



# THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

## INDEX TO THIS ISSUE

President's Corner .....	1
When Non-Performance Can Be Excused.....	2
New Test in Longshore Worker's Attempted Suicide 'Unchained' .....	4
NRG Linhas Decision – is a Change to the SMA Rules Needed? .....	6
Beware When You Amend Your Charter Party: <i>The Sir Lancelot</i> , SMA 4190 (2012) and SMA 4178 (2012) .....	6
Vessel Redelivery Notice Deemed Improper: <i>The Falcon Carrier</i> , SMA 4217 (2013) .....	7
In Memoriam — Donald Joseph Szostak .....	9
In Memoriam — Herbert Sondheim .....	10
In Memoriam — Robert V. Corbett .....	10
Professor Joseph C. Sweeney A/K/A "Joe Boats" Retires From Fordham Law School .....	11
Annual Seminar on Maritime Arbitration Under SMA Rules .....	12
The SMA at 50 .....	12
Editors Note .....	13

*The views expressed in the articles in this publication are those of the authors alone and do not represent the views of the editors or The Society of Maritime Arbitrators, Inc.*

## PRESIDENT'S CORNER

We are off to an excellent start. As Klaus Mordhorst reports in more detail later in this issue, the SMA 50<sup>th</sup> Anniversary events were outstanding. The seminar on Ship Vetting, held at the City Bar Building could not have come off any better. The venue of course was spectacular, and the intellect, gravitas, and diversity of the Panel was superior. The dinner dance at the New York Yacht Club the following evening turned into quite a party – the dancing at various points became a bit, let's say, enthusiastic! The comments by our special guest the Chief Judge of the U.S. District Court for the Southern District of New York Loretta Preska were very clever. She weaved language used in some judicial rulings with maritime terminology to the humorous pleasure of us all. The Lifetime Achievement Award presented to a shocked and emotionally appreciative Michael van Gelder provided a very memorable moment to an evening that was both elegant and great fun. Thank you Klaus!

As the expression goes, "Life is about Change." With that in mind we are making two meaningful location changes, our office and our monthly luncheons. After 50 years we have moved from Lower Manhattan to Midtown. Our new address and phone number:

Society of Maritime Arbitrators, Inc.  
One Penn Plaza, 36th floor  
New York, NY 10119  
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Our Office Manager Patricia Leahy's email address stays the same: [pleahy@smay.org](mailto:pleahy@smay.org)

With the office move (which has been completed – thank you Patty!) and our old standby the Captain's Ketch closing for renovations, we decided to bring the luncheons uptown as well.

On February 12<sup>th</sup>) we held our inaugural luncheon at our new venue the Yale Club. We are delighted with this upgrade to our luncheon program. Our excellent speaker was Dean E. Grabelle, General Counsel for Aker Philadel-

phia Shipyard. The one downside is when you move to an elegant Midtown location you have to pay Midtown prices. Rest assured this is at best a breakeven event for us. We will continue to make every effort to provide exceptional programming in a convivial atmosphere of camaraderie, while recognizing the need to keep the pricing reasonable. Our next luncheon at the Yale Club (located at 50 Vanderbilt Avenue opposite Grand Central Terminal) will be held Wednesday March 5. We will gather at 12:15 for your beverage of your choice (cash bar) with lunch at 1 pm, followed by our speaker.

Klaus is at it again, having organized the 2014 session of the SMA course on “**Maritime Arbitration in New York**” scheduled for February 20 and 21, 2014. For New York based lawyers the program will qualify for 12 CLE credits (12 sessions) in “Areas of Professional Practice.” This link gives the program details <http://www.smany.org/sma/seminar2014/seminar2014>

I am proud to announce that past president David Martowski will be representing us as the New York panelist in BIMCO’s interactive mock arbitration before an international audience at its April meeting to be held in Dubai. His fellow panelists will be London’s Bruce Harris and Singapore’s Jude Benny.

At this point I will close so you can get on to the many interesting, informative, and possibly provocative articles that follow. Hope to see you at the Yale Club.

**Jack Warfield**



## WHEN NON-PERFORMANCE CAN BE EXCUSED...

By Lucienne C. Bulow\*

It is not often that non-performance can be excused. However, that was the result in an SMA award<sup>1</sup> which was confirmed by Judge Naomi Reice Buchwald of the U.S. District Court for the Southern District of New York in a well-reasoned Order dated October 31, 2013.<sup>2</sup>

Phoenix Bulk Carriers, Ltd., as Disponent Owner, and American Metals Trading, LLP (AMT), as Charterer, entered into a Charter Party on March 26, 2007 whereby Phoenix was to nominate two vessels, each to load a cargo of pig iron at the Paul berth in Vitoria, Brazil for discharge in the Mississippi River. The first vessel was to be nominated by March 31, 2007, with laydays/cancelling April 15-30, 2007 and the second vessel by April 15, 2007, with laycan of May 1-20, 2007. Owner never nominated the two vessels. Charterer, who was then forced to charter replacement vessels at a higher rate than what was agreed in the original Charter Party, claimed damages in the form of freight differential. At first glance, this non-performance would seem to be a clear breach of the contract. Yet we unanimously concluded that, although there was non-performance on the part of the vessel Owner, no damages were due.

The Panel reached this conclusion for several reasons. The Charter Party was a berth Charter Party. In fact, the performance of the contract was tied to loading at a specific berth. The Charter Party specified that, because the parties were aware of potential problems with the operation of the facility at Paul, before committing to performing vessels, Owner would first check with Charterer to ensure that the dock was operating at the times of the proposed vessels’

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ETAs. Vale do Rio Doce, the operator of the dock in question, had obtained a court order excusing it from operating the dock after mid-April 2007.

Clause 45 of the Charter Party read in pertinent part as follows:

Both Charterers and Owners are aware of potential problems with the operation of the facility at Paul and before committing to performing vessels Owner shall check with Charterers to ensure dock is operating on proposed vessels ETA.

After detailed testimony and an exhaustive analysis of vessel line-ups in Vitoria, as well as of delivery schedules from the pig iron producing region of Belo Horizonte in the interior of the country to the berth, the Panel concluded that the contract could not have been performed as intended and that the language in clause 45 regarding the operational problems constituted a condition of performance which excused Owner from having to perform the two voyages.

