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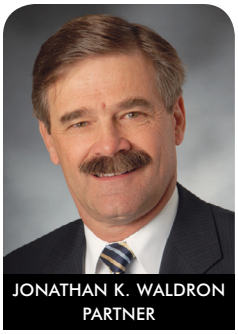
Does Responder Immunity Only Benefit Responders? What No One Has Explained to You about Insurance

BY JONATHAN K. WALDRON



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There is a bit of weariness (and disappointment) in our industry with regard to the initiative to enact an enhanced responder immunity regime. Indeed, it has been over four years since the fire and incurred loss of life related to the *Deepwater Horizon* incident. But this issue remains important because all of the spill response organizations, the spill management team, and the dispersant spraying companies were sued after the incident, and remain in litigation even though BP was able to settle its claims with the plaintiffs. In addition to the following summary of the status, for the first time I will explain why enactment of the proposed legislation will not only benefit responders, but also the marine industry in general, and responsible parties in particular.

As way of review, following the lessons learned from the *Deepwater Horizon* incident, specifically the extensive lawsuits filed against all segments of the response industry involved in the response, a Responder Immunity Coalition (the "Coalition") was formed. The Coalition is comprised of all response interests, including the salvage industry, oil clean-up industry, spill management industry, the offshore vessel support industry, and the well containment industry, to work with Congress to enact enhancements to the current responder immunity provisions enacted by the Oil Pollution Act of 1990 ("OPA 90").

The two main concerns following the incident were that (1) the plaintiffs sued the responders under general maritime law, alleging personal injury caused by the exposure to the spilled oil and the dispersants that were approved for use on a daily basis by the Federal On-Scene Coordinator ("FOSC") pursuant to the National Contingency Plan ("NCP"); and (2) the plaintiffs made bare allegations of gross negligence and willful misconduct related to the response actions without having to detail any underlying facts to support such allegations.

To address these concerns, the proposed legislation would:

- extend the immunity under the law to a full range of response activities by explicitly defining the response activities covered under the immunity;
- provide immunity to a responder with regard to exposure claims related to the oil and dispersants, but otherwise maintain the current regime of responder employer liability for slips, trips, and fall type injuries (seaman Jones Act remedies) that commonly occur in marine operations; and

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- establish a presumption that response actions do not constitute gross negligence and require claimants to pay attorneys' fees and court costs for meritless claims to disincentivize frivolous lawsuits.

As the Coalition heard from various factions of the industry, it became clear that there were deficiencies in the initial proposal that needed to be addressed. As a result, the current version reflects necessary changes to address concerns that the immunity was not unnecessarily broad and would not have unintended consequences.

Thus, the current proposal includes new language to make clear that no new liability is transferred to a Responsible Party ("RP"). Under the law today, a RP is strictly liable for damages and removal costs and would be liable for an exposure claim as discussed above if found negligent under general maritime law. This proposal would not change that liability. And in all cases, an injured party will always have a remedy that will be backed up by the Oil Spill Liability Trust Fund even if a RP is unable or unwilling to pay compensation.

In addition, concerns have been raised that "opening up OPA 90 to amendments" would result in numerous OPA 90 amendments that could be attached to the Coalition's proposal, which potentially would have negative effects on the marine industry, such as increased limits to liability that were proposed shortly after the *Deepwater Horizon* incident. However, it has been over four years since the incident, and the constant barrage of OPA 90 amendments related to the proposed legislation has died down completely. There is simply no longer a valid reason not to move forward with this proposal. OPA 90 has been amended numerous times since the initial enactment.

Moreover, the industry in general, and a RP in particular, will substantially benefit if this legislation is enacted as currently drafted. In short, this is because it is the RP and others requiring the services of responders who pay the cost of any frivolous litigation against a responder. Indeed, if a robust responder immunity protection is not available through statute, then the RP will still have to bear this liability and cost. Moreover, if a responder is afraid to aggressively respond to a spill incident, then the oil will spread quicker and damages will continue to mount, resulting in significant increased costs to a RP and greater damages to our environment.

Specifically, with regard to insurance, under the routine response contract between a RP and responders, the RP will have agreed to provide enhanced contractual indemnity provisions to their contracted responders. And, as a result of this indemnification, the RP will have to pay in the future the increased time and material services costs as their contracted responders are forced to pay for increased insurance premiums to insure against these risks because the current regime of responder immunity is not providing the protection from lawsuits that was envisioned.

In addition, once a responder is sued, the RP will not only have to pay for its own defense costs as the RP, but it will also have to pay the defense costs of the responder as a result of its indemnification provision. Thus, the RP is paying double defense costs if adequate responder immunity is not available, and will ultimately pay for the responder's increased insurance rates through higher costs for response services that will be passed along to the RP. This is exactly what happened as a result of the *Deepwater Horizon* incident due to the claims against responders that are still pending in court. Accordingly, the Coalition proposal benefits potential RPs by avoiding unnecessary additional defense costs and increased rates for services.

As a result of the Coalition effort to better educate the industry, we have recently seen a turn within the industry to support this effort as more stakeholders begin to fully understand how this enhanced responder immunity will not only help the response industry, but also provide tangible benefits to a RP and our industry as a whole in a future incident.

The only reason this legislation was not enacted earlier was because there were objections raised by a key industry organization. These objections carried great weight despite the fact that key congressional offices supported enactment of this proposal. As a result of the Coalition effort to better educate the industry, we have recently seen a turn within the industry to support this effort as more stakeholders begin to fully understand how this enhanced responder immunity will not only help the response industry, but also provide tangible benefits to a RP and our industry as a whole in a future incident. Added to that, a faster response will better protect our environment and best mitigate damages.

