

ORIGINAL

(S E R V E D)
(May 2, 2002)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

May 2, 2002

DOCKET NO. 02-04

ANCHOR SHIPPING CO.

v.

ALIANCA NAVEGACAO E LOGISTICA LTDA.

Complainant Anchor Shipping Co., an NVOCC, alleges that respondent Alianca, an ocean common carrier, violated some 16 sections of the Shipping Act of 1984 by breaching a service contract with Anchor, by denying bookings, switching service contracts without Anchor's authority, interfering with Anchor's ability to obtain service contract rates, coercing Anchor to accept unfavorable rates or services, and other things. Anchor chose to go to arbitration, as required by its service contract, and presented evidence to an arbitrator on contractual as well as Shipping Act issues. The arbitrator awarded Anchor over \$381,000 on the contractual and Shipping Act issues, which award respondent Alianca paid. Respondent consequently moves to dismiss Anchor's complaint and for the Commission to deny Anchor's motion to amend its complaint so as to add several new companies allegedly operating as ocean common carriers. It is ruled:

- (1) The policy of the law and the Commission's regulations is to encourage arbitration as a form of dispute resolution alternative to litigation and to give finality to arbitral awards. Because Anchor chose to go to arbitration and even won, it would be unfair to respondent Alianca, which had a right to believe that the arbitral award would be final and would terminate its dispute with Anchor, to subject Alianca to litigation before the Commission on the same matter. Similarly, it would be unjust and unfair to bring new companies into the same dispute by allowing Anchor to amend its complaint.

- (2) The complaint is dismissed and the motion to amend it is denied. Such action does not mean that the Commission is surrendering its jurisdiction to a court or tribunal but only that it is respecting the integrity of arbitration and enforcing the strong policy, embodied in federal statutory law and the Commission's own regulations, giving finality to arbitral decisions.

**MOTION TO DISMISS COMPLAINT GRANTED;
MOTION TO AMEND COMPLAINT DENIED'**

Norman D. Kline, Administrative Law Judge.

I have before me a motion filed by respondent Alianca Navegacao E. Logistica Ltda. (Alianca), an ocean common carrier, asking that the complaint be dismissed and a motion by complainant Anchor Shipping Co., an ocean transportation intermediary (OTI) acting as an NVOCC, asking permission to file an amended complaint. After considering replies to these two motions, I have decided that the complaint should be dismissed and that complainant should not be allowed to file and have served an amended complaint. My reasons fully explaining the basis for these rulings are set forth below.

Anchor's complaint, which began this proceeding, was served on March 11, 2002. Anchor, which is proceeding "pro se," i.e., without legal counsel, has drafted a complaint that is not the product of an experienced attorney or practitioner before this Commission and accordingly shows defects and deficiencies in various ways. However, any person can represent him or herself before

¹Complainant has the right to file an appeal to the Commission within 22 days of date of service of these rulings. See 46 C.F.R. 502.227(b)(1).

the Commission as can an officer of a corporation. See 46 C.F.R. 502.21. As I note later, the fact that a complaint or other pleading has been drafted by a non-attorney and that the party is being represented by himself is no disqualification. On the contrary, as I will later explain, it is customary in the courts to show leniency toward “pro se” litigants that would not be shown to litigants represented by attorneys as regards the quality of their pleadings. Consequently, certain technical defects in Anchor’s complaint are not the reason why I conclude that the complaint should be dismissed.’

As mentioned the complaint was filed by a non-attorney, who is Mr. Alfred Hemandez, Anchor’s president. It comprises nine pages containing seven paragraphs and considerable factual detail. It alleges that some 16 sections of the Shipping Act of 1984 have been violated by respondent Alianca either alone or in concert with other carriers (who are named as respondents in Anchor’s amended complaint, which Anchor wishes to have served). It is not easy to unravel the many allegations to discern what Anchor is trying to allege. However, it appears that Anchor is alleging that Alianca breached its obligations under a particular service contract and acted in other ways violative of the Shipping Act to injure Anchor in the amount of \$1 ,000,000, which Anchor is claiming as its damages (reparations). The 16 sections of the Act that are mentioned are: sections 4,

²Forexample, pursuant to the Commission’s revised regulations, complainants are supposed to indicate whether they have used informal dispute resolution techniques prior to filing the complaint and further whether they have consulted with the Commission’s Dispute Resolution Specialist about utilizing the Commission’s alternative dispute resolution program. See 46 C.F.R. 502.62(e). The complaint does refer to an arbitration prior to the filing of the complaint but not whether the Commission’s ADR Specialist was consulted. Furthermore, Anchor asks the Commission to enforce the civil penalty provisions of section 13(a) of the 1984 Act, although the Commission assesses civil penalties only in Commission-instituted formal investigatory proceedings, not in complaint cases. Also, Anchor asks the Commission to take some kind of action against Alianca’s attorneys for alleged “moral-ethics” lapses, although such allegations relate to attorneys who are not regulated entities under the Shipping Act. Among the 16 different sections of the 1984 Act invoked by Anchor, such as sections 4, 5, 6, and 7, even if proven to have been violated, such violations may not be the proximate cause of Anchor’s alleged injury of \$1,000,000, i.e., the alleged nonfiling of an agreement may not be the proximate cause of injury to a private person whereas the concerted activity may be. As I explain later, however, it is not necessary to pursue the complaint to determine whether Anchor should be allowed to litigate under these various laws.

5, 6, 7, 8, 9, 10, 10(a)(2), 10(a)(3), 10(b)(1), 10(b)(2), 10(b)(3), 10(b)(7), 10(13)(a) (sic), 10(13)(b) (sic), and 10(c)(1).³ In its amended complaint, which Anchor wishes to have served, Anchor has added sections 10(c)(7) and 10(c)(8). It appears that Anchor has invoked virtually all the operative provisions of the 1984 Act without discrimination, including section “10,” which contains provisions, such as section 10(a)(1), which cannot as a matter of law apply to a complainant who is not alleging that it attempted to obtain transportation at less than the legal rates and charges, and other provisions of section 10(c) regarding types of concerted activity that are not alleged to have occurred in the complaint. As I explain below, as a result of the Commission’s ruling in another case involving an alleged breach of a service contract with overlapping allegations of Shipping Act violations, if this case were to proceed to be litigated, it would be necessary to examine all of the above many sections of the 1984 Act to determine which were primarily or inherently Shipping Act violations which would presumably lie within the Commission’s jurisdiction and not matters for a court or for arbitration pursuant to the parties’ agreement. See *Cargo One, Inc. v. COSCO Container Lines Company, Ltd.*, 28 S.R.R. 1635 (2000). Because I am dismissing the complaint, unless the Commission rules otherwise on appeal or on review, a lengthy analysis of Anchor’s many factual allegations and legal contentions is not necessary. However, to understand more fully the nature of Anchor’s claims, I provide a brief description of these claims as best I can understand them, considering that the complaint was not drafted by an experienced attorney or Shipping Act practitioner.