The Panel, nevertheless, considered that the language in clause 45, together with the nomination clause, obligated Owner to at least propose vessels for consideration as potential loaders within the agreed laydays and to discuss with Charterer the situation at the Paul dock. By its failure to even propose any vessel, even a TBN, Owner technically breached the Charter Party. On the other hand, the Panel found that Charterer had some responsibility to accurately discuss the situation with Owner as well. Charterer was, in fact, continuously denying that there was any problem with the Paul dock. The facts showed that, even if Owner had nominated vessels, Charterer would not have been able to confirm their acceptances by the dock operator. The replacement of the vessels was inevitable and could not be attributed to Owner's breach as the dock was not available for loading the cargoes during the laydays/canceling dates. The proof of this finding and arbitral decision was that the replacement vessels eventually had to load at two other berths. The Panel, therefore, denied Charterer's claim and awarded to Owner 65% of its legal expenses.

Charterer moved to vacate the award, arguing that the Panel had manifestly disregarded the law when it ruled that there was a breach but refused to award damages. The Federal Arbitration Act limits the grounds for vacatur, but under the doctrine of "manifest disregard of the law" which was first mentioned as dictum in the 1953 Supreme Court decision in *Wilko v. Swann*,<sup>3</sup> 3 unsuccessful parties have tried to open the door to judicial review of the legal merits of arbitral awards. Manifest Disregard has been controversial ever since, but it has nevertheless been the rare grounds for trying to vacate an arbitration award under

the Federal Arbitration Act. Interestingly enough, "manifest disregard of the law" is not even mentioned in that Act. For years, it was virtually defunct as a valid reason to vacate an award, but its application has recently been revived by recent Supreme Court decisions<sup>4</sup> and by the Court of Appeals for the Second Circuit decision in *T. Co. Metals, LLC v. Dempsey Pipe & Supply, Inc.*<sup>5</sup>

In her Order, and in great detail, Judge Buchwald analyzed the argument for vacatur on the grounds of Manifest Disregard of the Law. Charterer had challenged the Panel's decision because it acknowledged that Owner could not use impossibility and frustration of purpose as defenses under the general doctrine of frustration. The Judge found "more than the required" justification for the Panel's decision. She stated that the Panel's reasoning is supported by longstanding principles of contract law. She agreed that, under the facts of the case, although Phoenix had breached the contract by failing to nominate vessels, AMT would nonetheless have been unable to perform its reciprocal obligation to obtain Vale's acceptance of the vessels. In addition, she found that in a breach of contract action, plaintiff cannot recover if it would have suffered the harm regardless of defendant's actions. As such was the case here, Judge Buchwald concluded that the Panel had properly applied the law to the facts of the case. Accordingly, the arbitration award could not be vacated on the grounds of manifest disregard.

The court also rejected Charterer's argument that the Panel exceeded its authority by construing Clause 45 as a condition of performance and that it impermissibly re-wrote the contract. Judge Buchwald found that there was certainly no support for that conclusion. She thought that the Panel's determination that clause 45 constituted a condition of performance, was reasonable.

The award was confirmed.

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\*Member, Governor, Past President, SMA.

1. SMA 4201 (2013) (Bulow, Fox, Martowski).
2. *Phoenix Bulk Carriers, Ltd. v. American Metals Trading, LLP*, 10 Civ. 2963 (NRB), (S.D.N.Y., 2013).
3. 346 U.S.427, 437 (1953).
4. *Hall Street Associates L.L.C v. Mattel, Inc.*, 552 U.S. 576, 584-91 (2008) and *Stolt-Nielsen S.A et al. v. Animalfeeds International Corp*, 559 U.S. 662, 672 n. 3 (2010).
5. 592 F.3d at 329, 339-40 (2010). In this decision, the Second Circuit held that manifest disregard of the law remains a valid ground for challenging the confirmation of arbitral awards in the wake of the Supreme Court's 2008 decision in *Hall Street* decision.

## NEW TEST IN LONGSHORE WORKER'S ATTEMPTED SUICIDE 'UNCHAINED'

By James E. Mercante\*

Imagine being so physically and mentally traumatized by a personal injury that the thought of suicide becomes a reality. Worse yet, imagine executing on the idea and failing. The scenario presents a perplexing legal challenge in the field of Workers' Compensation. Indeed, one such case remains unresolved 10 years after a longshore worker's suicide attempt, but a recent ruling may put the issue to rest.

### Fall and Suicide Attempt

In 2001, William 'Willie Boy' Kealoha, a ship laborer on cleaning detail, fell 25 to 50 feet from the top of a barge to the steel deck of a dry dock. He barely survived the fall and suffered severe trauma to the head, chest, and abdomen. Apparently, not thrilled to be so painfully alive after the horrific fall, two years later, Kealoha shot himself and once again barely survived. He sought benefits under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§901-950) (LHWCA or Longshore Act). The compensation claim is still not resolved 10 years later, but in a decision that has echoed resoundingly in the field of longshore Workers' Compensation, the U.S. Court of Appeals for the Ninth Circuit recently determined that a suicide may be compensable even where there is evidence of pre-planning (as opposed to a momentary 'irresistible impulse'), and provided guidance to administrative law judges and the Benefits Review Board on the proper test to apply. Meanwhile, according to his Workers' Compensation attorney, Jay L. Friedheim, Kealoha lives in pain from the barge fall, in addition to facial injuries and a hole in one eye socket from the failed suicide attempt. He continues to seek much needed medical attention, compensation benefits, and an artificial eye.