However, this turnaround has to happen quickly so that objections from these interests are at least changed to neutral if not in support of the proposal. This is because the House passed its version of the Coast Guard Authorization bill earlier this year and action is expected in the Senate in the next few weeks to initially introduce its version of the Coast Guard Authorization bill. Following introduction, the bill will next proceed to a full Senate Commerce Committee mark-up (the committee with jurisdiction over this matter). Following that action, it will next

be brought to the full Senate floor for consideration. This will likely be in the form of an amendment folded into a Managers' Substitute package or as an amendment offered by a specific member (with co-sponsors and other member support) during floor debate on the bill.

If the proposal is not added during Senate action, it is possible to add it during formal or informal conference negations between the House and Senate (to work out any differences between the two bills), provided that there is a provision, or provisions, in either the House or Senate final bills, that are close enough in subject matter to make the proposal "germane," and therefore within the scope of the two bills. As to timing, it is likely that the bill will not be wrapped up until much later in the year (in the November-December timeframe), which should provide ample time to work the issue based on these new developments.

In conclusion, it is clear that if the Coalition's proposal is enacted, it will provide noteworthy benefits in terms of reducing the RP's defense costs because plaintiffs will be discouraged from suing responders unnecessarily (*i.e.*, the RP will only have to pay defense costs for lawsuits against the RP and not have to reimburse responders through indemnification provisions in their response contracts). As a result of this outcome, there will be no increase in the amount of insurance premiums, and thus no additional costs passed on to a RP due to any increased premiums. And an effective response immunity regime will provide responders with the necessary confidence to respond expeditiously without the fear of unfounded lawsuits. This has the overall public benefit of minimizing the damages to the greatest extent possible, which will have the added benefit to lower the RP's liability for additional damages that would result from a slow response effort. ■

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Jeremy Herschaft, an associate with Blank Rome's New York Maritime, International Trade, and Public Contracts practice group, will be relocating to Blank Rome's Houston, Texas office in mid-July 2014. Mr. Herschaft concentrates his practice on all aspects of international and domestic maritime litigation, and handles a broad spectrum of cases ranging from maritime commercial disputes to vessel casualty and pollution response, personal injury and death actions, Rule B and C claims, and general blue water incidents. He graduated from Tulane Law School in 2004 (LL.M., Admiralty Law) and is a member of the South Carolina, Louisiana, D.C., and New York Bars. He is also a member of Blank Rome's Maritime Emergency Response Team ("MERT"). ■

Fill 'er Up with Gas: The Advent of LNG as Bunker Fuel

BY KEITH B. LETOURNEAU

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Market, regulatory, and technological developments are acting in concert to accelerate the development of a liquefied natural gas ("LNG") bunker fuel market. U.S. domestic gas production has reached all-time highs with the country becoming the world's number one gas producer, which serves to keep natural gas prices relatively low and stable. U.S. and international regulations have tightened vessel emissions standards by implementing emission control areas ("ECAs") around certain coastal regions. Various U.S. and international shipyards are in the process of designing and building or refitting vessels with LNG-propulsion plants. Together, these evolving changes are giving LNG an inroad in the highly competitive bunker fuel industry. Meanwhile, regulatory programs are in the works to address new risks attendant to LNG-fueling operations.

The U.S. Energy Information Administration's ("EIA") *Annual Energy Outlook* projects that natural gas production from shale reserves will balloon total annual U.S. domestic production of natural gas from 23 trillion cubic feet in 2012 to approximately 32 trillion cubic feet in 2040. Assuming crude oil prices continue to climb over time, the EIA predicts that the price differential between natural gas and crude will provide a substantial incentive for the direct use of natural gas in transportation. LNG is natural gas converted to liquefied form to facilitate transportation and storage.

As implemented under the International Convention for the Prevention of Pollution from Ships (MARPOL Annex VI), ECAs now govern Northern European waters, coastal zones around the United States and Canada, and the U.S. Caribbean basin, which includes Puerto Rico and the U.S. Virgin Islands. Within these areas, vessels are required to limit emissions of sulfur dioxide (SOx), nitrogen oxide (NOx), and particulate matter (PM). In the North American ECA, by January 1, 2015, SOx must be reduced to 0.10% of exhaust emissions. Additionally, IMO NOx Tier II requirements apply to certain marine engines, and those standards are scheduled to tighten in the coming years.

In 2013, TOTE, which operates Jones Act vessels in the Alaskan and Puerto Rican trades, committed to the construction of two new LNG-fueled containerships and the conversion of two diesel-electric trailerships. These vessels will generate substantially less emissions per container, 100% less sulfur dioxide, 90% less nitrogen oxide, 91% less particulate matter, and 35% less carbon dioxide (CO2). Similar projections pertain to other LNG-powered vessels. These reductions enable LNG to comply with International Maritime Organization's ("IMO") Tier III limits, which apply to the NOx ECAs, while reducing carbon dioxide emissions by 20 to 25%. Meanwhile, other vessel operators are making or considering the switch to LNG power. Crowley is constructing the first U.S. flag, LNG-powered roll-on/roll-off container (Conro) ships. Harvey Gulf is building the first U.S. flag, LNG-fueled offshore supply vessels (to be serviced by its own LNG-fueling station in Port Fourchon, Louisiana), and ferry services in New York and Washington state are studying whether to retrofit their vessels with LNG-propulsion systems.

Powering vessels with LNG dovetails both the ready availability of this natural resource and compliance with the newly-implemented ECA emissions standards. Classification Society DNV notes that while only 83 LNG-fueled vessels were in service as of October 2013, that number is expected to grow to more than 3,000 by 2025.

With tighter air emissions standards, an incredible abundance of natural gas, and increasing economic investment in LNG-propulsion systems, LNG will soon fuel a sizeable portion of the maritime fleet.

The European Union is well underway to developing a coordinated LNG-bunkering system. The EU is striving to install LNG-bunker stations in 139 sea and inland ports. The International Organization for Standardization ("ISO") has issued draft guidelines that set forth functional requirements for LNG-bunkering operations, and DNV has created a Recommended Practice to serve as a practical guide for developing design solutions and operating requirements for such operations.