Although it is not entirely clear, Anchor alleges that respondent Alianca switched or substituted service contracts with Anchor without Anchor’s authority and threatened to expire a

³Anchor appears to have incorrectly cited sections 10(b)(13)(a) and 10(b)(13)(b) as “10(13)(a)” and “10(13)(b).” See complaint, para. III. O.

service contract with Anchor dealing with shipments to various South American destinations. Moreover, it is alleged, Alianca refused bookings under the service contract that Anchor claims to have been in effect at the relevant times and, in conjunction with other carriers, allegedly operating under an **unfiled** agreement, interfered with Anchor's ability to obtain service contract rates and coerced Anchor to accept unfavorable rates or services, even to the extent of offering deferred rebates to Anchor. Moreover, alleges Anchor, respondent, through legal counsel, interfered with Anchor's relationship with its legal counsel and behaved improperly during arbitration proceedings. Moreover, alleges Anchor, respondent injured Anchor's reputation or competitive position vis a vis Anchor's customers and even may have taken some of Anchor's customers away from Anchor. Also, it is alleged, respondent Alianca, being displeased with its service contract with Anchor, attempted to coerce Anchor to relinquish its rights and even "knowingly allowed a meritless case go through **lengthly** (sic) arbitration as a means of causing damages to complainant" as a "retaliation on the complainant to be considered a flagrant violation of section 10(b)(3) for its resulting severity to complainant." (Complaint, par-a. V.E.) Also, it is alleged, Alianca ignored Anchor's numerous mitigation efforts using "its inside knowledge of at least one discussion group agreement and/or pooling arrangement activity. . . ." (*Id.*, para. V.F.) Anchor describes other alleged misconduct by respondent Alianca involving Alianca's breaches of contract and Alianca's alleged interference with Anchor's attempts to obtain service contract rates acting in concert with other carriers. Finally, Anchor alleges "contract damages," loss of customers and loss of "intangible benefits." Anchor acknowledges receiving an arbitration award "under SMA Rules, pursuant to The Federal Arbitration Act and in accordance with The Shipping Act, covering proven contract damages related to breach." (Complaint, end of **para. VI.**) However, Anchor claims that it "suffered and continues to suffer consequential damages not reached by the arbitration award to include, lost profits . . . payroll for

the president of the company” for having to perform various duties relating to the arbitration and the expense of drafting and filing the instant complaint and pursuing it. Anchor claims also “numerous other financial setback’s (sic) caused through carrier misconduct, plus, an undetermined amount of income complainant was likely to earn and produce over time, as consequence of goodwill, investments in the company and number of other intangible benefits the complainant would have realized had the respondent acted in good faith.” (*Id.*) Finally, Anchor seeks \$1,000,000 with interest and attorney’s fees “or such other sum as the Commission may determine to be proper as an award of reparation” and other proper remedial orders. (*Id.*)

Respondent Alianca’s Motion to Dismiss

Respondent Alianca’s motion to dismiss the complaint sets forth numerous reasons supporting such dismissal. Alianca contends that Anchor presented its evidence and arguments under contract and Shipping Act law to the arbitrator who considered them and rendered her decision on the same matters as those now alleged by Anchor in its complaint before the Commission. As Alianca argues, the arbitrator awarded Anchor \$381,880.59 for damages, including lost profits and an assumed legal fee for Anchor’s president, Mr. Hernandez, for the period in which he was acting “pro se” and Alianca also incurred substantial legal fees and expenses plus the majority of the arbitrator’s fees. Alianca contends that it should not now be required to pay additional damages to Anchor based on the same allegations and complaints that were presented to the arbitrator. Alianca argues that “Complainant has had its bite at the apple, a very successful bite. It has won its arbitration, It has been paid in full in accordance with the arbitration award. Now Complainant has reached further than its grasp.” (Motion to Dismiss at 3.) Alianca proceeds to analyze Anchor’s

complaint and compare it with the arbitrator's decision, showing that virtually all of the instant Shipping Act issues were ruled upon by the arbitrator. Alianca quotes that portion of the relevant service contract under which Anchor initiated arbitration proceedings wherein it is stated:

any disputes will be resolved by arbitration which shall be conducted in the City of New York before a single arbitrator in accordance with the rules and procedures of the Society of Maritime Arbitrators, Inc. (Motion to Dismiss at 5.)

Furthermore, as Alianca points out, the relevant service contract also provided as follows:

The service contract shall be construed and governed by the Shipping Act of 1984, as amended and regulations issued by the Federal Maritime Commission pursuant thereto. To the extent issues of construction relate to matters of contract or other law, the law of the State of New York shall be the applicable law. (Arbitrator's Decision and Final Award at 5.)

Alianca then proceeds to analyze the arbitrator's decision in detail to show that the arbitrator was presented with and did rule upon the Shipping Act sections that Anchor is now seeking to litigate in its complaint, which sections were in most instances expressly mentioned by the arbitrator or generally dealt with by her. Alianca cites those portions of the arbitral decision that found Alianca to have violated sections 8(c)(2) and 8(c)(3) of the 1984 Act and where she cited section 8(c)(1) for her authority to apply a certain measure of damages. (Motion to dismiss at 6.) Alianca also cites those portions of the arbitral decision where the arbitrator found Alianca to have violated sections 10(b)(2), 10(b)(3), 10(b)(13) (A and B) and 10(a)(3). (*Id.* at 7.) Furthermore, Alianca cites portions of the arbitral decision that deal with other sections of the Shipping Act and refer to meetings among Alianca and other carriers, and without finding violations of specific sections of the Act, does indicate that she considered the entire Shipping Act in the light of Anchor's allegations. (*Id.* at 7.) Moreover, as to certain sections of the Act that Anchor claims to have been

violated, namely, sections 6, 7, and 9, Alianca explains, these laws are not apposite because they deal with procedures relating to filed agreements, exemptions from antitrust laws and activities of controlled carriers, of which Alianca is not one. (*Id.*, at footnote 13.) Alianca contends furthermore that all the sections of the Shipping Act that are possibly involved in the instant complaint were present in the arbitration proceeding. As to issues not expressly before the arbitrator, such as Anchor's allegations of improper behavior of Alianca's counsel in the arbitration proceeding and an allegation that another carrier, Crowley, offered Anchor a service contract because of an arrangement with Crowley's alleged affiliate, Alianca, Alianca contends that even if true, such facts do not show that Alianca violated the Act. (*Id.* at 8-9, citing relevant portions of the complaint.)

Alianca's position is that Anchor presented its evidence and arguments to the arbitrator who made awards for damages claimed by Anchor which had the opportunity to present more evidence and claims for damages than it did but failed to do so. By doing so, and especially when the arbitrator showed willingness to hear and decide all of Anchor's claims for damages, Alianca argues that Anchor should now be precluded from seeking items of damages that were ruled upon or could have been ruled upon had Anchor presented them to her. (Motion to Dismiss at 9 - 11.) Alianca also points out furthermore that the arbitrator was under no restrictions as to the wide breadth of possible damages that she could award, including the types of consequential damages that Anchor is now claiming in its complaint before the Commission. Indeed, according to Alianca, the arbitrator even awarded Anchor money for lost opportunity profit but denied other items of damages claimed by Anchor such as loss of customers and business, as being too speculative. Nevertheless, Anchor is claiming such damages in its complaint.