The 1927 Longshore Act provides that Workers' Compensation is the exclusive remedy for maritime workers against their employer. Notably, the federal Act was modeled largely upon New York's Workmen's Compensation Law, which at the time, was the pioneer in the field of similar state statutes.<sup>1</sup> When the federal law was proposed, it was recognized that it would afford maritime workers the same remedies that state legislation provided non-marine workers injured or killed in the course of employment.<sup>2</sup> In exchange for giving up the right to sue in maritime tort,

a longshore worker would generally expect prompt and diligent claim resolution. But, as seen in *Kealoha v. Director, Office of Workers' Compensation Programs, Leeward Marine*, that is not always the case.<sup>3</sup>

New York's Workers' Compensation Law excludes recovery for willful injuries.<sup>4</sup> Similarly, Section 903(c) of the LHWCA (which is similar in substance to New York's law) precludes compensation if the injury was "occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." 33 U.S.C. §903(b). Thus, the haunting legal question is whether and under what circumstances a self-inflicted injury is compensable under Workers' Compensation statutes.

Typically, a death benefit is allowed if an injury results 'naturally' or 'unavoidably' in disease, and the disease leads to death.<sup>5</sup> But, one would expect suicide to fall into the "willful intention" exclusion of the Longshore Act. Nonetheless, two courts that have considered the issue under the Longshore Act, have held that there are exceptions to the "willful intention" exclusion that make a suicide caused by work-related injuries compensable.<sup>6</sup> In one case, the U.S. Court of Appeals for the Fifth Circuit approved an award upon finding that the accident and injury aboard ship caused a "manic-depressive insanity" such that the longshoreman's reasoning faculties were so far impaired that his act of self-destruction was not voluntary and willful within the meaning of the Act.<sup>7</sup>

The District of Maryland held that a work-related injury caused severe physical and mental impairment from which the longshoreman's impulse to end his life germinated.<sup>8</sup> Another court awarded benefits under the Longshore Act for a suicide even without a prior physical injury. In that case, the employee's death resulted from distress and depression over the continuing decline in business.<sup>9</sup>

Similarly, in a non-marine context, the New York Court of Appeals held in 1928 that death benefits might be awarded if a compensable work-related injury causes insanity which, in turn, results in suicide.<sup>10</sup> Indeed, there is an ALR (American Law Reports) article dedicated to this subject.<sup>11</sup>

The *Kealoha* case involved a lengthy judicial ping-pong that would appear to contradict the spirit and purpose of the Longshore Act in which the injured worker's exclusive remedy is compensation benefits paid promptly. The claim for injury resulting from the suicide attempt was joined with the original barge accident claim and a hearing was held in January 2004, before Chief Administrative Law Judge, Jennifer Gee, of the San Francisco District Office of the Department of Labor.

While Section 919(c) of the Longshore Act mandates that an ALJ “shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim,” there is no viable remedy for non-compliance. Here, the record indicates that Judge Gee’s initial decision denying the claim was issued 17 months after the hearing. A year later, the Benefits Review Board (BRB) reversed and remanded to the ALJ for further consideration. With no further hearing or briefing, Judge Gee issued her decision—again denying the claim—in April 2010, nearly four years after it was remanded. A year after that, the BRB affirmed the ALJ’s renewed denial, setting the stage for the appeal to the Ninth Circuit which reversed and remanded the case in an April 2013 published opinion back to the ALJ, where the claim again remains pending.

The ALJ had initially decided that Kealoha’s self-inflicted injuries were not compensable because the suicide attempt was not the ‘natural and unavoidable’ result of his fall, or the result of a momentary ‘irresistible impulse,’ but rather a planned and intentional action related to other factors such as employment and marital problems, a withdrawn settlement offer, and stress of an upcoming deposition.<sup>12</sup> However, on remand, the ALJ determined that Kealoha’s fall from the barge was indeed a cause of his suicide attempt, but decided that compensation was barred because the facts still demonstrated his actions were planned and pre-meditated and therefore not the result of an “irresistible impulse” (one narrow exception to the LHWCA’s “willful intent” exclusion).

On appeal, the Ninth Circuit held that evidence that a claimant planned his suicide (or attempt) does not necessarily preclude an award under the “willful intention” exclusion of the Longshore Act.<sup>13</sup> The court considered the “irresistible impulse” exception that other courts have applied in state Workers’ Compensation and life insurance self-inflicted injury cases, but determined that the operative question or ‘proper inquiry’ on remand, should be whether the work-related injury caused the claimant to attempt suicide. Thus, the court decided that a broader test should apply in LHWCA cases, namely that a suicide or injuries from a suicide attempt are compensable when there is a direct and unbroken “chain of causation” between a work-related injury and the suicide attempt. According to the court, a “chain of causation” test better reflects the Longshore Act’s focus on *causation*, rather than *fault*. 33 U.S.C. §904(b) (“Compensation shall be payable irrespective of fault as a cause for the injury”).<sup>14</sup>

## Conclusion

In view of the interest in ‘uniformity’ of admiralty law, the Ninth Circuit’s “chain-of-causation” analysis applied in *Kealoha*, if adopted by other circuits, should narrow the focus on the test to be applied in LHWCA suicide or self-inflicted injury cases.

As for the claims process, the attention a case such as this brings may precipitate changes that provide for the expeditious resolution of claims under the Longshore Act, including perhaps enforcement of section 919(c) of the act’s time limit to render a decision.

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\*Partner, Rubin, Fiorella & Friedman LLP, and Commissioner on the Board of Commissioners of Pilots of the State of New York. This article originally appeared in the October 31, 2013, edition of the New York Law Journal and is reprinted here with the permission of the NYLJ and the author.

