International
Comparative
Legal Guides

Practical cross-border insights into shipping law

Shipping Law 2023

10th Edition

Contributing Editor:
Bruce G. Paulsen
Seward & Kissel LLP

ICLG.com

Expert Analysis Chapter

Q&A Chapters

USA


Bruce G. Paulsen


Hoyoon Nam


Brian P. Maloney

Seward & Kissel LLP

1 Marine Casualty

1.1 In the event of a collision, grounding or other major casualty, what are the key provisions that will impact upon the liability and response of interested parties? In particular, the relevant law / conventions in force in relation to:

(i) Collision

The United States did not ratify the Brussels Collision Liability Convention of 1910, and has historically followed the general maritime law of the United States, only belatedly adopting principles of proportionate liability and comparative fault. See, e.g., *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411, 95 S. Ct. 1708, 1716 (1975). The United States adheres to the International Regulations for Preventing Collisions at Sea 1972 (COLREGs). The U.S. Departments of Defence and Commerce, as well as the U.S. Coast Guard (USCG) within the Department of Homeland Security, publish regulations to ensure U.S. compliance with the COLREGs.

(ii) Pollution

With respect to pollution, currently, the United States is a signatory to Annexes I, II, III, V and VI of the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL). Annexes I, II, V and VI have been incorporated into U.S. law by the Act to Prevent Pollution from Ships (APPS) and implemented within 33 U.S.C. 1901 and 33 CFR 151. The United States incorporates Annex III by the Hazardous Materials Transportation Act (HMTA) implemented within 46 U.S.C. 2101 and 49 CFR 171–174 and 176. The United States has not ratified Annex IV, but has equivalent regulations under the Federal Water Pollution Control Act (FWPCA) (as amended by the Clean Water Act, 33 U.S.C. 1251 *et seq.* and implemented by 33 CFR 159) for treatment and discharge standards of shipboard sewage.

On December 4, 2018, the Vessel Incidental Discharge Act (VIDA) was also signed into law, restructuring the way the Environmental Protection Agency (EPA) and USCG regulate incidental discharges from commercial vessels. The VIDA requires the EPA and USCG to develop standards of performance and implementing regulations, respectively, for these discharges. Until the EPA publishes final standards, together with implementing regulations to be published by USCG, the existing EPA Vessel General Permit and USCG ballast water regulations remain in full force and effect. EPA is currently developing a Supplemental Notice, expected in Fall 2023, that it anticipates will provide clarification on the proposed rule, share new ballast water data, and discuss additional regulatory options that the EPA is considering for the final rule, which is now expected by Fall 2024.

The United States likewise has an extensive body of federal and state environmental laws and regulations concerning oil pollution prevention and spill response including, for example, the Oil Pollution Act of 1990, 33 U.S.C. § 2701, *et seq.*

(iii) Salvage / general average

With respect to salvage, the United States has adopted the International Convention on Salvage 1989. Courts have noted the parallels between the 1989 Salvage Convention and pre-existing general maritime law, and continue to look to applicable principles in those cases. With respect to general average, disputes concerning this are often resolved under the York Antwerp Rules. Under Rule A:

"*There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.*"

(iv) Wreck removal

With respect to wreck removal, the United States has not adopted the Nairobi International Convention on the Removal of Wrecks 2007. Certain provisions of the Rivers and Harbors Act of 1899, also known as the Wreck Act, impose a duty of diligent removal upon the owner, lessee or operator of a vessel sunken in a navigable waterway. Failure to remove such a vessel subjects it to removal by the U.S. government, and subjects the vessel owner, lessee or operator to reimburse the government for the cost of removal or destruction and disposal.

