Bitter End Bulletin

Committee on Marine Torts and Casualties

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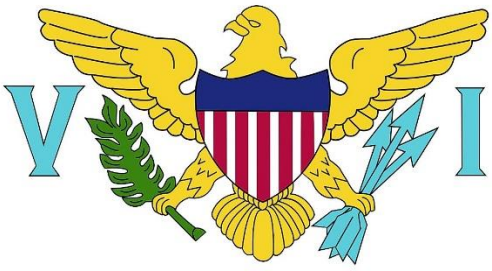

The First U.S. Open Ship Registry: A Sticky Wicket for Torts and Beyond

By Adam E. Deitz

In what media outlets are calling "the most historic moment for U.S. maritime interests this century," the U.S. Virgin Islands is taking steps to create a new open ship registry in the United States. Details about the new registry remain few, however, one thing is for certain—if brought to fruition, an open ship registry could be an important shift in the U.S. marine transportation sector and U.S. maritime law.

A Refresher on Open Ship Registries

Most readers already understand the basics of an open ship registry, but here is a brief explanation for those who are not. Oceangoing vessels in international trade are "registered" with a nation of the world. A registered vessel will fly the flag of that country. The list of vessels flying the nation's flag is the "registry." A ship's registry is important because a vessel is subject to the national laws of its flag state.

An "open" registry allows vessels that are not owned or operated by citizens of a country to fly that nation's flag. Some open registries attract vessel owners by offering lower taxes, less burdensome administrative fees, and potentially looser legal regimes. This perception led to the commonly used yet pejorative term, "flag of convenience." Convenient or not, open registries such as Panama, Liberia, and The Marshall Islands collectively service over 50% of all ships in international trade.

(U.S. Open Ship Registry, con't from p.1)

The Jones Act and the U.S. Virgin Islands

Naturally, an open ship registry in the United States will have ripples throughout the realms of maritime law. But this is a torts periodical, so we will focus on the Jones Act. The U.S. Virgin Islands is one of only three U.S. territories with a full exemption from the Jones Act. It appears that the U.S. Virgin Islands government is interpreting this to mean that vessels flying their flag will be subject to the vast majority of U.S. laws—just not the Jones Act. If they are correct, the world's oceans could one day be plied by ships flying the U.S. Virgin Islands flag that are owned/operated/constructed outside the United States and crewed by mariners from all over the world. Still more surprising, those ships could be subject to stringent U.S. law (e.g., environmental laws) but free from claims for Jones Act negligence for crewmember injuries.

It is hard to imagine the amount of litigation that this kind of change could create in seaman injury matters. Vessels flying the flag of a U.S. territory may be subject to maritime common laws such as maintenance & cure, unearned wages, and unseaworthiness, regardless of Jones Act exemption. Indeed, injured seamen aboard U.S. ships had such claims before the Jones Act was passed in 1920 (*The Osceola*, 189 U.S. 158 (1903)). Could this mean an influx of new seaman injury claimants from overseas? If not, what kind of claims for compensation will be available to merchant seamen injured in service of U.S. Virgin Islands-flagged ships? This is very much a developing situation.

One certainty amongst the ambiguities caused by the new open registry is criticism. Detractors are legion. Labor unions, including American Maritime Organization, Sailors Union of the Pacific, Seafarers' International Union, International Organization of Masters, Mates & Pilots, Marine Engineers' Beneficial Association, and Marine Firemen's Union, issued a joint statement on February 1, 2022, condemning the registry. They contend that:

"This latest effort is nothing more than an exercise in labor arbitrage designed to generate registry fees and to enrich foreign shipowners at the expense of American workers and America's national interests."

Some maritime lawyers are also piling on a laundry list of legal issues, including preemption.

Stay tuned for future updates.

