

Houston Maritime Arbitrators Association Newsletter

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Chairman's Report HMAA Newsletter

By Bob Ryniker

As Chairman of HMAA, it is my pleasure to report to the membership that the recent training seminar led by Mr. John P. Bowman, was extremely informative and provided a depth and breadth of information with respect to arbitration that, frankly, I have not seen anywhere else. Everyone who attended came away with a thorough understanding of the process, as well as an excellent set of arbitration materials.

I also take this opportunity to encourage all of our members to pursue any opportunity to include HMAA arbitration clauses wherever and whenever possible. This includes charter parties, contracts of affreightment, bills of lading, contracts of sale and any contract covering any aspect of a commercial venture. There is no question that the long-term success of HMAA and developing arbitration of commercial disputes in Houston is dependent upon the actions of our membership.

Please note as well, that the terms of two of our most distinguished and hard working directors will expire at our next Annual Meeting, Ed Bluestein and George McCarthy. Ed Bluestein will be ineligible to succeed himself due to our recent enactment of term limitations. George McCarthy will be able to run again, should he choose to do so. Although both these individuals will be difficult acts to follow, I encourage anyone who is interested to let any of the members of the board know that you would like to be considered for nomination to the board at the next election.

H.M.A.A. HOLDS ARBITRATORS' WORKSHOP

Houston Maritime Arbitrators Association held a Workshop to train new arbitrators on Tuesday and Wednesday, February 15th and 16th, 2005

at The Houston City Club. Trainees included three commercial persons, five maritime attorneys, and two students from Texas Maritime Academy (Texas A&M at Galveston). Four of HMAA's Directors (Ryniker, Knutsen, Bluestein, and McCarthy) and Member Mike Bell



were also in attendance as assistant instructors.

The first day's program consisted primarily of lectures, backed up by a most informative Power Point slide show, prepared and presented by our Chief Instructor, John Bowman of Fulbright &



Jaworski. Additionally, Bowman prepared and distributed a highly detailed and valuable binder of arbitration resource material to all attendees.

The exceptional presentation engendered much give and take between the Chief Instructor and those in attendance.



Many extremely complimentary comments were offered afterwards by the attendees, with some experienced attendees stating that it was the finest special educational program they had ever attended. It is believed much was learned by all hands as a result of John Bowman's hard work preparing the program, as well as his very evident expertise on the subject of arbitration.

The second day's program was made up of mock arbitration's presented by our Chairman, Robert Ryniker, of Bell, Ryniker, & Letourneau, and his partner, Mike Bell. All attendees (including your Directors) got deeply involved in



these most informative mock arbitration proceedings, and, once again, much was learned by all participants.

Our special thanks to John Bowman, Robert Ryniker, and Mike Bell for making the program possible, and also to our Treasurer, Ed Bluestein, for concluding the usual excellent arrangements with The Houston City Club.

We are in the process of adding the following HMAA member graduates of this Workshop to the HMAA Register on our website:

Capt. William Douglas of the Seamen's Church Institute, Capt. Robert Eittle of Offshore Marine Consultants, Michael Mahaffey of Mike Mahaffey PLLC, Edward Patterson of Fulbright & Jaworski, John Pearson of Gardere Wynne Sewell, David Redford of Brown Sims and William Warnement of Cormac Maritime LLC. Two students from Texas A&M University at Galveston majoring in port management, Brian Borski and David Brueggen, also completed the course. Additionally, Mike Bell of Bell, Ryniker & LeTourneau who served as an instructor for the course, has been approved by the Board of Directors for inclusion in the Registry of Arbitrators pursuant to Section 3.12 of the HMAA bylaws.

TREASURERS REPORT

Our Treasurer Ed Bluestein wishes to remind everyone that Annual dues are due. There are still a few members that have not submitted these.

A final reminder will go out shortly, and any member still in arrears will be dropped from the register.

MARKETING H.M.A.A.

Thanks to the top notch recent Arbitrator's Training Workshop, we are off to a great start marketing the HMAA in 2005.

We have been busy reconsolidating/checking everyone's contact information and updating the website with periodic changes. Look for a more thorough update to the overall website in the near future as we continue to try to keep an active profile with the market.

Some of our anticipated future marketing efforts will include: Running small ads in selected and cost-effective venues

HMAA soiree where members are asked to bring a member candidate.

As always, your input and comments are appreciated.

**LAW COMMITTEE ON MARITIME
ARBITRATION
FALL 2004**

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**RECENT COURT DECISIONS
ON ARBITRATION**

In an attempt to keep Members of the Houston Maritime Arbitration Association advised of current cases, the following is a summary of recent cases from the Federal Courts which may be of interest and helpful to the arbitration process. These are merely summaries and do not offer any opinion as to their applicability to any case or arbitration.

***Kergosien v. Ocean Energy, Inc.*,**
390 F.3d 346 (5th Cir. 2004) – Decided
November 2, 2004

This decision involved an appeal from a district court's vacatur of an arbitration award. The Court found that the district court improperly vacated the award, and thus reversed and remanded the district court's vacatur with instructions to reinstate the arbitration award.

