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Inside This issue

Bankruptcy: The Winners, the Losers, and the Collateral Damage

By Lawrence Rutkowski and Robert J. Gayda*

Shipping bankruptcies give rise to unique legal and practical issues given the transitory nature of the principal assets – ships – the typically foreign domicile of shipping companies, and the awkward intersection of bankruptcy and admiralty law. Our intent is to focus on a limited range of issues and to bring that focus primarily from the perspective of creditors of a shipping company in a Chapter 11 proceeding.

The key issue we address is the risk that a charter (in maritime nomenclature) or lease (in land-based terminology) might be recharacterized as a financing transaction in a bankruptcy, thereby upending the expectations of the parties to that contract and potentially weakening the "owner's" position. This issue is not a new one, but it is one that has taken on new urgency given the growing popularity of sale and leaseback transactions in ship finance and the uncertainties in the shipping markets in a COVID-19 world.

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Managing Editor's Introductory Note

We begin this edition with an article by Lawrence Rutkowski and Robert J. Gayda on issues pertaining to charters in bankruptcy situations. Larry and Robert discuss the awkward intersection of bankruptcy and admiralty law, and "the risk that a charter (in maritime nomenclature) or lease (in land-based terminology) might be recharacterized as a financing transaction in a bankruptcy, thereby upending the expectations of the parties to that contract and potentially weakening the 'owner's' position." Given the growing popularity of sale and leaseback transactions in ship finance, they conclude that "[h]ow a lease or charter is structured and how the lessor/owner behaves pre- and post-petition will go a long way to determine whether such owner/lessor ends up a "winner" or "loser" in bankruptcy."

Our next article in this edition, by Kirby Aarsheim, looks again at the issue of maritime liens and fishing permits, but goes beyond to discuss the difference between the treatment given to fishing permits in the maritime lien context, on the one hand, and, on the other hand, whether the value of the permit should be considered in determining the amount of security that must be posted in a limitation of liability action. Kirby gives a very clear analysis of the difference in the two concepts, and concludes "where fishing permits are appurtenances subject to maritime liens but not appurtenances to be included in the limitation fund – the goals of encouraging investment and protecting the interests of fishing vessel owners are achieved."

In this edition's "Window on Washington" column, Bryant Gardner points out the difficulties of obtaining passage of very important legislation in the current political climate. He discusses the difficulties facing the National Defense Authorization Act for FY 2021, the Water Infrastructure Bill, and the Coast Guard Authorization Act, legislation that is crucial to maritime industry and commerce but which faces unprecedented difficulties in obtaining sufficient bipartisan support to achieve passage. As Bryant points out "[o]nly time will tell if the partisan paralysis will begin to thaw."

We are very pleased to follow with two articles by Colin T. Kelly and Ilana G. Smirin in our "Future Proctors" section.

Colin gives a very detailed analysis of the decision by the International Tribunal for the Law of the Sea in the M/V NORSTAR (Panama v. Italy) Case, addressing issues of freedom of the high seas and claimed interference with this important principle arising out of an arrest of a vessel in territorial waters. Colin reviews the historical development of the concept of free high seas navigation and describes its current place in the international law of the sea, and then gives a keen analysis of the decision and its potential impact on established principles of the freedom of high seas navigation, the international community, and ITLOS itself.

Ilana gives us a close look at autonomous shipping and its potential impact on world trade. She discusses the gaping hole in the uniformity and enforcement of regulations for autonomous shipping, and analyzes how the International Maritime Organization intends to address it. She points out that historically, technology always precedes the development of the law, and warns that "[i]f the IMO falls too far behind technological developments, the IMO's ability to encourage compliance with their regulations could be severely limited."

Last but not least, we conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

We urge our readers who may have summer associates or interns from law schools working for them to encourage them to submit articles for publication in our Future Proctors section.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

Robert J. Zapf

Bankruptcy: The Winners, the Losers, and the Collateral Damage

By Lawrence Rutkowski and Robert J. Gayda

(Continued from page 155)

I. The Basics

A. Differing Objectives

The U.S. bankruptcy laws, set forth in the Bankruptcy Code (Title 11 of the United States Code), have objectives that are, in many respects, inconsistent with the objectives of admiralty law. The fundamental principles of the U.S. bankruptcy laws are (a) to give the debtor a "breathing spell" and the opportunity for a "fresh start," and (b) to ensure equitable treatment of creditors.[1] U.S. bankruptcy law favors reorganization over liquidation and, in most instances, management remains in control of the debtor, its operations, and assets for the duration of a reorganization proceeding.

In contrast, admiralty law, insofar as it relates to the debtor/creditor relationship, is creditor-oriented, generally permitting aggressive individual creditor remedies. From a policy point of view, admiralty law is intended to encourage international shipping, trade, and finance by enabling efficient recourse against defaulting parties to address the issues created by shipping's "moving targets."

B. Creditor Enforcement

Under admiralty law, creditors possessing liens are generally able to arrest or attach vessels or other property of a maritime debtor, actions expressly prohibited under the Bankruptcy Code once a bankruptcy proceeding is commenced. When a debtor commences a bankruptcy case under chapter 11 (or 7)[2] of the Bankruptcy Code, the "automatic stay" prevents creditors from taking steps to enforce their debts without first obtaining bankruptcy court authorization.[3]

C. Asset Recovery

The Bankruptcy Code permits debtors to recover assets seized by or transferred to creditors, as well as obtain the nonconsensual release of liens granted or obtained near the bankruptcy filing date.[4] The ability of a debtor to recover assets or get the release of (or to "avoid") liens received by creditors in the time leading up to the bankruptcy filing discourages creditors from "racing to the courthouse" or taking other action that could worsen the debtor's financial position or disadvantage other, less aggressive creditors. In contrast, admiralty law rewards creditors for aggressive enforcement of their debts against the debtor.

A consequence of these differing approaches – the U.S. Bankruptcy Code approach being fairly unique – is that most creditors, whether they are senior mortgage holders, trade creditors or unsecured debt holders, especially those non-U.S. creditors to whom the U.S. bankruptcy approach is utterly foreign, fear a bankruptcy proceeding since the rules by which they are accustomed to playing are fundamentally altered.

D. Jurisdiction Over Admiralty Law Issues

Bankruptcy courts have broad jurisdiction to consider claims against and relating to a debtor and its assets. Depending on the degree to which a dispute or claim arising under admiralty law is related to a given bankruptcy proceeding, the bankruptcy court may determine the issue or decide that it should defer to another court or tribunal.

II. The Creditor Perspective

Who are the typical creditors of a shipping company and what are their concerns? In our experience, creditors of most shipping company fall into four general categories, namely (1) senior mortgage lenders, (2)

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1 House Report No. 95-595, 95th Congress, 1st Sess. 340-2 (1977); Senate Report No. 95-989, 95th Congress, 2d Sess. 49-51 (1978).

2 Most filings are under chapter 11, the reorganization chapter under the Bankruptcy Code; chapter 7 is the liquidation chapter. A notable exception was the Chapter 7 filing of Eastwind Maritime and its affiliates.

3 11 U.S.C. § 362

4 *See, e.g.*, 11 U.S.C. § 547 on "preferences" and 11 U.S.C. § 548 on fraudulent transfers.

bondholders or mezzanine debt lenders[5] and (3) trade debt. A fourth category of parties that does not always fit easily into one of the foregoing groups are parties who have vessels chartered to a debtor in bankruptcy. It is this last group that is the primary focus of this article.

A. Senior Mortgage Lenders

As noted above, immediately upon the commencement of a chapter 11 case, the Bankruptcy Code's automatic stay prohibits the arrest of any of the debtor's vessels located anywhere in the world.[6] Among other things, that means no mortgage holder is going to be able to commence foreclosure proceedings in respect of their mortgage(s). While the U.S. bankruptcy court's ability to enforce the stay and its orders is often practically limited to the debtor's assets within the U.S. and against foreign enforcement efforts initiated by U.S. creditors or those foreign creditors with a meaningful presence in the U.S., virtually all mortgage lenders to the shipping industry are either located in the U.S., have a meaningful presence in the U.S., or are otherwise subject to U.S. court jurisdiction. A consequence is that mortgage lenders are immediately deprived of access to their collateral and, more importantly, their principal leverage over their borrower. Thrust into a bankruptcy court, whose jurisdiction they did not invoke, the mortgage lenders lose their ability to control the direction their relationship with their borrower will take. But does that mean they are without recourse?

We cannot address in this article all the questions that surround the rights of secured creditors, particularly mortgage lenders, but the first point we would make to mortgage creditors is that bankruptcy is not necessarily a process to be feared. Indeed, one can reasonably take the position that chapter 11 (and even chapter 7) can bring order to what might otherwise be a free for all. Not only are mortgagees stayed but so are any other creditors within the reach of the court's jurisdiction. Sure, there might be a port agent somewhere who cannot be blocked from asserting a claim, but claimants such as those are often dealt with before a company seeks bankruptcy protection or can be dealt with immediately after the proceedings begin as cash becomes available to a debtor. Moreover, a mortgage holder does not lose its lien; rather, the ability to immediately enforce it is circumscribed.

This last point is an important one. Secured creditors are generally protected within the chapter 11 process. Foremost among the protections offered to secured creditors is the right to "adequate protection." To the extent a vessel is a wasting asset, secured creditors who are threatened by the diminution of the value of their mortgage lien are entitled to seek relief from the stay, replacement liens, or periodic cash payments.[7] Moreover, a reorganization plan in a chapter 11 proceeding cannot be approved by the court unless at least one class of claims that is impaired under a plan approves the plan.[8] In addition, any plan of confirmation must meet a "best interests of creditors" test.

All in all, an argument can be made that, barring unusual circumstances, first mortgage creditors can make it through a bankruptcy without losing value of their claims. Indeed, the intent of the Bankruptcy Code is to maintain a secured creditor's position, as it stood on the date the debtor filed its bankruptcy petition and throughout the pendency of the case, and a well-advised creditor can take advantage of these provisions. Accordingly, while it may be a stretch to describe senior mortgage lenders as "winners" in a bankruptcy, we submit that they are far better off than other participants in the process. To the extent there is "collateral damage," with respect to senior creditors the damage is likely a result of market forces and not the bankruptcy process if the system works as it should.

B. Bondholders/Mezzanine Lenders

Some, though not all, private and public shipping companies have unsecured bondholders or mezzanine debt providers in their capital structure. These creditors find themselves in a position very distinct from that of first lien creditors.[9] If a shipping company is in bankruptcy, especially in this market cycle, it is likely a result

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[5] With the growth in the first decade of this millennium in the number of public companies with greater access to different debt providers in the capital markets, it is common for shipping companies to now have a layer of unsecured or subordinated lenders in addition to senior mortgage lenders. In addition, some of the larger shipping companies have access to unsecured bank debt, typically in the form of a working capital revolving credit facility.

[6] The automatic stay imposed by 11 U.S.C. § 362 operates as protection for a debtor against, among other things, "any act to create, perfect, or enforce any lien against property of the estate."

[7] *See* 11 U.S.C. § 361.

[8] 11 U.S.C. § 1129(a)(9). A class is "impaired" if its current rights against the debtor are altered—that is, the value thereof is reduced. This would include, for example, in the context of a mortgage lender, altering the amortization of a loan, changing interest rates, or extending a loan maturity.

[9] Discussions of the relationships of different ranking creditors under intercreditor agreements is beyond the scope of this presentation and, as such, while worthy of consideration, are not analyzed here.

of depressed freight rates resulting in revenue streams no longer sufficient to cover both operating expenses and debt service. Vessel values are obviously correlated to revenue earnings and the resultant fall in values is likely to result in insufficient collateral cover for subordinated or unsecured lenders. If vessel values are barely sufficient to cover first mortgage debt, subordinated creditors will probably be deemed "under secured" in a bankruptcy and be treated, at least in part, as unsecured creditors in a plan of reorganization.

Unsecured bondholders (as well as other unsecured claim holders) are arguably in the most difficult position. They are likely to receive value in a reorganization worth only a fraction of the nominal value of their claims. Moreover, the affirmative participation of unsecured creditors in a plan of reorganization may not even be necessary. As noted above in the discussion of the position of first mortgage debt holders, while at least one class of impaired claims must vote to approve a plan, other impaired classes of creditors need not vote to approve a plan if under the plan of reorganization they will receive "property of a value, as of the effective date of the plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under chapter 7."[10] These classes of creditors may be subject to "cram down." At the risk of oversimplification, we would summarize the "cram down" in the following manner: as long as all of the general requirements of a plan of confirmation under 11 U.S.C. § 1129(a) are met, a plan may be confirmed over the objection of dissenting impaired classes of creditors if the plan does not discriminate unfairly and is fair and equitable with respect to the applicable impaired class or classes under 11 U.S.C. § 1129(b).

With this in mind, it is not difficult to posit a hypothetical where a shipowner has vessels the value of which is no greater than the claim of the first mortgage holder thereby effectively eliminating subordinated and unsecured indebtedness in a plan of reorganization as long as the first mortgage debt is prepared to support the plan. Clearly, bondholders and mezzanine debt holders risk being "losers" in a bankruptcy.

C. Trade Debt

Some trade debt is secured as the providers of the services represented by such debt hold maritime liens; some is not. The holders of trade debt, however, sometimes find themselves unusually favored, not at law, but in practicality in the days preceding and following a bankruptcy. Vessels cannot operate without the support of the many suppliers to those vessels. Whether a supplier has a lien superior to or subordinate to that of a mortgage holder, if that supplier is crucial to the operation of a vessel (e.g., a bunker supplier) or beyond the reach of the bankruptcy court's jurisdiction (e.g., foreign port agent), those bills that will need to be paid usually do get paid pre- (or sometimes post-) bankruptcy.[11]

D. Lessors/Lessees

We now turn our attention to the position of those who might lease vessels to or from a party in bankruptcy (with a distinct emphasis on the former). Leases (charters in our industry nomenclature) can be examined from a number of perspectives. The first issue relates to the possible rejection of such contracts, the second to whether the contract involved is truly a charter.

1. Rejection of Executory Contracts

Under the Bankruptcy Code, a debtor has the right to assume (i.e., perform) or reject (i.e., breach/terminate) executory contracts and unexpired leases (those contracts/leases under which both the debtor and the non-debtor counterparty continue to have material performance obligations). Vessel charters generally have been treated as executory contracts and/or leases under the Bankruptcy Code. Consequently, a debtor charterer (or even a debtor shipowner) under a charter may decide that the terms of a charter are unfavorable and "reject" the charter, resulting in a claim for damages arising from the breach of the charter in favor of the non-debtor counterparty. Generally, outside of the bankruptcy context, a breach of a charter by the shipowner will result in a maritime lien in favor of the charterer.[12] As indicated above, this would typically enable the charterer to attach and arrest the vessel as security for payment. Consequently, a damages claim arising from the debtor's rejection of a charter in bankruptcy may constitute a maritime lien, which might be entitled to higher priority than certain other

[10] 11 U.S.C. § 1129(a)(7).

[11] Subject to the usual caveats regarding preferences.

[12] *See Bank One Louisiana v. Dean*, 293 F.3d 830, 832, 838 (5th Cir. 2002).

lien claims coming into existence after commencement of the charter and before rejection of the charter.[13]

2. Assumption and Assignment of Executory Contracts

Alternatively, a debtor may assume a given charter, provided that the debtor cures all monetary defaults and provides adequate assurance that it will be able to continue to perform its obligations under the charter. Additionally, the debtor may assume and assign a charter, even if there is a provision prohibiting such assignment in the charter, so long as the debtor can provide adequate assurance of the assignee's ability to perform under the contract. In a chapter 11 case, the debtor has until the time at which its plan of reorganization is approved by the bankruptcy court to decide whether to assume or reject certain contracts. However, a non-debtor party may request that the bankruptcy court compel the debtor to earlier assume or reject a given contract, but would have to show that delay would result in extreme hardship to it to prevail in such request.

3. Recharacterization of Charters

In comparison with the relatively straightforward analysis of the foregoing matters, the issue of recharacterization of charters is considerably more complex. Certain types of charters (e.g., "bareboat" charters) are often used in the shipping industry in connection with sale lease-back transactions as a means of vessel financing. If a charterer under such an arrangement files for chapter 11 protection, the bankruptcy court may be asked to evaluate whether the charter represents a "true" lease or a disguised financing.[14] If the charter is recharacterized as a financing, the bankruptcy court may deem the vessel to be the property of the debtor charterer, not the owner. Under such circumstances, the charterer -- not the owner -- would be able to retain possession of the vessel without performing its obligations under the relevant charter, and claims by the ship owner against the charterer would be treated as general unsecured claims, ranked equally or below other creditors in the bankruptcy case.

The potential negative consequences to the lessor of such a determination are significant. In nearly all instances, an owner/lessor will be in a materially better position if it retains ownership of a vessel theretofore chartered to a debtor even if it may be subject to maritime lien claims incurred by the charterer while in its possession, than if it is reduced to filing a claim in a bankruptcy as an unsecured claimant in respect of unpaid "hire." If the owner is deemed a lender in such circumstance, not only has its collateral been diminished, it may be lost. While the parties to leases of non-vessel collateral, e.g., containers, can file precautionary Uniform Commercial Code financing statements to protect themselves (or at least improve their position) in an insolvency, vessel owners do not have that option other than in the limited instances discussed below.

Under what circumstances would a Bankruptcy Court find that a charter was a disguised financing and not a "true" lease?

Initially, we note that the party seeking to recharacterize a charter as a financing transaction has the burden of establishing that the purported charter is really a disguised financing.[15]

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[13] Thus, lenders receiving preferred mortgage liens with respect to vessels in connection with loans to the debtor during the bankruptcy proceeding should be aware that it is possible that their own liens may receive lower priority than damage claims resulting from the debtor's rejection of a charter during bankruptcy that existed prior to the loan being made. If it is determined by a bankruptcy court that the breach of the charter arising from rejection does not result in a maritime lien, however, then the amount of damages will be treated as a general unsecured claim in the bankruptcy. It would appear that the way to fix this from the bankruptcy court's perspective, though, is (i) to provide broad notice (probably publication notice) of an intended loan to a debtor in bankruptcy, so that if a maritime lienor does not oppose the loan, its lien will be deemed junior (this would, arguably, satisfy due process concerns), and (ii) to have the court's order approving the loan provide that the lien is superior to all others. The only remaining risk would be that, in a later proceeding before a foreign court, that court may not recognize the bankruptcy court's order and instead prioritize the maritime lien.

[14] *See American President Lines, Ltd. v. Lykes Bros. Steamship Co. (In re Lykes Bros. Steamship Co.)*, 196 B.R. 574, 580, 585 (Bankr. M.D. Fla. 1996) (holding that the bareboat charters at issue were not leases but really disguised financing arrangements and therefore the debtor lessee retained ownership of the vessels) (hereinafter "*Lykes Bros. Steamship Co.*").

[15] *See In re Ecco Drilling Co.*, 390 B.R. 221, 226 (Bankr. E.D. Tex. 2008); *WorldCom, Inc. v. General Elec. Glob. Asset Mgmt. Servs. (In re WorldCom, Inc.)*, 339 B.R. 56, 62 (Bankr. S.D.N.Y. 2006); *In re Owen*, 221 B.R. 56, 60 (Bankr. N.D.N.Y 1998).

Courts generally look to applicable non-bankruptcy law to determine whether a charter or lease is in fact a disguised financing arrangement.[16]

While U.S. courts considering contractual disputes will generally apply the law selected by the contracting parties, including that of foreign nations, a number of U.S. bankruptcy courts have determined that, where the interpretation of a contract implicates the rights of third parties such as creditors and/or bankruptcy trustees who were never a party to the original contract, such third parties cannot be bound by the contract's choice of law provisions.[17]

In most instances, U.S. bankruptcy courts will base determinations as to which law to apply on the choice-of-law rules of the forum state.[18] A New York bankruptcy court would likely look to the applicable choice of law statutes in the N.Y. U.C.C. in deciding whether to apply the governing law of the charter to a determination of whether as to whether the charter at issue is a true lease or a disguised financing.

Section 1-105(2) of the N.Y. U.C.C. provides that where certain provisions of that statute, including Sections 9-301 through 9-307, specify the applicable law, those provisions govern "and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules so specified."[19] Section 9-301 states that, with exceptions, while a debtor or collateral is located in a jurisdiction, the law of that jurisdiction governs perfection, the effect of perfection or non-perfection, and the priority of a security interest in collateral.[20]

Consequently, because a determination of whether a charter is a true lease or a disguised financing would necessarily implicate the nature of the owner's interests, if any, in the relevant vessel, if the charterer commences a bankruptcy proceeding in New York, a bankruptcy court would likely apply the laws of New York, not the laws otherwise governing the charter, to such a determination.

Bankruptcy Courts applying New York law rely on the N.Y. U.C.C. to distinguish between a lease and a security interest.[21] Article 2A of the N.Y. U.C.C. defines a "lease" as a "transfer of the right to possession and use of goods[22] for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease."[23] Section 1-201(37) of the N.Y. U.C.C. defines a "security interest" as "an interest in personal property or fixtures which secures payment or performance of an obligation" and sets forth two distinctive and sequential tests which courts have drawn upon to determine whether a transaction is a security interest.[24]

Under the N.Y. U.C.C., the question of whether a transaction creates a lease or security interest is "determined on a case-by-case basis" and "courts are to examine the facts of each case."[25] The N.Y. U.C.C. 1-201(37)(a) sets forth a bright-line or "per se" test, which if satisfied would lead a court to conclusively find a transaction to be a financing. The per se test is meant to provide courts with clear guidance on the issue and requires the party seeking to recharacterize a lease as a secured financing to demonstrate that (i) the purported lessee does not have the right to terminate the lease and (ii) one of four enumerated statutory factors is met.[26] The four factors are frequently referred to as the "residual value factors."[27]

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16 *See Lykes Bros. Steamship Co.*, 196 B.R. at 579-80 (looking to New York's Uniform Commercial Code (the "N.Y. U.C.C.") since the underlying charter provided for application of New York law and noting that "courts have taken the approach of the [N.Y. U.C.C.] as indicative of the federal common law of admiralty").

17 *See, e.g., In re Salander O'Reilly Galleries*, 453 B.R. 106, 131-32 (Bankr. S.D.N.Y. 2011) (holding that a Jersey choice of law provision did not govern a determination of whether a painting was property of the bankruptcy estate); *In re Eagle Enters.*, 223 B.R. 290, 293 (Bankr. E.D. Pa. 1998) (holding that a German choice of law provision did not apply in a determination of whether certain leases were true leases or disguised financing arrangements).

18 *See Salander O'Reilly Galleries*, 453 B.R. at 131 n.12 (citing *Eagle Enters*., 223 B.R. at 292).

19 N.Y. U.C.C. § 1-105(2) (McKinney's 2011).

20 N.Y. U.C.C. § 9-301(b) (McKinney's 2011). *See also Salander O'Reilly Galleries*, 453 B.R. at 131.

21 The Uniform Commercial Code is a uniform law and New York's version of the U.C.C. is substantially similar to the U.C.C. in effect in other states. Therefore, decisions from those states interpreting the U.C.C. can be looked to for guidance. *See In re WorldCom, Inc.*, 339 B.R. at 63-64 & n.3. For purposes of this analysis, we did not canvas the law in all jurisdictions that have adopted the U.C.C.

22 Article 2A of the N.Y.-U.C.C. defines "Goods" to include "all things that are movable at the time of identification to the lease contract." N.Y. U.C.C. § 2A-103(h) (McKinney's 2011). Since the Vessel is movable we assume it would fall within this definition.

23 N.Y. U.C.C. § 2A-103(j) (McKinney's 2011).

24 N.Y. U.C.C. § 1-201(37) (McKinney's 2011).

25 *Duke Energy Royal, LLC v. Pillowtex Corp. (In re Pillowtex, Inc.)*, 349 F.3d 711, 717 (3d Cir. 2003).

26 *PSINet, Inc. v. Cisco Sys. Capital Corp. (In re PSINet, Inc.)*, 271 B.R. 1, 43-44 (Bankr. S.D.N.Y. 2001).

27 *In re WorldCom, Inc.*, 339 B.R. at 65.

The per se test is as follows:[28]

> (a) Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and:
>
> > (i) the original term of the lease is equal to or greater than the remaining economic life of the goods,
> >
> > (ii) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,
> >
> > (iii) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or
> >
> > (iv) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

In the event that a financing is not found under the per se test, courts will analyze the transaction under a second test that has been dubbed the "economic realities" test, which examines the underlying economics of the transaction to determine whether a transaction should be properly characterized as a lease or financing.[29]

When considering the economic realities of the transaction, courts typically focus on the following three factors: " '[a] whether the purchase option price at the end of the lease is nominal; [b] whether the lessee is required to make aggregate rental payments having a present value equaling or exceeding the original cost of the leased property; and [c] whether the lease term covers the total useful life of the equipment.' "[30]

Additionally, although the current version of N.Y. U.C.C. § 1-201(37)(a) no longer mandates that courts consider the parties' expressed intentions when entering into a transaction, courts still examine the "parties' expectations and predictions in that they constitute in large part the economic realities and context in which the agreement was made."[31]

Other factors which courts consider to be relevant in deciphering the economic substance of the transaction (and which may be particularly relevant here), include whether the lessor was in the business of leasing, had any input on the selection of equipment, required a third-party guarantee, or required an indemnity from the lessee against all liability.[32] Where a transaction includes factors indicative of both a lease and a financing, the dispositive factor may be whether the transaction provided the lessor with a return on its investment.[33]

a. Application of the "Per Se" Test.

The per se test first inquires as to whether the lessee may not terminate the lease. If a charter has "hell or high water" provisions commonly found in finance leases or requires payment of a "Termination Sum" or "Stipulated Loss Value" upon a termination for any reason, a debtor will likely make the argument that the first prong of the "per se" test has been met.[34]

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[28] N.Y. U.C.C. § 1-201(37)(a) (McKinney's 2011).

[29] *See, e.g.*, *Pillowtex*, 349 F.3d at 717; *In re WorldCom, Inc.*, 339 B.R. at 70-71.

[30] *Pillowtex*, 349 F.3d at 719 (quoting *In re Edison Bros. Stores*, 207 B.R. 801, 809-10 & nn.8-10 (Bankr. D. Del. 1997)).

[31] *In re WorldCom, Inc.*, 339 B.R. at 70 (stating that the statutory revision was meant to overrule previous decisions that found the parties' intent alone operated as a legal conclusion).

[32] *See Lykes Bros. Steamship Co.*, 196 B.R. at 582-84.

[33] *See Pillowtex*, 349 F.3d at 719-20. While courts will consider the three factors described above, as well as other factors, the N.Y. U.C.C. specifies that the mere presence of any one of five enumerated factors in a lease does not in and of itself indicate a financing. N.Y. UCC § 1-201(37)(b).

> (i) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,
> (ii) the lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods,
> (iii) the lessee has an option to renew the lease or to become the owner of the goods,
> (iv) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed, or
> (v) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

[34] *See, e.g.*, *In re Ecco Drilling Co.*, 390 B.R. at 228 (finding first prong met where lessee was not allowed to terminate payment obligations and agreements had "hell-or-highwater provisions").

Assuming the first part of the per se test is met by the charter in issue, it is necessary to examine the four residual value factors of the per se test.[35]

The first residual value factor looks to whether the lease term is equal to or greater than the remaining economic life of the goods and courts will generally look to see whether there is "something of value to return to the lessor after the term" of the lease.[36] For instance, where the lease term is essentially equal to the economic life of the leased property, a court may find that a transaction is not a true lease and treat it as a disguised financing.[37]

The N.Y. U.C.C. indicates that the "remaining economic life of the goods" is established according to "the facts and circumstances at the *time the transaction is entered into*."[38]

The second residual value factor often comes into play with bareboat charters with so-called hire purchase provisions. These charters are essentially the equivalent of installment sale contracts where ownership of the vessel will vest in the charterer at the end of the charter term. Similarly, put options in charters can be troublesome in this analysis.

The third residual value factor, which relates to the renewal of the lease, is only applicable if the relevant charter contains renewal provisions.

The fourth residual value factor considers whether any purchase option exercise price is nominal.[39] Section 1-201(37)(c)(i) of the N.Y. U.C.C. indicates that an option price is not nominal if the agreement states that it is the fair market value at the time the option is to be performed and is nominal if it is less than the lessee's "reasonably predictable" cost of performing under the agreement if the option is not exercised. Courts will generally determine whether an option price is nominal based upon the parties' estimated value of the leased goods at the time the transaction is entered into.[40]

Although there are a number of tests concerning whether an option price is nominal, it is generally established by (1) comparing the option exercise price to the fair market value of the goods and (2) comparing the option exercise price to the cost of performing any lease obligations.[41] For example, an option price that was above 50% of the estimated fair market value was not considered nominal.[42] But, an option price that was predicted to be 15% of the fair market value of the leased equipment, was considered nominal.[43]

An option price may also be deemed nominal where the only logical choice for the lessee would be to exercise the option because the cost of continuing to perform under the lease would be substantial.[44]

b. Application of the "Economic Realities" Test.

