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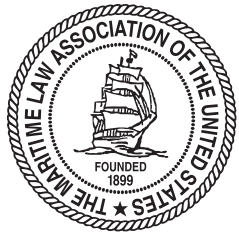

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THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

THE MLA REPORT

Editors:

CHESTER D. HOOPER
DAVID A. NOURSE

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EDITORIAL COMMENT

Hurricane SANDY struck New York with great force on October 29, 2012, causing substantial damage to the transportation systems of New York City and crippling the telephone and internet communications of many of the downtown law firms. As a result, the MLA's 2012 Fall meeting, scheduled to be held in New York City during the period November 6-9, 2012, was cancelled, an unprecedented event. However, many of the Association's Committees had prepared newsletters in anticipation of that meeting and several Committees actually met, as scheduled, with some members present and others participating by telephone.

We are very pleased in this edition of the MLA Report to publish both the Committee newsletters prepared in connection with the cancelled Fall 2012 meeting, a total of eight, as well as the minutes of those Committee meetings held on November 7 and 8, 2012, which in the ordinary course would have been the subject of reports to the Association's General Meeting on November 9th. They are the minutes of the meetings of the Committees on Arbitration and ADR and International Organizations, Conventions and Standards and of the joint meeting, held in Washington, D.C., of the Committees on Marine Ecology and Maritime Criminal Law; Regulation of Vessel Operations, Safety, Security, and Navigation; and Government Counsel.

In accordance with our practice of honoring members who have materially advanced the work of the Association, this issue of the MLA Report contains several remembrances of Michael Marks Cohen of New York, who passed away on December 1, 2012.

We thank the following members of the Committee on Young Lawyers for their proof-reading and cite checking assistance in the preparation of this edition: Corey R. Greenwald of Clyde & Co. US LLP in New York, Patrick J.R. Ward of Hand Arendall LLC in Mobile; and Arthur Alan Severance of Trident Law, PC in Whittier, California. We appreciate their help. However, we remain

responsible for any errors or ambiguities that may have escaped their view.

As in the past, we remind readers that articles, case notes and comments published in the MLA Report are for informational purposes only, are not intended to be legal advice and are not necessarily the views of The Maritime Law Association of the United States.

Chester D. Hooper
David A. Nourse
Editors

IN MEMORIAM

Michael Marks Cohen

Michael Marks Cohen graduated *magna cum laude* from Columbia Law School in 1965 where he was a Kent Scholar and the Managing Editor of the Columbia Law Review. After graduation he served as a law clerk to Stanley H. Fuld, the Chief Judge of New York, followed by three years as a trial attorney in the Admiralty and Shipping Section of the United States Department of Justice in Washington, D.C. In 1970, he joined the admiralty law firm of Burlingham Underwood Wright White & Lord. He became the senior partner in the firm in 1990 and held that position until the firm closed its doors in 2002. Thereafter, he became of counsel to the firm of Nicoletti Hornig & Sweeney.

But Michael was much more than just a practicing admiralty lawyer. He taught the admiralty law course at Columbia Law School for 31 years. He was an Associate Editor of American Maritime Cases, a co-editor of the Index and Digest of the Award Service of the Society of Maritime Arbitrators, and an editor of several volumes of Benedict on Admiralty. He authored numerous scholarly articles on admiralty law.

Michael was a Life Member of The Maritime Law Association of the United States where he served on the Executive Committee and on many of its working committees. For many years, he was the Chairman of the Committee on the Comité Maritime International ("CMI"), which was a subject of special interest to him. He was a Titulary Member of the CMI and served for seven years on the Documentary Committee of the Baltic and International Maritime Council in Copenhagen, drafting maritime documents for use world-wide. Additionally, he was a member of the Maritime Law Associations of Canada, Australia & New Zealand and South Africa.

Michael was elected to membership in the American Law Institute, where he was recognized for his contributions to the

Institute's work by being named as a recipient of the John Minor Wisdom Award.

He served for years with distinction on the Secretary of State's Advisory Committee on Private International Law. He was also a member of the American Bar Association, which at its 2012 fall meeting named Michael as the 2013 recipient of its prestigious "Leonard J. Theberge Award for Private International Law." The award was established to honor those persons who have made lifetime contributions to the development of private international law.

Michael was recognized as one of the leading practitioners of maritime law, not only by his peers in the United States, but by admiralty lawyers throughout the world.

He is survived by his wife Bette, his son Daniel and Daniel's wife Jill, and his grandson Caleb.

I first met Michael when I was interviewing for a position as an associate at the Burlingham firm in the fall of 1974. I honestly don't remember that interview, but from Michael's subsequent descriptions over the years of my pitiful performance during the interview, I can only say that he must have engaged in an extreme act of generosity in agreeing to allow the firm to hire me.

Before I joined the firm, I took Michael's admiralty law course. Michael did not stand at the front of the room and simply lecture on admiralty law, but rather taught by the Socratic method. Michael said he could reach students and create in them a passion for the law by engaging in such a dialogue. I can only say that for me at least it felt like being subjected to the Spanish Inquisition. Since Michael knew me from my job interview, I had the honor of being the first student he ever called on in the first class he ever taught. I then had the dishonor of telling him that I was unprepared because I hadn't bought the book. He was so astounded by my answer that he actually passed on to another member of the class.

Incredibly, despite my less than stellar start in his class, Michael did not insist that the firm withdraw its offer to me and upon graduation I became an associate at the Burlingham firm. I am not sure if it was an official position, but Michael took it upon himself to be the mentor to all the associates in the firm. I was lucky enough to be able to work with Michael for a very substantial part of my time. Although it only occasionally felt like the Socratic method (for example when he interrogated me about some conclusion I had reached in a research memo I had prepared for him), he continued to teach me what it meant to be a practicing lawyer.

Michael taught all of us associates that we were blessed to be a part of the admiralty bar. It is a relatively small, close-knit bar, where your adversary does not have to be your enemy. He maintained a friendship with an astounding number of maritime lawyers, many of whom were his adversaries in litigation. Michael insisted that a lawyer's reputation for integrity meant everything. He taught me that it took a lifetime to build up your reputation, but only one misdeed to ruin it. It is a lesson I still strive to apply every day.

Michael was particularly noted (or perhaps I should say notorious) among the firm's associates for his editing of our drafts. Among the associates, it was considered a "victory" if 25% of your words remained when he got done with his editing. Like most young lawyers, I would try to make myself sound smarter by using stiff, formal language in my writing. Michael would look at me and ask "Do you talk like that?" When I inevitably said no, he would want to know why then I would write like that.

When I became one of his partners, and he still continued to tear my drafts apart with his editing, I once asked him if it wouldn't be quicker if I just submitted blank lined paper for him to write on so he would not have to spend so much time crossing out my draft. He replied that it would probably be quicker, but I wouldn't be learning and improving. He continued to serve as my teacher, long after I had become his partner. And slowly, more and more of my words survived his editing.

I had the pleasure of working with Michael on many interesting and challenging cases, but one will always stand out in my memory as a demonstration of Michael's brilliant and creative lawyering. We represented the owner of a vessel that was operating under a long term charter to the national oil company of the Philippines. When the oil company failed to pay the money due to the owner, Michael waited until the vessel was loaded with a full cargo of oil destined for Japan, and then had the owner divert the vessel to Guam where he arrested the cargo in the United States District Court on the island to obtain security for an arbitration that we had started on the owner's behalf in New York for the moneys overdue. I did not even know Guam had a United States District Court, but of course Michael did. The oil company chose to apply pressure on the owner by refusing to post security to release the oil (and of course on the vessel, as there were no shore tanks available to store the cargo in). Therefore, we sought and obtained an order from the court in Guam to sell the cargo. Continuing its gamesmanship, the oil company first had the sale postponed because there was not sufficient time to advertise the sale and to allow potential buyers to travel to Guam for the sale. When the time for the adjourned sale approached, the oil company secretly threatened all of its trading partners in the Far East that they would never be allowed to purchase another cargo from the oil company if they bid at the auction. When the United States Marshall opened the bidding, the only people present were representatives of the oil company and Michael. Initially, there was complete silence. As the Marshall was about to close the auction without any bids, Michael jumped up and bid one dollar. When no other bids were forthcoming, Michael was declared the highest bidder. He was careful to have it noted on the record that he paid the full purchase price on the spot.

The problem then became having the sale confirmed. I bet Michael that we could never have the sale confirmed at such an obviously inadequate price. I no longer remember what the stakes of the bet were, but I know I had to pay off. Michael convinced the District Court in Guam to confirm the sale. He argued that after delaying the original sale in order to ensure that all interested buyers

could attend and after failing to bid even $2 for the oil themselves, the oil company could not argue that $1 was not a fair and reasonable price. The District Court in Guam accepted his argument and this decision was upheld by the Ninth Circuit Court of Appeals in California and even withstood a petition for *certiorari* in the United States Supreme Court. Thereafter, armed with a multimillion dollar windfall for the client when the cargo was successfully sold through back door channels, Michael was able to negotiate a very favorable settlement for our client with the oil company.

In 2002, Michael, our other partners, and I had to close down the Burlingham firm. As usual, Michael's concerns were about everyone else more than himself. He was particularly keen to ensure that all of the staff found employment. It was a difficult time for us all, but it was much easier to go through it with Michael's leadership.

After Burlingham closed, Michael joined Nicoletti Hornig & Sweeney. There Michael continued to practice and to teach a whole new set of lawyers for an all too brief 10 year period. Of course, he also continued with his never ending burden of trying to teach me as well.

By: Terry L. Stoltz

LETTER TO BETTE COHEN FROM THE HON. CHARLES S. HAIGHT, JR.

United States District Court Senior Judge for the Southern District of New York sitting by designation in the District Court of Connecticut

April 14, 2013

Dear Bette:

From my self-imposed exile as a senior U.S. district judge in New Haven, Connecticut, I had missed the news of Michael's death until the brief first notice in *The Arbitrator,* which Manfred Arnold kindly continues to send me. My first reaction was that shared by so many others whose lives Michael touched and enriched: shock, disbelief, a denial bordering upon rage that so vital, energetic, concerned, caring, yes, *young* in spirit a man had been taken from us. The sense of loss felt by these multitudes is, of course, dwarfed by that borne by you, Daniel, and maybe even Caleb, but I'd like to say that I valued Michael's company greatly, enormously, and try to explain why that was so.

As a third-generation member of a family given to the admiralty law, I have a certain feeling for the traditions of that special world. I am confident that when the history of the practice of admiralty and maritime law in the United States during the last half of the 20th century and first decades of the 21st comes to be written, Michael Marks Cohen will be identified and remembered as a towering figure, not only as a practitioner at the maritime bar, although Michael was most assuredly a powerful advocate and a formidable opponent, but also as a professor of admiralty at Columbia, a guiding force for the MLA and the SMA, an informed and energetic participant or commentator in every undertaking of any consequence in the world of admiralty, here or in other nations. Michael was one of those giant figures who come along very rarely, whose quality and achievements are transcendent.

We all have memories - in the parlance of the trial courts, "war stories" – about Michael. I offer two of my own: one when I was still at the bar, the second after I made a fiscally quixotic move to the bench. In the first situation, the Burlingham and Haight firms were on opposing sides in a charterparty case involving a charterer's unilateral cancellation of a long-term charter, resulting in a claim by the shipowner for millions of dollars. Herbert Lord and Michael represented the shipowner. I represented the charterer. The case was to be decided by a panel of three eminent SMA arbitrators. The first hearing took place in a Burlingham conference room. Herb Lord made some characteristically smooth introductory remarks and told the arbitrators the owner's case would be presented by his partner, Michael Marks Cohen. Michael thereupon delivered an opening statement of such elegance, eloquence and persuasive force that the three arbitrators - I was peeking at them - were quite transfixed. Michael finished his opening statement and moved seamlessly to the offering of the shipowner's first exhibit. Realizing that the arbitrators had forgotten there was anyone else in the room, I sneezed, coughed, dropped my briefcase on the floor, and eventually conveyed the thought that there was a second side to the case and I would like to be heard. The arbitrators blinked, came out of their trance, turned to me, and said they would hear me. So I got to deliver my own opening remarks: not as forceful as my adversary's but, I like to think, not without some professional value. If my memory serves, the case was settled by the parties shortly thereafter: we did not have prolonged evidentiary hearings, and if I'd spent that much time in close combat with Michael, I'd remember it. But my recollection of the power of his opening to the arbitrators is as vivid to me today as it was at the time: can't you tell?

My second vivid recollection of Michael dates back to 1994, the year of the ICMA Convention in Hong Kong. The previous ICMA Convention had featured the First Cedric Barclay Memorial Lecture, which was delivered by that fine British lawyer and judge Lord Mustill, sitting as a Law Lord in the House of Lords. Apparently, the London and New York maritime arbitration societies

took turns organizing the ICMA conventions, and so in 1994 it was the SMA's responsibility to come up with the Second Cedric Barclay Lecturer. I was asked to do it, and was very pleased, but I learned later, from Michael, Manfred Arnold, Glenn Bauer or some other friend, that the Brits were appalled: I was, after all, only a lowly trial judge, having been appointed to the SDNY in 1976 and never promoted. One London official inquired, I am told, if perhaps the Chief Justice might be available. My sponsors responded that no, they didn't think Chief Justice Rehnquist could make it, but this district judge knew something about maritime arbitration, they persisted in their selection, and the U.K. delegation acquiesced, although with manifest trepidation. And I was feeling considerable trepidation myself, because I knew nothing about Cedric Barclay. Michael, of course, knew everything about Cedric Barclay. And I shall always be grateful for what Michael did next. He called me up, came over for a visit, filled me in thoroughly on the London maritime arbitration world and Cedric Barclay's place in it, and loaned me his personal file of Barclay achievements and anecdotes. I built one of those anecdotes into the peroration of the lecture I delivered to the ICMA Convention, which seemed well received. My present point is that Michael knew I was in a tough spot and needed help, and instantly reached out and gave that help. You don't forget friendship of that quality. I certainly never will.

Michael's and my professional voyages put in at some of the same ports of call. We were both trial attorneys with the Admiralty and Shipping Section of the Department of Justice, and we both became partners of leading New York admiralty firms. It is a little sobering, even sad, to reflect that in those earlier days, four admiralty firms bestrode the maritime world like colossi: in alphabetical order Bighams, Burlinghams. Haights, and Kirlins. As the years went by, Michael from his practice and I from the cloistered corridors of the court watched these four great firms dwindle and their names ultimately vanish. I recall that Burlinghams was the last to disappear, and Michael was the last partner left to turn out the lights as he closed the door. He closed that door with the courage and grace that informed everything he did, and if that Golden Age of admiralty

law had to come to an end, it is a source of melancholy comfort that Michael Marks Cohen pronounced the final benediction.

The Maritime Arbitrator's later edition and longer tribute painted a splendid portrait of the richly varied and happy life Michael lived, among friends, colleagues, and primarily, of course, his family. Michael was truly a Renaissance man: because that is so, people who mourn his passing come from all over the world. Looking back and reliving those days, my most persistent memory of Michael is that he was *joyful*. Of course, that could not always be so, not in this life of joys and sorrows; but I think of Michael in the way Rafael Sabatini described his hero Scaramouche: "He was born with the gift of laughter and the sense that the world was mad." I'm not sure Michael thought the world was mad, but he had the precious gift of laughter, and a joyful approach to life that warmed all those in his company. There is not enough intelligence, integrity and joy in this troubled world. No one can share your loss in a truly meaningful sense, but we share it nonetheless.

With deepest sympathy,

ADDRESS BY STUART HETHERINGTON

President of Comité Maritime International (CMI) at Memorial Service for Michael Marks Cohen at India House, Hanover Square, New York, April 30, 2013

Michael was a titulary member of the CMI and Chairman for many years of the US MLA CMI Committee. In these remarks I want to remember a Michael whose joie de vivre livened up CMI (and any meetings he attended), was a marvelous correspondent, a great teacher, and a lovely man whom we all miss enormously.

My first meeting with Michael and Bette was not auspicious. On the opening night of the CMI Conference in Sydney in 1994 there was a moment when it was thought Bette's handbag had been stolen from the boat that we were on, after the opening ceremony, on Sydney Harbour. Happily a helpful attendant had put it in a safe place when it had slipped off her chair. As the Chairman of the Organizing Committee it was a tense moment.

My next meeting was almost as bizarre. I recall having to address the Carriage of Goods Committee at the US MLA Conference in Kauai in 1995 and noticed one of the delegates had arrived bearing his tennis racket and the appropriate attire and mentioned to me before I started that I needed to make it quick as he was due on court with Bette, probably to play against the Griggs, who, I understand, were regular opponents. (Patrick Griggs, one of my predecessors as President of the CMI, and his wife Marian knew Michael and Bette for 40 years and regret that they could not be here this week.)

Since I have been in New York I have bought a book entitled "Dinner with Churchill" by Cita Stelzer. Most of you will know that the British war time Prime Minister, Sir Winston Churchill, loved food (and drink) and loved entertaining. He believed that personal contacts around a dinner table enabled ideas to be exchanged and people to become better acquainted and better able to understand

one another. He obviously enjoyed the company of interesting and amusing people. The book opens with the story of a Labour MP asking Churchill in the House of Commons question time if he would "indicate if he will take the precaution of consulting the consuming public before he decides to abolish the Food Ministry". (Bear in mind that this was during rationing after the Second World War.) Churchill's response, which was greeted with gales of laughter, was "On the whole I have always found myself on the side of the consumer!!" I would have enjoyed sharing that with Michael, who shared Churchill's enjoyment of fine food, interesting conversation and laughter.

It was at the US MLA Conference in Kauai that my wife and I first experienced Michael's hospitality at dinner with guests from other countries. From that moment on, Michael and Bette were the couple that my wife and I looked forward to meeting most at CMI or USMLA meetings. Michael, as you all know, was always entertaining, he had a wide range of interests, was knowledgeable in all manner of things and was fun to be around. My wife's Hungarian background and PhD in Russian history were grist to the Michael mill.

At a CMI Colloquium In Cape Town, the Hetherington inefficiency found us not having made any arrangements for dinner on Valentine's night. On mentioning this to Michael he insisted that the two of us and our then six year old daughter join he and Bette at a restaurant he had identified and booked some weeks before as a result of his usual research. Michael was, I am informed by Frank Wiswall, the tour director for US MLA attendees at CMI conferences, making arrangements with airlines for special group rates and with the conference hotel for breakfast meetings, usually including the Canadian MLA. It was not unusual for a large number of potential delegates to CMI events to receive from Michael restaurant reviews and travel tips about a certain city weeks before the meeting was to take place.

My wife particularly recalls that evening in Cape Town,

which was delightful, as we had taken a taxi to the venue which dropped us off quite a long way from the actual restaurant where we were meeting Michael and Bette. On arrival my wife explained to Michael that we had had a somewhat scary walk through an area about which we had previously been warned we should not be walking on our own and Michael's response was: "It's ok, we've got Bette".

We shared a table with Michael and Bette at CMI Conference dinners in both Singapore and Athens (with our then 9 year old, underneath the Acropolis) which were also memorable CMI evenings. It was in Athens that I recall Bette heading off to the gym / swimming pool complex and being seen off by Michael in the foyer of the hotel and reminding her to do his exercises for him.

Michael was always a great friend of the CMI and, as all good friends should be, a critic where necessary. At the Buenos Aires Colloquium a couple of years ago he provided advice to the CMI Charitable Trust as to how it should use its funds. As Patrick Griggs has described it to me recently, Michael "was thoughtful and prepared to be provocative if he felt that suited his purpose". As a result of the comments he made in Buenos Aires about the Charitable Trust, Patrick tells me "We are in the process of changing how we use the money. However, we will not be following his suggestion of eating into the capital to fund projects".

The Charitable Trust meets the expenses of CMI members who lecture at the International Maritime Law Institute (IMLI) in Malta. Michael was a regular lecturer. In preparing these remarks I asked the Director of the Institute, Professor David Attard, to let me know how the Institute regarded Michael's contribution and I can only quote his response:

> Michael Marks Cohen was one of the finest admiralty lawyers. He had a career spanning over 40 years specializing in admiralty law, marine insurance, commodities trading, and international arbitration,

areas in the development of which he contributed significantly.

Michael Marks Cohen was a unique academic. He taught the admiralty course at Columbia Law School for more than 30 years. I recall him saying that when he first studied maritime law, the course wasn't based on experience in the field and that he felt, after being out in practice, that there were insights that students deserved to learn.

It is in the capacity of a lecturer that the IMLI students remember him. He taught according to the Socratic method, but with a light touch and sense of humour. As he used to say, "students respond more enthusiastically if you can make clear that you're not mean, and that you are attempting to use the dialogue as a way of advancing knowledge. And I can get the students to focus on the material a little more closely if their adrenaline is flowing."

Michael Marks Cohen had a great sense of humour. I recall the last time he visited IMLI, he was recovering from a small misfortune and had a scar on his face. With his usual sense of humour, when asked for a photo, he replied, "Please make sure you only capture in the picture the good side of my face."

Above all, Michael Marks Cohen was a very kind hearted person and very generous with his time and his knowledge. He always supported IMLI's work and his generous book donations contributed to the expansion of the Institute's library holdings.

He is sadly missed.

When attending the US MLA Spring meeting in New York a few years ago I attended a lecture Michael gave. He had told me

beforehand that he was trying out the "Socratic method" of teaching. He was teaching in the afternoon to a gathering that I am sure wished they were doing something else and perhaps needed the CLE points. Michael's method of teaching, I observed, provoked the students into taking an active part in the lectures and kept them awake.

By chance I was recently looking through the publication of the special proceedings of the US MLA Centennial Meeting on 7 May 1999 and noticed that Anne Hopkins of the AMC said:

> AMC is in debt to Michael Marks Cohen because at the time that we were dropped by Shepard's for a brief time, he devised ways to put new sections in the 5-year digest and eventually the annual records. We have pink pages and yellow pages and we have rainbow editions that Michael's students got together, which took the place of what had been once in Shepard's.

David Sharpe, who had been Professor of Law at George Washington University, acknowledged a few of the people who had taken him into their fellowship. One was Nick Healy, another was Elliott Nixon and another was Michael. He had this to say:

> Michael Marks Cohen exploited me in his usual shameless fashion on the maritime legislation committee, gave me work to do, received and re-wrote the results, and toughened my mental machinery in many hours of conversations - a great teacher in every respect.

I was fortunate enough on two occasions during visits to New York to attend Broadway shows with Michael and Bette (and on one of those two occasions the current President of the US MLA and Forrest were also present). Michael and Bette had eclectic tastes: one performance was "Spamalot" (Eric Idle of Monty Python fame's stage show) and the other "August in Osage County". Both were

memorable evenings spent in Michael's, Bette's and their friends' company. Churchill would have approved. Unfortunately I was never fortunate enough to attend an opera with them but Patrick Griggs tells me that Michael was the only US supporting member of Opera Rara, the opera recording company of which Patrick was chairman until the end of 2012. Patrick and Marian had been guests of Michael and Bette at the opera at the Met.

Michael kept in touch with CMI friends and colleagues from around the world on a regular basis. Whether it was as a recipient of his annual new year postcard (in exchange for a Christmas card) which invariably was interesting in itself and reflected his love of colour or of some decision usually on an arbitration or maritime topic, it was rare for many weeks to go by without some communication from him.

I would like to share with you a couple of emails I received from Michael. After I had sent him an Australian judgment he responded: "Do your Judges get paid by the word?". I should say Michael became good friends with a number of Australian Judges including Ken Handley and Bill Priestley of the NSW Court of Appeal. I have shamelessly had cause to plagiarise that line since.

Another email from me in July 2007 elicited the response "Your message arrived as we were off implementing the right to the pursuit of happiness as Thomas Jefferson put it in the Declaration of Independence."

At about the same time I had told him that my son was selling Australian Equities in the New York office of Citi Group and received this response: "Are the Australian Equities Islands off the Australian Coast - somewhere like the Scottish Hebrides? Is there really such a big market for islands?"

A couple of years ago I told him that the same son had produced a grandchild for us in New York and received this in reply: "Mazel Tov on your new grandchild - an American. Does this mean

that Bette and I are likely to see you and Gabriella up here some time soon? We've had some happy times as well recently. First we celebrated our golden wedding anniversary. Second our son Daniel got engaged which means we'll become grandparents too (we have our fingers crossed - both Daniel and his fiancée Jill are 40)". I have recently seen a photo of the resultant grandson and know that they got their wish!

Finally in response to a marketing email which my firm sent to the rest of the world when I won an award from the Lloyd's List's Australian publication he wrote: "Mazel Tov. Of course it's an old Pommy trick to give awards, medals, titles but not money. Here you get at least a lunch, maybe a dinner and sometimes for prestigious awards such as the one you received a large stipend. Still it's better to be honoured than to be tarred and feathered. And there is only a thin line between fame and infamy."

When corresponding with Patrick Griggs about these remarks he suggested I may feel it necessary "to say something about Michael's choice of ties". I am sure Michael was only trying to have his own back on those of us that insisted on wearing bow ties from time to time!

The CMI will miss Michael enormously.

By: Stuart Hetherington

COMMITTEE ON ARBITRATION AND ADR

Editor: Leo G. Kailas

NEWSLETTER

November 2012

I. ISSUES ARISING BEFORE ARBITRATION PROCEEDINGS COMMENCE

Southern District of New York Finds Jurisdiction and Venue over Foreign Entity Based on Designation of UNCITRAL Rules

Travelport Global Distribution Systems B.V. v. Bellview Airlines Limited, No. 12 Civ. 3483 DLC, 2012 WL 3925856 (S.D.N.Y. Sept. 10, 2012), involved a petition to compel arbitration and for injunctive relief in a dispute concerning a distribution agreement. In 1997, the predecessor of Travelport Global Distribution Systems B.V. ("Travelport"), a Dutch organization, had entered into a Distribution Agreement with Bellview Airlines Limited ("Bellview"), a Nigerian corporation, pursuant to which Bellview would distribute Travelport's computerized travel reservation system in Nigeria. Under Section 19.1 of the Distribution Agreement, New York law would apply to the agreement and any disputes arising thereunder. Section 19.2 provided that any disputes or controversies related to the agreement "may be submitted to arbitration in the United States in accordance with the UNCITRAL Arbitration rules in force at the date of reference. The Appointing Authority shall be the United States Council of Arbitration and such appointment will be in accordance with its 'Procedures for Arbitration.'"

In 2011, Travelport advised Bellview that it would terminate the Distribution Agreement unless Bellview cured its alleged material breach of its obligations within 30 days. After Bellview denied the allegations and requested that Travelport withdraw its notice of termination, Travelport declined to withdraw the notice of termination, at which point Bellview suggested that the parties

submit to arbitration as per the Distribution Agreement. Travelport terminated the Distribution Agreement via letter two days later. One week later, Bellview initiated a court action in Nigeria. Bellview sought a declaration that a dispute had arisen between the parties and that Bellview was entitled to refer the dispute to arbitration, and an order for injunctive relief. The Nigerian court issued an order enjoining Travelport from terminating the Distribution Agreement and from appointing another entity to distribute its product in Nigeria. Travelport twice attempted to vacate the order but was unsuccessful.

Travelport then served a notice of arbitration on Bellview. Bellview responded a month later and stated that it intended to continue pursuing the Nigerian action because the arbitral body specified in the Distribution Agreement was "non-existent" and the arbitration provision was thus "incapable of being performed." Bellview continued its Nigerian filings, including contempt proceedings against the directors and officers of Travelport. Travelport then filed its petition seeking an order compelling arbitration and for an anti-suit injunction as to the Nigeria action.

The court first addressed Bellview's argument that the arbitration provision was permissive, and not mandatory, because it contained the word "may." The court rejected Bellview's position based on Second Circuit case law that interpreted "may" as being mandatory and requiring arbitration where a party to the agreement demands arbitration. Additionally, the court found that permissive arbitration would render the arbitration provision superfluous under basic principles of contractual construction.

Although Bellview did not pursue in its brief its earlier argument that the "United States Council of Arbitration" was a non-existent appointing authority, the court addressed and dismissed this position. The court concluded that as the parties clearly expressed their intent to arbitrate in the agreement, the court could designate a proper arbitral authority. Bellview further argued that Travelport waived its right to compel arbitration by participating in the Nigeria action, but the court found that Travelport had consistently sought

arbitration and that there would be no prejudice based on their limited involvement in the Nigeria action, in which there had been no substantive rulings.

The court next addressed the issues of venue and personal jurisdiction. With respect to the venue objection, the court looked to *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975 (2d Cir. 1996), which held that a party is deemed to have consented to the jurisdiction of a court in a state where a party has agreed to arbitrate and the FAA makes such an agreement enforceable. The court then determined that it had personal jurisdiction over Bellview because the parties had agreed (1) to arbitrate their disputes in the United States; (2) that New York law would govern the agreement; and (3) that the arbitration would take place in accordance with the UNCITRAL Arbitration Rules. As UNICTRAL was a body within the United Nations, which is headquartered in New York, the court deemed the arbitration provision an agreement to arbitrate in New York. In its decision, the court cited to *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos*, 553 F.2d 842 (2d Cir. 1977), which construed an agreement that a contract be governed by New York law and that arbitration be conducted "under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange" as an agreement to arbitrate in New York. Thus, the court synthesized the applicable law and arbitral rules as conferring personal jurisdiction in New York, which in turn deemed Bellview to reside in the Southern District for all venue purposes.

Finally, the court addressed Travelport's request for an anti-suit injunction. The court reviewed the requirements for the issuance of a foreign anti-suit injunction: "(1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined." *quoting China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35, 1988 AMC 880, 882 (2d Cir. 1987). The court concluded that the prerequisites were clearly met.

The court then analyzed the five suggested "*China Trade* factors" employed by the Second Circuit: (1) frustration of a policy

in the enjoining forum; (2) the foreign action would be vexatious; (3) a threat to the issuing court's *in rem* or *quasi in rem* jurisdiction; (4) the proceedings in the other forum prejudice other equitable considerations; or (5) adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment. The court held that the first factor supported an anti-suit injunction because of strong federal policy in support of arbitration. The tactics of Bellview in first suggesting arbitration then initiating a Nigerian court action satisfied the second factor of vexatiousness. The court also found that the delay and expense occasioned by Bellview's conduct were "palpable" and that the Nigeria action created a serious risk of race to judgment. Thus, Travelport's petition was granted in its entirety.

Agreement to Arbitrate May be Found Where One Party Did Not have Actual Notice of Arbitration Clause

Filho v. Safra Nat. Bank of New York, 489 F.App'x 483 (2d Cir. 2012), considered whether a bank customer can be bound to arbitrate based on a modification of the banking agreement that was not actually communicated to the customer.

Filho opened an account with Safra National Bank of New York ("Safra") in 2002. At that time, the conditions governing the account were contained in a document titled "International Banking Terms and Conditions" ("IBTC"). The IBTC did not include an arbitration clause, but did permit the bank unilaterally to change the terms of the agreement. The IBTC also provided that Safra would hold all of Filho's mail for pickup and that Filho would be bound by any announcements in the documents so held, regardless of whether he saw them. In 2005, Safra changed the terms and conditions governing Filho's account to a document titled "General Terms and Conditions" ("GTC"). The GTC included an arbitration clause. The provisions regarding notice did not change.

Filho sued Safra in the Southern District of New York for claims involving the account. Safra moved to dismiss the Filho's action in favor of arbitration pursuant to the arbitration clause in

the GTC. The district court granted Safra's motion without an evidentiary hearing, "adopting the bank's position that Filho had constructive notice of the GTC and that the bank was entitled to impose arbitration on Filho through putative delivery of the GTC to Filho's held mail."

On appeal, the Second Circuit vacated and remanded to the district court, finding that the record did not contain sufficient evidence to establish Safra's compliance with its own notice provisions. Despite the technical disposition of the appeal, the Second Circuit gave some insight on its views of the merits of Safra's motion.

Citing the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S.Ct. 1758, 1773-74 (2010), the court explained that "consent is the foundation of arbitration" and that a "party may be compelled to arbitrate a dispute only if he or she has agreed to arbitration." *Filho*, 489 F.App'x at 484 *citing Bell v. Cendant Corp.,* 293 F.3d 563, 566 (2d Cir. 2002). If there is a factual issue "as to the making of the agreement for arbitration, then a trial is necessary." *Id*. q*uoting Bensadoun v. Jobe–Riat,* 316 F.3d 171, 175 (2d Cir. 2003). To determine whether the bank's procedures amounted to an agreement to arbitrate, the court applied state law principles of contract formation.

Turning to the record before it, the court observed that the documents signed by Filho appeared to bind him to all changes imposed by Safra, as long as notice of the change was delivered to Filho's held mail. The IBTC also provided that notices are binding ten days after delivery, and that notices are deemed delivered as of the date printed on correspondence or on the mailing list held by Safra.

Despite Filho's apparent consent to be bound by notices delivered to his held mail, the court did not find any evidence of a mailing list or correspondence indicating whether the GTC was actually delivered to Filho's held mail. Moreover, Filho claimed that his held mail did not contain a copy of the GTC when he eventually

retrieved it. Accordingly, the court held that a trial was necessary to determine whether Filho received notice of the GTC as required by the IBTC.

The Second Circuit also directed the district court to consider two additional issues raised by Filho in the first instance. First, Filho argued that the GTC constituted an entirely new contract and not merely an amendment of the IBTC, so Filho's consent to unilateral "amendments" did not permit Safra to impose the GTC. Second, Filho argued that an arbitration agreement was not the sort of term that Safra could unilaterally impose pursuant to the IBTC. The court did not opine on these issues.

Second Circuit Holds That Declaratory Judgment Act Confers Federal Subject Matter Jurisdiction Where Plaintiff Disclaims Existence of Maritime Contract

In *Garanti Finansal Kiralama A.S. v. Aqua Marine and Trading Inc.,* 697 F.3d 59, 2012 AMC 2926 (2d Cir. 2012), the Second Circuit *nostra sponte* addressed the jurisdictional applicability of the Declaratory Judgment Act ("DJA") to situations where the plaintiff in admiralty disclaims the existence of a maritime contract. The plaintiff, Garanti Finansal Kiralama ("GFK"), had filed a declaratory judgment action in the Southern District of New York after Aqua Marine and Trading, Inc. ("AM") initiated arbitration against GFK in New York, demanding to be paid for bunkers AM delivered to the M/V CEMREM and the M/V SEMA ANA, both of which were owned by GFK.

GFK, which had not signed the order confirmations, argued that it was not bound to arbitrate the dispute. The order confirmations had been signed by an entity, CMR, "as manager on behalf of the registered owners." GFK claimed that it had leased the vessels to non-party shipping companies on bareboat charters and that CMR was not their agent. AM argued that GFK was bound by the contract as a matter of law and pointed to various documents where CMR had listed itself as the manager of the CEMREM and two insurance certificates on the CEMREM issued jointly to GFK and CMR "as

Mangers." The district court agreed with AM and dismissed the case from the bench, citing federal policy in favor of arbitration and finding that it was more than likely that CMR was functioning as the agent for GFK.

Before visiting the merits of the district court's holding, the Second Circuit reviewed the jurisdiction of the lower court *nostra sponte*, as both parties and the lower court had assumed that the court had admiralty jurisdiction over the case. As the court noted, the dispute involved the peculiar situation where a declaratory judgment plaintiff, who also has the burden of proving subject matter jurisdiction, "will be simultaneously denying the existence of a contract and invoking our admiralty contract jurisdiction." *Garanti,* 697 F.3d at 66, n.7, 2012 AMC at 2932 n.7. The court noted that if AM had brought the action against GFK seeking to collect on the bunkers contracts, the federal courts would unquestionably have admiralty jurisdiction over the dispute.

After discussing the history and purpose of the DJA, the court spent considerable time reviewing *Skelly OilCo. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). In *Skelly Oil*, the Supreme Court found that a declaratory judgment action did not present federal-question jurisdiction because, had the action been a coercive suit, the federal question would only have arisen as a defense to a state-law claim. As such, the complaint in a traditional setting would have been barred by the well-pleaded complaint rule. Based on *Skelly Oil*, the subject-matter jurisdiction analysis in a DJA suit requires that the court "conceptually realign the declaratory judgment parties and claims and analyze them as they would appear in a coercive suit." *Garanti*, 697 F.3d at 67, 2012 AMC at 2935. The court noted that no federal appeals court had ever squarely applied *Skelly Oil* to an analysis of admiralty jurisdiction. The court decided that the "simple and effective analysis" of *Skelly Oil* should apply to admiralty suits based on the federal government's strong interest in resolving admiralty suits in federal court, as well as to not deprive certain admiralty litigants of the speedy and inexpensive tool of declaratory judgments. As the court would unquestionably have jurisdiction over the hypothetical coercive suit by AM to enforce

the bunkers contracts, the court found it had jurisdiction over the instant declaratory judgment action.

The court then turned to the merits of the DJA suit. The court reversed and remanded the district court's dismissal of the action because the lower court had prematurely resolved disputed factual issues regarding CMR's status as GFK's agent. The existence and scope of an agency relationship can only be resolved as a matter of law if (1) the facts are undisputed; or (2) there is but one way for a reasonable jury to interpret them. As AM raised the agency issue as an affirmative defense to the existence of a contractual relationship via agency principles, AM was required to prove such relationship. The court noted various existing factual disputes concerning the actual authority of CMR and determined that the district court had apparently made factual findings and legal findings which misconstrued basic principles agency law and precluded dismissal. With respect to the issue of apparent authority, the court determined that the only evidence that "plausibly" stood as a statement by GFK which could be reasonably interpreted as conveying authority consisted of the insurance certificates issued jointly to CMR and GFK. However, reaching such a conclusion would require an impermissible adverse inference against GFK, the non-moving party on this issue. As the district court's treatment of the dispute was tantamount to a grant of summary judgment, the court remanded the case to the Southern District.

Second Circuit Affirms Dismissal of Court Action Where Challenge to Existence of Arbitration Agreement is Fraudulent Inducement of the Contract as a Whole

In *Ipcon Collections LLC v. Costco Wholesale Corp*., 698 F.3d 58 (2d Cir. 2012), the Second Circuit affirmed the Southern District of New York's dismissal of an action in favor of a pending arbitration, as well as the lower court's refusal to impose sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. Ipcon Collections LLC ("Ipcon") was the successor-in-interest to ES Electrosales Leadsinger, Co. Ltd. ("Leadsinger"), which had entered into a series of agreements to sell its goods – including

karaoke systems - on a consignment basis to Costco Wholesale Corp. ("Costco"). Costco allegedly did not perform its obligations under such contracts, each of which contained a clause requiring the parties to submit any disputes concerning the contracts to arbitration.

Ipcon sued Costco alleging various causes of action, including, *inter alia*, fraud, conversion and fraud in the inducement. Costco then initiated arbitration proceedings and moved pursuant to Federal Rule of Civil Procedure 12(b)(6) and the Federal Arbitration Act to dismiss the district court action as barred by the arbitration clause in each agreement. Costco also sought sanctions pursuant to FRCP 11. Ipcon cross-moved to stay arbitration and argued that the arbitration clauses were ineffective because the parties had never formed valid contracts in the first place based on Costco's fraudulent inducement.

The district court dismissed Ipcon's complaint because it found that Ipcon could not defeat the arbitration clause on the basis of fraud in the inducement by alleging that Costco had lied and misrepresented its intentions to induce Leadsinger to enter into the agreement. The Court also denied Costco's motion for sanctions. Both parties appealed the rulings and Costco again sought sanctions pursuant to Federal Rule of Appellate Procedure 38.

The Second Circuit first distinguished cases challenging a contract containing an arbitration clause as (1) those that challenge the contract as a whole and (2) those that challenge the arbitration clause itself. While a challenge to the arbitration clause itself may be adjudicated by a federal court, claims of fraud in the inducement of the contract generally may not. However, there is a limited exception where the party is questioning whether a contract was ever made.

Ipcon argued that the contracts between Costco and Leadsinger were void at their signing because Costco never intended to honor them. It further alleged that Costco committed "fraud in the factum," which would mean that the contracts were *void ab initio*. The court firmly rejected Ipcon's argument because

Ipcon's complaint actually asserted fraud in the inducement (in form and in substance). The court noted that fraud in the *factum* was limited to rare cases where the alleged misrepresentation goes to the proposed contract itself, such as where a party induces the other to sign a document by falsely stating its enforceability or by changing the documents after they were signed. As the basic elements of contractual formation were present, the court upheld the district court's determination that an arbitrator should be adjudicating Ipcon's fraud claims.

The appellate court also affirmed the denial of sanctions against Ipcon at the trial level. While it acknowledged that Ipcon's arguments were weak, "given the confusing nature of the division of responsibility between courts and arbitrators as to contract formation" the court declined to upset the district court's exercise of discretion.

District Court Properly Intervened Where Arbitrator Selection Process Suffered "Mechanical Breakdown"

The Fifth Circuit Court of Appeals ruled on a highly complex arbitral dispute in *BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd.*, 689 F.3d 481 (5th Cir. 2012). Noble and Exxon entered into a Drilling Services Agreement in 2009, pursuant to which Noble would provide offshore drilling contractor services to Exxon on Noble's semi-submersible drilling rig located in the waters off Libya. In March of 2010, Exxon entered into an agreement with BP, with Noble's consent, pursuant to which Exxon assigned and BP assumed the drilling agreement for the time required to drill two deepwater wells in the Libyan waters. Noble was required to maintain the rig according to the safety and operational requirements as per the original drilling agreement. The assignment and assumption of Exxon's obligations would be effective no later than June 1, 2010.

In April of 2010, BP inspected the rig and found several problems related to the safety and operation of the rig. A dispute ensued among the parties and Exxon eventually took the position that the rig was assigned to BP as from June 30, 2010 and that BP was

responsible to pay Noble. BP disclaimed a contractual relationship with Noble and asserted that the rig had not yet been assigned as it was not satisfied with the condition of the rig. BP informed Exxon and Noble that it was terminating the assignment agreement based on material breaches of the same and that BP had no obligation to pay either party.

The Assignment Agreement contained an arbitration provision. With respect to any arbitration to which Noble was a party, the Assignment Agreement mandated that such arbitration would be governed by the arbitration provisions in the Drilling Agreement. Section 18.2 of the Drilling Agreement provided, in relevant part: "Any dispute arising out of, or in connection with, this contract shall be finally settled by arbitration under the rules of the Arbitration and Conciliation Act 1990, by three (3) arbitrators appointed in accordance with such rules…." Schedule 1 to the Arbitration and Conciliation Act 1990 ("ACA"), incorporated as part of the Laws of the Federation of Nigeria, contains arbitration rules ("ACA Rules"). Pursuant to ACA Rule 7(1), "If three arbitrators are to be appointed, each party shall appoint one arbitrator; and the two arbitrators thus appointed shall choose the third arbitrator." Where the second party fails timely to name an arbitrator, ACA Rule 7(2) states that "the first party may request the court to appoint the second arbitrator." ACA defines "court" for purposes of Section 7 as "the High Court of a State, the High Court of a Federal Capital Territory, Abuja or the Federal High Court." The ACA has similar sections related to arbitrator appointment and vests such appointment in the Secretary-General of the Permanent Court of Arbitration at the Hague (the "PCA").