In the U.S., the LNG-bunkering process is just getting started. No concerted government or industry efforts are in place to construct LNG fueling stations, though a fragmented bulk-LNG infrastructure may serve as a network foundation and a number of LNG-fueling terminals are under construction. Currently, there are no officially promulgated Coast Guard regulations or policy letters addressing LNG-fuel-transfer operations. Existing directives relate to vessels carrying LNG in bulk as cargo. The Coast Guard is currently working to promulgate three new LNG initiatives, the first two of which have resulted in draft policy letters:

1. A policy letter addressing LNG as a fuel standard (CG-OES Policy Letters 01-14);
2. LNG bunkering guidance (CG-OES Policy Letters 01-14, and 02-14); and
3. A Merchant Marine Personnel Advisory Committee ("MERPAC") directive concerning licensing standards for mariners handling LNG.

The Coast Guard's draft LNG-fuel-transfer guidance applies to waterfront facilities handling LNG (currently governed by 33 CFR Part 127, which sets forth LNG transfer procedures for handling LNG in bulk), and commercial vessels transferring LNG as fuel (current vessel guidance is found at 46 CFR Subchapter D, rules and regulations for tank vessels, and 46 CFR Part 154, which addresses safety standards for vessels carrying LNG in bulk and all vessels (foreign and domestic) using fuel in U.S. waters). Contemporaneously, the American Bureau of Shipping ("ABS") has published a study addressing the bunkering of LNG gas-fueled vessels in North America, which addresses, among other things, the variety of overlapping regulations that may apply to LNG-bunkering operations in some measure and the existing infrastructure in North America.

Unlike current diesel-fuel-bunker operations, the Coast Guard's draft guidance requires the facility or vessel from which LNG is transferred to submit proposed transfer procedures for approval to the Coast Guard Captain of the Port ("COTP"), who must also receive advance notice of the transfer operation's time and place. Before LNG-fuel-transfer operations are carried out, the vessel's owner or operator will also be required to submit the vessel's LNG-fuel-transfer system operations, emergency, and maintenance manuals to the COTP for review at least 30 days before transferring LNG. Additionally, the Coast Guard's draft-bunkering policy letter imposes training requirements on the entire crew with respect to gas-related safety, operational, and maintenance training.

As with typical liquid-bulk transfers, a declaration of inspection must be completed by the vessel receiving LNG fuel and the facility or vessel from which the LNG is received. Foreign vessels using LNG as fuel also must submit documentation to the Coast Guard that Class has reviewed and approved the vessel's LNG fuel system and confirmed that it complies with IMO interim guidelines on "Safety for Natural Gas-Fueled Engine Installations in Ships." For U.S. flag vessels, this process will be employed in conjunction with issuing the vessel's certificate of inspection. U.S. vessels must meet the Coast Guard's policy guidance letter No. 01-12 addressing natural gas fuel system design criteria.

Nevertheless, LNG-refueling operations carry a variety of risks, including, among others, LNG spills and leaks (due to a pressure surge in transfer lines, incorrect cooling down and connection procedures, over-filling and over-pressurization of a ship's LNG storage tanks, and possible rollover in a ship's LNG storage tanks caused by loading LNG of different densities), structural failure due to high temperatures, fire and explosions (potential boiling liquid expansion vapor explosion ("BLEVE") event, and possible vapor cloud explosion and blast loads), as well as cryogenic hazards (brittle steel exposed to an LNG spill, and frostbite or asphyxiation from liquid or cold vapor spills). Consequently, risk assessments and procedures for handling these new hazards will be an integral part of the LNG-fueling process.

Additionally, depending upon the supporting modes of transport (tank trucks, rail cars) and facilities (shore tanks, portable tanks), numerous other regulations and agencies may be implicated in the process, both for safety and security reasons.

With tighter air emissions standards, an incredible abundance of natural gas, and increasing economic investment in LNG-propulsion systems, LNG will soon fuel a sizeable portion of the maritime fleet. Regulatory oversight is gradually catching up to these developments and within a few short years, "fill 'er up" will take on a whole new meaning. ■

Sources: Energy Information Administration *Annual Energy Outlook,* May 7, 2014; American Bureau of Shipping Study, *Bunkering of Liquefied Natural Gas-fueled Marine Vessels in North America;* Svein Inge Leirgulen, *DNV GL recommends ways to make LNG bunkering safe and efficient,* 15 Oct 2013; CG-OES Policy Letter Nos. 01-14 and 02-14; TOTE, *Converting Our Fleet to LNG,* https://toteinc.com/about/lng/; Harvey Gulf, http://harveygulf.com/green.html; and Crowley Maritime, http://www.crowley.com/Crowley-Home/What-We-Do/Shipping-and-Logistics/Hidden-Webpages/Coming-Soon-Revolutionary-LNG-Powered-ConRo-Ships-for-U.S.-Puerto-Rico-Trade.

Recent Developments in Maritime Punitive Damages

BY DAVID G. MEYER AND KATE B. BELMONT

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In 2009, in *Atlantic Sounding Co., Inc. v. Townsend,* the Supreme Court "sea tossed" the law of maritime damages when it held that punitive damages are recoverable for an employer's willful and wanton failure to provide a seaman with maintenance and cure benefits.[1] 557 U.S. 404, 407-08 (2009). By doing so, *Townsend* put an end to almost twenty years of near certainty that punitive damages were not available in maintenance and cure claims. To some, *Townsend* also signaled a shift away from the "uniformity principle" approach to maritime damages as set forth in *Miles v. Apex Marine,* 498 U.S. 19 (1990).

