

# Houston Maritime Arbitrators Association Newsletter

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## **HMAA Board of Directors briefs CITGO Marine**

At the request of CITGO Marine, several members of the HMAA Board briefed a group of CITGO executives at the Houston Headquarters regarding HMAA on September 8, 2005. The members of the HMAA Board who attended and participated in the HMAA briefing were: Robert Ryniker, George McCarthy, Bill Seele, and Ed Knutsen. The presentation was very well received by CITGO. Many questions were asked and answered, and some of the CITGO executives expressed interest in joining HMAA. Other CITGO execs have been placed on our mailing distribution list at their request. Following the briefing/presentation, CITGO hosted the HMAA Board members in attendance to a luncheon, also held at the CITGO headquarters in Houston

## **Temporary Jones Act suspensions**

When the United States was hit by two disastrous hurricanes, Katrina and Rita, in short order this year, the U.S. Government ordered some temporary suspensions of the Jones Act, which requires cargo between American ports to be carried in U.S. Flag vessels. This was reportedly carried out to ensure that all areas of the country would have access to gasoline and other products normally transported via pipelines due to the short term shutdown of some pipelines due to hurricane damage. Whether these temporary suspensions were, in fact, necessary or aided in avoiding/alleviating any shortages, is subject to debate. It is also noted, that B.P. obtained a temporary waiver of the Jones Act until December 15, 2005 to enable B.P. to transport crude oil from one of its deepwater rigs in the Gulf of Mexico into U.S. ports in a foreign flag shuttle tanker

## **H.M.A.A. Training Session**

John Bowman, of Fulbright & Jaworski, has once again agreed to be our Chief Instructor at our next Arbitrators' Workshop. The Workshop has been scheduled for Thursday, April 6, 2006 and Friday, April 7, 2006 at a location still to be selected. If you have not previously taken this Workshop, or wish to take same again, please advise Ed Knutsen as soon as possible. We are very pleased to once again have John Bowman as our Chief Instructor and feel sure this event will be every bit as successful as our 2005 Workshop proved to be.

## **ARBITRATIONS**

As you know, due to Houston Maritime Arbitrators Association "decentralized" modus operandi, we frequently are unaware of arbitrations which may have been conducted or are underway using HMAA Rules. However, we do know of two recent arbitrations under HMAA Rules. One is/was a three arbitrator panel, while another is/was a sole arbitrator.

This information is disseminated for your information and guidance

## **"Maritime Advocate online"**

The following article appeared in the "Maritime Advocate online" October 4, 2005.

*Capt Ed Knutsen was recently re-elected president of the Houston Maritime Arbitrators Association, while Robert Ryniker was re-elected chairman. The HMAA also bestowed an honorary life membership on Ed Bluestein for his years of service as an officer and director.*

## **MARKETING H.M.A.A.**

Many thanks to all of you for sending in email contact information on people you think would be interested in joining the HMAA.

Once we receive the email address of a potential future member, we send them the latest copy of the Newsletter together with a brief introductory emailing outlining some of the benefits of HMAA and where to get additional information.

We then keep them on our email distribution list of upcoming events, next course etc. for a period of time.

Please continue to send email contact information on potential new members as word-of-email continues to be the best way to spread the news.

## **HMAA Member Survey:**

Look for a member survey in the near future as we query the HMAA membership on how to improve the overall value of the HMAA to its members and their clients. Subject survey forms will be distributed via email to all the members for their input. Your participation can only help us make the HMAA of greater benefit to all.

## **I.C.M.A.**

The International Congress of Maritime Arbitrators will be holding their XVI meeting 26 Feb – 2 March in Singapore. A dedicated website [www.icma2007.com](http://www.icma2007.com) has been set up to provide information about the event.

## **HOLIDAY GREETINGS**

This opportunity is taken to extend to each and every member of HMAA, your families, friends, and associates very best wishes for a joyous Holiday Season, and a prayer for good health, happiness, success, peace, and prosperity in the New Year of 2006. From the Board of

Directors and Officers of the Houston Maritime Arbitrators Association.

