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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

THE MLA REPORT

TABLE OF CONTENTS

EDITORIAL COMMENT

This issue of the MLA Report will introduce the new Committee on International Law of the Sea of which Jack L. Allbritton, Esq., of Houston is the Chairman. This was formerly known as the Committee on Undersea Development and Exploration whose area of interest was primarily the offshore oil industry. President Gordon W. Paulsen has, with the approval of the Executive Committee, made a policy decision that the Association should take an active interest in the so-called Law of the Sea.

Traditional maritime law is, of course, a branch of private international law, whereas the Law of the Sea is public international law. That is to say, it deals primarily with government-to-government relations. Historically, the Law of the Sea has encompassed problems involving surface vessels, commercial, naval, fishing, etc. Typical problems have concerned navigation rights, offshore boundaries, ownership and/or control of straits and archipelagoes, etc. In recent years the most controversial part of the Law of the Sea has been that involving deep seabed mining. At this point the connection between Undersea Development and Exploration on the one hand, and the Law of the Sea on the other, becomes obvious.

In order to kick off the work of the Committee on International Law of the Sea a member of the Committee, Geoffrey J. Ginos, Esq., of New York, prepared a "Status Report on the Law of the Sea and Related Legislation and Developments" which is published in this issue. The Committee has also inaugurated a newsletter which appears herein following the Status Report.

The medium of a committee newsletter was originated several years ago by the Committee on Bills of Lading. This was followed by the newsletter of the Committee on Practice and Procedure. It is conceivable that other committees may follow suit. The primary purpose of this issue of the MLA Report is to publish the three newsletters that appeared in the fall of 1983. Heretofore we have been publishing the Report semi-annually to coincide with the mailing of the minutes of the meetings, approximately March 1 and September 1. However, since part of the value of the newsletters is their timeliness, it appears that the newsletters should be published to the membership more promptly. Our present plan is to put out a "newsletter issue" of the MLA Report coincident with the first mailing after the Spring and Fall meetings (thus effecting a considerable saving in mailing costs). On this occasion, at least, the Report is being mailed with the President's personal newsletter. In view of the production by the committees of an increasing number of worthwhile newsletters, reports and memoranda of general interest to the membership, we may find it desirable to publish the

MLA Report four times a year. In any event the next issue will appear in March.

We take this opportunity of repeating our standing request to committee chairmen to submit to the Editors any papers that might be worthy of publication. We do not, however, intend to publish a law review containing articles written by members of the Association in their private capacity.

David R. Owen
Editor

INTERNATIONAL LAW OF THE SEA

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November 3, 1983

Jack L. Allbritton, Esquire
Chairman, MLA Committee on
International Law of the Sea

Dear Jack:

Enclosed is a status report which I have prepared on law of the sea, deep seabed mining and related Executive branch and Congressional developments. In view of the change of the name and focus of our Committee, it appears that we will be more active than ever in this area.

I have established numerous contacts during my familiarization with developments on law of the sea which I believe will prove invaluable to the Committee in view of its new function. All of these people, whether in government or private organizations, have welcomed the news that the MLA has decided to convene a committee on international law of the sea, and have expressed both a willingness to be of whatever help possible to the Committee and a desire to hear from the Committee no the various issues raised by the Law of the Sea Convention and this country's response thereto. Particular interest has been expressed in the MLA's views on the very difficult questions of international maritime law arising therefrom.

Very truly yours,

/s/ Geoffrey J. Ginos
Geoffrey J. Ginos

STATUS REPORT ON LAW OF THE SEA AND RELATED LEGISLATION AND DEVELOPMENTS

I. LOS DEVELOPMENTS

There are now 131 signatories to the 1982 Law of the Sea Convention (''UNCLOS'') and 9 ratifications: Belize, Egypt, Fiji, Ghana, Bahamas, Jamaica, Mexico, Zambia and the United Nations Counsel for Namibia. The Convention enters into force one year after sixty countries have ratified it.

Delegations from 82 countries and 16 observers terminated the 1983 session of the UNCLOS Preparatory Commission (''PREPCOM'') with agreement on a number of recommendations which may clear the way for substantive technical deliberations when PREPCOM reconvenes next Spring in Jamaica from March 19 to April 13, 1984. PREPCOM has given the United Nations Law of the Sea Secretariat a mandate to prepare background and discussion papers on relevant legal, financial, economic and technical issues for the 1984 meeting.

This year, PREPCOM created four Special Commissions and elected 14 vice-chairmen, a Rapporteur General and the four chairmen of these Special Commissions. Each Special Commission held an organizational meeting on September 9, 1983 to elect vice-chairmen. The 36 officers thereby elected make up PREPCOM's General Committee, which is now charged with all questions of organization.

The four Special Commissions will consider:

(1) potential problems of developing, land-based producer states likely to be most seriously affected by production of minerals from the international sea bed;

(2) measures for the early and effective operation of the Enterprise, the operational mining arm of the International Seabed Authority;

(3) rules, regulations and procedures for the development of seabed mineral resources (the Mining Code); and

(4) arrangements for the establishment of the International Tribunal on the Law of the Sea, called for in the Convention.

Three major topics will be taken up in PREPCOM's 1984 plenary session: (a) preparation of rules, regulations and procedures dealing with administrative, financial and budgetary matters of the International Seabed Authority; (b) the implementation of Resolution II governing preparatory investments by ''pioneer'' deep seabed miners; and (c) PREPCOM's final report to the International Seabed Authority.

In 1983, PREPCOM identified guidelines for registration of pioneer investors under Resolution II. Although the mining states noted that they did not view these as exhaustive, the guidelines nevertheless do move PREPCOM forward in its work. To meet Soviet insistence that PREPCOM be prepared to act on its pioneer submission as soon as possible, the elaboration and adoption of rules to implement Resolution II will be treated as a high priority item at PREPCOM's first 1984 session. Further, the guidelines adopted this year include stipulations that pioneer investor registrations are to be reviewed by the General Committee within 15 days of receipt, and that within 45 days of receipt of the information required by applicable rules, PREPCOM is to allocate one of the two sites submitted to the pioneer applicant.

Pioneer site applications are to contain relevant data identifying applicants; confirming effective control by the certifying state; identifying the mine site, size and division into two parts of equal, estimated commercial value, including supporting data; and verifying the absence of conflicting claims and qualifying expenditures in accordance with the provisions of Resolution II.

It should be noted that many states consider the fate of the UNCLOS Convention to rest on PREPCOM's efforts to broaden the acceptibility of the treaty's seabed mining regime. Initial confidence in PREPCOM was shaken by its protracted delay in electing a chairman, determining organizational structure and adopting rules of procedure. However, steady albeit slow progress was made by PREPCOM during its meeting in 1983. Joseph S. Warioba of the United Republic of Tanzania was elected PREPCOM's chairman, and vice chairmen were chosen for the four Special Commissions. Rules of procedure were adopted and agreement was reached on numerous administrative matters. Although some observers continue to express serious doubts as to PREPCOM's ability to make progress in 1984 on substantive issues, it would appear that the stage has at least been set for deliberations in 1984 on the details of the seabed mining regime. Nevertheless, it is evident that PREPCOM has a long and difficult way ahead of it. There is general agreement that PREPCOM must be careful not to inflate its bureaucracy and costs, nor to prematurely elaborate rules and regulations that will be too detailed in light of the delay in commercial prospects for deep seabed mining. Mining technologies may have changed significantly by the time commercial mining does commence. The worldwide recession has so depressed demand for minerals that economic conditions are the immediate obstacle to creating a commercially viable deep seabed mining industry today. Deepsea Ventures, Inc., which sought in 1974 to file a claim to the international seabed with the U.S. State Department,

now forecasts that commercial mining operations are unlikely before late in this century. (But, then too, technological progress has a way of surprising us.)

These perceived delays diminish the urgency of drafting all the detailed rules for seabed mining and thus allow PREPCOM more time to produce a widely accepted treaty mining regime. They also reduce pressures on the pioneer mining governments to obtain a viable legal/political regime at this time, and postpone any pressing need for them to choose between an international or alternative regime. On the other hand, the mining states will insist on reviewing a number of the treaty's implementing rules before they make a final decision on ratification.

II. EXECUTIVE BRANCH/U.S. CONGRESS

President Reagan's March 10, 1983 Executive Economic Zone ("EEZ") Proclamation and the implementing legislation introduced immediately thereafter (H.R. 2061 and S. 750) are consistent with the provisions of the 1982 Law of the Sea Convention as far as they go. However, they do not exercise coastal state rights to establish a twelve mile territorial sea, or to claim jurisdiction over marine scientific research in the Exclusive Economic Zone. Nor do they assume the coastal state obligation under the 1982 Convention to share up to 7% of the revenue from seabed mineral development on the continental shelf beyond 200 miles.

The President's Proclamation and accompanying oceans policy statement note that all states enjoy high seas freedoms in the EEZ; that the U.S. will respect foreign maritime claims that are consistent with international law as reflected in the UNCLOS Convention, "if U.S. rights and freedoms in such areas under international law are respected by the coastal state"; and that the U.S. will respect 12 mile territorial sea claims "which accord to the U.S. its full rights under international law in the territorial sea". They thereby underscore the U.S. view that traditional ocean rights such as navigation and overflight are protected under customery international law outside the UNCLOS Convention, and invoke a notice of reciprocity in respecting foreign claims.

