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A WORD FROM THE CHAIR

WELCOME FROM CHRISTOPHER NOLAN

It is my pleasure to share with you our Spring 2023 newsletter. Not only does it provide a useful recap of our efforts during the last year, but the key cases around the country to be mindful of. In the year ahead, we will continue to gather for our popular monthly Coffee Break programs on the third Friday from 11:30-12 p.m. Eastern.

We always welcome suggested topics and speakers that will appeal to our diverse audience of practitioners, arbitrators, mediators, and in-house counsel and claims persons.

For the May 2023 meeting, as it is our first in-person CLE meeting and the topic could not be more important for practitioners and companies alike, the use of sealed offers following the SMA's new rule. We look forward to re-connecting and continuing to plan for our 100 Years of Maritime Arbitration seminar in Spring 2025.

Onward and upward!

- Chris

Encourage a colleague to become a member of the MLA and the Arbitration and ADR Committee:
<https://mlaus.org/join-the-mla/>

Chris Nolan, Chair
Lindsay Sakal, Vice-Chair
Casey O'Brien, Secretary
Ifigeneia Xanthopoulou, Young Lawyer Liaison

COFFEE BREAKS

BRIEF RECAP OF WHAT'S BEEN ON YOUR MINDS

<p><u>June 17</u></p> <p>AAA-ICDR for the Resolution of Maritime Disputes</p>	<p>Moderator: Lindsay Sakal; Speakers: Svetlana Gitman and Jeff Zaino, Vice Presidents of the Commercial Division, American Arbitration Association - International Centre for Dispute Resolution</p> <ul style="list-style-type: none">• Discussion on AAA and how its international components are well suited to maritime Industry• Opportunity to solicit experienced maritime practitioners to serve as Arbitrators
<p><u>July 15</u></p> <p>ZF Automotive US, Inc., et al. v. Luxshare, Ltd. Perspective</p>	<p>Moderator: Chris Nolan; Speaker: Michael Frevola, Holland & Knight</p> <ul style="list-style-type: none">• The Supreme Court's recent decision on whether 28 USC 1782 can be used as a vehicle for obtaining discovery in the US for use in private foreign arbitrations. ZF Automotive US, Inc., et al. v. Luxshare, Ltd. and AlixPartners, LLP, et al. v. The Fund for Protection of Investors' Rights in Foreign States, 213 L. Ed. 2d 163 **; 2022 U.S. LEXIS 2861 **; 142 S. Ct. 2078; 2022 WL 2111355 (June 13, 2022)• Addressed the fate of using 28 USC 1782 in the shipping space• Aggressive measures to obtain documents by alternative means
<p><u>August 19</u></p> <p>Maritime Arbitration at the Halfway Mark of 2022</p>	<p>Moderator: Iifgeneia Xanthopoulou; Speakers: Jan Gisholt, Vice President, Skuld North America Inc., and George Tsimis, Director, GJT Marine Consultants LLC</p> <ul style="list-style-type: none">• Delay from port closure in March 20 fell within the Force Majeure clause and time should not count while the port is closed given unprecedented nature of pandemic that neither party could have contemplated.• Dispute prompted amendment to Section 31 of SMA rules to include express provisions for fees and costs when sealed settlement offers are made.• In another dispute over legal fees, arbitration clause referenced "the City of New York" with no reference to SMA so SMA could not look broadly to award atty fees. Make sure to reference specific rules or the ability of a panel to award fees.