1. *Liability For Compensation*, NY WORK COMP Consol. Laws c.67 §10 (1913); see also *Branham v. Terminal Shipping Co.*, 136 F.2d 655 at 658 (4<sup>th</sup> Cir. 1943).
2. See H.R. Rep. No. 69-1767, at 20 (1927).
3. 713 F.3d 521 (9<sup>th</sup> Cir. 2013).
4. *Liability For Compensation*, NY WORK COMP §10.
5. 33 U.S.C. § 902(2); *Voris v. Tex. Employers Ins. Ass’n*, 190 F.2d 929, 934 (5<sup>th</sup> Cir.).
6. *Voris v. Tex. Employers Ins. Ass’n*, 190 F.2d 929, 934-35 (5<sup>th</sup> Cir. 1951); *Terminal Shipping Co. v. Traynor*, 243 F. Supp. 915 (D.Md. 1965).
7. *Voris*, 190 F.2d at 929.
8. *Terminal Shipping Co. v. Traynor*, 234 F. Supp. at 915.
9. *Director, OWCP v. Cooper Assoc. Inc.*, 607 F.2d 1385, 1387-88 (D.C. Cir. 1979) (per curiam). *Kealoha v. Director, OWCP*, 713 F.3d 521, 524 (9<sup>th</sup> Cir. 2013).
10. *Delinousha v. Nat’l Biscuit Co.*, 248 N.Y. 93, 96 (1928).
11. *Suicide As Compensable Under Workmen’s Compensation Act*, 15 A.L.R.3d 616 §5[b].
12. *Kealoha v. Director, OWCP*, 713 F.3d 521, 524 (9<sup>th</sup> Cir. 2013).
13. *Id.*
14. *Id.*

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## NRG LINHAS DECISION – IS A CHANGE TO THE SMA RULES NEEDED?

By Leo G. Kailas\*

In *NRG Linhas Aereas, S.A. v. MatlinPatterson Global Opportunities et al.*, 717 F.3d 322 (2d Cir. 2013), the Second Circuit reversed the lower court's denial of a petition to confirm a Brazilian arbitral award on the ground that the lower court failed to consider whether the parties had agreed to an arbitration clause that assigned to the arbitration panel questions concerning the scope of the parties' arbitration agreement. The Second Circuit remanded the case to the District Court to determine, "on the particular facts of this case," whether the court or the ICC Arbitral Tribunal had the power to determine the scope of the parties' agreement to arbitrate.

In reaching this result, the Court referred to the Supreme Court's holding in *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995), "that questions of arbitrability are to be sent to arbitration if and only if the parties clearly and unmistakably expressed their intention to do so." The *Linhas* Court noted that the arbitration provision specifically provided that disputes arising under the agreement "including those concerning its validity, effectiveness, breach, [and] interpretation" were to be submitted to the ICC Court of Arbitration. The Court reasoned that if that provision had become part of the parties' agreement—MatlinPatterson disputed that it had—the arbitrators had the power to decide the arbitrability issue and the Final Award would be judged by the liberal standards applicable to review of arbitration awards (and almost certainly be confirmed).

One of the dispute resolution forums that competes with the SMA in the international dispute arena is the American Arbitration Association ("AAA"). The AAA Commercial Arbitration Rules as well as the AAA rules applicable to international arbitration specifically provide that the arbitrator "shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." (Rule 7 of the Commercial Arbitration Rules). The grant to the arbitrators of the power to determine their own jurisdiction cuts down on the volume of extraneous litigation concerning arbitrability that often accompanies a party's journey through the arbitration process.

The SMA Rules do not have a similar provision that permits arbitrators to decide their own jurisdiction. The SMA/MLA Liaison Committee in recent years has suggested changes to the SMA Rules that make SMA arbitration a speedier and more efficient process. Examples are the recent changes to the SMA consolidation and taking of evidence rules that are improvements to the arbitral process. I suggest the SMA, with input from the Liaison Committee and users of New York arbitration, take up the issue of whether an explicit rule permitting SMA arbitrators to decide their own jurisdiction is worthy of adoption.

*Editors' Note: The editors solicit the views of the readers on this issue.*

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\*Partner, Reitler Kailas & Rosenblatt LLC, New York and Co-Chair, SMA-MLA Liaison Committee.

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## BEWARE WHEN YOU AMEND YOUR CHARTER PARTY: THE SIR LANCELOT, SMA 4190 (2012) AND SMA 4178 (2012) (BERG, BULOW, MARTOWSKI)

By Lucienne Carasso Bulow\*

Many are under the impression that the type of cases which are heard by SMA arbitrators merely concern demurrage or cargo claims. While these types of claims are numerous, SMA arbitrators actually hear many different types of cases.

A recent case involved the bareboat charter of the *SIR LANCELOT*, a U.S. flag dive support vessel (DSV) under a BARECON 2001, a BIMCO Standard Bareboat Charter. The parties were both companies organized under the laws of the State of Wisconsin.

The charter provided that any dispute be referred to three persons in Wisconsin, one to be appointed by each party and the third by the two so chosen. The proceedings were to be conducted in accordance with SMA rules.

Under the terms of the contract between Veolia ES Special Services, Inc. ("Veolia") as charterer and Pilgrim Investments, LLC ("Pilgrim") as owner agreed that Veolia would bareboat charter the vessel for 60 months and would automatically become the owner of the vessel at the expiration of the charter. The charter clearly provided that at the end of the contracted period, Owner would tender the vessel to Veolia. The latter paid hire for 5 years

but when it came to tender the vessel, Pilgrim argued that because of a subsequent amendment to the charter, Veolia had failed to exercise its option to purchase in time and that consequently, Pilgrim maintained ownership of the vessel. Because Veolia had not yet redelivered the vessel, Owner contended that it was entitled to damages of over \$2.3 million.

Veolia moved for a Summary Judgment, asking that the Panel declare that it was the owner of the *SIR LANCELOT*. The parties, who had negotiated the amendment which gave Charterer the option to purchase the vessel sooner than in five years, requested that the Panel interpret the terms of the charter and limit its analysis to the four corners of the contract itself. The language of the amendment clearly stated that if the Charterer waited to purchase until the expiration of the charter, it had to pay Owner “the sum of \$10,000 at such time.” Both parties agreed that the charter ended on January 31, 2011.

Charterer/Buyer, Veolia, argued that the vessel automatically became its property at the end of the charter whereas Pilgrim contended that Charterer had to exercise its option to purchase the vessel before the charter ended on January 31 and that it had to pay \$10,000 beforehand.

As both parties agreed that, according to the terms of the BARECON, the charter period ended on January 31 and that the Panel was requested to interpret the charter without referring to any extrinsic evidence, the Panel could only find that Owner’s interpretation of the charter was correct (*i.e.* that the amendment had changed the agreement and that Veolia had to exercise its option to purchase prior to January 31). The arbitrators, however, surmised that there must have been communications between the parties prior to January 31 as Owner had been invoicing Charterer for hire payments in February and March, which Veolia had paid. As a result, when issuing its Partial Final Award (SMA #4178), the Panel wisely left the door open for the parties to request another hearing to present evidence.

