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In this issue

President's Message

By LeRoy Lambert, SMA President

The SMA is growing! At the September meeting, we were delighted to welcome four new members to the SMA: Bill Moore, Kevin Byrne, James Vlachos and Antonios Panagiotareas. You will find their bios on pages 2-3. All are active in the maritime industry and will provide new links between the industry and the SMA. Welcome!

We are close to finalizing a contract with Jus Mundi, www.jusmundi.com, which will introduce the SMA to thousands of users around the world, most of whom will be hearing about the SMA for the first time.

On November 1, the SMA and BIMCO will be the lead sponsors of a seminar to discuss the GENCON 2022 charter party form. ASBA, CMA, and NYMAR are sponsoring as well. The panelists will include John Weale, the chair of the revision committee, along with Stephen Harper of BW Group, Paul Hirtle of N.W. Johnsen, Magne Andersen of Nordisk, and the

SMA's own Louis Epstein (Trammo) and Robert Shaw (Sea Trade Holdings). Registration details are found on page 14. The brokers, owners, operators, charterers, and traders in Connecticut are key stakeholders in the maritime industry. By holding the seminar in Stamford, we hope to draw more persons who fix charters every day than we would by holding it in New York.

The SMA and the New York bar will be well represented at ICMA Dubai. See more at page 16.

George Tsimis and I are putting together a presentation to the container industry cluster (Zim, CMA-CGM, and MLL) in Norfolk later this fall.

Join us on October 11th at 3 West to hear Clay Maitland speak about the present and future of Open Registries. There's sure to be a crowd. Be there!

The Board will continue to find ways to let our industry know about the SMA, but don't wait on us! Make a call, ask for a meeting, attend events, write an article, comment on events on social media, be available for interviews. Onward!

LeRoy Lambert
President

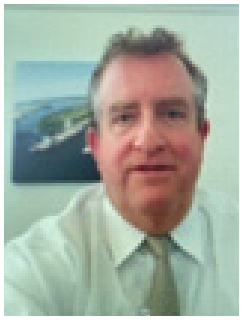
Focus on SMA Members

The SMA continues to broaden its membership with new members coming from different professional backgrounds. Here are thumbnail sketches of four members who have recently joined the SMA.

Dr. William H. Moore

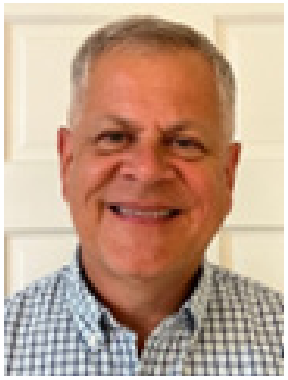
Dr. William Moore is the Global Loss Prevention Director at Shipowners Claims Bureau, Inc., managers of the American Club. In that capacity, he brings 30 years of experience in safety and risk management expertise in the reduction of maritime risks and incidents. He formerly worked at ABS in New York and Gard Services in Norway. He acquired his doctorate degree at the University of California at Berkeley in Naval Architecture & Offshore Engineering and is also a graduate of Ocean Systems Management at the Massachusetts Institute of Technology.

Dr. Moore is also formerly the Chairman of the IMO's Joint Maritime Safety Committee & Marine Environmental Protection Committee's working group on the Human Element, has participated in and chaired numerous committees of the International Ship and Offshore Structures Congress, participated as a committee member of the National Academy of Sciences, Engineering and Medicine committee on Strengthening US Coast Guard Oversight and Support of Recognized Organizations. He is also a Member of the American Bureau of Shipping.



Kevin J. Byrne

Kevin Byrne is currently a shipbroker at MID-SHIP Group LLC, Port Washington, NY, where he has represented exclusive Chartering clients since 2005. He began his career in shipping in 1979 at Omnium Agencies, Inc., NY, exclusive brokers for the largest private Brazilian Bulk Carrier Owner at that time. He has worked closely his entire career with Brazil, where he resided for a short time, and is fluent in Portuguese. He has worked as an exclusive freight broker and manager for major shipowners as well as some of the world's largest charterers handling all types of freight contracts for full range of cargo sizes in the dry cargo business. He has extensive experience in Chartering as well as Operations with expertise in Charter Party negotiations and post-fixture voyage management and has market knowledge and understanding of international trade and commodity flows. He is also a former Board Member of the Association of Shipbrokers and Agents (ASBA). He has a Bachelor of Arts degree in Finance from Villanova University and a Certificate in Chartering from the Association of Shipbrokers and Agents.



James Vlachos

A graduate of SUNY Maritime College at Fort Schuyler, **James Vlachos** sailed as Third Officer on transatlantic parcel tankers as well as coastal tugs/gas barges. He served as President of Bulkchem Chartering Corp., having started with the company in 1993. He has extensive experience in and knowledge of dry and liquid bulk chartering and operations from the outset of charter party negotiations through the duration of the voyage, including implementation of bills of lading/documentation, laytime calculations, dispute resolution and finalization of accounts. In 2023, he joined Macrosource LLC as Director of Vessel Chartering and Brokerage. He is a member of the Association of Ship Brokers and Agents (ASBA).

Antonios P. Panagiotareas

Antonios Panagiotareas is Director of Oceanus Maritime Services LLC, providing engineering and consulting services to clients in North America since 2016. His previous experience includes four years sailing on ships, newbuilding supervision, twelve years as a technical superintendent, ten years as Technical Manager, and two years as General Manager of shipping companies in Greece. His expertise is in marine operations, vessel management, new buildings, dry-docking, General Average, H&M Claims, S&P, bunker claims, cargo claims, U.S. criminal cases and arbitration. He studied Maritime Systems Engineering (Hydrodynamics) at Texas A&M University (1986) and earned an MBA in Maritime Administration at the University of Leicester (2003). He is a member of SNAME, ASME, IMarEST, The Nautical Institute, Industry Advisory Board of the Department of Marine Engineers, Texas A&M University at Galveston.

The Second Circuit Expands Dangerous Goods Liability

By Edward P. Flood, Partner, and Jon Werner, Partner, of Lyons & Flood LLP, New York*

The Second Circuit's recent decision in connection with the 2012 explosion and fire aboard the *MSC Flaminia* containership[1] is significant in two respects. First, it represents an extension of the failure to warn cause of action under the Carriage of Goods by Sea Act ("COGSA") established in the *DG Harmony* case to situations involving a shipper's pre-carriage handling. Second, it is the first time the Second Circuit has affirmed the right of an ocean carrier to contractual indemnity for breach of a dangerous goods clause contained in a bill of lading.

Background

To fully appreciate the significance of the decision, the facts underlying the case need to be discussed briefly.

