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In this issue:

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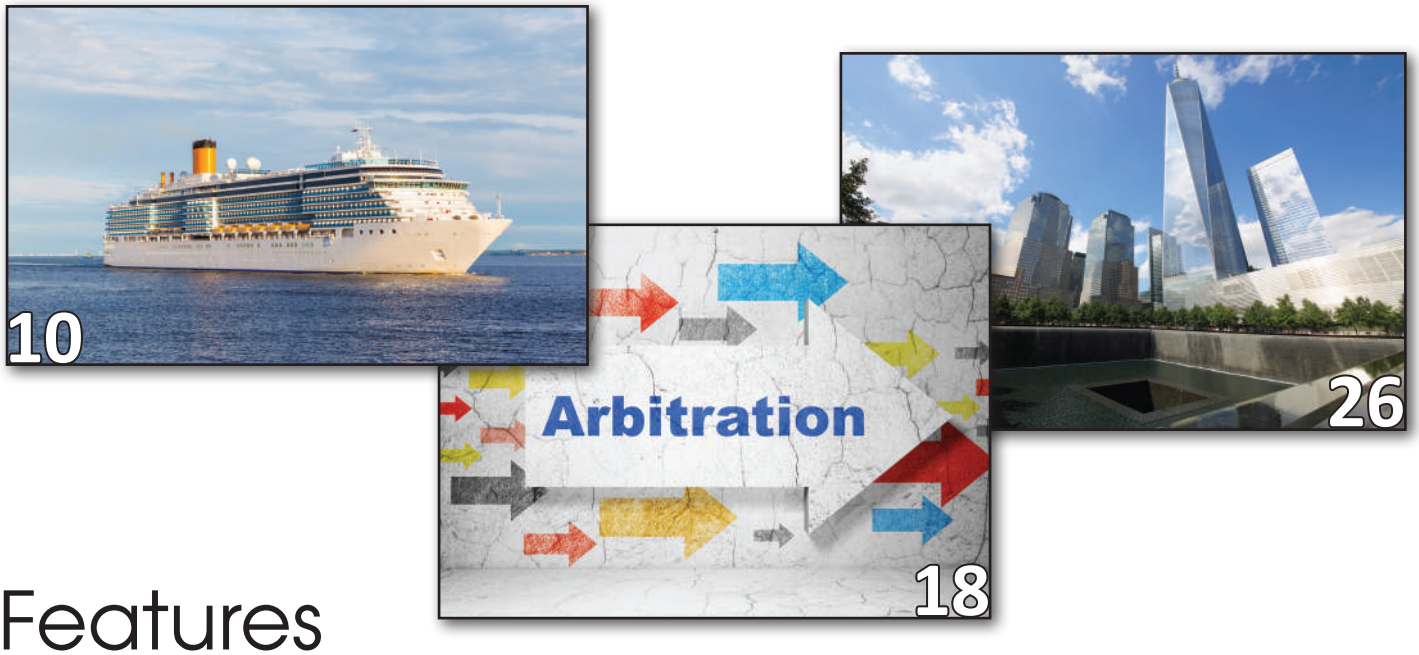

Features

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Message From the Chair

Florida—Connected to Every Corner of the Globe

Florida winters are known for their abundant sunshine, mild temperatures, and throngs of part-time residents and visitors looking to escape dreary, colder locations. This image of Florida with its snowbirds, however, is becoming an anachronism. The reality in 2018 is a Florida with more than 20 million year-round residents and booming commercial activity that connects Florida and its citizens to every corner of the globe.

A. LACAYO

This Winter 2018 issue of the *International Law Quarterly* dives into international aspects of maritime, admiralty, and transportation law. Transportation, whether by air, land, or sea, has transformed Florida, and understanding the legal landscape associated with the movement of people and goods inures to the benefit of all international practitioners. Similarly, developments in the law in the specialized fields of admiralty and maritime law reverberate in a state with fourteen seaports stretching from the Port of Pensacola to the Port of Key West.

Through this edition of the *ILQ*, The Florida Bar International Law Section continues to *Lead Globally with Information, Innovation, and Insight*. The Florida Bar International Law Section is committed to amplifying the message that Florida is the place for international legal expertise and services, and this is particularly true for the three practice areas covered in this issue.

If our section's mission resonates with you, get involved. Attend our flagship CLE program, the iLaw 2018, on 16 February 2018, and learn about cutting-edge developments in the law in one of three concurrent tracks. In the spring, join us for the Florida-Quebec Forum in Fort Lauderdale in March and the ILS Retreat and Annual Meeting in Bonita Springs in May. For all the latest information, follow us through our weekly email *Gazette*, our continually updated website (internationallawsection.org), or our various social media platforms.

We look forward to seeing you soon!

Arnoldo B. Lacayo
Chair
International Law Section of The Florida Bar

From the Editors . . .

EDITORS JAVIER PERAL, RAFAEL RIBEIRO, AND LOLY SOSA

Florida is one of the world's leaders in international trade. According to statistics provided by Enterprise Florida, over $148.8 billion flowed through Florida's airports and seaports in 2016. Florida also accounts for 24% of the total U.S. trade with Latin America and the Caribbean, more than 60,000 exporting companies are based in the state, and the international trade sector supports 2.5 million Florida jobs. Florida also is home to many cruise lines, and in 2017, there were 2,506 cruise ship stops in six destinations in Florida, with 20 cruise lines deploying 96 cruise ships from our seaports.

To support these vital industry sectors, we are fortunate to have a deep bench of Florida-based legal practitioners who are specialists in admiralty, maritime, and transportation law. In this Winter 2018 *International Law Quarterly*, we wanted to give these practitioners an opportunity to address the latest and most significant issues in their respective fields, and we think you will find the Winter 2018 *ILQ* enlightening and useful.

The *ILQ* would like to thank co-editors Ryon L. Little of De Leo & Kuylenstierna PA and Peter Quinter of GrayRobinson PA for their assistance in securing the content for this edition. We also would like to thank Captain Robert Gardana, chair of The Florida Bar's Admiralty Law Section, for his and the Admiralty Section's support of the Winter 2018 *ILQ*.

R. LITTLE

P. QUINTER

Ethics Questions? Call The Florida Bar's ETHICS HOTLINE: 1/800/235-8619

Florida Supreme Court Adopts Bar Rules on International Litigation and Arbitration Certification

On 9 November 2017, the Florida Supreme Court adopted a new Subchapter 6-31 (Standards for Board Certification in International Litigation and Arbitration), outlining standards for board certification in the field of International Litigation and Arbitration. This subchapter includes four new Bar Rules.

Bar Rule 6-31.1 (Generally) provides that a member in good standing with The Florida Bar, who is eligible to practice law in Florida and meets the standards prescribed in Subchapter 6-31, may be issued a certificate identifying the lawyer as board certified in international litigation and arbitration. Bar Rule 6-31.2 (Definitions) provides definitions for the terms "International Litigation and Arbitration," "Practice of Law," and "International Litigation and Arbitration Certification Committee." Bar Rule 6-31.3 (Minimum Standards) outlines the minimum standards of practice, experience, and education required to earn a certification in International Litigation and Arbitration. And Bar Rule 6-31.4 (International Litigation and Arbitration Recertification) describes the requirements for seeking recertification in International Litigation and Arbitration at the conclusion of a five-year cycle.

The International Litigation and Arbitration certification becomes the twenty-seventh certification in The Florida Bar's certification program. Applicants for this certification will be required to have fifty CLE credits in international litigation and/or arbitration over the five years preceding application.

The inaugural nine-member committee for the new International Litigation and Arbitration Certification is expected to begin its work in February.

Crack in the Carmack? Florida Supreme Court Holds Carmack Amendment Preemption Not Absolute in All Claims Involving Inland Shipments

By Robert J. Becerra, Miami

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The Carmack Amendment, 49 U.S.C. Sec. 14706 et. seq., was enacted in 1906 to establish a uniform national law covering interstate carriers' liability for property loss.[1] It imposes strict liability on a motor carrier or freight forwarder in an inland shipment for all losses relating to goods it transports in interstate commerce. The plaintiff need not prove negligence. A shipper establishes a prima facie case under the Carmack Amendment with proof by a preponderance of the evidence that the goods: (1) were delivered to the carrier in good condition; (2) arrived in damaged condition; and (3) resulted in the specified amount of damage.[2] Once the plaintiff establishes a prima facie case under the Carmack Amendment, the burden shifts to the defendant to show that it was free of negligence and that the damage was caused by one of the several excepted causes that relieve carriers of liability.[3] The amendment's provisions typically preempt state law claims against interstate trucking companies for damages to transported goods, promoting interstate commerce by achieving a uniform legal regime across all fifty states and preventing truckers from being exposed to fifty different sets of laws.[4]

The Carmack Amendment preempts state law claims against interstate trucking carriers for loss or damage

Carmack Amendment, continued

to shipped goods or property. Preempted state law claims include negligence, fraud, conversion, and unfair trade practices, if the claims arise out of a bill of lading issued for shipment of property.[5] Carmack Amendment preemption embraces all losses resulting from any failure to discharge a carrier's duty as to any part of an agreed transportation. A cause of action against an interstate carrier outside the preemptive scope of the Carmack Amendment is the rare exception.[6] For example, courts have found that the Carmack Amendment preempts fraud and conversion claims arising from a carrier's misrepresentations regarding delivery conditions and failure to carry out delivery;[7] fraud; negligent and intentional infliction of emotional distress claims; claims under the Texas Deceptive Trade Practice Act, when a moving company failed to deliver household goods to a new home in time for Christmas;[8] fraud claims relating to the making of a contract; and claims based on an alleged fraudulent estimate made to induce a transportation contract.[9]

Laing v. Cordi[10] is instructive to understanding the wide scope of Carmack Amendment preemption. In *Laing*, the plaintiffs, after rejecting the terms of carriage of the defendant, arranged transportation of their household goods from Michigan to Florida with a competitor of the defendant. Instead of the competitor picking up the goods, the defendant loaded the goods into the trailer. The plaintiffs refused to sign a contract with the defendant, sign a bill of lading, or pay additional costs to the defendant. The plaintiffs ultimately received their shipment after a couple of months, but upon delivery discovered most of the goods were missing or destroyed. The plaintiffs filed suit, alleging both Carmack Amendment and state law claims[11] against the defendant. The defendant moved to dismiss the state law claims, asserting that these were preempted by the Carmack claims.

The *Laing* court granted the defendant's motion to dismiss, finding that the Carmack Amendment preempts "state law claims arising from failures in the transportation and delivery of goods." Although the court acknowledged that situations may exist where the Carmack Amendment does not preempt state law claims, those claims must be based on "conduct separate and distinct from delivery, loss of, or damage to goods."[12] The court stated that the plaintiffs' claims for conversion and civil theft were predicated on the carrier's failure to deliver the plaintiffs' goods. Although the claim alleged that the carrier knowingly, intentionally, and maliciously converted the plaintiffs' property, the court stated that these contentions did not alter the fact that the claims were based on the carrier's failure to deliver the property, and thus were preempted by the Carmack Amendment.[13]

Other courts have found Carmack preemption in cases where the claims alleged were intentional torts. The Eleventh Circuit has found Carmack preemption of state or common law claims for fraud, negligence, wantonness, and outrage for failing to deliver goods[14] while the Seventh Circuit has found that the Carmack Amendment preempted claims for negligence, breach of contract, conversion, intentional misrepresentation, negligent misrepresentation, and negligent infliction of emotional distress.[15] A South Carolina district court held that the Carmack Amendment preempted all state law contract and tort claims arising out of an international shipment of goods, including claims under South Carolina's Unfair Trade Practices Act, finding that the Carmack Amendment has "great preemptive force."[16]

Does this mean there is no hope for state law claims where the Carmack Amendment may also be applicable to loss or damage claims in an interstate shipment? A recent Florida Supreme Court decision opened a crack in what otherwise appeared to be solid Carmack preemption doctrine. In *Mlinar v. UPS*,[17] the plaintiff, Ivana Mlinar, a professional artist, brought suit against United Parcel Service (UPS), alleging that two of her oil paintings were unscrupulously removed from their packaging during the interstate shipment process and subsequently sold to a third party without her knowledge or consent. Mlinar had shipped her paintings through UPS, but when the container with the paintings

... continued on page 45

Rough Waters Ahead . . . Navigating Maritime Liens and Arrests
Why the Advice of Maritime Counsel Remains Crucial Prior to Arresting a Ship

By Michelle Otero Valdés and Megen M. Gold, Miami

Maritime liens and in rem actions constitute a complicated and unique area of maritime law. Suppose a supplier provides "necessaries" to a ship under a contract with the shipowner. Necessaries may include repairs, supplies, towage, or the use of a dry dock.[1] The shipowner subsequently defaults on payments to the supplier, arguably causing a maritime lien to arise. To arrest the ship and recover its due, the supplier should seek advice of competent counsel experienced in maritime law (competent counsel).

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The situation becomes more complicated if the shipowner has a contract (the underlying contract) with a party (contractor) to provide certain services for the transport of cargo and the underlying contract contains a no liens provision,[2] such that the contractor may not act in any way to permit some other party (subcontractor or supplier) to obtain a lien against the ship.[3] Accordingly, if the contractor subcontracts with a supplier to perform services for the ship, then the supplier will likely not possess a valid maritime lien against the ship, as: (1) the shipowner prohibited this type of subcontracting through the inclusion of the no liens provision in the underlying contract; and (2) the subcontractor will be unable to prove that it had a contract with the owner or owner's agent. In these situations, the supplier should not assert a maritime lien against the vessel without first obtaining the advice of competent counsel.

Even in a case where the facts appear clearly to allow for the assertion of a maritime lien, there may exist details unknown, but readily available, to the supplier that may negatively impact the supplier's right to recourse. If the supplier has decided to assert a maritime lien against the ship without the advice of competent counsel, then the supplier has no means of understanding the significance of certain facts and the consequences that may transpire. The most troubling consequences surface when the shipowner brings suit for wrongful arrest against the supplier and the considerable attorneys' fees,

costs, and damages that result therefrom.

This article examines the law of maritime liens and offers insight into the necessity of retaining the advice of competent counsel to avoid wrongfully arresting a ship and the extensive litigation that may arise from such an arrest.

Establishing a Maritime Lien

Maritime law recognizes the transitory nature of ships and the importance of capturing a ship immediately when a wrong has occurred, given the ship's ability to flee at any moment.[4] This is particularly true with a foreign ship that transits to the United States, commits a malfeasance against a party, and subsequently departs the United States to continue on her voyage without recompense. Before the creation of maritime liens, if the ship never returned to the United States, the damaged party effectively possessed no recourse. With maritime liens, that party now acquires a "property right that adheres to the vessel wherever it may go," regardless of transfer of title.[5]

Various claims in maritime law allow for the assertion of a maritime lien, including: torts arising under the general maritime law;[6] seaman's wages; salvage; general average;[7] breach of contract for supplies, repairs, necessaries provided to a vessel, or towage; wharfage;[8] pilotage; stevedoring;[9] damage to cargo; unpaid freight; and breach of charterparty.[10] This article focuses on breach of contract for necessaries provided to a ship, one of the most common and complex maritime lien claims brought in the United States.[11]

... continued on page 48

International Comity Prevents Public Policy Challenges From Going Adrift in Recent Maritime Arbitration Cases

By Marcus G. Mahfood, Miami

Whether it be cruise lines, cargo ships, or the world of super yachts, maritime commerce involves a matrix of varying international interests. Arbitration provisions are often used in maritime contracts to provide predictability and efficiency in resolving international legal disputes. When things go awry, foreign claimants often seek out United States courts to resolve their disputes due to relatively high standards of recovery. Recently, U.S. courts have been faced with public policy challenges to the enforcement of arbitral awards rendered in maritime cases by foreign tribunals. As discussed below, international comity has served as the polestar for enforcement of foreign arbitral awards where U.S. maritime law would have dictated a different result.

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The Convention and the Defenses to Enforcement of Foreign Arbitral Awards

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1]—as implemented by the U.S. Federal Arbitration Act[2]—codified universal standards for resolution of international disputes through arbitration. The rise of international commerce during the twentieth century prompted the development of a strong U.S. federal policy favoring arbitration in order to efficiently resolve the growing number of global disputes. The Convention helped the United States effectuate this policy preference because the Convention "provide[s] businesses with a widely used system through which to obtain domestic enforcement of international commercial arbitration awards resolving contract and other transactional disputes, subject only to minimal standards of domestic judicial review for basic fairness and consistency with national public policy."[3]

These "minimal standards of domestic judicial review" are specifically delineated in the Convention itself, which articulates a mere seven grounds for refusing to affirm a foreign arbitral award: (1) incapacity of the parties or the invalidity of the arbitration agreement under the law to which the parties subjected the agreement; (2) lack of proper notice of the arbitration proceedings; (3) the award deals with matters beyond those made subject to arbitration by the arbitration agreement; (4) the composition of the arbitral tribunal, or the procedure used by same, was not in accordance with the parties' agreement or with the law of the country where the arbitration occurred; (5) the award has not yet become binding; (6) the subject matter of the award

is not capable of resolution by arbitration in the country where enforcement of the award is sought; and (7) the enforcement of the award would be contrary to the public policy of the country in which enforcement is sought.[4] It is the seventh of these defenses—premised on public policy—that has recently made proverbial waves in the maritime community.

The public policy defense was initially viewed by some commentators as a loophole in the Convention's pro-enforcement policy.[5] But, in practice, the public policy defense has rarely been successful.[6] This is so, in large part, because the limited scope of domestic review provided for by the Convention does not contemplate vacatur of an award for either mistake of fact or legal error.[7] Rather the public policy defense is "construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice."[8] As explained by the U.S. Supreme Court, the minimal judicial review under the Convention effectuates the United States' "emphatic federal policy in favor of arbitral dispute resolution," which policy "applies with special force in the field of international commerce."[9]

Recent Public Policy Challenges Based on U.S. Maritime Law

In the maritime context, many of the recent public policy challenges have come from Filipino seamen seeking to vacate foreign arbitral awards that were rendered pursuant to the scheduled benefits promulgated by the Philippine Overseas Employment Administration (POEA). The Filipino crewmembers contended that awards under the rules of the POEA violate U.S. public policy protecting seafarers as wards of admiralty[10] or wards of the court.[11]

The highest court within the United States to address the Convention's public policy defense in this context is the federal Fifth Circuit Court of Appeals in *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG.*[12] Asignacion, a Filipino seaman, was working aboard a vessel docked in the Port of New Orleans when he suffered severe burns to 35% of his body. After he initiated litigation against the shipowner, the shipowner successfully compelled arbitration in the Philippines based on the arbitration clause in Asignacion's POEA employment contract. Applying Philippine law, the arbitrators assigned Asignacion a Grade 14 disability—the lowest grade of disability that is compensable under POEA rules—and awarded him US$1,870. Unhappy with that result, Asignacion returned to the United States and argued that the arbitral award was unenforceable under the Convention's public policy defense because the arbitrators' application of Philippine law deprived him of certain unique protections available to seamen under U.S. maritime law. The trial court agreed with Asignacion and refused to enforce the award, citing the prospective waiver[13] and wards of admiralty doctrines.

The shipowner appealed the trial court's refusal to enforce the award and the Fifth Circuit reversed, ruling that the prospective waiver doctrine did not apply to non-statutory, common law claims sounding in the general maritime law of the United States. As to the wards of admiralty doctrine—which, again, provides that seamen's rights are entitled to special deference—the Fifth Circuit held that these interests are outweighed by the strong federal policy favoring arbitration. The Fifth Circuit weighed these relative interests in light of the Philippines' intent to protect its own citizens: (1) through the POEA's promulgation of its rules regarding employment contracts; and (2) through application of its own laws to its own citizens.[14]

A similar situation arose in *Navarette v. Silversea Cruises Ltd.*,[15] where the U.S. District Court for the Southern District of Florida refused to vacate an arbitration award under the Convention's public policy defense. There, a Filipino arbitral tribunal awarded Navarette US$80,000 based on the POEA's scheduled benefits for the loss of his leg below the knee. *Navarette* essentially extended the holding in *Rickmers* by not only finding that the strong federal policy favoring arbitration outweighed the wards of admiralty doctrine, but that the prospective waiver doctrine did not provide grounds for vacating the award despite Navarette's assertion of a *statutory*

... continued on page 56

Undeclared War

By Scott A. Wagner, Miami

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Many of you may have followed the plight of the forty-four mariners who lost their lives off Patagonia in the recent foundering of the submarine ARA San Juan, owned and operated by the Argentine government. But did you notice the mission of the submarine that was lost? It may be a surprise to many, but they were on the hunt for criminals illegally fishing the Patagonian waters in what might be one of the most, if not the most, critical issue facing the world's oceans: illegal, unreported, and unregulated (IUU) fishing.[1]

IUU fishing is real and it is global, the effects and consequences of which filter down to almost every hot button political topic from climate change and environmental protection to the economic stability and sustainability of developing countries to food security, world hunger, and health issues. According to the United Nations Food and Agriculture Organization, overfishing is depleting oceans across the globe, with 90% of the world's fisheries fully exploited or facing collapse.[2]

Notable conflicts over food are not uncommon or even complex; in fact, they are quite basic and straightforward—many issues concerning food commodities of far less economic and strategic significance than illegal harvesting of millions of tons of fish have resulted in war. There were the Salt Wars of 1482-1484 and 1540, the Flour War of 1775, and even the Pastry War of 1838-1839. The Roman Empire went to war with Egypt over bread. During World War II, the Germans made their belated fatal move into Russia in part to gain access to the "grain belts of southern Russia and the Ukraine."[3] In the twentieth century, the UK and Iceland battled one another in a dispute known as the Cod War, with respect to fishing rights in the North Atlantic.[4] And North and South Korea have clashed twice over their boundary in the Yellow (West) Sea, exacerbated by competition for valuable blue crab.[5] It should be no surprise then that war over such a highly valuable commodity as a nation's food stock in its fisheries is reaching fever pitch today.

What constitutes war is as murky now as ever, as bad actors have transformed from yesteryear's formal, overt, and clear declarations of war to anonymous and often untraceable acts affecting another's territory, resources, and livelihood. Historically, attackers wore uniforms, flew flags, marched troops, and engaged in set battles. Today, war is no longer waged on traditional battlefields and perpetrators have turned to more secretive transactions, using government subsidies and opaque principals to drive investment into a mercenary class that has morphed to become faceless, anonymous, and undetected as it carries out its missions. Rogue fishing vessels that obscure their names and hailing ports, mother ships receiving covert transshipments at sea, and well-funded pirates now do the bidding (the amount

Undeclared War, continued

of pirate activity in West Africa is up almost double in the last two years)[6]; indeed these acts are a form of war—economic and political—over precious, scarce, and dangerously dwindling resources, although many are not yet viewing it through this lens.

Imagine, however, the results if Texans learned that renegade and unauthorized operators in Mexico were secretly siphoning out and depleting forever the world's most valuable commodity, oil, without permission. The ability to perceive a clear act of war is difficult when many acts are increasingly imperceptible. When does the unauthorized exhaustion of food stock in a country's territorial borders constitute an attack on sovereigns calling for a political, economic, or military response; how does one characterize the unauthorized draining of another country's critical resources? Make no mistake about it; wars have been fought when far less hung in the balance.

The United States has launched itself onto the battlefield. Efforts by the United States to assert itself in cross-border identification and enforcement mechanisms have continued to grow both domestically and abroad over the past several years, with many different treaties attempting to set standards for monitoring, measuring, and mitigating the effects of illegal fishing on the environment and the economy. The United States has an interest, whether by signatory, cooperation, or implementation of the standards in a set of global international fisheries and related agreements such as the United Nations Convention on the Law of the Sea, which sets jurisdiction and management authority in the oceans and establishes general requirements concerning conservation; the UN Fish Stocks Agreement, which sets specific rules for the conservation and management of straddling and highly migratory fish stocks; the UN Food and Agriculture Organization (FAO) Compliance Agreement, which requires flag states to exercise control

... continued on page 61

Rule B and *Daimler*: The Interplay of Personal Jurisdiction and Maritime Attachments in the United States

By Damon T. Hartley, Miami

The U.S. Supreme Court
Steven Frame/Shutterstock.com

Attachment of property has long existed as a remedy under maritime law.[1] It was developed because of the highly international nature of maritime commerce and the transitory nature of maritime assets within a given jurisdiction.[2] The Supplemental Rules for Admiralty or Maritime Claims of the U.S. Federal Rules of Civil Procedure, commonly known as the Admiralty Rules, are a set of rules that apply strictly to admiralty cases and allow for the commencement of actions by arrest or attachment. Admiralty Rule B provides that in an in personam admiralty case, "[i]f a defendant is not found within the district, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property."[3] The analysis employed by courts to determine whether a foreign defendant can be found within a judicial district includes a determination of whether the court has personal jurisdiction over the defendant. In the fairly recent decision of *Daimler AG v. Bauman*, the U.S. Supreme Court heightened the standard for the exercise of personal jurisdiction over foreign corporations when jurisdiction is based on the corporation's contacts with the forum state.[4] The heightening of the jurisdictional standard in *Daimler* calls into question whether U.S. courts will alter the standard for determining whether a defendant is found in a judicial district for purposes of Rule B. If personal jurisdiction remains a part of this determination and courts follow the *Daimler* standard, it will be much more

difficult for foreign corporations to avoid attachment of their assets located in the United States. This may lead to an increase in the use of Rule B attachments in U.S. maritime cases, which potentially could have a disruptive impact on the maritime industry.

