SAFE PASSAGE

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What If the *Ever Given* Grounding Had Occurred Here?

BY JEFFREY MARTINEZ

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The timing of the *Ever Given's* grounding in the Suez Canal could not have been better, at least as far as my admiralty law students at Drexel University and I were concerned. The incident occurred right after we covered the subject areas of casualties, cargo losses, and the potential liability of pilots. And just in time for me to add this extra-credit question to the final exam: "If the maritime law of the United States were applicable to the *Ever Given* incident, who would be liable for what, why, or why not?"

Background

As readers will no doubt remember, *Ever Given* became hard aground by both its bow and stern across a single-lane portion of the Suez Canal in March. The pilots, who were employees of the Suez Canal Authority ("SCA") lost control of the ship in a severe wind/sand storm, partly because of the enormous sail area created by the multi-tier deckload of containers.

While costly salvors worked to free the ship, one of the most important shipping shortcuts in the world was completely impassable. Hundreds of ships at each end had to either wait or take the long route around the Cape of Good Hope. These ships were loaded with livestock, agricultural products subject to spoiling, and parts inventories for the world's "just in time" manufacturing economy. The SCA claims to have lost millions in passage fees. The ship was at least slightly damaged both bow and stern; owners of its cargo suffered delays and/or damage.

Once freed, *Ever Given* was effectively seized by an Egyptian court order, and the SCA demanded one billion dollars in security. The SCA alleged that the shipowners are obliged, by the terms of a tariff or other form of contract, to indemnify and hold the SCA harmless for all damage and claims. The SCA and the ship's P&I Club and owners have recently reached a confidential settlement of some kind, at least as to the amount of the release bond sufficient to allow the *Ever Given* to go on its delayed way. Those owners have filed a petition in London seeking to consolidate all potential claims and limit their liability per international convention. The owners have also declared General Average, which may take years to complete. (General Average is a process by which the shipowners and cargo owners are allocated shares in the costs incurred when a ship and the voyage come to be at risk.)

Many Questions … Any Answers?

A situation like this is a law professor's (and maritime lawyer's) dream because it is chock full of thorny and interesting questions: Is the SCA, the putative employer of the pilot(s), potentially liable itself (under the doctrine of *respondeat superior)* to the ship for its damage? Do the pilots themselves have any personal liability exposure? Do the cargo owners have any claims for delays, consequential losses, or physical damage to their goods given that the grounding seems to have been caused either by an error in navigation or by an instance of extraordinarily bad weather? Do owners of ships that had to wait or divert have any claims given that their vessels did not suffer any physical harm? Is the tariff or contract upon which the SCA relies for indemnity enforceable? Was the ship's master negligent for failing to assume control and allowing the pilot(s) to give inappropriate helm or engine orders? Do the shipowners bear any responsibility for having purchased such a huge and unwieldy vessel or for choosing to send it through the narrow confines of the Suez Canal? Are the owners entitled to limit their liability under any law and, if so, to what amount?

> **If the maritime law of the United States were applicable to the *Ever Given* incident, who would be liable for what, why, or why not?**

Assume that a similar grounding incident occurred in our Chesapeake and Delaware Canal. How would U.S. law answer these questions?

Briefly, an employer is liable under U.S. law for the negligence of its employees performing in the scope of their employment. But an association of river pilots is not an employer or even a partnership under longstanding Supreme Court precedent, so our local pilots' association

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cannot be held liable for any alleged negligence of one of its members while piloting a ship. Individual pilots have liability exposure for damage resulting from their failure to exercise reasonable care and professional skill, but the extent of damages that could arise in a serious maritime calamity is as a practical matter uninsurable and out of all proportion to the fees charged for services. Moreover, the ship itself is liable for the negligence of a compulsory pilot, and coverage via the ship's enrollment in one of the P&I Clubs is virtually unlimited.

The shipowner could be liable for the acts or errors of the master, but under U.S. law the duty of the master to relieve a pilot is limited to situations in which the pilot is obviously impaired or incompetent.

The rules for liability for harm to cargo are primarily found in the U.S. Carriage of Goods by Sea Act, which applies to all shipments to or from a U.S. port, but could be incorporated into a bill of lading to apply to any shipment. Considering the *Ever Given* situation, shipowners have two important defenses so long as they abide by their duty to provide a seaworthy vessel and take reasonable care of the goods in their charge: the "error in navigation and management of the vessel" rule and the so-called "heavy weather" defense. If cargo damage is caused by a collision or grounding arising from pilot or crewmember negligence in ship handling, the ship's owner is not liable. And if damage to cargo is caused by heavy weather that is not reasonably foreseeable, the shipowner likewise has no liability.

For practical purposes, no claims for "consequential losses"—think lost business due to delays receiving microchips needed to build cars—are allowed. Moreover, the carrier's liability for physical cargo damage under COGSA is most often limited to 500 dollars per package. Shipping containers are rarely, depending upon the terms of the bill of lading, considered to be "packages" *per se,* but a pallet or box of microchips inside might if damaged result in a loss well in excess of 500 hundred dollars.

The owners of ships delayed by marine casualties but not physically harmed cannot collect damages under U.S. law, per the well-known "economic loss" rule of the *Robins Dry-dock* case.

The terms of a private contract or tariff are not automatically or blindly enforced. In some instances, a statute passed by a legislature may bar the enforcement of an onerous term in a contract, such as one insulating a carrier from the consequences of its own negligence. Courts may find certain contract provisions unenforceable as "void as against public policy." Indeed, a group of cases decided by the U.S. Supreme Court held that indemnity and hold harmless clauses in contracts involving pilotage or towing can be voided under certain circumstances.

As far as limitation of liability is concerned, the United States has an infamous statute that says that unless the owner of a cargo ship had "privity" and/or "knowledge" in the cause of an accident, its liability, if any, can be no more than the post-casualty value of the ship. *Ever Given* was not significantly damaged in the grounding, was built only three years ago, and has a purported value of $170 million. But are the owners truly without privity or knowledge in the occurrence of the incident? Wasn't it they who decided to purchase such a ship and place it in a trade which practically required use of the narrow Suez Canal? Wasn't the enormous overall length, breadth and sail area of the ship a contributing factor to the incident?

If U.S. law applied, those questions would lead to the spillage of much legal and judicial ink. □

The Gateway to Federal Court: Admiralty Jurisdiction and Limitation of Liability

BY MARTIN WALKER AND HENRY GRANT

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In the United States, state and federal courts operate on a dual track, with the difference that state courts are courts of "general jurisdiction" (hearing all cases not specifically reserved to federal courts), while federal courts are courts of "limited subject matter jurisdiction" (hearing cases involving "diversity of citizenship," raising a "federal question," or "sounding in admiralty").

Admiralty and Maritime Subject Matter Jurisdiction

As it relates to admiralty and maritime subject matter jurisdiction, the U.S. Constitution states in Article III, Section 2 that *"[t]he judicial Power shall extend… to all Cases of admiralty and maritime Jurisdiction…"* The first statute defining the boundaries of admiralty jurisdiction was enacted in 1789 (known as the First Judiciary Act; Chapter 20, section 9, 1 Stat. 73). The current statutory grant of admiralty jurisdiction, however, can be found at 28 U.S.C. § 1333(1), which gives federal district courts original jurisdiction over "any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." Some kinds of maritime cases—typically those involving *in rem* remedies against a vessel or cargo—are subject to the exclusive jurisdiction of the federal courts. Under the "savings to suitors" clause, on the other hand, state courts have concurrent jurisdiction over admiralty claims when a state court is competent to grant relief, which is in most instances where *in personam* jurisdiction may be had in a state court.

In connection with this grant of jurisdiction, suits may be filed *in personam* against a specific party or *in rem* against certain inanimate objects (such as vessels or cargo) if various legal predicates are met and the causes of action are "maritime claims." In turn, U.S. maritime jurisdiction encompasses a wide variety of such claims, particularly with respect to tort actions and commercial disputes.

To determine whether a federal court has admiralty subject matter jurisdiction over a particular tort claim, U.S. courts apply a two-part test requiring a party to satisfy conditions of both maritime location and also a connection with maritime activity. The "location" portion focuses on whether the tort at issue occurred on navigable waters or, alternatively, whether an injury suffered on land was caused by a vessel on navigable waters. The "connection" inquiry further requires the court to address whether 1) the incident at issue has a potentially disruptive impact on maritime commerce, and 2) whether the general character of the activity giving rise to the incident shows a substantial relationship to a traditional maritime activity. Both the location and connection tests must be met for a U.S. court to have admiralty tort jurisdiction.

Admiralty contract jurisdiction is perhaps even more nuanced. In general, a contract relating to a ship in its use as such, or to commerce or navigation on navigable waters, or to transportation by sea or to maritime employment, is subject to maritime law and the case is one of admiralty jurisdiction, whether the contract is to be performed on land or water.

However, a contract is not considered maritime merely because the services to be performed under the contract have reference to a ship or to its business, or because the ship is the object of such services or that it has reference to navigable waters. In order to be considered maritime, there must be a direct and substantial link between the contract and the operation of the ship, its navigation, or its management afloat, taking into account the needs of the shipping industry. The analysis is not always subject to simple logic. For example, contracts for towage and salvage have been deemed to be maritime contracts within the scope of admiralty jurisdiction, and a contract to repair or insure a ship is considered maritime; on the other hand, a contract to build a ship is not. Similarly, contracts for the sale of vessels are not subject to admiralty jurisdiction, but charter parties are considered "quintessential maritime contracts."

Jurisdiction in Maritime Cases

As a general proposition, a court can exercise three types of jurisdiction over a party in maritime cases: *in personam, in rem,* and *quasi-in rem. In personam* jurisdiction is jurisdiction over the person or entity itself, and is predicated

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on that party's contacts with the forum. *In rem* jurisdiction is jurisdiction over the object in controversy, typically to enforce a maritime lien, and arises when the property can be arrested in the district. *Quasi-in rem* jurisdiction is jurisdiction over the person or entity through the attachment of its property found within the district, but only to the extent of the value of property attached.

The Federal Rules of Civil Procedure, as interpreted by the U.S. Supreme Court through case law, require a court to have at least one type of jurisdiction over a defendant before adjudicating a case. In addition to the Federal Rules, the Supplemental Rules for Certain Admiralty and Maritime Claims ("Supplemental Rules"), which are found after the numbered Federal Rules, provide specific procedures for obtaining jurisdiction over defendants in cases sounding in admiralty and maritime law as defined by Rule 9(h) of the Federal Rules of Civil Procedure.

Shipowner's Limitation of Liability

Similar to other seafaring nations, shipowners in the United States are, under certain circumstances, entitled to limit their liability in respect of a maritime casualty. Under the governing U.S. statute, the right to limit is based on the post-casualty value of the vessel plus then-pending freight. While vessel owners can elect to raise a limitation defense in answer to a state or federal lawsuit brought against them, shipowners also have the option to initiate a limitation action in federal court, with that action taking precedence over competing suits against the vessel owner. The procedures for a limitation proceeding are governed by the Limitation Act itself (46 U.S.C. § 30501, *et. seq.*) and Supplemental Rule F.