Divinylbenzene ("DVB") is a chemical that, in its natural state, must be inhibited to prevent it from undergoing a dangerous chemical reaction known as polymerization. Moreover, the inhibitor commonly used starts to become ineffective if the temperature of the DVB begins to exceed 80° F. Deltech, a Louisiana-based manufacturer of DVB, had learned this problem when some of its earlier DVB shipments had auto-polymerized during transit to Europe. As a result, Deltech instituted logistics procedures to prevent DVB from being shipped from New Orleans to Europe between April and November.

However, in the spring and summer of 2012, Deltech shipped tank containers of DVB from New Orleans to Europe using the services of its NVOCC and tank container provider, Stolt. Despite knowing about the prior incidents and Deltech's procedures to avoid shipping from New Orleans during this time of year, Stolt did not raise any safety concerns about these shipments which were contrary to Deltech's procedures. Moreover, in contradiction to other Deltech procedures that sought to minimize the time DVB sat at the terminal, Stolt

arranged for early delivery of the subject DVB shipments to the New Orleans terminal. Doing so caused the shipments to sit at the terminal for ten days during the hottest period of the year before being loaded aboard the *MSC Flaminia*.

Consequently, at the time of loading aboard the ship, the DVB had just about reached its critical temperature and was ripe for auto-polymerization. The three tank containers were stowed below deck in accordance with the regulations applicable to DVB under the International Maritime Dangerous Goods (IMDG) Code.

Fourteen days after departing New Orleans, and while the vessel was in the mid-Atlantic, one of the tank containers of DVB began to auto-polymerize and large amounts of flammable vapor began to vent from hold no. 4. The crew, believing the white clouds of vapor were smoke, attempted to fight what they thought was a fire by deploying CO2 into the hold and preparing for boundary cooling on deck. The vapor ignited, and a massive explosion and fire erupted on the vessel, ultimately resulting in the deaths of three crew members and enormous damage to both the vessel and its cargoes.

After extensive litigation involving hundreds of witnesses, dozens of experts, and two bench trials, Deltech and Stolt were the only parties found liable for the casualty, and MSC (as well as the shipowner and operator) were found entitled to complete indemnity under the dangerous goods clause in MSC's sea waybill. Deltech and Stolt appealed the liability decision in 2019, and the Second Circuit issued its decision on June 30, 2023.

Liability Under a COGSA Negligent Failure to Warn Theory

The *MSC Flaminia* case is one of several cases where the Second Circuit has faced the question of whether an ocean carrier can recover from the shipper of dangerous goods under COGSA. One of the leading cases prior to the *MSC Flaminia* decision was the *DG Harmony,* where the Second Circuit upheld a district court's determination that a shipper of dangerous goods can be liable to a carrier under a COGSA negligent failure-to-warn theory. This theory, which is premised on judicial interpretation of COGSA § 4(3), permits a carrier to recover where the shipper's failure to warn the carrier about "dangers ... of which the stevedore and ship's master could not reasonably have been expected to be aware," caused harm to the carrier. *In re M/V DG Harmony,* 533 F.3d 83, 94 (2d Cir. 2008). The warning that must be conveyed relates to the "specific type" and the "degree of danger" the cargo poses. Both the *MSC Flaminia* and the *DG Harmony* involved this latter scenario — a failure to warn the carrier that there is a heightened degree of risk associated with the cargo offered for carriage.

The *DG Harmony* case involved a shipment of calcium hypochlorite ("calhypo") which was packed hotter than usual into a smaller than standard size drum (allowing for higher density packing in a container) and which, therefore, unbeknownst to the carrier, was more prone to heat up spontaneously than a regular calhypo shipment. The Second Circuit upheld the district court's holding that the shipper was liable under a COGSA negligent failure to warn theory, observing that the shipper's "breach of duty consisted of its failure-to-warn the carrier of the dangers posed by the calhypo it was shipping *in this particular configuration*." *Id*. at 96 (emphasis added).

In other words, because the shipper of the calhypo had altered the degree of danger posed by its calhypo shipments by changing the method in which they were packed and prepared for carriage, and had neglected to warn the carrier about this increased degree of danger, the shipper was liable under COGSA for any resulting damages.

Similarly, in the *MSC Flaminia,* the Second Circuit, focusing on the heightened danger caused by Deltech and Stolt's pre-shipment handling, stated:

> Consistent with the principles enunciated in *DG Harmony,* the district court correctly concluded that Stolt and Deltech bore a duty to warn of the "particular heat sensitivities of the DVB[-80]" in the tanks loaded onto the Flaminia. Under the circumstances presented here, it would have been unreasonable to expect MSC, Conti, and NSB either together or individually to know of the specific type and degree of danger posed by this cargo of DVB-80. The risk-producing circumstances — the early filling of the tanks and the long period outside in the heat at NOT [the New Orleans terminal], in particular — were neither apparent on visual inspection nor described in the tanks' accompanying documentation.

* * *

> MSC could not be expected to know that the three tanks had been exposed to such conditions, and therefore presented a higher risk of danger, without an express warning from Deltech or Stolt.

In re M/V MSC Flaminia, 72 F.4th 430, 449 (2d Cir. 2023) (internal citation omitted).

These two holdings provide ocean carriers with a broader path for recovery from shippers and NVOCCs who fail to properly warn carriers of the true dangers of their cargoes. It is the authors' hope that shippers and NVOCCs will be more forthcoming in the future so that ocean carriers can properly determine whether dangerous goods are suitable for carriage and, if so, better determine how to stow such cargoes aboard their vessels safely.

Contractual Indemnity Based on Breach of a Dangerous Goods Clause

The Second Circuit also upheld the district court's finding that Deltech and Stolt were required to contractually indemnify MSC (as well as its subcontractors, Conti and NSB) based on their breach of the dangerous goods clause in MSC's sea waybills issued for the DVB.

The clause in question provided that "[w]hen the Merchant delivers Goods of a dangerous or hazardous nature to the Carrier, the Merchant shall fully inform the Carrier in writing of the precise and accurate details of the Goods, and special precautions or handling required for the Goods."

This is a typical dangerous goods clause, commonly found in nearly all bills of lading and sea waybills issued by any major carrier today. Such clauses protect carriers from losses that could arise if shippers fail to fulfill their regulatory[2] and legal obligations to provide full disclosure concerning the dangerous goods they are offering for carriage.

Although the duty on the part of shippers to inform carriers about any special requirements concerning their cargoes well in advance of stowage has long been recognized under U.S. general maritime law[3], there are few decisions addressing the enforceability of dangerous goods clauses in carrier bills of lading.[4]

Consequently, the Second Circuit's decision in the *MSC Flaminia* case — upholding (for the first time) a carrier's right to contractual indemnity based on a breach of a dangerous goods clause — is another tool by which carriers can recover from negligent shippers or NVOCCs.