Where the transaction cannot be characterized or clearly characterized as a financing under the per se test, courts will then turn to a more contextual analysis that considers the "economic reality of the transaction, based on the facts and circumstances of each case, to determine whether the transaction is more fairly characterized as a lease or…financing."[45] Under the economic realities test, the court will likely consider the applicable transaction as a whole. When making this determination, the

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35 *See In re WorldCom, Inc.*, 339 B.R. at 65 (analyzing residual value factors where lessee did not possess a right of termination and was obligated to pay for the full term of the lease); *but see In re Owen*, 221 B.R. at 61 (declining to examine four additional factors under per se test where lessee had the right to terminate the lease).

36 *In re PSINet, Inc.*, 271 B.R. at 45-46 (quoting *In re Marhoefer Packing Co.*, 674 F.2d 1139, 1145 (7th Cir. 1982)).

37 *See In re PSINet, Inc.*, 271 B.R. at 46 (finding transactions were not "true leases" where parties conceded that the leased equipment would have no economic value at the end of the lease term); *but see, In re Marhoefer Packing Co.*, 674 F.2d at 1145-46 (finding true lease where the four year lease term was less than the eight to ten year life of the leased equipment).

38 N.Y. U.C.C. § 1-201(37)(c)(ii) (McKinney's 2011) (emphasis added).

39 *See In re WorldCom, Inc.*, 339 B.R. at 65-66.

40 *See In re WorldCom, Inc.*, 339 B.R. at 67 (noting that the U.C.C. provides that " 'reasonably predictable' is 'to be determined with reference to the facts and circumstance at the time the transaction was entered into' ").

41 *See id.* at 66, 68 (explaining party seeking to recharacterize lease must establish the anticipated value of the leased goods at the end of lease term and the expected cost of continuing to perform under the lease).

42 *In re Uni Imaging Holdings, LLC*, 423 B.R. 406, 418 (Bankr. N.D.N.Y. 2010) (unable to conclude that an option price of $175,000 based upon an estimated fair market value of $328,742.00 was nominal).

43 *In re Ecco Drilling Co.*, 390 B.R. at 230 (option for 15% of the equipment's' fair market value viewed as a "premium" that the parties expected to be exercised and was considered nominal).

44 *See Lykes Bros. Steamship Co.*, 196 B.R at 581-82 (finding bareboat charters there were financing arrangements where debtor "had nothing but a Hobson's choice" to exercise an option to purchase the vessels rather than making charter payments in an amount of more than double the option price).

45 *Pillowtex*, 349 F.3d at 719.

parties' intentions and expectations at the time of the transaction are relevant to the analysis.[46]

Among the factors courts consider are whether the option exercise price is nominal and whether the lease covers the useful asset's economic life. These factors are considered in the context of the residual value factors of the per se test which compare the term of the lease to the economic life of the goods and the option exercise price with the fair market value. As we have already discussed these issues above, we will focus on some of the key remaining factors, including, but not limited to, whether the present value of the lease payments exceeds the cost of the Vessel.

Courts typically compare the "present value"[47] of the lease payments with the fair market value or purchase price for the leased goods.[48] In emphasizing the importance of this factor, courts have noted that "if the alleged lessee is obligated to pay the lessor a sum equal to or greater than the full purchase price of the leased goods plus an interest charge over the term of the alleged lease agreement, a [financed] sale is likely to have been intended since what the lessor will receive is more than a payment for the use of the goods and loss of their value; the lessor will receive…a return on its investment."[49] Thus, where the aggregate lease payments have a present value that is greater than or equal to the cost of the leased goods the second factor will likely be found to exist and the lease will be considered a financing.[50]

As the economic realities test looks to the facts and circumstance of each case to determine the true economic reality of the transaction, courts tend to also consider other factors, in addition to those set forth above, including whether the lessee bears the risk of loss, and is required to pay taxes, insurance, maintenance, and other costs that are associated with ownership.[51] If the charterer is obligated to bear the risk of loss and pay taxes, insurance, maintenance, attorneys' fees, and other costs of the vessel, it may be considered to be a financing. However, this should not be determinative of the issue because those provisions are standard in bareboat charters.[52]

The above should make clear that the sale and leaseback transactions so prevalent today bring with them risks the parties may not appreciate and the paths to mitigate those risks are not always readily apparent. There are vessel registries that now allow for the filing of "financing charters" (notably, the Republic of the Marshall Islands and the Republic of Liberia) in an effort to provide the owner/lessor with a basis to claim the status of a secured creditor in a chapter 11 proceeding but this system is as of now untested. Moreover, this is only two registries out of many.

We are aware that some financing providers who are party to sale and leaseback transactions execute these transactions through special purpose affiliates from whom they then take a mortgage but this is not a foolproof method of mitigating the risk of recharacterization. We note, for example, that there are cases that have held mortgages granted by an owner to its sole shareholder are subject to being equitably subordinated.[53]

How a lease or charter is structured and how the lessor/owner behaves pre- and post-petition will go a long way to determine whether such owner/lessor ends up a "winner" or "loser" in bankruptcy.

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[46] *See Lykes Bros. Steamship Co.*, 196 B.R at 577 (finding transaction was not a true lease where debtor was in need of financing, wanted to retain control of the vessels and structured terms of transaction to provide a specific rate of return). It should be noted that the leases involved in *Lykes Brothers* qualified as "true leases" under the IRS safe harbor rules for leases as well as the then applicable accounting standards. These factors alone were not enough to dissuade the court from recharacterizing the leases.

[47] The N.Y. U.C.C. defines "present value" as "the amount at a date certain of one or more of sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of the case at the time the transaction was entered into." N.Y. U.C.C. § 1-201(c)(iii) (McKinney's 2011). It does not appear that the parties specified an interest rate in the transaction and thus a court would apply what it determines to be a commercially reasonable rate to discount the future stream of hire payments to the present value.

[48] *In re Owen*, 221 B.R. at 62 (finding a lease where the present value of the total payments under lease was less than the purchase price of leased equipment).

[49] *Pillowtex*, 349 F.3d at 719-20 (finding purported lease to be a disguised financing under the economic realities test where it was conceded that aggregate payments equaled or exceeded the present value of the cost of the leased equipment).

[50] *See id*.

[51] N.Y. U.C.C. § 1-201(37)(b)(ii).

[52] *See International Trade Admin. v. Rensselaer Polytechnic Inst.*, 936 F.2d 744, 751 (2d Cir. 1991) (cautioning, where "indicia of ownership of lessee" were present and a factor in court's decision that a transaction was really a disguised financing, that analyzing lessee's obligations to pay taxes and maintenance costs associated with property in isolation would be misleading because it was standard in the transaction at issue).

[53] *See generally Custom Fuel Servs., Inc. v. Lombas Indus., Inc.*, 805 F.2d 561 (5th Cir. 1986).

To Include The Fishing Permit, Or Not To Include The Permit? That Is The Question! A Look At The United States District Court For The District Of New Jersey's Holding In *In re Complaint of B&C Seafood, LLC*, 426 F. Supp. 3d 82 (D.N.J. 2019).

By Kirby Aarsheim, Esq.*

Introduction to Fishing Permits[1]

In 1976, Congress enacted the Magnuson Act, later renamed the Magnuson Stevens Act ("MSA") in response to overfishing and inadequate conservation measures.[2] In implementing the MSA, Congress also created eight regional fishery management councils charged with efficiently managing the federal fisheries seaward of the states comprising them in accordance with the conservation directives of the MSA.[3] The councils develop fishery management plans ("FMPs") to outline the rules for each fishery pursuant to the MSA, which for most fisheries included establishment and issuance of fishing permits and history as a method of gaining control of the fishery.[4] Fishing permits essentially reflect rights to fish for certain species for a certain number of days each year.[5] Interestingly, courts have held that holders of fishing permits issued pursuant to the MSA do not possess valid property interests in such permits.[6]

In some fisheries, the fishing permits and histories hold substantial value. Currently, a Limited Access Full Time Scallop Permit for a two [2] dredge vessel issued by the Greater Atlantic Regional Fisheries Office of the National Oceanic and Atmospheric Administration ("NOAA") has an estimated market value of approximately $5.5-5.75 million based on an average baseline permit, excluding the value of the fishing vessel and depending on whether the permit includes other permitted fisheries as well.[7] The larger baseline permits have an estimated value at higher amounts in the $6.0 million range.[8] A Full Time Small Dredge permit, with a good baseline of at least eight [80] feet and a 500 horsepower engine, is currently valued at approximately $3.9 million.[9]

Appraising permit values for other fisheries, such as groundfish and lobster, requires a more complex analysis. The value of a groundfish permit depends on the composition of groundfish species on the permit. It is difficult to provide a quantitative estimate for groundfish permits since the value depends on the annual catch

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1 *See* Aarsheim, Kirby, Sparks Heisterhagen, Kasee, *Opposing Perspectives: Should Fishing Permits be Classified as Appurtenances and Subject to Attachment of a Maritime Lien?* 15 Benedict's Mar. Bull. 192 (Fourth Quarter 2017), for a further explanation of fishing permits and background on maritime liens. Attorney Aarsheim also previously authored an article on the topic of fishing permits in the Limitation of Liability context published in the fall 2013 edition of the ABA Admiralty and Maritime Law Committee Newsletter titled, *Limiting the Vessel Owner's Liability to the Value of the Vessel and…Its Fishing Permits?*

2 *See Hall v. Evans*, 165 F. Supp. 2d 114, 123-24 (D.R.I. 2001) (citing *Parravano v. Babbitt*, 837 F. Supp. 1034, 1040 (N.D.Cal.1993), *aff'd*, 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016, 116 S. Ct. 2546, 135 L. Ed. 2d 1066 (1996) (citing 16 U.S.C. § 1801(a)).

3 *A.M.L. International, Inc. v. Daley*, 107 F. Supp. 2d 90, 93 (D. Mass. 2000) (citing 16 U.S.C. § 1852(a)(1)).

4 *PNC Bank Delaware v. F/V MISS LAURA*, 381 F.3d 183, 185 (3d Cir. 2004) (citing 16 U.S.C. § 1801 (2000); *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 68 (1st Cir. 2001) (some fishing vessels "are valuable significantly, and sometimes almost entirely, because of their permits").

5 *Gowen*, 244 F.3d at 68.

6 *Willie R. Etheridge Seafood Co. v. Pritzker*, No. 2:14-CV-73-BO, 2015 U.S. Dist. LEXIS 93281, at *6 (E.D.N.C. July 16, 2015) (citing *Conti v. United States*, 291 F.3d 1334, 1341 (Fed. Cir. 2002) (permit issued by Department of Commerce to harvest swordfish in Atlantic Swordfish Fishery does not confer a property interest); *see also Am. Pelagic Fishing Co., v. United States*, 379 F.3d 1363, 1374 (Fed. Cir. 2004) (mackerel and herring commercial fishing permit does not confer a property interest for purposes of the Fifth Amendment).

7 Telephone interview with Bill Rocha, a broker at Athearn Marine Agency, Inc., (October 2, 2020). Athearn Marine Agency, Inc. has been engaged in the brokerage of commercial fishing vessels, permits, and related services since 1946. Mr. Rocha can be reached by telephone at 774-766-2199 and email: brocha@athearnmarine.com to obtain more information.

8 *Id.*

9 *Id.*

entitlement attached to the permit.[10] In assessing the value of a lobster permit, the geographic location of the fishery, state versus federal, value per trap tag, and tag allocation, are considered. As an example, an Area 3 offshore lobster vessel with a price of $350 per tag and a 1,000 tag allocation may be worth approximately $350,000.[11]

The highly valued fishing permits described above often exceed the value of the associated vessels. These vessel owners are able to use the permits to secure loans for new builds where they may not have been able to secure the loan if not for the highly valued permit. The current cost of building a two [2] dredge scallop vessel can exceed $4 million depending on the shipyard. A lender will likely require a scallop vessel owner looking to commission a new build to use its permit with its existing vessel as collateral for the new construction loan.[12] Most banks will not collateralize the loan with just the permit, hence support for the argument that the permit is an appurtenance of the vessel subject to a maritime lien. On the other hand, an owner of a scallop vessel that holds a Limited Access Full Time Scallop Permit valued over $5 million is unlikely to benefit from attempting to limit its liability if that permit is to be included in the limitation fund. Further, inclusion of the permit in a limitation fund would require vessel owners to incur increased operational costs in order to obtain additional protection and indemnity insurance to cover the value of the permit. Otherwise, a vessel owner risks being under insured if its coverage is below the value of the vessel plus permit and it attempts to limit its liability where the permit is included in the fund.

Recent Decision: *In re Complaint of B&C Seafood, LLC*, 426 F. Supp. 3d 82 (D.N.J. 2019)

The United States District Court for the District of New Jersey is the first court to squarely address the issue of whether fishing permits are appurtenances to be included in the value of a Limitation Fund.[13] The court correctly held that case law interpreting the Limitation of Liability Act as well as case law assessing the value of a vessel does not support the assertion that a fishing permit should be included as an appurtenance of a vessel for purposes of the Act.[14] The court emphasized that finding fishing permits to be appurtenances subject to the limitation fund would be inconsistent with the Supreme Court's holding in *The Main* that the limitation fund should include "all the appurtenances comprising whatever is on board for the object of the vessel."[15]

The court first analyzed what is included in the valuation of a vessel when determining the limitation fund.[16] The ultimate measure of the value of a vessel for purposes of the Act is the fair market value of the vessel to be established by evidence of either the actual sale of the vessel or sales of comparable vessels at the approximate time and within the relevant market.[17] The vessel's fishing permits are not considered when assessing the vessel's fair market value, are typically valued independently of the vessel, and do not have to be sold with the vessel.[18]

The next key factor considered was whether fishing permits fall within *The Main* description of what the owners have on board the vessel.[19] The limitation fund should include "all the appurtenances comprising whatever is on board for the object of the vessel."[20] The decision in *The Main* intended to "cover what the owners have at risk on the vessel for the object of the adventure."[21] Case precedent supports the notion that physical objects are appurtenances, not permits or licenses, to be included in the fund.[22]

Fishing permits are intangible objects that were not "on board" the vessel at the time of the collision at issue in

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10 *Id.*

11 *Id.*

12 *See Gowen*, 244 F.3d at 68-69 ("Thus, not only the market value but the creditworthiness of the fishing vessel may well depend on its permits quite as much as on its engine, physical dimensions, and navigation equipment. Maritime liens underpin the extension of credit to fishermen, and this mechanism for ready credit would be impaired by excluding from the lien the permits that allow vessels to carry on their accustomed fishing activities. Thus, in the large, fishermen seeking repairs and supplies on credit are likely to benefit from treating a vessel's permits as appurtenances.")

13 *In re Complaint of B&C Seafood, LLC,* 426 F. Supp. 3d 82, 88 (D.N.J. 2019).

14 *Id.*

15 *Id.* at 87 (citing *The Main v. Williams*, 152 U.S. 122, 131, 14 S. Ct. 486, 38 L. Ed. 381 (1894)).

16 *Id.* at 86.

17 *Id.* at 85 (citing *Cody v. Phil's Towing Co.*, 247 F. Supp. 2d 688, 693-94 (W.D. Pa. 2002), citing *Standard Oil of New Jersey v. Southern Pacific Co.*, 268 U.S. 146, 155 (1925)).

18 *Id.; see also Sailor Inc. F/V v. City of Rockland,* 324 F. Supp. 2d 197, 200 (D. Me. 2004) ("The value of the fishing permits, which were not impaired due to the sinking, is not properly includible in the vessel's fair market value for the purpose of determining whether the vessel was a constructive total loss.").

19 *In re Complaint of B&C Seafood,* 426 F. Supp. 3d at 86-87.

20 *Id.* (citing *In re Waterman S.S. Corp.*, 794 F. Supp. 601, 605 (E.D. La. 1992)).

21 *Id.* (citing *The Main* 152 U.S. at 819).

22 *Id.*

In re Complaint of B&C Seafood.[23] Even if a copy of the fishing permit is on the vessel at the time of a casualty, the value of the permit rests with the intangible right to fish vested with the permit holder.[24] The First Circuit in *Gowen* acknowledged that "[a]lthough a vessel's fishing permits generally must be kept 'on board,' 50 C.F.R. § 648.4(l), the rights themselves are what matter, and they are intangible."[25] Thus, there is a distinction between physical objects on board a vessel and objects not on board a vessel for purposes of determining what is an appurtenance under the Limitation of Liability Act.[26] "Fishing permits are intangible objects not on board a vessel, therefore, holding that fishing permits should be included as an appurtenance for purposes of the Act would be inconsistent with relevant case law."[27]

The court credited the differences with how appurtenances are handled in maritime lien cases, on the one hand, from how they are handled under the Limitation of Liability Act on the other, to the intended industry goals in each area.[28] "Maritime liens were created to promote commerce by allowing suppliers to freely extend credit to ships but still be protected from shipowners escaping their debts by sailing away without payment."[29] In contrast, the Limitation of Liability Act was intended to protect vessel owners from unlimited exposure to liability.[30] Notably, both the Act and maritime liens are aimed at encouraging maritime commerce and investments.

Appurtenances: Maritime Liens vs. Limitation of Liability

As acknowledged in the *In re Complaint of B&C Seafood, LLC* case, the determination of what are appurtenances differs between maritime lien and limitation of liability cases. The ownership of the appurtenance and whether it is on board the vessel are two important factors with different repercussions when analyzing appurtenances subject to a maritime lien or to be included in the limitation fund.

Maritime liens attach to maritime property or *res* which can include vessels, as well as the vessel's engines, equipment, appurtenances, cargo, freight, and subfreights.[31] The vessel's equipment and appurtenances are subject to liens *even if not actually owned by the vessel owner*.[32] A maritime lien can attach to a vessel's equipment that the vessel owner leases from a third party.[33]

The maritime lien system is based upon practical realities confronting maritime businesses.[34] The rule allowing liens against severable and leased equipment "is predicated upon the principle that one extending credit to a ship has the right to assume that the entire vessel, including all of her equipment essential to her navigation or to the completion of the voyage upon which she is embarked, stands as security for the debt."[35]

Conversely, in determining the value of the vessel for purposes of the Limitation of Liability Act, the Supreme Court has stated:

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[23] *Id.* (citing *In re Waterman S.S. Corp.,* 794 F. Supp. at 605).

[24] *Id.*

[25] *Gowen*, 244 F.3d at 68.

[26] *Id.*

[27] *In re Complaint of B&C Seafood*, 426 F. Supp. 3d at 87.

[28] *Id.*

[29] *Id.* (citing Raleigh P Watson, Understanding Maritime Liens, MARLIN (Mar. 27, 2018), https://www.marlinmag.com/maritime-liens/ (providing general information relating to maritime liens); *Gowen*, 244 F.3d at 67-68 (explaining why fishing permits should be considered appurtenances for purposes of maritime liens)).

[30] *See id.* (citing *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 121 S. Ct. 993, 148 L. Ed. 2d 931 (2001)).

[31] Schoenbaum, Thomas J., 1 Admiralty & Mar. Law § 9-1.

[32] *Gowen, Inc. v. F/V Quality One*, 2000 U.S. Dist. LEXIS 8587 (D. Me. June 14, 2000), *aff'd*, 244 F.3d 64 (1st Cir. 2001) (citing *SS Tropic Breeze v. Tropical Commerce Corp.*, 456 F.2d 137, 141 (1st Cir. 1972)).

[33] *See Gonzalez v. M/V Destiny Panama*, 102 F. Supp. 2d 1352, 1356 (S.D. Fla. 2000) (an item may be appurtenant to a vessel even though the vessel and the item are not under common ownership); *The Augusta*, 1920 U.S. Dist. LEXIS 688, at *2 (E.D. La. Sep. 7, 1920) (radio equipment leased from the Radio Corporation of America could be used to satisfy maritime liens against the vessel if the proceeds of the ship were insufficient); *United States v. F/V Sylvester F. Whalen*, 217 F. Supp. 916, 917 (D. Maine 1963) (radar equipment and a fathometer installed on board a fishing vessel were appurtenances subject to a maritime lien on the vessel even though the owner of the vessel had leased the equipment from a third party); *United States v. F/V Golden Dawn*, 222 F. Supp. 186, 188 (E.D.N.Y. 1963) (held that preferred maritime liens "tend toward reaching every sort of interest in the congeries of vessel, tackle, apparel and furniture that has been committed to the hazard of the vessel's voyages and enterprise without regard to ownership and sub-divisions of ownership interests" but that mortgages extend only to what mortgagor owns); *The Frolic*, 148 F. 921, 923-24 (D.R.I. 1906) (the title of an appurtenance becomes immaterial if the vessel owners have in fact consented to its use as an appurtenance of the vessel).

[34] *Gulf Copper & Mfg. Corp. v. M/V Lewek Express*, No. 3:19-CV-00034, 2019 U.S. Dist. LEXIS 101822, at *6-7 (S.D. Tex. June 18, 2019).

[35] *Id.* (quoting *Stewart & Stevenson Servs., Inc. v. M/V Chris Way MacMillan*, 890 F. Supp. 552, 562 (N.D. Miss. 1995)).

> the custom has been to include all that **belongs to the ship**, and may be presumed to be **the property of the owner**, not merely the hull, together with the boats, tackle, apparel, and furniture, but all the appurtenances comprising whatever is on board for the object of the voyage, **belonging to the owner**, whether such object be warfare, the conveyance of passengers, goods, or the fisheries.[36]

Multiple courts have analyzed the issue of permit ownership when addressing permit holder claims that the government's revocation of the permit constitutes either a categorical or a noncategorical regulatory taking in violation of the Fifth Amendment. In applying "traditional notions of property and existing rules and understandings" courts have concluded that a fishing permit does not confer a legitimate property interest.[37] To be considered property, fishing licenses conferring a "right to use a vessel to fish" must exist "independent of the regulatory regime."[38] The licensees granted fishing permits through a regulatory process "do not possess a valid property interest in such permits."[39] Since fishing permits are technically not the property of the vessel owner, that characteristic of the permit fails to meet a threshold requirement to be an appurtenance under the Limitation Act as stated in *The Main*.[40]

While appurtenances deemed part of the limitation fund can be severable from the vessel, those appurtenances must still be on board the vessel during the subject voyage. The appurtenances must also be part of what is risked during the subject voyage, a factor not exactly considered in the maritime lien context. These were key issues considered by the court in *In re Complaint of B&C Seafood, LLC*.

An appurtenance subject to a maritime lien is "any specifically identifiable item that is **destined for use aboard** a specifically identifiable vessel and is essential to the vessel's navigation, operation, or mission."[41] It is well-established that an appurtenance need not be installed or on board a vessel at the time of her arrest to be itself subject to the warrant for arrest.[42] The issue of whether a lien can attach to an intangible fishing permit has been specifically decided in the affirmative.[43]

Indeed, an item may be an appurtenance even though it has never been installed on the vessel to which it belongs.[44] For example, a chronometer not on board the vessel when the marshal made his seizure, and never in his physical possession, was nonetheless an appurtenance of the ship.[45] A tail shaft that had never been installed on the boat for which it was destined was an appurtenance to the vessel that was the subject of a preferred ship mortgage.[46] Installation of the equipment may not be a necessary pre-condition to a finding that a given item is appurtenant to a vessel.[47]

Courts have repeatedly upheld maritime liens on appurtenances not owned by the vessel owner and not on board the vessel. However, those appurtenances would not satisfy the requirements that an appurtenance be "the property of the owner" and physically on board the vessel to be included in a limitation fund.[48]

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[36] (Emphasis added) *In re Complaint of B&C Seafood*, 426 F. Supp. 3d at 85 (quoting *The Main*, 152 U.S. at 131).

[37] *Willie R. Etheridge Seafood Co. v. Pritzker*, No. 2:14-CV-73-BO, 2015 U.S. Dist. LEXIS 93281, at *6 (E.D.N.C. July 16, 2015) (citing *Conti*, 291 F.3d at 1341; *Am. Pelagic Fishing Co.*, 379 F.3d at 1374).

[38] *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 196 F. Supp. 3d 436, 444-45 (D. Del. 2016) (citing *Gen. Category Scallop Fishermen v. Sec'y of U.S. Dep't of Commerce*, 720 F. Supp. 2d 564, 576 (D.N.J. 2010)); *See also Am. Pelagic Fishing Co*, 379 F.3d at 1377-80 ("Because the right…was not inherent in its ownership of the [property], [but instead was totally dependent upon the regulatory scheme,] American Pelagic did not suffer the loss of a property interest…when its…permits were revoked.").

[39] *United States ex rel. Moore & Co.*, 196 F. Supp. 3d at 445 (citing *Gen. Category Scallop Fishermen*, 720 F. Supp. 2d at 576; *Am. Pelagic Fishing Co.*, 379 F.3d at 1377, 1380 ("[U]se of…vessels to fish in the [Exclusive Economic Zone]…does not equate to a cognizable property interest.")).

[40] *The Main*, 152 U.S. at 131.

[41] *Gulf Copper & Mfg. Corp. v. M/V Lewek Express*, No. 3:19-CV-00034, 2019 U.S. Dist. LEXIS 101822, at *6 (S.D. Tex. June 18, 2019) (quoting *Motor-Servs. Hugo Stamp, Inc. v. M/V REGAL EMPRESS*, 165 Fed. Appx. 837, 840, 2006 U.S. App. LEXIS 2961 (11th Cir. Feb. 7, 2006)) (citing *Gonzalez*, 102 F. Supp. 2d at 1356)).

[42] *Gonzalez*, 102 F. Supp. 2d at 1354-55 (citing *The Great Canton*, 1924 AMC 1074, 1075 (S.D.N.Y. 1924)).

[43] *Gowen*, 244 F.3d at 68; *Bank of Am. v. PENGWIN*, 175 F.3d 1109, 1119 (9th Cir.), *cert. denied*, 528 U.S. 872, 120 S. Ct. 174, 145 L. Ed. 2d 147 (1999) (Court assumed without discussion that permits were subject to liens); *Offenbacher v. Ahart*, No. 07-CV-326-BR, 2009 U.S. Dist. LEXIS 16231, at *16-17 (D. Or. Feb. 25, 2009) (Court adopted the reasoning of *Gowen*); *Bank of the Pac. v. F/V ZOEA*, No. 3:15-CV-05758-RBL, 2017 U.S. Dist. LEXIS 29928 (W.D. Wash. Mar. 2, 2017) (ship mortgage lenders can have a security interest in Washington commercial fishing permits appurtenant to a mortgaged vessel); *see also PNC Bank Del. V. F/V Miss Laura*, 381 F.3d 183 (3d Cir. 2004).

[44] *Gonzalez*, 102 F. Supp. 2d at 1355.

[45] *Id.*

[46] *Id.* (citing *Stewart & Stevenson*, 890 F. Supp. at 561-62).

[47] *Gonzalez*, 102 F. Supp. 2d at 1355.

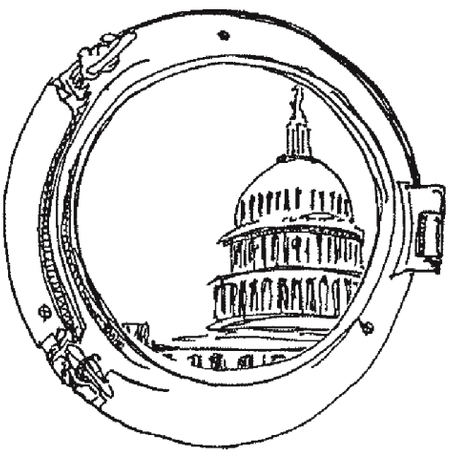
[48] *In re Complaint of B&C Seafood,* 426 F. Supp. 3d at 85 (quoting *The Main*, 152 U.S. at 131).

Conclusion:

Under the foregoing case law – where fishing permits are appurtenances subject to maritime liens but not appurtenances to be included in the limitation fund – the goals of encouraging investment and protecting the interests of fishing vessel owners are achieved.

Classifying permits as appurtenances subject to maritime liens allows a fishing vessel owner to use said permits as collateral to secure loans beyond its vessel's value. This is particularly important when the vessel owner is building a new fishing vessel or faced with purchasing a replacement vessel. In the event of a marine casualty, a fishing vessel owner is potentially able to limit its liability to the value of its vessel, excluding the permit, assuming lack of privity or knowledge. The owner can still preserve its right to that permit for use as security. Thanks to the holding in *In re Complaint of B&C Seafood, LLC*, the current legal climate allows a fishing vessel owner to essentially have its cake and eat it too.