## **LAW COMMITTEE** **ON** **MARITIME ARBITRATION** **WINTER 2005**

Editors: William A. Durham,  
John M. Elsley,  
William H. Seele

## **RECENT COURT DECISIONS** **ON ARBITRATION**

In an effort to keep Members of the Houston Maritime Arbitration Association advised of current cases pertinent to the subject of maritime arbitration, the following is a summary of some recent cases which may be of interest. This is not a review or survey of all federal or state cases addressing arbitration issues but rather is a summary of recent circuit court cases specifically in the admiralty/maritime context.

***Stolt-Nielsen S.A. v. Celanese A.G.***  
2005 U.S. App. LEXIS 25053 (2<sup>nd</sup> Cir. 2005)  
Decided November 21, 2005

This appeal arose out of a dispute over alleged anti-competitive behavior in the parcel tankers market. The claimants in arbitration, various shippers of chemical products, instituted arbitration proceedings against Odfjell and Jo Tankers for price-fixing, bid rigging, and other wrongful behavior. The arbitration was conducted in New York pursuant to a Charter Party's ASBATANKVOY arbitration clause under the Rules of the Society of Maritime Arbitrators.

The arbitration panel issued a subpoena to Stolt's record custodian and to Stolt's former general counsel to appear and testify in an arbitration proceeding and to bring certain documents with them. Stolt and its general counsel were non-parties to the New York arbitration proceedings. Stolt sought to quash the subpoenas. The district court denied the Motion to Quash filed by Stolt, rejecting Stolt's argument that the Subpoenas were thinly

disguised attempts to obtain pre-hearing discovery, ruling instead that the subpoenas called for the non-parties to appear before the arbitrators themselves, and thus were authorized under section 7 of the FAA. Stolt appealed.

On appeal, Stolt argued that the power of arbitrators to subpoena non-parties for testimony and documents should be limited to a trial-like arbitration hearing on the merits. Stolt contended that the claimants and the arbitration panel had conspired to circumvent Section 7's limitation through a contrivance of conducting its discovery in the presence of the arbitrators. The Appellate Court was unpersuaded by Stolt's arguments, for four reasons. First, the court ruled that the subpoenas were well within the authority provided arbitrators under section 7, because, unlike depositions which take place outside the presence of the decision maker, the witnesses were directed to appear at a hearing before the arbitrators, and all three arbitrators were present at that hearing. Second, the arbitrators heard testimony directly from Stolt's former general counsel and the panel ruled on evidentiary issues such as admissibility and privilege. Third, the testimony provided at the hearing became a part of the arbitration record, to be used by the arbitrators in the determination of the dispute before them. Finally, there was no finding by the district court that the claimants were attempting by artifice to undermine a prior ruling by the district court forbidding the use of section 7 to take prehearing discovery.

The Second Circuit ruled that the FAA's section 7 was limited only by the requirement that the witness be summoned to appear before the arbitrators, or any of them, and that any evidence requested be material to the case. This broad language authorized the use of subpoenas at preliminary proceedings even in front of a single arbitrator, before the full panel hears the more central issues. Specifically not ruled upon by the Court was the question of whether section 7 authorizes arbitrators to issue discovery-type subpoenas to those who are not parties to the arbitration.

***Offshore Marine Towing, Inc. v. MR23***  
412 F.3d 1254 (11<sup>th</sup> Cir. 2005)  
Decided June 20, 2005

This appeal presented the issue of whether a district court acted within its authority under the Federal Arbitration Act when it modified an arbitration award in favor of a salvor to exclude attorneys' fees and expenses.

The salvage was conducted on a no-cure no-pay basis and provided for arbitration of all disputes regarding the reasonableness of any fees or charges due under the contract. After a successful salvage, the salvor filed suit in the Southern District of Florida and arrested the MR23 as security for its salvage lien. The salvor moved the district court to compel arbitration, and the district court ordered the parties to submit to arbitration. Eventually, the arbitrator issued an award in favor of the salvor for salvage and, in addition, granted the salvor legal fees and expenses in an amount approaching twice the amount of the salvage award. The salvor then moved the district court to confirm the arbitration award and the vessel owner moved the district court to modify or vacate the award solely with regard to attorneys' fees and expenses. The district court ruled that attorneys' fees could not be awarded in an *in rem* action and that the issue of attorneys' fees had not been submitted to the arbitrator. Thus, the arbitration award was modified and attorneys' fees were denied. The salvor appealed.

