THE SHIPPING LAW REVIEW

EIGHTH EDITION

Editors
Andrew Chamberlain, Holly Colaço and Richard Neylon

THE LAWREVIEWS

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CONTENTS

PREFACE

The aim of the eighth edition of this book is to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. We have again invited contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

As with previous editions of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry: competition and regulatory law, sanctions, ocean logistics, piracy, shipbuilding, ports and terminals, offshore shipping, marine insurance, environmental issues, decommissioning and ship finance.

Each jurisdictional chapter gives an overview of the procedures for handling shipping disputes, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered. Contributors have summarised the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims. We have also asked the authors to address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, security and counter-security requirements, and the potential for wrongful arrest claims are also included.

The authors review the vessel safety regimes in force in their respective countries, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are examined, and contributors set out the current position in their jurisdiction. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction during the coming year. This year, we welcome Costa, Albino & Lasalvia Sociedade de Advogados as the new contributors of the chapter focusing on maritime law within Brazil. There are also two new jurisdictions in this edition – Israel (Harris & Co) and Mexico (Adame Gonzalez De Castilla Besil) – and Portugal makes a return, with Andrade Dias & Associados as the new contributors.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations Conference on Trade and Development (UNCTAD) estimating that the operation of merchant ships contributes about US$380 billion in freight rates within the global economy, amounting to about 5 per cent of global trade overall. Between 80 per cent and 90 per cent of the world's trade is still transported by sea (the percentage is even higher for most developing countries) and, as of 2019, the total value of annual world shipping

trade had reached more than US$14 trillion. Although the covid-19 pandemic has had a significant effect on the shipping industry and global maritime trade (which plunged by an estimated 4.1 per cent in 2020), swift recovery is anticipated. The pandemic truly brought to the fore the importance of the maritime industry and our dependence on ships to transport supplies. The law of shipping remains as interesting as the sector itself and the contributions to this book continue to reflect that.

Finally, mention should be made of the environmental regulation of the shipping industry, which has been gathering pace this year. At the International Maritime Organization's (IMO) Marine Environment Protection Committee, 72nd session (MEPC 72) in April 2018, it was agreed that international shipping carbon emissions should be cut by 50 per cent (compared with 2008 levels) by 2050. This agreement will now lead to some of the most significant regulatory changes in the industry in recent years, as well as much greater investment in the development of low-carbon and zero-carbon dioxide fuels. The IMO's agreed target is intended to pave the way for phasing out carbon emissions from the sector entirely. The IMO Initial Strategy, and the stricter sulphur limit of 0.5 per cent mass/mass introduced in 2020, has generated significant increased interest in alternative fuels, alternative propulsion and green vessel technologies. Decarbonisation of the shipping industry is, and will remain, the most important and significant environmental challenge facing the industry in the coming years. Unprecedented investment and international cooperation will be required if the industry is to meet the IMO's targets on carbon emissions. The 'Shipping and the Environment' chapter delves further into these developments.

We would like to thank all the contributors for their assistance in producing this edition of *The Shipping Law Review*. We hope this volume will continue to provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

Andrew Chamberlain, Holly Colaço and Richard Neylon
HFW
London
May 2021

Chapter 43

UNITED STATES

James Brown, Michael Wray, Jeanie Goodwin, Thomas Nork, Chris Hart, Alejandro Mendez, Melanie Fridgant and Svetlana Sumina[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The United States has a diverse maritime landscape comprising the Arctic, Pacific and Atlantic Oceans; the Gulf of Mexico; the Great Lakes; and thousands of canals, rivers and bays that make up its inland waterways. These extensive bodies of water have made the US water transportation industry a major player in international commerce.

The United States is one of the world's largest trading countries, making up one-quarter of the world's imports and exports, which includes more than 2.2 billion metric tonnes of cargo. In 2020, the value of total US trade with foreign countries was US$7.7 trillion. Despite this volume of international trade, the US-flagged merchant fleet (ocean-going vessels of more than 1,000 gross tonnage) is comprised of only 181 vessels, 100 of which are Jones Act eligible vessels that benefit from laws protecting US citizens' participation in domestic trade.

The expansion of liquefied natural gas (LNG) exports is expected to further increase the activity of US ports. Exports of LNG are forecast to average 9.5 billion cubic feet in the first quarter of 2021 and subsequently 9.5 billion cubic feet per year.

The US shipbuilding industry has remained consistent during the past 30 years. US shipyards have built on average more than 1,600 vessels a year since 1987, ranging from military vessels to small barges. The Biden Administration has announced an ambitious clean energy plan with many states adopting green energy plans. It is forecast that the evolution of the US offshore wind energy industry will increase the demand for Jones Act eligible vessels, which may boost the shipbuilding industry. For example, in 2021, it was announced that a first Jones Act compliant wind turbine installation vessel would be built at a Texas shipyard.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Admiralty and maritime law is one of the oldest sources of US common law. The Constitution extends admiralty jurisdiction to federal courts and provides that Congress may pass legislation in this field. There are four main sources of admiralty law: general maritime law, federal statutes, international agreements and state law when not pre-empted.

The primary source of admiralty law is judge-made general maritime law. This is a body of principles, rules, customs and concepts that have been developed over time by the federal courts. In addition to the federal judiciary, Congress can exercise its constitutional powers

1 James Brown, Michael Wray, Jeanie Goodwin and Thomas Nork are partners, Chris Hart is an of counsel, Alejandro Mendez is a senior associate, and Melanie Fridgant and Svetlana Sumina are associates at HFW.

to enact legislation governing maritime issues such as death on the high seas, seafarers' rights and workers' compensation. These enactments often pre-empt the general maritime law and courts will conform to the will of Congress in these areas.

The United States is a party to a number of significant international conventions, such as:

a International Regulations for Preventing Collisions at Sea 1972 (COLREGs);
b International Convention for the Safety of Life at Sea 1974 (SOLAS);
c International Convention for the Prevention of Pollution from Ships 1973 (MARPOL);
d International Convention on Load Lines 1966 (the Load Lines Convention); and
e International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995 (the STCW Convention).

There is a large body of federal law that governs maritime activities. Statutes such as the Carriage of Goods by Sea Act (COGSA), the Jones Act, the Shipowner's Limitation of Liability Act, the Oil Pollution Act and the Clean Water Act cut across a wide area of maritime activity. Federal regulators such as the US Coast Guard (USCG), Customs and Border Protection, and the Federal Maritime Commission have a significant role in regulating maritime commerce.

Federal maritime law strives for uniformity given its unique environment. However, when there is not a federal rule that pre-empts an area, state law is often applied by maritime courts. For example, marine insurance is governed by state law. In some instances, activities that appear to be maritime in nature, such as shipbuilding, are in fact governed by state law.

The common law and statutory framework that affects maritime commerce is a composite mixture of international conventions, federal statutes, case law and, to a lesser extent, state law. The bulk of the body of law, however, that affects maritime activities remains federal statutory and the general maritime law.

III FORUM AND JURISDICTION

i Courts

The United States is a federal system with federal and state judicial jurisdictions. Federal district courts have original jurisdiction over admiralty and maritime claims. Under the Constitution's 'savings to suitors' clause, a claimant may bring a common law claim in a state court. Federal admiralty courts have exclusive admiralty jurisdictions over *in rem* claims and several statutes, such as the Limitation of Shipowner's Liability Act and the Ship Mortgage Act, provide for exclusive jurisdiction in federal courts.

An original proceeding in the federal judicial system starts in the district court. Decisions from federal district courts may be appealed to one of the 11 federal courts of appeals, which are organised geographically. In view of their location, the Ninth Circuit Court of Appeals (West Coast), Fifth Circuit (Gulf of Mexico region) and Second Circuit (New York area) have well-developed bodies of maritime case law. The United States Supreme Court is the nation's highest court and its decisions are binding on all federal and state courts. Rarely employed by US courts, the doctrine of *forum non conveniens* can be applied to transfer a case, improperly filed in a federal district court, to another country's courts where it can be more conveniently litigated.

Each state has its own independent judicial system that generally has a three-tiered court system – trial court, intermediate court of appeals and state Supreme Court. Although substantive admiralty law should be applied, the procedural rules applicable to the jurisdiction in which a claim is filed will govern.

Where a claim is filed is often a strategic decision and may depend on whether a claimant is seeking a trial by jury. If a claim is brought in admiralty in federal court, the trial will be before a judge who will serve as the fact finder. Note that some statutes, such as the Jones Act, confer a right to a jury trial. In the federal system, a claimant could forgo its right to proceed in admiralty and instead file an action based on diversity of citizenship to obtain a jury trial.

Whether filed in state or federal court, cases generally follow a similar pattern. A complaint is filed and thereafter responsive pleadings are filed. If a case cannot be summarily dismissed or jurisdictional objections are not successful, discovery ensues. Under US practice, discovery is very broad and will typically involve written interrogatories, document production, depositions and the retention of expert witnesses. Discovery often involves obtaining evidence and deposition testimony from third parties. The costs associated with discovery can often be significant. Mandatory pretrial mediation is increasingly becoming part of most courts' scheduling orders. Mediation is often conducted by a private independent mediator retained by the parties.