(v) Limitation of liability

The United States is not a party to the 1976 Convention on Limitation of Liability for Maritime Claims. Instead, the United States continues to apply the Limitation of Liability Act (the Limitation Act), passed in 1851 to encourage investment in shipping. Under this Act, vessel owners (including demise charterers) may limit liability

to the value of the vessel and pending freight in certain circumstances where the loss occurred without the privity or knowledge of the owner. As a matter of procedure, a vessel owner's action for limitation must be commenced within six months of the owner being given adequate written notice of a claim, regardless of whether a claimant has initiated a legal proceeding. Limitation may apply to claims brought by the U.S. government. The Limitation Act may be applied to a wide variety of claims but is not generally favoured by the courts, and there are different limits in cases of personal injury and death, pollution liabilities, wage claims and others. Notably, the US recently passed amendments to the Limitation Act in December 2022 that exclude "covered small passenger vessels" from the coverage of the Act, and that extend the minimum limitations period for giving notice of or filing claims for personal injury or death from six months to two years.

(vi) The limitation fund

In the United States, a limitation proceeding is commenced under Rule F of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (the Supplemental Rules) and creates not only a limitation proceeding, but also a concursus of claims where all claims are marshalled into one proceeding. To commence the proceeding, the owner must deposit with the court a sum equal to the value of the owner's interest in the vessel and its pending freight (or security therefor), together with such sums as the court may deem necessary to carry out the provisions of the act.

1.2 Which authority investigates maritime casualties in your jurisdiction?

The National Transportation Safety Board (NTSB) has authority to investigate and establish the probable cause of any major marine casualty or any marine casualty involving both public and non-public vessels under 49 U.S.C. § 1131(b)(1). This report is based on factual information either gathered by NTSB investigators or provided by the USCG from its informal investigation of the accident. As specified by the NTSB regulation, "[NTSB] investigations are fact-finding proceedings with no formal issues and no adverse parties […] and are not conducted for the purpose of determining the rights or liabilities of any person". Title 49 Code of Federal Regulations, § 831.4. NTSB reports may be provided to the USCG or other governmental agencies.

Concurrently, the USCG is authorised to conduct examinations and enforce compliance with the laws and regulations within its ambit, including with respect to maritime casualties, and may detain or deny entry to the territorial waters of the United States for vessels operating outside of acceptable standards. The USCG may issue civil penalties for deficiencies, as well as conduct oversight and enforcement efforts arising from maritime casualties within its jurisdiction.

1.3 What are the authorities' powers of investigation / casualty response in the event of a collision, grounding or other major casualty?

The USCG functions as a law enforcement agency that may conduct criminal investigations separately or in coordination with other federal agencies, such as the Department of Justice and the EPA, which may result in the issuance of fines or other sanctions, including in some circumstances criminal prosecution, for violations of safety or environmental regulations or arising from a collision, grounding or other major casualty.

2 Cargo Claims

2.1 What are the international conventions and national laws relevant to marine cargo claims?

The United States applies a version of the Hague Rules through the Carriage of Goods by Sea Act (COGSA) as well as the Harter Act. The United States also signed the Rotterdam Rules, which are not yet ratified. COGSA has been in place for generations and provides a reasonable and predictable cargo loss and damage liability regime. COGSA applies "tackle to tackle" (that is, from the time the cargo is loaded onto the receiving vessel until it is offloaded at the port of discharge). The period it covers is frequently extended by clauses in bills of lading, for example, to the inland portion of an intermodal shipment.

2.2 What are the key principles applicable to cargo claims brought against the carrier?

COGSA governs all contracts for carriage of goods by sea to or from U.S. ports in foreign trade (and bills of lading as evidence of such contracts). 46 U.S.C. § 30701, note § 13. COGSA governs the carrier's liability to cargo interests whenever a bill of lading or similar document of title is the contract of carriage. The "carrier" is identified in COGSA as "the owner, manager, charterer, agent, or master of a vessel" and can include all owners or charterers involved with carrying the cargo.