As neither party was paying its invoices, Noble served an arbitration demand on BP and Exxon as co-respondents seeking damages for breach of contract and nominated its arbitrator pursuant to ACA Rule 7(1). BP and Exxon realized that ACA Rule 7(1) could not accommodate a three-party dispute; if each party appointed an arbitrator, there would be three arbitrators and no neutral. BP and Exxon refused jointly to appoint one arbitrator.

BP subsequently filed suit in federal district court in Texas under the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards seeking judicial intervention in the parties' appointment process pursuant to 9 U.S.C. § 5, which provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

BP and Exxon each appointed arbitrators, reserving their rights at the same time. Exxon answered the complaint and agreed that a "lapse" had occurred and that judicial intervention was necessary. Noble moved to dismiss the complaint as it alleged that no "lapse" had occurred in the appointment process. Noble argued, in the alternative, that the court should order BP and Exxon to appoint an arbitrator jointly or, to the extent the BP and Exxon could not agree, the court should appoint the second arbitrator.

BP then moved for a final order under the FAA, requesting that the court intervene, dismiss the current slate of appointed arbitrators and require the parties to select the arbitrators under a different procedure. BP proposed multiple procedures, one of which would require the parties to engage in a five-arbitrator proceeding with the three current appointees and two neutrals. Exxon requested

that the court order the parties to proceed with the three appointed arbitrators. The district court granted BP's motion for a final order on the terms of BP's suggested five-arbitrator panel. Noble appealed the order and argued: (1) the district court lacked authority to intervene under 9 U.S.C. § 5 and that the issue of arbitrator selection was a procedural issue to be decided by an arbitrator and (2) that the district court erred in ordering a panel of five arbitrators, which was not in conformity with the three-arbitrator panel in the agreement.

The court first confirmed that it had subject matter jurisdiction over the dispute and then analyzed the district court's authority to intervene. It found that the district court's order granting BP's motion for final order, which resolved Noble's motion to dismiss, was a "final decision with respect to an arbitration" under 9 U.S.C. § 16(a)(3), which preserves immediate appeal of any such decision.

With respect to its first point, Noble argued that the ACA Rules provided a resolution to any lapse, as they allowed the first party appointing an arbitrator to request "the court" to appoint the second arbitrator. Noble contended that the "court" referenced in those rules was properly the PCA, the "appointing authority" referenced in Section 44(6) of the ACA. However, the court agreed with BP and Exxon that the arbitrator appointment process as agreed by the parties had reached a "mechanical breakdown" or lapse, which authorized the district court to intervene. The court defined "lapse" for purposes of 9 U.S.C. § 5 as "a lapse in time in the naming of the' arbitrator or in filling of a vacancy on a panel of arbitrators, or some other mechanical breakdown in the arbitrator selection process." *BP Exploration,* 689 F.3d at 492. It concluded that the parties had reached an "impenetrable deadlock" over the panel selection process, as the appointment of three arbitrators precluded appointment of a neutral arbitrator, which would violate the express terms of the arbitral agreement. The court supported its finding by looking to the UNCITRAL Rules, on which the ACA was based. The UNCITRAL Rules were amended in 2010 to provide for multi-party arbitrations and the Working Group recognized that Article 7 did not address

the appointment of arbitrators in such situations. Thus, the court found that the district court had authority to intervene based on the mechanical failure of the arbitral appointment process.

The court, however, did agree with Noble's argument that the district court erred in ordering a five-arbitrator panel. The court emphasized the need properly to form the arbitral panel, as a defective process could risk *vacatur* of an eventual award. As the five-member panel would be in contravention of the clear language of the parties' agreement, the Fifth Circuit found that the district court had exceeded its authority in creating a panel of a different size than the parties bargained for, effectively rewriting the parties' negotiated agreement.

In its remand, the court directed the district court to enter an order appointing three arbitrators. The Fifth Circuit also requested – but did not order – that the district court consider entering an order:

> (1) requiring BP and Exxon, as the co-respondents to Noble's arbitration demand, to appoint a second arbitrator, who would follow the agreed procedure for selecting a neutral member of the arbitral panel; (2) if BP and Exxon cannot agree on a second arbitrator by a certain date to be determined by the district court, the district court shall appoint the second arbitrator; and (3) if the two arbitrators cannot agree on the selection of a neutral member of the arbitral panel in accordance with the agreed procedure, the district court shall appoint the neutral arbitrator.

BP Exploration, 689 F.3d at 497**.**

The court noted that the district court was free to modify such requirements as it saw fit, so long as such order was not inconsistent with the court's opinion.

II. ISSUES ARISING DURING ARBITRATION PROCEEDINGS

Federal Arbitration Act Does Not Empower Court to Consider Procedural Issues such as Consolidation of Arbitrations

In *Rice Co. v. Precious Flowers Ltd*., 2012 AMC 1947, 2012 WL 2006149 (S.D.N.Y. June 5, 2012), the court denied the petitioner's motion to stay a New York arbitration pending the resolution of its petition to consolidate with another arbitration arising from the same voyage.

The underlying arbitrations involved a shipment of wheat from Texas to Peru. Precious Flowers Ltd. ("Precious Flowers") had chartered the vessel to The Rice Company ("TRC"), which in turn chartered the vessel to the Government of Peru ("Peru"). Both charter parties included an arbitration clause providing that all disputes would be submitted to the Society of Maritime Arbitrators ("SMA").

After the vessel discharged its cargo in November 2004, the cargo receivers asserted a claim against Precious Flowers for contamination and short delivery. Precious Flowers settled the claim for approximately $175,000. Precious Flowers then sought reimbursement for a portion of this amount from TRC and commenced arbitration in October 2010. TRC, in turn, commenced its own arbitration proceedings against Peru seeking indemnity for any amount it would be required to pay to Precious Flowers.

After the parties selected their arbitrators, but before umpires were appointed, TRC sought to consolidate the two separate arbitrations pursuant to Section 2 of the SMA Rules. Section 2 provides, in part:

> The parties agree to consolidate proceedings relating to contract disputes with other parties which . . . arise in substantial part from the same maritime transactions or series of related transactions, provided

all contracts incorporate SMA Rules . . . .

Peru opposed TRC's request to consolidate, and TRC petitioned the U.S. district court for an order compelling consolidation. TRC also filed a motion to stay the arbitration with Precious Flowers until the court decided its petition to consolidate.

To decide TRC's stay request, the court considered 1) TRC's likelihood of success on the merits, 2) irreparable harm to TRC, 3) prejudice to other interested parties, and 4) the public interest. On the first issue of whether TRC was likely to succeed, the court noted that its role under Section 4 of the Federal Arbitration Act is limited to determining the "question of arbitrability," i.e., the whether the matter is subject to arbitration. The court explained that questions of arbitrability included only "narrow circumstances," such as whether the parties are bound to a given arbitration clause or whether a concededly binding arbitration clause applies to a particular type of controversy. "By contrast, ' 'procedural' questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide.'" *Rice Co.*, 2012 AMC at 1952, 2012 WL 2006149, at *4 *quoting Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). Such procedural questions outside the court's jurisdiction include time limits, notices, laches, estoppel, and other conditions precedent to an obligation to arbitrate.

Turning to the issue at hand, the court explained that "absent a clear agreement to the contrary, the question of whether arbitration proceedings should (or should not) be consolidated is a procedural matter to be decided by the arbitrators, not by a court." *Id.* at 1953, 2012 WL 2006149, at *4. The court emphasized that TRC was seeking consolidation pursuant to the arbitrators' own rules, which the court considered to be within the arbitrators' expertise instead of its own. Accordingly, the court found that TRC was "almost certainly doomed to failure." *Id*.

Turning to the remaining stay factors, the court found that any harm from not granting a stay was not "irreparable" because the arbitrators could stay the arbitrations, if warranted, before

considering a request for consolidation. The court also found that TRC failed to show that the private and public interest factors were in its favor.

Accordingly, the court denied TRC's request for a stay.

Judicial Review of Arbitration Panel's Stay Limited

In *SH Tankers Ltd. v. Koch Shipping Inc.,* 2012 AMC 2096, 2012 WL 2357314 (S.D.N.Y. June 19, 2012), the court denied a petition (1) to compel the respondent to proceed with arbitration that was stayed pending the petitioner's compliance with a countersecurity award or (2) in the alternative, to vacate the stay. The court also granted the respondent's cross-motion to confirm a countersecurity order.

The parties' dispute arose after pirates hijacked SH Tankers Ltd.'s ("SH Tankers") oil supertanker while it was on charter to Koch Shipping International ("KSI"). SH Tankers' war risks underwriter, Garex, paid the $9 million ransom demand. Garex then commenced arbitration against KSI on behalf of SH Tankers seeking reimbursement for the ransom and related costs totaling $11.8 million. KSI counterclaimed against SH Tankers seeking $13.4 million for various losses caused by the hijacking.

During the arbitration, KSI sought an interim countersecurity award for its counterclaims, which the panel granted. SH Tankers failed to provide countersecurity and KSI moved to dismiss SH Tankers' claims for failure to comply with the countersecurity award. The panel denied KSI's motion, but agreed to KSI's subsequent request to stay the arbitration *sine die* until SH Tankers or Garex posted countersecurity. The panel noted that SH Tankers and Garex chose to disobey the countersecurity award and found that proceeding with the arbitration could force KSI to incur substantial legal fees to obtain what might be an uncollectible award. The panel advised the parties that it remained constituted to hear the parties' claims as soon as SH Tankers or Garex chose to provide countersecurity.

After the panel issued the stay, SH Tankers commenced an action in the Southern District of New York asking the court to compel KSI to prosecute its counterclaims or, alternatively, to vacate the stay. KSI cross-petitioned to confirm the interim countersecurity award.

Regarding the petition to compel, SH Tankers argued that KSI has "'refused to arbitrate' within the meaning of Section 4 [of the Federal Arbitration Act ("FAA")] by obtaining an indefinite stay of the arbitration and declining to proceed once the stay was in place." *SH Tankers,* 2012 AMC at 2100. FAA § 4 permits "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to petition the district court for an order directing such arbitration to proceed.

The court rejected SH Tankers' argument, explaining that "KSI has not refused to arbitrate within the meaning of Section 4 -- it neither commenced litigation in lieu of arbitration nor refused to comply with a Panel order to arbitrate." *Id*. at 2101. The court continued: "KSI's refusal to forfeit a favorable ruling -- obtained *within* arbitration -- is hardly a refusal to *submit* to arbitration." *Id*. On the contrary, SH Tankers was aggrieved by the panel's decision to grant the stay, not KSI's decision to abide by it. The court concluded that "KSI's adherence to the Panel's ruling to stay the arbitration pending the posting of security is not a refusal to arbitrate, and SH Tankers cannot attempt to thwart the Panel's ruling under the guise of 'compelling arbitration.'" *Id*. Accordingly, the court denied SH Tankers' petition to compel arbitration.

SH Tankers' petition to vacate the stay fared no better. SH Tankers argued that the Panel's decision to stay the arbitration amounted to "misconduct . . . in refusing to hear evidence pertinent and material to the controversy." *Id*. at 2101-02. The court disagreed, finding that the stay was a "nonfinal procedural order that this Court has no power to review." *Id*. at 2102. The stay "did not 'dispose' of any claim in the arbitration, much less 'finally….'" *Id*. Indeed, the court noted "even the stay itself is not final" insofar that the panel's

ruling provided that "'the Panel will proceed' with arbitration once security is posted." *Id*. at 2103. The court also disagreed with SH Tankers' argument that the practical effect of the stay was a final dismissal. The court echoed the panel's finding that SH Tankers and Garex chose not to post countersecurity and that arbitration would proceed once security was posted. If SH Tankers was unable, and not merely unwilling, to post security, then it needed to persuade the panel of this point.

The court also discussed the *functus officio* doctrine. Under this doctrine, arbitrators' authority over a question ends once they have finally decided the issues submitted to them. The court found a corollary to this doctrine: if an arbitrator is not *functus officio* with respect to an issue that is the subject of an interim award, then the interim award is not subject to judicial review. Because the arbitrators in the instant case expressly reserved their ability to revisit the ruling, the court found that the ruling "is neither final nor subject to judicial review." *Id*. at 2014. Similarly, the court found that the stay was not reviewable as a collateral order because it did not "conclusively determine" a question, insofar that the panel expected to "review and revisit" the stay once SH Tankers posted security.

As a separate ground for refusing to vacate the stay, the court noted that the FAA only permits the court to vacate "awards." Because the stay was an interim ruling, not an award, it was not subject to vacatur under Section 10 of the FAA.

Finally, the court considered KSI's cross-petition to confirm the panel's countersecurity award. The court found that, unlike the stay, the countersecurity award "*is* a final disposition of a separate issue, and thus reviewable and subject to confirmation." *Id*. at 2105. The court found that none of the FAA's enumerated grounds for refusing to enforce an award applied. Accordingly, the court concluded that it "must confirm the Security Award." *Id*. at 2106.

Interim Awards Finally and Conclusively Disposing of Independent and Separable Claim Enforceable in New York State Court

In *Cotugno v. Bartowski*, 2012, WL 4770137, 37 Misc.3d 1206, 961 N.Y.S.2d 357 (Sup. Ct., Suff. Co. 2012) the petitioner moved to confirm two interim arbitral awards in New York state court. Pursuant to the shareholder agreement for Hi-Tech Business Systems, Ltd. ("Hi-Tech"), the parties agreed to resolve any disputes concerning the same under binding arbitration before an arbitrator appointed by the American Arbitration Association. The claimant alleged that the respondent had frozen him out of Hi-Tech, had wrongfully misappropriated and diverted corporate assets and he had failed to pay the claimant pursuant to the parties' compensation agreement. The respondent asserted that the claimant was totally disabled within the meaning of the shareholder agreement, which triggered an automatic buyout of the claimant's interest in Hi-Tech. The parties agreed to bifurcate proceedings.

After the first phase of proceedings, the arbitrator issued an interim award in favor of Cotugno. The arbitrator found that Cotugno was not disabled within the meaning of the shareholder agreement and that Cotugno was underpaid and Bartowski overpaid during a seven-year period. The arbitrator ordered Bartowski to disgorge to Cotugno the excessive salary he had paid himself and his wife. The arbitrator then directed the parties to submit proposed awards regarding the amounts to be disgorged by Bartowski and also directed Cotugno to submit an application for his reasonable attorney's fees, costs and disbursements per the shareholder agreement. The arbitrator issued separate awards directing Bartowski to disgorge to Cotugno $138,434.29 plus interest and directing Bartowski and Hi-Tech to pay Cotugno $164,020.99 plus interest for his attorney's fees.

Cotugno moved to confirm and to enter judgment on the awards. The respondent opposed confirmation and argued that the awards were not final as is required by Article 75 of New York's Civil Practice Law and Rules ("CPLR"). As the court noted, an award is deemed final and may be confirmed where it finally and

conclusively disposes of a separate and independent claim. Under New York case law, an award need not dispose of all claims submitted to arbitration to be deemed final. Moreover, conclusive awards rendered pursuant to voluntary bifurcation agreements are final for purposes of enforcement. (citing *Universitas Educ., LLC v. Nova Group, Inc.*, 11 CIV. 1590 LTS HBP, 2012 WL 2045942 (S.D.N.Y. June 5, 2012) *aff'd,* 12-3504, 2013 WL 781100 (2d Cir. Mar. 4, 2013)) The court rejected respondents' argument, as the respondents failed to identify any claim in the first awards that was not severable from the second phase of proceedings. The court also found that it would be inequitable to require the claimant to wait until the conclusion of the second phase of proceedings before receiving the compensation and attorney's fees to which he was entitled.

Although the respondents had failed to cross-move to vacate the awards, the court still considered their arguments per the relevant case law. Bartowski and Hi-Tech argued that the arbitrator exceeded her power by directing Bartowski, rather than Hi-Tech, to pay Cotugno's salary; that the obligation to pay Cotugno's salary was a corporate obligation, not the personal obligation of a co-shareholder; and that for such reason the compensation award was miscalculated, awarded on a matter not submitted to the arbitrator, or that it was imperfect in manner or form.

The court discussed the broad discretion given to arbitrators and that, under New York law, where "the arbitration is conducted under a broadly worded arbitration agreement, the resulting award will not be vacated unless it is violative of a strong public policy, totally irrational, or exceeds a specifically enumerated limitation on the arbitrator's power." *Cotugno*, 2012 WL 4770137, *3 (quoting *Matter of Windsor Cent. School Dist. [Windsor Teachers Assn.] 306* A.D.2d *669, 670)*. The court rejected that the arbitrator exceeded her power, as there was no specific limitation on her power in the arbitration clause. The court dismissed the irrationality aspect of the argument, as it found that the arbitrator fashioned an appropriate remedy for Bartowski's breach of fiduciary duty in paying himself and his wife excess compensation. As such, the court rejected the

remaining arguments regarding the imperfection or miscalculation of the award.

11th Circuit Permits Discovery in Aid of Foreign Arbitration under 28 U.S.C. § 1782

In *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.,* 685 F.3d 987, 2012 AMC 2825 (11th Cir. 2012), the Eleventh Circuit Court of Appeals held that proceedings before private international arbitration panels are a "foreign international" tribunal for purposes of 28 U.S.C. § 1782(a), which allowed the moving party to seek evidence in aid of such proceedings.

A dispute arose between Consorcio Ecuatoriano de Telecomunicaciones S.A. ("CONCEL") and Jet Air Services Ecuador S.A. ("JASE") regarding alleged billing inflation in the companies' foreign shipping contract. JASE initiated arbitration proceedings in Ecuador against CONCEL for nonpayment under the contract. CONCEL contemplated private civil and criminal suits against two of its former employees who it claimed approved alleged fraudulent invoices from JASE. CONCEL sought discovery from JASE's U.S. affiliate, JAS Forwarding (USA), Inc., in the Southern District of Florida under 28 U.S.C. § 1782, which provides, in part: "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation…". 28 U.S.C. § 1782(a)

CONCEL successfully argued that proceedings before private international arbitration panels are a "foreign international" tribunal for purposes of 28 U.S.C. § 1782(a). CONCEL proffered two theories as to why this requirement was met: the pending arbitration between the parties was a proceeding already pending in a foreign tribunal and CONCEL wanted the evidence for use in reasonably contemplated civil collusion proceedings against two former employees. The court looked to the Supreme Court case *Intel*

Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004), which took a broad view of the statutory term "tribunal" based on a Senate report explaining that the word replaced "judicial proceedings" so as not to restrict the application of the statute to proceedings before conventional courts. The *Intel* court quoted the definition of "tribunal," which included arbitral tribunals, from Professor Hans Smit, who was the dominant drafter of the 1964 revision to 28 U.S.C. § 1782. In its application of the broad definition of "tribunal," the Supreme Court held that the Directorate-General of the European Commission acted as a "proof-taking" body and a "first-instance decisionmaker" whose decisions were reviewable in court, and was thus a tribunal as envisioned by 28 U.S.C. § 1782.

CONCEL presented evidence regarding the pending arbitration that, the court found, met the criteria articulated in *Intel*. The arbitral panel had the authority to resolve the dispute, receive evidence and award a final and binding decision. Moreover, the award could be appealed under certain circumstances which provided procedural and constitutional protections to the parties. JASE argued that the award is not subject to judicial review as the court will not address matters of substance in the award. The court rejected JASE's argument, noting the similarities in the limitations of United States court review of arbitration awards and finding that the mere limitation of review has no effect on the fact that a review occurs. Thus, the court held that the arbitration panel was a first-instance decisionmaker whose judgment would be subject to judicial review and fully in comport with *Intel*.

The court then addressed JASE's argument that the district court abused its discretion because CONCEL's application was an unduly intrusive or burdensome request as it sought confidential and proprietary information regarding JASE's pricing practices. The court rejected this argument and found that the requests were "undeniably relevant" to CONCEL's defense in the pending arbitration and "narrowly tailored" to dealings between the parties so as not to reveal general pricing information. Thus, the district court had not abused its discretion with respect to the substance of the request.

III. AWARD ENFORCEMENT ISSUES

Arbitral Panel Did Not Exceed Jurisdiction by Allowing Third-Party Beneficiary Standing

In *Thai-Lao Lignite (Thailand) Co. Ltd. v. Gov't of Lao People's Democratic Republic*, 492 F. App'x 150, 151-52 (2d Cir. 2012) *cert. denied*, 133 S. Ct. 1473 (2013) the Second Circuit addressed issues of arbitrability and deference to the panel's findings in affirming the confirmation of an arbitration award by the Southern District of New York. Thai-Lao Lignite (Thailand) Co., Ltd. ("TLL") had entered into a Project Development Agreement ("PDA") with the Government of The Lao People's Democratic Republic ("Laos"). Hongsa Lignite (Lao PDR) Co., Ltd. ("HLL") was a third-party beneficiary of TLL's interests in the PDA. After prevailing in arbitration in Malaysia, TLL and HLL moved to confirm the award pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as implemented by the Federal Arbitration Act.

Laos argued that *vacatur* was warranted because the arbitral panel had exceeded its jurisdiction under the PDA by allowing HLL standing as a third-party beneficiary. The PDA provides for arbitration governed by UNCITRAL rules. As the Second Circuit noted, article 21 of the UNCITRAL Arbitration Rules provides that the arbitral tribunal shall have the power to rule on objections to the tribunal's jurisdiction. The Second Circuit agreed with the district court that the panel was free to decide the scope of its own jurisdiction, including the standing of third-party beneficiaries. The Second Circuit also found that HLL's presence in the proceedings did not disadvantage Laos in any way.

The court then reviewed the district court's deferential standard of review in its analysis of the panel's decision under an abuse of discretion standard. Relying on *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974), the court held that the New York Convention does not permit second-guessing the

arbitrator's construction of an agreement. The court found that Laos merely sought to undo the panel's interpretation of the PDA, which lay beyond the scope of its review.

Southern District of New York Sanctions Party Seeking to Vacate Award for Advancing Frivolous Arguments

In *DigiTelCom, Ltd. v. Tele2 Sverige AB*, 12 Civ. 3082 RJS, 2012 WL 3065345 (S.D.N.Y. July 25, 2012), DigiTelCom, Ltd. and related companies ("Plaintiffs") moved to vacate the arbitration decision in favor of Tele2 Sverige AB ("Defendant"). Defendant cross-moved to confirm the award and moved for attorney's fees pursuant to 28 U.S.C. § 1927. The Southern District of New York confirmed the arbitration award and granted the Defendant's motion for its attorney's fees.

The dispute concerned telecommunications companies in Russia and their dealings regarding multiple agreements. The Plaintiffs initiated arbitration proceedings before the International Centre for Dispute Resolution ("ICDR") pursuant to arbitration provisions in the agreements. After three days of hearings, the arbitral tribunal dismissed Plaintiffs' claims and awarded Defendant its attorney's fees.

Plaintiffs appealed the arbitral award on three grounds: (1) imperfect execution of the award under Federal Arbitration Act ("FAA") § 10(a)(4) based on the arbitrators acting outside the scope of their authority; (2) manifest disregard of the law; and (3) evident partiality under FAA § 10(a)(2). District Judge Sullivan rejected each argument. The court found that the imperfect execution argument was merely an assault on the tribunal's factual findings and contractual interpretation. With respect to manifest disregard of the law, the court found that Plaintiffs' assertions were belied by the record and the detailed 117-page decision issued by the tribunal. The court dismissed the evident partiality challenge, as it found that Plaintiffs sought to infer partiality from alleged errors in fact-finding and contractual interpretation.

The court then turned to the fees awarded by the tribunal, which Plaintiffs claimed were unreasonable and in manifest disregard of the law. Judge Sullivan emphasized Plaintiffs' failure to object to the proposed fees in the first instance; as Plaintiffs never presented a legal argument as to why the fees were excessive or not allowed, the tribunal had no law to supposedly manifestly disregard. Secondly, Article 31 of the ICDR Rules allows the tribunal to fix the costs of the arbitration in its award, which may include legal fees. Article 31 provides broad discretion to the arbitral tribunal, as it allows the tribunal to apportion the costs among the parties as it sees fit based on the circumstances of the case. Thus, the court found the fee award within the governing arbitral rules and in no manner a manifest disregard of the law.

The court then examined Defendant's fee request. Pursuant to 28 U.S.C. § 1927, "[a]ny attorney…who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." In order to impose such sanctions, a court must find clear evidence that (1) the offending party's claims were entirely meritless and (2) the party acted for improper purposes. The court noted that sanctions are not to be imposed lightly; however, citing Southern District of New York and 11th Circuit precedent, stated that sanctions are particularly appropriate in the context of arbitration awards which are challenged merely for dilatory purposes. The court then heavily criticized Plaintiffs' misrepresentation of which facts were disputed or undisputed and selective quoting of the relevant agreements as "disingenuous at best." *DigiTelCom,* 2012 WL 3065345, at *7. Judge Sullivan also found that Plaintiffs had failed to cite any principle of law that the tribunal was to have ignored and only offered speculation as to why the tribunal was partial. Thus, the court determined that Plaintiffs' petition served only to cause the parties to incur unnecessary expense and delay implementation of the award.

Incorporation of AAA Rules is Consent to Jurisdiction for Confirmation of Final Awards

In *Noble Americas Corp. v. Iroquois Bio-Energy Co., LLC*, 12 Civ. 3236 JMF, 2012 WL 5278505 (S.D.N.Y. Oct. 25, 2012), the Southern District of New York confirmed an arbitration award of $918,435.00 in favor of Noble Americas Corp. ("Noble"). Noble had entered into an Ethanol Purchase and Sale Agreement ("Ethanol Agreement") and a Denaturant Supply Agreement ("Denaturant Agreement") with Iroquois Bio-Energy Company, LLC ("IBEC") in 2005 and 2006, respectively. A dispute arose between the parties regarding the automatic renewal provision in each Agreement. Pursuant to the terms of each Agreement, any disputes concerning the Agreements would be submitted to a three-person arbitration panel of the American Arbitration Association ("AAA") and governed by the AAA Commercial Arbitration Rules.

Noble successfully argued that IBEC had not provided Noble sufficient notice of its desire to terminate the Agreements and, as the automatic renewal provisions of the Agreements were thus effective, IBEC had breached the Agreements by refusing to perform. The panel awarded Noble $918,435.00 for IBEC's breach of the Ethanol Agreement and $78,686.00 for IBEC's breach of the Denaturant Agreement, interest thereon and arbitration costs of $30,554.37. Noble petitioned for confirmation of the award, its attorney's fees and costs associated with the petition. After the petition was filed, IBEC paid Noble the amount awarded for the breach of the Denaturant Agreement and the arbitration costs, leaving the confirmation of the Ethanol Agreement portion of the award as the only contested aspect.

IBEC did not argue that the award should be vacated or modified under any of the statutory provisions of the Federal Arbitration Act ("FAA"). Rather, IBEC opposed confirmation on the grounds that the court did not have subject matter jurisdiction because the parties had not explicitly consented in the Ethanol Agreement to entry of judgment by a federal court or otherwise agree that the award would be final.

IBEC based its argument largely on *Varley v. Tarrytown Assocs., Inc.,* 477 F.2d 208 (2d Cir. 1973), where the Second Circuit held that mere incorporation of the AAA Rules was insufficient to provide federal jurisdiction. The court squarely rejected IBEC's argument based on subsequent case law and the AAA Rules. After *Varley*, the AAA amended its rules. AAA Rule 48(c) provides that parties "shall be deemed to have consented that judgment on the arbitration award may be entered in any federal or state court having jurisdiction thereof." The court looked to *Idea Nuova, Inc. v. GM Licensing Grp., Inc*., 617 F.3d 177 (2d Cir. 2010), in which the Second Circuit plainly stated that "parties to AAA arbitration consent to judicial confirmation of final arbitral awards." 617 F.3d at 182. Thus, the court held that where parties incorporate the AAA rules as in the Ethanol Agreement, the FAA's "consent to confirmation" requirement is met and a court has subject matter jurisdiction to confirm.

Noble requested attorney's fees in its reply memorandum. The court first noted that it may require the payment of attorney's fees where an arbitral award is challenged without justification. Next, the court criticized IBEC's opposition to confirmation as "a meritless argument that was squarely rejected by the Second Circuit only two years ago." *Noble Americas*, 2012 WL 5278505, at *3. The court added that "IBEC conspicuously failed to cite *Idea Nuova* or reference the fact that the AAA Rules in *Varley* were materially amended" and cited the New York Code of Professional Responsibility that requires counsel to disclose adverse controlling authority. *Id*. Although the court seemed poised to sanction IBEC, as Noble had requested attorney's fees in its reply brief, it allowed IBEC an opportunity to be heard before definitively addressing the issue.

UNCITRAL Arbitration Rules art. 21 Provides Clear and Unmistakable Evidence of Intent to Refer Questions of Arbitrability to Arbitrators "In the First Instance"

In *Schneider v. Kingdom of Thailand*, 688 F.3d 68 (2d Cir. 2012), the Second Circuit affirmed the Southern District of New

York's confirmation of an arbitration award of over 30 million euros in favor of Walter Bau AG ("Walter Bau"), represented in the confirmation proceedings by its insolvency administrator, Schneider. Walter Bau initiated arbitration proceedings against the Kingdom of Thailand ("Thailand") in 2005 seeking damages arising out of investments made by its predecessor in interest in Thailand between 1989 and 1997 in a tollway project in Thailand. The arbitration was commenced based on a bilateral investment treaty entered into between Germany and Thailand in 2002, which had retroactive effect. The treaty permitted arbitral resolution of disputes between Germany or Thailand and an investor from either country concerning "approved investments" under the treaty. A three-member panel was composed based on the Terms of Reference entered into by Walter Bau and Thailand, which empowered the tribunal to "consider…objections to jurisdiction" and incorporated the UNCITRAL Arbitration Rules as the procedural rules governing the arbitration.

Thailand objected to the jurisdiction of the tribunal by claiming that Walter Bau's investments were not "approved investments" that enabled arbitration. The tribunal reviewed written submissions on the issue, conducted a two-day hearing then issued a 43-page unanimous opinion confirming that the dispute concerned "approved investments" as defined in the treaty. After an 11-day hearing on the merits, the tribunal awarded Walter Bau over 30 million euros in damages, costs and expenses.

Walter Bau petitioned for confirmation of the award in the Southern District of New York under the New York Convention and Thailand cross-moved to dismiss, arguing that the tribunal lacked jurisdiction for the same reasons as in the arbitration and that *forum non conveniens* mandated dismissal as well. The district court decided that it need not conduct a *de novo* review of the award because the "approved investments" issue went to the scope of the agreement and did not concern a question of formation. It then performed a deferential review of the tribunal's jurisdictional determination and confirmed the award. Thailand appealed the adverse ruling, but not on its *forum non conveniens* defense.

Schneider argued that because the question of whether the tollway project involved "approved investments" concerns the scope of the agreement, and not its formation, the district court correctly performed a deferential review of that question without discerning whether there was clear and unmistakable evidence of the parties' intent to submit the question to the tribunal. The court agreed that an arbitration agreement unquestionably existed and that the issue went to the scope of the agreement. However, the court determined that the district court should not have refused to determine independently whether the tollway project involved "approved investments" without finding clear and unmistakable evidence of the parties' intent to submit the question to arbitration. The court then undertook its own analysis of the facts.

The court first looked to the UNCITRAL Arbitration Rules, as the parties agreed to such procedural rules in the Terms of Reference. Under article 21 of the UNCITRAL Arbitration Rules, "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement." The court then applied its recent case law to dispose of the issue. In *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011), the court held that a bilateral investment treaty's incorporation of the UNCITRAL Arbitration Rules constituted clear and unmistakable evidence that the parties intended questions of arbitrability to be decided by the arbitral panel "in the first instance." Coupled with the Terms of Reference, which empowered the tribunal to "consider…objections to jurisdiction," the court held that UNCITRAL Arbitration Rules clearly and unmistakably agreed that the tribunal would consider matters affecting its jurisdiction in the first instance. The court noted that to require the district court to consider such issues *de novo* would frustrate the advantages of speed and lower costs associated with arbitration as opposed to court proceedings. Based on the foregoing, the court held that the tribunal's decision on arbitrability was reviewed with deference and affirmed confirmation of the award.

[Editors' note: The editor wishes to acknowledge the contributions of Patrick O'Mea and David Cole, who wrote the case summaries appearing herein, and of the following members who took the time to contribute cases for the newsletter: Michael Marks Cohen, Keith Heard and Peter Skoufalos.]

COMMITTEE ON CARRIAGE OF GOODS

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CARGO NEWSLETTER NO. 60

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"IT'S ALIVE! IT'S ALIVE!…"
(With Apologies to Colin Clive, Wherever you Are)

Man Ferrostaal, Inc. v. M/V Akili, 704 F.3d 77, 2013 AMC 113 (2d Cir. 2012)

A shipment of steel pipe was transported from Shanghai to New Orleans. The pipe had been placed at the bottom of a cargo hold and was damaged when heavier pipes were placed on top. Damages amounted to some $286,078.32.

Man Ferrostaal (a sub-voyage charterer) filed an action *in rem* against the vessel and in personam against the owner of the vessel, its manager and S.M. China (a sub-charterer). The time charterer (Seyang Shipping, Ltd.) was not made a party to the action. S.M. China was never served.

The date and provisions of the charter party between Seyang Shipping, Ltd. and S.M. China are not known. The time charter between the vessel owner and Seyang was dated June 19, 2006 and the voyage charter between S.M. China and Man Ferrostaal was dated June 8, 2006 with the vessel as "TBN" (to be named).

The district court, after a bench trial, found the vessel liable *in rem* on the basis it was a "common carrier" and had ratified the bill of lading issued on behalf of S.M. China when it loaded the

cargo and sailed. At the same time, it held the vessel owner and its manager not liable in personam.

Appeal was taken to the Second Circuit Court of Appeals on behalf of the vessel, arguing that the district court erred in holding the vessel liable *in rem* and in holding the Carriage of Goods by Sea Act applied, asserting the vessel was not a "Carrier" under that Act. Man *Ferrostaal* crossed appealed from the district court's failure to hold the vessel owner and the manager liable in personam.

The circuit court affirmed the district court's decision, but for different reasoning.

As to the argument that the vessel was not liable *in rem* as it was not a "carrier" within the meaning of COGSA, the court disagreed: "COGSA assumes the existence of the *in rem* proceeding rather than creates it.", noting that, prior to the enactment of COGSA and the Harter Act, maritime law held vessels liable *in rem* for cargo damage due to improper stowage. *Man Ferrostaal*, 704 F.3d at 83, 2013 AMC at 118-19.

It disagreed with the district court's reasoning that the vessel was liable *in rem* as a COGSA carrier in ratifying the bill of lading on sailing with the cargo:

> The "implied ratification" doctrine gives rise directly to *in rem* liability. It does not render a vessel a carrier under COGSA.

Id. at 83 n.6, 2013 AMC at 119 n.7

The court found the vessel, "by setting sail with cargo on board, impliedly ratified the contract of the affreightment between S.M. China and Ferrostaal." *Id*. at 84, 2013 AMC at 119. "As between S.M. China and Ferrostaal, the contract of affreightment was the Voyage Charter Party rather than the bill of lading." *Id*., 2013 AMC at 119.

Referring to its prior decision in *Insurance Company of*

North America v. S/S American Argosy, 732 F.2d 299, 1984 AMC 1547 (2d Cir. 1984), the court distinguished that case as recognizing that the ratification doctrine applied where a bill of lading had been issued "by a charterer of the vessel," but declined to extend the doctrine to situations involving NVOCCs (in the *American Argosy*, the NVOCC issued its own bill of lading which differed from the vessel owner's bill of lading.). The court stated "unlike an NVOCC, S.M. China operated the ship for the purpose of carrying cargo pursuant to a charter agreement, as authorized by the ship's owner, and the ratification doctrine therefore applies." *Man Ferrostaal*, 704 F.3d at 84 n.7, 2013 AMC at 119 n.7.

> To sum up, even if a vessel is not a "carrier" within the meaning of COSGA, maritime law renders vessels liable *in rem* for a carrier's violations of its obligations.

Id., 2013 AMC at 120.

The court next dealt with the argument that a provision of the voyage charter called for stowage be "free of risk and expenses to the vessel…".

The court noted the Hague-Visby convention was "almost identical with COGSA" (the convention was incorporated into the clause paramount of the voyage charter party). The court commented on dealing with the "distinction" between "public" or "private" carriage and found it did not need to resolve any of the various issues which might be raised because the Voyage charter party clause paramount incorporated the Hague-Visby Rules. Thus, even if COGSA did not apply, the voyage charter party provided rules regarding the impermissibility of a waiver of *in rem* liability, i.e. Hague-Visby identical to those of COGSA.

Turning to the clause paramount of the voyage charter party, the court found it identified the law governing the rights and liabilities of the parties and, thus, superseded the free-in-and-out provision. The court emphasized the clause paramount itself stated

its provisions governed "[n]otwithstanding any other provision in this contract." Therefore, the clause paramount incorporated the prohibition found in the Hague-Visby Rules which supersede the free-in-and-out provision as one which should be taken as relieving the vessel of liability for improper stowage. It thus found the vessel liable on the basis of the voyage charter party.

As to Ferrostaal's argument that the owner/manager of the vessel should be liable *in personam*, the court noted the sub-charterer was not authorized to issue bills of lading on behalf of either and neither clearly had nothing to do with the stowage of the cargo or with respect to the documentation issued.

[Editors' note: In its decision, the district court, referring to 46 U.S.C. Section 30701, stated: "Since a carrier can include "the owner, manager, charterer, agent, or master of a vessel," each of the defendants may be a carrier by the language of the Act. *Id*".

The Second Circuit in its decision stated: "COGSA defines a 'carrier' to mean 'the owner, manager, charterer, agent, or master of a vessel,' 46 U.S.C. Section 30701, including the 'owner or the charterer who enters into a contract of carriage with a shipper'. *Id.* at Note § 1(a)."

The Legislative History of 46 U.S.C. § 30701 explains the definition of "carrier" *refers to the Harter Act* and is effective as of the recodification of the Act, October 6, 2006. The Legislative History indicates the definition was added based upon language appearing in various provisions of *the Harter Act*.

The Carriage of Goods by Sea Act is included as a note following Section 30701 without *modification or amendment*.]

YOU DON'T GOT IT, YOU DON'T GET IT….

Underwriters at Interest Under Bailee Ins. Policy No. 09RTAMIA1158 v. SeaTruck, Inc., 858 F. Supp. 2d 1334, 2012 AMC 1662 (S.D. Fla. 2012)

Arrangements were made for the transportation of a shipment from the United States to Trinidad. The cargo owner, through a freight forwarding company, engaged the services of the defendant for transportation of the cargo to Trinidad. The freight forwarder leased space for the cargo in a warehouse in Doral, Florida where it awaited shipment. The relationship between the cargo owner and defendant, SeaTruck, "would have been governed by the terms of SeaTruck's standard bill of lading, to be issued once the cargo was loaded on board SeaTruck's vessel." SeaTruck, 858 F. Supp. 2d at 1336, 2012 AMC at 1663.

The defendant carrier (Seatruck) provided the warehouse operator with a container, along with a confidential booking number to be used to reference and identify the cargo to be shipped.

A "truck driver", claiming to be a representative of the carrier, arrived at the warehouse and provided the booking number for identification. The cargo was loaded into the driver's truck and the truck departed. Shortly after the cargo left the warehouse, SeaTruck's representative provided a second, additional tracking number and stated the warehouse operator should request the new number from anyone who came to pick up the cargo. Allegedly, this second number was issued when SeaTruck realized its security had been breached. Soon after the issuance of the second number, a SeaTruck driver arrived at the warehouse for the cargo, but, by that time, the cargo was no longer there. The first driver was an imposter who absconded with the cargo before anyone caught onto the ruse.

The plaintiff underwriters paid $243,208.30 and then brought an action in state court, claiming against the SeaTruck defendants, among others, for negligence. SeaTruck removed the action to federal court based upon COGSA. The underwriters filed an amended complaint, asserting the same substantive claim for negligence in separate counts and then requested remand of the action back to state court on the basis of lack of subject matter jurisdiction.

The court noted federal courts are courts of limited jurisdiction and that a "removing defendant bears the burden of

proving proper federal jurisdiction…any doubts about the propriety of federal jurisdiction should be resolved in favor of remand to state court." *Id*. at 1337, 2012 AMC at 1665 (Citing cases).

The SeaTruck defendants premised removal of the action on the basis of a federal question, claiming that state law claims were preempted by COGSA.

The court noted COGSA only applies from the time cargo is loaded onto a carrier's vessel until it is discharged; however, it also noted that parties may agree in the bill of lading to extend the application of COGSA to pre-loading and post-discharge periods.

While it was undisputed that no bill of lading was issued, it was agreed by the parties that in some circumstances, a bill of lading that would have been issued, such as a standard bill of lading, might still bind the parties. SeaTruck's standard bill of lading contained a clause paramount making COGSA applicable before the goods were loaded and after they were discharged from the vessel.

With respect to SeaTruck's argument that the clause paramount of the bill of lading extended COGSA to cover the circumstances involved, the court found no authority for the extension of COGSA to a period prior to the point where the carrier or one of its agents takes custody of the cargo: "The bills of lading found by courts in this Circuit and others to extend COGSA to pre-loading or post-delivery periods have generally found such extension where it was limited to the time of the carrier's actual physical custody of or responsibility for the cargo." *Id*. at 1339, 2012 AMC at 1667-68 (Citing cases).

The court rejected SeaTruck's argument that COGSA should be extended

> to allow COGSA claims to exclusively cover an alleged failure to safeguard internal security information while the carrier had neither custody of nor ultimate responsibility for the cargo in question. To call such circumstances a loss of cargo in the course of shipment is something of a mischaracterization.

> The Court is not convinced that parties may extend COGSA to a pre-loading period before the carrier takes actual custody of the cargo.

Id. at 1340, 2012 AMC at 1669.

As to the carrier's bill of lading, the court noted that, even if the parties could contractually extend COGSA well beyond the scope of the carrier relationship, the express terms of SeaTruck's standard bill of lading did not extend COGSA's application to a pre-custody period.

The court found the paramount clause of the carrier's standard bill of lading "did not, by its own terms, effectively extend COGSA's application to a pre-loading, pre-custody period. (assuming that it could even do so)." *Id*. at 1342, 2012 AMC at 1672.

The court granted the motion, remanding the case to the appropriate state court.

BUT COGSA MAY GO ALL THE WAY….

Royal & Sun Alliance Insurance, PLC v. Service Transfer, Inc., 2013 AMC 345, 2012 WL 6028991 (S.D.N.Y. 2012)

Transportation of a shipment of frozen human plasma was booked from Erlanger, Kentucky to Norfolk, Virginia and thence by sea to Bremerhaven, Germany, en route to its ultimate destination in Vienna, Austria. During the road leg between Kentucky and Virginia, the truck driver fell asleep and drove the truck off the road. The truck burned and the shipment was lost.