The Proclamation and its accompanying legislation affirm the U.S. interpretation of treaty provisions that: (1) management of highly migratory tuna is to be effected through international agreement; and (2) the primary criteria to be used in boundary delimitation between opposite and adjacent states shall be "equitable principles". They also reassert this country's right to authorize mining beyond national jurisdiction as a freedom of the high seas, despite UNCLOS Convention provisions on international man-

agement of these resources as the "common heritage of mankind," and extend the coverage of the 1980 U.S. Deep Seabed Mining Law (P.L. 96–283) to *all* seabed minerals, rather than solely to manganese nodules.

The legislation in addition:

(1) grants greater discretion to the U.S. in determining whether or not to allocate portions of the annual surplus fish harvest to foreign fishermen;

(2) alters the interim nature of the Deep Seabed Mining Act and the Magnuson Fishery Conservation and Management Act of 1976 to delete all references to the Law of the Sea Convention, which was pending at the time of their enactment;

(3) sets forth procedures for U.S. scientists to obtain access to foreign zones for the conduct of marine research;

(4) defines the outer boundary of the U.S. continental shelf by amendment to the Outer Continental Shelf Lands Act; and

(5) calls for an 18 month review of other affected U.S. laws and programs with results and recommended changes to be submitted to the U.S. Congress.

It would appear that the President's Proclamation and accompanying legislation enhance existing U.S. ocean rights by extending U.S. sovereignty to (a) hard rock minerals beyond the continental shelf and within 200 miles of the U.S.; and (b) to renewable energy sources within 200 miles—neither of which, however, is expected to be commercially developed for many years.

On the other hand, some have criticized the Administration's stance on UNCLOS and domestic legislation on the grounds that an impression abroad that the U.S. is picking and choosing among provisions of the 1982 UNCLOS Convention "package deal" may provoke other nations to make counter-claims and assertions of ocean law and policy detrimental to critical U.S. interests in navigation and overflight. (Substantial criticism has been leveled at the President's proclamation of a 200 mile EEZ by developing countries (77) and the USSR.)

Numerous parties have taken the position that the Administration's assertion that PREPCOM will not be able to sufficiently amend a basically flawed document, and that the U.S. should therefore not participate even as an observer in its deliberations, is itself seriously flawed. In their opinion, an examination of the criticisms set forth by the President reveals that all but one of these could be significantly addressed within PREPCOM's mandate without actually changing the language of the UNCLOS Convention itself.

The one U.S. criticism which could not be dealt with in the PREPCOM procedure is the entry into force for the U.S. of amendments to the deep seabed mining system over U.S. objection when the Review Conference meets after 15 years of mining have elapsed. Efforts to improve upon this situation through an agreed Protocol, interpretative understandings or agreed amendments to the UNCLOS Convention prior to final national decisions on ratifications would be required to resolve this criticism.

However, among the more technical issues which some feel do fall within PREPCOM's mandate and are viewed as problematic by the U.S. government are the following:

(1) the need for more explicit decision-making procedures by the regulatory institutions for seabed mining, a clearer definition of the scope of various decisions, and an identification of the specific criteria upon which they will be based;

(2) difficulties with the UNCLOS provisions on transfer of technology;

(3) the Enterprise, the mining arm of the International Seabed Authority; and

(4) streamlining of the International Seabed Authority.

Nations which sign the UNCLOS Convention are entitled to participate in PREPCOM with full decision-making powers; countries which sign only the Final Act, the document which records briefly the history and attendance at UNCLOS III, may participate fully in PREPCOM deliberations but will have no vote. President Reagan's decision of July 8, 1982 opted for signature of the Final Act, but declined participation in PREPCOM to which the U.S. would then be entitled. A great deal of controversy has been generated over the questions of whether or not the U.S. should at least participate in PREPCOM so as to take advantage of what some view as an opportunity to mold the UNCLOS seabed mining regime more to liking of the U.S. and other industrialized mining nations.

On June 28, 1983 the House Committee on Merchant Marine and Fisheries marked up and approved an amended bill (H.R. 2853) to establish a two year "National Ocean Policy Commission". (The companion bill in the Senate is S. 1238.) The proposed high-level blue ribbon commission would make recommendations on a comprehensive U.S. oceans policy. It is hoped by the bill's sponsors that amendments introduced by the House Merchant Marine and Fisheries Committee will make the bill acceptable to the Administration. As presently amended, the bill provides for review and recommendations by a 19 member Commission in such areas as: (a) international ocean policies; (b) any necessary changes in existing U.S.

policies, laws, regulations and practices to develop efficient long-range programs for research on, and conversation, management, and development of marine resources; (c) equitable balance of Federal/State marine responsibilities; and (d) protection of the marine environment.

It is significant that the bill establishing a National Oceans Policy Commission enjoys wide support from both sides of the aisles in Congress and from conservatives and liberals alike. The fairly broad spectrum of support for this bill has been attributed to a realization, after the Administration's rejection of the UNCLOS Convention, that this nation's technical and foreign policy interests in UNCLOS issues are such that it might be best to depoliticize the atmosphere in which they are deliberated. The purpose of the bill is to set up an independent, bipartisan, short-term entity of well respected experts to look into the problems posed by UNCLOS and to recommend possible solutions which would best serve U.S. interests. H.R. 2853 was passed by the House on October 31, 1983, but no action is expected by the Senate on the companion bill, S. 1238, during this session of Congress.

Part of the reason for the Senate's inactivity on S. 1238 is due to the fact that it has been waiting to see what action the House would take on it, and to the fact that no Senate hearings have been held and Senate study of the measure has been less advanced than that of the House. Senate inactivity has also been due to problems arising out of potential conflicts and overlapping jurisdictions between (a) the National Oceans Policy Commission; (b) the Administration's proposals for the creation of an independent National Oceanic and Atmospheric Administration; and (c) the six month panel on EEZ-related issues launched on October 17, 1983 by the National Advisory Committee on Oceans and Atmosphere. The latter panel, although not intended to pre-empt the proposed National Oceans Policy Commission would cover much the same ground as the proposed commission's six month study of EEZ and related marine policy issues. Debate concerning these bills and proposals has become burdened by questions of possible duplication of effort among these initiatives. Accordingly, no Senate action is likely on the National Ocean Policy Commission until the next session, when it is expected that resolution of jurisdictional disputes and clarification of the respective roles of these agencies and commissions is likely to be a major topic during Senate hearings on S. 1238.

H.R. 2061 and its companion, S. 750, designed in part to implement the Administration's concept of an exclusive economic zone adjacent to the U.S. territorial sea, and to assert U.S. national rights therein, are presently the subject of much controversy and are not expected to make much progress in Congress in the near future.

As regards the Deep Seabed Mining Act, the House Mining Subcommittee is in the process of preparing licenses for seabed areas. The deep seabed program will be up for reauthorization in Congress next year, and so there will no doubt be activity at that time in respect of this.

There is also presently before Congress a bill (H.R. 703) "to facilitate the conduct of international marine scientific research." This legislation provides for the initiation of negotiation with foreign countries or groups of countries for the purpose of obtaining bilateral and regional agreements to facilitate marine scientific research on the continental shelf. Permission for such research would be granted on a reciprocal basis. No action is expected to be taken this session with respect to this bill either.

III. DEEP SEABED MINING

Private industry efforts to resolve overlapping mine site claims among the pioneer deep seabed mining consortia and the French national enterprise named in UNCLOS Conference Resolution II continue. Industry efforts to draw the Japanese national consortium into their private overlapping claim settlement process have passed the first hurdle—they are now talking. Conflicting mine site claims must be resolved before the pioneer operators named in UNCLOS Resolution II may register claims with PREPCOM. With Japan apparently joining the industry arbitration process, this will leave only the Soviet pioneer mine site to be taken into account for possible overlaps, since India's claim is in the Indian Ocean. Once all the claims overlaps are resolved, these sites could be registered with PREPCOM provided that every application for registration covers an area sufficiently large and of sufficient estimated commercial value to allow two mining operations as required by Resolution II.

It should be noted that the Japanese mining consortium is reported to be the only group with an active exploration program in 1983/84. Some U.S. mining industry representatives believe Japanese mining capabilities may soon equal those of the other four principal international mining consortia.

The governments of the western mining states (absent Canada) are still engaged in attempts to complete an agreement among themselves. According to this new draft agreement, which would follow on the September 1982 Conflict Resolution Agreement signed by France, The United Kingdom, the United States and the Federal Republic of Germany, each of these countries would agree not to issue mining licenses in areas where activities were authorized by another signatory state on the basis of a national mining law—a *de facto* process for recognizing other states' claims. At the present time the aforesaid four states and the Japanese have

enacted national laws. The Italians, the Belgians and the Dutch have not done so. Like the 1982 pact, however, any new agreement would not prejudice states' positions with respect to the UNCLOS Convention; it would neither be inconsistent with the Convention nor with Conference Resolution II on Preparatory Investment Protection. In this way, the European mining states and the Japanese preserve their options to sign and/or ratify the 1982 Convention and to mine under it once it enters into force for them—something the U.S. has, of course, failed to do.

The Interior Department is planning to postpone a lease sale for the development of Gorda Rydge Polymetallic sulfide deposits. An environmental draft impact statement is expected to be completed in late Fall, 1983. The Department's Minerals Management Service sponsored a meeting aimed at industry on outer continental shelf non-energy minerals on September 1, 1983 in San Francisco. Industry scepticism of the Gorda Ridge lease sale was voiced, describing it as premature by at least two years. Industry concerns included lack of technological development and scientific research, lack of environmental information, high capital outlays, and the need for certainty in the administrative process for the lease.