2.3 In what circumstances may the carrier establish claims against the shipper relating to misdeclaration of cargo?

Under circumstances involving the shipment of inherently dangerous goods, a shipper may be held strictly liable for damages resulting directly or indirectly from such shipment, where the carrier had no actual or constructive knowledge of the danger. 46 U.S.C. § 30701 note (previously codified at 46 U.S.C. § 1304(6)). Such a circumstance could arise where the shipper fails to or inaccurately declares the particulars of the cargo. That said, the liability of the shipper under COGSA turns on the carrier's lack of knowledge concerning the nature and character of the cargo, and courts have found that a carrier has "knowledge" when it has notice of any aspect of the cargo's danger.

Carriers may also seek to establish a claim for a shipper's negligent failure to warn of dangers posed by the cargo where the shipper does not disclose the nature or character of the cargo or where its warnings are inaccurate or misleading, and the shipper's actions cause the harms complained of.

A shipper's misidentification of cargo may also permit carrier claims for breach of contract or for indemnification against liability arising out of the misidentification of the cargo. Such claims will be governed by the terms of the contract of carriage.

2.4 How do time limits operate in relation to maritime cargo claims in your jurisdiction?

Cargo claims must be brought within COGSA's one-year limitation period. COGSA § 3(6), 46 U.S.C. § 30701 note (previously codified at 46 U.S.C. § 1303(6)).

3 Passenger Claims

3.1 What are the key provisions applicable to the resolution of maritime passenger claims?

Passenger claims involving personal injury or death are governed by applicable contracts of carriage and by the general maritime law of the United States, as the United States is not a party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. Passenger contracts are liable to be subject to forum selection clauses, arbitration agreements or other limitations that may vary the position under the general maritime law, if they are "reasonably communicated" to the passenger. Compensation for wrongful death outside the three-mile nautical limit that separates the territorial waters of the United States from the high seas is also provided under the Death on the High Seas Act, 46 U.S.C. §§ 30301 *et seq.*, with damages generally confined to those of a pecuniary nature for the benefit of a decedent's family. Provisions under 46 U.S.C. §§ 30501 *et seq.* regulate a carrier's ability to limit its liability, including that the liability of a vessel owner shall not exceed the value of the vessel and pending freight (§ 30505) except with respect to claims for personal injury or death (see §§ 30506, 30509).

3.2 What are the international conventions and national laws relevant to passenger claims?

The United States has not acceded to or ratified the Athens Convention.

Under the Limitation Act, claims against a ship or its owner for cargo loss, personal injury and death that are subject to limitation:

> "*Are those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel […] any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner).*"

Moreover, under the Limitation Act, a shipowner may not limit liability for negligence to passengers. In addition, "covered small passenger vessels" are now excluded from the coverage of the Limitation Act under amendments to that legislation passed in December 2022.

3.3 How do time limits operate in relation to passenger claims in your jurisdiction?

With respect to passenger claims, carriers by sea may impose a contractual limitation period of no less than one year to file a civil action for personal injury or death, running from the date of injury or death. Likewise, a carrier may impose a limitation period of no less than six months to provide notice of, or file a claim for, personal injury or death. 46 U.S.C. § 30508(b) (former 46 U.S.C. App. § 183b). These periods are tolled in the event of a claim involving a minor or mental incompetent, or in the event of wrongful death, until the earlier of: (1) the date a legal representative is appointed for the minor, incompetent or decedent's estate; or (2) three years after the injury or death. Finally, where notice of a claim is required by contract, the failure to give such notice may be a bar to recovery unless the court finds that: (1) the carrier had knowledge of the injury or death and the vessel owner was not prejudiced by the failure; (2) there was a satisfactory reason why notice could not have been given; or (3) the owner fails to object to the failure to give notice. 46 U.S.C. § 30508(c).

Unless modified by contract, a claim for personal injury or death arising out of a maritime tort must typically be brought within three years. 46 U.S.C. § 30106.

4 Arrest and Security

4.1 What are the options available to a party seeking to obtain security for a maritime claim against a vessel owner and the applicable procedure?

