision of the

Third Circuit in this regard was affirmed. The Court also noted: “...the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties’ wishes...but to ensure that commercial arbitration agreements, like other contracts, ‘are enforced according to their terms.’”

Significantly, under First Options, there is now a “reverse presumption” that issues of arbitrability are to be viewed as not delegated to arbitrators absent “clear and unmistakable” evidence.

5) *Who Decides Issues of Time Bar?*

Howsan v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002)

A client sued its broker for misrepresentation concerning limited partnership investments. The broker sought to have the court dismiss the claim on the basis that the NASD rules which included a rule providing that no dispute “shall be eligible for submission to arbitration... where six (6) years have elapsed from the occurrence or event giving rise to the...dispute.” The Court (per Justice Breyer), reviewing past cases, said that some “gateway” questions of “arbitrability” are for courts and some are for arbitrators. The Court, unhelpfully it would seem, suggested that courts should decide issues of arbitrability where the “contracting parties would likely have expected a court to have decided the gateway matter,” and not an arbitrator. It said such cases have included questions of whether a corporate successor should arbitrate and questions interpreting whether a particular issue falls within the scope of an arbitration clause. By contrast, the Court said that there are other arbitrability issues which contracting parties would expect to be decided by arbitrators. This includes “procedural” issues and issues of “waiver, delay, or a like defense to arbitrability.” In the light of this precedent, the Court ruled that the NASD time limit rule “is a matter presumptively for the arbitrator, not for the judge.”

6) *Who Decides Whether Arbitration May Proceed by Class? — Chapter 1: Arbitrators Decide*

Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003)

This case indicates the fracturing of the Court on questions of arbitrability. Justice Breyer wrote the plurality opinion which was joined by Justices Scalia, Souter and Ginsburg. Justice Stevens concurred with the result

in remanding the case but did not endorse the rationale in the plurality opinion and added his own views. Justice Rehnquist wrote a dissent which was joined by Justices O'Connor and Kennedy. Justice Thomas, in line with his prior opinions, did not think the Federal Arbitration Act precedents should apply to a case subject to state law.

In this case the customers of a lending institution filed suit for failure of the lender to provide legally required forms. The customers sought to have the action certified as a class action. The lending institution objected and pointed out the loan required arbitration and that this was inconsistent with class actions. The South Carolina Supreme Court, deciding the issue on South Carolina law made applicable in the loan agreement, found that the arbitration clause was silent on the availability of a class action/arbitration and, under its law, ordered that the arbitration proceed as a class. The Court plurality, noting the agreement was silent, but viewing the issue as a procedural one for the arbitrator to decide, ordered that the case be remanded to the South Carolina court for it to direct that the arbitrator decide if the arbitration should proceed by class participation. Justice Rehnquist's dissent urged that proceeding by a class arbitration was inconsistent with the implications in the arbitration agreement.

7) *Who Decides Whether Arbitration Proceeds Where Contract Is Purportedly Void Ab Initio on Grounds of Fraud and Usury?*

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006)

In this case customers of a check cashing company sued the company on grounds of fraud and usury. The defendant, relying on an arbitration clause, sought to have the case dismissed pending arbitration. The customer/plaintiffs objected urging that, under Florida law (made applicable in the agreement), the contract was void on the grounds of illegality and, hence, the contract should be treated as a nullity and the arbitration clause of no relevance. The lower Florida state court thought the court should decide the issue, the appellate court thought the arbitrator should decide the issue and the Florida Supreme Court, on the basis of Florida law, found the contract illegal and unenforceable.

Justice Scalia, writing for the majority and echoing *Prima Paint*, considered that there are only 2 types of challenge to an arbitration agreement—those which challenge the arbitration clause itself and those that challenge

the “contract as a whole.” He considered the challenge to the arbitration clause here as one challenging the “contract as a whole.” On the basis of *Prima Paint*, he ruled that such a challenge to the contract as a whole was for the arbitrator to decide. He also noted that on the basis of the Court's prior opinion in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the issue of the enforceability of an arbitration clause subject to the Federal Arbitration Act was governed by federal arbitration law and not by state law. Justice Thomas dissented on this last point.

It will be noted that this case seems incompatible with the Second Circuit's *Sphere Drake* decision discussed above which sought to distinguish between “void” and “voidable” contracts.

8) *Who Decides Whether Arbitration May Proceed by Class? — Chapter 2: Court Decides*

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010)

In this case the Court seemingly altered its views on the availability of class actions in arbitration from its prior decision in *Bazzle*.