The Limitation Act applies to all "seagoing vessels and vessels used on lakes or rivers or in inland navigation…" In addition to commercial vessels, owners of pleasure craft may be permitted to limit liability, provided that the vessel was located on "navigable" waters. Navigable waters are those that are capable of use in commerce between states or nations. As such, landlocked lakes within a single state, lakes whose navigability is interrupted by impassible dams, and shallow rivers and streams are generally not considered navigable.

While the Act applies to vessel "owners," that term has been interpreted to include not only the registered owner of a vessel, but also shareholders of vessel-owning companies and demise and bareboat charterers. On the other hand, time- and voyage-charterers may not take advantage of the Act.

Almost every type of loss claim against a vessel owner will be subject to the Limitation Act, provided that the act was "done, occasioned, or incurred, without the privity or knowledge of the owner." However, certain seaman's claims are not subject to limitation, nor are claims related to personal contracts involving the shipowner or those arising under the Oil Pollution Act of 1990 and the Clean Water Act.

The "privity and knowledge" qualifier has been interpreted to mean that a shipowner may limit liability in instances where the owner lacked both awareness of the casualty-causing act of negligence/unseaworthy condition and privity with anyone who did have knowledge. Generally, a master or crew's navigational errors are not attributable to the owner. Privity and knowledge has been found to exist, on the other hand, where, for instance, the vessel was negligently entrusted to an incompetent operator, where the owner failed to provide adequate navigational charts and equipment, or where there were inadequate maintenance procedures.

> **In order to be considered maritime, there must be a direct and substantial link between the contract and the operation of the ship, its navigation, or its management afloat, taking into account the needs of the shipping industry. The analysis is not always subject to simple logic.**

In a limitation proceeding, there is a shifting burden of proof: the claimant has the initial burden of proving liability of the owner, and, if liability is found, the owner then has the burden of proving its lack of privity or knowledge of the condition or negligence responsible for the loss.

With respect to the process of bringing a limitation action, a vessel owner has a six-month deadline from when it receives written notice from a claimant of a claim arising from the casualty to file the action. In a multi-claimant situation, the six-month period begins to run from the date of the first notice of a claim to the owner.

A limitation action must be brought in the same district where the vessel has been arrested or attached or, if the

vessel has not been seized, in any district where the shipowner has already been sued. If there is no prior lawsuit against the vessel or shipowner, the action may be filed in whatever district the vessel is located at the time of filing or, if the vessel is at sea or in foreign waters, in any federal district that the shipowner wishes.

A shipowner must provide security (the limitation fund) equal to the value of the vessel and its pending freight at the end of the voyage at issue. All other lawsuits against the vessel owner are stayed in favor of the limitation proceeding, and all claimants are required to assert their claims against the vessel owner in the limitation action *(i.e.,* a "concursus" of claims).

However, recognizing the tension between the concursus requirement of the Limitation Act and the "savings to suitors" clause referenced above, claimants may be able to return to prior state or federal actions if certain conditions are met. For example, claimants may be relieved from the limitation injunction where the limitation fund is more than adequate to cover all claims brought against the owner. In such case, to obtain relief from the injunction, all claimants may be required to enter certain stipulations 1) waiving *res judicata* and issue preclusion defenses, 2) agreeing to stay enforcement of a judgment until the conclusion of the limitation action, and 3) reserving all issues related to limitation issues to the exclusive jurisdiction of the federal court presiding over the limitation action. If there are multiple claimants, they must also stipulate to a priority of competing claims.

Conclusion

In sum, the Limitation Act provides a valuable defense to shipowners, and can be raised in either state or federal court. However, the benefits of a federal limitation action are more robust than invocation of the Limitation Act as a defense in a plaintiff-initiated action. Accordingly, shipowners should be mindful of the Act's statute of limitation, and timely consider whether to initiate a limitation action following a maritime casualty. □

Marine Casualty Investigations: Legal Standards

BY WILLIAM ANDERSON

WILLIAM ANDERSON

Without a doubt, shipping industry stakeholders should always strive to have zero days lost due to accidents. But, equally, the industry should also always be prepared to immediately respond to and investigate unfortunate events when they occur. In this regard, it is critical to understand the investigative process that sets in motion after a significant marine casualty occurs.

Our experience investigating and providing legal representation for clients following a marine casualty has shown that, despite decades of implementing international safety protocols, advancements in ship design, and an industry-wide focus and dedication to improved safety, marine casualties will continue to occur; maybe not as often, but they will happen. Simply put, following all the safety protocols put in place may not be enough to avoid a casualty. Indeed, vessels of all sizes, large and small, transiting the world's oceans, subject themselves to influences beyond their control that create the inherent risk of a casualty occurring.

Authority to Investigate Marine Casualties

When a marine casualty triggers an investigation, the U.S. Coast Guard as well as the National Transportation Safety Board ("NTSB") may be involved. The Coast Guard has broad authority to immediately investigate a "marine casualty" to determine the cause, whether a violation of law has occurred, whether the offender should be subject to a civil or criminal penalty, and whether there is a need for revised or new laws or regulations to prevent the recurrence of a similar casualty. 46 U.S.C. § 6301. The jurisdictional reach of the Coast Guard related to investigating marine casualties involving foreign-flag vessels is generally restricted to the navigable waters of the United States, which includes waters seaward from the coastline to 12 nautical miles.

The NTSB is an independent federal agency charged with investigating all civil aviation accidents in the United States and significant accidents in other modes of transportation including "major marine casualties" occurring on the navigable waters of the United States or involving a vessel of the United States under regulations prescribed jointly by the NTSB and the Coast Guard. 49 U.S.C. § 1131(a)(1)(E).

The Marine Casualty Investigation

When a vessel-related accident occurs on the navigable waters of the United States, the operator, owner, or person in charge of a vessel involved in such a casualty is obliged to give the soonest practicable notification, often followed by a written report, to the local Coast Guard Sector or office. This begins a process in which livelihoods, liberty, and civil liability might all be at stake. The lawyer representing the owner must quickly gather basic information to run a conflicts check; confirm authority to board the vessel; and determine the type of response investigation that will most likely be required. Careful thought is required when the Coast Guard investigating officer calls to request an interview.

The requirements to notify the Coast Guard of the occurrence of an incident are laid out in Subpart 4 of Title 46 of the Code of Federal Regulations. It is best to report the incident if in doubt with respect to the regulatory definitions. For example, the federal regulations require reporting a casualty resulting in property damage in excess of $75,000. (46 CFR 4.05-1(a)7.) Unless little more than scratching of paint occurred, (except in situations involving an allision with a bridge), it would be wise to immediately notify the Coast Guard rather than wait for the estimate of a marine surveyor.

At the outset, the lawyer should gather the following information at a minimum: 1) the name of the vessel, its location, and the nature of the incident; 2) the condition of the crew, vessel, and cargo; 3) the identity of any other involved party, injured or otherwise; 4) the vessel's itinerary; 5) the presence of governmental authorities; and 6) contact information for the vessel owner, underwriters, and vessel's agent. Such information will assist the lawyer when making important decisions with respect to the initial response. For instance, the lawyer must determine the type of information that must be collected and decide whether to send notices of protest or notices of claims, or whether to retain and dispatch a marine surveyor.

With respect to the investigation, the lawyer must understand the Coast Guard's role and capabilities. The Coast Guard's investigations range from obtaining and analyzing evidence for minor incidents to establishing a marine board of investigation to investigate incidents involving serious personal injury, death, and significant environmental and property damage. The purpose of every Coast Guard investigation is to analyze the facts surrounding the casualty, determine the root cause(s) of the casualty, and, if necessary, initiate corrective actions. It will use the information gathered during the investigative process to consider promulgating new rules or advisories to prevent further casualties.

Our experience investigating and providing legal representation for clients following a marine casualty has shown that, despite decades of implementing international safety protocols, advancements in ship design, and an industry-wide focus and dedication to improved safety, marine casualties will continue to occur; maybe not as often, but they will happen.

Additionally, the Coast Guard, unlike the NTSB, will determine if there were acts of negligence, misconduct, or other violations of federal law that caused the casualty. And, if so, the Coast Guard may refer the matter to the U.S. Department of Justice for a further review to determine whether a crime was committed. Consequently, it is critical at an early stage of the investigation that the lawyer representing the owner make a determination whether any crew member has any potential personal criminal exposure that might create a conflict of interest between the owner and that crew member. If so, then it will be very important to ensure that the crew member is separately represented by counsel so that he or she may receive unvarnished advice about whether/how to proceed in connection with any investigation.

Witness Statements

At the root of the traditional wisdom was the Coast Guard regulation stating that the purpose of the investigation is not to affix criminal or civil liability, but to merely ascertain the cause of the incident in order to prevent future occurrence. (46 CFR § 4.07-1(b)). The regulations also contain a form of limitation with respect to the admissibility of the mariner's statement: "In order to promote full disclosure and facilitate determinations as to the cause of marine casualties, no admission made by a person during

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an investigation…may be used against that person in a [license suspension and revocation] proceeding, except for impeachment.” (46 CFR § 5.101(b)). This provision seems to assure mariners that their statements would not come back to haunt them in subsequent proceedings against their licenses. It was also thought that cooperation with the Coast Guard is relatively harmless because the final report of the Coast Guard’s investigation cannot be used in a civil lawsuit to affix liability. (46 USC § 6308; *but see* L. Lambert, The Use of Coast Guard Casualty Investigation Reports in Civil Litigation, 34 J. Mar. L. Comm. 75 (2003)).

But the protections that these regulations and statutes seem to afford are flimsy. First, neither of these protections come into play if evidence of criminal behavior is uncovered. The Coast Guard is duty-bound to notify the local U.S. Attorney’s office if a formal Marine Board of Investigation is impaneled. Moreover, the Coast Guard is legally required to present any evidence of criminal conduct uncovered in its investigation to the U.S. Attorney General. Therefore, even if a statement made to the Coast Guard might not be directly useable as evidence in a suspension and revocation proceeding or as evidence in a civil trial, such statements or evidence might be directly used in a criminal prosecution.

Any statements made to an investigating officer, whether amounting to an admission or not, can be used to assess liability for civil penalties. The federal statutes allow for imposition of a civil penalty of $5,000 for every proven breach of the Inland Navigational Rules (33 USC §2072 (a)) and $25,000 for every instance of negligent navigation (46 USC §2302(a)). There is nothing in the law or the regulations to prevent the Coast Guard from using any statement given in an interview to support its assessment of those civil penalties.

Cooperation with Investigation

Ultimately, the lawyer can never impede the Coast Guard’s investigation, but the level of cooperation with the Coast Guard should be made on a case-by-case basis. Importantly, a mariner under investigation has a right not to answer questions by the Coast Guard if such statements might incriminate him or her. Equally important, if crew members do choose to answer questions and fail to do so truthfully, both the crew members and the owner may be exposed to separate charges for obstruction of justice or perjury.