To obtain security for a maritime claim against a vessel owner, the United States has powerful prejudgment remedies, which may be brought as an *in personam* claim for attachment or garnishment against the vessel owner or third-party garnishees in possession of property of the defendant, or *in rem* arrest, which may be brought against the vessel. These operate under Rule B and Rule C, respectively, of the Supplemental Rules.

In a Rule B action, seeking *in personam* attachment or garnishment – which may include vessel seizures – the court requires a verified complaint by the plaintiff setting forth a *prima facie* valid admiralty claim at the time of the filing of the complaint, and an accompanying affidavit signed by the plaintiff or the plaintiff's attorney stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district.

In a Rule C *in rem* arrest action, the court likewise requires a verified complaint that describes with reasonable particularity the property that is the subject of the action, and that the property is within the district or will be within the district while the action is pending.

4.2 Is it possible for a bunker supplier (whether physical and/or contractual) to arrest a vessel for a claim relating to bunkers supplied by them to that vessel?

Vessels are routinely arrested to enforce necessaries liens and many ship mortgage foreclosures are commenced by such suppliers rather than mortgagee banks. Under the Commercial Instruments and Maritime Lien Act (46 U.S.C. § 31301 *et seq.*), vessel arrests may proceed *in rem* against the vessel, provided necessaries are supplied on the order of the owner or a person authorised by the owner. Under the statute, charterers are generally presumed to have authority to procure necessaries for the vessel and suppliers of necessaries are also generally presumed to rely on the credit of the vessel and will typically be entitled to a maritime lien unless they have actual notice of a "no lien" clause in the charter.

4.3 Is it possible to arrest a vessel for claims arising from contracts for the sale and purchase of a ship?

Admiralty jurisdiction, and thus, *in rem* remedies to arrest a vessel, do not extend to contracts that are solely for the sale of a vessel. That is, the breach of a contract for the sale of a vessel is not a maritime contract and does not give rise to a maritime lien, although jurisdiction may be extended to the charter portion of a charter-sale contract. *Cary Marine, Inc. v. M/V Papillon*, 872 F.2d 751, 755 (6th Cir. 1989); *Gaster Marine Recovery & Sales, Inc. v. M/V "The Restless I"*, 33 F. Supp. 2d 1333, 1334 (S.D. Fla. 1998).

4.4 Where security is sought from a party other than the vessel owner (or demise charterer) for a maritime claim, including exercise of liens over cargo, what options are available?

In Rule B attachment proceedings under the Supplemental

Rules, a plaintiff may seek maritime attachment or garnishment against any tangible or intangible personal property – up to the amount sued for – in the hands of garnishees named in the process. These actions may proceed *ex parte* on the basis of a verified complaint and an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. If an attachment is ordered, Supplemental Rule E provides a prompt hearing for any person claiming an interest in the property, at which the plaintiff is required to show why the arrest or attachment should not be vacated. In the case of cargo liens, which derive "from the right of the ship owner to retain the possession of the goods until the freight is paid" prior to unconditional delivery, *The Bird of Paradise*, 72 U.S. (5 Wall.) 545, 555 (1866), attachment or arrest proceedings are likewise available to enforce the maritime lien, where the lien survives a qualified delivery. *Cf. In re World Imps., Ltd. v. OEC Grp. N.Y.*, 820 F.3d 576, 588 (3d Cir. 2016) (permitting enforcement of cargo liens obtained prior to bankruptcy on post-petition goods, considering owner's contractual rights of non-waiver and substitution).

4.5 In relation to maritime claims, what form of security is acceptable; for example, bank guarantee, P&I letter of undertaking?

The procedure to secure the release of a vessel is set out under Rule E(5) and permits the parties to stipulate to "the amount and nature of such security" by way of a special or general bond conditioned to answer the judgment of the court or of any appellate court. Accordingly, a Club letter of undertaking (LOU) or other third-party surety bond may be acceptable if the parties can agree. In the absence of agreement, the court may fix the principal sum of the bond at an amount sufficient to cover the plaintiff's claim fairly stated with accrued interest and costs, up to a maximum of the smaller of twice the amount of the plaintiff's claim, or its value upon due appraisement, with interest thereon at six per cent *per annum*.