Admiralty Rule B

Admiralty Rule B is a procedural mechanism whereby a plaintiff with an in personam claim against a defendant not subject to a court's personal jurisdiction may reach that defendant's assets or property found within the court's jurisdiction via attachment of such property. Actions under Rule B are referred to as quasi in rem actions because they subject the defendant's property to the jurisdiction of the court through attachment, yet the actions are essentially in personam since they are based on the personal liability of the property owner.[5] Under Rule B, the plaintiff's claim is against the property owner, not the property, but because the person cannot be found within the court's jurisdiction, the "plaintiff is protected by the ability to proceed against the thing."[6] An attachment under Rule B has a dual purpose: (1) to obtain jurisdiction of the defendant in personam through his property; and (2) to assure satisfaction of any potential judgment.[7]

In order to commence an action under Rule B, the plaintiff must show that: (1) it has a valid admiralty claim against the defendant; (2) the defendant cannot be found within the district; (3) the defendant's property may be found within the district; and (4) there is no statutory or maritime law bar to the attachment.[8] In support of a request for Rule B attachment, the plaintiff must submit an affidavit "stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district."[9] The purpose of the affidavit is to "assure the district court that the plaintiff has been diligent in searching for the defendant within the district in which the action is filed."[10] The term *found within the district* is not defined in Rule B, and the courts have developed a two-pronged analysis, which asks: "first, whether [the defendant] can be found within the district in terms of jurisdiction, and second, if so, whether it can be found for service of process."[11] In order to avoid an attachment, a defendant must show that it is present in the judicial district in the jurisdictional sense, and also that it is amenable to service of process in the district either personally or through an agent.

Daimler May Change the Game

In the U.S. courts, personal jurisdiction is differentiated between general jurisdiction and specific jurisdiction. General jurisdiction focuses on the defendant's contacts with the forum state and whether sufficient minimum contacts exist such that the exercise of personal jurisdiction over the defendant would meet the due process requirements of the U.S. Constitution. Specific jurisdiction, on the other hand, requires a connection between the forum state and the underlying dispute. In 2014 with its *Daimler* decision, the U.S. Supreme Court heightened the standard for the exercise of general personal jurisdiction over a foreign corporation. Following the *Daimler* decision, in order for a U.S. court to have personal jurisdiction over a foreign corporation, the corporation's affiliations with the forum state must be so "continuous and systematic" as to render it essentially "at home" in the forum state.[12] The Supreme Court noted that typically a corporation is regarded as at home in both its place of incorporation and its principal place of business.[13] The Court indicated that in order for a foreign corporation to be at home in a U.S. forum state, its contacts with the forum state must be so substantial that it is "comparable to a domestic enterprise in that state" and that such jurisdiction would exist only in the "exceptional case."[14] Following *Daimler*, some courts have found that where a foreign corporation's contacts with a forum state may previously have been sufficient to establish general jurisdiction, those same contacts were no longer sufficient to meet *Daimler's* at home standard.[15]

Potential Effect of *Daimler* on Maritime Attachments

Whether courts will alter the test for determining if a defendant is found within a district for purposes of Rule B

... continued on page 65

Maritime Arbitration—A Preferred Alternative Dispute Resolution Mechanism

By George M. Chalos and Patrick W. Carrington, New York

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Arbitration is a contractually agreed form of alternative dispute resolution (ADR) used to adjudicate matters outside of a traditional court proceeding. Arbitration is often favored over litigation between commercial partners because of the expected speed of dispute resolution, the expertise of the arbitrator(s), cost-effectiveness, and flexible procedures, including limitations on discovery and pre-trial practice, confidentiality, and location.[1] In arbitration, a tribunal, generally consisting of one to three arbitrators (impartial, neutral third parties), hears both sides of a dispute and renders a decision. Arbitration is especially useful in cases involving specialized industries such as in maritime, FINRA, or commodity trading disputes.

History of Arbitration in the United States

The first modern arbitration law in the United States was the New York Arbitration Act of 1920 (NYAA).[2] The NYAA was the result of a joint committee led by Charles A. Boston, Julius Henry Cohen, and Daniel S. Remsen of the New York State Bar Association and the Chamber of Commerce of the State of New York.[3] The NYAA, for the first time, made contracts to arbitrate effectually enforceable.[4] The NYAA was the basis for the Federal Arbitration Act (FAA),[5] which sets forth the legislative framework for the enforcement of arbitration agreements and arbitral awards throughout the United States. The FAA was passed by Congress in 1925 to ensure arbitration agreements in maritime transactions were "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[6]

Prior to the FAA, federal courts did not regularly enforce agreements to arbitrate. Several cases decided prior to the FAA's enactment demonstrate the courts' hostility to arbitration agreements. For example, in 1920 the U.S. District Court for the Southern District of New York refused to enforce an arbitration clause in a shipping contract because "the arbitration clause cannot be availed of by or against [a party] to oust our courts of jurisdiction."[7] In 1923, a federal appellate court refused to enforce an arbitration provision because "a general agreement to submit to arbitration did not oust the

Maritime Arbitration, continued

courts of jurisdiction, and that rule has been consistently adhered to by the federal courts."[8] Subsequently in 1991, the U.S. Supreme Court expressly recognized that the FAA's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American Courts . . . ."[9]

Commercial relationships often suffered under the juridical approach to dispute resolution.[10] The legal system placed primary importance upon procedural safeguards and requirements of substantive principles; by contrast the business community's focus was often on preserving relationships despite conflict.[11] Commercial parties needed a different process, one that could render commercially knowledgeable and rapid determinations, as opposed to the unassailable procedural framework of the courts.[12] The FAA was designed to make arbitration available to those commercial parties that engaged in maritime or other commercial transactions.[13] The FAA made arbitration agreements "valid, irrevocable, and enforceable,"[14] thereby equating them with ordinary contracts and eradicating the tradition of judicial hostility.

The FAA established very limited grounds for judicial review of arbitral awards.[15] Federal court decisions have consistently reiterated support for the clear statutory mandate of the FAA, namely to uphold the validity of the contractual choice of arbitration and to make arbitration a fully viable adjudicatory option.[16] The U.S. Supreme Court determined the FAA is not just a procedural enactment, but that it contains substantive directives that are imposed upon federal courts as a matter of congressional authority.[17] Arbitration is now a preferred method of dispute resolution amongst commercial parties.

The Society of Maritime Arbitrators

The Society of Maritime Arbitrators, Inc. (SMA) is a professional, nonprofit organization whose mission is

... continued on page 67

Limitations of Liability Under the Carriage of Goods by Sea Act

By Daniel W. Raab, Miami

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An important aspect of international commerce is the topic of limitations of liability under federal law and bills of lading. The main statute governing bills of lading in the United States is the Carriage of Goods by Sea Act (COGSA), enacted as 46 U.S.C.A. 1301 et al. and now cited as 46 U.S.C. § 30701 note § 4(5). COGSA governs cargo shipped between the United States and foreign ports and has been incorporated into bills of lading for transportation between the continental United States and other U.S. territories, including Puerto Rico and the U.S. Virgin Islands, typically through a clause paramount listed on the back of the bill of lading. Although certain overlapping statutes exist, including the Shipping Act of 1984, the Harter Act, and the Bill of Lading Act, these do not deal with limitations of liability to the same extent. Notably, a number of international laws also address limitations of liability in ocean shipments, including the Hamburg Rules and the Hague Convention.

One of the most litigated COGSA statutes limits liability to $500.00 per package on cargo claims. This seemingly straightforward requirement has led to varied contentious litigation. Everything from a shipping container to a box of clothing has been litigated on this issue. When adopted in 1936, it was believed that this statute was in the shipper's favor, but this has not necessarily been the case over the last eighty-one years. 46 U.S.C.A. § 1304(5), the relevant COGSA section, states the following:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.[1]

A carrier seeking to assert the package limitation must provide an opportunity for the shipper to declare a higher value.[2] It is best if this is clearly designated on the bill of lading. Very few shippers, however, will take advantage of this opportunity to declare a higher value, although it is usually a cheaper option than declaring a higher value with the ocean carrier. Marine cargo

Carriage of Goods by Sea Act, continued

insurance can often be purchased through the ocean freight forwarder or a non-vessel operating common carrier, entities that are often used by shippers to book cargo with ocean carriers. The non-vessel operating common carrier typically acts as a consolidator for the cargo and is a carrier licensed by the Federal Maritime Commission that does not operate the actual ship; thus, it may include a $500.00 per package limitation on its bills of lading.

Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co. demonstrates the importance of insurance. In this case, the court held that a stage was a package and that Tropical Shipping Construction Company Ltd., the ocean carrier, was only liable for $500.00.[3] The shipper in the matter had two forms of insurance, such that it could claim more than $500.00 from the insurance carriers. Although the package limitation was used to limit the value of the stage to $500.00, the insurance from the two different insurance carriers, one a property insurer and the other a cargo insurer, contributed considerably more to the loss.

46 U.S.C.A. § 1304(5) also states:

> By agreement between the carrier, master, or agent of the carrier, and the shipper, another maximum amount than that mentioned in this paragraph may be fixed: Provided, that such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.[4]

If the package limitation does not apply, then the invoice value is often used to compute damages. Replacement value has also been used in some instances when the item can be quickly replaced with no damages due to a loss of market. Fair market value is another means that has been used to compute damages.[5]

A good reference as to what does and does not constitute a package is contained in 2A-XVI, Benedict on Admiralty § 170, which gives a list of different items such as containers, pallets, vehicles, etc., that have been considered to be a package under the COGSA. There are numerous cases on what constitutes a package and/or a customary freight unit. The author was involved in a case where two school buses were considered to be packages, *Expeditors Int'l of Wash., Inc. v. Crowley Am. Transp., Inc*.[6] This case, although dealing with a domestic shipment of buses from Ohio to Puerto Rico, was one in which the COGSA was incorporated through a clause paramount in the bill of lading, applying the COGSA to this domestic shipment. The court ruled that the plaintiff could recover a maximum of $1,000.00 or $500.00 per customary freight unit (bus) for the alleged misdelivery of the buses. When shipping vehicles of any kind, it is a good practice to ensure the vehicle is insured or declared at a higher value. Declaring a higher value could be more expensive than purchasing insurance.

Another case worth noting is *American Home Assurance Co. v. Crowley Ambassador*, where the bill of lading indicated that the container held "22,355 pieces" of clothing, and the garments were prepackaged in sets wrapped in plastic.[7] There was no indication of how many sets there were in the container. The court held

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... continued on page 72

Maritime Security Law—*An International Precept*

By Captain Robert L. Gardana, Miami

Maritime security is widely defined as "those measures employed by owners, operators, and administrators of vessels, port facilities, offshore installations, and other marine organizations or establishments to protect against threats, seizure, sabotage, piracy, pilferage, annoyance, or surprise."[1] The tenets of international and domestic law, directed at preserving a sustainable maritime environment, have developed into a body of laws known as maritime security law. At an international level, the evolution of maritime security law has been derived primarily through the work of the International Maritime Organization (IMO). At a domestic level, U.S. maritime law has evolved through legislation directing the United States Coast Guard and the Department of Homeland Security to develop maritime security protocols that maintain a secure maritime domain.

From the mid-19th century, shipping nations improved safety at sea through the development of international regulations. By the mid-20th century, the establishment of a permanent international body to promote maritime safety was proposed. In 1948, the IMO was adopted by the United Nations.[2]

The Maritime Safety Committee (MSC) is the IMO's main forum for addressing matters affecting the technical safety aspects of shipping. The MSC submits recommendations and guidelines for future adoption relating to issues that impact maritime safety, including navigation, maritime safety procedures, vessel construction and equipment standards, prevention of collisions at sea, salvage, search and rescue, and transport of dangerous cargoes.[3]

Article 1(a) of the IMO Convention (1948)[4] identifies the IMO's purpose as follows:

> To provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.

The IMO has expanded the law at sea from its marine safety origin to include an international body of laws known as maritime security law.[5] As a direct response to the October 1985 hijacking of the *Achille Lauro*—a passenger ship off the coast of Egypt held by four terrorists from the Palestine Liberation Front—on 20 November 1985, the IMO adopted Resolution A.584(14) on Measures to Prevent Unlawful Acts Which Threaten the Safety of Ships and the Security of Their Passengers and Crew.[6] This resolution "directed that internationally agreed measures should be developed, on a priority basis, by the Maritime Safety Committee to ensure the security of passengers and crews on board ships and authorized the Maritime Safety Committee to request the Secretary-General to issue a circular containing information on the agreed measures to governments, organizations concerned and interested parties for their consideration and adoption."[7]

Achille Lauro

Maritime Security Law, continued

On 26 September 1986, the IMO MSC issued MSC/Circ.443 on Measures to Prevent Unlawful Acts Against Passengers and Crews on Board Ships (adopted 10 March 1988; implemented 1 March 1992), for the purposes of increasing the safety and security of passengers and crews, including ship and port security plans; appointing a designated authority to approve such plans; and reporting of security incidents. The circular guidance section provides advice on the conduct of security surveys at ports and on ships, together with detailed strategy on security measures and procedures for ship security and the training of security staff.[8] On 4 November 1993, the MSC adopted Resolution A.738(18) on Measures to Prevent and Suppress Piracy and Armed Robbery Against Ships, which provides for member governments, particularly "in areas affected by acts of piracy and armed robbery against ships," to "continue their efforts to prevent and suppress acts of piracy and armed robbery (piratical attacks) against ships at sea."[9]

This resolution reaffirmed the IMO's first efforts to address the issue of maritime piracy in 1983, with Resolution A.545(13) on Measures to Prevent Acts of Piracy and Armed Robbery Against Ships, declaring that governments should take "as a matter of highest priority, all measures necessary to prevent and suppress acts of piracy and armed robbery," and urging states to continue efforts to do so.[10]

IMO Resolution A.922(22) (adopted 29 November 2001, entitled Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships) embraced the Law of the Sea Convention's definition of piracy under Section 2.1, which defines *piracy* as an illegal act of "violence or detention committed . . . for private ends." Resolution A.922(22) also defined *armed robbery against ships* under Section 2.2 as "any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such a ship, within a State's jurisdiction over such offences." The resolution permits relevant states to intervene in an act of piracy or armed robbery against a ship, during and/or after the event.[11]

The International Convention for the Safety of Life at Sea (SOLAS) is an international maritime treaty that is generally regarded as the most important international treaty concerning the safety of merchant ships. It was first adopted in 1914 in response to the Titanic disaster and was revised in 1929, 1948, 1960, and 1974. SOLAS, adopted in 1974 and entered into force on 25 May 1980, establishes the safety standards governing the design and maintenance of oceangoing ships, and has been ratified by 155 countries. The current SOLAS requirements came into force on 1 July 1986.[12]

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... continued on page 74

International Ship and Port Facility Security Code

By Captain Robert L. Gardana, Miami

The cruise ship Sea Princess leaving Southampton Harbor; fences are visible on the right, which prevent access to the ship under the ISPS Code.
Photo by Remi Kaupp

The IMO effected its adoption of the International Ship and Port Facility Security Code (ISPS) by amendment to the International Convention for the Safety of Life at Sea (SOLAS) in 2002, which became effective 1 July 2004. The ISPS Code was implemented through Chapter XI-2 of SOLAS.[1] The ISPS sets forth detailed mandatory security-related requirements for governments, port authorities, and shipping companies, as well as guidelines to implement these requirements, making compliance mandatory for the 148 contracting parties to SOLAS, including the United States.[2] The purpose of the ISPS is to provide a standardized, consistent framework for evaluating risk, enabling governments to offset threats to ships and port facilities through appropriate security levels and corresponding security measures. In essence, the ISPS takes the approach that ensuring the security of ships and port facilities is a risk management activity and that, to implement appropriate security measures, a risk assessment for each particular case must be made.[3]

The provisions of Chapter XI-2 of SOLAS (entitled "Special Measures to Enhance Maritime Security") apply to port facilities and certain ships. Part A of Chapter XI-2 of SOLAS is mandatory and contains detailed security-related requirements for governments, port authorities, and shipping companies.[4] These mandatory security measures include several amendments to SOLAS.[5] Part B of the ISPS contains non-mandatory guidance for applying SOLAS requirements, as amended, and Part A of the ISPS.[6] ISPS provisions are applied to passenger ships (including high-speed passenger craft) and cargo ships (including high-speed craft) of 500 gross tons or more, as well as mobile offshore drilling units and port facilities serving such ships engaged on international voyages.[7]

The ISPS encompasses certain technical provisions, including Security Levels 1, 2, and 3, to define the level of security risk at issue:

- Security Level 1 requires the minimum appropriate protective security measures to be maintained at all times.
- Security Level 2 requires appropriate additional protective security measures to be maintained for a period of time because of heightened risk of a security incident.
- Security Level 3 requires additional, specific protective security measures to be maintained for a limited period of time when a security incident is

International Ship and Port Facility Security Code, continued

probable or imminent, although it may not be possible to identify the specific target.[8]

Under Regulation 1 of the ISPS, the definition of *ship* is expanded to include mobile offshore drilling units and high-speed craft when used in Regulations 3 through 13 of the ISPS. *Mobile offshore drilling units* and *high-speed crafts* are defined in Chapter X, Regulation 1 of SOLAS (94). The ISPS provides for the creation of both a ship security plan and a port facility security plan.[9] A ship security plan is a plan developed to ensure the application of measures on board the ship designed to protect persons on board, cargo, cargo transport units, ship's stores, or the ship from the risks of a security incident. A port facility security plan (PFSP) is a plan developed to ensure the application of measures designed to protect the port facility and ships, persons, cargo, cargo transport units, and ship's stores within the port facility from the risks of a security incident.[10]

Pursuant to Part 16.61 of the ISPS, steps should be taken at all stages to ensure that the contents of the PFSP remain confidential.[11] The ISPS mandates the creation of certain security-related positions, both aboard ships and at ports, as follows:

- Ship security officer: The person on board the ship, accountable to the master, designated by the company as responsible for the security of the ship, including implementation and maintenance of the ship security plan and for liaison with the company security officer and port facility security officers.
- Company security officer: The person designated by the company for ensuring that a ship security assessment is carried out; that a ship security plan is developed, submitted for approval, and thereafter implemented and maintained; and for liaison with port facility security officers and the ship security officer.
- Port facility security officer: The person designated as responsible for the development, implementation, revision, and maintenance of the port facility security plan and for liaison with the ship security officers and company security officers.[12]

The ISPS requires the designation of a ship security officer, as defined in Chapter XI-2, Part A, § 2.1.6 of

SOLAS, on each ship.[13] The duties and responsibilities of a ship security officer include, but are not limited to, the following:

- Undertaking regular security inspections of the ship to ensure that appropriate security measures are maintained;
- Maintaining and supervising the implementation of the ship security plan, including any amendments to the plan;
- Coordinating the security aspects of the handling of cargo and ship's stores with other shipboard personnel and with the relevant port facility security officers;
- Proposing modifications to the ship security plan;
- Reporting to the company security officer any deficiencies and non-conformities identified during

... continued on page 78

Maritime Transportation Security Act of 2002

By Captain Robert L. Gardana, Miami

Cargo containers provide a convenient and efficient means of delivering goods. They are essential to today's "just-in-time" supply chain, moving almost 90% of the world's manufactured goods.[1] Due to the heightened awareness of transportation security concerns and increased risk to the maritime industry in the aftermath of the attacks of 11 September 2001, Congress developed a body of enhanced security regulations with the newly formed Department of Homeland Security, ultimately enacting the Maritime Transportation Security Act of 2002 (MTSA).[2]

Memorial Complex to the victims of 11 September 2001, New York City
Pavel L. Photo and Video/Shutterstock.com

The MTSA became effective on 25 November 2002 and contains nationwide directives for increasing both vessel and port security. The MTSA was enacted to address maritime transportation security and to deter potential *transportation security incidents*, defined as "security incident[s] resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area."[3] Congress expressed that the MTSA would include random security screening on high-risk maritime vessels for the purpose of preventing a transportation security incident, as such screenings would deter "the unauthorized introduction of dangerous substances and devices" onto such vessels.[4] Under the MTSA, vessel and maritime facility owners and operators, and personnel operating in the U.S. Maritime Transportation System, are regulated by 33 C.F.R. 101, 104, 105, 106.

The stated purposes of the MTSA are "(1) [t]o implement portions of the maritime security regime required" by the MTSA; "(2) [t]o align, where appropriate, the requirements of domestic maritime security regulations with the *international maritime security standards*" in SOLAS, the ISPS, and Parts A and B of the International Code for the Security of Ships and of Port Facilities; and "(3) [t]o ensure security arrangements are as compatible as possible for vessels trading internationally."[5] And "[f]or those maritime elements of the national transportation system where international standards do not directly apply, the requirements in this subchapter emphasize cooperation and coordination with local port community stakeholders, and are based on existing domestic standards, as well as established industry security practices."[6] The MTSA mandates that the United States Coast Guard evaluate the effectiveness of antiterrorism measures in foreign ports and impose conditions of entry on vessels arriving to the United States from countries that do not maintain effective antiterrorism measures.[7]

The MTSA applies to "all passenger vessels over 100

Maritime Transportation Security Act of 2002, continued

gross tons, carrying more than 12 passengers for hire; making voyages lasting more than 24 hours, any part of which is on the high seas; and for which passengers are embarked or disembarked in the United States or its territories."[8] The MTSA does not apply to "ferries that hold Coast Guard Certificates of Inspection endorsed for 'Lakes, Bays, and Sounds,' and that transit international waters for only short periods of time, on frequent schedules."[9]

Under 46 U.S.C. § 70110, the U.S. Coast Guard is authorized to impose conditions of entry on vessels arriving in U.S. waters from ports that the U.S. Coast Guard has not found to maintain effective antiterrorism measures.[10] The prime elements of these requirements are security assessments and plans, as well as communication procedures, for MTSA-regulated vessels, facilities, and Outer Continental Shelf (OCS) facilities.[11] These security assessments, security plans, and Declarations of Security (DoS) involve collections of information that are vital to securing the safety of maritime areas. These requirements are critical in determining appropriate security measures to reduce the risk of a transportation security incident.

To accomplish this end, the MTSA developed specific definitions as follows:

1. The term *Area Maritime Transportation Security Plan* means an Area Maritime Transportation Security Plan prepared under 70103(b).
2. The term *facility* means any structure or facility of any kind located in, on, under, or adjacent to any waters subject to the jurisdiction of the United States.
3. The term *National Maritime Transportation Security Plan* means the National Maritime Transportation Security Plan prepared and published under section 70103(a).
4. The term *owner or operator* means:
   A. in the case of a vessel, any person owning,

... continued , next page

Maritime Transportation Security Act of 2002, continued

operating, or chartering by demise such vessel; and

B. in the case of a facility, any person owning, leasing, or operating such facility.

5. The term *Secretary* means the secretary of the department in which the Coast Guard is operating.
6. The term *transportation security incident* means a security incident resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area.[12]

The U.S. Coast Guard uses the following jurisdictional terms to enforce treaties, laws, and regulations of the United States: internal waters, inland waters, navigable waters, territorial sea, exclusive economic zone, high seas, and waters subject to the jurisdiction of the United States.[13]

As a result of the adoption of the MTSA, the territorial seas jurisdiction was extended from three to twelve nautical miles. To define these terms uniformly, and to maintain conformity under various federal acts, the U.S. Coast Guard uses regulations, policies, and procedures to determine whether it has jurisdiction on certain waters in cases when specific jurisdictional definitions are not otherwise provided, including the definition of *territorial sea* as set forth in 33 C.F.R. § 2.22. To determine what security measures are required for high-risk vessels, a vessel owner must prepare a Vessel Security Assessment (VSA). A VSA is "an analysis that examines and evaluates the vessel and its operations by taking into account possible threats, vulnerabilities, consequences, and existing protective measures, procedures, and operations."[14] The assessment is made by collecting specified background information and carrying out an on-site survey of the vessel to check existing protective measures, procedures, and operations for a variety of factors.[15] Generally, the on-site assessment must include the following:

1. General layout of the vessel;
2. Threat assessments, including the purpose and methodology of the assessment, for the area or areas in which the vessel operates or at which passengers embark or disembark;
3. The previous VSA, if any;
4. Emergency and standby equipment available to maintain essential services;
5. Number of vessel personnel and any existing security duties to which they are assigned;
6. Existing personnel training requirement practices of the vessel;
7. Existing security and safety equipment for the protection of personnel, visitors, passengers, and vessel's personnel;
8. Escape and evacuation routes and assembly stations that have to be maintained to ensure the orderly and safe emergency evacuation of the vessel;
9. Existing agreements with private security companies providing waterside or vessel security services; and
10. Existing security measures and procedures.[16]

The on-site survey serves to verify or gather information required in 33 C.F.R. § 104.305(a). It consists of an actual survey that examines and evaluates existing vessel protective measures, procedures, and operations for:

1. Ensuring performance of all security duties;
2. Controlling access to the vessel, through the use of identification systems or otherwise;
3. Controlling the embarkation of vessel personnel and other persons and their effects, including personal effects and baggage whether accompanied or unaccompanied;
4. Supervising the handling of cargo and the delivery of vessel stores;
5. Monitoring restricted areas to ensure that only authorized persons have access;
6. Monitoring deck areas and areas surrounding the vessel; and
7. The ready availability of security communications, information, and equipment.[17]

Practitioners should note that the procedures and information for a Vessel Security Assessment are very detailed, and should review 33 C.F.R. § 104.305(a)-(b) for a more thorough analysis.