The Appellate Court's standard of review of a district court's decision to vacate an arbitration award is a *de novo* standard, with an "exceedingly deferential" view of the arbitrator's award. In addition, the district court's review of an arbitration award is "extraordinarily narrow." As long as an award is rationally inferable from the facts before the arbitrator, the award must be affirmed. The Court addressed two issues typically presented as a statutory basis for vacating an arbitration award under 9 U.S.C. §10(a): (1) whether the arbitrator exceeded his powers; and (2) whether the arbitrator manifestly disregarded the law.

Of note is the Court's treatment of the second issue. In considering whether the arbitrator manifestly disregarded the law, the Court held that this term means more than error or misunderstanding with respect to the law. The error must be obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciated the existence of a clearly governing principle but decided to ignore or pay no attention to it. Furthermore, even if the arbitrator did manifestly disregard the law, a second step of the manifest disregard analysis requires that, before an arbitrator's award be vacated, the Court must find that the award resulted in a "significant injustice."

***Mire v. Full Spectrum Lending, Inc.*,**
389 F.3d 163 (5th Cir. 2004) – Decided October
25, 2004

The Court granted the defendant's motion to dismiss an appeal from an order compelling arbitration, staying proceedings, and administratively closing a case constitutes an appealable order. The Court held that it lacked jurisdiction and the appeal should be dismissed. Based upon U.S. Supreme Court precedent, and the language of 9 U.S.C. §16(b)(1), an appeal may not be taken from an interlocutory order granting a stay, instead of a dismissal. The Court distinguished an earlier decision by the Court in which an order was entered compelling arbitration, staying related State Court litigation and "closing" the case, from the instant case, which involved only an administrative closure. Because district courts frequently make use of the device of administrative closure to remove from their pending cases suits which are temporarily active elsewhere, the Court held that the effect of an administrative closure is not different from a simple stay, except that it affects the count of active cases pending on the Court's docket. The appeal was thus dismissed.

***Republic Ins. Co. v. Paico Receivables LLC*,**
383 F.3d 341 (5th Cir. 2004) – Decided
September 13, 2004

This is a waiver of arbitration case. The case is interesting, however, because it involved a no waiver provision in the Agreement that stated: "The institution and maintenance of an action for judicial relief, the pursuit of provisional or ancillary remedies or other remedies provided

for in this Agreement or the Related Settlement Documents shall not be deemed a waiver of the party's right to demand arbitration or to continue arbitration." One of the parties, Republic, had undertaken extensive litigation activities before asserting its right to arbitrate under the Agreement. It had answered counter-claims, conducted discovery, taken four depositions, amended its Complaint, and filed required pre-trial materials with the district court. The normal rule regarding waiver states that waiver will only be found when a party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party. There is a strong presumption against finding a waiver of arbitration, and the party claiming that the right to arbitrate has been waived bears a heavy burden. In this case, the Court ruled that a no waiver provision does not alter the ordinary analysis undertaken to determine if a party waived its right to arbitration. The Court ruled that the Agreement's "no waiver" clause was not sufficient to overcome the district court's exercise of its inherent authority to determine that waive indeed had occurred.

Pemex-Refinacion v. Tbilisi Shipping Co., Ltd.

2004 A.M.C. 2424 (S.D.N.Y. 2004) – Decided August 29, 2004

In this case, the Court determined whether, after the conclusion of arbitration, but prior to a decision being rendered, the death of one member of a three-member arbitration panel mandated that the arbitration be re-commenced anew, or instead, whether a replacement arbitrator may be appointed. The "general rule" dictates that, where one member of a three-person arbitration panel dies before the rendering of an award and the arbitration agreement does not anticipate that circumstance, the arbitration must commence anew with a fresh panel. Thus, absent a party's demonstration of "special circumstances," the general rule that the arbitration must commence anew is applicable. "Special circumstances" meriting the appointment of a replacement arbitrator typically involve instances where vacancies have occurred during the very early stages of arbitration or where a panel has rendered a final decision with respect to only some of the issues raised in the arbitration (i.e. a bifurcated arbitration). The fact that the arbitration was 11 years old, was not sufficient,

in the Court's opinion, to rewrite the contract, by appointing a replacement arbitrator.

Odfjell ASA v. Celanese AG,
2005 A.M.C. 18 (S.D.N.Y. 2004)

This decision holds that the FAA does not authorize arbitrators to compel pre-hearing discovery from non-parties. The chief arbitrator issued, at one of the party's request, a subpoena directing a non-party to appear for a pre-hearing deposition and to produce at that time various materials requested. The non-party was then incarcerated at a federal correctional institution. After the non-party failed to comply with the terms of the subpoena, the defendant brought a motion before the Court for an order compelling the non-party to comply. The Court ruled that the FAA conferred upon the arbitrator the power to summon a non-party to appear before the arbitrator(s) as a witness and the power to require certain document production, but that the words "before them" in the FAA strongly suggests that the power refers only to an evidentiary hearing before the arbitrators. Section 7 does not confer upon an arbitrator the power to compel a pre-hearing deposition of or pre-hearing document production from a non-party.