Window on Washington



Lame Duck on the Wing

Bryant E. Gardner*

Heading into autumn of 2020, Congress is nearly frozen in partisan paralysis. Although mid-terms handed the Democrats control of the House, the Senate—with its staggered 6-year terms — remains too closely divided to achieve 60-member majorities needed to make headway, despite nominal Republican control, and veto threats from the White House hang thick like Spanish moss in the swamp. Returning from summer recess, the Senate took up another virus relief bill but failed to pass a watered-down alternative to that offered by the House. Even bills to fund the government are on life support. The House passed 10 of the 12 regular spending bills in July, but with Senate appropriators deadlocked, a stopgap continuing resolution looks more likely in the near term. Heading into elections, Democrats have less and less incentive to compromise on big policy measures, to the extent they believe they may gain greater control of the Senate or take the White House in elections.

Two bills with legs in the twilight of the 116th Congress are the National Defense Authorization Act for FY 2021 ("NDAA")—which sets national security policy, including maritime programs—and the Water Infrastructure Bill—which will improve ports and waterways. Washington has enacted an NDAA for 59 consecutive years, but the road to 60 could be rocky. The President has tweeted his intention to veto both the House and Senate versions of the NDAA on the grounds that they would require renaming military assets honoring Confederates; the White House put out a list of lengthy objections to other provisions, including limits on the diversion of Defense construction funds to projects like the border wall, and another allowing D.C. to control its National Guard. Despite the Administration's objections, legislators generally have fewer significant disagreements than they did during debate of last year's measure.

Historically, the Coast Guard Authorization Act is the other major piece of maritime legislation that passes Congress in most years. Passage of a Coast Guard Act in 2020 also remains in question. Taking a novel approach, House leadership appended the Coast Guard Act bill to the NDAA in hopes of riding its coattails to the President's desk.[1] The Senate has not adopted a similar approach and it remains to be seen how this is-

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[1] The Elijah E. Cummings Coast Guard Authorization Act of 2020 is Division H of the House National Defense Authorization Act. The House's independent Coast Guard Authorization Act previously reported out of committee July 23, 2019, is H.R. 3409. The Senate Coast Guard Authorization Act, which is not included in the Senate NDAA, is S. 227 and was reported out of committee in September 2019.

sue will be handled in conference, as of this writing. Although the water infrastructure bill has been relatively free from controversy and the committee is pressing ahead, it could still fall apart if Democrats believe they can push through additional priorities in the new Congress.

Tanker Security Fleet

The House NDAA renews the chamber's 2019 proposal to establish a 10-vessel "Tanker Security Fleet."[2] The program would be modeled after the existing Maritime Security Program ("MSP").[3] Under the tanker program, owners of self-propelled, militarily useful tank vessels documented under U.S. law would be eligible to receive a $6 million per vessel annual stipend in exchange for commitments to make such vessels available to the U.S. Government at pre-negotiated rates in times of war and national emergency. The programs aim to ensure access to the global logistics networks maintained by commercial operators, and the availability of U.S. controlled sealift capacity without the expense of maintaining mothballed grey-hull assets. The Secretary of Transportation, U.S. Maritime Administration, would be responsible for selection of program participants, in consultation with the Department of Defense, U.S. Transportation Command ("TRANSCOM").

The size of the stipend remains a topic of discussion. Whereas dry cargo MSP vessels can remain in commercial operation and offset higher U.S. operating and manning costs through a mix of commercial and U.S. Government impelled cargoes, tanker markets operate differently, often carrying single-owner cargo loads at one-way rates to or from the United States, which many operators argue will require additional stipend amounts closer to $10 million per vessel in order to establish commercial viability and attract participants.

There remain some discussions among stakeholders as to whether the program should include some kind of tie-breaker award preference for "Section 2" citizen owners who meet the U.S. ownership and control rules that govern U.S. ownership tests under the Jones Act cabotage law. Currently, vessels engaged in the international trades, including those enrolled in the MSP, need only be documented with a registry endorsement, allowing foreign carriers robust participation provided they do so through U.S. subsidiaries. Some participants oppose attempts to introduce additional U.S. citizen preferences to these national defense sealift programs. On the other hand, Jones Act operators and Section 2 operators in the foreign trades have written Congress expressing support for such a preference in the tanker program.

There is no tanker program in the Senate bill, and so, as of this writing, it remains to be seen whether the Senate will accept the proposal, having rejected it last year. However, there are signals that the Senate may be increasingly receptive to some kind of tanker sealift program, in part because TRANSCOM has become more supportive of the proposal as a means to address the widely acknowledged deficiency in liquid bulk U.S.-flag capability to support the defense mission.

Jones Act Waiver Changes

The Jones Act cabotage law can be waived by the Federal Government in very limited circumstances governed by statute.[4] Although the waiver requires that doing so is "necessary in the interest of national defense," the process has been applied over time to accommodate hurricane relief, Strategic Petroleum Reserve shipments, and other situations including the DEEPWATER HORIZON and EXXON VALDEZ incidents, sparking concern of a "camel's nose under the tent" among Jones Act stakeholders.[5] Accordingly, these stakeholders have moved to tighten the process over time and curb perceived abuses. Section 3504 of the House NDAA bill would make several tweaks to the waiver process.

Under current law, there are two avenues to waiver. First, if the waiver is requested by the Department of Defense ("DOD"), then Homeland Security grants the waiver automatically. Second, in all other cases, waiver requires a finding by MARAD that there are no suitable Jones Act vessels available, that MARAD identify actions that could be taken to remedy that condition, that MARAD publish its determination on the MARAD website (so that Jones Act stakeholders can man the battle stations), and notify Congress. The House bill would require that a DOD request be necessary not just "in the interest of national defense" but also "to address an immediate adverse effect on military operations." Additionally, the measure would limit non-DOD waivers to ten days, extendable for an additional 10 days by MARAD, and further limit to 45 days the aggregate duration of all waivers and extensions of waivers with respect to one set of events.

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2 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, § 3511, 116th Cong., Aug. 5, 2020.

3 46 U.S.C. Ch. 531.

4 46 U.S.C. § 501.

5 *See generally* Constantine G. Papavizas & Brooke F. Shapiro, Jones Act Administrative Waivers, 42 Tul. Mar. L.J. 317 (2018), *available at* https://www.winston.com/images/content/1/5/v2/156258/Jones-Act-Waivers-Article.pdf.

Ready Reserve Force Recapitalization

The U.S. Maritime Administration ("MARAD") maintains 46 grey-hulled national defense sealift vessels in layup status for use during any initial sealift "surge" requirement, called the "Ready Reserve Force". These vessels—35 ro/ro, 2 heavy lift, 6 crane ships, 1 tanker and 2 aviation repair vessels—are strategically positioned in Tacoma, San Francisco, Los Angeles / Long Beach, San Diego, Beaumont, New Orleans, Charleston, the Virginia tidewater, Baltimore, and Philadelphia.[6] American vessel operators contract to crew and maintain these vessels with civilian mariners, although the vessels are U.S.-government owned.

The fleet needs recapitalization, pitting U.S. shipyard interests against budgeteers eager to save money by outsourcing construction to foreign yards, mostly in the Far East. In partial compromise, the Congress granted MARAD authority to procure up to seven foreign-built vessels at reasonable cost, provided that any conversion or modernization of the vessel occurs in a U.S. shipyard.[7] Preference is awarded to vessels that participated in the MSP, but MARAD cannot purchase more than two foreign-built vessels under the provision without certifying to Congress it has initiated an acquisition strategy for not less than 10 U.S.-built vessels. The House NDAA would up MARAD's purchase authority to nine foreign-built vessels, and up to four without certifying a U.S.-build strategy.[8] The Senate bill would leave the authorized number of foreign-built vessel purchases at seven and remove the requirement that MARAD certify to a 10-vessel build program before exceeding two foreign-build purchases.[9]

Cargo Preference

Under current federal law, U.S. Government-impelled cargoes must be shipped 100% U.S.-flag for Export-Import Bank and Defense Department shipments, and 50% for civilian agency shipments.[10] The House NDAA would rewrite the governing Military Cargo Preference Act of 1904.[11] The Committee report states that the provision would "increase compliance with military cargo preference requirements."[12] Under current law, military cargo preference shipments move at rates which "may not be higher than charges made for transporting goods for private persons," often measured by reference to carriers' published tariffs. The proposal adds a requirement that such rates be "at a fair and reasonable rate for commercial vessels of the United States," which mechanism has long been in place for civilian cargoes and involves a cost-plus rate determination by the MARAD. Additionally, the proposal permits waiver of the preference where vessels are not available at such fair and reasonable rates, but requires reporting such waivers to Congress. The Senate bill does not include a comparable provision.

Furthermore, the House bill requires a Government Accountability Office ("GAO") examination of cargo preference enforcement.[13] Industry stakeholders have long believed that there are significant pools of untapped preference cargo which are not moving in U.S. bottoms, especially cargo moved by lower-tier subcontractors on large projects and military contracts. The GAO report would aim to look at such leakage and other instances of non-compliance. The proposal further directs the GAO to capture instances in which shipper agencies ship foreign-flag and then refuse to acknowledge such shipments as shipped foreign for purposes of determining compliance with the minimum U.S.-flag carriage requirements. The GAO would also assess internal training and compliance controls used by the various shipper agencies and the enforcement activities undertaken by MARAD since it obtained muscular new statutory authority in 2008, including the power to assess fines and require catch-up cargoes not otherwise subject to the flag requirement.

Financial Aid and Relief Programs

The House bill would establish a new emergency relief program aimed at creating greater resiliency in the maritime transportation system.[14] Under a state of emergency or public health emergency, MARAD would have broad authority to make grants and enter into contracts to facilitate emergency response, including construction and repair projects, maritime transportation system operations, personal protective equipment ("PPE"), sanitization, workforce retention, cleaning and sanitization, debt service payments, and emergency response. Eligible entities would include both public and private entities engaged in vessel construction, transportation by water, or support activities for transportation by water. Although the provision would still require appropria-

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6 U.S. Maritime Administration, https://www.maritime.dot.gov/sites/marad.dot.gov/files/docs/national-defense/office-ship-operations/rrf/2701/rrf-outport-12-22-2017.pdf

7 10 U.S.C. § 2218.

8 H.R. 6395 § 1022.

9 National Defense Authorization Act for Fiscal Year 2021, S. 4049, § 1021, 116th Cong., July 23, 2020.

10 10 U.S.C. § 2631, 46 U.S.C. §§ 55304 & 55305.

11 H.R. 6395 § 1024

12 H. Rep. 116-142 at 195, July 9, 2020.

13 H.R. 6395 § 11104. This is within the Coast Guard Authorization Act section of the NDAA, Division H.

14 H.R. 6395 § 3505.

tions, it would provide MARAD with flexible powers to support the maritime industry in a wide variety of possible local or national emergencies, including PPE support during the current pandemic, which is explicitly defined as an emergency sufficient to trigger funding availability.

A separate provision of the House proposal would establish a MARAD-administered loan program to help fund the education of merchant mariners, including those working to receive a Standards of Training, Certification, and Watchkeeping (STCW) endorsement.[15] Loans would be allocated on the basis of need and could be used to fund training at federal, state, commercial, and nonprofit training institutions, with no more than 50% of funds going to the state maritime academies. Undergraduate students at the U.S. Merchant Marine Academy would not be eligible. The measure also direct MARAD to formulate and publish a plan to recruit, train, and retain mariners within one year for the five-year period following publication, and provides MARAD with grants authority to facilitate the plan.

Coast Guard Title: Shipping and Maritime Provisions

The Coast Guard Division of the House NDAA includes a variety of initiatives relevant to the maritime industry. Both the House measure and the earlier Senate Coast Guard bill[16] would make electronic charts equivalent to paper charts for purposes of meeting existing legal requirements,[17] and require the use of engine cut-off switch links on certain recreational vessels.[18] The House version would exempt additional classes of persons working onboard vessels from the requirement to hold merchant mariner's credentials, including oil spill response, marine firefighting, commercial diving, salvage, diving support, and industrial vessel workers not associated with the navigation of the vessel, to sunset in two years.[19] Both chambers also include a provision which would permit towing vessels to transit beyond the boundary line in certain limited situations to fulfill the vessel's duties without being subject to additional requirements.[20]

Under current law, notices of claims of lien filed on a vessel abstract expire after three years; the House bill would require the Coast Guard to annotate the abstract (or continuous synopsis record) of the vessel accordingly.[21]

Consistent with the longstanding concerns about U.S. icebreaking capability, the House and Senate bills each contain authorization of additional Coast Guard icebreaking capability and add new authority to procure icebreaking capability for the Great Lakes equivalent to the USCGC MACKINAW.[22]

Both chambers would also clarify the subrogation rights of insurers or other indemnifiers providing fund compensation under the Oil Pollution Act,[23] establish a new oil pollution research and development program to better understand the impacts of marine oil pollution,[24] and require limited indemnity provisions in standby oil spill response contracts funded through the Oil Spill Liability Trust Fund.[25]

Water Resources Legislation

The House and Senate committees of jurisdiction passed their water resources development bills in July and May 2020, respectively, and appear headed toward a successful compromise which would result in new harbors and waterways maintenance and improvements.[26]

The $17 billion Senate bill includes provisions which Sen. Dan Sullivan (R-AK) characterized as the first steps towards a "system" of deep-draft arctic ports, including Nome, observing "[e]ven the Chinese have a plan on the Arctic and yet in America, an arctic nation, we have no strategic arctic port that can handle any serious shipping. … Our first draft will support U.S. Navy and Coast Guard assets and provide vital economic support for communities in Western Alaska."[27]

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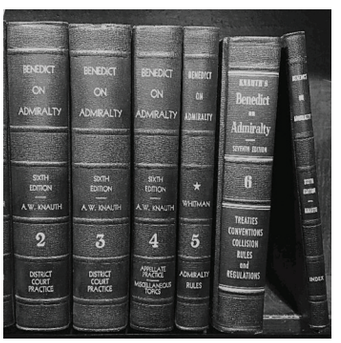
15 H.R. 6395 § 3507.
16 S. 2297, 116th Cong, July 25, 2019.
17 H.R. 6395 § 10101; S. 2297 § 301.
18 H.R. 6395 § 10206; S. 2297 § 414.
19 H.R. 6395 § 10203.
20 H.R. 6395 § 11102; S. 2297 § 406.
21 H.R. 6395 § 10303.
22 H.R. 6395 §§ 8006, 8007, 8008 & 8011; S. 2297 §§ 105 & 235.
23 H.R. 6395 § 10102; S. 2297 § 413.
24 H.R. 6395 § 10104; S. 2297 § 429.
25 H.R. 6395 § 10105; S. 2297 § 421.
26 H.R. 7575, 116th Cong., July 29, 2020, S. 3591, 116th Cong., May 4, 2020.
27 Caroline Tanner, Congressional Quarterly, Senate Water Bills Advanced by Public Works Committee (May 6, 2020). *See also* S. 3591 § 1206 (directing expedited completion of the decision document for the project for navigation, Arctic Deep Draft Port, Nome, Alaska).

The Harbor Maintenance Trust Fund ("HMT") was established in 1986 to fund port dredging through a tax on imported cargoes; however, the funding has long been bottled up in offset of other discretionary funding priorities. House Transportation and Infrastructure Chairman Peter DeFazio (D-OR) would release $10 billion from the Trust Fund to begin to address the $40 billion backlog in critical projects through provisions in the House bill. The bill would also increase support for inland waterways, providing a 65% federal general fund cost share for the next seven years, instead of the current 50%, and making the cost share permanent for any construction project that receives funding during that period. The Senate bill would make the 65% general fund / 35% Inland Waterway Trust Fund share permanent.

Moving Forward

Only time will tell if the partisan paralysis will begin to thaw, but the NDAA and the Water Infrastructure Bill are likely contenders to break the current logjam. The pandemic has continued to change the way America, and our Government, do business. Should the democrats seize control of the Senate and capture the White House, it is reasonable to anticipate the demise of the Senate filibuster and a return to a more active legislative branch, with fresh new initiatives originating from Congress aided by a President with a longer legislative tenure than any other in history. These dynamics could very well come together, propelled by an American public fed-up with dysfunction, to make for a very different 117th Congress.

Future Proctors



A Novel Interpretation of the Freedom of High Seas Navigation: ITLOS Broadens the Application of UNCLOS Article 87 in the M/V NORSTAR (Panama v. Italy) Case

By Colin T. Kelly*

I. Introduction

The M/V NORSTAR was moored in a bay of the island of Mallorca when Spanish authorities seized the vessel as evidence of a crime.[1] The seizure followed upon a request from Italian authorities based in Savona, Italy.[2] Between 1994 and 1998, the Panamanian-flagged oil tanker M/V NORSTAR had been purchasing gasoil in Italy and then supplying this fuel to mega yachts in the international waters of the western Mediterranean in order to evade Italian tax duties.[3] More than twenty years later, the International Tribunal for the Law of the Sea (ITLOS) issued a judgement in the dispute that arose between Panama and Italy following the seizure of the M/V NORSTAR and awarded compensation to Panama for the loss of the tanker.[4] This decision was reached through a 15-7 vote finding that the seizure and detainment of the M/V NORSTAR by Italy, via Spain, had violated Article 87(1) of the United Nations Convention on the Law of the Sea (UNCLOS), which guarantees the freedom of high seas navigation.[5] This judgement constitutes the first direct ruling by an international tribunal on the principle of freedom of navigation in international waters.[6]

The intention of this comment is to show that ITLOS's judgment in the M/V NORSTAR Case was incorrect and involved an overly broad interpretation of key provisions of UNCLOS.

Starting with Part II, this Comment will review the historical development of the concept of free high seas navigation and describe its current place in the international law of the sea.

Part III will discuss the M/V NORSTAR Case in detail, including the facts, judgment, award, and the joint dissent.

Part IV of this Comment will show how the judgment reached by ITLOS is inconsistent with the established

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1 M/V "NORSTAR" (Panama v. Italy), Case No. 25, Judgment of April 10, 2019, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Judgment/C25_Judgment_10.04.pdf [hereinafter NORSTAR], at para. 75. The seizure took place on September 25, 1998.

2 *Id.*, at para. 74-75.

3 *Id.*, at para. 69-70.

4 *Id.*, at para. 469. The judgment was issued on April 10, 2019.

5 *Id.*; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force November 16, 1994) [hereinafter UNCLOS].

6 Richard Collins, *Introductory Note to the NORSTARM/V NORSTAR Case (Panama v. Italy) (ITLOS)*, 58 Int'l Legal Materials 673, 673 (2019).

principles of the freedom of high seas navigation, especially those embodied in UNCLOS Articles 87 and 92.

Part V will discuss some potential ramifications of this novel decision for Italy, the international community, and ITLOS itself.

Part VI will conclude by reiterating that the seizure and detainment of a vessel at anchor for offshore bunkering of smuggled gasoil cannot be construed as violating that vessel's right to freely navigate the high seas. This decision will have potentially far-reaching consequences for the international law of the sea. It would be prudent to re-evaluate ITLOS's reasoning process before any adverse repercussions are felt.

II. Development of the Law of Free High Seas Navigation

A. Early Sources for the Freedom of the Seas

The law of the sea is inseparably linked to international law and has developed in tandem with it.[7] As independent States with individual territory emerged from the empires of the ancient world, the relations between these States evolved into international law.[8] This law relied partly on Roman law canons for its early development.[9] The same may be said for the early concepts of the law of the sea.[10] Roman law established the principle that the sea is free and open to all humanity.[11] The philosophers and jurists of ancient Rome, in contrast to earlier concepts promoting the idea of maritime dominion, laid the foundation for later generations to build up a law protecting the freedom of the high seas.[12]

Despite this Roman influence, claims of maritime appropriation continued throughout the middle ages. The Papal Bull of Pope Alexander VI, for example, divided the entire known world, including sea territory, into Spanish and Portuguese dominion.[13] But in 1608 Hugo Grotius, a Dutch jurist and scholar, made the most important early contribution to the controversy surrounding control over the oceans.[14] In *Mare Liberum*, Grotius observed that the sea was not susceptible to appropriation because "that which cannot be occupied, or which has never been occupied, cannot be the property of any one, because all property has arisen from occupation."[15] Relying on scriptural and classical sources, he argued that the sea, like the air, cannot be occupied or possessed because of its limitlessness, and therefore it is open to the use of all people both for navigation and commercial activity.[16] At the heart of Grotius' argument for the freedom of the seas is the guarantee of the freedom of movement for commercial shipping.[17]

Grotius' application of natural law, rather than the "voluntary law of nations," towards promoting the free seas theory was not without its detractors.[18] Most notably,

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7 R.R. Churchill & A.V. Lowe, The Law of the Sea, at 3 (3d ed. 1999).

8 *Id.*

9 *Id.*

10 Pitman B. Potter, The Freedom of the Seas in History, Law and Politics, at 27 (1924) ("The oft-quoted dictum of the Emperor Antoninus: 'I am indeed the lord of the world, but the law is lord of the sea,' may be taken as a fine Roman statement of the principle of maritime freedom.").

11 Donald R. Rothwell & Tim Stephens, The International Law of the Sea 2 (2d ed. 2016) (citing Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, at 4 n.3 (rprt.1970) (1927)) ("Roman Law did pass on to posterity the concept of the 'freedom of the seas' which concept exerted profound influence upon the development of international law").

12 *Id.*; see also *Id.* at 26 (quoting Cicero, De Officiis, I, 51) ("This, then, is the most comprehensive bond which unites together men as men and all to all; and under it the common right to all things that nature has produced for the common use of man is to be maintained, with the understanding that, while everything assigned as private property by the statutes and by civil law shall be so held as provided by those laws, everything else shall be regarded in the light indicated by the Greek proverb: 'Amongst friends all things in common.'").

13 *Id.*

14 *Id.* at 3.

15 Hugo Grotius, The Freedom of the Seas or the Right which Belongs to the Dutch to Take Part in the East Indian Trade 26 (Oxford Univ. Press 1916) (trans. 1633) (". . . . *eas res quae occupari non possunt, aut occupari numquam sunt, nullius proprias esse posse; quia omnis proprietas ab occupatione coeperit*.").

16 *Id.* at 27 ("…*commune est omnium Maris Elementum, infinitum scilicet ita, ut possideri non queat, et omnium usibus accomodatum: sive navigationem respicimus, sive etiam piscaturum*.").

17 Hans Jürgen Stöcker, Die >>Freiheit der Meere<< und die Dritte Seerechtskonferenz der Vereinten Nationen. Anmerkungen aus der Sicht der deutschen Handelsschiffahrt, Recht Über. *See* Festschrift für Rolf Stödter 317 (1979) ("*Die Verkehrsfreiheit der Handelsschiffahrt ist historisch das Kernstueck des von Grotius in der 1609 erschienen Schrift über das* >>Mare liberum<< *entwickelten Prinzips der* >>Freiheit der Meere<<.").

18 Churchill & Lowe, *supra* n. 7, at 4.

the English jurist and scholar John Selden published a response to *Mare Liberum* in his *Mare Clausum* of 1635. This work attempted to establish the right of the English crown to assert control over the sea areas around Britain but also sought to reassert the principal that national dominion over the seas in general was valid.[19] Much longer and wider-ranging than Grotius' treatise, Selden's work was not without its merits.[20] The Englishman's pedantic viewpoint, however, did not align with the "growing spirit of freedom throughout the world."[21] Ultimately, the forward-looking spirit of Grotius and his ideal of the freedom of the seas prevailed.[22]

B. Modern Concepts

These early foundations for the law of the sea have been continually modified.[23] Gradually the natural law tradition gave way to theories based on consensual government, and positivism gained prominence in the realm of international law.[24] In the eighteenth century, writers such as Wolff and Vattel began to place customary law on an equal footing with natural law.[25] The positivist school placed greater importance on actual State practice, States' voluntarily assumed obligations, customary international law, and treaties rather than on the natural law theories of the ancients.[26] Nevertheless, the notion that the sea, as something unpossessable and common to all, is not subject to law continued into the twentieth century, along with the attendant principle of freedom of navigation.[27]

This conception of the high seas long held a central place in State practice and customary international law.[28] Although the concept of high seas freedoms remained deeply embedded in the western legal consciousness, beginning in the nineteenth century, the high seas themselves began gradually to contract geographically as a result of increased feasibility of access and the growth of territorial sea claims.[29] This has resulted in a greater need for regulation and "an increase in global concerns over oceans management in areas beyond national jurisdiction."[30]

1. Attempts at Codification of the Law of the High Seas

As suggested in article 38 of the Statute of the International Court of Justice, the sources of international law are embodied in international conventions, customary international law, general principles of international law, judicial decisions, and the writings of publicists.[31] Attempts to codify the rules of international law pertaining to the sea in general from these sources have been multifold.[32] As early as 1873, organizations such as the International Law Association, the Institute of International Law, Harvard Law School, and the American Law Institute have produced reports and proposed regulations on ocean-related topics such as territorial waters, marine pollution, deep sea bed resources, piracy, and Port State jurisdiction.[33] By the early twentieth century, a number of multilateral treaties had been enacted, which were important steps towards the establishment of the modern high seas regime.[34] These included conventions designed to improve international efforts to ensure the safety of life at sea following the sinking of the *Titanic* and the 1931 International Convention for the Regulation of Whaling.[35]

In total, there have been four official intergovernmental attempts at codifying the law of the sea and high

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19 Rothwell & Stephens, *supra* n. 11, at 3.

20 Potter, *supra* n. 10, at 64 ("But as argument attempting to prove the legal validity of maritime dominion or maritime liberty in the period prior to 1650, Selden's work is incomparably superior to that of Grotius…").

21 Rothwell & Stephens, *supra* n. 11, at 3 (citing Thomas Wemyss Fulton, The Sovereignty of the Sea, at 370 n. 3 (1911)).

22 *Id.*; *see also* Potter, *supra* n. 10, at 64 (". . . . Selden was fighting against the tendency of historical international developments, while Grotius was fighting the battle of the future.").

23 Churchill & Lowe, *supra* n. 7, at 5.

24 *Id.*; see Lexico, https://www.lexico.com/en/definition/positivism (last visited April 1, 2020) (defining positivism as "[t]he theory that laws are to be understood as social rules, valid because they are enacted by authority or derive logically from existing decisions, and that ideal or moral considerations (e.g., that a rule is unjust) should not limit the scope or operation of the law.").

25 *Id.*

26 *Id.*

27 Stöcker, *supra* n. 17, at 318 ("*Der Gedanke, daß eine Sache, die nicht aufgebraucht werden könne, frei von Rechten sei und dem Gemeingebrauch dienen müsse, hat die Vekehrsfreiheit dauerhaft und wirkungsvoll bis in das 20. Jahrhundert getragen*.").

28 Rothwell & Stephens, *supra* note 11, at 154.

29 *Id.* at 154-155; Stöcker, *supra* note 17, at 318 ("*Die vermehrte und intensivere Nutzung des Meersraums ließ wesentliche Voraussetzungen – die Unerschöpflichkeit des Meeresressourcen und die Unmögligkeit einer einzelnen Nation, sich bestimmter Meersgebiete zu bemächtigen und ihre alleinige Nutzung für sich durchzusetzen – an Gültigkeit verlieren*.")

30 Rothwell & Stephens, *supra* n. 11, at 154-55.

31 Churchill & Lowe, *supra* n. 7, at 5-13; Statute of the International Court of Justice, April 18, 1946, 33 UNTS 993, art. 38.

32 *Id.* at 13.

33 *Id.* at 13-14.