Following price fixing investigations against parcel tanker owners by the Department of Justice, parcel tanker charterers brought purported class action suits in various jurisdictions. In one such case in Connecticut the district court ruled that these claims were not subject to arbitration. The Second Circuit reversed, holding the actions were subject to arbitration. The various suits were then consolidated with the Connecticut action.

Animal Feeds, the original plaintiff, then sent a demand for class arbitration in New York. The parties agreed, in a supplemental agreement that the question of whether the arbitration could proceed by class was for the arbitrators, who were to follow AAA class arbitration rules. The arbitrators, thinking they were following the decision in *Bazzle*, ruled in a partial final award that, because the arbitration clause was broad and because there was no prohibition against class arbitrations, the case could proceed by class arbitration. The arbitrators then stayed proceedings pending judicial review.

The District Court vacated the award on the grounds of manifest disregard of the law because the arbitrators had failed to follow choice of law rules which would have led to application of federal maritime law, including custom and usage. The Second Circuit reversed, finding no manifest disregard of the law and affirmed the award.

The Court granted cert. In a 5-3 decision (Sotomayor not participating) the Court found that the award of the arbitrators was not rooted in the agreement of the parties but, instead, in public policy considerations adopted by the arbitrators which viewed class arbitrations as “beneficial.” The Court therefore ruled that the arbitrators, in following their own policy choices, had exceeded their power under the Federal Arbitration Act and vacated the award. The Court suggested that the panel had misinterpreted *Bazze* to mean that, absent a prohibition of class arbitration, arbitrators were free to find that they may proceed by class. The Court then proceeded to “decide the question originally referred to the panel.”

The Court began this analysis by revisiting its decision in *Bazze* which the Court thought had “confused” the arbitrators. It noted that *Bazze* was only a plurality opinion and said that *Bazze* had not decided “the rule to be applied in deciding whether class arbitration is permitted” and that the Court would “turn to it now.” It acknowledged that its past decisions had left certain “procedural matters” to be decided by arbitrators. It ruled, however, that class arbitrations were not merely procedural. Agreements to arbitrate included who was to be a party to the arbitration and bilateral arbitrations, which identified the parties who were to arbitrate, were fundamentally different from class arbitrations. It concluded that, absent an affirmative agreement, class arbitrations were incompatible with bilateral agreements to arbitrate.

Justice Ginsburg, joined by Justices Stevens and Breyer, wrote a strong dissent, noting that the parties had agreed in a supplemental agreement, to have the arbitrators decide whether the arbitration could proceed by class and that the arbitrators had simply made an award as they had been specifically empowered to do. She was also critical of the Court taking review of an interim award and critical that the Court had decided the issue rather than remanding it to the arbitrators.

9) *Who Decides Whether Arbitration Proceeds If the Arbitration Clause Itself Is Purportedly Unconscionable and Issues of Contract Being Void or Voidable Have Been Delegated to the Arbitrators?*

Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010)

This case again highlights the sharp division of thought by members of the Court on issues of arbitrability. The decision was 5-4 with strong dissent by Justice Stevens who was joined, in dissent, by Justices Ginsburg, Breyer and Sotomayor.

In this case Antonio Jackson filed an employment discrimination case against his employer alleging breach of federal law. The employer sought to have the case dismissed on the grounds of an arbitration clause. Jackson urged that under Nevada law the arbitration clause itself was procedurally and substantively unconscionable. This seemingly hit the mark of posing a challenge to the arbitration clause itself and not to the contract as a whole and, hence, rendering the issue one for the courts to decide. Justice Scalia, writing for the majority, however, had a different view. The arbitration clause in that case contained a sub-clause stating: “the Arbitrator shall have exclusive authority to resolve any dispute relating to the . . . enforceability of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.” Justice Scalia referred to this as the “delegation” provision since it delegated such issues of arbitrability to the arbitrators. Justice Scalia viewed the delegation provision as a clause separate and apart from the arbitration clause itself, relying on the concept of “severability” from *Prima Paint*. He then ruled that Jackson had failed to challenge the delegation clause itself and had only attacked the arbitration clause “as a whole.” He viewed Jackson’s failure to urge that the delegation clause itself as unconscionable was fatal to his claim that a court should decide this issue. The Court therefore ruled that the issue of the enforceability of the delegation clause was for the arbitrator to decide and remanded the case to the Ninth Circuit.