There may very well be instances in which a full exposition by the mariner may convince the Coast Guard that no further inquiry or investigation need be made and/or that no negligence or breach of the rules of the road took place. Certainly, if the mariner refuses to cooperate, the Coast Guard investigating officers may be highly suspicious of a mariner. In the end, however, the decision whether to answer questions must be made with the presumption in mind that any statement given to the Coast Guard will be used in some form or another in suspension and revocation hearings, civil penalty hearings, and criminal trials. □

Maritime Decarbonization

BY MARIE MARTINEZ AND ALEX WILLIAMS


MARIE MARTINEZ


ALEX WILLIAMS

As the international shipping industry prepares to reduce emissions, there are many recent developments that present both obstacles and opportunities that must be explored while preparing to set sail on the challenge.

IMO Timeline and Introduction to Initial Strategy

Shipping is already the most carbon-friendly form of transportation. Despite carrying approximately 90 percent of the world’s goods, shipping only accounts for about 2.9 percent of global greenhouse gas emissions. While the maritime industry and its regulatory body, the International Maritime Organization (“IMO”), rightly are trying to reduce this number, the outsized role of shipping in the world economy and its relative impact on global emissions should be the starting point of any analysis.

A key aspect in the debate on how to decarbonize centers is between the difference in gross output as opposed to efficiency. The IMO’s strategy contains targets for both types of metrics. The current goal seeks to cut overall greenhouse gas (“GHG”) emissions by at least half by 2050 (using 2008 as a baseline). On the efficiency side, the shipping industry seeks to reduce GHG emissions per transport work by 40 percent in 2030 and 70 percent by 2050.

Attaining such targets will require innovation in operations and approaches. Shipping companies are working to reduce emissions and increase shipboard efficiency, and the IMO is coordinating measuring these approaches. This will be done in two ways. First, the technical aspects and design of vessels will be regulated by the new Energy Efficiency Existing Ships Index (“EEXI”) for existing ships. EEXI regulations exist for an “Attained EEXI” to be calculated for each ship, and a “Required EEXI” for specified ship types. Second, the operational aspect will be done by way of the new Carbon Intensity Indicators (“CII”) index, which categorizes every ship in categories A to E in terms of its operational efficiency based upon the vessel’s Data Collection Service (“DCS”) information. Aspects of a vessel’s CII will need to be documented under the existing framework of the Ship Energy Efficiency Management Plan (“SEEMP”). On or before January 1, 2023, ships of 5,000 GT and above will need to revise their SEEMP.

Explanation of the IMO’s Initial Strategy Short-, Medium-, and Long-Term Goals from MEPC 76

The IMO’s recent Marine Environment Protection Committee meeting (“MEPC 76”) developed various short-term (2018–2023), medium-term (2023–2030), and long-term (2030–2050) measures. MEPC 76 approved a three-phase work plan aimed at supporting the Initial IMO Strategy on Reduction of GHG from Ships and its program of follow-up actions: Phase I–Collation and initial consideration of proposals for measures (Time period: Spring 2021 to Spring 2022); Phase II–Assessment and selection of measures to further develop (Time period: Spring 2022 to Spring 2023); and Phase III–Development of measures to be finalized with agreed target dates (Timeline: Target date(s) to be agreed in conjunction with the IMO Strategy on reduction of GHG emissions from ships).

> **The IMO is targeting a 40 percent reduction in CO_2 emissions by 2030 and a 50 percent cut in greenhouse gas emissions by 2050. Meeting these goals will require significant deviations from the current norm in shipping.**

The MEPC 76 meeting also included the adoption of amendments to MARPOL Annex VI. The amendments to MARPOL Annex VI (adopted in a consolidated revised Annex VI) are expected to enter into force on November 1, 2022, with the requirements for EEXI and CII certification coming into effect from January 1,2023. This means that the first annual reporting will be completed in 2023, with the first rating given in 2024. A review clause requires the IMO to review the effectiveness of the implementation of the CII and EEXI requirements, by January 1, 2026, at the latest, and, if necessary, develop and adopt further amendments.

The IMO MEPC 77 meeting was held November 22–26, 2021, in the wake of the COP26 event. Several proposals were advanced, including a two-dollar-per-ton bunker fee to

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Maritime Decarbonization (continued from page 9)

pay for low-carbon propulsion research and an increase in the IMO's decarbonization strategy of reducing emissions by 100 percent, instead of 50 percent, by 2050. However, neither proposal was adopted. MEPC 77 did address the need for correction factors for certain ship types and operation profiles to be developed as well as the plan for previously developed SEEMP guidelines to be adopted at MEPC 78 in 2022. Member states pledged to continue discussing decarbonization efforts in 2022 and 2023.

Current Decarbonization Efforts and Potential Challenges

There are many different decarbonization efforts that can be deployed. Technological measures include using alternatives (such as hydrogen, methanol, biofuel, LNG/LPG, batteries, and ammonia) as well as utilizing hull coating and hull cleaning or air lubrication technologies to reduce drag and increased emissions. Additionally, operational measures, such as speed management, route planning, and voyage optimization, can be used to maximize safety and fuel efficiency. Market-based measures, such as the use of economic or policy mechanisms like taxes, incentives, and green shipping credits, can also be used. Management measures to assist with decision support, such as the use of optimal network design, fleet deployment, berth allocation, scheduling optimization, and vessel routing, can also be used to assist in reducing emissions by reducing fast-steaming practices that may result in idle time at anchorage due to port conditions.

The current projections from these efforts will not result in meeting the current targets set by the IMO and shipping community. As such, more research and development is needed to explore options to reduce GHG, such as alternative fuels, revolutionary changes in sailing patterns, or other yet unknown options.

Conclusion

The IMO is targeting a 40 percent reduction in CO_2 emissions by 2030 and a 50 percent cut in greenhouse gas emissions by 2050. Meeting these goals will require significant deviations from the current norm in shipping. One particular tension is that as more and more goods are shipped, gross GHG output increases despite efficiency gains. Research and development is needed to advance options to meet these targets. With the current delta between projected outcomes and targets, the industry and IMO must consider the costs of meeting these targets and how gains in efficiency and overall reduction. The path forward to decarbonization is starting to take shape, but the journey will require an all-hands-on-deck approach from all stakeholders. ◻

Maritime Law Primer: Maritime Liens and Arrests under U.S. Law

BY DEBRA BROWN AND REBECCA SCOTT

DEBRA BROWN

REBECCA SCOTT

What is a maritime lien?

A maritime lien is a non-possessory right in a vessel that gives the lienholder a right to proceed *in rem* against the property. In the United States, maritime liens are based on the fiction of a "personified" vessel. Under this legal fiction, a vessel is considered to be a legal person separate and distinct from its owner or operator and can be held liable for torts and contractual obligations. A person claiming to hold a maritime lien against a vessel may file suit *in rem* against the vessel and have the court order the arrest of the vessel to secure their claim.

Maritime liens arise by operation of law. Although parties may waive or surrender the right to a maritime lien by contract or otherwise, they may not agree to confer a maritime lien where the law does not provide for one. Maritime liens are governed by the Commercial Instruments and Maritime Liens Act ("CIMLA") and general maritime law.

Categories of Maritime Liens

Most maritime liens arise from torts, contracts, or particular maritime services such as salvage or towage. Maritime claims that give rise to maritime liens include the following claims:

- Seamen's wages
- Salvage operations
- Torts that arise under the general maritime law
- General Average claims
- Preferred ship mortgages
- Supplies, repairs, and other necessaries furnished to a vessel
- Towage, wharfage, pilotage, and stevedoring
- Claims for damages or loss of cargo
- Claims by carriers for unpaid freight
- Breach of charter parties

Ship Mortgage Act

The Ship Mortgage Act was first enacted in 1920 and has since been recodified and incorporated into the CIMLA. Under the Ship Mortgage Act, a preferred mortgage is "a lien on the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by the vessel." In order to qualify as a preferred ship mortgage, CIMLA sets forth certain requirements.

Properly filed ship mortgages are valid against third parties from the time it is filed. By perfecting a preferred ship mortgage on a vessel, the lender creates a maritime lien against the vessel, enforceable by an action *in rem.* Preferred ship mortgage liens have priority over all claims against the vessel except for *custodia legis* expenses and preferred maritime liens.

In the United States, maritime liens are based on the fiction of a "personified" vessel. Under this legal fiction, a vessel is considered to be a legal person separate and distinct from its owner or operator and can be held liable for torts and contractual obligations.

Maritime liens that arise prior in time to a preferred shop mortgage or which have preferred status because they arise out of a tort—such as a collision—outrank preferred ship mortgages. Preferred maritime liens are defined by CIMLA as follows: 1) arising before a preferred mortgage was filed under CIMLA, 2) for damage arising out of a maritime tort, 3) for wages of a stevedore, 4) for seaman's wages, 5) for general average, or 6) for salvage (including contract salvage).

Necessaries

CIMLA defines "necessaries" as "repairs, supplies, towage, and the se of a drydock or marine railway." The term "necessaries" has been broadly defined by the courts to

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encompass any goods or services that are reasonably needed for the venture in which the vessel is engaged. Necessaries can include fuel and lubricating oil, insurance, stevedoring services, pilotage, food, repairs, radar, and equipment, but also taxi fare for crewmembers, linens for a dinner cruise vessel, or gambling equipment for a cruise ship—really anything that keeps the vessel in operation and enables the vessel to perform its function.

In order for a maritime lien to arise in favor of a supplier of necessaries, the necessaries must be supplied "on the order of the owner or a person authorized by the owner." This is key—a common ground that is often raised for contesting a maritime lien focuses on whether the underlying good or service was in fact provided on the order of the owner or person authorized by the owner.

Extinguishment of Maritime Liens

Maritime liens can be extinguished in several ways:

- Waiver: Maritime liens can be waived by agreement or by implication. Courts will require clear evidence of an intent to waive the lien in favor of other security.
- Laches: A maritime lien is extinguished when a lienholder has unreasonably delayed asserting their lien to the prejudice of the other party.
- Complete and total destruction of the *res.*
- Payment of the claim.
- Judicial sale of the vessel by a federal court sitting in admiralty.

Arrest and Attachment

Arrest is an essential step to enforce a maritime lien. It also has the important result of giving the claimant security for its claim. Unlike many other countries, the United States is not a signatory to any international ship arrest conventions. Actions involving ship arrests and attachment are governed by the Federal Rules of Civil Procedure's Supplemental Admiralty Rules. Rules B and C are the rules related to maritime attachment and arrest, respectively, and Rule E governs the process for each.

Maritime Attachment under Rule B

Although similar to an arrest in that property is seized and may ultimately be sold, maritime attachment is practically quite different. While a maritime lien is required for an arrest, a maritime attachment is based on an *in personam* claim. A maritime arrest requires the vessel to be present in the jurisdiction, while maritime attachment allows for the seizure of a party's assets if that party otherwise is *not* present in the jurisdiction.

Attachment is a procedure designed to 1) provide security and 2) establish *in personam* jurisdiction of a defendant up to the amount of security obtained. In seeking an attachment, a plaintiff must assert a "maritime claim." The attached property, however, need *not* be maritime.

Maritime Arrest under Rule C

Because ships are constantly moving from port to port, the ability to carry out an arrest quickly and on an *ex parte* basis is important. Under Rule C, a claimant must demonstrate a lien that may be exercised against a vessel or other property *in rem* that is located in the district at the time the arrest order is served.