34 Rothwell & Stephens, *supra* n. 11, at 160.

35 *Id.*

seas regulation.[36] The first was the League of Nations in 1924, which made a preliminary effort to select and prepare topics for codification.[37] When the League of Nations was replaced by the United Nations in 1945, the International Law Commission was established and began preparation of draft articles concerning the high seas and territorial waters.[38] The majority of its draft was devoted to the high seas and included topics such as navigation, fishing, and submarine cables and pipelines.[39] This material laid the foundation for the work of the first United Nations Conference on the Law of the Sea (UNCLOS I) in Geneva in 1958, which adopted four conventions: the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas; the Convention on the Continental Shelf, and the Convention on Fishing and Conservation of the Living Resources of the High Seas.[40] The Convention on the High Seas entered into force well before the other three conventions and with little contention, reflecting that customary international law concerning the high seas was already well established at this point.[41] Two years later a second conference, UNCLOS II, convened to focus on the issues of the breadth of the territorial sea and fishery limits.[42] This conference produced no consensus, and state practice concerning the law of the sea continued to develop through the 1960s.[43] In 1967, however, the United Nations General Assembly established the Sea Bed Committee to investigate issues concerning the deep sea bed, as advancing technology made sea bed resource extraction increasingly feasible.[44] Although many nations were hesitant to revisit the recently codified law of the high seas, it was apparent that deep sea bed resource exploitation would require a re-examination of the national jurisdictional limits of the high seas.[45] Additionally, many newly independent States, which were not part of the 1958 Conventions, were in favor of reviewing the earlier law of the sea, as concern was growing generally over the problems of over-fishing and marine pollution.[46] Finally, these factors combined with "the recognition that the various parts of the law of the sea were inextricably inter-related" and should be reviewed as a whole.[47] In 1970, therefore, the General Assembly resolved to convene a United Nations conference to create a comprehensive Law of the Sea Convention.[48]

2. 1982 United Nations Convention on the Law of the Sea

The third United Nations Convention on the Law of the Sea (UNCLOS III) took place over nine years from 1973 to 1982.[49] The Law of the Sea Convention produced by UNCLOS III came into force in 1994 and "remains one of the most comprehensive international law-making instruments of its time."[50] It embodies "a truly comprehensive regime for the law of the sea"[51] and, in Part VII, lays out the rules pertaining to the high seas. Article 86, the first article of Part VII, makes clear that the high seas consist of "all parts of the sea" that are not included within the EEZ, territorial sea, the internal waters of a coastal state or the archipelagic waters of an archipelagic state.[52] In turn, Article 89 states that the high seas are not subject to the sovereignty of any State,[53] which reflects the current position of customary international law.[54] This principle, gainsaying the ability of States to assert sovereignty on the high seas and limiting the exercise of jurisdiction to certain practices, leads to the proposition that "no State has the right to prevent ships of other States from using the high seas for any 'lawful purpose.'"[55]

3. Principle of the Freedom of the High Seas Navigation, Art. 87(1)

Among the lawful uses of the high seas are those embodied in Article 87(1), which provides a non-exhaus-

36 Churchill & Lowe, *supra* n. 7, at 14.
37 *Id.*
38 *Id.* at 15.
39 Rothwell & Stephens, *supra* n. 11, at 161.
40 Churchill & Lowe, *supra* n. 7, at 15.
41 Rothwell & Stephens, *supra* n. 11, at 162.
42 *Id.* at 9.
43 *Id.* at 9-10.
44 Churchill & Lowe, *supra* n. 7, at 15-16.
45 *Id.* at 16.
46 *Id.*
47 *Id.*
48 *Id.*
49 Rothwell & Stephens, *supra* n. 11, at 12.
50 *Id.* at 14.
51 *Id.*
52 *Id.* at 164; UNCLOS, *supra* n. 5, art. 86.
53 UNCLOS, *supra* n. 5, art. 89.
54 Rothwell & Stephens, *supra* n. 11, at 164.
55 Churchill and Lowe, *supra* n. 7, at 166.

tive list of six high seas freedoms.[56] Commentators note that "the listing of the freedom of navigation as the first freedom is iconic," and the fact that this freedom required no further explanation suggests the solidity of the concept in state practice and customary international law.[57] Accordingly, there are very few instances where a ship navigating on the high seas may be interfered with. These include the right of visit allowed to certain vessels and the prohibition of particular acts such as piracy and traffic in narcotic drugs.[58] However, the "freedom of the high seas is not absolute."[59] Article 87(2) requires that States and vessels must use the seas "with due regard for the interest of other States in their exercise of the freedom of the high seas."[60] Later articles of UNCLOS elaborate on how violations of the "due regard" clause may be enforced.

4. Principle of Exclusive Flag State Jurisdiction, Art. 92(1)

UNCLOS codifies the principle of exclusive flag state jurisdiction, which maintains that the State granting a vessel the right to use its flag has exclusive jurisdiction over that vessel.[61] This is made explicit by Article 92(1), which states that "[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas."[62] This exclusive jurisdiction encompasses both legislative and enforcement jurisdiction and, moreover, applies to all persons on board a vessel flying a State's flag regardless of their individual nationality.[63]

Historically, the principle of exclusive flag state jurisdiction was often supported by the theory of the ship's territoriality.[64] This conception views a ship as a "floating island" or "detached part of the territory" of its flag State.[65] This view, however, is not realistic because in practice ships are subject to the right of visit on the high seas by foreign enforcement vessels and fall under the territorial sovereignty of coastal States when they enter those States' territorial seas and internal waters.[66] Exclusive flag State jurisdiction, therefore, is better explained as a "corollary of the freedom of the high seas and the requirement of the submission of the high seas to law."[67] Its purpose is to protect the freedom of activity on the high seas while ensuring compliance with the national and international laws concerning that activity.[68] It is both logical and practical for flag States to take the lead in upholding the rule of law on the high seas since no national jurisdiction or central governing body holds sway there.[69]

As alluded to above, the principle of exclusive flag state jurisdiction is subject to two major exceptions, namely the right of visit and the right of hot pursuit. The right of visit, which applies only to private ships and not to military vessels or government ships with a non-commercial purpose, is set forth in Article 110(1) of the UNCLOS. This article "seeks to reinforce an international order on the high seas" by allowing warships to board vessels on the high seas that are reasonably suspected

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[56] Rothwell & Stephens, *supra* n. 11, at 164; UNCLOS, *supra* n. 5, art. 87(1):

> Article 87
> Freedom of the high seas
> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:
> (a) freedom of navigation;
> (b) freedom of overflight;
> (c) freedom to lay submarine cables and pipelines, subject to Part VI;
> (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
> (e) freedom of fishing, subject to the conditions laid down in section 2;
> (f) freedom of scientific research, subject to Parts VI and XIII.

[57] Rothwell & Stephens, *supra* n. 11, at 164.

[58] *Id.* at 165.

[59] Yoshifumi Tanaka, The International Law of the Sea 156 (2012).

[60] UNCLOS, *supra* n. 5, art. 87(2).

[61] Tanaka, *supra* n. 59, at 157.

[62] UNCLOS, *supra* n. 5, art. 97(1).

[63] Tanaka, *supra* n. 59, at 157; *see also* M/V SAIGA (No. 2) Case (1999), 38 ILM 1347, para. 106 ("[T]he ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.").

[64] Tanaka, *supra* n. 59, at 157.

[65] *Id.* (citing The Case of the SS LOTUS, PCIJ 1928 Series A/10, p. 25).

[66] *Id.* (citing Dissenting opinion by Lord Finlay, the Case of the SS LOTUS, PCIJ Series A, No. 10, p. 53).

[67] *Id.*; see Gidel Le droit international public de la mer 225 (reprt. 1981) (1932-34) ("*Le caractère de juridicité de la haute me rest pratiquement une notion indispensable.*"); see also Gidel at 230 ("*Pratiquement, la nationalité du navire est le moyen technique d'organiser la >>juridicité<< de la haute mer.*").

[68] *Id.* at 158.

[69] *Id.*

of engaging in certain activities such as piracy or slave trading.[70]

The other exception, hot pursuit, is embodied in Article 111, which allows coastal states to pursue vessels believed to have violated the state's laws and regulations as long as the pursuit begins within the coastal state's internal waters, archipelagic waters, territorial sea, contiguous zone, and in certain circumstances within the exclusive economic zone and continental shelf.[71] Hot pursuit, however, although well established as a state practice before UNCLOS,[72] is subject to a number of constraints, such as continuousness, non-interruption, and halting at the territorial sea of foreign coastal states.[73] Right of visit, therefore, permits enforcement action to be taken against vessels engaged in certain kinds of activity while navigating on the high seas, but the right of hot pursuit allows for the pursuit unto the high seas of vessels suspected of having violated laws within a coastal state's national jurisdiction.[74]

In addition to the two major exceptions of right of visit and hot pursuit, exclusive flag State jurisdiction is tempered in three other situations, wherein non-flag States are given leeway to regulate the high seas activity of foreign vessels.[75] These include specific treaties, such as those regulating illicit traffic in narcotics, self-defense, and counter-migration efforts.[76] The major and minor exceptions to exclusivity are narrow and leave a broad responsibility to flag states, which are left to regulate all the other high seas activities of their flagged vessels.

III. M/V NORSTAR Judgment

A. Facts

It is helpful to keep in mind the history of high seas regulation and the current state of international law pertaining to the high seas when looking at the facts of the NORSTAR Case. The M/V NORSTAR was a Panamanian-flagged oil tanker that was owned by Intermarine & Co. AS ("Intermarine"), a company registered in Norway.[77] The vessel was chartered to a Maltese company, Nor Maritime Bunker, and between 1994 and 1998 was engaged in bunkering mega yachts with gasoil in the international waters of the Mediterranean Sea.[78] Rossmare International S.A.S ("Rossmare"), an Italian-registered company, acted as broker for the vessel and directed this bunkering activity.[79]

Italian fiscal police commenced an investigation into Rossmare and the M/V NORSTAR concerning the bunkering and concluded that the vessel was purchasing gasoil in Italy and selling it to European leisure boats in avoidance of tax duties.[80] Thereafter, the police began criminal proceedings against the president of Intermarine, the captain of the M/V NORSTAR, the owner of Rossmare, and five other individuals.[81] On August 11, 1998 the Public Prosecutor at the Court of Savona, Italy issued a Decree of Seizure calling for the M/V NORSTAR and the oil products on board to be seized as *corpus delicti*.[82] The Decree alleged that Rossmare was selling oil "in a continuous and widespread fashion" that it had purchased under tax exemption as ship's stores from warehouses in Livorno, Italy and Barcelona, Spain and that it evaded customs duties and taxes and committed tax fraud by selling this fuel oil to EU vessels.[83] The decree also alleged that the M/V NORSTAR was supplying this gasoil to mega yachts "exclusively moored at EU ports" and that, therefore, it knew that the oil would be used at a destination inconsistent with the one the tax exemption was intended for.[84]

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70 *Id.* at 164-65; UNCLOS, *supra* n. 5, art. 110(1):
> Article 110
> Right of visit
> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
> (a) the ship is engaged in piracy;
> (b) the ship is engaged in the slave trade;
> (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
> (d) the ship is without nationality; or
> (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

71 Rothwell & Stephens, *supra* n. 11, at 176; UNCLOS, *supra* n. 5, art. 111.

72 *Id.* at 176; *see also* O'Connell, 2 The International Law of the Sea, 1076 n.35 (1982) ("The right of a State to pursue foreign ships on the high seas which have offended its laws within its national jurisdiction was well-established in the nineteenth century, although the derivation of the right is obscure.").

73 Rothwell & Stephens, *supra* n. 11, at 176; UNCLOS, *supra* n. 5, art. 111.

74 *Id.* at 176.

75 Tanaka, *supra* n. 59, at 173.

76 *Id.*

77 *NORSTAR*, at para. 69.

78 *Id.*

79 *Id.*

80 *Id.* at para. 70.

81 *Id.*

82 *Id.* at para. 71.

83 *Id.* at para. 72.

84 *Id.* at para. 73.

On the same day, August 11, 1998, the Office of the Prosecutor at the Court of Savona sent a request for assistance, in accordance with relevant EU conventions, to the Office of the Public Prosecutor of the Court of Palma de Mallorca to enforce the seizure decree.[85] Thereupon, the Spanish authorities seized the M/V NORSTAR on September 25, 1998 as the vessel was "moored in the bay of La Palma," which is within the territorial waters of Spain.[86] Throughout 1999 requests were made by the shipowner for release of the vessel, while Italian authorities gave notice through their embassy in Norway that release would be possible upon payment of bail or guarantee of 250 million lire.[87] On January 20, 2000, the Public Prosecutor issued indictments against the eight individuals involved in the bunkering activity.[88]

On March 14, 2003, however, the Court of Savona acquitted all of the accused, stating that "whoever organizes the supply of fuel offshore…does not commit any offence even though he/she is aware that the diesel fuel is used by leisure boaters sailing for the Italian [coasts]."[89] Subsequently, the Court of Savona ordered the revocation of the seizure of the M/V NORSTAR and a return to its owner and requested that the Court of Palma de Mallorca carry this release order into effect.[90] Later that month, the Court of Savona informed Intermarine of the release order and of the thirty day withdrawal deadline to avoid a judge-ordered sale of the vessel.[91] The parties disagree as to whether effective notice was given to the shipowner concerning the release of the vessel, but the shipowner did not take the vessel back into possession.[92] Following an unsuccessful appeal by the Public Prosecutor in Savona and exchanges between Spain and Italy concerning the fate of the unclaimed M/V NORSTAR, the Port Authority of the Balearic Islands sold the vessel at public auction to a waste management company which removed it from port for conversion into scrap.[93]

Subsequently, in December 2015, the Republic of Panama ("Panama") applied to ITLOS and instituted proceedings against the Italian Republic ("Italy") derived from the dispute "between the two states concerning the interpretation and application of the United Nations Convention on the Law of the Sea … in connection with the arrest and detention by Italy of mv Norstar, an oil tanker registered under the flag of Panama."[94] Panama claimed that Italy violated the right of its vessels to enjoy the freedom of navigation on the high seas, as embodied in UNCLOS and international law, by ordering and maintaining the arrest of the M/V NORSTAR and that in doing so Italy also demonstrated a lack of good faith.[95] In response Italy filed Preliminary Objections the following March disputing the jurisdiction of ITLOS over the matter and the admissibility of the claim.[96] ITLOS issued its judgment on Preliminary Objections in November 2016 finding that Articles 87 and 300[97] of UNCLOS were "relevant to the present case," which finding asserts ITLOS's jurisdiction over the matter and the admissibility of the case.[98] Finally, on April 10, 2019 ITLOS found in favor of Panama, declaring that Italy's seizure of the M/V NORSTAR violated Panama's right

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85 *Id.* at para. 74.
86 *Id.* at para. 75.
87 *Id.* at para. 76-8.
88 *Id.* at para. 79.
89 *Id.* at para. 80.
90 *Id.* at para. 80-1.
91 *Id.* at para. 82.
92 *Id.* at para. 82-3.
93 *Id.* at para. 84-6.

94 *Id.* at para. 1.

95 *Id.* at para. 63-4; Panama's claim relies on UNCLOS art. 33 (Contiguous zone), art. 73 (Enforcement of laws and regulations of the coastal state), art. 87 (Freedom of the high seas), art. 111 (Right of hot pursuit), art. 226 (Investigation of foreign vessels), and art 300 (Good faith and abuse of rights).

96 *Id.* at para. 17; M/V "NORSTAR" (Panama v. Italy), Case No. 25, Preliminary Objections, Judgment of November 4, 2016, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Preliminary_Objections/C25_jJudgment_04.11.16_orip.pdf.; UNCLOS, *supra* n. 5, art. 294:

> Article 294
> Preliminary proceedings
> 1. A court or tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine proprio motu, whether the claim constitutes an abuse of legal process or whether prima facie it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case.
> 2. Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time-limit within which they may request it to make a determination in accordance with paragraph 1.
> 3. Nothing in this article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure

97 UNCLOS, *supra* n. 5, art. 300:

> Article 300
> Good faith and abuse of rights
> States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

98 *NORSTAR*, para. 101-3; *see also* M/V "NORSTAR" (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Rep. 2016, p. 44, at p. 73, para. 122.

to the freedom of the high seas contained in paragraphs 1 and 2 of UNCLOS article 87.[99]

B. Basis of Decision

The main focus of ITLOS's ruling was Article 87(1).[100] As a threshold and determinative question, the Tribunal had to consider whether the seizure of the M/V NORSTAR concerned the vessel's activities on the high seas or crimes allegedly committed in Italian territory or both.[101] Italy argued that the criminal proceedings and seizure of the M/V NORSTAR did not concern the vessel's bunkering activity on the high seas but rather alleged evasion of customs duties, tax evasion and smuggling in Italian territory.[102] The Decree of Seizure, moreover, was not a challenge to high seas activity but was issued because the vessel was the *corpus delicti* of the alleged series of tax evasion and smuggling crimes.[103] Therefore, the scope of Italian legislation, which underlay the Decree the Seizure, was "strictly territorial."[104]

The Tribunal disagreed and pointed to Italy's letter rogatory requesting the seizure of the M/V NORSTAR as evidence.[105] In the letter Italy requested execution of the Decree of Seizure based on three operational elements, namely that the M/V NORSTAR purchased and loaded tax exempt gasoil in an Italian port, the tanker then bunkered megayachts outside Italy's territorial sea, and the megayachts entered Italian ports without declaring the gasoil.[106] Although the first and third elements did not involve extraterritorial activity, the Tribunal observed that the bunkering activity took place beyond the Italian territorial sea and upon the high seas.[107] Ultimately, the Tribunal found that the seizure of the M/V NORSTAR concerned both alleged crimes perpetrated in Italian territory and bunkering activity on the high seas.[108] The high seas bunkering, in the Tribunal's view, formed "not only an integral part, but also a central element, of the activities targeted by the Decree of Seizure and its execution."[109]

As the Tribunal notes, bunkering on the high seas is an activity included under freedom of navigation.[110] Even though Italy did not physically interfere with the M/V NORSTAR on the high seas, the application of Italian criminal and customs laws to the vessel's bunkering activity could produce a "chilling effect" on such activity and, regardless, could constitute a breach of the freedom of navigation.[111] Enforcement in internal waters, such as the arrest of the M/V NORSTAR in the Bay of Mallorca, was still an extraterritorial application of law that violated the principles of UNCLOS Article 87.[112]

Secondly, the Tribunal considered Panama's claim that Italy breached the "due regard" clause contained in UNCLOS Article 87(2).[113] This provision, as noted above, requires States Parties to have due regard for other States while exercising the freedom of the high seas.[114] Because the dispute in this case involved only the M/V NORSTAR's navigation of the high seas and did not concern Italy's usage of high seas freedoms, the Tribunal unanimously found that Article 87(2) was inapplicable to this case.[115]

Finally, the Tribunal assessed Panama's claim that Italy violated the "good faith" clause of Article 300.[116] The claim was based on a broad reading of Article 87 and the contention that Italy, by impeding the right of free navigation of the M/V NORSTAR, did not fulfill its Article 87 duties, which action showed a lack of good faith and invoked Article 300.[117] The Tribunal referenced the prior decision in the M/V LOUISA case, which established that "article 300 of the Convention cannot be invoked on its own," and reiterated that a State Party invoking Article 300 must establish a link between that article and a violation of another part of the Convention.[118] Panama's claim that "a breach of article 87… necessarily entails the breach of article 300" was insufficient.[119] Ultimately, the Tribunal found no violation of Article 300 because its finding, above, that Italy did not

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99 *Id.* at Para. 469.
100 Collins, *supra* n. 6, at 673.
101 *NORSTAR*, para. 153.
102 *Id.* at para. 160-62.
103 *Id.* at para. 161.
104 *Id.* at para. 164.
105 *Id.* at para. 166.
106 *Id.*
107 *Id.*
108 *Id.* at para. 186.
109 *Id.*
110 *Id.* at para. 219 (citing M/V "VIRGINIA G" (Panama v. Guinea-Bissau), Judgment, ITLOS Rep. 2014, p. 4 at p. 70, para. 223).
111 *Id.* at para. 223-4.
112 *Id.* at para. 226.
113 *Id.* at para. 231.
114 *Id.*; UNCLOS, *supra* n. 5, art. 87(2).
115 *Id.*
116 *Id.* at para. 232.
117 *Id.* at para. 236-7.
118 *Id.* at para. 241 (referencing M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Case No. 18 Judgment of May 28, 2013, Para. 137, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_merits/C18_Judgment_280513.pdf.).
119 *Id.* at para. 243.

violate the due regard principle of Article 87(2) meant there was no contention that Italy committed an abuse of rights under Article 300.[120]

C. Award

Having determined that Italy breached UNCLOS Article 87(1), the Tribunal turned to the assessment of reparations owed to Panama.[121] Citing its prior decision in the M/V "SAIGA" (No. 2) Case, the Tribunal stated that under international law reparations may take many forms, including restitution in kind and compensation.[122] Because restitution of the M/V NORSTAR was no longer possible, the Tribunal proceeded to the calculation of compensation owed by Italy.[123] Finding that only "damage directly caused by the arrest and detention of the M/V 'NORSTAR'"[124] was compensable and that no such damage could have been caused after March 26, 2003,[125] when the shipowner acknowledged receipt of notice that the vessel could be collected, the Tribunal ultimately awarded Panama US $285,000 plus interest for the loss of the tanker.[126] This was far less than the amount of damages requested by Panama, which exceeded US $50 million,[127] and may have reflected a "lack of sympathy for Panama's position" derived from its failure to provide suitable evidence and the lengthy delay it took before initiating proceedings.[128]

D. Dissent of Judges Cot, Pawlak, Yanai, Hoffman, Kolodkin and Lijnzaad and Judge Ad Hoc Treves

The twenty-one judges that make up ITLOS are each nominated by States Parties to UNCLOS and elected to a nine year term by a two-thirds majority.[129] Every three years elections for the positions of one-third of the judges are held at a meeting of States Parties in New York.[130] These judges are "elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea."[131] In the instant case, six of these highly qualified judges, and an additional judge ad hoc, strongly disagreed with the majority's judgment and issued a poignant joint dissent.[132]

The dissenters asserted that Article 87(1) was not applicable to this case, and that even if it was, it was not breached by Italy's actions.[133] The main thrust of their argument is that the proposition that Articles 87 and 92 combine to entirely foreclose the possibility of non-flag States applying their prescriptive criminal jurisdiction to high seas activity is not supported by the text of UNCLOS, its *travaux préparatoires*, other international treaties, customary international law, or the practice of States Parties.[134] The contrary proposition, moreover, is supported by highly regarded scholars of the law of the sea whose research establishes that assertions of prescriptive jurisdiction over unlawful activity on the high seas is not prohibited to non-flag States.[135]

The issue of a possible breach of Article 87 was relevant for the determination of whether the Tribunal had jurisdiction, but the relevance of the article is not in itself sufficient proof that Italy breached it and in fact "targeted and criminalized the bunkering activities of the M/V NORSTAR".[136] Italy never criminalized high seas bunkering and only exercised jurisdiction in this case over the crimes of tax evasion and smuggling.[137] The dissenters state that:

> It is widely recognized that a State may extend its prescriptive criminal jurisdiction to conduct beyond its territory when a constituent element of an alleged crime has occurred in its territory or where there is a sufficient connection to it. It may do so, in particular, if the alleged crime, of which the conduct is a part, originated in its territory, or if it was completed in its territory

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120 *Id.* at para. 307.
121 *Id.* at para. 309.
122 *Id.* at para. 319 (quoting M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Rep. 1999, p. 10, at p. 65, para. 171).
123 *Id.* at para. 320-22.
124 *Id.* at para. 335.
125 *Id.* at paras. 357, 370.
126 *Id.* at para. 462.
127 *Id.* at para. 386.
128 Collins, *supra* n. 6, at 674.
129 General Information, International Tribunal for the Law of the Sea, https://www.itlos.org/general-information/, (last visited April 6, 2020).
130 *Id.*
131 *Id.*
132 M/V "NORSTAR" (Panama v. Italy), Case No. 25, Joint Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin and Lijnzaad and Judge *ad hoc* Treves, April 10, 2019, para. 1, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Judgment/C25_DO_joint.pdf [hereinafter NORSTAR Dissent].
133 *Id.* at para. 13.
134 *Id.* at para. 19.
135 *Id.* at para. 19 (referencing A. Proelss, United Nations Convention on the Law of the Sea. A Commentary 700-01 (1st ed. 2017) and G. Gidel, 1 Le Droit international public de la mer: le temps de paix 261 (reprt. 1981)).
136 *Id.* at para. 27.
137 *Id.* at para. 21.

> and, at least in some cases, when the alleged crime produces harmful effects in the State's territory.[138]

Here, the alleged crime was tax evasion, which began in Italian territory, where the fuel was purchased under false pretenses by the M/V NORSTAR; was completed in Italian territory when the non-declared fuel returned to Italian waters in megayachts; and had harmful financial effects in Italy in the form of unpaid taxes.[139] Therefore, there was sufficient connection between the M/V NORSTAR's activity and the territory of Italy to justify Italy in its exercise of prescriptive criminal jurisdiction in this case.[140]

Moreover, the dissent claims that the question whether Italy exercised "territorial" or "extraterritorial" jurisdiction in this case is irrelevant.[141] It was tax crimes and not high seas activity that was targeted, and the M/V NORSTAR was seized, after it voluntarily entered internal waters, as an instrument and *corpus delicti* of those crimes.[142] Finally, the dissenters close with the argument that prescriptive criminal jurisdiction is appropriate "not when it is justified or allowed by international law . . . . but when it is not prohibited by international law…."[143] In short, Italy's issuance and request of execution of the Decree of Seizure against the M/V NORSTAR was made "in conformity with international law."[144]

IV. The M/V NORSTAR Judgment is Inconsistent with the Freedom of High Seas Navigation

A. Tribunal's Reading of Article 87(1) is too broad

The Tribunal's judgment in this case and application of UNCLOS Article 87 is overly broad and inconsistent. As discussed at length above, this provision of the Convention guarantees the right of freedom of navigation on the high seas.[145] The M/V NORSTAR, however, was seized while at anchor after having voluntarily entered the internal waters of Spain.[146] Common sense suggests that it is highly questionable whether freedom of navigation applies to this case at all. As Italy itself argued, even if we assume *arguendo* that it applied its prescriptive jurisdiction extraterritorially, "without a concrete interference with the freedom of navigation, this conduct would not be in breach of article 87."[147] The seizure of an anchored vessel in internal waters is an infirm basis for a claim invoking high seas rights of free navigation.

The dissent takes a much more reasonable view of the matter, and their view is clearly correct that Article 87 is not applicable to this case. Even two judges from the majority acknowledged in the Preliminary Objections stage, that no enforcement action was taken against the M/V NORSTAR that prevented the free movement of the vessel on the high seas.[148] It was not seized on the high seas, so its movement thereon was not interfered with by Italy. Moreover, there is no basis for the majority's judgment in international law,[149] and its broad application of the freedom of high seas navigation is inconsistent with the historical development of that principle. The Grotian concept that ships are free to navigate in commerce on the high seas because those waters are unpossessable and open to all States would likely not extend its protections to a vessel suspected of criminal activity lying voluntarily in internal waters.

B. Application of Article 92 is Flawed

The Tribunal's judgment also gives a broad reading of Article 92 when it asserts that the exclusive jurisdiction of the flag state is an "inherent component of the freedom of navigation."[150] According to this interpretation, the flag State's exclusive jurisdiction "prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas."[151] This

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138 *Id.* at para. 31 (citing as examples James Crawford, Brownlie's Principles of Public International Law, at 458-59 (8th ed. 2012); Cedric Ryngaert, Jurisdiction in International Law, at 78-79 (2nd ed. 2015); Christopher Staker, Jurisdiction, International Law, at 297-98 (5th ed. 2018).

139 *Id.* at para. 32.

140 *Id.* at para. 33.

141 *Id.* at para. 34.

142 *Id.* at para. 35.

143 *Id.* at para. 36 (citing "LOTUS", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 19).

144 *Id.*

145 *See* UNCLOS, *supra* n. 5, art. 87.

146 *NORSTAR*, at para. 75.

147 *Id.*, at para. 207; *see also id.* at para. 208 ("According to Italy, article 87 does not concern territoriality or extraterritoriality, but rather 'interference with navigation, as simple as that; and none happened here, in any, including the slightest, form.'").

148 *NORSTAR* Dissent, at para. 15 n. 30 (quoting M/V "NORSTAR" Case (Panama v. Italy), Preliminary Objections, Joint Separate Opinion of Judges Wolfrum and Attard, para. 38) ("[A]rticle 87 protects against enforcement actions undertaken by a State different from the flag State which hinder the freedom of movement of the vessel concerned. In this case such an enforcement action on the high seas did not take place.").

149 *See id.* at para. 19.

150 *NORSTAR*, at para. 225.

151 *Id.*

reasoning, however, is inapposite to the facts of the case because Italy did not extend its prescriptive jurisdiction to *lawful* activities conducted on the high seas but rather to the unlawful activity of tax evasion and smuggling of gasoil. Italy acted within its rights by exercising concurrent prescriptive jurisdiction over activity that violated its criminal law.