INTERNATIONAL LAW OF THE SEA NEWSLETTER NO. 1

FALL, 1983

This is the first issue of our Newsletter, which this Committee intends to publish on an annual basis. It is primarily designed to report on significant developments in the areas of offshore oil and gas related litigation, recent litigation in these areas, provide a current bibliography, and, where appropriate, to report on new developments in the industry. Additionally, when appropriate, we shall report on developments in connection with the Law of the Sea Treaty.

CASE SUMMARIES
(From the "Offshore Docket")

MARITIME TORT

In *Brown v. Link Belt Division of FMC Corp.*, 666 F.2d 110 (5th Cir. 1982), plaintiff was injured while being lowered from an offshore oil platform to a vessel. The platform owner, Shell, was also the bareboat charterer of the vessel, and the jury held Shell liable for the negligent operation of the vessel on the ground that Shell negligently instructed the vessel to attempt the transfer in rough weather. Both plaintiff and Shell filed claims against the operator of the vessel, but these claims were tried to the court, and the court held in favor of the vessel operator on the ground that "because Shell was in control of the vessel and had final authority to order the loading of the vessel, the captain was not negligent in following Shell's directions." In affirming the District Court's refusal to hold the vessel operator liable, the Fifth Circuit noted the testimony that it was common practice for Shell to make the final decision and held that "[w]hen a representative of Shell, who is both experienced in the task undertaken and who had first had knowledge of the difficulties involved, chose to override the master's advice that the weather was too rough to transfer Brown, the master's acqueiscence in Shell's decision did not relieve Shell of its consequences."

ADMIRALTY JURISDICTION

The offshore oil industry has presented difficult questions concerning admiralty jurisdiction, as evidenced by two recent Fifth Circuit decisions. In *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Com-*

pany, 644 F.2d 1132, 1982 A.M.C. 2644 (5th Cir.), *cert. den. sub nom., Valero Energy Corp. v. Sohyde Drilling and Workover, Inc.*, 454 U.S. 1081, 102 S.Ct. 635, 70 L.Ed.2d 615, 1982 A.M.C. 2111 (1981), the court held that property damage claims arising out of a well blowout in a dead end dredged canal slip in Louisiana were not within the admiralty jurisdiction even though the well was accessible only by water transportation and the drilling contractor was working from a submersible drilling barge. The court held that admiralty jurisdiction, even under the Admiralty Extension Act, 46 U.S.C. § 740, requires both maritime locality and a significant relationship to maritime activity under *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454, 1972 A.M.C. 845 (1972). In concluding that the property damage claims from the blowout did not have sufficient maritime nexus to support admiralty jurisdiction, the court discussed the four factors set forth in *Kelly v. Smith*, 485 F.2d 520, 1973 A.M.C. 2478 (5th Cir. 1973), *cert. den. sub nom., Chicot Land Co. v. Kelly*, 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558, 1974 A.M.C. 1891 (1974), to determine the existence of a substantial maritime relationship and emphasized that the parties, the vehicles and instrumentalities, and the causation and type of injury were all no different from a land-based well blowout. The court's emphasis is on the lack of maritime nexus, but the analysis of the Kelly factors could be applied to a similar blowout arising offshore, and it is not clear whether an offshore locality would have produced a different result.

In *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1983 A.M.C. 2836 (5th Cir. 1982), the court relied on the lack of maritime locality in denying admiralty jurisdiction over a wrongful death claim for a pilot who crashed in a Louisiana marsh. The court held that the decision in Executive Jet did not dispense with the maritime locality requirement. It was therefore not sufficient for admiralty jurisdiction that the crash involved a plane equipped to take off from either land or water that had just been used to reach a site inaccessible by land and was regularly used to fly passengers involved in mineral exploration to locations both in Louisiana and offshore. The court also held that the plane was not a vessel under the Jones Act, 46 U.S.C. § 688, and that the deceased pilot had therefore not been a "seaman." In contrast, maritime locality was present in a consolidated case involving claims for death and property damage arising out of a helicopter crash into the high seas adjacent to a fixed platform offshore. The helicopter was also regularly engaged in transporting passengers to and from offshore sites, and it crashed in the water taking off from a fixed platform on the Outer Continental Shelf and striking part of the crane located on the platform. The death claim for the pilot was held to be within the Death on the High

Seas Act, 46 U.S.C. §§ 761–68 (''DOHSA''). Admiralty jurisdiction was held to be unaffected by the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–56 (''OCSLA''), because the injury had a maritime locality and the deceased pilot had been performing a maritime-type function. The claim for property damage to the helicopter, which did not fall under DOHSA, was also held to be within the admiralty jurisdiction because of the maritime locality of the accident and the conclusion that the transportation of supplies to and from offshore drilling structures bore a significant relationship to traditional maritime activities under *Ledoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824, 1980 A.M.C. 2162 (5th Cir. 1980).

The decisions in *Sohyde* and *Smith* may be reconcilable on the ground that the *Sohyde* claim and the claim held to be not within the admiralty jurisdiction in *Smith* both occurred in the Louisiana marshes rather than offshore. However, such a reconciliation does not appear to be consistent with the expressed rationale of the two decisions.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

(A) JURISDICTION

In *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784, 1981 A.M.C. 2033 (1981), the Supreme Court held that state courts have concurrent jurisdiction over personal injury actions falling under the Outer Continental Shelf Lands Act. The Court found nothing in the statute itself, its legislative history, or its underlying policies sufficient to support the exercise of exclusive federal jurisdiction over such personal injury actions.

The Supreme Court's decision in *Gulf Offshore* was relied on by the Louisiana Supreme Court in *Thompson v. Teledyne Movible Offshore, Inc.*, 419 So.2d 822, 1983 A.M.C. 1224 (La. 1982), in which an injured Louisiana resident was allowed to recover under the Louisiana workers compensation statute even though he was injured beyond the state territorial waters. The Louisiana compensation statute specifically provided for payment for injuries beyond the territorial limits of the state if the injured party either had been hired in Louisiana or had his employment principally in Louisiana. Consequently, the principal issue before the court was whether the applicability of the LHWCA under the OCSLA to plaintiff's injury on a fixed platform on the Outer Continental Shelf prevented concurrent application of the Louisiana state compensation scheme. The court found support in *Gulf Offshore Company* for its conclusion that the state

compensation laws were not incompatible with the LHWCA and therefore could be applied to the plaintiff.

In reaching its conclusion in *Thompson*, the court noted that the plaintiff there involved was not a longshoreman or an historically maritime worker. However, in *Beverly v. Action Marine Services, Inc.*, 433 So.2d 139 (La. 1983), the Louisiana Supreme Court was faced with claims concerning the death of an employee involved in cleaning out vessel tanks. Although the court indicated that the deceased's employment had probably been "maritime but local," thereby entitling him to coverage under both the state and federal compensation schemes, that issue was not decided because the court concluded that the Louisiana compensation system could apply because no relief was available under the LHWCA. The plaintiffs in *Beverly* were nondependent parents who were not entitled to recovery under the LHWCA but were provided benefits under the state compensation scheme. Consequently, the Louisiana system could supplement the LHWCA without creating any risk of defeating the uniformity of maritime law and without regard to whether the deceased's employment was characterizable as "maritime but local."

(B) STATUS UNDER LHWCA-MARITIME EMPLOYMENT

In *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1983 A.M.C. 1321 (5th Cir. 1982), *cert. den. sub nom., A.W.I., Inc. v. American Insurance Co.*, ___ U.S. ___, 103 S.Ct. 815, 74 L.Ed.2d 1014, 1983 A.M.C. 2107 (1983), the Fifth Circuit sitting en banc held that the 1972 amendments to the LHWCA were not intended to withdraw coverage from any employees covered under the prior interpretation of the statute. This conclusion was subsequently adhered to by the United States Supreme Court in *Director, Office of Workers' Compensation Programs, United States Dept. of Labor v. Perini North River Associates*, ___ U.S. ___, 103 S.Ct. 634, 74 L.Ed.2d 465, 1983 A.M.C. 609 (1983). Under these two decisions, any employee injured on navigable waters who would have been covered under the interpretation of the LHWCA prior to the 1972 amendments is automatically considered to be engaged in "maritime employment" and thus to meet the status test added to the LHWCA in 1972. Both courts examined the legislative history behind the 1972 amendments and concluded that one of the principal purposes of the 1972 amendments was to provide coverage for employees doing certain shoreside work if such work could be considered maritime employment. Given this purpose, neither court found any intent to withdraw coverage for any employee covered under the statute as interpreted prior to the 1972 amendments.

In what appears to be a type of alternative holding, the Fifth Circuit in *Boudreaux* held that plaintiff, because he was engaged in performing specialty mineral production work on a drilling barge within state territorial waters, was engaged in "maritime employment" within the status requirement of the LHWCA independenty of any pre-1972 interpretation of the Act. With respect to this alternative holding, the Fifth Circuit relied on its prior decision in *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981), in which the plaintiff wireline operator had been injured while preparing to perforate the casing and set packers on board a drilling barge. Plaintiff sued the barge owner and the barge lessee, who in turn each filed third-party claims against plaintiff's employer for indemnification and/or contribution. The accident occurred within territorial waters, so plaintiff was not automatically a longshoreman under the OCSLA but plaintiff's employer nevertheless argued that plaintiff met the dual situs and status test of the LHWCA. Having been injured on a vessel, plaintiff clearly satisfied the situs test. In addition, the court held that plaintiff met the status test, that of being engaged in maritime employment at the time of his injury, because his work facilitated offshore drilling, which was held to constitute maritime commerce. Since plaintiff was covered under the LHWCA, the claim for indemnity by the barge owner was barred by 33 U.S.C. § 905(b).