The shipment was subject to a sea waybill which provided for through intermodal transportation of the goods from Erlanger, Kentucky to Vienna, Austria. For the purposes of the waybill, APL was the "Carrier" and plaintiff's assured was the "Merchant" shipper. The trucker acted as a sub-contractor of APL with respect to the shipment.

[APL was not made a party to the action, suit being brought by the interested cargo underwriter against the inland trucker.]

The waybill included a clause paramount and a Himalaya clause which extended COGSA to the period prior to loading and permitted APL's sub contractors to invoke COGSA's liability limitations, respectively.

The trucker, in a motion for partial summary judgment, argued it was entitled to the limitation of liability in the ocean's carrier's sea waybill and that the plaintiff's assured had benefited from APL's "all-in" door-to-door rates and the corresponding limitations on APL's liability under COGSA. The plaintiff underwriter opposed the motion, arguing that the Carmack Amendment governed the case, not COGSA.

The court noted that COGSA allowed the option of extending COGSA terms by contract to cover the entire period in which the goods would be under a carrier's responsibility, including a period of inland transport. (citing *Regal-Beloit*).

In contrast, the Carmack Amendment governs the terms of bills of lading issued by domestic motor carriers providing transportation or service subject to the jurisdiction of the Surface Transportation Board ("STB").

The court found the clear terms of the waybill indicated that COGSA governed the matter. The ocean freight services agreement between the plaintiff's assured and APL provided that liability for any freight claims should be determined pursuant to the terms and conditions of the waybill. The waybill specified that APL was responsible for the performance of the carriage from the "Place of Receipt…to the…Place of Delivery". The combined carriage indicated on the waybill was from Erlanger, Kentucky to Vienna, Austria via the ports of Norfolk, Virginia and Bremerhaven, Germany. It contained a clause paramount which specifically extended COGSA's application to the inland portions of the shipment.

The court noted, as a preliminary matter, that the Carmack Amendment, by its terms, does not apply to non-receiving carriers transporting goods as part of a shipment between the United States and a non-adjacent foreign country under a through bill of lading (citing cases). Thus, at most, "Carmack could govern the domestic portion of a shipment from the United States to an adjacent foreign country. That is not the situation here." *Royal,* 2013 AMC at 350, 2012 WL 6028991, at *3.

The plaintiff underwriter argued that the Supreme Court decision in *Regal-Beloit* supported its argument that the trucker acted as a "receiving carrier" subject to the Carmack Amendment. The court noted *Regal-Beloit* addressed international shipments coming into the United States, but, in that case, the Supreme Court chose not to address the status of shipments received in the United States for export. Nonetheless, it stated the reasoning of the Supreme Court supported the application of COGSA in this case.

The court considered that *Regal-Beloit* established a two-part test for determining whether the Carmack Amendment applies to a particular domestic transport of goods. First, the carrier must provide transportation or service "subject to the jurisdiction of the [STB]." Second, the carrier must "receive the property" for transportation under the STB's jurisdiction over domestic motor transport.

The court found the second prong of the test precluded application of the Carmack Amendment, even though it was undisputed that the trucker acted as the first carrier to transport the plasma from Kentucky:

> Being the first carrier does not necessarily make [the trucker] the "receiving" carrier for the purposes of Carmack coverage. Instead, the "receiving" carrier is the "principal" party to the contract governing the subject shipment…and is responsible for the transportation to destination." (citation omitted) In other words, it is the carrier which holds "unity of

> responsibility for the transportation to destination. (citing cases).

Id. at 351, 2012 WL 6028991, at *4.

In the instant case, it was undisputed that the trucker was not the carrier responsible for the entire course of the shipment. A single waybill was signed and a single "all-in" through rate paid. Therefore, the trucker did not function as a "receiving" carrier, and the Carmack Amendment did not apply.

Noting the potential impact on through bills of lading in international shipping, the court found "[a]lthough the Supreme Court has not addressed the present circumstances, where goods are received at a point in the United States for export, *see* [*Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S.Ct.] at 2444, [2010 AMC at 1532,] the same reasoning applies to those contracts which create a single transaction for shipments across inland segments to overseas destinations." *Id*. at 352, 2012 WL 6028991, at * 4.

The court dealt with the plaintiff underwriter's argument that the bill of lading of its assured acted as a "de facto" second interstate domestic bill of lading" extending Carmack's coverage to the trucker.

The court rejected this theory, noting that the bill of lading indicated that it involved a shipment from Kentucky to Vienna, not a domestic shipment. Second, even if it were assumed that the bill of lading was intended to cover the interstate shipment between Kentucky and Virginia, Carmack would still not apply as, when a non-receiving carrier signs a second bill of lading in connection with a through shipment, "'Carmack makes any subsequent bill of lading void unless the so-called second bill of lading represents the initiation of a new shipment.'" *Id*. at 353, 2012 WL 6028991, at *5 *citing* *Regal-Beloit*, 130 S. Ct. at 2443, 2010 AMC at 1531. A second bill of lading is thus invalid "unless the connecting carrier has received a consideration for the bill of lading in addition to that which flowed under the bill of lading issued by the initiating carrier."

The trucker did not receive any freight payment from the plaintiff's assured, nor was any other form of consideration exchanged or received by the trucker. The court held COGSA governed the claim at issue and granted the trucker's motion for partial summary judgment.

WHEN THE MUSIC IS OVER….

Orient Overseas Container v. Crystal Cove Seafood,
10 CIV 3166 PGG GWG, 2012 WL 6720615
(S.D.N.Y. Dec. 28, 2012)

The ocean carrier filed an action to recover damages for the wrongful refusal to accept delivery of frozen tilapia [see Newsletter No. 59]. The defendant consignee brought a counter claim under COGSA for damage to that shipment. The district court awarded damages to each side on its claim ($4,390 for the carrier's demurrage claim and $60,860 for the cargo damage claim). (The carrier had previously collected $30,610 by way of salvage sale). The Court also granted the consignee's application for attorney's fees "to the extent it is premised on (the carrier's) challenge to the counter claim for damage to the cargo."

In a nineteen page decision, the United States magistrate judge to whom the matter was assigned recommended awarding fees on the basis of 202.6 hours (50 percent of the total number of 405.2 originally billed) based on a rate of $225 per hour. Fees recommended to be awarded came to $45,585 plus $5,248.84 for costs (50 percent of a total of $10,497.67) for a total of $50,833.84. The magistrate judge rendered a detailed decision with respect to the awarding of attorney's fee dealing with the aspects of "reasonable hours", detailed time entries, reasonable hourly rate, the lodestar aspect, etc.

[Editors' note: The reader is referred to the comments of the magistrate judge in considering the necessary support and substantiation of fees and costs incurred.]

FORWARDER INKS THE DEAL….

Norfolk S. Ry. Co. v. Sun Chem. Corp., 2013 AMC 135,
318 Ga. App. 893, 735 S.E.2d 19 (Ct. of App. 2012)

The Court of Appeals of Georgia considered an intermodal shipment damaged on the outbound railroad of transportation. Two containers of ink were booked for shipment from Kentucky to Brazil. The manufacturer entered into a contract with the ocean carrier to transport the ink under a "through bill of lading" in which cargo owners "can contract for transportation across oceans and to inland destinations in a single transaction." The ocean carrier took responsibility for the entire (intermodal) transportation from the place of receipt to the place of final delivery and retained "the right to use the services of other precarriers and/or oncarriers and any mode of transport to accomplish same." The bill of lading also contained a provision advising that the terms and conditions of transport documents with respect to a precarrier or oncarrier might be less than the liability of the carrier than the sea transport. The bill of lading also authorized the ocean carrier to subcontract "on any terms" for the whole or any part of the handling in carriage of the goods.

The ocean carrier subcontracted with a freight forwarder to arrange inland transportation and the freight forwarder in turn hired the railroad to transport the ink to Savannah, Georgia. The railroad's rules circular provided that "unless language expressly selecting 'Carmack' is included in the original shipping instructions, any tender of freight for transportation…will be accepted under 'standard' liability coverage provided and not under 'Carmack' coverage." The transportation agreement between the forwarder and the railroad as well as the railroad's rules circular gave the forwarder the option to impose Carmack liability on the railroad if certain additional procedures were complied with and a higher rate was applied. By contrast, the standard provision stated that the railroad would not be liable for damage or delay to any party other than the rail services buyer. No evidence was produced that the freighter

forwarder chose, or otherwise selected Carmack liability.

The shipment of ink was destroyed in rail transportation due to derailment.

The interested underwriter paid a claim for the loss of the ink and suit was brought against the railroad for the amount paid, plus interest and costs.

The lower court granted a motion on behalf of the manufacturer plaintiff and denied the railroad's motion to dismiss on the ground that the railroad was strictly liable under Carmarck.

On appeal, the court considered the principal question before it was whether the cargo interest could be bound by the bargain reached between the freight forwarder (reached without notice to the cargo manufacturer/shipper) so that the railroad could not be held strictly liable under the Carmack Amendment.

The court, referring to Supreme Court precedents (*Kirby* and *Regal-Beloit*), considered these cases to authorize parties to international intermodal transport agreement involving "any 'substantial carriage of goods by sea' to reach their own terms as to liability for damage or loss of cargo." *Norfolk Southern*, 318 Ga. App. at 896, 735 S.E.2d at 28.

In relying on *Kirby*, the court noted that "[w]hen an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed." *Id*. at 898, 735 S.E.2d at 24.

The court noted the ocean carrier's bill of lading alerted the cargo manufacturer to the extension of liability limitation to the downstream agents and subcontractors and also called attention to the possible differential between liability coverages for the land and sea portions of the ink's intermodal transport. Thus, based on *Kirby* alone, the manufacturer should be bound by the agreement between the freight forwarder and the railroad as to liability terms.

The court then turned to discuss the impact of *Regal-Beloit*. In *Regal-Beloit*, the Supreme Court framed the question before it as whether the Carmack Amendment applied to the in-land segment of an overseas *import* shipment under a through bill of lading. Although the *Regal-Beloit* Court explicitly declined to address the fact pattern before this court, i.e., where goods were received at a point in the United States for export, the court noted at least one federal court, applying both *Kirby* and *Regal-Beloit*, characterized a freight shipment originating in the United States for overseas destination as essentially involving a "maritime contract" to which Carmack does not apply, referring to *Hartford Fire Ins. Co. v. Expeditors Int'l of Washington, Inc.*, 2012 AMC 1934 (S.D.N.Y. 2012) *reconsideration denied*, 10 CIV. 5643 KBF, 2012 WL 6200958 (S.D.N.Y. Dec. 11, 2012).

Although the Supreme Court's decision in *Regal-Beloit* appeared before the Georgia trial court's decision, the court noted the trial court did not have the benefit of the *Expeditors'* decision at the time it ruled. Instead, the trial court based its imposition of Carmack liability on two earlier Southern District of New York's decisions (*Sompo v. Norfolk S. Ry. Co.* and *American Home Assur. Co. v. Panalpina, Inc.*) The court noted the first was abrogated by *Regal-Beloit* and the *Panalpina* case relied on *Sompo*.

It summarized the cases stating:

> We think that the Southern District of New York's more recent decision in *Expeditors* implements *Kirby*'s and *Kawasaki Kisen*'s objectives of promoting efficient maritime contracting more effectively than the earlier *Panalpina* decision, and that federal law requires us to uphold the bargained-for terms of the through bill of lading before us, including its binding of Sun to its downstream agent Riss's refusal of the Carmack liability offered by Norfolk Southern.

Norfolk S. Ry., 318 Ga. App. at 903, 735 S.E.2d at 27.

It therefore concluded that the railroad, "which was brought into an international ocean shipping arrangement two transactions after CSAV had issued its bill of lading, cannot be subject to Carmack liability because (1) the bill of lading issued by CSAV is a "maritime contract" to which Carmack liability should not apply; (2) Norfolk Southern was not the 'receiving carrier' of the ink containers for purposes of Carmack liability; and (3) Sun authorized downstream carriers to reach their own terms as to liability, which Riss did when it declined Norfolk Southern's offer of Carmack liability." *Norfolk S. Ry.*, 318 Ga. App. at 904-05, 735 S.E.2d at 28.

The court went on to uphold the bill of lading's convenant that Sun could sue only the ocean carrier and/or the immediate buyer of the railroad's services. Finally, the court rejected the cargo interest's claim of negligence or breach of bailment. It remanded the case with directions that judgment be entered in favor of the railroad.

FIRST COVENANT GETS CREDENCE; SECOND NEEDS EXPLANATION!...

Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.,
891 F. Supp. 2d 489, 2012 AMC 2409 (S.D.N.Y. 2012)

Background: Two interested cargo underwriters filed actions against the railroad for damages resulting from the derailment of a train on which the cargo was being carried. The matters were assigned to Judge Chin who granted summary judgment against the railroad on the basis that the claims were covered under the Carmack Amendment.

At that time, Second Circuit precedent was that the Carmack Amendment applied to "the domestic inland portion of the foreign shipment regardless of the shipment's point of origin." This precedent was abrogated by the Supreme Court in *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2010 AMC 1521 (2010).

On appeal, the Second Circuit vacated the court's grant of summary judgment and remanded for further proceedings which

also would consider further grounds claimed by the plaintiffs-appellees to support the judgment, regardless of *Regal-Beloit*. The court considered cross motions for summary judgment.

[Editors' note: The case was referred to and decided by Judge Chin, now sitting on the Second Circuit Court of Appeal and sitting by designation in the district court in this matter.]

The principal matter considered by the court was whether the railroad was entitled to the benefit of bill of lading provisions that no party, other than the carrier that issued the bill of lading, could be sued (usually referred to as "covenant not to sue"). In dealing with this question, the court considered two separate bills of lading involved. The first (Yang Ming's bill of lading) "expressly limits the liability of any entity Yang Ming engages to perform carriage of goods such that only Yang Ming can be held liable for the goods during transport." Judge Chin interpreted such a limitation "to be an express agreement by the plaintiffs' insured not to seek or hold any entity other than Yang Ming liable for the goods in question." *Sompo*, 891 F. Supp. 2d at 496, 2012 AMC at 2417. The provision provided:

> It is understood and agreed that, *other than the Carrier*, no Person, firm or corporation or other legal entity whatsoever (including the Master, officers and crew of the vessel, agents, *Underlying Carriers*, *Sub-Contractors*, and/or any other *independent contractors* whatsoever utilized in the Carriage) is, or shall be deemed to be, liable with respect to the Goods as Carrier, bailee or otherwise.

Id., 2012 AMC at 2417.

The court found no ambiguity with the bill of lading and held the provision constituted an express agreement not to sue any entity other than the carrier, including the defendant rail carrier for damage to the goods in question.

As to the second bill of lading, the court found the "Nippon Express" bill ambiguous and susceptible to different interpretations as to what entities may be sued under its terms. The court considered several provisions of the bill of lading to offer different interpretations finding in the provisions "ambiguous" ("in such instances, we look to evidence of the intent of the parties.")

The court set forth some indicia of intent that might be relevant. As to enforceability of the covenants not to sue, the court considered plaintiffs' argument that the terms in any of the bills of lading were void under the Harter Act. The court did not reach the question of whether the Harter Act applies:

> … as even if it does, the Act does not bar such provisions. Moreover, to the extent the parties suggest that the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. Section 30701 note, applies, or that certain bills of lading incorporate the Hague Rules, I conclude that neither statutory regime prohibits the liability limitations in question.

Id. at 500, 2012 AMC at 2423.

The court further considered the Himalaya clauses ("a contractual provision in a bill of lading that extends the bill's liability limitations to downstream parties contracted by the carrier to assist in the carriage of goods.")

The court noted in *Kirby*, 543 U.S. at 20 & n.2.,

> that an inland rail carrier subcontracted by an intermediary ocean carrier could be the "intended beneficiary" of Himalaya Clauses in both (1) the bill of lading issued to the cargo owner by the initial freight forwarder and (2), the bill of lading issued by the intermediary ocean carrier to the freight forwarder.…Consequently, the rail carrier was "entitled to the protection of liability limitations" in both bills of lading.

The court further noted that the "Covenant Not to Sue" did not relieve or lessen the carrier's liability arising from negligence, fault or failure in its duty of obligations, constituting an enforcement mechanism rather than a reduction of the carrier's obligations to the cargo owner, citing *Federal Ins. Co. v. Union Pacific R. Co*., 651 F.3d 1175, 1180, 2012 AMC 1303, 1309 (9th Cir. 2011). It also referred to other court decisions which reached similar conclusions with respect to the enforcement of clauses prohibiting suit against entities other than the carrier (citing cases).

The court agreed with the Ninth Circuit's rationale in *Federal Ins. Co*. and found that the clauses do not allow the carrier to "avoid", "lessen", or "relieve" its liability to plaintiffs. They merely direct suit against the carrier and leave the carrier to seek indemnification from the parties with whom it contracted to complete carriage of the goods. In short, plaintiffs are not "without a remedy" for their injury.

Ultimately, the court found "such liability limitations are enforceable with respect to the defendants and do not violate any of the statutory regimes raised in the parties' arguments or implicated in the bills of lading at issue." *Id*. at 502-03, 2012 AMC at 2428.

As to an argument by plaintiffs that notwithstanding liability limitations, they have the right to sue defendants in tort and bailment, the court agreed that claims for cargo damage could sound in tort as well as in contract, however, such did not overcome the fact that plaintiffs "agreed to sue only the carrier that issued the bill of lading". The court dismissed all claims arising under the Yang Ming bill of lading. With respect to the claims involving the Nippon Express bill of lading, the court suggested further proceedings. It denied plaintiffs' cross motions for summary judgment.

[Editors' note: The editors are advised that the captioned matters are currently *sub judice* on motions for reconsideration.]

LONG ARM REACHES FAR ENOUGH….

Zurich Am. Ins. Co. v. M/V APL PEARL, 12 CIV. 4083, 2013 WL 399271 (S.D.N.Y. Feb. 1, 2013)

A shipment of suits was transported from Bangladesh to the port of New York where it was discharged. The complaint alleged that the garments were severely damaged during the course of the voyage. The subrogated cargo underwriter brought suit against the issuer of a bill of lading covering the shipment (apparently an NVOCC).

An attempt was made to serve a summons upon an individual working at the offices of an entity called "Expolanka USA, LLC," located in Jamaica, New York. Subsequently, the plaintiff underwriter, within 120 days of the filing of the complaint, served process on a different entity which accepted service.

The defendant moved to dismiss pursuant to FRCP 12(b)(2)&(5) due to improper service of process and lack of personal jurisdiction.

The court referred to New York's long-arm statute, "a court may exercise personal jurisdiction over any non-domiciliary…who in person or through an agent…contracts anywhere to supply goods or services in the State of New York,…" providing that the cause of action arose from the contract to supply goods or services. *Zurich Am. Ins.*, 2013 WL 399271, at *2.

Under the terms of the bill of lading, the defendant was clearly identified as the carrier of the cargo. The court, referring to *Volkart Bros., Inc. v. M/V "PALM TRADER",* 88 CIV. 7527 (RLC), 1989 WL 34094 (S.D.N.Y. Apr. 6, 1989), found the carrier's agreement to deliver the goods in New York is obviously a contract to perform services in the state and involved a submission the laws of the state. Such an agreement satisfies the constitutional requirement that jurisdiction be grounded on acts that are "purposefully directed toward the forum state."

The defendant carrier argued that, as carrier, its responsibility for the cargo was only from the loading of the vessel "up to and during discharge of the vessel," and that it did not handle customs clearance or distribution. The court noted the carrier was responsible for the cargo up to and including its discharge from the vessel in New York and such constitutes sufficient contact with New York to establish a basis for long-arm jurisdiction.

As to service of process, the court noted the defendant's contention that the first attempted service was ineffective because the entity served was wholly independent from the defendant and, therefore, the defendant could not be served by service upon that entity. At the same time, the court also noted the subsequent service on a separate entity, "which accepted service on behalf of Expolanka". At oral argument, the plaintiff underwriter took the position that this constituted adequate service upon the defendant and the defendant did not dispute this contention. Thus, the court found the plaintiff underwriter had met its burden to prove adequate service and denied the defendant carrier's motion to dismiss.

COMMITTEE ON CRUISE LINES AND PASSENGER SHIPS

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NEWSLETTER

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PUNITIVE DAMAGES RESURRECTED

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In *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009), the Supreme Court recognized the unwarranted over extension that many courts had attributed to its earlier opinion in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) and sought to restore the pre-existing balance found in maritime law. As time has progressed, the true measure of this opinion is just starting to be seen as the federal courts are beginning to readdress many of the misconceptions, which arose from *Miles*. Perhaps the greatest impact has been in the resurrection of punitive damages as a viable remedy in both seamen's cases involving maintenance and cure and unseaworthiness as well as passenger suits against carriers.

Miles

In *Miles*, the mother of a seaman, who was stabbed to death by a fellow crewmember while the ship was docked in a U.S. port, sued the vessel's operators, owner and charterer for failing to prevent the assault on her son under the Jones Act and doctrine of unseaworthiness. After traveling through the lower courts, the issues reaching the Supreme Court were limited to whether the seamen's mother could recover for loss of society and her son's future earnings.

The Court concluded that since nonpecuniary damages were not recoverable by a seaman's beneficiaries under either the Jones Act or DOHSA, they were therefore likewise not permitted under general maritime law so as to preclude the loss of society claim.

The Court similarly held that the claim based upon loss of future earnings was precluded, since survival claims were not allowed under the Jones Act.

Although *Miles* specifically dealt with these limited claims, its rationale was given broad effect in cases involving other types of nonpecuniary damages by subsequent circuit courts opinions in interpreting the Court's expression of the justification for its holding:

> We sail in occupied waters. Maritime tort law is now dominated by federal statute . . .
>
> It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially—created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence…

498 U.S. at 27, 36.

Although the Court in *Miles* did not address the issue of punitive damages, some courts, such as the First, Fourth and Sixth Circuit Courts of Appeal, nevertheless concluded that it prohibited such damage claims in those circumstances where they were not allowed under a concurrent statutory remedy, even though claimed under general maritime law, such as part of a seaman's unseaworthiness claim. *See, e.g.*, *Horsely v. Mobil Oil Corp*., 15 F.3d 200, 1994 AMC 1372 (1st Cir. 1994); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1993 AMC 1217 (6th Cir. 1993)(also precluding claims for loss of society and consortium).

Other courts, such as the Fifth, Ninth and Eleventh Circuit Courts of Appeal, precluded such claims even in the absence of a

concurrent statutory remedy. See *Guevara v. Maritime Overseas Corp*., 59 F.3d 1496, 1995 AMC 2409 (5th Cir. 1995); *Glynn v. Roy Al Boat Management Corp*., 57 F.3d 1495, 1995 AMC 2022 (9th Cir. 1995); *In re Amtrak Sunset Ltd. Train Crash*, 121 F.3d 1421, 1997 AMC 2962 (11th Cir. 1997). Some of these latter courts expressly relied upon what they perceived to be the "*Miles* philosophy."

Then Along Came *Townsend*

Two decades of an expansive interpretation of Miles, however, came to an abrupt end in *Townsend*. In its narrowest sense, the Court's more recent opinion reaffirmed the continued viability of punitive damages in maintenance and cure claims for willful and wanton misconduct by the seaman's employer. Even more significantly, however, the Court reined in the overly broad construction given to *Miles* by many lower courts.

After first noting that the historical antecedents of punitive damages predated the adoption of the Constitution, Justice Thomas writing for the majority then went on to criticize the expansive interpretation of *Miles* by those courts which had relied upon it to preclude the recovery of punitive damages:

> [This] reading of *Miles* is far too broad. *Miles* does not address either maintenance and cure actions in general or the availability of punitive damages for such actions. The decision instead grapples with the entirely different question whether general maritime law should provide a cause of action for wrongful death based on unseaworthiness. By providing a remedy for wrongful death suffered on the high seas or in territorial waters, the Jones Act and DOHSA displaced a general maritime rule that denied any recovery for wrongful death. . . .
>
> . . . Unlike the situation presented in *Miles*, both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well

> established before the passage of the Jones Act. . . .
>
> Because punitive damages have long been an accepted remedy under general maritime law, and because nothing in the Jones Act altered this understanding, such damages for the willful and wanton disregard of the maintenance and cure obligation should remain available in the appropriate case as a matter of general maritime law.

557 U.S. at 419-424 (emphasis added).

A number of subsequent decisions have therefore construed *Atlantic Sounding* to hold that punitive damages are available as damages in all actions under general maritime law unless specifically limited by Congress. The two areas where this rationale has had the greatest impact have been in claims by passengers against cruise lines and in unseaworthiness cases.

For example, in *Lobegeiger v. Celebrity Cruises*, Inc., 2011 WL 3703329 *7 (S.D. Fla. Aug. 23, 2011) , the court allowed a child's punitive damage claim to stand for a shipboard injury noting that "Congress has not enacted any legislation to limit a passenger's right to recover punitive damages in a personal injury action under general maritime law." A similar result was reached in *Doe v. Royal Caribbean Cruises, Ltd.*, 11-23323-CIV, 2012 WL 920675 (S.D. Fla. Mar. 19, 2012), which expressly concluded in a passenger sexual assault claim that *Townsend* had overruled the Eleventh Circuit's prior preclusion of punitive damages under the general maritime law in *In re Amtrak Sunset Ltd.,* 121 F.3d at 1429, 1997 AMC at 2974.

Several courts have also seized upon language in *Townsend* to conclude that punitive damages are also available in seaman's personal injury claims brought under the doctrine of unseaworthiness, since the remedy likewise existed under general maritime law prior to the adoption of the Jones Act. *See, e.g., In re Complaint of Osage Marine*, 2012 AMC 953, 2012 WL 709188 (E.D. Mo. Mar. 5, 2012); *Wagner v. Kona Blue Water Farms, LLC*., 2010 AMC 2455, 2010

WL 3566730 (D. Haw. Sept. 13, 2010)(dismissing punitive damage claim under the Jones Act, but denying motion as to unseaworthiness count).

Townsend, however, has had a greater effect than simply reigning in the unwarranted extension of Miles by the circuit courts. *Miles* in essence found an implicit pre-emption of general maritime remedies by the simple existence of a federal statutory remedy, regardless of whether the statute contained any pre-emptive language. *Townsend*, instead, now requires the statute expressly to pre-empt existing common law remedies for such an effect to arise. Thus, *Townsend* expressly recognizes that concurrent remedies may co-exist together in the same pond called maritime law.

EXCEPTION RECOGNIZED TO ARBITRATION OF SEAMAN'S CLAIM

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The issue of whether arbitration provisions pertaining to cruise line seaman personal injury claims are enforceable has been a hotly litigated issue over the past seven years. Nearly every major line today inserts arbitration provisions into its seafarer's contracts or collective barging agreements. Along with arbitration provisions, the lines include foreign choice of law provisions.

The purpose for these provisions is to limit personal injury liability exposure. These provisions take the personal injury claims away from juries and place them in the hands of arbitrators (generally lawyers) and apply foreign laws that are less liberal than the Jones Act, Penalty Wage Act and United States general maritime law.

Since the 2005 landmark decision of *Bautista v. Star Cruises*, 396 F.3d 1289, 2005 AMC 372 (11th Cir. 2005), courts have overwhelming enforced such arbitration provisions. Despite wide enforcement of these arbitration provisions, courts have made some

exceptions. The recent case of *Cappello v. Carnival Corp*., 2013 AMC 478, 2012 WL 3291844 (S.D. Fla. Aug. 10, 2012), decided in the Southern District of Florida, illustrates such an exception.

Facts of *Cappello*

This case involved an Italian engineer who was blinded when mixing caustic chemicals needed to clean the cruise ship's desalination plant. The cruise ship was operated by Carnival Corporation. Cappello, however, was a contract employee of Golden Falcon, a wholly owned company of Carnival.

The employment contract required "[a]ny and all disputes arising out of or in connection with [the] Agreement, including any question regarding its existence, validity, or termination, or Officer's service on the vessel, shall be referred to and fully resolved by arbitration." The contract was signed by Cappello and Golden Falcon, but not Carnival.

The Litigation

Cappello filed his personal injury claim against Carnival in Florida state court. The cruise line removed the action to federal court under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Convention Act (9 U.S.C. § 201, et seq.) based upon the Cappello/Golden Falcon contract. Cappello moved to remand the case arguing lack of federal jurisdiction as Carnival failed to produce a signed written agreement to arbitrate between the parties of the dispute as required by the Convention. The cruise line argued the Cappello/Golden Falcon contract required arbitration of the claim against Carnival under the doctrine of equitable estoppel.

The equitable estoppel doctrine allows a non-contract signatory to compel arbitration under two circumstances: (1) when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory, or (2) when the signatory to the contract

containing the arbitration clause raises allegations of "substantially interdependent and concerted misconduct" by both the nonsignatory and one of the signatories to the contract.

Carnival relied on the first prong of this test, arguing the dispute was controlled by contract because Cappello's claims invoked its terms as his injury incurred during his service on the vessel. The court rejected Carnival's arguments finding it conflated two distinct concepts — the scope of the arbitration clause, and the scope of the agreement containing the arbitration clause.

The court examined of the scope of the agreement in light of the claims asserted and found: (1) the complaint did not presume the existence of the contract; and, (2) the cruise line made no particularized showing of why the agreement is relevant to these claims. Based upon these findings, the court determined federal jurisdiction was wanting and remanded the entire claim to Florida state court.

Import

The import of this decision is that the federal courts will not blindly compel seaman personal injury cases to arbitration. Cruise lines will have firmly to establish that the dispute arises from the employment contract signed by the seaman in order to obtain the benefit of arbitration.

New Publications

The following new publications discuss issues which will be of interest to committee members:

1. Robert D. Peltz, *Has Time Passed Barbetta By?*, 24 U.S.F. Mar. L.J. 1. 11 (2011)

2. Hon. Thomas A. Dickerson, *Cruise Passengers Right and Remedies, 2012*, http://www.nycourts.gov/courts/9jd/TacCert_pdfs/Dickerson_docs/CRUISEPASSENGERSRIGHTS_REMEDIES2012.pdf.

CASE LAW UPDATE

Damages

In re Complaint of Osage Marine Services, Inc., 2012 AMC 953, 2012 WL 709188 (E.D. Mo. March 5, 2012)

Relying upon the opinion in *Atlantic Sounding Co., Inc. v. Townsend*, 129 S. Ct. 2561 (2009), the court held that punitive damages are recoverable as part of a seaman's unseaworthiness claim. In reaching this conclusion, the court held that *Atlantic Sounding* had corrected prior misinterpretations of the Supreme Court's earlier opinion in *Miles v. Apex Marine Co.*, 498 U.S. 19 (1990), which gave it an excessive interpretation. Instead, the court construed *Atlantic Sounding* to hold that *Miles* only "deals with whether general maritime law can provide a remedy for wrongful death actions where damages for such actions have been limited by Congress." As a result, it went on to hold that *Miles* did not preclude the award of punitive damages in unseaworthiness claims. See also *Ness v. Sea Warrior, Inc*., 2010 AMC 2297, 2010 WL 5140687 (Wash. Sup. Ct. 2010) (allowing claims for punitive damages under the Jones Act); *Lobegeiger v. Celebrity Cruises, Inc.*, 2011 WL 3703329 (S.D. Fla. Aug. 23, 2011) (upholding punitive damages in passenger cases); *In re Oil Spill by the Oil Rig Deep Water Horizon in the Gulf of Mexico, on April 20, 2010,* 808 F. Supp. 2d 943 (E.D. La. 2011)(upholding the recovery of punitive damages under general maritime law).

Shore Excursions

Gibson v. NCL (Bahamas) Ltd., 11-24343-CIV, 2012 WL 1952667 (S.D. Fla. May 30, 2012).

In a passenger suit arising out of injuries obtained during a "jungle bus" excursion, the court denied the cruise line's motion to dismiss the plaintiff's complaint, which sought recovery under both direct and vicarious liability principles. The cruise line asserted that it could not be held liable by virtue of a ticket provision which stated that all tour operators were independent contractors.

The carrier further contended that its only duty under maritime law was to warn of known latent hazards and as a result it could not be responsible for the negligence of a tour operator in the absence of notice of the hazard, which resulted in the passenger's injury.

In rejecting these arguments, the court held that a carrier could not immunize itself from liability for its own negligence under the provisions of 46 U.S.C. § 30509. The court further rejected the carrier's argument that its only duty was to warn of known latent dangers, holding that under *Kermarac*, a carrier also has the duty to exercise "reasonable care under the circumstances of each case," which duty does not stop at the shoreline. The court also upheld the passenger's vicarious liability claims based upon joint venture, holding that the passenger's allegations demonstrated sufficient control by the carrier over the shore excursion to meet the principles established in *Fulcher's Point Pride Seafood, Inc. v. M/V Theodora Maria*, 935 F.2d 208, 1993 AMC 2993 (11th Cir. 1991).

Lapidus v. NCL America LLC, 12-21183-CIV, 2012 WL 2193055 (S.D. Fla. June 14, 2012)

During the course of an excursion in Volcanos National Park in Hawaii sold by the carrier, the passenger sustained a heart attack. The court concluded that the typical ticket disclaimer did not prevent the passenger from establishing that the tour operator was an apparent agent of the carrier, since the issue of reasonable reliance is a question of fact. The court further held that the plaintiff had sufficiently alleged the existence of a joint venture. Nevertheless, the court found that the plaintiff had failed adequately to allege a claim for negligence, since the complaint, which was based upon a failure to warn, did not contain any allegations of any conditions which were not open and obvious.

Gayou v. Celebrity Cruises, Inc., 11-23359-CIV, 2012 WL 2049431 (S.D. Fla. June 5, 2012)

In a lawsuit by a passenger against a cruise line for injuries sustained in a zip lining excursion due to brake failure, the court dismissed without prejudice the plaintiff's claim for negligence

because of plaintiff's failure allege sufficient facts showing that the carrier knew or should have known that the zip lining excursion was not safe. The court also dismissed without prejudice the passenger's claims based upon misleading advertising and negligent misrepresentation, holding that such claims require compliance with the provisions of Rule 9(b), since they are grounded in fraud. Although granting the carrier's motion to dismiss the passenger's actual agency count because of a disclaimer in the tour excursion agreement, the court left standing the claim based upon apparent agency.

McLaren v. Celebrity Cruises, Inc., 11-23924-CIV,
2012 WL 1792632 (S.D. Fla. May 16, 2012

A passenger who was injured while disembarking from a tour operator's small boat sued the cruise line on the grounds of failure to warn, negligent selection/retention of the excursion operator and misrepresentation. In upholding the passenger's failure to warn claim, the court distinguished prior cases in which a passenger had been injured due to hazards which were not associated with a tour sold and conducted by the cruise line (*e.g*: passengers mugged and robbed while visiting Nassau). Accordingly, the court concluded that allegations that the cruise line had failed to warn the passenger "of the dangers of and the conditions under which the tour would be conducted, including the fact that there was no safe means of ingress or egress during embarkation and disembarkation, which defendant knew or should have known about, having selected the tour" were held sufficiently to state a cause of action based upon failure to warn. The court further concluded that where the passenger had set forth sufficient allegations to support its negligent selection/retention claim, the defendant's contrary assertions raised questions of fact that were not appropriate on a motion to dismiss.

E & H Cruises, Ltd. v. Baker, 88 So. 3d 291, 293
(Fla. Dist. Ct. App. 2012), *reh'g denied* (May 30, 2012),
review denied, 107 So. 3d 403 (Fla. 2012)

In a rare state court action involving a cruise line excursion, the Third District Court of Appeal reversed the trial court's denial

of a tour operator's motion to dismiss on the grounds of lack of jurisdiction. In overturning the trial court's evidentiary findings upholding the existence of personal jurisdiction, the appellate court discounted the tour operator's numerous contacts with the state. The appellate court further concluded that due to the disclaimer contained in the tour operator's agreement, the tour operator could not be charged with the in state contacts of the cruise line, under a joint venture or agency theory.

Pleading

Chaparro v. Carnival Corp., 693 F.3d 1333 (11th Cir. 2012)

In a response to a growing number of district court judges who have required the extensive pleading of factual matters as well as evidence in response to the Supreme Court's decisions in *Twombly* and *Iqbal*, the Eleventh Circuit Court of Appeal cautioned that Rule 8 "does not require detailed factual allegations." Although holding that the recent Supreme Court cases require more than "an unadorned, the - defendant – unlawfully – harmed – me accusation" and "labels and conclusions," the Eleventh Circuit pointed out that in order to survive a motion to dismiss the plaintiff need only allege "enough facts to raise a reasonable expectation that discovery will reveal evidence of the defendant's liability." Under this standard, the plaintiff's allegations that a cruise line knew of a particular area's reputation for criminal activity, yet failed to warn its passengers of any of these dangers, despite encouraging them to visit the area, stated sufficient facts to support a claim for negligence.

Athens Convention

Wajnstat v. Oceania Cruises, Inc., 684 F.3d 1153, 2012 AMC 1805 (11th Cir. 2012)

The Eleventh Circuit dismissed an appeal filed by a carrier of a summary judgment order entered in favor of a passenger holding that the provision in the cruise line's ticket of passage attempting to

adopt the damage cap contained in the 1976 Athens Convention was unenforceable on a completely foreign voyage. The district court had concluded that the carrier's inclusion of references to multiple different conventions and statutes rendered the ticket too confusing for the typical lay person to understand under the standard set forth in *Wallis v. Princess Cruises*, 306 F.3d 827, 2002 AMC 2270 (9th Cir. 2002). See *Wajnstat v. Oceania Cruises, Inc*., U.S.D.C. So. Dist. Fla. Case No.: 09-21850 (Cooke). The Eleventh Circuit dismissed the carrier's subsequent appeal on the grounds that the order was not properly appealable under the court's interlocutory appeal jurisdiction.

Farraway v. Oceania Cruises, Inc., Case No.: 1:10-cv-24312-JLK (S.D. Fla. Jun. 10, 2011)

The court refused to allow the defendant to amend its answer to assert an affirmative defense based upon the damage cap contained in the 1976 Athens Convention on the grounds of futility of amendment. The court noted that the Athens Convention expressly provides that the limitation on damages is not applicable in cases based upon intentional or reckless acts of either the carrier or its agents. Accordingly, the court concluded that the limitation could not apply as a matter of law to the case, since the passenger claimed that she was raped by a crew member.

Service and Jurisdiction

Royal Caribbean Cruises Ltd. v. Andino, Case No.: 11-cv-24327-MGC (S.D. Fla. July 2, 2012)

Service by mail against a cruise line employee temporarily stationed at one of the company's out islands was upheld by the court pursuant to the provisions of Fed.R.Civ.P. 4(c)(2)(f)(ii). In determining that the employee's right to due process was not violated, the court also relied upon the fact that he had entered into an indemnity agreement and/or joint defense agreement with the cruise line pursuant to which his attorney was also representing the carrier.

Gibson v. NCL (Bahamas) Ltd., 11-24343-CIV, 2012 WL 1952670 (S.D. Fla. May 30, 2012)

In a suit against a tour excursion operator, the passenger was entitled to conduct discovery in order to respond to a motion to dismiss and accompanying affidavit filed by the defendant contending a lack of jurisdiction over the person. See also *Pownall v. Cunard Line Ltd. Co.,* No. 06-22836-CIV-Altonga/Turnoff, 2007 WL 5080671 (S.D. Fla. Aug. 1, 2007).

Settlement and Releases

Bruton v. Carnival Corp., 2012 AMC 1765, 2012 WL 1627729 (S.D. Fla. May 2, 2012)

Following a settlement reached at mediation, the parties entered into a settlement agreement, which "specified only that the plaintiff was to execute a general release with 'Medicare provision' without specifying what those provisions would be." Subsequently, a dispute arose between respective counsel regarding whether the release could require the passenger to establish a Medicare set aside. When the carrier refused to tender the settlement proceeds without the inclusion of such a provision in the release, the passenger filed a motion to enforce settlement. The court granted the passenger's motion concluding that the settlement agreement only required the release to contain provisions relating to Medicare and not the establishment of a Medicare set aside. Since the release did contain certain provisions relating to Medicare, the court concluded that the passenger had satisfied the conditions imposed by the cruise line in the settlement agreement.

Sipler v. Trans Am Trucking, Inc., 881 F. Supp. 2d 635 (D.N.J. 2012)

In a non-maritime case having application to the issue of Medicare set asides, the court concluded that where the parties reached an agreement to settle a personal injury case, but did

not make any references to Medicare, the defendant could not subsequently require the plaintiff to create a Medicare set aside or contractually waive its right to seek Medicare benefits in the future. The court noted that while the Center for Medicare and Medicaid Services issued a memorandum recommending the creation of set asides in order to protect Medicare's interest when resolving cases that might include future medical expenses, that this was merely an "interpretive rule" which lacked the force of law. As a result, the court concluded that "no federal law requires set aside arrangements in personal injury settlements for future medical expenses." Accordingly, the court refused to impose such a provision as part of the parties' settlement agreement, which was otherwise silent on the issue.

Admiralty Jurisdiction

Vincenzo v. Carnival Corp., 09-20234-CIV, 2012 WL 1428888 (S.D. Fla. Apr. 24, 2012)

Where a passenger tripped and fell in a terminal after exiting the cruise ship at the end of the voyage, the court concluded that the lawsuit was not subject to admiralty jurisdiction. Since diversity of citizenship jurisdiction did not exist in the case, the court dismissed the complaint. The court further concluded that the plaintiff was free to file suit in the state courts of Florida.

Arbitration

Tomevska v. NCL (Bahamas) Ltd., 10-23665-CIV, 2012 WL 1831866 (S.D. Fla. May 18, 2012)

The court rejected the seaman's argument that she should not be required to arbitrate her personal injury claims under the terms of her CBA, since she could not afford to pay the arbitration filing fee and the required deposit for the arbitrator's fees, which could amount to as much as $50,000. The court concluded that since the plaintiff could pursue her claims against the defendant "through the relevant union representative" in which case she would be entitled

to have all the initial costs of arbitration paid by the defendant, the arbitration agreement was not unenforceable as "incapable of being performed." In reaching this conclusion, the court rejected the seaman's claim though it would result in denying the plaintiff her choice of counsel and require her to be represented by a foreign union.

Arauz v. Carnival Corp., 466 F. App'x. 815 (11th Cir. 2012) (unpublished)

The Eleventh Circuit rejected a seaman's argument that the arbitration provision in his contract was unenforceable under *Thomas v. Carnival Corp*., 573 F.3d 1113, 2009 AMC 2830 (11th Cir. 2009), where the cruise line stipulated that it would waive its contractual right to the application of foreign law and instead agree to arbitrate using U.S. law.

Lujan v. Carnival Corp., 11-23826-CIV, 2012 WL 1104253 (S.D. Fla. Apr. 2, 2012), *appeal dismissed* (Aug. 22, 2012)

The court rejected the seaman's claim that the CBA requirement that his personal injury claim be litigated under Panamanian law was void as against public policy under the rule enunciated in *Thomas v. Carnival Corp.,* 573 F.3d 1113, 2009 AMC 2830 (11th Cir. 2009) on the grounds that *Thomas* is a "dead letter" in light of the subsequent decision in *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257 (11th Cir. 2011).