In its response to Alianca's motion to dismiss, Anchor acknowledges that it was the one who initiated the arbitration proceeding but argues that the arbitrator was limited in her authority as

regards the Shipping Act, which only the Commission can enforce. Anchor argues also that it will produce evidence to prove all of its allegations under the Shipping Act and that only the Commission can enforce the Act by assessment of civil penalties so that even if the arbitrator ruled upon Shipping Act violations, it would still be necessary to bring these matters before the Commission for enforcement of penalties or reparations. Anchor argues, furthermore, that Alianca knew that the arbitration proceeding was supposed to relate only to breach of contract issues and that Alianca argued to the arbitrator that she had no authority to rule upon Shipping Act issues and that Alianca even tried to coerce Anchor into releasing Alianca from its obligations under relevant service contracts during the arbitration proceedings. Anchor contends that dismissal of its instant complaint would enable carriers to avoid Shipping Act obligations merely by using arbitration clauses in service contracts to compel persons to go to arbitration before arbitrators who are not authorized to enforce the Shipping Act. Anchor asserts that the arbitrator in this case “acted professional (sic) and ethically” and that Anchor “fully agrees with the arbiter’s final decision and award.” (Anchor’s Response to Motion at 8, 9.) However, Anchor maintains that she did not have the authority to rule upon Shipping Act issues and that Anchor’s evidence that was presented to her was limited only to breach of contract issues. Therefore, according to Anchor, her monetary award to Anchor was based upon such breaches and not upon the Shipping Act and its present claim for damages does not duplicate those claimed and awarded by the arbitrator. Because, it is argued, the arbitrator was not authorized to rule upon Shipping Act issues, furthermore, Anchor contends that the arbitral decision cannot be final and binding on the parties as regards Shipping Act issues. Thus, asserts Anchor:

To the contrary, and a little absurd, the Arbiter’s Decision would be final and binding on the parties, the Commission would not have to hear any of the violations already cited, and respondent would be responsible for all the violations cited in the final decision. (*Id.* at 11.)

Anchor proceeds to argue against the finality of the arbitral decision as regards Shipping Act issues and against Alianca's contention that Anchor should be precluded from raising Shipping Act issues before the Commission by referring to its claim that only the Commission is authorized to determine Shipping Act issues and that these issues and others dealing with assessment of civil penalties cannot be or were not "litigated" before the arbitrator. Anchor continually refers to the arbitration proceeding as one in which the parties "litigated" the issues. (Indeed, Anchor uses the word "litigated" eight times when referring to the issues that were the subject of the arbitration proceeding.) (*Id.* at 12-14; 17.) In brief, although Anchor is apparently pleased with the arbitral award, Anchor does not want to give that award finality but wishes the Commission to look at the same issues (and, if its amended complaint were to be served) a few additional Shipping Act sections, and, it is hoped, award Anchor \$1,000,000 more. As I explain below, I find no merit to Anchor's arguments, which totally misconceive the nature of arbitration and ignore the fact that Anchor asked for arbitration, did not then seek to limit the arbitrator's authority, caused Alianca to participate in the arbitration proceeding with Alianca's expectation and hope that the arbitral decision would terminate the disputes between the parties without litigation, and now even seeks to have the Commission add to its award under certain new theories and items of damages that were found to be meritless by the arbitrator or are not awardable as reparations under the Shipping Act even if the Commission were to decide to entertain the complaint.⁴

⁴As I discuss later, contrary to Anchor's arguments, the arbitrator was not limited in her consideration of Anchor's claimed damages such as lost profits and expenses. On page 2 of her final decision, she stated that "[t]he arbitrator may award costs, attorney's fees, interest and expenses." On page 57 of her final decision, the arbitrator did award Anchor amounts for "Freight Differential/Lost Profits," "reimbursement of Expenses," "Legal Expenses," and "Allowance for Party costs leading to the Interim Award." The Commission does not normally award reparations for "costs" and "expenses" but only for actual proven financial injury proximately caused by Shipping Act violations. See, e.g., *Tractors and Farm Equipment, Ltd v. Cosmos Shipping Co, Inc*, 26 S.R.R. 788, 797 *et seq.* (I.D., finalized, 1992 (continued...))

1

C. P. 12/20

**The Strong Policy Favoring Alternative Dispute
Resolution (ADR) and Arbitration in Particular**

The instant case presents the question of whether a person who has gone to arbitration in lieu of litigation and succeeded in winning a sizable monetary award can thereafter seek to litigate the same dispute in a forum which may have statutory jurisdiction over some aspects of the dispute. Furthermore, it could be argued, such person may, in effect, be attempting to attack the arbitral award collaterally or be seeking either to invalidate it or modify it by augmenting the award. Whatever he is doing, the person is clearly not willing to live with the award and to renounce litigation. Because in this case complainant Anchor has won an award of over \$381,000 after arbitration and now wants to litigate essentially the same matters before the Commission, it is necessary to consider what the courts and this Commission have to say about ADR and arbitration and whether it is their policy not to give finality to arbitral awards but to allow them to be ignored or undermined by persons who have participated in the arbitration proceeding and, moreover, who have even been largely successful in that proceeding.

A brief history of arbitration in American legal history is provided in 4 Stein, Mitchell, and Mezones, *Administrative Law*, App. 33C-4 *et seq.* According to this authority, “arbitration, which was known to the common law, has always been employed in America for the resolution of some disputes.” Moreover, “[i]n modern times, it has gained widespread use in labor relations and commercial practices.” At first, courts were hostile to arbitration and lent it little or no aid, believing that it threatened their jurisdiction. However, courts have become more hospitable to arbitration and

⁴ (...continued)
(FMC.) Thus, in certain respects the arbitrator was more generous toward Anchor than the Commission would most likely have been. Moreover, the arbitrator denied some of Anchor’s claims for damages as being “speculative” and cut down Anchor’s award from the total claimed as \$509,511.55 (alternatively \$418,069.26). (Final decision at 3; *Id.* at page 52 (claims for loss of business and customers).

Congress and most state legislatures have enacted the U.S. (later the Federal) Arbitration Act (9 U.S.C.A. sees. 1-14) and analogous state statutes, respectively. These laws authorize courts to enforce arbitral awards and to review them on very limited grounds. A series of Supreme Court decisions, furthermore, have upheld arbitration. It is stated that “[m]odern cases often emphasize the need to honor contracts” and in one case the Supreme Court held that the U.S. Arbitration Act required enforcement of an agreement to arbitrate a securities dispute although to do so meant that there would be two separate proceedings.” (*Id.* at App. 33C-5, citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).) This authority discusses Supreme Court cases in which the Court has interpreted some statutes as precluding arbitration but as for other statutes, such as the federal antitrust laws, the Court has held that the lower court should defer to arbitration even as to a dispute involving alleged violations of the antitrust laws. (*Id.* at App. 33C-28 et seq., citing, among other cases, *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).) In more recent cases the Supreme Court has interpreted the U.S. Arbitration Act (later called the Federal Arbitration Act) broadly to limit exemptions from it. See *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (2001). In the case cited the Court also observed that by going to arbitration the parties did not contravene the policy of the relevant labor statute to afford protection against discrimination but they only chose to have their dispute resolved outside of a judicial forum. In this regard the Court stated (121 S. Ct. at 13 13):

The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA [Federal Arbitration Act] without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in *Gilmer*, “by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.” (Case citation omitted.) (Emphasis added.)

The Supreme Court and lower courts have recognized that the earlier judicial hostility to arbitration on grounds that it ousted courts of their jurisdiction has given way to the recognition that arbitration serves a worthwhile purpose in lessening court congestion and that arbitration clauses in contracts should be given broad interpretations when questions arise as to whether a particular issue should be subject to arbitration. Thus, in *Dean Witter Reynolds v. Byrd*, cited above, 470 U.S. at 221, the Court, citing an earlier decision, stated:

The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.

Similarly, the court in *Mediterranean Shipping Co. Geneva v. Pol-Atlantic*, 229 F.3d 397, 405-406 n. 14 (2d Cir. 2000), discussed how judicial attitudes toward arbitration clauses in contracts have changed so that “[n]ow, there is a heavy presumption in favor of such clauses.”