* Lyons & Flood, LLP represents the time charterer, MSC, in this case. Although liability issues have been resolved by the Second Circuit's decision, a damages trial is scheduled for May 2024.

1 *In re M/V MSC Flaminia,* 72 F.4th 430 (2d Cir. 2023).

2 For example, SOLAS, Chapter VI, Regulation 2, obliges shippers to "provide the master or his representative with appropriate information on the cargo sufficiently in advance of loading to enable the precautions which may be necessary for proper stowage and safe carriage of the cargo to be put into effect" and to confirm this information "in writing and by appropriate shipping documents prior to loading the cargo on the ship."

3 *See, e.g., O'Connell Mach. Co. v. M.V. Americana,* 797 F.2d 1130, 1134 (2d Cir. 1986) ("[T]he shipper had an obligation to inform the carrier of special requirements regarding stowage location, and to make such special arrangements in advance of stowage, including payment of additional fees for special services when indicated."); *Sun Co. Inc. v. S.S. Overseas Arctic,* 27 F.3d 1104, 1112 (5th Cir. 1994); *Tenneco Resins, Inc. v. Davy Int'l, AG,* 881 F.2d 211, 213-14 (5th Cir. 1989).

4 Aside from a Ninth Circuit decision, *APL Co. Pte. v. UK Aerosols Ltd.,* 582 F.3d 947 (9th Cir. 2009), the only other decisions addressing the issue are at the district court level. *See, e.g., A.P. Moller-Maersk A/S, Trading as Maersk Line v. Safewater Lines (1) Pvt, Ltd.,* 276 F. Supp. 3d 700, 710 (S.D. Tex. 2017); *In re M/V DG Harmony,* 436 F. Supp. 2d 660, 670 (S.D.N.Y. 2006); *Scholastic Inc. v. M/V Kitano,* 362 F. Supp. 2d 449, 457 (S.D.N.Y. 2005); *Luckenbach S. S. Co. v. Coast Mfg. & Supply Co.,* 185 F. Supp. 910, 923 n.1 (E.D.N.Y. 1960).

U.S. Supreme Court Holds that Appeal on Arbitration Denial Automatically Stays Trial Court Proceedings*

By Ed Mullins, Partner, and Zachary J. Kosnitzky, Summer Associate, Reed Smith, Miami

On June 23, 2023, the U.S. Supreme Court issued a narrow 5-4 decision in *Coinbase, Inc. v. Bielski,* 2023 U.S. LEXIS 2636, at *1 (U.S. June 23, 2023), holding that a district court must stay its proceedings while an interlocutory appeal of a denial of a motion to compel arbitration is ongoing.

Specifically, the Supreme Court reversed the Ninth Circuit's decision to decline the stay brought by defendant Coinbase. Coinbase challenged the district court's denial of its motion to compel arbitration pursuant to section 16 of the Federal Arbitration Act (FAA). 9 U.S.C. section 16(a)(1). Section 16 allows movants to seek an interlocutory appeal of the denial of a motion to compel arbitration, but it does not say whether that appeal triggers a general stay during the appeal.

The circuits were split. Most circuit courts had held that an appeal of the denial of a motion to compel arbitration automatically stays the trial court proceedings. The Second, Fifth, and Ninth Circuits held that it does not. The Court resolved this split in favor of the majority view.

In the majority opinion by Justice Kavanaugh, the Court relied on its interpretation of the text of section 16, as well as the *Griggs* principle that "[a]n appeal, including an interlocutory appeal, 'divests the district court of its control over those aspects of the case involved in the appeal.'" Furthermore, whether a case is triable is an issue that extends to "the entire case." Therefore, according to the majority, an appeal on the question of arbitration versus trial must divest the district court of its ability to control the case completely. According to the majority, Congress drafted section 16 in light of this idea.

This approach, wrote Justice Kavanaugh, "reflects common sense," as proceeding with an entire trial would negate the benefits that parties seek to gain by agreeing to arbitration in the first place. The majority continued that "[a] right to interlocutory appeal of the arbitrability issue without an automatic stay of the district court proceedings is therefore like a lock without a key, a bat without a ball, a computer without a keyboard – in other words, not especially sensible."

Writing for the minority, Justice Jackson disputed the majority's statutory interpretation of the FAA. Agreeing that the district court should be divested of the question of arbitrability pending appeal, the minority distinguished that question from those that remain before the trial court: "whether the claims have merit, whether the parties are entitled to the discovery they seek, and so on." The minority went on to characterize the decision as a windfall to defendants seeking arbitration, as "any defendant that devises a non-frivolous argument for arbitration can not only appeal, but also press pause on the cause – leaving plaintiffs to suffer harm, lose evidence, and bleed dry their patience and funding in the meantime."

The decision is good news for entities that include arbitration in their contracts. An appeal of an adverse order compelling arbitration will keep the trial case stayed. This provides a key protection to arbitration, as without a stay, the appeal will be moot if the parties continue to litigate. The *Coinbase* decision stands as a firm reminder that the Supreme Court remains a stalwart guardian of arbitration.

* This article was originally published as a Reed Smith Client Alert on July 5, 2023 and is republished here with permission. https://www.reedsmith.com/en/perspectives/2023/07/us-supreme-court-appeal-arbitration-denial-stays-trial-proceedings

Avoiding Discovery Sanctions in an Ever-Evolving Technological World*

By Lindsay Calhoun, Partner, Phelps Dunbar LLP, New Orleans

As new technologies develop and new apps proliferate in the workplace, both attorneys and litigants must be mindful of the need to preserve and produce relevant data across myriad platforms or face the risk of severe (and even terminating) discovery sanctions. Recent case law from across the country demonstrates the dangers of assuming that Electronically Stored Information ("ESI") obligations end with the production of emails. As the three cases outlined below show, counsel should ensure they fully understand the technologies their clients use to communicate on relevant topics, including the clients' routine deletion and preservation policies, and remain actively involved in the preservation, collection, and review of data for discovery purposes.

Attorneys should be aware of clients' auto-deletion policies

In *Columbia Pictures Indus. Inc. v. Galindo*, No. 2:20-cv-03129, 2022 WL 3009463 (C.D. Cal. June 14, 2022), Report & Recommendation adopted, 2022 WL 3369629 (C.D. Cal. Aug. 15, 2022), the Court not only ordered defendant Alejandro Galindo to pay plaintiffs' reasonable attorneys' fees due to defendant's refusal to participate in discovery, but also issued terminating sanctions against him. Among many other discovery violations, including deleting relevant email accounts and hiding and destroying devices, Galindo also obfuscated business-related messages he exchanged in the Telegram app by changing the app's settings to auto-delete messages every seven days. Galindo "took these actions despite being told by his counsel not to destroy evidence." *Galindo,* 2022 WL 3009463, at *4. After a year of litigating Galindo's discovery abuses, the Court eventually imposed severe sanctions under Federal Rule of Civil Procedure 37 and terminated the case in plaintiffs' favor. It also ordered Galindo to pay $181,080 in attorneys' fees to plaintiffs. In issuing sanctions, the Court specifically called attention to Galindo's decision to set the Telegram app to auto-delete, which destroyed relevant ESI and noted that Galindo had "no excuse for his continued use of Telegram set to automatically delete messages." *Galindo,* 2022 WL 3009463 at *12.