The requirements for a Rule C arrest action include the filing of a verified complaint, which means it includes written verification, under penalty of perjury, attesting to the truth of the statements therein. The arresting party will also file a memorandum of law setting forth the reasons why the warrant should be issued and can also file motions to allow the vessel to continue cargo operations and for a substitute custodian.

Substitute Custodian

The U.S. Marshals are the law enforcement arm that serve the warrant on the vessel. Generally, the Marshals will not remain on the vessel while the vessel is under arrest. Instead, the plaintiff will move to have a substitute custodian remain with the vessel on the Marshals' behalf. Such appointment is conditioned on acceptance by the substitute custodian of responsibility and liability during the appointment and plaintiff's agreement to hold the Marshal harmless.

Notice

If the vessel is not released within 14 days after execution of the warrant, the plaintiff must give public notice of the arrest as provided by Rule C(4). If the arresting party is a mortgagee, they also must provide written notice to all known lienholders.

Intervention

Any party with a claim against the vessel may seek to intervene in the proceedings, regardless of who initiated the arrest. The vessel will be considered arrested by all intervening parties and all then share in the costs and benefits of the arrest. If the claim is successful, the intervening parties are paid out of the proceeds of the sale or the security posted, in order of lien priority.

Security and Release

When property is seized under Rules B and C, it can be released upon the posting of adequate security. The parties will generally agree upon the amount and the type of security, though the court can also order security to be posted. Adequate security can take a number of different forms, including bank guarantee, bail bond, insurance company bond, and cash bond. The most common form is a P&I Club Letter of Undertaking ("LOU"), which is issued in lieu of a bond. The wording is important both when drafting and receiving a LOU. Some key items to include in a LOU include:

- Description of the incident
- Definite and reasonable amount of security
- Law and jurisdiction clause
- "Inclusive of interests and costs"
- Subject to final judgment or agreement between parties with the P&I Club's consent
- Issued without prejudice to liability
- Consideration to not arrest/rearrest as broad as possible
- Member's defenses including rights to limit not waived

If the vessel's owner does not promptly offer to post security, the arresting party can move for an order directing the interlocutory sale of the vessel. The arresting party must show that a) the vessel is subject to deterioration, b) the expense of keeping the vessel is excessive, or c) the owner's delay in posting security has been unreasonable.

Countersecurity

Under Rule E(7), a defendant who has given security to the plaintiff is entitled to seek countersecurity for any counterclaim arising out of the same transaction or occurrence as the main claim. The court has discretion as to whether to order the posting of countersecurity and, if so, in what amount.

Wrongful Arrest

The wrongful arrest standard is very high. An arrest can only be held to be wrongful if made in bad faith, with malice, or with gross negligence. Damages for wrongful arrest include attorneys' fees, costs, and any damages directly attributable to the attachment, including lost profits. A claim for wrongful arrest has been held not to arise out of the "same transaction or occurrence" as the claim upon which the arrest or attachment is premised, such that a party cannot demand countersecurity for a wrongful arrest claim under Rule E(7). □

Can the Biden Administration Meet Its Offshore Wind Goals?

BY AMANDA PRESCOTT AND TINA GONZALEZ


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TINA GONZALEZ

UPDATE: ***Since this article was first published in October 2021, the Biden administration has issued a Record of Decision for a second commercial offshore wind farm, the South Fork Wind Farm off New England, which will provide 132 MW of offshore wind to residents of Long Island, New York, for the first time. Congress passed and President Biden signed into law the Infrastructure Investment and Jobs Act (Pub.L. 117-58), which provides $17 billion for ports, including $450 million a year for the Port Infrastructure Development Program (with a preference for wind ports) and codifying the FAST-41 process for expediting permitting of major infrastructure projects, discussed further below. The House of Representatives also passed the Build Back Better Plan, which will extend the Investment Tax Credit and the Production Tax Credit through 2031 and create a new manufacturing tax credit for all wind parts manufactured in the United States (except vessels). The Senate is expected to take up the Build Back Better Plan for further changes and could send it to President Biden for his signature by the end of the year.***

In the first week of his presidency, President Biden, by Executive Order, set a goal of doubling offshore wind by 2030—an ambitious goal to help put the United States on a path to meet its commitments under the Paris Climate Accords, which President Biden rejoined. To implement the general goal, the three lead departments—Interior ("DOI"), Energy ("DOE"), and Commerce ("DOC")—subsequently committed to working towards a specific 30 gigawatts (GW) goal by 2030 while protecting biodiversity, promoting ocean co-use, and creating tens of thousands of jobs. This article describes the progress made thus far in meeting this goal and discusses any remaining impediments.

Current Progress on Offshore Wind in the United States

To date, the Biden administration, along with previous administrations, have:

- Approved 18 offshore wind leases in federal waters;
- Approved the largest offshore wind farm to be constructed in federal waters (*i.e.,* the Vineyard Wind project off the coast of Massachusetts);
- Identified five new Wind Energy Areas ("WEAs") for potential leasing in the area of the New York Bight;
- Began the process of identifying additional WEAs in the Gulf of Mexico and off California; and
- Issued several notices of intent to begin the environmental review process under the National Environmental Policy Act ("NEPA") for additional wind farms off New York, North Carolina, and South Carolina.

These steps alone have moved the administration closer to meeting or even exceeding its 30 GW goal with a total of 35,000 megawatts (MW) plus in the pipeline, according to a recent definitive report from the DOE's National Renewable Energy Laboratory.

The entire offshore wind leasing and permitting program in the United States is based on a modest amendment to the Outer Continental Shelf ("OCS") Lands Act ("OCSLA") enacted in 2005, which granted the Secretary of the Interior the authority to lease areas of the OCS for renewable energy, in addition to his existing authority for oil and gas leases. With this single stroke of the legislative pen, the DOI, with authority delegated subsequently to the Bureau of Ocean Energy Management ("BOEM"), undertook a strategic plan to open up the OCS for offshore wind leasing. As noted above, this has resulted in the 18 already awarded leases.

Experienced European Developers Have Made a Difference

With the exception of the Coastal Virginia Offshore Wind ("CVOW") project off the coast of Virginia managed by the state's utility, Dominion Energy Virginia, the rest of the leases have gone to experienced developers from Europe. These include Ørsted, Avangrid Renewables and Copenhagen Infrastructure Partners (joint partners in Vineyard Wind), Renexia, Equinor, and BP. In fact, Europe has far outpaced the United States when it comes to offshore wind, already producing 25 GW of offshore wind with a goal of 300 GW by the middle of the century. Europe's commitment to renewable energy and the Paris Climate Accords has remained steady due to strong public support and perhaps less access to oil and gas supplies. U.S. progress has unfortunately experienced fits and starts.

The Leasing and Permitting Process Can Take Two to Four Years

The leasing process is just the first step of a lengthy four-step program consisting of planning and analysis, leasing, site assessment, and finally construction and operations, as laid out on the Regulatory Roadmap tab of the BOEM's Regulatory Framework and Guidelines. The most critical and time-consuming part of the process remains the NEPA review process. Typically, BOEM issues an Environmental Assessment followed by a comprehensive Environmental Impact Statement ("EIS") for major offshore wind ("OSW") projects. In the case of the Vineyard Wind project, which would be the largest offshore wind project on the U.S. East Coast, an additional or Supplemental EIS was issued in June 2020, prompting Vineyard Wind to withdraw its application from BOEM last year and resubmit to the Biden administration. This delay and restart allowed the Biden administration to issue a final Supplemental EIS on May 11, 2021, and a final Record of Decision greenlighting the project. Production of wind power will commence in 2023.

Criticality of State Law Support

State laws and policies promoting clean energy are critical to supporting offshore wind projects, even in federal waters. The wind power eventually must come to shore through underwater cables and fed into state grids and power purchase agreements. This is certainly true in the case of the Virginia Clean Economy Act, which called for 5200 MW of offshore wind as being in the public interest. The CVOW project will contribute about half of this goal. New legislation was just signed by California Governor Newsom to promote offshore wind, an important first step to help resolve use conflicts off that state's coast where floating wind farms are expected to soon be the norm. The California bill would direct state agencies to set strategic goals for offshore wind and develop a strategic plan to achieve large scale projects by 2045. Without strong state law support, renewable energy from the OCS would simply blow away in the wind.

Impediments to the Future of Offshore Wind

REGULATORY UNCERTAINTY

One initial impediment or challenge was determining which laws apply to offshore wind leasing on the OCS. The 2005 amendment to the OCSLA did not spell this out. In 2020, Congressman John Garamendi (D-CA) sponsored an amendment to help resolve this issue and ensure that all U.S. laws that applied to oil and gas leasing would also apply to renewable energy development on the OCS. The Garamendi amendment went into effect on January 1, 2021, as part of the FY2021 National Defense Authorization Act and it clarified and confirmed that all federal law, including the Jones Act and other coastwise laws, apply to all offshore

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energy development on the OCS, including wind energy. P.L. 116-283 § 9503. In his accompanying press release, the congressman stressed the application of the Jones Act to the OCS.

Subsequent to enactment of this law, U.S. Customs and Border Protection ("CBP") has begun to issue rulings applying the Jones Act to offshore wind operations. This should start providing assurance to developers, vessel owners, and other stakeholders as to where the dividing line is drawn.

The Biden administration is well on its way to meeting its 30 GW goal with new commercial wind farms coming soon off the U.S. East Coast and possibly someday soon off the coast of California. Nonetheless, a number of challenges remain to continued growth of the U.S. offshore wind market.

It also allows foreign-flag vessels to continue the heavy lifting of turbine foundations and turbines installed on the OCS because CBP does not interpret this activity as transportation under the Jones Act. In addition, a coastwise-qualified, turbine-installation vessel ("TIV")—Charybdis—is under construction at the Keppel AmFELS shipyard in Texas and financed by Dominion Energy Virginia.

EXPEDITING THE REVIEW PROCESS THROUGH FAST-41

As noted above, the NEPA process can be the longest part of the BOEM approval process. This was certainly true in the case of the Vineyard Wind project. One avenue to expedite this process is to use the FAST-41 process created by the 2015 highway bill, the "Fixing America's Surface Transportation Act" ("FAST Act"). The FAST Act established a coordinated review process for major infrastructure projects, with a designated lead agency, and a goal of two years to complete the review. To review any project subject to the FAST-41 process, one only needs examine the FAST-41 dashboard. Several offshore wind projects are subject to this process, including the now-completed Vineyard Wind project and the pending CVOW project. Congress is working to codify this process for all major infrastructure projects in the Senate-passed Bipartisan Infrastructure Plan (H.R. 3684), which is now pending in the House of Representatives.

CONFLICTS WITH OTHER ENVIRONMENTAL LAWS

But, even a coordinated process cannot legally supersede individual environmental laws that still apply to offshore wind projects on the OCS. These include the Magnuson-Stevens Fishery Conservation and Management Act, the Marine Mammal Protection Act, the Endangered Species Act, the National Historic Protection Act, and the federal consistency provisions of the Coastal Zone Management Act—all applicable to the BOEM permitting process.

