



# MAINBRACE

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BLANKROME  
maritime

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# Note from the Editor

BY THOMAS H. BELKNAP, JR.

**Looking back through past issues of *Mainbrace***, the articles published over time clearly reflect the ebb and flow of “hot” topics in the maritime industry. These have included—among many others—the global financial crisis and resulting scramble for maritime security on claims, the sharp rise of piracy, the perilous state of maritime cybersecurity, the ever-changing ballast water and emissions regulations landscape, the flood of maritime bankruptcies, and the dynamic U.S. sanctions landscape. Finding these topics covered in our newsletter should not be surprising to our readers—we have always aimed to provide timely and relevant analysis of the issues that are important to our clients.

This issue of *Mainbrace* is no different. Perhaps most importantly, the #MeToo movement has spurred a long-overdue discussion of the role of women in the maritime industry and the many challenges they face, both shipboard and in the home office. In their article, [Susan Bickley](#), [Emery Richards](#), and [Jeanne Grasso](#) provide an excellent overview of this topic, both from the vantage point of the employee and the employer.

Additionally, [Sean Pribyl](#) addresses new developments in the industry’s inexorable march towards autonomous vessels; [Jon Waldron](#) and [Joan Bondareff](#) discuss recent developments that strongly indicate that offshore wind is finally moving from concept to mainstream project in the United States; and Joan and Jeanne highlight some of the issues arising from the massive (and growing) island of plastic circling the Pacific Ocean.

We also bring you a roundup of recent developments in the maritime litigation world, including raising new questions about when a defendant may be “found” in a district for purposes of maritime attachment under Rule B ([Thomas Belknap](#) and [Noe Hamra](#)); what constitutes a safe port in the modern world ([Emma Jones](#)); and when a “knock for knock” indemnity agreement may be enforceable under maritime law in oil and gas exploration contracts ([David Meyer](#)). And [Mike Schaedle](#) and [Rick Antonoff](#) from our Firm’s bankruptcy group discuss a recent decision concerning chapter 15 of the bankruptcy code, relating to recognizing foreign main proceedings.

Lastly, I am very excited to announce the **launch** of our maritime blog, *Safe Passage*, where readers can find archives of articles from our *Mainbrace* newsletter and also our maritime development advisories. Articles are sorted both chronologically and by broad topic area to make the blog not only easy to peruse, but also a useful research resource.

We hope you find this issue interesting and informative. As always, we welcome any comments and, particularly, ideas for future articles. ▣



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# What #MeToo Means for the Maritime World

BY SUSAN L. BICKLEY, EMERY G. RICHARDS, AND JEANNE M. GRASSO



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**The #MeToo movement has shone new attention** on issues for employers in the maritime industry seeking to ensure that seafarers and shore-based personnel can participate in a work environment free of sexual harassment and assault, both shipboard and shoreside. Employees at sea, often for months at a time, can face special challenges associated with a work environment that can be thousands of miles away from any home office, lead to feelings of isolation, make communications difficult, involve close proximity between work spaces and living quarters, and generally require employees to remain at the workplace during rest periods.

In other sectors of the global maritime industry, companies engaged in international business can find themselves navigating scenarios that arise from expectations regarding workplace interactions between men and women that are as diverse as their workforces. We examine here the unique legal framework that applies to sexual harassment in the maritime context, what to keep in mind for addressing incidents, and recent trends regarding steps employers are currently taking in response.

## The Statistics Are Staggering

Both onshore and shipboard, sexual harassment issues affect individuals of every gender, sexual orientation, and gender identity. Increasing focus from #MeToo has recently highlighted issues surrounding sexual harassment and assault among women working in the transportation and shipping sectors, and related industries. For example, over 1,000 Swedish women in the maritime industry have shared witness accounts of sexual harassment and abuse on board vessels through #lättaankar, the Swedish version of the #MeToo hashtag. Many accounts spotlight the unique challenges inherent to both working and living aboard vessels, as well as the minority presence of women in many jobs, with an estimated less than two percent of the world's 1.65 million seafarers being women—and the vast majority of those working on cruise ships.

## The Legal Framework

Like maritime law, sexual harassment law in the United States is a generally consistent jurisprudence, particularly because it is based on federal law under the parameters of Title VII of the Civil Rights Act of 1964. Though sexual harassment issues are not new, growing momentum is supporting a broader array of options for confronting them, as demonstrated, for example, by the collaborative efforts regarding sexual assault/sexual harassment (“SASH”) training and protocols developed by a consortium in the maritime industry, labor organizations, and the Maritime Administration (“MARAD”) that was instrumental

Given the nuances among the various legal claims that can arise in harassment situations, their unique legal standards, and the overlapping intricacies of maritime and employment law, significant implications can arise for protecting insurance coverage that may apply to a claim, making it worthwhile to seek legal counsel from a source well-versed in each of these areas.

in the 2017 resumption of the U.S. Merchant Marine Academy's Commercial Sea Year for Midshipmen after it was suspended due to concerns regarding these issues. Despite the burgeoning social and institutional changes occasioned by the increased scrutiny #MeToo has brought to employer policies, and

the dramatic consequences of workplace incidents for companies confronting them in the social media era, however, little has changed in the law regarding liability for sexual harassment and discrimination, and the Equal Employment Opportunity Commission (“EEOC”) has not seen a huge increase in sexual harassment charges.

For an employer faced with addressing an allegation of sexual harassment in the maritime world, the following factors continue to guide the applicable legal framework: What laws apply? Where did it happen? What happened? Who is the accused? Who are witnesses? What are the employer's policies, and have they been uniformly applied? What, if any, consequences occurred to the individual and their ability to

*(continued on page 3)*

## What #MeToo Means for the Maritime World (continued from page 2)

succeed at work? What corrective or remedial measures, if any, are required to end any inappropriate conduct? What disciplinary action is appropriate?

Depending on the answers and relevant jurisdiction, a claimant may be able to pursue a Title VII claim in the United States, first with the EEOC and later, generally at the plaintiff's election, in state or federal court. In addition, Jones Act, maintenance and cure, the Longshore and Harbor Workers' Compensation Act ("LHWCA"), or state worker's compensation claims may also be available. In the international arena, these issues are being increasingly addressed under the Maritime Labour Convention, 2006, which was drafted under the auspices of the International Labour Organization and has now been ratified by over 80 countries, including most European Union member states, though not the United States. Given the nuances among the various legal claims that can arise in harassment situations, their unique legal standards, and the overlapping intricacies of maritime and employment law, significant implications can arise for protecting insurance coverage that may apply to a claim, making it worthwhile to seek legal counsel from a source well-versed in each of these areas.

### What Employers Are Evaluating Right Now

With the recent media attention on sexual harassment in the workplace, employers are wondering what to do next. A wide array of issues have sparked focus among company leadership, boards, human resources departments, legal teams, and individuals with crisis management and risk mitigation responsibilities:

- How to handle an employee's complaint against a high-profile or powerful accused.
- Protecting boards of directors and corporate officers from personal liability for another's harassing conduct, and the public relations fallout.
- The use of nondisclosure agreements and mandatory arbitration clauses, and how recently enacted and proposed legislation at the state and federal level, as well as practical realities regarding their enforceability, may change their use.
- Updating sexual harassment policies and reporting procedures.
- Training: Will there be further emphasis on culture and tangible actions embodying corporate values vs. total reliance on "check the box" training?

- "Due process" provided to the accused.
- What to do with untimely complaints, and/or complaints learned through unconventional means, such as social media.
- Whether internal investigations will be conducted under the auspices of the attorney-client privilege, and whether an external neutral or internal individual should investigate.
- Recognizing, preventing, and addressing any backlash in the workplace from the #MeToo movement, which itself creates exposure. For example, what to do if an employer learns male employees segregate or do not want to travel with female employees out of fear of claims, realistic or not.
- In instances of sexual assault, how to address criminal implications, reporting, and investigations.
- Redefining "for cause" termination parameters and consequences in executive compensation agreements with regards to sexual harassment incidents.
- Examining insurance coverage issues that can arise in these scenarios.
- Acknowledging that this movement highlights gender and generational differences in perception, and various paths for moving forward.

### Takeaway

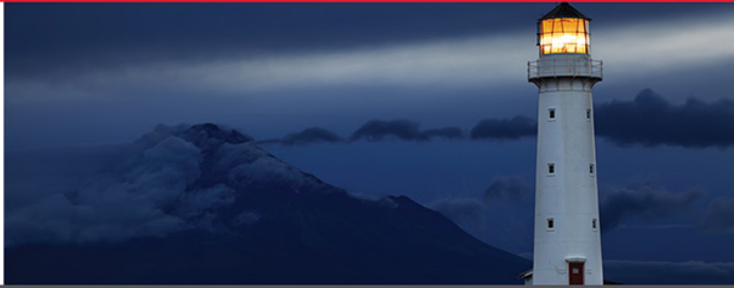
Policies and procedures that are implemented to address the concerns raised by the #MeToo movement and that are taken seriously can help employers avoid the problems that persist from headline to headline. Employers are currently taking steps to make bystanders more willing to intervene in incidents, ensuring appropriate designation of individuals to whom complaints can be brought, implementing and strictly enforcing anti-retaliation policies, undertaking investigations swiftly and confidentially, carefully documenting findings and remedial measures taken, raising awareness of gender equality concerns, and more.

As challenges from the #MeToo movement continue, employer responses are rapidly evolving. The importance that industries involving maritime commerce have long placed on diversity, inclusion, and equality will no doubt extend in new ways in this era of change. Blank Rome LLP continues to monitor these developments with updates on the Firm's employment law blog, [blankromeworkplace.com](http://blankromeworkplace.com). □ – ©2018 BLANK ROME LLP



# SAFE PASSAGE

News & Views from Blank Rome Maritime and *Mainbrace*



**We welcome our readers to dive into our archives** of *Mainbrace* newsletters and maritime development advisories, as well as keep abreast with all of our current and upcoming analyses on trending maritime topics and legislation, in our just-launched ***Safe Passage*** blog.