<p><u>September 16</u></p> <p>June 2022 SMA Rules Revisions, Explained.</p>	<p>Moderator: Casey O'Brien; Speakers: LeRoy Lambert, President of the Society of Maritime Arbitrators, and Lucienne Bulow, Head of the Rules Committee for the SMA</p> <ul style="list-style-type: none"> • Parties can always agree to adopt the new rules but dispute on contract after 6/1/22 trigger the new rules • Section 23 and Preamble now allow for virtual and in-person • Section 38 adding arbitrator's immunity • Discussion of fees- up to individual arbitrator to set fees, no consensus agreed to • Raised \$3500 limit to fees for short; \$2500 for counterclaim • Increased maximum lawyer's fees from \$4500 to \$6000 • https://smany.org/pdf/2022/SMA-ARBITRATION-RULES-6-1-2022.pdf
<p><u>November 18</u></p> <p>Procedural Arbitral Potpourri</p>	<p>Moderator: Chris Nolan; Speaker: Patrick Lennon, Esq., Partner, Lennon, Murphy & Phillips</p> <ul style="list-style-type: none"> • <i>Topic: Covering charter party chain pitfalls, CPLR Article 75 traps, and preemption/choice of law issues for good measure.</i> • Charter party chain pitfalls addressed • CPLR Article 75 traps for the uninitiated • Preemption/choice of law issues ever increasing
<p><u>December 16</u></p> <p>Approaching Matters with CGJAG</p>	<p>Moderators: Lindsay Sakal; Speaker: CDR Tyler Stutin, USCG</p> <ul style="list-style-type: none"> • <i>Topic: Understanding the Process to Minimize Potential Litigation -- A discussion with CDR Tyler Stutin, USC.</i> • Background on when CGJAG is involved in matters and interplay with other agencies. • Coast Guard's mandate is to facilitate lawful maritime commerce and an owner/counsel enabling the inspection and examination is the fastest path for vessel back to sea. It is a shared goal - remembering that should help resolve matters before litigation. • CGJAG prevention attorneys are involved in marine casualty investigations and pollution cases but also continuously try to identify areas where legislative change is needed, where our regs need improvement, and where our internal policy could be improved.

<p><u>January 20</u> Small Passenger Vessel Liability Fairness Act</p>	<p>Moderator: Iifgeneia Xanthopoulou; Speakers: Attilio M. Costabel, Of Counsel to De La Peña Group and Adjunct Professor at St. Thomas University, School of Law in Miami,</p> <ul style="list-style-type: none"> Assessed the scope of the newly-enacted Small Passenger Vessel Liability Fairness Act. Initial consideration of potential larger impact on the 1851 Limitation of Liability Act. Act drafted in consultation with the USCG and the DOJ; compensation not limited to the value of the vessel; time frame to file a claim increased from 6 months to 2 years.
<p><u>February 17</u> Scope and application of the SMA Salvage Rules</p>	<p>Moderator: Casey O'Brien; Speakers: William Fennell, Partner at Nicoletti Hornig & Sweeney, and James Shirley, Maritime Consultant with JTS Marine LLC and SMA Arbitrator</p> <ul style="list-style-type: none"> <i>Topic: scope and application of the SMA Salvage Rules -- when does it apply and who has jurisdiction to compel?</i> SMA Arbitration Rules are the default but Salvage Rules exist Key provisions: sole arbitrator, shortened arbitration on the paper, cap on arbitrator's fee, inapplicable where dispute is over \$250k
<p><u>March 17</u> NYIAC</p>	<p>Moderator: Lindsay Sakal; Speaker: Marisa Marinelli, Director and member of the Executive Committee of the New York International Arbitration Center, Co-Chair of NYIAC's Programming Committee, and partner at Holland & Knight in the firm's Litigation Section,</p> <ul style="list-style-type: none"> Topic: NYIAC's role, the current state of international arbitration in New York City and opportunities for NYC to make strides, and potential collaboration with the SMA NYIAC has no rules and does not administer cases or appoint arbitrators. NYIAC does offer great hearing spaces and services (we are currently located within JAMS) Introducing folks from NYIAC to the SMA and others in the maritime industry would benefit both communities
<p><u>April 21</u> Evolving World of Subpoenas in Maritime Arbitration</p>	<p>Moderator: Chris Nolan; Speakers: Jim Hohenstein, founding partner, Hohenstein & Parkinson LLP, and Louis Epstein, Senior VP and General Counsel, Trammo, Inc. and Member, Society of Maritime Arbitrators</p>

- Topic: The Evolving World of Subpoenas in Maritime Arbitration: A Practitioner and Arbitrator View
- overview of subpoenas in Arbitration with 2nd circuit perspective
- new legal theory with wide and interesting implication specifically Intl arbitrations that touch on the US.
- Arbitral panel can establish venue at or near witness-arbitrators will be viewed as sitting there.

FEATURED ARTICLE

HIGHLIGHTING THOUGHTS OF OUR COLLEAGUES

Facilitating Settlement at Mediation

By Frederick B. Goldsmith, Goldsmith & Ogradowski, LLC¹

I began practice 32 years ago as a maritime defense lawyer in Houston, after clerking for a federal district judge. I have since worked up and tried or mediated state and federal cases on both sides of the docket in several jurisdictions and have also begun serving as a mediator. In my experience, this is what all counsel should do *well beforehand* to increase the odds of a favorable settlement at mediation.

