Dear Colleagues:

I am writing to solicit comments/views from Committee Members on a specific issue that is under consideration by the Liaison with Society of Maritime Arbitrators Subcommittee (Subcommittee). Specifically, the Subcommittee is looking into whether Section 5 of the SMA’s Code of Ethics should be amended. This topic was considered at the Subcommittee’s last meeting and it was the widely held view that the Subcommittee would benefit from comments from the admiralty bar on this issue.

Section 5 of the SMA’s Code of Ethics currently reads as follows:

5. No member shall confer with the party or counsel appointing him regarding the selection of the third Arbitrator.

The question under consideration is whether to amend Section 5 to permit counsel to confer with party-appointed arbitrators on a suitable third Arbitrator/panel Chairman and, if so, to what extent. For example, can counsel suggest specific individuals; suggest a third arbitrator with a specific expertise; provide names or types of third arbitrators that should be excluded from consideration (i.e., a potential chair who is employed at a P&I Club or practicing lawyer), etc.

Other arbitral organizations take differing approaches on this issue. By way of example:

Canon III(b)(2) of the American Arbitration Association’s Code of Ethics for Arbitrators in Commercial Disputes, provides as follows:

“In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;”

Guideline 8(b) of the IBA Guidelines on Party Representation in International Arbitration, provides as follows:

It is not improper for a Party Representative to have Ex Parte Communications in the following circumstances:

(b) A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.

If you have a view on this issue, please share it with me [pskoufalos@browngavalas.com] and our Committee’s Vice-Chairman, Chris Nolan [chris.nolan@hklaw.com]. If there is a sensitive consideration you do not wish to address in writing, we will be glad to schedule a short call with you so that we can add it to our summary findings. Also, if you think Section 5 of the SMA’s Code of Ethics should be amended in a particular manner, feel free to suggest wording. Chris and I will then compile your responses and report to the Subcommittee.

The collective experience and insights of our Committee Members is invaluable, so we hope you will take the time to provide your input on this issue. We would like to report back to the Subcommittee within the next three weeks before our Spring meeting. We will provide a summary of the findings at that time.