The dissent sharply challenged the approach of the majority and outlined that neither party had urged the reasoning adopted by the Court. It viewed the Court’s prior opinions as relegating to the courts “questions regarding the existence of a legally binding and valid arbitration agreement.” It further reasoned that, while it was possible to delegate such issues to arbitrators, under *First Options*, any such delegation had to be “clear and unmistakable.” Here, it considered there was no “clear and unmistakable” delegation agreement since Jackson, in fact, urged that the arbitration clause was procedurally and substantively unconscionable and, hence, this undermines any notion that he clearly and unmistakably agreed to have arbitrators decide arbitrability. In the dissent’s view, the issue was whether there was a clear and unmistakable delegation and this was for the courts, not the arbitrators to decide. Finally, the dissent compared Justice Scalia’s severability analysis as akin to “Russian nesting dolls” and suggested this “new layer of severability” missed the larger issue of whether there is a “discrete challenge” to the existence of an agreement to arbitrate.

10) *Who Decides Arbitrability of Class Action Where Parties Agree the Arbitrator May Do So —Chapter 3: Arbitrator Decides, But . . . Does It Bind Absent Class Members?*

Oxford Health Plans v. Sutter, 559 U.S. 564 (2013)

In this case doctors commenced a class action in state court against a health provider. The health provider claimed a right to arbitration. The parties then agreed the arbitrator could decide whether a class proceeding was arbitrable. He decided it was and the health provider moved to vacate the award on the grounds that the arbitrator exceeded his power. The Court ruled that parties could, as here, specifically delegate arbitrability of class cases to an arbitrator and that here the arbitrator had not exceeded his authority. Disturbingly, the Court indicated that the arbitrator may have been wrong but had not exceeded his power. In a concurring opinion, Justice Alito, joined by Justice Thomas, opened the proverbial “can of worms” by outlining that the arbitrator’s award could not bind absent members of the class. He further noted that this gave an unfair advantage to absent members who could sit on the sideline and see how the arbitrator ruled and, if they did not like the result, could proceed separately. This seems to open a new, unchartered chapter in class arbitrability issues.

11) *Can Court Not Send Case to Arbitrators, Despite Delegation Clause, If Court Considers a Particular Claim for Arbitration “Wholly Groundless”?*

Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S.Ct. 524 (2019)

Compared to the internecine warfare among Justices in cases like *Green Tree Financial* and *Rent-A-Center*, the issue in this case was mild and the opinion unanimous. The plaintiff had brought suit for defendant’s alleged violations of federal and state anti-trust laws. Defendant sought to stay the action on the basis of an arbitration clause. The arbitration clause called for arbitration of “any dispute arising under or related to this Agreement” but contained exceptions for “actions seeking injunctive relief.” Part of what the plaintiff sought was injunctive relief. Of particular note was one of the rules of the American Arbitration Association which provides that “arbitrators have the power to resolve arbitrability questions.”

The narrow issue in the case arose out of a split in the

circuits. Some circuits, when faced with a provision that delegates issues of arbitrability to arbitrators “nonetheless will short-circuit the process and decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is ‘wholly groundless.’” In that case the District Court and the Fifth Circuit had found the argument in favor of arbitration was “wholly groundless,” presumably because the arbitration clause contained exceptions where injunctive relief was sought. The decision in *Henry Schein* was that the “wholly groundless” exception is inconsistent with basic principles of what parties may agree to respecting arbitrability and, hence, that no such exception should exist. The Court therefore vacated the ruling of the Fifth Circuit and remanded the case for the Fifth Circuit to decide whether the parties had agreed to delegate the issue of arbitrability to the arbitrators (which the Fifth Circuit had not decided). In doing so, however, the Court said “We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. . . . Under our cases, courts ‘should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.’” The interesting but yet unanswered question is whether the (possibly unknown) delegation of arbitrability issues in the AAA rules satisfies the “clear and unmistakable” requirement for a delegation.

12) *Arbitration Rules Granting Arbitrators Jurisdiction to Correct “Computational Errors”*

Crédit Agricole Corporate and Investment Bank v. Black Diamond Capital Management, LLC (Magistrate Kevin Fox; 18 Civ 7620; March 22, 2019)

In this case the arbitrator made a correction to her final award in an amended award. AAA Rule 8 allows the arbitrators to interpret the AAA rules and AAA rule 50 allows the arbitrator to correct “computational errors.” Here, the amended award changed the computation of interest from compound interest to simple interest and credited payments from the principal amount due instead of from principal and interest. The court considered that these changes did not correct “evident material miscalculation of figures” and amounted to legal changes to the original award. As such, the court considered the arbitrator had no jurisdiction to amend the original award and that the amended award amounted to a violation of the “manifest disregard of the law” standard and hence vacated

the amended award. This is arguably incorrect. First, the court used the wrong standard. The “evident material miscalculation of figures” standard is for a court to employ under FAA Section 11(a). As to the arbitrator’s interpretation of AAA Rules 8 and 50, this is arguably governed by the principle that doubts concerning the scope of an arbitration clause should be resolved by a court in favor of arbitration. See Point 3 above.