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# Stronger Winds Blowing Off the Atlantic Coast

BY JOAN M. BONDAREFF AND JONATHAN K. WALDRON



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**We are seeing strong signs of a burgeoning** offshore wind industry off the Atlantic Seaboard. While modest, the first offshore wind project, Deepwater Wind, is fully operational in Rhode Island state waters, bringing low-cost renewable energy to the residents of Block Island. In addition, new projects in Massachusetts and Rhode Island, described further below, are setting the stage for the construction of much larger offshore wind farms in federal waters. From Maine to North Carolina, governors and states are lining up to be a part of the offshore wind revolution. This is good news for developers, suppliers, consumers, and the environment.

## Why This Is Happening Now

There are several reasons why offshore wind is taking off now. In the first place, the price of offshore wind is coming down—largely based on Europe’s experience with offshore wind and bringing this experience to the United States as lessees, partners, and contractors, as well as the development of improved and more efficient turbines and other related technologies. Indeed, European developers and contractors are now looking to partner with U.S. interests. In addition, companies are finding ways to work within the framework of the Jones Act, as discussed in more detail below.

Second, states and governors are declaring their support for renewable energy, including offshore wind, with new ambitious goals both in policies and laws. Additionally, consumers are demanding more green energy, and offshore wind can help fulfill this demand for greener energy. The same governors that support offshore wind are also staking their vocal opposition to oil and gas leasing off their coasts.

Furthermore, it is now clear that the Trump administration fully supports offshore wind as part of its efforts for an “all of the above” energy strategy, in an effort to make the United States energy independent and dominant. This goal was expressed at a recent conference in Princeton, New Jersey, by Secretary of the Interior Ryan Zinke.

**From Maine to North Carolina, governors and states are lining up to be a part of the offshore wind revolution. This is good news for developers, suppliers, consumers, and the environment.**

The Department of the Interior’s support for offshore wind includes its recent proposal to expand lease areas off the entire Atlantic Seaboard (comments are due on or by July 5, 2018) and calls for the establishment of four new wind energy areas off Long Island, specifically. Secretary Zinke has also called for the expedited permitting of wind projects, including the completion of environmental review requirements within one year.

The Atlantic Outer Continental Shelf where most of the leasing and development is taking place not only has the most abundant wind, but it is also close to population centers on the East Coast that need more supplies of energy, especially in light of the closure of coal-powered plants.

For the most part, labor and industry have welcomed the prospect of new, high-paying wind jobs. Maritime organizations and ports have also mostly welcomed offshore wind, but their concerns for crowded shipping lanes must be taken into account. The same is true for fishermen who fear losing their fishing grounds and have filed a suit against the Bureau of

Ocean Energy Management (“BOEM”) to stop wind activities off Long Island. (See [Fishing Groups and Communities Move Forward with Suit against NY Wind Farm](#), Fisheries Survival Fund, September 19, 2017.)

The production tax credit is still in place for two more years, albeit with a phasedown of the credit on an 80-60-40 schedule, causing some developers to move up their timelines for putting steel in the water.

Finally, the threat of climate change has prompted states and governors to look at new sources of renewable energy, including offshore wind.

## Recent Developments

The most encouraging news has come from **Massachusetts** and **Rhode Island**. Pursuant to 2016 Massachusetts legislation calling for 1600 MW of offshore wind energy in the next decade, Vineyard Wind—composed of Avangrid Renewables and Copenhagen Infrastructure Partners—was selected on May 24, 2018, by Massachusetts Electric Distribution Companies and the Massachusetts Department of Energy Resources to be the first supplier of offshore wind to Massachusetts utilities. Vineyard Wind plans to build an 800 MW wind farm approximately 15 miles south of Martha’s Vineyard, with construction expected to begin in 2019 and

operations to begin in 2021. This wind farm is expected to supply renewable energy for up to 750,000 homes. In the same competition, Rhode Island selected Deepwater Wind's Revolution Wind to construct a new 400MW offshore wind farm to supply offshore wind to Rhode Island. Revolution Wind will be ten times the size of the Deepwater Wind farm in state waters. Although there are still contracts to be negotiated and environmental documents to be completed, the selection of Vineyard Wind and Deepwater Wind for these new megaprojects is exciting and forecasts major offshore wind projects that will bring renewable energy to both Massachusetts and Rhode Island residents in the near future.

**New York** and **New Jersey** also have set ambitious goals for offshore wind. In his 2017 State of the State Address, New York's Governor Cuomo called for 2400 MW of offshore wind power by 2030—enough to power 1.2 million homes. In 2018, he called for at least 800 MW of offshore wind power to be procured in two solicitations—2018 and 2019—to power 400,000 New York homes. The lead agency in New York is the New York State Energy Research and Development Authority ("NYSERDA"), which is currently working with the New York Public Service Commission on wind procurement options. NYSERDA has also published a Master Plan covering 20 topics as well as a document identifying the locations of potential suppliers for the offshore wind industry.

BOEM, which has responsibility for the offshore wind leasing program, has asked for comments on four new sites in the Long Island Bight to address Governor Cuomo's call for more wind energy. The comment deadline was extended until July 30, 2018.

Incoming New Jersey Governor Phil Murphy set the stage for New Jersey to be a part of the offshore wind revolution by immediately signing an executive order calling for 3500 MW of offshore wind energy to be generated by 2030. At the same time, Governor Murphy directed the New Jersey Board of Public Utilities to start the rulemaking process for awarding ocean renewable energy credits ("ORECs")—a process that had been stymied in the prior administration. And, on May 24, 2018, Governor Murphy signed into law A-3723, which is renewable energy legislation that establishes a new renewable energy standard for New Jersey and codifies his goal of 3500 MW of offshore wind by 2030. Danish developer Ørsted and EDF Renewable Energy have both expressed interest in working with New Jersey on new offshore wind projects.

Coming down the Atlantic Coast, **Maryland** also made headway in implementing its state renewable energy legislation in 2016 by awarding ORECs worth \$1.8B to two companies: U.S. Wind, a subsidiary of Italian renewable energy giant Renexia, and Skipjack, a division of Deepwater Wind. The ORECs were awarded by the Maryland Public Service Commission at a price of \$131.93/MWh for 20 years, beginning when the plants are operational. The U.S. Wind project consists of 62 turbines that are 12–15 nm offshore, and the Skipjack project consists of 15 turbines that are 17–21 nm offshore. Maryland also awarded grants in 2018 for workforce development and training, and just announced a new workforce development grant program for 2019. The announcement is open until August 1, 2018.

In **North Carolina** last year, Avangrid Renewables, part owner of the Vineyard Wind project noted above, won the lease off North Carolina with an auction bid of a little over nine million dollars.

And lastly, **Virginia**, under Governor Northam's leadership, has passed new legislation declaring that its two-turbine research project—owned by Dominion Energy and managed by Ørsted—is "in the public interest." On May 22, 2018, Virginia's Department of Mines, Minerals, and Energy issued a Request for Proposals ("RFPs") seeking qualified contractors to establish how Virginia and Hampton Roads could become the supply and logistics center for offshore wind. Replies to the RFP are due on June 22, 2018.

*(continued on page 7)*



**Stronger Winds Blowing Off the Atlantic Coast (continued from page 6)****The Jones Act and Offshore Wind**

When offshore wind was still an idea and not a reality in the United States, European developers were asking about the possible implications with the Jones Act. As time has passed, developers have become more comfortable working within the Jones Act framework. This has been accomplished by recognizing that foreign-flag vessels can perform the heavy lift installation, maintenance, and repair work when Jones Act vessels do not have that capability. In addition, by following Customs and Border Protection rulings issued to the oil and gas industry, developers are now complying with the long-standing precedent distinguishing between installation work and the transportation of merchandise by Jones Act vessels to offshore wind farms. These rulings have recognized that cable-laying and pipe-laying vessels and jack-up barges can be used for installation purposes only, and are not considered the transportation of merchandise subject to the Jones Act. We continue to work with developers and contractors to provide advice on ongoing and potential upcoming projects, and are monitoring all Jones Act developments that may affect offshore wind farms.

**Opportunities for the Maritime Industry to Participate in the New Industry**

While European developers and shipping companies are welcome to participate in the American offshore wind market,

we believe that the market provides new opportunities for American workers, shipyards, and ports. In some instances (e.g., Maryland and Massachusetts), a certain percentage of the work must be set aside for U.S. businesses. In other cases, U.S. boat builders are stepping up to the plate and building new offshore supply vessels carrying crew and supplies to offshore wind farms. In addition, U.S. investors and local communities are recognizing that there are real opportunities to create jobs related to wind farms by expanding their terminals and making space available to construct and install the immense components needed to build these large new farms, and by also developing the necessary logistical network and infrastructure needed to support this fledging industry.

**Conclusions**

A convergence of time, closure of coal-powered plants, falling offshore wind prices, the entry of European developers, Trump administration support, and new gubernatorial policies and state laws has brought us to the point where offshore wind is becoming a reality in the United States. This is welcome news for the offshore wind industry, including the developers, their U.S. partners, the maritime industry, maritime labor, and, eventually, consumers. □ – ©2018 BLANK ROME LLP

**JEFFREY S. MOLLER****PARTNER**

## Jeffrey Moller Elected to the Maritime Law Association's Board of Directors

Blank Rome Partner **Jeffrey S. Moller** has been elected to the board of directors of the Maritime Law Association of the United States ("MLA") for a three-year term. A member since 1988, Jeffrey has also served as chairman of MLA's Committee on Regulation of Vessel Operations.

Founded in 1899, the MLA is the primary maritime law organization in the United States with over 3,600 members. The objectives of the MLA are to advance reforms in U.S. maritime law; furnish a forum for discussion of problems affecting maritime law and its administration; participate as a constituent member of the Comité Maritime International and affiliated organization of the American Bar Association; and act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations, and practices of different nations.

For more information, please visit [mlaus.org](http://mlaus.org).





# Has the Ground Shifted under the Law Concerning When a Party Is “Found within the District” for Purposes of Rule B?

BY THOMAS H. BELKNAP, JR., AND NOE S. HAMRA



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It has long been the law in the Second Circuit that when a foreign party registers with the New York Department of State to conduct business in New York and designates an agent within the district upon whom process may be served, it will be “found within the district” for purposes of Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure (the “Admiralty Rules”). This precedent was clearly established in *STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 133 (2d Cir. 2009), where the Second Circuit unequivocally held that “a company registered with the Department of State is ‘found’ [within the district] for purposes of Rule B...”