The fact that the courts have long since abandoned their hostility toward arbitration because they no longer believe that arbitrators were ousting the courts from their jurisdiction under various statutes is illustrated by the case of *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). In *Shearson/American Express*, two customers of a brokerage firm subject to regulation by the Securities and Exchange Commission (SEC) had a dispute with the brokerage firm over their account and filed a complaint in federal court alleging violations of the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act (RICO). The brokerage firm moved to compel arbitration under the Federal Arbitration Act but, on appeal, the Court of Appeals held that neither claim was arbitrable. The Supreme Court held, however, that both claims were arbitrable under the Federal Arbitration Act even though the securities matter fell under the jurisdiction of the SEC, that agency’s statute contained a provision ostensibly prohibiting a person

from waiving his rights under the regulatory statute and the RICO law was one for the courts to enforce. The Supreme Court commented on the change in attitude of the courts, which no longer were hostile to arbitration agreements but began to enforce them “rigorously” pursuant to the Federal Arbitration Act, which “establishes a ‘federal policy favoring arbitration.’” (482 U.S. at 226.) The Court also described how enforcement of arbitration agreements was encouraged even when a party claimed that he had certain statutory rights that could not be waived. Thus, the Court stated (*Id.*):

This duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights. As we observed in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals” should inhibit enforcement of the Act “in controversies based on statutes.” . . . The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims.

As a result of the Supreme Court’s decision in *Shearson/American Express, Inc.*, lower courts have not only upheld agreements to arbitrate in areas otherwise subject to exclusive court jurisdiction but have held that parties who proceeded into arbitration under their agreements had waived their rights to have courts determine issues under various statutes such as RICO and the Securities Exchange Act of 1934. See *C.D. Anderson & Co., Inc. v. Lemos*, 832 F.2d 1097, 1099 (9th Cir. 1987) (“We hold that by submitting its federal securities law and RICO claims to arbitration, C.D. Anderson [the plaintiff in the court suit] waived any right it had to litigate those claims in federal court.”). See also 18 Wright, Miller and Cooper, *Federal Practice and Procedure*, sec. 4475 at 770-771, stating that arbitration provides a nonjudicial forum for resolving disputes that may and should support preclusion in subsequent judicial proceedings.

This strong policy favoring arbitration, even in areas subject to specific federal regulatory laws, has been carried forward into the field of administrative law by Congress. In 1990, Congress

enacted the Administrative Dispute Resolution Act, P.L. 101-552, 104 Stat. 2736 (the ADRA). It was subsequently amended in 1996 by P.L. 104-320, 110 Stat. 3870, and is now codified as 5 U.S.C.A. secs. 571 *et seq.* Following enactment of the ADRA, the Commission promulgated regulations to implement it and issued a policy statement. In its policy statement, the Commission stated:

It is the Commission's policy to encourage the use of ADR to the fullest extent compatible with the law and the agency's mission and resources. Commission employees and all other persons involved in disputes before the Commission are required to consider at an early stage whether the use of ADR techniques would be appropriate and useful in a particular matter. Docket No. 93-07 - Interim Policy Statement, at 3.

Elsewhere, the Commission stated:

In order to emphasize the importance the Commission places on ADR in appropriate circumstances, Rule 1 [46 C.F.R. 502.11 includes a reference to the mandatory consideration of the use of ADR in all proceedings. (*Id.* at 4.)

The Commission also amended a number of its rules of procedure following enactment of the ADRA to require consideration of ADR techniques and encourage their use in lieu of expensive litigation. The Commission commented on the congressional purpose in enacting the ADRA, stating:

In enacting the ADRA, Congress indicated that administrative proceedings have become too formal and lengthy, and that alternative procedures may in some instances be more efficient. Docket No. 93-06 - *Rules of Practice and Procedure; Alternative Dispute Resolution*, 26 S.R.R. 1032, 1033 (1993).

After amendment of the ADRA by Congress in 1996, the Commission followed up with amendments to its rules of practice and procedure, stating that the Commission "intends to expand

ADR services available from the Commission.” Docket No. 01-05 -*Alternative Dispute Resolution*, 29 S.R.R. 304,305 (2001). The Commission has been quite active in promoting ADR techniques, which include mediation as well as arbitration. In its 40th Annual Report to Congress, the Commission stated:

During fiscal year 2001, the Commission implemented a significantly enhanced, comprehensive Alternative Dispute Resolution (“ADR”) program in order to find ways to settle disputes without having them processed via costly and time-consuming formal adjudications. To this end, the Commission issued a revised ADR policy statement and issued rules that provided guidelines and procedures for arbitration, as well as making mediation and other ADR services available for conflicts or disputes on ocean shipping matters. 40th Annual Report at 14.

To illustrate further the Commission’s strong interest in avoiding costs associated with litigation, in the Commission’s Annual Program Performance Report for FY 2001 (March 2002), the Commission stated (at 10):

The Commission plans to continue its efforts to encourage all parties to take advantage of its dispute resolution services, given the savings the agency experiences in processing formal complaints, and the positive service it provides to the industry.

While arbitration, as well as other ADR techniques, have thus been encouraged in every type of Commission proceeding, arbitration is especially relevant in cases involving disputes among parties to service contracts. Section 8(c)(1) of the 1984 Act provides in pertinent part:

The exclusive remedy for a breach of a contract entered into under this subsection shall be an action in an appropriate court, unless the parties otherwise agree.

In the service-contract context, parties to such contracts invariably agree to have disputes resolved by arbitration so as to avoid litigation in a court. The subject service contract in the instant

case contains such an arbitration provision (Rule No. 101) and Anchor initiated an arbitral proceeding pursuant to the relevant provision in the contract. The question next arises as to whether the Commission has or should exercise jurisdiction to entertain Anchor's complaint, which mixes breach of contract claims with Shipping Act claims. Resolution of this question has become more complicated following the Commission's Order in Docket No. 99-24 - *Cargo One, Inc. v. COSCO Container Lines Company, Ltd.*, 28 S.R.R. 1635 (2000). That is because prior to its order in *Cargo One*, the Commission had consistently dismissed complaints involving breaches of service contracts, interpreting section 8(c)(1) as divesting the Commission of jurisdiction in such cases. The first of these mixed breach of contract-Shipping Act cases was *Vinmar, Inc. v. China Ocean Shipping Co.*, 26 S.R.R. 420 (1992).

In *Vinmar*, a shipper had accepted a service contract offer but the respondent carrier refused to file the contract with the Commission as required by the 1984 Act and refused to accept bookings from the shipper. The shipper sought enforcement of the contract and money damages on account of the breach. The Commission held that the shipper's exclusive remedy was in a suit in court for breach of the contract, although complainant *Vinmar* had also alleged that section 10(b)(12) of the 1984 Act had been violated. However, the Commission found the dispute "in essence" to be "a private contractual dispute" (26 S.R.R. at 424) and that Congress intended "to limit the Commission's jurisdiction to award remedies that would otherwise be available in a breach of contract action if the matter were brought before a court." (*Id.*)

Vinmar was followed by a series of cases involving breaches of service contracts in which complainants had added sections of the Shipping Act that they alleged to have been violated. Finally, in *Cargo One*, the Commission took a hard look at the *Vinmar* doctrine and while expressly

not holding that *Vinmar* was incorrectly decided,⁵ modified some of the language in the opinion so as to retain some Commission jurisdiction over such cases under certain circumstances. However, the Commission held that it had jurisdiction over certain allegations of Shipping Act violations only presumably, i.e., the presumption could be rebutted. In this regard, the Commission stated (28 S.R.R. at 1645):

However, we find it inappropriate and contrary to the intent of the statute that section 8(c) bar any Shipping Act claim which bears some similarity to, overlaps with, or is couched in terms suggesting that the remedy may be available in a breach of contract action. We believe the more appropriate test is whether a complainant's allegations are inherently a breach of contract claim, or whether they also involve elements peculiar to the Shipping Act. We find that as a general matter, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violations successfully rebutts the presumption that the claim is no more than a simple contract breach claim. In contrast, where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency. (Footnote omitted.) (Emphasis added.)