A two-day evidentiary hearing was eventually held in New York by agreement of the parties. Eight witnesses testified, and evidence was presented. The Panel was presented with evidence that Charterer had not only paid all the charter hire required under the charter but that it had paid an additional \$234,488 over and above the \$10,000 purchase price option. Charterer actually had credits owed it for overpayments far in excess of the \$10,000 purchase option price.

Owner insisted that it was legally impermissible for the Panel to accept the introduction of extrinsic evidence. By its Final Award (SMA #4190), the Panel found that the parties had not treated the Charter Party as if it had ended on January 31, 2011. Pilgrim continued to invoice for charter

hire, and Veolia kept paying the invoices. Charterer was awarded damages of \$505,218 as well as \$150,000 towards its legal fees as required by Section 30 of SMA Rules.

In addition, the Panel ordered that Pilgrim promptly take all of the necessary steps to effect the immediate transfer of title and that the vessel be immediately delivered to Veolia.

Had the parties been more careful and not created ambiguities when they amended their charter, grounds to go to arbitration would probably not have been sufficient to do so.

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\*Member, Governor, Past President, SMA.

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## VESSEL REDELIVERY NOTICE DEEMED IMPROPER: *THE FALCON* CARRIER, SMA 4217 (2013) (MARTIN, ARNOLD, BERG)

By Chris Hewer\*

Maritime arbitrators in New York recently awarded a shipowner \$7.45m in damages after finding a charterer was in breach for cancellation and premature redelivery of the owner’s vessel, which had achieved the necessary approval of three oil majors under the terms of the charter party.

The dispute had its origins in a two-year time charter on the Shelltime (1984) form between Falcon Carrier Shipping Ltd, as owner of the 68,147 dwt oil tanker Falcon Carrier, and time charterer ST Shipping and Transport Pte Ltd, the shipping and chartering arm of Glencore Ltd.

The charter party at issue was a two-year agreement dated May 2008. Just before delivery under the charter, the vessel underwent a ship inspection report program (SIRE) by a BP inspector. BP subsequently advised Falcon the vessel was rejected and unacceptable for BP Group use. Shortly thereafter, ST Shipping issued notice to cancel.

The vessel underwent three subsequent SIRE inspections. Falcon contended these were favourable and the vessel was acceptable to the oil major named under the charter. But ST Shipping maintained the results were negative, and therefore began issuing cancellation notices and arranging for redelivery of the vessel at Cristóbal, Panama.

Two days after the vessel’s arrival at Cristóbal, ST Shipping reversed its position and said it intended to continue with the time charter. It issued voyage orders, which Falcon agreed to comply with provided ST Ship-

ping's redelivery notice was withdrawn and ignored. Eleven days later, while the vessel was performing the nominated voyage, ST Shipping claimed it still deemed the original cancellation notice to be in force. Thereafter, the vessel performed five further chartered voyages before ST Shipping issued a second notice of cancellation and redelivery, pursuant to physically redelivering the vessel on March 3, 2009.

The principal issue in dispute was whether ST Shipping's cancellation of the charter and its early redelivery of the vessel were wrongful and in breach of clause 48 of the charter. The clause stipulated, in pertinent part: "The vessel shall hold at least three out of the following oil majors – Conoco / Chevtex / Exxonmobil / BP Amoco / Shell / Statoil... If during the charter any of the approvals will be withdrawn or expired, owners shall take necessary steps to rectify the faults and/or maintain acceptance... Should owners fail to maintain at least three approvals... charterers to notify owners and owners to have 45 days after notification, or three discharge ports, whichever occurs later, to rectify same. If after such time vessel still fails to maintain at least three oil company approvals... charterers have the option to cancel the charter."

Falcon maintained approval clauses in tanker charters were a misnomer and a carry-over from pre-Erika days, and the tanker industry now fully understood there are no such approvals. ST Shipping, meanwhile, contended clause 48 was not a charterer's clause and it was the owner's burden to prove the vessel did in fact have the requisite approvals.

The arbitrators Manfred Arnold, Jack Berg and John Martin agreed oil majors no longer issue approvals as such. But they disagreed as to the proper construction of the clause 48 approval provision. The three issues to be decided were: whether the clause 48 notice remained in effect after Falcon accepted early redelivery of the vessel and after ST Shipping subsequently agreed to continue with the time charter; whether the vessel had three oil major approvals when ST Shipping gave its notice of redelivery; and whether the notice of redelivery satisfied the time requirements under clause 48.

The arbitrators agreed Falcon had every reason to believe ST Shipping had agreed to waive the clause 48 notice when it decided to continue performing under the charter party after initially redelivering the vessel at Cristóbal. It was noted Falcon had conditioned its agreement to perform the ST Shipping sub-charter on ST Shipping's agreement to withdraw all previous redelivery notices. The arbitrators said ST Shipping had severely prejudiced Falcon's right to refuse the voyage

instructions and to retain commercial control of the vessel. ST Shipping had therefore waived any right to claim the clause 48 notice remained in effect.

The arbitrators found Falcon was not in breach of the three oil major approvals at the time of the redelivery notice being issued. Clause 48 provided Falcon with the time and opportunity to have additional SIRE inspections performed before the vessel could be redelivered, but did not mention an actual acceptance of the vessel for a voyage by an oil major. Since it was ST Shipping that controlled the vessel's employment and the actual tendering of the vessel to a particular oil major, its construction of the clause 48 provision of time for additional SIRE inspections provided no protection to Falcon, which would have no way of knowing the vessel had been rejected by an oil major that had previously approved it.

The arbitrators emphasised not every rejection of a vessel by an oil major indicates the vessel is totally unacceptable to that oil company, and noting the vessel had approval from BP and Shell in February 2009, the arbitrators found Falcon had done all in its power to obtain the approval and it was likely the vessel would be accepted at least for some voyages by those companies.