Recent developments in the law concerning the constitutional scope of a court’s personal jurisdiction, however, combined with the absence of clear legislative statements in New York’s registration statute, raise fresh questions about the continuing viability of *STX Panocean*’s holding, and the extent to which a party can seek to immunize itself against Rule B attachment in a state by registering there.

## Background

Rule B of the Admiralty Rules allows a maritime claimant to attach a defendant’s tangible or intangible personal property as security for a maritime claim. Specifically, Rule B (1)(a) states, in relevant part, that “[i]f a defendant is not found within the district, when a verified complaint praying for attachment and the affidavit required by Rule B (1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant’s tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process.”

Historically, maritime attachments were broadly available in recognition of the difficulty in obtaining jurisdiction over parties to a maritime dispute who are often peripatetic and their assets transitory. Thus, the policy underlying maritime attachment was to permit attachments wherever the defendant’s assets could be found, thereby obviating the need for a plaintiff to “scour the globe” to find a proper forum for suit, or property of the defendant sufficient to satisfy a judgment.

Although the Admiralty Rules do not define what it means to be “found within the district,” the Second Circuit held in *Seawind Compania, S.A. v. Crescent Line, Inc.*, 320 F.2d 580, 582 (2d Cir. 1963), that this requirement presents “a two-pronged inquiry: First, whether (the respondent) can be found within the district in terms of jurisdiction, and second, if so, whether it can be found for service of process.” In *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 268 (2d Cir. 2002), the Second Circuit clarified that “a defendant will be considered ‘found within the district’ in which the plaintiff brings its action if the defendant has sufficient contacts with the district

No federal court, on the other hand, has yet addressed the issue of whether *Daimler* overruled *STX Panocean* on the question of whether a foreign corporation is “found within the district” for purposes of Rule B attachments by virtue of its registration in New York.

to meet minimum due process standards and can be served with process in the district.”

While federal law defines the jurisdictional due process boundaries surrounding a court’s exercise of jurisdiction,

the federal courts look to the relevant state law to determine if those jurisdictional requirements are met. Until recently, it was well-settled under New York law that registration to do business in New York constituted a voluntary submission to general personal jurisdiction in New York. Relying on New York law, federal courts within the Second Circuit thus consistently held that registration with the New York Department of State to conduct business in New York, and designation of an agent within the district upon whom process may be served, constituted being “found within the district” for purposes of Rule B. Most relevant to the court’s analysis was a party’s amenability to suit, rather than its economic and physical activities in the district. After all, as the *STX Panocean* court noted, “[i]n the context of peripatetic defendants with transient assets, maritime attachment is aimed at obviating a plaintiff’s need to determine where the defendant is amenable to suit. However, no ‘scour[ing of] the globe’—and, therefore, no

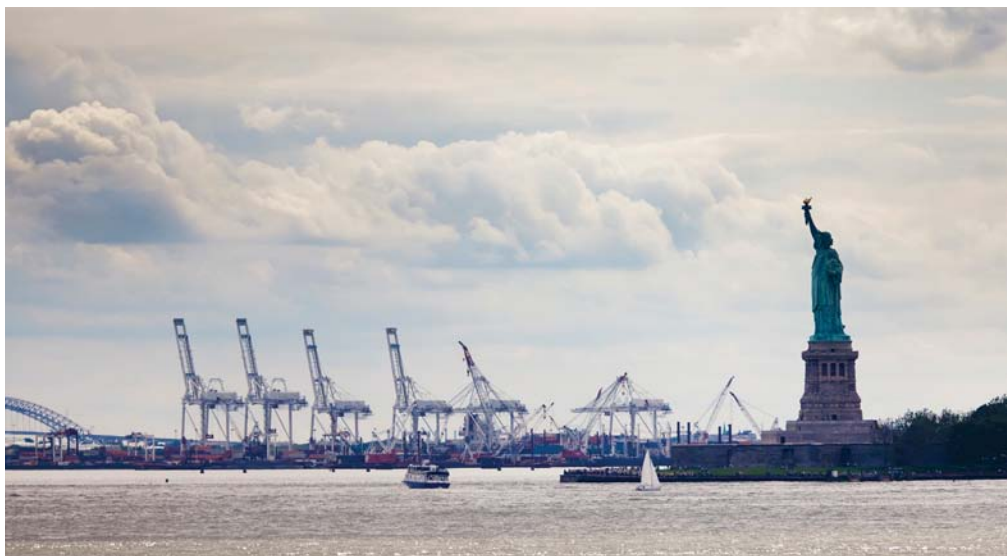
(continued on page 9)

## Has the Ground Shifted under the Law Concerning When a Party Is “Found within the District” for Purposes of Rule B? (continued from page 8)

attachment—is necessary where the defendant has already voluntarily subjected itself to the district’s jurisdiction by reason of its registration with the State.”

### Recent Developments

In 2014, the Supreme Court in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), addressed the question of whether, consistent with due process, a foreign corporation may be subject to a court’s general jurisdiction—*i.e.*, amenability to suit in a jurisdiction having no relationship with the matter in dispute—based on the contacts of its in-state subsidiary. The court held



that a corporation may be subject to general jurisdiction in a state only where its contacts are so “continuous and systematic,” judged against the corporation’s national and global activities, that it is “essentially at home” in that state. The court further stated that aside from “an exceptional case,” a corporation is at home only in a state where it is incorporated or it has its principal place of business.

Subsequent to *Daimler*, the Second Circuit Court of Appeals, which hears appeals from the federal district courts in New York, Connecticut, and Vermont, considered in *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016), whether a party who had registered in Connecticut could still be said to have submitted to that state’s general jurisdiction in light of the Supreme Court’s ruling in *Daimler*. The *Brown* court found that the Supreme Court’s shift in the general jurisdiction analysis over foreign corporations from the traditional “minimum contacts” review to the more demanding “essentially at home” test enunciated in *Daimler*, suggested that federal due process rights likely constrain an interpretation that transforms a “run-of-the mill” registration and appointment statute into

a full corporate “consent” to the general jurisdiction of that state’s courts. Thus, without a clear legislative statement and a definitive interpretation by the Connecticut Supreme Court, the *Brown* court declined to interpret the Connecticut registration and agent-appointment statute as providing consent-by-registration jurisdiction.

On the basis that New York’s registration statute is similar to Connecticut’s, and guided by *Brown*, federal district courts for the Southern, Eastern, Western, and Northern Districts of New York, in a series of non-Rule B cases, overturned a century of case law by finding that due process no longer permits courts located in New York to exercise general jurisdiction over foreign defendants on the basis of their registration to do business in the state and their appointment of a local agent for service of process. These district courts expressly declined to rely on pre-*Daimler* New York state law precedent.

No federal court, on the other hand, has yet addressed the issue of whether *Daimler* overruled *STX Panocean* on the question of whether a foreign corporation is “found within the district” for purposes of Rule B attachments

by virtue of its registration in New York. Based on the ruling in *Brown* and the New York cases following it, however, it seems plain that this is an issue ripe for litigation.

### Conclusion

Currently, there is a bill in the New York state legislature to amend New York’s licensing and registration statutes to clearly inform a foreign corporation that if it applies for authority to do business in New York, it is then consenting to general jurisdiction in New York for all purposes.<sup>1</sup> Should this bill become law, the issue of whether registration and appointment of an agent for service of process amount to being “found within the district” for Rule B purposes may become moot. In the meantime, however, foreign corporations should be aware that registering to do business in New York and appointing an agent for service of process as a shield from plaintiffs’ attachments may be insufficient to render it “found within the district” within the meaning of Rule B. ■ – ©2018 BLANK ROME LLP

1. New York State Bill S5889 (2017-2018), [nysenate.gov/legislation/bills/2017/s5889](https://nysenate.gov/legislation/bills/2017/s5889) (last visited April 24, 2018).

## Blank Rome Maritime Highly Ranked in *The Legal 500 United States 2018*

Blank Rome's maritime practice and attorneys were highly ranked and recommended in *The Legal 500 United States 2018*, receiving the following rankings:

### Top-Tier Firm

- Transport: Shipping – Finance
- Transport: Shipping – Litigation
- Transport: Shipping – Regulation

### Leading Lawyers

- **Brett M. Esber**  
(Transport: Shipping – Finance)
- **R. Anthony Salgado**  
(Transport: Shipping – Finance)
- **John D. Kimball**  
(Transport: Shipping – Litigation)

### Recommended Lawyers

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- **R. Anthony Salgado**

#### TRANSPORT: SHIPPING – REGULATION

- **Jeanne M. Grasso**
- **Gregory F. Linsin**
- **Sean T. Pribyl**
- **Matthew J. Thomas**
- **Jonathan K. Waldron**

#### TRANSPORT: SHIPPING – LITIGATION

- **Thomas H. Belknap, Jr.**
- **Michael K. Bell**
- **John D. Kimball**
- **Keith B. Letourneau**
- **Emma C. Jones**
- **Douglas J. Shoemaker**



**Blank Rome also received high rankings** and recommendations for our Government Contracts, Insurance: Advice to Policyholders, and M&A/Corporate and Commercial – M&A: Middle-Market (sub-\$500M) practices, as well as for attorneys in those practices.

**To view Blank Rome's full *Legal 500* rankings, please click [here](#).**

**For more information on *The Legal 500 United States 2018*, please visit [legal500.com](http://legal500.com).**

# Advanced Automation in Shipping Takes Center Stage at IMO

BY SEAN T. PRIBYL



SEAN T. PRIBYL  
ASSOCIATE

**Advanced automation** in the international maritime industry has officially arrived on the international stage, as the International Maritime Organization’s (“IMO”) Maritime Safety Committee (“MSC”) 99th session furthered the discussion on Maritime Autonomous Surface Ships (“MASS”).

The topic garnered a great deal of attention, with the IMO receiving 19 papers from industry and various countries in support of the MASS regulatory scoping exercise. The international interest in this topic echoes sentiments of the IMO Secretary-General Kitack Kim, who recently acknowledged that digitalization—including autonomous ships—remains at the top of his agenda, along with climate change and seafarer issues.