4.6 Is it standard procedure for the court to order the provision of counter security where an arrest is granted?

It is not standard procedure for the court to order counter security to be provided upon the arrest of a vessel. The U.S. Marshals Service, however, will require a deposit of sufficient funds to cover anticipated custodial costs before arresting a vessel, which vary based on the characteristics of the vessel and other circumstances. In addition, under Rule E of the Supplemental Rules, if the vessel owner asserts a counterclaim, the court will require that counter security be provided under Rule E(7). Rule E mandates that security be in the form of a bond or other suitable security, and the court may require security in the form of a sufficient amount to pay all costs and expenses that may be awarded against a party.

4.7 How are maritime assets preserved during a period of arrest?

If the parties cannot agree on the provision of substitute security, such as a special bond, Club LOU or deposit of cash into the registry of the court, the vessel is often ordered to be held by a substitute custodian to maintain the vessel within the district during the period of arrest. If the vessel or cargo is at risk of loss, any party to the action, the Marshal or the custodian may make a motion to the court for interlocutory sale of the vessel.

4.8 What is the test for wrongful arrest of a vessel? What remedies are available to a vessel owner who suffers financial or other loss as a result of a wrongful arrest of his vessel?

A claim for damages arising from the wrongful arrest of a vessel requires a claimant to make a showing of "bad faith, malice or gross negligence" on the part of the arresting party in proceeding with the attachment or arrest. A party may have a good defence to such a claim where the circumstances involve a *bona fide* maritime lien claim or where the seizure was supported by the advice of counsel in deciding to proceed with the arrest.

Should a vessel owner establish the required showing and overcome any defences, the caselaw suggests that all damages that proximately flow from the wrongful arrest, insofar as they can be proved to a reasonable certainty, may be recoverable (e.g., lost charter hire, demurrage, lost profits or loss of business opportunity). Punitive or exemplary damages may be available at common law upon evidence of wanton, wilful or outrageous conduct. However, the U.S. Supreme Court recently declined to recognise punitive damages claims for Jones Act unseaworthiness actions in 2019 in *Dutra Group v. Batterton*, which casts some doubt on their availability in other contexts in maritime law.

5 Evidence

5.1 What steps can be taken (and when) to preserve or obtain access to evidence in relation to maritime claims including any available procedures for the preservation of physical evidence, examination of witnesses or pre-action disclosure?

One of the procedures available to a person who expects to be a party to an action but cannot presently bring it or cause it to be brought is found under Fed. R. Civ. P. 27, allowing for depositions to perpetuate testimony that may then be used in any later-filed district-court action involving the same subject matter. This procedure is not typically available as a vehicle for discovery prior to filing a complaint but instead in circumstances where testimony needs to be preserved that may otherwise be lost.

Separately, parties seeking to obtain discovery in the United States for use in a foreign proceeding may petition the court for testimony or documents under the provisions of 28 U.S.C. § 1782.

5.2 What are the general disclosure obligations in court proceedings? What are the disclosure obligations of parties to maritime disputes in court proceedings?

The Federal Rules of Civil Procedure and applicable rules of professional responsibility govern disclosure obligations in admiralty proceedings.

Under Rule 26(a), initial disclosures are required to be exchanged without awaiting a discovery request, identifying persons likely to have discoverable information, the documents and things that a party may use to support its claims and defences (other than impeachment material), the categories of damages claimed, and any applicable insurance agreements.

Under Rule 26(b), unless otherwise limited by court order, parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defence and proportional to the needs of the case, considering "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the

parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit". Information need not be admissible in evidence to be discoverable.

5.3 How is the electronic discovery and preservation of evidence dealt with?

Rules 26 and 34 principally govern the procedures for requesting and responding to requests for electronically stored information (ESI). Ordinarily, a responding party must: produce documents as kept in the usual course of business or organise and label them to correspond to the categories in the request; and produce ESI in a form in which it is ordinarily maintained or in a reasonably usable form. Parties will frequently negotiate the scope of ESI or agree on search terms in light of the considerations in the Rules.