Further, the MTSA requires owners and operators of the applicable maritime vessels to implement a U.S. Coast

Maritime Transportation Security Act of 2002, continued

Guard-approved Vessel Security Plan (VSP). A VSP is a "plan developed to ensure the application of security measures designed to protect the vessel and the facility that the vessel is servicing or interacting with, the vessel's cargoes, and persons on board at the respective MARSEC Levels."[18] An Alternative Security Program (ASP) is "a third party or industry organization developed standard" that is approved at a national level by the Coast Guard's commandant, provided the plan offers a level of security equivalent to that established by the agency's regulations.[19]

The company security officer must ensure that a VSP is developed and implemented for each vessel. He or she must then submit the VSP to the U.S. Coast Guard for review and approval, by mail, fax, or electronically submitted via email.[20] Submissions may be sent to: Commanding Officer (MSC), Attn: Marine Safety Center, U.S. Coast Guard Stop 7410, 4200 Wilson Boulevard, Suite 400, Arlington, VA 20598-7410. The requirements for the creation of a VSP are governed by 33 C.F.R. § 104.405, and provide:

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(a) A vessel owner or operator must ensure that the VSP consists of the individual sections listed [herein]. If the VSP does not follow the order as it appears in the list, the vessel owner or operator must ensure that the VSP contains an index identifying the location of each of the following sections:

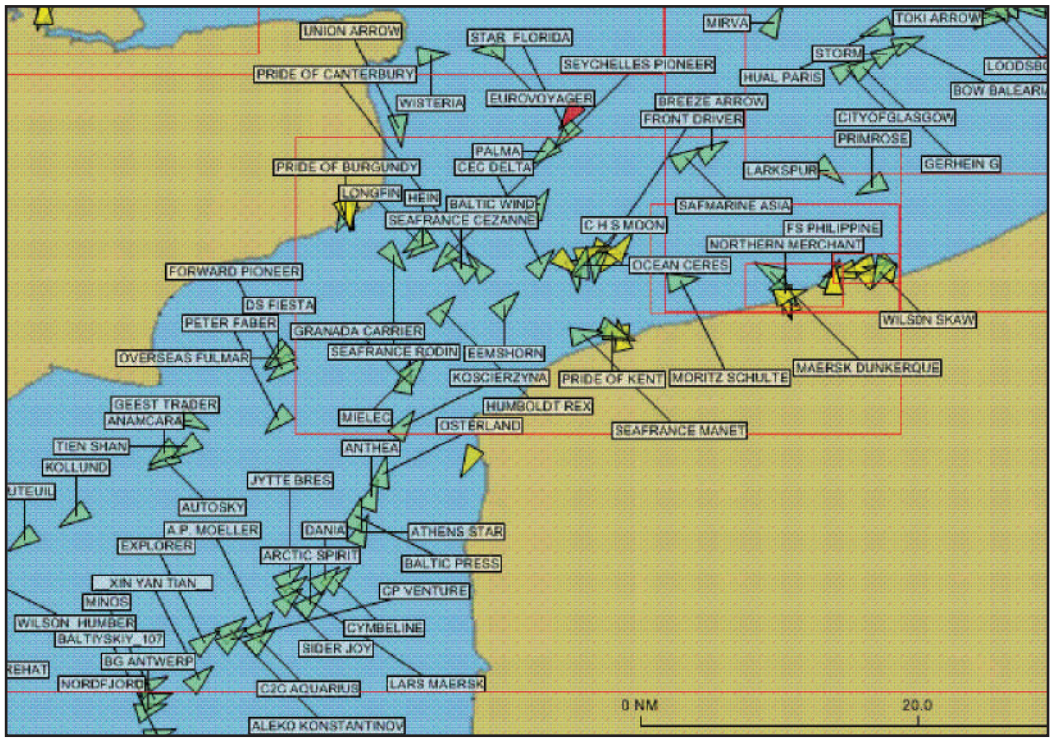
1. Security organization of the vessel;
2. Personnel training;
3. Drills and exercises;
4. Records and documentation;
5. Response to change in MARSEC level;
6. Procedures for interfacing with facilities and other vessels;
7. Declarations of Security (DoS);
8. Communications;
9. Security systems and equipment maintenance;
10. Security measures for access control, including designated passenger access areas and employee access areas;
11. Security measures for restricted areas;
12. Security measures for handling cargo;
13. Security measures for delivery of vessel stores and bunkers;
14. Security measures for monitoring;
15. Security incident procedures;
16. Audits and Vessel Security Plan (VSP) amendments; and
17. Vessel Security Assessment (VSA) report.

Additionally, the VSP must describe in detail how the requirements of Subpart B (Vessel Security Requirements) will be met. The practitioner should note that VSPs that have been approved by the Coast Guard before 26 March 2007 do not need to be amended to describe their transportation worker identification credential (TWIC) procedures until the next regularly

Maritime Transportation Security Act of 2002, continued

scheduled resubmission.[21]

The minimum performance standard requirement outlined in a VSP for vessels towing any certain dangerous cargo (CDC) or Subchapter D&O tank barges is 100% compliance.[22] Owners of a vessel operating under a VSP must "[s]creen persons, baggage (including carry-on items), personal effects, and vehicles for dangerous substances and devices at the rate specified in the approved Vessel Security Plan."[23] Owners must also "[c]heck the identification of any person seeking to board the vessel."[24]



Automatic Identification System (AIS)
Photo by Pline/wikipedia.org

Owners and operators of high-risk vessels are permitted a certain measure of flexibility within this general framework. They may opt out of identification checks and passenger screening requirements in 33 C.F.R. § 104.265(f)(2), (f)(4).[25] As an alternative, vessel owners "may ensure security measures are implemented that include":

1. Searching selected areas prior to embarking passengers and prior to sailing; and
2. Implementing one or more of the following:
   (i) Performing routine security patrols;
   (ii) Providing additional closed-circuit television to monitor passenger areas; or
   (iii) Securing all non-passenger areas. *Id.*

A vessel owner or operator, with the express permission of the U.S. Coast Guard, may opt out of any regulatory requirement contained in a VSP, provided the U.S. Coast Guard has determined that "the waiver will not reduce the overall security of the vessel."[26] The Code also permits owners and operators to propose an "equivalent" to any of the security measures required by a VSP.[27]

Consistent with the ISPS, the MTSA directed the U.S. Coast Guard to prescribe regulations requiring certain vessels to be equipped with and operate an automatic identification system (AIS).[28]

The vessels requiring an AIS are listed in 46 U.S.C. § 70114(1)(a) as follows:

(A) A self-propelled commercial vessel of at least sixty-five feet overall in length;

(B) A vessel carrying more than a number of passengers for hire determined by the Secretary;

(C) A towing vessel of more than twenty-six feet overall in length and six hundred horsepower; and

(D) Any other vessel for which the Secretary decides that an automatic identification system is necessary for the safe navigation of the vessel.

Exemption from this AIS requirement is provided if it is deemed "not necessary for the safe navigation of

Maritime Transportation Security Act of 2002, continued

the vessel on the waters on which the vessel operates" and there is a waiver of the application of 46 U.S.C. § 70114(1)(a).[29]

All U.S. flag cargo vessels of 500 gross tons or more on international voyages and all U.S. flag passenger vessels carrying 12 or more passengers on international voyages must be issued and carry on board a Continuous Synopsis Record (CSR) during operations on and after 1 July 2004.[30] Specifically, 33 C.F.R. § 101.115(b) incorporates by reference Chapter XI-1 of SOLAS, as amended, and 33 C.F.R. § 104.297(a) requires vessels on international voyages to comply with Chapter XI-1 of SOLAS, if applicable.

Regulation 5 of SOLAS, Chapter XI-1, prescribes the requirements of the CSR, including the requirements that: (1) the CSR must be onboard the vessel and available for inspection at all times; (2) vessel masters, owners, or operators must submit updated information to the vessel's flag state to amend the CSR when changes occur; and (3) flag states must forward the administration's records of a vessel's CSR to the new flag state when a vessel changes flag. While in U.S. waters, vessels not in compliance with Regulation 5 are subject to operational control and compliance measures, as well as the civil penalties set forth in 33 C.F.R. §§ 101.400, 101.410, and 101.415. U.S. vessels operating in foreign waters can be detained by a port state for not meeting the SOLAS requirement to carry a valid CSR onboard on or after 1 July 2004, in accordance with the port state control measures allowed by SOLAS.

The Department of Homeland Security must issue regulations preventing individuals from entering secure areas of vessels or MTSA-regulated port facilities, unless such individuals are authorized to be in the secure areas and either hold biometric transportation security cards (TSC) or are accompanied by another individual who holds such a transportation security card.[31] Issuance of the card is mandatory unless an individual poses a *security risk* as defined as "an individual convicted of a felony that would indicate the individual could cause a severe transportation security incident, or otherwise cause the individual to be a terrorist risk." Additionally, the card may be denied to any person subject to deportation or otherwise posing a terrorist threat.[32]

In accordance with the MTSA, the U.S. Coast Guard has identified the following countries that currently do not maintain effective antiterrorism measures and are therefore subject to conditions of entry: Cambodia, Cameroon, Comoros, Cote d'Ivoire, Equatorial Guinea, the Republic of The Gambia, Guinea-Bissau, Iran, Liberia, Libya, Madagascar, Nigeria, Sao Tome and Principe, Syria, Timor-Leste, Venezuela, and Yemen.[33] Notably, although Cuba was once on the list, the U.S. Coast Guard has recently determined that the Republic of Cuba maintains effective antiterrorism measures in its ports.[34] The actions required in paragraphs C and D of the Port Security Advisory are no longer required for vessels that arrive in the United States after visiting ports in the Republic of Cuba. Nonetheless, the Department of the Treasury Office of Foreign Asset Control's travel restrictions to the Republic of Cuba and regulations regarding "Unauthorized Entry Into Cuban Territorial Waters" shall remain in effect.[35] In particular, these impose restrictions on recreational vessels returning from the Republic of Cuba, mandating that "[a]t a minimum, owner/operators of each vessel which enters a Cuban port must conduct a full search of the vessel before departure back to the United States."[36] The security requirements still mandate certain reporting perquisites: (1) the owner/operators arriving from Cuba must notify the Coast Guard of their vessel's arrival 24 hours before entry by email (preferred), telephone, or marine band VHF; (2) report all security actions taken to the local U.S. Coast Guard captain of the port (COTP) responsible for the port of arrival prior to the vessel's arrival into U.S waters; and (3) depending on the vessel's port of entry, contact the appropriate Coast Guard Sector.[37]

If an owner or operator of a passenger vessel is required to comply with the MTSA or the ISPS, and is required to obtain a permit from the U.S. Coast Guard under 33 C.F.R. 107, the owner or operator must follow the security measure as outlined in the United States Coast Guard's Port Security Advisory 3-15 (available at www.

Maritime Transportation Security Act of 2002, continued

nepia.com/media/259726/11-2015_PSA_3-15.pdf). This requirement applies to passenger vessels carrying more than twelve passengers, including at least one passenger for hire, on an international voyage. A vessel owner or operator should review the requirements in 33 C.F.R. 160 regarding provision of an "Advance Notice of Arrival" to the National Vessel Movement Center, which applies to U.S. flagged vessels in commercial service arriving from a foreign port and foreign vessels in commercial service.[38]

On 8 October 1996, Congress enacted the Maritime Security Act of 1996.[39] The Act established the Maritime Security Program (MSP) as a direct subsidy program for militarily useful U.S. flag vessels, essentially replacing the operating-differential subsidy agreement system contained in the sixty-year-old Merchant Marine Act of 1936.[40] Although primarily intended as U.S. flag promotional legislation, the Act also contains a number of citizenship changes affecting U.S. flag vessels in general. The Act was subsequently amended by Congress in 2003, otherwise known as the Maritime Security Act of 2003.[41]

The Maritime Administration (MARAD), an agency within the U.S. Department of Transportation, oversees the MSP.[42] The MSP requires the secretary of transportation to establish a fleet of militarily useful, privately owned vessels to meet national defense and other security requirements and to maintain the United States' presence in international shipping.[43] The MSP "was enacted to ensure that militarily useful vessels are available to the United States government in the event of war or national emergency."[44] Under the MSP, MARAD subsidizes approximately sixty privately owned commercial vessels that are engaged in U.S.-foreign trade by entering into operating agreements with the vessel owners.[45]

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Endnotes

1 U.S. Customs and Border Protection, Fact Sheet, 29 Mar. 2006 (available at www.cbp.gov).

2 Maritime Security Transportation Act of 2002 (MTSA), Pub.L.No.107-295, 116 Stat. 2064 (codified at 46 U.S.C. 701).

3 46 U.S.C. § 70101(6).

4 33 C.F.R. § 104.265(a)(1). *See* 46 U.S.C. § 70103(a).

5 33 C.F.R. § 101.100(a)(1)-(a)(3).

6 33 C.F.R. § 101.100(b).

7 *See* 46 U.S.C. §§ 70108-70110.

8 33 C.F.R. § 120.100

9 *Id. See Hicks v. Waterman Steamship Corp.*, 2009 WL 4572776, 2009 AMC 2257 (S.D. Tex. 2009).

10 *Id.*

11 *Id.*

12 46 U.S.C. § 70101(1)-(6).

13 68 FR 42595-01; 70 FR 42596-01.

14 33 C.F.R. § 101.105.

15 *See* 33 C.F.R. § 104.305(a)-(b).

16 33 C.F.R. § 104.305(a).

17 33 C.F.R. § 104.305(b).

18 33 C.F.R. § 101.105.

19 *Id*.

20 33 C.F.R. § 104.400 (b). Information for submitting the VSP electronically is available at www.uscg.mil/HQ/MSC.

21 *See* 33 C.F.R. § 104.405(10).

22 *Fitch Marine Transport, LLC v. American Commercial Lines, LLC*, 2010 WL 2523062, *5 n.10 (E.D. La. 2010).

23 33 C.F.R. § 104.265(f)(1).

24 33 C.F.R. § 104.265(f)(4).

25 33 C.F.R. § 104.292(b).

26 33 C.F.R. § 104.130 (owner or operator of high-risk vessel is permitted to "apply for a waiver of any requirement . . . that the owner or operator considers unnecessary in light of the nature or operating conditions of the vessel").

27 33 C.F.R. § 104.135.

28 46 U.S.C. § 70114

29 46 U.S.C. § 70114(2).

30 *See* Chapter XI-1 of SOLAS, and 33 C.F.R. §§ 101.115(b), 104.297(a).

31 46 U.S.C. § 70105(a)(1).

Maritime Transportation Security Act of 2002, continued

32 The transportation worker identification credential (TWIC) is a security measure to ensure that individuals who pose a security threat do not gain unescorted access to secure maritime transportation areas of the U.S. transportation system. Through the joint effort of the TSA and the U.S. Coast Guard, the TWIC program was developed to meet the requirements of a TSC, providing credentials to eligible maritime workers requiring unescorted access to secure areas of port facilities and vessels regulated under the MTSA. The U.S. Coast Guard regulates facility and vessel security standards, approves security plans, and conducts enforcement. As previously stated, VSPs that have been approved by the Coast Guard before 26 March 2007 do not need to be amended to describe their TWIC procedures until their next regularly scheduled resubmission.

33 U.S. Dep't. of Homeland Security, United States Coast Guard, Port Security Advisory (1-16) (14 March 2016) (available at https://homeport.uscg.mil) (Maritime Security tab<International Port Security Program (ISPS Code) (Port Security Advisory)). *See* 80 FR 35660-01. *See also* 46 U.S.C. §§ 70108-70110, which authorizes the U.S. Coast Guard to impose conditions of entry on all vessels arriving in U.S. waters from ports that the U.S. Coast Guard has not found to maintain effective antiterrorism measures.

34 U.S. Dep't. of Homeland Security, United States Coast Guard, Port Security Advisory (1-16) (14 March 2016) (available at https://homeport.uscg.mil) (Maritime Security tab<International Port Security Program (ISPS Code) (Port Security Advisory)).

35 33 C.F.R. §§ 107.200 *et seq*., still apply. See *Requirements for Vessels Returning From Cuba* (available at www.uscg.mil/d7/docs/Cuba%20UEC%20COE%20Requirements%20Addendum_30Oct152.pdf).

36 *Requirements for Vessels Returning From Cuba* (available at www.uscg.mil/d7/docs/Cuba%20UEC%20COE%20Requirements%20Addendum_30Oct152.pdf).

37 *Id*. Contact information for other COTPs and Sectors can be found by accessing the Port Directory on the U.S. Coast Guard's Homeport website (available at homeport.uscg.mil/mycg/portal/ep/home.do). Vessels arriving from the Republic of Cuba will be examined to verify compliance with these security requirements and to verify the validity of owner's/operator's permit to enter Cuban territorial seas. This permit is required by the U.S. Coast Guard under Title 33, Part 107, of the Code of Federal Regulations. Failure to comply with the above requirements may result in delay or denial of entry into the United States. Owner/operators are reminded they must still comply with applicable requirements of other federal agencies, including U.S. Customs and Border Protection.

38 *See* 33 C.F.R. § 160.212.

39 Maritime Security Act of 1996, Pub. L. No. 104-239, 110 Stat. 3118.

40 Merchant Marine Act of 1936, 46 U.S.C. Appx. §§ 1171 et seq. *See* 46 U.S.C. §§ 296.1 *et seq*.

41 Maritime Security Act of 2003, Pub. L. No. 108-136, 117 Stat. 1392.

42 *Liberty Global Logistics LLC v. United States Maritime Administration*, 2014 WL 4388587 (E.D. N.Y. 2014).

43 46 U.S.C. Appx. § 1187(a). *See In re Kykes Bros. Steamship Co.*, 221 B.R. 881 (M.D. Fla. 1997).

44 *Liberty Global Logistics LLC*, 2014 WL 4388587 at *1.

45 *Id.*

WORLD ROUNDUP

AFRICA

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Zambian citizens permitted to bring suit in the UK for environmental injuries caused by UK company's Zambian subsidiary.

In *Lungowe et al. v. Vedanta Resources Plc and Konkolo Copper Mines Plc,* a case that could have significant impact on a parent company's liability for its overseas subsidiary, a UK appellate court allowed 1,826 Zambian citizens to bring claims in the United Kingdom against a UK parent company and its Zambian subsidiary for pollution and environmental damage caused by discharge from the Nchanga copper mine in Zambia. The Zambian citizens allege that the discharge from the Nchanga copper mine polluted the local waterways, causing personal injury, property damage, loss of income, and inability to enjoy the land.

The Nchanga copper mine is owned and operated by Konkolo Copper Mines Plc (KCM), which is incorporated in Zambia. Vedanta Resources Plc (Vedanta) is a UK based holding company for a diverse group of metal and mining companies, including KCM. The Zambian citizens live in the area where the Nchanga copper mine is located, known as the Copperbelt region, and most of the Zambian citizens are farmers who rely on the land and waterways for their livelihood. The Zambian citizens brought claims against Vedanta for negligence and against KCM, inter alia, for negligence, nuisance, and violation of Zambian laws.

KCM and Vedanta both argued that the UK courts lacked jurisdiction to hear the claims and that Zambia was the appropriate jurisdiction. The UK High Court of Justice and the Court of Appeals held that the Zambian citizens' claims could proceed in the United Kingdom. Regarding Vedanta, the court of appeals confirmed that UK courts have jurisdiction under Article 4 of the Recast Brussels Regulation, which states "Subject to the Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." Additionally, a UK court cannot refuse to exercise the mandatory jurisdiction under Article 4 on forum non conveniens grounds.

Jurisdiction over KCM was permitted under what is regularly referred to as the "necessary or proper party" gateway, which required the Zambian citizens to show that (1) there is a real issue between the Zambian citizens and Vedanta that is reasonable for the court to try; and (2) KCM is a necessary or proper party to that claim. The UK High Court of Justice and the Court of Appeals found that the Zambian citizens met their burden, noting that there is a possibility that Vedanta owed a duty to the Zambian citizens because of its relationship with KCM. Indeed, Vedanta's board oversaw KCM; Vedanta provided KCM's health, safety, and environmental training; and Vedanta provided financial support for KCM. Counsel for KCM and Vedanta argued that there has been no reported case where a parent company was held to owe a duty of care to a person affected by operations of a subsidiary. The court of appeals judge stated, "That may be true, but it does not render such a claim unarguable. If it were otherwise the law would never change." The court's decision makes it potentially more difficult for UK corporations to insulate themselves from the actions of their foreign subsidiaries and provides a path toward justice for foreigners faced with a subsidiary's environmental or human rights violations.

ECOWAS Court of Justice orders Nigeria to compensate victims of the Biafran civil war.

The Economic Communities of West African States (ECOWAS) Court of Justice ordered Nigeria to pay 88 billion naira to compensate the victims of the Biafran civil war. The Biafran war erupted in 1967, approximately seven years after Nigeria gained its independence from Britain, and ended in 1970.

Ethnic and religious conflicts plagued Nigeria from its inception, as its boundaries were arbitrarily drawn by European colonizers without regard for the differences among the approximate 250 ethnic and linguistic groups within the newly formed country. The most populous ethnic groups are the Hausa-Fulani in the north who are mostly Muslim, the Igbos in the southeast who are mostly Christian, and the Yoruba in the southwest who are historically more Muslim.

The Biafran war began after Nigeria's southeastern region, which is predominately Christian and of the Igbo ethnic group, attempted to secede and form the independent state of Biafra. After Nigeria's independence, the ethnic tensions resulted in a scramble for political power: an Igbo-led coup in 1966 and a Hausa-Fulani countercoup approximately six months later, which was followed by the large-scale massacre of Igbo Christians living in the predominately Muslim north. The southeastern region immediately formed the independent state of Biafra,

resulting in a civil war with approximately two million civilian casualties, which ended with the surrender of Biafran forces.

The ECOWAS ruling resulted from a consent judgment, which many think is Nigeria's attempt to quench renewed calls for an independent Biafra, a movement that is steadily gaining support. The consent judgment requires that 50 billion naira be used to compensate war victims and that the remaining 38 billion naira be used for repairing war-torn regions and removing bombs and other abandoned weapons.

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MIDDLE EAST

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United Arab Emirates approves new investment law.

In an attempt to spur economic growth and to attract more foreign investment, the United Arab Emirates (UAE) has approved a new investment law that allows foreign companies to own more than 49% of UAE companies. The change will not apply to all business sectors.

Saudi Arabia approves draft whistleblower protection law.

In accordance with its latest anticorruption push, the Saudi Arabia Shoura Council has approved a draft whistleblower law that would protect individuals reporting financial and administrative corruption. The draft law would also protect experts who provide opinions in proceedings related to corruption issues.

Arbitration panel in the Dubai International Financial Centre finds sovereign immunity waiver by the Kurdistan Regional Government of Iraq.

The Kurdistan Regional Government of Iraq (KRG) and several oil and gas companies entered into an agreement for the development and sale of petroleum and liquefied petroleum products from two fields in Kurdistan. In the agreement, the KRG expressly waived any immunity for itself and its assets. When the KRG refused to pay, the claimants (i.e., the oil and gas companies) commenced arbitration, ultimately prevailed, and were awarded $2 billion in damages. The claimants sought to enforce the award in the Dubai International Financial Centre (DIFC), among other places. The KRG argued that enforcement of the award was precluded because it had sovereign immunity. A panel of the DIFC found that the KRG had expressly waived its sovereign immunity in the underlying agreement. The panel's decision is worth noting because the UAE does not have an express civil code provision addressing sovereign immunity.