Rather than an "inherent component" of the freedom of navigation, exclusive flag state jurisdiction is a corollary to high seas navigation.[152] This jurisdiction plays a "dual role."[153] It guarantees that vessels on the high seas retain freedom of activity, and it ensures that those vessels, through the flag State's responsibility, comply with national and international laws pertaining to their activities.[154] The Tribunal's application here of the exclusive flag state provision in Article 92, therefore, is flawed because the high seas activity of the M/V NORSTAR was not the target of the vessel's arrest and the vessel's compliance with regulations was not at issue. Italy seized the M/V NORSTAR as the *corpus delicti* of the crime of land-based tax fraud.[155]

Additionally, the Tribunal's judgment contradicts the usual approach in international law that recognizes exclusive flag State jurisdiction only in relation to enforcement activity against vessels on the high seas and not in the realm of legislation. The exclusivity of flag state enforcement jurisdiction is itself not actually exclusive. It is subject to many physical exceptions, including the right of visit, hot pursuit, and exceptional measures. Thus, it seems unreasonable for ITLOS to apply exclusivity rigidly to the seizure of the M/V NORSTAR. Moreover, as the following section will show, since the exercise of prescriptive jurisdiction over high seas criminal activity is a custom of the international law of the sea, Italy was also acting within accepted norms by prosecuting a tax evasion scheme that had a high seas element.

C. Judgment is Contrary to Internationally Accepted Norms

As stated above, it is an internationally accepted norm that coastal states have certain limited powers over the activities of vessels on the high seas. One of the leading scholars on the law of the sea, Douglas Guilfolye, has written that "[w]hile no State may extend its sovereignty over the high seas, '[t]he absence of any authority over ships' sailing there 'would lead to chaos.'"[156]

The device of giving nationality to ships and providing for flag State jurisdiction is meant to promote order, but there is a fundamental difference between order achieved through enforcement jurisdiction and that reached through prescriptive jurisdiction. Only the former is given exclusively to the flag State in the realm of high seas activity.[157] For example, States are allowed to prescribe laws to govern the actions of their citizens, and "flag State jurisdiction does not prevent other States from attaching consequences to the conduct of their nationals on the high seas, even when aboard foreign vessels."[158] From prescriptive jurisdiction over citizens' conduct, we can analogize that Italy's application of its criminal code to the smuggling of its tax exempt gasoil was not without the sanction of internationally accepted States practice. The Italian criminal and tax codes at issue are lawful exercises of prescriptive, rather than enforcement, jurisdiction and do not conflict with principles of flag State jurisdiction on the high seas.

Additionally, the idea of the high seas as a commons supports the theory that all States can there "project their authority to varying extents" and that there is a possibility for States' prescriptive jurisdiction over high seas activity to run concurrently.[159]

We find an example of this proposition in UNCLOS Article 117, which says that States have an obligation to take necessary measures "for their respective nationals" to conserve high seas living resources.[160] A model of this concept is the common practice of coastal States regulating fishing activity beyond their territory and upon the high seas through Regional Fisheries Management Organizations. If States are allowed to exercise control of high seas activity in this realm, it is a small leap to recognize the reasonableness of Italy's extension of its criminal tax and smuggling laws to high seas bunkering activity. This is especially the case considering that Italy did not enforce these laws against the M/V NORSTAR while the vessel was upon the high seas. As Guilfoyle, again, writes, "Absent…treaty law restrictions, any State with an ordinary jurisdictional nexus to conduct on the high seas may assert jurisdiction. The only gen-

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152 Tanaka, *supra* n. 57, at 157.
153 *Id.* at 153.
154 *Id.*
155 *NORSTAR*, at para. 35.
156 Douglas Guilfoyle, The High Seas, The Oxford Handbook of the Law of the Sea, at 209 (1st ed. 2015).
157 *Id.*
158 *Id.*
159 *Id.*
160 UNCLOS, *supra* n. 5, art. 117.

eral prohibition is upon States exercising *enforcement* jurisdiction over vessels on the high seas."[161]

V. Potential Ramifications

A. Pending Italian Litigation

Italy's line of argument in this case has been described as cautious, and it had reason to be tentative in its proposals.[162] Italy is currently involved in a dispute with India following an incident where two Italian marines shot and killed two Indian fishermen, allegedly mistaking them for pirates, in international waters off the Indian coast.[163] In its Preliminary Measures argument before ITLOS in that case, the ENRICA LEXIE Incident, Italy claims that the arrest of the two marines violated its right to the freedom of navigation on the high seas and its exclusive jurisdiction as the flag State.[164] This is essentially the same argument that Panama offered in the M/V NORSTAR case and to which Italy there objected. The ENRICA LEXIE case will be an opportunity to see whether ITLOS continues to uphold the reasoning of the instant decision. It is ironic that a similar ruling would benefit Italy in the later case, but the rationale and application of Article 87 in that case is likewise inapposite. The principle of the freedom of high seas navigation is not strong enough to overpower the interest of sovereign states to punish those who murder its citizens, even when the death occurs on the high seas.

B. Ability of Coastal States to Enforce Laws and Regulations

If ITLOS continues its rigid and broad application of UNCLOS Articles 87 and 92, the result could be far reaching and seriously hamper the ability of coastal states to enforce domestic law. It is recognized in the current international law of the sea that coastal states have domestic interests that are affected by high seas activity. Fishing is a prime example, where overfishing of highly migratory fish stocks on the high seas can seriously damage the fish stocks available to fishermen within territorial waters. Additionally, marine pollution that takes place on the high seas can travel with currents and tides and eventually have a harmful effect on territorial waters, resources, and coastal lands.

States are given the right and means to protect themselves from harmful high seas activity. States engaged in fishing certain fish stocks are encouraged to create Regional Fisheries Management Organizations to regulate exploitation of those stocks on the high seas.[165] They are able to take measures such as inspecting and confiscating the fishing gear of illegal, unreported, and unregulated ("IUU") fishing vessels.[166] Pollution is also policed domestically through Port State controls, whereby Port States are able to take measures such as requiring unseaworthy vessels in danger of causing pollution to proceed to nearby shipyards for repair.[167] Similarly, UNCLOS "gives port states the ability to take action against vessels for breaches of international pollution standards wherever these breaches take place,"[168] including on the high seas.

These enforcement activities are essential to the health and safety of Coastal States, but ITLOS's judgment in the M/V NORSTAR case calls into question the continued ability of States to exercise these rights. If Coastal States cannot enforce regulations against detrimental activity and are left with no recourse but application to flag States for enforcement of these rules, the environmental consequences would be far reaching. ITLOS would do well to consider these potential after-effects of this judgment before such hinderance is felt by coastal states.

C. Tribunal Selection and the Future of ITLOS

The Tribunal should consider its own future and the damage to credibility that a strange decision such as this could bring about. UNCLOS Article 287 provides for choice of procedure for disputes arising under the Convention.[169] States Parties upon "signing, ratifying or acceding to th[e] Convention or at any time thereafter" are free to elect from among four means of dispute settlement including ITLOS, the International Court of Justice, an arbitration tribunal, or a special arbitration tribunal.[170] This has been called a "cafeteria" style approach to dispute settlement.[171] An unorthodox and unprecedented ruling, such as the M/V NORSTAR judgment, may discourage parties from selecting ITLOS

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161 *Id.* at 210.

162 *See* Collins, *supra* n. 6, at 675.

163 The "Enrica Lexie" Incident (Italy v. India), Case No. 24, Order of 24 August 2015, Paras. 39, 40, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/24_published_texts/2015_24_Ord_24_Aug_2015-E.pdf.

164 *Id.*

165 UNCLOS, *supra* n. 5, art. 118.

166 *See* Rothwell & Stephens, *supra* n. 11, at 470.

167 UNCLOS, *supra* n. 5, art. 219.

168 Rothwell & Stephens, *supra* n. 11, at 383.

169 UNCLOS, *supra* n. 5, art. 287.

170 *Id.*

171 Rothwell & Stephens, *supra* n. 11, at 483 (citing Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 International and Comparative Law Quarterly 37, 40 (1997)).

to resolve their disputes in the future. Since States are afforded such freedom in selection of tribunals, there is little incentive to risk an unpredictable application of the well-established provisions and concepts embodied in UNCLOS.

It is arguable that this effect is already being felt. There are currently only two cases pending before ITLOS.[172] On the other hand, of the seventeen cases pending before the International Court of Justice currently, four are maritime disputes that could have been submitted to ITLOS.[173] Perhaps States Parties are already suspicious of ITLOS's ability to issue predictable, reasonable judgments. Furthermore, when ITLOS, the tribunal specifically created by UNCLOS for the resolution of disputes arising under the Convention, issues judgments that surprise and confuse the international community, it provides a disincentive to nations, such as the United States, who are not yet parties to the Convention to become members. Will these nations become more reluctant to bind themselves to an agreement that is not susceptible to accurate, predictable interpretation by its own tribunal?

VI. Conclusion

No other international tribunal has issued a direct ruling on the principle of the freedom of navigation in international waters.[174] Unfortunately, it appears that the pioneer judgment got it wrong. ITLOS applied an overly broad interpretation of UNCLOS Article 87 and a too-narrow view of Article 92 to the facts of the M/V NORSTAR Case. No provisions of the Convention itself nor customs of international law supports a conclusion that the seizure of a vessel at anchor in internal water for engaging in an allegedly criminal tax evasion scheme violates that vessel's right to free navigation on the high seas. This judgment has the potential to reverberate through the law of the sea and effect not only the future understanding of UNCLOS but also the credibility of ITLOS, the Tribunal specifically created to interpret the Convention. It would be sensible to re-examine and continue to critique the Tribunal's reasoning here before it is replicated in other judgments. As one commentator has said, it is clear "that the M/V "NORSTAR" case will not be the last word on the thorny topic of the exclusivity of flag state jurisdiction for criminal acts occurring on the high seas."[175] It will hopefully not be the last word on the freedom of high seas navigation either.

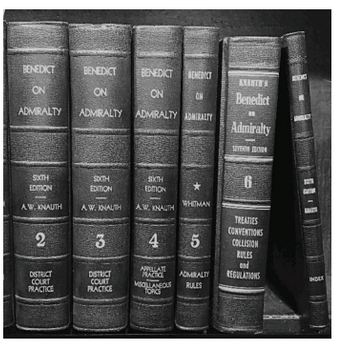
[172] List of pending case and current status, International Tribunal for the Law of the Sea, https://www.itlos.org/en/cases/docket/ (last visited April 1, 2020).

[173] Pending cases, International Court of Justice, https://www.icj-cij.org/en/pending-cases (last visited April 1, 2020).

[174] Collins, *supra* n. 6, at 673.

[175] *Id.* at 675.

Future Proctors



The Promise Of Autonomous Shipping Leaves The IMO's Scoping Exercise In Its Wake

By Ilana G. Smirin*

I. INTRODUCTION

Autonomous shipping sounds futuristic and farfetched to some, but in truth, the idea has been circulating for over a century.[1] In 1898, Nikola Tesla demonstrated a remote-controlled boat, marking a race of robots he foresaw bringing about a second industrial revolution.[2] After someone in the crowd suggested the applicability of this invention to warfare, Tesla retorted "You do not see there a wireless torpedo; you see there the first race of robots, mechanical men which will do the laborious work of the human race."[3] His vision of the future, this so-called second industrial revolution, has largely rung true as artificial intelligence and autonomy disrupts every industrial sector, including the maritime shipping industry.[4] Autonomous shipping will transform the growing shipping industry which is significant because estimates show that 90% of the world's trade is moved via ships.[5]

When it comes to autonomous shipping, the focus is mostly on the potential benefits of autonomy.[6] The potential benefits espoused include streamlined efficiency, increased safety, reduced costs, and fewer environmental hazards, all of which sounds promising.[7] The end goal for autonomous shipping is to have largely unmanned vessels, which gives rise to a unique set of challenges.[8] Currently, there is a gaping hole in the uniformity and enforcement of regulations for autonomous shipping that the International Maritime Organization ("IMO") hopes to remedy by undertaking a regulatory

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1 *See* Stephanie Guerra, *Ready About, Here Comes AI: The Potential Maritime Law Challenges for Autonomous Shipping*, 30 USFMLJ 69, 70 (2018) (discussing the advent of autonomous shipping).

2 *Id.*

3 Margaret Cheney, Tesla: Man Out Of Time, 81 (1981).

4 Guerra, *supra* n. 1; *see* Varsha Saraogi, How will autonomy shape the UK shipping industry?, Ship Technology (July 20, 2019), https://www.ship-technology.com/features/how-will-autonomy-shape-the-uk-shipping-industry/.

5 Prableen Bajpai, Autonomous Shipping: Trends and Innovators In A Growing Industry, Nasdaq: Technology (Feb. 18, 2020), https://www.nasdaq.com/articles/autonomous-shipping%3A-trends-and-innovators-in-a-growing-industry-2020-02-18.

6 Guerra, *supra* n. 1.

7 *Id.*

8 *Id.*

scoping exercise.[9] Filling this hole is necessary for admiralty-focused international jurisprudence to function effectively in light of how far ahead this technology is compared to the existing regulatory frameworks.[10]

This comment will focus primarily on the progress of autonomous shipping: what the IMO is doing in their scoping exercise, what may be missing from the scoping exercise, and whether the IMO can adequately address an issue progressing faster than its surrounding regulation. However, it is not possible to fully address all of the issues arising with autonomous shipping. This comment will not address the legal status surrounding autonomous ships, such as whether they will be considered vessels or maintain a different legal status.[11] Instead this comment will focus on autonomous shipping's technological development, and how that affects the IMO's scoping exercise.

Part II of this comment will start with an overview of autonomous shipping and the IMO's scoping exercise including exactly what the scoping exercise is.

Part III will discuss what the flaws may be in the IMO's scoping exercises including what the IMO is potentially missing in their scoping exercise.

Part IV will discuss the benefits of autonomous shipping weighed against the disadvantages.

Part V will conclude with whether the IMO is truly prepared to deal with the issue of autonomy on the high seas.

II. OVERVIEW ON AUTONOMOUS SHIPS AND THE IMO

A. The Draw of Autonomous Shipping

In 2016, Mikael Makinen, President of the Marine Division of Rolls-Royce, declared "autonomous shipping is the future of the maritime industry. As disruptive as the smart phone, the smart ship will revolutionize the landscape of ship design and operations."[12] The profitability of automation in the shipping world is practically assured because globalization and international commerce is built on maritime trade.[13] In 2015, the United Nations ("UN") estimated that seaborne trade volume passed ten billion tons for the first time ever.[14] Maritime commerce is profitable and takes place on an unimaginably large scale. Shipping by sea, while slower than shipping by air, is advantageous because it is significantly cheaper than the alternative.[15] The maritime shipping industry is always pushing to lower operating costs to maintain their edge over shipping via the air.[16] Lower operating costs also helps the maritime shipping industry keep up with demand as international trade increases globally every year.[17] Therefore, the rise of autonomous ships is unsurprising because it will likely be a cheaper way of moving goods long term.[18] The expected decrease in cost is derived from multiple places, the most significant decrease coming from the reduction or elimination of salaries of crew members and the removal of the deckhouse (crew housing).[19] The removal of the deckhouse will make ships slightly more aerodynamic, and most importantly, it will allow more space for cargo.[20] Autonomous shipping's money-saving potential gives this technology real staying power.[21] Jouni Saarni, a leader in economics, stated that "[r]emote and autonomous ships have the potential to redefine the maritime industry and the roles of the players in it with implications for shipping companies, shipbuilders and maritime system providers[.]"[22] The potential of autonomous shipping to save the maritime industry millions of dollars has caused industry professionals to focus primarily on the benefits of autonomous shipping.[23] This leaves one wondering what the potential negative consequences are, and how well they are understood.

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9 *Maritime Autonomous Ships (MASS) and Framework Development Challenges*, GSDM: Emerging Issues (July 25, 2019), https://www.gsdm.global/2019/07/25/maritime-autonomous-surface-ships-mass-and-framework-development-challenges/.

10 *Id.*

11 *See generally* Craig H. Allen, *Determining The Legal Status of Unmanned Maritime Vehicles: Formalism vs Functionalism*, 49 JMARLC 477, 480 (2018).

12 Mikael Makinen, President-Marine, Rolls-Royce, Address at Helsinki's Finlandia Hall (Apr. 2016).

13 Jon Walker, *Autonomous Ships Timeline – Comparing Rolls-Royce, Kongsberg, Yara and More, EMERJ* (Nov. 22, 2019), https://emerj.com/ai-adoption-timelines/autonomous-ships-timeline/.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *See id.*

22 Jouni Saarni, Development Manager, Centre for Collaborative Research at the Turku School of Economics, Address at Helsinki's Finlandia Hall (Apr. 2016).

23 *See, e.g.,* Bajpai, *supra* n. 5; Walker, *supra* n. 13.

B. Definition of Autonomous Shipping, its Development, and Expected Use

The IMO defines Maritime Autonomous Surface Ships ("MASS') as ships that can operate independently of human interaction to a varying degree.[24] The phrase "varying degree" means that there are different degrees of autonomous ships, and contained within each degree are variable amounts of human input and interaction with the ship.[25]

There are two overarching categories: (1) fully autonomous ships operated without a crew, and (2) remote ships operated by a human from shore.[26] Within these two broad categories, there are multiple levels of both automation and remote control.[27] As a result, ships in the same broad category can function differently from one another.[28] This difference within levels raises logical questions about how regulations will be implemented when there are multiple sub-categories within each level. Various ships will require different technology depending on whether they are mostly autonomous, remotely controlled by humans, or some combination of the two.[29]

Some companies opt to build fully autonomous ships from scratch, however, the popular trend is to retrofit existing ships to transition them from manned to possessing some autonomous functions.[30] Retrofitting is cheaper, and it has created a niche market for shipping companies, looking to keep up with autonomous technology.[31] For example, there is now an opportunity for existing cargo ships to get retrofitted with autonomous technologies thanks to a tech start-up called Shone.[32] Shone's technology focuses on provide piloting assistance and detecting and preventing movement of other ships nearby.[33] Shone's successful business model proves companies are opting to retrofit rather than construct entirely new autonomous ships.[34] Companies like Shone are helping ease the world into autonomous shipping.[35]

The first autonomous ships will be used inland or in coastal areas because the water is calmer, routes are simple, and traffic is minimal.[36] This allows autonomous ships to test the waters and make sure they function properly before venturing into less idyllic conditions.[37] A prime candidate for an early venture for autonomous ships is a ferry because ferries cross smaller distances inland or along the coast, over simple routes, across fairly calm waters.[38] In fact, Rolls-Royce together with a Finnish ferry operator demonstrated the world's first fully autonomous ferry.[39] This ferry, named FALCO made its maiden voyage in Finland in December of 2018.[40] During FALCO's voyage the vessel detected objects, used collision avoidance procedures, and berthed automatically—all without any human intervention or crew.[41] These autonomous functions are attributed to advanced sensors courtesy of Rolls-Royce intelligence technology, which allows the ferry to instantaneously construct an image of its surroundings.[42]

Additionally, there is an inland electric container ship, YARA BIRKELAND, that began as a manned ship in 2018.[43] YARA BIRKELAND carries chemicals and fertilizer from production plants to nearby town, and the ship follows short specific paths.[44] Over time, YARA BIRKELAND will slowly transfer more operations and responsibility to its AI system (artificial intelligence that is reactive based on the data gathered from sensors and

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24 Press Release, IMO, IMO takes First Steps To Address Autonomous Ships (May 25, 2018) (on file with the IMO).

25 *Id.*

26 *Id.*

27 Bernard Marr, *The Incredible Autonomous Ships Of The Future: Run By Artificial Intelligence Rather Than A Crew*, Forbes (June 5, 2019), https://www.forbes.com/sites/bernardmarr/2019/06/05/the-incredible-autonomous-ships-of-the-future-run-by-artificial-intelligence-rather-than-a-crew/#664eec7b6fbf.

28 *Id.*

29 *Id.*

30 *Id.*

31 *See id.*

32 *Id.*

33 *Id.*

34 Scott Martin, *AI Makes a Splash: Parisian Trio Navigates Autonomous Cargo Ships*, NVIDIA (Dec. 10, 2018), https://blogs.nvidia.com/blog/2018/12/10/ai-shone-autonomous-cargo-ships-cma-cgm-ycombinator-gpu-robotics/.

35 Marr, *supra* n. 27.

36 *Id.*; *see* Walker, *supra* n. 13.

37 Marr, *supra* n. 27.

38 *Id.*

39 *Id.*

40 *Id.*

41 Press Release, Rolls-Royce, Rolls-Royce Statement On The World's First Fully Autonomous Ferry (Dec. 3, 2018), https://www.rolls-royce.com/media/press-releases/2018/03-12-2018-rr-and-finferries-demonstrate-worlds-first-fully-autonomous-ferry.aspx.

42 *Id.*

43 Walker, *supra* n. 13.

44 Dyllan Furness, *Autonomous ships are coming, and we're not ready for them*, Digital Trends: Emerging Tech (July 13, 2019), https://www.digitaltrends.com/cool-tech/autonomous-ships-are-coming/.

has a limited memory[45]), and beginning this year, the ship will start operating remotely.[46] The ultimate goal is for YARA BIRKELAND to be fully autonomous by 2022 and upon doing so, it will be one of the first of its kind.[47] This ship, like the ferry FALCO, will only travel short well-defined routes across calm waters, emblematic of the voyages expected for early autonomous shipping.[48] Both FALCO and YARA BIRKELAND mark the beginning of autonomous shipping.[49]

The shipping world is looking beyond small ferries toward unmanned commercial shipping operations.[50] In May of 2019, the world's first unmanned commercial shipping operation occurred when an unmanned vessel transported a box of oysters from the United Kingdom ("UK") to customs officers in Belgium.[51] The vessel was successfully controlled by a remote control center.[52] This commercial shipping operation indicates just how quickly autonomous ships are moving beyond their expected early use and into more profitable commercial trade.[53] Whether the world is ready or not, autonomous ships are on the rise.[54] Organizations like the IMO are in the position of trying to respond and adjust to technology that is either in development or already in use.[55]

C. Why The IMO Is Examining Autonomous Shipping Now

When it comes to international shipping, the IMO, a specialized agency of the UN, is the ultimate authority when it comes to creating standards for safety, security, and the environment.[56] To fulfill that role, the IMO endeavors to create a regulatory framework for the shipping industry that is fair, effective, and universally adopted and implemented.[57] The IMO strives to both establish an even playing field for ship operators while also preventing ship operators from cutting corners through effective standardized regulations.[58] New innovative technology in the maritime sector is at the forefront of the IMO's examination when it comes to suggesting and implementing new global standards.[59] The IMO assembly, which notably includes China, the United States, and the UK, meets every two years to adopt a strategic plan for themselves that covers a six-year period.[60] The current strategic plan, covering 2018-2023, is focused on integrating new technologies into the regulatory framework.[61] This plan includes balancing the benefits of these new technologies against safety and security concerns, environmental impact, facilitation of international trade, potential costs to the maritime industry, and the impact on maritime personnel.[62]

D. What Is The Current Scoping Exercise By The IMO And What Is Included In The Exercise

In 2017, after various member states proposed it, the IMO's Maritime Safety Committee ("MSC") decided to include the MASS issue in their strategic plan by undertaking a scoping exercise.[63] A scoping exercise, while not clearly defined, means that the IMO is gathering all relevant information available about autonomous shipping and using it to locate gaps in the existing regulatory framework regarding autonomous ships.[64] The scoping exercise will also determine whether autonomous ships can or cannot fit neatly into the existing framework.[65]

Specifically, the IMO's scoping exercise will determine how the secure, safe, and environmentally conscious integration of MASS may be introduced into the IMO's instruments going forward.[66] This scoping exercise is expected to examine issues including the human element and its level of essentialness, safety, security, liability, interactions with ports, pilots, incident responses,

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45 *Brief guide to artificial intelligence in shipping*, Thetius, https://thetius.com/brief-guide-to-artificial-intelligence-in-shipping/ (last visited on Apr. 6, 2020).

46 Callum O Brien, *Key advantages and disadvantages of ship autonomy*, Safety4Sea: E-Navigation (Sept. 21, 2018), https://safety4sea.com/key-advantages-and-disadvantages-of-ship-autonomy/.

47 *Id.*

48 *Id.*; Rolls-Royce, *supra* n. 41.

49 *See* generally Rolls-Royce, *supra* n. 41; Marr, *supra* n. 27.

50 GDSM, *supra* n. 9.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 Int'l Maritime Org. [IMO], Introduction to IMO, http://www.imo.org/en/About/Pages/Default.aspx.

57 *Id.*

58 *Id.*

59 *Id.*

60 Int'l Maritime Org. [IMO], A.1110(30), Strategic Plan For The Organization For The Six-Year Period 2018 to 2023 (Dec. 6, 2017), http://www.imo.org/en/About/strategy/Pages/default.aspx; Int'l Maritime Org. [IMO], Member States http://www.imo.org/en/About/Membership/Pages/MemberStates.aspx, (last visited Apr. 6, 2020).

61 Int'l Maritime Org [IMO], Autonomous Shipping, http://www.imo.org/en/MediaCentre/HotTopics/Pages/Autonomous-shipping.aspx.

62 *Id.*

63 *Id.*

64 *Id.*; Kathryn Ehrich et al., How to do a Scoping Exercise: Continuity of Care 25 (2002).

65 GDSM, *supra* n. 9.

66 Int'l Maritime Org [IMO], Autonomous Shipping, *supra* n. 61.

and protection of the environment.[67] It is essential the IMO examine this issue because of how quickly autonomous shipping is developing.[68] While the IMO is conducting their scoping exercise, the MSC approved interim guidelines for autonomous ship trials since autonomous ship development does not stop while the IMO undertakes their scoping exercise.[69] The guidelines state that the trials must be conducted as safely as possible under the relevant instruments, and risks should be minimized.[70] Autonomous shipping technology will continue to progress, leaving the IMO's efforts to regulate in its wake.

The IMO contains different committees within their organization, each with their own roles and specific provisions to examine during the scoping exercise.[71] The IMO identified all of the instruments related to maritime safety and security, liability, and compensation that the committees may need to cover in the scoping exercise.[72] The bulk of the scoping exercise will be carried out by the MSC.[73] The instruments the MSC is examining include the International Convention for Safety and Maritime Security ("SOLAS"), the International Regulations for Preventing Collisions at Sea ("COLREG"), Search and Rescue (SAR), and more.[74] The Facilitation Committee is examining the Convention on Facilitation of International Maritime Traffic.[75] The Legal Committee is covering various conventions and protocols including those that cover bunker oil pollution, international funds for compensation from pollution, the carriage of passengers and luggage, salvage, and more.[76] Some conventions, including those relating to intervention on the high seas in instances of pollution, will be examined by the Legal Committee together with other IMO committees.[77]

After each committee identified the regulations they intended to reexamine, the MSC adopted a general framework and methodology for the scoping exercise.[78] The other committees, such as the Legal Committee, are following MSC's approach with slight adjustments to the framework and methodology as needed.[79]

The IMO's scoping exercise involves two main steps in their effort to address the changes autonomous ships will bring on a world-wide scale.[80] First, for each instrument relevant to the scoping exercise, specific provisions within each instrument will be identified and the committee's will determine whether they apply to MASS.[81] In determining whether the provisions apply, there are several options the committees have.[82] One option is that the provisions apply to MASS and they prevent MASS operations because of how the provisions are currently written.[83] Another option is the provisions apply to MASS and do not prevent MASS operations, so the provisions require no substantive action.[84] Yet another option is that the provisions apply to MASS and do not prevent MASS operations, but they do require amendments or clarification.[85] The last option is that the provisions are irrelevant to MASS operations.[86]

The first step is complicated by the fact that these ships have varying degrees of autonomy and each degree requires consideration when deciding the application of the provisions to MASS.[87] The IMO organized the levels of autonomy into four main degrees in an effort to facilitate the regulatory scoping exercise.[88] Degree one includes ships with automated processes and decision support, but there are workers aboard who will operate and control shipyard systems and functions.[89] Here, some operations are automated and unsupervised, however, workers are able to regain control at any point.[90] Degree two differs in that it refers to remotely controlled ships exclusively, but there are still workers aboard able to regain control if needed.[91] Degree three refers to remotely controlled ships akin to level two; however, there are no workers aboard, differentiating it from degrees one and two.[92] The final level, degree four, includes fully autonomous ships where the ship is able to make decisions and determine appropriate actions by itself without remote control or workers aboard.[93]

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67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.*
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.*

After the first step of the scoping exercise has been completed and all relevant provisions have been identified and reviewed, the IMO will begin the second step of the scoping exercise to determine on a practical level what those applications mean in regards to MASS.[94] As a result, the second step will focus on analyzing the best way to address MASS operations.[95] This analysis must take into account multiple factors including the human element, technology, and operational factors.[96] This analysis is expected to identify whether the existing instruments need amendments to account for MASS operations.[97] The analysis will also identify whether equivalences in the existing instruments are needed or if interpretations are necessary to properly address MASS operations.[98] The other option available as part of the analysis includes developing entirely new instruments to fully integrate MASS operations.[99] The last option is that none of the other options are needed for implementing MASS operations because the instrument is currently adequate.[100] The IMO is hoping to complete this ambitious project in 2020.[101]

III. THE PROBLEMS FACING THE IMO'S SCOPING EXERCISE

A. The IMO Is Starting From Behind

Technology has leapt ahead of the much-needed legal frameworks that are meant to regulate it.[102] Autonomous shipping technology has progressed for nearly a decade; most automation technology existed well before the IMO started their scoping exercise in 2018.[103] The current framework of maritime law including international treaties was created before autonomous ships were envisioned as a distant possibility.[104] Professor Brennan, a maritime law expert, stated, "[t]he legal regime is decades, if not a century-and-a-half out of date… As unmanned ships were never contemplated until recently, legislation says manning is essential for having a ship that is seaworthy, classified, and authorized to operate[.]"[105] This raises concern and leaves one with the question of whether the IMO's scoping exercise can catch up with autonomous shipping. The answer to this question may depend on whether the IMO takes a conventional approach to their regulatory exercise because conventions may no longer be the answer.[106] The conventional approach usually entails separating security issues from disaster risk factors, when in fact, a paradigm shift is necessary because the security and risk landscape is changing with the technology.[107] The regulatory approach must combine all of the relevant factors and integrate them into the relevant regulatory frameworks and expand those frameworks when necessary.[108]

The MSC believes that truly autonomous ships operating with no human operator, either aboard or on land, are not a realistic goal at this time.[109] As a result, the IMO is not fully including that scenario in the scoping exercise.[110] However, many companies like Shone are actively developing this technology.[111] The IMO's purposeful ignorance of this issue raises the question of when the IMO will resolve this question, because this technology is coming.[112]

B. The IMO's Levels of Autonomy Compared With Other's Levels of Autonomy And The Significance of The Difference

The IMO pointed out that a single autonomous ship can operate with multiple degrees of autonomy within a single voyage.[113] This complicates the regulatory process because this means ships can alternate between levels, which may affect the duties autonomous ships have during a single voyage based on the outcome of the scoping exercise.[114] However, even before the regulations are addressed, there is a potential issue because the IMO is operating under the assumption that ships will only be moving between the four levels of autonomy they have identified.[115] Other organizations have identified as many as six levels of autonomous ships, which is not an insignificant difference.[116] In comparison, the IMO's levels could appear oversimplified and it increases concerns that degrees of autonomy have slipped through the cracks of the scoping exercise.