Generally stated, the *Miles* uniformity principle holds that if a category of damages is unavailable under a maritime cause of action established by statute, it is similarly unavailable for a parallel claim brought under general maritime law. Because the Jones Act prohibits non-pecuniary damages, and punitive damages are considered non-pecuniary, the *Miles* uniformity principle was subsequently applied by lower courts to preclude punitive damages claims by seamen for all causes of action, including maintenance and cure claims.

Since *Townsend,* courts throughout the U.S. have recognized the availability of punitive damages in maintenance and cure claims. However, because the Supreme Court's holding in *Townsend* only expressly dealt with maintenance and cure, the more difficult question has been whether and to what extent the reasoning in *Townsend* might authorize punitive damages in other maritime causes of action, despite the *Miles* uniformity principle. Some courts have recently exhibited a willingness to find that *Townsend* allows for the recovery of punitive damages for a wider range of general maritime law claims beyond simply maintenance and cure. Unseaworthiness claims in particular have drawn interest, as such claims are routinely alleged in Jones Act and other maritime personal injury lawsuits, and like maintenance and cure claims are based in general maritime law and pre-existed the enactment of the Jones Act.

By way of background, a seaman has a claim under the general maritime law for injuries caused by the unseaworthiness of a vessel, and this claim is independent from a claim under the Jones Act for an employer's negligence. The duty of a vessel owner to provide a seaworthy vessel is an absolute non-delegable duty; the duty imposes liability without fault. A ship is seaworthy if the vessel, including her equipment and crew, is reasonably fit and safe for the purposes for which it was intended to be used. Unseaworthiness is not a fault-based standard; a plaintiff must show, however, that the unseaworthy condition "played a substantial part in bringing about or actually causing the injury and that the injury was either a direct result or a reasonably probable consequence of the unseaworthiness."

After *Miles* and prior to *Townsend,* it was reasonably settled that punitive damages were not recoverable for unseaworthiness

claims. Following *Townsend,* however, courts have been more willing to recognize the recoverability of punitive damages in unseaworthiness actions.

In one early post-*Townsend* case, the United States District Court for the Eastern District of Louisiana refused to allow a Jones Act plaintiff to amend his complaint to assert a claim for punitive damages under the Jones Act and general maritime law unseaworthiness based on well-established precedent, and specifically declined to extend *Townsend* beyond its limited holding. See *Rogers v. Resolve Marine,* 2009 U.S. Dist. LEXIS 91423 (E.D. La. September 11, 2009). However, shortly thereafter in 2010, the District Court of Hawaii extended the principles established in Townsend and held that *Townsend* had reaffirmed the Ninth Circuit Court of Appeals' 1987 decision in *Evich v. Morris,* 819 F.2d 256, which allowed punitive damages under general maritime law claims for unseaworthiness. See *Wagner v. Kona Blue Water Farms, LLC.,* 2010 AMC 2469 (D.Hi. 2010). Similarly, in 2012, the Eastern District of Missouri also followed the analysis in Townsend and held that punitive damages are available under the general maritime law for unseaworthiness claims. See *In re Complaint of Osage Marine Services, Inc.,* 2012 WL 709188 (E.D. Mo. March 5, 2012).

Perhaps the most significant development came in October 2013, when the Fifth Circuit Court of Appeals, which includes almost all of the U.S. Gulf Coast states, issued its decision in *McBride v. Estis Well Service, L.L.C.,* 731 F.3d 505 (5th Cir. 2013). *McBride* involved wrongful death and multiple personal injury claims arising out of a drilling rig collapse that occurred in Louisiana's coastal waters. The plaintiffs filed suit against Estis, the employer and owner of the vessel at issue, asserting causes of action for unseaworthiness under the general maritime law and negligence under the Jones Act and sought to recover compensatory as well as punitive and/or exemplary damages. Estis successfully moved to dismiss the claims for punitive damages, arguing that punitive damages are not an available remedy for unseaworthiness or Jones Act negligence as a matter of law. Recognizing that the issues presented were "the subject of national debate with no clear consensus," the district court granted the plaintiffs' motion to certify the judgment for immediate (interlocutory) appeal.

The principal question presented on appeal was whether seamen may recover punitive damages for their employer's willful and wanton breach of the general maritime law duty to provide a seaworthy vessel. After a lengthy and detailed discussion of the history of punitive damages in maritime cases through *Townsend,* the Fifth Circuit concluded that punitive damages were available in such cases. The court summarized its reasoning as follows:

> To give effect to that principle, *Townsend* established a straightforward rule going forward: if a general maritime law cause of action and remedy were established before the passage of the Jones Act, and the Jones Act did not address that cause of action or remedy, then that remedy remains available under that cause of action unless and until Congress intercedes. Estis does not dispute that the rule's premises are satisfied in this case: the cause of action (unseaworthiness) and the remedy (punitive damages) were both established before the passage of the Jones Act, and the Jones Act did not address that cause of action or remedy, then that remedy remains available under that cause of action unless and until Congress intercedes.

Just four months after issuing the *McBride* opinion, the Fifth Circuit granted a motion for rehearing *en banc,* which rarely occurs and which had the effect of withdrawing and vacating the prior opinion. See *McBride v. Estis Well Serv., L.L.C.,* 743 F.3d 458 (5th Cir. 2014). It remains to be seen what the Fifth Circuit will do on rehearing. However, at least two U.S. District Court judges have relied on the initial *McBride* opinion to hold that punitive damages are available in unseaworthiness actions for "willful and wanton conduct" by the shipowner in the creation or maintenance of the unseaworthy conditions. See *Ainsworth v. Caillou Island Towing Co., Inc.,* 2013 WL 6044376 (E.D. La. Nov. 14, 2013); and, *Stowe v. Moran Towing Corp.,* 2014 WL 247544 (E.D. La. Jan. 22, 2014) ("Of course, punitive damages are available as a remedy to seamen under the general maritime law claim of unseaworthiness.").