New bylaws to the UAE's Federal Legal Profession Law only apply to Emirati lawyers.

A recent ministerial decision, Decision No. 972 of 2017, issued bylaws to the UAE's Federal Legal Profession Law. Included in these bylaws was a requirement that only Emirati lawyers may act in arbitrations or court cases in the UAE. Many leading foreign legal experts interpreted the new bylaw to mean that foreign lawyers could not represent parties in arbitrations seated in the UAE. As recently explained by some of the UAE's preeminent legal practitioners, however, that is not the case. The new bylaw only applies to Emirati lawyers and does not apply to foreign lawyers practicing law in the UAE.

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RUSSIA

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State Duma releases a number of citizens from the obligation to report on foreign accounts.

On 15 December 2017, the State Duma adopted a law exempting Russian citizens permanently residing abroad from reporting on accounts and deposits with foreign banks. The law entered into force on 1 January 2018. Citizens of the Russian Federation permanently residing abroad, including those on a study or work visa, who have not appeared in Russia for six months are automatically considered nonresidents for tax purposes. The same rule, however, did not apply to Russian residency status for currency control purposes and, as a result, these citizens were previously required to report annually on their foreign accounts and deposits, even if they had entered Russia for only one day during the year. Under the new law, Russian citizens who reside outside of Russia for more than 183 days a year, regardless of their number of entries to the Motherland, will no longer be required to report annually on accounts and deposits abroad.

Russians living abroad have also previously faced a number

of restrictions when transferring money to their accounts. The list of currency transactions that can be undertaken by Russian citizens while they are abroad is expanding, however. Last year, the Multilateral Competent Authority Agreement (MCAA) on the automatic exchange of financial information entered into force, within which the tax authorities of participating countries agreed to exchange information automatically on accounts (deposits) opened in their territory by residents of other member countries of the agreement. The new law extends the list of permitted funds transfers to accounts (deposits) owned by resident individuals and opened in banks outside the territory of the Russian Federation. Among such permitted cases are transactions related to the sale of a vehicle owned by a resident individual outside of the Russian Federation to the nonresident, and the sale of immovable property belonging to an individual resident to a nonresident, if such property is registered in the territory of a foreign state that is a member of the Organisation for Economic Co-operation and Development or the Financial Action Task Force, and such foreign state has joined the MCAA.

Russian government undertakes measures to mitigate the impact of sanctions.

In December 2017, the EU Council announced its intention to extend economic sanctions against Russia for another six months. Anti-Russian sanctions were introduced by the United States and the EU in 2014 after Russia's annexation of Crimea. The sanctions were expanded several times thereafter. In August 2017, U.S. President Donald Trump signed a law that introduced new restrictions on Russia, imposing penal measures against foreign organizations conducting business with Russian corporations appearing on a "black list."

In turn, the Russian government undertook a number of measures aimed at protecting strategically important organizations from the impact of sanctions. Previously, a bank could not participate in the deposit insurance system without disclosing information about the ultimate beneficiaries. On 15 December 2017, the State Duma adopted an amendment authorizing the government to determine exceptions to this rule. Under the new rule, the government may allow banks not to disclose information, or disclose only some information, about owners to a wide range of persons. In addition, non-state pension funds and companies that administer their funds, as well as insurance and nonbank credit organizations, investment funds, and depositories, can receive government approval for nondisclosure of information. The State Duma also passed a bill allowing the government to determine when securities issuers will not be required disclose information, setting forth the criteria for selecting banks that may be subject to a state defense order, and permitting the government to classify that list of banks.

As a result of these measures, at least 126 companies will now be able to conceal a wide range of data during public procurement procedures, including Gazprom, Rosneft, RZD, Rosseti, Rostelecom, and other companies, as well as their subsidiaries. All of their bidding and purchases will go through the closed procurement system on the Sberbank site. Each company's management has been given an order to approve nondisclosure of information on a number of transactions under this law. Counterparties in such transactions will be expected to participate under numbers, not names. The government also proposed to transfer all competitive purchases to the automated system of bidding of the state defense order.

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SOUTH AMERICA

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Latin American countries pass legislation, increase enforcement of anti-bribery and anticorruption laws.

A key component present in all Latin American countries is corruption. According to Transparency International's Corruption Perceptions Index, Latin American countries such as Brazil, Argentina, Venezuela, Colombia, and Mexico are ranked highly in regard to political corruption. Corruption includes political decisions made for the benefit of a small group of people based on their particular private interests without regard for the harm these decisions may cause to other citizens. Several measures are being adopted to end this systemic and cyclical problem in Latin American countries, such as the enactment of anticorruption laws and the imposition of criminal liability for individuals and companies caught in bribery schemes.

On 8 November 2017, Argentina's congress approved the Corporate Liability Bill to hold companies accountable for bribery schemes. Before the enactment of this bill, the anti-bribery laws of Argentina were applied only to individuals. The scope has now been expanded, as the bill now allows for the sanctioning of legal entities for offenses including national and transnational bribery and improper and unlawful transactions of public officials.

Brazil is also increasing its anticorruption efforts, recently releasing new guidelines related to corporate leniency

agreements. Because the Brazilian Clean Company Act (Law 12,846/2013) holds legal entities are strictly liable for corrupt practices and subject to certain sanctions, legal entities have been permitted to execute leniency agreements with public authorities that self-disclose corruption and/or other illicit activities in their cooperation with governmental authorities. On 24 August 2017, the Brazilian Federal Prosecution Office released new guidelines on requirements for leniency agreements due to an increase of leniency agreements among legal entities. The new guidelines are an important measure to guarantee more transparency and predictability within leniency agreement negotiations. Leniency agreements can be signed by Brazilian companies and foreign companies with headquarters, subsidiaries, or offices in Brazil.

Another example of a measure adopted by a Latin American country to fight corruption is the General Law of Administrative Responsibility that entered into force in Mexico on 19 July 2017. The General Law of Administrative Responsibility reinforces Mexican anticorruption laws and establishes administrative penalties for improper payments to government officials and bid-rigging in public procurement processes, among other corrupt activities. The main provisions of this new legislation are related to corrupt activities committed by legal entities and the implementation of compliance programs meant to decrease corporate liability.

Considering the recent wave of scandals in many Latin America countries, it is likely that these countries will remain focused on the continuous enforcement of anticorruption laws. Acts of corruption are no longer seen as a subject that should be ignored; therefore, cooperative relationships are expected to increase between Latin America's authorities to end corruption and bribery schemes.

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WESTERN EUROPE

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The Brexit divorce is a long affair.

In a post from an unknown source that went viral on social media this fall, Brexit was described as "the undefined being negotiated by the unprepared in order to get the unspecified for the uninformed." A year and a half after the referendum that triggered the current institutional crisis, uncertainty remains at the heart of the United Kingdom's withdrawal from the European Union.

On 29 March 2017, the British government invoked Article 50 of the Treaty of the EU, thus beginning the two-year negotiation period that should ultimately lead to the United Kingdom's withdrawal from the EU. Accordingly, on 29 March 2019, all EU treaties will cease to apply to the United Kingdom.

Yet some voices still suggest that Britain may not leave the EU. In October, Donald Tusk, president of the European Council, said, "It is in fact up to London how this will end, with a good deal, no deal or no Brexit." Even British Prime Minister Theresa May, who declared soon after the referendum that there would be no attempt to remain inside the EU, supported remaining in the EU. In a leaked pre-Brexit campaign speech to Goldman Sachs, she warned against the economic risks that leaving the single market would entail. While there is arguably no legal impediment to the United Kingdom halting its withdrawal process, the possibility that the United Kingdom remains in the EU seems dim.

Both the European Commission, on behalf of the member states, and the United Kingdom have been actively negotiating. After seven rounds of negotiations between June 2016 and December 2017, progress has been made on certain discrete issues including frontier workers' rights, health care, and social security benefits. There has been, however, a confrontation over money. The two sides cannot seem to agree over the divorce bill, i.e., how much the United Kingdom will have to pay to honor its promise to fund some European projects. Some estimate that the bill will range between 30 to 60 billion euros. An EU diplomat described the issue as a chicken or egg dilemma, in which the EU will only work on the transition if the United Kingdom makes progress on the financial aspects of the deal and where British officials will not commit to a number unless the EU agrees on the transition deal outline.

Ultimately, as the European Union Committee of the House of Lords reported on 7 December 2017, the clock is ticking, with the Article 50 deadline looming on the horizon: the feasibility of securing a comprehensive agreement by then is uncertain and the "overriding UK and EU interest is now to secure an orderly and legally certain transition, as early as possible."

The Catalan crisis may signal a resurgence of regionalism in a global era.

Catalonia, one of Spain's most economically dynamic communities, has transformed its velleity of independence into a powerful political movement geared

toward obtaining secession from Spain, culminating with a referendum for independence on 1 October 2017. The Catalans voted 92% to 8% in favor of independence, with a 43% turnout. As the day ended, demonstrations became clashes, and the national police sent by the central government responded with violence. Some separatists denounced a repression that was reminiscent of the Franco dictatorship. Since 1-O, the numeronym used by the Spanish media to refer to 1 October 2017, Spain has been struggling with an institutional and democratic crisis.

The referendum itself is highly controversial. A few weeks before it was held, the Constitutional Court of Spain declared the referendum illegal because the law enabling it violated the Spanish Constitution and was against the principle of "indissoluble unity of the Spanish nation." The law was also found to be in violation of the Catalan Statutes of Autonomy, as it did not meet the required two-thirds majority for amending statutes. In addition, the turmoil during the day of the referendum caused irregularities in the administration of the vote, further eroding its legitimacy.

On 10 October 2017, Carles Puigdemont, president of Catalonia, signed a declaration of independence. Later that month, on 27 October, the Catalan Parliament voted to declare independence. The Spanish Senate immediately responded by invoking the never-before-used Article 155 of the Constitution, which grants the Spanish government the right to take all measures necessary to compel a community to meet its obligations and protect the general interest of Spain. That evening, the prime minister of Spain, Mariano Rajoy, dismissed the Executive Council of Catalonia, dissolved the Parliament of Catalonia, and called for regional elections in December. Puigdemont and other Catalan cabinet ministers were charged with rebellion. Puigdemont and a few other ministers fled to Belgium while others were jailed.

Rajoy's bid to restore stability after the regional elections, however, backfired on 21 December 2017, when the separatist parties won the majority of seats of the Parliament of Catalonia, with close to an 80% turnout, thus crystalizing the independence movement with a legitimate election sanctioned by Spain. As a result, there is now little hope of a quick resolution of the crisis.

Meanwhile the international community has been a passive observer of the Catalan crisis. Many foreign governments, including France, the United Kingdom, and the United States through its embassy in Madrid, stated that the Catalan independence was an internal issue of Spain. The United Nations also refused to monitor the referendum but has condemned the violence.

The inaction of the EU in spite of calls to mediate the conflict has been noteworthy. The EU, however, is ill-equipped to deal with separatism crises within its confines. Indeed, the EU has no power over the institutions and internal organization of its member states. Pursuant to Article 4 of the Lisbon Treaty, the Union shall respect its members' state functions, including their territorial integrity, and the maintenance of law and order. With regard to the violence that took place, the European Court of Human rights—not the EU—is the institution in charge of upholding the 1950 European Convention on Human Rights. In fact, the European Union is not bound by the European Court of Human Rights' rulings.

The Catalan secession movement is very different from the judicial reforms that recently took place in Poland and led to the European Union triggering, for the first time, Article 7 of the European Union Treaty on 20 December 2017. The Polish reforms have stripped the judiciary of its independence and jeopardized the country's rule of law. Article 7 can be triggered when a member state infringes upon the Union's founding values, including freedom, democracy, equality, the rule of law, and respect for human rights. It allows the European Council to suspend some of the member state's rights, including its voting rights. Hungary, which is also undergoing major antidemocratic reforms, is also under scrutiny.

Spain, while facing an unprecedented political crisis, is not threatening the core values of the European Union. The EU, nevertheless, through its president of the European Parliament, Antonio Tajani, has warned that no one in Europe will recognize the independence of Catalonia, in a possible attempt to deter other secessionist movements in other regions, including the Basque country, Galicia, or Corsica.

While Spain is trying to resolve these very serious issues, a trending topic on social media in late December called for the independence of Tabarnia, a proposed Spanish autonomous community based on the metropolitan territories of Barcelona. It is just a viral joke that ironically uses the rhetoric and slogans of the independentists, claiming a right to secede from Catalonia because "Barcelona is not Catalonia." The prank is intended to force the Catalan separatists to adopt unionist arguments. The social media phenomenon, at least, allows for a discussion of the shortcomings of the arguments on both sides and the potential nesting doll effect of regionalism.

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SECTION SCENE

ILS Holiday/Dress for Success Benefit Party

14 December 2017 • Sequor Law, Miami

On 14 December 2017, the ILS held its annual holiday cocktail party as well as a drive supporting the Women in International Law Committee's Dress for Success initiative. Dress for Success provides professional attire, development tools, and a support network to women who are entering or re-entering the work force.

Mahesh Nanwani, Jim Meyer, Ed Davis, Greg Grossman, Al Lindsay, Miguel Zaldivar and Robert Pittman

Tatiana Crockett, Aileen Falcon, Ivonne Herrera, and Gus Oliva

Yine Rodriguez, Al Lindsay, Jackie Villalba, and Jim Meyer

Rodrigo Da Silva, Justin Di Blasio, and Kristin Drecktah Paz

Ana Barton, Solimar Santos, and Gilbert Squires

Al Lindsay, Ryan Reetz, and Arnie Lacayo

SECTION SCENE

ILS Outreach Luncheon

16 November 2017 • Citrus Club, Orlando

The ILS held a sold-out outreach luncheon at the Citrus Club in Orlando on 16 November 2017. The luncheon was organized as part of the chair's initiative to increase the section's outreach to Central and North Florida during this Bar year.

Penelope Perez-Kelly, Brock McClane, Bob Becerra, Jackie Villalba, Clarissa Rodriguez, Yine Rodriguez, and Arnie Lacayo

Adriana Hincapié, Penelope Perez-Kelly, Yine Rodriguez, and Arnie Lacayo

ILS Secretary Clarissa Rodriguez makes a presentation at the luncheon.

Former ILS Chair Brock McClane is on hand to address the group.

ILS Treasurer Bob Becerra addresses the luncheon's attendees.

SECTION SCENE

ILS Outreach Luncheon, continued

Yine Rodriguez and guests

Penelope Perez-Kelly and guests

Standing are Jim Meyer, Clarissa Rodriguez, Brock McClane, Arnie Lacayo, and Penelope Perez-Kelly; seated are Bob Becerra and Robert Q. Lee.

Seated are Gary Forster and Jackie Villalba, with Bob Becerra standing at right.

Brock McClane, Kim Radcliffe, and Arnie Lacayo

SECTION SCENE

ILS Fall Cocktail/Puerto Rico Hurricane Relief Event

15 November 2017 • Langford Hotel, Miami

Thank you to all who joined us at the ILS Fall Cocktail at the Langford Hotel, and especially to those who participated in the fundraising efforts in support of hurricane relief in Puerto Rico. We were able to raise over $3,631! Please continue to make donations to ConPRmetidos at http://www.conprmetidos.org/. Congratulations to the organizers: Cristina Vicens Beard, Ana Barton, Sylmarie Trujillo, and Marycarmen Soto.

Arnie Lacayo, Ana Barton, Cristina Vicens, Solimar Santos, and Carlos Osorio

Laura Reich, Clarissa Rodriguez, and Justin Dibiaso

Sophia San Palo, Nicolo Gargiulo, Valeria Angelucci, and Fabio Giallanza

Ana Barton, Cristina Vicens Beard, Marycarmen Soto, and Sylmarie Trujillo

Cristina Vicens Beard, Omar Ibrahem, Pablo Espinoza, and Arnie Lacayo

SECTION SCENE

ILS Lunch and Learn

14 November 2017 • Fiduciary Trust, Coral Gables

The November Lunch and Learn featured a presentation by Raquel (Rocky) A. Rodriguez, Miami managing member with McDonald Hopkins. Carlos Osorio, ILS chair-elect, was the co-organizer and interviewer for the session, and Fiduciary Trust hosted the event.

Michael Cabanas of Fiduciary Trust introduces Raquel (Rocky) A. Rodriguez (seated at right). Carlos Osorio is seated next to Ms. Rodriguez.

The ILS Lunch and Learn is always a popular and well-attended event.

A Seat at the Table for Women International Law Practitioners

1 November 2017 • JAMS Miami Resolution Center

On 1 November 2017, the Women in International (WIL) Committee of the ILS collaborated with JAMS to host a roundtable discussion titled “A Seat at the Table: A Panel Discussion on Diversity.” Each panelist represented a different sector of law practice: arbitrator, former judge now mediator, transactional attorney, litigator, and in-house counsel. The discussion was impactful and the feedback clear: we need more frank roundtables. WIL is planning another discussion in 2018.

The panelists are pictured at the head of the table: Patty Menéndez-Cambó, Ana Velez, Lorraine Brennan, and Judge Cristina Pereyra-Alvarez.

Speakers share their expertise and best advice for practitioners in international law.

Carmack Amendment, from page 9

arrived in New York, the container was empty. She was offered US$100 for her loss. At some point, however, UPS sold the missing paintings to Cargo Largo, its lost goods contractor. Cargo Largo then auctioned off the paintings. Two years after losing her paintings, the purchaser of the paintings at auction called Mlinar, informing her that he had purchased one of her two paintings.[18]

Upon discovering that her paintings had been auctioned by UPS's lost goods contractor, Mlinar filed suit against UPS, Cargo Largo, and the purchaser of the paintings at auction. She asserted four Florida state law claims in her complaint: conversion; profiting by criminal activity; unauthorized publication of name or likeness; and claims under Florida's Deceptive and Unfair Trade Practices Act (FDUTPA). The trial court dismissed all of Mlinar's claims against UPS, ruling that the state law claims were preempted by the Carmack Amendment.[19] On appeal, the Fourth District Court of Appeal also held that the Carmack Amendment preempted Mlinar's state law claims, reasoning that the allegations did not involve conduct separate and distinct from the delivery, loss of, or damage to goods, but were predicated on or closely related to the performance of the delivery contract.[20] The Fourth District Court of Appeal certified conflict with another court of appeal, however, and the Florida Supreme Court granted review.

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In *Mlinar*, the Florida Supreme Court recognized that "Congress enacted the Carmack Amendment to achieve uniformity in rules governing liability arising from interstate shipping contracts" and that "[c]onsistent with this goal, it became well established that the statute 'broadly' preempts state law claims arising from failures in the transportation and delivery of goods."[21] The Florida Supreme Court also recognized that courts nationwide had not settled on a single test to determine whether state law claims escape Carmack preemption, a conflict that extended even to Florida's district courts of appeal.[22]

The Florida Supreme Court found that case law in Florida had embraced two competing tests for assessing Carmack Amendment preemption: one based on alleged harm to the shipper; and the other focusing on the carrier's conduct. In reviewing each test, however, the Supreme Court found that neither needed to be adopted as the sole standard in determining whether common law and state law claims are preempted by the Carmack Amendment.[23] In *Mlinar*, for example, the Fourth District Court of Appeal applied the "separate conduct" rather than "separate injury" test. Applying that test, the Fourth District concluded that since all of Mlinar's claims arose from the intentional removal of her oil paintings from the UPS shipment and their subsequent sale, the claims were preempted by the Carmack Amendment. The Florida Supreme Court, after reviewing the case law across the nation, concluded that "various courts have found it prudent either to adopt or address both tests for purposes of evaluating Carmack Amendment preemption."[24] As such, the Florida Supreme Court found no compelling reason to adopt one test over another, and instead held that a state law or common law claim is generally preempted by the Carmack Amendment unless the claim alleges conduct or harm that is separate and distinct from the loss or damage to the goods to be transported.[25]

Applying this principle to the *Mlinar* case, the Florida Supreme Court quashed the Fourth District's decision

Carmack Amendment, continued

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affirming the trial court's dismissal of Mlinar's case. The Court rejected UPS's contention that Mlinar's claims stemmed from UPS's loss of Mlinar's package. Instead, it found that Mlinar alleged that Cargo Largo was a "fencing organization"; that UPS was paid by Cargo Largo for misappropriating the paintings; and that UPS had policies, procedures, and practices that were intended to result in payments to UPS of excessive rates through false pretenses and misleading billing practices. The Court stated that these allegations would illustrate a course of criminal conduct by UPS and its cohorts that bears only a tangential relationship to the interstate shipment process and a carrier's contractual obligation to transport goods. As such, the Florida Supreme Court refused to extend Carmack preemption to larcenous misconduct by the carrier that was intended to "and in fact resulted in the separation of goods from their owner," concluding that Mlinar's conversion, criminal activity, and FDUTPA claims arose from conduct or harms independent from the loss of goods in the shipping process. The Court stated that permitting Carmack preemption under such circumstances would "perpetuate dishonesty by companies that hold themselves out to the public as providers of interstate shipment services and in which consumers entrust their property."[26]

Conclusion

Generally, the Carmack Amendment will insulate interstate carriers from state law and common law claims, promoting Congress's goal of a uniform national regime governing the interstate trucking business. Under the Florida Supreme Court's holding in *Mlinar*, however, carriers cannot shield themselves under the Carmack Amendment to avoid claims alleging harms that are separate and distinct from the loss of or damage to the goods transported. Claims against carriers for criminal conduct, including conversion, FDUTPA, and profiting from criminal activity, can proceed under state and common law to redress losses suffered by shippers and owners that are victims of such conduct.

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Endnotes

1 *N.Y., N.H. & Hartford R.R. Co. v. Nothnagle*, 346 U.S. 128, 131 (1953).

2 *Fuente Cigar, Ltd. v. Roadway Express, Inc.*, 961 F.2d 1558, 1560 (11th Cir. 1992) (*quoting Fine Foliage of Florida, Inc. v. Bowman Transportation, Inc.*, 901 F.2d 1034, 1037 (11th Cir. 1990); *Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013 (11th Cir.1987).

3 *Independent Machinery, Inc. v. Kuehne & Nagel, Inc.*, 867 F.Supp. 752, 758 (N.D.Ill.1994).

4 *Casamassa v. Walton P. Davis Co., Inc.*, 2008 U.S. Dist. LEXIS 24941 (M.D. Fla. 28 Mar. 2008).

Carmack Amendment, continued

5 *White v. Mayflower Transit, LLC*, 543 F.3d 581 (9th Cir. 2008); *Miracle of Life, LLC v. N. Am. Van Lines, Inc.*, 368 F.Supp. 2d 494 (D.S.C. 2005); *Hanlon v. UPS*, 132 F.Supp. 2d 503 (N.D. Tex. 2001); *North Am. Van Lines v. Pinkerton Sec. Sys.*, 89 F.3d 452, (7th Cir. 1996).

6 *Brightstar Int'l Corp. v. Minuteman Int'l*, 2011 U.S. Dist. LEXIS 11419 (N.D. Ill. 4 Oct. 2011).

7 *Moffit v. Bekins Van Lines Co.*, 6 F.3d 305 (5th Cir. 1993).

8 *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 289 (7th Cir. 1997).

9 *United Van Lines v. Shooster*, 860 Fsupp. 826 (S.D. Fla. 1992).

10 *Laing v. Cordi*, 2012 U.S. Dist. LEXIS 145220 (M.D. Fla. 9 Oct. 2012).

11 The state law claims were for conversion, civil theft, and breach of agreement.

12 2012 U.S. Dist. LEXIS 145220 at *6.

13 *Id.*

14 *Smith v. UPS*, 296 FR.3d 1244, 1247 (11th Cir. 2002).

15 *Hughes v. United Van Lines, Inc.*, 829 F.2d 1407, 1415 (7th Cir. 1987).

16 *Miracle of Life, LLC v. N. Am. Van Lines, Inc.*, 368 F.Supp. 2d 494 (D.S.C. 2005).

17 *Mlinar v. UPS*, 186 So.2d 997 (Fla. 2016).

18 186 So.3d 997, 999.

19 129 So.3d at 408-409.

20 *Id.*, at 410-411.

21 186 So.3d 997, 1000.

22 186 S.3d 997, 1001.

23 *Id.*

24 186 So.3d 997, 1003.

25 *Id.*

26 186 So.3d 997, 1004-1005.

Rough Waters Ahead, from page 11

The maritime lien for necessaries has been codified at 46 U.S.C. §§ 31341-31343 as the Commercial Instruments and Maritime Liens Act (CIMLA).[12] Under CIMLA, a party: (1) providing (2) necessaries to a ship (3) "on the order of the owner or a person authorized by the owner" possesses a maritime lien on the ship and may bring an action in rem to enforce the lien and need not prove that credit was given to the vessel.[13] At first glance, CIMLA provides a simple claim for suppliers of necessaries against ships. Upon further review, however, each numbered phrase above leaves in its wake extensive precedent and arguable interpretations.