The obligation to preserve evidence attaches when a party reasonably anticipates litigation. A culpable failure to comply with a party's obligation to preserve relevant evidence subjects a party to spoliation sanctions, which are in the discretion of the court and can include precluding the introduction of certain evidence, imposing an adverse inference, assessing attorneys' fees and costs, or the dismissal of a party's complaint or entry of judgment by default.

6 Procedure

6.1 Describe the typical procedure and timescale applicable to maritime claims conducted through: i) national courts (including any specialised maritime or commercial courts); ii) arbitration (including specialist arbitral bodies); and iii) mediation / alternative dispute resolution (ADR).

6.1.1 Which national courts deal with maritime claims?
The federal courts have original jurisdiction over any civil case of admiralty or maritime jurisdiction (saving to suitors all other remedies to which they are otherwise entitled), and permit arrest or attachment proceedings under Rule B and Rule C "maritime claims". Such claims include suits to enforce a judgment of a foreign admiralty court or to obtain security in aid of arbitration. In general, maritime claims include actions under contracts with sufficient reference to maritime service or maritime transactions, see, e.g., *Norfolk S. Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 24, 125 S. Ct. 385, 393 (2004), and tort claims occurring on the high seas, or on the navigable waters of the United States where they bear a sufficient connection with maritime activity, see, e.g., *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, 115 S. Ct. 1043, 1048 (1995).

6.1.2 Which specialist arbitral bodies deal with maritime disputes in your jurisdiction?
The relevant arbitral body is the Society of Maritime Arbitrators (SMA) in New York. Houston and Miami also are looking to become centres of maritime arbitration. Many charter parties specifying arbitration in New York are *ad hoc* and do not require that arbitrators be members of any specific arbitral body.

6.1.3 Which specialist ADR bodies deal with maritime mediation in your jurisdiction?
As set forth in response to question 6.1.2, the SMA likewise has procedures for non-binding mediation or conciliation proceedings.

6.2 What are the principal advantages of using the national courts, arbitral institutions and other ADR bodies in your jurisdiction?

With respect to maritime arbitrations, the SMA is very active in promoting maritime arbitration in the United States, maintaining its roster of arbitrators and in publishing panel awards, which are available on the LEXIS and Westlaw services. The SMA provides only limited administration of arbitrations or mediations, which generally proceed autonomously under rules promulgated by that body.

6.3 Highlight any notable pros and cons related to your jurisdiction that any potential party should bear in mind.

Awards issued by the SMA are published and the SMA rules likewise require reasoned awards, unless the parties opt out. There are over 4,000 awards available online and the availability of this precedent gives predictability to parties seeking to understand the strengths and weaknesses of their case. It also enhances mediation as the mediators and parties can point to precedent in negotiations. The Federal Arbitration Act (FAA), adopted in 1925, has put arbitration on a strong footing and is the touchstone for the U.S. Supreme Court's vigorous pro-arbitration jurisprudence, which provides for summary confirmation proceedings and only limited grounds for *vacatur* or modification of awards.

7 Foreign Judgments and Awards

7.1 Summarise the key provisions and applicable procedures affecting the recognition and enforcement of foreign judgments.

There is no uniformity in the United States with respect to the recognition and enforcement of foreign judgments, which is governed by individual state statutes and common law. Many states have adopted either the 1962 Uniform Money-Judgments Recognition Act or the 2005 Uniform Foreign-Country Money Judgments Recognition Act, seeking to codify the recognition of foreign judgments. States that have not adopted either version of the model acts rely on common law principles of comity.

7.2 Summarise the key provisions and applicable procedures affecting the recognition and enforcement of arbitration awards.

The United States is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), as implemented by the FAA, 9 U.S.C. § 201 *et seq.* Foreign maritime arbitration awards are frequently enforced under the New York Convention.