Gilroy v. Seabourn Cruise Line, Ltd., C12-107Z, 2012 WL 1202343 (W.D. Wash. Apr. 10, 2012), *appeal dismissed* (June 14, 2012)

A ticket provision requiring passengers to arbitrate non-personal injury claims, such as the entitlement of a ticket refund, was upheld. Although the court concluded that the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards was not applicable, since both the passenger and cruise line were considered to be citizens of the United States, it

nevertheless upheld the provision under the Federal Arbitration Act. See 9 U.S.C. § 1 et seq.

Passenger Injuries

Perciavalle v. Carnival Corp., 12-CV-20996, 2012 WL 2412179 (S.D. Fla. June 26, 2012)

In a case brought by a passenger based upon the negligence of the ship's crew in allowing him to be assaulted by other passengers, the court rejected the cruise lines argument that its only duty was to warn its passengers of hazards of which it had notice. Instead, the court held that a carrier also has the duty to "of exercising reasonable care under the circumstances of each case."

Mendel v. Royal Caribbean Cruises, Ltd., 10-23398-CIV, 2012 WL 2367853 (S.D. Fla. June 21, 2012), *appeal dismissed* (Nov. 20, 2012)

The court granted the carrier's motion for summary judgment in a suit by a passenger who slipped and fell on a step in the vessel's pool. The court concluded that in the absence of evidence establishing that the cruise line was responsible for the allegedly improper design of the swimming pool, the plaintiff could not rely upon such a claim under the Eleventh Circuit's opinions in *Groves v. Royal Caribbean Cruises, Ltd*., 463 F. App'x 837 (11th Cir. 2012) and *Rodgers v. Costa Crociere, S.P.A*., 410 F. App'x 210 (11th Cir. 2010).The court went on further to hold that the existence of the step was open and obvious and that accordingly the cruise line had no legal obligation to warn the passenger of its existence.

Evidence

Cooke v. Royal Caribbean Cruises, Ltd., 11-20723-CIV, 2012 WL 1792628 (S.D. Fla. May 15, 2012)

In a suit by a passenger against the cruise line, the court denied the defendant's motion *in limine* seeking to prohibit the plaintiff from producing evidence at trial of the carrier's purported violation of various industry standards and guidelines, including those from the American Society of Testing and Materials (ASTM) the International Maritime Organization (IMO), the marine committee of the Illuminating Engineering Society of North America (IES) and the National Fire Protection Association (NFPA). Although recognizing that the standards were non-binding on foreign flag vessels, the court concluded that they still may be admissible on the issue of negligence and the carrier's breach of duty.

Shipboard Malpractice

Lobegeiger v. Celebrity Cruises, Inc., 869 F. Supp. 2d 1365, 2013 AMC 1254 (S.D. Fla. 2012)

The court granted summary judgment in favor of a cruise line on a passenger's medical malpractice claim which sought to hold the carrier liable under the theory of apparent agency. In granting summary judgment, the court concluded that the ticket language was sufficient to negate any reasonable belief on the passenger's part that the doctor was an agent, rather than an independent contractor.

Collateral Source

McCuller v. Nautical Ventures, LLC., Case No.: 2:05-cv-01195 (E.D. La. Jun. 6, 2012)

In a suit under the Jones Act and general maritime law for injuries by an employee of Halliburton, while working aboard a vessel owned by another company, the court concluded that the seaman's future medical costs which were to be funded through Medicare and his private Blue Cross/Blue Shield insurance policy were covered by the collateral source rule. As a result, the court went on further to hold that for the purposes of trial, the cost of the seaman's future medical expenses would be calculated using "the

usual customary charges" for such services and not based upon any discounts the seaman would receive as a result of contracts which Medicare or his insurers had with their providers. *See also Vanhoy v. United States*, CIV.A. 03-1090, 2006 WL 3093646 (E.D. La. Oct. 30, 2006) *aff'd,* 514 F.3d 447 (5th Cir. 2008)

Discovery

Myer v. Carnival Corp., Case No. 12-cv-20321-WLZ
(July 11, 2012)

Although the court has the discretion to stay non-jurisdictional discovery when the defendant has filed a motion attacking jurisdiction over it, "courts are not compelled to grant such motions upon the filing of a motion to dismiss-there is no 'broad rule that discovery should be deferred whenever there is a pending motion to dismiss.'" In denying such a motion, the court concluded that "such motions are not favored because when discovery is delayed or prolonged it can create case management problems which impede the court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems." Accordingly, the court concluded that a request to stay all discovery pending the resolution of such a motion is rarely appropriate unless the resolution of the motion will dispose of the entire case.

Maintenance and Cure

Royal Caribbean Cruises, Ltd. v. Brigby, 96 So. 3d 1146
(Fla. Dist. Ct. App. 2012)

An evidentiary hearing is required to determine if a seaman had achieved maximum medical cure where there is a factual dispute over this issue. Also see *Rio Miami Corp. v. Balbuena*, 756 So. 2d 258 (Fla. Dist. Ct. App. 2000).

NEWSLETTER

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A CRUISE LINE'S RESPONSIBILITY FOR DESIGN DEFECTS

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It is an often repeated axiom of maritime law that a cruise ship operator owes its passengers the duty to exercise reasonable care for their safety under the circumstances. What this means in the context of shipboard design and construction, however, has often been the subject of some debate.

A certain amount of mischief has been caused by careless language in several cases, which have perfunctorily repeated the adage that "as a prerequisite to imposing liability, that the carrier [must] have had actual or constructive notice of the risk-creating condition." *See, e.g., Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1359, 1991 AMC 700, 704 (11th Cir. 1990). Accordingly, some defense lawyers argue in all cases that the only duty owed by a cruise line to its passengers in any circumstances is the duty to warn of latent or "non-obvious" hazards. *See Gibson v. NCL (Bahamas) Ltd*., 11-24343-CIV, 2012 WL 1952667, at *3 (S.D. Fla. May 30, 2012).

This argument, however, improperly mixes concepts as the duty to warn is only one aspect of the greater duty to exercise reasonable care for the safety of passengers. This duty also includes the obligation to avoid affirmatively taking actions which create an unsafe or unreasonably hazardous condition. *See, e.g., Rockey v. Royal Caribbean Cruises, Ltd.,* 99-708-CIV-GOLD, 2001 WL 420993 (S.D. Fla. Feb. 20, 2001) (placement of a bingo board, which fell on passenger).

Thus, there is a distinct difference in the underlying nature of claims based upon the cruise line's failure to correct a dangerous

situation created by another and one created by the cruise line itself. Where the cruise line is charged with negligence for failure to correct a hazard created by another, such as failing to clean up a spilled foreign substance, the passenger must establish that the cruise line had either constructive or actual notice of the condition. *See, e.g., Keefe v. Bahama Cruise Line, Inc*., 867 F.2d 1318, 1990 AMC 46 (11th Cir. 1989)(slip and fall on wet spot on floor). Where, however, the basis of the claim is that the cruise line created the situation, such as the placement of an object in a location to create a hazard, notice is not an element. *See, e.g., McDonough v. Celebrity Cruises, Inc*., 64 F. Supp. 2d 259, 2000 AMC 257 (S.D.N.Y. 1999); *Rockey*, 2001 WL 420993; *Palmieri v. Celebrity Cruise Lines, Inc*., 98 CIV. 2037LAPHBP, 1999 WL 494119 (S.D.N.Y. July 13, 1999); *Prokopenko v. Royal Caribbean Cruises Ltd*., 10-20068-CIV, 2010 WL 1524546 (S.D. Fla. Apr. 15, 2010); *Baker v. Carnival Corp*., 2007 AMC 807, 2006 WL 3519093 (S.D. Fla. Dec. 6, 2006).

These principles apply equally in the context of cases based upon negligent design or construction. Therefore, as with non-design cases, notice only becomes important where the passenger is unable to prove that the cruise line did not create, participate in or approve the defective condition. *See, e.g., Groves v. Royal Caribbean Cruises, Ltd*., 463 F. App'x 837 (11th Cir. 2012); *Rodgers v. Costa Crociere, S.P.A.,* 410 F. App'x. 210 (11th Cir. 2010).

The Practicalities of Proving Negligent Design

Many of the negligent design cases have been unsuccessful because of the lack of admissible evidence establishing the cruise line's participation in the design process. *See e.g. Mendel v. Royal Caribbean Cruises, Ltd*, 10-23398-CIV, 2012 WL 2367853 (S.D. Fla. June 21, 2012), *appeal dismissed* (Nov. 20, 2012). Therefore, it is of critical importance to understand both the design and construction process in order to properly handle such cases from either side.

Virtually all cruise lines have a dedicated group of personnel who are involved in the design and construction of both the interior and exterior of their ships. These groups or teams have a variety

of different names and structures, but their purpose is the same—to exercise control over both the design and building process.

Their participation runs the gamut from major issues, such as overall vessel and propulsion design to more minor ones, such as the cosmetic features of dining rooms and bars. Typically, many of the involved individuals will live in close proximity to the shipyard during the course of the construction and are present on a daily basis throughout the entire process. The lead personnel serve as a link between the cruise line back in the United States, the shipbuilder, the contractors utilized for particular portions of the project and suppliers and vendors. This gives the cruise line the opportunity to closely monitor and control the building as it is ongoing.

Generally, the shipbuilding contract will also reserve to the cruise line the power to reject construction, which is deemed either nonconforming or unsafe. Therefore, the cruise line has both the opportunity and the right to control the details of the shipbuilding at every step in the process.

Although their function is the same, different cruise lines employ different structures for this purpose. Royal Caribbean, for example, utilizes a group of shoreside employees called the "New Build" department, which consists of over 20 individuals, including architects and engineers. These employees coordinate and oversee the construction and refurbishing of its new vessels. Carnival, on the other hand, utilizes a subsidiary called Carnival Corporation Shipbuilding to perform similar functions.

Proving Notice

Where notice is an issue, it can be established by proving constructive as well as actual notice of the defect. Constructive notice can be proved in many different ways. One of the surest methods is through the existence of prior similar accidents. *See, e.g., Harnesk v. Carnival Cruise Lines, Inc*., 1992 AMC 1472, 1991 WL 329584 (S.D. Fla. Dec. 27, 1991).

Although more often utilized in slip and fall cases involving foreign substances, constructive notice of a defective design can also be established by showing that a dangerous condition existed for a sufficient length of time that it should have been discovered through the exercise of reasonable care by the carrier. The nature of the condition itself may be sufficient to establish such duration, where it reasonably infers that it has taken a significant time to develop. For example, where a leak is claimed to have caused a slipping hazard on the deck, constructive notice may be inferred from the size of a puddle, where its source is such to give rise to the inference that it would take a long time to accumulate. *See, e.g., Erickson v. Carnival Cruise Lines, Inc*., 649 So. 2d 942 (Fla. Dist. Ct. App. 1995) (puddle that was 3 to 5 feet in width).

Constructive notice can also be shown through the failure of the vessel to meet either the company's safety regulations, industry standards or manufacturer's recommendations. Virtually all ships conduct weekly inspections by officers, engineering staff and supervisory personnel to make sure that such requirements are being met. Accordingly, the failure during such inspections to determine that equipment is not operating in accordance with either manufacturer's recommendations or industry standards may give rise to constructive notice of the defect. *See, e.g., Galentine v. Holland America Line-Westours, Inc.,* 333 F. Supp. 2d 991, 2004 AMC 711 (W.D.Wash. 2004).

Differences Between Land and Sea

Due to the nature of travel by sea there are obvious differences between the marine and land based environments. One such difference, which has been the source of much litigation, is the existence of various thresholds and combings on ships that create tripping hazards not typically found on land.

If there is a functional need for such thresholds, their mere existence will generally not subject the shipowner to liability. Where they are difficult to see, however, because of their color, composition, surrounding area or other visual distractions, there

is a duty effectively to warn of their existence. *Harnesk*, 1992 AMC 1472, 1991 WL 329584 (S.D. Fla. Dec. 27, 1991); *Caputo v. Holland Am. Line, Inc*., C09-1096-JCC, 2010 WL 2102820 (W.D. Wash. May 25, 2010). The shipowner may also be liable for their negligent design or construction in the first instance, where they are larger than necessary to accomplish their function. *Harnesk*, 1992 AMC 1472, 1991 WL 329584.

Products Liability Theories

Where a cruise line modifies the original design of a product installed into its ship, it can be held liable under both negligence and products liability theories. Accordingly, where a passenger was injured while striking the back wall on a FlowRider onboard surfing simulator, which had been shortened by the cruise line to fit onto its ship, the court upheld the applicability of claims based upon both negligence and strict liability. *See Morris v. Royal Caribbean Cruises Ltd.*, Case No. 11-23206-CIV-JG (S.D. Fla. Feb. 7, 2012).

Conclusion

Notice, in the absence of prior accidents, can sometimes be difficult to establish in defective design cases. Therefore, a stronger argument for the passenger may be made where it can be shown that the shipowner controlled or was actively involved in the design or construction of the defective portion of the vessel causing the injury, so that notice is not an element. To do so, however, requires developing a thorough knowledge of the design and construction process in order to be able accurately to establish the cruise line's role in it.

DEFENDING DANGEROUS CONDITION AND DESIGN CASES

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Consider the following true scenario: While travelling on her first cruise, Ms. White, a woman of large proportions, used the

public ladies room near the pool. Shortly after sitting down on the toilet, Ms. White was struck in the back of the head by a rather large tile-covered access panel that suddenly came loose from the bulkhead immediately behind her. Such an occurrence had never happened in the eight months since the ship had been in service, and the shipowner had no advance warning that the panel was in any way a danger. A review of the ship's maintenance and repair logs did not reveal any problems with the panel or the plumbing behind the panel. Indeed, later investigation revealed that the rotating lever arm that held the access panel in place barely caught the lip of the surrounding frame. At trial, the shipowner argued that Ms. White's generous weight placed sufficient downward force on the non-structural bulkhead to which the toilet was attached, to cause the bulkhead to sag enough for the arm to no longer contact the surrounding frame. The panel crushed several of her cervical vertebrae resulting in the need for spinal fusion surgery. Ms. White filed suit against the shipowner alleging that the access panel was negligently designed and that the shipowner was negligent in allowing the dangerous condition to exist.

In defending a shipowner against claims of negligence, basic well-established principles should be kept in mind. First is the general lens through which the shipowner will be judged. It has long been held that shipowners owe their passengers the duty to exercise reasonable care under the circumstances. *Kermarec v. Compagine Generale Transatlantique*, 358 U.S. 625 (1959). However, the law is clear that a shipowner is not the insurer of its passengers' safety. *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1334, 1985 AMC 826, 828 (11th Cir. 1984). In other words, merely because an accident occurs, a shipowner does not automatically become liable for a passenger's injuries. *Katz v. Cie Generale Transatlantique*, 271 F.2d 590, 1960 AMC 52 (4th Cir. 1959); *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 n.3, 1991 AMC 700, 704 n.3 (11th Cir. 1990).

Whenever a physical component of a ship is thought to have contributed to an accident, the shipowner is often faced with dual allegations of both negligence in allowing the dangerous condition to exist and negligent design of the dangerous component.

Claims that a shipowner was negligent in allowing a dangerous condition to exist can generally be grouped into two broad categories: transitory and non-transitory conditions. Transitory condition cases are those where a normally safe area is made dangerous -- such as where a foreign substance is on the deck, a tile comes loose, or a slat on a deckchair breaks -- because of the temporary or transitory condition. Non-transitory condition cases are those where a permanent structure on the ship is allegedly dangerous, such as where a ramp is too steep, a threshold too high, or an area is poorly lit. Then, there are the true negligent design cases, where the shipowner is accused of active negligence in the design of an allegedly dangerous component or area of the ship. Often, these types of claims are intermixed in the same case – or even in the same count.

Not surprisingly, the first step in defending claims of negligent design is to determine – and ideally prove – that the shipowner is not responsible for the design or construction of the allegedly dangerous component or area. *Groves v. Royal Caribbean Cruises, Ltd.*, 463 F. App'x 837 (11th Cir. 2012). In *Groves,* the Eleventh Circuit affirmed the district court's grant of summary judgment to a cruise line on a passenger's negligent design theory and held that the shipowner could only be held liable for negligent design if it actually created, participated in, or approved the alleged negligent design of the area where the accident occurred. Likewise, in *Rodgers v. Costa Crociere, S.P.A*., 410 F. App'x 210 (11th Cir. 2010), the Eleventh Circuit affirmed the district court's grant of summary judgment. The district court held that the plaintiff's failure to prove the shipowner was responsible for the design of a staircase was fatal to their negligent design allegation.

Keep in mind that even where the shipowner may have participated in the design of a component alleged to have been "negligently designed," the burden remains on the claimant to establish that the negligently designed component caused the incident. For example, in *Fedorczyk v. Caribbean Cruise Lines*, 82 F.3d 69, 1996 AMC 1604 (3d Cir. 1996), the plaintiff alleged that the lack of sufficient abrasive strips in a bath tub caused her to fall

while showering. The district court granted the defendant's motion for summary judgment because even if there were an insufficient number of abrasive strips (i.e., a dangerous condition), the plaintiff was unable definitively to state that she was not standing on one of the abrasive strips at the time

DEFENDING DANGEROUS CONDITION CLAIMS

Shipowners sometimes defend dangerous condition cases on the basis that the condition was not dangerous and/or on the basis that it did not have actual or constructive notice of the claimed dangerous condition, and therefore did not deviate from the standard of care.

Of course, if a shipowner knows of a dangerous condition, it has actual notice of that condition. However, a shipowner need not have actual notice of a dangerous condition to be found liable. If a dangerous condition exists for a sufficient interval of time to invite corrective measures, the shipowner is deemed to have constructive notice of the dangerous condition. *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 66, 1988 AMC 1146, 1147 (2d. Cir. 1988). *See also Wish v. MSC Crociere S.A.*, 07-60980-CIV, 2008 WL 5137149 (S.D. Fla. Nov. 24, 2008)(entering judgment on behalf of cruise line and noting that there was no evidence to show how long the allegedly dangerous condition existed that would trigger the cruise line's duty to correct or warn).

In non-transitory situations, such as the one presented above, it is often argued that a shipowner has the requisite notice of the allegedly dangerous condition simply by virtue of its ownership and control over the ship. Put another way, claimants often attempt to prove notice of an allegedly dangerous condition by arguing that the shipowner's operation and control of the ship automatically creates the required notice.

Such arguments, however, have been soundly rejected; claimants must still prove that the shipowner had actual or constructive knowledge of an allegedly dangerous condition. For example, in *Everett v. Carnival Cruise Lines*, 912 F.2d 1355,

1991 AMC 700 (11th Cir. 1990), a passenger who tripped and fell over a small elevation change in the ship's deck argued that notice of the condition was imputed to the shipowner simply because it owned the ship and maintained the area. The Eleventh Circuit, relying upon *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1990 AMC 46 (11th Cir. 1989), rejected this argument and held that the passenger must still prove that the shipowner had notice of the allegedly unreasonably dangerous condition before liability could be assessed. In the *Keefe* court's view, to hold otherwise would covert the shipowner into an insurer of its passengers' safety.

DEFENDING NEGLIGENT DESIGN CLAIMS

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for summary judgment because even if there were an insufficient number of abrasive strips (i.e., a dangerous condition), the plaintiff was unable to definitively state that she was not standing on one of the abrasive strips at the time she fell. As such, she could not satisfy her burden of proof that the defendant's alleged negligence actually caused her injury.

In our factual scenario above, the jury returned a defense verdict, apparently agreeing that the shipowner was not liable for the dangerous condition or the access panel design. However, if the shipowner had been aware that the access panel did, or could, fall when a passenger was using the toilet, then the shipowner may have been held liable for not remedying the potential danger the access panel posed.

Practical Considerations

In claims involving allegations of dangerous conditions – either transitory or non-transitory -- it is important to identify the prior maintenance and claims history of the component or area in order to establish lack of the requisite notice. In cases involving transitory conditions, it is important to identify the procedures in place for monitoring areas where transitory conditions sometimes occur. Keep in mind, it is always the claimant's burden to establish the duration of the allegedly dangerous transitory condition prior to the accident in order to attempt to impute constructive knowledge of that condition on the shipowner. Finally, in true negligent design claims, efforts should be made to establish the design and construction process and the shipowner's lack of involvement in that process. In all cases, defense efforts should always be focused on proving lack of causation between the allegedly dangerous condition or negligent design and the accident.

CASE LAW UPDATE

Procedure

Chaparro v. Carnival Corp., 693 F.3d 1333 (11th Cir. 2012)

Following the Supreme Court's decisions in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), some federal district judges have essentially required plaintiffs to set forth in their complaints detailed evidence in support of every element of a cause of action or damage claim in order to survive a motion to dismiss. As a result, it is not unusual for complaints against cruise lines, especially when based upon accidents occurring during excursions or as a result of medical malpractice, to routinely reach 30 and 40 pages in length. In recognition that such a requirement violates Rule 8's notice pleading standards, the court overturned the dismissal of such a complaint in a suit arising out of the shooting of passengers in an area of St. Thomas, where it was alleged the ship knew was dangerous due to gang violence. While noting that the recent Supreme Court decisions required more than merely "labels and conclusions" or "a formulaic resuscitation of the elements of a cause of action," the Eleventh Circuit reiterated that "Rule 8's pleading standard does not require detailed factual allegations." Accordingly, it concluded that in the case before it, the Plaintiff's allegations that the defendant was familiar with the area and knew of the dangers to its passengers due to gang violence, public shootings, drug sales and theft was sufficient to state a cause of action for negligence in failing to warn its passengers of such dangers was stated.

Shore Excursions

Belik v. Carlson Travel Grp., Inc., 11-21136-CIV,
2012 WL 4511236 (S.D. Fla. Oct. 1, 2012)

The court denied a shore excursion operator's motion to dismiss on the grounds of *forum non conveniens* for an accident occurring at a Señor Frogs restaurant in Cozumel, Mexico. After

reiterating the "well established" rule that a case may not be dismissed on *forum non conveniens* grounds, if U.S. maritime law is applicable, the court noted that such jurisdiction may extend "literally beyond the gangplank" to common law torts against cruise ship passengers that occur on land. *See also Doe v. Celebrity Cruises, Inc.,* 394 F.3d 891, 2005 AMC 214 (11th Cir. 2004). In order to determine whether jurisdiction existed in the case before it, the court concluded that resort to the *Lauritzen-Rhoditis* factors was appropriate. Nevertheless, since the burden is upon the defendant to establish the factors supporting dismissal on the grounds of *forum non conveniens*, the failure of the excursion operator to present such an analysis was deemed fatal by the court, which therefore denied the motion to dismiss.

Manning v. Carnival Corp., 12-22258-CIV, 2012 WL 3962997 (S.D. Fla. Sept. 11, 2012)

A complaint which asserted separate counts against a cruise line for negligence in (1) allowing an excursion to be held at a particular dangerous location and (2) in negligently selecting a tour operator was upheld despite an overlap between the allegations in each count. The court noted that the cruise line could be held separately liable under each theory and that it was not necessary for the passenger to establish that the cruise line had failed to make a sufficient inquiry into the competency of the cruise line to establish the claim based upon the negligent choice of the excursion location

Seamen

Wallace v. NCL (Bahamas) Ltd., 891 F. Supp. 2d 1343 (S.D. Fla. 2012)

Following a bench trial, the court concluded that the cruise line had created a situation where it was nearly impossible for its cabin attendants to clean all of their assigned cabins within the allotted time period on embarkation day, which forced them to hire and pay helpers, so that they did not receive their full wages in violation of the Seaman's Wage Act. Nevertheless, the court

went on to further hold that violation of the Act by itself does not entitle the seaman to recover penalty wages, where the shipowner is able to establish "sufficient cause" for its actions. Such sufficient cause exists where the employer has a reasonable belief that the wages were not due or whether there is a valid dispute over them. In light of the lack of prior precedence finding a violation of the Seaman's Wage Act under the circumstances presented, the court concluded that the shipowner had a valid doubt over its obligation to reimburse its cabin stewards for the payments they made to other crew members to assist them. As a result, while the court found that the cabin stewards were entitled to recover such reimbursements from their employer, it declined to award additional penalties.

Discovery

Parks v. NCL (Bahamas) Ltd., 285 F.R.D. 674 (S.D. Fla. 2012)

Where the plaintiff's trip and fall accident was captured on a security video, the court upheld the defendant's contention that production of the video should be delayed until after the plaintiff's deposition, since the defendant was entitled to the plaintiff's sworn testimony based on an unrefreshed recollection of the incident. The court concluded that it was not necessary for it to determine whether the surveillance video was protected as work product as claimed by the defendant, since it had authority under Rule 26 (d) to decide the time and the sequence of discovery. The court's conclusion in this case was directly opposite to the holding on the identical issue in *Schulte v. NCL (Bahamas) Ltd.*, 10-23265-CIV, 2011 WL 256542 (S.D. Fla. Jan. 25, 2011).

Forum Selection Clauses

Estate of Tore Myhra v. Royal Caribbean Cruises Ltd.,
695 F.3d 1233, 2012 AMC 2678 (11th Cir. 2012)

A forum selection clause requiring that suit be initiated in England was upheld where the ticket had been sold to the passenger,

who was an English citizen, in the United Kingdom by a British travel agent. The court held that giving effect to the forum selection clause under the circumstances in the case would not violate the provisions of 46 U.S.C. §30509 even though requiring suit to be filed in the United Kingdom would give effect to the Athen's Convention and its limitation on damages. The court reasoned that the statute only prohibited a carrier from inserting only ticket provisions which directly limited damages and not the use of an otherwise permissible forum selection clause, even though it might have the same indirect effect. The holding of the case appears to be limited to those circumstances in which a foreign national purchases a ticket in his home country, which requires any resulting suit to be filed in the courts of such country.

COSTA CONCORDIA

Giglio Sub S.N. C. v. Carnival Corp., 2012 WL 4477504, 2012 AMC 2705 (S.D. Fla. Sept. 26, 2012)

The court dismissed on *forum non conveniens* grounds a class action brought on behalf of more than 1,000 fisherman, property owners, business owners and wage earners on Giglio Island, as well as those "working in and around the islands," who claimed damages to their businesses stemming from the wreck of the COSTA CONCORDIA. After discussing the propriety of the various affidavits and declarations submitted on the motion, the court concluded that dismissal was proper under the four factor *Gilbert* analysis. In this regard, it concluded that Italy was an available and adequate forum even though it did not provide class action procedures. Although acknowledging that the majority of the evidence relating to Carnival's control over Costa would be found in the United States, the court nevertheless pointed out that the overwhelming location of the evidence on the other issues (ie: breach of duty, causation and damages) all favored trial in Italy. Since Italy also had the greatest interest in both the liability and damage issues in the case, the court likewise found that the public interest factors also overwhelmingly favored the defendant's motion.

Arbitration

Estibeiro v. Carnival Corp., 12-22713-CIV, 2012 WL 4718978 (S.D. Fla. Oct. 3, 2012)

Based upon the Eleventh Circuit's opinion in *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257 (11thCir. 2011), the district court upheld an arbitration clause in a seaman's contract requiring the matter to be decided in Bermuda under that country's laws. The court joined the growing list of other judges post *Lindo* who have concluded that public policy objections to arbitration clauses requiring the use of foreign law may only be asserted in review following the arbitration proceedings.

COMMITTEE ON FISHERIES

Chair: Kevin J. Thornton
Editor: Terence G. Kenneally

FISHERIES CASE BRIEFS

November 2012

Bickford v. Marriner, No. 2:12-cv-00017-JAW, 2012 WL 3260323 (D. Me. Aug. 8, 2012).

Parties and Issue

The plaintiff, David Bickford, is a seaman who alleges that he was employed by the defendant, vessel owner Alan Marriner, as a "third-man" to wash gear for a limited three day period. During that period he suffered an injury aboard the F/V COOL BREEZE. The defendant denied that the plaintiff worked on his vessel during the date of the plaintiff's alleged injury. The defendant filed a Motion to deposit the plaintiff's maintenance and cure benefits in the court's registry under Federal Rule of Civil Procedure 67, which permits a litigant to deposit funds with the court and to continue to claim an interest in all or part of it. In the alternative, the defendant requested that the court impose conditions on the payment of such funds to the plaintiff.

Analysis and Holding

The defendant alleged that he was faced with an "unfair conundrum" because if he did not pay the plaintiff maintenance and cure then he may be subject to punitive damages for failure to pay. If he paid the maintenance and cure benefits to the plaintiff, and it was later determined that the plaintiff was not his employee, he would be "exposed to absolute loss of the funds." The plaintiff argued that because a vessel owner is required to pay maintenance for food and lodging to a seaman injured in the service of the vessel, to hold those funds in an escrow-like arrangement until the

resolution of the case would defeat the very purpose of admiralty law's maintenance requirement, which is to provide financial relief to a seaman following an injury or illness until he has recovered and is again able to support himself.

The court concluded that to allow the vessel owner to deposit the amount of the maintenance and cure benefits into the court's registry would alter the balance of legal duties between the shipowner and the seaman. As to the defendant's unfair conundrum, the court answered that the vessel owner must know his seamen. If the plaintiff was not the defendant's seaman, there is no issue and no conundrum. If the plaintiff was the defendant's seaman, and the defendant did not know it or refused to admit it, then the conundrum is one of his own making. The court exercised its discretion against the vessel owner and declined to approve a Rule 67 deposit in the court's registry for the amount of the maintenance and cure benefits.

Pont v. Williams, No. 11-04583 (JAP), 2012 WL 1805420 (D.N.J. May 17, 2012)

Parties and Issue

The plaintiff, Ronald Pont, filed his complaint pursuant to the Jones Act, 46 U.S.C. § 30106, alleging that he sustained personal injuries while employed as a seaman aboard the F/V MISS PEACHES. He brought this action against Annie Mae Williams, the widow of the Plaintiff's former employer and the owner of the vessel, and against the vessel itself *in rem*.

Analysis and Holding

The plaintiff claimed to have been injured when the captain of the vessel swung a steel chain and struck plaintiff in the jaw. The Jones Act states that plaintiffs "may bring a civil action against a master, mate, engineer, or pilot of a vessel, and recover damages, for personal injury or loss caused by the master's, mate's, engineer's, or pilot's-(1) negligence or willful misconduct; or (2) neglect or refusal to obey the laws governing the navigation of vessels." 46 U.S.C. § 30103.

The defendant demonstrated that she was not the plaintiff's employer, and instead her late husband, Mayhew Williams, Jr., employed the plaintiff. Mr. Williams, and not the defendant, was the owner of the vessel at the time of the accident. The defendant argued that because she was not the plaintiff's employer or the owner of the boat at the time the alleged injury occurred, the plaintiff failed to state a claim against her for which relief may be granted. Further, the plaintiff never asserted a claim against Mr. Williams' estate.

The plaintiff did not sue the defendant in any representative capacity, and did not assert any legal basis for holding her personally liable. He merely asserted that she "stands in the shoes of the decedent," without citing any law to support that assertion. A Jones Act claim may only be maintained against the seaman's employer. 46 U.S.C. § 30104; *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 790, (1949). As to the unseaworthiness claim under maritime law, only the shipowner at the time of the injury can be held liable. See *Mitchell v. Trawler Racer, Inc*., 362 U.S. 539, 549–50, (1960). The plaintiff's claims may only lie against Mr. Williams as the plaintiff's employer and the owner of the boat at the time of the injury. Thus, filing an action against Mr. Williams' estate, which the plaintiff failed to do, would be the only appropriate forum for hearing plaintiff's case.

Trident Seafoods Corp. v. Bryson, No. 2:12-cv-0134-MJP, 2012 WL 1642214 (W.D. Wash. May 10, 2012) and *Trident Seafoods Corp. v. Bryson*, No. 2:12-cv-0134-MJP, 2012 WL 1884657 (W.D. Wash. May 23, 2012).

Parties and Issue

Defendant, National Marine Fisheries Service ("Fisheries Service"), regulates rockfish fisheries located on the Alaskan coast. Each rockfish fishery has three components: (1) processors (i.e. plaintiffs, Trident Seafoods Corp.), (2) catcher vessels that catch and deliver fish to processors for processing, and (3) catcher–processor vessels that catch fish and process them on-board while at sea (i.e. intervenors).

The decisions at issue in this case involved Fishermen's Finest, Inc.'s, North Pacific Fishing, Inc.'s, and U.S. Fishing, L.L.C's (collectively referred to as "Catcher–Processors") motion to intervene (May 10, 2012 decision) and United Catcher Boats' ("UCB") and Alaska Whitefish Trawlers Association's ("AWTA") motions to intervene (May 23, 2012 decision). Plaintiffs–processors (Trident) are owners of rockfish processing facilities located on the Gulf of Alaska in Kodiak, Alaska. The proposed intervenors, the Catcher–Processors, are a collective of offshore vessels that catch and process rockfish at sea in the Gulf of Alaska fishery. The processors brought this suit to challenge the current fishery management plan for the Gulf of Alaska, Amendment 88.

UCB is a membership organization comprised of catchers as well as processors, including plaintiff Trident Seafoods Corporation; however, UCB sought to intervene on behalf of its catcher boat members only. UCB's catcher boat members own 9 of the 46 licenses eligible to participate in the Amendment 88 program. AWTA is an association of catcher vessels that sought to intervene at both the merit and remedy stages. Under Amendment 88, AWTA member-vessels hold 64 percent of the overall catcher quota in the rockfish fishery.

Analysis and Holding

The court applied a four-part test for analyzing a motion to intervene as a matter of right under Federal Rule 24(a)(2): (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

The court first found that UCB and AWTA's intervention at the remedy stage was appropriate. While the processors must prevail on their legal arguments first, the processors ultimately sought to reinstate the pilot program. Reinstatement of the pilot program

would eliminate the catchers' quota shares under Amendment 88 and would require the catchers to again contract with specific processors in delivering rockfish on-shore. The catchers were concerned that setting aside Amendment 88 would render the rockfish fishery less cooperative and that the fishery would return to an open access system, which lends itself to short seasons, dangerous conditions, and long hours. Therefore, if the court were to determine that the Fisheries Service should have considered the processors' legal status in the fishery, the catchers would have a significantly protectable interest in the plan that would be in effect while the Fisheries Service develop a new management plan.

The court also found that the Fisheries Service will not adequately represent the catchers' interests in the remedy stage of litigation because their interests were narrower than the Fisheries Service's interests. The catchers were interested in retaining their allocation of quota shares, whereas the Fisheries Service's goal was to balance a number of competing economic, environmental, scientific, and conservation interests in determining whether the reinstate the pilot program. Because the parties' interests were different, the court concluded that it was unlikely that the government will make all of the catchers' arguments.

Additionally, the court granted the Catcher-Processor's motion to intervene as a matter of right in the remedy stage because the Catcher-Processors have a protectable interest in maintaining their current harvest quota share, the litigation potentially impairs that interest, and the Fisheries Service will not adequately represent the Catcher-Processors' interest during the remedy phase.

Pac. Coast Fed. of Fishermen's Ass'n v. Blank, 693 F.3d 1084 (9th Cir. 2012).

Parties and Regulations at Issue

Plaintiffs/appellants in this matter were members of the Pacific Coast Federation of Fishermen's Association, a collection of primarily non-trawl fishermen's association and groups whose

longtime participation in the fishery may shrink under Amendments 20 and 21 to the Groundfish Fishery Management Plan. The Pacific groundfish fishery extends 200 miles into the Pacific Ocean, along the coasts of California, Oregon, and Washington. Amendments 20 and 21 were designed to increase economic efficiency through fleet consolidation, reduce environmental impacts, and simplify future decision-making. Plaintiffs argue that the Amendments are unlawful under MSA and NEPA. The district court granted summary judgment for the defendants, NMFS and NOAA.

Analysis and Holding

Every two years, the Pacific Council establishes catch limits, called "optimum yields" or "annual catch limits," which "represent an annual quantity of fish that the groundfish fishery as a whole may catch." Prior to Amendments 20 and 21, the Council enforced catch limits primarily by regulating the number of fishing trips. Bycatch was recorded on only one-quarter of non-whiting trawl fishing trips. In mixed-stock fisheries like the Pacific groundfish fishery, harvests of healthy species are constrained by measures to protect overfished species, even if those species are not targeted by any particular fishery.

In August 2010, NMFS approved Preferred Alternative 4b as Amendment 20, and various preferred alternatives as Amendment 21. Amendment 20 divides the trawl fishery into three sectors and then assigns a discrete number of fishing privileges within each sector. For the on-shore sector, privileges are initially allocated based on catch history and then become freely transferable after two years. Liberal transferability is expected to yield economic efficiency and bycatch reductions, but it also may force out participants from local fishing communities by consolidating privileges and making them more expensive.

Section 1853a(c) of the MSA, titled "Requirements for limited access privileges," contains various provisions related to fishing communities. To be eligible to participate in a limited access program, fishing communities must "meet criteria developed by the

relevant Council [and] approved by the Secretary" and "develop and submit a community sustainability plan." The plaintiffs argued that the MSA requires NMFS to (1) develop criteria for ensuring that quota shares are distributed to fishing communities, and (2) adopt "other measures and policies" to ensure the sustained participation of fishing communities. NMFS responded that § 1853a(c) only required it to consider the sustained participation of fishing communities against other objectives, including by developing optional participation criteria or other measures. NMFS also argued that Amendments 20 and 21 adequately serve to protect fishing communities. The court found that §1853a requires NMFS to take fishing communities into account in fashioning a limited access program, but does not require NMFS to guarantee communities any particular role in that program. The plaintiffs argued that Amendments 20 and 21 defied the National Standard 8 policy of fostering community participation in the fishery. The court determined that the National Standards do not require any particular outcome with respect to allocations; rather, they provide a framework for the Council's analysis.

The plaintiffs next argued that §1853a(c)(5) and (c)(7) require NMFS to restrict the authority to receive and hold quota shares to those who "substantially participate" in the fishery. The court agreed with NMFS' argument that §1853a(c)(1)(D) is the sole provision setting forth who is excluded from acquiring quota shares, and §1853a(c)(5)(E) means "that those who substantially participate in the fishery must be among those eligible to acquire [shares], but are not the only entities or person[s] who can receive [shares]." *Pac. Coast*, 693 F.3d. at 1095. The court reasoned that §1853a(c)(5) and (c)(7) lacked the words "only or "solely" as the plaintiffs read into it. The phrase "persons who substantially participate in the fishery" is not found in §1853a(c)(1)(D), which is the only provision that specifies who may not acquire quota shares. Also, limiting quota shares to those who "substantially participate" in the fishery would conflict with other parts of §1853a(c).

The plaintiffs' first argument under NEPA was that a single EIS was required for Amendments 20 and 21 under two NEPA regulations: 40 C.F.R. §§ 1502.4(a) and 1508.25(a)(1). However,

§1502.4(a) does not impose an independent test for determining when to study related actions in a single EIS. Rather, as the section's full language makes clear, it directs agencies to make that determination. The court found that NMFS clarified what each amendment did and substantively addressed the misdirected comment or referred the reader to the appropriate EIS, where those issues were always addressed. Therefore, NMFS's decision to prepare two amendments, and hence two EISs, did not undermine its compliance with NEPA

The plaintiffs next argued that under NEPA an agency is required to study a reasonable range of alternatives to the proposed action. The court reviewed the agency's range of alternatives under a rule of reason standard that requires an agency to set forth only those alternatives necessary to permit a reasoned choice. For Amendment 20's EIS, NMFS studied seven alternatives, ranging from how they managed catch, initially allocated privileges, and treated processors to the accumulation limits they set and the species they covered. For Amendment 21, NMFS studied six alternatives in detail, which differed primarily based on how they allocated groundfish stocks among different sectors.

An EIS must contain a reasonably thorough discussion of the significant aspects of the probable environmental consequences of a proposed action. Courts may review agency decisions to ensure that the agency has taken a hard look at the potential environmental consequences of the proposed action. The court here cited to the length of the Amendments in support of their conclusion that the agency took a hard look at the environmental impacts. In the Plaintiffs' view, NEPA requires more because the Amendments will "ensure the long-term domination of trawling" in the fishery and trawling is harder on fish habitat than fishing using fixed gear. The court disagreed with the plaintiffs' view and found that Amendments 20 and 21 will not necessarily favor trawling over fixed gear relative to current management. The court concluded that under NEPA, NMFS appropriately studied Amendments 20 and 21 in separate EISs, considered an adequate range of alternatives, evaluated the Amendments' impacts on fish habitat and non-trawl communities, and considered and adopted appropriate mitigation measures.

The court summarized its holdings by reiterating that NMFS satisfied its duties under MSA to consider fishing communities in fashioning a limited access program and making fishing privileges available to those who substantially participate in a fishery. The court also found that NMFS complied with the MSA's National Standards.

Kahea v. Nat'l Marine Fisheries Serv., Civil No. 11-00474 SOM-KSC, 2012 WL 1537442 (D. Haw. April 27, 2012).

Parties and Regulations at Issue

Plaintiffs, KAHEA and Food and Water, Inc., seek to invalidate a one-year fishing permit issued by the NMFS to Kona Blue Water Farms, Inc., ("KBWF"). The permit authorizes KBWF to "sock, culture and harvest" almaco jack fish using "CuPod gear" in federal waters off the coast of the Big Island. The "CuPod" is a brass-link mesh cage that, instead of being tethered to land or anything stationary, is continuously towed behind a vessel, remaining submerged at a predetermined depth during normal operations. The permit at issue authorized KBWF to hold up to 2,000 almaco jack at one time in the CuPod, where they were expected to grow. Plaintiffs describe the KBWF project as a fish farm and characterize its operations as "aquaculture."

Defendants, NMFS, issued KBWF a Special Coral Reef Ecosystem Fishing Permit pursuant to MSA. Plaintiffs argued that, although defendants may properly issue such permits authorizing "fishing," KBWF's project involves aquaculture, which is not fishing under the MSA. Plaintiffs also argue that, by issuing KBWF a fishing permit, defendants made a *de facto* rule that aquaculture is fishing under the MSA, in violation of the MSA and APA.

After the parties had filed competing summary judgment motions, KBWF completed its project and removed and dismantled the CuPod. Defendants say that no additional operations are scheduled to be conducted under the permit and the permit was terminated.

Analysis and Holding

KBWF applied for and was granted a Special Coral Reef Ecosystem Fishing Permit by the NMFS that authorized KBWF to "demonstrate" the "Velella Concept" in federal waters. The Velella Concept cultures 2,000 almaco jack inside a CuPod, which is a 132–cubic–meter cage.

The fish cultured in the CuPod were to be obtained from KBWF's land-based hatchery and taken to the CuPod. Once at the project site, which was three nautical miles offshore, the CuPod was to be towed behind a sailing vessel in deep waters (between 10,000 to 20,000 feet). The CuPod was to be constantly moving. Upon completing their growth cycle inside the CuPod, the fish were to be removed and taken to land.

BWF submitted its permit application on November 5, 2010. The NMFS proposed the issuance of a limited, one-year permit so that KBWF could demonstrate the Velella Concept. After receiving public comment and approval by the Council, the NMFS submitted its final EA. Based on the EA, NMFS determined that the KBWF project would not have a significant impact on the quality of the human environment and issued a FONSI [Finding of No Significant Impact].