It is clear that technology continues to outpace the regulators, however, and more is still needed in the way of cultural acceptance. In fact, the industry challenges that the IMO faces over the next decade harkens those of disruptive technologies at the end of the 19th century with the advent of the automobile. At that time, England adopted what were commonly referred to as “red flag” traffic laws, which essentially required someone to walk in front of a moving automobile while waving a red flag to warn the public of the approaching automobile.

Near the turn of that century, the Pennsylvania state legislature also

proposed a law that would require the driver of a “horseless carriage” when approaching livestock to stop, disassemble the vehicle, and conceal the components behind nearby bushes. Cultural acceptance has long dismissed such initial concerns presented by the automobile.

While the automobile is not directly analogous to ships, the maritime industry is no stranger to innovation, having accepted the introduction of unmanned engine rooms, automated ports, and electronic navigation. To that end, Norwegian company Kalmar recently announced that they will deliver digitalized and autonomous container handling when the autonomous container vessel Yara Birkeland calls on port in Porsgrunn, Norway. The port of Caofeidian, China, is adding 20 self-driving container trucks, and APM Terminals in Vado Ligure, Italy, recently

Such investment in technology could lead to the ability to add more containers to a vessel with the same crew complement, and has the collateral effect of furthering the point that “autonomous” does not necessarily mean “unmanned”—a common misnomer in the industry.

received remotely operated gantry cranes. In these operations, a human will likely remain in the loop. Thus, even as technology transforms intermodal transportation, and companies decide whether being an early adopter of disruptive technologies is the right fit for them, cultural acceptance remains vital to progress.

## MSC 99—One Small, but Significant, Step

Over the next two years, the IMO’s regulatory scoping exercise will evaluate existing legal frameworks in order to assess the safe, secure, and environmentally sound operation of MASS. The scoping exercise will assess the human element, port infrastructure, and the marine environments, and examine several international instruments related to safety, collision regulations, stability, seafarer training, and search and rescue. MSC 99 was thus not intended to answer all industry questions attendant to MASS. Rather, it was meant to be a first step in the larger regulatory scoping exercise. To that end, it succeeded and achieved important consensus on three threshold areas related to MASS for purposes of the scoping exercise:

1) a methodology in which the scoping exercise will be conducted, 2) the definition of vessels with advanced automation as MASS, and 3) a description of the levels of autonomy applied to MASS. In other words, MSC 99 gave the IMO and stakeholders a common language on which to build the discussion.

The scoping exercise will first identify current provisions in IMO instruments and their applicability to ships with varying degrees of autonomy. Next, the MSC will conduct an analysis to determine the most appropriate way to address MASS operations. MSC 99 also succeeded in reaching

agreement on a much-needed term to apply to vessels with advanced autonomy—“MASS,” defined as “a ship which, to a varying degree, can operate independently of human interaction.” While such a determination may seem nonconsequential, much debate has surrounded this issue given the meaning of vessel or ship under domestic and international law. Moreover, MSC 99 received contributions from several countries and stakeholders on descriptions of the degrees of autonomy under which MASS may operate, and the IMO announced the following agreed upon degrees of automation to facilitate the scoping exercise:

- **Ship with automated processes and decision support:** Seafarers are onboard to operate and control shipboard systems and functions. Some operations may be automated.

- **Remotely controlled ship with seafarers onboard:** The ship is controlled and operated from another location, but seafarers are onboard.
- **Remotely controlled ship without seafarers onboard:** The ship is controlled and operated from another location. There are no seafarers onboard.
- **Fully autonomous ship:** The operating system of the ship is able to make decisions and determine actions by itself.

With these discussion points, the IMO is poised to develop thoughtful dialogue in the scoping exercise. Notably, the Legal Committee will also conduct a separate scoping exercise in parallel with the MSC, both of which will help shape the much-needed legal discussions related to advanced automation on ships, such as those related to negligence, liability, marine insurance, and navigational risk.

### Status of Advanced Automation in the United States

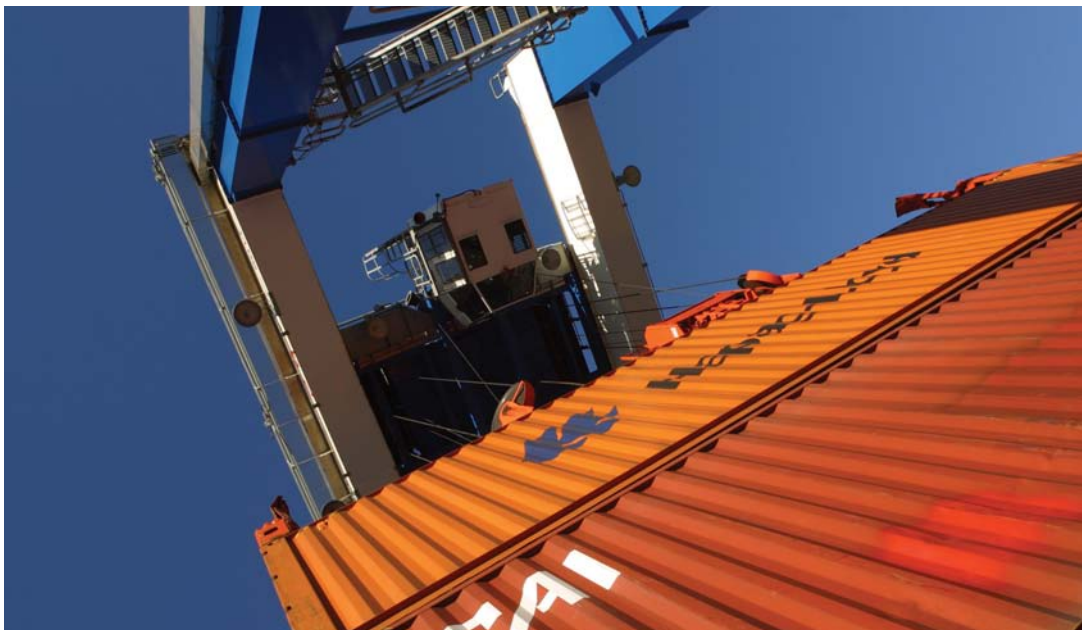
As the MSC continues its scoping exercise, the United States is also attempting to close the innovation gap on European counterparts. While the United States has never lagged technologically, Europe has been more active in practical application of advanced automation. Now, U.S. innovators are capitalizing on emerging opportunities in several maritime sector segments. In fact, A.P. Moller-Maersk recently selected Boston-based Sea Machines Robotics to trial artificial intelligence technology aboard one of their container ships to augment situational awareness for safer and more efficient maritime operations. Such investment in technology could lead to the ability to add more containers to a vessel with the same crew complement, and has the collateral effect of furthering the point that “autonomous” does not necessarily mean “unmanned”—a common misnomer in the industry.

U.S. innovators are also developing new technologies that are furthering growth in the “Blue Economy,” a sector focused on sustainable use of the oceans that contributes approximately

\$1.5 trillion annually to the global economy, according to the World Bank. The Department of Defense’s Project Overlord, an ongoing government solicitation for unmanned surface vehicles, will help drive the domestic conversation on issues such as COLREGs compliance. And, federal agencies like the Maritime Administration are taking formal strides to help bolster the U.S. marine sector through dedicated initiatives. Overall, the United States is making formidable strides towards embracing more innovation technologies.

### Conclusions

The IMO has indicated that it has a strategic view on the future of disruptive technologies in the industry—an industry in which regulations and international instruments are in many cases borne out of disaster. The proactive steps made by MSC 99 show that the IMO is balancing the advanced technologies with the human element, all with the aim of reducing the number of marine casualties and incidents. Importantly, MSC 99 set a valuable tone in the first steps of the scoping exercise in understanding the issues surrounding MASS before an incident occurs.



As the industry awaits formal IMO guidance or resolutions on MASS, domestic testing and practical implementation of MASS must continue under existing legal frameworks with an emphasis on equivalencies and competencies, as compared to those of manned vessels. Stakeholders should therefore continue to consult with counsel when considering use of these emerging technologies to ensure necessary compliance under the current legal regime. □ – ©2018 BLANK ROME LLP



# Chambers USA 2018 Honors Blank Rome Maritime Attorneys and Practices



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**Jeremy A. Herschaft — Band Three.** *Chambers USA* states: “Highlighted as a ‘super-smart and very detail-oriented’ attorney, Jeremy Herschaft is an up-and-coming maritime litigator who routinely represents energy and shipping companies in matters including terminal operator and charter party disputes, casualty cases and cargo claims. His practice also extends to Chapter 15 maritime insolvencies.”



**Keith B. Letourneau — Band Three.** *Chambers USA* states: “Keith Letourneau focuses his maritime litigation practice on vessel arrests, pollution incidents, collisions and marine personal injury matters, among others. He is described as a ‘very steady and thoughtful attorney’ by one client, while another notes that he is ‘very studious, measured and looks at the overall structure of a case, and what may happen several steps down the road.’”



**Douglas J. Shoemaker — Band Four.** *Chambers USA* states: “Douglas Shoemaker is ‘thoughtful and pragmatic, while being very aggressive and thorough in terms of representation,’ according to one client. His litigation practice is focused on maritime matters involving personal injury issues, cargo damage defense and onboard investigations.”

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**Jonathan K. Waldron — Band One.** *Chambers USA* states: “Jonathan Waldron is considered by one client to be the ‘top expert on the Jones Act,’ while another noted him for providing ‘responses that are well researched,’ adding that he is ‘always being available for further follow-up.’ He is ‘well respected in the industry,’ and regularly represents both international and domestic clients on Jones Act matters, maritime security and environmental compliance.”

**Jeanne M. Grasso — Band Two.** *Chambers USA* states: “The ‘excellent’ Jeanne Grasso is noted for her regulatory expertise relating to the US Coast Guard and environmental and safety compliance concerns. She regularly advises cargo owners, charterers and vessel owners and operators in regulatory matters, investigations and enforcement actions before agencies such as the DoJ and EPA. She was praised by sources for her ‘strong reputation’ in the regulatory space.”

**Matthew J. Thomas — Band Three.** *Chambers USA* states: “Matthew Thomas is experienced in the maritime regulatory space, representing clients such as ports, ship owners and shipyards on sanction matters before various US authorities.”