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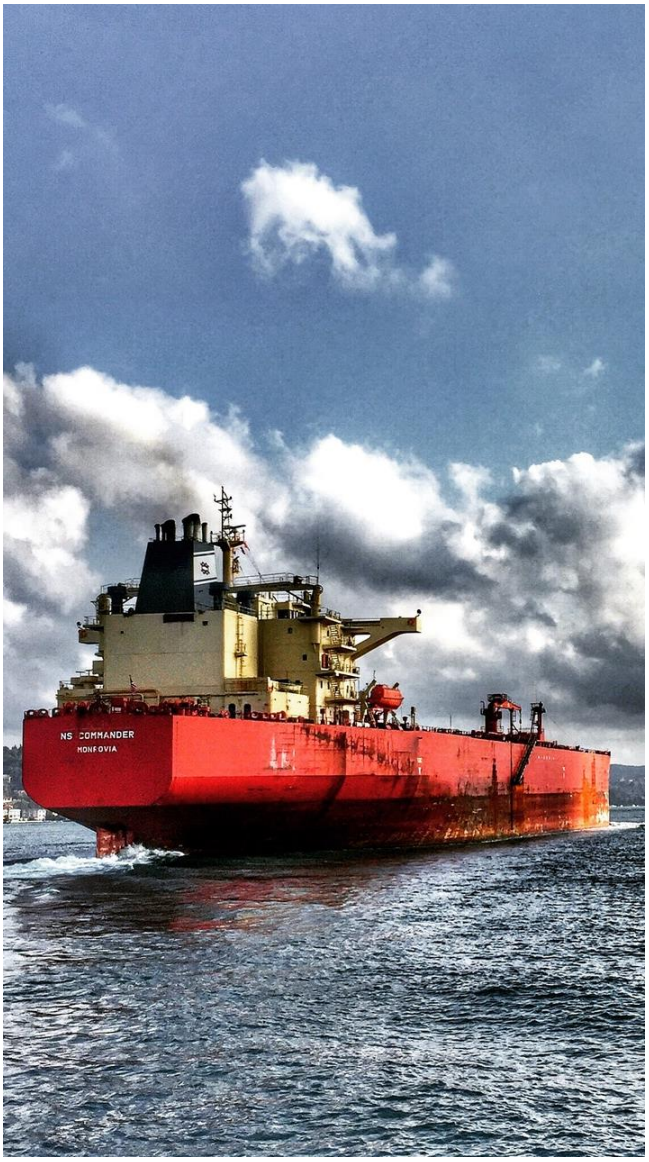


Troubled Waters – Crew Claims From The Black Sea

By Christine M. Walker

Following Russia's invasion of Ukraine, traversing the Black Sea has not been without incident. At least three non-military vessels have been hit by weapons contemporaneous to the invasion. These incidents have resulted in injuries to the crew, giving rise to the question - - what duty is owed to foreign crewmembers aboard vessels operating in dangerous and, potentially, warn-torn regions of the world?

In determining if a foreign crewmember can sue for negligence under the Jones Act, generally, the following factors are considered: (1) place of the wrongful act; (2) law of the vessel's flag; (3) the domicile of the crewmember; (4) domicile of the shipowner; (5) place of the contract; (6) inaccessibility of the foreign forum; (7) law of the forum; and (8) location of the shipowner's operations. If sufficient contacts exist, a crewmember can maintain an action under the Jones Act. To recover under the Jones Act's featherweight causation standard, the crewmember must only show that their employer's negligence was a cause, not the cause, of his or her injuries.

With a Jones Act action, inevitability, an unseaworthiness claim will also follow. Under the general maritime law, shipowner owners and pro hac vice owners (e.g., demise charterers) owe an absolute and nondelegable duty to provide a seaworthy vessel to crewmembers. This duty includes all parts of the vessel and its operation.

Therefore, presuming jurisdictional contacts are satisfied, the more specific liability issue becomes whether a shipowner can be held liable to an injured crewmember if the voyage plan required the ship to travel through dangerous waters. Said another way, the issue becomes whether the shipowner failed to provide the crewmember with a safe work environment by operating a ship in waters adjacent to land involved in a violent conflict. As with most cases involving maritime law, the answer is, of course, it depends.

