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Legal Report to North Atlantic Ports Association
Alexandria, VA
November 30, 2018 (Updated January 4, 2019)

I. Federal Maritime Commission
   a. User Fees Are Going Up: Direct Final Rule (Docket 18-08/Oct. 5, 2018) (Public comments were due Nov. 19). New fees to go into effect December 19, 2018.
      i. Informal Small Claims
      ii. Record Search and Document Duplication
      iii. Certification and Validation of Documents
      iv. Non-attorney admission to practice
      v. OTI Licensing Fees
      vi. Passenger Vessel Certificates of Financial Responsibility
   b. Status of FMC Investigation into Detention and Demurrage Practices at Ports (Fact Finding No. 28)
      i. Commissioner Rebecca Dye, in March 2018, initiated a fact-finding investigation into Detention and Demurrage at US Ports in International Oceanborne Commerce, mainly in response to complaints about alleged unfair practices in West Coast Ports.
      ii. Conducted scores of Port meetings and interviews. Sent written questions off to major marine terminal operators regarding their Detention and Demurrage practices.
      iii. September 5, 2018, Interim Report Issued; 6 Areas identified as ones that need to be developed in final report
         1. Standard language in Tariffs/Schedules for demurrage, detention and free time practices
         2. Simplification of demurrage and detention billing practices and a process for dispute resolution
         3. Explicit guidance as to the types of evidence that will be relevant to resolving detention and demurrage practices.
         4. Consistent notice to shippers of container availability
         5. Create an FMC Shipper Advisory Team to make recommendations as to the above four items.
      iv. During a September 19, 2018 Public Meeting of the FMC, the Commission also stated that it is engaged in a review of FMC Rules regarding the filing of Ocean Carrier and Marine Terminal Agreements.
      v. December 3, 2018: Final Report Issued by FMC on Fact-Finding No. 28, which adopted the interim recommendations identified above. Report is available to read on www.fmc.gov.
      vi. December 7, 2018: FMC voted to adopt Final Report, and to establish a Shipper Advisory Board to make recommendations as to the four items identified above.

c. Status of Proposed Interpretive Rule (Docket 18-06) Issued September 6, 2018
    i. In September, the FMC issued a Notice of Proposed Rulemaking intended to clarify when an aggrieved party can bring suit in the FMC against an Ocean Carrier or MTO for violation of the Shipping Act's prohibition in Section 10(d)(1) against "failing to establish, observe, and enforce just and reasonable regulations and practices" in connection with the receiving, handling, storing or delivering of property. In its proposed rulemaking, the FMC noted that it was having to handle a number of cases where only a single act of wrongful conduct by an MTO was alleged and where there were other venues (federal courts) where such claims could be better resolved.
    ii. The FMC proposed to amend its rule interpreting Section 10(d)(1) to state that a regulated entity will only be deemed to have violated the Shipping Act if it engages in a wrongful practice or regulation "on a normal, customary, and continuous basis" AND "is the proximate cause of the alleged loss."
    iii. Comments were due by October 10, 2018. As of that date, five comments had been received:
        1. New York New Jersey Freight Forwarders and Brokers Assn: Supports the proposed Rule. "Isolated instance" should not be raised to the level of a Shipping Act violation.
        2. International Trade Surety Association: Supports the proposed rule.
        3. National Customs Brokers and Forwarders: Supports the proposed rule to avoid turning the FMC into a small claims court, but stresses that the FMC should not eliminate the rule requiring that just and reasonable regulations and practices be established.
        4. AAPA: Supports the proposed rule. (Written by Jean Godwin) Proposed rule re-affirms FMC's former position and reverses more recent negative trend of finding single instances of misconduct to be Shipping Act violations.
        5. World Shipping Council: (Represents ocean common carriers): Supports FMC's proposed rule. There was a change in interpretation by the FMC between 2010 and 2013 that was a divergence from historic practice and the FMC should get back to its original interpretation of the act.
    iv. December 13, 2018: FMC announced that its interpretive rule would go into effect on December 17, 2018.