On appeal, the Court of Appeals for the Eleventh Circuit affirmed the district court's modification of the arbitration award. In issuing its affirmance, the Eleventh Circuit relied upon section 11 of the FAA which allowed the modification of a decision of an arbitrator in limited circumstances: (1) where there was an evident material miscalculation of figures or an evident material mistake; (2) where the arbitrators have awarded upon a matter not submitted to them; or (3) where the award was imperfect in matter of form not otherwise affecting the merits of the controversy. Citing well recognized precedent that attorneys' fees are not generally awarded in admiralty cases absent special circumstances, the court held that attorneys' fees were not recoverable in the underlying *in rem* action because it was an action to enforce a maritime lien for necessities, including contract salvage. Attorneys' fees incurred in the litigation and arbitration were not part of the value of the salvage lien against the vessel. Thus, the district court was correct in modifying the arbitration award to exclude attorneys' fees and costs.

***Bautista v. Star Cruises***

396 F.3d 1289 (11<sup>th</sup> Cir. 2005), *cert. dismissed*,  
2005 U.S. LEXIS 5234 (June 24, 2005)  
Decided January 18, 2005

This appeal presented the issue of whether crewmembers' employment agreements were shielded from arbitration by the seaman employment contract exemption contained in Section 1 of the Federal Arbitration Act.

The S/S NORWAY's steam boiler exploded on 25 May 2003, while the cruise ship was in the Port of Miami, killing six of its crewmembers and injuring four others. The plaintiffs brought suit against the defendant Norwegian Cruise Lines, owner of the NORWAY, and defendant Star Cruises, alleged by the plaintiffs to be the parent company of NCL. The defendants then moved to compel arbitration pursuant to each crewmember's employment agreement with the defendants, each of which included an arbitration clause. The district court enforced the arbitration clause pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") and its implementing legislation (the "Convention Act"). The plaintiffs appealed from the ruling compelling arbitration.

In affirming the district court's referral of the matter to arbitration, the Court of Appeals ruled that, in deciding a Motion to Compel Arbitration under the Convention Act, a district court may conduct only a very limited inquiry. The court must order arbitration unless four jurisdictional prerequisites are not met or one of the Convention's affirmative defenses applies. The four jurisdictional prerequisites require that: (1) there is an agreement in writing; (2) the agreement provides for arbitration in the territory of a signatory; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states.

It was undisputed that the second and fourth conditions were fulfilled, because the

crewmembers' arbitration provisions provided for arbitration in a signatory state, the Philippines, and the crewmembers were not citizens of the United States. The first and third jurisdictional prerequisites were at issue on appeal.

The Second Circuit, relying upon prior Fifth Circuit case law, *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327 (5<sup>th</sup> Cir. 2004) and *Francisco v. STOLT ACHIEVEMENT*, 293 F.3d 270 (5<sup>th</sup> Cir. 2002), *cert. denied*, 537 U.S. 1030 (2002) held that the FAA exemption for seamen's employment contracts did not apply to arbitration agreements covered by the Convention Act. The plaintiffs' employment contracts were commercial legal relationships under the Convention Act, regardless of the FAA seaman exemption.

The Second Circuit Court also held that the fourth jurisdictional predicate was present – there was an agreement in writing to arbitrate. The crewmembers signed the standard terms of the POEA contract, which satisfied the Convention requirement that the arbitration provision be in a signed agreement or an exchange of letters or telegrams. Nevertheless, the plaintiffs argued that the crewmembers did not knowingly agree to arbitrate disputes arising from the employment relationship, and supported its position with affidavits and the general solicitude for seamen reflected in the Jones Act. The court, however, found no authority indicating that the Convention or the Convention Act imposed upon the party seeking arbitration the burden of demonstrating notice or knowledgeable consent. In the limited jurisdictional inquiry prescribed by the Convention Act, the Second Circuit found it especially appropriate to abide by the general principle that one who has executed a written contract and is ignorant of its contents cannot set up that ignorance to avoid the obligation, absent fraud and misrepresentation. Therefore, all four jurisdictional pre-requisites of the Convention Act were met, and the district court was correct in ordering arbitration. Finally, the court considered, and rejected, claims that the agreements to arbitrate were null and void, inoperative, or incapable of being performed under the Convention.