One of the most difficult conflicts to resolve at the moment involves offshore wind and commercial fishing. Recently, the Responsible Offshore Development Alliance ("RODA"), a fishing industry association, filed suit in the First Circuit Court of Appeals challenging BOEM's approval of the Vineyard Wind project. RODA is clearly unhappy with the spacing between platforms that BOEM approved in its Record of Decision, which was, in turn, based on the U.S. Coast Guard's recommendation to leave one nautical mile between the proposed 62 wind turbines. We do not expect the litigation to conclude any time soon. So, despite FAST-41, litigation over permit decisions may remain until the courts and/or Congress steps in to resolve the disputes. Another alternative is for the Biden administration to appoint an offshore wind czar to work out these use conflicts, perhaps employing the offices of the Council on Environmental Quality, which is housed in the Executive Office of the President.

NIMBY

A remaining issue is the opposition of some local residents to offshore wind farms, commonly referred to as NIMBY—"Not in My Backyard." Public comments on OSW projects often include local residents or local officials who do not want their views disrupted by large turbines miles off their coast despite the fact that most turbines will be sited more than 25 miles from shore. Recently, a coalition of Nantucket residents, calling themselves the ACK Residents Against Turbines, sued BOEM and the National Oceanic and Atmospheric Administration to block the construction of the Vineyard Wind project, claiming that it would interfere with migration of the endangered right whale. This lawsuit is pending in federal district court in Boston.

OFFSHORE WIND FARM FINANCING

The construction costs of an offshore wind farm can reach hundreds of millions or even billions of dollars, but such costs are coming down sharply as larger wind turbines are deployed. Financing a large offshore wind farm can certainly present a serious challenge. However, the recent close of $2.3 billion of senior debt for the Vineyard Wind project by nine international and U.S. banks should provide an incentive for other banks and financial institutions or even pension funds to support other offshore wind projects.

U.S. SUPPLY CHAIN SUPPORT

Lack of a U.S. supply chain for major components of offshore wind farms remains a logistical problem. In the case of CVOW, for example, most of the largest parts of the project are coming from Europe. The United States has not yet developed its own manufacturing base for major OSW components, like turbines, nacelles, and offshore substations, although major U.S. companies like General Electric are certainly stepping up to the plate and trying hard to compete with or restrict competition from European turbine manufacturers, as exemplified in a recent patent dispute with Siemens Gamesa.

MARITIME INDUSTRY SUPPORT

Many states and ports along the East Coast have stepped up to the plate to establish new locations devoted to wind farm staging and manufacturing areas. For example, the Port of Virginia just entered into a leasing agreement with Dominion Energy Virginia to lease 72 acres as a staging area for offshore wind. Congress has also recognized the important role that ports play in commerce and the new OSW industry by significantly increasing funds for the Port Infrastructure Development Program to $17 billion in the Senate-passed infrastructure bill.

One area missing from any congressional attention is the Title XI Federal Ship Financing Program administered by the U.S. Maritime Administration. This program can play an important role in financing new vessel construction for the burgeoning offshore wind trade. Congress could improve the Title XI program by setting aside funds for and establishing a new expedited approval process to finance U.S. vessels dedicated to transport equipment and crews and install turbines and platforms.

Finally, the Biden administration is dedicated to creating thousands of construction and service jobs in the OSW industry with as many as possible being well-paid union jobs. A recent agreement between Dominion Energy Virginia and national and state Building Trade Unions to identify, train, and deploy union workers and veterans in the CVOW project pays tribute to this goal.

Conclusions

The Biden administration is well on its way to meeting its 30 GW goal with new commercial wind farms coming soon off the U.S. East Coast and possibly someday soon off the coast of California. Nonetheless, a number of challenges remain to continued growth of the U.S. offshore wind market. Although the streamlined review process is helpful, projects continue to face ocean-use conflicts and NIMBY opposition. That said, the industry is gaining significant support from states, consumers, the Biden administration, and U.S. businesses and developers, and we can expect the growth to produce thousands of jobs in the near future. ◻

Chambers USA 2021 Honors Our Maritime Attorneys and Practices

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What the team is known for: "Esteemed practice with significant experience handling high-profile maritime litigation for national and international clients, including P&I clubs, shipping companies and owners. Highly regarded for crisis response and offering additional expertise in alternative dispute resolution. Maintains an excellent reputation for advising maritime industry entities in federal investigations arising from intentional misconduct allegations and casualty events, as well as in a host of cybersecurity issues. Recently active on a range of fuel contamination, cargo loss, salvage and collision cases."

Strengths: "An impressed client reports: 'This firm really caters to its clients' needs, and each of the partners are very savvy and really provide great and succinct advice.' Sources praise the 'great team with good associates,' and highlight their 'wealth of knowledge.' Interviewees say: 'The team really is a leader in the space and really on top of the matters.'"

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Jeffrey Martinez – Band Two. *Chambers USA states:* "Jeffrey Martinez provides guidance on a range of issues including vessel arrests, maritime collisions and insurance coverage disputes." – "A talented and respected lawyer."

Janet Kertz – Band Two. *Chambers USA states:* "Janet Kertz is highly regarded for her shipping and maritime expertise with capabilities litigating maritime personal injury, property damage and seizure proceedings." — "She is an extremely smart person and a truly excellent lawyer."

Shipping Regulatory – Nationwide | Band One

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Pamela Campbell – Band One. *Chambers USA states:* "Pamela Campbell is held in high esteem for her representation of owners, cargo interests and operators. She advises clients on general regulatory compliance as well as investigations and enforcement proceedings." – "There is no one better in addressing maritime issues of all types. Her expertise, practical knowledge and legal skills are unsurpassed." "She is an extremely useful lawyer in everything to do with the U.S. Coast Guard and issues surrounding that area. She's very skilled and knowledgeable."

Martin Torres – Band Three. *Chambers USA states:* "Martin Torres represents all manner of maritime industry participants including shipowners, insurers, ports and marine terminal operators. An expert in maritime logistics, he is particularly recognized for his expertise in trade sanctions issues concerning sector clients." – "He is very clear and concise in his advice and knows his stuff inside and out in quite a technical area. He's willing to stick his neck out and say what he feels is the right thing to do. He's very user-friendly and a popular choice of attorney."

William Baker – Band One. *Chambers USA states:* "William Baker has an impressive reputation for his work in maritime environmental compliance, international trade and Jones Act work. Clients additionally benefit from his 20 years of service in the U.S. Coast Guard." – "He's extremely responsive, knows the subject inside out and is well connected in the community and with the legislature." "He is an incredible advocate for his clients and the maritime industry as a whole."

What the team is known for: "Highly acclaimed practice well known for its representation of significant shipping clients on a range of regulatory matters. Has expertise in Jones Act compliance, environmental investigation defense of companies and individuals, and government relations including legislative advice. Advises on maritime cybersecurity issues, including attacks and security breach avoidance. Further strength in counseling shipowners and operators on US trade sanction issues. Offers wider industry expertise in shipping within the context of offshore oil, gas and wind energy compliance matters."

Strengths: "Interviewees note: 'It is a very strong maritime firm and provides excellent regulatory advice.' Another source says: 'They keep their eyes to the ground and keep us informed of developments. They're very good at strategy and I'm impressed by their responsiveness.'"

Carriage of Goods by Sea Act Fundamentals

BY ALEX WILLIAMS

ALEX WILLIAMS

The Carriage of Goods by Sea Act ("COGSA") defines the basic relationship—duties, liabilities, rights, and immunities—between ocean carrier and cargo owner. COGSA was passed in the United States in 1936 and its enactment was the result of various concerns by Congress. In the early nineteenth century, carriers were strictly liable for cargo damage, with only few limited exceptions to liability for an act of God, public enemies, and inherent vices. By the second half of the nineteenth century, carriers began issuing bills of lading containing exculpatory clauses that sought to reduce or eliminate a carrier's liability altogether. Therefore, a compromise occurred in 1893 when Congress enacted the Harter Act, which sought to achieve uniformity in the rules of liability applied in international shipping and to strike a balance between carriers' efforts to reduce liability and cargo owners' efforts to impose liability regardless of fault. The Harter Act allowed carriers who furnished a seaworthy vessel and exercised due care with the cargo to be exempt from most liability. Currently, the Harter Act has not been repealed and does govern certain transactions where COGSA does not. Below is a detailed exploration of the key differences between the Harter Act and COGSA.

Differences Between the COGSA and the Harter Act

COGSA applies by force of law to contracts for the carriage of goods by sea, to or from foreign ports and U.S. ports. The Harter Act applies to the carriage of goods to or from U.S. ports. COGSA preempts the Harter Act with respect to contracts of carriage pertaining to foreign trade. COGSA does allow for parties to incorporate its provisions for the contract of carriage for voyages between U.S. ports. In fact, it is not uncommon for parties to do so. The question may be asked why a carrier would agree or even want to expand coverage: one reason could be that COGSA provides carriers with a wide array of defenses, and where liability does exist it can be limited.

COGSA applies from "tackle to tackle," meaning the time goods are loaded onboard the vessel until the time the goods are discharged from the vessel, while the Harter Act applies to preloading, or receipt of such cargo, to the post-discharge, or delivery of the goods. Both the Harter Act and COGSA do not apply to live animals, and COGSA does not apply to cargo carried on deck.

Other notable differences between the two acts include that COGSA provides for a $500 per package limitation, whereas the Harter Act does not and that COGSA claims must be filed within one year whereas a claim under the Harter Act does not have an enumerated time limitation.

Who is a COGSA Carrier and What Are the Carrier's Duties?

A COGSA carrier is generally the owner of the vessel, the vessel itself *(in rem),* or a time charterer that enters into a contract of carriage and issues a bill of lading.

A COGSA carrier has certain duties as prescribed by section 3(1). Specifically, a carrier, before and at the start of the voyage must exercise due diligence to provide a seaworthy ship, to properly man, equip, and supply the ship; and to make the holds, refrigeration and cooling chambers, and all other areas of the vessel where goods are carried, fit and safe for their reception, preservation, and carriage. Section 3(2) of COGSA requires the carrier to "properly and carefully load, handle, stow, care for, and discharge the goods carried."

Once the carrier receives the goods, it then, and upon demand of the shipper, must issue a bill of lading. Importantly, a carrier cannot use an exculpatory clause to avoid the duties and obligations set out in Sections 3(1) and 3(2) of COGSA, which requires the carrier to exercise due care, or due diligence. Thus, the liability of the carrier is based upon fault and negligence, not mere damage or loss to the cargo.

What is Meant by the Carrier's Obligation to Make a Vessel Seaworthy?

Seaworthiness is a relative term and is determined by whether the vessel is reasonably fit to carry the cargo that she has undertaken to transport. Pursuant to Section 4(1) of COGSA, neither the carrier nor vessel owner shall be liable for loss or damage arising from the unseaworthiness of the vessel unless it is caused by a lack of due diligence to make the ship seaworthy. Thus, unless the carrier is negligent in failing to discover the defective condition, or failing to remedy it once discovered, the carrier will not be liable. The duty to exercise due care is imposed before and at the commencement of the voyage. This means that the carrier is not liable for damage to the cargo resulting from the unseaworthy condition if the defective condition rendering the vessel unseaworthy is not reasonably discoverable, or it arose after the vessel's voyage commenced.

