



**STEVEDORES, MARINE TERMINALS AND
VESSEL SERVICES COMMITTEE**

LIVE AND WEBINAR CLE TIMED AGENDA

Thursday, May 4, 2023

10:30 – 12:00

In the Offices of Blank Rome

1271 Avenue of the Americas, New York

And by MLA Zoom Link (Must Pre-register)

Welcoming Remarks and Announcements (10:30 – 10:35)

Deborah C. Waters, Chair, Waters Law Firm, PC, Norfolk, Virginia

Continuing Legal Education Presentation:

Panelist Introduction (10:35 – 10:40)

Moderator: *Deborah C. Waters, Chair*

**Panel: Offshore Wind Farm Planning And Installation –Issues And Recent
Developments Pertinent To Legal Advisors (10:40 – 11:40)**

Panelists: *B. Jason Barlow, Port of Virginia, Norfolk, Virginia*
Brian McEwing, Reeves McEwing, LLP, Dorchester, New Jersey

Young Lawyer Update on LHWCA Cases (11:40 – 11:55)

Guillermo A. Cancio, Thomas Miller (Americas), Inc., Jersey City, New Jersey

Open Forum (11:55 – 12:00)

Closing Remarks, Thank You, and Adjourn

Deborah C. Waters, Chair, Waters Law Firm, PC, Norfolk, Virginia

The Maritime Law Association of the United States (“MLA”) is an accredited provider New York provider of continuing legal education (“CLE”). The program will be appropriate for experienced and newly admitted attorneys (Non-Transitional and Transitional). 1.0 New York CLE credit in the Area of Professional Practice will be offered. Attorneys admitted in jurisdictions other than New York may be entitled to CLE credit for attending the program and should consult with their jurisdictions’ CLE authorities.



Stevedores, Marine Terminals And
Vessel Services Committee

**OFFSHORE WIND FARM PLANNING AND INSTALLATION –
ISSUES AND RECENT DEVELOPMENTS PERTINENT TO LEGAL ADVISORS**

Panelists: B. Jason Barlow, Port of Virginia, Norfolk, Virginia
Brian McEwing, Reeves McEwing, LLP, Dorchester, New Jersey
Moderator, Deborah C. Waters, Waters Law Firm, PC, Norfolk, Virginia

May 4, 2023

1 Hour CLE – Presented Live and Virtually

- I. Offshore Wind Terminal Services: Competing Risk Allocation Regimes used in Offshore Windfarm Construction and Traditional Maritime Cargo Risk Concepts
 - A. Liability for Offshore Wind Component Damage during Component Marshalling and Terminal Handling
 1. Stevedore/Terminal Expectations: Traditional Risk Allocation based on Maritime Industry Protections and Limitations of Liability
 - a. Hague Convention as adopted by the United States Carriage of Goods by Sea Act ([46 U.S.C. § 30701 et sec.](#))
 - b. \$500 Per Package Limitation of Liability extended shoreward to stevedores and terminal operators through Bill of Lading Himalaya Clause ([COGSA § 4\(5\)](#); [COGSA § 7](#))
 - c. Public Terminal Tariffs Enforceable under Federal Shipping Act ([46 U.S.C. § 40501 \(f\)](#))

- i. Potential Issue:
 - (a) “Marine Terminal Operator” means “a person engaged in the United States in the business of providing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier...” ([46 CFR § 525.1\(c\)\(13\)](#))
 - (b) For terminal tariffs to apply as a matter of law under the Federal Shipping Act, terminals/stevedores must qualify as a “Marine Terminal Operator” ([46 U.S.C. § 40501 \(f\)](#))
 - (c) OSW component delivery and installation vessels are not typically providing “common carriage,” so do public marine terminals lose the enforceability of their tariffs as a matter of law?

2. Developer/OEM/Contractor Expectations: Turbine Supply Agreements with Liquidated Damages for Startup Delay

- a. All-inclusive supply/transportation/construction contracts that guarantee performance deadline with substantial liquidated damages for windfarm startup delay
- b. Limitation of liability commonly tied to contract value rather than “package” or customary freight unit
- c. Risk of loss for component damage during delivery, marshalling and installation remains with OEM/Supplier/Contractor rather than Wind Farm Owner/Developer

B. Service Guarantees/Delay Damages

- 1. Stevedore/Terminal Expectation: No guarantees; market forces incent efficient operation.
 - a. Berth availability, performance and service guarantees are fairly rare in the stevedore/terminal industry, especially unless vessels arrive on *pro forma*.