The arbitrators said, in connection with a sub-charter in January 2009, ST Shipping had stated the vessel was not unacceptable to ExxonMobil, Shell, BP, and Statoil Hydro. ST Shipping, the arbitrators said, could not subsequently assert the vessel was not acceptable to these oil majors. In conclusion, it was held that, in February 2009, the vessel had the requisite clause 48 approvals. Moreover, since the vessel had the required approval, the redelivery notice by ST Shipping was improper.

The arbitrators awarded Falcon Carrier Shipping the sum of \$7.45m in respect of cancellation damages, redelivery hire, off-hire, interest and legal fees.

The implications of the Falcon Carrier dispute formed the subject of a major discussion at a Society of Maritime Arbitrators (SMA) seminar held in New York on November 21, at which the commercial manager of the Falcon Carrier expressed his pleasure at the decision to opt for New York arbitration because of its "transparency, cost awareness and quality."

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\*Former editor of Fairplay International Shipping Weekly and currently a partner in Merlin Corporate Communications. This article appeared in Insurance Day, December 4, 2013, and is reprinted here with the permission of Insurance Day and the author.

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## IN MEMORIAM — DONALD JOSEPH SZOSTAK

By Manfred Arnold\*

As time went by, I had hoped it would become easier to write an obituary— but that is not so. I have come to realize that it is difficult for me to accurately describe and praise the multi-facets of Don's persona. We all saw the same man, but our memories may differ slightly depending on whether we are family, friends, members of St. Michael's, colleagues, schoolmates or his fishing partners. Hopefully, the whole of those memories will explain why we loved Don and now will so deeply miss him.

Don had a stellar career starting with traditional hands-on experience in a shipyard, then moving on to Webb Institute and graduating with a degree in Naval Architecture and Marine Engineering. His post-graduate work experience started with Lockheed, followed by General Dynamics and then 13 years with Marine Transport Lines. I guess it also was the time when Don experienced the close-knit contacts in the maritime industry; a time when you met people, associated with them and crossed paths again in the future. Don's broad industry background, ranging from chartering and operation to financing and insurance, also included pioneering knowledge in the LNG/LPG business, which coupled with his personal assets, had well prepared him for a continued and deserved ascension in the corporate hierarchies.

His next career move proves that very point. After a relatively short time with Navios, Don became president. For a brief period, the SMA had two former Navios presidents in its ranks – Don and Robert Shaw thereafter. After Navios, Don joined Energy Transportation as President and Chief Operating Officer until his retirement in 1992. During this period, he also served on the Board of Directors of the UK P&I Club.

When Don applied for membership in the SMA, we wanted him; his background, experience and reputation made him an ideal candidate. Not surprising at all, Don exceeded expectations very quickly and became a highly respected and valued colleague. For six years, Don was the editor of this publication. In 2006, I took over from Don. In "my" first issue, I stated, "I have asked Don Szostak to stay on and be not only my guardian angel, but ensure that I will continue the true and tested standards which he had created..." Four years later, Don resumed the editorial helm through the middle of last year. He never clamored for the limelight, but was always there to assist, supply his industry knowledge and provide leadership. He volunteered for many tasks and committees, such as education, award

writing and technology. He provided sound counsel at the Board meetings. Don certainly kept his promise to volunteer time for committee services, and he did so until the very end.

I had no real idea how far it was from New Hampshire, where he and Pat lived, until we attended the services (as did quite a number of our members). I was so used to seeing Don at Board and committee meetings that his dedication and duty became something one expected as a natural from Don. We all knew about Don and Pat's love for travel, but commuting to and from New York equaled, in net time, a flight cross-country or to Europe. Don took it on as part of his commitment to the SMA.

It was always great to see Pat and Don at the international arbitration conferences, as part of the SMA delegation, in London, Auckland, Hamburg and Vancouver.

Being lauded for professional achievements is a recognition of a person's success, but after having spoken with Pat over the last few months and meeting their children, spouses and grandchildren reconfirmed to me that the love and sorrow shown by the family is the real measure of his life, the man who had been chosen as the "Father of the Year" when the family lived in Chatham, New Jersey.

From the "Words of Remembrance" offered by his four children at the mass, we learned that he and his brother spent time in an orphanage. It is not something a person discusses, it certainly explains Don's love and concern for his family. The Szostak family have scattered over three continents; and keeping in touch by visits was always in Pat and Don's travel plans. One of his last wishes was that everyone in his immediate family would be able to travel from near and far and spend this past Christmas at their home in New Hampshire. Don's wish was fulfilled.

Someone once said that the advantage of getting older is that you will have old friends; on the other hand, the older you get the more of your old friends you will lose. Let's hold on to friends we have, old and new.

The Chinese have an expression – "old friend" – it means more than the plain words or having known a person for a number of years. It means a person who understands you, a person who will go out of his way for you without the expectation of a reward and without reservation.

*Thank you, Don – rest in peace, old friend.*

*For further details on Don's life, please visit the SMA website at [www.smany.org](http://www.smany.org).*

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\*Member, Governor, and Past President, SMA.

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## IN MEMORIAM — HERBERT SONDHEIM

By A. J. Siciliano\*

We have lost another of our beloved members. After enduring recurring bouts of pneumonia, Herb's heart gave out and he passed from us on January 12, 2014. Herb was laid to rest at the New Montefiore Cemetery, Farmingdale, N.Y. alongside his beloved wife, Beatrice, who had passed 12 years earlier, just one month short of what would have been their 50<sup>th</sup> Wedding Anniversary.

Born in 1927 in Germany, Herb emigrated to the US at the age of 12. A short five years later, Herb lost his father and returned home from the US Army to support the family. At the end of his workday, Herb attended college in the evening and graduated from the Baruch School of Business, with a major in accounting. He joined the SMA in 1975. At that time, Herb was still serving as Vice President and Treasurer of Kersten Shipping Agency, Inc., which positions he held until his retirement. As such, he was the only financially educated and professionally trained Treasurer the SMA has ever had. But his legacy is not one of numbers.