II. Update on Frescati v. CARCO (Athos I) Case: The Saga that Began in 2004 Continues.
a. In 2004, the ATHOS I, a single hulled tanker had been chartered by non-party Star Tankers from the vessel's owner, Frescati. CARCO, in turn, subchartered the vessel from Star to carry a cargo of crude oil from Venezuela to CARCO's private terminal on the Delaware River in Paulsboro, NJ. On its approach to the terminal, in a federally maintained anchorage, the vessel struck an abandoned 9 ton anchor in the riverbed, ripping a hole in the vessel's hull and causing 264,000 gallons of crude oil to spill into the River.
b. The subcharterparty of the vessel from Star to CARCO contained a "safe berth warranty," warranting that the vessel could safely dock at CARCO pier with a draft of 37 feet or less.

c. After the spill, Frescati incurred initial clean up expenses of $143 million and was reimbursed $88 million by the U.S. Government under OPA '90. Frescati and the government then filed suit against CARCO to recover the clean-up costs they had each paid.
d. April, 2011: 41 day bench trial in 2010 before the U.S. District Court for the Eastern District of PA (Judge Fullam): Held that CARCO was not liable under any theory. Frescati appealed.
e. May 2013: (First Appeal) Third Circuit affirmed in part and vacated that judgment in part, sending case back down to the District Court to make findings of fact and conclusions of law on two issues: (1) Did CARCO violate the "safe berth warranty" in its charterparty (with the appellate finding that Frescati was a third party beneficiary of the charterparty) and (2) Was CARCO negligent in maintaining the approach to its berth.
f. On remand, in July, 2016, District Court Judge Slomsky, after a virtual retrial of the case, concluded that
    i. CARCO had breached its safe berth warranty owed indirectly to Frescati as third party beneficiary shipowner, as, at the time of the allision with the anchor, the vessel only had a mean draft of 36 ft. 7 inches and a safe berth of 37 ft. had been guaranteed.
    ii. CARCO was negligent in maintaining its berth by failing to use sonar surveys within the approach to its berth, including the Federal Anchorage Area, to search for hazards and obstructions to navigation.
    iii. The U.S. Government's claim against CARCO for $88 million would be reduced by 50%, upholding CARCO's "equitable recoupment defense" that the U.S. government had never told CARCO that it was responsible for surveying the federal anchorage area.
    iv. CARCO and the U.S. government appealed.
g. March 29, 2018: (Second Appeal): Third Circuit held:
    i. CARCO, in wearing its hat as a vessel charterer from Star Tankers, had violated the safe berth warranty in its charterparty because the vessel did not make it safely to the berth, and Frescati, as vessel owner, was a third party beneficiary of the safe berth warranty.
    ii. Having reached liability on contract grounds, the 3rd Circuit found it did not need to reach the question as to whether CARCO, wearing its hat as a wharfinger, was negligent in failing to scan the approach to its berth for underwater obstacles. However, the 3rd Circuit expressed skepticism about the lower court's proposed duty of care, stating that there was no proof that a scan of the approach and berth (costing about $11K) would have uncovered the anchor (as it may have been "surfaced" only by a recent storm). The 3rd Circuit also recognized that single hulled vessel like ATHOS I posed unique risks and that is why such tankers are no longer permitted to operate in US waters.
    iii. The 3rd Circuit reversed the District Court's 50% limitation on the Government's recovery and held that the Government was entitled to recover 100% from CARCO, because the "equitable recoupment" defense was a tort defense and therefore could not be raised by CARCO as a defense to a breach of contract claim.
h. October 26, 2018: CARCO filed a Petition for Certiorari to the U.S. Supreme Court, No. 18-565, asking the Supreme Court to take the case on the grounds that there was a difference of opinion now among the lower courts as to whether a "safe berth

warranty" constituted a "guarantee" of the safety of a particular ship during berthing, or just created a "duty of due diligence."

i. CARCO consented to the filing of Amicus Briefs
ii. On November 30, 2018, Amicus Briefs were filed by the Maritime Law Association, Association of Shipbrokers & Agents, and the American Fuels and Petrochemicals Association, encouraging the Supreme Court to take the case to establish a uniform interpretation of the "safe berth" warranty in standard form charterparties.
iii. The Supreme Court on January 2, 2019 granted a Motion extending the time for all respondents to file their response to the Petition for Certiorari to February 1, 2019.

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