Defining *Necessaries*

Necessaries have been defined to include "repairs, supplies, towage, and the use of a dry dock or marine railway."[14] *Necessaries* additionally include

> [M]ost goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her particular function . . . [and] are things that a prudent owner would provide to enable a ship to perform well the functions for which she has been engaged . . . [including] money, labor and skill, and personal services as well as materials. What is a 'necessary' is to be determined relative to the requirements of the ship.[15]

The definition of *necessaries*, therefore, remains extremely broad. The courts have found that the transportation of drinking water, food, drilling equipment, and other supplies constitute necessaries,[16] as well as taxi service to and from a ship.[17] Further, insurance to keep a ship in commerce[18] and services to secure, prepare, and file documents related to marine mortgages[19] have been recognized as necessaries. In a recent decision by the United States First Circuit Court

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of Appeals, the court found that linens rented and delivered to a cruise ship and the services of cleaning, folding, pressing, packaging, staging, and shipping of the linens constituted necessaries to the ship, as these services "enabled the ship to serve as a hotel and were necessary to keep the ship's business afloat."[20] Attorneys' fees have been held not to be necessaries, however.[21]

Defining "Providing"

For necessaries to be *provided*[22] to a ship, the necessaries "must be either physically delivered or 'constructively dispatched to the vessel by handing over of the supplies to the owner or the owner's authorized agent for use on a designated vessel.'"[23] In the aforementioned First Circuit decision, the court found that continued ownership by the supplier, however, does not prevent a determination that rental items have been provided or delivered to the ship.[24] In such an instance, the court held that the use of the necessaries has been provided to the ship, rather than the items themselves, and have accordingly "limited maritime liens to the accrued rental value, depreciation, cost of necessary repairs, and replacement value of unrecoverable inventory."[25]

Further, in the worldwide saga of O.W. Bunkers, the United States District Court for the Southern District of New York recently ruled that O.W. Bunkers did not *provide* necessaries—in the form of bunkers—to the ships. The court explained, "'provided' clearly embodies a concept of payment protection for an entity that has put itself at financial or other risk in providing necessaries to vessels."[26] The court clarified that *providing* encompasses "a direct contractual relationship with the entity physically supplying the bunkers where there has been, or is promised to be, payment or other consideration to that entity."[27] As O.W. Bunkers did not take any risk in connection with providing necessaries, the court held that O.W. Bunkers did not have a maritime lien for the provision of bunkers to the ships, did not itself physically supply the bunkers, and never paid the suppliers that did physically supply the bunkers.[28]

Defining "On the Order of the Owner or Person Authorized by the Owner"

Those individuals presumed to have authority to procure necessaries for a ship exclusively include: the owner; master; "a person entrusted with the management of the vessel at the port of supply;" or an officer or agent appointed by the owner, charterer, owner pro hac vice, or an agreed buyer in possession of the ship.[29] Accordingly, myriad issues abound when a party not authorized to contract on behalf of the ship nevertheless contracts with a supplier for alleged necessaries for the ship.

Two lines of precedent exist in the United States with respect to suppliers of necessaries. The United States Fifth Circuit Court of Appeals addresses the general contractor/subcontractor line of cases, and the United States Ninth Circuit Court of Appeals provides the test for the principal/agent or middleman line of cases.[30] Under the Fifth Circuit general contractor/subcontractor cases, a subcontractor hired by a general contractor to supply necessaries cannot assert a maritime lien unless the subcontractor proves that an entity authorized to bind the ship controlled the selection of the subcontractor and explicitly directed that the subcontractor be selected as a supplier of the necessaries, as that would establish an agency relationship.[31] Under the Ninth Circuit middleman cases, physical suppliers in agency relationships may assert maritime liens against the ship, even if multiple intermediaries exist between the shipowner and the supplier.[32]

In another recent decision involving O.W. Bunkers, the Southern District Court of New York further explained the two lines of precedent. The court elucidated that with respect to the middleman cases, for a physical supplier to establish that it provided necessaries to a ship on the order of an entity authorized by the shipowner, it must demonstrate that the intermediaries that procured the necessaries had an agency relationship with the shipowner.[33] If such an agency relationship existed, then the intermediaries had authorization to bind the ship for the supply of necessaries and the physical supplier could assert a maritime lien against

the ship.[34] The court found that the shipowner did not authorize the intermediaries to bind the ship or the shipowner. The court rather held that the shipowner contracted with an intermediary that subcontracted with another intermediary that subcontracted with the physical supplier. The Southern District Court of New York accordingly determined that the general contractor/subcontractor cases applied, as "[e]ach step in this supply chain involved a separate contract of purchase and sale; each step was carried out independent of [the shipowner] and the [ship] . . . [and thus, the intermediary was] operating as a contractor, not an agent."

These cases, therefore, suggest that for the element of "on the order of the owner or a person authorized by the owner" to be satisfied, an agency relationship must exist between a party authorized to bind the ship and the supplier of necessaries.

The Effect of a No Liens Provision in the Underlying Contract

If the underlying contract contains a no liens provision, the supplier may not assert a maritime lien against the ship. Formerly, the law imposed a duty of inquiry upon a supplier of necessaries to determine the authority of the party contracting for necessaries.[35] Congress, however, appears to have eliminated the duty of inquiry to protect and assist suppliers in obtaining recourse.[36] As it stands today, the law provides that a maritime lien may be defeated when the shipowner establishes that the supplier only had actual knowledge that the party contracting for the supplies lacked authority to bind the ship or had knowledge of a no liens clause in the charterparty; no duty of inquiry is imposed upon the supplier.[37] Regardless of this general rule, "the duty of inquiry . . . still serves a valid goal . . . [as] [i]t prevents [suppliers] from 'shutting their eyes' to facts that they could easily discover."[38] Thus, suppliers should be wary of the potential that a no liens provision exists in the contract between the shipowner and the contractor and cannot "shut its eyes" to facts plainly before it.

Enforcing a Maritime Lien

To enforce a maritime lien, a party must bring an action in rem.[39] An in rem action is unique to admiralty law because under the law of the United States, it personifies the ship as the tortfeasor.[40] In other words, the arresting party brings an action in rem[41] against the ship herself.

Supplemental Rules C and E to the Federal Rules of Civil Procedure provide the process for arresting a ship for a maritime lien. In an action in rem, the plaintiff must file a complaint verifying the validity of the maritime lien through an affidavit: (1) describing with "reasonable particularity" the ship subject to the action; and (2) stating that the ship (the res) is located within the federal court's district or will be during the pendency of the action.[42] The court will review the complaint and supporting documentation and, if the requirements for an action in rem exist, the court will issue an order authorizing a warrant for the arrest of the ship, which must be delivered to the U.S. Marshal for service.[43] If the ship is not within the district when the action is commenced and no immediate prospect exists that the ship will enter the district, then the complaint will be dismissed.[44]

Generally, no requirement exists for the shipowner to be notified of the lien or the arrest.[45] If arrested and the ship has not been released within fourteen days after execution of the arrest, however, then the plaintiff must "give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district."[46] Once the ship has been arrested, the shipowner must file a verified claim of its ownership interest in the ship and post bond for the ship's release, or obtain the plaintiff's stipulation for release of the ship.[47] The shipowner then has a right to a prompt hearing, at which the plaintiff must prove why the arrest should not be vacated or why the court should grant other relief requested.[48] At this hearing, the plaintiff must demonstrate that probable cause supported the arrest.[49] If the plaintiff does not meet its burden of proof, then the case will be dismissed and the shipowner may bring a claim or separate suit for wrongful arrest.

Arresting a Ship Wrongfully and Its Consequences

Generally, in a suit or counterclaim for attorneys' fees in admiralty, the shipowner must prove the opposing party's bad faith, malice, or gross negligence.[50] If, however, a court determines that the arresting party wrongfully arrested the ship, then the shipowner may recover damages. The Fifth Circuit explained:

> The reasons for the award of damages are analogous to those in cases of malicious prosecution. The [arresting party] is required to respond in damages for causing to be done through the process of the court that which would have been wrongful for him to do himself, having no legal justification therefor and acting in bad faith, with malice, or through a wanton disregard of the legal rights of his adversary.[51]

In a recent decision, the Fifth Circuit held that although the arresting party "had access to all relevant information, it acted before it made a complete assessment of who owed what and did not provide its legal counsel complete information." Thus the court held that the arresting party acted in bad faith when arresting the ship, and did not rely on the advice of counsel in good faith.[52]

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On the other hand, the United States Eleventh Circuit Court of Appeals has explained that a claim for wrongful arrest cannot be used as a tool to redress good faith mistakes of a party's identity or the law, although such mistakes may be costly.[53] The Eleventh Circuit found that "these are the types of mistakes that our admiralty procedures anticipate and accept as a necessary evil to be suffered in the interests of preventing parties from fleeing a court's jurisdiction before the dispute can be adjudicated."[54] This principle, however, applies on a case-by-case basis. For instance, in this case, a Brazilian court awarded a Florida corporation, Dantzler, Inc., a judgment against Monsted Chartering.[55] To collect the judgment, the Brazilian court ordered the arrest of a vessel operated by a purported successor-in-interest to Monsted, Scan-Trans Holdings A/S.[56] Dantzler's counsel in Brazil requested the Brazilian court to arrest a Scan-Trans vessel and presented to the court a Scan-Trans fleet list, taken from Scan-Trans' website, listing the arrested vessel, M/V Industrial Fighter, as "owned" by Scan-Trans.[57] The Brazilian court issued an arrest order and the vessel was seized.[58] The actual vessel owner subsequently sent a letter to Dantzler informing him that the vessel had been mistakenly arrested and demanding its release.[59] Dantzler immediately disclosed the received information to his counsel.[60]

The Eleventh Circuit affirmed the decision of the United States Southern District Court of Florida, in which the Southern District determined that:

> [B]ased upon competent, albeit faulty evidence,[61] [Dantzler's counsel] petitioned the Brazilian Court to arrest a vessel he thought to be operated by Monsted's

> successor in interest . . . [and] [u]pon the receipt of notice that [Dantzler's counsel] had arrested property not belonging to Monsted, Dantzler immediately communicated with its United States and Brazilian counsel that an error may have been made, and honestly sought advice as to how to proceed."[62]

Accordingly, the Eleventh Circuit found that bad faith did not exist in a situation where the arresting party "was notified that it seized the wrong party's vessel but requested from that party further evidence to support that fact, rather than immediately releasing the vessel."[63] The Eleventh Circuit thus determined that Dantzler did not act in bad faith and honestly relied on counsel in deciding how to proceed.[64] The Eleventh Circuit held that although Dantzler could have discovered the true identity of the vessel's owner by consulting various maritime publications and resources, his failure to do so constituted merely negligence, which was not sufficient for liability.[65] The Eleventh Circuit, however, explained that although not found in this case, recklessness—consisting of "[c]onduct whereby the actor does not desire harmful consequences but nonetheless foresees the possibility and consciously takes the risk"—constitutes bad faith.[66]

The Eleventh Circuit further explained recklessness and discussed a United States Middle District Court of Florida case involving a marine collision.[67] After the first arrest, the arrestor agreed not to arrest the vessel a second time in exchange for the arrestee's stipulation of liability for the collision.[68] "[D]riven by its conviction that its promise not to rearrest the ship had been given for illusory consideration," the arrestor rearrested the vessel, knowing "full well of the ship's right not be rearrested."[69] The Middle District of Florida held that the arrestor proceeded recklessly and in bad faith.[70] Consequently, the Eleventh Circuit explained that bad faith may be found when a party acts in disregard of what one knows.[71]

Damages for wrongful arrest under CIMLA include recovery of attorneys' fees and costs to defend against the wrongful arrest.[72] The court may also award damages directly attributable to the arrest, including lost profits.[73] The United States District Court of Maine found that CIMLA does not require a showing of bad faith.[74] CIMLA provides, "[t]he court may award costs and attorneys[']fees to the prevailing party, unless the court finds that the position of the other party was substantially justified or other circumstances make an award of costs and attorneys[']fees unjust."[75] Accordingly, even if the shipowner cannot show bad faith, it may still be able to recover its attorneys' fees and costs if the arresting party did not have substantial justification in arresting the ship.

The main defense for the arresting party consists of relying on "the advice of competent counsel, honestly sought and acted upon in good faith."[76] Such advice constitutes a complete defense to an action for wrongful arrest, unless the arresting party knowingly omits material facts from counsel that could have precluded the arrest of the ship.[77] Note, however, that once the arresting party asserts the advice of counsel defense, the attorney-client privilege may be waived.[78]

Obtaining the Advice of Counsel Prior to Asserting a Maritime Lien

Given that the advice of competent counsel may constitute a complete defense to wrongful arrest, no excuse exists for a supplier to arrest a ship without first retaining counsel. The supplier should inform counsel of all facts in the case, being careful not to omit any facts that may preclude the arrest of the ship. Further, the advice must be from counsel competent in maritime liens and in rem actions. If the supplier retains advice from counsel that is not experienced in this highly specialized area of maritime law, then the defense may not apply and the supplier could be wholly liable for wrongful arrest. Maritime law practitioners should be wary of advising on the topic of maritime liens and in rem actions unless they can swear by affidavit that they are proficient in such actions. Otherwise, they may expose themselves to malpractice lawsuits if a supplier arrests a ship based on an incompetent counsel's advice. Practitioners should further advise their clients of the potential waiver of their attorney-client privileges resulting from the assertion of the advice of counsel defense.

Conclusion

Maritime liens and in rem actions constitute a complex area of maritime law. Although a situation may appear simple and straightforward, it could quickly devolve into convoluted litigation. Thus it will be rough waters ahead if the damaged party does not seek the advice of competent counsel before arresting a ship.

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Endnotes

1 46 U.S.C. § 31301(4) (2010).

2 A no liens provision is also referred to as a prohibition of liens provision.

3 In this situation, the shipowner has explicitly prohibited the party from contracting on behalf of the shipowner and the vessel by way of the no liens provision.

4 "The federal maritime lien is a unique security device, serving the dual purpose of keeping ships moving in commerce while not allowing them to escape their debts by sailing away." *Equilease Corp. v. M/V Sampson*, 793 F.2d 598, 602 (5th Cir. 1986).

5 *Id.*

6 Not including a seafarer's claim for personal injuries under the Jones Act. Robert Force, Admiralty and Maritime Law 175-176 (Kris Markarian ed., Federal Judicial Center, 2d ed. 2013).

7 Black's Law Dictionary defines *general average* as "[a]verage resulting from an intentional partial sacrifice of ship or cargo to avoid total loss [and] [t]he liability is proportionately shared by all parties who had an interest in the voyage."

8 Black's Law Dictionary defines *wharfage* as "[t]he fee paid for landing, loading, or unloading goods on a wharf [and] [t]he accommodation for loading or unloading goods on a wharf."

9 Black's Law Dictionary defines *stevedore* as "[a] person or company that hires longshore and harbor workers to load and unload ships."

10 *Id.*

11 Very few countries recognize a maritime lien for necessaries. *World Fuel Servs. Singapore, Pte, Ltd. v. Juliana*, No. 13-5421 at 5 (E.D. La. 16 June 2014).

12 Previously known as the Federal Maritime Lien Act (FMLA).

13 46 U.S.C. § 31342(a) (1989).

14 46 U.S.C. § 31301(4).

15 *Equilease Corp.*, 793 F.2d at 603.

16 *Trico Marine Operators, Inc. v. Falcon Drilling Co.*, 116 F.3d 159, 162 (5th Cir. 1997); *see also Portland Pilots, Inc. v. M/V Nova Star*, No. 16-2467, at 12-13 (1st Cir. 7 Nov. 2017).

17 *Port Ship Serv., Inc. v. Int'l Ship Mgmt. & Agencies Serv., Inc.*, 800 F.2d 1418, 1421 (5th Cir. 1986); *see also Portland Pilots*, No. 16-2467 at 12-13.

18 *Equilease Corp.*, 793 F.2d at 600; *see also Portland Pilots*, No. 16-2467 at 12-13.

19 *Security Pacific Bank of Wash. v. September Morn*, 754 F. Supp. 813, 814-815 (W.D. Wash. 1990); *see also Portland Pilots*, No. 16-2467 at 13.

20 *Portland Pilots*, No. 16-2467 at 14-15.

21 *M/V Sea Falcon*, 64 F.2d 585, 589-590 (11th Cir. 1995); *James Creek Marina v. Vessel My Girls*, 964 F. Supp. 20, 23 (D.D.C. 1997); *see also Portland Pilots*, No. 16-2467 at 13.

22 46 U.S.C. § 31342(a).

23 *Portland Pilots*, No. 16-2467 at 19 (*quoting Cianbro Corp. v. George H. Dean, Inc.*, 596 F.3d 10, 14 (1st Cir. 2010).

24 *Portland Pilots*, No. 16-2467 at 20.

25 *Portland Pilots*, No. 16-2467 at 21 (holding that the items in inventory had not been delivered to the ship to create a maritime lien for their replacement cost; however, the use of the rental items in inventory was part of the rental and cleaning services provided, and a lien had been properly awarded for the amount owed for such services); *see also Clubb Oil Tools, Inc. v. M/V George Vergottis*, 460 F. Supp. 835, 837 (S.D. Tex. 1978).

26 *ING Bank N.V. v. M/V Temara*, 2016 AMC 2946 (S.D.N.Y. 2016) (finding that an entity that contracts with another for the provision of necessaries can itself be deemed to have provided them under CIMLA but in that situation, "privity and/or a financial payment obligation between the physical supplier and contractor" exists).

27 *Id.* at 17.

28 *Id.* at 19.

29 46 U.S.C. § 31341(a) (1989). Under 46 U.S.C. § 31341(b), a person tortiously or unlawfully in possession or charge of a vessel has no authority to procure necessaries for the ship.

30 *O'Rourke Marine Servs. L.P., LLP v. M/V Cosco Haifa*, 179 F. Supp. 3d 333, 337-338 (S.D.N.Y. 2016); *see also Lake Charles Stevedores, Inc. v. M/V Professor Vladimir Popov* (199 F.3d 220 (5th Cir. 1999); *see also Marine Fuel Supply & Towing, Inc. v. M/V Ken Lucky* (869 F.2d 473 (9th Cir. 1988).

31 *O'Rourke Marine Servs.*, 179 F. Supp. 3d at 338 (explaining that the rationale for this test is "[w]ithout an agency relationship between the vessel and the general contractor, and without actual or apparent authority on the part of the general contractor to bind the vessel to a specific subcontractor, the subcontractor cannot

Rough Waters Ahead, continued

show that it provided necessaries on the order of the owner or its agent").

32 *Id.*

33 *Id.*

34 *Id.*

35 *Belcher Oil Co. v. M/V Gardenia*, 766 F.2d 1508, 1511 (11th Cir. 1985).

36 *Id.*

37 *Id.* at 1513.

38 *Cardinal Shipping Corp. v. M/S Seisho Maru*, 744 F.2d 461, 471 (*quoting* THE LAW OF ADMIRALTY, G. GILMORE & C. BLACK 672 (2d ed. 1975) (holding that the duty of reasonable and diligent inquiry still binds suppliers).

39 46 U.S.C. § 31342(a).

40 *See Equilease Corp.*, 793 F.2d 598, 602 (finding that "[t]he maritime lien concept thus somewhat personifies a vessel as an entity with potential liabilities independent and apart from the personal liability of its owner"). Under English law, the personification theory has not been utilized. Instead, English law operates on a procedural theory, whereby the maritime lien is seen as a means of compelling the appearance of the shipowner in court. *See The Dictator* [1892] P 304; *see also The Indian Grace No. 2* [1998] 1 Lloyd's Rep 1.

41 An in rem action is cognizable only in federal court. *Madruga Superior Court*, 346 U.S. 556 (1954).

42 Fed. R. Civ. P. Supplemental Admiralty Rule C(2).

43 FORCE, *supra* note 5, at 32; *see also* Fed. R. Civ. P. Supplemental Admiralty Rule C(3)(a); *see also* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 895 (Thomson Reuters, 5th ed. 2012). The Marshal will then take the ship into its possession. Fed. R. Civ. P. Supplemental Admiralty Rule C(4)(b).

44 FORCE, *supra* note 5, at 32.

45 Fed. R. Civ. P. Supplemental Admiralty Rule C(3)(b).

46 *Id.* at Rule C(4).

47 SCHOENBAUM, *supra* note 17, at 895; Fed. R. Civ. P. Supplemental Admiralty Rule C(6)(a). This hearing has been designed to satisfy the constitutional requirement of due process by guaranteeing the shipowner a prompt post-seizure hearing at which he can rebut the complaint, arrest, security demanded, and any other alleged deficiency in the proceedings. Fed. R. Civ. P. Supplemental Admiralty Rule E(5). Further, the principal sum of the bond may not exceed "twice the amount of the plaintiff's claim or . . . the value of the property on due appraisement, whichever is smaller." *Id.* at Rule E(5)(a).

48 Fed. R. Civ. P. Supplemental Admiralty Rule C(3)(f); *see also* Fed. R. Civ. P. Supplemental Admiralty Rule E advisory committee notes.

49 *Comar Marine, Corp. v. Raider Marine Logistics, LLC*, 792 F.3d 564, 576 (5th Cir. 2015); *see also Lion De Mer S.A. v. M/V Loretta D*, 1998 AMC 1410 (holding that the court has discretion to consider extrinsic evidence presented at the hearing to determine whether the arresting party has met its burden).

50 *Marastro Compania Naviero v. Canadian Maritime Carriers, Ltd.*, 959 F.2d 49, 53 (5th Cir. 1992); *Frontera Fruit Co. v. Dowling*, 91 F.2d 293, 297 (5th Cir. 1937).

51 *Frontera Fruit*, 91 F.2d at 297.

52 *Comar Marine*, 792 F.3d at 576.

53 *Industrial Maritime Carriers, LLC v. Dantzler*, No. 14-15130 at 16 (11th Cir. 29 May 2015).

54 *Id.*

55 *Id.* at 2.

56 *Id.*

57 *Id.*

58 *Id.* at 3.

59 *Id.*

60 *Id.*

61 *Id.* at 2.

62 *Id.* at 4.

63 *Id.* at 10 (*citing Furness Withy (Chartering), Inc., Panama v. World Energy Sys. Assocs., Inc. (Furness I)*, 772 F.2d 802, 808 n.9 (11th Cir. 1985)).

64 *Id.* at 10-11.

65 *Id.* at 9.

66 *Id.* at 12.

67 *Id.* at 11 (*citing Coastal Barge Corp. v. M/V Maritime Prosperity*, 901 F. Supp. 325 (M.D. Fla. 1994)).

68 *Id.*

69 *Id.* (*quoting Coastal Barge Corp.*, 901 F. Supp. at 328-329).

70 *Id.*

71 *Id.* at 13 (*citing Sea Star Line Caribbean, LLC v. M/V Sunshine Spirit*, No. 09-1152 (JAF), 2009 WL 3878246, *6 (D.P.R. 13 Nov. 2009), in which the defendant arrested the plaintiff's vessel, despite a contract between the parties prohibiting the arrest of the vessel). The court in *Sea Star* found that the defendant was "charged with implied actual knowledge of the . . . clause, and it [was] a sophisticated business entity engaged in the trade of carriage of goods by sea."

72 46 U.S.C. § 31343(c)(2) (2010).

73 *Comar Marine*, 792 F.3d at 576-577.

74 *Cianbro*, 733 F. Supp. 2d 191 (D. Me. 2010).

75 46 U.S.C. § 31343(c)(2).

76 *Comar Marine*, 792 F.3d at 576.

77 *Coastal Barge Corp. v. M/V Maritime Prosperity*, 901 F. Supp. 325, 329 (11th Cir. 1994). The court explained that a merely negligent omission does not rise to the level of bad faith.

78 A party may waive the attorney-client privilege by asserting reliance on the advice of counsel as an affirmative defense. In such a case, the party "has made the decision and taken the affirmative step in the litigation to place the advice of the attorney in issue . . . by placing the advice in issue, the client has opened to examination facts relating to that advice." *Rhone-Poulenc Rorer v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994).

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International Comity, from page 13

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claim under the Jones Act.[16] The court's rationale was twofold. First, the Filipino tribunal actually considered and rejected Navarette's Jones Act claim, finding that he was not a seaman within the meaning of the Act and was thus not entitled to its protections. A domestic review of that finding was precluded by the narrow scope of the Convention's defenses. Second, the court held that "even if [it] disagreed with the result, the finding by the Arbiter that Navarette is not a Jones Act seaman does not 'so offend public policy' that it should be set aside."[17] As the court went on to explain, "[a]n arbitrator's result may be wrong; it may appear unsupported; it may appear poorly reasoned; it may appear foolish. Yet, it may not be subject to court interference."[18] The court's reasoning on this point illustrates the extreme deference that U.S. courts—in compliance with the Convention—afford to the decisions of foreign arbitral tribunals.