Counsel must closely supervise the client's preservation techniques

John Schnatter, the founder and former CEO of Papa John's pizza, learned a similar lesson in ESI preservation requirements in *Schnatter v. 247 Group, LLC*, No. 3:20-cv-00003, 2022 WL 2402658 (W.D. Ky. Mar. 11, 2022). Schnatter brought claims against 247 Group, LLC, a company that provided marketing services to Papa John's, and whose employees had been on a recorded call with Schnatter in 2018 when he used a racial slur—a story later reported by *Forbes Magazine*. Schnatter subsequently separated from Papa John's and the Papa John's name was removed from the University of Louisville's football stadium. Schnatter sued 247 Group, alleging that it had tortiously interfered with his business contracts, including Papa John's naming rights agreement with the University of Louisville, and harmed his reputation. At the outset of engagement, Schnatter's counsel issued him a litigation hold letter, which outlined in detail his ongoing obligations to preserve relevant documents and data.

Over the course of years of litigation, 247 Group discovered that Schnatter had a practice of deleting all emails and text messages immediately after sending or receiving them. Moreover, Schnatter revealed that during the relevant period, he possessed 11 different cellphones, most of which had never been subject to imaging in discovery, and most of which had been discarded during the course of the litigation. In sum, due to Schnatter's actions, significant ESI had been lost. *Id.* Accordingly, Defendants moved for spoliation sanctions. The Court concluded that Schnatter "failed to take reasonable steps to preserve [ESI]"; "he deliberately deleted every text message he sent and received since his preservation duty was triggered," and finally determined that there was no indication that the lost data could be recovered or duplicated. *Schnatter,* 2022 WL 2402658 at *10, 12. The Court ultimately determined that Schnat-

ter's conduct did not warrant sanctions under Rule 37(e)(2), which requires a showing of intent to deprive another party of the information's use in the litigation, because Schnatter was able to show that from 2014 (well before the onset of the litigation), it was his routine practice to delete messages as he sent and received them. The Court's conclusion was further supported by the fact that Schnatter had not retained data favorable to him while deleting unfavorable data. However, as the Court noted, "[t]his does not mean that Schnatter's conduct was harmless." *Schnatter,* 2022 WL 2402658 at *14. Ultimately, the Court ordered Schnatter to pay Group 247's reasonable attorneys' fees and costs associated with the discovery dispute and granted Group 247 a permissive inference based on the spoliation, meaning that Group 247 was allowed to present evidence of Schnatter's destruction of data to the jury. In coming to its conclusion, the Court also chastised Schnatter's counsel, and although it did not sanction them, it noted that "counsel failed to intervene in order to mitigate the effects of Schnatter's conduct." *Schnatter,* 2022 WL 2402658 at *19.

Attorneys should develop a full understanding of the client's methods of communication and use acceptable preservation, search, and review tactics tailored to the particular ESI

Finally, in lengthiest and most detailed exploration of a litigant's discovery wrongdoing, the Court in *Red Wolf Energy Trading, LLC v. Bia Capital Management, LLC*, 626 F. Supp. 3d 478 (D. Mass. 2022) issued terminating sanctions and attorneys' fees against defendants Bia Capital Management, LLC and Gregory Moeller. After years of litigation and deficient discovery responses, including some for which they were sanctioned, and after Moeller submitted multiple false affidavits attesting that he and his company had searched for and produced all relevant data, the Court opined:

> At best, defendants' repeated failures to produce required documents for three years was in reckless disregard of their duties established by the Federal Rules of Civil Procedure and court orders. This misconduct was extreme. The fact that it occurred after stern warnings from the court exacerbates it. Red Wolf has been severely prejudiced by defendants' extreme misconduct. It has also seriously injured the court's ability to manage this case and many others on its docket.

Red Wolf, 626 F. Supp. 3d at 482. At the heart of defendants' misconduct was their obfuscation of Slack messages that supported plaintiff's allegation that defendants had misappropriated their trade secrets by using an algorithm plaintiff had developed for its trading business. Defendants' explanation for the missing Slack message constantly evolved. First, they claimed that Slack could not be searched, until an expert e-vendor testified that was untrue. Next, they claimed that hiring a vendor to handle the Slack messages was cost-prohibitive, so they engaged a "consultant" to create his own search mechanism to respond to discovery. However, the "consultant" was an individual living in Kazakhstan who had never before undertaken such a project and who received no cash payment for his services, only equity in Moeller's company.

Defendants' recalcitrance in discovery wreaked havoc on the Court's docket. The Court was forced to extend the discovery deadline several times to permit plaintiff the opportunity to obtain all discovery relevant to the case. Moreover, after defendants repeatedly "found" and produced relevant and responsive documents beyond the discovery deadline, the Court allowed key witnesses to be re-deposed on the contents of those materials, again delaying the proceedings. Finally, after defendants discovered and produced yet more responsive documents on the eve of trial, the Court was forced to delay the trial and instead consider additional discovery sanctions against defendants.

The Court determined that defendants' conduct was "extreme" and "prejudicial." It noted that these were the worst and most persistent discovery issues presented to it in over 37 years of litigation disputes. Finally, it ordered Moeller to pay plaintiff's reasonable attorneys' fees and costs related to the plaintiff's motion for sanctions, and issued terminating sanctions in plaintiff's favor:

> In this case, ordering default judgment as the sanction for defendants' repeated violations of court orders despite stern warnings that severe sanctions could be imposed if they were violated is also justified in order to deter others from emulating defendants' misconduct. The law is not a game, and, as the court told

> defendants, civil discovery is not a game of hide and seek. The decision in this case should encourage litigants to understand that it is risky business to recklessly or deliberately fail to produce documents, and perilous to disobey court orders to review and, if necessary, supplement prior productions.

Red Wolf, 626 F. Supp. 3d at 507-08.

Galindo, Schnatter, and *Red Wolf* provide stern warnings to counsel to properly oversee the preservation, collection, and production of relevant and responsive ESI, lest they or their clients face significant discovery sanctions. As *Galindo* and *Schnatter* illustrate, it may not be enough that an attorney issues a client a detailed litigation hold letter or otherwise instructs the client not to destroy evidence—that attorney must then make a good faith effort to ensure that their advice is being followed, and all relevant and responsive information is preserved. And as *Red Wolf* and *Galindo* further evince, counsel would be well served by closely monitoring a client's methods of preserving data across all relevant modes of communication, including inquiring as to any auto-deletion policies, and ensuring that search and review techniques meet the standards expected under the Federal Rules of Civil Procedure. The consequences could otherwise be severe.