Defendants argue that plaintiffs' NEPA claim is moot because KBWF has completed its project. Addressing whether a NEPA claim was moot, the Ninth Circuit has stated, "[w]here the activities sought to be enjoined have already occurred, and the appellate courts cannot undo what has already been done, the action is moot." *Friends of the Earth v. Bergland*, 576 F.2d 1377, 1379 (9th Cir.1978). The court reasoned that the plaintiffs did not allege any continuing harm resulting from the issuance of the permit. The plaintiffs sought to invalidate the permit because the NMFS allegedly failed to comply with various statutes in issuing the permit, not because KBWF's project has harmed or will harm the environment in any definable or discernible way. The court concluded that since the permit has been terminated, there was no effective relief that the court could order for an alleged NEPA violation.

Next, the court found that plaintiffs' MSA claim was not moot because it was "capable of repetition yet evading review." KBWF told defendants that it intended to seek another permit, and the NMFS required KBWF to submit a new SCREFP application to get a future permit. Plaintiffs argued that the permit at issue was outside the authority of the MSA because KBWF was engaging in aquaculture, not fishing, as authorized by the MSA. However, the court concluded that the MSA defines "fishing" broadly and therefore the activity, "harvesting of fish," as NMFS defined KBWF's project, was covered under the MSA.

Finally, the court determined that NMFS' issuance of one permit authorizing a specific project does not mean that every application that NMFS receives requesting a permit to conduct aquaculture will be granted. There is no indication that KBWF's permit applies to any other fishery or has any future effect. Accordingly, NMFS did not promulgate a *de facto* rule when they issued the permit to KBWF.

U.S. v. Reeves, 891 F.Supp. 2d. 690 (D. N.J., 2012).

Parties and Issue

Under the Lacey Act, Congress provided for federal criminal penalties premised upon the violation of various state, tribal, foreign and federal fish and wildlife protection laws. 16 U.S.C. §§3371–3378. The Lacey Act provides that it is unlawful for any person to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce, any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law.

The indictment herein charged, among other things, that several defendants violated §3372(a)(2)(A) by buying or selling or transporting oysters in interstate commerce that had been taken, possessed or transported in violation of the laws and regulations of New Jersey because "the oysters were not reported as required, and were in excess of the amount authorized to be harvested and landed" under New Jersey law and regulations.

Count III charged defendants Thomas Reeves, Todd Reeves, Shellrock, LLC, Mark Bryan and Harbor House, Inc. with violating the Lacey Act from August 2, 2006 through on or about October 9, 2006 and from April 19, 2007 through on or about October 4, 2007 in the District of New Jersey, and aiding and abetting this crime. The charging language specifically stated that these defendants trafficked fish or wildlife "in a manner unlawful under the laws and regulations of New Jersey." The indictment incorporated the New Jersey statutes and administrative code provisions.

The State of New Jersey empowers the Commissioner of the Department of Environmental Protection ("DEP") to control and direct the shellfish industry and protect the shellfish resource throughout the state. The Commissioner is empowered to make such rules and regulations as may be necessary for the preservation of the shellfish industry and resources after consultation with the Shell Fisheries Council. The Legislature set forth that it is only lawful to catch and take oysters in certain portions of the Delaware Bay upon compliance with Title 50 "and any rules and regulations issued pursuant thereto." By statute, no person may catch oysters from the natural shellfish beds unless the Shellfish Council has issued an annual license for taking shellfish for each vessel.

Analysis and Holding

The Delaware Bay section of the Shell Fisheries Council makes annual recommendations of the total quota for harvesting oysters from the state seed beds. The DEP sets the annual quota, though not by regulation nor with general notice or publication, and that quota figure is divided by the number of licensed oyster dredge vessels which intend to participate in the open season of seed bed oyster harvesting. The resulting quota is the same for each vessel, determined each year and subject to change as conditions warrant. The oyster vessel owners must sign a Statement of Understanding and Agreement to Terms for the annual direct market harvest season, containing terms and conditions upon the vessel's participation. This Agreement acknowledges that the Division set a total season quota, for the 2007 season, the quota was 79,026 bushels of oysters and

that the quota per licensed vessel was 1,040 bushels. This oystering quota is one of the terms and conditions that defendant Reeves was accused of violating by exceeding the quota for the season.

Another disputed requirement is the term of the Agreement requiring the oyster harvester to place two calls to the Division's office when harvesting seed bed oysters. The first call is prior to the workday reporting the name of the vessel and the seed bed area where the vessel intends to harvest oysters. The second call is at the end of the harvest day, to report the vessel's name, harvest location, quantity of oysters harvested, landing area and approximate time the oysters are to be landed. Reeves is accused of violating the call-in term by underreporting the actual quantity of seed bed oysters harvested. A third disputed term refers to the filing of weekly harvester reports. The dealer must keep a log of all oysters received that were harvested from the Delaware Bay, noting the date, time, vessel license number, and quantities of bushels received, and send the completed form to the Bureau of Shellfisheries at the end of each week. The Government alleges that several defendants trafficked in oysters that were harvested in violation of the weekly vessel report requirement because the reports submitted to the state with regard to these oysters were allegedly false.

The Government's central argument is that the "Terms and Conditions" to the annual New Jersey oystering license agreement can serve as a predicate for a Lacey Act violation even if these terms and conditions are not promulgated as laws or regulations under New Jersey state law. The Government presented no case in which the federal court looked to federal law to determine whether a state or foreign law was a proper predicate for a Lacey Act violation. Rather, courts have looked directly to state law, and in the only Third Circuit case presented, called directly upon experts of foreign law to determine the validity of the underlying predicate offense under foreign law. After reviewing the cases relied on by the Government, the court was persuaded that the underlying predicate offense under the Lacey Act must be a violation of a valid New Jersey law or regulation. If the terms and conditions are not considered to be state laws or regulations, then the violation of such a Term or Condition

cannot serve as a basis for this Lacey Act prosecution. The court then looked to New Jersey law to determine whether the annual oyster permit terms and conditions constitute a "law or regulation" of the State of New Jersey for purposes of the Lacey Act.

New Jersey's statutory language expressly authorizes the DEP Commissioner to act through rules and regulations to control the shellfish industry and oyster harvesting in the natural seed beds. The central inquiry was then whether the conditions set by the DEP as terms and conditions of maintaining an oyster license constitute rules and regulations were consistent with the NJ statutes.

After examining the underlying body of New Jersey law on the subject, the court held that the Terms and Conditions at issue for the years 2004–2007 did not qualify as a "law or regulation" of New Jersey; the DEP should have promulgated regulations (as it later did in 2010) specifying these requirements and it did not do so as required by the New Jersey APA and controlling precedent, nor was there substantial compliance with the APA. The court reasoned that by limiting predicate violations to violations of actual state law or regulations, Congress did not extend the reach of the Lacey Act trafficking provision to fish or wildlife taken or transacted in violation of state policies or directives or license conditions, as here, that do not rise to the level of duly promulgated regulations of the state, as determined by state law.

The court concluded that the oyster quota requirement, the daily call-in requirement and the weekly vessel log requirement are *de facto* rules subject to the provisions of the Administrative Procedure Act. The court further found that the DEP did not comply with the requirements of the APA as the DEP did not provide prior notice of the terms and conditions in the New Jersey Register, did not submit the Terms and Conditions to the Legislature for review and did not publish the Terms and Conditions in the New Jersey Administrative Code. As a result of these deficiencies, the Terms and Conditions could not be considered a law or regulation of the State of New Jersey during the time period charged in the Indictment, 2004 to 2007.

The court also noted that the DEP Commissioner properly passed administrative rules and regulations to establish surf claim quotas. The conditions at issue in this case were not passed pursuant to the APA, nor in substantial compliance with the Act, and were not codified in any state regulatory code book. This distinction supported the court's conclusion that the "Terms and Conditions" attendant to the oyster license agreements were nothing more than terms and conditions of the license and not a DEP determination having the force of a rule or regulation under the laws of the State of New Jersey.

The court held that the harvest conditions set annually by the DEP from 2004 to 2007 and attached as Terms and Conditions of the oyster license agreement were not part of the laws or regulations of the State of New Jersey and therefore the violation of these Terms and Conditions could not serve as a basis for the Lacey Act.

[Editors' note: This discussion is based upon the legal research assistance of Kirby Aarsheim, Esq. of Clinton & Muzyka, P.C., Boston, MA.]

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BILGE & BARRATRY

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From the Helm

With profound thanks for Dennis Minichello, the past-Chair of this Committee who started this newsletter, I launch my first issue of Bilge & Barratry. This issue continues our practice of providing our membership with information on the most current issues in marine ecology and maritime criminal law. Please let me know what other topics are of interest to you, and I shall endeavor to include them in our next issue.

Katherine F. Newman
Chair & Editor

NORTH AMERICAN EMISSIONS CONTROL AREA (ECA)

Guidelines on Enforcement (CG-CVC Policy Letter 12-04)

Capt. K.P. McAvoy, CG-CVC Policy Letter 12-04 (July 25, 2012) (available at http://www.uscg.mil/hq/cg5/lgcncoe/docs/02.pdf (last visited July 8, 2013))

CG-CVC Policy Letter 12-04 addresses the following material:

Background.

a. Since January 8, 2009, U.S. and foreign flagged vessels operating in the waters of the United States have been subject to Annex VI [of the International Convention for the Prevention of Pollution from Ships, Nov. 3, 1973, 34 U.S.T. 3407, 1340 U.N.T.S. 184, amended by Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, Feb. 17, 1978, 134 U.N.T.S. 61, 17 I.L.M. 546 {hereinafter MARPOL}]. The Marine Environmental Protection Committee (MEPC) of the [International Maritime Organization ("IMO")] adopted amendments to Annex VI and the nitrogen oxides (NOx) Technical Code, collectively referred to as Annex VI (Revised) . . . . [M.E.P.C. Res. 176(58), Int'l Maritime Org. Doc. MEPC.176(58) (Oct. 10, 2008). Annex VI (Revised) entered into force on July 1, 2010. These amendments include significant and progressive limits for SOx [(sulfur oxide)] and NOx [(nitrogen oxide)] emissions from marine engines and for the first time addressed emissions of PM [(particulate matter)]. The amendments replaced the SOx Emissions Control Areas (SECA) by introducing the concept of Emission Control Areas (ECA) for SOx, NOx, and PM.

b. On March 26, 2010, MEPC at its 60th session adopted amendments to MARPOL Annex VI, by resolution MEPC.190(60) to designate the new North American ECA . . . . The North American ECA entered into force on August 1, 2011 and shall take full effect on August 1, 2012 . . . .

c. On June 26, 2012, the [U.S. Environmental Protection Agency ("EPA")] issued an *Interim Guidance on the Non-Availability of Compliant*

Fuel Oil for the North American Emission Control Area . . . . This guidance addresses how the EPA will effectuate the fuel oil availability provisions . . . for ship owners and operators unable to obtain fuel oil meeting the sulfur standards . . . applicable to ships operating in the U.S. ECA(s).

d. The Coast Guard [(USCG)]has entered into a Memorandum of Understanding (MOU) with the EPA. . . dated June 27, 2011, to set forth the terms by which the USCG and EPA will mutually cooperate in the implementation and enforcement of Annex VI to MARPOL as implemented by APPS [(the Act to Prevent Pollution from Ships), 33 U.S.C. §§ 1901 *et seq.*]. Memorandum of Understanding Regarding Enforcement of Annex VI As Implemented by the Act to Prevent Pollution from Ships, USCG-EPA, June 27, 2011, *available at* http://www.epa.gov/enforcement/air/documents/policies/mobile/annexvi-mou062711.pdf (last visited July 9, 2013).

. . .

Purpose. [The] policy letter outlines the Coast Guard's methods and procedures for verifying compliance with MARPOL Annex IV . . . and how violations identified by the Coast Guard . . . are documented and referred to the . . . EPA for enforcement.

Directives Affected. None.

. . .

Methods & Steps to verify Compliance with MARPOL Annex VI, Regulation 14 (amended).

a. **Ships utilizing low sulfur fuel for compliance** . . . .

i. **Non-availability of compliant fuel oil for purchase [MARPOL Annex VI, Reg. 18]:** . . . [t]he EPA issued Interim Guidance on the Non-Availability of Compliant Fuel Oil for the North American Emission Control Area . . . [which] is available on EPA's website at http://www.epa.gov/otaq/oceanvessels.htm.

(1) **U.S. Flag Ships** . . . .

(2) **Foreign Flag Ships** . . . .

ii. [Marine Inspectors and Port State Control Officers ("MI/PSCO's")] encountering ship fuel oil with sulfur content exceeding 1.00% m/m while operating in the ECA (under U.S. jurisdiction) should determine if a non-availability report was submitted to the EPA . . . ..

(1) If the required report was submitted, look to the following:

a. Verify if notification was provided to the Flag Administration;
b. Review records of actions taken to attempt to achieve compliance and any evidence submitted to the EPA that the ship attempted to purchase compliant fuel oil (i.a.w. voyage plan);
c. Obtain a copy of the bunker delivery note(s) for the fuel oil in use while operating in the North American ECA (VI/Reg. 18.7.1);
d. If the ship is scheduled to receive compliant fuel oil during the port call (or has already received bunkers): Obtain a copy of the bunker delivery note; and
e. Refer to [the U.S. Coast Guard ECA Job Aid, available at https://homeport.uscg.mil/cgi-bin/st/portal/uscg_docs/MyCG/

Editorial/-20120725/ECA_Job_Aid_3.pdf?id=16baf705bb08f64a8a3a3e44e47b1f33277f599e&user_id=2a47d4dbfd24ce2da39438e736cab2d6 (last visited July 10, 2013)] for deficiency examples and recommended actions.

(2) If the required report was not submitted, look to the following:

a. Review any records of actions taken to attempt to achieve compliance;
b. Review any evidence that the ship's crew attempted to purchase compliant fuel oil (i.a.w. voyage plan), whether any attempts were made to locate alternative sources and despite best efforts compliant fuel oil could not be purchased as it was unavailable;
c. Determine if the flag Administration was notified;
d. Obtain a copy of the bunker delivery note(s) for the fuel oil in use while operating in the North American ECA;
e. Request the Master to submit [a non-availability] report [to the EPA];
f. If the ship is scheduled to receive fuel oil during the port call (or has already received bunkers), obtain a copy of the bunker delivery note(s); and
g. Refer to [the U.S. Coast Guard ECA Job Aid] for deficiency examples and recommended actions.

b. **Ships complying with MARPOL Annex VI, Regulation 14 through equivalent controls, as established in Regulation 4 of Annex VI:**

i. **U.S. flagged ships** . . . .
(1) The Coast Guard [and EPA] will review requests [to approve the use of fittings and materials, as well as alternative fuel oils, procedures, or compliance methods] . . . .

(2) Following consultation with the EPA, the Coast Guard . . . will make the determination of whether the equivalence is accepted.

. . .

ii. **Foreign flagged ships** . . . .
(1) The Coast Guard will review proposals meeting a flag Administrations [sic] approval for design and installation, for compliance with applicable U.S. Laws, regulations, policies, and procedures.
. . .
(2) Following consultation with the EPA, the Coast Guard will provide official correspondence to a flag Administration acknowledging the proposal as an acceptable equivalency or provide a statement as to why the proposal should not be accepted with recommendation and/or concerns.
(3) The Coast Guard will add a special note in their vessel inspection data base (MISLE) for a ship receiving a flag Administration equivalency under Annex VI Regulation 4, which has been received, reviewed and accepted by the Coast Guard.

c. **Ship operators seeking exception and/or exemption under MARPOL Annex VI, Regulation 3.2** . . . .

d. **Transfer Monitors:** Coast Guard Personnel conducting transfer monitors are reminded that ships may purchase fuel oil for operating outside the ECA

with a sulfur content of 3.5% m/m or 1.00% m/m for operating within the ECA.

Equipment casualty or failure.

Deficiencies.

MISLE – Documentation.

a. Due to the limited character constraints in the MISLE "detail block", MI/PSCOs should provide:

i. The deficiency code, regulatory site and a brief description of the deficiency.

b. **Under the "Requirement/Resolution" section, enter the following:**

i. Due date . . . .
ii. If the Annex VI deficiency was resolved or corrected by the conclusion of the vessel exam:
(1) Place a check-mark in the "Resolved/Corrected" block.
(2) Select the date of the Annex VI correction.
(3) Enter the details of the resolution in the "Resolution" block.

. . .

c. **Placing documents/evidence into MISLE** . . . .

d. **Narrative Section** . . . .

Enforcement of detected violations.

a. USCG detection of violations that will be referred to the EPA for enforcement action (non-criminal).

b. USCG detection of violations that will not be referred

to EPA for Enforcement Action.

c. USCG Detection of Violations, evidence of Criminal Liability.

i. CG-CVC will maintain liaison with their EPA Headquarters counterpart for timely sharing of reports or information. Captain of the Port/Officer in Charge, Marine Inspection are encouraged to maintain liaison with the local EPA Agents.

ii. The EPA may be invited by the cognizant [Captain of the Port or Officer in Charge, Marine Inspection ("COTP/OCMI")] to assist in the investigation into the allegations . . . for reports received of this nature during an ongoing Coast Guard inspection or examination. . . .

iii. When evidence of a suspected criminal activity is not substantiated under this section, but deficiencies detected are subject to enforcement actions, each Agency will take the appropriate enforcement (civil penalty) action . . . .

iv. Coast Guard Districts may contact CG-CVC-2 (Port State Control Program Manager) at 202-420-9710 (duty cell) for additional guidance.

Additional Information and changes . . . .

Forms . . . .

Questions . . . .

Disclaimer . . . .

Corey Shipley

Charleston School of Law Student

Summary of Topics Discussed in Frequently Asked Questions by USCG and EPA Regarding ECA

The U.S. Coast Guard ("USCG") and the Environmental Protection Agency ("EPA") have compiled a list of Frequently Asked Questions ("FAQ") from the common questions they have received regarding implementation of the North American ECA. Frequently Asked Questions: North American Emission Control Area (ECA), U.S. Coast Guard Office of Commercial Vessel Compliance (Aug. 30, 2012), *available at* http://www.uscg.mil/hq/cg5/csncoe/docs/ECA%20FAQs.pdf (last visited July 10, 2013). The FAQ provides clarifications on the following issues:

- The types of vessels that must comply with the North American ECA;
- The vessels that are exempt from the ECA's fuel sulfur requirements;
- The fact that yachts, recreational vessels, and fishing vessels are not exempt from compliance unless they are using only marine distillate fuels meeting the requirements of 40 C.F.R. § 80, "essentially number 2 diesel and lighter," purchased in the United States;
- U.S. and Canadian enforcement of the ECA regarding each other's vessels on the Great Lakes;
- How various vessels utilizing low sulfur fuel oil will demonstrate their compliance with the ECA, including (1) vessels that enter/exit the ECA; (2) vessels that operate solely within the ECA; (3) vessels over 400 GT ITC operating internationally; and (5) vessels operating domestically using marine distillate fuel;
- The fact that fuel purchased in the U.S. is not automatically

ECA compliant;

- How information about sulfur content should be documented;
- The fact that soot blowing is not regulated under the ECA;
- How the U.S. will handle ECA violations occurring outside of U.S. waters, including the fact that the U.S. has jurisdiction to enforce the ECA against U.S.-flagged vessels operating anywhere in the world and foreign-flagged vessels visiting U.S. ports, but must refer foreign-flagged vessels operating outside of U.S. waters to the flag state for action;
- How representative fuel oil samples will be analyzed and the ECA's maximum limit of 1% m/m of sulfur;
- The fact that vessels whose company policies require them to await third party lab results before burning newly loaded bunkers should document the requirement on fuel non-availability reports along with the estimated delay;
- The fact that vessels are permitted to incinerate sludge using an onboard incinerator; and
- The fact that only vessels over 400 GT on international voyages must comply with bunker delivery note and fuel oil sample storage requirements.

The FAQ indicates that the Coast Guard and EPA are researching responses regarding the following additional commonly raised issues:

- Whether the ECA applies to mobile offshore drilling units ("MODUs") and/or vessels using dynamic positioning;
- Whether a vessel that receives fuel oil with a bunker delivery note indicating 1.00% m/m sulfur and later learns from third party analysis that the sulfur content is higher

has committed a violation;

- Whether only fuel oils with a viscosity less than 11 centistokes are considered straight distillate fuels deemed in compliance with the ECA;

- Whether a vessel that does not have ECA-compliant distillate fuels but does have fuel oil with viscosity less than 11 centistokes must use that oil;

- Whether a vessel that does not have ECA-compliant fuel, cannot take bunkers, and also does not have fuel oil with viscosity less than 11 centistokes must file a non-compliance and non-availability report;

- Whether every vessel entering the ECA be inspected or whether inspections be will be random and, if random, how frequently the inspections will occur;

- What the provision that the Coast Guard will perform "ship inspections and examinations during the course of flag state and port state examinations" in the Memorandum of Understanding Regarding Enforcement of Annex VI As Implemented by the Act to Prevent Pollution from Ships, USCG-EPA, June 27, 2011, *available at* http://www.epa.gov/enforcement/air/documents/policies/mobile/annexvi-mou062711.pdf (last visited July 9, 2013), means;

- What the noncompliance penalty is, how it will be assessed, and whether it will be more severe for multiple violations;

- Whether compliance verifications will only occur in port and what the verification procedure will be; and

- Where the EPA will maintain the register of local suppliers of low sulfur fuel oil required by the Memorandum of Understanding.

Rob Crabtree
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"Fight?" New Support in Fight Against ECA Regulation

Press Release, U.S. Dep't of Justice, New Support in Fight Against ECA Regulation (Oct. 19, 2012), *available at* http://gov.alaska.gov/parnell/press-room/full-press-release.html?pr=6288 (last visited July 10, 2013)

> October 19, 2012, Juneau, Alaska – Governor Sean Parnell today welcomed the support of the Resource Development Council (RDC) after it moved to intervene in litigation against the federal government and its new emission rules imposing a 200-mile emissions control area (ECA) off most of Alaska's coast.
>
> "The State of Alaska, our congressional delegation, and Alaska's businesses repeatedly told the federal Environmental Protection Agency (EPA), years ago when they were considering the new rules, that they did not have the facts or the science to support imposing the ECA on Alaska," Governor Parnell said, "Incredibly, but not surprisingly, the EPA admitted a lack of science and modeling but chose to force the new regulation on Alaska. I am proud to stand with the Alaska businesses, individuals, Alaska Native corporations, and communities that make up the membership of the RDC in this fight."
>
> While some vessels in the maritime fleet could make costly adjustments to comply with the ECA, those costs will be passed on, increasing the price of goods and fuel in Alaska. The state is requesting the EPA to withdraw the ECA, perform the proper studies, consider and balance the impacts and costs to Alaska jobs and families, allow all Alaskans to

review accurate information and provide comment, and follow the proper procedures before imposing any new rules.

BALLAST WATER

Final Rule

On March 23, 2012, the U.S. Coast Guard issued its final rule amending its regulations on ballast water management entitled "Standards for Living Organisms in Ship's Ballast Water Discharged in U.S. Waters," which became effective on June 21, 2012. 77 Fed. Reg. 17,254, 17,301 (to be codified at 33 C.F.R. pt. 151, 46 C.F.R. pt. 162). The final rule requires all vessels equipped with ballast tanks, with certain exceptions, to install and operate a ballast water management system ("BWMS") approved by the Coast Guard in order to discharge ballast water into U.S. waters. BWMS's approved by the Coast Guard must meet the ballast water discharge standards ("BWDS") relating to the presence of organisms of a certain size and type set forth in the final rule. The final rule establishes a schedule for vessel compliance based on the date of construction and ballast water capacity. Prior to the applicable compliance date, vessels have the option of performing a complete ballast water exchange in an area 200 nautical miles from any shore prior to discharging ballast water. Alternatively, the final rule recognizes (1) non-discharge of ballast water, (2) discharge of ballast water to an onshore facility or another vessel, and (3) the use of only water from a U.S. public water system as ballast water as approved ballast water management methods. If a vessel intends to install a BWMS prior to its compliance date and the Coast Guard has not yet approved a BWMS for that type of vessel, the vessel may install a BWMS approved by a foreign administration pursuant to the standards set forth in the International Convention for the Control and Management of Ships' Ballast Water and Sediments, Feb. 13, 2004, I.M.O. Doc. BMW/CONF/36 (Feb. 16, 2004), [2005] A.T.N.I.F. 18, and approved by the Coast Guard as an Alternative Management System ("AMS") based on the Coast Guard's determination that the system is at least as effective as ballast water exchanges. A vessel may use an AMS to discharge

ballast water before its compliance date and for five years after its compliance dates, which should be sufficient time to secure Coast Guard approval for the AMS.

Matt Koch
Marwedel Minichello & Reeb PC

Frequently Asked Questions (FAQ)

The U.S. Coast Guard has compiled a list of Frequently Asked Questions ("FAQ") from the common questions they have received regarding its Standards for Living Organisms in Ships' Ballast Water Discharged in United States Waters ("Final Rule"), 77 Fed. Reg. 17,254 (Mar. 23, 2012) (to be codified at 33 C.F.R. pt. 151, 46 C.F.R. pt. 162). The FAQ was issued on August 1, 2012, and revised on August 7 and 17, 2012. It provides clarification on the following issues:

- The definition of the Exclusive Economic Zone;
- The types of vessels regulated under the Final Rule;
- Ballast Water Management requirements, including which vessels must have Ballast Water Management Systems ("BWMS") installed, the applicability of the Final Rule to unmanned deck barges towed more than 200 nm offshore, requirements to show proof of where water came from, and extensions for compliance and approval of Ballast Water Management Plans;
- The use of Alternate Management Systems ("AMS"), the difference between AMS determinations and type approval, time frames, eligibility and requirements for BWMS vendors to submit AMS applications, testing requirements for AMS determination, the applicability of the Environmental Protection Agency's Environmental Technology Verification Program, and the bar to changes to BWMS after submitting an AMS application;

- The phase one ballast water discharge standard, see 33 C.F.R. § 151.2035(b) and the implementation schedule for approval of ballast water management methods, including a chart to determine a vessel's compliance date;

- The requirements to incorporate fouling organism and sediment removal procedures in ballast water management plans;

- Enforcement and compliance, including the interaction between the Coast Guard and EPA, which should engage in joint efforts to prevent illegal discharges;

- Questions regarding guidance on the regulations, new requirements, state control exams for inspectors, delayed type approved systems, and compliance with implementation dates;

- How a vessel's enrollment in the Shipboard Technology Evaluation Plan ("STEP"), affects requirements under the Final Rule;

- BWMS approval procedures, including applications for type approval, and the fact that approval processes can take from 30 to 60 days, even for accepted AMS

- The use and acceptance of existing data for foreign type approval, compliance requirements regarding EPA Environmental Technology Verification ("ETV"), additional testing required by BWMS vendors, and data required to comply with the requirements of 46 C.F.R. pt. 162.060; and

- The requirements and responsibilities of Independent Laboratories ("ILs"), requirements for storing data, and the interplay between the ETV and verification of ballast water treatment technologies. A list of Coast Guard approved ILs can be found on the Coast Guard Maritime Information Exchange website, http://cgmix.uscg.mil/

EQLabs/EqLabsSearch.aspx (last visited July 9, 2013). The Coast Guard supports novel processes, but they will be subject to greater scrutiny to gauge potential operations and discharges. Certifications will be issued to type approved systems and the procedures for type approval can be found at 46 C.F.R. §§ 162.060-10. BWMS equipment should be installed in nonhazardous locations, but if not, then the equipment must meet the corresponding requirements for where it will be installed.

[Editors' note: The FAQ was also updated on April 5, 2013.] It is available at http://www.uscg.mil/hq/cg5/cg522/cg5224/docs/BWM_FAQs_Vol%20I_05-April2013.pdf (last visited July 10, 2013).]

Limor BenMaier
Kelley Kronenberg

Letter of Authorization (LOA)

The International Convention for the Control and Management of Ships' Ballast Water and Sediments, Feb. 13, 2004, I.M.O. Doc. BMW/CONF/36 (Feb. 16, 2004), [2005] A.T.N.I.F. 18, requires that Ballast Water Management Systems ("BWMS") demonstrate compliance with the standards outlined in regulation D-2 of the convention. In May 2012, the Coast Guard accepted Ann Arbor, Michigan, based NSF International and several sub-laboratories in other locations as the first U.S.-accepted independent laboratories for evaluation, inspection, and testing of BWMS compliance. U.S. acceptance of these independent laboratories should facilitate the ability of vessel owners to implement more efficient BWMS. A list of Coast Guard approved laboratories can be found on the Coast Guard Maritime Information Exchange website, http://cgmix.uscg.mil/EQLabs/EqLabsSearch.aspx (last visited July 9, 2013). U.S. regulations for BWMS can be found at 46 C.F.R. pt. 162.060, *available at* http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title46/46cfr162_main_02.tpl (last visited July 9, 2013).

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Alternative USCG Policy on Obtaining Alternative Management System Determination

Ballast water discharged from marine vessels is noted to be one of the pathways for the introduction and spread of aquatic nuisance species to new marine ecosystems. Pursuant to the National Invasive Species Act of 1996 ("NISA"), 16 U.S.C. §§ 4701 et seq., the U.S. Coast Guard promulgates ballast water regulations and issues guidelines to prevent the introduction and spread of aquatic nuisance species. NISA allows the Coast Guard to approve alternate ballast water management methods that are at least as effective as mid-ocean ballast water exchange. 16 U.S.C. § 4711.

In 2004, the International Maritime Organization ("IMO"), adopted the International Convention for the Control and Management of Ships' Ballast Water and Sediments ("IMO Convention"), Feb. 13, 2004, I.M.O. Doc. BMW/CONF/36 (Feb. 16, 2004), [2005] A.T.N.I.F. 18, which aims to prevent the spread of aquatic nuisances species by establishing standards and procedures for the management and control of ships' ballast water and sediments. Since 2004, foreign flag administrations have been approving Ballast Water Management Systems ("BWMS") that comply with the IMO Convention.

The Coast Guard recognizes that vessel owners will install foreign-type BWMS on vessels that routinely discharge ballast water into U.S. waters before U.S. approved BWMS are available for all vessels. Capt. R.C. Proctor, CG-OES Policy Letter 12-01 (June 15, 2012) ("CG-OES Policy Letter") (available at http://www.uscg.mil/hq/cg5/cg522/cg5224/docs/CG-OESPolicyLetter12-01.June2012.pdf (last visited July 9, 2013). Foreign-type BWMS approved by a foreign administration may request a Coast Guard determination that the foreign BWMS is an Alternative Management System ("AMS") for the purposes of complying with U.S. ballast water management regulations. 33 C.F.R. § 151.2026.

On June 15, 2012, the USCG distributed a letter explaining the USCG policy by which foreign BWMS manufacturers may request a USCG compliance determination as an AMS. CG-OES Policy Letter. To obtain approval for a foreign BWMS, the Coast Guard must determine the foreign-type BWMS is (1) approved by a foreign administration in accordance with the IMO Convention and (2) qualifies as an AMS that can be used in lieu of ballast water exchange ("BWE"). CG-OES Policy Letter. The Coast Guard policy letter provides specific instructions on the procedure and necessary documents that foreign BWMS manufacturers must submit to the Coast Guard for AMS determination. *Id.* Please note that the use of an AMS by a vessel will be allowed for up to five years after the vessel is required to comply with the federal ballast water discharge standards. 33 C.F.R. § 151.2026(c).

Justin Mitchell
Fugro USA

Carlos Tamez
APL

GREAT LAKES UPDATES

Stop Invasive Species Act (S. 2317) Proposed Bill and Canadian Assistance in Preventing the Spread of Asian Carp.

On April 19, 2012 Senator Stabenow (D-MI) introduced the Stop Invasive Species Act, S. 2317, 112th Cong. (2d Sess. 2012), to compel the Secretary of the Army to complete the Great Lakes Mississippi River Interbasin Study within 18 months and to focus particular attention on the permanent prevention of the spread of aquatic nuisance species between the Great Lakes and the Mississippi River Basins. As of June 29, 2012, the bill has passed through both houses of Congress and is well on its way to becoming law. The Act would require the creation of a plan to block Asian carp from entering the Great Lakes through a number of rivers and tributaries across the Great Lakes region by using a hydrological separation system. On May 28, 2012, Canada said that it would devote $17.5

million to protecting the Great Lakes from Asian carp, including development of an early warnings system with U.S. agencies.

[**Editors' note:** An identical bill was introduced in the House of Representatives. H.R. 4402, 112th Cong. (2d Sess. 2012). Both bills were referred to committees, but were never reported out. To date, they have not been introduced in the current term.]

Stefan Fiedler
Charleston School of Law Student

Coast Guard Proposed Rule on Dry Cargo Residue Discharge in the Great Lakes.

The U.S. Coast Guard issued a supplemental notice of rule-making aimed at replacing its existing interim rule with a new rule that would regulate dry cargo residue ("DCR") discharges in the Great Lakes. Dry Cargo Residue Charges in the Great Lakes, 77 Fed. Reg. 44,528 (July 30, 2012) (to be codified at 33 C.F.R. pt. 151). This proposed new rule, aimed at U.S. and foreign vessels carrying bulk dry cargo such as limestone, iron ore, and coal, would continue to allow non-hazardous and non-toxic discharges of bulk DCR in limited areas. However, vessel owners and operators would need to limit DCR discharges and document the methods used in DCR management plans. Furthermore, the DCR discharge of limestone and clean stone DCR discharges would not be permitted where they are now permitted. The Coast Guard's plan promotes maritime mobility, safety, and protection of natural resources.

Stefan Fiedler
Charleston School of Law Student

MARPOL ANNEX V (GARBAGE)

The International Maritime Organization has posted a simplified overview of the revised version of Annex V (Garbage), Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships

("MARPOL"), M.E.P.C. Res. 201(62), I.M.O. Doc. MEPC.201(62) (July 15, 2011), which comes into effect on 1 January 2013. The overview is available at http://www.imo.org/OurWork/Environment/Pollution-Prevention/Garbage/Documents/Annex%20V%20discharge%20requirements%20for%20website%203.pdf (last visited July 9, 2013). More detailed guidance regarding discharge requirements are set forth in the revised text of Annex V and the 2012 Guidelines for the Implementation of MARPOL Annex V. M.E.P.C. Res. 219(63), I.M.O. Doc. MEPC.219(63) (Mar. 2, 2012).

ANTI-FOULING

US – Ratification of AFS Convention

The International Maritime Organization issued a circular stating that the United States has submitted its instrument of ratification for the International Convention on the Control of Harmful Anti-fouling Systems on Ships ("AFS Convention"), Oct. 5, 2001, I.M.O. Doc. AFS/CONF/26 (Oct. 18, 2001). *Ratification by the United States of America*, I.M.O. Doc. AFS.1/Circ.49 (Aug. 21, 2012). The AFS Convention will come into effect for the United States on November 21, 2012.

Thad Pope
Charleston School of Law Student

USCG – Guidance re AFS Convention

The U.S. Coast Guard issued a policy letter providing guidance to U.S. vessels and to foreign vessels calling in U.S. waters on compliance with the International Convention on the Control of Harmful Anti-fouling Systems on Ships ("AFS Convention") Oct. 5, 2001, I.M.O. Doc. AFS/CONF/26 (Oct. 18, 2001). Capt. K.P. McAvoy, CG-CVC Policy Letter 12-08 (Oct. 15, 2012), *available at* http://www.uscg.mil/tvncoe/Documents/policyletters/AntiFouling-Systems12-08.pdf (last visited July 9, 2013). The policy letter addresses domestic vessel inspections and certifications, as well as port state control procedures for foreign vessels.

Thad Pope
Charleston School of Law Student

California – Proposed Amendments to Biofouling Regulations

The California State Lands Commission ("SLC") issued a Notice of Second Modification to Text of Proposed Amendments to Regulations for the Management of Biofouling for Vessels Operating in California Waters ("Notice of Second Modification") (Feb. 29, 2012) (to be codified at Cal. Code Regs. tit. 2, § 4.8), available at http://www.slc.ca.gov/spec_pub/mfd/ballast_water/Documents/Notice_4_8_29Feb12.pdf (last visited July 9, 2013). The Notice of Second Modification states that the SLC is proposing *amendments* to regulations for the management of biofouling for vessels operating in California waters. Among other things, the proposed amendments include a modification of procedures for the presumption of compliance for sea chests and addition of procedures for presumption of compliance for sea chest gratings, bow and stern thrusters, and bow and stern thruster gratings. Comments on the proposals were due by March 16, 2012.

Thad Pope
Charleston School of Law Student

California – Proposed Modifications to Proposed Amendments to Biofouling Regulations

The California State Lands Commission ("SLC") issued a Notice of Modification to Text of Proposed Amendments to Regulations for the Management of Biofouling for Vessels Operating in California Waters ("Notice of Amendment Modification") (June 11, 2012) (to be codified at Cal. Code Regs. tit. 2, § 4.8), *available a*t http://www.slc.ca.gov/spec_pub/mfd/ballast_water/Documents/Attachment%201_Article%204_8%20Cover%20Letter_11June12.pdf (last visited July 9, 2013). The Notice of Amendment Modification states that the SLC proposes to amend its regulations relating to management of biofouling for vessels operating in California waters. The SLC also posted the regulatory text showing

both proposed deletions and proposed new language. *See* Notice; *see also* Marine Invasive Species Program (MISP), California State Lands Commission, http://www.slc.ca.gov/spec_pub/mfd/-ballast_water/Ballast_Water_Default.html (follow "Rulemaking Documents" hyperlink under Update on Proposed Changes to Article 4.8) (last visited July 8, 2013). Comments on the proposal were due by June 26, 2012.

[**Editors' Note:** According to the California State Lands Commission website, the changes proposed by the Notice of Second Modification and the Notice of Amendment Modification have not yet been adopted. Marine Invasive Species Program (MISP), California State Lands Commission, http://www.slc.ca.gov/spec_pub/mfd-/ballast_water/Ballast_Water_Default.html (last visited July 9, 2013).]

Thad Pope
Charleston School of Law Student

DEPARTMENT OF THE INTERIOR – BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT ("BSEE")

Deepwater Well Control Exercise (Gulf of Mexico)

The Bureau of Safety and Environmental Enforcement ("BSEE") has announced that Marine Well Containment Company's ("MWCC") well containment exercise was a success. BSEE Declares Deepwater Well Containment Exercise a Success, World Oil Online, July 31, 2012, http://www.worldoil.com/BSEE_declares_deepwater_well_containment_exercise_a_success.html (last visited July 9, 2013); BSEE: First Deepwater Well Containment Exercise a Success, Oil & Gas Journal, July 31, 2012, http://www.ogj.com/articles/2012/07/bsee-first-deepwater-well-containment-exercise-a-success.html (last visited July 9, 2013).

BSEE recently issued an unannounced deployment and containment exercise to test MWCC's well control system and spill response plans. On July 24, MWCC deployed its capping stack,

which measures 30 feet tall and weighs 100 tons. The stack was deployed from Houston, Texas and transported nearly 200 miles from shore where it was lowered to nearly 7,000 feet onto a simulated wellhead on the ocean floor. The simulation included connecting the stack to the wellhead and pressurizing the equipment to 10,000 psi. It took approximately five days from the time of deployment to latching the capping stack onto the simulated wellhead.

The equipment used in this control exercise is similar to the capping stack that was used to stem the flow during the Deepwater Horizon Macondo well tragedy in 2010. However, where it took less than a week to get the simulated wellhead under control, it took months to build and latch the stack onto the Macondo wellhead during the Horizon response.

The multi-week exercise gave engineers, inspectors and oil spill specialists the opportunity to identify ways to improve safety and environmental protection including securing mud mats for subsea accumulator skid ("SSAS"). So far, no critical failures have been noted in the demonstration.

Allison King
Charleston School of Law Student

Oil Spill Response Plan Guidance

The Bureau of Safety and Environmental Enforcement ("BSEE") recently issued new guidance regarding Oil Spill Response Plans ("OSRPs"). BSEE is taking action in response to the April 20, 2010, DEEPWATER HORIZON tragedy that killed 11 workers in the Gulf of Mexico. On August 10, 2012, BSEE published National Notice to Lessees and Operators of Federal Oil and Gas Leases and Pipeline Right-of-Way Holders ("NTL") No. 2012-N-06 titled "Guidance to Owners and Operators of Offshore Facilities Seaward of the Coast Line Concerning Regional Oil Spill Response Plans," a*vailable at* http://www.bsee.gov/uploadedFiles/BSEE/-Regulations_and_Guidance/Notices_to_Lessees/2012/NTL2012-N06.pdf (last visited July 9, 2013). The NTL is designed

to ensure consistent national OSRP preparation and to encourage offshore oil spill response techniques. All plans will be evaluated by the Oil Spill Response Division ("OSRD") of BSEE.

Factors Considered:

- Location of the potential worst case discharge;
- Proximity to sensitive resources;
- Nature of the event;
- Estimated discharge volume;
- Oil characteristics;
- Appropriate source control containment methods;
- Weathering; and
- Other resources at risk.

The NTL sets forth detailed submission instructions. Adherence to preferred content and format facilitate the BSEE's review of an OSRP but is not required to obtain approval.

Allison King
Charleston School of Law Student

U.S. DEPARTMENT OF JUSTICE PROCEEDINGS

Gonzalez

A jury for the U.S. District Court for the Southern District of Florida found Alejandro Gonzales, a ship surveyor in Miami, guilty of lying to the U.S. Coast Guard and falsely certifying that inspections had been performed on two vessels. Sentencing concluded on August 29, 2012, with Gonzales to serve 21 months in prison. At trial, evidence proved that Gonzales fabricated a claim

that the M/V CALA GALDANA was dry docked in Colombia, after Coast Guard inspectors discovered the vessel taking on water in San Juan, Puerto Rico, and asked Gonzales when the vessel was last dry-docked. The surveyor was also found guilty of falsifying documents regarding the M/V COSETTE. Despite Gonzales having certified the ship as safe for sea, Coast Guard inspectors in the New York harbor found exhaust and fuel discharging into the vessel's engine room. U.S. Attorney Wilfredo A. Ferrer observed that the sentencing is a reminder to ship surveyors of "the great responsibility that they carry and the consequences of their actions."

Press Release, U.S. Dep't of Justice, Miami Man Sentenced to 21 Months in Prison for Obstruction of Justice and False Statements for Certifying Ships Safe for Sea (Aug. 29, 2012), *available at* http://www.justice.gov/opa/pr/2012/August/12-enrd-1063.html (last visited July 9, 2013).

Mike Stello
Charleston School of Law Student

Guisseppe Bottiglieri

On August 15, 2012, the U.S. District Court for the Southern District of Alabama sentenced Guisseppe Bottiglieri Shipping Company S.P.A. to pay a $1,000,000 criminal fine, serve four years of probation, and make a $300,000 contribution to the National Fish and Wildlife Foundation. In addition, chief engineer Vito La Forgia of the M/V BOTTIGLIERI CHALLENGER was sentenced to one month in jail. These remunerations stem from a U.S. Coast Guard inspection on January 25, 2012, in the Port of Mobile where investigators uncovered a "magic pipe" to divert oily waste past pollution prevention equipment for discharge overboard. In violation of federal law, these discharges were not recorded in the oil record book by La Forgia, as is required with making such records available to Coast Guard inspectors. Kenyen Brown, U.S. Attorney for the Southern District of Alabama, aptly noted that this case represents a "second tremendous win for our environment in just the past few months."