In concluding that offshore drilling constituted maritime commerce and that plaintiff's participation in offshore drilling constituted a realistically significant relationship to maritime commerce, the court in *Pippen* attempted to distinguish its prior holding on *Sohyde* (see Admiralty Jurisdiction, *supra*), that a claim for property damage caused by the blowout of a gas well did not have a sufficient maritime nexus to fall within the admiralty jurisdiction. The court's attempted explanation in *Pippen* seems strained, and the apparent conflict was not mentioned in *Boudreaux*.

Pippen's holding that offshore drilling constitutes maritime commerce was again followed in two recent cases, *Herb's Welding v. Gray*, 704 F.2d 176 (5th Cir. 1983), and *Thornton v. Brown & Root, Inc.*, 707 F.2d 149 (5th Cir. 1983). In *Herb's Welding*, the plaintiff was injured while conducting welding operations on a fixed platform located in Louisiana territorial waters. Since the fixed offshore platform constituted an artificial island under *Rodrigue v. Aetna Casualty & Surety Company*, 395 U.S. 352 89 S.Ct. 1835, 23 L.Ed.2d 360, 1969 A.M.C. 1082 (1969), the plaintiff would not have been covered under the LHWCA prio to the 1972 amendments and did not fall under the decisions in *Boudreaux* and *Perrini*. Similarly, the plaintiff was not automatically a longshoreman under the OCSLA because the accident occurred in state territorial waters. Nevertheless, the court held that the situs of plaintiff's injury was within the ex-

panded shoreside coverage of the LHWCA since its amendment in 1972 because the platform was the functional equivalent of a wharf on an island under the decision in *Rodrigue*. In addition, since plaintiff's welding work was necessary for the offshore drilling process, which constitutes maritime commerce under *Pippen*, plaintiff was engaged in "maritime employment" and met the status test of the LHWCA as well.

In *Thornton*, the two consolidated plaintiffs were land-based employees who were injured while employed to construct equipment to be used for offshore drilling and production of oil; one plaintiff had been employed constructing offshore stationary platforms, while the other had been employed constructing housing modules and helicopters for offshore stationary platforms. Although both employees occasionally assisted in loading the completed equipment onto barges, this represented only a small percentage of their work, and neither had been injured while performing such loading operations. Consequently, both had been denied benefits under the LHWCA as not being engaged in "maritime employment" and therefore not meeting the status test. In reversing, the Fifth Circuit relied on *Pippen*'s holding, and the endorsement of that holding in *Boudreaux*, that offshore drilling and production of oil and gas constitutes maritime commrece. Since both employees facilitated maritime commerce by constructing equipment to be used offshore, they were engaged in "maritime employment." Both cases were remanded to determine whether the employees met the LHWCA situs test as well as the status test.

(C) DUTY OF VESSEL OWNER UNDER SECTION 905(b)

In *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983), the court held that a vessel owner's duty to a longshoreman under section 905(b) of the LHWCA is less exensive that under traditional tort rules. Under Fifth Circuit jurisprudence prior to the Supreme Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1, 1981 A.M.C. 601 (1981), a vessel owner could be liable to an injured longshoreman under section 905(b) if the owner knew or *should have known* of the potential hazard. However, under the *Scindia* standard, the vessel owner could not be liable absent *actual* knowledge that the stevedore/employer could not be relied upon to prevent the potential harm. Under the instructions to the jury in the district court, the jury could have found the vessel owner liable based solely on constructive knowledge, and the decision against the vessel was therefore reversed and remanded.

INSURANCE AND INDEMNITY

In *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983), an offshore worker on a fixed platform owned by Mobil was injured while unloading a vessel chartered by Mobil. The jury exonerated the vessel operator and found Mobil 100% at fault for permitting the unloading of the cargo to continue despite the allegedly obvious danger created by poor weather conditions. Mobil was denied recovery on its contractual claim for indemnity against the vessel oeprator, but Mobil was granted recovery against the vessel operator's protections and indemnity (P & I) insurance policy which named Mobil as an additional assured. On appeal, P & I underwriters contended that Mobil's fault, if any, was in its capacity as platform owner not in its capacity as "vessel owner," and that therefore there was no coverage for Mobil under the decision in *Lanasse v. Travelers Insurance Co.*, 450 F.2d 580, 1972 A.M.C. 818 (5th Cir. 1971), *cert. denied, sub nom., Chevron Oil Co. v. Royal Insurance Co.*, 406 U.S. 921, 92 S.Ct. 1779, 32 L.Ed.2d 120, 1972 A.M.C. 1916 (1972).

In *Lanasse*, a platform owner who was also a time charterer, was held liable for injuries to a plaintiff during the unloading of a vessel. However, the platform owner/time charterer in *Lanasse* was denied recovery under the P & I policy because liability was based on actions as a platform owner rather than as a vessel owner or time charterer; the vessel was nothing more than the "inert locale of the injury." Consequently, the platform owner had not been held liable as "owner of the vessel" and was not entitled to coverage.

Lanasse was distinguished by the court in *Helaire* on the ground that the negligence in *Lanasse* was based on the operation of a platform based crane whereas in *Helaire*, "nothing happened on the platform to cause the accident." The physical presence of the platform representative on the platform was held to be irrelevant, and the allegedly negligent decision to permit unloading cargo in bad weather was found to be "traditionally and historically vessel-related." The court also held that "maritime, rather than state law applies where the situs of the injury was on navigable waters and the negligence bears a significant relationship to traditional maritime activity." The state law claim was properly dismissed under the LHWCA's exclusivity provision and coverage under the P & I policy properly upheld. In an alternative holding, the court held that there was coverage under the policy even if Mobil had only been held liable as a platform owner because the coverage language insuring "against liabilities . . . in respect of the vessel" contained the significant deletion of the words "as owner of the vessel named herein." The District Court had concluded that

"this deletion was intended to provide coverage for Mobil regardless of the capacity in which Mobil was sued," and the Fifth Circuit held that this finding was not clearly erroneous.

The decision in *Helaire* should be compared to that in *Tarlton v. Exxon*, 688 F.2d 973 (5th Cir. 1982), *cert. den. sub nom., Diamond M. Drilling Corp. v. Tarlton*, ___ U.S. ___, 103 S.Ct. 3536, 77 L.Ed.2d 1387 (1983), in which the court followed *Lanasse* and refused to allow contractual indemnity. In *Tarlton* the plaintiff was the captain of a vessel used to service an offshore platform owned by Exxon, and plaintiff was injured while attempting to secure equipment unloaded from the platform to the vessel. The cause of the injury was the negligent decision of the drilling contractor's crane operator to sneak heavy equipment onto the vessel without first consulting the captain. Exxon was exonerated of liability, but it appealed the refusal to allow recovery of costs of defense and attorney's fees under a contractual indemnity provision covering suits arising "out of the operation of the vessel." Relying on the rationale of *Lanasse*, the Fifth Circuit denied indemnity on the ground that the accident was caused by the negligence of the crane operator and not by the operation of the vessel or the "expected performance of [the vessel's] service."

CONTRACTUAL INDEMNITY

In *Hyde v. Chevron USA, Inc.*, 697 F.2d 614 (5th Cir. 1983), a drilling contractor's employee brought an action against the owner of a fixed platform located on the Outer Continental Shelf off the coast of Louisiana to recover for back injuries sustained when a step "gave way" on a stairway. The platform owner sought indemnity for its strict liability based upon a master service contract existing between the parties. The indemnity provision in the contract provided in pertinent part:

> The contractor . . . shall defend, indemnify and hold operator harmless from and against any claims . . . for injury to, impairment of health or death of employees of contractor . . . that may arise from contractor's operations under this agreement . . .

The contract also provided that the contractor was to obtain insurance coverage so as to satisfy its indemnity obligation. The Fifty Circuit held that it was the clear intention of the parties for the contractor to indemnify the oil company against all claims of its employees, including claims based on strict liability and that, therefore, it was not necessary that the contract contain the magic words "strict liability."

INDEMNITY

In *Verrett v. McDonough Marine Service*, 705 F.2d 1437 (5th Cir. 1983), a pumper employed by the owner of a production facility was injured when a speed boat which he was operating during inspections at night collided with a barge in a dead-end canal. The pumper brought suit under the Jones Act and the general maritime law against his employer and the owner of the tug which had moored the barge. The defendants asserted cross-claims for indemnity. The District Court found both defendants negligent and denied indemnity. On appeal, the Fifth Circuit relied on its previous decision in *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493 (5th Cir. 1982), that there was no further need for the active-passive indemnification rule in a comparative fault system and denied indemnity.

OCSLA—FIXED PLATFORM ACCIDENTS

In *Hyde v. Chevron USA, Inc.*, 697 F.2d 614 (5th Cir. 1983), a drilling contractor's employee brought an action against the owner of an oil well drilling platform located on the Outer Continental Shelf off the coast of Louisiana to recover for back injuries sustained when a step "gave way" on a stairway. At trial, the court found that the platform owner was liable to plaintiff under a Louisiana law imposing strict liability for accidents caused by defective things or buildings on their owner. The trial court held that contributory negligence of the injured worker was not a defense to the strict liability action. On appeal, the Fifth Circuit noted that an unsettled question of Louisiana law existed as to whether Louisiana's "victim fault" defense to strict liability actions encompasses contributory negligence. After reviewing prior jurisprudence, the court held that contributory negligence may be a defense under Louisiana law to a strict liability action brought against the platform owner. *See also CNG Producing Co. v. Columbia Gulf Transmission*, 709 F.2d 959 (5th Cir. 1983).