If a pretrial resolution is not achieved, cases are tried and typically appealed. If an appeal is taken, a panel of three judges will typically render a ruling. It is not unusual for it to take anywhere between 18 months and three years, if not longer, to resolve a case through an appeal. Under the American Rule, attorneys' fees are not generally recoverable unless provided for by statute or in the parties' agreement.

Although certain statutes have express statute of limitations (e.g., the COGSA has a one-year statute of limitations), there is no uniform statute of limitations applied to admiralty claims. Rather, the admiralty law applies the doctrine of laches, which is an equitable concept. The laches doctrine will look to analogous state law statute of limitations for guidance. The concept behind the laches doctrine is that the defendant should not be prejudiced by a claimant's failure to assert a timely claim.

ii Arbitration and ADR

Contractual arbitration provisions are commonly found in maritime contracts. Since the United States Supreme Court's 1972 decision in *Bremen v. Zapata Offshore Co* and its 2013 decision in *Atlantic Marine Construction Co v. United States District Court for the Western District of Texas*, forum selection clauses, including arbitration clauses, and choice of law clauses are presumptively valid.

The United States has a well-developed body of law relating to arbitration. In addition to the Federal Arbitration Act (FAA), the United States is a party to the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) and the Inter-American Convention of International Commercial Arbitration (the Panama Convention).

Whether crew claims for personal injuries are subject to an arbitration agreement is an often hotly contested issue. A US crew member will contend that he or she is exempt from arbitrating a claim under the Jones Act and general maritime law as seafarers' contracts are

exempt from arbitration under the FAA. In *Dahir v. Royal Caribbean Cruises Ltd*,[2] a federal court found that the claim of a US seafarer working in international waters for a foreign employer was subject to arbitration as the FAA did not apply. Foreign seafarers' claims are generally subject to the New York Convention and will be subject to arbitration.

For commercial arbitration, the American Arbitration Association, the Society of Maritime Arbitrators and the Houston Maritime Arbitration Association administer arbitrations and provide a body of arbitrators who are well versed in maritime matters. Parties may also agree to an ad hoc arbitration to suit their needs. For smaller claims, most arbitration bodies' rules provide for a shortened procedure, which involves a sole arbitrator. For more significant matters, a three-person tribunal is the norm. Discovery in arbitration often mirrors the costs incurred in court proceedings. Unlike the United Kingdom, the FAA[3] provides a very limited right to appeal the decision of an arbitration panel. A challenge to a panel's award is often centred on fraud, allegations of misconduct or an assertion that the panel made a manifest error of law.

Provisional remedies are often used to obtain security in aid of a maritime arbitration. The FAA specifically permits an action for security utilising an *in rem* arrest proceeding or a process of marine attachment. Although the merits of a claim may be resolved by the parties via arbitration, a pre-arbitration security proceeding filed in federal court is quite common.

iii Enforcement of foreign judgments and arbitral awards

Under the New York Convention, which is encompassed in the text of the FAA, a valid final foreign arbitration award may be enforced via an original proceeding in a federal district court. Under the Convention, defences by a party resisting enforcement are primarily limited to due process or fraud. If a New York Convention recognition action is successful, the foreign arbitration award will be converted into a judgment, which can be enforced.

Although there is not an international agreement concerning judgment enforcement to which the United States is a party, a similar procedure is used by US courts to enforce a valid foreign judgment. Both federal and state laws contain procedures to recognise a foreign judgment and convert it into a domestic US judgment. Most states have adopted some variant of the Uniform Foreign Judgments Recognition Act, which provides the framework for state courts to recognise a valid final foreign judgment. Similar to New York Convention recognition proceedings, there are limited defences predicated upon fairness and due process to a judgment and enforcement action.

IV SHIPPING CONTRACTS

i Shipbuilding

The US shipbuilding and repairing industry is comprised of establishments that are primarily engaged in operating shipyards, which are fixed facilities with dry docks and fabrication equipment. Shipyard activities include ship construction, repair, conversion and alteration, as well as the production of prefabricated ship and barge sections and other specialised services.

2 *Dahir v. Royal Caribbean Cruises Ltd*, 275 F. Supp. 3d 826 (S.D. Tex. 2017).

3 9 USC Section 10.

The industry also includes manufacturing and other facilities outside the shipyard, which provide parts or services for shipbuilding activities within a shipyard, including routine maintenance and repair services from floating dry docks not connected with a shipyard.

In 2018, there were 124 shipyards in the United States, spread across 26 states that are classified as active shipbuilders. In addition, there are more than 200 shipyards engaged in ship repairs or capable of building ships but not actively engaged in shipbuilding. The majority of shipyards are located in the coastal states, but there also are active shipyards on major inland waterways, such as the Great Lakes, the Mississippi River and the Ohio River. Employment in shipbuilding and repairing is concentrated in a relatively small number of coastal states, of which the top five account for 63 per cent of all private employment in the shipbuilding and repairing industry. The federal government, including the US Navy, US Army and USCG, is an important source of demand for US shipbuilders. Although just 8 per cent of the ocean-going vessels delivered in 2020 (18 of 205) were delivered to US government agencies, 15 of the 17 large deep-draft vessels delivered went to the US government: eight to the US Navy and seven to the USCG.

There are no statutory formalities or requirements (beyond standard contractual requirements) with which parties must comply when entering into shipbuilding contracts for commercial vessels.

What may surprise some observers not familiar with the US legal system is that a contract to build a ship is not considered a 'maritime contract' and, therefore, is not within admiralty jurisdiction and not governed by general maritime law. Shipbuilding contracts are subject to state law and commonly contain choice of law and forum clauses. It is common for dispute resolution clauses to contain a referral to the classification society, such as the American Bureau of Shipping (ABS), for a determination of technical disputes. Even foreign choice-of-law clauses will be enforced if there are sufficient contacts present. For instance, in *Hartford Fire Insurance Co v. Orient Overseas Containers Lines (UK) Ltd* (decided on 27 October 2000), it was held that '[a]bsent fraud or violation of public policy, a court is to apply the law selected in the contract as long as the state selected has sufficient contacts with the transaction'.

Performance and quality standards are often subject to classification society rules or International Maritime Organization (IMO) standards. The flag state authority is the USCG, which has delegated a significant portion of its monitoring of newbuilds to the ABS or similar classification societies.

A ship repair contract, in contrast to a newbuild contract, is a maritime contract governed by general maritime law. There is warranty of workmanlike performance that is implied in common law. Depending on the governing law, common clauses such as warranty, indemnity and additional insured provisions could have dramatically different results. Common law remedies for breach of contract and the availability of liquidated or consequential damages may also vary by state.

Commercial shipyard disputes often arise out of claims by subcontractors, which may be subject to the provisions of the Uniform Commercial Code or state lien law. In addition, a security interest can be created in favour of third-party creditors of either the buyer or the builder over both a vessel under construction and related equipment.

Shipyard workers are covered by the Longshore and Harbor Worker's Compensation Act (LHWCA), which provides a federal worker's compensation scheme for injured workers. Indemnity provisions in shipyard contracts are often affected by the LHWCA, which precludes certain indemnity schemes. Contracts to build or repair vessels in the United States should account for that possibility.

Owners of US-flag vessels who purchase equipment for, and repair, a vessel outside the United States are subject to declaration, entry and payment of *ad valorem* duty, an imposition of 50 per cent duty on all repairs conducted in foreign yards. When the US vessel returns home, it must file a vessel repair declaration with Customs and Border Protection (CBP), even if the vessel underwent no foreign repairs.

If a vessel incurred foreign repair-related expenses, the entry generally must show all foreign voyage expenditures for equipment, parts of equipment, repair parts, materials and labour. US-flagged vessels are exempt for the repairs if they were made in countries with which the United States has a free trade agreement or were done by the regular crew members of the vessel.

Prior to CBP making a determination of duty, an application for relief of duties can be filed with CBP within 90 days of the vessel's arrival in the United States – applications for relief are very detailed and need to include items such as itemised bills, receipts, invoices, photocopies of relevant parts of vessel logs, certification or permits.

In addition to issuing a determination of duty, CBP may issue penalties for failure to report, enter or pay duty and for a false declaration.

Depending on CBP's determination of duty, a protest may be filed under 19 USC 1514(a)(2). A protest is the basic means of challenging a Customs Service decision. The protest must be filed within 180 days of issuance of the duty.

A protest is typically decided at the port level; however, an importer could also request that Customs Headquarters review the protest. A denied protest may be challenged in the United States Court of International Trade (CIT). To begin a case in the CIT, a summons is filed with the Clerk of the Court within 180 days of the date Customs denied the protest or two years from the non-protestable decision being challenged.