More recently, in *Castro v. Tri Marine Fish Company, LLC*,[19] a Filipino plaintiff was injured, requiring surgery to repair torn ligaments in his knee. In arbitration, Castro was awarded US$24,160, but he attempted to invalidate the award by advancing arguments similar to those discussed above. The U.S. District Court for the Western District of Washington enforced the award in accordance with the rationale articulated in *Rickmers* and *Navarette*. The court also emphasized the fact that the benefits schedule under which the award was calculated was promulgated by the POEA, which "closely regulates the employment of Filipino seamen by foreign corporations and which has a mandate to promote and monitor the overseas employment of Filipinos and to *safeguard their interests*."[20] Again, the Convention prevents U.S. courts from imposing their judgments as to the fairness of the foreign laws under which these arbitrations proceed.

No matter the theory advanced to support a public policy challenge, it is clear that claimants' real qualm with enforcement of foreign arbitral awards is that the awards do not meet the threshold of recovery that litigants have come to expect from U.S. courts under U.S. law. These recent challenges raise an interesting question about U.S. public policy as it relates to the scope of damages recoverable under foreign law: who are we to sit in judgment of what another country believes is adequate to protect its own citizens?

International Comity Takes Center Stage

The common thread unifying these recent rulings is the fact that U.S. courts deciding maritime cases are heeding the prior admonitions of the U.S. Supreme Court by giving due deference to principles of international comity when determining whether to enforce foreign arbitral awards. As used in this context,

International Comity, continued

comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[21]

Notwithstanding the burgeoning "America First" rhetoric prevalent in U.S. politics today, maritime courts resist the temptation to "unnecessarily exalt the primacy of United States law over the laws of other countries."[22] The underpinning of the United States' strong pro-enforcement policy favoring international arbitration is tied to fundamental respect for foreign governments and their laws. The need for such deference is aptly summarized by the U.S. Supreme Court in *M/S Bremen v. Zapata Off-Shore Company*:[23]

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[24]

Practically speaking, the tenor of this principle makes public policy challenges to POEA arbitral awards even more difficult, especially given the scope and intent of the POEA regime. A closer look at the inner workings of the POEA demonstrates why maritime courts exercise the deference that international comity proposes.

The Philippines government established the POEA, an agency of the Philippines Department of Labor and Employment, to promote and develop overseas employment opportunities for Filipino workers, and to

International Comity, continued

afford protection to them and their families. Through the POEA, the Philippines government closely supervises and regulates the employment of Filipino seamen and, in so doing, has promulgated extensive rules and regulations controlling their employment overseas. The POEA registers seamen seeking jobs, prescribes standard employment contracts for them, approves their wages, and requires that 80% of their earnings be sent home. The POEA also regulates corporations' solicitations and advertisements for employment, contract processing, and travel documentation; regulates the filing of grievances; and provides worker assistance and welfare services.[25]

The POEA's protections require inclusion of arbitration provisions in every crewmember employment contract, providing that disputes between Filipino seamen and their employers are to be resolved through arbitration in the Philippines. A POEA contract is not simply a voluntary contract of employment negotiated and executed by seamen and their employers; rather it is a mandatory form meant to help ensure minimum employment standards for Filipino seafarers employed by foreign corporations.[26] The POEA has also developed a no-fault compensation system to ensure that its overseas workers are adequately protected if they are injured.

Like a typical workers' compensation statute, the rules promulgated by the POEA provide the exclusive remedy for Filipino seamen injured in their work.[27] Importantly, neither the employer nor the employee plays a role in drafting the POEA contract, although it must be used if a foreign corporation wants to employ Filipino workers.

In light of the role played by the POEA—and the United States' domestic application of similar workers' compensation benefit systems—it would be hypocritical for a U.S. court to invalidate a POEA arbitral award to a Filipino seafarer on grounds that the award violates public policy. Should U.S. courts deem POEA arbitral awards inadequate merely because the Philippine government—rather than the U.S. government—promulgated and enforced the benefits system? Are U.S. courts justified in vacating such awards simply because the quanta of same fall short of U.S. standards? Ultimately, *Rickmers, Navarette,* and *Castro* were all correct in enforcing the subject POEA arbitral awards, deferring to the judgments made by the Philippine government and the POEA about the measure of recovery that should be available to Philippine citizens. Just because litigation in a U.S. court may have led to a different—perhaps more generous—award, it does not mean that the public policy of the United States was offended. The United States does not always know best.

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As stated in *Rickmers*, "[a]pplying Philippine law to a Filipino seaman in Philippine arbitration, by itself, is not cause for setting aside the award, even if American choice-of-law principles would lead to the application of another nation's law."[28] Similarly, *Navarette* concluded that "[s]imply because a foreign arbitral award provides for a smaller recovery than may have been available under United States maritime law does not necessarily mean the award violates public policy."[29]

International Comity, continued

That is not to imply that the benefits provided by the POEA are "less than"; the Philippine government simply provides different protections. Under the POEA scheme—unlike the United States' Jones Act—the amount of a seaman's compensation is calculated based on disability ratings. But also unlike the Jones Act, the POEA regime does not require that a seaman prove liability. Thus the POEA system guarantees payment to an injured Filipino overseas worker whereas a U.S. seaman injured under similar circumstances would need to establish the defendant's fault in order to recover under the Jones Act. Thus there exists the possibility that, under the Jones Act, an injured seaman will be entitled to nothing at all. Filipino seamen subject to the POEA regime therefore enjoy a unique benefit unavailable to seamen who are subject to U.S. law. As maritime courts have recognized in the past, the policy and structure of the POEA were put in place by the Philippine government to serve the best interest of its citizens working abroad.[30]

The maritime rulings discussed above properly relied upon well entrenched principles of international comity to distinguish between: (1) foreign arbitral awards that truly rise to the level of offending U.S. public policy; and (2) those that merely led to a result different from what a plaintiff would obtain under U.S. law.[31] The U.S. Supreme Court, in *Mitsubishi Motors v. Soler Chrysler-Plymouth*,[32] refined the standard for the applicability of the public policy defense:

> [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' [arbitration] agreement, even assuming that a contrary result would be forthcoming in a domestic context.[33]

The Supreme Court further cautioned that if the United States' judiciary does not remain solicitous of the laws of foreign sovereigns when examining their arbitral awards, the implications could do greater harm: "To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations."[34]

So long as foreign arbitral awards are fairly administered and do not offend the United States' "most basic notions of morality and justice,"[35] courts in the United States should respect foreign governments' policies, tribunals, and laws, and should enforce arbitration awards rendered elsewhere. U.S. maritime courts have properly applied these principles, granting due deference to foreign tribunals even when the ultimate result would have been different or more beneficial to the claimant if litigated domestically. Doing so has furthered the strong federal policy favoring international arbitration and has assured the world that principles of international comity are alive and well in the United States.

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Endnotes

1 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

2 9 U.S.C. §§ 201-208 (2012).

3 *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998) (*quoting* G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 Duke L.J. 829, 888 (1995)).

4 New York Convention, art. V, 10 June 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

5 *See, e.g.*, Joseph T. McLaughlin & Laurie Genevro, *Enforcement of Arbitral Awards Under the New York Convention – Practice in U.S. Courts,* 3 Int'l Tax & Bus. Law 249 (1986); Note, *The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards*, 7 Cal. W. Int'l L.J. 228, 228-29 n.1 (1977) (noting commentators' interpretation of the defense as a loophole).

6 *Parson & Whittemore Overseas Co. v. SocieteGenerale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974).

7 *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-40 (1987) ("A court cannot review arbitration awards for errors of fact or law even if the Court believes the arbitral tribunal made serious errors."); *United Steelworkers of America v. Enterprise Wheel*

International Comity, continued

& Car Corp., 363 U.S. 593, 599 (1960) (noting that "plenary review by a court on the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final"); *Delta Air Lines v. Air Line Pilots Ass'n, Intern.*, 861 F.2d 665, 670 (11th Cir. 1988) ("An arbitrator's result may be wrong; it may appear unsupported; it may appear poorly reasoned; it may appear foolish. Yet, it may not be subject to court interference").

8 *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie*, 508 F.2d 969, 973-74 (2d Cir. 1974); *see also Admart AG v. Stephen and Mary Birch Foundation, Inc.*, 457 F.3d 302, 308 (3d Cir. 2006); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004); *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998).

9 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

10 *Putnam v. Lower*, 236 F.2d 561, 569-70 (9th Cir. 1956) ("Ever since the opinion of Justice Story in *Harden v. Gordon*, [11 F. Cas. 480 (C.C. D. Me. 1823) (No. 6,047)], it has been settled in the maritime law of the United States that seamen are the wards of Admiralty, and as such the courts of admiralty vigilantly guard against any encroachment upon their rights").

11 *Huseman v. Icicle Seafoods, Inc.*, 471 F.3d 1116, 1124 (9th Cir. 2006).

12 783 F.3d 1010 (5th Cir. 2015).

13 According to *Rickmers*, 783 F.3d 1010, the prospective waiver doctrine was addressed in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 619-21 (1985) and applies when choice-of-forum and choice-of-law clauses act as a prospective waiver of a party's right to pursue statutory remedies. The *Mitsubishi Motors* court stated that it would "have little hesitation in condemning the agreement as against public policy." 473 U.S. at 637 n.19. Finding that this doctrine is limited only to statutory rights, the Fifth Circuit held in *Rickmers* that the lower court erred when it concluded Asignacion could pursue his claims under general maritime law. 783 F.3d at 1021.

14 *See Rickmers*, 783 F.3d 1010.

15 169 F. Supp. 3d 1314 (S.D. Fla. 2016).

16 *See* 46 U.S.C. §§ 30101-30106 (2012).

17 *Id.* at 1318-19.

18 *Id.* at 1319 (quoting *Delta Air Lines v. Air Line Pilots Ass'n, Intern.*, 861 F.2d 665, 670 (11th Cir. 1988)).

19 No. C17-8RSL, 2017 WL 3262473, at *5-6 (W.D. Wash. 31 July 2017).

20 *Id.* at *6 (internal quotation marks omitted).

21 *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

22 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 n.11 (1974).

23 407 U.S. 1 (1972).

24 *Id.* at 9.

25 *See Balen v. Holland America Line, Inc.*, 583 F.3d 647, 650-51 (9th Cir. 2009); *Marine Chance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 219 n.12 (5th Cir. 1998); *Cruz v. Chesapeake Shipping, Inc.*, 932 F.2d 218, 221 (3d Cir. 1991).

26 *Cargotec OYJ v. Mol Ship Mgmt. Co.*, No. CIV. CCB-11-2163, 2014 WL 1004105, at *4 (D. Md. 13 Mar. 2014).

27 Compl. of Eternity Shipping, Ltd., 444 F.Supp.2d 347, 374-75 (D. Md. 2006).

28 *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010 (5th Cir. 2015).

29 *Navarette v. Silversea Cruises Ltd.*, 169 F. Supp. 3d 1314, 1317 (S.D. Fla. 2016).

30 *See Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005).

31 As noted in *A. Halcoussis Shipping Ltd. v. Golden Eagle Liberia Ltd.*, No. 88 CIV. 4500 (MJL), 1989 WL 115941 (S.D.N.Y. 27 Sept. 1989), all laws—be they procedural or substantive—are founded on strong policy considerations. *Id.* at *2. "Yet not all laws represent a country's 'most basic notions of morality and justice.' Were it otherwise, the Convention's public policy exception would eviscerate the very goal of the Convention as a whole—to encourage the recognition and enforcement of commercial arbitration agreements." *Id.*

32 473 U.S. 614 (1985).

33 *Id.* at 629.

34 *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304 (1918).

35 *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie*, 508 F.2d 969, 973-74 (2d Cir. 1974).

Undeclared War, from page 15

over their vessels on the high seas to ensure that they follow applicable conservation and management regulations; and the Convention of International Trade in Endangered Species (CITES), which provides for the protection and regulation against over-exploitation of species, through limitations on international trade.

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Additionally, the United States takes part in several regional bodies covering the Atlantic and Pacific oceans as they relate to IUU fishing, mostly concerning tuna, shark, and dolphin issues. Domestically, Congress remains engaged in exerting influence and doling out authority to combat IUU fishing by giving authority to the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Coast Guard to enforce these issues. The formative legislation arose in the Magnuson-Stevens Fishery Conservation and Management Act, enacted in 1976, at 16 U.S.C. 1801, which served as the legislative birthplace for conservation and management of fisheries, and was initially limited to that occurring within the Exclusive Economic Zone. Then the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 directed substantial attention to fishing issues outside U.S. waters, particularly IUU fishing, by establishing an identification and certification procedure for nations whose vessels engage in IUU fishing. The Illegal, Unreported, and Unregulated Fisheries Enforcement Act of 2015 strengthened mechanisms to stop IUU fishing, 16 U.S.C. 1801, and implemented the PSMA, 16 U.S.C. 7401 et seq., and the Antigua Convention, 16 U.S.C. 951, to assist in its efforts. Notably, the High Seas Driftnet Fisheries Enforcement Act, 16 U.S.C. 1826a-1826c, sought to end the use of large-scale driftnets by foreign fisheries operating beyond the Exclusive Economic Zone of any nation, and the High Seas Driftnet Fishing Moratorium Protection Act, 16 U.S.C. 1826d-1826k, prohibited the United States from entering into international agreements that would prevent full implementation of the UN Moratorium on Large-Scale High Seas Driftnets. Further, the High Seas Fishing Compliance Act (HSFCA), 16 U.S.C. 5501-5509, implemented the FAO Compliance Agreement for vessels flagged in the United States. The HSFCA requires all U.S. vessels to obtain a permit before engaging in operations on the high seas; authorizes the secretary of commerce to issue such permits subject to conditions and limitations; and mandates sharing of information relating to permitted vessels with the FAO. The HSFCA also prohibits use of high seas fishing vessels in contravention of international conservation management measures recognized by the United States, or in a manner that would violate a permit condition. The Lacey Act, 16 U.S.C. 3371-3378, prohibits the import, export, transport, sale, possession, or purchase in interstate or foreign commerce of any fish or wildlife taken, possessed, transported, or sold in violation of any U.S. state law or regulation or of any foreign law. And the Pelly Amendment to the Fishermen's Protective Act of 1967, 22 U.S.C. 1978, provides for the possibility of trade-restrictive measures. The legislation mentioned

Undeclared War, continued

above is extensively chronicled in NOAA's "Improving International Fisheries Management," a mandated biennial report to Congress pursuant to Section 403(a) of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006.

All of this is a constant effort to ensure the fisheries remain sustainable and the supply chain of food arriving in the United States is not tainted with the import of ill-gotten gains. Ninety percent of the seafood consumed in the United States is imported from outside the United States, an amount which equates in value to nearly $5 billion per year.[7] The majority (over 84%) of this catch is finfish.[8] The United States has expressed that it is duty bound to exchange in consideration for its import a reciprocal export of sustainable practices through fisheries management globally to conserve and protect the precious resources of developing and vulnerable nations.[9]

As you might imagine, the United States is a strong leader in sustainability efforts and has robust identification and enforcement mechanisms; weaker countries, such as those in West Africa and South America, which have fewer resources to monitor and police IUU fishing, are generally rife with illegal and unregulated trade. And that trade is profitable.[10] The illegal shark fin trade in Hong Kong suggests that three to four times more sharks are killed than official reports claim, yielding $292 to $476 million in shark fin sales.[11] Russian sockeye salmon caught illegally is estimated to be 60% to 90% above reported levels, based on the amount of fish being traded, representing economic losses of $40 million to $74 million.[12] The infamous illegal trade in Chilean sea bass (a market name for toothfish) from waters around Antarctica is hard to pin down, with estimates for illegal catches ranging from five to ten times greater than the official reported catch.[13] Swordfish and tuna in Greece and cod in the United Kingdom are estimated to be illegally caught half of the time.[14] Bluefin tuna on the black market may reach $4 billion annually, with an estimated five to ten times higher volume of illegally caught fish than the official catch.[15] Illegal catches of skipjack, yellowfin, albacore, and bigeye tunas are estimated at $548 million annually.[16]

West Africa loses over $2 billion *annually* to illegal fishing.[17] West African countries rely heavily on fish as one of the principal sources of protein, but also as a source of income and employment for nearly 7 million people.[18] Chinese vessels in particular (or those masquerading on behalf of Chinese interests)—part of China's impressive, increasing, and imperial distant-water fleet—are drawn there due to China's huge population, its growing demand for consumption, the expanding middle class with funds to purchase at retail prices, and West Africa's corruption and weak enforcement of regulations by its local governments.[19] China's distant-water fleet will likely reach 3,000 vessels soon, and there are astonishing estimates that nearly two-thirds of those vessels are engaged in some sort of IUU fishing. Many of the illegal fishing acts have turned violent. In March 2016, the Argentine Naval Prefecture sank a Chinese fishing vessel, Lu Yan Yuan Yu 010, after detecting it illegally fishing within the country's exclusive

Sunset over Victoria Harbor, Hong Kong, as viewed atop Victoria Peak
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economic zone.[20] Four of the crewmembers were rescued by the Argentine Navy; the other twenty-eight by several *other Chinese fishing vessels* in the area. South Korea ramped up its efforts to engage and combat illegal fishing by the Chinese after sinking a Chinese vessel and engaging in skirmishes with several others.[21] South Africa detained three Chinese ships for illegal squid fishing.[22] And Ecuador summoned the Chinese ambassador to warn China about illegally fishing in the Galapagos.[23]

China shows little sign of slowing down. Its fishing economy supports 14 million people and accounts for billions of dollars in revenues. And, notably, the Chinese government is heavily subsidizing its distant-water fleet to engage in illegal activities, by subsidizing the diesel fuel it costs to operate the vessels, although the Chinese claim it is going to aggressively cut those fuel subsidies in the immediate future.[24] "The era of fishing any way you want, wherever you want, has passed," Liu Xinzhong, deputy general director of the Bureau of Fisheries in Beijing, has said. "We now need to fish by the rules." But these statements are often just strategically utilized to reduce the heat in the proverbial kitchen; one recent Greenpeace report noted Chinese "(f)uel subsidies are rapidly increasing, while data transparency continuously declines."[25] With fuel making up 37% of the distant-water fishing industry's overhead for operations, attacking this subsidy from the Chinese government through public and private pressure is certainly an important factor in combating IUU fishing.

And while the key to combating economic gain must come in the form of removing the economic incentive to fish illegally, the imposition of criminal sanctions and prosecution of crew members remains shortsighted because it does not hit the owners or operators where it hurts, in their pockets, as these rogue owners place a low value on their crew members and their well-being. The detention and release of vessels before securing economic reparations and damage is likewise foolhardy. And the penalties levied are typically minor compared to the value of stolen fish, often approximately only 1.5% of the IUU landings.[26]

If you believe the reports and data, the food security of the world is at stake and soon we may actually be on the brink of war over the global depletion of fisheries. To combat this, countries must address a lack of effective fisheries management and the little to no transparency of access agreements granting permission to engage in legal fishing activities.[27] "There is corruption in opacity," said Rashid Sumaila, director of the Fisheries Economics Research Unit at the University of British Columbia Fisheries Center. "Sometimes the Chinese pay bribes to get access and that money doesn't trickle down, so the population is hit by a double whammy."[28] IUU fishing is often a game of three-card monte with special chartering arrangements, joint ventures, use of flags of convenience, and name changes utilized to mask real interests and to buy time to allow a vessel to escape to another jurisdiction. The inability of governments to control IUU fishing and the inability to trace the vessels engaged in it have led to more courageous activity by the perpetrators. But this can be controlled with effective use of satellite technology and tracking capabilities, which can be addressed if there is a reduction in the lack of regional coherence and an uptick in harmonized management measures. Management, control, and surveillance must be coupled with effective cross-border treaties and mechanisms to enable effective enforcement. This may come with changes to existing laws so they are more restrictive and enable multiple entities to enforce violations. For instance, there are rampant abuses by vessels that fish shallow waters and interfere with local artisanal fishing, with vessels that display illegal, obscured, and/or non-existing markings such as names and ports of call, and with vessels that turn off their automatic identification system (AIS) tracking when fishing in a particular region, whether to engage in impermissible fishing and harvesting or to link up with assisting mother ships for the transshipment of fish at sea and the commingling of permitted landings with unauthorized fish, making tracking nearly impossible. These acts should be construed under regional laws as prima facie evidence of IUU fishing, and there should be regionally harmonized laws that allow authorities to enforce them.

Regional fisheries management organizations need to have cohesive buy-in, IUU vessels and their history

Undeclared War, continued

of transgressions should be prominently listed and shared, tracking and use of technology systems should be required, and a network of local fisherman who can engage in citizen patrols and make reports to authorities should be developed. "Fish stocks are not restricted to national boundaries, and that is why the solutions to end the overfishing of West Africa's waters can only come from joint efforts between the countries of the region," said Ahmed Diame, Greenpeace's Africa oceans campaigner.

Every two years, the NOAA fisheries department, Improving International Fisheries Management, issues a mandated report to Congress on the status of improving international fisheries management, which includes updates on the identification and enforcement of IUU fishing.[29] The effective use of these regional control measures coupled with financial and trade sanctions against violators could have a significant impact on reducing IUU fishing and breathing new life into depleted fisheries, allowing them to rebound and for resources to be properly managed and conserved.

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Rule B and Daimler, from page 17

Singaport cityscape at dusk
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following *Daimler* remains to be seen. The drafters of Rule B explicitly did not include a definition of this term, thinking it best to allow the meaning of the phrase to be developed on a case-by-case basis by the courts.[16] If personal jurisdiction remains a requisite component of the test and the *Daimler* at home standard is followed, then foreign corporations will face greater difficulties in avoiding the attachment of their property by establishing that they are domiciled within a district. This could potentially lead to an increase in the use of attachment as a remedy in maritime cases that could in turn have an impact on the maritime industry. Many maritime entities, such as shipowners and shipping lines, although based outside of the United States, have significant assets and property located in the United States. If foreign maritime players increasingly have property and assets necessary for the operation of their businesses tied up in courts, it would almost certainly have a disruptive effect on their business. Although property may be released from attachment by posting security, a defendant can still potentially face significant costs depending on the type of security posted. An increase in the use of Rule B attachments based on a court decision would not be unprecedented. There was a boom in Rule B attachments between 2002 and 2009 following a decision of the U.S. Second Circuit Court of Appeals, later overruled, which allowed attachment of electronic funds transfers, most of which were routed through New York.[17]

The potential effect of *Daimler* can be demonstrated by examining two cases decided pre- and post-*Daimler*. In *STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, the U.S. Court of Appeals for the Second Circuit affirmed

a decision of the federal district court where that court had vacated an attachment under Rule B, finding that a Singapore based defendant was found within the district because it was registered to do business in the state of New York.[18] The court found that because the defendant had registered to do business in New York, it had consented to jurisdiction there, and therefore vacatur of the attachment was proper under Rule B because the defendant was found within the district.[19] In a recent non-maritime case, the same federal district court held that following *Daimler*, the mere fact that a foreign company was registered to do business in New York did not establish that the court had personal jurisdiction over the defendant.[20] As is evident, the *STX Panocean* case might have been decided differently post-*Daimler* if the court had employed the heightened standard.

Only one reported decision has discussed the effect of *Daimler* in the context of a Rule B attachment. In *Louis Dreyfus Co. Freight Asia PTE v. Uttam Galva Steels Ltd.*,[21] the U.S. District Court for the Southern District of New York found that *Daimler* did not alter the analysis of where a defendant's property may be attached, stating "[t]he law of personal jurisdiction governs where a party can reasonably be haled into court. Maritime attachment law, by contrast, implicates other considerations."[22] Unfortunately, the court's analysis was quite cursory, and the issue of whether *Daimler's* heightened standard affects a determination of where a defendant is found for purposes of Rule B was not directly addressed.

Conclusion

Given the potential for an increase in the use of Rule B attachments following *Daimler*, it is likely this issue will be further litigated going forward. Although it is not clear which direction the courts will take, it is clear that application of *Daimler* in Rule B attachment cases could have an impact on the maritime industry.

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Endnotes

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18 *STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 133 (2d Cir. 2009).