Since the standard for Jones Act negligence is slight, likely, a crewmember can raise a colorable claim for Jones Act negligence by alleging that requiring a vessel to operate in a war-torn region or not ordering a deviation from the voyage plan was a cause of their injury. However, under the Jones Act, the shipowner can counter with an allegation that the crewmember could quit prior to the voyage if he or she was uncomfortable traveling in the selected region. With unseaworthiness, the standard is not perfection, but reasonable fitness.

Accordingly, raising a colorable unseaworthiness claim would require a crewmember to allege that requiring a vessel to operate in a war-torn region or not ordering a deviation from the voyage proximately caused the crewmember's injury. Reasonable fitness is determined through a reasonable person standard under tort law. This makes the timing of the incident relative to the severity of the conflict, the information available regarding the weapons utilized in the conflict as well as the actions of other shipowners to avoid the conflict all relevant.

As a result, while the global shipping community is facing uncertain safety challenges in an uncertain political environment, the traditional maritime litigation framework should apply to potential causes of action with some degree of certainty. Although judgment calls may have to be made with respect to providing crewmembers with a safe work environment versus ships meeting their contractual requirements, this certainty should help attorneys, insurers, and shipowners to make informed recommendations and/or decisions where potential litigation exposure from crew tort claims can be factored into the decision-making process.

A Word About SWIFT Accounts and Crew Pay. . .

By Christine M. Walker

SWIFT accounts provide an international network enabling secure money transfers. The recent economic sanctions by a few NATO countries have resulted in the removal of select Russian banks from the SWIFT system. Consequently, issues may develop pertaining to making wage payments to crewmembers who have elected to have their wages deposited into a Russian bank removed from the SWIFT system.

Section 10313(g) of Title 46 of the United States Code provides that when a shipowner fails to pay wages without sufficient cause, the crewmember is entitled to double wages for each day in which the payment is delayed. Subsection (f) of that section provides that wages are due to the crewmember within 24 hours after the cargo is discharged or within four days after the crewmember is discharged, whichever is earlier. To avoid potential liability for failing to timely pay wages, shipowners and/or their wage distribution proxies must be able to establish sufficient cause for the delay.

In *Collie v. Fergusson*, 281 U.S. 52, 55 (1930), the United States Supreme Court held that the foregoing statute only conferred a right to double wages if the payment was delayed due to an arbitrary or willful reason, not attributable to impossibility of payment. The Court further explained it was necessary to look to the motivation of the shipowner in failing to make proper payment. As such, in the current global environment, presuming a shipowner fails to make a wage payment to a crewmember due to the unexpected removal of the crewmember's bank from the SWIFT system, they will most likely not be liable for double wages because payment was impossible.

Notwithstanding the foregoing, attempting to work with crewmembers on alternative mechanism for payment not associated with the centralized banking system and timely making payments if and when the SWIFT system becomes available again to Russian banks is likely a prudent way to establish evidence of good faith in favor of the shipowner, thereby, creating a strong defense to a potential claim.

Regulatory Updates for Tort Practitioners

By Adam E. Deitz

The maritime industry is heavily regulated at the state, national, and international levels. These rules and regulations are often relevant in tort litigation for standards of care, negligence per se, statutory interpretation, and other purposes. If you learn of a change in maritime rules and regulations that may impact the maritime tort practice, please contact the editors of *Bitter End Bulletin* and ask to be featured.

#1 — U.S. Coast Guard Issues Guidance on Whether a Floating OCS Facility is a Vessel

The U.S. Coast Guard issued CG-OES Policy Letter 01-22, Determination of Whether a Floating Outer Continental Shelf Facility (FOF) is a Vessel, and CG-MMC Policy Letter 01-22, Merchant Mariner Credential Endorsements for Service on Floating Outer Continental Shelf (OCS) Facilities on February 4, 2022.