Importers are reluctant to bring a claim in the CIT because of the perceived expense of litigation, a general reluctance on the part of some importers to be seen suing the US government and the incorrect notion that Customs will always prevail.

ii Contracts of carriage

The movement of goods over the water is complex and involves various interlinked systems, particularly in multimodal carriage. Often there are overlapping contracts in place between shippers, ocean carriers, freight forwarders and non-vessel owning common carriers (NVOCCs).

Contracts of carriage are generally frequently governed by the COGSA and its precursor, the Harter Act. Enacted in 1936, COGSA is the US enactment of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules). The United States has not adopted the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules) or the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules).

Contracts of carriage for common carriage are generally evidenced by bills of lading or contracts of affreightment. Contracts of private carriage are generally reflected in charter parties. Bills of lading can serve as the contract of carriage and as documents of title. The interpretation of the clauses in a bill of lading is the focal point of many cargo damage suits. Many carriers and NVOCCs will maintain a copy of their tariff with the standard terms of their bills of lading on file with the Federal Maritime Commission.

Charter parties are maritime contracts governed by US general maritime law, although courts typically enforce a clause choosing other law to govern, subject to choice-of-law rules. Disputes under charter parties are usually resolved in arbitration pursuant to an arbitration clause. Courts have fashioned some principles of general maritime law applicable to charter parties. The US Supreme Court has interpreted a safe berth clause in a voyage charter. In *Citgo Asphalt Refining Co v. Frescati Shipping Co* (decided 30 March 2020), the Supreme Court held that an unqualified safe berth clause constitutes a warranty that imposes on the charterer an absolute duty for safety of the berth it selects. Parties remain free to contract around the warranty, such as by a clause expressly limiting the charterer's obligation to an exercise of due diligence to nominate a berth or port that is safe.

A charter party includes an owner's implied warranty of seaworthiness at the commencement of every voyage, unless express contract language limits or extends this warranty. Breach of a charter party can give rise to a maritime lien.

By its terms, the COGSA applies to 'all contracts for carriage of goods by sea to or from ports of the United States in foreign trade'. The 'contract of carriage' covers 'only . . . contracts of carriage covered by a bill of lading or any similar document of title'. Section 1305 of the COGSA specifically excludes charter parties, unless bills of lading are issued under the charter party. The definition of 'goods' excludes live animals and certain deck cargo. Further, the definition of 'carriage of goods' covers only 'the period from the time when the goods are loaded on the ship to the time when they are discharged from the ship'.

The COGSA applies to most international ocean shipments to or from the United States during the tackle-to-tackle period. It may be extended by contract to cover the entire period that the goods are in the carrier's possession. Via a *Himalaya* clause in the contract of carriage, the COGSA defences and limits may be further extended to the agents and contractors of the carrier, such as stevedores, or connecting carriers. The extension of the COGSA by contract is generally motivated by the desire to benefit from the Act's US$500 per package or customary freight unit limitation of liability.

The Harter Act frequently comes into play on inland shipments (i.e., tug and barge movements) for domestic US shipments. The Harter Act generally applies to domestic carriage (in the absence of a contrary agreement), shipments under charter parties, most deck cargo and damages outside the tackle-to-tackle period. The Harter Act does not contain any specific language regulating the extent to which a carrier may limit its liability. Although the Harter Act has no package limitation, common practice made the US$100 agreed valuation clause the effective equivalent and some carriers have used even lower amounts.

Under the Harter Act, a carrier is never exempted from liability for cargo loss unless it exercised due diligence to make the ship seaworthy at the beginning of the voyage. If unseaworthiness and a lack of due diligence are found, the carrier cannot invoke the Harter Act exoneration clause even if there is no causal connection between the unseaworthiness and the loss or damage. The Harter Act makes unlawful any provisions in a bill of lading or shipping document that relieves the manager, agent, master or owner of any vessel transferring property between ports of the United States and foreign ports from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery.

Both shippers and consignees may be bound by the terms of a bill of lading. Accordingly, indemnity claims by a carrier for vessel or property damage arising out of a contract of

carriage could involve claims against both the shipper and the consignee. As explained below, the consignee may also be bound by a forum selection or choice of law clause in a bill of lading that it may never have seen.

Since the 1972 United States Supreme Court decision in *Bremen v. Zapata*, contractual choice of law and forum selection clauses in maritime contracts have been held to be presumptively valid. Subsequently, the US Supreme Court in *Vimar Seguros y Reaseguros, SA v. M/V Sky Reefer* declined to nullify foreign arbitration clauses in contracts for carriage of cargo as a lessening of the carrier's liability under the COGSA. Cargo claims often involve litigation over which law to apply, as some parties try to avoid the COGSA US$500 package limitation in favour of a more advantageous limitation scheme.

An interesting phenomenon is the extension of the COGSA, its defences and limits to inland portions of the carriage of goods under a 'through bill of lading'. A through bill of lading is issued for the 'door-to-door' transportation of goods whereas a 'port-to-port' bill of lading covers transportation from loading to unloading. In 2004, in *Norfolk Southern Railway Co v. Kirby*, the US Supreme Court held that a through bill of lading was a maritime contract and therefore the COGSA limits could apply to a rail company that was not a party to the bill of lading. The *Kirby* decision was reinforced by the Supreme Court's decision in 2010 in *Kawasaki Kisen Kaisha Ltd v. Regal-Beloit Corp*, which extended the reach of a forum selection clause to a rail company under a through bill of lading.

iii Cargo claims

Given the sheer volume of goods that move in and out of US ports, cargo damage and loss claims are bound to occur. Small claims typically do not generate lawsuits. Rather, marine surveyors inspect the damage, exchange customary documents, and insurance adjusters negotiate settlements.

For large matters or more difficult claims, suits are often filed in federal district courts under admiralty jurisdiction. A cargo claim also gives rise to an *in rem* claim against the vessel. As such, cargo suits are often started with a vessel arrest or the furnishing of a letter of undertaking or a surety bond by the ocean carrier's insurer. Damage claims filed in state courts arising out of ocean carriage are far less frequent than federal suits.

The COGSA provides carriers with strong statutory defences, such as errors in navigation, perils of the sea or insufficiency of the packaging, and a time bar that requires a lawsuit to be commenced within one year. The COGSA also requires the ocean carrier to exercise due diligence at the beginning of the voyage to make the vessel seaworthy, and the carrier must properly load, stow and care for cargo.

The COGSA sets up a complex system of shifting burdens of proof and accompanying presumptions of liability. The COGSA 'ping pong ball' burden of proof follows a well-established path. The shipper must establish a *prima facie* case that the cargo was loaded in good order and upon discharge it was lost or in damaged condition.

a A shipper's *prima facie* case creates a presumption of liability, which may be rebutted by the carrier.

b The carrier is required to establish that (1) it exercised due diligence to prevent the cargo loss or damage, or (2) the cargo loss or damage falls within one of the enumerated COGSA defences.

c If the carrier successfully rebuts the shipper's *prima facie* case, the burden returns to the shipper to establish that the carrier's negligence was at least a concurrent cause of the loss.

d If the shipper establishes that the carrier's negligence is at least a concurrent cause of the loss then the burden shifts once again to the carrier, which must establish what portion of the loss was caused by other factors.

If the carrier is unable to prove the appropriate apportionment of fault, then it becomes fully liable for the full extent of the shipper's loss.

The application of the COGSA package limitation is often hotly contested. Depending on the facts of a case, cargo claimants may assert that there was an improper geographical deviation or improper deck stowage, so as to deprive the carrier of the right to limit. Oddly enough, although the COGSA itself does not do so, a well-defined body of case law outlines what a COGSA package is. For non-containerised cargo, a package may be prepared for shipment by being fully or partially boxed or wrapped, regardless of the size of the cargo. For containerised cargo, the wording on the bill of lading often determines whether the container or its contents are the 'packages'.

The measure of the shipper's recovery when cargo is damaged is normally the difference between the fair market value of the goods at the port of destination in the same condition as they were in when shipped and their value damaged. Incidental damages, such as survey costs, are recoverable. Damages for delay are more problematic to establish and will often be determined if the contract of carriage is on a 'time is of the essence' basis. Consequential damages are potentially recoverable but are often excluded as a matter of contract.

iv Limitation of liability

Background

In 1851, the United States Congress enacted the US Limitation of Liability Act (the Act). Limitation of liability for shipowners was common in the admiralty law of most nations well before 1851. In 1734, a limitation of liability scheme was enacted under British law. Prior to 1851, US shipowners were uneasy facing potentially unlimited personal liability, which also put them at a competitive disadvantage with respect to shipowners in countries that offered a limitation of liability scheme. The US shipowners pressed Congress to remedy this perceived disparity. As a result, Congress passed the 1851 Act. Whereas many countries have since amended their limitation of liability schemes, the US Limitation Liability Act of 1851 remains essentially unchanged.