Press Release, U.S. Dep't of Justice, Italian Ship Owner and Chief Engineer Sentenced in Alabama for Crimes Related to Illegal Discharges from Cargo Ship (Aug. 15, 2013), *available at* http://www.justice.gov/opa/pr/2012/August/12-enrd-1012.html (last visited July 9, 2013).

Mike Stello
Charleston School of Law Student

Sanford

Also on August 15, 2012, a jury in the U.S. District Court for the District of Columbia found Sanford, Ltd., a New Zealand fishing company, guilty of six counts of conspiracy, obstruction of justice, and violating the Act to Prevent Pollution from Ships. 33 U.S.C. §§ 1901 *et seq*. Sanford now faces up to $3,000,000 in fines, and James Pogue, Sanford's chief engineer, may be sentenced to as much as 20 years in prison for his involvement. In addition to failing to keep an accurate account of bilge waste, the mandatory oil record book falsely stated that pollution prevention equipment had been in use on the F/V SAN NIKUNAU. Another chief engineer aboard the vessel, Rolando Ong Vano, had already pleaded guilty to the same events that arose from a Coast Guard examination in Pago Pago, American Samoa. U.S. Attorney Ronald C. Machen, Jr., stated, "These verdicts hold a company and one of its chief engineers accountable for polluting the waters off American Samoa with oily waste, and then trying to cover up their acts."

Press Release, U.S. Dep't of Justice, New Zealand Fishing Company Found Guilty in Washington, D.C., of Environmental Crimes and Obstruction of Justice (Aug. 15, 2012), *available at* http://www.justice.gov/opa/pr/2012/August/12-enrd-1011.html (last visited July 10, 2013).

Mike Stello
Charleston School of Law Student

Taohim

Prastana Taohim, former captain of the M/V GUARAV PREM, was found guilty on May 17, 2012, by the U.S. District Court for the Southern District of Alabama of two counts of obstruction of justice. At trial, evidence showed that Taohim ordered the discharge of hundreds of plastic cylinders that previously contained insecticides and then failed to record the discharge in the vessel's garbage record book. Upon inspection by the Coast Guard, the former captain produced the falsified garbage record book, resulting in the current count of obstruction of justice related to covering up the pollution by creating a false and fictitious garbage log.

Press Release, U.S. Dep't of Justice, Singapore Ship Operator and Engineers Plead Guilty to Crimes Related to Pollution from Cargo Ships Traveling to Mobile, Alabama (May 30, 2012), *available at* http://www.justice.gov/opa/pr/2012/May/12-enrd-691.html (last visited July 10, 2013).

Mike Stello
Charleston School of Law Student

Nimrich

Press Release, U.S. Dep't of Justice, German Shipping Companies Convicted in Texas and Alaska for Environmental Crimes, *available at* http://www.justice.gov/opa/pr/2012/November/12-enrd-1313.html (last visited July 10, 2013)

> Two German shipping companies pleaded guilty [on November 2, 2012] in federal court in Houston to criminal charges that they concealed the illegal dumping of oil at sea from U.S. Coast Guard inspectors.
>
> Nimrich & Prahm Bereederung and Nimrich & Prahm Reedrei, the operator and owner of the commercial cargo vessel *M/V Susan K*, will pay a

> $1.2 million dollar criminal penalty, $200,000 of which will go to the National Marine Sanctuaries Fund as a community service payment . . . . As a condition of probation, all vessels owned or operated by the defendants will be prohibited from entering US ports or waters for five years.

Katharine Newman
ConocoPhillips

NATURAL RESOURCE DAMAGE ASSESSMENT FOR M/V EVER REACH

Motion to Enter Consent Decree

United States v. Evergreen Int'l, S.A., No. 2:12–cv–02532–RMG (D.S.C. 2012)

On October 15, 2012, the United States, on behalf of the National Oceanic and Atmospheric Administration and the Department of the Interior, acting through the U.S. Fish and Wildlife Service ("Federal NRDA Trustees"), along with the South Carolina Department of Health and Environmental Control and Department of Natural Resources (''State NRDA Trustees''), filed a motion in the U.S. District Court for the District of South Carolina, seeking entry of a consent decree lodged with the court on September 4, 2012. If judicially approved and entered by the court, the consent decree would resolve all claims for natural resource damages, penalties, and response costs brought by the Federal and State NRDA Trustees against Evergreen International, S.A., stemming from a September 2002 accidental discharge of fuel oil from the M/V EVER REACH into the Cooper River in Charleston, South Carolina.

The discharge of oil from the EVER REACH occurred during the vessel's transit to her berth at the North Charleston Terminal on the Cooper River on September 30, 2002, when the vessel's hull came into contact with an unmarked, submerged dredge pipeline, piercing the vessel's hull, which allowed an estimated 12,500 gallons

of fuel oil to escape into the river, predominantly concentrated along the western shore of the river in the vicinity of the North Charleston Terminal and the piers and docks of the former U.S. Naval Base. Evergreen International, S.A., as owner of the EVER REACH at the time of the spill, was designated as the Responsible Party in accordance with the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701 *et seq.*

In their joint complaint filed contemporaneously with the consent decree, the NRDA Trustees are seeking damages under Section 1002 of OPA, 33 U.S.C. § 2702, and under the South Carolina Pollution Control Act, S.C. Code Ann. § 48–1–90, to compensate for injuries and losses to natural resources allegedly attributable to the EVER REACH spill, as well as the recovery of assessment costs incurred by the NRDA Trustees as a result thereof. Specifically, the terms of the consent decree provide that Evergreen International, S.A. agrees to (1) perform a compensatory marsh restoration project at a former golf course along Noisette Creek in North Charleston, South Carolina, which is designed to restore approximately 11.7 acres of salt marsh habitat; (2) pay $121,000 in monetary damages for lost recreational uses allegedly attributable to the spill; (3) reimburse the NRDA Trustees $820,685.27 for costs incurred in assessing the nature and extent of the natural resource injuries caused by the spill and in planning the marsh restoration project; and (4) reimburse the NRDA Trustees for their reasonable, future assessment and oversight costs incurred in monitoring the compensatory restoration project.

Sean Houseal
Womble Carlyle Sandridge & Rice, LLP

[**Editors' note:** The court granted an order entering the consent decree on October 24, 2012.]

U.S. ARCTIC

NOAA's ERMA Mapping Tool

ERMA ("Environmental Response Management Application"), https://www.erma.unh.edu/arctic (last visited July 10, 2013), is a web-based mapping tool that aids environmental resource managers and emergency responders dealing with incidents that may harm the environment. ERMA is equipped with near real-time oceanographic observations and weather data from NOAA, and critical environmental, commercial, and industrial data information from various agencies.

As Arctic sea ice continues to contract and thin, energy exploration and transportation activities will be increasing in the region, escalating the risk of oil spills and accidents. As of July 2012, the Arctic ERMA tool has come online to assist in dealing with potential environmental incidents. ERMA already has been implemented for regions in the Atlantic, Gulf of Mexico, Pacific Islands, Southwest, Caribbean, New England, and the Pacific Rim.

The launch of Arctic ERMA is part of ongoing efforts by the Interagency Working Group on Coordination of Domestic Energy Development and Permitting in Alaska. This working group aims to coordinate the federal agencies responsible for overseeing the safe and responsible development of onshore and offshore energy in Alaska.

Jude Smith

Capping Stack Update - Shell

In September 2012, Shell Alaska spokesman Curtis Smith addressed the Associated Press and described four lines of environmental defense that Shell will have in place for drilling in the Beaufort and Chukchi Seas off the northern coast of Alaska.

The first defense, he said, would be killing a blowout the traditional way: by pouring drilling mud down the well.

The second method, still traditional, is the activation of a blowout preventer ("B-O-P"), which seals a well by use of a hydraulic shear ram through the drill casing. In the Arctic offshore wells, Shell's B-O-Ps will be fitted with double shear rams for redundancy, Smith said.

The third line of defense is the capping stack, Smith said. The capping stack resembles a giant spark plug and is designed to provide a metal-to-metal seal on a malfunctioning B-O-P. The capping stack can be used to send drilling mud down a hole, simply stopping the flow of oil, or by directing oil, gas, and water to the surface through alternate lines. The capping stack is the most significant change to Shell's safety program, Smith said, and it followed BP's Deepwater Horizon blowout at the Macondo prospect in the Gulf of Mexico.

"The capping stack is modeled after the same one that ultimately stopped the most prolific offshore blowout in the history of North America," Smith said. "We modified it. We made it Arctic-ready."

More importantly, Shell's capping stack is prebuilt and will be staged in the Arctic, he said.

Whereas, "during the Macondo [blowout], there was not one available," he said. BP had to design and build a capping stack on the fly to serve where the B-O-P so infamously failed.

E.g., *Shell Arctic Safety System's Problems Plague Alaska Drilling Plans*, The Huffington Post, Sept. 18, 2012, *available at* http://www.huffingtonpost.com/2012/09/18/shell-arctic-safety_n_1892513.html (last visited July 10, 2013).

Ryan Gilsenan
Womble Carlyle Sandridge & Rice, LLP

Environmentalists Challenge Arctic Drilling

Environmentalists continue to challenge Arctic drilling in the Chukchi and Beaufort Seas. The latest lawsuit, *Alaska Wilderness League v. U.S. Dep't of the Interior*, No. 1:12-cv-00010-RRB (D. Alaska), filed on July 10, 2012, challenges the Bureau of Safety and Environmental Enforcement's ("BSEE") decisions to approve Shell's spill plan. More pointedly, environmentalists argue that a spill late in the season, when ice is moving into the area, could prevent clean up and allow oil to gush unabated. This action is related to the environmental group's action filed against the Minerals Management Service (now the Bureau of Ocean Energy Management, Regulation, and Enforcement) challenging the Final Environmental Impact Statement, *Native Village of Point Hope v. Salazar*, No. 1:08-cv-00004-RRB (D. Alaska) [**Editors' note:** *Native Village of Point Hope* was dismissed in its entirety on Feb. 13, 2012. It is currently pending on appeal and was argued and submitted on March 5, 2013. *Native Village of Point Hope v. Salazar*, No. 12−35287 (9th Cir.)].

Shell has gone on the offensive seeking declaratory judgment on the validity of a number of governmental approvals that it believes will be challenged by the environmental groups.

On February 29, 2012, Shell filed an action, *Shell Gulf of Mexico, Inc., v. Center for Biological Diversity, Inc.*, 3:12-cv-00048-RRB (D. Alaska), seeking a declaration that the Bureau of Safety and Environmental Enforcement's approval of the Oil Spill Response Plan is valid. [**Editors' note:** This action was consolidated with *Alaska Wilderness League v. U.S. Dept. of the Interior*, No. 1:12-cv-00010-RRB (D. Alaska), on July 25, 2012.]

On May 3, 2012, Shell filed an action, *Shell Gulf of Mexico, Inc., v. Center for Biological Diversity*, No. 3:12-cv-00096-RRB (D. Alaska), seeking a declaration that the National Marine Fisheries Service issuance of two Incidental Harassment Authorizations was valid. [**Editors' note:** This case was dismissed without prejudice on November 14, 2012. It is currently pending on appeal as *Shell*

Gulf of Mexico, Inc. v. Alaska Wilderness League, No. 12−36034 (9th Cir.).]

On June 5, 2012, Shell filed an action, *Shell Gulf of Mexico, Inc. v. Center for Biological Diversity*, No. 3:12-cv-00110-RRB (D. Alaska), seeking a declaration that Fish and Wildlife Service's issuance of six Letters of Authorization was valid. [**Editors' note:** This action was voluntarily dismissed on November 14, 2012.]

Despite the litigation, Shell officials, as late as August 17, 2012, remained confident that Arctic drilling would occur in 2012. *E.g., Artic Drilling by Shell Expected to Begin This Year*, N.Y. Times, Aug. 17, 2012, *available at* http://www.nytimes.com/2012/08/18/business/energy-environment/arctic-drilling-by-shell-expected-to-begin-this-year.html?_r=0 (last visited July 10, 2013). Despite their confidence, drilling has not yet commenced in either the Chukchi or Beaufort Seas. In late September, Shell announced it would limit drilling to "top-hole" work, the shallow but time-consuming preparation for an offshore well. *E.g., Shell Hopeful on Artic Drilling Despite Setback*, Alaska Journal, Oct. 4, 2012, available at http://www.alaskajournal.com/Alaska-Journal-of-Commerce/October-Issue-1-2012/Shell-hopeful-on-Arctic-drilling-despite-setback/ (last visited July 10, 2013).

Brian McEwing
Donna Adelsberger & Associates PC

Limited Approvals for Shell's US Arctic Drilling

Shell has obtained limited approvals for preparatory activities in the Arctic waters of offshore Alaska. On August 30, 2012, the Bureau of Safety and Environmental Enforcement ("BSEE") granted Shell a permit to create a mudline cellar and to drill and set the first two strings of casing into shallow non-oil-bearing zones in the Chukchi Sea. The BSEE granted Shell a permit to conduct the same activities in the Beaufort Sea on September 20, 2012. However, the Beaufort Sea operations must await the end of the subsistence whaling season and approval from the Bureau of Ocean Energy

Management. Prior to drilling into any oil-bearing zones, Shell must obtain Coast Guard certification of its containment system in each potential Arctic development area.

Press Release, Bureau of Safety & Environmental Enforcement, BSEE Authorizes Shell Preparatory Activities in Chukchi Sea: Limited Activities to be Conducted in Non-Oil-Bearing Zones (Aug. 30, 2012), *available at* http://www.bsee.gov/BSEE-Newsroom/Press-Releases/2012/Press08302012(2).aspx (last visited July 10, 2013).

David Cole
Reitler Kailas & Rosenblatt LLC

Shell's 2012 Arctic Drilling Season Concludes

Shell's 2012 Artic Drilling Season Concludes, The Maritime Executive (Nov. 1, 2012), http://www.maritime-executive.com/article/shell-s-2012-arctic-drilling-season-concludes/ (last visited July 10, 2013)

> Shell has ended its drilling season off Alaska's Arctic. With a shortened amount of time, the oil giant managed to drill just the top portions of two wells, when it had originally planned as many as six exploration wells.
>
> The company did not try to penetrate deeper reservoirs that could hold oil, but confirms that this work will aid tremendously in positioning Shell for a successful drilling program in 2013. Each well was drilled to a depth of 1,400 feet, according to the Seattle Times.
>
> Despite the mass opposition surrounding Shell's exploratory drilling plans, the Obama administration issued the drilling permits that were necessary to begin work.

> Alaska's open-water season is usually restricted to about four months of the year. Although the Arctic region is suffering from an overall ice thaw, the sea ice lasted longer than predicted in the Chukchi Sea where Shell was planning to drill. Following the receipt of its final permit, Shell still had to wait for a giant ice sheet to pass.
>
> Their season got shorter again because of delays in retrofitting a spill containment barge so that it would pass Coast Guard inspection. The oil spill containment dome was later damaged during sea trials. As precious time continued to dwindle, the U.S. Interior Department gave Shell permission to drill the tops of its planned wells and to set in place blowout preventers, ultimately stating that there was not enough time for Shell to try to drill down to reservoirs that the company hopes contain oil and natural gas.

RIGHT WHALES

The North Atlantic right whale is on the brink of extinction with the population hovering at around 350 to 550 whales. Press Release, National Oceanographic and Atmospheric Administration, Underwater Noise Decreases Whale Communications in Stellwagen Bank Sanctuary (Aug. 15, 2012), *available at* http://www.noaanews.noaa.gov/stories2012/- 20120815_rightwhale.html (last visited July 10, 2013). Right whales are docile, slow, surface-skimming feeders that stay close to coasts. Because of these habits and their seasonal migrations, right whales are at great risk for entanglements with fishing nets and collisions with ships. Many regulations have been put in place to try to mitigate these risks, including a required speed of ten knots or less in Seasonal Management Areas. Currently there are no active mandatory speed zones, but to facilitate compliance with these seasonal regulations, a free Whale Alert computer app has been developed. Press Release, National Oceanographic and Atmospheric Administration, New iPad, iPhone App Helps Mariners

Avoid Endangered Right Wales (Apr. 4, 2012), *available at* http://www.noaanews.noaa.gov/stories2012/-20120404_whale_app.html (last visited July 10, 2013). Among other features, the app provides the most current data overlaid on digital charts, providing mariners with up-to-date speed restriction areas as well as the location of nearby right whales, determined by real-time acoustic buoys. The creators of the app hope it will prevent right whale collisions with ships, which is the leading cause of premature whale death, and prevent mariners from suffering legal penalties for failure to comply with the speed restrictions in the Seasonal Management Areas.

Right whales have also been the focus of a federal suit against the United States Department of the Navy. *Defenders of Wildlife v. U.S. Dept. of the Navy*, 895 F. Supp. 2d 1285 (S.D. Ga. 2012). Twelve environmental groups sued the Navy and recently lost on a motion for summary judgment regarding the Navy's development of an undersea warfare training range. The Navy plans to use the training range for anti-submarine warfare training, but the chosen location near Jacksonville, Florida is the North Atlantic right whale's only known calving ground. Aside from continued fears of ship strikes and entanglement with fishing nets, the plaintiffs are concerned about right whale well-being because the Navy will use the site for sonar training exercises. There are concerns that this noise disruption will negatively affect the breeding and feeding behaviors of the mothers and calves. (The National Oceanic and Atmospheric Administration (NOAA) issued a news release in August 2012 reporting a study that found high levels of background noise in the Stellwagen Bank National Marine Sanctuary caused mostly by ships have decreased the ability of North Atlantic right whales to communicate by about two-thirds.) Press Release, National Oceanographic and Atmospheric Administration, Underwater Noise Decreases Whale Communications in Stellwagen Bank Sanctuary (Aug. 15, 2012), *available at* http://www.noaanews.noaa.gov/stories2012/- 20120815_rightwhale.html (last visited July 10, 2013).) On September 6, 2012, the U.S. District Court for the District of Georgia found that the Navy had complied with the requirements of federal law and could move forward with its plan. The Navy first began planning the undersea warfare range in 1996 when it published its notice of intent to prepare an environmental

impact statement. After considering four alternative sites on the East Coast, the Navy decided in 2008 that the preferred location for the range is the present offshore site near the Georgia/Florida border.

Lauren E. Burk
Phelps Dunbar

PIRACY DEVELOPMENTS

Update on GUARDCON

Since the launch of BIMCO's GUARDCON piracy security contract in March 2012, there has been hesitant acceptance among ship owners. The contract is intended to address standards of service and performance for security contractors, necessary insurance to cover liabilities and contractual indemnities, permitting and licensing, and ultimate responsibility for command of a vessel.

Thus far, limited insurance markets are available to meet the requirements of GUARDCON contracts. For example, Chesterfield offers $5 million in cover to address the majority of the GUARDCON contract terms. Despite some availability, underwriters have thus far excluded offer cover for unlawful acts. Due to the complex nature of onboard security, liability for unlawful acts has been identified by BIMCO's drafting group as a source of risk that should be insured against.

While there is clearly a conflict between the BIMCO group's ideal conception of security coverage, and what insurance providers are capable of legally providing, for now it appears that providers who are utilizing the GUARDCON form are simply ignoring the conflicted language.

Guillermo Cancio
Allianz Global Corporate & Specialty

Charlie Marts
Tulane Law School Student

Update on *US v. Said and US v. Dire* Split in Fourth Circuit

Since publication of the last installment of *Bilge and Barratry,* the Fourth Circuit Court of Appeals has apparently settled the split within the Eastern District of Virginia regarding whether the crime of piracy requires a "taking of property."

The court vacated Judge Jackson's August 2010 opinion in *United States v. Said*, 757 F. Supp. 2d 554, 2010 A.M.C. 2034 (E.D. Va. 2010), which dismissed the piracy charge against Somali defendants who fired upon the USS ASHLAND from a skiff in the Gulf of Aden because no taking of property was alleged. 680 F.3d 374, 2012 A.M.C. 1266 (4th Cir. 2012). The petition for certiorari that was filed on October 1, 2012, was denied. *Said v. United States*, 133 S. Ct. 982 (2013).

In *United States v. Dire*, which was issued by the Fourth Circuit in tandem with its *Said* ruling, the court explained that the definition of the crime of piracy, as proscribed by 18 U.S.C. § 1651, encompasses violent conduct and does not require a taking of property. 680 F.3d 446, 2012 A.M.C. 1217 (4th Cir. 2012), *cert. denied sub nom. Dire v. United States*, 133 S. Ct. 982 (2013). *Dire*, referred to in the district court as *Hasan I*, contained facts nearly identical to those of *Said*. The Somali defendants fired upon the USS NICHOLAS from a skiff on the Indian Ocean.

The court based its decision on what it considered the "two prominent international agreements that have directly addressed, and defined, the crime of general piracy," namely the Convention on the High Seas ("High Seas Convention"), Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11, and the United Nations Convention on the Law of the Sea ("UNCLOS"), Dec. 10, 1982, 1833 U.N.T.S. 3. Although the 1820 opinion *U.S. v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), included language that seemed to require robbery, the Fourth Circuit held that restricting the interpretation of piracy to that definition would "render it incongruous with the modern law of nations and prevent [U.S. courts] from exercising universal

jurisdiction in piracy cases." The court also recognized that the modern definition of piracy without the element of robbery was supported by UNCLOS, as well as the High Seas Convention, and has been "reaffirmed in recent years as nations around the world have banded together to combat the escalating scourge of piracy."

Guillermo Cancio
Allianz Global Corporate & Specialty

Charlie Marts
Tulane Law School Student

Universal Jurisdiction over Pirate Facilitator Addressed in *United States v. Ali*

United States v. Ali, 885 F. Supp. 2d 17 (D.D.C. 2012)
opinion vacated in part, 885 F. Supp. 2d 55 (D.D.C. 2012)

The U.S. District Court for the District of Columbia has also been hearing a prosecution of a Somali pirate. Defendant Ali Mohamed Ali has been charged with aiding and abetting acts of piracy. However, the majority (if any) of these activities did not occur on the high seas. As a result, the case tests the boundaries of the U.S. courts' willingness to prosecute pirates under universal jurisdiction.

Ali was a pirate "negotiator." He boarded the CEC FUTURE two days after it was taken by pirates. An English-speaker, he communicated the pirates' demands to the ship's owner Clipper Group A/S during the remaining sixty-nine days while the vessel was held, and he departed the ship after the ransom was received. Ali was arrested by U.S. authorities more than two years later at Dulles International Airport, when he was en route from Somalia to an educational conference in Raleigh, North Carolina, while serving as the Director General of the Ministry of Education in Somaliland. He has been accused of helping the pirates.

Following the Fourth Circuit's interpretation of the United Nations Convention on the Law of the Sea ("UNCLOS"), Dec. 10,

1982, 1833 U.N.T.S. 3, as set out in the *Hasan I* and *Dire* cases mentioned above, Judge Huvelle points out the relevant provision is article 101(c) which provides that any act of inciting or of intentionally facilitating an act of piracy is itself piracy. UNCLOS art. 101(c). Under domestic law, 18 U.S.C. § 2 makes those who aid, abet, counsel, command, induce, procure, or willfully cause the commission of a federal crime punishable as a principle. 18 U.S.C. §§ 2(a), 2(b). The definitions are functionally equivalent.

Despite Ali's involvement, the piracy charge has been limited by Judge Huvelle because the acts of abetting piracy were not alleged by the government to have occurred on the high seas, and because "the text of the general piracy statute [18 U.S.C. § 1651] makes clear that it only applies to high seas conduct."

The court concluded that Ali's prosecution for aiding and abetting may proceed, but that the government must convince the jury beyond a reasonable doubt that Ali intentionally facilitated acts of piracy while he was on the high seas.

Guillermo Cancio
Allianz Global Corporate & Specialty

Charlie Marts
Tulane Law School Student

HURRICANE SANDY

A reported 300,000 gallons of diesel fuel has spilled into waters between New Jersey and New York from a New Jersey oil refinery that was closed due to Hurricane Sandy.

E.g., Sandy Responsible for 300,000 Gallon Oil Spill on U.S. East Coast, The Maritime Executive, Nov. 1, 2012, *available at* http://www.maritime-executive.com/article/sandy-responsible-for-300-000-gallon-oil-spill-on-u-s-east-coast/ (last visited July 10, 2013).

MACONDO UPDATES

Former BP Engineer Awaiting Trial on Two Counts of Obstructing Justice

A former BP engineer, Kurt Mix, has been arrested on charges of intentionally destroying evidence sought for a U.S. probe of the 2010 Gulf of Mexico oil spill. According to a criminal complaint filed in Louisiana federal court on April 23, 2012, in *United States v. Mix*, No. 2:12-cv-00171-SRD-SS (E.D. La.), Mix, a drilling and completions engineer, is accused of deleting email and text messages he had sent to senior BP managers estimating that the amount of oil spilling into the Gulf was many times greater than the amount stated publicly. Mix resigned from BP in January 2012. The affidavit filed along with the complaint stated that Mix was specifically instructed by attorneys contracted by BP to retain his records before he deleted them. The instructions were in connection with the pending grand jury investigation of the 2010 oil spill.

One week after Mix's arrest, a federal grand jury indicted Mix on two counts of obstruction of justice. Mix allegedly deleted the e-mails on or about October 2010 despite receiving multiple notices from BP in the weeks after the spill, "which stated on the cover, in bold and underlined type, that instant messages and text messages needed to be preserved," the U.S. said in its indictment issued May 2. The indictment further states "The amount of oil flowing was relevant to various efforts to stop the flow and was also relevant to assessing the damage caused by the flow, including potential civil damages and civil and criminal fines and restitution." If convicted, Mix could receive a maximum penalty of 20 years in prison and a fine of up to $250,000 as to each count.

Mix was arraigned before U.S. Magistrate Judge Daniel Knowles and released on $100,000 unsecured bond. At first, Judge Knowles ordered Mix to get approval from the court if he traveled outside his home state of Texas, Louisiana or Massachusetts and New York, where his legal teams have offices. Federal prosecutors argued that Mix was a flight risk because he had been applying for a

green card and, according to prosecutors, had shown he intended to flee the country. However, Mix's flight restrictions were later eased on May 29, allowing him to travel within the continental United States.

On July 25, 2012, Mix requested the government to order prosecutors to immediately release details of its case again him. Specifically, Mix asked that the prosecutors identify which message formed the basis of the government's allegations and to show how the messages impaired a grand jury investigation. U.S. Magistrate Sally Shushan denied Mix's request stating, "The indictment details the factual allegation and provides the defendant with sufficient information to enable him to prepare his defense and to avoid surprise."

Mix, who has pleaded not guilty, faces a trial date of February 25, 2013. [**Editors' note:** The trial has been continued and is currently scheduled for December 2, 2013.] U.S. Attorney General Eric Holder stated earlier in 2012 that the charges against Mix are likely to be followed by others in regards to the spill.

E.g., Margaret Cronin Fisk & Jef Feeley, *BP Engineer Loses Bid to Force Prosecutors to Specify Evidence*, Bloomberg News, July 25, 2012, http://origin-www.bloomberg.com/apps/news?pid=conewsstory&tkr=BP:AR&sid=aJQ9Jv7Wba3s (last visited July 10, 2013.; Allen Johnson & Jef Feeley, *Ex-BP Engineer Mix's Travel Restrictions Eased*, Bloomberg News, May 29, 2012, http://www.businessweek.com/news/2012-05-29/ex-bp-engineer-mix-s-travel-restrictions-eased-by-judge (last visited July 10, 2013).

Order Granting Motions to Dismiss the "Pure Stigma Claims," "BP Dealer Claims," and "Recreation Claims."

On October 1, 2012, U.S. District Judge Carl Barbier granted several motions to dismiss filed in the B1 pleading bundle. *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 902 F. Supp. 2d 808 (E.D. La. 2012). The motions addressed three types of claims, "Pure Stigma Claims,"

"BP Dealer Claims," and "Recreation Claims," that are not included in the proposed class settlement.

"Pure Stigma Claims" were described as claims alleging a loss in the value of real property caused by the oil spill even though the property was neither physically impacted by oil nor sold. Judge Barbier ruled that these claims are not recognized under general maritime law, state law, or the Oil Pollution Act of 1990 ("OPA") 33 U.S.C. §§ 2701 *et seq*. Judge Barbier noted that under the rule of *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 1928 A.M.C. 61 (1927), maritime law bars unintentional tort claims for economic losses when they are unaccompanied by physical injury to the plaintiff's proprietary interest. Under Louisiana state law, the court acknowledged that the Admiralty Extension Act, 46 U.S.C. § 30101, does extend admiralty jurisdiction to cases that do not concern physical damage to property, using *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1020, 1985 A.M.C. 1521 (5th Cir. 1985) (*en banc*) as an example. In response to plaintiffs' argument that OPA preserves state law claims, the court explained that while it has recognized that OPA contains a savings clause, 33 U.S.C. § 2718, it also has rejected the contention that this clause prevents other federal laws from preempting state law. Judge Barbier also declined to interpret OPA as allowing for the recovery of unrealized diminution of real property and concluded that, until the property was sold and a loss was realized, damages were too speculative.

The "BP Dealer Claims" were those plaintiffs whose claims were based only on consumer animosity toward BP. The court ruled that maritime law applied to these claims and that state law was excluded. Under the application of maritime law, Judge Barbier dismissed the claims based on consumer animosity because, as explained in the context of the "Pure Stigma Claims," maritime law does not allow claims for pure economic losses unaccompanied by physical damage to a proprietary interest. The court made a point to note that the dismissal did not apply to those claims made by BP franchisees who allege economic losses due to the overall decline in tourism in the wake of the oil spill.

Judge Barbier also dismissed "Recreational Claims," which are those claims by individuals such as recreational fishermen, recreational divers, beachgoers, and recreational boaters who suffered damages that include loss of enjoyment of the Gulf of Mexico for recreation and amusement purposes. BP divided those claims into two separate types of claims. "Loss of Enjoyment" claims are those in which the plaintiff claims a loss of enjoyment due to the inability to engage in recreational activities. "Loss of Deposit" claims are those that the plaintiff lost money spent in preparation for recreational activities. Judge Barbier dismissed both types of claims.

Under OPA, the court noted that "Loss of Deposit" claims could not be compensable as they are not claims for "loss of profits" or "impairment of earning capacity" as defined under the Act. Furthermore, the claims are not compensable as they do not arise from a physical injury or destruction to property owned or leased by the plaintiff. Under general maritime law, the court refused to expand an exception to the *Robins Dry Dock* rule that currently applies only to commercial fishermen to recreational boaters, recreational fishermen, recreational divers, and waterfront property owners. Additionally, the court concluded that even those claims which could satisfy the *Robins Dry Dock* requirement of physical injury to real property, such as the cost of cleanup of an oiled pleasure boat, would not be eligible to recover damages as general maritime law does not allow recovery for loss of use of a private pleasure boat. As to the "Loss of Deposit" claims, Judge Barbier stated that these claims are not available under OPA as they do not involve injury or destruction of real or personal property, because monetary payments, such as deposits, do not qualify as property under the Act.

Further Topics…

On May 2, Judge Barbier authorized preliminary approval of BP oil settlement claims. . Preliminary Approval Order (Docket No. 6418), *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, No. 2:10-md-02179-CJB-SS (E.D. La. May 2, 2012), *available at* http://www.laed.uscourts.gov/

OilSpill/Orders/05022012Order(Economic-Settlement).pdf (last visited July 10, 2013).

Still awaiting approval by Judge Barbier is the $7.8 Billion Settlement of thousands of claims by coastal business and property owners who sued for economic damages for the BP Oil Spill.

More on the settlement will follow once it is approved.

Becky Hamra
The Standard Club

USE OF DISPERSANTS – CLUB CIRCULAR

TO ALL OWNERS AND MEMBERS

8 October 2012

Dear Sirs
US POLLUTION

NRC and MSRC – Addenda Concerning Use of Dispersants to Contracts for Tank Vessels['] Vessel Response Plans – General Conformity with International Group Guidelines

Members will recall that, as from 22 February 2011, tank vessel operators were required to include a capability for the aerial application of dispersants in their vessel response plans (VRPs).

Both of the main oil spill removal organisations (OSROs), Marine Spill Response Corporation (MSRC) and National Response Corporation (NRC), confirmed that they had such capability. Owners/members are referred to the club's circular of 2 September 2011 in which we advised that MSRC required that its customers sign an addendum (MSRC Addendum) to their standard service agreement

before including MSRC dispersant capability in their VRP. The MSRC Addendum has the footer "(version 22 August 2011.)"

NRC are now introducing a similar addendum (NRC Addendum) to their existing contract: "Agreement for provision of Response Services," bearing the footer: "(Version September 15, 2004)." The NRC Addendum is entitled "Alternative Technologies Amendment to Agreement for Provision of Response Resources (Tank Vessels)" and has footer "September 27, 2012." It will come into effect on 1 January 2013.

Certain terms of both the MSRC Addendum and the NRC Addendum do not conform with the International Group (IG) guidelines on VRPs. Therefore, agreeing to the terms of either addendum could result in owners/members incurring liabilities which fall outside the scope of club cover. Owners/members wishing to obtain additional cover for such liabilities can contact the club for details (as previously advised in relation to the MSRC Addendum). However, it should be noted that this additional insurance provides a limited level of cover.

For NRC clients, there is also the alternative of not signing the NRC Addendum, but instead paying an additional annual charge of USD 250 per vessel. This option would not prejudice club cover and would avoid the need for additional insurance. The full limits of club cover would remain in place.

All tanker owners/members are reminded that, whether they have cited NRC or MSRC in their plans, if calling at Hawaiian ports it will be necessary to cite Clean Islands Council in the VRP as well. The Clean Islands Council contract does not conform with the IG VRP guidelines. Therefore, signing their contract could result in owners/members incurring liabilities which fall outside the

scope of club cover. Owners/members wishing to obtain additional cover for such liabilities can contact the club for details. At the present time non-tank vessels are not required to include a capability for the aerial application of dispersants in their VRPs.

Vessel Response Plans – General Conformity with International Group Guidelines

Members are reminded that, as set out in the club's circular of 19 June 2009, certain contracts for pollution response services do not conform with the IG guidelines for vessel response plan contracts. Use of such contracts – which in certain geographical areas may be unavoidable for want of alternative resources – may consequently expose owners/members to liabilities that fall outside club cover. A list of conforming contracts is available from the club.

The club is able to arrange some limited cover for owners/members for these liabilities. Owners/members are reminded that this cover operates on an individual declaration basis, such that owners/members must declare each call to ports where use of a contractor with a non-conforming contract is contemplated. In case of doubt, owners/members should contact the club for advice.

Owners/members should contact the club should they have any queries regarding any of the above.

All clubs in the International Group will be issuing a similar circular.

Yours faithfully
Alistair Groom
Chairman

Charles Taylor Mutual Management (Asia) Pte Limited

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE

Committee Chair: Joseph G. Grasso
Editor: Gene B. George

NEWSLETTER

Fall 2012

RECENT CASES OF INTEREST

No Reimbursement for Cost of Insured's Independent Counsel

Downhole Navigator, L.L.C. v. Nautilus Ins. Co., 686 F.3d 325 (5th Cir., 2012).

This nonmaritime (oil well drilling services) case may have some value when dealing with a claim by an insured for reimbursement for the cost of retaining independent counsel in place of or in addition to counsel offered by the insurer.

The insurer, Nautilus, issued a commercial general liability policy to the insured, Downhole. When a third party (Sedona) sued Downhole it rejected the representation offered by Nautilus under the policy, claiming that the insurer's reservation of rights letter (asserting that after investigation it might conclude that certain policy exclusions applied) had created a conflict of interest. Downhole hired its own independent counsel, and Nautilus refused to reimburse it for that expense.

Downhole filed a declaratory judgment action seeking a ruling that under Texas law Nautilus had a contractual duty to defend and indemnify which included the cost of independent counsel. The magistrate judge in the U.S.D.C. for the Southern District of Texas granted partial summary judgment in favor of Nautilus and Downhole appealed to the Fifth Circuit Court of Appeals, which affirmed.

The court of appeals held that because the facts to be adjudicated in the Sedona/Downhole lawsuit were not the facts upon which coverage depended, the potential conflict did not disqualify the attorney offered by the insurer to defend its insured. Therefore, Downhole was not entitled to reimbursement for that expense.

The court of appeals explained:

> Under Texas law, it is well-settled that the insurer owes a duty to defend its insured against any allegation that is potentially covered by the policy. See *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchants Fast Motor Lines, Inc*., 939 S.W.2d 139, 141 (Tex. 1997). It is also well settled that an insurer's "right to conduct the defense includes the authority to select the attorney who will defend the claim and to make other decisions that would normally be vested in the insured as the named party in the case." *N. Cnty. Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 688 (Tex. 2004). "Under certain circumstances, however, an insurer may not insist upon its contractual right to control the defense." *Id.* In *Davalos*, the Texas Supreme Court noted one such circumstance:
>
> > In the typical coverage dispute, an insurer will issue a reservation of rights letter, which creates a potential conflict of interest. And when the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends, the conflict of interest will prevent the insurer from conducting the defense.
> >
> > *Id*. at 689 (citation omitted).[FN2]
> >
> > [FN2] Although the Texas Supreme Court has not clarified the meaning of "facts to be adjudicated," the term "adjudicate" plainly means "to rule upon judicially." Black's

> Law Diction (9th Ed.2009); *see also Rx.com Inc. v. Hartford Fire Ins. Co.*, 426 F.Supp2d 546, 559 (S.D. Tex. 2006) (citing *Davalos* for the proposition that "[a] conflict of interest does not arise unless the outcome of the coverage issue can be controlled by counsel retained by the insurer for the defense of the underlying claim"); *Partain v. Mid-Continent Specialty Ins. Servs., Inc.*, Civ. No. H-10-2580, 2012 WL 201864, at *15 (S.D. Tex. Jan. 20, 2012) (interpreting *Davalos* to stand for the proposition that "[i]n order for a disqualifying interest to exist… it must be apparent that facts upon which coverage depends will be ruled upon judicially in the Underlying Suit").

Downhole Navigator, 686 F.3d at 328.

Downhole argued that a more recent Texas Supreme Court case, *Unauthorized Practice of Law Comm. v. Am. Home Assurance Co.*, 261 S.W. 3d 24, 39 (Tex. 2008), changed the applicable standard, so that a conflict of interest arises if facts that could be developed in the underlying litigation are the same facts on which coverage depends. Downhole cited the Texas Supreme Court's statement that "[o]ther coverage issues may also depend on the facts developed in the litigation." *Id.* at 40.

The Fifth Circuit rejected that argument, concluding:

> … [W]e decline to follow Downhole's strained reading of *Unauthorized Practice*. One inconsequential line of *dicta* – "[o]ther coverage issues may also depend on the facts developed in the litigation," *id*. – surely did not usher in a doctrinal change. Neither in *Unauthorized Practice* nor elsewhere has the Texas Supreme Court ever held that a conflict arises any time the attorney offered by the insurer could be

> tempted – in violation of his duty of loyalty to the insured – to develop facts in the underlying lawsuit that could be used to exclude coverage. The mere observation that coverage issues may turn on facts developed in the litigation does not necessarily entail that a conflict of interest will arise if the facts that could be developed in the underlying litigation are the same facts upon which coverage depends. Proceeding from the former observation to the latter conclusion requires an illogical leap.

[Editors' note: Our sincere thanks to Keith W. Heard of Burke & Parsons, New York, New York, for calling this case to our attention]

ADMIRALTY JURISDICTION OVER POLICY INSURING YACHT UNDER CONSTRUCTION

Certain Underwriters at Lloyd's of London, v. Horton,
2012 AMC 1862, 2012 WL 1642208 (W.D. Wash. 2012)

Plaintiffs, four Lloyd's of London syndicates, sought damages from defendants Eugene Horton, LLC, Eugene Horton and OAMPS Special Risks, Ltd, on claims arising from the issuance of a marine insurance policy covering a luxury yacht under construction in the State of Washington.

Defendants, a Washington limited liability company, a Washington resident insurance broker, and a foreign business entity registered as a Lloyd's broker, procured a marine yacht insurance policy on behalf of Stephen Yadvish and Northcoast Yachts, Inc. to insure a 125-foot luxury yacht under construction from 2006 through 2010.

Prior to January 2009, Northcoast had insured the construction under a builder's risk policy covering damage to the yacht during construction, and a policy covering liability to injured workers under the Longshore and Harbor Workers Compensation Act. At the

urging of Yadvish to obtain a policy with lower premiums, Horton, working through OAMPS, obtained a yacht insurance policy from plaintiffs covering the vessel, which was still under construction, from January 2009 to January 2010. That policy, identified as a Hull & Machinery policy, included a trading warranty, a provision for the identification of three crewmembers and moorage at a specified location, and a provision for coverage of any LHWCA claims.

The yacht was not actually launched until March 2010. In May of 2009, a worker (Moore) was injured in the course of the construction of the yacht. In April of 2010, Northcoast and Yadvish sued the defendants in state court, claiming professional negligence and violation of Washington's Consumer Protection Act. In May 2010, Moore filed a formal LHWCA claim against Northcoast, which Northcoast tendered to defendants and plaintiffs for defense.

After plaintiffs (Underwriters at Lloyd's) failed to respond, Northcoast and Yadvish amended their state court complaint to add them as defendants, asserting claims for coverage and bad faith. Ultimately the state court granted Horton's motion for summary judgment, finding that the yacht policy covered Moore's LHWCA claim, and later awarded Northcoast and Yadvish $64,431.00 in fees.

Plaintiffs subsequently settled with Northcoast and Yadvish in return for an agreement to nonsuit and assign their claims against defendants Horton LLC, Horton and OAMPS. Plaintiffs then brought this federal court action seeking damages for material misrepresentation, breach of the duty of utmost good faith, and negligence.

Defendants moved to dismiss, claiming plaintiffs: (1) had not established admiralty jurisdiction; (2) had not established diversity jurisdiction; and (3) had asserted claims that are barred by the *Rooker-Feldman* doctrine. The court characterized these as "facial" attacks on subject matter jurisdiction falling under FRCP 12(b)(1), and noted that the burden of establishing subject matter jurisdiction falls on the party asserting jurisdiction.

With respect to admiralty jurisdiction, the courts have established two distinct tests: a locality test for tort claims and a subject matter test for contract claims. Plaintiffs' contractual claims here were for violation of the duty of utmost good faith and making material misrepresentations when requesting the yacht insurance policy. They argued that the court had admiralty jurisdiction because their contract claims arise from the issuance of a marine insurance policy.

The court pointed out that marine insurance contracts covering vessels have long been considered a traditional subject of admiralty jurisdiction, but that the "dispositive inquiry" must be whether the principal objective of the contract is maritime commerce. The analysis is "conceptual," not "spatial," so the fact that some of a contract's performance occurs on land does not defeat its essentially maritime nature.