The Coast Guard's new guidance is intended to help determine if a Floating Outer Continental Shelf Facility (FOF) is a vessel or a non-vessel. Non-vessel FOFs will no longer receive a Certificate of Inspection (CG Form 841), and personnel serving on these FOFs will no longer be required to hold Merchant Mariner Credentials. The Coast Guard's analysis will largely follow the Supreme Court's decision in *Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115 (2013), considering whether the FOF was designed to a practical degree for carrying people or things over the water. Determinations will be conducted on a case-by-case basis.

For more information: https://www.federalregister.gov/documents/2022/02/10/2022-02707/guidance-documents-determining-whether-a-floating-ocs-facility-is-a-vessel-or-non-vessel-oversight

#2 — New Fire Extinguisher Rules for Pleasure Boats Take Effect in April 2022

In October 2021, the U.S. Coast Guard announced amended rules for fire extinguishers aboard recreational boats. Boaters may be caught by surprise when these new rules go into effect on April 20, 2022.

There is no change as to how many extinguishers are required aboard pleasure craft. Instead, the rules are more likely to require removal of certain extinguishers from service. The new rules require:

- For boats manufactured in model year 2018 and after, the fire extinguisher must be replaced if it is over 12-years old from the date of manufacturing.
- Boats of model year 2017 and older should replace older, undated, fire extinguishers but can continue to carry these undated extinguishers if they are maintained in good and serviceable condition.

Recreational boating fires remain a significant cause of tort litigation nationally. In 2020 alone, the Coast Guard reported over $12 million dollars in damages resulting from fires aboard pleasure craft. This change in fire extinguisher rules will be relevant to many fire claims going forward.

For more information: https://www.federalregister.gov/documents/2021/10/22/2021-22578/fire-protection-for-recreational-vessels?utm_medium=email&utm_campaign=subscription+mailing+list&utm_source=federalregister.gov

Bitter End Bulletin Seeks Contributors

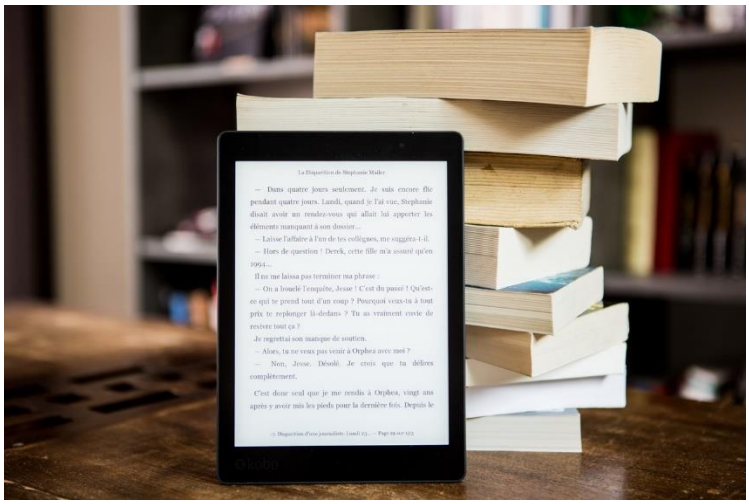
By Adam E. Deitz and Christine M. Walker

As famously stated by Connecticut's P.T. Barnum: "*There's no such thing as bad publicity.*"

The Committee on Marine Torts and Casualties as well as the editors of *Bitter End Bulletin* invite contributors of all backgrounds and experience levels to provide articles, updates, and other content for this quarterly periodical.

- Are you a maritime tort practitioner with an interesting legal issue that you would like to write about?
- Are you a young lawyer looking for exposure to the MLA?
- Are you a law student looking for writing experience?

If your answer is "yes," don't be shy—get in touch with the editors of the *Bitter End Bulletin*.



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