Carrier Immunities Under COGSA

Pursuant to Section 4(1), COGSA carriers have 17 enumerated immunities, or defenses. These defenses are based upon a variety of circumstances. Some of the enumerated defenses can arise due to external forces, such as acts of public enemies, war, arrest or restraint of princes (or governments), and strikes. Defenses can arise due to the negligence of employees, such as errors in navigation. Defenses can also be attributed to natural forces such as acts of God and perils of the sea. Additionally, in some cases, carrier defenses can be attributed to the acts of the shipper, such as losses resulting from inherent vices, insufficiency of packaging or marking.

Burdens of Proof in a COGSA Case

The cargo owner bears the initial burden under COGSA to make a *prima facie* case by showing that the cargo was delivered to the carrier in good order and condition and was discharged in damaged condition. To avoid liability, the carrier must then prove that the cause of the loss was due to one of the excepted causes enumerated in Section 4(1) and that it acted with due diligence to care for the cargo. If successful, the burden shifts back to the cargo interests to prove that the damage resulted from the carrier's negligence. Where negligence is shown as at least a concurrent cause of the damage, then the burden shifts one more time to the carrier to establish what portion of the loss was attributable to its negligence and what portion was attributable to an excepted cause; if it fails to meet this burden then it will be liable for the entire loss.

Per-Package Limitation

Usually, pursuant to COGSA, when cargo is damaged or lost in situations that are not within the 17 enumerated defenses, the shipper is entitled to recover damages. COGSA limits carrier liability to 500 dollars per package in these instances. In order for carriers to assert the per-package limitation, U.S. courts typically require adequate notice of the limitation and the fair opportunity given to the shipper to declare a higher excess value.

In order to fully comprehend the 500-dollars-per-package limitation, it is important to understand what constitutes a "package." If cargo is completely enclosed, it is considered a package for COGSA purposes. Difficulties arise when goods are only partially enclosed. Most courts look to the intent of the parties, as evidenced in the bill of lading. It is also important to note that a cargo interest will never receive more that its actual damages.

If the goods are not shipped in a "package," then the liability is limited to 500 dollars per customary freight unit ("CFU"). The CFU is derived from the method that was used to calculate the freight in the contract of carriage, usually based upon weight.

Unreasonable Deviations

There are different consequences under COGSA depending on whether a deviation is reasonable or unreasonable. A deviation that is intended to save life or property at sea is not a breach of the contract of carriage and thus the carrier would not be liable for loss or damage resulting from the deviation. Conversely, COGSA states that a deviation for the purpose of loading or unloading cargo or passengers shall be regarded as unreasonable. COGSA does not specify the consequences of an unreasonable deviation; however, the majority of courts regard an unreasonable deviation to deprive the carrier of both the defenses under COGSA and the $500 per-package limitation if there is a causal connection between the deviation and the cargo damage or loss.

Conclusion

To summarize, an ocean carrier is not necessarily fully liable for whatever might occur to cargo during transit. COGSA does not impose strict liability. Liability under COGSA is predicated on fault or negligence. Carrier defenses can arise due to internal or external forces, and it is important for the carrier and the shipper to perform a cargo assessment to determine whether the cargo may be exempted from liability.

Changing EU Data Transfer Requirements Create New Challenges

BY SUZANNE DAVIS AND STEPHANIE SMITH

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Businesses in the maritime industry may not think of themselves as engaged in significant processing of personal data. However, global shipping and logistics companies regularly transport personal data around the globe. This may include passenger data, sensitive employee data, and customer business contact information used for fulfillment and marketing purposes, all of which are vital to the operations of the business.

As a result, businesses in the maritime industry need to address compliance with a myriad of quickly evolving privacy laws around the globe, including evolving requirements for employees and business contacts in major ports in California and a newly active agency to enforce Brazil's recently passed omnibus privacy law.

The requirements relating to cross-border transfer of personal data from the European Economic Area ("EEA") to other jurisdictions, in particular the United States, is an acute challenge for the maritime industry. Legal requirements for such transfers have undergone substantial changes in the past 15 months that require global businesses to assess and make changes to data transfer compliance strategies.

The European Union's General Data Protection Regulation ("GDPR") empowers regulators to impose fines of as much as four percent of global annual revenue for cross-border data transfer missteps or step in and halt non-compliant transfers, which could result in significant operational disruption. Accordingly, companies in the maritime industry cannot overlook compliance with regulatory requirements relating to cross-border data transfer.

Game Changer

The GDPR and EU member state national implementing legislation require that companies transfer personal data out of the EEA only to countries that have been deemed by the European Commission to provide "adequate" protection for personal data or through the use of a valid legal mechanism. Only 12 countries have been deemed adequate so far and the United States is not among them. Consequently, most transfers of personal data out of the EEA, including those to the United States, need to rely on some alternative legal mechanism for transfer.

Historically, the most common mechanisms for transfers to the United States were participation in the U.S.–EU Privacy Shield program or use of standard contractual clauses ("SCCs"). The Privacy Shield program was used by over 5,400 companies, which all changed in July 2020 when the European Court of Justice ("CJEU") invalidated the framework in Schrems II, stating that U.S. surveillance laws did not provide limitations and safeguards necessary to guarantee the protection of EU citizen's fundamental rights of data privacy.

> **Only 12 countries have been deemed adequate so far and the United States is not among them. Consequently, most transfers of personal data out of the EEA, including those to the United States, need to rely on some alternative legal mechanism for transfer.**

Moreover, the CJEU upheld use of SCCs for personal data transfers, but only when adequate protections can be guaranteed for the transferred personal data, which may require adoption of additional safeguards not provided by the SCCs. However, the CJEU's decision left significant questions about when additional safeguards would be needed and, if required, what additional safeguards would be adequate.

Following Schrems II, several data protection authorities released often-conflicting guidance on additional safeguards. Several data protection authorities stepped in to suspend data transfers, often using logic that made it difficult to see how an organization could safeguard data for a valid transfer in a way that ever satisfied the data protection authority.

Finally, in June 2021, the European Commission released new versions of the SCCs intended to address both the requirements of GDPR and the Schrems II decision to create a transfer mechanism that could provide for adequate protection of personal data. Almost simultaneously, the European Data Protection Board ("EDPB") released final guidance on how to ensure appropriate safeguards for transfers of personal data. Companies are now tasked with implementing these new transfer tools consistent with the EDPB guidance to ensure compliance with GDPR requirements.

New Standard Clauses

The new SCCs became effective June 27, 2021, and the old versions of the SCCs were repealed on September 27, 2021. Now, the old SCCs may no longer be used for new data transfers. Contracts that already incorporate the old SCCs will continue to be valid for 18 months following publication of the implementing decision—until December 27, 2022—provided the processing operations described in the contract remain unchanged.

Consistent with the Schrems II decision and subsequent data protection authority guidance, the new SCCs require parties to evaluate each transfer and document through a transfer impact assessment ("TIA") that an adequate level of protection is afforded to transferred personal data. The TIA must be provided to the competent supervisory authority upon request. Additionally, data importers must provide notification to the data exporter of legally binding requests from public authorities for the disclosure of transferred personal data and challenge the request if there are reasonable grounds to do so.

Compliance Recommendations

With the old SCCs phased out as a viable data transfer mechanism, businesses should inventory cross-border data transfers of European personal data, including the transfer mechanism used and the identity and posture (*i.e.,* processor or controller) of parties involved in the transfer. Companies should also analyze the new SCCs to determine whether the new terms affect operational processes that have been put in place (*e.g.,* notification of sub-processing) or risk posture (*e.g.,* liability clauses) and determine whether process modifications or risk mitigation actions, such as reviewing insurance coverage, should be undertaken.

Companies should further implement and maintain processes for assessing the adequacy of protection afforded to transferred personal data consistent with the Schrems II decision, data protection authority guidance, and the new SCCs. Companies will need to create and maintain documentation of such assessments for each data transfer and, as mentioned above, provide the assessments to data protection authorities upon request.

For cross-border data transfers utilizing old SCCs, companies need to begin the process of replacing old SCCs with new SCCs before the December 27, 2022, deadline. To help facilitate this process, companies should determine if there are events within particular contractual relationships, such as renewal periods, that could be leveraged to replace terms with minimal disruption.

Don't Ignore Bankruptcy Code's Chapter 15 in Civil Actions

BY WILLIAM GREEN AND ROBERT POTTS

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In 2005, the United States adopted the Model Law on Cross-Border Insolvency, promulgated by the United Nations Commission on Internal Trade, under chapter 15 of the United States Bankruptcy Code. In so adopting, Congress intended chapter 15 "to be the exclusive door to ancillary assistance to foreign proceedings." H.R.Rep. No. 109–31, at 110–11 (2005). Notwithstanding the express congressional intent, not all courts have required chapter 15 relief as a prerequisite to seeking relief in a pending civil litigation against a debtor. Two district court decisions highlight the divergent views.

First, in *HFOTCO LLC v. Zenia Special Maritime Enterprise,* the United States District Court for the Southern District of Texas (the *"HFOTCO* Court"), denied a motion for summary judgment seeking dismissal, based on German insolvency law, of all claims against a debtor that had a pending insolvency proceeding in Germany. Following the majority view, the *HFOTCO* Court found that it is powerless to afford comity to the movant because its insolvency proceeding had not been formally recognized under chapter 15.

Second, in D*avid Moyal v. Münsterland Gruppe GmbH & Co. KG* (the "New York Action") the United States District Court of the Southern District of New York (the *"Moyal* Court") dismissed a lawsuit against a German debtor, Münsterland Gruppe GmbH & Co. KG ("MGKG"), based on the pendency of its insolvency proceeding and the application of German law. The *Moyal* Court applied an outdated *ad hoc* comity analysis and summarily rejected as "absurd" the need for recognition under chapter 15. And, by implication, treated chapter 15 as a kind of discretionary alternative to general comity.

The *HFOTCO* Civil Action

In 2014, MS Constantin S entered into an insolvency proceeding in Germany. Mr. Veit Schwierholz was appointed as the insolvency administrator for MS Constantin S's assets. An insolvency administrator is akin to a trustee in U.S. bankruptcy proceedings. In January 2018, Mr. Schwierholz sold a vessel named X-Press Machu Picchu (f/k/a M/V Constantin S). Two months later, the vessel was involved in an incident at the shipping terminal owned by HFOTCO. Specifically, a vessel, the Minerva Zenia, moored at the terminal, allegedly caused damage to the terminal when the M/V Constantin S passed along side it at an unsafe speed. After the incident, HFOTCO sued Minerva Zenia. Minerva Zenia, in turn, filed a third-party complaint against MS Constantin S and Mr. Schwierholz, based on allegations that the vessel was not sold and delivered to the buyer until after the incident.

MS Constantin S, in moving for summary judgment, argued that under German law, "any court action initiated after the commencement of insolvency proceedings must be directed against the insolvency administrator." Therefore, as a matter of comity, the *HFOTCO* Court must recognize and respect German insolvency law by dismissing MS Constantin S as an improper defendant. In opposition, HFOTCO and Minerva Zenia argued that even if comity was appropriate, either MS Constantin S or Mr. Schwierholz must first obtain recognition by a U.S. bankruptcy court, under chapter 15, of the German insolvency proceeding. In response, MS Constantin S contended that it does not satisfy the definition of a "foreign representative" under Bankruptcy Code section 101(24) and, therefore, the requirements of chapter 15 do not apply.