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94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.*
102 GDSM, *supra* n. 9.
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.*
113 Press Release, IMO, *supra* n. 24.
114 *Id.*
115 *Id.*
116 O Brien, *supra* n. 46.

Lloyd's Register is a leading international provider of classification, compliance and consultancy services to the marine and offshore industries. It is focused on classification, compliance, and consultancy for marine industries, and has identified a total of six levels of autonomy.[117]

Lloyd's Register's levels of autonomy start with autonomous level ("AL") zero and end with AL six.[118] AL Zero, also called manual, has no autonomous functions beyond the typical technology found aboard most ships and humans control all of the ship's major actions.[119] AL One, called on-board decision support, has all of its actions taken by a human operator.[120] However, the decision support tool in AL One presents options to the human operators and the tool can influence the operator's decision through data provided by the ship's systems.[121]

AL Two, called on and off-board decision support, is similar to AL One because all actions are taken by a human operator with information provided by the decision support tool; however, AL Two differs because data can be provided by systems both off-board and onboard. operator.[122]

AL Three has an active human in the loop supervising all decisions and actions the ship makes, but the decisions and actions are performed by the ship.[123]

AL Four includes ships where decisions and actions occur autonomously with human supervision giving the operators the option to intervene and override autonomous ship decisions, especially in emergency situations.[124]

AL Five is deemed fully autonomous because all ship operations are made entirely by the autonomous system with slight human supervisions over some operations.[125]

AL Six is completely autonomous as operations are unsupervised and decisions and actions are carried out by the system alone during voyages.[126] Lloyd's Register points out, similarly to the IMO, that ships may be a combinations of different AL's.[127]

Lloyd's Register came up with their levels of autonomy before the IMO released theirs.[128] Because Lloyd's Register's specialty is government compliance, it is likely they expected the IMO to include more levels of autonomy in their scoping exercise, and Lloyd's Register was preparing to comply with the expected categorization by the IMO.[129]

Lloyd's Register focused more about where the data used for of decision-making originates, and whether the data is provided by on-board or off-board systems.[130] Additionally, Lloyd's Register focuses on how the decision support tool that uses the data influences the actions taken by the human operator.[131] Lloyd's Register's levels of autonomous shipping show more emphasis on the technology itself and the technology's influence over decision-making by both the human operator and the ship than the IMO.[132]

The IMO's focus, when it comes to their levels of autonomous shipping, is largely on whether the ship is controlled via remote control or whether the ship is more autonomous on its own.[133] The IMO also focuses on whether there is a crew onboard or not.[134] The IMO skips from automated process with decision support at Degree One to a completely remotely controlled ship at Degree Two.[135] Additionally, the IMO moves from remote controlled ships with no one on board and decisions made remotely at Degree Three to a fully autonomous ship at Degree Four.[136] Again, this is contrasted with Lloyd's Register where there are several levels of complete autonomy, but there are options for human operators to override the ship and make decisions if neces-

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117 Lloyd's Register, https://www.lr.org/en-us/marine-shipping/ (last visited Mar. 11, 2019).
118 Components and Systems for Vessels, Unmanned Marine Systems Code, Lloyd's Register https://www.lr.org/en-us/unmanned-code/ (last visited Mar. 11, 2019).
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.*
128 *Id.*
129 *See id.*
130 *See id.*; Int'l Maritime Org [IMO], Autonomous Shipping, supra note 61.
131 *See* Lloyd's Register, *supra* n. 118.
132 *See* Lloyd's Register, *supra* n. 118; Int'l Maritime Org [IMO], Autonomous Shipping, supra note 61.
133 *See* Int'l Maritime Org [IMO], Autonomous Shipping, supra note 61.
134 *Id.*
135 *Id.*
136 *Id.*

sary up until the final level of autonomy where the ship is completely autonomous.[137]

It is unclear what the differences in degrees might mean for compliance with the updated regulations by the IMO. The IMO has made it clear ships can move between degrees of autonomy during a voyage.[138] This raises questions about how a ship will comply with regulations put in place when the ship may switch from remote-controlled to automated during the same voyage.[139] This issue could be complicated by the fact that the IMO's levels of autonomy appear oversimplified in comparison to the levels of autonomy identified by Lloyd's Register.[140] This is something the IMO must be clear about in their scoping exercise if they want autonomous ships to comply with the regulations that will be put in place.

IV. WHAT ARE THE BENEFITS OF AUTONOMOUS SHIPPING AND WHAT ARE THE COSTS

A. Autonomous Ships' Effect on Operational Safety

No job or industry is immune from human error, and the maritime industry is no exception, with current estimates indicating that 75% to 96% of maritime accidents are caused by human error.[141] Estimates show that human error in shipping resulted in more than $1.6 billion in losses between 2011-2016.[142] Autonomous and semi-autonomous ships, by their very nature, reduce the reliance ships have on humans.[143] Humans errors, like fatigue, would not occur at the same frequency on autonomous ships.[144] This reduction of risk can occur even on board semi-autonomous ships because the data gathered from the ship's sensors together with AI algorithms will inform the crew's decision-making.[145] Furthermore, the data produced by the shipping industry can likely be used as information to provides real-time findings and alerts to help reduce accidents.[146] The technology on autonomous ships will use data from both environmental sound recordings and satellite navigations to try to increase safety.[147]

B. Autonomous Ships Reduce Costs and Increase Efficiency

With autonomous shipping's expected removal of human error, it is only a matter of time before the crews themselves are also removed.[148] By reducing the crew, autonomous ships reduce the cost of personnel and auxiliary costs like insurance for the crew.[149] Additionally, autonomous shipping will reduce costs because they will make longer and fewer voyages.[150] Crew-related expenses make up for about 30% of a ship's budget, and one study projected savings of more than seven million dollars over 25 years per each autonomous ship based on the reduction of salaries, supplies, and fuel savings.[151] The cost-reduction potential of autonomous ships includes lives as well as dollars.[152] Unmanned ships will reduce risk to human life as they become the alternative for naval military operations for dangerous missions.[153]

The redesign necessary for ships to become autonomous, while initially expensive, looks promising long-term.[154] Ships will be redesigned for efficiency because ship builders can largely eliminate accommodation structures such as living quarters and kitchens resulting in a more aerodynamic ship.[155] Ships with crews will have to undergo a fairly drastic redesign to transition to fully autonomous ships.[156] With no crew and certain features of cargo ships eliminated, autonomous ships will be lighter and sleeker allowing for less fuel consumption.[157] Additionally, by cutting out crew quarters, sewage, and elements of ventilation, there will be more

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137 Lloyd's Register, *supra* n. 118.
138 *See* Int'l Maritime Org [IMO], Autonomous Shipping, *supra* n. 61.
139 *Id.*
140 *See* Lloyd's Register, *supra* n. 118; Int'l Maritime Org [IMO], Autonomous Shipping, *supra* n. 61.
141 Marr, *supra* n. 27.
142 Furness, *supra* n. 44.
143 Marr, *supra* n. 27.
144 *Id.*
145 *Id.*
146 Bajpai, *supra* n. 5.
147 Varsha Saraogi, *How will autonomy shape the UK shipping industry?*, Ship Technology (July 20, 2019), https://www.ship-technology.com/features/how-will-autonomy-shape-the-uk-shipping-industry/.
148 *Id.*
149 *Id.*
150 Natalie Klein, *Maritime Autonomous Vehicles Within The International Law Framework To Enhance Maritime Security*, 95 USNINTLLS 244, 246 (2019).
151 Marr, *supra* n. 27.
152 *Id.*
153 *Id.*
154 *See* Baibhav Misrah, *Artificial Intelligence and the Era of Autonomous Shipping*, Sea News (Jan. 23, 2020), https://seanews.co.uk/features/artificial-intelligence-and-the-era-of-autonomous-shipping/; see also O Brien, *supra* n. 46.
155 Furness, *supra* n. 44.
156 *Id.*
157 Misrah, *supra* n. 154.

space for cargo.[158] Overall, it is easy to see why there is emphasis on the cost reduction benefits of autonomous ships.

Efficiency of autonomous cargo ships goes beyond carrying capacity, as autonomous ships will likely reduce pollution and carbon emissions.[159] The increase in ocean traffic has led to increased pollution levels, thereby making the commercial maritime shipping industry a major contributor to global air pollution.[160] As a result, the shipping industry has set a goal of reducing maritime emissions.[161] The YARA BIRKELAND mentioned earlier in this comment will eventually become a zero-emission container ship.[162] Sleeker ships, like those mentioned earlier, with no crew quarters will produce fewer carbon emissions.[163] The IMO set a target to reduce emissions by 50% by 2050, providing another reason for ship owners to prioritize autonomous ships because of their ability to reduce emissions.[164]

C. Autonomous Ships And The Expectation That They Will Reduce Piracy

Autonomous ships will likely reduce the frequency of piracy.[165] Piracy is extremely costly for the shipping industry; in fact, the economic cost of Somali piracy was $1.7 billion last year and has been as high as $7 billion in years past.[166] Unmanned ships can be built to make it difficult for pirates to board, and even if pirates get aboard, ship controls can be made inaccessible.[167] Without a captured crew for pirates to ransom, piracy is a lot less valuable, and with no hostages to worry about it will be easier to regain control of ships.[168] The combination of the difficulty of boarding and controlling autonomous ships along with the fact that piracy will be less fruitful makes it seems likely that piracy will be less common on autonomous ships.[169] However, there is a concern that instead of eliminating piracy, autonomous shipping may simply force pirates to be more creative.[170] Pirates may try and stop unmanned ships by disabling shots or somehow damaging the ships propeller.[171]

D. The Danger Of Autonomous Ships When It Comes To Cyber-Security

Technology is practically synonymous with hacking and cyber security issues.[172] Hackers are evolving faster than technology, and autonomous shipping is no exception.[173] There are concerns that "the first Achilles heel of unmanned shipping might be the very technology that created it."[174] The risk of cyber-attacks causes serious concern, especially because high profile cyber-attacks are only increasing in number and severity.[175] Examples include cyber-attacks against South Korea's Defense Ministry in 2018 where sensitive strategic military documents were stolen, and a cyber-attack crippled UK's National Health Service and cost the UK €92 million in 2017.[176] There has been an increase in phishing attacks, specifically against large shipping companies which will continue as these companies start moving towards autonomous shipping.[177] It is also important to note that autonomous ships may be relying on satellites to inform their routes and these satellites may be vulnerable to cyber-attack as well.[178] Satellites are practically always turned on and many ship terminals are available publicly on the internet with simple default credentials (like admin/1234) making satellite communications easy to hack.[179] Furthermore, autonomous ships frequently communicate with control centers and these control centers may be vulnerable to cyber-attacks as well.[180]

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158 *Id.*
159 Bajpai, *supra* n. 5; Saraogi, *supra* n. 147.
160 Bajpai, *supra* n. 5.
161 Saraogi, *supra* n. 147.
162 Bajpai, *supra* n. 5.
163 *Id*; Saraogi, *supra* n. 47.
164 Bajpai, *supra* n. 5.
165 *Id.*
166 Walker, *supra* n. 13.
167 Bajpai, *supra* n. 5.
168 Oskar Levander, *Forget Autonomous Cars – Autonomous Ships Are Almost Here*, IEEE Spectrum (Jan. 28, 2017) https://spectrum.ieee.org/transportation/marine/forget-autonomous-cars-autonomous-ships-are-almost-here.
169 *Id.*
170 Stav Dimitropoulos, *Will ships without sailors be the future of trade?*, BBC News (July 16, 2019), https://www.bbc.com/news/business-48871452.
171 *Id.*
172 Robert Siciliano, *Hacker Are Evolving Faster Than Technology*, The Balance (Nov. 5, 2019), https://www.thebalance.com/how-has-hacking-evolved-with-technological-advances-1947546.
173 *Id.*; see GDSM, *supra* n. 9.
174 Dimitropoulos, *supra* n. 170.
175 *Id.*
176 *Id.*
177 Saraogi, *supra* n. 147.
178 Elizabeth Montalbano, *Container ships easy to hack, track, send off course and even sink, security experts say*, The Security Ledger (2018), https://securityledger.com/2018/06/container-ships-easy-to-hack-track-send-off-course-and-even-sink-security-experts-say/amp/.
179 *Id.*
180 Saraogi, *supra* n. 147.

Cyber-attacks are costly and autonomous ships may create an intersection between cyber-security and piracy if hackers keep information hostage until they are paid off.[181] Hackers may access the ship's location by hacking the satellites the autonomous ships use, which would make autonomous ships vulnerable to hackers online who can then broadcast the ship's location to pirates on the high seas.[182] If this combination of cyber-security and piracy is comprehended by the IMO and they are prepared to deal with that challenge, perhaps there would be less concern surrounding the implementation of autonomous ships.[183] However, it is unlikely the full scale of these challenges are understood, indicated by the fact that the IMO's scoping exercise is focused primarily on navigation, manning, and liability.[184] While those issues are important to the successful implementation of regulations on autonomous ships, cyber security must be considered within the same framework.[185]

A recurring weakness when it comes to technological innovation is that frequently the legal framework does not consider the intersection of security (e.g. cyber-crime, piracy, terrorism) and disaster risk management factors (pollution, search and rescue of crew, disaster impacts).[186] Unfortunately, there is a reasonable probability that when these two separate factors meet and are evaluated separately, there may be catastrophic harm.[187] For instance, an attack on an autonomous ship could cause a loss of connectivity between an autonomous ship's control center and the ship itself.[188] If that connectivity issue occurred on a ship that has degree three or four automation, there is no manpower on board to manually take control of the ship's operating systems.[189] The IMO's separate committees, each with their own focus and duties, risk failing to address issues that might have been addressed if they worked together.[190] Some argue that cyber-security will not be a big concern because the software systems on the ship can and likely will be designed to provide heavy protection against cyber-attacks.[191] Furthermore, it is unclear that unmanned ships will be attractive targets to hackers depending on the cargo the ship contains. Some cyber-attacks are the result of human error, which gives an autonomous shipping an edge over manned ships.[192] For instance, currently when someone boards a ship they risk infecting the ship's system with corrupted devices, such as a virus-filled USB drive.[193] Removing the human element removes the risk of accidental infection from an outside source, therefore, cyber-attacks will likely be less common.[194]

E. Can Autonomous Ships Carry Out Tasks Required By International Law?

Ships have a search and rescue obligation enshrined both in the International Convention for the Search at Sea and Rescue ("SAR") and SOLAS.[195] These conventions require that assistance be rendered to people in distress or in danger of being lost at sea.[196] It is important to note that both SOLAS and SAR are being reexamined by the IMO in their scoping exercise to determine how autonomous ships will fit into the conventions.[197] The obligation to rescue normally rests with the master of the vessel, but on an autonomous ship there may not be a master.[198] This raises the issue of whether the duty to rescue still exists for these ships and if so, who has the duty to rescue.[199] On a practical level, if the duty to rescue exists, questions remain about how an autonomous ship is going to bring rescued people on board and provide necessary aid to them.[200] Another issue that arises related to the IMO, the relevant conventions, and autonomous ships is how the IMO will enforce the duty to search rescue on autonomous ships even if it applies to them.[201]

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181 *See generally Autonomous Shipping: The Future of Seafaring*, The Manufacturer (Dec. 12, 2018), https://www.themanufacturer.com/articles/autonomous-shipping-future-seafaring/.
182 Montalbano, *supra* n. 178.
183 Saraogi, *supra* n. 147.
184 *Id.*
185 *Id.*
186 *Id.*
187 *Id.*
188 *Id.*
189 *Id.*
190 *Id.*
191 *Id.*
192 Saraogi, *supra* n. 147.
193 *Id.*
194 *Id.*
195 Klein, *supra* n. 150 at 264.
196 *Id.*
197 Press Release, IMO, *supra* n. 24.
198 Klein, *supra* n. 150 at 265.
199 *Id.*
200 *Id.*
201 *Id.*

V. CONCLUSION

It is easy to see why the idea of autonomous shipping has practically taken over globally.[202] Not only is autonomous shipping the natural progression of technology in the maritime sector, but it is now viewed as a necessity for the maritime industry to remain relevant as trade by ship increases.[203] The technology for autonomous shipping is moving forward quickly, while the IMO is still addressing where autonomous technology was in 2018.[204] Just because that is where the technology was in 2018, it does not mean that is where the technology is today or where it will be tomorrow, or next month, or next year. It leaves one wondering if it is the destiny of the IMO to fall further behind the practical world. After all, historically, technology always precedes the development of the law.[205] It may not be an option for the IMO to resign themselves to being behind because modernized conventions and treaties are necessary for the international maritime world to function smoothly. If the IMO falls too far behind technological developments, the IMO's ability to encourage compliance with their regulations could be severely limited. Autonomous shipping will fundamentally alter maritime commerce and if the IMO cannot keep pace with that, it could be deemed irrelevant. Something needs to change for the IMO to catch up to the technology, otherwise it will be left in autonomous shipping's wake.

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[202] Saraogi, *supra* n. 147.

[203] *Id.*

[204] Int'l Maritime Org [IMO], Autonomous Shipping, *supra* n. 61.

[205] Dimitropoulos, *supra* n. 170.

Recent Developments

Admiralty Jurisdiction

Crowley Mar. Corp. v. Robertson Forwarding Co., 2020 U.S. Dist. LEXIS 135131 (S.D. Fla. July 30, 2020)

This action arose from the Defendant's purported breach of maritime contracts that required the Defendant to pay Crowley a total of $36,607.00 for transporting cargo aboard ocean vessels and hauling trucks at the request and direction of the Defendant. In support of its allegations, the Plaintiff, Crowley Maritime Corporation, attached to the amended complaint, a Bill of Lading instructing that payment be remitted to Crowley Puerto Rico Services Inc.; an unsigned copy of Terms and Conditions to the Bill of Lading; and an invoice to the Defendant issued by, and instructing that payment be remitted to, Crowley Caribbean Logistics, LLC. Neither "Crowley Puerto Rico Services Inc." nor "Crowley Caribbean Logistics, LLC" was a party to this action. Further, the only named plaintiff, "Crowley Maritime Corporation," was not mentioned in any of the purported marine contracts that allegedly conferred admiralty jurisdiction upon the Court.

On February 4, 2020, the Defendant raised the issue of subject matter jurisdiction for the first time in its answer to the original complaint. Specifically, the Defendant "denie[d] that this Court has subject matter jurisdiction," and explained further that "[t]here is no maritime contract between [the Plaintiff] and [the Defendant] that affords this Court jurisdiction." After the Defendant called into question the Court's subject matter jurisdiction, the Plaintiff timely filed an amended complaint. However, the amended complaint only modified "some of the underlying factual allegations" and added a count for unjust enrichment; it did not address the jurisdictional issue that the Defendant raised. Accordingly, the Defendant's answer to the amended complaint again denied the existence of subject matter jurisdiction on the same grounds.

Because the question of Article III standing implicates subject matter jurisdiction, it must be addressed as a threshold matter prior to the merits of any underlying claims. *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1250 (11th Cir. 2015). The "irreducible constitutional minimum" of standing under Article III consists of three elements: (1) the plaintiff must have suffered an actual or imminent injury, or a concrete "invasion of a legally protected interest"; (2) that injury must have been caused by the defendant's complained-of actions; and (3) the plaintiff's injury or threat of injury must likely be redressable by a favorable court decision.

Motions to dismiss a complaint for lack of subject matter jurisdiction can consist of either a facial or factual attack on the complaint.

The issue before the Court was whether the Plaintiff, solely in its capacity as a parent company of subsidiaries that were parties to contracts, had standing to sue for breach of those contracts. The Court held that it did not. "It is axiomatic that a plaintiff generally must assert his own legal rights and cannot rest his claim to relief on [the] legal rights or interests of third parties." *eLandia Int'l, Inc. v. Ah Koy*, No. 09-20588-CIV, 2010 U.S. Dist. LEXIS 53193, 2010 WL 2179770, at *1 (S.D. Fla. Feb. 22, 2010) (Torres, Mag. J.) (*quoting Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)), *report and recommendation adopted by*, No. 09-cv-20588, 2010 U.S. Dist. LEXIS 53123, 2010 WL 2196040 (S.D. Fla. June 1, 2010) (Moreno, C.J.).

As a matter of law, the Plaintiff did not have standing merely because it was a parent corporation of subsidiaries that entered into the underlying contracts. The Court dismissed the complaint without prejudice for lack of subject matter jurisdiction. As the Plaintiff did not show subject matter jurisdiction and had not sought leave to amend, the Court dismisses the complaint without leave to amend.

Submitted by JAP

Eclipse Liquidity, Inc. v. Geden Holdings Ltd., 2020 U.S. DIST. LEXIS 114960 (E.D. Pa. July 1, 2020)

Eclipse brought this suit in state court in Pennsylvania against Geden, a judgment debtor of Eclipse, based on a judgment obtained in London for Geden's failure to purchase a vessel. According to Eclipse, Geden had restructured its business to avoid satisfying that judgement. Geden's obligation to satisfy the judgement then fell on Advantage Award Shipping, which owned the vessel and Advantage Tankers which owned 100% of the shares of Advantage Award Shipping.

Geden then removed the case to the United States District Court for the Eastern District of Pennsylvania

based on the Court's original admiralty jurisdiction. Judge Schiller noted that the Court had original jurisdiction over cases of admiralty or maritime jurisdiction, including disputes over maritime contracts.

The court found that the case was not about a sale of a boat or the terms of a bareboat charter. Instead, it is about alleged corporate fraud and improper business restructuring. Thus, the case did not fall within the court's maritime jurisdiction and, noting that "the ship has sailed," remanded the case back to state court.

Submitted by SPB

Ghiazza v. Anchorage Marina, Inc., 2020 U.S. DIST. LEXIS 132596 (S.D.N.Y. July 27, 2020)

In payment for work he performed for his parents, Jeffrey Ghiazza was transferred title to his parents' boat, LUCKY FOUR. After his parents death, the LUCKY FOUR remained stored at Anchorage Marina, which asserted a lien against the vessel for storage costs.

Jeffrey, representing himself *pro se*, brought this suit in the United States District Court for the Southern District of New York against Lawrence Ghiazza, who was named executor of their parents' estate, and Anchorage Marina, asserting claims under New York law to clear title to the vessel, for Anchorage's asserting a defective lien, and for Lawrence's failing to deliver the vessel to Jeffrey free of the lien.

Jeffrey acknowledged that the parties were citizens of New York, but he claimed that there was federal jurisdiction because the LUCKY FOUR is under the jurisdiction of the United States Coast Guard and Homeland Security. The Defendants then moved to dismiss the action, claiming that mere registration of a vessel with the Coast Guard does not establish maritime jurisdiction, particularly when the vessel has been stored on land for an extended period.

Therefore, because the claims did not involve a vessel on navigable waters, Judge Karas dismissed the suit for lack of subject matter jurisdiction.

Submitted by SPB

Great Lakes Insurance SE v. American Steamship Owners Mutual Protection and Indemnity Association, 2020 U.S. DIST. LEXIS 140912 (S.D.N.Y. Aug. 6, 2020)

Asserting that the Vessel's interests conspired to abandon the Vessel in Brazil after it broke free from her moorings and grounded in order to avoid paying claims and that the American Club abandoned its obligations as insurer of the Vessel, to cover the claims, the Charterer's Club brought this action based on prima facie tort, promissory fraud, civil conspiracy, unjust enrichment, and negligence.

Prior to being abandoned, George and Efstathios Gourdomichalis purchased the Vessel (with a market value of no more than $6 million) in the name of Adamastos Shipping and then used a financing scheme to mortgage the vessel for more than $24 million. Adamastos Shipping and the operator of the vessel, Phoenix Shipping, then insured the vessel with the American Club. Adamastos Shipping chartered the vessel to Pacific Gulf, which subchartered the vessel to Intergis. Pacific Gulf and Intergis obtained insurance coverage through the Charterers P&I Club.

The Defendants asserted that the court lacked admiralty tort jurisdiction over the claims and moved to dismiss the complaint. Judge Abrams first held that the tort did not occur on navigable water as the fraud (although related to a vessel on navigable waters) occurred on land.

Despite being sufficient to hold that the court lacked admiralty jurisdiction, Judge Abrams also addressed the question whether the connection part of the test for admiralty tort jurisdiction was satisfied. Judge Abrams reasoned that the general type of incident was the abandonment of a detained vessel on navigable waters and the termination of the vessel's insurance coverage. The Judge concluded that this incident did not have a potentially disruptive impact on maritime commerce as it would not obstruct the free passage of commercial ships on navigable waterways.

Judge Abrams therefore dismissed the complaint and declined to give leave for an amendment as additional pleading would be futile on the jurisdiction issue.

Submitted by SPB

Arbitration

Kozur v. F/V ATLANTIC BOUNTY, 2020 U.S. Dist. LEXIS 148633 (D.N.J. Aug. 18, 2020)

After slipping and falling while serving as a seaman on the F/V ATLANTIC BOUNTY, Anthony Kozur brought this action for negligence under the Jones Act and for unseaworthiness and maintenance and cure under the general maritime law.

Every time Kozur went on a fishing trip for the Defendant, he signed the ship's manifest that was on the galley table open to the signature page. That manifest included

an arbitration clause. However, he allegedly never read the document or even saw the arbitration clause in the manifest, and the captain never explained to him that the manifest contained an arbitration clause. Kozur did know that there were terms on the other pages of the manifest and signed the signature page without looking to see what the terms were.

Judge Rodriguez, concluding that there was no obligation to alert Kozur to the arbitration clause, held that the clause was applicable and was clear and unambiguous. However, as the clause was in a seaman's employment contract, it was exempt from enforcement under the Federal Arbitration Act.

The Defendant argued that the clause was enforceable under New York law, applicable to the enforceability of the arbitration clause under the terms of the manifest, but Kozur responded that the FAA prohibited enforcement of arbitration clauses against seamen under state law. Judge Rodriguez rejected that argument, finding no conflict between state and federal law.

In granting Defendant's motion for arbitration, Judge Rodriguez then addressed Kozur's argument that contracts limiting choice of venue are void under the FELA, and that the FELA rule should apply in Jones Act cases. Judge Rodriguez held that nothing in the Jones Act prohibited a seaman from waiving the right to a jury trial and agreeing to arbitration. Finally, Judge Rodriguez held that the general maritime law does not preclude application of state law to the issue of arbitration.

Submitted by SPB

Monjasa A/S v. Mund & Fester GmbH & Co., 2020 U.S. Dist. LEXIS 140904 (S.D.N.Y. Aug. 6, 2020)

Fuel supply company Monjasa Lda sent the M/V GOLDEN OAK, a bunker tanker, to deliver fuel to the M/V BBC SCOTLAND, but there was a collision between the SCOTLAND and the GOLDEN OAK, which damaged the GOLDEN OAK.