13) *Class Arbitration Where the Arbitration Clause is Ambiguous*

Lamp Plus, Inc. v. Varela (587 U.S., (2019))

In this case there was again sharp division among members of the Court, as reflected in its six separate opinions.

A hacker, impersonating a Lamp Plus, Inc. official, obtained tax information concerning approximately 1,300 Lamp Plus employees. As a result, a fraudulent tax return was filed on behalf of one such employee, Mr. Varela, who then filed a class action against Lamp Plus. Lamp Plus moved to stay the action on the grounds of an arbitration clause in the employment contract. The district court found that the matter was subject to arbitration under the contract but also found that the arbitration clause was ambiguous as to whether it was broad enough to permit class arbitration. It eventually reasoned that, under principles of *contra proferentum*, the clause should be interpreted against Lamp Plus, the drafter, and hence ordered the case to arbitration on a class basis. The Court of Appeals for the Ninth Circuit affirmed. On writ of certiorari to the Court, it reversed, with the majority holding that class arbitration could not be ordered where the arbitration clause was ambiguous and that federal law (created by this opinion) trumped the *contra proferentum* rule of construction and required clear agreement on allowing class arbitration, without reliance on that rule of construction to arrive at this result. Justice Ginsburg, writing one of four dissents in the case, complained “how treacherously the Court has strayed from the principle that ‘arbitration is a matter of consent, not coercion,’” pointing out that the employee, Valera, had had no real choice in agreeing to the employer’s arbitration clause. She and other dissenters also urged that the FAA was designed to have arbitration clauses enforceable between business entities but was never meant to force parties of unequal bargaining power to arbitrate.

Postscript—The Status of Incorporation of Institutional Arbitration Rules that Contain Delegation Provisions Delegating Issues of Arbitrability to Arbitrators

As of April 2019, whether incorporation of institutional arbitration rules that contain provisions which delegate all issues of arbitrability to arbitrators constitutes a “clear and unmistakable” agreement by the parties to so delegate arbitrability is unclear. Many thought that this issue would be resolved in the recent Schein and Lamp Plus decisions, but it was not. Some federal courts of appeal have ruled that such incorporation meets the “clear and unmistakable” rule in some instances. See *Oracle Am., Inc. v. Myriad Group, A.G.*, 724 F.3d 1069, 1074-1075 (9th Cir. 2013); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High-Tech Inst.*, 559F.3d 874, 878 (8th Cir. 2009); *Auwah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373(Fed. Cir. 2006); *Terminex Int’l Co. v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005). At least one other court has disagreed. See *Quilloin v. Tenet Health System Philadelphia, Inc.*, 673 F.3d 221, 225-6, 230 (3d Cir. 2012). See also *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775 & n. 1, 780 (10th Cir. 1998) and compare with *Dish Network v. Ray*, 2018 WL 3978537 (10th Cir. Aug. 21, 2018). However, several federal courts of appeal have held that a contractual incorporation clause does not, absent more specificity, render the arbitrability of class actions subject to arbitration. See *Chesapeake Appalachia LLC v. Scout Petroleum LLC*, 809 F.3d 746, 2016 WL 53860 (3d Cir. 2016). *Accord Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013), cert. den., 134 S.Ct. 2291 (2014); *Huffman v. Hilltop Cos.*, 740 F.3d 391 (6th Cir. 2014); *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017).

Other courts have held that incorporation of institutional rules containing a delegation clause should not be effective as to non-signatories who are bound to arbitrate. See *Rachal v. Reitz*, 403 S.W. 3d 840 (Tex. 2013). The American Law Institute has opposed the proposition that referenced rules containing a delegation provision satisfy the “clear and unmistakable” requirement. See *ALI, Restatement of the U.S. Law of International Commercial and Investor-State Arbitration*, Section 2-8 Competence of the Tribunal to Determine Its Own Jurisdiction, reporter’s note b(iii)(Tentative Draft No. 4, 2015).