- b. No liability for delay in delivery provided by COGSA ([46 U.S.C. § 30701 et sec.](#)) or the Harter Act without an express agreement that goods will be delivered in a particular time frame; Carrier bills of lading and terminal tariffs frequently negate any undertaking with respect to delivery date or time frame.
 - c. Commercial market drives performance and service
 - i. Terminals/stevedores compete to provide fast, efficient service to discretionary cargo
 - ii. Shippers and Carriers factor efficiency (cost) into routing decisions and port calls
 - iii. Stevedore/Terminal pricing often on a “pick” or per container or per ton basis—incentives Stevedore/Terminal to process as many containers or perform as many lifts as safely possible
2. Developer/OEM/Contractor Expectations: Captive cargo market requires service guarantees enforced through liquidated delay damages
- a. Guaranteed berth availability; berthing priority over other vessels
 - b. Captive cargo, so no real competition to drive performance and service
 - i. Developer/OEM/Contractor sets performance deadlines/timelines
 - ii. Deviations from required deadline/timeline results in delay liquidated damage

C. Insurance Landscape

- 1. Stevedore/Terminal Expectations
 - a. Cargo Insurance – Cargo often insured while in transit (*See e.g., [Brammar Corp. v. Holland-Am. Ins. Co., 228 N.Y.S.2d 512 \(N.Y. 1962\)](#)*)
 - b. Marine Terminal Operator/Stevedore Liability Insurance – Provides affordable customer liability cover, underwritten based on traditional maritime package limitations, COGSA/terminal tariff defenses
 - i. “Liquidated Damage” coverage exclusion
 - ii. Special treatment of consequential and special damages

2. Developer/OEM/Contractor Expectations

- a. Construction All Risk Cover – Covers entire offshore wind project, including components during transit, marshalling, and construction through turnover to developer with reasonable deductible structure
 - i. Contractors/Subcontractors/Port Authorities commonly added as Additional Insured with Waivers of Subrogation for Cargo Damage
 - ii. Developer/OEM/Contractor willing to cap component damage liability at applicable CAR deductible
 - iii. Startup Delay Coverage available, but rarely purchased unless lenders require

II. Vessel Support for Offshore Wind: Balancing the Risks and Rewards

- A. Vessel Types and Requirements [46 CFR § 1-199](#). Vessel requests can vary as does the type of work requested
 - 1. Crew Boat
 - 2. CVT
 - 3. DP2
 - 4. Lift Boat
- B. Contract Type
 - 1. BIMCO SUPPLYTIME is favored by most foreign entities looking for vessels
 - i. Upstream contractors eviscerate same in their favor
 - 2. Other time charter forms
 - i. Owner drafted forms are generally rejected by upstream contractors
- C. Contracting parties, novations or assignments
 - 1. Most BIMCO agreements allow for assignment or novation by charterer.
 - 2. Vessel substitution by Owner often not permitted unless breakdown

- D. Upstream Contract Back-to-Back Issues
 - i. The scope of work and profits for downstream contractors is generally less than upstream, but upstream contractors want back-to-back terms
 - ii. insurance requirements are often far in excess of typical USA vessel charters
 - iii. P&I amounts have been requested as high as \$50M, additional premium is foisted back on charterer
 - iv. Special operations cover is often requested but the work performed does come within such definition
 - v. Indemnity provisions.
 - 1. Typically knock-for-knock
 - 2. Impact of OCLSA [43 U.S.C. § 1331](#), on enforceability
- E. Flow-down Provisions
 - 1. HSE
 - i. MTSA [33 C.F.R. § 105](#)
 - ii. IMO
 - iii. MCL
 - iv. IMTSA
 - 2. Property damage risk is troubling when dealing with a minor contractor damaging a tower or cable
- F. Cancellation Clauses
 - 1. Penalties for early cancellation – often graduated to increase percent of firm hire due as delivery date closes
 - 2. Most charters are short-term which is problematic for owners attempt to have smooth scheduling and not turn down potential work with others
- G. Late delivery of Vessel
 - 1. Penalties
 - i. Length of Charter v. LDs must be weighed out by owner
 - ii. Per diems and caps need to be negotiated based on firm hire period and daily rate

2. Substitute vessels (if available), charterer wants substitute, but availability is scarce
 - i. Charterer pushes for payment in full for replacement vessel procured by charterer
 - ii. Owner push back is often necessary as availability of vessels is scarce at present
 - iii. Often the charterer has to install specialty equipment, so substitutes also leads to delay

- H. Liquidated Damages
 1. Daily rate is often excessive on charterer initial version
 2. Caps are needed

- I. Consequential damages
 1. Typically, no consequential damages are granted in favor of either party, the scope of work/hire amount preclude same

- J. Scope of work and Nature of work, risk avoidance
 1. Risks incidental to nature of work and acceptance or rejection of LDs
 2. CPB rulings as to Jones Act vessel requirements
 - i. Cable laying
 - ii. Boulder removal
 - iii. Mat placement