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

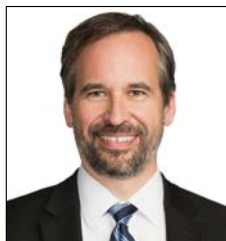
**Strengths:** ““The strength of the team is that of focus combined with great depth of experience. In that way they are a first-class team who are responsive and always available to discuss matters,’ says a client. Sources praise the team for being an ‘excellent firm with excellent professionals.’”

# Significant Opportunity to Provide Comments Concerning Maritime Regulatory Reform

BY JONATHAN K. WALDRON, MATTHEW J. THOMAS, AND EMMA C. JONES



**JONATHAN K. WALDRON**  
PARTNER



**MATTHEW J. THOMAS**  
PARTNER



**EMMA C. JONES**  
ASSOCIATE

On May 18, 2018, the Office of Information and Regulatory Affairs (“OIRA”), within the Office of Management and Budget (“OMB”), published a Request for Information (“RFI”) seeking public input as to how the federal government may best reduce burdens in the maritime sector. Comments are due on July 16, 2018.

This RFI was spurred by Executive Order 13771, published on January 30, 2017, by President Trump as one of his first initiatives after taking office, which aims to reduce regulation and control regulatory costs, and Executive Order 13777, published shortly thereafter on February 24, 2017, which aims to enforce the regulatory reform agenda. The RFI seeks public comment to help identify existing rules affecting the maritime sector that are inefficient, redundant, obsolete, unnecessary, or otherwise not justified. Ultimately, OIRA intends to communicate any regulatory reform suggestions to the Regulatory Reform Task Force established for the maritime sector.

For the purposes of this RFI, the maritime sector is broadly defined to include all enterprises related to maritime commerce, such as shipbuilding, repairing, manning and operating vessels, port facilities, and shipyards, including maritime activities related to resource extraction, renewable energy, cable laying, and marine research.

In order for OIRA to effectively evaluate comments submitted in response to the RFI, it has requested comments based on

15 questions to include (but does not limit to): supporting data or cost information; specific suggestions regarding repeal, replacement, or modification; insight into specific experiences regarding regulatory redundancy, compliance inefficiencies, or outdated requirements; and information regarding challenges for small or medium-sized companies. Importantly, the scope of the RFI includes identifying regulatory programs of two or more agencies that apply to the same sectors in a way that is redundant or conflicting.

This RFI provides an excellent opportunity for the public to potentially have an impact on future regulatory reform under the Trump administration. Indeed, it is extraordinary in its scope, opening the door for virtually any maritime regulatory topic, ranging from environmental and safety standards to liner competition regulation, ports development, coastwise and citizenship rules, U.S. flag promotional programs, and more. No other administration has cast such a wide net in examining the maritime regulatory landscape, creating a rare opportunity for all corners of the industry to be heard.

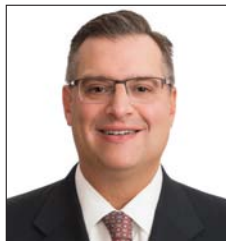
**For more information, please read the [Federal Register notice](#).** Blank Rome’s attorneys are also ready and available to assist clients with providing comments in response to the RFI. □

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# Oi Brasil and Competing Foreign Main Proceedings: Creditors Can't "Weaponize" Chapter 15

BY MICHAEL B. SCHAEDEL AND RICK ANTONOFF



MICHAEL B. SCHAEDEL  
PARTNER



RICK ANTONOFF  
PARTNER

## A Fight over the Effect of Consolidation

According to the Manhattan Bankruptcy Court's thoughtful and well-written December 4, 2017, decision in *In re Oi Brasil Cooperatief U.A.*,<sup>1</sup> a bondholder, Aurelius Capital Management ("Aurelius") forced the straight Dutch liquidation of Oi Brasil Cooperatief ("Coop") in order to revoke the prior recognition as a foreign main proceeding in the Manhattan Bankruptcy Court of a broader Brazilian reorganization of Coop and its operating affiliates, the Oi Group, a Brazilian telecommunications consortium. In that Brazilian reorganization, Coop was to be consolidated substantively with other Oi Group members. This consolidating effect, according to the court, would limit Aurelius recoveries to a single pathway in a unitary capital structure and prevent additive recoveries for the holder on bond guaranties.<sup>2</sup>

## Aurelius Criticized for Insisting on Dutch Recognition in Order to Preserve Guaranties

Specifically, the court found that Aurelius was an active participant in the hearing on the Oi Group's Brazilian proceeding's recognition in June and July of 2016, negotiating rights reservations to act in the Netherlands in its own interest, but never challenging the propriety of Brazil as the Oi Group's (and Coop's) "center of main interest" or "COMI."<sup>3</sup> At the same time, the court ruled that even as Aurelius participated in the first-filed New York Oi Group chapter 15, it intended to challenge the Brazilian recognition of Coop by seeking to liquidate Coop in the Netherlands through a Dutch trustee.<sup>4</sup> According to the court, these Dutch-centered tactics were in aid of an Aurelius strategy to achieve higher recoveries at the Coop level of the Oi Group restructuring in the Netherlands outside of the Brazilian reorganization (where ratable recoveries for Aurelius would be lower after consolidation), while intercompany claims for the benefit of Coop and in aid of this Netherlands-centered strategy were pursued by a Dutch trustee in a Dutch home court.<sup>5</sup>

## Creditors Can Be Found to Manipulate COMI

Per the court, Aurelius, in the wake of Brazilian recognition in New York, successfully caused the appointment of Mr. Jasper Berkenbosch, a well-respected fiduciary in the Netherlands and in the European Union, as an independent trustee for Coop in a straight Dutch liquidation proceeding. According to the court, Aurelius then pressured Mr. Berkenbosch to resist the Brazilian consolidating reorganization and to file his own competing chapter 15 for Coop in New York, asserting that Coop's COMI was in the Netherlands.<sup>6</sup> On the record established at trial, the court, among other things, found that in the context of Mr. Berkenbosch's chapter 15 petition for Coop seeking recognition of the Dutch liquidation, Aurelius' conduct in promoting the Dutch liquidation and the chapter 15 itself, all for the purpose of reversing the court's earlier Brazilian COMI determination, was inconsistent with the principles of chapter 15 and was a basis to deny reconsideration of the Brazilian recognition decision under U.S. Bankruptcy Code section 1517(d).<sup>7</sup> The court ruled, therefore, that recognition of the Coop proceeding in the Netherlands and termination of the Brazilian proceeding's prior recognition was not appropriate under section 1517(d).<sup>8</sup>

The court noted that its focus on a *creditor's conduct*, as opposed to that of a foreign debtor or its insiders or a foreign representative, in deciding whether to recognize a foreign proceeding was unusual.<sup>9</sup> Indeed, Aurelius, a well-known and important distressed investor, has, as the court acknowledged, no fiduciary duty to Oi Group or Coop or any court-appointed fiduciary for such entities.<sup>10</sup> Further, in response to this decision, it should be noted that Aurelius immediately and very publicly asserted its entire good faith in prosecuting a bankruptcy and litigation strategy predicated on maintaining corporate separateness and the integrity of its guaranteed bonds, working as part of an ad hoc committee.<sup>11</sup> Aurelius went so far as to move the court to reconsider or vacate its findings as to Aurelius (reconsideration/vacatur was denied).<sup>12</sup>

## Universalist Approach to International Insolvency Enforced; Weaponizing Comity

Emphasizing its broad discretion over any revocation of recognition, the court analyzed the two-prong standard stated in Section 1517(d) closely. It ruled that the original record supporting Brazilian recognition was sufficiently complete to maintain the court's first finding that Coop's COMI was in Brazil. And even while acknowledging that 1) Berkenbosch had aggressively fulfilled his fiduciary duties, taking multiple concrete steps to administer Coop's affairs in the Netherlands, and 2) in some circumstances, a liquidator's administration can

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**Oi Brasil and Competing Foreign Main Proceedings: Creditors Can't "Weaponize" Chapter 15 (continued from page 16)**

change COMI; in this case, the court found that Berkenbosch's administration did not alter Coop's status as a SPV dependent on the Brazilian Oi Group nerve center, financially and operationally. In support of this finding, the court noted that the Dutch fiduciary had to involve himself materially in the Brazilian reorganization because the administration of Coop required such involvement given Coop's dependence on and relationship to the Oi Group as a whole and that the Dutch trustee's intercompany action in the Netherlands amounted to little more than the assertion of a claim against the Brazilian estates (an act that could be taken in Brazil as part of the claims reconciliation process in that jurisdiction).<sup>13</sup>

Again, the court clearly viewed the Dutch trustee's petition for recognition and his 1517(d) action to be, in important part, an attempt by Aurelius (an active participant in the original process of recognizing the Brazilian reorganization) to spike the Brazilian reorganization as it related to Coop. The court was both turning back what it found was an inappropriate collateral challenge to its own original order recognizing the Oi Group Brazilian proceeding, while fulfilling its duty to do comity to the

Brazilian proceeding in the United States—a duty that arose as a result of the original recognition of the Brazilian proceeding.

This broad and aggressive approach<sup>14</sup> to protect the Brazilian reorganization and its U.S. ancillary proceedings from collateral challenges is consistent with the evolving development of an implicit "good faith" finding requirement to support chapter 15 recognition under the *Creative Finance* decision recently discussed in our [September 2016 Mainbrace](#) publication. Further, the court's decision sends a very important signal to the market.