It remains unclear how the incorporation/delegation issue will be resolved. There seem to be weighty considerations that incorporation of institutional rules delegating all issues of arbitrability to arbitrators should not meet the “clear and unmistakable” test. This includes the very fundamental notion that arbitration is a significant alteration to the right of trial, appeal and application of governing law and such rights should only be considered to have been waived when a party clearly and knowingly does so. Indeed, as Justice Black noted in his dissent in *Prima Paint*, what is at stake is tantamount to the loss of “due process of law.” That should not be lost based on the legal fiction that a clause incorporating lengthy, complicated, institutional arbitration rules constitutes a “clear and unmistakable” waiver of “due process of law” guaranteed in the Constitution. In all events, these issues have spawned no small amount of litigation and, given the sharp divisions in the case law, the outcome of any newly emerging issue concerning arbitrability will be difficult to predict.

THE NEXT CHAPTER? . . .

ONE SUPREME COURT ARBITRATION CASE TO WATCH THIS FALL¹

By: Steven K. Davidson, Michael J. Baratz, Jared R. Butcher, Molly Bruder Fox, and Bruce C. Bishop, Steptoe & Johnson, Washington, D.C.

This fall, the US Supreme Court will consider the question of whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) permits a nonsignatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel. This is an important issue in many different commercial contexts. When parties to a contract with an arbitration clause enter into other relationships with other nonsignatories (for example, a subcontractor or supplier), it is not always clear whether disputes involving those nonsignatories are arbitrable. If the crux of the dispute is the failed performance of a nonsignatory, this creates a potential barrier to arbitration. The US Supreme

Court now has a chance to clarify this issue in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*.

Petitioner GE Energy is a French company that manufactured motors for delivery to respondent Outokumpu Stainless USA, the operator of a steel plant in Alabama. Outokumpu installed the motors in its plant, but they later failed. Outokumpu ultimately sued GE Energy in Alabama state court, at which point GE Energy removed the case and filed a motion to compel arbitration. The problem was that GE Energy was a subcontractor and did not have a direct contractual relationship with Outokumpu. Thus, GE Energy invoked the arbitration clause in the contract between Outokumpu and the general contractor, arguing that Outokumpu was equitably estopped from avoiding arbitration because it signed an agreement containing an arbitration clause and the case was within the scope of that clause because Outokumpu’s claim “arose out of” the agreement.

GE Energy prevailed at the district court. However, the Eleventh Circuit Court of Appeals reversed. The Court of Appeals focused on whether there was a sufficient agreement in writing for purpose of the New York Convention, which is enforceable in the United States through Chapter 2 of the Federal Arbitration Act (FAA). Article II of the New York Convention provides that “[t]he term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” Construing this provision, the Court of Appeals held that “to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities.” Thus, the Court reversed the District Court’s decision.

The Eleventh Circuit’s decision exacerbates an existing circuit split by joining the Ninth Circuit Court of Appeals in holding that nonsignatories cannot enforce arbitration agreements under the New York Convention. See *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017). Conversely, both the First and Fourth Circuit Courts of Appeals have reached the opposite conclusion. See *Sourcing Unlimited, Inc. v. Asimco Int’l, Inc.*, 526 F.3d 38 (1st Cir. 2008); *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355 (4th Cir. 2012). In a similar situation in a case litigated by Steptoe, the Second Circuit Court of Appeals determined that nonsignatories could not compel arbitration because Swiss law controlled and Swiss law did not permit nonsignatories to invoke arbitration agreements. See *Motorola Credit Corp. v. Uzan*, 388 F.3d 39,

¹ This article originally appeared at <https://www.stepsto.com/en/news-publications/one-supreme-court-arbitration-case-to-watch-this-fall.html> and is reprinted here with the permission of the authors.

52-53 (2d. Cir. 2004). However, the Second Circuit did not foreclose the possibility of compelling nonsignatories to arbitrate under the New York Convention, and subsequent decisions of district courts in that circuit have determined that “a nonsignatory may be bound to arbitrate pursuant to several different common law principles arising under contract and agency law.” See *Trina Solar US, Inc. v. JRC-Servs. LLC*, 229 F. Supp. 3d 176, 185 (S.D.N.Y. 2017); see also *Thomson-CSF, S.A. v. Am. Arbitration Assoc.*, 64 F.3d 773, 776 (2d Cir. 1995) (recognizing five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel).

The key distinction has been the willingness of US courts to use equitable estoppel to compel arbitration under an agreement even though the party seeking to enforce arbitration did not sign the agreement. This use of equitable estoppel is common in domestic arbitration agreements, which are subject to Chapter 1 of the FAA and US common-law doctrines for enforcing contracts. Foreign arbitration agreements, however, are subject to Chapter 2 of the FAA and the New York Convention.