Purpose and benefits

In general, limitation liability schemes seek to limit the exposure of the shipowner to its interest in the vessel and any pending freight. This was the heart of the Act and remains so today.[4] When a vessel sinks or suffers extreme damage, there may be little or nothing in the limitation fund to pay personal injury and death claimants. In 1935, Congress amended the Act to ensure that in cases of personal injury or death, the shipowner would have to establish a fund in the amount of US$420 per gross tonne solely to pay personal injury or death claims.

Not all participants with an interest in a voyage are permitted to take advantage of the Act; it is reserved solely for the owner or demise charterer. 'Owner' is defined by the Act to include a demise charterer that 'mans, supplies, and navigates the vessel'. Time and voyage charterers do not fall within this definition.

4 46 USC Sections 30505 to 30512.

The limitation fund is to be equal to the value of the vessel at the conclusion of the voyage or casualty, plus any pending freight. The owner stipulates this amount in court. The claimants can demand that security be deposited with the court in the same amount. Claimants to the fund can also challenge the sufficiency of the limitation fund and seek to have it increased. A vessel owner may limit only for tort claims, including property damage, personal injury and death. Under the 'personal contract doctrine', a vessel owner cannot limit liability for contractual agreements entered into prior to the casualty.

Venue, concursus and injunction

The owner files its limitation proceeding in the district court. If the vessel owner has not yet been sued, it must file its action in the judicial district where the vessel lies. If the owner has been sued, it must file its limitation action in the judicial district where the first suit was lodged. If the vessel remains at sea outside any judicial district and the owner has not been sued, the owner can file its limitation action in any judicial district of the United States.

When a vessel owner files its own limitation of liability proceeding, the federal court will then issue an injunction staying any suits that have been filed in any other court. It will also order those suits, as well as all future suits, to be brought solely in the limitation proceeding commenced by the shipowner. It will order all claimants to file their claim in the shipowner's limitation of liability proceeding within four to six weeks. Claimants that fail to file by that date are subject to being defaulted by the court. This is an excellent tool for the shipowner not only to pick its forum but to force the many claimants that arise out of a major casualty to file their claims in the shipowner's action. Thus, time and expense are saved by not having to litigate multiple claims in various jurisdictions and venues. Shipowners must be mindful that they have six months from written notice of a claim to file their limitation of liability proceeding.[5] If a shipowner does not file within six months and a suit is filed against it, it still has the right to assert limitation of liability under the Act as an affirmative defence. However, it does not have the right to the injunction and marshalling of claims into its own proceeding.

Claimants' stipulation and the shipowner's privity and knowledge

If all the claimants agree and stipulate that they will not seek to enforce a judgment in excess of the federal court's limitation value set forth in the initial order, the court will allow the case to go back to state court for trial. If a judgment is obtained in excess of the limitation value, the parties then return to federal court to resolve the issues surrounding the limitation value and the right of the owner to limit in the first place. The theory behind the Act and all limitation liability schemes is to limit the owner's liability for the negligence of his or her crew, owing to the fact that the ship is at sea and the owner lacks control over the vessel's operation. If, however, the court finds that the negligent act or omission causing the casualty was within the privity and knowledge of the shoreside management, the vessel owner will be denied its right to limit liability. Although Congress has chosen not to amend or repeal the Act, the federal courts are often keen to find privity and knowledge, especially in cases of severe personal injury or death juxtaposed with a limitation value that is extremely low.

5 Supplemental Rules For Admiralty or Maritime Claims, Rule F.

Should the limitation proceeding proceed to trial in the federal court, three results may be obtained:

a the vessel owner is totally exonerated;

b the owner is found liable, but damages are limited to the post-casualty value and pending freight; or

c the owners are found liable, the court finds the cause of the casualty within its privity and knowledge, and the owner must pay the full damages awarded by the court.

For the foreseeable future, it does not appear that the US Congress will alter or amend the Act. The Limitation of Liability Act is available to shipowners of any nationality. It remains a useful tool not only for limiting liability but for fixing venue, marshalling claims in one convenient form, and maintaining control of what can be an expensive and complicated litigation.

V REMEDIES

i Ship arrest

The United States is not a signatory to any arrest convention. Under US law, the two primary tools for arresting or attaching a vessel are found under Rule C and Rule B of the Federal Rules of Civil Procedure Supplemental Rules for Certain Admiralty and Maritime Claims.

Rule C

Under Rule C, a plaintiff can bring an *in rem* action against the vessel or property if a maritime lien exists or if the plaintiff has certain statutory rights against the vessel regardless of whether the defendant can be found in the district. Maritime liens are defined in the Federal Maritime Lien Act and the Ship Mortgage Act. Liens under maritime law include seafarers' wages, tort, salvage and general average. Suppliers of necessaries to a vessel that are authorised by the owner have a maritime lien on the vessel. Necessaries are defined by statute and include repairs, supplies, towage, use of a dry dock, bunkers, food and spare parts. A person providing necessaries must rely on the credit of the vessel.

Rule B

Under Rule B, a plaintiff with a *prima facie in personam* maritime claim may attach the defendant's vessel or property as security for the claim, which gives the plaintiff quasi *in rem* jurisdiction over the defendant, provided the defendant has property in the arrest jurisdiction and is not found in that jurisdiction. Whether or not a claim is 'maritime' is determined under US federal law. The *prima facie* validity of the claim is determined under the law that applies to the claim. Examples include a judgment or pending arbitration or litigation in another jurisdiction. A maritime lien on the vessel is not required under Rule B.

Property subject to arrest

Under Rule C, property subject to a maritime lien includes vessels, freight, bunkers and vessel equipment. Under Rule B, property subject to attachment includes vessels, tangible property bank accounts and debt owed by others (subject to garnishment). There is no associated or sister ship arrest regime in the United States under Rule C, which provides for *in rem* jurisdiction over only the vessel or other property that is subject to the lien.

Procedure

The two arrest procedures are alike in that the plaintiff must file a verified complaint that describes with reasonable particularity the property sought to be arrested, and states that the property is in the district. The court will then issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property. In a Rule B attachment, the plaintiff includes an affidavit stating that the defendant cannot be found in the district in which the attachment is sought. The plaintiff must also pay a deposit to cover the cost of the arrest. The defendant may post security to release the property from arrest or attachment. The security is often in the form of a letter of undertaking furnished by the vessel owner's protection and indemnity (P&I) club.

Practicalities

The actual arrest of a vessel may not take place outside the territorial jurisdiction of the district. A vessel on the high seas – which is a distance beyond 12 nautical miles from shore – may not normally be arrested by the US Marshal. Under the doctrine of 'free passage', a vessel may transit territorial waters without being subject to arrest. The US Marshal may decide not to arrest a vessel in territorial waters in heavy seas, such as a vessel at anchor offshore during a storm. Usually, the USCG will assist in providing water transportation if necessary; however, the USCG will not use force to stop a vessel.

ii Court orders for sale of a vessel

Generally, the US Marshal handles the sale of seized or attached property; however, the court may order another person to do so. A vessel or property on board a vessel may be sold by a person assigned by the court if the US Marshal is a party in interest. In addition, Title 28 of the US Code, Section 1921 provides for the use of a public auctioneer. There are two types of sales: interlocutory and final.

Prior to the final disposition of a case, the court may authorise the sale of a vessel or other property under arrest or attachment if (1) the property is perishable, or the vessel or property is subject to decay, deterioration or damage, (2) the cost of keeping the vessel or property is disproportionately expensive, or (3) because there is an unreasonable delay in securing the release of the vessel or property. A final judgment sale is based on the final judgment issued at the final disposition of the case.

The court will issue the order authorising the sale of the vessel or other property. Specific provisions must be followed by the US Marshal. Generally, the interested party will contact the US Marshal to determine a convenient date, time and place for the sale and the conditions or requirements that the US Marshal would like to see included in the order. The order for sale may include whether:

a a minimum bid amount has been set;
b there are required minimum increments in the bidding (e.g., US$1,000 or more);
c credit bids are allowed;
d a certain amount of deposit or down payment is required;
e the number of days for the balance to be paid is designated;
f there are any limitations regarding who may bid (e.g., an alien restricted from bidding on the purchase of a US-flagged vessel);
g any special methods of payment are designated (e.g., a cashier's or certified cheque);
h there are any provisions regarding the filing of objections with the court;

i in the absence of objections, the court or local rules provide for automatic confirmation of sale; and

j a successful bidder is required to file an order for the clerk of the court's signature stating that no opposition of the sale has been filed to provide a written record for the court and documentation for submission by the new owner to the USCG or other authority where the new owner may wish to register the vessel.

After the order of sale is issued by the court, a notice of the sale must be prepared. This notice contains the date, time, location and all conditions connected to the sale as outlined in the order authorising the sale. The US Marshal will publish the notice of sale in accordance with the local rules and procedures.

VI REGULATION

i Safety

The USCG (a branch of the US Department of Homeland Security) is the prime agency charged with the regulation of marine safety. Accordingly, it also has a significant role in port and waterway safety and security.