Make sure the time is right. The opposing lawyers need to talk with each other and ensure all sides are ready to mediate. Counsel for each party and their client, insurer, and/or P&I club must know enough about their case to be able to meaningfully evaluate a likely trial outcome. If there are too many unknowns it is difficult for counsel to effectively predict the outcome at trial and thus know an appropriate settlement range. For example, if counsel have not yet deposed a key witness or the court has not yet ruled on a significant motion, it may be too soon to meaningfully evaluate a case and thus too soon to effectively mediate. Given how much time good lawyers spend preparing themselves and their clients for mediation, the costs of preparing for and participating in a mediation, including counsel time, travel time and expenses, and mediator fees, it is better to wait until the time is right, rather than going into a mediation just to see what happens. If there is a scheduling order or other court deadline to mediate, but the case is not ready, most judges are receptive to a joint motion to delay the mediation.

Plaintiff's counsel should identify all liens. Plaintiff's counsel in an injury or death case should investigate all potential liens before making a pre-mediation settlement demand. Examples of liens which can have a substantial impact on what a plaintiff will net from a settlement include medical providers and insurers, CMS (the Centers for Medicare and Medicaid Services (<https://www.cms.gov/>), from whom a Conditional Payment Letter should be obtained and reviewed for unrelated charges), short- and long-term disability plans, workers' comp, longshore comp, unpaid income tax, and unpaid or future child and/or spousal support.

If an MSA is needed, plaintiff's counsel should have it performed at least a month ahead of time. If the plaintiff in a severe injury case will require future medical care, expensive medications, and/or costly medical

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appliances, plaintiff's counsel should commission a Medicare Set-Aside analysis and provide to the firm preparing it all medical records and other data needed to perform the analysis. If there are no such future medical needs, plaintiff's counsel should obtain a letter or office note from their client's treating physician(s) confirming this. The MSA will effectively reduce the amount the plaintiff will net from a settlement (see #5, below).

Plaintiff's counsel should fully prepare the lienholder(s). Plaintiff's counsel should keep key lienholders apprised of the progress of the case and request updated lien amounts. If plaintiff's counsel will need the lienholder to reduce their lien by more than a contract, insurance policy, or applicable law requires, they should prepare the lienholder for this well before the mediation and try to secure their advance buy-in.

Plaintiff's counsel must arm their client(s) with all information needed to calculate their net from any given settlement offer. Well before mediation, Plaintiff's counsel should provide to their client(s): (a) an up-to-date case costs sheet, including anticipated costs through mediation, such as court reporter, videographer, and expert invoices, and their client's estimated share of the mediator's fee; (b) an itemization of all liens; (c) if applicable, the cost to fund and administer an MSA; and (d) the attorney's fee.

Consider a focus group. As a plaintiff's personal injury lawyer, when my case has significant value, I focus group the case. This process can provide insights into the strengths, weaknesses, and value of a case.

Plaintiff's counsel should consider producing a pre-mediation video. If a case has significant value, a pre-mediation video highlighting key deposition testimony, photos, videos, documents, and/or injuries is an effective and palatable way of imparting to opposing counsel, the opposing party, insurance/P&I club personnel, and the mediator the contours of a case. This way, those authorizing settlement funds can see and evaluate for themselves how a jury may react to key witnesses and the plaintiff's case.

Plaintiff's counsel should prepare a credible demand e-mail or letter. Counsel should draft these not only for opposing counsel to see, but also for those who will be deciding what to pay on a case. The demand letter or e-mail should be direct and professionally worded. Plaintiff's counsel should neither overstate their case nor write in a tone which will annoy the other side, but they should impart they know and have meaningfully evaluated their own and their opponent's case. If a case has weaknesses, address them candidly.

Plaintiff's counsel should serve their demand letter or e-mail at least two weeks before the mediation to allow defense counsel time to evaluate it and send their own pre-mediation case evaluation to their client and its insurer/P&I club. Having served as defense counsel for Lloyds syndicates, domestic insurers, P&I clubs, self-insured corporations, and as in-house counsel, I know obtaining settlement authority can take a long time. Plaintiff's counsel must know that defense counsel requires sufficient time to receive the demand, have time to read and analyze it, and send to their client or insurer(s) the demand along with their own analysis of the procedural history of the case, the judge, the venue, opposing counsel, the opposing party, fact witnesses, testifying experts, key exhibits/evidence, defense costs through mediation and trial, and liability and damages exposure. Some insurers require defense counsel to complete a form which includes a matrix which does the math. Then the recipients of the demand letter and defense counsel's pre-mediation evaluation require time to digest both and secure or provide appropriate settlement authority. Neither plaintiff nor defense counsel should wait until a few days before the mediation, or until the mediation, to make a formal demand, formally evaluate their own and their opposition's case, and/or obtain settlement authority.