> **Further, reliance on an *ad hoc* analysis will be of little use to complex foreign debtors who need to control multiple stakeholder interests and subject a large U.S. collective of claims and rights to a foreign collective remedy.**

On July 7, 2021, the *HFOTCO* Court denied the motion for summary judgment. Specifically, the *HFOTCO* Court found that the provisions of chapter 15 make explicit that prior to obtaining comity from *any* U.S. court with respect to a foreign insolvency proceeding and, concomitantly, foreign insolvency law, a foreign representative must file a petition for relief and obtain recognition by a U.S. bankruptcy court. *See* 11 U.S.C. § 1509. That is because if the U.S. bankruptcy court denies recognition, chapter 15 empowers it to "issue any order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States." 11 U.S.C. § 1509(d). Similarly, looking to the legislative history, the *HFOTCO* Court found that chapter 15 was enacted to "provide effective mechanisms for dealing with cases of cross-border insolvency." "'Central to Chapter 15 is comity' and the facilitation of cooperation between multiple nations. To affect these goals, the statutory provisions 'concentrat[e] control of these questions in one court.'" There is simply "no other mechanism" to provide comity to a foreign insolvency proceeding. The "only sensible solution," according to the *HFOTCO* Court, would be for MS Constantin S to ensure that its foreign representative, ostensibly Mr. Schwierholz, apply for recognition in a U.S. bankruptcy court.

Point-Counterpoint: The *Moyal* Civil Action

On February 1, 2019, Mr. David Moyal commenced the New York Action seeking damages from MGKG for breach of a distribution agreement. Due to a lack of financial resources to defend itself, MGKG did not answer the complaint. Mr. Moyal, therefore, moved for a default judgment and an inquest was commenced on the amount of damages.

On March 11, 2021, prior to the entry of a judgment, MGKG commenced an insolvency proceeding in Germany and an insolvency administrator was appointed to liquidate MGKG's assets. Pursuant to the German Code of Civil Procedure, the commencement of the insolvency proceeding automatically stayed all previously filed actions against MGKG—at least in Germany. As a result, MGKG's U.S. counsel filed a notice of the insolvency proceeding and a motion seeking to dismiss or stay the New York Action. Thereafter, the insolvency administrator informed MGKG's U.S. Counsel that by operation of German law, the U.S. Counsel's mandate to represent MGKG was terminated. MGKG's U.S. counsel subsequently moved to withdraw as counsel.

Unsurprisingly, Mr. Moyal opposed the dismissal of the New York Action. In his opposition, Mr. Moyal argues that chapter 15 provides the exclusive means to recognize a foreign insolvency proceeding and stay actions within the United States. Specifically, Mr. Moyal relied upon the express language of Bankruptcy Code section 1509(a), which provides "[a] foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding…" And, without recognition, a foreign representative does not have the capacity to sue and be sued in the United States. *See* 11 U.S.C. § 1509(b).

In response, MGKG first argued that chapter 15 is only a remedy available to a foreign representative and because the insolvency administrator was not a party to the New York Action, recognition was irrelevant. Second, MGKG argued chapter 15 relief was unnecessary because any judgment for damages by Mr. Moyal would still be subject to a proceeding in Germany to enforce the judgment. Third, MGKG argued that chapter 15 does not preempt comity.

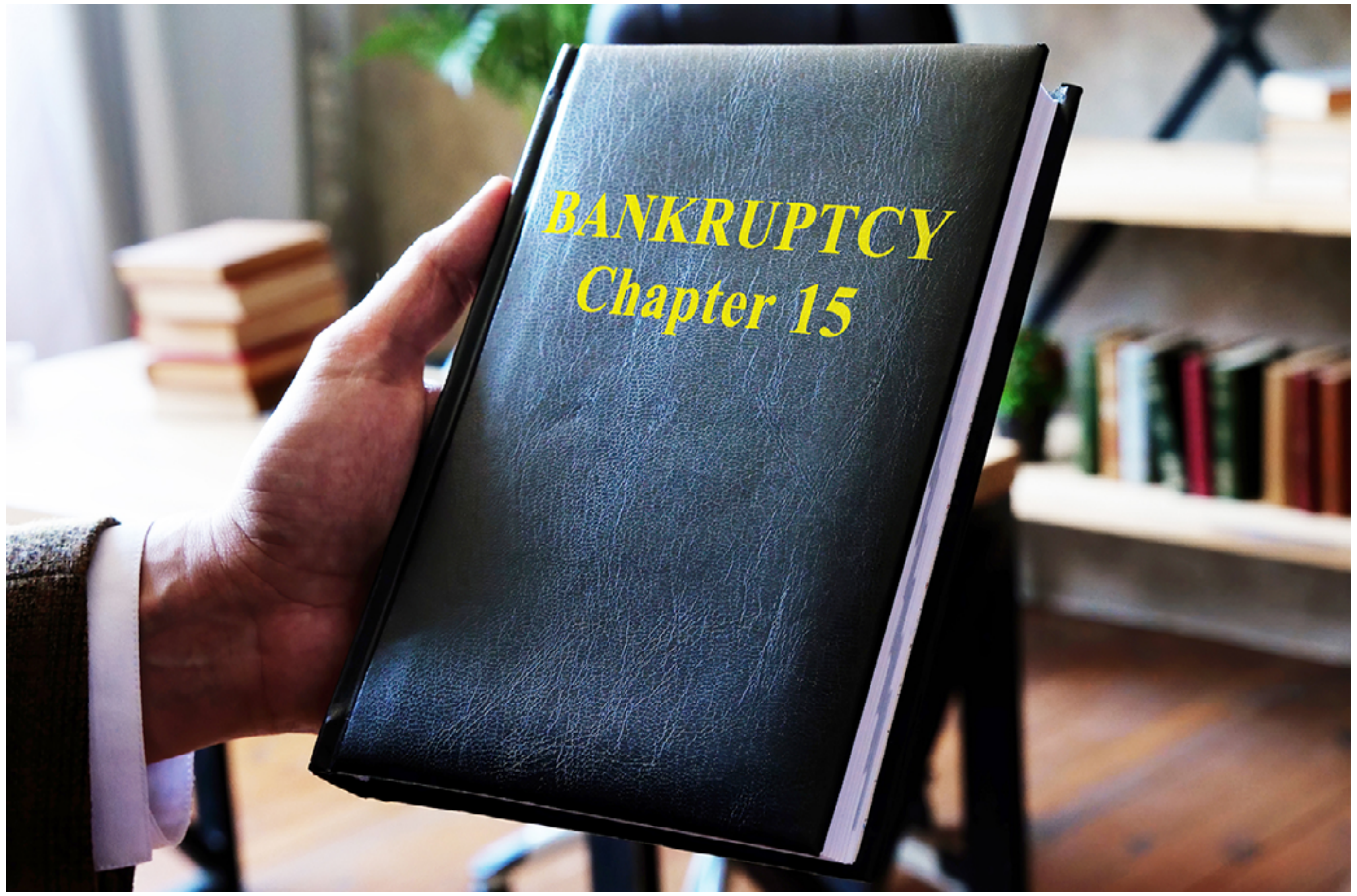
On May 17, 2021, the *Moyal* Court entered its *Opinion and Order* (the *"Moyal* Opinion") dismissing the New York Action. The *Moyal* Court found that comity requires the dismissal of the New York Action. Specifically, "[d]eference to a foreign bankruptcy proceeding is appropriate where 'the foreign proceedings are procedurally fair and…do not contravene the laws or public policy of the United States.'" *Id.* at *6. And, that MGKG had shown that the German insolvency proceeding was procedurally fair, providing for an equitable distribution of assets and making no distinction between foreign and domestic creditors. The *Moyal* Court rejected the notion that a chapter 15 proceeding is required to stay or cause the dismissal of the New York Action, finding such argument to be "absurd and would fly in the face of comity principles because courts regularly grant comity on the request of a party other than a foreign representative." *Moyal* Opinion at 6 n.1

Chapter 15 Replaced an *Ad Hoc* Comity Analysis for Recognition of a Foreign Law

Here, in both cases, the debtor attempted to create a distinction between it and a foreign representative for purposes of comity and chapter 15 recognition. This argument and reasoning, however, does not take into account how a chapter 15 case protects foreign debtors, entities who already are under the control of foreign representatives, for the purpose of chapter 15 commencement. No chapter 15 case can be commenced by a representative that does not have control over a foreign debtor for such purposes—either by easily ascertainable statutory law or by a specific order of a foreign court naming the representative. *See* 11 U.S.C. § 1515.

For example, while it is true that MGKG's insolvency administrator was not literally substituted as a named party for MGKG in the New York Action, under German

(continued on page 26)



Don't Ignore Bankruptcy Code's Chapter 15 in Civil Actions (continued from page 25)

insolvency law, the insolvency administrator was in charge of MGKG's assets and the administration of claims against MGKG. Thus, in effect, MGKG's insolvency administrator, a person appointed to liquidate the debtor's assets or affairs (*i.e.,* the eligible MGKG foreign representative under 11 U.S.C. § 101(24)), through the MGKG's U.S. counsel, sought the assistance of a foreign court to protect and maximize the value of a German debtor's assets for the benefit of all creditors in a German insolvency proceeding. *See* 11 U.S.C. § 1501(a)(3)-(4). The *Moyal* Court, however, did not address the key question—whether the insolvency administrator needed to act as the foreign representative and commence a chapter 15 to obtain enforcement of key aspects of the German insolvency law in the United States; to wit, the dismissal of the debtor from a U.S. action, the recognition of the German moratorium, and claims reconciliation process in Germany.

In *HFOTCO,* the court clearly answered this key question in the affirmative. To obtain the benefit of a stay and related relief doing comity under German insolvency law, (in *HFOTCO* the dismissal of the U.S. proceeding), a foreign representative must first seek recognition of the German insolvency proceeding. This is the precise business of chapter 15—a law designed to provide a clear, simple, statutory standard on when courts should apply comity to a foreign insolvency proceeding and the collective remedy sought in that proceeding.

The fact that, in extending comity, the *Moyal* Court considered many of the same factors as a bankruptcy court can in ordering specific relief for a foreign debtor under Bankruptcy Code section 1507, including whether the German insolvency proceeding provided "protection of claim holders in the United States against prejudice and inconvenience in the processing of claim in such foreign proceeding," does not obviate the need for prior chapter 15 recognition. As the *HFOTCO* Court made clear, comity "is not a rule of law, but one of practice" and chapter 15 provides the exclusive statutory framework and venue for a court to engage in the "factual determination with respect to recognition before principles of comity come into play." Recognition is the finding that comity should be applied to a foreign collective remedy and ensures that U.S. claimants will be treated equitably in the foreign proceeding. It is the key predicate to any U.S. federal court acting as an ancillary to a foreign court in bankruptcy.