Once a foreign main proceeding is recognized, the Manhattan Bankruptcy Court will act to implement the foreign reorganization with universalist vigor. The court's commitment to universalist international reorganization can directly impact non-fiduciaries like Aurelius when carrying out otherwise straightforward recovery strategies (such as resisting consolidation and enforcing guaranties at different levels of complex capital structures) across borders. The stakes at a recognition hearing can be high indeed. ■—©2018 BLANK ROME LLP

1. 578 B.R. 169 (Bankr. S.D.N.Y. 2017) *reconsideration/vacatur in part. den'd*, 582 B.R. 358 (Bankr. S.D.N.Y. 2018).
2. It should be noted that there is nothing illegal or inappropriate about a creditor resisting the consolidation of members of a corporate group and the collapse of complex capital structures. Nor is the assertion of guaranty claims at multiple levels of a capital structure inappropriate under applicable U.S. bankruptcy law. See *In re Owens Corning*, 419 F.3d 195, 211-12 (3d Cir. 2007) (citations omitted) (substantive consolidation under U.S. law is an "extreme" remedy; "respecting entity separateness is a 'fundamental ground rule [.]'"); see also *In re Tribune Co.*, 464 B.R. 126, 203-04 (Bankr. D. Del. 2011) *aff'd in part. part 799 F.3d 272* (3d Cir. 2015) *cert. denied* 136 S.Ct. 1459 (2016) (non-consensual impairment of third-party guaranty claims denied because such relief is "extraordinary" under the law).
3. *Oi Brasil*, 578 B.R. at 185. "COMI" is not specifically defined in the U.S. Bankruptcy Code, but is a determination made by bankruptcy courts. The decisional law looks at various factors, but an essential way of short-handing the analysis is to say that in finding COMI, a bankruptcy court is identifying the "nerve center" of a foreign debtor. See *id.* at 185, 195-96. In the first-filed Brazilian chapter 15, Judge Lane found that Coop's specific "nerve center" was in Brazil because Coop was a so-called "special purpose vehicle" designed only to act as an Oi Group bond issuer and as an intercompany lender, managed from Brazil, directed by Oi Group management designees, with only a nominal office presence in the Netherlands. *Id.* at 185, 235.
4. Coop had been the subject of involuntary petitions by Aurelius and other holders for straight liquidation prior to the commencement of the Oi Group's chapter 15 to implement the Brazilian restructuring. After recognition of the Brazilian proceeding, Coop responded to the involuntary filings by commencing its own follow-on voluntary Dutch insolvency (a suspension of payments case) to implement the Brazilian plan when approved. *Id.* at 186, 208-09.
5. *Id.* at 238-39.
6. *Id.* at 240-44.
7. Section 1517(d) of the U.S. Bankruptcy Code states:  
The provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition....
8. Indeed, counsel for the Steering Committee of the Ad Hoc Group of Bondholders (a holder group supporting Brazilian reorganization and opposing Dutch proceeding recognition) suggested in argument and papers that Aurelius was "manipulating COMI" in violation of chapter 15's blackletter and policy. *Oi Brasil*, 582 B.R. at 366. This is an interesting argument, which is usually raised in connection with the conduct of foreign debtors and their insiders and foreign representatives in seeking recognition of a specific foreign proceeding.
9. *Oi Brasil*, 578 B.R. at 240.
10. *Id.*
11. See [Bloomberg.com](#), "Aurelius Can't 'Weaponize' Law in Global Debt Dispute Judge Says" (Dec. 5, 2017) (referencing and linking to Aurelius statement that it did not deserve criticism for a public strategy launched prior to Brazilian recognition); see also *Oi Brasil*, 582 B.R. at 363.
12. *Id.* at 369-70.
13. *Oi Brasil*, 578 B.R. at 240-44.
14. It is important to reflect that the Manhattan Bankruptcy Court's opinion addresses a number of other important issues under the chapter 15 law. For example, the contest arose in the context of Mr. Berkenbosch's motion for recognition of the Dutch liquidation and his basic position was that he had satisfied the categorical requirements of U.S. Bankruptcy Code section 1517(a) for recognition of Coop's straight Dutch liquidation. Berkenbosch's position was that 1517(a) mandated recognition for Coop if 15 basics are established (the collective nature of the Dutch proceeding, the existence of a Dutch COMI based on the location of a registered office and Coop employees, etc.), superseding any prior recognition order. The court rejected this position as inconsistent with 1517(d), ruling that Berkenbosch's suggestion that 1517(a) could be used to narrow a prior corporate group recognition finding would write (d) out of the law entirely. *Id.* at 198-203.

# The Ocean Is Awash with Plastic: How Can the Maritime Industry Help?

BY JOAN M. BONDAREFF AND JEANNE M. GRASSO



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OF COUNSEL



JEANNE M. GRASSO  
PARTNER

The eight-part series, [Blue Planet II](#), narrated by Sir David Attenborough last year on BBC, seems to have awoken the public's attention to the crisis of our oceans being littered with vast amounts of plastic, fishing gear, and other types of marine debris. As a result, cities, states, and nations around the world, as well as major cruise lines, are proactively looking at ways to reduce plastic to keep it from entering the sea.

## The Extent of the Problem

Most plastic or marine debris comes from land-based sources, including from rivers that enter the sea, especially from countries with less responsible garbage practices. For example, [according to the BBC](#), most garbage in the ocean comes from 15 nations around the Pacific Rim, including China, Indonesia, the Philippines, Sri Lanka, Vietnam, and Thailand.

According to a study published in *Nature* magazine and also [reported](#) in *USA Today* in March 2018, the "Great Pacific Garbage Patch," a collection of floating plastic trash halfway between Hawaii and California, has grown to more than 600,000 square miles—an area twice the size of Texas. The trash is said to come from the Pacific Rim as well as North and South America. Since the garbage patch is in international waters, no nation has stepped up to clean it up. (*Id.*)

A large amount of lost or discarded fishing gear is also found in the ocean depths. Some [estimates](#) from the World Animal Protection organization are that as much as 700,000 tons of lost or abandoned fishing gear are left in the ocean every year; this is often called "ghost gear" because it entangles fish and marine mammals simply by floating unattended in the ocean. The National Oceanic and Atmospheric Administration ("NOAA"), which manages a modestly funded marine debris program in the United States, [believes](#) that both fish and wildlife are harmed by the plastic pollution because these animals

can ingest the plastic and not eat their regular sources of nutrition, the plastic can do damage to their digestive systems, and they also can become fouled in plastic debris.

## The Shipping Industry Must Do Its Part in Reducing Marine Debris

The shipping industry is endeavoring to do its part, largely because it is required to handle garbage responsibly as a result of international conventions and national laws. Working through the International Maritime Organization ("IMO"), maritime nations have adopted several international conventions to address marine pollution. These include the United Nations Law of the Sea Convention, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (London Convention), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, and the International Convention for the Prevention of Pollution from Ships ("MARPOL"), including its six annexes.

Annex V of MARPOL specifically addresses garbage and was significantly amended at the IMO to strengthen its provisions over the last five years. On January 1, 2013, the approach to garbage management changed from generally allowing the disposal of garbage unless specifically prohibited or limited, to imposing a general prohibition on the discharge of garbage unless expressly provided for under Annex V's regulations. These regulations allow the limited discharge of only four cat-

The cruise lines are also doing their part to reduce the amount of plastic used shipboard that therefore could inadvertently enter the sea. The Cruise Lines International Association ("CLIA") adopted a comprehensive waste management policy that it expects its member lines to follow.

egories: food waste, cargo residues, certain operational wastes not harmful to the marine environment, and carcasses of animals carried as cargo. Combined with the general prohibition on the discharge of garbage outside these limited categories, the regulations greatly reduced the amount of garbage that vessels will be able to dispose of at sea.

Additional amendments to MARPOL Annex V entered into force on March 1, 2018, that also strengthened Annex V by changing the criteria for determining whether cargo residues are

(continued on page 19)

## The Ocean Is Awash with Plastic: How Can the Maritime Industry Help? (continued from page 18)

harmful to the marine environment and revising the Garbage Record Book format to include a new garbage category for e-waste. Annex V also establishes Special Areas (e.g., the Wider Caribbean Region), within which more stringent discharge requirements apply for the prevention of pollution by garbage. (Click [here](#) for further details on MARPOL Annex V, as noted by the IMO.)

The cruise lines are also doing their part to reduce the amount of plastic used shipboard that therefore could inadvertently enter the sea. The Cruise Lines International Association (“CLIA”) adopted a [comprehensive waste management policy](#) that it expects its member lines to follow. According to CLIA’s website, its “[m]embers have agreed on the need to incorporate international, national and local environmental performance standards into their individual [Safety Management Systems].” In addition, CLIA’s members also take “great measures to manage garbage and continuously strive to implement new and more effective waste minimization processes and procedures.”

Building on CLIA’s policies, and possibly as a result of the public’s visceral reaction to the scenes portrayed in *Blue Planet II*, earlier this year, major cruise lines, including Royal Caribbean, Carnival Cruise Line, and P&O Cruises, have agreed to eliminate single-use plastics. (See [Royal Caribbean Pledges to Cut Back on Plastics](#), *Maritime Executive*, Feb. 2018.) Carnival Cruise Line, for example, has “stopped placing plastic straws in glasses when drinks are ordered in an effort to be more environmentally friendly.” P&O Cruises and Cunard (also under the Carnival Corporation umbrella) pledged to abolish all single-use plastics—including straws, water bottles, and food packaging—from its ships by 2022.

European nations, through the European Commission, as well as U.S. states and cities, are also playing their part in reducing the use of plastic. The European Commission is planning on proposing a ban on single-use plastic. Commission officials indicate the draft directive will include the following:

- A ban on the private use of disposable plastic products, such as straws, plastic plates, plastic utensils, plastic coffee stirrers, cotton swabs with plastic stems, and plastic balloon holders.
- For every kilogram of plastic waste that wasn’t recycled, European states would be required to pay a certain amount to the EU budget.
- Each member state will be encouraged to use a deposit system or other measure in order to collect 90 percent of plastic bottles used in their country by 2025.

- A recommendation that the use of plastic cups and packaging for fast food be curbed.
- A recommendation for an increase in consumer information about the dangers of plastic packaging.

The draft directive must then be negotiated with the EU’s 28 member states, as well as the European Parliament, before it can go into effect. (See [EU Commission Plans Ban on Plastic Waste](#), *Deutsche Welle*.)

In the United States, the city of San Francisco is currently considering a ban on single-use plastic. And, New York Governor Andrew Cuomo has also proposed a new ban on single-use plastic bags that would go into effect in 2019.