All counsel should prepare a credible confidential mediation position statement. Plaintiff's counsel should attach to their position statement their demand letter or e-mail and, if they have sent a pre-mediation video to opposing counsel, they should also provide this to the mediator. Mediation position statements should boil the case down into a palatably sized document. Make it easy for the mediator to understand your case, the claims and defenses, and their factual bases. Make it clear you have looked objectively at both sides of

the case. Experienced mediators ignore puffery and evaluate the credibility of counsel as they read these statements. They will appreciate a brief and accurate recitation of applicable law. The mediator will want to see weaknesses addressed, because the other side will be addressing such and they will want to see how you intend to handle difficult facts or law. If the operations or equipment involved in your case are complex or unique, explain such, in plain English, and include photos, videos, or illustrations. If there are important expert reports or deposition excerpts, photos, videos, or documents, consider sending them to the mediator with your position statement, just do not send entire transcripts. Do not write a position statement which is ridiculously long or unreasonably argumentative, or one primarily written to impress a client. Such position statements are unhelpful to the mediator. Candor *is* helpful.

All counsel should fully prepare their clients, key family members, and/or client representatives, as applicable. Counsel should explain the mediation process to their client(s) and others attending (for many, it will be their first mediation) ahead of time, so they are prepared for the logistics and typical ebb and flow of a mediation, and so they do not have an unproductive emotional response to a demand or offer.

All counsel should ensure well ahead of time everyone necessary for a successful mediation will appear and stay for as long as it takes. As plaintiff's counsel, I have seen mediations fail because the adjuster on the other side had a plane to catch, or they or a lienholder thought the mediation would only last a few hours, and so exited in the middle. Counsel should communicate with their adversaries, clients, insurance/P&I club reps, and lienholders before the mediation to ensure key participants will attend in person, via Zoom, or if permitted, by phone, and stick around or be immediately available for what may be a long day.

All counsel should consider having a pre-mediation call with the mediator. If a case involves complex facts, operations, or legal principles, or there are logistical challenges, counsel should consider asking the mediator for a brief phone call a day or so before the mediation to go over such. If plaintiff's counsel will need the mediator's help at the mediation bringing their injured client down to earth or if defense counsel will need the mediator's help explaining to a client or insurer the defense's exposure given the trial judge or jurisdiction, a pre-mediation heads-up type phone call with the mediator can be productive.

If the mediation will be remote, test ahead of time everyone's connection, software, and equipment. Just as you would test your trial presentation equipment and software in the courtroom before a trial, at least a few days before the mediation ensure all remote participants have a reliable internet connection, working computers (or other digital devices) with good microphones, speakers, and cameras, and that everyone has updated their device's remote videoconferencing software. Zoom, for example, frequently updates its software and app. All participants should test their equipment using the remote conferencing platform which will be used during the mediation.

Bring or have access to key file materials at the mediation. Often at mediations, the mediator will walk into or click into (if it's a remote mediation) your room asking about a particular record or telling you and your client(s) that the other side says a witness testified a certain way or what a document states. Bring your laptop to in-person mediations and have it or a flash drive loaded with key file materials such as deposition transcripts, key documents, medical records, and expert reports.

If the case settles at mediation, don't leave the mediation without a signed term sheet or another enforceable written contract. People's memories can fade or differ. Put the agreements reached at mediation in writing, or at least get and save assenting emails, before everyone leaves, with all lead lawyers signing and the signatures of your client(s).

Conclusion – Prepare for mediation with diligence and attention to detail. It will take a lot of work. Put in the necessary time. Cover all the necessary bases. Just like preparing for trial, you maximize your chances for a successful outcome at mediation only if you and your client are fully prepared.

UPCOMING COFFEE BREAKS

Jun 15

- **Topic:** Stay Tuned! Or Share an idea with us. All are welcome.

Have questions, comments, or ideas for a future Coffee Break, topics?

Please email us at MLA.ArbitrationADR@gmail.com or contact anyone in our leadership.



MLARB & ADR

100 Years of Maritime Arbitration
1925 - 2025 • Federal Arbitration Act

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