Moreover, the *Moyal* Opinion's application of comity rested primarily on cases decided prior to the enactment of chapter 15 under repealed Bankruptcy Code section 304, which vested substantial discretion in bankruptcy courts to determine when to support a foreign insolvency process. Congress enacted chapter 15 to expressly avoid the results of the *Moyal Opinion.* As the *HFOTCO* Court stated, Congress intended chapter 15 recognition to be mechanistic, and there is simply no other statutory process available to a U.S. federal court, other than a bankruptcy court to grant such relief. All other courts are "powerless to grant" recognition of a foreign insolvency proceeding.

Indeed, the legislative history confirms that "chapter 15 is intended to be the exclusive door to ancillary assistance to foreign proceedings" and that "[t]he goal [of Section 1509] is to concentrate control of these questions in one court. That goal is important in a federal system like that of the United States with many different courts, state and federal, that may have pending actions involving the debtor or the debtor's property." H.R.Rep. No. 109–31, at 110–11 (2005). The House Report goes on to note that under prior law, some courts had:

> granted comity suspension or dismissal of cases involving foreign proceedings without requiring a[ ] petition or even referring to the requirements of that section. Even if the result is correct in a particular case, the procedure is undesirable, because here is room for abuse of comity. Parties would be free to avoid the requirements of this chapter and the expert scrutiny of the bankruptcy court by applying directly to a state or Federal court unfamiliar with the statutory requirements.

Id.; see also Guide to Enactment at 21 ("[a]pproaches based purely on the doctrine of comity or on exequatur do not provide the same degree of predictability and reliability").

Moreover, the *Moyal* Court's reliance on the notion that courts regularly provide comity to foreign insolvency proceedings without chapter 15 recognition seems to conflate recognition of a foreign insolvency-related judgment with recognition of a foreign insolvency proceeding. As the *HFOTCO* Court recognized, where a party requests a U.S. court to "accord it the same right[s]" it has under foreign law, recognition of such legal rights would be tantamount to formally recognizing a foreign proceeding. That is because recognition of a foreign law implicitly assists in the administration of a foreign insolvency proceeding by conferring some benefit on the debtor and its estate. On the other hand, courts that have provided assistance in aid of a foreign insolvency, without chapter 15 recognition, usually have done so only when enforcing an insolvency-related judgment—not a statutory right. Essentially, in such a context, the U.S. court is simply giving preclusive effect to a specific factual and legal finding made by a foreign court. 8 Collier on Bankruptcy ¶ 1509.02 (16th ed. 2021).

Accordingly, even though arguably the result in MGKG's case was correct—the dismissal of the New York Action in light of the pendency of the German insolvency proceeding and Mr. Moyal's ability to interface with German courts over the reconciliation of his claim—the *Moyal* Opinion "is undesirable" because of the precedent it sets (*i.e.,* that "parties would be free to avoid the requirements" of chapter 15 relief). H.R.Rep. No. 109–31, at 110–11 (2005). HFOTCO represents the approach followed by the majority of U.S. courts in requiring chapter 15 process as the exclusive gatekeeper to comity to foreign insolvency proceedings. Practically, while it is tempting to seek a quick dismissal under *Moyal,* there is a significant risk that such a dismissal-based strategy will fail and the movant will have to organize a chapter 15, having increased the foreign debtor's transaction costs in administering its case in the United States.

Implications

The *Moyal* case is likely to remain an outlier given the clear and mandatory requirements of chapter 15, as confirmed by HFOTCO and a majority of other cases. Further, reliance on an *ad hoc* analysis will be of little use to complex foreign debtors who need to control multiple stakeholder interests and subject a large U.S. collective of claims and rights to a foreign collective remedy. *Ad hoc* informal comity in multiple U.S. courts is an inefficient and expensive way to bind creditors to a liquidation or restructuring of assets; chapter 15 process is the value-optimizing, efficient process to facilitate complex international restructuring in the United States. ◻

Maritime Cybersecurity: Prepare, Detect, and Respond

BY ALEX WILLIAMS

ALEX WILLIAMS

At a time when the world has become more aware than ever before about the vital importance of the world's ocean shipping fleet, which carried supplies, merchandise, and much-needed personal protective equipment during the COVID-19 pandemic, an increased risk from a different threat, cyberattacks, presents a set of new challenges. According to Israeli cybersecurity specialist Naval Dome, since February 2020, there has been a 400-percent increase in attempted hacks on the maritime realm, coinciding with a period when the maritime industry turned to greater use of technology and working from home due to the coronavirus pandemic. Increased phishing attempts, malware, and ransomware attacks can be attributed to the changes in operations and procedures during the travel restrictions and operational hurdles encountered during the pandemic. These global challenges resulted in a move by the United States to bolster the federal government's cybersecurity practices and contractually obligate private sector to align with such enhanced security practices. For instance, the ransomware attack on Colonial Pipeline, which controls nearly half the gasoline, jet fuel, and diesel flowing along the East Coast, prompted President Biden to sign an Executive Order ("EO") on "Improving the Nation's Cybersecurity (14028)" on May 12, 2021. On August 25, 2021, the president also held a cybersecurity summit with leading tech company and Wall Street banking executives to discuss cybersecurity concerns.

The Colonial Pipeline ransomware attack provides important lessons for critical infrastructure providers in the maritime industry on being prepared for cyber-attacks. It still remains a mystery how the attacker, DarkSide, first broke into Colonial Pipeline's business network, but recent reports speculate that the pipeline was taken offline because there was no separation between data management and the pipeline's actual operational technology. "Other pipeline operators in the United States deploy advanced firewalls between their data and their operations that only allow data to flow one direction, out of the pipeline, and would prevent a ransomware attack from spreading in." In this case, the attacker did not aim to take hold of the pipeline, but held the data for ransom. The ransomware attack on Colonial Pipeline illustrates the need for separate, offline backup systems and cyber incident response plans.

Addressing Maritime Cyber Attacks

Similar to the Colonial Pipeline attack and other recent cyber incidents, a targeted cyber-attack upon a sizeable ocean carrier or its supply-chain network could cripple significant segments of the world's transportation capacity to deliver essential goods. We have seen during the COVID-19 pandemic the effects of hindered supply chains, scarce products on store shelves, and long lead times for integral components. To help address the need for increased action against cyber-attacks, the International Maritime Organization ("IMO") Maritime Safety Committee, at its 98th session in June 2017, adopted Resolution MSC.428(98), *Maritime Cyber Risk Management in Safety Management Systems.* The resolution encourages administrations to ensure that cyber risks are appropriately addressed in existing safety management systems (as defined in the ISM Code) no later than the first annual verification of the company's Document of Compliance after January 1, 2021. Additionally, the IMO has issued MSC-FAL.1/Circ.3, *Guidelines on Maritime Cyber Risk Management.* The guidelines provide high-level recommendations on maritime cyber risk management to safeguard shipping from current and emerging cyber threats and vulnerabilities and include functional elements that support effective cyber-risk management. The Baltic and International Maritime Council ("BIMCO") has also published its own Guidelines on Cyber Security Onboard Ships to aid shipowners and ship managers in meeting the IMO requirement to implement cyber-risk management in their safety management systems. The maritime community should review these guidelines and implement strategic objectives.

Critical Cyber Issues for New and Existing Ships

Given the digital revolution that has been taking place in the maritime industry, ships are more connected now than ever before. While the increased connectivity and system integration aids in operational, commercial, and safety efficiencies, it also enlarges the attack surface available to bad actors seeking to exploit vulnerabilities for potential cyber-attacks.

There are increased risks for maritime cyber-attacks because shipboard systems and networks are often interconnected with other onboard or remote systems and the Internet, which constantly interface with international contacts of all kinds. Both new and old vessels can be susceptible to cyber incidents. Newer vessels are being branded as "smart" ships with thousands of sensors, remote monitoring and troubleshooting, and artificial intelligence capabilities to analyze data in real time. These vessels integrate information technology systems with operational technology systems, thus increasing the exposure of these interdependent systems to cyber incidents. Older ships that are not as sophisticated could still experience a cyber incident because of obsolete operating systems that can no longer be updated, missing or outdated anti-malware software, insufficient security protocols and safeguards (including employee mismanagement of the network and the use of default administrative accounts and simple passwords), integrated computer systems that lack safeguards and network segmentation, systems that must be connected to a server on land to function correctly, or are always connected to a system on shore that is not secure, and unsecure access controls for service providers and contractors. Thus, it is vital to invest in cyber assessments to identify potential areas of weakness to combat potential threats.

According to Israeli cybersecurity specialist Naval Dome, since February 2020, there has been a 400-percent increase in attempted hacks on the maritime realm, coinciding with a period when the maritime industry turned to greater use of technology and working from home due to the coronavirus pandemic.

Looking Ahead: Procedural and Operational Countermeasures

The large maritime-cyber ecosystem, consisting of shipboard automation and communication systems, cargo and passenger manifests, port operations, and other supply chain members, needs to remain vigilant and proactive by performing cybersecurity training and simulated tests, deploying defenses, and developing incident response plans. Defenses require continuous improvement and there is no one-size-fits-all approach. Both procedural and technical countermeasures are needed, and a layered approach is essential. Possible defenses include: backup and data recovery capabilities, multi-factor authentication and access controls, anti-malware tools, robust network monitoring processes, use of Virtual Private Networks ("VPN"), maintaining software upgrades, patches and maintenance schedules, e-mail and spam filtering, providing security awareness training to personnel and maintaining and testing an incident response policy, and physical security to restrict access to shipboard areas.

Shipowners, charterers, and seafarers also have vital roles to play. Shipowners need to ensure that there are prevention, detection, and response plans in place. Shipowners and charterers need to understand who bears the risk if a cyber incident occurs that results in delays, damage to the vessel, or ransom payments. Shipowners should understand the extent of insurance coverage for cyber incidents and potential losses due to third-party liability. Seafarers should follow company compliance plans and policies to protect onboard systems from phishing attempts and eliminate other opportunities for potential cyber breaches through shore visits, and ship-to-shore interfaces and remote access. Ship managers should also ensure that the proper contractual language is inserted for third-party suppliers and agents to protect and secure sensitive data and information, and that contractors are properly vetted.

As shipping continues to move towards remotely operated and autonomous driven vessels, stakeholders and governments must collaborate to identify new risks and regulatory gaps. The need for new tools and collaboration to protect against cybersecurity incidents is paramount, as the ecosystem is only as strong as the weakest link. For example, blockchain and other encrypted solutions could aid in the safety and security of maritime transactions. Not only does blockchain simplify and provide transparency into fragmented shipping and logistics processes, blockchain does not have a centralized server, thus reducing the chances of malicious cyber-attacks. Blockchain also reduces inefficiencies, such as error-prone manual exchanges between numerous parties.

Furthermore, investment is needed. Developing nations will require support to ensure resilience throughout the supply chain against potential future disruptions. Maritime cybersecurity is a topic that will continuously change course depending on how the industry, and key stakeholders prepare, detect, and respond. ◻

Shipping remains the most important means of moving goods around the world. With over 90 percent of cargo imported to the United States moving through seaports, maritime law and regulation—directly or indirectly—affects most businesses. Increased global trade, rising fuel costs, ongoing environmental regulation, overcapacity in the industry, the prospects for autonomous shipping, and cyber risks have converged to make this industry alter course.

We help companies find safe passage in these turbulent times by providing legal and business counsel in all aspects of the maritime industry.

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