* This article was originally published on the American Bar Association's website on August 24, 2023. It is republished here with permission.

From Across the Pond

Charterers liable to pay hire rate for time associated with hull underwater cleaning after redelivery*

By Aris Moschopoulos, Partner, Ioanna Gavriiloglou, Senior Associate, Ince & Co., Piraeus, and Reema Shour, Professional Support Lawyer, Ince & Co., London

In *Smart Gain Shipping Co. Ltd v. Langlois Enterprise Ltd (Globe Danae)* [2023] EWHC 1683 (Comm), the Court has upheld an LMAA tribunal's award, which found that the hull fouling clause in a time charterparty for a single time charter trip required the Charterers to pay for the time associated with the hull underwater cleaning after redelivery of the vessel at the hire rate. The Owners were not limited to a claim in damages for breach of the charterparty and did not have to prove loss of time.

The background facts

The parties entered into a single trip time charterparty on an amended NYPE form. The duration was about 40 to 50 days and the cargo was metallurgical coke in bulk that was loaded in India and discharged in Brazil. The Brazilian receivers rejected the cargo and, as a result, the vessel remained idle in Brazilian tropical waters for at least 42 days. Therefore, clause 86 of the charterparty was engaged. This stated:

> *"Clause 86 Hull Fouling*
>
> *Owners not to be responsible for any decrease in speed/increase in consumption of the Vessel whether permanent or temporary cause [sic] by Charterers staying in ports exceeding 25 days trading in tropical and 30 days if in non-tropical waters. In such a case, underwater cleaning of hull including propeller etc. to be done at first workable opportunity and always at Charterers' time and expense. After hull cleaning vessel's performance warranties to be reinstated."*

The Charterers redelivered the vessel without undertaking underwater hull cleaning, despite Owners' requests that they do so. The Owners, therefore, arranged for this themselves before the vessel was delivered into her next employment under a subsequent fixture.

The Owners claimed the time associated with the underwater cleaning from the Charterers at the hire rate. The Charterers submitted that where the vessel had already been redelivered, the Owners were confined to damages for loss of time, for example by proving that the cleaning prevented the vessel from being further chartered.

The arbitration award

The tribunal found in the Owners' favour. The purpose of clause 86 was to assign responsibility for

the risks associated with marine growth forming on the hull if the vessel spent an extended period of time idle pursuant to the Charterers' orders. While the clause was said to be ambiguous in part, the tribunal concluded that it obliged the Charterers to arrange underwater cleaning at the first workable opportunity at their time and expense at the charterparty hire rate, regardless of when the vessel was redelivered, and that this obligation gave rise to a claim in debt.

The tribunal accepted the Owners' submission that *The Nicki R* [1984] 2 Lloyd's LR 186 was an authority for the proposition that the Owners were not required to demonstrate loss of time regardless of whether the cleaning was performed before or after redelivery. Although that decision dealt with stevedore damage rather than hold cleaning, the facts, clause, and issues were considered to be the same as in this case. As in *The Nicki R,* if a clause allocated liability for the time to the charterers, the owners did not have to prove any actual loss of time.

The Commercial Court decision

The Charterers' appeal was dismissed. The clause placed an obligation on the Charterers to pay compensation at the rate of hire – not hire itself – for the underwater cleaning of the hull in the circumstances set out in the clause. It was a specific clause to address this issue, so there was no need to turn to other clauses in the charterparty such as clause 4, which provided for hire to continue until redelivery.

If what the parties intended was that the Charterers would compensate the Owners for any "loss of time" resulting from the cleaning, clause 86 could have stated this expressly. Instead, they agreed that cleaning was *"always at Charterers' time."*

Clause 86 required that the cleaning be at the Charterers' expense. There was no requirement that the underwater cleaning had to be undertaken before the vessel's redelivery, nor were the Charterers obliged to undertake the underwater cleaning themselves. The vessel could be returned unclean but, in that case, the Charterers would have to compensate the Owners at the hire rate for the time when cleaning was undertaken. The Court added that, if the vessel was returned uncleaned, it was likely that the Owners would endeavor to clean it before its new employment, since there would otherwise be a breach of warranty to the new charterers.

The Court agreed that *The Nicki R* lent support to the tribunal's conclusion. In that case, the Court held that where the relevant clause required that repair be *"at charterer's expense,"* it meant a claim for hire in debt at the charterparty hire rate, not a claim in respect of time lost or damages, even though repairs took place after completion of the contractual trip and concurrently with the owners' own work on the engine.

Comment

This decision is based on the construction of the wording of the specific clause in question. Nonetheless, the Court emphasized that this was the commercially sensible outcome. There would be much greater uncertainty if the Charterers had been correct and it was necessary to prove and calculate loss of time and damages.

* This article was originally published on July 18, 2023 on Ince & Co. website's Insights and is republished here with permission. Ince & Co. acted for the Owners in this case.

Iraq Telecom Ltd. v. IBL Bank S.A.L.*: Second Circuit Affirms District Court's Ruling that the Enforcement of an Arbitration Award Should Not Be Stayed Despite a Pending Foreign Annulment Proceeding

By Jacob M. Kaplan and David Zaslowsky, Partners, Baker McKenzie, New York, and Michael Fabiyi, Summer Associate, Baker McKenzie, Houston

In 2018, Iraq Telecom Ltd. ("Iraq Telecom") brought an arbitration proceeding against IBL

Bank S.A.L. ("IBL") and others before the Lebanese Arbitration Center of the Chamber of Commerce, Industry and Agriculture of Beirut and Mount Lebanon. After a four-day evidentiary hearing, the arbitration tribunal ruled in favor of Iraq Telecom and awarded it $3 million.

Iraq Telecom sought to confirm the award in the U.S. District Court for the Southern District of New York. While those proceedings were ongoing, IBL initiated an exequatur proceeding in a Lebanese court seeking to annul the award. IBL then requested a stay of the U.S. confirmation proceedings, arguing that the Lebanese court had the power to set aside the award and might do so. The district court did not find that IBL had demonstrated a likelihood of success in the annulment action and granted Iraq Telecom's petition to confirm the award.

On appeal, the Second Circuit began its analysis by turning to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards—implemented by 9 U.S.C. § 201 *et seq.*—which provides that a district court "may, if it considers it proper, adjourn the decision on the enforcement of the award" if "an application for setting aside or suspension of the award" has been made in the jurisdiction in which the award was made. The Second Circuit then considered its earlier decision in *Europcar Italia S.p.A. v. Maiellano Tours, Inc.*, in which it had set out a non-exhaustive list of six factors that a district court should consider in exercising its discretion to adjourn enforcement proceedings in the face of parallel foreign annulment proceedings.