This case squarely presents an important issue not just for arbitration practitioners, but also for any company that engages in cross-border commercial transactions. These transactions frequently involve performance by parties that are not actual signatories to the contract at issue. These include important roles in commercial transactions, such as sureties, sub-contractors, lenders, and third-party beneficiaries. If the Supreme Court agrees with the Eleventh Circuit’s view, it will be harder to enforce arbitration agreements that fall under the New York Convention, and nonsignatories that are involved in the underlying commercial transaction may need to take additional steps to avoid being unexpectedly subject to suit in a foreign court.

WHAT IS A REASONED AWARD?¹

By: Gilbert A. Samberg, Mintz, New York

It is not unusual for an arbitration agreement to require, expressly or impliedly, a “reasoned award.” Indeed, that is very likely. And if the parties have stipulated that any award is to be “reasoned,” an arbitrator who

fails to satisfy that requirement arguably is exceeding his/her powers by rendering an award in a non-compliant form, thereby making it vulnerable to vacatur under FAA § 10(a)(4). So, what is a “reasoned” award?

In *Smarter Tools, Inc. v. Chongqing SENCI Import & Export Trade Co.*, 2019 U.S. Dist. LEXIS 50633 (S.D.N.Y. Mar. 26, 2019), it was undisputed that the parties had requested a “reasoned award,” but the award in question was found lacking in that regard.

The underlying dispute concerned sales by SENCI (a Chinese company) to STI (a Virginia corporation) of thousands of a particular model gas-powered inverter generator. STI maintained that it had required that the generators be compliant with both EPA and California air standards, but that they were not. SENCI disputed both points. STI claimed that because the generators were not compliant, it was (i) forced to end sales of the generators in the U.S. and (ii) fined \$507,000 for selling non-compliant generators in California. *Id.* at *2. STI also alleged that SENCI unilaterally cancelled previously-placed orders for generators. This was also denied. It was undisputed, however, that STI failed to pay SENCI for some of the delivered generators. *Id.*

The purchase orders for the generators provided for arbitration of disputes in New York “under the International Commercial Dispute Resolution Proceedings of the [AAA].” *Id.* at *3. Accordingly, SENCI commenced arbitration to recover over \$3 million owed for delivered generators. *Id.* STI counterclaimed, alleging that “many of the generators received were defective” and non-compliant with California and EPA (national) standards. *Id.* On that basis, STI sought to recover for (i) the fine it paid to California, (ii) costs associated with storing and returning unsaleable generators, (iii) lost profits, and (iv) damage to STI’s “goodwill.” *Id.* at *3.

The arbitrator awarded SENCI approximately \$2.4 million, considering that to be the net balance due after credit for generators that were returned to SENCI, commenting that SENCI’s claims were “well-founded and supported by the evidence.” *Id.* at *4.

In contrast, the arbitrator gave short shrift to STI’s counterclaims, in effect dismissing them entirely on the basis that (i) he did not find evidentiary support for STI’s claims and (ii) he did not find the testimony of STI’s expert witness to be credible (and he therefore “excluded” that testimony). *Id.* at *4-*5. But, among other things, the award “ma[de] no finding as to whether any generators provided by SENCI were defective or non-compliant, nor whether SENCI unilaterally cancelled scheduled deliveries.” *Id.* at *5.

1 This article originally appeared at <https://www.mintz.com/insights-center/viewpoints/2196/2019-04-what-reasoned-arbitration-award>, and is reprinted here with the permission of the author.

On ensuing cross-motions to confirm and to vacate, the Court recognized that its review of the award should be extremely deferential to the arbitrator, and that “[o]nly a ‘barely colorable justification for the outcome reached’ by the arbitrator is necessary to confirm” an award. *Id.* at *6. Indeed, the Court noted that an award should be confirmed if a ground for the arbitrator’s decision “can be inferred from the facts of the case.” *Id.*, citing *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 110 (2nd Circuit 2006). The Court furthermore acknowledged that a party seeking to vacate an arbitral award has a very high burden of persuasion. *Id.* at *6.

STI had moved to vacate the award on the basis that, among other things, “the arbitrator exceeded its authority in failing to issue a reasoned award...” *Id.* at *7. The Court recognized that an arbitrator generally need not explain the rationale for an award, but that parties may contract to require arbitrators to issue more detailed awards. *Id.* at *7-*8. It was undisputed that the parties had requested a reasoned award in this instance. *Id.* at *8.