### U.S. Congress Acts to Save Our Seas

The U.S. Congress is playing its part in attacking the problem of marine debris. Last year, during the first session of the 115th Congress, the Senate, by unanimous consent, passed the Save Our Seas Act (S. 756). Sponsored by a coalition of bipartisan senators who belong to the Senate Oceans Caucus, including the lead sponsors, Senator Dan Sullivan (R-AK), Senator Lisa Murkowski (R-AK), and Senator Sheldon Whitehouse (R-RI), S. 756 would reauthorize the marine debris program of NOAA; require NOAA to work with other federal agencies to develop outreach and education strategies on sources of marine debris; authorize the administrator of NOAA to make a severe marine debris event determination as well as make funds available to affected states; and promote international action to reduce marine debris. (H. Rept. 115-135.) A companion bill in the House of Representatives, H.R. 2748, sponsored by Congressman Don Young (R-AK), also with bipartisan support, is pending consideration in two House Committees, Transportation and Infrastructure and Natural Resources. If the House passes its bill this year, or adopts the Senate bill, the final bill will be sent to President Trump for his signature. The unanimous consent vote in the Senate almost certainly makes this bill veto-proof if passed by the House of Representatives.

### Conclusions

The United States, Congress, European nations, IMO, and the maritime industry—in particular, cruise lines—are doing their part to try and clean up the oceans through mandatory and voluntary efforts. Other countries must also step up to help reduce land-based pollution, especially plastic pollution, that enters the ocean by promoting programs for recycling, conservation, using less plastic, and supporting innovative research. ■ – ©2018 BLANK ROME LLP

# The Future of the “Safe Port” Warranty: Smooth Sailing or Murkier Waters?

BY EMMA C. JONES



EMMA C. JONES  
ASSOCIATE

**In an age when cybersecurity** breaches regularly make headlines, and autonomous vessels are appearing on the not-so-distant horizon, it's important to consider how age-old contracts like maritime charter parties will fare in the face of rapidly changing technology and the security risks that come with it.

The “safe port” warranty is a tenet of charter party language, and an unsafe port or berth is often asserted in commercial negotiations as justification for damages resulting from delays or damage at port. While there is not a great deal of case law analyzing the warranty in the context of modern technological risks and threats, the cases and arbitration awards that we do have provide an interesting background against which to consider the potential for an expansion of the definition of the safe port warranty in an increasingly tech-based world.

## Background

The definition of a “safe port” most commonly used by courts and arbitrators is from a British case from 1958 called *The Eastern City*: “a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship...”<sup>1</sup>

The practical application of a safe port (or safe berth<sup>2</sup>) warranty can be found in charter party language, generally in time charters, providing that the charterer shall only nominate ports and berths where the vessel may “safely lie, always afloat” or “NAABSA” (Not Always Afloat But Safely Aground). The safe port warranty has been interpreted to mean that there is **a** safe approach for a vessel to reach the specific port or berth, not necessarily that **all** approaches will be safe. The definition of an “approach” includes adjacent areas a vessel must traverse to either enter or leave the port, which includes the entirety of a river as well as any bridges that a vessel may need to pass. The test as to whether an unsafe condition is “avoidable by good navigation and seamanship” is whether, in the exercise of reasonable care in the circumstances, a competent master would be expected to avoid the dangers present at the

port or berth. Where such language is used, it is a charterer's non-delegable duty to provide a port or berth that is safe for the specific vessel under charter.

An owner's remedy if the charterer's duty is breached is to refuse to accept the charterer's orders to proceed to an unsafe port or berth, or if the condition was unknown to the owner before entering, to recover damages for costs incurred due to nomination of such an unsafe port or berth.

## Traditional Application of the Safe Port Warranty

While the definition of a safe port is not a question that is frequently litigated, often there are assertions of unsafe ports or berths in commercial negotiations, even if ultimately no claim is made. The most common types of unsafe port claims arise when vessels encounter challenges reaching a port due to swells, tides, currents, ice, unforeseeable weather, dangerous berth conditions, or missing or misleading navigational aids.

There also have been assertions that a “political” danger renders a port unsafe. In one case, where the load port had been under threat of guerilla attacks and was placed outside

**The limited case law available indicates that a finding that a port is unsafe will generally require some risk of physical danger, as, even in the “political unsafety” cases, the ultimate risks involved damage to or seizure of the particular ship.**

Institute Warranty Limits by war risk underwriters, an arbitration panel found that the Libyan load port was in a danger zone and that the owner was justi-

fied in withdrawing the vessel on the basis of the charterer's safe port warranty.<sup>3</sup> By contrast, in considering whether the port of Ras Tanura, Saudi Arabia, was unsafe as a result of a boycott on vessels that had called at Israeli ports, the United States Court of Appeals for the Second Circuit concluded that, in the circumstances, the safe port warranty could not be extended so as to place liability for the loss of the voyage on the charterer. The court's justification was that the parties had never considered the risk of loading interference from a boycott, and that the owner was aware of the vessel's prior call to Israel so therefore had knowledge of and control over the facts surrounding the potential source of “unsafety.” The court noted that the term “safe” was implied in the sense of physical safety, not “political” safety.<sup>4</sup>

(continued on page 21)

### The Future of the “Safe Port” Warranty: Smooth Sailing or Murkier Waters? (continued from page 20)

English law provides further guidance as to what makes a port “unsafe.” In a case from 1861, the House of Lords analyzed a situation where the Chilean government had declared a port closed because of a rebellion, and if the vessel were to proceed on the charterers’ orders, she would have been liable to confiscation. The court stated, in relevant part:

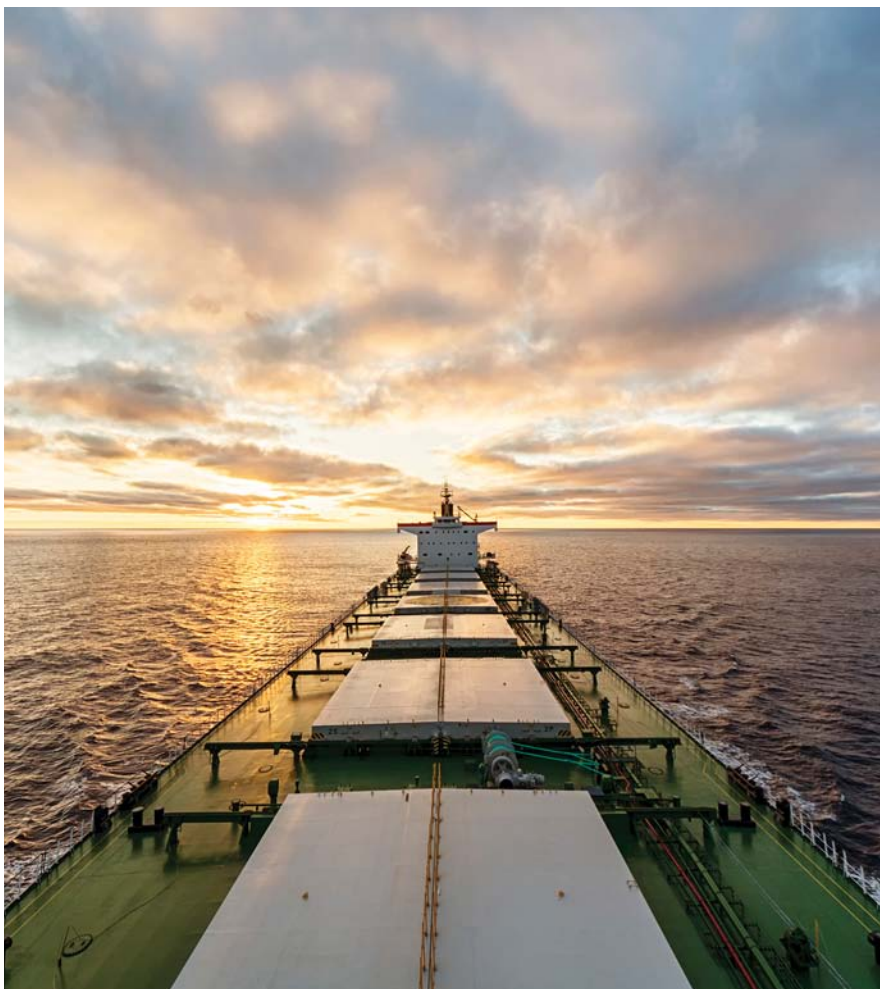
If a certain port be in such a state that, although the ship can readily enough, so far as natural causes are concerned, sail into it, yet, by reason of political or other causes, she cannot enter it without being confiscated by the Government of the place, that is not a safe port within the meaning of the charterparty.<sup>5</sup>

In more modern times, the House of Lords rejected the charterers’ argument that a port could only be unsafe in a physical sense, finding that the outbreak of war between Iran and Iraq, a “political” unsafety, invoked the charterers’ warranty to nominate a safe port.<sup>6</sup> On the other hand, the London Court of Appeal overruled a lower court holding that the port of Massawa, Eritrea, was prospectively unsafe for a vessel to proceed to because it was a characteristic of that port that vessels proceeding to it or at anchor outside it could be subject to attack by pirates. The court proposed a test to ask, “if a reasonably careful charterer would on the facts known have concluded that the port was prospectively unsafe.”<sup>7</sup>

The limited case law and arbitration awards discussing “non-physical” risks in the context of a safe port warranty are few, and they reach different conclusions depending on factual circumstances. But the rule appears to be that if a reasonable owner or master would refuse to send a vessel to a port for fear it would be seized, damaged, or destroyed, the port could likely be considered unsafe.

#### **Murkier Waters**

While even the cases conducting an analysis of “political” unsafety still focus largely on the risk of physical danger to a vessel, it does not seem out of the question to consider less traditional instances of unsafety as falling within the realm of an unsafe port assertion. For example:



1. What if a port develops a reputation for corruption, and a shipowner knows it likely will face spurious detention claims unless certain “fines” are paid? Could an owner refuse to accept the charterer’s orders in such a situation, or at least open a commercial dialogue to request a different port order under the purview of the safe port warranty, arguing that such a situation would render the port unsafe?
2. Consider the practice at some Chinese ports of requiring crew members to surrender mobile phones or other electronic devices for inspection upon arrival. Such inspections have been said to be conducted at random or if a ship was specifically identified as posing a security threat.<sup>8</sup> If a port authority or foreign government was targeting specific ships and requiring surveillance of the crew members’ work and personal devices, could an argument be made that such a port was unsafe for that particular ship?

3. What if a cyber-criminal threatens a vessel with remote hijacking if it enters a certain port without paying some sort of ransom? It is conceivable that a cyber-criminal could hack a port's IT system such that its infrastructure is compromised, posing a physical danger to vessels entering the port. Alternatively, even if such a criminal did not have the actual capability to do so, it still could make that threat. Could owners assert that such a threat warrants a port unsafe?