The USCG's safety role cuts across a wide variety of activities. Although marine search and rescue is probably its best-known role, USCG personnel inspect commercial vessels, respond to pollution, investigate marine casualties and merchant mariners, manage waterways and license merchant mariners. The USCG also issues regulations across a wide range of topics, which include navigation rules, marine safety, crewing, licensing, manning requirements, and design and engineering standards. The USCG is also the agency that enforces international conventions, such as SOLAS, to which the United States is a party. From time to time, the USCG issues Marine Safety Information Bulletins, which in some cases can reflect the prudent standards of care and restrictions while navigating on certain waterways.

On 20 June 2016, the USCG published the Inspection of Towing Vessels, 81 Federal Register 40004. Referred to as Subchapter M, it necessitated that a fleet of nearly 6,000 uninspected vessels should be inspected and carry a certificate of inspection (COI). Now codified in the Code of Federal Regulations (CFR) at Part 46, Subchapter M, this USCG final rule established an inspection regime for commercial towing vessels. Owners or operators of towing vessels with keels laid on or after 20 July 2017 were required to have a percentage of their fleet (of two or more vessels) in compliance by 20 July 2018. With a current portfolio of 12,000 inspected vessels, the addition of nearly 6,000 towing vessels increased the USCG inspected fleet by 50 per cent. Subchapter M sets minimum safety standards for towing vessels. The issuance of COIs for existing towing vessels is being phased in over four years (from July 2018 to July 2022).

Subchapter M establishes two paths to compliance for towing vessel operators: either annual USCG inspections or the implementation of a USCG-accepted Towing Safety Management System (TSMS). Prior to Subchapter M, the American Waterways Operators established the Responsible Carrier programme by which most operators voluntarily instituted safety management systems similar to that required by Subchapter M. Therefore, attaining compliance with the new regulation will not be too challenging for most major operators. The TSMS is the US towing industry's equivalent of the International Safety Management Code (the ISM Code).

All towing vessels, regardless of size, involved in the movement of barges carrying oil or hazardous material in bulk shall be certificated and manned in accordance with the vessel's COI. To acquire the COI and as the regulation unfolds, operators will complete internal vessel surveys and audits followed by external surveys and audits by a third-party organisation (TPO). The USCG then conducts the inspection and the COI is issued. The external TPO audit must be conducted six months prior to the issuance of the initial COI. Documentation of deficiencies by the USCG will depend on the type of inspection and the presence of the vessel's TPO. Generally, deficiencies will be documented by the TPO in accordance with the vessel's TSMS. USCG inspectors will typically inspect TSMS vessels once in five years, unless the vessel is involved in a marine casualty.

In areas where the USCG may have overlapping jurisdiction with other federal agencies, it will enter into a memorandum of agreement (MOA). For example, it has several MOAs with the Bureau of Environmental Safety and Environmental Enforcement, which regulates offshore drilling. These MOAs promote collaboration and define each agency's role in regulating offshore drilling platforms, which are also vessels.

USCG regulations are set forth in the CFR at Parts 33 and 46. As is further described in other sections, a recent development is the expansion of USCG regulations under 46 CFR Subchapter M to establish towing vessel safety regulations, inspection standards and safety management systems. These regulations have had a large impact on the US inland marine industry.

A USCG investigator or a Marine Board of Investigation will investigate a marine casualty. A Marine Board of Investigation is the highest level of the investigatory process and will often include live testimony. With greater frequency, the National Transportation Safety Board's (NTSB) Office of Marine Safety has been getting involved in investigations of major marine accidents on or under navigable waters, internal waters or the territorial sea of the United States, and accidents involving US-flagged vessels worldwide. The NTSB is an independent federal agency mandated by Congress to investigate transportation accidents, determine probable causes of the accident, issue safety recommendations, study transportation safety issues and evaluate the safety effectiveness of government agencies involved in transportation. The NTSB makes its findings and recommendations public through accident reports or safety studies, which can be found on its website.

For USCG investigations, parties in interest may participate in the interviewing of key personnel and other aspects of the investigation. A 'party in interest' is defined by the USCG as any person with a direct interest in the investigation, including 'an owner, a charterer, or the agent of such owner or charterer of the vessel or vessels involved in the marine casualty or accident, and all licensed or certificated personnel whose conduct, whether or not involved in a marine casualty or accident is under investigation by the Board or investigating officer'.[6] Participation in USCG investigations are particularly crucial in circumstances in which another vessel's interest is involved since a party in interest will have an opportunity to be present when the other vessel's master and crew are interviewed, to request that other witnesses be interviewed, and to be present when the other vessel is inspected. When formal hearings are held by the USCG, a party in interest will have the additional rights to cross-examine witnesses under oath and to present witnesses on its behalf.

6 46 CFR 4.03-10.

By statute, USCG and NTSB investigation findings are not admissible in civil suits.[7] The statutes make clear that the investigative reports are protected from discovery and inadmissible as evidence in litigation. There have been some courts that have held that attachments such as photographs, factual determinations, and documents that were not prepared as part of the investigation report can be admissible in litigation.[8] As investigation reports are public record, it is common practice in casualty litigation to obtain the investigation reports and provide the same to a party's retained liability expert.

Pursuant to 42 CFR Sections 70.2, 71.31(b) and 71.32(b), whenever the Director of the Centers for Disease Control and Prevention (CDC) determines that the measures taken by health authorities of any state or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such state or possession to any other state or possession, he or she may take such measures to prevent the spread of the diseases as he or she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination and destruction of animals or articles believed to be sources of infection. Pursuant to that Regulation, on 14 March 2020, to preserve human life, to prevent further introduction, transmission and spread of covid-19 into and throughout the United States, and to maintain the safety of shipping and harbour conditions, the Director of the CDC issued a No Sail Order[9] to cruise ships (all commercial non-cargo, passenger-carrying vessels operating in international, interstate or intrastate waterways and subject to the jurisdiction of the United States with the capacity to carry 250 or more individuals (passengers and crew) with an itinerary anticipating an overnight stay on board or a 24-hour stay on board for either passengers or crew).

The No Sail Order of 14 March 2020 was modified and extended by a No Sail Order of 9 April 2020, which requires a cruise ship operator wanting to continue operations to develop, implement and operationalise an appropriate, actionable and robust plan to prevent, mitigate and respond to the spread of covid-19 on board cruise ships. The No Sail Order specifies the elements that a plan must address to be considered an appropriate plan. The measures include on-board surveillance of passengers and crew, daily reporting to the CDC and USCG of the number of persons on board with covid-19 while the ship is in US waters, temperature checks, medical screening, on-board isolation and quarantine, an outbreak management and response plan, and many other elements. A cruise ship that does not comply with the rather comprehensive criteria mandated by the CDC will not be permitted to disembark passengers and crew members at ports or stations, except as directed by the USCG in consultation with the CDC, and will not be permitted to re-embark any crew member except as approved by the USCG. The No Sail Order is effective until the earliest of the expiry of the declaration that covid-19 constitutes a public health emergency, 100 days from the date of publication, or until the Director of the CDC rescinds or modifies the No Sail Order.

7 46 U.S.C. Section 6308(a); 49 U.S.C. Section 1154(b).

8 *Newill v. Campbell Transp. Co., Inc.*, No. 12-cv-1344, 2015 WL 222438 (W.D. Pa. 14 January 2015); *Stepski v. M/V NORASIA ALYA*, No. 7:06-CV-01694, 2010 WL 6501649, at *5 (S.D.N.Y. 14 January 2010).

9 US Department of Health and Human Services Centers for Disease Control and Prevention, Order Under Sections 361 and 365 of the Public Health Service Act (42 U.S.C. 264, 268) and 42 Code of Federal Regulations, Part 70 (Interstate) and Part 71 (Foreign).

ii Port state control

The USCG's port state control programme is responsible for ensuring that foreign-flagged vessels operating in US waters comply with international conventions, such as SOLAS, MARPOL and the International Ship and Port Facility Security Code 2004 (the ISPS Code), and US law.[10] The USCG focuses its investigations on vessels deemed substandard. The USCG bases whether a ship is substandard or not on a variety of factors, including ship management history, flag state detention ratio, vessel compliance history and a ship's particulars. If a vessel is not in substantial compliance with US law and international conventions, the USCG will impose controls on the vessel until compliance is achieved.

According to the USCG's most recent Port State Control Annual Report, in 2018, 10,418 individual vessels from 84 different flag administrations, made 84,141 port visits to the United States. In 2018, the USCG conducted 9,025 SOLAS safety exams and 8,819 ISPS exams on these vessels.[11] In 2018, the USCG detained 105 vessels for environmental protection and safety-related deficiencies (15 more than in 2017) and eight vessels for security-related deficiencies. The sectors of Houston/Galveston, Miami, New Orleans and San Juan had double-digit determination numbers, Houston/Galveston having the highest at 14 detentions. More than 30 per cent of the vessels detained were bulk carriers, followed by general dry cargo ships. Of the detentions in 2018, 22 per cent concerned firefighting and fire protection systems and 16 per cent concerned certificate or logbook errors. Port State Control states that these serious safety deficiencies suggest problems with the vessels' safety management systems. Even though the official numbers have not been released at the time of writing, the trend in the past few years is indicative that there has been a slight increase in the overall number of detentions since 2018.