The question now presented is whether, on the basis of its decision in *Cargo One*, the Commission should exercise jurisdiction over Anchor's complaint. I believe the answer is in the negative for several reasons. First, unlike the complainant in *Cargo One*, Anchor has exercised its rights under the service contract to go to arbitration and, in fact, has been quite successful in obtaining an award of over \$38 1,000, which Alianca has paid. Unlike the situation in *Cargo One*,

⁵Thus, in *Cargo One*, 28 S.R.R. at 1644, the Commission stated that "[we] are not overruling *Vinmar* or suggesting that the case was wrongly decided." In footnote 12 to the page cited, the Commission went on to explain:

In fact, *Vinmar* appears to have been correctly resolved. As noted by the administrative law judge in that proceeding, the complainant there appears to have been seeking little more than enforcement of what it considered to be a contract dishonored by the carrier-respondent.

The Commission further explained that the Shipping Act issue raised by complainant *Vinmar* "merged with the injury it allegedly suffered on account of the breach of contract."

moreover, in this case the arbitration was required to be and was conducted in New York City under American law whereas under the service contract in *Cargo One*, the American shipper would have had to go to arbitration in Beijing under Chinese law. (*Cargo One*, 28 S.R.R. at 1637.)⁶ Furthermore, unlike *Cargo One*, where there was no arbitral award at all, in the instant case what is at stake is the doctrine of finality that the law gives to arbitral awards subject to very limited judicial review. Moreover, even the Commission's own regulations pertaining to arbitration do not allow appeal to the Commission by a disgruntled party to an arbitral award. If the Commission were to entertain the instant complaint, such action would send a message to persons whom the Commission and courts are urging to go to arbitration rather than to litigate that any arbitral decision has no finality and that the parties' agreement to go to arbitration in their service contracts similarly has no binding effect. As stated in 18 Wright, Miller and Cooper, *Federal Practice and Procedure*, cited above, sec. 4475 at 770-771:

If any party dissatisfied with the award were left free to pursue a judicial remedy on the same claim or defenses, arbitration would be substantially worthless.

Entertaining such complaints as the instant one thus undermines both the strong policy encouraging use of arbitration instead of expensive litigation and the policy of respecting the integrity of the parties' own contracts where they promised to arbitrate. Finally, as was done in *Cargo One*, if the Commission were to retain the instant complaint, it would be necessary to examine some 16 sections of the 1984 Act invoked by complainant Anchor to determine which of them were inherently breach of contract claims as opposed to inherently Shipping Act claims because the Commission in

⁶*Cargo One* was decided under the 1984 Act prior to OSRA, which amended section 8(c)(1) of the Act so as to deal with arbitration clauses in service contracts of "controlled carriers" that required arbitration in communist countries, in effect, making such clauses unenforceable. This amendment would counteract the decision in *Vinmar*. See section 8(c)(1), as amended, last sentence.

Cargo One expressly limited its analysis to the six sections of the pre-OSRA Shipping Act that were involved in that case. See *Cargo One*, 28 S.R.R. at 1645 n. 15. This exercise would have to be performed for the benefit of a shipper who, having won a substantial award from a competent arbitrator on the shipper's contract and Shipping Act claims, now seeks to undermine the binding nature and finality of that award. Under such circumstances I find that the presumption that some of the claims are inherently Shipping Act matters that should be heard by the Commission has been rebutted. I now explain more fully.

As Alianca argued, it has already paid Anchor over \$381,000 as required by the arbitral award and claims to have spent already well over half a million dollars on this matter. Moreover, as the arbitral decision attached to Alianca's motion shows, the parties presented their claims and defenses to the arbitrator both under the Shipping Act and under contract law and, although Alianca believes that the arbitrator erred in law, Alianca has decided that it would be very difficult to seek to overturn the arbitral decision in court and wishes an end to its dispute with Anchor. I agree with Alianca that it is entitled to have an end to its dispute with Anchor and is entitled to have **finality** given to the arbitral decision even though it required Alianca to pay Anchor considerable money. I have discussed earlier the fact that the courts and the Commission strongly encourage arbitration in lieu of expensive litigation. The courts have similarly recognized that awards issued under the U.S. or Federal Arbitration Act must be given finality and can only be overturned on very limited grounds set forth in that Act. See the discussions and cases cited in *Vacation of Arbitration Award*, 20 A.L.R. Fed 295; and *Vacating Arbitration Awards*, 141 A.L.R. Fed 1. In the former annotation, the author describes the differences between arbitration and judicial proceedings and notes that "through statutory enactments . . . arbitration has been made binding, irrevocable, and enforceable." (20 A.L.R. Fed at 306.) Furthermore, under the United States Arbitration Act, then 9 U.S.C.A.

sec. 1 O(a-d), “awards are presumed to be valid and arbitration proceedings need not meet procedural requirements; awards are not reviewable for errors or misinterpretations of fact or law, and. . . only those grounds specified in section 10 may be considered as a possible basis for vacating, and the burden of establishing such grounds is on the party seeking to upset the award” (20 A.L.R. Fed at 307.) In *Vacating Arbitration Awards*, 141 A.L.R. Fed 1, 35 the author states:

The grounds on which a federal district court may vacate an arbitration award are, therefore, much narrower than the grounds on which an appellate court can overturn the decision of a federal district court, and the courts have, correspondingly, shown little inclination to vacate arbitration awards on any ground, vacating awards in approximately 10% of the instances in which they have been challenged under the Act.

The Commission similarly regards an arbitral award as final and not subject to appeal to the Commission. In the Commission’s own ADR regulations pertaining to arbitration, it is stated:

Exceptions to or an appeal of an arbitrator’s decision may not be filed with the Commission. 46 C.F.R. 502.409(a)(2).

It should be noted that this attempt to give finality to arbitral decisions has been codified in the administrative law context in the ADRA. Thus, in 5 U.S.C.A. sec. 581(a), it is stated:

Notwithstanding any other provision of law, any person adversely affected or aggrieved by an award made in an arbitration proceeding conducted under this subchapter may bring an action for review of such award only pursuant to the provisions of sections 9 through 13 of title 9.

The Commission’s policy, therefore, is to give finality to an arbitrator’s decision if the parties have chosen to have an arbitrator (who need not be a Commission employee) selected under the Commission’s regulations resolve their dispute without litigation.

Alianca also argues for dismissal of the complaint on grounds of issue preclusion (also called collateral estoppel). (Motion to Dismiss at 12-13.) Alianca cites cases under that doctrine in which courts and the Commission have estopped complainants who are seeking to relitigate the same matters in a second court or competent agency. Among the cases cited by Alianca is *Elinel Corporation v. Sea-Land Service, Inc.*, 26 S.R.R. 1220 (ALJ), affirmed, 26 S.R.R. 1399 (FMC 1994). In *Elinel*, it was held that a federal district court had decided all the matters in dispute relating to tariff interpretation and freight owing to the carrier and that the complainant could not relitigate the same matters before the Commission, even though complainant was trying to make new arguments or new theories to the Commission as to his damages. In *Elinel*, it was held that under the doctrine of claim preclusion a party was precluded from raising new arguments or theories to support its claim that should have been raised before the court which first heard the dispute. The decision explained the difference between claim preclusion (*res judicata*) and issue preclusion (collateral estoppel) as follows (26 S.R.R. at 1221):

In modern decisions *res judicata* has been increasingly referred to as “claim preclusion” while collateral estoppel has been referred to as “issue preclusion.” The primary difference between the two doctrines is that a party is precluded from raising any claim or defense in a second action that should have been raised in the first action under claim preclusion whereas the party is not precluded from litigating a claim or defense that was never litigated in the first action under issue preclusion. (Emphasis added.)