The fuel supply contract was made between Monjasa Lda and Angola de Navegacao, the M/V SCOTLAND's charterer. The agreement incorporated the Monjasa Terms, which included an arbitration agreement. As the GOLDEN OAK was unable to deliver the fuel, another tanker, the DUZGIT VENTURE delivered the fuel to the SCOTLAND on behalf of Monjasa Lda with a bunker delivery note stating that the sale was governed by the terms and conditions between the vessel and Monjasa A/S, acting as principal.

The owners of the GOLDEN OAK sought damages from the owners of the SCOTLAND, and that demand was resolved by a payment of $300,000 by the insurer. The SCOTLAND's insurer then sent an arbitration demand to Monjasa A/S seeking contractual indemnity based on the reciprocal indemnity clause of the Monjasa Terms that were incorporated into the bunker delivery note. In response, Monjasa A/S brought suit against the SCOTLAND's insurer seeking a declaratory judgment that it was not bound by the arbitration agreement in the Monjasa Terms or by the reciprocal indemnity agreement in the Terms.

Judge Caproni held that Monjasa A/S was not a party to the arbitration agreement between Monjasa Lda and was entitled to the declaratory judgment. Judge Caproni reasoned that the bunker delivery note was not indicative of any action taken by Monjasa A/S, but rather it merely confirmed that the fuel was delivered. Additionally, the reference to Monjasa A/S as principal in the bunker delivery note was insufficient to establish apparent authority as there was no evidence that Monjasa A/S authorized the DUZGIT VENTURE to provide that Monjasa A/S was the principal.

Submitted by SPB

COGSA

Shelter Forest International v. COSCO Shipping (USA) Inc., 2020 U.S. Dist. LEXIS 133532 (D. Or. July 28, 2020)

Shipper/consignee sought to recover damages over two shipments of forest products under an FMC filed Service Contract with ocean carrier COSCO. Plaintiff alleged multiple causes of action under state law for one damaged shipment and the second shipment which was rerouted and much delayed. On Defendant's motions for summary judgment, Magistrate Judge Jolie Russo ruled that federal law, COGSA, preempted Shipper's state law claims, that the parties conduct in attempting to negotiate resolution of the cargo claims did not toll COGSA's one-year statute of limitations for suit, and plaintiff's claims were time-barred. The court further ruled that the Trump Administration's "broad trade war against China" with imposition of associated tariffs, was not a force majeure event and did not excuse shipper's nonperformance of the Service Contract in failing to meet minimum container shipment volumes. Accordingly, COSCO was entitled to recover liquidated damages under the Service Contract.

Submitted by PL

Collision

Deloach Marine Services, L.L.C. v. Marquette Transportation Co., 2020 U.S. App. LEXIS 28953 (5th Cir. Sept. 11, 2020)

On January 26, 2016, the M/V JUSTIN PAUL ECKSTEIN and the M/V VANPORT were involved in a collision on the Mississippi River. The events giving rise to the collision began when the M/V JUSTIN PAUL ECKSTEIN'S captain, Billy Jackson, announced a maneuver where he would top around in the river so he could begin navigating down river. The M/V VANPORT, which was traveling downriver several miles above the M/V JUSTIN PAUL ECKSTEIN, had slowed down to allow another ship to pass it. The two captains exchanged radio calls about Jackson's intent to top around, but the M/V VANPORT's captain understood that the M/V JUSTIN PAUL ECKSTEIN would not begin to top around until after he had passed in the river. The M/V JUSTIN PAUL ECKSTEIN, however, believed it was clear to top around and began to do so. The vessels collided, and both vessel owners filed suit against each other. The district court found the M/V JUSTIN PAUL ECKSTEIN to be 70% at fault and attributed the other 30% to the M/V VANPORT. Both parties appealed.

The United States Court of Appeals for the Fifth Circuit upheld the district court's factual findings, finding no clear error in its conclusions. The Fifth Circuit agreed with the district court that the M/V JUSTIN PAUL ECKSTEIN should have waited until the water channel was clear before topping around and should have more clearly communicated its intent to top around in front of the M/V VANPORT.

The Fifth Circuit also agreed with the district court that the M/V VANPORT should have realized that the M/V JUSTIN PAUL ECKSTEIN could not top around in front of him and should have more clearly communicated to the M/V JUSTIN PAUL ECKSTEIN to wait to begin its turn. The Fifth Circuit further upheld the district court's conclusions that both captains violated Rule 14(d) of the Inland Navigational Rules by not clearly communicating the manner of passage.

The Fifth Circuit also noted that the judgment was silent as to any award of prejudgment interest and remanded the case to the district court for the purpose of considering whether prejudgment interest was appropriate.

Submitted by KMM

Cruise Lines

Cortes v. Princess Cruise Lines, 2020 U.S. Dist. LEXIS 168348 (C.D. Cal. Sept. 8, 2020)

Plaintiff, a passenger on the CROWN PRINCESS, and who relied on a scooter or walker to ambulate because of a motor neuron disease, was injured during a cruise from Ft. Lauderdale to Europe when she slipped and fell in a shower trying to grab the handrail in the shower area of her cabin. She had been on approximately 30 cruises with the same cruise line. Prior to her fall, she had already taken a dozen showers in her cabin, without any problems. Claiming lack of notice (no record of any passenger falls in the shower area of plaintiff's cabin or any similarly configured cabin on the ship), the cruise line moved for summary judgment.

Plaintiff presented the testimony of the cruise line's manager of access compliance that the cruise line was involved in the design of the ship and was aware of industry guidelines and standards. Her expert opined in his declaration that the cruise line's shower was not configured to comply with ADA guidelines that were applicable to land-based buildings and that were not required for cruise ships.

The court rejected the plaintiff's claim that a higher duty of care was owed to her because of her physical disabilities. However, the court held that a reasonable juror could have held that the shower configuration breached the defendant's duty of care and that the defendant was aware of the shower configuration because of its involvement in the review and design of its ships and knowledge of the layout of the cabins. The court reasoned that the jury could find that, despite the water on the floor, the passenger's fall was caused by a faulty shower configuration.

Accordingly, the court denied the motion for summary judgment.

Submitted by AAE

Phillips v. NCL Corp., 2020 U.S. App. LEXIS 25202 (11th Cir. Aug. 10, 2020)

This action arose when a putative class action suit was filed by passengers that had purchased a travel insurance plan from Norwegian Cruise Lines ("NCL"). The suit raised claims under the Florida Deceptive and Unfair Trade Practices Act and for unjust enrichment, alleging that NCL failed to disclose profits it would earn in connection with the sale of the travel insurance. They claimed that NCL utilized deceptive and unfair marketing and sales practices by failing to disclose kick-

backs from the sale of the travel insurance policies and by charging an inflated price for those policies. They also alleged that NCL had engaged in a "reinsurance scheme" in which the insurer reinsured the policy with a "reinsurance company" that NCL owned. The district court granted NCL's motion to compel arbitration and dismiss the class action. The passengers appealed.

NCL argued that the arbitration clause included in the Guest Contract signed by all passengers booking a cruise applied to the Passengers' claims. The Passengers argued the Guest Contract's arbitration provision was not applicable to their consumer-fraud claims because their claims were brought against NCL in its role as an insurance distribution participant, not a cruise line carrier, and thus were unrelated to either the Guest Contract or their cruises. Because the cost of the travel insurance policy was a separate cost distinct from the cruise cost, the Passengers' argued, there existed two separate contracts and two distinct relationships.

The Eleventh Circuit stated that to be subject to the arbitration provision in the Guest Contract, the Passengers' claims, which are based on NCL's alleged "deceptive and unfair marketing and sales practices" during the cruise booking process, must relate with at least some directness to the Guest Contract or the Passengers' cruises.

The Eleventh Circuit affirmed the district court's ruling holding that the Guest Contract and the purchase of the travel insurance plan was not an independent, separate transaction, and instead, any alleged fraudulent conduct was wrapped up in the same transaction that culminated in the Guest Contract, which was the basis of the only contractual relationship between the Passengers and Norwegian.

Submitted by SMM

Forum Non Conveniens

Curtis v. Galakatos, 2020 U.S. Dist. LEXIS 143704 (D. Mass. Aug. 11, 2020)

Cindy Curtis was injured while vacationing in Greece when a boat she was a passenger on was struck by another boat, the M/V GALANI. At the time of the incident, the boat was being piloted by Dimitrios Faroupos, the Defendants gardener. The M/V GALANI passed over the passenger area of the M/V GALANI's marina, where Ms. Curtis was struck by the hull and propellers of the boat. She suffered multiple bone fractures and deep lacerations on her left leg for which she received extensive treatment both in Greece and in the United States.

Cindy Curtis, a resident of New York, brought this suit in the United States District Court for the District of Massachusetts against the owner of the M/V GALANI, Nicholas Galakatos, who was a resident of Massachusetts. Galakatos moved to dismiss the suit on the basis of *forum non conveniens*, and Judge O'Toole agreed that the case should be litigated in the courts of Greece. Although her damages would be capped in Greece and she would not be entitled to a jury trial, those factors did not deprive her of the ability to have the claims fairly decided in Greece and did not outweigh the fact that much of the evidence was in Greece and that Greek law applied.

Submitted by SPB

Forum Selection Clause

Laufer Group International, Ltd. v. Standard Furniture Manufacturing Co., 2020 U.S. Dist. LEXIS 147000 (S.D.N.Y. Aug. 14, 2020)

Laufer Group, a non-vessel operating common carrier, contracted with Defendants to transport goods from Asia to the United States. When Defendants failed to pay for the shipments, Laufer Group brought this suit in the United States District Court for the Southern District of New York against Defendants Standard Furniture Manufacturing and International Furniture Marketing (Alabama companies) and others that it identified as principals of the companies. The Defendants moved to dismiss the action on the grounds that there was no personal jurisdiction over the Defendants in the action brought in New York. In contravention, Laufer Group cited the New York forum-selection clause in its bills of lading.

The Defendants argued that the actual bills of lading were not before the court because Laufer Group had only attached generic, unnamed bills to its complaint. Judge Oetken, however, disagreed with Defendants argument and reasoned that the Plaintiff can defeat a motion to dismiss by pleading legally sufficient allegations of jurisdiction, and it is not necessary to attach the actual bills of lading.

Similarly, Judge Oetken denied the Defendants' motion to dismiss for failure to allege a claim of breach of contract because of the failure to attach the bills of lading. All that was necessary was that Laufer Group plead the

elements of breach of contract, and Laufer Group did not have to attach the actual bills of lading to do that.

Submitted by SPB

Maa v. Carnival Corp., 2020 U.S. Dist. LEXIS 172621 (C.D. Cal. Sept. 21, 2020)

Mr. and Mrs. Maa were passengers on the CORAL PRINCESS on a cruise from San Antonio, Chile. Both contracted COVID-19 during the cruise, and Mr. Maa passed away shortly after his return in Miami. Mrs. Maa survived. Mrs. Maa and her husband's estate sued the defendant cruise line in California state court, and the defendant removed the suit to federal court based on the original admiralty jurisdiction of the court, citing the forum-selection clause in plaintiffs' ticket requiring them to bring their lawsuit in federal court and thus waiving any right to object to a removal and to seek remand.

The plaintiffs argued that removal was not the proper way to enforce a forum-selection clause and that a forum-selection clause was unenforceable. The court disagreed.

Judge Fischer held that the federal court had original admiralty jurisdiction, and the protections asserted by the plaintiffs from the saving-to-suitors clause were procedural protections that could be waived. Judge Fischer denied the plaintiffs' motion to remand, concluding that the forum-selection clause was enforceable and that it effectively waived the plaintiffs' procedural objection and right to seek removal.

Judge Fischer also granted the defendant's motion to dismiss the survival claim for the estate of Mr. Maa, holding that because Mr. Maa contracted COVID-19 while he was on the high seas, DOHSA preempted the survival claim under the general maritime law. The court pointed out that DOHSA does not permit recovery for the decedent's pre-death pain and suffering through a survival action under general maritime law, dismissing plaintiffs' claim with leave to amend to bring an appropriate claim under DOHSA.

Submitted by AAE

Jones Act

Adams v. Liberty Maritime Corp., 2020 U.S. Dist. LEXIS 136278 (E.D.N.Y July 31, 2020)

Francis Adams, a bosun who sailed onboard the M/V LIBERTY EAGLE, began experiencing health problems during a service, and his symptoms were provided to his employer's telemedicine services provider, Future Care, who relayed the information to Dr. Brian Bourgeois, a physician in Louisiana. Dr. Bourgeois, however, did not properly diagnose Adams' conditions as congestive heart failure and atrial fibrillation, causing damages that Adams' would not have suffered if his condition had been timely and properly diagnosed.

Adams brought suit against the vessel owner/employer, the captain of the vessel, and Future Care. District Judge Morgan held that the ship was not unseaworthy for failing to adequately train the crew or to have adequate procedures for handling medical emergencies, and that the employer was not liable for negligence in selecting Future Care as its medical services provider. However, Adams' employer was vicariously liable under the Jones Act for the negligence/malpractice of Dr. Bourgeois.

The question was then presented whether the three-year maritime statute of limitations or the one-year Louisiana limitation for malpractice applied with respect to the employer's liability for Dr. Bourgeois' malpractice. 46 U.S.C. § 30510 provides that vicarious liability of the employer/vessel owner for malpractice occurring at a shoreside facility is subject to statutory limits of liability applicable to the medical provider in the state in which the shoreside medical care was provided. Noting that the medical care was not provided "at a shoreside facility," Judge Morgan held that the three-year statute was applicable, and the suit was timely.

Judge Morgan also held that the captain was liable for failing to provide medical care to Adams, but that both the employer and captain were only liable for damages suffered by Adams until he reached maximum medical improvement from the events on board the M/V LIBERTY EAGLE. As Adams did not establish when the payments ended compared to the court's finding of maximum cure, Judge Morgan held that Adams was not entitled to any additional maintenance or to punitive damages for failure to properly pay maintenance and cure.

However, Judge Morgan did find that the captain was grossly negligent in the providing of medical care to Adams, which led the Judge to address the circuit split on the application of *respondeat superior* to conduct of employees of a corporation, as noted by the United States Supreme Court in *Exxon Shipping Co. v. Baker*. Finding a "distressing lack of oversight" of the captain, Judge Morgan held that his employer should share the blame for the captain's gross negligence.

Submitted by SPB

Boatner v. C&G Welding, Inc., 2020 U.S. Dist. LEXIS 135997 (E.D. La. July 30, 2020)

This was a Jones Act case that arose from a shoulder injury a rigger suffered while lifting a bundle of cable slings aboard a barge. The motion before the Court raised one question: Had the rigger forfeited his right to maintenance and cure by skipping over 75% of the physical therapy sessions his doctor deemed "absolutely critical" to his recovery? The Court found that he had.

Ira Boatner worked as a rigger for C&G Welding aboard a derrick barge owned by Shore Offshore. He tore his left rotator cuff while lifting a bundle of cable slings. C&G Welding promptly paid him maintenance and cure. Four months after his injury, Boatner visited a surgeon, Dr. Felix Savoie. Dr. Savoie recommended that Boatner undergo arthroscopic surgery. He noted that Boatner would "require 6 months of physical therapy to return to his heavy-duty occupation" after the surgery. It was "absolutely critical," he added, that "therapy once started some 6-8 weeks post-surgery not be interrupted." Dr. Savoie ordered Boatner to complete eighteen sessions of physical therapy. Boatner did not comply: He attended just six sessions, citing "transportation" issues. Ten months after his surgery, Boatner saw Dr. Savoie for a follow-up. Dr. Savoie said Boatner's shoulder was "not quite as good as I had hoped because therapy was discontinued." By then, Dr. Savoie "thought [he] would be releasing" Boatner to return to work. Instead, Boatner's shoulder health was deteriorating. To prevent further deterioration, Dr. Savoie again ordered Boatner to attend physical therapy. But Boatner—again—failed to attend. He skipped sixteen of the eighteen sessions prescribed this second round. In total, he had missed twenty-eight of thirty-six physical therapy sessions—over 75% of them.

Boatner sued C&G Welding and Shore Offshore under the Jones Act and general maritime law. He argued his shoulder injury was caused by the negligence of the defendants and the unseaworthiness of the barge. He asked for punitive and compensatory damages, attorneys' fees, and payments of maintenance and cure. C&G Welding and Shore Offshore moved for partial summary judgment dismissing Boatner's claim for maintenance and cure. The motion turned on the question of or not whether Boatner had forfeited his right to maintenance and cure by "willfully rejecting" or "unreasonably refusing" medical care.

Summary judgment is proper if the record discloses no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

A Jones Act employer owes an "absolute, non-delegable duty" to pay maintenance and cure to a seaman who "becomes ill or suffers an injury while in service of the vessel." *In re 4-K Marine, L.L.C.*, 914 F.3d 934, 937 (5th Cir. 2019). "Maintenance" is "a per diem living allowance for food and lodging." Id. at 937. "Cure" is "payment for medical, therapeutic, and hospital expenses." *Id.* A seaman forfeits his right to maintenance and cure in "well-defined and narrowly limited circumstances." *Oswalt v. Williamson Towing Co.*, 488 F.2d 51, 53 (5th Cir. 1974). Two circumstances were relevant here. The first was when the seaman "unreasonabl[y] refus[es] to accept medical care." *Id.* at 53 (citing *Brown v. Aggie & Millie, Inc.*, 485 F.2d 1293 (5th Cir. 1973)). When the seaman "voluntarily stops short" of maximum medical improvement by "refusing medical attention," the "justification for the payments likewise ceases." *Oswalt*, 488 F.2d at 54 (citing *Brown*, 485 F.2d at 1293). The second was when the seaman "willful[ly] reject[s]" the "recommended medical aid." *Coulter v. Ingram Pipeline, Inc.*, 511 F.2d 735, 737 (5th Cir. 1975).

The Court found that Boatner forfeited his right to maintenance and cure by failing to attend twenty-eight of the thirty-six physical therapy sessions his surgeon ordered. Accordingly, the Court granted C&G Welding and Shore Offshore's motion for partial summary judgment and dismissed Boatner's claim for maintenance and cure with prejudice.

Submitted by JAP

Meaux v. Cooper Consolidated, LLC, 2020 U.S. Dist. LEXIS 140433 (E.D. La. Aug. 6, 2020) & 2020 U.S. Dist. LEXIS 1655425 (E.D. La. Sept. 10, 2020)

Meaux was hired by Savard Labor & Marine ("Savard") to work for Cooper Consolidated ("Cooper"). Savard paid Meaux, but Cooper controlled his work. Meaux was assigned to Cooper's crane barges to assist in loading and unloading vessels in the Mississippi River. On February 19, 2019, Meaux was helping the crane operator on Cooper's crane barge put covers on a barge when he was struck by a cover dropped by the crane. At the time of the incident, Cooper was working on a vessel that was not owned by Cooper.

Cooper tried to return Meaux to work after his injury, but he insisted he could not continue working so Cooper terminated Meaux. Savard then authorized Meaux to seek treatment from a neurosurgeon who diagnosed herniated discs at the C4-C5 and L5-S1 levels. Meaux

was assigned to do physical therapy but quit when he claimed it was too painful. The doctor then performed surgery, and Savard continued paying for Meaux's medical treatment. Savard later quit paying for further treatment claiming that Meaux was not complying with prescribed treatment when he failed to attend physical therapy before and after surgery.

Meaux filed suit against Savard and Cooper alleging claims under the Jones Act and general maritime law. Meaux and Cooper filed cross-motions for summary judgment on the issue of seaman status. Meaux further argued that his maintenance and cure payments were arbitrarily cut off by Savard and Cooper and that he was Cooper's borrowed servant because Cooper controlled his work.

The court found that Meaux was a seaman even though he spent most of his time working on vessels not owned by Cooper. Noting that Cooper's vessels were tasked with the loading and unloading of other vessels, the court concluded that, even though he was not actually on board Cooper's vessel, Meaux's work contributed to the function of Cooper's vessels by assisting in the loading and unloading of vessels. The court concluded that Meaux was a sea-based employee performing work in the service of Cooper's vessel to advance the vessel's mission. The court found Meaux's assignment to Cooper's vessels was permanent and that his work as a flagger and utility man was necessary to the mission of the Cooper vessel. In summary, Meaux was a seaman as a matter of law. Thus, the court denied the motions for summary judgment filed by Cooper and Savard and granted in part Meaux's motion for summary judgment on the issue of seaman status.

Turning to Meaux's arguments for maintenance and cure, the court noted issues of material fact regarding Meaux's reasons for discontinuing physical therapy and his previous back injuries. Therefore, Meaux's motion for summary judgment on maintenance and cure was denied.

As to borrowed servant status, the court found no issues of fact that Meaux was Cooper's borrowed servant. In particular, the court noted that Meaux worked exclusively for Cooper performing work for Cooper's benefit. Cooper also controlled Meaux's work. Thus, the court granted summary judgment to Meaux on his claim that he was Cooper's borrowed servant.

Cooper later moved for reconsideration of the court's determination that Meaux was a seaman. The court denied the motion for reconsideration concluding that it was not necessary to look only at the time Meaux was physically present on a vessel owned by Cooper because (1) Meaux was never permanently assigned to work on a non-Cooper vessel and (2) all of Meaux's work was done in furtherance of the mission of Cooper's vessels.

Submitted by KMM

LHWCA

Jordan v. SSA Terminals, LLC, 973 F. 3d 930 (9th Cir. Aug. 28, 2020)

A longshoreman claimant sustained back injuries at work in 2014, when the truck he was driving for SSA Terminals was lifted and dropped by a crane. The claimant kept having back problems after the accident and finally underwent spinal fusion surgery in 2018. While SSA and its LHWCA's carrier agreed that the claimant was totally disabled immediately following the accident and again after the surgery, they disputed his disability between April 2015 and the March 2018 surgery based primarily on the surveillance videos which showed the claimant lifting and carrying objects, engaging in physical activities such as bending, tossing a baseball, and doing push-ups, and attending sporting events where he appeared to sit and stand for long periods without difficulties.

After his injury, the claimant did not work as a longshoreman, but continued to work on his landscaping business, although not at "full capacity." The Administrative Law Judge heard the testimony from the claimant and his physicians to determine whether the claimant was disabled between April 2015 and March 2018. The claimant testified that there was nothing he could not do, but it was either painful or he could not do it for the amount of time that would be considered a job. He also testified that with respect to his landscaping business, he assumed a more supervisory role and performed physical tasks when he had no choice.

The claimant's treating physician, who did not see the surveillance tapes, corroborated his complaints of pain and testified that he was totally disabled from longshore work principally because he could not work an eight-hour day in a regular fashion. The non-treating physicians (a neurologist, an osteopath, and an orthopedist) who conducted an independent medical examination of the claimant and saw the videos, testified that the claimant's complaints of pain were inconsistent with the videos and that he could return to work as a longshoreman without restrictions.

The ALJ rejected SSA's assertion that the claimant was not credible, but described his testimony as to whether his remaining disability would allow him to work to be "at best, ambiguous." He also found the claimant's complaints of pain were "not wildly improbable." While he found the claimant's treating physician highly qualified and credible, he noted that he did not review the videos, whereas the differences in the claimant's self-described limitations and the activities depicted in the videos was "striking." ALJ also noted that the impact the videos had on the medical opinions of the examiners was "remarkable." He then concluded that the claimant was not disabled and could return to work without restrictions. The claimant appealed to the Benefits Review Board, which affirmed ALJ's determination.

The central issue for the United States Court of Appeals for the Ninth Circuit was whether Jordan's complaints of pain described a covered disability. Writing for the Ninth Circuit, District Judge Block held, as a matter of first impression, "that credible complaints of severe, persistent, and prolonged pain can establish a prima facie case of disability, even if the claimant can literally perform his or her past work." Given the considerable range between the "poles" of pain, between "discomfort and torture," Judge Block stated that "the level of pain must be sufficiently severe, persistent, and prolonged to significantly interfere with the claimant's ability to do his or her past work." He added that pain could be so severe that an employee literally cannot do the job or cannot perform the required work over a full workday. He also stated that employees do not have to perform work that would exacerbate the injury to a degree that significantly impedes the claimant's ability to perform his or her past work.

The Ninth Circuit reversed the affirmance of the ALJ's decision and ordered the Board to remand the case to the ALJ to determine if Jordan's complaints of pain were credible and whether the pain affected his ability to do his past work based on the new standard for the worker's ability to perform his work established by the Ninth Circuit.

Submitted by AAE

Mays v. Chevron Pipe Line Co., 968 F.3d 442 (5th Cir. 2020)

This action arose when Plaintiff was killed in an explosion on an offshore platform owned by appellant Chevron Pipe Line Company ("Chevron"). Plaintiff was directly employed by a Chevron subcontractor, Furmanite American ("Furmanite"), which serviced valves on Chevron's platforms. Plaintiff's widow and children sued Chevron for state-law wrongful death, and Chevron claimed immunity under the state workers' compensation scheme. The parties agreed that state immunity did not protect Chevron if Plaintiff's accident was covered by the federal Longshore and Harbor Workers' Compensation Act ("LHWCA") which extends to injuries "occurring as the result of" natural-resource extraction on the Outer Continental Shelf ("OCS"). The jury found Plaintiff's death was caused by Chevron's OCS activities, which meant that the LHWCA applied and that Chevron did not enjoy state immunity. The jury found Chevron 70% at fault for Plaintiff's death and awarded his widow $2 million for her loss of affection. Chevron appealed.

Chevron raised three issues on appeal. First, it claimed that the district court misapplied the Supreme Court's *Valladolid* decision by instructing the jury to determine whether there was a substantial nexus between Plaintiff's death and Chevron's—as opposed to Furmanite's—OCS operations. Second, even assuming the focus was correctly on Chevron's OCS operations, Chevron argued that the link between those operations and Plaintiff's death was so "indirect" and "tenuous" that it failed the substantial nexus test as a matter of law. Third, Chevron argued that the district court abused its discretion by refusing to reduce Mrs. Mays' $2 million because the facts were not "especially tragic" compared to other cases and supported at most a $700,000 award.

In regard to Chevron's first argument, the United States Court of Appeals for the Fifth Circuit affirmed the judgment stating that *Valladolid*, consistent with the language of the statute it interpreted, requires only a link "between the injury and extractive operations on the shelf." It does not specify which employer's OCS operations are relevant in a case, where a subcontractor's employee does work for a contractor with OCS operations.

The Fifth Circuit also rejected Chevron's second argument for appeal finding that it amounted to asking the Court to reweigh the evidence which it could not do. Finally, the Fifth Circuit rejected Chevron's third argument holding that an analysis of the facts did not show an abuse of discretion and Plaintiff's wife gave compelling testimony of her damages.

Submitted by SMM

Rivers v. Costamare Inc., 2020 U.S. Dist. LEXIS 163128 (S.D. Tex. Aug. 6, 2020)

Plaintiff Warren Rivers ("Rivers") filed suit in the United States District Court for the Southern District of

Texas against Defendants Costamare Inc., Costamare Shipping Co. SA, and Montes Shipping Co. ("Defendants") for injuries that Rivers sustained while working as a longshoreman in support of the vessel MARESK KAWASAKI. Rivers alleged that, under the LHWCA, Defendants failed to provide him proper equipment to perform the job, failed to maintain the vessel and her appurtenances, and failed to provide him with a reasonably safe place to work. Defendants moved to dismiss the Complaint because Rivers failed to state a plausible third-party liability claim under the LHWCA.

The United States District Court for the Southern District of Texas granted Defendants' motion to dismiss. The Court held that Rivers' negligence claim could only arise under the LHWCA and, pursuant to the Supreme Court's decision in *Scindia*, a vessel owner had three narrow duties: (1) a turnover duty, (2) a duty to exercise reasonable care in the areas of the ship under the active control of the vessel, and (3) a duty to intervene. In his Complaint, Rivers provided conclusory statements, as opposed to factual allegations, that Defendants negligence caused him injuries. The Court held that Rivers failed to provide any factual allegation as to what each Defendant did and when they did it. The only allegations that the Court considered as factual were that Rivers was a longshoreman and that he was assisting loading containers onto a vessel. These allegations were insufficient to state a plausible claim under the LHWCA. Although the Court dismissed Rivers' Second Amended Complaint, it allowed Rivers one final opportunity to amend his Complaint to state a plausible cause of action against Defendants.