Ballast water management (BWM) has been receiving a great deal of attention from Port State Control agents. The USCG conducted 8,140 ballast water examinations, which is similar to the number conducted in 2017 (8,229). In 2018, the USCG issued 119 deficiencies for BWM compliance issues. With the approval of more and more ballast water treatment systems by the USCG (as at 6 January 2021, 29 systems had received approval and eight others were under review),[12] the USCG is increasing its emphasis on BWM compliance and limiting the granting of extensions of time to comply.

The USCG's Quality Shipping for the 21st Century (QS21) programme, which allows eligible flag administrations and vessels to receive less frequent and reduced examinations, ended the 2018 calendar year with an enrolment of 2,213 vessels (an increase of more than 200 vessels from 2017). One flag administration lost its eligibility. Vessels from that flag administration that are currently enrolled in the programme will remain enrolled until their QS21 certificates expire. For 2018, nine additional flags (China, Croatia, Curaçao, Italy, Jamaica, Liberia, Norway, Taiwan and Thailand) became eligible.

10 www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/CG-CVC/CVC2/psc/AnnualReports/annualrpt16.pdf.

11 According to the Port State Control Statistics by port, the highest number of safety and security examinations took place in the sectors of New Orleans and Houston/Galveston, with each more than double the number of examinations of the next port.

12 www.dco.uscg.mil/Portals/9/MSC/BWMS/BWMS_Approval_Status_06JAN21.pdf.

The aim of the USCG's QS21 E-Zero programme is to add environmental stewardship to the existing QS21 programme. E-Zero focuses on compliance with international environmental conventions, anti-fouling and US ballast water regulations. Eligibility for an E-Zero designation requires:

a QS21 enrolment;
b no worldwide MARPOL detentions for three years;
c no environmental deficiencies in the United States for three years;
d no letters of warning, notices of violation or civil penalties for Right Whale Mandatory Ship Reporting violations for five years; and
e a USCG-approved ballast water management system.

As of 9 February 2021, 147 ships had received a E-Zero designation.[13]

iii Registration and classification

Vessel registration is administrated by the USCG's National Vessel Documentation Center (NVDC). The NVDC maintains databases of recorded preferred ship mortgages, certificates of documentation, certificates of inspection and abstracts of title, all of which are public record. To the extent that a common lien is reported to the USCG, it will appear on the abstract of title. Preferred ship mortgages issued by both domestic and foreign banks may be recorded with the NVDC.

The USCG is one agency that is involved with the administration of the coastwise laws under the Jones Act. Under the Jones Act and the Passenger Service Act, a coastwise-qualified vessel must be employed to carry passengers and merchandise between two coastwise points in the United States, which can include certain US territories. The CBP enforces penalties associated with violations of the coastwise laws. An advisory opinion may be requested from the CBP as to whether any potential movement violates the coastwise law. In 2017, the CBP proposed altering its interpretation of vessel equipment, which would have overruled dozens of past rulings. If the CBP proposal had gone forward, the items formerly classified as vessel equipment would not be considered merchandise, which would require a coastwise-qualified vessel. After receiving significant public comment, the CBP withdrew its notice of intent to modify its prior ruling until additional research has been conducted.

Classification societies are important in many aspects of maritime business. To all intents and purposes, it is impossible for a vessel to operate and trade without being classed and certified by a classification society. Both port and flag states rely on classification and, in some respects, statutory certification has been delegated to these societies. The ABS is a major US classification society. Foreign classification societies may inspect US-flagged vessels assuming that USCG authorisation is obtained.

In *Otto Candies, LLC v. Nippon Kaiji Kyokai Corporation*,[14] the Fifth Circuit Court of Appeals was the first to 'cautiously recognize' that classification societies could be liable to third parties in tort for negligent misrepresentation. This is a somewhat heavy burden of proof as to have an actionable claim in negligence, plaintiffs must prove that the classification society owed them a duty of care. Plaintiffs must prove that (1) the classification society, in the course of its profession, supplied false information for the plaintiff's guidance in a

13 www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/CG-CVC/CVC2/psc/safety/qualship/List_of_EZero_Vessels22021.pdf.

14 346 F.3d 530 (5th Circuit 2003).

business transaction, (2) the classification society failed to exercise reasonable care in gathering the information, (3) the plaintiff justifiably relied on the false information in a transaction that the classification society intended to influence, and (4) the plaintiff thereby suffered pecuniary loss.[15]

iv Environmental regulation

There is an extensive body of US environmental laws that regulate air and sea pollution, especially affecting the shipping industry. The US Department of Justice (DOJ) boasts that as at the end of fiscal year 2018, the United States had imposed US$260 million in civil and criminal penalties, totalling more than US$466 million in criminal fines and more than 319 months of confinement against shipping companies and their crew for intentional discharges of pollution from ocean-going vessels in the previous 20 years.[16]

The Act to Prevent Pollution from Ships (APPS) is the US codification of MARPOL and is intended to prevent the discharge of oily waste into the sea. Annex VI to MARPOL addresses pollution from ships. Annex VI, the APPS and implementing regulations are promulgated by the Environmental Protection Agency (EPA) under the Clean Air Act, and impose engine-based and fuel-based standards that apply to US-flagged ships, wherever located, and to non-US flagged ships operating in US waters. The APPS statute requires engine manufacturers, owners and operators of vessels, and other persons to comply with Annex VI of the MARPOL Protocol.

The EPA and the USCG will enforce these requirements pursuant to authority under the APPS, the Clean Air Act and a 2011 memorandum of understanding between the EPA and the USCG setting forth the terms by which the EPA and the USCG will mutually cooperate in enforcement and implementation. These regulations apply to vessels operating in US waters and to ships operating within the 200 nautical mile border around the United States, including the North American emission control area (ECA) and the US Caribbean ECA, which encompasses waters around Puerto Rico and the US Virgin Islands.

The APPS and MARPOL set limitations on the oil content that is allowed to be discharged into the sea. The APPS and MARPOL also require that vessels maintain an oil record book that documents all oily waste discharges or transfers. The USCG is entrusted with investigatory authority to ensure compliance and, if it suspects illegal discharges, it refers the matter to the DOJ for further investigation and potential prosecution.

The Clean Water Act (CWA) created the basic structure for the regulation of pollutant discharges into US waters. Under Section 312 of the CWA, the EPA and the USCG jointly regulate the sewage discharges of vessels within US waters. The EPA regulates the equipment used by vessels to treat or hold the sewage and establishes no-discharge zones. Section 402 of the CWA authorises the National Pollutant Discharge Elimination System permitting programme to regulate discharges that are incidental to the normal operations of commercial vessels, for example ballast water, bilge water, water from sinks and showers (grey water) and deck wash-down run-off.

The Oil Pollution Act (OPA) requires vessels to submit to the US government plans describing how they intend to respond to large discharges of oil. It focuses on preventing

15 *Cargill, Inc. v. Degesch Am., Inc.*, 875 F. Supp. 2d 667, 674 (E.D. La. 2012) (citing *Otto Candies*, 346 F.3d at 535).

16 www.justice.gov/enrd/page/file/1174746/download.

and responding to large oil spills but also created a liability and compensation scheme for oil pollution within navigable waters. OPA violations can carry civil and criminal penalties for vessel owners, operators and crew members.

These environmental regulations are typically enforced by the EPA and the USCG. After a violation has been alleged or investigated, the DOJ will decide whether to seek criminal or civil prosecution of the alleged violations. For example, in one case, the USCG inspected the oil record book of a Liberia-flagged vessel and found at least eight occasions when the vessel entered US waters with false and misleading entries. The oil record book did not accurately record the vessel's transfers and discharges of oily water. The USCG turned over its investigation to the DOJ's Environmental Crimes Section for further prosecution of the ship management company and the vessel owner.

Two international shipping companies were fined US$1.9 million for covering up illegal dumping of oily bilge water and garbage from their ships into the sea. The USCG received information from a crew member that the ship was illegally bypassing the oily water separator and dumping oily bilge water over the side. The companies pleaded guilty to violating the APPS and obstruction of justice. In addition to their monetary fine, the companies were placed on a four-year probation that includes strict compliance plans for all its ships operating in US waters.

Frequently, it is not only violation of the environmental regulations that are prosecuted but also the actions of the crew in covering up or providing false statements to the investigators of the alleged violations. In 2017, two Greek shipping companies were sentenced to pay US$2.7 million after being convicted of violating the APPS, obstructing justice, witness tampering and conspiracy. During a routine inspection by the USCG, it was discovered that two senior engineers were trying to hide the fact that the vessel had been dumping oily waste water into the ocean for months. The vessel owner and operator were each given a five-year probation and prohibited from sending ships into US ports until their fines were paid. The two senior engineers were found guilty of the same crimes as the shipping companies and were sentenced to a 12-month and a nine-month prison term, respectively.