There is no question that *Townsend* has "reinvigorated the debate" as to the availability of punitive damages in maritime cases. As a result, maritime practitioners and their clients will continue to have to deal with the uncertainty surrounding punitive damages in the post-*Townsend* world of maritime litigation. This uncertainty can become particularly troubling when dealing with, for example, inexperienced plaintiff's attorneys, marginal claims, and/or cases involving high-profile or "sensational" incidents/accident, all of which might generate a tendency to overemphasize the threat of punitive damages as leverage. Accordingly, while the courts continue to struggle with the issue, maritime practitioners must continue to monitor developments in order to be able to guide their clients to safety through the confused seas left in *Townsend's* wake. ■

1. A claim for maintenance and cure concerns the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship. Subject to certain defenses, this obligation arises without regard to fault, and benefits must be provided until the seaman reaches maximum medical recovery or improvement ("MMI"). Maintenance benefits provide the equivalent of a seaman's food and lodging on the ship, and recent court opinions have approved daily maintenance rates from $30 up to $45 per day.

CHAMBERS 2014 HONORS

The quotes, commentary, and rankings referenced in this document are published in Chambers USA 2014.

SHIPPING LITIGATION (NEW YORK)

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Chambers 2014 says: Blank Rome Maritime's litigation team is known for its leading maritime practice, with expertise across the full range of shipping disputes, including litigation and arbitration, both domestically and internationally. The team handles cases arising from catastrophic events such as oil spills, collisions, and sinking of vessels.

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Key Individuals for Shipping Litigation

John D. Kimball ranked as a **band one** attorney. *Chambers 2014* says: Maritime litigation practice leader John Kimball offers experience in areas such as maritime casualties, insurance matters, and charter party. He is described as being "very able in all aspects of representation, both in live appearances and in writing."

Thomas H. Belknap, Jr. ranked as a **band two** attorney. *Chambers 2014* says: Leading maritime attorney Thomas Belknap focuses on issues such as contract disputes and cargo damage claims. Commentators say he is "a rising force—he is hard-working, with a good understanding of the law, particularly cargo matters."

Lauren B. Wilgus ranked as an **associate to watch.** *Chambers 2014* says: Lauren Wilgus focuses on maritime litigation and alternate dispute resolution.

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Chambers 2014 says: Blank Rome Maritime has an emerging force in maritime litigation from its D.C. office, complementing its market-leading New York office. Areas of excellence include insurance disputes, charter party disputes, environmental incidents, and maritime casualties.

Notable Practitioner: Blank Rome Partner **Jeanne M. Grasso** is a key contact for Blank Rome Maritime's D.C. litigation team.

BLANK ROME MARITIME ATTORNEYS

Key Individuals for Shipping Regulatory

SHIPPING REGULATORY (OUTSIDE NEW YORK)

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Sources say: "Very knowledgeable attorneys. They give practical advice and are well connected with the regulators, especially the Coast Guard."…"First-rate lawyers, and people I rely on."

Jonathan K. Waldron ranked as a **band one** attorney. *Chambers 2014* says: "Knowledgeable but practical" practice leader Jonathan Waldron is known for his prominence in matters relating to the Coast Guard. Sources note that he "has proven to be an expert in this field," and particularly appreciate that he is "very well connected within the Coast Guard."

Jeanne M. Grasso ranked as a **band two** attorney. *Chambers 2014* says: Jeanne Grasso is a distinguished practitioner known for her useful government relations and expertise in regulatory laws related to maritime vessels. "She gave us very good advice and helped us pull off some seamless operations," said one client.

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Chambers 2014 says: Blank Rome Maritime's financial services team is known for representing lenders, borrowers, and underwriters in a range of shipping finance transactions, including those related to equipment. The team is present in multiple jurisdictions, advising on international joint ventures.

Notable Practitioner: Blank Rome Partner **Brett M. Esber** is a key contact for Blank Rome Maritime's financial services practice.

Calculating the Settlement Value of a Case

BY THOMAS H. BELKNAP, JR.

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It has been said that war is politics by other means. It is probably equally true that litigation is business by other means. On the one hand, the threat of litigation—and the resulting costs, inconvenience, and uncertainty—will often compel parties to resolve their differences on terms that they might otherwise consider less than ideal. And on the other hand, if an acceptable compromise cannot be reached, then litigation is the tool by which the parties can obtain a definitive resolution to the dispute.

This analogy does not apply just to "business" litigation. Resolving a personal injury claim is equally a "business" transaction, in the sense that one party is seeking payment from the other, and each side has to decide how much it is willing to take or pay to avoid litigation.

To the extent that litigation is just another means of conducting business, it follows that the parties to a dispute should be continually assessing the costs and benefits of that strategy just as they would assess the costs and benefits of any other business strategy they undertake. But how does one "value" a claim that may end up in litigation so that they can make a reasoned determination about what a reasonable settlement value might be?

Factors in Valuing a Claim

First, what are the factors that help determine a claim's settlement value? Of course, every case is different. But, there are some factors that apply in nearly every case. Probably the most obvious factor—and often (but not always) the most important—is the strength of the claim or defense. If a party's claim is highly meritorious, then that will clearly suggest a high settlement value. On the flip side, if a party's defense is strong, then that will favor a low settlement value.

In any given case, of course, there are many other factors that may greatly impact the claim's settlement value—whether on the plaintiff's or defendant's side. Litigation costs often are a major factor, and both parties must consider the benefit of avoiding such costs in any settlement analysis. Other factors may include the likely inconvenience and interruption of business that may result from litigation; the potential publicity and damage to (or enhancement of) reputation; the value of an on-going commercial relationship with the opposing party; the impact of settlement on the deterrence of similar claims in the future; the consequences of a catastrophic adverse judgment; the time value of money—*i.e.*, the value of payment now versus at some point in the future; and the financial stability of the counterparty—*i.e.*, its ability to pay on a favorable judgment. And on top of those factors are often more emotional ones such as pride, ego, reputation, and the personal agendas of the decision makers on each side. And this just scratches the surface…

Based on the above, one might think it impossible to meaningfully analyze a claim's settlement value. To be sure, it is part science and part art. There are, however, ways of applying rational business-style analysis to the process that can be extremely useful.