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Maritime Arbitration, from page 19

to educate the public and members of the maritime industry about procedures for ADR and to encourage the use of ADR for the resolution of commercial disputes. The SMA was formed in 1963 and is recognized as the leading forum for the arbitration of maritime and commercial disputes. The SMA Rules, in accordance with Title 9 of the United States Code, limit and define the powers and duties of arbitrators and apply wherever the parties have agreed to arbitration under the rules of the society.[18]

A party to an agreement for arbitration under SMA Rules may initiate arbitration by giving written notice to the other party of its demand for arbitration and naming its chosen arbitrator.[19] Once a claimant has initiated arbitration, the respondent is required to appoint its arbitrator pursuant to the time limit set out in the contract or the rules governing the proceeding. If the responding party fails to appoint an arbitrator, the party demanding arbitration may appoint a second arbitrator with the same force and effect as if that second arbitrator were appointed by the other party. The two appointed arbitrators then appoint a third arbitrator, who acts as chairperson for procedural matters for the tribunal.[20] Each party has the option to be represented in the arbitration proceeding by counsel or another duly appointed representative.[21] Unless the arbitration agreement requires a unanimous decision, the decision and award of the arbitrators are determined by majority vote.[22]

Once a hearing is scheduled, the parties submit pre-hearing statements of claim. The claimant submits its pre-hearing statement not less than twenty business days prior to the first hearing, and the respondent submits its pre-hearing statement of defense not more than ten business days thereafter.[23] There is no automatic right to pre-hearing discovery, but parties are encouraged to cooperate in an exchange of disclosures. Copies of any exhibits intended to be introduced at a particular hearing should be provided at least ten business days prior.[24] Any fact or expert witness intended to testify before the tribunal should likewise be identified and a brief description of his or her testimony given at least one week in advance of the scheduled hearing date.[25] Once all evidence has been provided, the parties may choose to present their arguments in a final oral hearing or in written briefs. Once this has been completed, the proceedings are closed.[26] The arbitrator(s) must issue an award within 120 days of the closing of proceedings.[27]

Equitable Powers of the Arbitration Tribunal

Arbitrators are given broad equitable powers, such as the power to award pre-judgment security as well as costs and attorneys' fees. The tribunal's ability to collect evidence is potentially broader than federal courts in certain circumstances, as it is not limited by the Federal Rules of Civil Procedure or the Federal Rules of Evidence. These rules are strictly construed in federal court, but may or may not be strictly applied by the tribunal.

Discovery – The tribunal may subpoena witnesses and/or documents, and direct that depositions be taken, either upon request or at their own initiative.[28] The arbitrators may hear testimony or receive evidence on preliminary issues in advance of an ultimate hearing on the substantive merits of the underlying claims.[29] A preliminary hearing may be ordered to decide whether to preserve the status quo and to decide issues of privilege, authenticity, and admissibility.[30]

Pre-judgment Security – In *E. Asiatic Co. v. Transamerica Steamship*,[31] a tribunal found it was premature to issue an interim award in the favor of the petitioner; however, "in the interest of equity," it directed respondents to post security in the amount of $84,183.62, to be disbursed as directed in the final award.[32] The SMA Rules provide "[t]he Panel, in its award, shall grant any remedy or relief which it deems just and equitable . . . ."[33] This power was effectively demonstrated in *Commodities & Minerals Enter, Ltd. v. CVG Ferrominera Orinoco, C.A.*,[34] where the arbitrators ordered the respondent to provide over $62 million as security for the underlying claim, on the basis that the petitioner made an adequate showing that it was likely to prevail on the merits.[35] The tribunal, after reviewing the evidence and legal arguments presented by the parties, unanimously decided the petitioner was

entitled to security in the amount of $62,730,279.98.

The authority of an arbitral tribunal in awarding pre-judgment security has been recognized by federal courts. Its "power to award security in appropriate circumstances is well-established by decisions rendered in the Second Circuit and in numerous SMA awards."[36]

Attorneys' Fees – The tribunal may award pre-judgment interest, as well as attorneys' fees, expenses, and costs.

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Reasonable attorneys' fees may be awarded even if the underlying contract does not expressly provide for their recovery.[37] The power of an arbitral tribunal to award pre-judgment interest has been recognized by federal courts where an arbitration decision is final and binding.[38]

Enforcement of Arbitration Award

Most final awards rendered by arbitrators are promptly paid. Should a U.S. arbitration award go unpaid, at any time within one year after the final award, the prevailing party may seek a court order confirming the award.[39] The application may be made to the U.S. District Court for the district within which the award was made.[40] To have an award confirmed, the party must file a motion to confirm with the court, along with a copy of the arbitration agreement and a copy of the award.[41] For international arbitral awards, the FAA provides that a petition to confirm must be filed within three years from the date of the award.[42]

Upon conclusion of a successful confirmation application, the court enters judgment on the award that "shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered."[43]

Challenges to an Unfavorable Award

Many have challenged the outcome of arbitration proceedings, but the prospects for success absent exceptional circumstances are statistically low. The U.S. Supreme Court has reinforced the FAA's policy favoring arbitration when considering a court's power to vacate an arbitral award. In *Hall St. Assocs., LLC v. Mattel*,[44] the U.S. Supreme Court held that the "national policy favoring arbitration requires just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[45]

In *Hall St. Assocs.*, the Supreme Court confirmed four very limited grounds for vacating an arbitral award. These grounds are those enumerated in the FAA.[46] They are: (1) fraud by the opposing party in securing the award;[47] (2) the tribunal's corruption or evident partiality

to one of the parties;[48] (3) other misconduct by the tribunal granting the award;[49] or (4) the tribunal grossly exceeding its powers in issuing the award.[50]

(1) Fraud

Absent fraud by a party, or the arbitrator's dishonesty, reviewing courts are not authorized to reconsider the merits of an arbitration award since this would undermine the federal policy of privately settling disputes by arbitration.[51]

(2) Corruption or Partiality

An award may be vacated on the basis of evident partiality or corruption by the arbitrators. Partiality is established by demonstrating that the arbitrator failed to disclose relevant facts or that actual bias was displayed at the proceeding.[52] Courts have found a "reasonable impression of partiality" is established when the arbitrator has had a direct business relationship with one of the parties in the arbitration,[53] but was not found where the spouse of an arbitrator and the spouse of one of the parties belonged to the same civic and social organizations.[54]

(3) Misconduct

An award may be vacated if a court finds that the arbitrators committed misconduct in their evidentiary determinations. Courts have held that misconduct only occurs when "fundamental fairness is violated."[55] Even if the arbitrator makes an error, if "his error was not in bad faith" it does not rise to the level of affirmative misconduct.[56]

(4) Manifest Disregard of the Law

Federal courts are split on whether vacatur is appropriate when there has been a manifest disregard of the law. "A finding of manifest disregard requires 'more than error or misunderstanding with respect to the law' and cannot be made solely because the court disagrees with the arbitrator on a matter of contractual interpretation."[57]

Prior to *Hall St. Assocs.*, most federal courts recognized manifest disregard of law as a common law ground for vacatur, independent from the enumerated FAA grounds. Since *Hall St. Assocs.*, the vitality of the manifest disregard doctrine as a basis to vacate arbitration awards has been called into question. Though the Supreme Court did not expressly eliminate the availability of the manifest disregard doctrine, its continued viability was cast in doubt.

The Second[58] and Seventh[59] Circuit Courts of Appeal have issued conflicting rulings concerning the manifest disregard doctrine. In *Schwartz v. Merrill Lynch & Co.*,[60] the Second Circuit held that:

> [a]lthough the Supreme Court placed the proper scope of the manifest disregard doctrine into some doubt with its decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, the Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* declined to decide whether the manifest disregard standard survives [its] decision in *Hall Street Associates* . . . as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.[61]

The Second Circuit continued to recognize manifest disregard as a valid ground in the wake of the Supreme Court's decision in *Stolt-Nielsen*.[62] In *T. Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*,[63] the Second Circuit held that manifest disregard remains a valid ground for vacating arbitration awards. In the Seventh Circuit, "manifest disregard of the law is not a ground on which a court may reject an arbitrator's award" unless the award orders parties to do something that they could not otherwise do legally (e.g., form a cartel to fix prices).[64]

The Fifth[65] and Eleventh[66] Circuit Courts of Appeal present a much simpler solution. Both circuits have held that the Supreme Court's unequivocal holding that the statutory grounds listed in the FAA are the exclusive means for vacatur means that "manifest disregard for the law is no longer an independent ground for vacating arbitration awards under the FAA."[67]

Conclusion

The specialized knowledge and broad equitable power of an arbitral tribunal make arbitration an attractive alternative to traditional litigation. The expected speed, expertise, cost-effectiveness, flexible procedures, confidentiality, and location are all crucial factors when

Maritime Arbitration, continued

deciding whether to use arbitration. There are additional incentives when selecting New York as the venue. New York has a long history with arbitration, is one of the most frequently selected venues for international arbitration in the world, and is the most popular city for arbitration in the United States. The pool of professionals available in New York is second to none and includes many specialized arbitrators and advocates that are uniquely experienced in a variety of fields.

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The arbitration court of Amur region, Blagoveshchensk, Russia
Ovchinnikova Irina/Shutterstock.com

Endnotes

1 *See* Lloyd N. Shields, *Arbitration as ADR*, 41 La. B.J. 222, 224-25 (1993).

2 Katherine V. W. Stone, *Arbitration Law* 6 (2003).

3 H. H. Nordlinger, *The Law and Practice of Arbitration in New York*, 13 Mo. L. Rev. 196 (1948).

4 *Id.*

5 9 U.S.C. § 2.

6 *Id.*

7 *Jane Palmer v. French Republic*, 270 F. 609, 613 (S.D.N.Y. 1920).

8 *Haskell v. McClintic-Marshall Co.*, 289 F. 405, 409 (9th Cir. 1923).

9 *Gilmver v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

10 Tomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 Me. L. Rev. 263, 263-64 (1988).

11 *See id.*

12 *See id.*

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14 *Id.*

15 *Discussed infra.*

16 *See Osterneck v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 841 F.2d 508, 510 (3d Cir. 1988); *Woodcrest Nursing Home v. Local 144, Hotel, Hosp., Nursing Home & Allied Workers*, 788 F.2d 894, 897-98 (2d Cir. 1986).

17 *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

18 The SMA provides a model arbitration clause any party may use in its contract to stipulate to the use of SMA Rules in resolving disputes. The model clause may be found at http://www.smany.org/sma-model-arbitration-clause.html.

19 *See* SMA Arbitration Rules § 6 (available at http://www.smany.org/pdf/SMA-arbitration-rules.pdf).

20 http://www.smany.org/arbitration-practical-guide.html

21 *See* SMA Arbitration Rules § 14.

22 *See id.* § 20.

23 *See id.* § 21.

24 *Id.*

25 *Id.*

26 *See id.* § 25.

27 *See id.* § 28.

28 *See* SMA Arbitration Rules § 23.

29 *Id.*

30 *See Stolt-Nielsen Transp. Group, Inc. v. Celanese AG,* 430 F.3d 567, 579 (2d Cir. 2005).

31 *The E. Asiatic Co., Ltd. v. Transamerican Steamship Corp.*, Soc'y Mar. Arbs. Nos. 2430 & 2430-A (1986) (Arnold, Hennessey & Martowski, Arbs.).

32 *Id.*

33 SMA Arbitration Rules § 30.

34 *Commodities & Minerals Enter, Ltd. v. CVG Ferrominera Orinoco, C.A.*, Soc'y Mar. Arbs. No. 4296 (2017) (Siciliano, Wentz & Kimball, Arbs.).

35 *Id.* at 7.

36 *Sunskar Ltd. v. CDII Trading, Inc.*, Soc'y Mar. Arbs. No. 4163 (2012) (Arnold, Martowski & Burke, Arbs.); *see also Asil Gida ve Kimya Sanayii ve Ticaret A.S. v. Cosco Qingdao*, Soc'y Mar. Arbs. No. 3784 (2003) (Bulow, Nichols & Sheinbaum, Arbs.) ("Courts in this District have viewed arbitral relief such as the posting of security pending final resolution of the parties' claims as an equitable remedy, . . . squarely within the arbitrators' broad discretion to award").

37 *See* SMA Arbitration Rules § 30.

38 *Abondolo v. H. & M. S. Meat Corp*, 2008 U.S. Dist. LEXIS 38726, *8 (S.D.N.Y. 2008) (internal citation omitted).

39 9 U.S.C. § 9.

40 *Id.*

41 9 U.S.C. § 13.

42 9 U.S.C. §§ 207, 302.

43 9 U.S.C. §§ 13, 208, 307.

44 552 U.S. 576 (2008).

45 *Id.*

46 9 U.S.C. § 10.

47 9 U.S.C. § 10(a)(1).

48 9 U.S.C. § 10(a)(2).

49 9 U.S.C. § 10(a)(3).

50 9 U.S.C. § 10(a)(4).

51 *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

52 *See Scott v. Prudential Sec.*, 141 F.3d 1007, 1016 (11th Cir. 1998); *Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 427 (9th Cir. 1996).

53 *See Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 455 F. Supp. 2d 545, 552 (N. D. Tex. 2006).

54 *See id.*

55 *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997).

56 *United Paperworkers,* 484 U.S. at 40.

57 *N.Y.C. Dist. Council of Carpenters v. Gotham Installations, Inc.*, 2013 U.S. Dist. LEXIS 159057 (S.D.N.Y. 2013).

58 The U.S. Court of Appeals for the Second Circuit is in New York City and has appellate jurisdiction over the District of Connecticut; the Eastern, Northern, Southern, and Western Districts of New York; and the District of Vermont.

59 The Seventh Circuit is in Chicago and has appellate jurisdiction over the Central, Northern, and Southern District of Illinois; the Northern and Southern Districts of Indiana; and the Eastern and Western Districts of Wisconsin.

60 665 F.3d 444, 452 (2d Cir. 2011).

61 *Id.* at 451 (internal citations and quotations omitted).

62 *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121-22 (2d Cir. 2011).

63 592 F.3d 329, 340 (2d Cir. 2010).

64 *Affymax Inc. v. Ortho-McNeil-Janssen Pharms., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011).

65 The Fifth Circuit is in New Orleans and has appellate jurisdiction over the Eastern, Middle, and Western Districts of Louisiana; the Northern and Southern Districts of Mississippi; and the Eastern, Northern, Southern, and Western Districts of Texas.

66 The Eleventh Circuit is in Atlanta and has appellate jurisdiction over the Middle, Northern, and Southern Districts of Alabama; the Middle, Northern, and Southern Districts of Florida; and the Middle, Northern, and Southern Districts of Georgia.

67 *Frazier v. Citifinancial LLC*, 604 F.3d 1313, 1323 (11th Cir. 2010) (quoting *Citigroup Mkts. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009)).

Carriage of Goods by Sea Act, from page 21

that it had "no other viable option" than to treat the container as the "package."[8] This was seen as an issue as to whether or not the packages can stand on their own as one fully packaged item that could be shipped on its own. Notably, *Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co.* found that a master carton of clothing was held to be a package.[9]

There are cases holding that a container is not a package, such as *Tokio Marine & Fire Ins. Co. v. Nippon Express U.S.A. (Illinois), Inc.*, where the bill of lading indicated that one container held 33 skids consisting of 177 pieces, with the number 1 in the column for packages and the number 33 for the skids. The skids were held to be a package.[10] It was affirmed at 45 F. App'x 710 (9th Cir. 2002). In this case, the skids were certainly a method used to prepare the cargo for shipment.

Pallets are sometimes considered to be packages. In *Groupe Chegaray v. De Chalus v. P&O Containers*, 2,270 shoebox-sized corrugated cardboard cartons of perfumes and cosmetics were placed into 42 larger units and were bound together with plastic wrap as pallets with an additional 2 cartons remaining inside an 8-ton, 40-foot container.[11] The description on the bill of lading described the contents of the container as "42 packages [said to contain] 2268 cartons + 2 ctns" of cosmetics.[12] The court held that each of the forty-two palletized units and each of the two remaining cartons constituted a COGSA "package," as pallets are another form of preparation for shipment and the individual cartons could not have been shipped and placed individually into a container.[13]

The bill of lading will typically have a section to fill in the number of packages. This can come into play in these cases; however, courts will look beyond this column on the bill of lading.

It should be noted that the carrier cannot arbitrarily decide to apply the limitation, if the carrier knows what is actually being shipped and/or was constructively notified of the value of the shipment.[14] In other words, the shipper cannot be denied an opportunity to declare a higher value and then have a limitation imposed upon it.

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Carriage of Goods by Sea Act, continued

The $500.00 per package limitation can be raised as an affirmative defense. The burden is on the carrier to prove the applicability of an affirmative defense. This issue should be resolved early in a case whenever possible. If a claim is going to be limited to $500.00, the parties will want to know that before they go through considerable discovery and possible trial preparation.

Another important limitation is the statute of limitations. It is only one year from the date of delivery or when delivery should have been made by the carrier.[15] This is quite short when compared to Florida's four-year statute for negligence and five-year statute for breach of contract on written contracts. A number of cases deal with delivery, so the attorney needs to be careful in interpreting what constitutes delivery. Extensions of time can often be obtained from the ocean carrier, but you must be sure to get the extension from the proper party and it should be in writing. In fact, there could be several parties involved that are able to claim this limitation through a Himalaya clause from whom the shipper might also need to get an extension of time. If there is a non-vessel operating common carrier, that entity can also assert the $500.00 per package limitation. It can be tricky in some instances to determine who is the correct carrier.

The package limitation might not apply if there is an unreasonable deviation.[16] This typically could be delivery to the wrong port. A deviation, however, does not extend the time for filing a lawsuit under the COGSA.

The package limitation, along with the rest of the COGSA, can be extended to inland shipments on intermodal bills of lading. This is typically where the carrier picks up the cargo from the point of origin to the point of destination. *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.*[17] and *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.* are two cases dealing with extending the COGA to inland shipments.[18]

Shippers and their attorneys should educate themselves on the package limitation for international shipments and, in some cases, for domestic shipments. When handling a claim, it is necessary to ask for the entire bill of lading, both the front and the back, as they typically cross reference each another. The package limitation is a reason for a shipper to purchase cargo insurance to protect the full value of the items being shipped.

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Endnotes

1 46 U.S.C.A. § 1304(5).

2 *Aetna Ins. Co. v. M/V Lash Italia*, 858 F.2d 190 (4th Cir. Md. 27 Sept. 1988; *Jean-Baptiste v. New York Terminal 1, Inc.*, 2014 U.S. Dist. LEXIS 14746, 2014 WL 495160); and 2A-XVI. Benedict on Admiralty § 166.

3 *Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co.*, 254 F.3d 987 (11th Cir. 2001).

4 46 U.S.C.A. § 1304(5).

5 8-V Benedict on Admiralty § 5.15 (2017)(discussing all three methods of computing damages).

6 *Expeditors Int'l of Wash., Inc. v. Crowley Am. Transp., Inc.*, 117 F. Supp. 2d 663 (D. Ohio 2000).

7 *American Home Assurance Co. v. Crowley Ambassador* 2003 AMC 510, 512 (S.D.N.Y. 2003).

8 2003 AMC at 516.

9 *Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co.*, 240 F.3d 956 (11th Cir. 2001).

10 *Tokio Marine & Fire Ins. Co. v. Nippon Express U.S.A. (Illinois), Inc.*, 155 F. Supp. 2d 1167, 2001 AMC 1239 (C.D. Cal. 2000).

11 *Groupe Chegaray v. De Chalus v. P&O Containers*, 251 F.3d 1359, 1367-70 (11th Cir. 2001).

12 251 F.3d at 1365.

13 251 F.3d at 1368.

14 *See Belize Trading v. Sun Ins. Co.*, 993 F.2d 790, 1993 U.S. App. LEXIS 14774, 7 Fla. L. Weekly Fed. C 475.

15 46 U.S.C.A. 1303(6).

16 *Unimac Co. v. C.F. Ocean Serv.,* 43 F.3d 1434 (11th Circuit 1995) and Benedict on Admiralty Volume 8 § 5.05.

17 *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.,* 543 U.S. 14 (2004).

18 *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89 (2010).

Maritime Security Law, from page 23

Implementation of SOLAS (1974) includes the *tacit acceptance procedure*, which provides that an amendment "shall enter into force on a specified date unless, before that date, objections to the amendment are received from an agreed number of Parties." Such provision was provided for when the United States ratified SOLAS on 1 November 1974.[13,14] SOLAS applies to ships on international voyages, except: (1) ships of war and troopships; (2) cargo ships (including tankers) under 500 tons gross tonnage; (3) ships not propelled by mechanical means; (4) wooden ships of primitive build; (5) pleasure yachts not engaged in trade; and (6) fishing vessels.[15]

The law of the flag is customary international law recognized within the courts of the United States and the world.[16] It is known as "the most venerable and universal rule of maritime law," which gives cardinal importance to the law of the flag.[17] Under this rule, each state under international law may determine for itself the conditions upon which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. The law of the flag supersedes the territorial principle—even for purposes of criminal jurisdiction of personnel of a merchant ship—because the ship "'is deemed to be a part of the territory of the sovereignty [whose flag it flies], and does not lose that character when in navigable waters within the territorial limits of another sovereignty.'"[18] The application of the law of the flag is limited to jurisdiction over the onboard activities of ships and their personnel.[19]

The United Nations Convention on the Law of the Sea (UNCLOS), through Article 1 of the IMO Convention, is an international agreement that provides nation states with the authority to develop governance regimes for the world's oceans.[20] The preamble to the UNCLOS states that its aim is to contribute to the strengthening of peace, security, cooperation, and friendly relations among all nations in conformity with the principles of justice and equal rights, and to promote the economic and social advancement of all peoples of the world, in accordance with the purposes and principles of the United Nations as set forth in the charter.[21]

Under Article 53(3) of UNCLOS, an *archipelagic sea lane passage* is "the exercise . . . of the rights of navigation . . . in the normal mode solely for the continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."[22] Under Article 53(5) of UNCLOS, "[s]uch sea lanes . . . shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points. Ships and aircraft in archipelagic sea lanes passage shall not deviate more

Maritime Security Law, continued

than 25 nautical miles to either side of such axis lines during passage, provided that such ships and aircraft shall not navigate closer to the coasts than 10 per cent [sic] of the distance between the nearest points on islands bordering the sea lane."[23]

Under Article 19(1) of UNCLOS, passage constitutes *innocent passage* "so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law."[24] Under certain circumstances, innocent passage may be temporarily suspended.[25] Article 19(2) of UNCLOS provides that the passage of a foreign ship is "considered to be prejudicial to the peace, good order or security of the coastal State" if it engages in any of the following activities:

(a) Any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal state, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) Any exercise or practice with weapons of any kind;

(c) Any act aimed at collecting information to the prejudice of the defense or security of the coastal state;

(d) Any act of propaganda aimed at affecting the defense or security of the coastal state;

(e) The launching, landing, or taking on board of any aircraft;

(f) The launching, landing, or taking on board of any military device;

(g) The loading or unloading of any commodity, currency, or person contrary to the customs, fiscal, immigration, or sanitary laws and regulations of the coastal state;

(h) Any act of willful and serious pollution contrary to this convention;

(i) Any fishing activities;

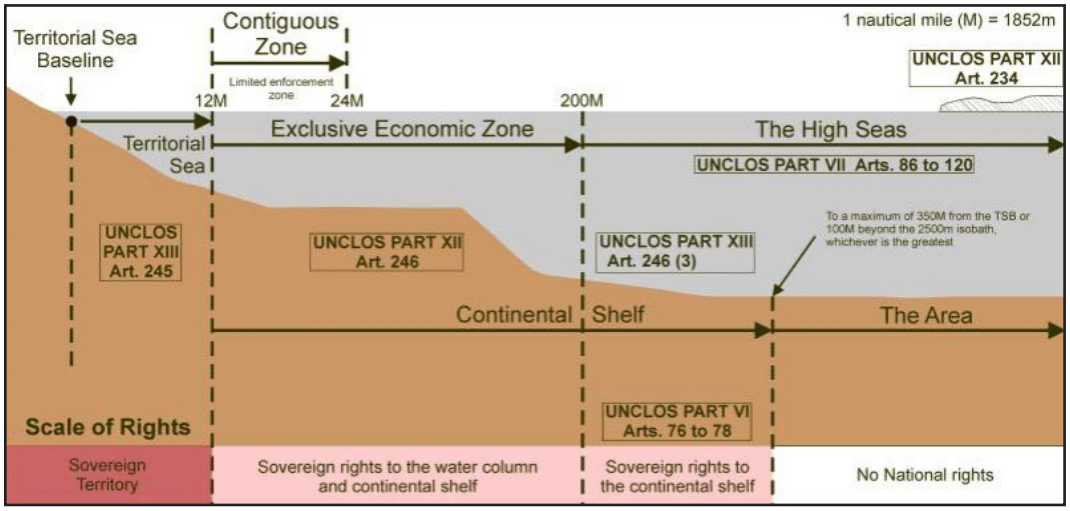
(j) The carrying out of research or survey activities;

(k) Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal state;

(l) Any other activity not having a direct bearing on passage.[26]

Part II, Article 2, of UNCLOS provides that a coastal state may exercise sovereignty and jurisdiction over its adjacent waters, measured by the distance from the coast. A state's *territorial sea* (also referred to as its *territorial waters*), extends not more than twelve nautical miles from its coast and is the area for which a state exercises sovereignty and jurisdiction.[27]

Section 3 of UNCLOS defines territorial waters or territorial sea as a belt of coastal waters extending at most twelve nautical miles (i.e., 13.8 miles) from the baseline (i.e., the mean low-water mark) of a coastal state. A state's *contiguous zone* is the area outside the territorial sea extending not farther than twenty-four miles from the state's coast in which the state may exercise control necessary to prevent infringement of laws and regulations within its territory or territorial sea.[28] A state's *exclusive economic zone* is the area



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beyond and adjacent to the territorial sea, not extending beyond 200 nautical miles from the coastal baseline.[29] This provision provides for states' sovereign rights of (and authority to exercise jurisdiction related to) exploration and exploitation, conservation and management of any natural resources, through which all states generally enjoy the freedoms of navigation and overflight, among others.