The grounds to resist enforcement of the award are limited. As specified in the FAA, "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention". As such, the FAA incorporates only the limited enumerated exceptions or defences set forth in Article V of the New York Convention. Absent such a defence, a U.S. court "shall confirm" the award.

8 Offshore Wind and Renewable Energy

8.1 What is the attitude of your jurisdiction concerning the maritime aspects of offshore wind or other renewable energy initiatives? For example, does your jurisdiction have any public funding programme for vessels used in offshore wind? Summarise any notable legislative developments.

Several governmental authorities have pursued efforts to increase wind energy infrastructure and consumption. Among them are the US Department of Transportation's Maritime Administration ("MARAD"), the US Department of Energy ("DOE") and its Office of Energy Efficiency and Renewable Energy and Wind Energy Technologies Office, the US Department of the Interior's Bureau of Ocean Energy Management ("BOEM"), the US Department of Commerce's National Oceanic and Atmospheric Administration, and several state agencies including the New York State Energy Research and Development Authority and the New Jersey Department of Environmental Protection. These agencies coordinate to ensure a balance of interests between clean wind energy, economic opportunity and environmental protection.

The aforementioned agencies have implemented programmes to incentivise offshore wind investment. Chief among such programmes is MARAD's designation of offshore wind vessels as "Vessels of National Interest" which make them eligible for financial support through the Federal Ship Financing Program (Title XI). This programme specifically incentivises domestic collaboration and progress, assisting with modernisation of shipyards to construct and retrofit vessels, and to help domestic shipowners to finance US-made newbuilds with better-than-market credit terms. The programme also partners with several east coast states to strengthen the offshore wind supply chain by facilitating relationships and contracts between wind farm operators and the states themselves.

8.2 Do the cabotage laws of your jurisdiction impact offshore wind farm construction?

The Jones Act (which contains the cabotage laws relating to maritime commerce) governs in part the installation of offshore wind farms, however there are several issues arising in this novel space. US government agencies (including Customs and Border Patrol ("CBP")) have noted they intend to treat offshore wind similarly to offshore oil and gas. Further, a ruling from CBP in April 2022 confirmed that foreign wind turbine installation vessels may install foundations and towers so long as the vessel has not transported the materials from a U.S. point. The rationale is that the vessels may move crew members and installation materials from job site to job site because they are not considered "passengers" or "merchandise" under the Jones Act and CBP interpretation. CBP has also ruled that a foreign vessel may lay electrical cable in U.S. waters between U.S. points, including picking up that cable in a U.S. port before laying it. The method of laying the cable was ruled not to be "dredging" and as such is also allowed under the CBP guidance. Several issues and interpretations remain undecided, but CBP's recent rulings indicate an open mindset toward allowing foreign vessels opportunities in the offshore wind space, even if not traditionally allowable under the Jones Act and its cabotage laws.

9 Updates and Developments

9.1 Describe any other issues not considered above that may be worthy of note, together with any current trends or likely future developments that may be of interest.

The IMO 2023 regulations, which aim to reduce carbon emissions from oceangoing vessels, have been launched. In particular, the Energy Efficiency Existing Ship Index (EEXI) and Carbon Intensity Indicator (CII) regulations have now come into effect. Under these IMO amendments to MARPOL Annex VI, all ships of 5,000 gross tonnage and above will be assigned a CII letter rating from A to E (with A being the best). All ships of 400 gross tonnage and above will also calculate and compare their EEXI value to baseline, with the regulations requiring such value to be below the required EEXI for a comparable ship. The first annual reporting is expected to be completed in 2023, with initial CII ratings given in 2024.

Shipping companies should also continue to remain focused on sanctions compliance for 2023. We continue to see companies seeking advice with respect to international sanctions, particularly with respect to sanctions relating to China, Iran, Russia and Venezuela. The United States has continued aggressively to adopt, implement and enforce U.S. sanctions, including by establishing entirely new sanctions programmes, expanding and reinvigorating existing sanctions programmes, and resolving novel and significant enforcement actions.