Amendments to MARPOL Annex VI (Regulations for the Prevention of Air Pollution from Ships) require that from calendar year 2019, each ship of 5,000 gross tonnage and above collect the data specified in Appendix IX of MARPOL Annex VI, for that and each subsequent calendar year or portion thereof, as appropriate. The data specified in Appendix IX includes:

a identity of the ship;
b IMO number;
c period of calendar year for which the data is submitted;
d start date;
e end date;
f technical characteristics of the ship;
g ship type, as defined in Regulation 2 of the Annex;
h gross tonnage;
i net tonnage;
j deadweight tonnage;
k power output of main and auxiliary reciprocating internal combustion engines over 130kW;
l Energy Efficiency Design Index (if applicable);
m ice class;

n fuel oil consumption, by fuel oil type in metric tonnes and methods used for collecting fuel oil consumption data;
o distance travelled; and
p hours under way.

In addition, Annex VI includes a global cap on the sulphur content of fuel oil and allows for the designation of special areas (ECAs) where more stringent controls on sulphur emissions apply. The new sulphur limit set by Annex VI came into effect from 1 January 2020. Under the new rules, the global limit for the sulphur content of ships' fuel oil is 0.5 per cent mass/mass (m/m) as opposed to the previous global limit of 3.5 per cent m/m. The United States ratified the amendments in October 2008; thus, the cap applies to US-flagged ships, wherever located, and to non-US flagged ships operating in US waters. Caution should be exercised in that the terms and conditions in fuel oil (bunker fuel) contracts for all ship types reflect consistent language regarding forum for litigation and applicable remedies.

Upon receipt of reported data, the Administrator of the EPA or any organisation recognised by it shall determine whether the data has been reported in accordance with MARPOL Annex VI and, if so, issue a statement of compliance.

Those classification societies that have received authorisation by the USCG to issue international energy efficiency certificates are also authorised to issue statements of compliance – fuel oil consumption reporting. Results of the verification performed by the EPA are to be reported directly to the IMO Ship Fuel Oil Consumption Database based on IMO resolution MEPC.293(71).

Wreck removal and salvage

A vessel grounded or sunk in the navigable waters of the United States is subject to the requirements of the Wreck Removal Act (part of the Rivers and Harbors Act of 1899, found at 33 USC Sections 409 to 415) (the Wreck Act). This Act imposes a strict, non-delegable duty on the owner of a wrecked vessel to mark the wreck as soon as possible. This includes a duty to use diligent efforts to locate the wreck. The vessel owner may ask the USCG to mark the wreck; however, this does not relieve the owner of the duty to exercise due care to see that the mark is maintained.

Section 409 of the Wreck Act also requires the owner to 'commence immediate removal' of the wreck if it is a hazard to navigation. Civil and criminal fines may accrue for failure to abide by the requirements of Section 409. Should the owner abandon the wreck, it is liable to reimburse the US government for removal costs incurred, except in the case of a non-negligent sinking. The owner of a wreck who has failed to mark or remove the wreck is liable for damage caused if another vessel collides with the wreck.

Salvage

The United States is a party to the International Convention on Salvage of 1989 (the 1989 Convention), which entered into force on 14 July 1996. The 1989 Convention gives rise to a right to a reward and a maritime lien in the salvaged property. Accordingly, the court may exercise jurisdiction both *in personam* and *in rem*, depending on the circumstances. The elements of a valid salvage claim are (1) a marine peril that places the property at risk, (2) the salvage is voluntarily rendered, and (3) the salvage effort must be successful in whole or in part. The two most popular salvaged contracts are the Lloyd's Open Form (LOF) and MARSALV contracts, which require the salvage award to be assessed under the 1989 Convention's criteria

if a fixed cost for the salvage project was not agreed. The LOF and MARSALV contracts provide for arbitration if any dispute arises. The LOF is governed by English law and requires London arbitration, whereas the MARSALV form requires US arbitration.

Ship recycling

Shipbreaking primarily involves the dismantling and disposal of obsolete US Navy and Maritime Administration (MARAD) ships, commercial barges and mobile offshore drilling units. Exporting these vessels for scrapping in other countries was stopped by the Navy in December 1997 and by MARAD in January 1998 because of concerns about the safety and health or workers and adverse effects on the environment.

US ship scrapping and recycling is regulated for pollution issues by the EPA. The EPA has published 'A Guide for Ship Scrappers: Tips for Regulatory Compliance', which provides ship recycling facilities with an overview of the most pertinent environmental and worker health and safety requirements. The guide is structured by specific processes, including asbestos removal, metal cutting, PCB[17] handling and fuel and oil removal. The EPA has also published 'National Guidance: Best Management Practices for Preparing Vessels Intended to Create Artificial Reefs'.

Worker safety is regulated by Occupational Safety and Health Administration, which promulgates general regulations pertaining to protection from falls, the use of cranes and forklifts, cutting and welding, fire prevention and protection, and so forth.

US shipbreaking facilities are currently active in Brownsville, Texas, where most of the obsolete Navy and MARAD ships are taken for recycling. The ships are towed into slots dredged into the side of the channel, grounded and disassembled.

v Passengers' rights

The United States is not a signatory to the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention), a multinational treaty allowing a cruise carrier to limit its liability in damages to passengers, while guaranteeing compensation to injured passengers. Instead, US federal law prohibits the limitation of liability to a cruise passenger when the cruise docks in the United States.[18]

Several cruise lines, however, have incorporated certain limitations from the Athens Convention into their passenger ticket contracts and have attempted to enforce them against US passengers, in US courts, when the voyage is entirely foreign. Although the Supreme Court has not yet ruled on the legitimacy of these practices, lower courts have increased the burden on cruise carriers by narrowing the reasonable communicativeness test as applied to cruise line passage contracts, especially when they invoke international treaties such as the Athens Convention.[19]

Regarding passengers' rights before injury, the Cruise Lines International Association, of which most of the world's major cruise lines are members, introduced its 2013 Cruise

17 Polychlorinated biphenyls.

18 46 USC Section 30509.

19 In the Ninth Circuit, see *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. 2002). In the Eleventh Circuit, see *Wajnstat v. Oceania Cruises, Inc.*, No. 09-21850-CIV-COOKE/TURNOFF (S.D. Fla. 12 July 2011) (order denying defendant's motion for partial summary judgment); see also *Wajnstat v. Oceania Cruises, Inc.*, No. 11-13670 (11th Cir. 12 August 2011); and *Wajnstat v. Oceania Cruises, Inc.*, 684 F.3d 1152 (11th Cir. 2012).

Industry Passenger Bill of Rights. This makes certain promises to passengers in respect of mechanical failures, medical care, essential provisions and unspecified emergencies. However, the Bill of Rights states no specific compensation if a cruise line violates these rights.

vi Seafarers' rights

Seafarers' maritime claims may be adjudicated in state or federal courts, but federal maritime law applies.

Jones Act negligence

The Jones Act is a federal law providing a cause of action in negligence for seafarers injured in their employment. An employer is liable for the injuries to its employee by acts or omissions of the employer's officers, agents or employees.

The standard of care applicable in the Jones Act context is ordinary care. The employer's non-delegable duty under the Jones Act is to provide the seafarer with a reasonably safe place to work. The employer must have actual or constructive notice of the unsafe condition and an opportunity to correct the problem before liability attaches. Moreover, an employer exercises ordinary prudence when a safe procedure is used even though a safer or more preferable procedure might exist.

Similarly, the standard of care applicable to seafarers under the Jones Act is ordinary care and prudence under the given circumstances. Although a seafarer's contributory negligence or assumption of risk does not bar his or her recovery, comparative negligence applies, and fault is allocated on a comparative basis.

Once a seafarer proves his or her employer was negligent, and that the employer's actions were the cause of the seafarer's injuries (in whole or in part), he or she need only show that the employer's negligence 'played any part, even the slightest, in producing the injury or death for which damages are sought'.[20] Thus, the seafarer's burden of proof of causation is slight. The same causation standard also applies in determining whether the seafarer was contributorily negligent for his or her injuries. This is often called the 'featherweight' causation standard.

If successful in proving negligence under the Jones Act, a seafarer may recover for pecuniary losses, including loss of earning capacity, past lost wages, medical expenses, pain and suffering, mental anguish and physical discomfort. A seafarer may not recover non-pecuniary damages, including punitive damages or loss of society, from his or her employer.

Unseaworthiness

A seafarer may also maintain a cause of action for breach of the warranty of seaworthiness under the general maritime law against the owner of the vessel on which he or she worked. The doctrine of unseaworthiness imposes on the shipowner an absolute and non-delegable duty to furnish a seaworthy vessel and appurtenances reasonably safe and fit for their intended use.[21] Unseaworthy conditions may include defective equipment, hull, tools or appliances; slippery decks; insufficient or incompetent crew; inadequate supplies; improper methods of work; failure to provide adequate safety equipment; and failure to provide safe means of ingress and egress from the vessel.