The Commission has applied claim or issue preclusion to parties seeking to relitigate matters that were previously decided by a court. See, e.g., *Ataei v. Barber Blue Sea Line*, 24 S.R.R. 647 (I.D., F.M.C. notice of finality, Jan. 1, 1988). In *Ataei*, complainant had filed suit in federal district court in New York City under Shipping Act and admiralty law against the carrier which had delayed delivery of cargo and assessed storage charges against the consignee of the cargo pending decision

on ownership of the cargo. The court decided against complainant whose complaint before the Commission alleging the same facts was dismissed under both issue and claim preclusion. The decision stated (24 S.R.R. at 653):

At the outset it should be noted that the doctrine of res judicata and collateral estoppel have, and have always had one objective-judicial finality. (Footnote omitted.) The urge to achieve that objective is so strong that a final, valid judgment, even though it may be erroneous, is not subject to collateral attack and until properly set aside, has a binding effect on the parties as res judicata or collateral estoppel in all the nation's courts, both federal and state. (Footnote omitted.) This is so even though in some cases the application of the doctrine produces a demonstrably incorrect result, such as where some parties appeal and others do not, and where as to the appellants, the judgment is reversed. (Footnote omitted.) (Emphasis added except for the words "even though it may be erroneous".)

The instant case does not involve a previous court decision or previous litigation before a tribunal. Rather it involves an attempt to litigate a matter for the first time after a party is not satisfied with resolution of the matter by an arbitrator even though the party prevailed to a large extent before the arbitrator. Thus, the rules pertaining to res judicata and collateral estoppel are perhaps useful only by analogy. However, the same policy regarding the need to enforce repose and to give finality to the first resolution of a dispute applies to arbitration as does the principle that a party should not have a second chance to bring his claims to a formal tribunal such as the Commission under the same facts and legal theories or under new theories that should have been presented to the arbitrator. This principle that a party who is dissatisfied with an arbitral ruling is estopped from attempting to litigate the matter in a court in order to seek more money is illustrated by the case of *Ritchie v. Landau*, 475 F.2d 151 (2d Cir. 1973). In *Ritchie* the plaintiff had won an award in an arbitration proceeding but, being dissatisfied with it, sought to sue defendant, adding a new legal theory in an amended complaint. However, the district court dismissed the complaint

and the court of appeals affirmed. The court treated the case as a matter of relitigation of the same issues, although the earlier resolution came by way of arbitration, not litigation. However, the court held that the plaintiff had had a full and fair opportunity to present his claims before the arbitrator and was not entitled to a second chance. In this regard the court remarked (475 F.2d at 155):

Ritchie was provided a fair opportunity to litigate his entire bonus claim in the arbitration proceeding, he did so, the award of the arbitrators reduced the amount he sought but gave him a recovery, the award was confirmed by the Supreme Court of New York . . . and the award has been paid in full. More than this the judicial process is not required to provide to disappointed claimants. (Emphasis added.)

Elsewhere the court, after discussing another similar case, stated (475 F.2d at 156):

The critical fact in both cases is that the plaintiffs were given one opportunity to litigate their claims for compensation before the arbitrators; and one opportunity is all they are entitled to have. (Case citation omitted.) (Emphasis added.)

In the instant case, Anchor, having opted for arbitration under its service contract and having presented its evidence and arguments supporting its claims for monetary compensation, and having won a substantial award, is seeking more money arguably under some new theories. However, it is a basic principle of arbitration law that the award settled all Anchor's claims. As one authority states (4 American Jurisprudence 2d, *Alternative Dispute Resolution*, sec. 213 at 240):

Every award rendered in compliance with all legal requirements is a complete, final, and binding determination of a controversy and may not be disturbed except on statutory grounds. Once a valid award is made, it and the submission upon which it is founded are the sole basis for any further determination of the rights of the parties with respect to any demands embraced in the submission, for the latter are merged and extinguished in the award. (Footnotes omitted.)

Moreover, one receiving the benefits of an arbitral award is not allowed to question its validity. *Id.*, sec. 249 at 278, citing numerous cases.

The doctrine of giving finality to arbitral awards, like *res judicata* and collateral estoppel, is designed to give repose to parties involved in a dispute. Thus, it is instructive to note that courts will preclude persons from relitigating what are essentially the same claims when such persons attempt to allege new theories to support the same claim or even seek additional relief to that which such persons have already received. Thus, a person might be precluded if such person failed to raise every argument or theory in the first litigation but tried to raise new theories in a second action. The courts **frown** on such practice because it allows “piecemeal litigation.” The courts look to see such factors as whether the two suits arise out of the same transactional nucleus of facts, whether allowing the second litigation would destroy or impair the rights or interests of parties that had been established in the first case, whether the two suits involved infringement of the same rights, and whether substantially the same evidence would be presented in both suits. Of these factors some courts held that the most important one is whether the two suits arise out of the same transactional nucleus of facts. See *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201-1202 (9th Cir. 1982); *Rein v. Providian Financial Corp.*, 252 F.3d 1095, 1100 (9th Cir. 2001); *In Re Piper Aircraft Corp.*, 244 F.3d 1289, 1301 (11th Cir. 2001) (there must be a common nucleus of operative facts to invoke *res judicata*); *Brannigan v. United States*, 249 F.3d 584, 588 (7th Cir. 2001) (new legal arguments advanced to claim relief from the same events do not amount to a new claim and would be precluded); *Hellman v. Hoenig*, 989 F. Supp. 532,536 (S.D. N.Y. 1998) (later claim arising out of the same factual grouping as an earlier litigated claim is barred even if the later claim is based on different legal theories or seeks dissimilar or additional relief).

The reason why the courts invoke the doctrines of res judicata or collateral estoppel, which are not statutory in origin, is to avoid duplicative litigation and to promote judicial economy by compelling parties to present all their evidence and legal theories to the first court. In other words, parties cannot litigate some of their claims or argue some of their legal theories, lose the case, and then try to relitigate a second time using legal theories that they failed to present the first time. In the instant case, Anchor is seeking to litigate essentially the same Shipping Act claims adding several new legal theories relating to the same nucleus of operative facts. To allow such litigation before the Commission would unfairly burden Alianca, which expected that its rights and obligations were resolved by the arbitrator so as to be free of litigation. Moreover, Anchor would likely be presenting the same or similar evidence to the Commission as it had presented to the arbitrator. Anchor would be precluded by courts and, as noted, the Commission follows the doctrines of res judicata and collateral estoppel. Although the first resolution of the parties' dispute was by an arbitrator and not a court, the same policy of avoiding "piecemeal litigation" applies. Arbitration is not "litigation." The arbitrators act because the parties ask them to resolve their dispute without having to litigate before a court or agency whose authority is limited by statute. By presenting its breach of contract and Shipping Act claims to an arbitrator, Anchor was asking for a resolution of its dispute with Alianca without litigation and Alianca had the right to expect that there would be a resolution having finality. It is thus unfair to Alianca for Anchor to claim now that the arbitrator had no authority to resolve Shipping Act issues and to try out new theories or claim new items of damages. If Anchor wanted to make an argument limiting the scope of the arbitrator's jurisdiction, Anchor should have made the argument to the arbitrator, as did Alianca. It is too late and unfair to Alianca to make such an argument now.