OCSLA—DAMAGES

When a state remedy is applicable through the OCSLA all aspects of the remedy are applicable, except for "mere housekeeping rules." Thus, in *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983), the court concluded that state law on inflation, rather than federal law, governs in an OCSLA action based on surrogate state law. The Fifth Circuit in *Olsen* further held that the better view is that prejudgment interest may be awarded in an OSCLA case where the remedy is based upon surrogate state law and

where the law of the surrogate state allows an award of prejudgment interest, noting earlier conflicting panel decisions concerning awards of prejudgment interest in OCSLA cases. *See, e.g., Musial v. A & A Boats, Inc.*, 696 F.2d 1149 (5th Cir. 1983) in which a panel of the Fifth Circuit held that the award of interest in a suit brought under the Outer Continental Shelf Lands Act is governed by federal law.

SEAMAN STATUS

The widow of a shore-based rigger filed suit under the Jones Act alleging that he died of asbestosis and silicosis caused by the inhalation of asbestos and sand particles in the shipyard. The District Court granted a summary judgment for Avondale Shipyards on the ground that the decedent had not been a Jones Act seaman. The Fifth Circuit held that the decedent's work as a rigger did not have the necessary permanency or substantiality to qualify him as a seaman since he was essentially a shore-based worker engaged in ship construction. *Bouvier v. Krenz*, 701 F.2d 89 (5th Cir. 1983).

In *Presley v. Vessel Carribean Seal*, 709 F.2d 406 (5th Cir. 1983), the court held that the Oceanographic Research Vessel's Act, 46 U.S.C. § 441–445, prevents scientific personnel assigned to an oceanographic research vessel from being considered as seamen under the Jones Act, but does not prevent them from being considered seaman under the general maritime law.

In *Griffin v. Oceanic Contractors, Inc.*, ___ U.S. ___, 102 S.Ct. 3245, 73 L.Ed.2d 973, 1982 A.M.C. 2398 (1982), the Supreme Court interpreted the double wage penalty statute, 46 U.S.C. § 596—which requires masters and vessel owners to pay seamen promptly after they are discharged and authorizes seamen to recover double wages for each day that payment is delayed without sufficient cause for the employer's failure to pay—to be mandatory in nature. The Court permitted a welder who had been working aboard a pipe-laying barge in the North Sea and who was owed only $412.50 in earned wages to recover over $300,000.00 representing double wages which accrued from the date of entitlement to date of judgment.

MAINTENANCE AND CURE

In *Wood v. Diamond M Drilling Co.*, 691 F.2d 1165, 1983 A.M.C. ___ (5th Cir. 1982), *cert. den.* 460 U.S. ___, 1983 A.M.C. 2112 (1983), a roughneck filed suit under the Jones Act and the general maritime law

alleging negligence and unseaworthiness and seeking damages for maintenance against the drilling contractor. The jury awarded him $200,000.00 for loss of future earnings and maintenance benefits at a rate of $30.00 per day up to the date on which he reached the point of maximum medical benefits. On appeal, defendant contended that because the worker was employed at a salary in excess of the amount he had received while employed by the drilling contractor and because he had not intended to remain a rig worker for the rest of his life, the jury's award of $200,000.00 was not supported by the evidence. The Fifth Circuit held that the cut-off point for maintenance and cure is not the time at which the seaman recovers sufficiently to return to his old job but is the time of maximum medical recovery. The roughneck's voluntarily obtaining other employment did not preclude him from being entitled to maintenance up until the date on which he reached the point of maximum medical benefit. Similarly, the Court upheld the award of lost wages based upon its analysis that awards for loss of future earnings should be based upon loss of employment opportunities as opposed to actual reduction in earnings.

RETALIATORY DISCHARGE

In *Roberie v. Gulf Oil Corp.*, 545 F.Supp. 298 (W.D. La. 1982), a roustabout on a fixed platform owned by an oil corporation brought suit claiming he was wrongfully terminated because he had filed suit against the oil corporation for a work-related injury. On defendant's motion to dismiss, the District Court held that a roustabout on the Outer Continental Shelf is a maritime worker and, thus, the retaliatory discharge of a maritime employee should be viewed as a maritime tort, regardless of where the employee receives his proverbial "pink slip."

RECENT LEGISLATION IN THE OFFSHORE ARENA

SEAMEN STATUS—ALIEN SEAMEN ENGAGED IN DRILLING FOR MINERAL RESOURCES

Congress has recently passed an amendment to the Jones Act, 46 U.S.C. § 688(b), precluding persons who are not citizens or permanent resident aliens of the United States from maintaining actions under the Joines Act or under the general maritime law if the accident occurred in the territorial waters of another sovereign and the seaman was engaged in the exploration, development or production of offshore mineral or energy resources. This prohibition, however, does not apply if it can be established that no remedy is available under the laws of the nation asserting jurisdiction over the area where the accident occurred or under the laws of the worker's domicile or residence.

This legislation is in accord with recent circuit court decisions which affirmed the discretionary dismissal of such suits for lack of subject matter jurisdiction or *forum non conveniens* grounds. *See Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015 (5th Cir. 1983) and *Vaz Borralho v. Keydril Co.*, 710 F.2d 207 (5th Cir. 1983) (on denial of rehearing).

LONGSHOREMAN AND HARBOR WORKERS COMPENSATION ACT—PROPOSED AMENDMENTS

A bill is pending in the Senate (S. 38) that would amend the Longshoreman and Harbor Workers Compensation Act, which includes provisions significant to the offshore industry. In particular, Section 4c of the bill would enable a drilling contractor and a service contractor (e.g., diving crews, mud logging crews, etc.) to enter into an agreement in which each party agrees to hold the other harmless for injuries to or death of certain employees and other people it may bring to the drilling location.

The purpose of the Bill is to make an exception for the offshore industry with regard to the Longshoreman Act's prohibition of indemnity agreements between employers and vessels, in this case mobil offshore drilling rigs, and to allow the industry to continue its longtime practice of contractually allocating risk of injured employees to employers, without reducing the rights or remedies of employees.

S. 38 passed the Senate in June, 1983. In November, 1983, the House Labor Standards Subcommittee passed an amended version of the bill with Section 4c deleted. This version, in turn, was passed by the full House

Education and Labor Committee, but it is unlikely that the bill will receive consideration by the full House before it adjourns.

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BILLS OF LADING

CARGO NEWSLETTER NO. 8
FALL, 1983

A PASSEL OF PACKAGE CASES

Taiwan Power Company v. M/V GEORGE WYTHE:

The District Court for the Northern District of Florida (Pensacola Div., PCA 82–0649 dated June 14, 1983) held a 42.5 foot long pressurizer, placed on three wooden saddles and secured to the saddles by steel straps, to be a package.

The Court stated it was presented with a situation with no clear cut conclusion of law possible in the laws's present state insofar as "this circuit is concerned". It noted that the authorities are split on the question, referring to divergent decisions in the Second Circuit and in the Ninth Circuit.

The Court considered that cargo has been held to be "packages" regardless of size and that the pressurizer was packaged in the sense that it was prepared for shipping both to protect it and to facilitate its shipment. The Court also noted that the bill of lading referred to the shipment as being "one package: pressurizer".

In finding the pressurizer to be a package, the Court stated: "To this Court under an admittedly unclear act and admittedly divergent judicial decisions on the meaning of the act, this could have been a "package". The parties here involved, dealing with shipping, at the least should have known that there was n question whether the piece of equipment here involved was a package within the meaning of the act and their characterization of it as a package should be given considerable weight."

Vegas v. Compania Anonima Venezolana de Navegacion:

On November 28, 1983, the Court of Appeals for the Eleventh Circuit treated a shipment of 109 cartons consolidated into two master cartons build on pallets. The bill of lading described the shipment as two under the heading "No. of Pkgs." and under the description of packages and goods as "palletized master cartons, STC: 109 Cartons: Auto brake parts". (No. 81–6222)

The Court found the 109 cartons each to constitute a package as opposed to the two master palletized cartons.

The Court referred to the Second Circuit's decision in *Mitsui & Co. v. American Export Lines, Inc.*, 636 F.2d 807, 1981 A.M.C. 331 (1981)

which opined that the goal of international uniformity would be served if the COGSA provisions were construed in harmony with the 1968 Brussel's Protocol "to which the United States is a party" (Editor's Note: The United States has not yet ratified the 1968 Brussel's Protocol referred to).

The Court went on to consider the meaning of the word package in its "plain ordinary meaning". Quoting from the *Mitsui* decision, the Court approved the dictionary definitions of "package" as found in Webster's New International Dictionary and in Black's Law Dictionary.

The Court noted that both individual cartons and the master cartons could fit within these definitions; however, taking the "congressional purpose" of the statute as being to "limit agreements restricting carriers' liability", the Court could not justify restricting liability on the basis of consolidation of the 109 cartons into master cartons.

Associated Metals & Minerals Corporation v. A/S D/S SVENBORG, et al.: (U.S.D.C., S.D.N.Y. 81 Civ. 7242 Oct. 4, 1983)

Judge Motley of the Southern District of New York found bundles of ingots to constitute packages.