Submitted by JAY

Skipper v. A&M Dockside Repair, Inc., 2020 U.S. App. LEXIS 29514 (5th Cir. Sept. 16, 2020)

Skipper was employed by Helix and assigned to work at A&M's shipyard. He was injured on a barge and filed suit against A&M. A&M, in turn, filed a third-party demand against Helix for contribution and indemnity. They resolved their third-party demand and then jointly moved for summary judgment claiming that A&M was Skipper's borrowing employer under the Longshore and Harbor Worker's Compensation Act. The district court granted the motion, and Skipper appealed.

The court found that Skipper was a borrowed employee as a matter of law. It noted that Skipper testified he followed directions of A&M's yard superintendent and that Helix had no supervisors on site. Skipper's work was performed for A&M. The court also found that Skipper acquiesced in work for A&M and had no regular contact with Helix. Further, A&M had the right to discharge Skipper's work for A&M.

The court also noted that a provision in the agreement between A&M and Helix that Skipper would be an independent contractor did not preclude a finding of borrowed servant status given that other factors for borrowed servant status were met. Finally, the court noted that it did not matter that Helix was actually paying Skipper's wages because the funds used to pay Skipper were ultimately coming from A&M. Having found that the majority of the borrowed servant factors were satisfied, the United States Court of Appeals for the Fifth Circuit affirmed the district court's grant of summary judgment in favor of Helix and A&M.

Submitted by KMM

Limitation of Liability

Devall Towing & Boat Service of Hackberry, L.L.C. v. Lanclos, 2020 U.S. App. LEXIS 28819 (5th Cir. Sept. 11, 2020)

Lanclos was a deckhand on a vessel owned by Devall Towing. While assisting a vessel owned by Deloach break its tow, Lanclos was injured. Both Devall Towing and Deloach filed complaints in federal court to limit their liability. Lanclos filed suit in state court and filed a claim in the limitation action. Devall Towing also filed a claim in the Deloach limitation action seeking contribution, indemnification, and reimbursement.

Lanclos moved to lift the automatic stay to proceed in state court. Devall Towing refused to agree to any protective stipulations regarding limitation. The district court allowed the parties to proceed in state court but enjoined any right to enforce any state court judgment and held that any judgment would have no binding effect. Devall Towing and Deloach appealed.

The United States Court of Appeals for the Fifth Circuit found that, based on Devall Towing's refusal to agree to any stipulations, the exceptions necessary to lift the stay were not in place. In the absence of an agreement by all claimants to lift the stay, the court found that the district court lacked authority to impose stipulations on the claimants. Thus, the Fifth Circuit vacated the district court's order.

Submitted by KMM

Marion Hill Associates, Inc. v. Pushak, 2020 U.S. DIST. LEXIS 131274 (W.D. Pa. July 23, 2020)

John Pushak brought suit against his employer Marion Hill Associates in state court in Pennsylvania after injuries he sustained while working on a barge. Marion Hill then filed this limitation action. Pushak sought to lift the stay so that he could try his case in state court.

Pushak stipulated that Marion Hill was entitled to litigate all issues regarding limitation of liability in federal court except concerning his maintenance and cure claim. Although Marion Hill did not contest that the maintenance and cure claim was not subject to the protection of the Limitation Act, it did argue that the stipulations filed by Pushak were improper as there could be a duplication of damages between the maintenance and cure claim and the other claims brought by Pushak. Magistrate Judge Lenihan, noting that Pushak did not argue that the federal court should not have the power to reexamine the state court award for duplication of damages, recommended that the language in the stipulations regarding maintenance and cure be deleted.

Pushak also asserted a compensation claim under the LHWCA against Marion Hill, and Marion Hill argued that the stipulation waiving *res judicata* from the state court proceeding should be amended to include the LHWCA compensation claim. Opposite to his recommendation regarding maintenance and cure language, Judge Lenihan recommended that the stipulation regarding waiver of *res judicata* should include a decision or judgment in any proceeding or forum and that Pushak should stipulate to the continuing jurisdiction of the federal court over any other proceedings filed by Pushak against Marion Hill in any forum.

Lastly, Marion Hill objected to Pushak's assertion in the stipulations that he did not agree that Marion Hill was entitled to litigate the issue of exoneration in the limitation action. Siding with Marion Hill, Magistrate Judge Lenihan ruled that the stipulations should contain no definitive statement about exoneration.

Submitted by SPB

Marine Insurance

Arlet v. Workers' Compensation Appeal Board, 2020 Pa. Commw. LEXIS 612 (Pa. Commw. Ct. July 29, 2020)

On March 9, 2011, Robert Arlet was injured during the course and scope of his employment when he fell on an icy sidewalk on his employer's premises. His employer's insurer paid Arlet maintenance and cure benefits under the Protection and Indemnity Clauses of the Commercial Hull Policy.

Claimant filed a petition seeking workers compensation. Employer filed a response asserting that Claimant's remedy was governed by the Jones Act and that Claimant had fully recovered from his injury as of May 12, 2011. Arlet, however, sought benefits under the Pennsylvania workers' compensation statute. Although Arlet performed most of his work on the vessel when it was docked, and he had not sailed on the vessel since 2000, a workers' compensation judge determined that Arlet was a seaman. Then the Workers' Compensation Appeal Board reversed that decision and held that Arlet was not a seaman and was entitled to seek an award of state compensation benefits. The P&I insurer then sought to subrogate and recover the maintenance and cure payments it made.

The facts demonstrated that Arlet's employer discontinued state workers' compensation coverage three days before Arlet's accident. His employer thus argued that it was the named insured for the P&I coverage, and it had no insurance coverage for the state workers' compensation benefits. Therefore, the insurer would be subrogating against the payments from its own insured. The appeals court agreed with the board's December 4, 2018 decision and held that the insurer was not entitled to subrogate against its own insured for the maintenance and cure payments.

Submitted by SPB

Atlantic Specialty Insurance Co. v. Karl's Boat Shop, Inc., 2020 U.S. Dist. LEXIS 150619 (D. Mass. Aug. 20, 2020)

In 2018, a fire caused extensive damage to a sizeable three-story barn owned by the Defendant about two miles from the ocean. The fire allegedly destroyed multiple boats stored by Defendants. The Defendants received demands for payment from the boat owners.

The Defendants insurer, Atlantic Specialty, paid for the property loss to the storage barn. However, Atlantic Specialty determined that, despite Defendants undertaking to do so, the Defendants failed to require their customers to sign waivers or storage contracts.

As a result, Atlantic Specialty filed a Declaratory Judgment action against Defendants, alleging that Defendants liability coverage was void, under both maritime and Massachusetts law, because of their failure to comply with the warranty of truthfulness and the doctrine of *uberrimae fidei*.

On summary judgment, Judge Young found in favor of Atlantic Specialty under both maritime and Massachusetts law. Judge Young also found that admiralty jurisdiction was present as the insurance agreement and the risks insured against had, among other things, "a genuinely salty flavor."

Submitted by DC

Marine Pollution

Power Authority of the State of New York v. M/V ELLEN S. BOUCHARD, 968 F.3d 165 (2d Cir. July 30, 2020)

On January 6, 2014, while towing a barge through Long Island Sound, the tug Captain decided to drop the anchor, but misread the navigation chart and negligently ordered the anchor to be dropped in a cable area. The barge's anchor hit the cable (an underwater system that transmits electricity, and through which dielectric fluid is pumped as a lubricant and coolant). This resulted in a discharge of thousands of gallons of fluid into Long Island Sound before the cable was capped nearly two months after the incident.

The Power Authority of the State of New York, owner and operator of the transmission cable system, paid $9,848,087.12 for the cost of remediation and brought suit against the tug, barge, and owners under the Oil Pollution Act of 1990 and the New York Oil Spill Law. The vessel interests simultaneously filed actions seeking exoneration from or limitation of liability under the Shipowner's Limitation of Liability Act of 1851. The issue presented on appeal was the application of OPA and the Shipowner's Limitation of Liability Act.

The United States District Court for the Southern District of New York held that the cable was not an OPA facility, and OPA therefore did not preclude limitation actions. The District Judge ordered the Authority's claims transferred to the limitation proceedings.

On appeal, the United States Court of Appeals for the Second Circuit disagreed with the district court and held that the cables satisfied the definition of a facility under OPA as a structure or equipment that "is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil"). The Second Circuit reasoned that the cables were employed to transfer dielectric fluid, and the cables did convey the fluid along the length of the cables between the pressurization plants. Consequently, the Second Circuit found that the district court's decision to transfer the Authority's NYOSL claims to the Limitation Act proceeding, predicated as it was on the finding that the Authority did not have a viable OPA claim, was error as well.

Submitted by SPB

Practice and Procedure

Centennial Bank v. S/V Limitless, 2020 U.S. Dist. LEXIS 142505 (N.D. Fla. Aug. 10, 2020)

Intervening Plaintiff QCS Marine Solutions LLC (QCS Marine) moved for permission to conduct a marine survey of the S/V LIMITLESS prior to its scheduled sale date. QCS Marine alleged that the survey was necessary to rebut claims by Defendant Jason Gilkey (Gilkey) that QCS Marine caused damage to the vessel and failed to make appropriate repairs or improvements to the vessel. QCS Marine filed the motion with the Court because the U.S. Marshals Service, through a substitute custodian, had custody of the vessel. Gilkey objected to the motion because QCS Marine did not possess the required state electrical contractors at the time the alleged repairs were made and thus the survey would be immaterial. Plaintiff Centennial Bank did not object to the survey but requested that the survey be limited in scope such that QCS Marine would be prohibited from using the survey to establish a minimum bid at the sale of the vessel.

The Court granted QCS Marine's motion for permission to conduct a marine survey. The Court held that QCS Marine's survey was relevant to its maritime lien against the S/V LIMITLESS and breach of contract claim against Gilkey as a party may obtain discovery regarding any nonprivileged matter that is relevant to the party's claim or defense. Gilkey's objection went to the merits of the claim, not to whether QCS could conduct the survey as part of discovery. Further, the Court granted Centennial Bank's request to prohibit QCS Marine from using the survey to establish a minimum bid on the sale of the S/V LIMITLESS.

Submitted by JAY

Coughlan v. Jachney, 2020 U.S. DIST. LEXIS 126904 (E.D.N.Y. July 20, 2020)

Robert Coughlan and Aileen Coughlan brought this suit against the parties with which they contracted in April of 2018 for the construction of a yacht, asserting that they were entitled to almost $200,000.

The Court first noted that this contract was not a maritime contract, and the decision was based on New York law under diversity citizenship. Ultimately, the Coughlan's were unsuccessful in this dispute over yacht construction and in establishing their claims of fraud, conversion, unjust enrichment, and breach of contract.

Submitted by SPB

D'Amico Dry d.a.c. v. McInnis Cement Inc., 2020 U.S. DIST. LEXIS 114749 (S.D.N.Y. June 30, 2020)

D'Amico Dry d.a.c. entered into a charter party with McInnis Cement, a Canadian manufacturer and shipper of cement, to ship cement on a regular basis from Canada to ports throughout the United States. After McInnis Cement suspended all shipments and declared *force majeure* due to the COVID-19 pandemic, D'Amico demanded arbitration and brought this action to attach property of McInnis Cement in New York to satisfy an arbitration award.

McInnis moved to vacate the attachment pursuant to Rule E on the ground that it was not subject to service within the Southern District of New York.

Judge Caproni ruled that service could not be effected on the United States subsidiary of McInnis Cement as it was not a managing or general agent with sufficient authority to accept service for its parent company, and sufficient authority to accept service did not arise from the fact that the United States subsidiary helped negotiate the charter party. Interestingly, Judge Caproni noted that McInnis Cement was unquestionably subject to specific personal jurisdiction in the district in connection with the shipment of products into New York.

However, Judge Caproni concluded that because McInnis Cement could not be served within the Southern District of New York, it was not "found" within the district and denied the motion to vacate the order of attachment.

Submitted by SPB

Goodloe Marine, Inc. v. Caillou Island Towing Co., 2020 U.S. Dist. LEXIS 142600 (M.D. Fla. Aug. 10, 2020)

This action arose when Defendant was towing Plaintiff's dredge and Idler barge and the dredge began taking on water and sank. The Idler barge also sustained damage in the incident. Defendant countersued Plaintiff on the grounds that Plaintiff warranted to Defendant that the Dredge and Idler barge were seaworthy, properly and efficiently manned, supplied, equipped, and furnished. Plaintiff filed a six-count complaint against Defendant asserting claims of negligence, gross negligence, breach of contract, and breach of the implied warranty of workmanlike service. Defendant filed its counterclaim, asserting claims of breach of contract and negligence. Plaintiff then filed a motion to dismiss Defendant's counterclaim with prejudice, or to require Defendant to provide a more definite statement of its counterclaim. Defendant opposed the motion.

The court stated that in order to survive a motion to dismiss, factual allegations must be sufficient "to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). When deciding a Rule 12(b)(6) motion, the court's scope of review is limited to the four corners of the complaint. *St. George v. Pinellas County*, 285 F.3d 1334, 1337 (11th Cir. 2002). However, a document attached to the pleading as an exhibit may be considered if it is central to the plaintiff's claim and the authenticity of the document is not challenged.

Plaintiff argued that Defendant's breach of contract claim was not sufficiently pled because it was based on an alleged breach of the duty to furnish seaworthy vessels and therefore sounded in negligence. The United States District Court for the Middle District of Florida denied Plaintiff's motion on the breach of contract claim holding that Defendant adequately pled the elements of a claim for breach of the towing contract and that the claim was not duplicative of the negligence claim because breach of contract and negligence claims present different legal theories and require that different elements be proven.

Plaintiff argued that Defendant's negligence claim attempted to subject Plaintiff to a higher and inapplicable standard of care. The Middle District of Florida denied Plaintiff's motion as to this count.

Finally, Plaintiff alternatively moved that the court require Defendant to plead a more definite statement. The Middle District of Florida denied this count deeming Defendant's counterclaim provided sufficient notice of the claims against Plaintiff.

Submitted by SMM

Mullen v. Daigle Towing Serv., L.L.C., 2020 U.S. Dist. LEXIS 124711 (E.D. La. July 15, 2020)

This Jones Act litigation arose from a seaman's claim that he slipped and fell on the deck of a barge he could not name on a date he did not know. Mark Mullen worked as a deckhand for Daigle Towing Service aboard a tugboat named the M/V MISS LAURIE. He claimed he slipped and fell on the deck of an "undesig-

nated rock barge" in the MISS LAURIE's tow. He did not know when, exactly, he fell; he did not report the alleged fall; and he did not seek medical treatment until months later. But he sued anyway.

At first, Mullen sued only his employer, Daigle Towing. He later amended his complaint to add negligence and unseaworthiness claims against Lafarge. In that first supplemental complaint, he said he slipped on the deck of a Lafarge-owned "undesignated rock barge" because the deck was "slick and not properly covered with non-skid[.]" He soon changed his mind, though; he filed a second supplemental complaint asserting that American Commercial Barge Line——and not Lafarge——owned the "undesignated rock barge."

Lafarge moved for summary judgment, contending it had no duty to maintain the "undesignated rock barge." Lafarge alleged it ceded control of all such barges two years before the alleged incident, when it entered into a bareboat charter party with American Commercial Barge Line. Mullen responded that he needed more time for discovery and asked the Court to deny or defer summary judgment. See Fed. R. Civ. P. 56(d).

Summary judgment is proper if the record discloses no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A fact is material if it "might affect the outcome of the suit." *Id.* at 248.

The bareboat charter party between Lafarge and American Commercial Barge Line was "tantamount to, though just short of, an outright transfer of ownership" of the barges. *Agrico Chem. Co. v. M/V Ben W. Martin*, 664 F.2d 85, 91 (5th Cir. 1981) (citation omitted). It transferred "full possession and control of" the barges to the charterer, American Commercial Barge Line. *Walker v. Braus*, 995 F.2d 77, 80 (5th Cir. 1993). That transfer occurred in December 2016, over two years before Mullen's alleged fall. The Court found that Mullen cited no record evidence to support a finding that Lafarge owed the duty alleged in the Complaint. Accordingly, he could not prove the duty element of his negligence claim. The Court therefore granted Lafarge's motion for summary judgment on this claim and turned to the unseaworthiness claim. The Court further found that as a Jones Act seaman, Mullen "cannot maintain a *Sieracki* seaworthiness action against a vessel on which he is not a crew member." *Smith v. Harbor Towing & Fleeting, Inc.*, 910 F.2d 312, 315 (5th Cir. 1990). Because Mullen was not a crew member of the "undesignated rock barge," he could not prevail on an unseaworthiness claim against its alleged owner, *Lafarge*, at 315. The Court therefore granted Lafarge's motion for summary judgment dismissing Mullen's unseaworthiness claim.

Submitted by JAP

Rang Dong Joint Stock Co. v. J.F. Hillebrand USA, Inc., 2020 U.S. Dist. LEXIS 120027 (E.D. Cal. July 7, 2020)

This dispute involved a shipment of spoiled wine. A Napa Valley winery contracted with an international freight forwarder to ship three containers of wine to Vietnam, which containers were carried by a German carrier to a different terminal, contrary to the parties' shipping arrangements. A subsequent eight-day delay caused extensive heat damage to the cargo. The winery sued the freight forwarder and the carrier. The freight forwarder moved to dismiss the winery's claim of breach of fiduciary duty and the winery moved to amend its complaint to swap a claim for fiduciary duty with a negligence claim.

The court allowed the amendment, reasoning that the cargo claimant had shown good cause. The cargo claimant also moved the court for leave to serve the carrier, a German entity, through its counsel in the United States. As the cargo claimant had attempted service through the Hague Convention twice, the court held that the service on the carrier through its American counsel was appropriate as reasonably calculated to apprise the carrier of the action because counsel were aware of the procedural posture of this action and the substantive issues related to the carrier's status as a named party.

Submitted by AAE

Rosado v. Wheeler, 2020 U.S. DIST. LEXIS 126407 (E.D.N.Y. July 17, 2020)

At issue before the United States District Court for the Eastern District of New York was a proposal for open-water dredge disposal in Eastern Long Island Sound. Pursuant to the Environmental Protection Agency's plan for the disposal of dredging material for navigational channels and port facilities that was researched and drafted by the Army Corps of Engineers, the EPA designated an open-water site in Eastern Long Island Sound for disposal as the sediment would not drift from the site and contaminate nearby areas and would have minimal environmental impact on water quality and habitat compared to other areas.

Thereafter, the decision was challenged by governmental entities and groups, presenting Judge Korman with the question whether the EPA followed the decision-making processes of the Marine Protection, Research, and Sanctuaries Act and the Coastal Zone Management Act.

Judge Korman concluded that the EPA based its findings on substantial evidence and followed the agency's obligations under the statutes. Therefore, without endorsing the practice of open-water disposal or discouraging the EPA from pursuing more environmentally sustainable alternatives, Judge Korman upheld the decision of the EPA.

Submitted by SPB

Symington v. BVAJ Marine, Ltd, 2020 U.S. Dist. LEXIS 140828 (S.D. Fla. Aug. 5, 2020)

Plaintiff Robert Symington ("Symington") asserted claims under the Jones Act and general maritime law in the United States District Court for the Southern District of Florida against Defendant BVAJ Marine, Ltd (BVAJ Marine) for injuries that Symington suffered while working on a vessel owned by BVAJ Marine. BVAJ Marine moved to quash service and to dismiss the Complaint for improper service, lack of personal jurisdiction, and failure to state a cause of action. Symington argued that he properly served BVAJ Marine pursuant to the Florida Statutes.

The Court granted BVAJ Marine's motion to quash service. Symington served the chief engineer of the vessel that BVAJ Marine owned. According to the process server, BVAJ Marine did not have a registered agent in the State and the chief engineer stated that he was the only employee present and was in charge. BVAJ Marine filed an affidavit providing that the chief engineer was not authorized to accept service. The Court analyzed the applicable Florida statute (section 48.081) and held that service was improper. The Court reasoned that BVAJ Marine was not a corporation licensed or qualified to do business in Florida, that the chief engineer was not an agent or officer of BVAJ Marine, and that the chief engineer was not transacting business for BVAJ Marine in Florida which is required for service on foreign corporations.

The Court ruled that BVAJ Marine's motion to dismiss for failure to state a cause of action was premature. The Court also denied without prejudice BVAJ Marine's motion to dismiss for lack of personal jurisdiction and allowed Symington additional time to serve BVAJ Marine properly.

Submitted by JAY

Seamen

Sanchez v. Smart Fabricators of Texas, L.L.C., 2020 U.S. App. LEXIS 25930 (5th Cir. Aug. 14, 2020)

Defendant hired plaintiff to work as a welder on the deck of the ENTERPRISE 263, a jack-up drilling rig owned by Enterprise. At the time of his injury, plaintiff had spent 19% of his time working for the defendant on the ENTERPRISE 263 while it was located on the Outer Continental Shelf. Plaintiff also spent 72% of his time working on the ENTERPRISE 350 while the rig was adjacent to an inland pier.

Plaintiff was injured and filed suit under the Jones Act in Texas state court. The defendant removed the case to federal court claiming plaintiff could not establish his status as a seaman. The district court agreed with the defendant, refused to remand the case to state court, and granted summary judgment in favor of the defendant. Plaintiff appealed.

The United States Court of Appeals for the Fifth Circuit focused its analysis on whether the nature of the plaintiff's work was substantial and exposed him to the perils of the sea. The Fifth Circuit determined that the work on the ENTERPRISE 350 while docked next to the pier did not disqualify plaintiff from being a seaman. The court found that its previous decisions in *In re Endeavor Marine*, 234 F.3d 289 (5th Cir. 2000) and *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927 (5th Cir. 2014), required the determination that a seaman is still exposed to the perils of the sea even though he works on a vessel adjacent to land. Therefore, the court found that summary judgment should not have been granted. The case was remanded to the district court with instructions to remand to state court.

Judge Davis, the author of the opinion, wrote a special concurrence joined by the other panel members, Judges Jones and Willett. Judge Davis wrote that, while he believed reversal of the district court's ruling was compelled by Fifth Circuit precedent, he believed that precedent was inconsistent with the teachings of the Supreme Court and that en banc review of the Fifth Circuit's cases on seaman status may be appropriate. In Judge Davis' opinion, a seaman's duties must actually take him to sea as distinguished from someone who works on a vessel but is essentially a land-based worker.

Submitted by KMM

Thomas v. Seabird Exploration Cyprus Ltd., 2020 U.S. Dist. LEXIS 174322 (E.D. La. Sept. 23, 2020)

Plaintiff was a seismic navigator. He used employment agencies, Nautech and Newton, to find jobs for him to work. Plaintiff had an employment agreement with Newton and worked on vessels owned by Osprey and operated by Seabird. During one of those assignments, plaintiff was injured. He filed suit against Seabird and Osprey alleging claims under the Jones Act. Defendants moved for summary judgment challenging plaintiff's seaman status.

The court determined that any work by plaintiff for Nautech was irrelevant to the seaman status question. Instead, the court found plaintiff was employed by Newton and spent 50% of his time on defendants' vessels. Thus, the court concluded that there were issues of fact precluding summary judgment and denied the defendants' motion.

Submitted by KMM

Woolery v. Atlantic Capes Fisheries, Inc., 2020 U.S. Dist. LEXIS 136037 (D.N.J. July 31, 2020)

Travis Woolery was injured while working on the conversion of the F/V ALLIANCE from a shrimping vessel to a scallop fishing vessel in Cape May, New Jersey. He brought suit against Defendant Atlantic Capes Fisheries, Inc, for negligence under the Jones Act and under the general maritime law for unseaworthiness and maintenance and cure. As Woolery primarily worked as a welder on the Vessel, the Defendant moved to dismiss the case on the basis that Woolery was not a seaman.

Concerning the Plaintiff's seaman status and regarding the requirement that Woolery's duties contribute to the function or mission of the vessel, Judge Bumb held that a fact dispute existed regarding whether his welding and installing scallop fishing equipment and work maintaining the vessel contributed to the new mission of the vessel.

Next, regarding the two requirements that the worker's connection to the vessel must be substantial in both nature and duration, Judge Bumb held that there was sufficient evidence of the connection requirement because Woolery remained in service of the vessel day and night, performing seaman's activities "which exposed him to the typical perils of shipboard life" while the vessel was at the dock.

Finally, Judge Bumb addressed the employer's argument that Woolery's claims were barred by the exclusive remedy provisions of the LHWCA and the New Jersey workers' compensation statute. Noting that the employer had not paid compensation to Woolery under the LHWCA, Judge Bumb reasoned that the failure to pay compensation under the LHWCA created a fact question whether the employer had secured payment of compensation under the LHWCA so as to be entitled to the immunity defense.

Thus, Judge Bumb held that there were fact questions to be resolved on all of the elements of seaman status.

Submitted by SPB

Seaworthiness

Williams v. Dann Marine Towing, LC, 2020 Del. Super. LEXIS 1559 (Del. Super. Ct. Aug. 6, 2020)

Bruce Williams was injured while throwing a mooring line on the barge DS-204, which was in tow of the M/V PALM COAST. As an engineer and crew member on the tug M/V PALM COAST, Williams brought this action against his employer, Dann Marine, owner of the tug, for negligence, maintenance and cure, and unseaworthiness of both the tug and barge.

First, Judge Clark denied Dann Marine's Motion for partial summary judgment that the tug was not unseaworthy and that it was not liable for unseaworthiness of the barge. Dann Marine, relying on case law from the United States Court of Appeals for the Fifth Circuit, argued that a seaman is not owed the warranty of seaworthiness with respect to vessels to which he has not attained seaman status. However, Judge Clark stated that the decision of the Fifth Circuit in *Smith v. Harbor Towing and Fleeting* "does not address the warranty of seaworthiness." Judge Clark then held that there was a fact question whether Dann Marine had control over the barge regarding its warranty of seaworthiness.

With respect to the unseaworthiness claim against the tug, Judge Clark rejected Dann Marine's argument that its alleged negligence in the docking practice for the tug could constitute unseaworthiness. The court concluded that a pattern of negligent acts can amount to unseaworthiness in operation because the relief captain used the same docking maneuver each time that he docked the barge at the facility where Williams injury occurred. Thus, there was also a fact question regarding unseaworthiness of the tug.

Submitted by SPB

Shipping Act of 1984

Mercedes-Benz USA, LLC v. Nippon Yusen Kabushiki Kaisha, 2020 Super. Unpub. LEXIS 1570 (N.J. Super. Ct. App. Div. Aug. 10, 2020)

Mercedes-Benz brought suit in New Jersey state court against ocean carriers NYK Line, Wallenius, and others alleging violations of the New Jersey Antitrust Act, tortious interference, breach of contract, and breach of the covenant of good faith and fair dealing in connection with its purchase of roll-on, roll-off services from the Defendants' vessels for the shipment of Mercedes cars to and from the United States.

Mercedes-Benz became aware that Defendants were engaged in an illegal price-fixing agreement after media outlets reported a raid of Defendants' offices by antitrust authorities from the US, European Union, and Japan in connection with ongoing criminal investigations.

The New Jersey Court of Appeals dismissed the claims and concluded that the Federal Shipping Act of 1984 preempted antitrust, bad faith, tortious interference, and breach of contract claims under state law as all of the allegations were based on anticompetitive behavior from a conspiracy of the Defendants to overcharge Mercedes for the shipments.

Submitted by SPB

Towage

Cashman Equipment Corp. v. American Marine Corp., 2020 U.S. DIST. LEXIS 119290 (D. Mass. July 7, 2020)

American Marine, a tug operator, was hired by Cashman Equipment to tow its barge from Florida to Virginia and ultimately to Puerto Rico. Based on negligence and, arguably gross negligence, Cashman Equipment brought this suit seeking to recover alleged damage to its barge resulting from Winter Storm Grayson.

Prior to the incident, Cashman Equipment proposed using a BIMCO Towhire 2008 form, which contained reciprocal provisions for the allocation of fault, such that each party was responsible for damage to its property, regardless of the fault of the other party. American Marine agreed to these terms.

American Marine moved for summary judgment based on the exculpatory provision in the BIMCO Towhire contract, and Cashman Equipment responded arguing that the exculpatory clause was invalid under *Bisso v. Inland Waterways Corp*.

Following the decision of the United States Court of Appeals for the Fifth Circuit in *International Shipbreaking Ltd. v. Smith*, Judge Zobel distinguished *Bisso* on the ground that the reciprocal provisions did not exonerate the tug owner from all liability. Namely, American Marine retained significant exposure for damage to its tug, damage to third parties, injuries to its crew, and other damages. Therefore, Judge Zobel dismissed all negligence allegations in the complaint. However, Judge Zobel declined to dismiss the gross negligence claim against American Marine and held that it was sufficiently pleaded as the parties could not contract out of gross negligence.

Judge Zobel also granted American Marine's cross-motion for summary judgment for breach of contract entitling American Marine to an award of attorneys' fees from Cashman Equipment.

Submitted by DC

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