20 *Rogers v. Missouri Pac. R.R. Co.*, 352 US 500, 506 (1957).

21 *Seas Shipping Co. v. Sieracki*, 328 US 85, 89 (1946), overruled on other grounds.

In addition to the unseaworthy condition, the seafarer must also establish a 'causal connection between his injury and the breach of duty that rendered the vessel unseaworthy'. The mere fact an accident occurs does not establish unseaworthiness. Instead, a seafarer must prove that the unseaworthy condition was a direct and substantial cause of injury.

The damages available to a seafarer for the unseaworthiness of a vessel are virtually identical to those a seafarer may recover under the Jones Act. Specifically, a seafarer may recover pecuniary losses, including loss of earning capacity, past lost wages, medical expenses, pain and suffering, mental anguish and physical discomfort. In 2019, the US Supreme Court decided *Dutra Group v. Batterton*,[22] holding that punitive damages are not available in seafarers' unseaworthiness actions.

Maintenance and cure

In addition to bringing a claim for negligence under the Jones Act and unseaworthiness under the general maritime law, a seafarer is entitled to receive maintenance and cure from an employer if the seafarer becomes ill or is injured while in the service of the vessel. An employer's obligation to pay maintenance and cure is regardless of fault. Moreover, an employer must continue to pay maintenance and cure until the seafarer reaches maximum medical cure. A seafarer reaches maximum medical cure once his or her condition becomes permanent and cannot be improved by further medical treatment.

The doctrine of maintenance entitles an injured seafarer to the reasonable cost of food and lodging comparable to what is received on board the vessel. The amount of maintenance is a factual determination based on evidence of the seafarer's actual expenditure for food and lodging. Some federal circuits allow the seafarer's union to negotiate a standard maintenance rate with the employer in a collective bargaining agreement.

Cure is the employer's obligation to pay for medical expenses for a sick or injured seafarer. However, a seafarer must mitigate his or her medical expenses. Although a seafarer may be treated by a physician of his or her choice, overly expensive or unnecessary medical costs will not be reimbursed.

In *Atlantic Sounding Co. v. Townsend*,[23] the US Supreme Court held that a seafarer can recover punitive damages if an employer wilfully and wantonly denies maintenance and cure benefits. *Townsend* emphasised that marine employers and their claims handlers must ensure prompt and appropriate investigation of a seafarer's claim for maintenance and cure.

VII OUTLOOK

As a large nation with extensive coastlines and inland waterways, the maritime sector will always be a significant contributor to the US economy. The maritime sector is also affected by multiple, often disparate, geopolitical factors. With the current Congressional focus on infrastructure, it is hoped that US ports and terminals will receive significant and much-welcomed upgrades. Threatened protectionist tariffs issued by the Trump Administration could have an effect on imports. At the same time, strong domestic oil and gas production will allow the United States to become a net energy exporter in the years to come. With the emphasis on liquid natural gas – both as a maritime fuel and as an export commodity – coupled with the emergence of the offshore wind energy industry, domestic shipbuilding could see real gains.

22 139 S. Ct. 2275 (2019).

23 557 US 404 (2009).

Appendix 1

ABOUT THE AUTHORS

JAMES BROWN

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James Brown is the firm's shipping head for the Americas. He is licensed by the United States Coast Guard as master and first-class pilot. His practice focuses on maritime personal injury, collision and offshore energy matters. He also handles marine and energy administrative proceedings before state and federal regulatory bodies. Mr Brown is admitted to practise before the Supreme Court of the United States, the US Court of Appeals for the Fifth Circuit, the Southern, Eastern, Western and Northern Districts of Texas, and all Texas state courts. He is a maintaining member in the College of the State Bar of Texas and has served on the faculty of the State Bar's Advanced Personal Injury Law Course.

Mr Brown attended law school after working in industry. He received his BS in marine transportation with honours from Texas A&M University and is a graduate of the University of Houston Law Center. Mr Brown is a Proctor in Admiralty in the Maritime Law Association of the United States and served as a director of the Southeastern Admiralty Law Institute.

He has published articles in numerous journals, including *Journal of Maritime Law & Commerce*, *American Journal of Trial Advocacy* and the State Bar of Texas' *Texas Environmental Law Journal*.

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Michael Wray is a partner at the firm in Houston, Texas. His practice areas include marine and energy, commercial litigation, environmental, insurance coverage and transactional matters. He is part of the firm's regulatory team and has advised clients on issues involving the Bureau of Safety and Environmental Enforcement and the United States Coast Guard. Before joining the firm, Mr Wray practised in New York and Louisiana and is admitted to state and federal courts in New York, Louisiana and Texas as well as the US Court of Appeals for the Fifth Circuit. Mr Wray has worked with operators, service companies, oil spill removal organisations and London underwriters.

Mr Wray is a graduate of University of North Carolina at Chapel Hill and received a *juris* doctorate from Tulane School of Law, where he also obtained a Certificate in Environmental Law. He has authored or co-authored numerous presentation papers and articles on contractual risk allocation, insurance, regulatory and environmental issues. He is published in the *Texas Journal of Oil, Gas, and Energy Law* and has been listed in *Who's Who Legal: Energy*.

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Jeanie Tate Goodwin is an experienced civil trial lawyer. Her practice focuses on maritime law, including Jones Act personal injury, vessel status and cruise ship cases. She also spends significant time defending energy companies in complex commercial litigation. In addition, she has substantial experience in insurance law, both first-party and third-party litigation, as well as coverage opinions. Ms Goodwin has been licensed to practise law in Texas since 2004, and she is admitted to practise before the Southern, Northern and Eastern Districts of Texas, the US Court of Appeals for the Fifth Circuit and the Supreme Court of the United States. She is a member of the State Bar of Texas, the Houston Bar Association and DRI.

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Thomas Nork is a partner at the firm, a graduate of the New York Maritime Academy and an experienced licensed master mariner. He practises in the areas of admiralty and tort litigation. His practice areas include personal injury claims under the Jones Act and Longshore and Harbor Worker's Compensation Act, collision and cargo claims, contract and general liability claims. He represents clients with energy, insurance, marine and land transportation-related disputes, including Carriage of Goods by Sea Act and Carmack Amendment issues. He is also experienced in maritime-related transactions, including vessel construction loans, shipyard contracts, vessel purchases and charter parties.

Mr Nork received his MBA from the University of Houston and graduated with a *juris* doctorate from the University of Houston Law Center. Mr Nork is a member of the State Bar of Texas, the Houston Bar Association, the Houston Mariners Club and the Council of Master Mariners. He is admitted to practise before the Supreme Court of the United States, the Eastern, Northern, Southern and Western Districts of Texas and the US Courts of Appeals for the Second, Third, Fourth and Fifth Circuits.

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Chris has been a speaker and author for presentations and articles on topics including offshore wind farms, offshore drilling, coastwise trade laws, bunker contracts, offshore support vessel charter parties and many maritime law issues.

Chris is admitted to practise in Texas, in the Southern, Eastern and Western Districts of Texas, in the US Courts of Appeals for the Fifth and Tenth Circuits, and in the Supreme Court of the United States.

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Alex Mendez has built a solid track record of success in the areas of maritime, admiralty, logistics, transportation, labour and employment and corporate litigation. His primary focus is providing leadership in the areas of risk management, civil litigation, contract analysis, document drafting, and e-discovery to meet the client's needs. He is recognised by his clients for his attention to detail and ability to actively listen and address their concerns with fresh, yet grounded approach to interpreting laws and working within the legal system to achieve their goals.

Alex has extensive experience in conducting on-site investigations, including marine casualties, cargo and personal injury claims, draft reports detailing applicable law, legal strategy and possible outcomes. He has represented clients before government agencies, including the US Equal Employment Opportunity Commission, the National Labor Relations Board, US Customs and Border Protection Agency and US Coast Guard to minimise the impact of agency action on business operations and to mitigate potential liability.

Alex is admitted to practise in multiple jurisdictions, including Texas, Puerto Rico and Pennsylvania, and multiple United States federal courts. Alex is fluent in Spanish.

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Melanie Fridgant is an associate in the shipping group. Her practice focuses on maritime and offshore energy matters, transactional matters and commercial litigation.

Melanie is a member of the Order of the Barristers, an honorary award recognising excellence in oral and written advocacy. Having lived in France, the United Kingdom and Qatar, Melanie is bilingual English–French and speaks Romanian fluently.

Melanie received her bachelor of science degree from Northwestern University and her law degree from the University of Houston Law Center. While in law school, she was a member of the alternative dispute resolution team and she served as a senior article editor for the *Houston Journal of Health Law and Policy*, where her work on technological developments in the medical industry was also published.

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