The rule in the Second Circuit is that a “reasoned award” is something more than a line or two of unexplained conclusions “but something less than full findings of fact and conclusions of law on each issue raised before the panel.” *Id.* at *8, citing *Leeward Const. Co., Ltd. v. Am. Univ. of Antigua – College of Medicine*, 826 F.3d 634, 640 (2nd Circuit 2016). Therefore, what was required was the basic reasoning on the central issue or issues raised, but not an exploration of every argument made by the parties. *Id.* at *8. The Court concluded that the award in question did not meet that standard “because it contains no rationale for rejecting STI’s claims.” *Id.* at *8.

The Court pointed in particular to the arbitrator’s conclusory dismissal of STI’s counterclaims without describing a basis for that decision. See *Id.* at *9. The Court opined that “the arbitrator was not obliged to discuss each piece of evidence presented by STI, [but] he must at least provide some rationale for the rejection of STI’s overall argument for [SENCI’s] liability.” *Id.*

The Court furthermore noted that precedent in the Southern District holds that “an arbitrator exceeds his or her powers when the arbitrator renders a form of award that does not satisfy the requirements the parties stipulated to in the arbitration agreement.” *Id.* at *10. In this case the parties agreed that the award should be “reasoned,” but the award in question was not.

However, the Court concluded that the proper remedy was not *vacatur* of that award, but rather to remand the matter to the arbitrator “so that he can issue a ‘reasoned

award’ in accordance with the parties’ agreement.” *Id.* at *13-*14. The Court thus determined that a remand for clarification of findings would better facilitate the purpose underlying arbitration: “to provide parties with efficient dispute resolution, thereby obviating the need for protracted litigation.” *Id.* at *13, citing *T. Co. Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 342 (2d Cir. 2010).

We note that the “reasoned award” requirement is ubiquitous, either based on an express provision in the operative arbitration clause or on the adoption, and thus incorporation by reference, of the rules of a principal arbitration administrative organization. See, e.g., LCIA Arbitration Rules Art. 26.2 (“The Arbitral Tribunal shall make any award in writing and, unless all parties agree in writing otherwise, *shall state the reasons* upon which such award is based.”); ICC Arbitration Rules Art. 32(2) (“The award *shall state the reasons* upon which it is based.”); SIAC Arbitration Rule 32.4 (“The Award shall be in writing and shall state the reasons upon which it is based unless the parties have agreed that no reasons are to be given.”)

Notably, the Commercial Arbitration Rules of the American Arbitration Association present an exception. See AAA CAR-46(b) (“The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.”) Indeed, even the international arbitration rules of the same organization, administering under the name International Centre for Dispute Resolution, require a reasoned award. See ICDR Arbitration Rules Art. 30(1) (“The tribunal *shall state the reasons* upon which an award is based, unless the parties have agreed that no reasons need be given.”)

NOTES ON DECISIONS FROM ACROSS THE POND

By: LeRoy Lambert, SMA Member, New York

In *Aprile SPA v Elin Maritime Ltd* (“*The Elin*”) [2019] EWHC [1001] (Comm), the High Court in London had to determine liability for damage to deck cargo carried on deck pursuant to an express clause describing the cargo and stating “of which 70 pckgs as per attached list loaded on deck at shipper’s and/or consignee’s and/or receiver’s risk; the carrier and/or Owners and/or Vessel

being not responsible for loss or damage howsoever arising.” The court held that “howsoever arising” was clear and excluded liability even if the carrier was at fault, be it negligence or unseaworthiness. The clause did not run afoul of Hague or Hague-Visby because goods carried on deck and stated to be carried on deck are not “goods” with the meaning of those rules; the parties are free to contract as they wish with respect to liability for goods so carried. Assuming carriage was to or from the US, the Harter Act would require a different result. Under the Harter Act, clauses purporting to relieve the carrier from liability for its own negligence are “null and void and of no effect.” Unlike Hague/Hague-Visby, the Harter Act does not exclude deck cargo. *Saudi Pearl Insurance Co. v. M.V. Aditya Khanti*, U.S. DIST LEXIS 7663 (S.D.N.Y. 1997).

IN MEMORIAM: MICHAEL A. VAN GELDER (1922-2019)

By: Lucienne Bulow, A. J. Siciliano, and
Klaus C. J. Mordhorst

The SMA is saddened to report the passing on March 8, 2019, of one of its earliest and beloved members, Michael A. van Gelder. Michael was often heard to boast that he was the 14th person to be admitted to SMA membership. But he also twice (1971-1974 & 1979-1982) served as its President and was a member of the Board of Governors for nearly twenty years. Having been founded in 1963, the SMA was very much in its infancy when Michael arrived on the scene a short one year later. Michael was a contemporary of and well known to all the SMA’s founders. With more than 300 published awards to his credit, Michael has had a profound influence on both the SMA and the development of maritime arbitration in the port of New York.