Herb selflessly served the SMA as Treasurer for longer than anyone else. In doing so, he set a standard of integrity and professionalism for all to emulate. He was especially kind to me during my presidency. I often sought out his sage advice and wise counsel on knotty issues. Herb was never too busy to listen or to help me. I found him to be a reservoir of practical information and patience, often given with a twinkle in his eye and mischievous good humor. His was a calming voice, tempered by the wisdom and experience of having spent more than 50 years in shipping, including several as an officer and director of a number of ship owning companies.

I will remember Herb as the consummate gentleman, with special emphasis on "*gentle*."

Despite his raspy voice, people were naturally drawn to Herb's infectious smile and easy manner. I never heard him raise his voice or utter a harsh word against anyone. Herb was respected and admired by all who had the good fortune to know or work with him and that, not numbers, is his true and deserved legacy.

*Rest in peace dear friend ... your work here is done.*

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\*Member, Former Governor, and Past President, SMA.

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## IN MEMORIAM — ROBERT V. CORBETT

By Christophil B. Costas\*

Robert V. Corbett, sadly and quite suddenly, passed away on January 8, 2014. Bob practiced admiralty and maritime law in New York with the law firm of Joseph Cardillo, Jr., and its successor, Cardillo & Corbett, for his entire career, a career that spanned almost 50 years.

Bob was born in Hoboken, New Jersey in February, 1939. His beginnings were austere. His early childhood and teenage years were not easy ones. He lost his mother to a difficult illness at a very young age, a loss that must have been devastating. His father worked as a blacksmith. At one point in his early life, aged 9 or 10, Bob shined shoes on the streets of Hoboken, singing "O Danny Boy" to his Irish customers in hopes that they would give him a bigger tip. Fortunately, there were those who saw that he had the potential to rise from his humble beginnings, especially a stern and demanding nun in grade school. He often spoke of how she convinced his father that Bob could go beyond the streets of Hoboken and insisted that he try for admission to St. Peter's Prep School. He did so and was admitted.

Bob was the product of a Jesuit education, having attended St. Peter's Prep on a scholarship and St. Peter's College, where he majored in physics and from which he received a B.S. degree in 1960. After graduation from St. Peter's College, he took a position at Steven's Institute of Technology, programming computers and working on early nuclear submarines being developed there. Bob then decided he wanted to be a lawyer and attended New York University Law School, from which he received his LL.B degree in 1965. After graduation he joined the Cardillo law firm where he practiced all aspects of admiralty and maritime law as an associate and partner until his death. He also served the industry as an arbitrator in charter party disputes.

Bob had considerable talents and abilities as a lawyer. He had a very quick mind which enabled him to grasp the real issue and the heart of a problem and then offer strategies, theories and ideas for solving them not evident at the time to others. Not only did Bob know the law, he also knew the business of shipping. Accordingly, he could expertly advise his clients, be they shipowners, operators, charterers, agents, managers, anyone involved in a maritime venture, and provide them not only with sound legal advice but also with practical and commercial solutions to the daily problems encountered by them in their business. Over the years, many of his clients became and remained

Bob's good friends to whom he offered and who benefited from his usual, thoughtful counsel with respect to various personal matters. His counsel will be sorely missed by his clients and his partners.

Bob is survived by his wife Alisa, his son, Nathaniel, and daughter, Caroline.

May his memory be eternal.

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\*Partner, Cardillo & Corbett, New York

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## PROFESSOR JOSEPH C. SWEENEY A/K/A “JOE BOATS” RETIRES FROM FORDHAM LAW SCHOOL

By Howard M. McCormack\*

I am most pleased to be able to tell your readers about my colleague at Fordham Law School and my longtime friend, Professor Joseph C. Sweeney, known to all his students as “Joe Boats.” Professor Sweeney and the author were co-teachers at Fordham Law School of an upper-class course in Admiralty and International Maritime Law from approximately 2000 until 2012. The author of this article was an Adjunct Professor at Fordham Law School during that time.

Professor Sweeney was educated at Harvard College, A.B. 1954, Boston University Law School, LL.B 1957 and Columbia Law School, LL.M 1963. After finishing law school he was sent to Officer Candidate School of the U.S. Navy in Newport and was commissioned as a legal specialist in the Navy. (The Navy Judge Advocate Corps did not exist until some years later.) He spent five years as a Navy lawyer with duties at a Naval Air Station in Georgia and on the staff of the Destroyer Forces Atlantic Fleet Headquarters in Newport and as an instructor in the Naval Justice School. He also served in various overseas commands, eventually retiring as a Captain, USNR, Judge Advocate General Corps. He, therefore, outranked the author who, after three years at sea as a regular line officer on an Atlantic Fleet Destroyer rejoined the Naval Reserve after graduating from Fordham Law School in 1961, eventually retiring as Commander, USNR, Judge Advocate General Corps. Despite the fact that Joe outranked the author, we got along very well in our chosen careers in the practice of admiralty law.

After completion of his active-duty naval service, Professor Sweeney joined the admiralty law firm of Haight, Gardner, Poor & Havens in its collision section. He worked

with Charles Haight; Gordon Paulsen, a former president of the Maritime Law Association of the United States; Charles Haight Jr. (Terry), later a federal judge of the U.S. District Court for the Southern District of New York; Richard Ashworth; Ray Hayden, another president of the Maritime Law Association, and other leading members of the admiralty bar. He was personally involved in some of the leading admiralty cases involving collision.

He left Haight Gardner on Friday, September 16, 1966 to begin an academic career at Fordham Law School the following Monday. He started his well-known Admiralty and International Maritime Law course at Fordham in the fall of 1967, continuing there until the summer of 2013 when he retired. I felt privileged to join Joe on the Fordham Law faculty for over 12 years, co-teaching the Admiralty and International Maritime Law course after my service as president of the Maritime Law Association. In addition to a dozen Fordham J.D. students in their second or third years of law school, there were about 10 or 11 Master of Law students from around the world.

Joe's first Admiralty class in 1967 included at least four students who became leading members of the admiralty bar; namely, Ray Burke, Jr., William Crabtree, Bob Phillips and David Martowski, past president of the Society of Maritime Arbitrators.

He also taught many Fordham law graduates who in their careers have excelled in the practice of maritime law including Pat Bonner, most recent past president of the MLA, and Lawrence Brennan, who now teaches the Admiralty course at Fordham.