Expected Value

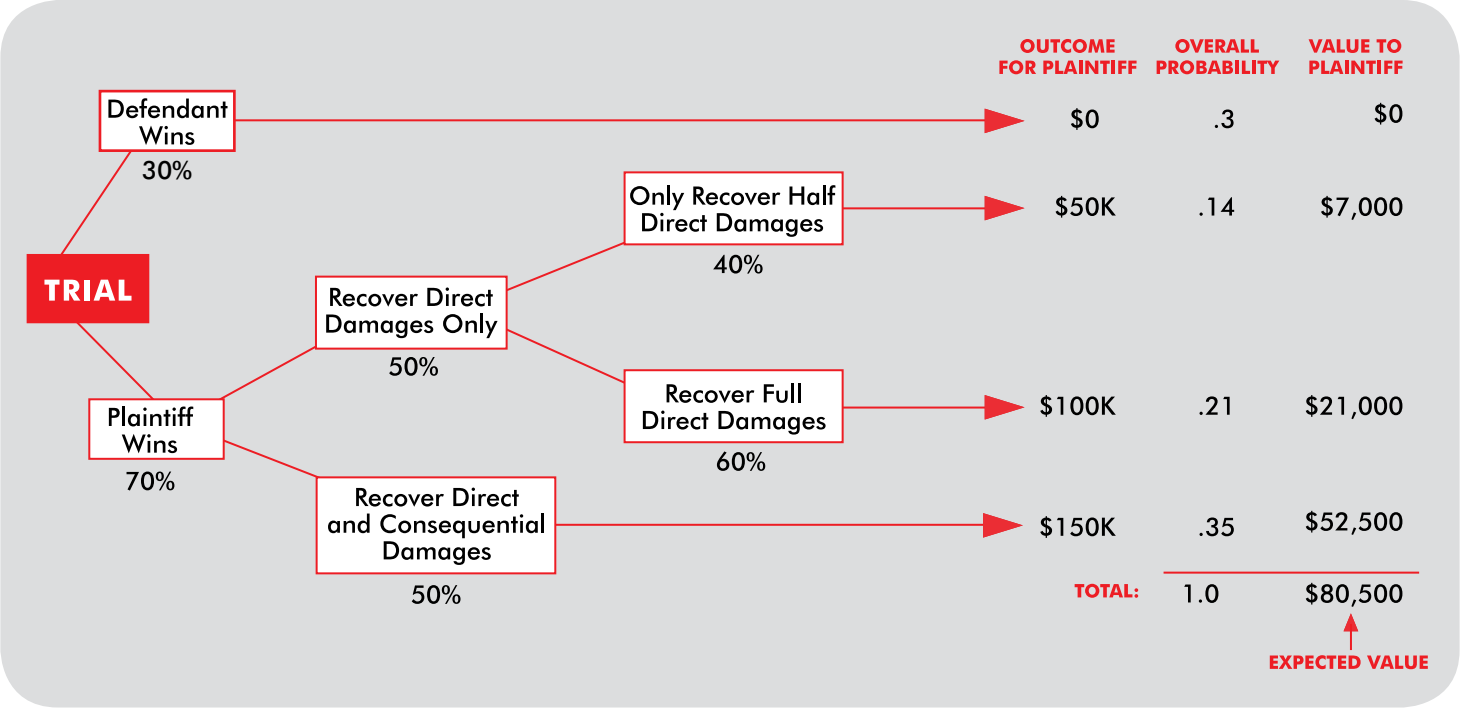
The core skill required to properly assess a claim's settlement value is the ability to identify a case's possible outcomes and to accurately assess the probability that any particular outcome will come to pass. This process allows a party to assess a case's "expected value." This is a task that lawyers perform in some form or another every day, and this process of analysis underlies every reasoned recommendation that a lawyer makes to his client.

To take a simple example: in a coin toss scenario where someone would pay you $10 every time the coin landed on heads, but nothing when the coin landed on tails, the expected value of a single coin toss would be $5—*i.e.*, 50% of the $10 payout. This same analysis can be applied to a claim: where a party seeks damages of $100,000 and assesses its chances of success at 50%, the expected value of the claim is $50,000.

To take a more realistic example, say the plaintiff claims for breach of a contract and seeks $100,000 in direct damages plus $50,000 in consequential damages. The defendant denies it breached the contract, and it contends that even if it did, the direct damages are only half of what the plaintiff claims. It further contends that the plaintiff is not entitled to consequential damages. If the matter goes to litigation, each side is likely to incur $20,000 in attorneys' fees and costs, and the contract states that neither party can recover fees and costs from the other side.

To the extent that litigation is just another means of conducting business, it follows that the parties to a dispute should be continually assessing the costs and benefits of that strategy just as they would assess the costs and benefits of any other business strategy they undertake.

How does one begin to analyze the settlement value of a claim like this? The answer is to break it down into all of the possible outcomes and then to ascribe a probability of



We can analyze the expected value of the claim in a chart that shows each possible outcome, the likelihood each outcome will occur, and thus each possible scenario's contribution to the overall expected value of the case.

occurrence to each possible outcome. Here, one possible outcome is that the defendant wins a judgment that it did not breach the contract. Let's say the plaintiff has analyzed the claim and concludes there is a 30% chance that may happen. That means the plaintiff considers there is a 70% probability that it will win. But, even if it wins, let's say the plaintiff estimates that it has only a 60% chance of recovering its full-claimed direct damages (as opposed to half) and only a 50% probability of recovering consequential damage.