The Second Circuit found that the district court reasonably determined that the two most important *Europcar* factors weighed against staying enforcement: (1) the expeditious resolution of disputes and the avoidance of protracted and expensive litigation and (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved. Specifically, the district court found that the annulment action was in its earliest stage, and that IBL had not provided any estimate of the length of those proceedings. The Second Circuit also denied IBL's contention that the district court had erred by not adequately considering the potential for future delay if the award were annulled and further litigation was required to set aside the enforcement judgment. The Second Circuit explained that the district court's finding that IBL had not shown it was likely to succeed in the annulment proceeding largely neutralized those concerns.

The Second Circuit further found that the district court reasonably concluded that the characteristics of the Lebanese proceeding counselled against a delay in enforcement of the arbitration award. In finding the district court's decision reasonable, the Second Circuit opined in detail on one sub-factor from *Europcar*—whether the annulment proceeding was initiated under circumstances indicating an intent to hinder or delay the resolution of a dispute. The fact that IBL filed the Lebanon annulment proceeding after the enforcement proceeding in the United States, and that IBL failed to provide detailed reasoning as to why the annulment proceeding would not create "unnecessary delay," weighed against a stay.

The Second Circuit then turned to another *Europcar* factor—determining the "balance of the possible hardships to each of the parties[.]" IBL argued that a stay would not cause hardship to Iraq Telecom because IBL had issued payment in compliance with the enforcement award. Yet the district court rejected this assertion because, under Lebanese law, IBL's attempt to pay Iraq Telecom was merely an offer that was rightfully declined by Iraq Telecom. Accordingly, if the enforcement action were stayed, a hardship to Iraq Telecom would exist.

The Second Circuit concluded its analysis by reviewing the district court's decision regarding another *Europcar* factor—"whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review[.]" The district reasoned that this factor "support[ed] a delay in [enforcement] . . . only slightly," because, although a Lebanese court may have a broader range of tools to vacate an arbitration award, IBL failed to show "that additional authority will be of benefit to it." The Second Circuit found this analysis reasonable, and consequently, did not find an abuse of discretion in the district court's decision to enforce the arbitration award. Hence, the Second Circuit affirmed the district court decision.

* This article originally appeared in the July 2023 edition of Baker McKenzie's International Litigation and Arbitration Newsletter and is republished here with permission.

The SMA ... in the Courts

By Louis Epstein, SMA Member

In the March 2022 edition of The Arbitrator, we discussed recent cases in New York courts arising out of arbitrations under the SMA Rules or in which SMA members served as arbitrators.[1] In this article, we will provide an update on one of those cases, *Preble-Rish Haiti, S.A. v. Republic of Haiti,* No. 21-CV-6704 (PKC), 2022 WL 229701 (S.D.N.Y. Jan. 26, 2022).

In the March 2022 edition, we discussed the January 26, 2022 decision of the United States District Court for the Southern District of New York granting the petition of the Claimant, Preble-Rish Haiti, S.A. ("PRH"), to confirm a Partial Final Award against the Respondents, the Republic of Haiti ("ROH") and the Bureau de Monétisation des Programmes d'Aide au Développement ("BMPAD"), and ordering them to deposit into an escrow account $23,043,429.79 as pre-award security for claims arising out of their alleged breach of contracts (the "Contracts") for the supply of various petroleum products. [2] The court, per Judge Castel, rejected the Respondents' arguments, on various grounds, that the partial final award should be vacated.

On February 7, 2022, a final hearing on the merits in the arbitration was held. After closing arguments, the hearing was adjourned, and post-hearing submissions were sent to the panel on February 23, 2022. On the same day, the panel also received a letter from a New York attorney asserting that her firm, along with another New York firm, had been retained to represent ROH in connection with the arbitration. The letter asserted that ROH was not a party to the Contracts containing the arbitration agreement and asked the panel to "clarify" that the "Partial Final Award did not run against ROH and that ROH was not a respondent in this arbitration." After receiving additional submissions from both PRH and ROH, the panel declined to reopen the Partial Final Award and determined that it would address the issues raised in the letter in its final award.

On August 23, 2022, the panel issued a Final Award holding that PRH was entitled to recover from respondents $28,184,756.65.[3] Among other things, the panel rejected the argument made on behalf of ROH that, as a non-signatory to the Contracts, it was not bound by them and the arbitration agreement. The panel determined that: (1) ROH waived this defense when it failed to assert it in the petition to stay arbitration that it brought in New York state Supreme Court (the petition was denied and the court granted PRH's motion to compel); (2) ROH was bound by its conduct and appearance in the New York arbitration; (3) BMPAD was the alter ego for ROH, and (4) at all relevant times, BMPAD acted as agent for ROH.

On September 1, 2022, PRH filed a petition to recognize, confirm and enforce the award. ROH opposed the petition and moved to dismiss upon two grounds, both of which were based on ROH not having been a signatory of the Contracts containing the agreement to arbitrate.

First, ROH asserted that it was immune from jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §1604 which provides, in pertinent part, that a "foreign state shall be immune from the jurisdiction of the courts of the United States ... except as provided in sections 1605 to 1607 of this chapter." PRH argued that two of statutory exceptions to immunity applied: (a) the "implied waiver" exception which, courts have held, results in a waiver under 28 U.S.C. § 1605(a)(1) of any sovereign immunity defense when a foreign state that is a signatory to the New York Convention enters into a contract containing an agreement to arbitrate; and (b) the "arbitration exception" set forth in 28 U.S.C. 1605(a)(6) which denies immunity in any case to enforce an agreement "made by the foreign state... to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not..." ROH asserted that because it was not a signatory to the Contracts, neither exception to immunity applied.