> The court concluded that the policy was a maritime contract because:
>
> > The policy specifically identifies itself as a "Hull & Machinery" policy, identifies the vessel covered, specifies a trading area, incorporates multiple Institute Yacht Clauses, and insures against damage due to perils of the sea incurred during navigation.

Horton, 2012 AMC at 1867

The provisions are maritime in nature because they relate to the ship in its use as such, to navigation on navigable waters, to transportation by sea, and to the maritime employment of the three crewmembers.

The defendants argued that even if the policy was a maritime contract, the court should not assert maritime jurisdiction because the yacht was a pleasure craft, not a commercial vessel. The court observed that such a construction was far too narrow and had been explicitly rejected in *Foremost Ins. Co. v. Richardson*, 457 U.S.

668, 674-75 (1982)(applying admiralty jurisdiction over collision of two pleasure boats) and *Sisson v. Ruby*, 497 U.S. 358, 362, 1990 AMC 1801 (rejecting requirement of a substantial relationship with commercial maritime activity and finding admiralty jurisdiction over a fire on a 56-foot yacht that damaged a marina).

Finding that it had admiralty jurisdiction, the court concluded that it need not reach the question of diversity jurisdiction, and proceeded to defendants' argument that the *Rooker-Feldman* doctrine prevented it from exercising jurisdiction because the plaintiffs' claims in the case before it were inextricably intertwined with a state court judgment. Under the doctrine, federal district courts lack jurisdiction to exercise appellate review over final state court judgments. A federal court may not assume jurisdiction in order to reverse or modify a state court judgment on the merits where the issues decided in the state court are inextricably intertwined with the issues before the federal court.

The basis for the doctrine is the statutory proposition that federal district courts are courts of original, not appellate, jurisdiction, and hence have no authority to review the final determinations of a state court. The doctrine is meant to preclude "federal adjudication of what would amount to a de facto appeal or an impermissible collateral attack upon a state court judgment." *Horton*, 2012 AMC at 1869. It is meant to prevent state court losers complaining of state court judgments entered before the federal court action began inviting federal district court review and rejection of those judgments.

However, the *Rooker-Feldman* doctrine only applies when the federal plaintiff both asserts his or her injury due to legal errors by the state court and seeks as the remedy relief from that state court judgment. Here, the state court proceedings determined only that the insurance policy covered Yadvish for claims under the LHWCA, whereas the federal court plaintiffs sought damages from defendants for material misrepresentation, breach of the duty of utmost good faith, and negligence. The underlying causes of action in the state and federal proceedings were "fundamentally different," and thus were not "inextricably intertwined," so plaintiffs' claims were not

barred under *Rooker-Feldman* and defendants' motion to dismiss was denied.

[Editors' note: Our sincere thanks to both Keith W. Heard of Burke & Parsons, New York, New York, and David L. Mazaroli of David L Mazaroli Law Offices, New York, New York, for calling this case to our attention]

FEDERAL MARITIME LAW GOVERNS BREACH OF POLICY WARRANTY CLAIM

Northern Assurance Co. v. Keefe, 845 F. Supp. 2d 406, 2012 AMC 958 (D. Mass. 2012)

This recent marine insurance decision from the U.S. District Court for the District of Massachusetts involved claims under a yacht policy subsequent to a grounding which occurred while the yacht was under charter and carrying passengers.

In *Northern Assurance*, Judge Woodlock considered the interplay between federal maritime law and Massachusetts state law in marine insurance cases alleging breach of warranty. The court noted that "[i]n their initial briefing, both parties relied on *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310, 313, 75 S.Ct. 368, 99 L.Ed. 337 (1955) and its progeny and agreed that Massachusetts law, instead of federal admiralty law, should be applied to construe the marine insurance policy at issue here." 845 F. Supp. 2d at 413. Judge Woodlock also noted, however, that the parties had not considered adequately the Supreme Court's 2004 decision in *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14 (2004), and had overlooked the First Circuit's most recent discussion of federal admiralty law regarding breaches of warranties in maritime insurance contracts, *Lloyd's of London v. Pagan–Sanchez*, 539 F.3d 19 (1st Cir. 2008). *Id*. He stated that in "[a]pplying the principles of *Norfolk S. Ry. Co.,* the First Circuit in *Lloyd's of London* investigated whether there was a well-established general federal rule governing the contract at issue, and, upon finding such a rule, stated that 'the question becomes whether [the state] has either clearly stated a contrary rule or demonstrated

a strong interest in having a different rule. Only if so, would we address the question of whether this is inherently a local dispute to [the state].'" *Northern Assurance*, 845 F. Supp. 2d at 414.

Judge Woodlock held that in *Lloyd's of London*, the

> First Circuit concluded that where such a warranty [in *Northern Assurance*, exclusion of coverage for charters of more than six passengers] exists in a marine insurance contract, it is a 'well-established general rule,'[539 F.3d] at 25, that 'a breach ... excuses the insurer from coverage,' *id.* at 24. Thus, the First Circuit has held that there is a judicially established federal rule governing this particular area of marine insurance contract interpretation; this Court may not ignore it, as both parties did, to focus almost exclusively on state law.

845 F. Supp. 2d at 414.

Though Judge Woodlock thus found federal maritime law controlling, he noted that the same result would be reached under Massachusetts law.

[Editors' note: Our sincere thanks to Brad Gandrup, Jr., of Partridge Snow & Hahn LLP, Providence, RI, bfg@psh.com · www.psh.com for summarizing the foregoing case.]

POLICY EXCLUDES COSTS OF REPAIRING FAULTY WORKMANSHIP

Alaska Village Elec. Coop., Inc. v. Zurich Am. Ins. Co.,
2012 AMC 2469, No. C11-1375 RAJ, 2012 WL 475948
(W.D. Wash., October 3, 2012).

The case involved a standard all risk Builder's Risk contract on AIMU forms for the construction of two ocean-going petroleum barges in south Texas yards. Counsel for the assureds insisted upon deletion of Addendum 2, the primary purpose of which has always

been to exclude damage resulting from defective work. Both barges were afflicted with widespread bad welding, so much so that the ABS required roughly $1.2 million in wholly remedial work. There was no allegation that the costs claimed were anything other than the costs of repairing the defective work itself.

Underwriters' Southern District of Texas declaratory judgment action against the three assureds was transferred to the Western District of Washington, where it was consolidated with an action by the parent company of one of the assureds, which had taken an assignment from all three assureds as to any proceeds under the builder's risk contract. The assureds asserted not just coverage claims, but bad faith claims, and claims under Washington's Consumer Protection Act and relatively new Insurance Fair Claim Practices Act. The "extra-contractual" exposure was significant.

After "vigorous" briefing from diametrically opposed viewpoints, the court ultimately found for the underwriters on cross-motions for summary judgment. The court felt the basic policy language excludes the costs of repairing faulty workmanship, and that the omission of Addendum 2 could not possibly change the meaning of the policy. Although the assureds' counsel argued with passion, the court could not see the logic in asserting that omission of an exclusion meant to foreclose damage from "accidents resulting from defective design or workmanship" had any effect whatsoever on the underlying lack of coverage for the defective workmanship itself.

Daniel F. Knox of Schwabe, Williamson and Wyatt's Portland, Oregon, office was lead counsel for the five underwriters (Zurich American, National Union Fire of Pittsburg through Chartis, National Casualty Company, Great American, and Starr Indemnity & Liability), with assistance from Mr. David Ebel and Ms. Claire Been of the firm's Seattle, Washington office. Counsel for the plaintiffs were Mr. Michael E. Gossler, Mr. Andrew R. Chisholm, and Mr. Jonathan R. Moore, all of Montgomery Purdue Blankenship & Austin, also in Seattle.

[Editors' note: Our sincere thanks to Daniel F. Knox of Schwabe, Williamson and Wyatt for the foregoing summary.]

NO PERSONAL JURISDICTION IN TURNOVER PROCEEDING

Bonzy, Inc. v. Intact Ins. Co., No. 105239, 2012 WL 171020 (Sup. Ct., N.Y. Co. January 9, 2012)

In this turnover proceeding, petitioner Bonzy Inc. sought a judgment directing respondent Intact Insurance Co., as successor to ING Insurance Company of Canada, to pay it the principal policy amount (together with interest, costs, poundage fees and disbursements) with respect to a judgment entered in favor of Bonzy against a judgment debtor, Can-Med Lines (USA), Inc., in the Supreme Court of New York, on the ground that respondent was in possession of property of the judgment debtor, or was indebted to the judgment debtor. Intact cross-moved for dismissal, which the court ultimately granted, finding it had no personal jurisdiction and that Bonzy's arguments did not constitute tangible evidence demonstrating a "sufficient start" to warrant further discovery.

Bonzy, an importer/exporter/wholesale distributor/vendor of consumer products, is a New Jersey corporation with its principal place of business in New York. Can-Med, based in Virginia, is a non-vessel-operating common carrier, which according to Bonzy regularly does business in New York, or within or without New York, from which the cause of action arose, and has derived substantial income from interstate commerce.

Can-Med requested that ING insure Bonzy's shipment of quartz analog watches, and ING issued a certificate of insurance covering the cargo. Can-Med was to supply the shippers with shared space in a container or take possession of a full container and arrange for shipment to the destination, Belgrade, Serbia.

Bonzy delivered the cargo and it was loaded into Can-Med's container, which was in turn delivered to Hapag-Lloyd for carriage.

The cargo was never delivered to Bonzy's customer, Bonzy was never paid, and Can-Med failed to account for the cargo or pay Bonzy for its loss.

Bonzy sued Can-Med and recovered a judgment. Bonzy brought a turnover proceeding against another primary insurer and recovered an agreed payment limited by the size of that insurer's bond covering the cargo ($75,000.00). Bonzy then sought to recover the balance of the judgment against Can-Med. ($1,113,838.16 with interest).

According to Bonzy, ING also insured the cargo under the policy, and Intact, as successor to ING, was liable for the balance due on its judgment against Can-Med.

Intact claimed the court lacked jurisdiction over it, because it had purchased the Canadian book of business of ING from a holding company based in the Netherlands. Intact alleged that neither company had ever been registered to do business in New York; nor licensed by the State Department of Insurance to issue policies in New York; nor had an office or general agent in New York; nor had a parent-subsidiary relationship with any corporation located in New York.

Intact further claimed that ING Canada issued an open cargo marine policy to Can-Med, which was located in Montreal, Quebec, in the form of a first-party cargo policy insuring the goods against various marine and transit risks, not from any liability Can-Med might incur to third parties for loss or damage to shipments. ING Canada's certificate was issued to Bonzy at its New Jersey address; the shipment was from New Jersey to Belgrade, Yugoslavia; and any claims payable under the certificate were to be made to ING Canada at its offices in Toronto.

The court noted that where a respondent moves to dismiss for lack of personal jurisdiction, the petitioner bears the burden of proof, but must only demonstrate that facts may exist establishing personal jurisdiction in order to make "a sufficient start to warrant

further discovery on the issue of personal jurisdiction over it," citing *Ying Jun Chen v. Lei Shi*, 19 AD 3d 407, 407 (2d Dept. 2005); and the evidence presented must be viewed in the light most favorable to the plaintiff.

A foreign corporation is subject to the jurisdiction of New York courts if it is engaged in such a continuous and systematic course of "doing business" as to warrant a finding of its "presence in the jurisdiction." Factors to be considered include: (1) the existence of an office in New York; (2) solicitation of business in the state; (3) bank accounts or other property in the state; and (4) the presence of employees of the foreign defendant in the state. Here, an Intact underwriter formerly employed with ING Canada averred that neither company: (1) had ever been registered in New York; (2) had ever been licensed by the New York State Insurance Department to issue policies in New York; (3) had ever maintained an office in New York; (4) had ever had a parent subsidiary relationship with any corporation located in New York; and (5) had ever issued policies to any insured located in New York.

The court pointed out that CPLR 302(a)(1) extends jurisdiction of the New York courts to a nonresident who purposely avails himself of the privilege of conducting activities within New York and thereby invokes the benefits and protections of its laws. But that long-arm authority does not extend to non-domiciliaries who merely ship goods into the state without ever directly crossing its borders. There must be some purposeful activities within the state that would justify bringing the nondomiciliary defendant before its courts.

Intact contended that ING Canada did, and Intact currently does, issue policies through brokers in Canada to insureds located in Canada; that the Can-Med policy was issued through a broker unaffiliated with ING Canada, located in Quebec; and that the certificate of insurance was made without any connection to New York.

Bonzy asserted that news reports that ING Canada would become Intact and operate under the Intact name raised a factual issue

that could not be resolved at such an early stage of the game, as did ING Canada's status as a subsidiary of a Dutch financial institution with operations worldwide. The court disagreed, because Bonzy failed to identify the existence of a New York subsidiary or parent of Intact that might confer jurisdiction over Intact. Such "blanket and conclusory statements" do not demonstrate a "sufficient start" to warrant further discovery.

Finally, the judgment entered against Can-Med did not establish jurisdiction. It was entered by default, Can-Med having never appeared in the action. In addition, venue of an action does not override the law's jurisdictional requirements. Accordingly, the petition was denied and the cross motion to dismiss was granted.

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FINANCE

Southern District of Florida Expunges Yacht Mortgage and Awards Clear Title to Third-Party Purchaser

Branch Banking & Trust Co. of Va. v. M/Y Beowulf,
883 F. Supp. 2d 1119 (S.D. Fla. 2012)

Citing irregularities in the loan papers and a bank's improvident decision to grant a workout to an insolvent borrower, a federal district court in Miami has awarded clear title to a third party who purchased a yacht without notice of the bank's mortgage.

The yacht was a custom sportfisherman built by Sculley Boatbuilders, Inc. ("Scully Boatbuilders") and used as security for a personal loan to James Sculley, the president of Sculley Boatbuilders. The mortgage identified Mr. Sculley as the owner of the yacht, but the note and other loan documents identified Sculley Boatbuilders as the owner. As a further complication, the hull identification number was not affixed to the yacht. Before funding the loan, the bank received a marine survey report noting the absence of the hull identification number.

Shortly after the mortgage was recorded by the U.S. Coast Guard, Sculley Boatbuilders assigned a different hull identification number to the yacht, obtained a different official number from the Coast Guard, and sold the yacht under a different name, all without notifying the bank. The issuance of the second identification number and official number resulted in two chains of title, so that

when the yacht was later sold again, the chain of title did not reflect the mortgage recorded under the first hull identification number.

Several years later, Mr. Sculley defaulted on the loan. Although he was saddled with other delinquencies, the bank agreed to modify the loan. As part of the modification, the bank corrected the loan documents to show the owner of the yacht as Sculley Boatbuilders. However, the bank did not correct the mortgage on record with the Coast Guard, nor did the bank inspect the yacht or insist on proof of insurance as a condition of the workout.

Mr. Sculley died about a year later, the modified loan went into default, and the bank filed a foreclosure action in federal court. The yacht's current owner, who had purchased it without knowledge of the mortgage, contested the foreclosure and argued that the mortgage was invalid and should in any event be equitably subordinated. The bank moved for summary judgment, but the court denied that motion (as reported in *Boating Briefs* Vol. 21:1. *Yacht Mortgage Forfeiture Stalled by Competing Chains of Title*, The MLA Report, Spring 2012 (Doc. 806), at 17,042) and ordered a trial on the merits.

The first issue was whether Mr. Sculley owned the yacht when he granted the mortgage in his own name. Observing that the question of vessel ownership is a matter of state law, the court applied Florida law and found that the bank had not established Mr. Sculley's ownership of the yacht. Although Sculley Boatbuilders had issued a builder's certificate naming Mr. Sculley as the person for whom the yacht was built and the mortgage itself identified Mr. Sculley as the "sole owner," Mr. Sculley's status as owner was contradicted by all the other loan documents, which named Sculley Boatbuilders as the owner. In these circumstances, the court held that the bank could not properly rely on the builder's certificate as conclusive evidence of title. Given the discrepancies in the loan documents, the bank had not carried its burden of proving that Mr. Sculley owned the yacht when he granted the mortgage. Accordingly, the mortgage was invalid.

The court went on to consider whether the bank's actions—both in granting the loan and in later agreeing to the modification—warranted equitable subordination. The court found that the bank, having received at the outset a copy of a survey report noting the absence of the hull identification number, was grossly negligent by not insisting that the hull identification number be affixed to the yacht. Then, according to the court, the bank again acted unreasonably by granting a loan modification to a deeply insolvent borrower without inspecting the yacht or taking other steps to protect its interest in the collateral, all to the detriment of the subsequent purchaser. Therefore, even if it were valid, the bank's mortgage would be equitably subordinated to the subsequent purchaser's interest.

[Editors' note: Although the bank appealed the decision to the Eleventh Circuit, it has since voluntarily dismissed the appeal. See Order, No. 12-14071 (11th Cir. Mar. 3, 2013).]

Mortgage Lien Perfected Despite Mortgagee Misnomer

In re Sherman, No. 11-32821 (LMW),
2012 Bankr. LEXIS 2669, 2012 WL 2132379
(Bankr. D. Conn. June 12, 2012)

A couple obtained a boat loan from Commerce Bank, N.A. In preparing the mortgage papers for signature, the documentation service hired by the bank mistakenly listed the mortgagee's name as "Commerce Bank/Shore, N.A.," an entity that had ceased to exist two years earlier as a result of a merger into Commerce Bank, N.A.

The borrowers later defaulted on their loan payments and filed a Chapter 7 bankruptcy petition. TD Bank, N.A., as successor to Commerce Bank, N.A., moved for relief from a bankruptcy stay, claiming it had a perfected security interest and should be permitted to exercise its rights as to the boat. The bankruptcy trustee objected, arguing that TD Bank, N.A.'s lien was not perfected because the mortgage did not show the mortgagee's correct name.

Rejecting the trustee's argument, the bankruptcy court held that a mortgage lien is perfected so long as the mortgage is filed in "substantial compliance" with the federal Commercial Instruments and Maritime Liens Act, 46 U.S.C. §§ 31301 *et seq*. Here, the error in the mortgagee's name did not render the mortgage lien unperfected. While "Commerce Bank/Shore, N.A." did not exist as a legal entity when the mortgage was signed, the actual mortgagee (Commerce Bank, N.A) did exist, and its name was similar to that shown on the mortgage. Moreover, the mortgagee address printed on the mortgage was in fact a place of business occupied by Commerce Bank, N.A. In the circumstances, the mortgage provided sufficient notice of the mortgagee's identity, the mortgage lien was perfected, and TD Bank, N.A.'s motion for relief was granted.

Low Price Did Not Make Sale of Repossessed Yacht Commercially Unreasonable

Provident Bank v. Bonnici, No. L-3136-09,
2012 N.J. Super. Unpub. LEXIS 1404, 2012 WL 2283458
(N.J. App. Div. June 19, 2012) (*per curiam*) (unpublished)

In 2007, a man purchased a yacht partly with borrowed funds, signing a 20-year note and security agreement. Within one year, he defaulted on the loan payments. Following an unsuccessful attempt to sell the yacht himself, he surrendered the yacht to the bank. Having reviewed the results of a marine survey and consulted the National Automobile Dealers Association ("NADA") valuation guide, a liquidator hired by the bank set the asking price at $95,000. Three offers and nine months later, the liquidator sold the yacht for $57,500—nearly $150,000 less than the borrower's original purchase price.

In response to the bank's suit for the loan deficiency, the borrower contended that the disparity between his purchase price and the price obtained by the liquidator rendered the sale commercially unreasonable and that a deficiency claim was therefore barred. According to the borrower, the liquidator also disregarded the

yacht's customized features and relied too heavily on the NADA guide in setting the asking price.

The trial court granted summary judgment for the bank, ruling that the disposition of the yacht was commercially reasonable despite the seemingly low sale price. The borrower appealed.

According to the appellate court, a low sale price does not necessarily render a repossession sale commercially unreasonable under New Jersey law. Here, the bank hired a liquidator in the business of selling repossessed boats; the liquidator set the asking price based on the condition of the yacht and the NADA valuation guide; and the liquidator passed all offers along to the bank, which made appropriate counteroffers in an attempt to obtain a higher sale price. According to the appellate court, "[t]he rejection of those counteroffers, and the fact that the handful of offers received approximated the price eventually obtained, demonstrates that the price for which the boat was sold was generated in a commercially reasonable manner."

Insurance Owner's Failure to Disclose Prior Casualty Voids Policy

St. Paul Fire & Marine Ins. Co. v. Matrix Posh, LLC,
2012 A.M.C. 1789 (E.D.N.Y. 2012), *aff'd*, 507 F. App'x 94
(2d Cir. 2013)

A yacht owner submitted a claim to his insurer, St. Paul, after the yacht allided with a submerged object in Long Island Sound. St. Paul brought an action for declaratory relief and moved for summary judgment on the basis that the policy was void due to misrepresentations and nondisclosures by the insured in the insurance application. In particular, St. Paul cited the insured's failure to disclose a prior incident in which an unmoored sailboat had drifted into the yacht—an incident which caused tens of thousands of dollars in damages to the yacht and which itself gave rise to an insurance claim.

The court held that, as a matter of law, the insured was obligated to disclose this prior incident to St. Paul. The prior incident had produced a crack in the yacht's hull, caused water ingress, and led the captain to put into port for what he described as "emergency" repairs. Moreover, St. Paul's insurance application specifically asked the insured to list any prior "insurance losses," yet the insured did not identify any such losses. The policy was therefore void at inception.

In Declaratory Relief Action, E.D.N.Y. Denies Jury Trial on Insured's Counterclaims

Markel American Ins. Co. v. Linhart, No. 11-CV-5094 (SJF) (GRB), 2012 U.S. Dist. LEXIS 10070, 2012 WL 2930207 (E.D.N.Y. July 11, 2012), *reconsid. denied*, 2012 U.S. Dist. LEXIS 166525, 2012 WL 5879107 (Nov. 16, 2012)

Matthew Linhart ("Linhart"), shortly after leaving the dock on his yacht, heard a loud bang and the yacht began taking on water. He submitted a claim to Markel American Insurance Company ("Markel") for payment of the repair costs. After an investigation, Markel concluded that the incident was caused by a deteriorated shaft coupler and that the loss resulted from "wear and tear," "gradual deterioration," and "failure to maintain the insured vessel," which the policy excluded from coverage.

Markel filed a declaratory relief action in admiralty. Linhart counterclaimed for breach of contract and bad faith, sought punitive damages, and demanded a jury trial. Markel moved to dismiss the counterclaim for bad faith and to strike the jury demand.

The counterclaim alleged that Markel "'engaged in wrongful conduct and handling of his claim,' which was 'of morally reprehensible or wantonly dishonest nature.'" The court dismissed this counterclaim as conclusory and implausible. Markel had denied Linhart's claim after an investigation, and Linhart alleged no facts to suggest that the denial was in bad faith or that the investigation was improperly conducted.

Markel also moved to strike Linhart's demand for a jury trial on the surviving counterclaims. The court noted that the New York courts are split on the "issue of whether a defendant is entitled to a jury trial on a non-admiralty cause of action that is asserted as a counterclaim." In this case, the court decided that Linhart was not entitled to a jury trial given that his counterclaims and Markel's complaint implicated the same issues. Allowing a jury trial on the counterclaims would, in the court's view, "be wasteful, duplicative, and risk inconsistent results."

Pollution Exclusion Bars Coverage for Carbon Monoxide Poisoning

Scottsdale Ins. Co. v. Pursley, 407 F. App'x 508 (11th Cir. 2012) (*per curiam*)

A boat mechanic allegedly failed properly to seal an engine exhaust system, which allowed carbon monoxide to enter the vessel's cabin, where it fatally poisoned the vessel owner. The owner's widow sued the mechanic, whose commercial general liability ("CGL") insurer denied coverage and sought declaratory relief on the basis of the policy's pollution exclusion. The trial court ruled for the insurer, and the widow appealed to the Eleventh Circuit.

The pollution exclusion precluded coverage for "'[b]odily injury' or 'property damage' which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." The policy defined the word "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

Citing the Georgia Supreme Court's ruling in *Reed v. Auto-Owners Insurance Co.*, 667 S.E.2d 90 (Ga. 2008), which applied a similar exclusion when a tenant was poisoned by carbon monoxide and sued the landlord, the Eleventh Circuit held that the CGL policy's pollution exclusion was indeed broad enough to preclude

coverage, even though carbon monoxide might not be thought of as pollution in the traditional sense.

The widow alternatively attempted to rely on the policy's property damage coverage, claiming that the death of her husband had diminished the value of the boat. The policy defined "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property. . . . or [l]oss of use of tangible property that is not physically injured." Because the widow alleged neither physical injury to nor loss of use of the boat, the court held that her claim for diminished value was not covered either.

Citing Wikipedia, Court Holds "Jet Skis" Exclusion Inapplicable to a Honda Personal Watercraft

Fire Insurance Exchange v. Oltmanns, 285 P.3d 802 (Utah Ct. App. 2012)

A homeowner's insurance policy excluded coverage for liability resulting from the use or ownership of "jet skis." The insured, while operating a Honda AquaTrax personal watercraft on a lake in southern Utah, was involved in an accident, and his passenger filed a lawsuit against him. Relying on the "jet skis" exclusion, the insurer argued that it had no duty to defend or indemnify the insured. The trial court agreed and granted summary judgment to the insurer.

The court of appeals reversed, ruling that the term "jet skis" was ambiguous because it could reasonably be seen as a reference to a particular brand of personal watercraft manufactured by Kawasaki (which held the trademark on the term "Jet Ski"), rather than a general reference to all kinds of personal watercraft. Although the insurer probably did not intend to exclude coverage only as to Kawasaki brand "Jet Ski" models, someone reading the policy could reasonably interpret the term "jet skis" as encompassing only Kawasaki models. As support for this conclusion, the court turned to what it described as "that great repository of contemporary wisdom, Wikipedia," which, as of the time of the court's decision, had the following entry under "Jet Ski":

Jet Ski is the brand name of a personal watercraft manufactured by Kawasaki Heavy Industries. The name is sometimes mistakenly used by those unfamiliar with the personal watercraft industry to refer to any type of personal watercraft; however, the name is a valid trademark registered with the United States Patent and Trademark Office, and in many other countries. The term "Jet Ski" (or JetSki, often shortened to "Ski") is often misapplied to all personal watercraft with pivoting handlepoles manipulated by a standing rider; these are properly known as Stand-up PWCs. The term is often mistakenly used when referring to WaveRunners, but WaveRunner is actually the name of the Yamaha line of sit-down PWCs, whereas "Jet Ski" refers to the Kawasaki line.

Because the term "jet skis" did not clearly encompass a Honda personal watercraft, the insurer could not rely on the exclusion to deny coverage.

Readers may be interested to know that Wikipedia's "jet ski" page was changed after this court's decision. As of November 20, 2012, it stated that "the term 'jet ski' is a popular term synonymous with 'personal watercraft.'" [**Editors' note:** It currently states, "The term is sometimes used to refer to any type of personal watercraft." Wikipedia, *Jet Ski*, http://en.wikipedia.org/wiki/Jet_Ski (last visited July 8, 2013).]

SALVAGE

Contributing to Successful Salvage Merits an Award, Even If Salvor Simply Towed and Anchored But Did Not Directly Improve Distressed Vessel's Condition

Esoteric, LLC v. One (1) 2000 Eighty-Five Foot Azimuth Motor Yacht Named M/V "Star One," F. App'x 639, 2012 AMC 2698 (11th Cir. 2102) (*per curiam*)

While underway near the Bahamas, the yacht ESOTERIC received an emergency report about a sinking vessel. The ESOTERIC arrived on the scene to find a large and mostly submerged yacht, the

STAR ONE. The captain of the ESOTERIC assessed the situation and determined that the STAR ONE was a navigational hazard and was at risk of drifting into nearby coral reefs.

The ESOTERIC towed the STAR ONE to the closest port, where Bahamian officials ordered the STAR ONE to be anchored just outside the harbor entrance. The STAR One's insurer then arranged for a professional salvage company to pump the vessel dry and tow the vessel to Miami, for which the insurer paid $93,000. A second salvage company was paid $2,800 to tow it to a boatyard. The ESOTERIC's owner filed suit, seeking a salvage award from the STAR ONE and its owner.

To succeed on a claim for pure salvage, a salvor must show that: (1) a marine peril existed; (2) the service was rendered voluntarily and not as part of an existing duty or contract; and (3) the service contributed to, or resulted in, the success of the salvage operation.

The district court found in favor of the ESOTERIC and rendered a salvage award of about $68,000, or 12 percent of the post-salvage value as determined by the court. Finding that STAR ONE's defense to the salvage claim was frivolous, the court also ordered STAR ONE to pay about $73,000 toward the ESOTERIC's legal fees.

The STAR ONE appealed, arguing that the element of success was missing inasmuch as the ESOTERIC had simply moved the vessel to a new location and made no improvement to the vessel's physical condition. The STAR ONE also challenged the award of legal fees.

Noting that the STAR ONE was in a well-traveled sea lane where the water was more than 6,000 feet deep, that the vessel was drifting toward a stretch of coral reefs, and that the ESOTERIC's efforts had brought the vessel to a location where professional salvors could complete the salvage process, the Eleventh Circuit affirmed the salvage award. The law of pure salvage requires that a salvor contribute to a successful salvage operation, not necessarily that it complete the entire operation by itself.

The STAR ONE also appealed the district court's award of legal fees to the ESOTERIC. The trial court had viewed as frivolous the STAR ONE's argument that a salvage claim requires proof of some physical improvement to the vessel. However, the appellate court disagreed, finding that the STAR ONE's argument was reasonable even though ultimately unsuccessful. Accordingly, there was no basis to award legal fees.

Boat Owner with No Defense to Salvage Claim Ordered to Pay Salvor's Legal Fees

Reliable Salvage & Towing, Inc., v. Bivona, 476 F. App'x 852, 2013 A.M.C. 591 (11th Cir. 2012) (*per curiam*)

On a calm Easter Sunday, a 35-foot Sea Ray ran into a shoal in Gasparilla Pass, near Boca Grande, Florida. Although neither the owner nor his boat was in immediate danger, a storm was expected that night and the following day. It would be several days before the tide was high enough for the boat to move under its own power.

The owner contacted a towing and salvage company, which used three vessels to free the boat from the strand. Before the operation began, the boat owner signed a form of contract as presented by the salvor, but the contract did not specify the rate that would be charged for the service.

After the operation was complete, the salvor sent a $7,500 invoice to the boat owner's insurer. However, the owner's insurance policy had lapsed, and the insurer declined to pay the salvage bill. The owner did not pay the bill himself.

Reliable eventually filed suit against the owner and the vessel, asserting claims for both contract salvage and pure salvage. After a bench trial, the district court dismissed the contract claim because the form of contract signed by the owner lacked material terms.

With respect to the claim for pure salvage, the boat owner argued that there was no marine peril since the weather was calm when the service was rendered. However, the district court determined that the coming storm was indeed a marine peril sufficient to support a salvage award. After evaluating the efforts and resources used in the salvage operation, the district court granted a salvage award of $14,000, nearly twice the salvor's original bill.

Moreover, based on the owner's concession at trial that the salvor had provided a service and was entitled to payment, the trial court concluded that the owner's defense to the pure-salvage claim was frivolous. Accordingly, the court awarded the salvor its legal fees and costs, which exceeded $36,500. (We reported on the trial court's decision in *Boating Briefs* Vol. 20:1. *10% Award for Extracting Vessel Hard Aground*, The MLA Report, Fall 2011 (Doc. No. 804), at 16,625 (2012))

On appeal, the owner argued that his successful defense to the contract claim barred any award of legal fees. The Eleventh Circuit was not persuaded. It ruled that a meritorious defense to one claim does not mean that a defense to another claim cannot itself be frivolous. The trial court's award of fees was therefore affirmed.

Landlocked Lake Entirely Within One State is Not a Navigable Waterway; Hence No Admiralty Jurisdiction Over Salvage Claim

MacGowan v. Cox, 487 F. App'x 930 (5th Cir. 2012) (*per curiam*)

A canoeist discovered an unmanned personal watercraft adrift on Lake LBJ near Austin, Texas. He towed the craft to shore and later filed an admiralty action against its owner, seeking a salvage award of $3,000, half the craft's value. The district court dismissed the action for lack of subject matter jurisdiction, and the would-be salvor appealed.

Due to its location in the middle of Texas, and with dams blocking passage at each end, the lake afforded no possibility of

interstate travel. The lake was therefore not navigable for purposes of admiralty jurisdiction, and the Fifth Circuit affirmed the district court's dismissal order.

SUBSTITUTE CUSTODIANSHIP

Court Disallows Fee to Custodian Who Neglected Vessel

Horizon Shipbuilding, Inc. v. Blyn II Holding, LLC, No. C-12-60, 2012 U.S. Dist. LEXIS 98229, 2012 WL 2911918 (S.D. Tex. July 16, 2012)

A group of businessmen purchased a dilapidated 131-foot crewboat for $680,000 with the intent of converting it into a luxury yacht. They hired a naval architect to manage the project, and signed a time-and-materials contract with an Alabama shipyard to carry out the conversion. Based on some preliminary specifications and drawings, the cost of the conversion was estimated at $4.5 million.

The architect's designs were not completed on time, which substantially delayed the project. Once the drawings were finally done, the shipyard reevaluated the project and informed the owners that the estimated cost of the project was now $9.4 million. The owners stopped paying the shipyard's invoices and issued a stop work order.

The shipyard sued the owners and the vessel, seeking $1.15 million for the value of the work already done. The shipyard had the vessel arrested and was appointed as the substitute custodian. (As reported in *Boating Briefs* Vol. 19:1, the case came before the Eleventh Circuit, which held that despite the extensive conversion the craft remained a vessel subject to a maritime lien. *Yacht Retains Vessel Status During Overhaul*, The MLA Report, Fall 2009/Spring 2010 (Doc. No. 795), at 15,728.) Later, the vessel owners entered bankruptcy.

Meanwhile, the shipyard was working on other projects and needed to use the drydock. Therefore, the shipyard launched the

still-unfinished vessel into the water. Over the course of several months, water and moisture entered the vessel, various components became moldy or rusty, and the hull became fouled with barnacles. The owners then sued the shipyard in the bankruptcy court to recover for this damage.

The bankruptcy court determined that the shipyard's $1.15 million claim for the conversion work was well supported. However, the bankruptcy court also held that the shipyard's poor performance as substitute custodian had caused $1 million in damages to the vessel. As a result, payment on the conversion work was almost entirely offset by the damage allegedly sustained during the custodianship. The bankruptcy court also denied the shipyard's request for custodial fees.

The shipyard appealed this decision to the federal district court, which observed that the duty of a substitute custodian is "to keep the property in a safe and secure manner, so as to protect it from injuries so that its value to the parties will not be impaired by unnecessary deterioration or damage." While a custodian is not charged with preventing normal wear and tear or depreciation, and is not required to make improvements, the district court agreed with the bankruptcy court that leaving the vessel in the water without adequate protection was indeed a breach of the custodian's duty of care.

Next, the district court evaluated the bankruptcy court's conclusion that the shipyard's neglect caused $1 million in damages to the vessel. The court noted that the owners had the burden of quantifying the damages. The bankruptcy court had based its finding on a "cost of repair" evaluation method, or in other words, by determining how much it would cost to return the vessel to the state it was in before it was launched into the water. However, that method did not account for the fact that the vessel would have experienced some degree of wear and tear in any event. Based on the evidence available, the district court found that the damages to the vessel were just over $100,000.

Finally, the district court noted that the bankruptcy court's denial of expenses *in custodia legis* could be reversed only for abuse of discretion. Given the shipyard's failure to take proper care of the vessel, the bankruptcy court did not abuse its discretion in declining to award the shipyard a custodial fee.

LIMITATION OF LIABILITY

Court Grants Limitation for Sinking in Extreme Weather

In re Anderson, No. C09-1436RSL, 2012 U.S. Dist. LEXIS 53176, 2012 WL 1301162 (W.D. Wash. April 16, 2012)

A man purchased a catamaran from its builder in South Africa. The purchase price included delivery from South Africa to Port Townsend, Washington. Although the purchaser took title to the vessel when it departed South Africa, the delivery crew was employed by a third-party service. After several unplanned crew changes along the way, and less than 1000 miles from its final destination and less than 10 miles from shore, the vessel sank in 100 mile-per-hour winds with the loss of all three crewmembers. One crewmember's widow sued the vessel owner, who filed a limitation action. The widow asserted claims under the Jones Act, 46 U.S.C. § 30104, and the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 30301 *et seq*.

First, the court held that the Jones Act claim could not proceed because the vessel owner did not employ the crew. The yacht-delivery service had hired all of the crewmembers, paid them, and instructed them as to what routes to take and when and where to sail. The vessel owner had no contact with the crewmembers at all, and before the casualty did not even know their identities. As such, the owner was not an employer and therefore could have no Jones Act liability.

Second, the court held that the widow's claims for nonpecuniary losses and for punitive damages had to be dismissed, since such claims are unavailable under DOHSA.

Finally, the court considered whether the vessel owner was entitled to limit liability. Although the widow alleged various problems with the vessel, ranging from nonfunctional or missing items, to negligent navigation, to negligent selection of the master, there were no facts to indicate that any of these problems actually caused the death of her husband. Ultimately, "the cause for the tragic events that underlie this case was a sudden 100-mile-per-hour-wind storm off the coast of Oregon—'an Act of God or peril of the sea.'" Any liability on the part of the owner was therefore limited to the value of the vessel at the end of the voyage, presumably zero.

Contribution Claims Against Owner Preclude Return to State Court

In re Linton, No. 1:12CV22-LG-JMR,
2012 U.S. Dist. LEXIS 86071,2012 WL 2367604
(S.D. Miss. June 21, 2012)

Courtney Davis and Richard Allen Linton were travelling on Linton's 2000 Seafox when both were thrown from the vessel, which then began spinning rapidly in circles, striking Davis and Linton. Linton was killed, and Davis's leg was amputated.

Davis sued Linton's estate in Mississippi state court, and also asserted product liability claims against the manufacturers, designers, assemblers, installers, distributors, and sellers of the vessel.

Two months later, Linton's estate filed a limitation action in federal court, claiming that the estate's liability should be capped at $7,000, the value of the vessel. The filing of the limitation action had the effect of staying the state court litigation.

Davis stipulated that the federal court had exclusive jurisdiction over the limitation action and that she would not seek to enforce any damage award in the state court greater than the value of the vessel. On this basis, she sought to lift the limitation court's injunction so that she could resume her state court action.

Meanwhile, the product defendants appeared in the limitation action and filed indemnity and contribution claims against the Linton estate. The product defendants did not join in Davis's stipulation.

In ruling on Davis's motion, the court noted that there are two instances in which a state court action should be allowed to proceed after a limitation action is filed: (1) when the total amount of claims does not exceed the value of the vessel or (2) when all claimants stipulate that the federal court has exclusive jurisdiction over the limitation proceeding and that the claimants will not seek to enforce any state-court judgment greater than the value of the vessel. Davis relied on Eleventh Circuit case law holding that state-court litigation may proceed even if the vessel owner is subject to contribution claims by parties who have not joined in the stipulation. However, the court was unable to locate any Fifth Circuit cases endorsing that view and, given the pending claims for contribution, declined to allow Davis to resume her state-court action.

Alleged Negligence by Beneficial Owner Insufficient to Deny Limitation Categorically, But State-Court Litigation Will Proceed First

In re Sailing Shipps Ltd., No. 11-00171,
2012 U.S. Dist. LEXIS 104421, 2012 WL 2884861
(D. Haw. July 12, 2012)

During a ride on a Zodiac boat, Jason Alconcel fell into the water and was injured by the propeller. The Zodiac was being driven by Chimo Shipp, allegedly a one-sixth owner and an employee of Sailing Shipps Ltd., the entity that owned the Zodiac. Alconcel sued Shipps in Hawaii state court, claiming that Shipps was liable for Chimo's allegedly negligent operation of the vessel. Shipps then filed a limitation action in Hawaii federal court, which issued the customary injunction restraining further proceedings in state court.

The Limitation of Liability Act, 46 U.S.C. §§ 30501 *et seq.*, permits a vessel owner to limit its liability to the value of the vessel

if the owner had no knowledge of the negligence that caused the injuries and if the owner was not in privity with the actor who caused the injuries.

Alconcel moved for summary judgment, arguing that because he was injured due to the negligence of a part owner of the company, the company necessarily had knowledge of that negligence such that the company could not possibly limit its liability. Alternatively, Alconcel asked that the state court action be allowed to proceed, with the limitation action to be revisited if necessary after the state court action ended.

The federal court first ruled that summary judgment was not appropriate on the question of the owner's right to limitation. Limitation issues are normally not decided until after the underlying liability has been established, and it was conceivable that Shipps could limit its liability even if Chimo were found to be negligent. In that regard, the court reviewed a series of cases holding that when a shareholder's negligence causes an injury, the corporation may be deemed to have knowledge of the negligence or be in privity with the negligent shareholder but only if the shareholder was a managing officer or a supervisory employee. Here, the record did not show that Chimo was a managing officer or supervisor. Therefore, the court could not presume that Shipps had knowledge of Chimo's alleged negligence or was in privity with him.

However, the court did agree to dissolve the injunction and allow the state court action to continue. The court noted that it had discretion to dissolve the injunction so long as Shipps' right to pursue limitation was protected. Because only one person (Alconcel) was suing Shipps, the case would be relatively uncomplicated, and the court could dissolve the injunction so long as Alconcel stipulated to three things: (1) that the value of the limitation fund would equal the value of vessel, (2) that Alconcel would waive any contention that a judgment in the underlying case prevented limitation of liability, and (3) that the federal court retained exclusive jurisdiction to determine limitation of liability.

Because Alconcel stipulated to these things, and because Shipps did not show that the limitation action would be somehow impaired by allowing Alconcel to proceed in state court, the federal court decided to dissolve the injunction. Shipps did argue that the evidence would overlap in the two cases and that this would invade the province of the federal court. However, the court observed that in the state litigation Alconcel would be attempting to prove that Chimo was an employee of Shipps, whereas in the federal court case Alconcel would have to either impute knowledge of Chimo's negligence to Shipps or show privity between Chimo and the company. The court viewed these as very different questions and rejected Shipps' argument.

Shipps also asserted that the state court case would create excessive delay and expense, but the court noted that these considerations did not outweigh Alconcel's right to pursue his claim in state court, as enshrined in the Saving to Suitors clause, 28 U.S.C. § 1331(1).

Accordingly, Alconcel would be permitted to pursue his claim in state court and the limitation action would be dismissed, with leave to reopen after the state court case ended.

TORTS

Coast Guard Has No Duty to Search for Overdue Boaters

Turner v. United States, 869 F. Supp. 2d 685, 2012 A.M.C. 1607 (E.D.N.C. 2012)

A married couple got underway on their 25-foot boat after informing the husband's father of their intended itinerary. Late that evening, when the couple did not return as expected and could not be reached on their cell phones, the father called 911, who in turn contacted the U.S. Coast Guard. Due to a shortage of assets in the area and a lack of specific information about the boat's possible location, the Coast Guard did not initiate an active search. A Coast Guard helicopter on its way back to refuel did keep a lookout for the boat but observed nothing unusual.