Michael at leisure sporting his signature smile.

Born July 7, 1922, in London, Michael was educated at Bradfield College in England and served in the British Armed Forces from 1940 to 1946, achieving the rank of Captain in the Parachute Brigade of the Indian Army. Michael’s career in shipping began in 1946 when he joined the shipowning division in Paris of Louis Dreyfus et Cie. It was there Michael met and developed his life-long friendship with SMA founder and future President John P. Besman.

During the next 18 years, Michael continued working for Dreyfus in Paris, London, and New York. From 1964 to 1968 Michael was a Vice President of Titan Industrial Corporation, a New York based importer and exporter of steel products. In 1968 he joined East West Chartering Corporation, New York, as Vice President Chartering, primarily chartering U. S. PL 480 cargoes to Pakistan.

In 1972 Michael and two partners established Troyman Chartering, Inc., in New York. This company brokered for various clients, moving steel, grain, and other commodities. After liquidating Troyman Chartering in 1980, Michael’s primary activities were as an active maritime arbitrator and President of the SMA. That work caught the attention of the American Arbitration Association, whose management asked and Michael agreed to serve as one of its directors from 1981 to 1984.

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

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

In March 2020, ICMA XXI will take place in Rio.

Those of us who had the good fortune to know and work with Michael can attest to his personal and professional integrity as well as his tireless devotion to the SMA.

This was a very special man and dear friend who will be fondly remembered and sorely missed.

MONTHLY LUNCHEONS

Molly McCafferty is again chairing the monthly luncheons and has announced the schedule of monthly luncheons for 2019-2020. Check the calendar link on the SMA website, <http://www.smany.org/calendar-luncheon-list.html>.

Join us on Tuesday, October 8, at noon, at 3 West Club, 3 West 51st Street. Chip Birthisel of Hamilton, Miller & Birthisel in Miami will speak on the topic: "Why Are Yacht Claims Different"?

ARBITRATION IN NEW YORK: IT'S HAPPENING!

The New York State Bar Association Dispute Resolution section and New York International Arbitration Center have issued a brochure summarizing some of the benefits of choosing New York as the seat for international arbitrations and as the place to conduct arbitral hearings: <https://nyiac.org/nyiac-core/wp-content/uploads/2013/01/Choose-NY-for-IA.pdf>

The New York International Arbitration Center (NYIAC) and the New York Branch of the Chartered Institute of Arbitrators (CIArbNY) have announced the formation of their joint New York Arbitration Week Organizing Committee established to launch the first New York Arbitration Week, a 3-day inaugural event November 20-22, 2019: <https://ciarbny.org/wp-content/uploads/2019.07.22-NYIAC-and-CIArbNY-Announce-NY-Arb-Week.pdf>. See also this link describing "New York's Inaugural Arbitration Week" events/activities November 20-22, 2019: <https://nyarbitrationweek.com>.

On November 22, Fordham Law School holds a Conference on International Arbitration and Mediation: https://www.fordham.edu/info/25756/conference_on_international_arbitration_and_mediation

LOOSE ENDS

MLA 2020 Meeting in Scottsdale

The MLA Fall meeting will be at the Gainey Ranch, Scottsdale, Arizona, October 29 - November 2, 2019. It's not too late to sign up: <https://mlaus.org/event/mla-fall-2019-meeting>.

Gencon 2019 (?)

BIMCO and its Documentary Committee continue to work diligently to announce revisions to the Gencon by the end of this year.

ICMA XXI in Rio March 8-13, 2020

ICMA XXI in Rio will take place 8-13 March 2020. The time to mark your calendars is past, time now to register! -- <https://www.icma2020.com>.

Friends and Supporters

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

Craig S. English (1949-2019)

We were also saddened to learn of the death on June 9, 2019, of Craig S. English, a well-liked and respected member of the maritime bar. Craig served in the United States Coast Guard, worked in the Admiralty Branch of the US Department of Justice, and went into private practice in 1983 with Chalos English & Brown and then at Kennedy, Lillis, Schmidt & English. His obituary can be read at <https://www.legacy.com/obituaries/name/craig-english-obituary?pid=193081354>.

Thanks!

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

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