The bills of lading listed the number of ingots under "No. of packages"; however, under the description column, the shipment was described as "in bundles of 24 each bundle". The Court found it was not constrained to regard "the margins of each column as absolutely fixed and precise borders and the information appearing within the boundaries of a particular column as the incontrovertible and ineluctable proof of the intent of the parties with respect to the information demanded by the column heading." Judge Motley held that the bill of lading was sufficiently clear and unambiguous to evidence the intent of the parties that *each bundle* is a COGSA package, also noting that the reference to bundles was typewritten and, to the extent that typewritten provisions conflict with printed provisions in a contract, the former takes precedence over the latter.

Alternatively, the Court held that to the extent any ambiguity existed in the bill of lading, the ambiguity in the circumstances of the case, would be construed against the plaintiff. Judge Motley noted that the shipper supplied all the information with respect to the ingots and bundles; the bill of lading form being sent blank to the shipper who supplied the information and then returned to the defendant ocean carrier.

Having found the parties intended each *bundle* to be a package, the Court turned to whether the bundle fit the dictionary definitions of package, also referring to the dictionary definitions quoted from *Mitsui*.

The Court had little difficulty in concluding that a stack of ingots held together by steel straps is a package within the meaning of COGSA.

Finally, the Court assumed, arguendo, that each bundle would not be a package and still limited plaintiff's recovery to the same amount on the basis that each individual ingot would not constitute a package. In such case, any limitation would be calculated on the basis of "customary freight unit". The customary freight unit was 1,000 kilograms (one metric ton) and each bundle weighed 1,000 kilograms. Thus, same result would be reached whether "package" or "customary freight unit". (An appeal has been filed in this case.)

Marcraft Clothes, Inc. v. M/V KUROBE MARU, et al.: (U.S.D.C. S.D.N.Y. 83 Civ. 2964 dated Dec. 2, 1983)

The plaintiff brought suit for alleged damage to a shipment of 4,400 suits shipped in one container. Each suit was on a hanger and wrapped in a plastic bag. Judge Sofaer of the Southern District of New York, also referring to *Mitsui*, noted the description of the goods in the bill of lading as "4,400 sets of men suits with vests". In following *Mitsui*, Judge Sofaer stated: "The *Mitsui* Court put to rest the rule, however, that the container is presumptively the package where the units inside are not suitable for breach bulk shipment: 'Even if this might tend to show that each of those units is not a package—a conclusion that is no means ineluctable—it does not at all follow that the container is. 636 F.2d at 818.'"

He further noted the "reaffirming" decision of *Smithgreyhound v. M/V EURYGENES*, 666 F.2d 746, 1982 A.M.C. 320 (2d Cir. 1981), where the Court stated that "in the absence of clear and unambiguous langauge indicating agreement on the definition of 'package'," it would conclusively presume that the container would not be the package where the bill of lading discloses the container's content.

Judge Sofaer went on to consider whether each suit as individually wrapped with a plastic bag after being placed on a hanger would constitute a package. Also referring to *Mitsui*, the Court found "each suit in the shipment at issue was a package . . . here the shipper had placed the suits on a hanger and wrapped each in a plastic bag in such a way as to conform to the accepted definitions of a package, such as 'a small or moderate size pack, . . . a commodity in its container (the plastic bag), . . . (or) a protective unit for storing or shipping a commodity.'" (Referring to the Webster's Third New International Dictionary definition as found in *Mitsui*).

"A CASE OF UNFRIENDLY PERSUASION"

On January 25, 1978 "a massive explosion shattered the hull of the motor vessel EVA MARIE severing its bow and eventually sinking it with all its cargo." The owner subsequently petitioned for exoneration from limitation of liability in the United States District Court for the District of Puerto Rico. In a 59 page opinion in *EAC TIMBERLANE v. PISCES LTD., et al.*, Judge Carmen Consuelo Cerezo found the vessel owner to have carried its burden of proof and persuasion. (Civil 78–1408CC, June 16, 1983).

> "After carefully weighing and comparing all the evidence presented by the parties, we are convinced that the defendant-petitioners carried their burden complying with the highest standards imposed by COGSA and the general admiralty law on this matter, assuming this standard were to apply. They have demonstrated by a preponderance of the evidence that they provided a seaworthy vessel and that they were free from fault regarding the cause of the damage. They also took it upon themselves to present a reasonable and probable explanation of why the detonators exploded. Their theory of causation rested on substantial and generally reliable scientific findings. The carriers' well-developed theory of spontaneous heating and their effective demonstration of due dilligence in providing a seaworthy vessel created a very credible and robust position. They discharged their burden of production and persuasion. This had to be met with at least equal force by plaintiff-claimants. It was incumbent upon the cargo claimants to either produce evidence to discredit the carrier's theory of causation or to present proof of an alternative and more probable explanation for the loss that would involve the carriers' causative or contributory negligence. The failure to produce sufficient evidence to elaborate any one of these alternatives when the exchange of burdens placed the duty to produce on the shippers' side was their fatal flaw."

The court went into great detail covering the evidence presented by experts on both sides.

In treating the vessel owner's "theory" offered (as opposed to an actual explanation of the cause) the court had the following comments:

> "Granted there are some factors that will always remain uncertain since the vessel took these enigmas with it to the ocean depths. Yet, it would be unreasonable and would constitute an erroneous application of the standard of sufficiency of proof for civil cases, see: 9 Wigmore, *Evidence*, Sec. 339, p. 795 (2d Ed.) to impose on the carrier the

practically impossible task of retrieving from a rusting hull lying somewhere on the bottom of the Gulf of Mexico all the necessary data to yield an *exact* explanation for the explosion that sank the vessel . . . . To require of carriers a 100% degree of certainty would be to impose on them a standard of proof higher than that required by a state in prosecuting its criminal offenders.''

ARGOSY GETS FLEECED IN REM

In *Insurance Company of North America v. S/S AMERICAN ARGOSY*, Judge Werker of the Southern District of New York (81 Civ. 7727, dated June 10, 1983) found *the vessel* liable *in rem* on a bill of lading issued by an NVOCC, although it found the vessel's owner not to be bound by that same bill of lading. Unbeknownst to United States Lines, the NVOCC issued a bill of lading to its shipper calling for transportation of four boxes from New York to Hodeidah, Yemen Arab Republic. The same day, United States Lines issued its own bill of lading to the NVOCC for a containerized shipment including the four boxes from New YOrk to Rotterdam, Netherlands. United States Lines did not consent to nor did it authorize the bill of lading issued by the NVOCC. The container was discharged and delivered by U.S. Lines at Rotterdam without exceptions. After delivery at ultimate destination, damage was noted to one of the boxes. Plaintiff argued that the package limitation did not apply as there was ''deviation'' under the NVOCC bill of lading which did not make any reference to transshipment at Rotterdam and on carriage to Hodeidah.

The Court found United States Lines not liable *in personam* because it did not authorize the issuance of the NVOCC bill of lading; however, found the vessel to be liable *in rem*, as the NVOCC bill of lading ''was ratified once the ARGOSY set sail with the goods on board (citing cases).'' The Court then found the transshipment (not mentioned in the NVOCC bill of lading) to be an unreasonable deviation and denied the application of the package limitation. The case was submitted to the Court for summary determination pursuant to Local Admiralty Rule 15 of the Southern District of New York.

(**EDITORS' NOTE**: An appeal has been taken from this decision and Briefs Amicus Curiae have been submitted on behalf of the Maritime Law Association, the West of England Protection and Indemnity Association, the West of England Protection and Indemnity Association and the Federal Maritime Commission. The Briefs Amicus Curiae argue that the District Court's holding that the vessel ''ratified'' the NVOCC bill of lading was in error.)

SECOND CIRCUIT "CONVERTS" TO NEW JERSEY LAW

In *Colgate Palmolive Company v. the S/S DART CANADA, et al., and Global Terminal & Container Services, Inc.*, Docket No. 83-7261, dated December 14, 1983, the Second Circuit considered the question of the availability of the package limitation to a stevedore/terminal operator (Global). Twenty-two drums of spearmint oil were delivered to Global's terminal in Jersey City, New Jersey to be shipped to France aboard the DART CANADA. Dock receipts were issued incorporating all the terms of the bills of lading issued by DART (the ocean carrier). Of the 22 drums received, 16 were not loaded aboard the vessel.

The District Court held Global entitled to the package limitation, limiting its liability to $8,000.

On appeal, Judge Lumbard, writing for the majority, reversed this holding. The Court's opinion noted that COGSA did not apply of its own force before loading, but merely as a contractual term. The Court found that the law of the State of New Jersey governed and would invalidate the package limitation provision upon which Global relied. The majority opinion found Global to be a "warehouseman" and then referred to the New Jersey version of the UCC which denied any limitation of liability to a warehouseman who converts goods to his own use. The Court noted that while the Supreme Court of New Jersey never addressed the issue of conversion directly, a New York court would have no difficulty in concluding that a conversion existed. Under New York law, a warehouseman that fails to provide an explanation for its failure to return stored property is liable for conversion. The Court did note a lower court in New Jersey had endorsed this approach and, thus, a New York court applying New Jersey law would look to its own rule and hold that the failure to explain the disappearance constituted a conversion. Thus, the majority held Global liable for the full amount.

Judge Van Graafeiland wrote a detailed dissent noting that Federal law should control and that Global's terminal facilities were subject to a broad and comprehensive scheme of Federal regulation. Therefore, although the COGSA limitation did not apply of its own force to the pre-loading period, the construction and application of the bill of lading should be governed by Federal law and Global's liability should be considered under those bills of lading and not as a warehouseman whose liability would be governed solely by New Jersey's version of the Uniform Commercial Code. Judge Van Graafeiland referred to a number of other cases holding a terminal operator to be entitled to the package limitation if the bill of lading clearly expresses such an intent.