As just one example, the Russian Harmful Foreign Activities Sanctions programme has continued to expand rapidly since the onset of the Russia-Ukraine war, and includes a range of new sanctions, import restrictions and export controls – including prohibitions upon (i) the import of certain Russian energy products into the United States, (ii) all new investments in Russia by US persons, and (iii) the export of certain professional services to Russia, including accounting, trust and corporate formation, and management consulting services.

Most recently, the United States has also prohibited a variety of specified services related to the maritime transport of Russian Federation origin crude oil and petroleum products, including trading/commodities brokering, financing, shipping, insurance (including reinsurance and protection and indemnity), flagging, and customs brokering. US persons involved in any aspect of these covered services should take particular note of the prohibitions. These prohibitions took effect for crude oil transport on 5 December 2022 and for other petroleum products on 5 February 2023. An exception exists to permit such services when the price of the seaborne Russian oil does not exceed the relevant price cap; but implementation of this price exception requires compliance with the record-keeping and attestation process outlined in OFAC's published guidance, which allows each party in the supply chain of seaborne Russian oil to demonstrate or confirm that oil has been purchased at or below the relevant price cap. We anticipate that the US and other countries will continue to vigorously enforce the price cap policy and its other sanctions regimes, and pursue enforcement proceedings against actors that would seek to evade such laws and regulations.

Bruce G. Paulsen is co-chair of Seward & Kissel's Litigation Group and chair of the Maritime Litigation Group. Ranked in the top 10 maritime lawyers by *Lloyd's List* in 2020, he specialises in handling complex commercial, maritime and international disputes. He is highly experienced in international sanctions. Bruce also handles finance and securities-related disputes in the shipping industry. He has represented bondholders, bond issuers, secured lenders and other creditors in matters arising from some of the most significant financing defaults in the shipping business and is experienced in maritime bankruptcy. He represents industry participants in litigations and arbitrations involving traditional maritime disputes and environmental matters. Bruce and the team recently had substantial success in numerous O.W. Bunker litigations and obtained the largest arbitration award in the history of New York maritime arbitration.

Seward & Kissel LLP
One Battery Park Plaza
New York 10004
USA

Tel: +1 212 574 1533
Email: paulsen@sewkis.com
URL: www.sewkis.com

Hoyoon Nam is a partner in Seward & Kissel's Maritime and Transportation and Corporate Finance Groups. He primarily devotes his time to the representation of financial institutions and borrowers in connection with bank financing and restructuring transactions, with a particular focus on matters of interest to clients in the transportation industry. He is experienced in other corporate transactional matters ranging from securities, mergers and acquisitions, private equity, joint ventures and corporate governance matters. Hoyoon is qualified in New York, England and Wales and the Marshall Islands, having previously practised law with an international law firm in London and New York. Hoyoon has contributed to several publications relating to shipping law.

Seward & Kissel LLP
One Battery Park Plaza
New York 10004
USA

Tel: +1 212 574 1640
Email: nam@sewkis.com
URL: www.sewkis.com

Brian P. Maloney is a partner in Seward & Kissel's Litigation Group and a member of the Maritime Litigation Group. Brian is a commercial litigator with significant experience across a wide range of sectors, including banking, maritime and securities. His work has included the defence and prosecution of Rule B attachments, Rule C arrest actions, and the defence of public shipping companies in securities class action claims, arbitration proceedings, regulatory inquiries and investigations. He was one of only 25 attorneys recognised nationally as a 2021 Litigation Trailblazer by *The National Law Journal*. He has written and spoken extensively in connection with his shipping litigation work, and is a contributor to Seward & Kissel's Maritime Blog and its Marshall Islands Law Blog.

Seward & Kissel LLP
One Battery Park Plaza
New York 10004
USA

Tel: +1 212 574 1448
Email: maloney@sewkis.com
URL: www.sewkis.com

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

The International Comparative Legal Guides are published by: global legal group