Interestingly, again by way of analogy, the Commission has dismissed a complaint brought by a person who had previously entered into a settlement agreement with a carrier in which she had been paid \$40,000 in compensation for her alleged injuries, but later violated the agreement by tiling a complaint with the Commission alleging Shipping Act violations based upon the same facts. She also alleged that the settlement agreement was void because of coercion. The Commission recognized that there were jurisdictional questions regarding the particular sections of the Shipping Act, 19 16, that she invoked in her complaint but refused to upset the settlement agreement. The case was *Hepner v. Peninsular and Oriental*, 22 S.R.R. 1543 (1984).⁷

I have considered two concerns that the Commission might have if the instant complaint is dismissed and Anchor is left with its \$38 1,000 arbitral award. First, if the Commission defers to the arbitral award, would the Commission be avoiding its responsibility to administer the Shipping Act over which the Commission has exclusive jurisdiction; and secondly, if the Commission so defers, would the Commission or future parties before the Commission be bound by the arbitral decision in the instant case? I do not find these concerns sufficient to justify the Commission's exercising its jurisdiction over Anchor's complaint. First, the Commission would not be deferring to another judicial tribunal which would have jurisdiction over the parties and the issues in question. Rather the Commission would be deferring to the parties' own agreement to go to binding arbitration, which is not a judicial proceeding, binds only the parties and has no precedential effect on future cases. As discussed above, arbitration is an ADR technique designed to avoid litigation, not foster it, and it is strongly encouraged as a quicker and less expensive means of resolving disputes. Thus, the

⁷In the Initial Decision in *Hepner*, which the Commission adopted, the presiding judge had observed that if there was something wrong with the settlement agreement, the proper recourse for complainant was not to go to the Commission but to go to "the local forum under which the jurisdiction of which the agreement was executed." (22 S.R.R. at 1228 n. 9.)

Commission would only be deferring to the parties' own agreement in their service contract.' Moreover, an arbitral decision binds only the parties thereto and has no precedential effect on future cases. This is made clear in the Commission's own regulations, which are patterned after the ADRA. In 46 C.F.R. 502.409(b), it is stated:

(b) An award entered in an arbitration proceeding may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding. Such an award also may not be used as precedent or otherwise be considered in any factually unrelated proceeding.

The same language appears in the ADRA (5 U.S.C.A. sec. 579(d)).

As I have indicated earlier, if the instant complaint were to be entertained, the basic purpose of ADR and arbitration would be undermined because any person dissatisfied with an arbitral decision could seek to overturn or invalidate it by filing a complaint with the Commission, in other words, to have a second bite at the apple. Furthermore, as discussed earlier, if a party is dissatisfied with an arbitral decision, the party's recourse is to seek to overturn it in court under one of the grounds set forth in the Federal Arbitration Act. As mentioned earlier, the ADRA also states as regards appeals of arbitral awards in the administrative arena:

⁸Rule No. 101 of the Essential Terms Publication Rules applicable to the subject service contract on file with the Commission, which I officially notice, provides in pertinent part:

Service contracts shall be construed and governed by the Shipping Act of 1984, as amended and regulations issued by the Federal Maritime Commission pursuant thereto. . . . Carrier and shipper shall endeavor, in good faith, to resolve any disputes under service contracts amicably, failing which any such dispute shall be referred to arbitration by either party by tendering a Notice of Arbitration. . . . The decision of the arbitrator shall be final and binding upon the parties. (Emphasis added.)

If there is a question as to whether Shipping Act issues were agreed to be arbitrated pursuant to Rule No. 101, the courts hold that such clauses as Rule No. 101 are to be construed broadly in favor of arbitration. See *Dean Witter Reynolds v. Byrd*, cited above, 470 U.S. at 221 ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). Whatever the agreement to arbitrate means, furthermore, in fact both parties appear to have presented evidence and arguments to the arbitrator relating to Shipping Act issues.

Notwithstanding any other provision of law, any person adversely affected or aggrieved by an award made in an arbitration proceeding conducted under this subchapter may bring an action for review of such award only pursuant to the provisions of sections 9 through 13 of title 9. 5 U.S.C.A. sec. 581(a).

Thus, even though Anchor claims that it “fully agrees with the arbiter’s final decision and award” (Anchor’s Response to Motion to Dismiss at 9), Anchor is not content to rest with it but seeks more relief. Consequently, if the Commission were to entertain Anchor’s complaint, it would be allowing Anchor to circumvent the exclusive procedure established for persons who are dissatisfied in some fashion with an arbitrator’s decision and would be fostering litigation instead of enforcing repose. Moreover, by allowing such persons to bring to the Commission new theories or new items of claimed damages to supplement what they presented to an arbitrator, the Commission would be undermining the policy requiring parties to present all their arguments and theories the first time, failing which they would be precluded from litigating any new arguments or theories before a second *court*. See, e.g., *Elinel Corporation v. Sea-Land Service, Inc.*, cited above, 26 S.R.R. at 1221.

I conclude therefore that Anchor, which chose to go to arbitration, presented evidence under contract and Shipping Act law and won a sizable award from a competent arbitrator, being dissatisfied in some respects with the arbitral award, is seeking to get more money under the same or even new legal theories based on the same or similar facts as those presented to the arbitrator. I conclude furthermore that to entertain Anchor’s complaint would be to undermine the strong policy in the law and in the Commission’s regulations that encourage arbitration in lieu of litigation and give the results of arbitration finality so as to enforce repose and would be unfair to respondent Alianca which had the right to expect repose. Even if the Commission retains some jurisdiction over the subject dispute notwithstanding section 8(c)(1) of the Shipping Act of 1984 (and to determine

this question would require careful examination of the 16 sections of that Act invoked by complainant), such jurisdiction would only be presumptive and subject to rebuttal. If so, the fact that Anchor has already won a sizable monetary award, which respondent has paid, rebuts the presumption and the fact that the Commission encourages finality to arbitration further militates against the exercise of Commission jurisdiction to examine the parties' dispute. Accordingly, respondent's motion to dismiss the original complaint is granted. I now turn to Anchor's motion to file an amended complaint.

Anchor's Motion to File an Amended Complaint

The Commission's relevant rule of practice and procedure (46 C.F.R. 502.70(a)) provides in relevant part that "[a]mendments or supplements to any pleadings will be permitted or rejected, either in the discretion of the Commission if the case has not been assigned to a presiding officer for hearing, or otherwise, in the discretion of the officer designated to conduct the hearing" For many of the same reasons as I have discussed earlier in connection with respondent Alianca's motion to dismiss, I have decided not to exercise my discretion to allow Anchor to file and have served its amended complaint. I find that Anchor has had its opportunity by arbitration to obtain relief for its claims regarding Alianca's breach of its service contract as well as its claims of alleged violations of the Shipping Act of 1984 and that to prolong its dispute with Alianca by adding additional carriers who allegedly acted in concert with Alianca to injure Anchor would undermine the strong policy of encouraging arbitration to enforce repose and would violate the strong policy against allowing persons to engage in "piecemeal litigation" by adding new legal theories to essentially the same

claims and to give such persons a second bite at the apple after they have already been compensated for their injuries arising out of the same nucleus of operative facts.