All of these scenarios seem increasingly more plausible given the developments in technology and the risks of security breaches. And of course, there are countless conceivable variations to these hypotheticals. Under the "traditional" definition of a safe port, the answer to the first two hypotheticals is "probably not," whereas the third probably could support a finding of unsafe port. This is because the first two hypotheticals identify only financial damage and privacy concerns, respectively. In the third, however, regardless of the cyber-criminal's actual capabilities, there appears to be a real risk of physical harm to the vessel.

The reference in the above definition to a "safe port" for the "particular ship" and to "avoidance by good navigation and seamanship" implies that the safe port warranty is not applicable to a port defect that is of an operational rather than a physical nature. The limited case law available indicates that a finding that a port is unsafe will generally require some risk of physical danger, as, even in the "political unsafety" cases, the ultimate risks involved damage to or seizure of the particular ship. That said, all of the case law on this topic hails from a time before any of those hypotheticals were plausible.

In any case, the analysis of whether or not a port or berth is safe will be a fact-based analysis, which is why there are a number of ways the definition of a safe port could feasibly

evolve to adapt to today's increasingly technology-reliant age. Even under the 1958 definition in *The Eastern City*, the exposure to fraudulent "fines," the requirement that crew members surrender their cellphones upon arrival, or a threat of cyber warfare to a ship, arguably could be dangers that cannot be avoided by good navigation and seamanship.

## Conclusion

There does not appear to be any immediate risk of upheaval to a 60-year-old definition of a safe port. But, it is important to think critically about how such long-standing charter party terms and principles could (or should) be altered in the context of new technologies and risks that could not have been foreseen at the time these maritime customs developed and charter party definitions were forged. ■ – ©2018 BLANK ROME LLP

1. *Leeds Shipping v. Societe Francaise Bunge* (The Eastern City)[1958] Lloyd's Rep. 127, 131.
2. "Port" also encompasses "berth" for the purposes of this article.
3. *In the Matter of the Arbitration Between Arietta Compania Naviera S.A. and World Wide Transport, Inc.*, "The Arietta Venizelos," 1973 AMC 1012, 1022 (1972).
4. *Pan Cargo Shipping Corp. v. United States*, 234 F.Supp. 623, 638 (2d Cir. 1967), cert. denied 389 U.S. 836 (1967).
5. *Ogden v. Graham* (1861) 1 B. & S. 773.
6. *The Evia* (No.2) [1981] 2 Lloyd's Rep. 613, [1982] 1 Lloyd's Rep. 334 (C.A.) and [1982] 2 Lloyd's Rep. 307 (H.L.)
7. *K/S Penta Shipping A/S v. Ethiopian Shipping Lines Corporation*, "The Saga Cob" [1992] 2 Lloyd's Rep. 545.
8. *Alert: Anti-terrorism Measures for Ships Calling at Ports in China*, Margaret Zhou and Helen Huang, UK P&I CLUB PUBLICATIONS, [ukpandi.com/knowledge-publications/article/alert-anti-terrorism-measures-for-ships-calling-at-ports-in-china-141306/](http://ukpandi.com/knowledge-publications/article/alert-anti-terrorism-measures-for-ships-calling-at-ports-in-china-141306/) (last visited February 13, 2018).

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# Gulf Coast Update: The Fifth Circuit Establishes a New “Maritime Contract” Test

BY DAVID G. MEYER



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**Whether a particular contract is “maritime”** is a legal question that can often arise in disputes subject to potential adjudication in the U.S. court system. There can be several reasons for this. One reason concerns determining whether a civil action can be heard in federal court versus state court. If a maritime contract is at issue, a case might be litigated in federal instead of state courts, and/or a plaintiff might have the ability to file an action in federal court for a pre-judgment arrest or attachment of a vessel or other property of a defendant.

## Knock for Knock Defense and Indemnity Clauses

Another area where the issue regularly arises concerns contracts connected to oil and gas exploration and drilling activities in both inshore and offshore waters of the Gulf of Mexico. By way of background, oilfield services contracts in the Gulf of Mexico region routinely contain what are known as “knock for knock” defense and indemnity clauses. In a typical knock for knock scheme, each company on a job agrees to indemnify, defend, and provide additional insured coverage to the others

In the wake of a casualty event, once defense and indemnity demands begin to be exchanged, if there is any credible possibility that state law could negate or limit the contract provisions under which the demands are made, the issue often is not resolved without resorting to litigation.

so that each is liable for injury to its own employees, regardless of fault. The intent underlying this is to apportion the insurable risk each contracting party bears to their relative size and role in the venture. Theoretically, this allows smaller companies to compete for jobs without potentially cost-prohibitive insurance premiums, and costs are further reduced by a decreased need to litigate the issue of liability among multiple defendants, as liability is assumed irrespective of fault or negligence of any other party.

Under the U.S. general maritime law, such clauses are generally enforceable. However, several states, such as Texas and Louisiana, have enacted laws limiting the scope and validity of such provisions when the contract at issue concerns oil and gas exploration, drilling, and production activities. Such state laws,

if applicable, will control the question of the enforceability of a contract’s defense and indemnity provisions to the exclusion of any other law that might have otherwise have deemed them enforceable.

Thus, answering the question of whether state versus federal law applies to a particular contract can have major implications for contracting parties, their subcontractors and other related service providers, and their insurers. In the wake of a casualty event, once defense and indemnity demands begin to be exchanged, if there is any credible possibility that state law could negate or limit the contract provisions under which the demands are made, the issue often is not resolved without resorting to litigation.

## The Fifth Circuit’s Tests

Beginning with its decision in *Davis & Sons, Inc. v. Gulf Oil Corporation*, 919 F.2d 313 (5th Cir. 1990), the United States Fifth Circuit Court of Appeals, whose jurisdiction includes the states that generate the majority of oil and gas drilling, exploration, and production activities in the U.S.’s portion of the Gulf of Mexico (Texas, Louisiana, and, to a lesser extent, Mississippi and Alabama), utilized a six-part test for determining whether a particular contract is maritime or not that required answering the following questions:

1. What did the specific work order in effect at the time of injury provide?
2. What work did the crew assigned under the work order actually do?
3. Was the crew assigned to work aboard a vessel in navigable waters?
4. To what extent did the work being done relate to the mission of that vessel?
5. What was the principal work of the injured worker?
6. What work was the injured worker actually doing at the time of injury?

As is plainly evident, the *Davis* test is highly case-specific, difficult to answer without access to a “global” set of facts concerning the work at issue in a casualty (which often cannot be obtained without the benefit of the civil litigation discovery process), and arguably cuts against the original intent behind the use of knock for knock provisions in oilfield services contracts (*i.e.*, defining, reducing, and controlling risks for the



contracting parties and their insurers). According to an amicus brief filed in the *In re Larry Doiron, Inc.*<sup>1</sup> appeal, “The result [of the *Davis* test] has been a tsunami of litigation; in the years since [*Davis*] was decided, [the Fifth Circuit] has been presented with this issue at least 20 times, and the district courts throughout the Fifth Circuit have had to deal with this issue at least 68 times. And, of course, these numbers reflect only the reported decisions; there are undoubtedly hundreds of other unreported cases where parties were confronted with this question.”



It was these concerns that led, at least in part, to the Fifth Circuit’s recent decision in *Doiron*, in which it replaced *Davis* with a simpler test that asks only two questions:

1. Is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters?
2. Does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?

If the answer to both questions is yes, then the contract is maritime and thus subject to federal maritime law.

### Applying the *Doiron* Test

The underlying facts at issue in *Doiron* were relatively typical for the types of disputes to which the *Davis* test had previously been applied. Apache owned a gas well located in navigable water in Louisiana. Apache had previously entered a blanket master services contract with Specialty Rental Tools & Supply (“STS”) that contained standard indemnity provisions. In early 2011, Apache issued an oral work order directing STS to perform flow-back services on the well. A stationary production platform provided the only access to the well. The work order did not require a vessel, and neither Apache nor STS anticipated that a vessel would be necessary to perform the job. After beginning the work, STS discovered that it needed a barge crane to finish the job. Apache hired Larry Doiron, Inc. (“LDI”) to provide one.

At some point after the LDI barge arrived at the work site, its crane struck and injured an STS worker. Litigation ensued, and LDI made a demand for contractual defense and indemnity to STS pursuant to the terms of the Apache-STS contracts. Applying the new test, the Fifth Circuit held that because the use of the barge was an insubstantial part of the job and not work that the parties expected to be performed, the contract at issue was nonmaritime and controlled by Louisiana law, which bars the type of indemnity provision contained in the

contract. LDI was therefore not entitled to defense and indemnity from STS for the claims asserted by the STS employee.

It is important to note that the Fifth Circuit expressly stated in *Doiron* that it was only dealing “with determining the maritime or nonmaritime nature of contracts involving the exploration, drilling, and production of oil and gas,” though it also stated that “[i]f an activity in a non-oil and gas sector involves maritime commerce and work from a vessel, we would expect that this test would be helpful in determining whether a contract is maritime.” As recognized by *Doiron*, the applicable standard for determining whether any contract is maritime is set forth in the U.S. Supreme Court’s *Norfolk v. Kirby* opinion, as follows:

To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case. Nor can we simply look to the place of the contract’s formation or performance. Instead, the answer depends upon...the nature and character of the contract, and the true criterion is whether it has reference to maritime service or maritime transactions.<sup>2</sup>

### Current Status

As of late May 2018, there were no reported decisions applying *Doiron*, and it remains to be seen how it will be applied by lower courts. However, it is certain that the issue of enforceability of knock for knock indemnity provisions will continue to be very significant for the companies and insurers involved in oilfield operations in the Gulf of Mexico region, and it is therefore important that all industry players be proactive in reviewing their contracts and potential liability exposure against the new *Doiron* test. □ – ©2018 BLANK ROME LLP

1. *In re Larry Doiron, Inc.*, 879 F.3d 568 (5th Cir. 2018), cert. denied sub nom. *Larry Doiron, Inc. v. Specialty Rental Tools & Supply, L.L.P.*, 17-1420, 2018 WL 1763437 (U.S. May 21, 2018).

2. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23–24, (2004) (internal citations omitted).

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