SYSTEMATIC THIEVES ARE NOT DEVIATES:

In *ITALIA DI NAVIGAZIONE, S.P.A. v. M/V HERMES I, et al.*, (2d Cir., 83–7564, dated December 13, 1983), the Court was faced with the argument that the doctrine of deviation should be applied to deprive the ocean carrier of its contractual limitation of time in which to bring suit. Italian Line acknowledged that its claims for non-delivery of goods were filed late, but argued that the one year statute should not be applied where there are "good faith allegations of systematic theft on the part of the officers and crew of the carrier."

The Second Circuit refused to extend the doctrine noting that in a previous decision, Judge Friendly of the Second Circuit had expressed the view that allowing even geographical deviations to avoid limitations on the carrier's liability "seems inconsistent with the language of COGSA" and referring to the admonition of Gilmore and Black that "it would seem unwise to extend analogically and by way of metaphor the doctrine of doubtful justice under modern conditions, of questionable status under COGSA and of highly penal effect", *The Law of Admiralty* 183 (2d Ed. 1975). These misgivings being well taken, the Court found the case not one compelling any extension of the doctrine of deviation.

FROZEN FOOD SECTION

In the case of *Insurance Company of North America v. S/S ITALIA*, (S.D.N.Y., 79 Civ. 4071, dated March 15, 1983), the District Court for the Southern District of New York considered freezing damage to cargos of wine transported from Italy to the Port of New York. The containerized shipments were carried on deck. Subsequent to the vessel's arrival and discharge of the containers, bitter cold temperatures obtained and, when delivered, it was found the wine had been damaged by freezing. The court found the wine was in good condition when received by the ocean carrier in Livorno, Italy. This finding was not based upon the issuance of clean bills of lading, "since the cargo was containerized in a manner which prevented ITALIA from ascertaining its condition." The finding was based upon Italian temperature records taken at Florence and Livorno, the testimony of the shippers and the fact that the two shipments originated at different places. While no evidence was received of temperatures encountered during the ocean crossing, the evidence of bitter cold temperatures after discharge tended to support an inference that the wine froze on the pier. The court found the ocean carrier had the obligation to protect the cargo until the consignee had a reasonable opportunity to remove it. As no evidence was offered that the carrier or its stevedore took reasonable precautions to

protect the cargo from the obvious danger of sub-degree temperatures, judgment was given for plaintiffs.

In a similar case, *Goya Foods v. S.S. ITALICA, et al.*, (S.D.N.Y., 78 Civ. 2912, dated April 13, 1983), the same ocean carried containerized shipments of pimentos from Valencia, Spain to the Port of New York. The containers were stowed on deck and were of a type which could not be heated during the voyage across the Atlantic. The court noted the ordinary practice in the trade is to use unheated containers. The containers were discharged at Weehawken, New Jersey and, although the pier had facilities to heat discharged cargo, the ocean carrier neither instructed the stevedore, nor did Goya request that the containers be heated. Subsequent to discharge and prior to delivery, temperatures frequently fell below freezing and the court found the evidence supported the plaintiff's claim that the pimentos froze.

The Court considered testimony that below-freezing temperatures were extremely rare in southern Spain and found that the freezing damage could have occurred only *after* delivery of the pimentos to the ocean carrier. The Court found the plaintiff did not prove its contention that the pimentos froze while on board the vessel prior to discharge. With respect to the period after discharge, the court noted jars of pimentos do not freeze easily but only if exposed to severe cold for an extended period. The ocean carrier's discharge in cold or freezing weather, in and of itself would not endanger the cargo.

> "Instead, Italia Lines' discharge of the containers onto an unheated pier conformed to industry practice. That practice, so far as the evidence shows, has never before resulted in freezing damage to discharged pimentos. Finally, Goya usually picks up cargo within one day of discharge. If Goya had adhered to that practice with respect to the present shipments, the pimentos could not have frozen at the pier. The court finds that Italia Lines had no reason to anticipate freezing damage and that if the pimentos did freeze at the pier, they did so because Goya failed timely to call for them. Italia Lines made proper delivery."

TOO HOT TO HANDLE

In *A&D Properties, Inc. v. M/V VOLTA RIVER*, (U.S.D.C., E.D. La., No. 81–4600 dated November 18, 1983), the Court agreed with a Master's refusal to load wet coal. The Court noted:

> All parties agree that the principle issue before the Court is whether the master wrongfully rejected a portion of the coal tendered for

shipment. A carrier has a duty to transport that cargo which it has contracted to carry pursuant to the terms and conditions of the contract of carriage. The duty to transport a cargo in accordance with a contract of carriage is not an unqualified one, however. A carrier is not obligated to load a cargo which, through no fault of the carrier, cannot be carried without danger to the vessel, her crew, and her other cargo. *See Boyd v. Moses*, 74 U.S. 316 (1869); *The Ensley City*, 70 F.Supp. 444 (D.Md. 1947), *aff'd*, 170 F.2d 25 (4th Cir. 1948); *Birt, Potter & Hughes v. Hardie*, 132 F. 61 (S.D.N.Y. 1904).

The determination of whether a cargo can be carried safely is committed to the sound discretion of the master, upon whom the responsibility for safe carriage rests. *Boyd v. Moses, supra; Birt, Potter & Hughes v. Hardie, supra*. Under the rule of *Boyd v. Moses*, when the master rejects a cargo based on a well founded concern for the safety of the vessel, after due consideration of all of the circumstances, his decision will not be judged with hindsight.

Here, the master, with the concurrence and approval of charterers, after consulting with two marine surveyors, determiend that certain of the coal was unsuitable to be loaded and transported aboard the ship because, under all of the circumstances, he believed that cargo would be dangerous to the VOLTA RIVER, to other cargo loaded and to be loaded, and to the vessel personnel. The Court finds that the master of the VOLTA RIVER did not act capriciously or unreasonably in rejecting the coal remaining in barges RGT-130 and AGT-11; nor was the master negligent in relying upon the findings of the Deep Sea and Davenport surveyors. During the Summer and Fall of 1981, there were at least five incidents in which coal carrying vessels met with danger due to heating or combustion of their coal cargoes. In each case the heating was attributed in part to the fine size of the coal cargo and its excessive moisture content, factors also present here. In light of the surveyors finding, the nature of the coal cargo, the rainy weather, the long voyage to Italy, the existing problems with coal shipments, and the state of the shipping industry's knowledge of the causes of coal self-heating, the Court finds that the master's rejection of the coal remaining in barges RGT-130 and AGT-11, which was hot and wet, was reasonable under the circumstances. The master exercised sound discretion and prudent judgment, and took action he deemed most expedient and in the best interest of all concerned.

INTER-CLUB DISAGREEMENTS

China Union Lines Ltd. v. Companhia De Navegacao Brasileiro, N.Y. Arbitration, October 3, 1983.

A non-unanimous panel of New York arbitrators construed the fabled P and I Interclub Agreement which was incorporated as a charterparty provision. In deciding who, as between owner and timecharterer, was liable for cargo damage, the majority stated:

> It is Charterers' contention that Clause 41 imposes responsibility for stowage upon the Master within the meaning of Clause (1) (ii) (C) of Inter-Club and therefore responsibility for claims due to bad stowage are to be apportioned 50% to Owners and 50% to Charterers.
>
> It is Owners' contention that Clause 41 does not materially amend Clause 8 and therefore Inter-Club provides responsibility for bad stowage rests 100% with Charterers.
>
> The Panel have duly deliberated the question submitted and we do not reach a unanimous decision. Arbitrators Armstrong and Nelson, being a majority of the Panel, have concluded that Clause 41 was not intended to materially change Clause 8 and therefore the answer to the question to be decided is that claims for cargo damages resulting from improper stowage shall be borne 100% by Charterers. Arbitrator Berg's Dissent will be found in Appendix A to this Decision and Award.
>
> If the parties intended that Clause 41 should shift responsibility for proper stowage of cargoes under Clause 8, the Clause hardly expresses that intention. Such a desire could have easily been accomplished by adding responsibility to Clause 8 or by having Clause 41 simply provide for Master's responsibility only. The parties chose to qualify their Clause 41 stipulation by adding, "But this is not to override or prejudice the stipulations in the printed Clause No. 8 of Charter Party". It cannot be said that the parties did not intend that this qualifying language should not have any meaning whatsoever. The Panel Majority believe that it is reasonable to assume that Charterers wanted the Master to have the final responsibility for proper stowage but in so doing he was acting for and on behalf of Charterers as provided for in Contract Clause 8 when unamended.

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PRACTICE AND PROCEDURE

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Rule B Attachment

Parcel Tanker v. Formosan Plastics Corp., Civil No. 81-1303, Southern District of Texas, Aug. 25, 1983

Judge Bue of the Houston Division held, in an extensive opinion, that a marine attachment under Rule B warrants "a more flexible application of the doctrines of due process consistent with its historical function as a security device in maritime commerce," and is constitutional. The Court cited the *Polar Shipping* and *Merchants National Bank* cases in support of its ruling.

The Court noted that the Southern District of Texas had no local rules calling for prompt post-seizure hearing, but commented that an Admiralty court had the inherent power to entertain such a motion.