The Commission generally follows the Federal Rules of Civil Procedure absent a specific Commission rule “to the extent that they are consistent with sound administrative practice.” See 46 C.F.R. 502.12. The comparable federal rule is Rule 15(a), 28 U.S.C.A., which, when referring to the need for leave of the court to file amended complaints, states that “leave shall be freely given when justice so requires.” I do not find that justice requires me to permit Anchor to have its amended complaint served on Alianca plus an additional number of alleged carriers whose identity as carriers rather than as carriers’ agents (over whom the Commission has no jurisdiction) is extremely unclear. However, the main reason for my ruling is not based upon Anchor’s naming of additional alleged carriers. If the complaint were to be served, the newly named respondents could answer and explain their status or move to dismiss and, assuming that some of the newly added respondents were not dismissed, the case could move forward in litigation. Anchor is now proceeding “pro se,” i.e., without legal counsel, and it is customary to be more lenient toward such parties than would be the case if an attorney were representing Anchor (as an attorney did in the arbitral proceeding). See *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994) (“[b]ecause Burgos is a pro se litigant, we read his supporting papers liberally, and will interpret them to raise the strongest arguments that they suggest.”). However, it has also been held that someone acting “pro se” has no license to ignore proper procedure or substantive law. See *Saeid B. Maralan (aka Sam Bustani), etc.*, 28 S.R.R. 928,929 (1999) (ALJ 1999), and the cases cited therein,

The more important consideration is that Alianca and the newly named companies would be drawn into litigation for the benefit of a party who, as discussed above, has already been given a

substantial award for its injuries but wishes, contrary to its agreement and decision to go to binding arbitration, now wants a second bite at the apple by raising new legal theories or seeking new items of damages based on facts that it has already brought to the attention of the arbitrator.

As mentioned, Federal Rule 15(a), 28 U.S.C.A., allows amendments to complaints liberally and normally so does the Commission's relevant rule, 46 C.F.R. 502.70(a). This is so in Commission cases when the amendment to a complaint does not add new issues untimely so as to prejudice a respondent or when the amendment merely clarifies the original complaint without adding new issues. See, e.g., *International Association of NVOCCs v. ACL et al.*, 24 S.R.R. 1585 (ALJ), affirmed, 25 S.R.R. 187 (FMC 1989); *Peltzman v. AMA*, 20 S.R.R. 939 (ALJ 1981) (if complaint is defective for lack of clarity, should allow leave to amend); cf. *Interconex, Inc. v. F.M.C.*, 572 F.2d 27 (2d Cir. 1978) (Commission should allow amendments to complaints liberally). In the instant case Anchor itself contends that it is only attempting to add necessary parties as respondents and that "[t]he amended complaint would not broaden the issues set forth in the original complaint." (Motion to Amend, para. 4.) The problem, however, is that the circumstances under which this complaint has been filed with the Commission indicate that justice does not require the case to proceed with or without the requested amendment to the original complaint.

Federal Rule 15(a), though liberal, does not require automatic approval of amendments to complaints. As one authority describes this rule (6 Wright, Miller and Kane, *Federal Practice and Procedure*, sec. 1487 at 61 1-612) (When Leave to Amend May be Denied):

The **liberal** amendment policy prescribed by Rule 15(a) does not mean that leave will be granted in all cases. (Footnote omitted.) Indeed, the text of the rule makes it clear that permission to amend is not to be given automatically but is allowed only "when justice so requires." . . . The decided cases reveal that a federal court will balance several factors in deciding whether leave to amend should be granted.

The leading case on Federal Rule 15(a) is *Foman v. Davis*, 371 U.S. 178, 182 (1962), in which the Supreme Court indicated generally under what circumstances a court should deny a motion for leave to amend a complaint as follows:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be “freely given.” (Emphasis added.)

It may be that Anchor is not trying to add new issues in its amended complaint, as Anchor itself claims, and that this case is in its early stages before the Commission so that Alianca and the other proposed respondents would not be prejudiced if they had to defend. However, it also may be argued more persuasively that Anchor is guilty of “bad faith” by refusing to abide by its agreement to go to binding arbitration and by questioning the authority of the arbitrator to resolve Shipping Act issues when Anchor presented its evidence on those issues to the arbitrator and led Alianca to believe that the arbitrator could resolve those issues. Moreover, it is apparent that to allow Anchor to amend its complaint would be futile when there is a sound objection against allowing the case to proceed to decision on the merits before the Commission because of the preceding arbitral award in Anchor’s favor. It is not necessary to cite all the cases in which courts have disallowed amendments to complaints because the amendments would have been futile. However, I cite five of them to illustrate the point. In *Schlesinger v. Councilman*, 420 U.S. 738, 744 n. 9 (1975), an army officer tried to get a federal court to enjoin a court martial proceeding against him but his complaint was defective in certain respects. The complaint could easily have been amended to correct the defects but the Supreme Court held that the District Court need not allow the requisite amendments because

the court should never have taken jurisdiction of the case in the first place. In *Tyco Laboratories Inc. v. Cutler-Hummer, Inc.*, 490 F. Supp. 1, 3-4 (S.D. N.Y. 1980), the District Court disallowed an amendment to a complaint because the amendment relied upon an allegation that, even if found, would not allow plaintiff relief because the plaintiff would be estopped. See also *Kweenaw Bay Indian Community v. State*, 11 F.3d 1341, 1348 (6th Cir. 1993) (motion to amend complaint to add indispensable parties without making material difference from original complaint denied); *Beal Corp. Liquidating Trust v. Valleylab, Inc.*, 927 F. Supp. 1350, 1374 (D. Colo. 1996) (amendment that would make no substantive change from original complaint and suffer from same infirmities denied); *Sierra Club v. Pena*, 915 F. Supp. 1381, 1387 (N.D. Ohio 1996), affirmed, 120 F.3d 623 (6th Cir. 1997) (amendments merely restating counts in original complaint and, if permitted, causing delay to end of case and cost burdens on defendants denied). In the instant case, adding more respondents to the original complaint would be futile because, as I have explained, justice would not be served by allowing Anchor, which has already won a substantial monetary award, a second bite at the apple. Consequently, I am denying Anchor's motion to amend its complaint.

Ultimate Conclusions

I am dismissing the subject complaint and denying complainant Anchor's motion to amend it to add more respondents because Anchor, having voluntarily opted to go to arbitration pursuant to its service contract with Alianca, presented an arbitrator with evidence and arguments relating to breach of contract and Shipping Act issues. Moreover, Anchor, which was represented by an attorney in the arbitration proceeding, did not attempt to restrict the arbitrator's scope of authority to contractual issues (whereas Alianca did) and won a substantial monetary award on both

contractual and Shipping Act issues. This case is therefore not one in which the Commission is being asked to give up its jurisdiction to another tribunal but rather one in which the Commission is being asked, in effect, by respondent Alianca to respect the parties' decision to proceed to binding arbitration in lieu of litigation as they had agreed to do and to leave the results of arbitration alone as the law and Commission's ADR regulations essentially require as regards arbitration. Ironically, it is the party who lost in the arbitration proceeding, respondent Alianca, who asks that the Commission not disturb the arbitral award but the party who won before the arbitrator is the party that wants to augment that award and consequently undermine its finality. The fact that Anchor, which was represented by an attorney in the arbitration proceeding, failed to seek to limit the arbitrator's authority to contractual issues (in contrast to respondent Alianca, which did make such an attempt) does not mean that Anchor, the winning party, should now be allowed to offset that mistake at the expense of respondent Alianca, which is willing to live with the arbitral award that was adverse to it and has even paid anchor substantial money on account of the contractual and Shipping Act violations that the arbitrator had found to have occurred. For the same reasons it would not be just to allow Anchor to clarify its original complaint by adding more respondents to support its original allegations that Alianca had acted in concert with other carriers to injure Anchor. In short, the time has come to enforce repose on this lengthy and expensive dispute between Anchor and Alianca and to require that Anchor be content with the \$381,880.59 which the arbitrator awarded to it and which Alianca has paid. The complaint is accordingly dismissed and Anchor's motion to amend it is denied.

Norman D. Kline

Norman D. Kline
Administrative Law Judge