Second, ROH sought to vacate the award under section 10(a)(4) of the FAA because the arbitrators "exceeded their powers," arguing that it "did not agree to submit the issue of arbitrability to the arbitrators because the Republic was not a party or signatory to the arbitration agreements at all..."[4] ROH asserted that the court "must decide, on de novo review, whether Preble-Rish can establish that its dispute is arbitrable against [ROH], as a non-signatory."[5]

In a decision issued on June 29, 2023,[6] the district court rejected ROH's contention that it had not agreed to arbitrate and therefore that the exceptions to immunity under the FSIA did not apply. The court held that the issue of whether ROH had agreed to arbitrate had already been litigated and decided by the New York State Supreme Court in a decision affirmed on appeal by the First Department:

> ROH and BMPAD jointly brought a petition in New York Supreme Court to stay arbitration under section 7503(b).... On September 27, 2021, Justice Andrew Borrok denied the petition to stay the arbitration and granted PRH's cross-motion to compel arbitration. *Republic of Haiti et al.,* Index No. 657237/2020, Doc. 68 (N.Y. Sup. Ct. Sept. 27, 2021). The Order denying the stay petition stated, "It is beyond dispute that the parties freely and unequivocally agreed to arbitrate all of their disputes in New York" and that "[t]he petitioners," ROH and BMPAD, "drafted the very agreements containing the arbitration clauses." *Id.* The Appellate Division, First Department, affirmed Justice Borrok's Order on April 12, 2022. *Republic of Haiti,* 204 A.D.3d at 482 (1st Dep't 2022).
>
> Justice Borrok's decision is a final judgment on the merits by a court of competent jurisdiction in a case involving the same parties and underlying claim as the instant action. ROH—as the party bringing the petition before Justice Borrok—is precluded from re-litigating issues that "were or could have been raised" in that proceeding. As ROH brought a motion to stay—which was denied—and PRH brought a cross-motion to compel arbitration against ROH—which was granted—ROH cannot now deny that it had a valid arbitration agreement with PRH.[3] As such, ROH is not entitled to FSIA immunity, and the Court has subject-matter jurisdiction over the action against it.[7]

The court held that under the doctrine of res judicata and under the Full Faith and Credit Clause of the Constitution, the state court's treatment of this threshold issue was entitled to preclusive effect.[8]

Upon the same ground, the court also rejected ROH's contention that the arbitrators exceeded their powers, observing again that the issue whether ROH had agreed to arbitrate had already been litigated and decided in state court:

> [A]s discussed above, the question of whether ROH was a party to the arbitration agreements and whether the parties had submitted the dispute to arbitration—i.e., "the question of arbitrability"—has already been judicially determined. This was the very issue in the action before Justice Borrok, an action ROH instigated and lost. The final judgment before Judge Borrok "precludes the parties or their privies from relitigating issues that were or could have been raised in that action." [citations omitted].[9]

Finally, the court rejected ROH's contention that the state court judgment should not be given preclusive effect against it because, as ROH now claimed, the law firm that appeared in the state court action on behalf of both ROH and BMPAD was not authorized to represent ROH:

> ROH asserts that it should not be bound by Justice Borrok's Order because the firm that represented it in that action, Harris Bricken, "never had authority to claim it represented the Republic." (ECF 33 at 4.) While the Court notes the serious ethical implications of this suggestion, federal district courts do not sit in review of state court judgments, but instead—as noted above—must give those judgments the "full faith and credit ... as they have by law or usage in the courts" of New York. 28 U.S.C. § 1738. The Court must "'give the same preclusive effect to a state-court judgment as another court of that State would give.'" If ROH seeks to attack the state court judgment against it, the proper forum would be the courts of New York. *[citations omitted]*[10]

The court therefore granted PRH's petition to confirm the award and denied ROH's motion to vacate.[11]

ROH has appealed the district court judgment to the Second Circuit. On September 7, 2023, a motion to the district court for a stay of enforcement pending appeal without posting of a bond was denied. ROH then moved in the Second Circuit for a stay. On September 21, 2023, an interim administrative stay of enforcement was granted by the Second Circuit pending resolution of ROH's motion to stay by the next available motions panel.

1 https://smany.org/pdf/arbitrator/Vol52_No1_Mar2022.pdf.
2 Although the arbitration clause did not incorporate SMA Rules, the three arbitrators, Robert Shaw, LeRoy Lambert and Louis Epstein (Chair), were all SMA members.
3 https://jusmundi.com/en/document/decision/en-preble-rish-haiti-s-a-v-republic-of-haiti-and-bureau-de-monetisation-de-programmes-daide-au-developpement-corrected-final-award-tuesday-23rd-august-2022#decision_28470
4 Slip op. at 23
5 Id.
6 *Preble-Rish Haiti, S.A. v. Republic Of Haiti,* 2023 WL 4267215, 11-cv-7503 (PKC) (June 29, 2023) (available at https://casetext.com/case/preble-rish-haiti-v-republic-of-haiti-1)
7 Slip op at 16-17.
8 Slip op. at 16. The court also rejected ROH's contention that service of PRH's petition to recognize confirm and enforce the award did not comply with the requirements of the FSIA, holding that both BMPAD and ROH had been properly served. Slip op. at 18-20.
9 Slip op. at 23-24.
10 Slip op. at 17-18, n. 3.
11 Slip op. at 24.

Spotlight on the SMA

SMA at the ASBA Annual Cargo Conference, Miami, Fl., September 27, 2023. SMA member **Molly McCafferty** was the moderator of a panel discussing "Stakeholders Share Their View on the Daily Business Dispute."

SMA at Marine Insurance Americas, Broward Convention Center, Fort Lauderdale, Fl. October 11, 2023. SMA member **Molly McCafferty** will participate in a panel discussion of "To Court, or not to Court?"

SMA at the MLA's Fall Meeting, San Francisco, Ca., Oct. 17-21, 2023. The SMA will be a sponsor of this event, which SMA President **LeRoy Lambert** will attend.

SMA at the University of Miami Law School's International Arbitration Institute, October 16-21, 2023. SMA member **Charles Anderson** will be teaching a course in Maritime Arbitration.

SMA at the Fort Lauderdale Mariners Club Insurance Seminar, The Westin Resort, Ft. Lauderdale, Fl., Oct. 23-24, 2023.

https://www.ftlmc.org/mariners-insurance-seminar

The SMA will be a "US Open" sponsor and "Commanders Club" seminar sponsor; SMA members **Charles Anderson, James DeSimone** and **Michael Monahan** are expected to attend.

SMA at GENCON 2022, Stamford Marriott Hotel & Spa, Stamford, Ct., Nov. 1, 2023.

https://bi-cm02.bimco.org/events/20231101-gencon-2022-stamford

Hosted by **BIMCO** and the **SMA**, and co-sponsored by ASBA, NYMAR and the CMA, the seminar will feature SMA members **Robert G. Shaw** and **Louis Epstein** as speakers, and SMA President **LeRoy Lambert** as a moderator.

SMA at ICMA , Dubai, Nov. 5-10. 2023 – see p. 16 infra.

SMA MONTHLY LUNCHEONS*:

September 12, 2023: Members-only luncheon hosted by the American Club. Induction of new SMA members **James Vlachos, Antonios Panagiotereas, William Moore and Kevin Byrne.**

From Left: Robert Meehan, SMA Vice-President, James Vlachos, Kevin Byrne, Antonios Panagiotareas, William Quinn, Chair, SMA Membership Committee, William Moore, LeRoy Lambert, SMA President

October 11, 2023: Clay Maitland, Managing Partner of International Registries, Inc. ("IRI"), will speak about "Open Registries, Today and Tomorrow."