Rule B Attachment

Construction Exporting Enterprises v. Nikki Maritime Ltd., 558 F.Supp. 1372 (S.D.N.Y. 1983)

The plaintiff seized the hull insurance proceeds under New York State attachment procedures. The Second Circuit remanded to consider whether a Rule B attachment was available to plaintiff.

On remand the District Court held that Supplemental Rule B was consistent with the United Nations Convention for the Recognition and Enforcement of Arbitral Awards.

The District Court also held that where the defendant transferred the management of its ship from New York to Greece, a Rule B attachment would be proper if made after the transfer.

Rule C Arrest

Alyeska Pipeline Service Co. v. BAY RIDGE, Civil Appeal No. 81-3229, 81-3249, Ninth Circuit Court of Appeals, Aug. 4, 1983

The Ninth Circuit denied the plaintiff's petition for rehearing en banc. Previous proceedings, 703 F.2d 381, 1983 A.M.C. 2719 (9th Cir. 1983).

Rule F Limitation Bond

In Re Queeny/Corinthos, Civil Action No. 75–374, Eastern District of Pennsylvania, July 19, 1983 (Slip Opinion)

Addressing the issue of vessel value for purposes of determining the size of a limitation of liability fund, the District Court found that the value of the petitioner's vessel was substantially in excess of the value of the original limitation bond filed eight years earlier. The District Court, following the Second Circuit's *Red Star* opinion, held that interest would run at 6% on the limitation bond, but that for the difference between the value of the vessel and the value of the bond, interest would be applied retroactively at market rates.

The interest rates applied by the Court, 10.5% from the date of the collision until the date of the damage judgment, and 10% from the date of the damage judgment until the fund is distributed, were the rates of pre and postjudgment interest awarded to claimant BP/Sohio.

In Rem Jurisdiction

United States v. Marunaka Maru No. 88, 559 F.Supp. 1365 (D. Alaska, 1983)

After the United States Coast Guard seized the defendant fishing vessel, but before the U.S. Marshal took formal custody, the owner filed a bond and the boat was released. The owner then sought to dismiss the United States' complaint on the grounds that the Court failed to obtain jurisdiction over the vessel.

The Court held that since the vessel had been within the jurisdiction of the Court and had been released pursuant to the posting of a bond, that the owner had submitted the vessel to *in rem*jurisdiction.

In Rem Jurisdiction

Harvey Maring v. MV RIVER ARC, 712 F.2d 458 (11th Cir. 1983)

Where the District Court dissolved the arrest warrant following a post-seizure hearing, and the vessel then sailed, there was no appellate jurisdiction over the dispute absent a stay of the order dissolving the arrest or the filing of a supersedeas bond.

In Rem Jurisdiction Lis Alibi Pendens, Foreign Arrest

Belcher v. MV MARTHA MARINER, 1983 A.M.C. 2089 (S.D. Tex. 1983)

Although Dutch law does not specifically provide for *in rem* actions, where the plaintiff had caused the vessel to be arrested by the Dutch

authorities and where the vessel was released upon the posting of security, the plaintiff would be barred from rearresting the same vessel in the United States over the same claim.

Since the Dutch Court had jurisdiction over the dispute, the United States action would be dismissed on the grounds of *lis alibi pendens*, a*pending suit elsewhere.*

In Rem Jurisdiction, Foreign Arrest

Gulf and Southern Terminal v. SS PRESIDENT ROXAS, 103 S.Ct. 3115

The Supreme Court denied certiorari on June 20, 1983, 1983 A.M.C. 2109. (See May 1983 Newsletter)

Jurisdiction—Pleasure Craft

Finneseth v. Carter, 712 F.2d 1040, 1983 A.M.C. 2391 (6th Cir. 1983)

The Court of Appeals, reversing the Western District of Kentucky, held that a collision between two pleasure boats on a dam-created lake straddling the Kentucky-Tennessee border was within admiralty jurisdiction, in that it occurred on an interstate highway for commerce. The Court pointed to no existing commercial use for the lake, but found it sufficient that the lake was susceptible for use in interstate commerce.

Jurisdiction—Jury Trial

Ashland Oil v. Third Nat. Bank of Ashland, KY, 557 F.Supp. 862 (E.D. Ky. 1983)

The District Court held that Ashland Oil, charterer of an oil barge which delivered an overflow cargo of gasoline to a shore tank, causing an explosion on shore, could bring a petition for limitation of liability and force non-jury trial on all claimants, including land based claimants who made cross-claims against each other.

Jurisdiction—Pendant Jurisdiction

Medema v. Gombo's Marina Corp., 97 F.R.D. 14, 1983 A.M.C. 1611 (N.D. Ill. 1983)

Deciding a marina owner's motion to dismiss an admiralty suit brought to recover for the loss of a stored boat in a shoreside marine fire, the District Court held that there was no admiralty jurisdiction over the negligence claim, but that since there was admiralty jurisdiction over the breach

of contract claim (for winter storage), the court would exercise pendant jurisdiction over the negligence claim.

Jurisdiction—New Construction

Fowler v. Stradler, 558 F.Supp. 1115 (S.D. Fla. 1983)

The District Court determined that it lacked admiralty jurisdiction to hear a suit brought over the uncompleted fitting out of a power boat. The decision was based upon the determination that the vessel was still under construction, and that under *Thames Towboat*, the court lacked admiralty jurisdiction over an uncompleted vessel.

The boat had been purchased by the plaintiff in an operable condition, and the defendant hired to customize it. Despite the fact that the plaintiff had taken the boat on numerous "sea trials", the court found that it was still under construction.

Miscellaneous Foreign Sovereign Immunities Act

Verlinden v. Central Bank of Nigeria, 461 U.S. ___, 1983 A.M.C. 1817 (1983).

The Supreme Court, reversing the Second Circuit, held the FSIA not unconstitutional as a grant of jurisdiction to federal courts over actions between foreign plaintiff and foreign sovereigns with a non-federal issue. In a suit brought by a Dutch corporation against a Nigerian government bank over cement contracts, the court concluded that the Act was a jurisdictional grant for cases "arising under" federal law.

The Court's decision turned on the concept that the FSIA contemplated the creation of a body of substantive federal law. However, the Supreme Court did not decide the question of whether the case contained sufficient United States contacts to warrant federal court jurisdiction under other aspect of the Act.

Miscellaneous: Foreign Sovereign Immunities Act

Ministry of Supply v. Universe Tankships, 708 F.2d 80, 1983 A.M.C. 1905 (2d Cir. 1983)

The Second Circuit, in a suit brought over rust and scale contamination of a grain cargo purchased by Egypt, held that the FSIA, which specifically allowed counterclaims against foreign sovereigns, did not prohibit cross-claims against foreign sovereigns, reversing the District Court.

Miscellaneous: Foreign Sovereign Immunities Act

O'Connell Machinery Co., Inc. v. MV AMERICANA, 566 F.Supp. 1381, 1983 A.M.C. 2622 (S.D.N.Y. 1983)

The Southern District held that while the protection of the FSIA could be waived by treaty, that the Treaty of Friendship, Commerce and Navigation between the United States and Italy did not contain such a waiver. The Court thereby dismissed both the *in rem* arrest and the plaintiff's *in personam* action against Italian Lines.

Miscellaneous: Jury Trial

T.N.T. Marine Service v. Weaver Shipyards & Dry Docks, 702 F.2d 585 (5th Cir. 1983)

Where the complaint alleged both admiralty and diversity jurisdiction, the plaintiff cannot appeal from an adverse judgment on the grounds that the District Court denied his right to a jury trial. Where the complaint invokes admiralty jurisdiction, there is no right to a jury trial.

Miscellaneous: Magistrates Act

Pacemaker Diagnostic Clinic of America, Inc. v. Instromedic, Inc., 712 F.2d 1305 (9th Cir. 1983)

Despite the fact that the parties consented to have their case heard by a Magistrate, the Court of Appeals, *sua sponte*, held that the referral of a civil case to a magistrate where there was no appeal to the district court violates both the due process clause and Article III of the United States Constitution. Stating the "Constitution establishes a framework of government that cannot be altered by statute nor waived by litigant consent. The independence of the judiciary, the distribution of power, and the separation of powers are at issue here." The Ninth Circuit brushed aside analogies to the use of special masters and to arbitration and held that Magistrates were Article I judges who could not constitutionally exercise the power of Article III judges.

Miscellaneous: Collateral Estoppel

Dracos v. Hellenic Lines Ltd., 705 F.2d 1392 (4th Cir. 1983)

The Fourth Circuit affirmed the District Court and held that offensive collateral estoppel will not be applied against Hellenic Lines without a showing by plaintiff that the conditions which led to the Supreme Court

decision in *Rhoditis* continued to prevail. The Court of Appeals refused to be bound by a thirteen year old finding that Hellenic Lines had sufficient U.S. contacts to require the application of U.S. law in a maritime tort claim, and held that the District Court had the discretion to decide whether the current conditions warranted the application of offensive collateral estoppel.

Miscellaneous: Forum Non Conveniens

Veba-Chemie v. MV GETAFIX, 711 F.2d 1243 (5th Cir. 1983)

The Fifth Circuit, affirming the Eastern District of Louisiana, held that for purposes of applying forum non conveniens; an alternative forum need not have been available at the time suit was filed, so long as it was available when the court chose to dismiss the action.

After the vessel's arrest in Louisiana, the defendant moved to dismiss for forum non conveniens. Although the Dutch court did not have jurisdiction over the arrest, the defendant's later agreement to submit to Dutch jurisdiction made that forum "available" for purposes of forum non conveniens.

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