- K. [Saving of Life at Sea - SOLAS 1974](#)
 1. Charterers want to approve deviation for life saving, Owners

- L. Limitation of Liability [46 U.S.C. § 30501](#)
 1. Typically rights are retained by owner

- M. Venue and applicable law, arbitration or litigation
 1. Coordination with upstream/downstream
 2. Litigation v Arbitration
 - i. Most are arbitration in NY with SMA rules, three arbitrators, but provide mediation option
 3. Forum selection

N. Operational Issues

1. Manning for twenty-four-hour workday, seven days/week
2. Room and Board for contractor personnel
3. Crew Change coordination
4. Maintenance of vessel during charter period
5. Shipyard schedules impacting charter period
6. Weather/vessel workability requirements
7. Right Whale Speed Restrictions [50 CFR § 224.105](#)
8. Recent death of Humpback Whales

B. Jason Barlow
Port of Virginia
Norfolk, Virginia

B. Jason Barlow serves as Vice President of Contracts and Risk Management for the Virginia Port Authority, where he leads VPA's Contracts, Real Estate, Compliance, Risk Management and Insurance teams, all of which service the three entities operating under The Port of Virginia® brand (Virginia Port Authority, Virginia International Terminals, LLC, and HRCP II, LLC).

Specifically, Mr. Barlow leads the Contracts team in the negotiation, drafting, and interpreting of contracts for all Port of Virginia entities. He oversees the Real Estate team, which manages the access, licensing, and leasing of the Virginia Port Authority's real estate holdings. Mr. Barlow leads the Compliance team in the management of an internal compliance function, including the a comprehensive compliance audit and non-conformance investigation process. He manages the Insurance team, which facilitates the placement and policy management of liability, property, workers' compensation, and specialty insurance for all Port of Virginia entities. Finally, Mr. Barlow leads the Risk Management team, which investigates, adjusts, and resolves claims against all Port of Virginia entities, and manages a comprehensive Enterprise Risk Management program.

Prior to joining VPA, Mr. Barlow practiced law with Troutman Sanders LLP (now Troutman Pepper Hamilton Sanders LLP). His practice focused on the transportation industry with an emphasis on maritime and admiralty law matters. Mr. Barlow routinely litigated in federal and state courts on behalf of ship-owners, towing and barge companies, dredging companies, terminal operators, cargo owners, shippers, and marine underwriters in marine casualty disputes, including maritime personal injury and death, vessel collisions/allisions, cargo damage, maritime salvage and marine pollution. He also advised clients through regulatory challenges, such as Coast Guard boarding and detentions, Oily-Water Separator ("Magic Pipe") violations, mariner licensure and credentialing and commercial fishing regulations and fishery management. Mr. Barlow represented clients in commercial maritime transactions, including maritime contracts, charter parties, towage agreements, marine insurance, vessel documentation and finance, and foreign-flag vessel registration. He specialized in unique Admiralty law procedures, including Federal Limitation of Liability Actions and ship arrest and attachment under the Supplemental Rules of Civil Procedure for Admiralty and Maritime Claims.

Mr. Barlow, a Virginia native, earned a Juris Doctor with Maritime Law Certificate from Tulane Law School in New Orleans, Louisiana and a Bachelor of Arts from Randolph-Macon College in Ashland, Virginia. He is licensed to practice in Virginia. He is a member of the Virginia State Bar and a Proctor in Admiralty of the Maritime Law Association of the United States

Brian McEwing
Reeves McEwing LLP
10 Andrews Lane
Dorchester, NJ 08316
mcewing@lawofsea.com
www.lawofsea.com
267-324-3773 (Philadelphia Office)
609-846-4717 (New Jersey Office)



Brian McEwing is partner in the law firm Reeves McEwing, LLP in Dorchester, New Jersey and Philadelphia, Pennsylvania. Brian received his bachelor's degree in political science from Rutgers University College Camden where he graduated summa cum laude. He graduated from Rutgers School of Law Camden in 2008.

He brings to the practice of law over thirty years' experience as a mariner, twenty years as a licensed officer, and fifteen years in marine management positions, including Port Captain. He holds USCG licenses as Master Inland any gross tons, Master Oceans 1600 gross tons, 2nd Mate Oceans and First-Class Pilot upon the Delaware Bay of any gross tons.

He has extensive practical experience in marine safety and operations, regulatory compliance, employment issues and collective bargaining. He advises a number of small and mid-size companies as outside general counsel on contract and employment matters and has tried cases around the country, to both the jury and the bench.

Admitted To Practice:

Supreme Court of the United States
Commonwealth of Pennsylvania
State of New Jersey
Eastern District of Pennsylvania
District of New Jersey