You can see from the chart that there are four potential outcomes: one in which the defendant wins, and three in which the plaintiff recovers different sums depending on how the damages issues turn out. The chart allows one to calculate "compound probabilities"—that is, the likelihood of a chain of events taking place—and then fit each alternative outcome into the overall picture.

Of course, most litigations will be more complex than this, but the same technique can be expanded as necessary to account for any number of variable outcomes, such as counterclaims, dispositive motions, variable damages awards (*i.e.*, where the potential damages are not fixed at a known dollar amount), and so forth. The analysis may be more challenging, but as the case gets more complicated, the analysis becomes all the more useful.

Attorneys' Fees and Costs and Other Factors

There is one critical factor that the Expected Value Analysis does not account for, and that is costs. Anyone analyzing the settlement value of a case obviously has to be cognizant of what it will cost to accomplish the forecasted result. In the above example, we know that the plaintiff and defendant are each estimated to spend $20,000 to get to a verdict. So, if each party is analyzing this issue at the beginning of the case (*i.e.*, before it has spent those fees), then an economist would say that the plaintiff should be willing to settle the case for any value greater than $60,500 (*i.e.*, $80,500 expected value less $20,000 costs), and the defendant should be willing to settle the case for any value below $100,500 (*i.e.*, $80,500 plus $20,000). This establishes a range within which both sides should rationally be willing to settle the case.

The time value of money also must be considered. A cash settlement today is more valuable to a plaintiff than an equivalent judgment two years from now, and any settlement analysis should take this factor into account.

The Importance of Critical Analysis

Of course, this kind of analysis is only as good as the data that goes into it. Most importantly, if a party is overly optimistic or pessimistic about the chances of an event occurring, then its calculation of the expected value of the case will be correspondingly skewed. In most cases, this kind of analysis is an evolving process. At the beginning of a case, the parties may not have all the facts or they may not have had an opportunity to research all the critical legal issues at stake. Moreover, in a highly complex case, it may not be possible at the beginning of the matter to anticipate all the developments that will unfold as parties are

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added, motions filed, counterclaims asserted, and so forth. As the case develops, therefore, it is critical to revisit the analysis to see how those developments impact the claim's expected value.

The Soft Factors

Economic analysis is a very useful way to look at a claim from a "business" perspective, but in many cases there are other factors that may materially alter a party's assessment of its "settlement value." A claim involving serious injury or death, for instance, may be charged with emotional factors that strongly influence a plaintiff's assessment of what it is willing to accept in settlement.

Risk acceptance or avoidance is often another significant factor. It is one thing to say that a coin toss is a 50/50 endeavor, but in any given coin toss, one side wins and the other side loses, and a party may be willing to pay a premium or take a discount in exchange for the certainty of avoiding a total loss. Moreover, psychological studies have shown that a plaintiff may in some instances be willing to take an economically "irrational" risk where there is a low probability of success but a very high potential reward. (You might call this the lottery effect.) And conversely, a defendant may be willing to pay an "irrationally" high amount to avoid a high value but low probability judgment—especially where such a judgment would be economically catastrophic.

Commercial considerations often significantly impact a party's settlement threshold. For instance, a defendant may be willing to pay a premium to resolve a claim that is interfering with other business objectives, such as a merger or a public offering of shares. A plaintiff may be willing to offer a discount in order to fund its "war chest" to allow it to more vigorously pursue claims against other parties.

Personality traits and "aspirations" of the negotiating parties may also play a significant role in how a party assesses the settlement value of a case. Pride and ego are always wildcards, and if the person making settlement decisions for one party has a personal incentive (raise, bonus, promotion) to accomplish a favorable settlement, that person may be "irrationally" willing to risk an adverse outcome at trial in exchange for that prospect.[1]

Conclusion

Analyzing the settlement value of a case is still part art and part science. Even the best analysis can never fully account for all the vagaries of litigation, such as predicting how a witness will hold up under skillful cross-examination or how a judge will rule on a motion. But as the above discussion demonstrates, a candid and thoughtful analysis of a case can help develop a solid framework from which to start a settlement negotiation. And as new facts and information develops, the expected value of the case must be constantly reanalyzed and the assumptions and calculations adjusted as necessary.

Importantly, for this kind of analysis to lead to a settlement, both sides have to carefully and candidly analyze their respective claims and defenses. One of the great frustrations in litigation is to deal with an opposing party who is either too busy or otherwise unable to critically assess the case's true risks and probable outcome. If everyone understands the relevant facts and legal issues and takes a candid view of the case, however, then each side's analysis should theoretically lead to similar estimated values. When that happens, the chances for settlement greatly increase.

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1. *See* Russell Korobkin, "Aspirations and Settlement," *Cornell Law Review* Vol. 80, p. 1 (2002), for an interesting discussion of various behavioral studies in the context of litigation settlement.

The Gateway to Chapter 15: An Evolving Issue

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Chapter 15 of the United States Bankruptcy Code is a relatively recent addition to the American bankruptcy statute and it incorporates the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency into American law. Using Chapter 15, American courts have a set rubric and system to determine when to "recognize" a foreign insolvency/rehabilitation/reorganization proceeding and to protect or implement that proceeding here in the United States. The aim of Chapter 15 is to create a universal and uniform approach to according comity to foreign insolvency proceedings, which are not violative of the essential public policy of the United States.