In 1982, UNCLOS created the International Tribunal for the Laws of the Sea (ITLOS) as part of its compulsory third-party dispute settlement system. The ITLOS did not enter into force, however, until November 1994. In the interim, adjudication of disputes arising out of the interpretation and application of UNCLOS were presented to the International Court of Justice (ICJ).[30] The ICJ and its predecessor, the Permanent Court of International Justice, have handed down some forty decisions and orders that involve the law of the sea.[31] The jurisdiction of the ITLOS comprises all disputes and all applications submitted to it in accordance with the convention.[32] It also includes all matters specifically provided for in any other agreement that confers jurisdiction on the ITLOS.[33] The ITLOS has jurisdiction to deal with disputes (i.e., contentious jurisdiction) and legal questions (i.e., advisory jurisdiction) submitted to it.[34]

In 1988, the IMO adopted the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA (Rome) Convention 1988),[35] which considered "that unlawful acts against the safety of maritime navigation jeopardize the safety of persons and property, seriously affect the operation of maritime services, and undermine the confidence of the peoples of the world in the safety of maritime navigation."[36]

Article 1 of the SUA (Rome) Convention 1988 defines *ship* as "a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft." Excluded from this definition under Article 2 is a warship, a ship owned or operated by a state when being used as a naval auxiliary or for customs or police purposes, or a ship that has been withdrawn from navigation or laid up.[37]

Article 3 of the SUA (Rome) Convention 1988 provides:

Any person commits an offence if that person unlawfully and intentionally:

(a) Seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

(b) Performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) Destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

(d) Places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) Destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) Communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

(g) Injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

In 2005, the SUA Protocol, an amendment to the SUA (Rome) Convention 1988, added to Article 3's definition of *offense* as to "Biological, Chemical, and Nuclear Threats Against Safe Navigation." Specifically,

> [a]ny person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:
>
> when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:
>
> uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage.[38]

In conclusion, through the MSC of the IMO, the abstract concept of maritime security is being defined and developed. The world's nations have labored exhaustively over the past three decades to develop resolutions, conventions, and the laws of the sea, designed to maintain a secure maritime domain by combating piracy and quelling terrorism in the maritime industry. Increasing acts of terrorism and the proliferation of piracy have served as the foundation for the adoption of the ISPS, through SOLAS, and the terrorist attacks of 11 September 2001 largely served as the catalyst that set the course for the United States to adopt the Maritime Transportation Security Act of 2002 (MTSA), creating a security regime designed to protect its flagged vessels worldwide and to put into place a security protocol at ports throughout the United States.

In the following two articles, the development, application, and enforcement of the International Ship and Port Facility Security Code (ISPS) are reviewed, followed by the United States' adoption of the code as the basis and format for the MTSA.

Endnotes

1 F. Attard, *IMO's Contribution to International Law Regulating Maritime Security*, 45 J. Mar. L. & Com. 479, 494 (2014)(quoting Hawkes, Maritime Security, 9 (Cornell Maritime Press 1989)).

2 *See Brief History of IMO*, International Maritime Organization (available at www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx).

3 *See* Schoenbaum & Langston, *An All Hands Evolution: Port Security in the Wake of September 11th,* 77 Tul. L. Rev. 1333 (June 2003).

4 The practitioner should note that IMO circulars, resolutions, and documents issued by the MSC are cited to throughout this chapter and are available on the IMO's website (available at https://webaccounts.imo.org) by registering as a public user.

5 *See Brief History of IMO*, International Maritime Organization (available at www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx).

6 *See* IMO Doc A.584(14) ("All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas"). *See also* 52 FR 11587 (Appendix 1); MSC 53/24, annex 14 (Appendix 1).

7 52 FR 11587.

8 *See* 52 FR 11587.

9 *See also* Kraska & Wilson, *The Pirates of the Gulf of Aden: The Coalition Is the Strategy*, 45 Stan. J. Int'l L. 243 (Summer 2009).

10 *See* Kraska & Wilson, *supra*.

11 *Id.* at Section 2.3 (Investigators).

12 *See* IMO, *Summary of Status of Conventions* (available at www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx).

13 *See* 32 U.S.T. 47.

14 For a detailed discussion of the implementation and ratification of SOLAS (1974), *see Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005). *See also* IMO, *International Convention for the Safety of Life at Sea (SOLAS)*, 1974 (available at http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life).

15 *See* 1184 U.N.T.S. 284.

16 *See Lauritzen v. Larsen*, 345 U.S. 571 (1953); *United States v. Royal Caribbean Cruises, Ltd.*, 24 F.Supp.2d 155 (D. P.R. 1997).

17 *Larsen*, 345 U.S. at 584.

18 *United States v. Royal Caribbean Cruises, Ltd.*, 24 F.Supp.2d at 160 (quoting *Larsen*, 345 U.S. at 584-585).

19 *Id.*

20 United Nations Convention on the Law of the Sea, 10 Dec. 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

21 *Id* at 398.

22 *Id.* at 417.

23 *Id*.

24 *Id.* at 404.

25 *See id.* at 407 (Art 25: "[t]he coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily, in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published").

26 *Id.* at 404-405.

27 *Id.* at 400.

28 *See* Art. 2, §2, UNCLOS (Limits of the Territorial Sea), *reprinted in* 6C-X Benedict on Admiralty Doc. No. 10-6 (2015).

29 UNCLOS, Art. 57.

30 Noyes, *The International Tribunal for the Law of the Sea*, 33 Cornell Int'l L.J. 109 (1998).

31 *See id*. For a detailed discussion of the ITLOS, *see* Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 Am. J. Int'l L. 69 (Jan. 1996); Janis, The Law of the Sea Tribunal, in International Courts for the Twenty-First Century, 245 (Martinus Nijhoss Publishers, 1992).

32 Article 21, International Tribunal for the Law of the Sea, Statute of the International Tribunal for the Law of the Sea.

33 *Id.*

34 For a detailed discussion of the ITLOS and its jurisdiction and procedure, *see* the International Tribunal for the Law of the Sea's website (available at www.itlos.org/jurisdiction/).

35 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA (Rome) Convention 1988), 1678 U.N.T.S. 222.

36 *Id.* at 222-223.

37 *Id.* at 224.

38 *See* 6D-XIII Benedict on Admiralty, Doc. No. 13-11A (2015).

International Ship and Port Facility Security Code, from page 25

internal audits, periodic reviews, security inspections, and verifications of compliance, and implementing any corrective actions;

- Enhancing security awareness and vigilance on board;
- Ensuring that adequate training has been provided to shipboard personnel, as appropriate;
- Reporting all security incidents;
- Coordinating implementation of the ship security plan with the company security officer and the relevant port facility security officer; and
- Ensuring that any security equipment is properly operated, tested, calibrated, and maintained.[14]

Each ship must carry on board a ship security plan, approved by the administration.[15] The plan must provide for the three security levels. *See* § 18.28. A recognized security organization may prepare the plan for a specific ship.[16] Further, the administration may entrust review and approval of ship security plans, or of amendments to a previously approved plan, to recognized security organizations. The recognized security organization undertaking the review and approval of a ship security plan, or its amendments, for a specific ship must not, however, have been involved in either the preparation of the ship security assessment or of the ship security plan, or of the amendments, under review.[17]

Under Chapter XI-2, Part A, § 9.3 of SOLAS, the submission for approval of a ship security plan, or of amendments to a previously approved plan, shall be accompanied by the security assessment on the basis of which the plan, or the amendments, have been developed. Such a plan shall be developed, taking into account the guidance given in Part B of this Code, and shall be written in the working language or languages of the ship. If the language or languages used are not English, French, or Spanish, a translation into one of these languages shall be included.[18]

Ship security plans must contain certain minimum requirements, including the following:

- Measures designed to prevent weapons, dangerous substances, and devices intended for use against persons, ships, or ports, and the carriage of which is not authorized, from being taken on board the ship;
- Identification of the restricted areas and measures for the prevention of unauthorized access to them;
- Measures for the prevention of unauthorized access to the ship;
- Procedures for responding to security threats or breaches of security, including provisions for maintaining critical operations of the ship or ship/port interface;
- Procedures for responding to any security instructions contracting governments may give at Security Level 3;
- Procedures for evacuation in case of security threats or breaches of security;
- Duties of shipboard personnel assigned security responsibilities and of other shipboard personnel on security aspects;
- Procedures for auditing the security activities;
- Procedures for training, drills, and exercises associated with the plan;
- Procedures for interfacing with port facility security activities;
- Procedures for the periodic review of the plan and for updating;
- Procedures for reporting security incidents;
- Identification of the ship security officer;
- Identification of the company security officer including 24-hour contact details;
- Procedures to ensure the inspection, testing, calibration, and maintenance of any security equipment provided on board;
- Frequency for testing or calibration of any security equipment provided on board;
- Identification of the locations where the ship security alert system activation points are provided; and
- Procedures, instructions, and guidance on the use of the ship security alert system, including the testing, activation, deactivation, and resetting, and to limit false alerts.

Under Chapter XI-2, Part A, § 9.4 of SOLAS, as to the last two content requirements, the administration may allow, to avoid compromising in any way the objective of providing on board the ship security alert system, this information to be kept elsewhere on board in a

International Ship and Port Facility Security Code, continued

document known to the master, the ship security officer, and other senior shipboard personnel as may be decided by the company. Certain information in a ship security plan is deemed confidential information, and therefore cannot be subject to inspection unless otherwise agreed by the contracting governments.

Confidential information includes:

- Identification of the restricted areas and measures for the prevention of unauthorized access to them;
- Procedures for responding to security threats or breaches of security, including provisions for maintaining critical operations of the ship or ship/port interface;
- Procedures for responding to any security instructions contracting governments may give at Security Level 3;
- Duties of shipboard personnel assigned security responsibilities and of other shipboard personnel on security aspects;
- Procedures to ensure the inspection, testing, calibration, and maintenance of any security equipment provided on board;
- Identification of the locations where the ship security alert system activation points are provided; and
- Procedures, instructions, and guidance on the use of the ship security alert system, including the testing, activation, deactivation, and resetting, and to limit false alerts.[19]

"[P]ersonnel conducting internal audits of the security activities specified in the plan or evaluating its implementation shall be independent of the activities being audited unless this is impracticable due to the size and the nature of the Company or of the ship."[20]

A port facility is required to act upon the security levels set by the contracting government within whose territory it is located.[21] The application of these security measures and procedures must cause minimal interference with, or delay to, the passengers, ship, ship's personnel and visitors, and goods and services, as follows:

At Security Level 1, the following activities shall be carried out through appropriate measures in all port facilities, taking into account the guidance given in Part B of this Code, in order to identify and take preventive measures against security incidents:

1. Ensuring the performance of all port facility security duties;
2. Controlling access to the port facility;
3. Monitoring of the port facility, including anchoring and berthing area(s);
4. Monitoring restricted areas to ensure that only authorized persons have access;
5. Supervising the handling of cargo;
6. Supervising the handling of ship's stores; and
7. Ensuring that security communication is readily available.

At Security Level 2, the additional protective measures, specified in the port facility security plan, shall be

International Ship and Port Facility Security Code, continued

implemented for each activity detailed in Section 14.2, taking into account the guidance given in Part B of this Code.

At Security Level 3, further specific protective measures, specified in the port facility security plan, shall be implemented for each activity detailed in Section 14.2, taking into account the guidance given in Part B of this Code.

In addition, at Security Level 3, port facilities are required to respond to and implement any security instructions given by the contracting government within whose territory the port facility is located.[22]

When a Security Level 3 is determined to exist, any conflicts between the ship security plan and port facility security are resolved as follows:

> When a port facility security officer is advised that a ship encounters difficulties in complying with the requirements of Chapter XI-2 or this Part or in implementing the appropriate measures and procedures as detailed in the ship security plan, and in the case of Security Level 3 following any security instructions given by the Contracting Government within whose territory the port facility is located, the port facility security officer and ship security officer shall liaise and coordinate appropriate actions.
>
> When a port facility security officer is advised that a ship is at a security level, which is higher than that of the port facility, the port facility security officer shall report the matter to the competent authority and shall liaise with the ship security officer and co-ordinate appropriate actions, if necessary.[23]

The port facility security assessment is a critical component in the process of developing and updating the port facility security plan. The assessment must be carried out by the contracting government within whose territory the port facility is located.[24] A contracting government may authorize a recognized security organization to carry out the assessment of a specific port facility located within its territory. In this instance, the security assessment must be reviewed and approved for compliance with § 15 by the contracting government within whose territory the port facility is located.[25] The persons carrying out the assessment must have appropriate skills to evaluate the security of the port facility, taking into account the guidance given in Part B of the ISPS.[26]

"[T]o provide a methodology for security assessments so as to have in place plans and procedures to react to changing security levels 'and' to ensure confidence that adequate and proportionate maritime security measures are in place[.]" Chapter XI-2, Part A, § 1.2 of SOLAS, the ISPS embodies a number of functional requirements. These include, but are not limited to, the following:

1. Gathering and assessing information with respect to security threats and exchanging such information with appropriate contracting governments;
2. Requiring the maintenance of communication protocols for ships and port facilities;
3. Preventing unauthorized access to ships, port facilities, and their restricted areas;
4. Preventing the introduction of unauthorized weapons, incendiary devices, or explosives to ships or port facilities;
5. Providing means for raising the alarm in reaction to security threats or security incidents;
6. Requiring ship and port facility security plans based upon security assessments; and
7. Requiring training, drills, and exercises to ensure familiarity with security plans and procedures.[27]

The port facility security assessment itself must include, at a minimum, the following elements:

1. Identification and evaluation of important assets and infrastructure that are important to protect;
2. Identification of possible threats to the assets and infrastructure and the likelihood of their occurrence, in order to establish and prioritize security measures;
3. Identification, selection, and prioritization of counter measures and procedural changes and their level of effectiveness in reducing vulnerability; and
4. Identification of weaknesses, including human factors in the infrastructure, policies, and procedures.[28]

The port facility security assessments must periodically be reviewed and updated, taking account of changing threats and/or minor changes in the port facility, and

International Ship and Port Facility Security Code, continued

must always be reviewed and updated when major changes to the port facility take place.[29] The scope of the port facility security assessment may cover more than one port facility if the operator, location, operation, equipment, and design of the port facilities are similar.[30] Any contracting government that allows such an arrangement must, however, communicate to the organization accordingly.

> Upon completion of an assessment, a report must be prepared, "consisting of a summary of how the assessment was conducted, a description of each vulnerability found during the assessment, and a description of countermeasures that could be used to address each vulnerability. The report must be protected from unauthorized access or disclosure.[31]

"A port facility security plan shall be developed and maintained, on the basis of a port facility security assessment, for each port facility, adequate for the ship/port interface."[32] The plan must provide for the three security levels.[33] A recognized security organization may prepare the port facility security plan of a specific port facility, if it is approved by the contracting government in whose territory the port facility is located.[34]

The port facility security plan must be approved by the contracting government in whose territory the port facility is located. The plan must be developed taking into account the guidance given in Part B of the ISPS and must be in the working language of the port facility.[35] The plan must address, at a minimum, the following:

1. Measures designed to prevent weapons or any other dangerous substances and devices intended for use against persons, ships, or ports, and the carriage of which is not authorized, from being introduced into the port facility or on board a ship;
2. Measures designed to prevent unauthorized access to the port facility, to ships moored at the facility, and to restricted areas of the facility;
3. Procedures for responding to security threats or breaches of security, including provisions for maintaining critical operations of the port facility or ship/port interface;
4. Procedures for responding to any security instructions the contracting government, in whose territory the port facility is located, may give at Security Level 3;
5. Procedures for evacuation in case of security threats or breaches of security;
6. Duties of port facility personnel assigned security responsibilities and of other facility personnel on security aspects;
7. Procedures for interfacing with ship security activities;
8. Procedures for the periodic review of the plan and updating;
9. Procedures for reporting security incidents;
10. Identification of the port facility security officer, including 24-hour contact details;
11. Measures to ensure the security of the information contained in the plan;
12. Measures designed to ensure effective security of cargo and the cargo handling equipment at the port facility;
13. Procedures for auditing the port facility security plan;
14. Procedures for responding in case the ship security alert system of a ship at the port facility has been activated; and
15. Procedures for facilitating shore leave for ship's personnel or personnel changes, as well as access of visitors to the ship, including representatives of seafarers' welfare and labor organizations.[36]

Personnel conducting internal audits of the security activities specified in the plan or evaluating its implementation must be independent of the activities being audited, unless it is impracticable because of the size and the nature of the port facility.[37] The port facility security plan may be combined with, or be part of, the port security plan or any other port emergency plan or plans.[38]

Under the IPIS Code, the designation of a port facility security officer is required, as defined in Chapter XI-2, Part A, § 2.1.8 of SOLAS, for one or more port facilities.[39] The duties and responsibilities of a port facility security officer include, but are not limited to, the following:

- Conducting an initial comprehensive security survey of the port facility, taking into account the relevant

port facility security assessment;

- Ensuring the development and maintenance of the port facility security plan;
- Implementing and exercising the port facility security plan;
- Undertaking regular security inspections of the port facility to ensure the continuation of appropriate security measures;
- Recommending and incorporating, as appropriate, modifications to the port facility security plan in order to correct deficiencies and to update the plan to take into account relevant changes to the port facility;
- Enhancing security awareness and vigilance of the port facility personnel;
- Ensuring adequate training has been provided to personnel responsible for the security of the port facility;
- Reporting to the relevant authorities and maintaining records of occurrences that threaten the security of the port facility;
- Coordinating implementation of the port facility security plan with the appropriate company and ship security officer(s);
- Coordinating with security services, as appropriate;
- Ensuring that standards for personnel responsible for security of the port facility are met;
- Ensuring that any security equipment is properly operated, tested, calibrated, and maintained; and
- Assisting ship security officers in confirming the identity of those seeking to board the ship, when requested.[40]

Pursuant to Part A, § 19.1, Chapter XI-2 of SOLAS, as amended, each ship is subject to certain specified verifications. Specifically, an initial verification is required before the ship is put in service or before an International Ship Security Certificate is issued for the first time. This initial verification must include a complete verification of its security system and any associate security equipment covered by the ISPS and the approved ship security plan. A renewal verification is required at intervals specified by the administration, but, generally, not exceeding five years. At least one intermediate verification is required. In this instance, the intermediate verification must take place between the second and third anniversary date of the certificate as defined in Regulation I/2(n). This verification must include inspection of the security system and any associated security equipment of the ship to ensure they remain satisfactory for the service for which the ship is intended. Such intermediate verification must be endorsed on the certificate. Finally, any additional verifications may be required as determined by the administration. The verifications of ships must be carried out by officers of the administration, or the administration may entrust the verifications to a recognized security organization referred to in Regulation XI-2/1.[41]

The security system and any associated security equipment of the ship after verification must be maintained to conform with the provisions of Regulations XI-2/4.2 and XI-2/6, Chapter XI-2 of the ISPS, and the approved ship security plan. After the completion of any verification, no changes can be made in the security system, the associated security equipment, or the approved ship security plan without being subject to sanctions by the administration.[42] An International Ship Security Certificate must be issued after the initial or renewal verification by the administration or by a recognized security organization acting on behalf of the administration.[43] Another contracting government may, at the request of the administration, cause the ship to be verified and, if satisfied that the provisions of § 19.1.1 are complied with, must issue or authorize the issue of an International Ship Security Certificate to the ship and, where appropriate, endorse or authorize the endorsement of that certificate on the ship. The regulations concerning issuance of interim International Ship Security Certificates are extensive.[44]

In May 2006, the International Maritime Organization through the Maritime Safety Committee developed MSC.1/Circ. 1193 (Guidance on Voluntary Self-Assessment by Administrations and for Ship Security), otherwise known as the "Implementation Checklist for

International Ship and Port Facility Security Code, continued

Ship Security Personnel," to assist ship security personnel in examining the security status of implementation of special security measures, which tracks Section A/7.2 of the ISPS. Furthermore, in December 2006, MSC.1/Circ. 1217 (Interim Guidance on Voluntary Self-Assessment by Companies and Company Security Officers (CSOs) for Ship Security) was issued to assist shipping companies in implementing SOLAS and the ISPS.

Endnotes

1 *Reprinted in* 6D-XIII Benedict on Admiralty, Doc. No. 13-15 (2015). *See* 33 C.F.R. § 101.410(a).

2 *See* §§ 18.25-18.26. *See also* IMO Resolution A.924(22) on Review of Measures and Procedures to Prevent Acts of Terrorism Which Threaten the Security of Passengers and Crews and the Safety of Ships (adopted 20 Nov. 2001).

3 *Id.*

4 For a discussion on the development of these standards, *see Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005).

5 *See* Part A, Mandatory Requirements Regarding the Provisions of Chapter XI-2 of the International Convention for the Safety of Life at Sea, 1974, as amended, *reprinted in* 6D-XIV Benedict on Admiralty, Doc. No. 14-1 (2015).

6 *See* Part B, Guidance Regarding the Provisions of Chapter XI-2 of the Annex to the International Convention for the Safety of Life at Sea, 1974 as amended and Part A of this Code, *reprinted in* 6D-XIV Benedict on Admiralty, Doc. No. 14-1 (2015).

7 Chapter XI-2, Regulation 2 ("Application"), SOLAS. *See* 6D Benedict on Admiralty, Applicability § 3.1, Doc. 13-15 (7th ed. rev. 2004).

8 *See* Chapter XI-2, Part A, §§ 2.1.9-2.1.11 of SOLAS.

9 *See* Chapter XI-2, Part A, §§ 2.1.4-2.1.5 of SOLAS.

10 *Id.*

11 *See* 6D-XIII Benedict on Admiralty, Doc. No. 13-15 (2015).

12 Chapter XI-2, Part A, §§ 2.16, 11, 12, 17 of SOLAS.

13 Chapter XI-2, Part A, § 12.1 of SOLAS.

14 Chapter XI-2, Part A, § 12.2 of SOLAS.

15 Chapter XI-2, Part A, § 9.1 of SOLAS.

16 *Id.*

17 *Id*.

18 *Id.*

19 Chapter XI-2, Part A, § 9.4 of SOLAS. *See* 6D-XIII Benedict on Admiralty, Doc. No. 13-15 (2015).

20 *Id*.

21 Chapter XI-2, Part A, § 14.1 of SOLAS.

22 Chapter XI-2, Part A, §§ 14.2-14.4 of SOLAS.

23 Chapter XI-2, Part A, §§ 14.5-14.6 of SOLAS.

24 Chapter XI-2, Part A, § 15 of SOLAS.

25 *Id*.

26 Chapter XI-2, Part A, § 15.3 of SOLAS.

27 Chapter XI-2, Part A, § 1.3 of SOLAS.

28 Chapter XI-2, Part A, § 15.5 of SOLAS.

29 Chapter XI-2, Part A, § 15.4 of SOLAS.

30 Chapter XI-2, Part A, § 15.6 of SOLAS.

31 Chapter XI-2, Part A, § 15.7 of SOLAS.

32 Chapter XI-2, Part A, § 16.1 of SOLAS.

33 *Id.*

34 Chapter XI-2, Part A, § 15.6 of SOLAS.

35 Chapter XI-2, Part A, § 16.3 of SOLAS.

36 Chapter XI-2, Part A, § 9 of SOLAS.

37 Chapter XI-2, Part A, § 9.4.1 of SOLAS.

38 Chapter XI-2, Part A, § 16.4 of SOLAS. *See* 6D-XIII Benedict on Admiralty, Doc. No. 13-15 (2015).

39 Chapter XI-2, Part A, § 17.1 of SOLAS.

40 Chapter XI-2, Part A, § 17.2 of SOLAS

41 Chapter XI-2, Part A, § 19.1.2 of SOLAS.

42 Chapter XI-2, Part A, § 19.1.4 of SOLAS.

43 Chapter XI-2, Part A, § 19.2 of SOLAS.

44 *See* Chapter XI-2, Part A, § 19 of SOLAS. *See also* 6D-XIII Benedict on Admiralty, Doc. No. 13-15 (2015).

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