December 13, 2023: SMA's traditional Holiday Luncheon, celebrating 60th anniversary of the SMA.

*** If you are not receiving information about SMA luncheons and want to be added to the list, then please contact Patty Leahy, the SMA's Office Manager, at pleahy@smany.org**

2024 - SMA SEMINAR:
MARITIME ARBITRATION IN NEW YORK
Will Take Place as an ONLINE PROGRAM in MARCH/APRIL 2024

If resolving arbitration issues is part of your job, this Seminar program will provide you with the background information needed to understand today's maritime arbitration proceedings. The SMA Rules provide the framework for a successful arbitration. Those involved in resolving or avoiding charter party disputes should be familiar with current practices.

THE SEMINAR PROGRAM:

The SMA will offer its online comprehensive seminar on "Maritime Arbitration in New York" in March and early April 2024. Dates and meeting times are:

ONLINE VIDEO SESSIONS	MEETING TIME
FRIDAY MARCH 1	1300 EST TO 1600 EST
FRIDAY MARCH 8	1300 EST TO 1600 EST
FRIDAY MARCH 15	1300 EDT TO 1600 EDT
FRIDAY APRIL 5	1300 EDT TO 1600 EDT

Since the Seminar went online in 2021, it has become an international event. Participants have logged in from Europe, Canada, Central America and the East, West and Gulf coasts of the United States. The online format made travel costs and time away from the office unnecessary.

WHO SHOULD REGISTER:

Attendees from shipowners, charterers, vessel operators, maritime claims adjusters, salvors, ship brokers, oil and chemical companies, insurers, traders and export/import companies should find the Seminar an efficient way to gain an understanding of the current practices in New York maritime arbitration proceedings. The program has also been beneficial to maritime attorneys needing additional information for their understanding of the maritime arbitration process.

SEMINAR CONTENT:

The Seminar offers opportunities to discuss issues typically appearing in arbitrations. The course is led by Professor Jeffrey Weiss, Esq., Professor of Maritime Law at New York Maritime College. Jeff has 38+ years of college and graduate-level teaching experience. The program's four interactive video sessions (via Zoom) provide 12 hours of instruction. Course materials and outlines will be distributed by internet in advance of each meeting. In addition, attendees have access to an online library of reference material.

The seminar covers subjects essential to those involved in the arbitration process whether they are arbitrators, participating parties or attorneys. Topics include Arbitration Overview, Commencing the Arbitration, the Federal Arbitration Act (FAA), SMA Rules, the Arbitration Award, Partial Final Awards, Final Awards, Majority Decisions, Dissenting Opinions, Confirmation, Vacatur and Enforcement of Awards, Panel Member and Ethical Considerations, Discovery in Aid of Arbitration, Hearing Procedures, Security in Aid of an Award, Evidentiary Considerations in Arbitration, the Federal Rules of Evidence, Laches, Time Bar, Defaults, Mediation and Consolidation of Arbitrations.

CONTINUING LEGAL EDUCATION CREDITS FOR AMERICAN LAWYERS

The Maritime Law Association of the United States ("MLAUS"), is an accredited New York State provider of Continuing Legal Education ("CLE") and is a co-sponsor of the 2024 SMA Arbitration Seminar for purposes of CLE credits. The Program will be appropriate for both newly-admitted attorneys (transitional) and experienced attorneys (non-transitional) and the complete Program will qualify for 12 CLE credits (12 sessions) in "Areas of Professional Practice." No credit can be given for partial attendance at a session. Attorneys from places other than New York State should consult with their appropriate local state authority to determine their entitlement to CLE credits based upon MLAUS CLE certification as an approved provider of CLE credit for the State of New York.

FULL REGISTRATION AND CLE DETAILS AVAILABLE AT WWW.SMANY.ORG

Questions? Contact: Austin L. Dooley, Chair SMA Education Committee (dseawx@ix.netcom.com)

– or –

Patty Leahy, SMA Office Manager (pleahy@smany.org)

ICMA XXII

ICMA XXII, the first ICMA Congress to be held in the Middle East, will take place in Dubai on **November 5-10, 2023** at the Jumeirah Emirate Towers. The Hon. Sir Bernard Eder, distinguished English Barrister and a former High Court Judge, will deliver the Cedric Barclay Lecture. Registration details and rates can be found at the ICMA XXII website, www.icma2023.com.

The Congress will include participants from around the globe, including the U.K, Brazil, Singapore, U.S., India, China, Australia, France, Germany, UAE, The Netherlands, Japan, Canada, Greece, Hong Kong, Malaysia, Korea, Norway, Latvia, New Zealand, Russia, Thailand, Venezuela and Turkey.

Members of the U.S. delegation who will attend and/or participate by submission of papers include George Chalos and Thomas Belknap as well as SMA members **David Martowski, Robert Shaw, George Tsimis, Robert Milana** and SMA President **LeRoy Lambert.**

U.S. delegates have prepared papers canvassing the following topics: "Nipping Counterparty Non-Performance Disputes in the Bud: The Application of the Doctrine of Adequate Assurances in SMA Arbitrations" (**George Tsimis**); "How Should Arbitrators Decide Claims and Counterclaims Arising from the Same Incident if on the Evidence Neither Party Meets its Burden of Proof?" (**Robert Shaw**); "Mediation 2023: Why Insurers and Insureds Should Attend" (**Robert Milana**); "Sire, Hire, Price Majeure and a Global Pandemic: Are vetting clauses a warranty or a due diligence obligation?" (**George Chalos**); and "Recent Developments in U.S. Maritime Arbitration" (**Thomas Belknap**).

Milestones

SMA | SOCIETY OF MARITIME ARBITRATORS

The **SMA** is proud to be celebrating its 60th year of offering alternative dispute resolution to the shipping community. This milestone will be marked at the SMA's annual holiday luncheon on December 13, 2023.

NYIAC

On September 20, 2023, the **New York International Arbitration Center** ("NYIAC") celebrated its tenth anniversary with its annual Grand Central Forum program and an anniversary program. SMA members **Louis Epstein, Lucienne Bulow** and **Müge Anber-Kontakis** attended.

In Closing

We thank everyone who contributed to this issue of **The Arbitrator.** A special thanks to Tony Siciliano and all readers who keep our membership abreast of maritime news items and developments. To our readers: we welcome all suggestions and feedback as to how **The Arbitrator** can best serve the needs of the maritime arbitration community in providing timely and relevant articles and information.

Thoughts or suggestions for a future article? Please let one of us know: louis.epstein@trammo.com; sandra.gluck@gmail.com; or gtsimis@gjtmarine.com.

Please also follow the SMA via LinkedIn.

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