The next morning a family friend located the boat with no one on board. The wife washed ashore, alive, shortly thereafter. The husband was found dead two days later.

The wife sued the United States under the Suits in Admiralty Act ("SIAA"), 46 U.S.C. §§ 30901 *et seq.*, which waives the federal government's sovereign immunity in situations where the government, if it were a private actor, would be subject to liability for maritime negligence. However, the government retains immunity with respect to acts or omissions of government employees "exercising due care, in the execution of a statute or regulation," and with respect to claims "based on the exercise or performance of [] discretionary function[s] . . . ." Fed. Tort Claims Act, 28 U.S.C. § 2680(a).

Although the Coast Guard is empowered by law to conduct search and rescue missions, it is not required to do so. Because the Coast Guard had discretion to conduct or not to conduct a search on the night the boat went missing, the court lacked subject matter jurisdiction to pass on the reasonableness of the Coast Guard's conduct. The case was therefore dismissed.

Court Enforces Indemnification Agreement in Boat Rental Contract

In re Aramark Sports & Entm't Servs., LLC, No. 2:09-CV-637-TC, 2012 U.S. Dist. LEXIS 123786, 2012 WL 3776859 (D. Utah Aug. 29, 2012)

In order to rent a powerboat for a trip on Lake Powell, a customer signed a rental contract with an indemnification clause requiring him to "*indemnify and hold harmless* [the rental company] from and against *any* claims, suits, penalties, obligations, costs and expenses (including reasonable attorney's fees), *including claims by Customer or by third parties* (which may include members of Customer's party), . . . *resulting or arising from Customer's use of the* [*boat*]." *Id.* (emphasis added by court). The five other people who were also to make the trip did not sign the contract, nor was there any evidence that they read it or were aware of its terms.

The next day, as the party of six was returning from their outing on the lake, the boat suddenly took on water and sank. Four people died, including the customer who signed the contract.

Based on the rental contract, the rental company argued that it was entitled to full indemnification from the customer's estate in connection with the claims arising from the sinking. The death claimants countered that the indemnification clause was unenforceable.

Because Lake Powell was a navigable waterway, and in light of case law holding that recreational boating bears a substantial relationship to traditional maritime activity, the court ruled that the enforceability of the indemnification clause would be decided according to general maritime law.

Under maritime law, indemnity and exculpatory clauses are generally enforceable if they are (1) clear and unambiguous; (2) consistent with public policy; and (3) not part of a contract of adhesion or the product of overreaching, a monopoly, or significantly unequal bargaining power. Here, the claimants did not allege overreaching or a monopoly, and although the customer may not have been free to reject the indemnification clause, he was free—given the recreational nature of the activity—not to enter into the contract at all.

Rather, the main issue was whether the indemnification clause was clear enough to inform the signer that he was absolving the company of any liability for its own negligence. The claimants contended that the clause did not unambiguously relieve the company of such liability because the clause did not use the word "negligence," "fault," or something similar. However, under maritime case law, an exculpatory clause does not need to use the term "negligence" to be clear and unambiguous. The phrase "all claims" had been previously held to include negligence claims, and it followed that the similar phrase "any claims" should include any negligence claims against the rental company. Furthermore, if "any claims" in the context of the indemnification provision did not

include the company's own negligence, then in the court's view the provision would have had no real effect.

A related issue was whether the clause violated public policy. The court noted that prior cases distinguished between ordinary and gross negligence, with most cases holding that a party may contractually absolve itself from liability for negligence but not from liability for gross negligence. Enforcing the indemnification clause here would therefore be consistent with public policy, unless the rental company was ultimately proven to have been grossly negligent.

The upshot was that the estate of the customer who signed the contract could not proceed with a negligence claim against the company. The other claimants, however, could proceed with their claims, which the company would have to defend and resolve before seeking indemnification from the customer's estate.

Injury Turns Sea Trial into Very Expensive Test Drive

Hines v. Triad Marine Center, Inc., 487 F. App'x 58 (4th Cir. 2012)

The Fourth Circuit Court of Appeals has upheld a judgment against a boat dealer in a suit brought by a doctor injured during a sea trial.

The plaintiff, an urologist, was boat shopping at the defendant's dealership. The defendant recommended a Triton model 2286. Despite a National Weather Service small craft warning, a salesman took the plaintiff and a guest out for a sea trial. The plaintiff operated the vessel for a time but then turned over the controls to the salesman.

The salesman steered the boat into the oncoming waves and struck a wave head-on. The plaintiff bumped his head on the overhead and fell to the deck, fracturing one ankle and spraining the other. He underwent surgery for the broken ankle and suffered from residual pain that required the use an opioid pain reliever. The

medication caused cognitive impairment, which led the plaintiff to quit the practice of medicine.

The plaintiff sued the dealership in admiralty. After a bench trial, the court entered a $10.3 million judgment for the plaintiff. The court found that the salesman (a dealership employee) was negligent, and that the plaintiff's injury, resulting pain, and medication prevented him from working as a doctor. The court also awarded prejudgment interest at North Carolina's statutory rate of eight percent.

The dealership appealed, challenging the court's findings as to breach of the standard of care, the extent of plaintiff's damages, the admissibility of plaintiff's disability income, and the use of the state prejudgment interest rate. The Fourth Circuit affirmed in all respects.

a) Breach of Duty

First, the defendant argued that the trial court erred in concluding that the salesman violated the standard of care. The plaintiff's expert had opined that the salesman was negligent by operating the boat too fast and by steering straight into an oncoming wave. The plaintiff's expert did concede, however, that had the plaintiff not been injured, his opinion of the operator's conduct might well have been different. Nevertheless, the Fourth Circuit decided that the expert's testimony, when combined with the other evidence, was sufficient to support a finding of negligence.

b) Damages

Next, the defendant argued that the trial court erred in its determination of damages. The trial court found that the plaintiff had a 20% permanent impairment in his ankle and that the pain would probably endure for the rest of his life. Although the defendant presented contrary expert testimony, the Fourth Circuit concluded that the trial court was within its discretion to give more weight to the plaintiff's expert. The Fourth Circuit also declined to reverse

based on video surveillance footage that seemed to show that the plaintiff was less than "totally disabled." Reversing on that ground would have amounted to reweighing the evidence, which was not the appellate court's function.

As to damages for future injuries, the defendant argued that the award for future pain and suffering was not based on sufficient medical evidence and was excessive to the point of being punitive. The Fourth Circuit disagreed. After pointing out the evidence supporting the finding, it noted the district court had "great latitude" in assessing the amount.

The defendant also argued the plaintiff failed to mitigate his damages since he could have lost weight and used his cane in a different manner, which could have reduced his pain, obviating the need for the opioid that caused his cognitive impairment and caused him to quit his practice. The court dismissed this argument as "purely speculative."

c) Admissibility of Plaintiff's Disability Payments

Next, the defendant argued that it should have been able to cross-examine the plaintiff about his receipt of disability income. The defendant offered the evidence to "challenge his credibility, rather than to show that he was receiving income from other sources." The trial court permitted examination about the contents of plaintiff's applications for disability, but not the amounts the plaintiff was drawing, reasoning that evidence of such "collateral source payments" was inadmissible. The Fourth Circuit found no abuse of discretion in this decision.

d) Prejudgment Interest Rate

Lastly, the defendant argued that the district court abused its discretion in awarding prejudgment interest at the North Carolina statutory interest rate of 8% rather than at the prevailing market rate. The Fourth Circuit noted that when "setting the proper rate of prejudgment interest, admiralty courts have broad

discretion and may look to state law or other reasonable guideposts indicating a fair level of compensation." The district court had therefore not abused its discretion by using the North Carolina interest statute.

WARRANTY

Economic Loss Doctrine No Bar to Owner's Claim for Consequential Damages Against Engine Repairer

Aviva, Ltd. v. Carter Mach. Co., 2012 A.M.C. 2317, 2012 WL 1970228 (W.D. Va. May 31, 2012)

The owner of the 153-foot yacht CHARADE paid an engine repairer $15,000 to overhaul the yacht's generator engines. Claiming that the workmanship was faulty, the plaintiff sued the repairer for negligence and breach of contract. Among the alleged damages were travel expenses incurred in making follow-up repairs, the costs of dockage and electricity consumed during those repairs, the cost of replacing lube oil, monitoring costs, and cleaning costs.

The repairer moved to dismiss the negligence claim, arguing it was barred by the economic loss doctrine as set forth in *East River S.S. Corp. v. Transamerica Delaval, Inc*., 476 U.S. 858, 1986 A.M.C. 2027 (1986). In that case, the U.S. Supreme Court held that there is no maritime negligence claim against a product manufacturer, supplier, or installer if the only injury is to the product itself and the loss is purely economic. A plaintiff in that situation is limited to warranty or contract claims.

Here, the district court concluded that *East River* presented no obstacle to the plaintiff's negligence claim because the plaintiff was seeking recovery not for injury to the engines but rather for consequential losses arising from the need to remediate the repairer's allegedly faulty work. Moreover, the repairer had not manufactured or supplied the engines but rather was hired to overhaul them. A claim against the repairer for negligently performing that service therefore did not contravene *East River*.

[Editors' note: Contributors to this issue were Meighan Burton, Alberto Castañer-Padró, David Garfinkel, Adam Jay Jaffe, Joseph Kulesa, Christian Packard, Ross Rochat, Patrick Ward, and Justin Woodward]

COMMITTEE ON YOUNG LAWYERS

Chair: Betsy Bundy

NEWSLETTER

Volume 2012-2, October 2012

Message from the Chair:

Dear YLC Members,

As you all know, the MLA Fall meeting in New York was cancelled in the wake of Hurricane Sandy. We also cancelled our YLC Social Event. As a result of all the upheaval, this newsletter was delayed in its distribution. Even though we did not have the opportunity to come together for the Fall meeting in NYC, I still wanted to share all of the recent accomplishments and activities of our committee. I also wanted to take this opportunity to offer our thoughts and best wishes to our friends and colleagues who are still recovering from the impact of the storm.

Betsy Bundy

COMMITTEE LIAISON PROGRAM

The Committee Liaison Program is in full swing. As you know, the purpose of the program is to assign one YLC member to each of the MLA's standing committees to serve as a liaison. The goal of this program is to increase the flow of communication between the standing committees and the YLC, which hopefully will lead to opportunities for our members to become more involved in the MLA at large. Additionally, Liaisons may provide a brief status report each year at the YLC Spring meeting pertaining to the work of that particular standing committee.

An updated chart identifying the appointed Liaison volunteers will be posted on our page of the MLA website for everyone's reference.

In the meantime, let this serve as a reminder to our Liaisons, you know who you are, that this committee is ready to work. Please spread the word to your respective committees to call on us if we can be of service.

Vacancy: We may have an opening for a new YLC Liaison to the Marine Ecology and Maritime Criminal Law Committee. The current Chair, Katharine Newman, is eager to find a volunteer that has time and resources to devote to the committee and a relevant background. If you are interested in volunteering to serve as the YLC Liaison to this committee, please e-mail Betsy Bundy at betsy.bundy@skuld.com.

COMPLETED PROJECTS

MLA Resolutions Project - This project has come to an end! The Secretary of the MLA, Hal Watson, requested the assistance of the Committee for a project to research and compile all of the Resolutions passed by the Association since its formation in 1899. This project was spearheaded by former Chair Alex Giles and was taken over and completed by Vice Chair Norman Stockman. Our members worked tirelessly to complete this endeavor. We would like to thank the following individuals for their contributions: Alex Giles, Patricia O'Neill, Joseph Peck, Luis Raven, Tara Voss, Patrick Ward, and Jon Werner.

ONGOING PROJECTS

Marine Insurance Definition Project - Thanks to our YLC Liaison to the Committee on Marine Insurance and General Average, Stephanie Espinoza, the YLC has been asked to assist with a project to analyze the definition of ocean marine insurance in U.S. jurisprudence and regulation, and create a proposal for a uniform definition. This project will build on the initial research of Graydon Staring, former president of the MLA, and will hopefully provide a comprehensive analysis that can be used in practice. Work on the project began last year and continues to move forward. The committee expects that the project will be completed by the Spring

meeting. We would like to thank the following YLC members who have worked on the project thus far: Jonathan Wright, Scott Sheffler, and Abby Nitka.

RECENT PROJECTS

At the request of Katharine Newman, Chair of The Marine Ecology and Maritime Criminal Law Committee, the YLC was asked to assist in preparing summaries to include in their newsletter: Bilge and Barratry. I am pleased to report that we had 19 volunteers for this project, many more than Katharine needed! Many thanks to the following individuals who assisted in preparing the latest addition of the newsletter: Matthew Koch, Limor BenMaier, Mark Zlomek, Justin Mitchell, Guillermo Cancio, Charlie Marts, Jude Smith, Ryan Gilsenan, Brian McEwing, David Cole, Lauren Burk, and Becky Hamra.

CALL FOR PROJECTS

To the Standing Committees: Please let us know how we can help with your projects. If you have projects in need of research or have writing opportunities that are well suited for younger lawyers, please keep our committee in mind. Additionally, we can usually find a YLC member to assist with staffing your meeting (handling CLE paperwork, sign-in sheets, handouts, and assisting with presentation set up, etc.), if and when the need arises.

PUBLICATION OPPORTUNITIES

Do you have any war stories from your practice that you wish to share with others? Do you think you have a sense of humor? Consider submitting your written piece for consideration to Benedict's Quarterly Maritime Bulletin. You may write to Managing Editor Joshua S. Force at jforce@shergarner.com.

PROCTOR STATUS

Any Associate member of the MLA who has been a member of the MLA for four years or more is eligible to apply for

Proctor status with the MLA. The advantages of Proctor status are numerous, not the least of which is that a member cannot serve as a committee chair, vice-chair or director unless s/he is a Proctor or Non-Lawyer member. Proctor applications may be obtained from the MLA Membership Secretary or may be downloaded from the MLA website (www.mlaus.org) in the "Membership Forms" section.

COMMITTEE ON ARBITRATION AND ADR

Minutes for the Meeting held on November 8, 2012

The November 8, 2012 meeting of the Committee on Arbitration and Alternative Dispute Resolution was held at the offices of Seward & Kissel, One Battery Park Plaza - 23rd Floor, New York, New York. A number of committee members attended via telephone.

The Agenda for the meeting was as follows:

1. Approve the minutes of the last meeting

2. Committee newsletter and other announcements

3. Presentation:

Discovery in England Relating to US Arbitration and Court Proceedings and Standards and Procedures for Enforcing US Judgments and Arbitration Awards in England

Presenter: Lindsay East
Reed Smith, London

4. Presentation:

Mediation in London: An Update and Discussion of Relevant Rules and Procedures

Presenter: Jonathan Lux
Ince & Co/JAMS, London

5. Presentation:

Sulamerica v. Enesa: How to Approach the Law that Governs an Arbitration Clause

Presenter: Terry O'Regan
Eversheds, London

6. Recent Cases of Interest

a. Garanti Finansal Kiralama - The Second Circuit decision addressing the applicability of the Declaratory Judgment Act to subject matter jurisdiction of federal courts in admiralty cases.

b. Travelport Global Distribution Systems - Southern District of New York finding personal jurisdiction and proper venue over a foreign defendant based on arbitration clause designation of UNCITRAL rules and arbitration in the United States.

7. Other business, if any.

Chairman, Leo Kailas called the meeting to order at 2:12 p.m.

1. The vote to approve the minutes of the September 18, 2012 meeting was deferred to the next meeting of the Committee.

2. Committee Newsletter and other announcements.

There was a brief discussion of the two cases cited in Agenda item 6 above: *Garantii Finansal Kiralama* and the *Travelport Global Distribution Systems.*

3. **Lindsay East,** provided a presentation entitled: *Discovery in England Relating to US Arbitration and Court Proceedings and Standards and Procedures for Enforcing US Judgments and Arbitration Awards in England*

A. Enforcement of American Judgments and Arbitration Awards in England and Wales

Unlike the EU countries, countries bound by the 1988 or 2007 Lugano Conventions and certain Commonwealth countries a judgment from the United States has to be enforced under the

common law. This means that the party seeking to enforce a judgment from the United States must "institute a fresh legal proceeding" in the UK.

In England a judgment is considered an "obligation actionable" so long as the defendant is within the English jurisdiction and the judgment is "sued upon as a debt." If the judgment appears "regular" the plaintiff can apply for summary judgment.

For a foreign judgment to be recognized in England, it must be a final and conclusive judgment of the court "which pronounced it" and it must have been given by a court regarded by English law as competent to render such judgment.

There are numerous exceptions to this of which just a couple are lack of jurisdiction of the foreign court and that the judgment is contrary to English public policy or the Human Rights Act of 1998.

New York Arbitration awards can be enforced in England pursuant to the New York Convention.

B. Disclosure in England and Wales in Relation to US Proceedings or Arbitrations

American Courts

The English Evidence Act of 1975 "confers power on the High Court to assist non-English Courts in foreign civil proceedings, actual or contemplated, by enabling evidence to be obtained from witnesses in England and Wales, for the purpose of those foreign proceedings." Note that though the Act applies to both oral and documentary evidence, there are a number of limitations on what can be produced

It is significant to note that this Act does not apply to requests in aid of a "private arbitral panel."

Mr. East submitted that there is some authority in England in aid of an American arbitral tribunal in Section 44 of the Arbitration Act of 1996 but the English courts have broad discretion as to whether to exercise that power.

C. The "*AQUAFAITH*" - Are You Obliged to Accept Renunciation/Repudiation of a Contract?

In this comment Mr. East discussed this case's involvement with "the role of the Arbitrator and the application of Sections 33, 68, and 69 of the Arbitration Act of 1996." He also provided a discussion of the court's view of the arbitrator's reasoning in consideration of the charterer's repudiation of a charter and his view of the grounds for and relative predictability that a court will review an arbitrator's decision on appeal.

4. **Jonathan Lux** delivered a presentation entitled: *Mediation in London: An Update and Discussion of Relevant Rules and Procedures*

In his presentation, Mr. Lux provided an overview of the mediation process in London and some of his personal view on the process.

Mediation is very popular in London, following a trend which began in the United States approximately 35 years ago.

London follows facilitative mediation, which is preferred by Mr. Lux, rather than Evaluative mediation where the mediator shares his thoughts on the relative merits of the matter.

The process leading to mediation in the UK is similar to that employed in the United States. The steps are: 1) Appointment of the mediator; 2) Agreement (Confidentiality); 3) establish the time, place, schedule; 4) submission of the mediation position papers; 5) separate papers for the mediator's eyes

only; 6) at the mediation, some mediators do not use a joint session.

Recent data shows that there are approximately 8,000 cases mediated in the UK per year and the trend is toward increased mediation. Recall that in the UK the loser in a trial must pay the legal fees and costs of the prevailing side.

There is not compulsory mediation in the UK, though Judges suggest it and it appears that absent reasonable grounds a court has discretion to grant sanctions for a party's failure to agree to mediate.

Mr. Lux noted that there were some disadvantages to mediation in the UK. One consideration was the lack of security for an agreement. Another was the issue of publicity of the conflict and whether one or the other of the parties desired publicity of the conflict or not. This could be made a part of the agreement to mediate. Another is there is no binding precedent in law and another is enforcement of the mediated agreement. It was suggested that the settlement agreement could be made in the form of a consent judgment.

As to the way forward, Mr. Lux takes the position that the use of mediation in the UK should be carefully nurtured and it is his hope that the presence of JAMS in London will add to the popularity and use of mediation in the UK.

5. **Terry O'Regan** gave a presentation entitled: *Sulamerica v. Enesa*: *How to Approach the Law that Governs an Arbitration Clause.*

This summary of the *Sulamerica* case[1] is provided "as guidance on determining the proper law of an arbitration agreement where none is expressly stated in the arbitration agreement."

[1] In the Court of Appeal (Civil Division) on appeal from the High Court of Justice Queen's Bench Division (Commercial Court), Neutral Citation Number: [2012 EWCA Civ 638, Case No.: A3/2012/0249; Before: The Master of the Rolls Lord Justice Moore-Bick and Lady Justice Hallett.

The *Salamerica* case involved a dispute that arose in connection with two all-risk insurance policies (the two policies were essentially the same) relating to the construction of a hydroelectric plant in Brazil. Both of the parties were Brazilian and the policies were written in Portuguese. Certain incidents occurred that led to the insured (*Enese Engenharia S.A.*) to make claims against the policies. The insurers (*Salamerica*) denied the claims on several grounds.

The policies contained a provision that stated Brazilian law would govern any dispute arising under the Policy and shall be subject to the exclusive jurisdiction of the courts of Brazil, a mediation clause, and an arbitration clause providing for London arbitration.

The insurers commenced arbitration in London. The insured argued the arbitration agreement was governed by Brazilian law, commenced legal proceedings in Brazil and obtained an interim order restraining the pursuit of the London arbitration. The insurers obtained an anti-suit injunction from the London Commercial Court, restraining the pursuit of the Brazilian proceedings.

The insured appealed, arguing that the parties had impliedly chosen Brazilian law as the law governing the arbitration agreement based on the express choice that the law of Brazil shall govern the policies, the close commercial connection between the parties and the policies with Brazil, and the inclusion of a provision, itself governed by the law of Brazil, requiring the parties to attempt mediation as a pre-condition to any arbitral proceedings.

The insurers argued that English law governed the arbitration agreement based on the fact that an arbitration agreement is separable from the substantive contract and accordingly the most “real connection” was the place of the seat of the arbitration.

Prior to this decision, there were two distinct lines of judicial thinking on this point; first that the law of the substantive contract should govern the arbitration clause and an agreement to arbitrate is severable from the contract. Therefore, it the first principle was applied Brazilian law would apply, yet if the second applied English law would apply to the arbitration.

The Court of Appeals determined that the previous authorities established two propositions that provided a starting point for any inquiry into the proper law to apply to the arbitration agreement.

Those were that even if the arbitration agreement forms part of a substantive contract, its proper law may not be the same as that of the substantive contract and the "proper law" is to be determined by undertaking a three-stage inquiry into:

The express choice of law;

The implied choice of law; and

The closest and most "real connection."

The court determined that the three considerations should be looked at separately in the above order as any express choice made by the parties as so stated in the agreement should be respected.

The court found that there were many factors in favor of finding that the law of Brazil should apply to the arbitration. However, the court found two important factors that indicated against the application of Brazilian law. The first was the choice of another country as the seat of the arbitration inevitably involves an acceptance that the arbitration law of that country will apply to the proceeding. An agreement to resolve disputes by London arbitration and therefore in accordance with English arbitral law did not have a close connection with the Brazilian law governing the policies. Its

closest and most "real connection" was with the law of the place where the arbitration was to be held - London. Second, the fact that under Brazilian law, the arbitration agreement would only be enforceable with consent significantly undermined the arbitration agreement.

In summary, the court held that the parties' express choice of Brazilian law to govern the substantive contract was not sufficient evidence of an implied choice of Brazilian law to govern the arbitration agreement, reasoning that parties could not have intended to choose a law that could significantly undermine that agreement on the basis that arbitration could only proceed with both parties' consent. Accordingly, the court held the arbitration agreement was governed by English law.

The lesson learned therefore is to expressly state the law that is to govern the arbitration agreement.

MICHAEL MARKS COHEN

The Committee's immediate past Chairman, Keith W. Heard, gave an excellent presentation on the many contributions that our colleague Michael Marks Cohen has made to Maritime Law Association of the United States, the Committee on Arbitration and ADR, the BIMCO Documentary Committee, and to the American Maritime Cases.

Thereafter, the following resolution was unanimously approved by the Committee:

BE IT RESOLVED that the Arbitration and ADR Committee of The Maritime Law Association of the United States hereby extends its congratulations to its esteemed member Michael Marks Cohen on his well-deserved recognition as the 2013 recipient of the American Bar Association's Leonard J. Theberge Award for distinguished contributions to private international law.

Chairman Kailas adjourned the meeting at 3:55 p.m.

Respectfully submitted,

Robert N. Dunn

COMMITTEE ON INTERNATIONAL ORGANIZATIONS, CONVENTIONS AND STANDARDS

Minutes of the Telephone Meeting Held on November 7, 2012

The International Organizations, Conventions and Standards Committee held a telephone call-in conference on Wednesday, November 7, 2012 from 11:00 a.m. to 12:00 noon. Most of the Committee's officers and some members were able to participate, although due to continued power outages and transportation difficulties in the northeast and in New York City in particular many members who had expressed an interest in participating were unable to obtain satisfactory telephone service. In addition to the regular membership, the Committee was privileged to have the participation of U.S. Coast Guard Captain Melissa Bert who kindly offered her support and gave some remarks during the course of the meeting.

CMI Sub-Committee Chair John Kimball provided a detailed report concerning the recent meeting of the CMI in Beijing. He reported that the U.S. delegation was the largest in attendance although there was naturally extensive Chinese participation, particularly on the first day. The Conference was divided into different substantive sessions and the U.S. delegation did its best to attend as much as possible.

Amendments to the 1989 Salvage Convention were addressed, including changes to SCOPIC to increase compensation, a matter which is opposed by P&I Clubs and vessel owners. A related subject, the proposed Convention on Protection of Underwater Cultural Heritage, was also addressed, a Convention strongly opposed by the salvage industry. No recommendations on either Convention were forthcoming from the CMI.

A session was held addressing the Rotterdam Rules where minor amendments to the official text were announced concerning terminal operators. Michael Sturley gave a positive report on the prospects for ratification of the Rotterdam Rules by the United States in the near future.

The draft Convention for Recognition of Foreign Judicial Sales of Ships was addressed and significant progress made on the draft.

Amendments to the York Antwerp Rules were addressed in another session. Discussion of whether CMI will support these amendments was postponed to the 2016 meeting. It was noted that the York Antwerp Rules amendments are uniquely the province of the CMI, unlike most other conventions which also go through IMO. Jonathan Spencer provided a copy of a report on the York Antwerp Rules prepared by Michael Harvey, a UK-based average adjuster who attended as a representative of AMD/ International Association of Average Adjusters, that is also attached hereto and made a part of this report.

In the general assembly on Friday, there was a separate topic in the conference program for discussion of the future role of the CMI. The venues for the next meetings of the CMI were addressed, noting that CMI will be meeting in Dublin in conjunction with the Irish MLA in September 2013. Possible future venues in 2014 or 2015 include Istanbul or Hamburg but nothing was agreed. Mr. Kimball noted that CMI's new president, Stuart Hetherington, has taken over from Karl-Johan Gombrii. The U.S. delegation discussed the roles to be played by its members in the CMI in future and potential leadership positions.

Mr. Kimball stated that the Shanghai add-on days were very good and the conference provided many opportunities for networking and outings. Southampton and Tulane Universities put on a joint CLE event which while not officially part of the CMI Convention were found to be well received and addressed broad legal developments in maritime law from a U.S. and U.K perspective over the last three decades.

Vincent Foley, who also attended the CMI, added some observations. He noted additional sessions addressed Arctic/ Antarctic issues and a draft Convention on Offshore Liability including a proposal to form an international working group to study the need for such a convention.

At the Shanghai add-on Mr. Foley noted a very interesting presentation at the Shanghai Maritime Court by one of the judges.

In his presentation the judge noted that there were ten to twelve courts handling over thirty-five hundred maritime cases per year. The facilities of the Shanghai Maritime Court were very modern and impressive.

Vincent Foley went on to provide a short presentation concerning planning for a joint MLA- CMI conference in New York in 2016. He noted there were about 400 attendees at the Beijing CMI Conference (180 of which were Chinese). It is expected that a New York CMI Conference will attract more than 500 attendees plus accompanying persons. The MLA- CMI 2016 planning committee for this conference held a preliminary meeting in early October just before the CMI Beijing conference, but there has not been any concrete planning of yet. The next steps are to consider retention of a professional conference organizer, and preparation of a budget for planning the conference. The 2016 CMI Conference will be held in combination with the MLA's Spring Meeting. It was noted that several members of this Committee are also on the CMI 2016 planning committee for this conference.

The Committee was privileged to be addressed by Capt. Bert of the U.S. Coast Guard Maritime and International Law Office. She discussed the status of the Law of the Sea Convention in Congress and reported that Senator Kerry promised a new push for ratification. The Coast Guard and State Department are both behind ratification and other agencies may join. She also reported there may still be a need to look at working around issues involving the Outer Continental Shelf.

Borianna Ferrar provided a brief report concerning her attendance at the Women's International Shipping & Trading Association ("WISTA") Conference held in Paris in the fall of 2012. She reported that the U.S. delegation was well represented for this two and a half-day conference. Compliance with the Ballast Water Convention was addressed and MLA member Jeanie Grasso provided comments on how U.S. whistleblowing statutes were emerging as a model for seafarers. During the conference the French Minister of Transport gave a long and emotional speech

about the role of women in shipping. The next WISTA Conference will be held in Montreal in October 2013.

Law of the Sea Sub-Committee Chair Doug Burnett was unable to attend this telephone conference but he submitted a written report which is attached hereto and made a part of this report.

The meeting was then open for discussion of new business and other topics. Early planning for the spring 2013 New York meeting was discussed, with an emphasis place on inviting pertinent speakers from the New York area to attend, especially persons who might have United Nations involvement to address the number of new and proposed international conventions that are currently the subject of much attention. With best wishes to all members currently recovering from Hurricane Sandy the meeting was then adjourned.

CMI CONFERENCE, BEIJING 2012

YORK-ANTWERP RULES

As most Members will be aware, I attended the recent CMI Conference in Beijing as a member of the International Working Group (IWG) that had proposed some amendments to the YAR. These amendments were an attempt to make the 2004 Rules more palatable to the Shipowning fraternity; the Shipowners' rejection of those rules being a source of embarrassment to the CMI. The proposed amendments concerned:

- Rule VI – Salvage,
- Rule XI(c) - Wages and maintenance at a port of refuge, and
- Rule of Application to require that the new rules be considered an amendment or modification of previous rules.

The Report of the IWG was sent to the National MLAs (NMLA) and their comments invited. It was evident from the responses that there was little enthusiasm for the IWG proposals. However, the British MLA (BMLA) put forward compromise proposals which might have provided an acceptable alternative.

The BMLA proposed adopting the non-contentious 2004 amendments to Rules XIV(b) (Temporary Repairs), XX (Commission), XXI, (Interest) and XIII (Time Bar) pending further review of the YAR generally at the 2016 CMI Conference.

The first YAR session at the Conference confirmed that there was no enthusiasm for the IWG proposals but it appeared that the compromise proposed by the BMLA might glean some support. However, there was criticism of the late involvement of the NMLAs giving them little time consult and consider their position. Perhaps more importantly, the International Chamber

of Shipping (ICS) made it quite clear that they were disappointed that they were not involved in the debate at an earlier stage and that they were unable to support ANY changes to the YAR at the Conference. Nevertheless they did concede that certain aspects of the YAR might need looking at and that they would not argue against a long-term review of the Rules.

BIMCO considered that it was premature to proceed with amendments at this time and that they generally agreed with the ICS and proposed further consultation.

IUMI (Ben Browne) pointed out the allowance in GA of a high interest under the 1994 Rules plus the allowance of commission was basically unjust. An additional IUMI concern was the length of time taken to prepare GA statements; i.e. the long tail of GA claims. Nevertheless, IUMI would support the BMLA initiative pro tern.

Since there was no enthusiasm for the proposals of the IWG (indeed a vote showed zero support), further discussion on same was dropped from the agenda. There then followed discussion re the BMlA alternative with most MLAs taking the position that they had no mandate to vote on the compromise which was only introduced at a very late stage; essentially they had not had the time to consult on the topic.

After some confused discussion with regard to how the BLMA compromise might be voted upon, a Time Out was called.

During this intermission, and after consulting with Richard Cornah (UK Member and Representative of the AAA), I suggested to the President of the CMJ (Karl Johan Gombrii), the Chairman of the Session (Bent Nielsen) and the Rapporteur (Richard Shaw) that, although there was little point in attempting to proceed with the BLMA compromise, consideration should be given to continuing the meeting as an informal workshop to establish areas of concern which might be considered and consulted upon with a view to recommending a revised set of rules at the next CMI Conference in 2016. This proposal was accepted and presented when the session recommenced.

The second YAR session took the form of workshop to identify and discuss issues that might be usefully reviewed with a view to presenting the text of YAR for discussion and ratification at the CMJ Conference in 2016.

Richard Cornah and I put forward a number of topics which we considered warranted consideration; a number of these had already been identified by the BLMA in their response to the IWG Report. These were supplemented by Ben Browne who presented IUMIs "shopping list."

The JCS said that they were open to looking at practical issues such as interest rates and security documentation but did not favor disturbing underlying principles. BIMCO said that they were not opposed to reviewing the issues which Richard and I raised; otherwise they were generally in line with the ICS. The ICS stance was supported by a number of NMLAs.

At the Plenary Session of the Conference the Chairman of the Working Group presented a summary of our deliberations and recommended to the CMI Executive Council "that it should appoint a new International Working Group on General Average, with a mandate to carry out a general review of the York Antwerp Rules on General Average, and, noting that the York Antwerp Rules 2004 had not found acceptance in the ship-owning community, to draft a new set of York-Antwerp rules which met the requirements of the ship and cargo owners and their respective insurers, with a view to their adoption at the 2016 CMI Conference." This recommendation was accepted by delegates.

After the CMI Assembly, the Chairman of the old IWG called a meeting to discuss the composition of and timetable for the new IWG. The following members are proposed:

Bent Neilsen (Chairman) Richard Shaw (Co-Rapporteur)

Taco Van Der Valk (Netherlands) (Co-Rapporteur)

Linda Howlett (ICS/BIMCO) Ben Browne (IUMI)

Michael Harvey (AMD)

Richard Cornah (AAA)

Jiro Kubo (Japan)

It was also suggested that a Norwegian Underwriter/Claims Adjuster might be invited to join the Group.

It was envisaged that a Questionnaire will be circulated by 1 December with a 4 month deadline for responses except for BIMCO who, due to their meeting timetable, will respond by end of May 2013. Armed with the responses the IWG will endeavour to issue a report by mid-June for consideration at the Assembly in Dublin in Sept/Oct 2013.

A list of issues was drawn up and while it was initially proposed that members of the IWG would take responsibility for drafting questions for specific issues, Richard Cornah and I have 'volunteered' to prepare a draft questionnaire.

Michael D. Harvey

5 November 2012

UNCLOS
Report

There are 164 State parties and the EU which are parties to UNCLOS. The following coastal States are not parties:

1. Ecuador - claims 200 NM territorial sea with fishing the key driver. Peru recently became a party so Ecuador may soon follow.

2. Venezuela - disputes with Aruba and Colombia on maritime boundaries.

3. U.S. - minority of Republican Senators block an up-or-down vote on UNCLOS on ideological grounds.

4. Turkey - disputes sovereignty over the Dardanelles.

5. Israel - disputes access to Israeli port in the Gulf of Acaba.

6. Iran - disputes sovereignty over the Strains of Hormuz.

7. U.A.E. - not sure of reason, perhaps inertia.

8. North Korea - its North Korea.

Senator Kerry, Chair of the Senate Foreign Relations Committee (SFRC) repeated as late as yesterday that he will hold a vote before the SFRC as soon as the election is complete. UCNLOS will be passed to the Senate by a 75% majority of SFRC.

At that point it will be up to President Obama to require Senator Reid to schedule a vote before the Senate before its term ends in January. If President Obama does not exercise this leadership, then UNCLOS will not be voted on in this Congress.

If President Obama wins the election, Senator Kerry might be the new Secretary of State. If so one can see another push in the next Congress but it is starting again for the third time from

zero. If Governor Romney wins, it is hard to say whether he will back the Navy and Department of State. He was never asked his position during the campaign. He is probably not against it but a lot will depend upon who is his Secretary of State and the composition of the Senate.

Respectfully submitted,

Doug Burnett

COMMITTEE ON MARINE ECOLOGY AND MARITIME CRIMINAL LAW

and the

COMMITTEE ON REGULATION OF VESSEL OPERATIONS, SAFETY, SECURITY AND NAVIGATION

and the

GOVERNMENT COUNSEL COMMITTEE

Minutes of the joint meeting held on November 7, 2012, at the offices of Troutman Sanders LLP, 401 9th Street NW, Washington, DC.

This meeting was held at the day and time assigned for the Fall 2012 Maritime Law Association Joint Committee meeting, but was held in Washington D.C. vice New York City.

The meeting was attended by 15 persons in the meeting room and 23 persons via conference call.

Welcome was given by Jeffrey S. Moller of Blank Rome, Philadelphia, PA, who expressed appreciation to David H. Sump and Troutman Sanders LLP for hosting and to U.S.C.G. for providing a speaker.

U.S.C.G. Potpouri

Captain Melissa Bert, Chief, United States Coast Guard Office of Maritime and International Law, discussed the following:

Law of the Sea Convention: Captain Bert summarized the history of the Law of the Sea Convention and the positions, both pro and con, regarding ratification. There are no present prospects for ratification however it is possible that it may be addressed in the Senate lame-duck session. Ratification is essential for specific "freedom of navigation" issues, outer continental shelf management and sea bed mining operations.

Arctic Issues: Current initiatives to map the precise location of the intercontinental shelf in the Arctic are underway. (Also continental shelf issues in Gulf of Mexico) These issues are governed in part by the unratified Law of the Sea Convention. Russia's claim to its continental shelf is being disputed at the UN Continental Shelf Commission based on the "non-continuous" nature of the shelf. Captain Bert also provided update on the Shell spill cleanup barge ARTIC CHALLENGER which was finally approved for deployment in the Arctic by the U.S. Coast Guard. Delays in meeting approval standards resulted in a lost season for Shell's drilling on its federal lease on the OCS. She also mentioned the journey of U.S.C.G.C. HEALY as it escorted Russian tanker RENDA to Nome, Alaska.

***Lozman v. City of Riviera Beach*:** U.S.C.G. participated in this U.S. Supreme Court litigation focusing on the definition of "vessel" for the purposes of invoking federal court admiralty jurisdiction. U.S.C.G. regulatory definitions of "vessel", as well as U.S.C.G. policy interpretations, were mentioned in the Supreme Court argument but were not the focus of the argument.

***PMSA v. Goldstene*:** Ninth Circuit rejected PMSA's argument that the State of California was pre-empted from regulating vessel operations within 24 miles of the coast and the case was returned to the trial court for litigation. The U.S. Supreme Court denied *certiorari*. This case was compared to the State of Alaska's challenge to the EPA's Emissions Control Area requiring use of low sulphur fuels within 200 miles of coast. U.S.C.G. is battling to preserve EPA autonomy in both instances although the Solicitor General briefed the Supreme Court in *Goldstene* that the case was not ripe for decision.

Ballast Water Management: Nations comprising 29% of the world's tonnage have adopted the Ballast Water Management Convention. The Convention will enter into force 12 months after ratification by 30 States, representing 35 per cent of world merchant shipping tonnage. As of this time there are 28 "type approved" systems.

Investigations: Captain Bert discussed many of the most recent casualty investigations, including COSTA CONCORDIA; the seaman's manslaughter cases involving parasailing; the Philadelphia DUKW boat casualties; as well as the issues involving requirements of foreign flag vessels to post security prior to departing port during environmental investigations.

Lawrence I. Kiern, Esq. Winston & Strawn, Washington D.C. discussed the following:

Legislative Update

Expect gridlock in the lame duck session. Focus will be on elimination of Bush tax cuts, sequestration and raising the debt limit.

In new session look for more of the same from a divided government. He noted that Republicans will likely have a reduced majority in the House and the Democrats will have an increased majority in the Senate.

The lame duck session may include action on the Maritime Security Program Reauthorization, possible repeal of the Cargo Preference Act Amendment and passage of the U.S.C.G. Authorization Bill (unlikely in the lame duck session).

Rotterdam Rules are not on the legislative radar at this time.

DEEPWATER HORIZON Litigation Update

Mike Underhill, Esq. U.S. Department of Justice Civil Division – Torts Branch, Washington, D.C.

Phase I liability trial scheduled to begin February 25, 2013 and is expected to be of two month's duration.

Phase I necessary because not all claimants in the litigation were part of the proposed class settlement. For instance, claims

for economic damages due to the drilling moratorium were not included in the settlement.

Fairness hearing about to be held in New Orleans to rule on settlement agreement.

Phase I trial will be limited to the period of time up to and including the blowout, but nothing thereafter.

Phase I will primarily litigate whether defendants are liable due to gross negligence/willful misconduct under OPA 90. Civil penalty caps will be increased for gross negligence/willful misconduct.

Phase II is currently in the discovery phase. Will determine how much oil leaked to assist the federal government in assisting the magnitude of the civil penalty and criminal penalty.

PMSA v. Goldstene

Eric Wise, Esq. Flynn, Delich & Wise, Long Beach, CA, gave the following update on litigation involving the Constitutionality of California Air Resource Regulations regarding air pollution resulting from use of certain marine fuels.

U.S. Supreme Court denied *certiorari*.

MLA provided *amicus curiae* brief supporting uniformity of the law and objecting to state regulatory authority over vessel operations outside territorial limits.

The Solicitor General, while agreeing the issue was important, took the position that the issue was not ripe for litigation in this case.

PMSA, upon remand, elected not to pursue the trial on the merits since the applicable regulations will become moot in 2015.

Recent Jones Act Decisions

Jonathan K. Waldron, Esq., Blank Rome, Washington, D.C. discussed recent Jones Act decisions. Recent issues involving foreign vessels in coastwise trade dominated Jon's report. Most recent issues involving operations in the oil patch.

OCSLA specifically provides that an offshore platform is a "coastwise point" for the purposes of coastwise trade.

Historically the "Christmas Tree" drilling apparatus was not considered "merchandise" by a prior ruling of the U.S. Customs/ Border Patrol and therefore a U.S. coastwise trade documented vessel was not necessary to transport the Christmas Tree to the offshore platform.

In a proposed rulemaking recently C.B.P. reversed its position that the "Christmas Tree" was not "merchandise", thereby making past C.B.P. opinions to the contrary invalid. C.B.P. then determined it would revoke all previous inconsistent C.B.P. opinions.

D.H.S. has since withdrawn the revocation of the inconsistent opinions and has not published the Final Proposed Rulemaking that would change the classification of the "Christmas Tree" as "merchandise."

Since November 2010 the industry has been operating under a cloud of uncertainty while waiting for a definitive ruling by D.H.S.

Piracy Update

Allen Black, Esq. Winston & Strawn, Washington, D.C. gave the following update:

Piracy attacks have been reduced significantly over the past year due in part to the increased presence of NATO forces.

Much credit for reduced attacks is attributed to the presence of armed security teams on commercial vessels.

Security teams present "use of force" issues for master and vessel owners. Casualties and deaths of innocent fishermen have occurred in the region apparently due to overzealous security teams.

ISO standards are in the drafting stage to address issues involving piracy countermeasures.

BIMCO "GUARDCON" contracts are increasingly being required by underwriters as a condition to coverage for security team liability.

Recent court decisions reinforce that acts of piracy must be committed on the high seas in order to subject a defendant to the sanctions associated with piracy.

Mr. Moller concluded the joint meeting.

TABLE OF CASES

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