Joe also served as an arbitrator in various maritime law arbitrations using SMA Rules and “ad hoc” procedures. He was also an expert witness in the Exxon Valdez insurance coverage dispute.

I was very grateful to Joe for allowing me to join him at Fordham Law School as his co-teacher. Joe, of course, had outstanding professional qualifications in admiralty law. We operated as the academic (Joe) and the practitioner of maritime law (the author), so we could give the student both a scholarly view of maritime law, as well as a practitioner's view of how the practice is conducted. We were a great tag team given our diverse backgrounds and many years of maritime law experience. My three years at sea were enough to permit Joe and me to give a realistic and practical focus on admiralty law. We matched our joint Navy and practical law firm experiences into what became an interesting and dynamic law course.

We also divided some topics in the classes based on each of our professional business law experiences. We both discussed salvage and collision, and due to my business experience in marine insurance; I covered that topic

plus general average. We both covered the other subjects, depending on how we wanted to address them. At times, like most admiralty attorneys, we used stories from our sea-going experiences to illustrate various issues. Joe was an erudite and charming law professor, due no doubt to his Irish heritage. Between the two of us, we had a wealth of experience on many of the admiralty subjects.

Joe was also a prolific author contributing more than 22 articles to the *Journal of Maritime Law and Commerce* where our great friend, the late Professor Healy, was an editor.

It was one of the most rewarding experiences of my professional life to have been associated with the late Nicholas Healy (a good friend of Joe's). I was Nick's student in a year-long course in Admiralty Law offered in the New York University Graduate International Law program. Joe and Nick knew each other professionally but they co-authored the leading Admiralty treatise on collision law which is still a guide for practicing lawyers. My one regret is that I graduated from Fordham Law School in 1961 before Professor Sweeney arrived in 1966 to teach various courses including admiralty. I made up for that with at least 12 years joining Joe as an Adjunct Professor of Law at Fordham Law School teaching our favorite aspects of maritime law and practice. It is not every day that one gets to teach such a course with someone like Joe Boats. Fordham was extremely lucky to have such an erudite and jovial Irishman on its faculty. As a graduate of Fordham Law School, I am honored to have been given the opportunity to work with him.

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\*Of Counsel, Burke & Parsons, New York, and Past President, The Maritime Law Association of the United States.

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## ANNUAL SEMINAR ON MARITIME ARBITRATION IN NEW YORK UNDER SMA RULES

By Klaus Mordhorst\*

The SMA again offered its popular, comprehensive two-day seminar on "Maritime Arbitration in New York under SMA Rules," for the 9th consecutive year, on February 20 and 21, 2014 at the Best Western Seaport Hotel,

33 Peck Slip, New York, NY 10038 (in the historic South Street Seaport District in Downtown Manhattan).

This course is offered to help further and promote the fair, just, ethical and cost effective resolution of charter-party and other maritime contract disputes by arbitration in New York. Jeffrey Weiss, Esq., Professor of Maritime Law at New York Maritime College, with over 28 years of college and graduate-level teaching experience, will again be the lead instructor.

The subjects to be covered will include: Arbitration Overview, Commencing the Arbitration, the Federal Arbitration Act and SMA Rules.; the Arbitration Award: Interim 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 and Related Issues; Time Bar, Defaults and Consolidation of Arbitrations.

The Maritime Law Association of the United States ("MLAUS"), is an accredited New York State provider of Continuing Legal Education ("CLE") was again a co-sponsor of the 2014 SMA Arbitration Seminar for purposes of CLE credits.

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\*Member, Governor, Past President, SMA.

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## THE SMA AT 50

By Klaus Mordhorst\*

If we wanted a real birthday party, I think we pulled it off. Our black-tie dinner dance on November 21<sup>st</sup>, 2013, was an elegant, festive and most enjoyable affair, which recognized and celebrated the past fifty years of diligent service to maritime arbitration by the Society of Maritime Arbitrators, Inc. and its members in a truly appropriate fashion.

The setting at the venerable New York Yacht Club in the middle of Manhattan, the spectacular Model Room with its hundreds of ship- and yacht models gracing the walls, bottom to ceiling, its enormous Tiffany window standing in for a ceiling, could not have been any more "on theme" to mark this remarkable occasion. Some 187 arbitrators, lawyers, attorneys, judges, wives, friends and sweethearts attended.



The Yacht Club and its attentive staff went all out, from the superb dinner,\*\* the meticulous service, to the personal attention. The Peter Duchin Orchestra provided non-stop music. They band played everyone's favorites and enveloped the capacity crowd in a genuinely "let's have a ball" atmosphere. It made a mockery of the ubiquitous jokes that legal professionals are stiff and humorless. We all had a ball!

There were some truly nice compliments and praises said by some wonderful people and friends. Whether or not deserved, we sincerely enjoyed and relished all the kind words and thank you for them and for your support in making it the party of the year.

We promise to keep our part during the next 50 years!

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\*Member, Governor, Past President, SMA.

\*\*Thanks, too, to three persons who could not attend but contributed anyway: Gerd Mangels, Rob Spaulding, and LeRoy Lambert.

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## EDITORS NOTE

Unfortunately, we have, yet again, had to say goodbye in this issue to several stalwarts of the New York arbitration community. We thank Manfred, Tony, and Chris for their remembrances of Don Szostak, Herb Sondheim, and Bob Corbett. They will be missed. And we wish all the best to Professor Sweeney in his retirement and thank him for his many contributions to maritime law and the maritime industry.

Although it's still more than a year away, it's not too early to make your plans to attend the next ICMA Conference, May 11 to 15, 2015, in Shanghai.

The Arbitrator has a long history of providing timely and relevant articles and information to the maritime arbitration community in New York and around the world. To continue to do so requires your support! If you have articles and ideas to contribute to future editions, please let us know. Also, we welcome your feedback on each and every issue. Please do not hesitate to contact us, [rshaw@mystrasventures.com](mailto:rshaw@mystrasventures.com) or [leroy.lambert@ctplc.com](mailto:leroy.lambert@ctplc.com). Thank you.

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