There is an acceleration in the number of Chapter 15 cases that are being filed, and thus a rapid evolution in the law governing Chapter 15. This takes place in a context where cross-border joint reorganization efforts are becoming more and more interconnected and complex. As of this writing, in the Nortel Networks Corp. liquidation in the Delaware Bankruptcy Court in the United States and the Ontario Superior Court in Canada, the Bankruptcy Court and the Superior Court are presiding over a joint trial in the United States and Canada over the allocation of value to $4.5 billion of patent proceeds, where a unitary record is being generated in front of both Judge Kevin Gross in Delaware and Justice Frank Newbould in Toronto, sitting together—with the courtrooms linked by advanced telephony and video. *See* J. Santo, *Nortel Units Spar Over Patent Sale in $7B Liquidation Fight,* Law360 (May 12, 2014). In the Irish Bank Resolution Corporation Limited (f/k/a Anglo Irish Bank) Chapter 15 in Delaware, the Bankruptcy Court just ordered the sale of a $1 billion loan portfolio to Goldman Sachs and Deutsche Bank to more fully implement a main Irish liquidation proceeding—since the disposition of the loan portfolio in question was largely governed by American law, subject to certain reserves. *See In re Irish Bank Resolution Corporation Limited,* slip op., 2014 WL 1759609 (Bankr. D. Del., February 14, 2014).

Given the usefulness and centrality of the Chapter 15 tool to international restructuring, how to access Chapter 15 bankruptcy is an important issue and has been litigated recently. This note focuses on two importantly different approaches to the gateway to Chapter 15 recognition—foreign debtor eligibility.

The United States Court of Appeals for the Second Circuit in *Drawbridge Special Opportunities Fund LP v. Katherine Elizabeth Barnet, Foreign Representative, et al. (In re Katherine Elizabeth Barnet) ("Barnet"),* 737 F.3d 238 (2d Cir. 2013), overturned a recognition order issued by the New York Bankruptcy Court in respect of an external administration proceeding for Octaviar Administration Pty Ltd. in Australia. Drawbridge Special Opportunities Fund LP, a stakeholder in Octaviar and litigation target in the Australian proceeding, objected to the recognition order on the grounds that Octaviar did not qualify as a "debtor" for American bankruptcy under Bankruptcy Code section 109(a), a provision of general applicability under the Bankruptcy Code. Section 109(a) requires a debtor under the Bankruptcy Code to reside or have a domicile or place of business in the United States or to have property in the United States.

The Second Circuit Court of Appeals found that section 109(a) was applicable to Chapter 15 and rejected the foreign representative's argument that Octaviar was not a debtor under Chapter 11 but under the Australian law, and that she sought relief under Chapter 15, not Octaviar directly. The Court of Appeals found that the presence of Octaviar was "inextricably intertwined" with the nature of the Chapter 15 proceeding and that the operative sections of Chapter 15 that would provide Octaviar with relief in the United States all referred to the "debtor." Likewise, the Court of Appeals did not find that section 1502 of the Bankruptcy Code, which contains a definition of the term "debtor" for Chapter 15 purposes ("an entity that is the subject of a foreign proceeding"), "blocked" application of section 109(a), but rather complemented the general eligibility guidelines—further defining the concept of "debtor" under the American law, rather than supplanting the section 109 directives as to debtor eligibility. The Court also found language in the bankruptcy venue statute, 28 U.S.C. § 1410, which states that Chapter 15 debtors need not have a place of business or assets in the United States to lay proper venue (venue is also proper wherever the foreign debtor faces an action or proceeding or where the interests of justice require venue to be found), to be "procedural" in nature. It then remanded the case to the

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New York Bankruptcy Court so that the Bankruptcy Court could determine whether Octaviar was 109 eligible.

Interestingly, the United States Court of Appeals for the Third Circuit in *In re ABC Learning,* 728 F.3d 301 (3d Cir. 2013), affirmed the Delaware Bankruptcy Court's recognition of another Australian insolvent in liquidation. In so doing, the Third Circuit emphasized in the strongest terms the commitment that American bankruptcy law makes through Chapter 15 to "a universalism approach to transnational insolvency. It treats the multinational bankruptcy as a single process in the foreign main proceeding, with other courts assisting in that single proceeding." *Id.* at 306. This is an approach that is distinguishable from that employed by the Second Circuit in *Barnet,* where the *Barnet* court insisted on the primacy of the general Bankruptcy Code (arguably the territorial American) eligibility requirements for a debtor as set forth in section 109 over the plain and specific language of section 1520 of the Bankruptcy Code, which did not tie access to Chapter 15 to American assets, offices, etc.[2]

This difference in emphasis can be important. In *In re Bemarmara Consulting a.s.,* slip op. at 8-12, Bankr. Case No. 13-13037 (KG) (Bankr. D. Del., Dec. 23, 2013), Judge Kevin Gross of the Delaware Bankruptcy Court recognized a Czech insolvency proceeding in respect of Bemarmara Consulting, a.s., a Czech entity, and did so, despite a record, which suggested Bemarmara might not have assets, an office, or a domicile in the United States, satisfying section 109. Citing *ABC Consulting* at length and its requirement that Chapter 15 be construed to effectuate the "universalist" approach to transnational insolvency, Judge Gross stated that he did not believe the Third Circuit would follow *Barnet.* Focusing on the plain language of Chapter 15, Judge Gross found 109 inapplicable because Bemarmara was not seeking relief directly. Rather, Bemarmara had left the petitioning to its duly appointed foreign representative (as is required under Chapter 15). According to the Delaware Bankruptcy Court, section 109 only governs debtors that seek relief directly under the Bankruptcy Code and foreign debtors under Chapter 15 do not seek such relief directly. Further, the Delaware Bankruptcy Court ruled that section 1502 defines the term "debtor" for all Chapter 15 purposes and more specifically than does section 109, a general and therefore excepted rubric, stating "there was nothing in the definition in Section 1502 which reflects upon a requirement that Debtor have assets."[3]

Delaware and New York are the primarily favored venues for complex rehabilitation, reorganization, and liquidation proceedings under the American bankruptcy system. So it is important to understand the different gateway requirements to Chapter 15 in each jurisdiction, which in turn derive from a subtly different approach to the relationship of Chapter 15 to the rest of the Bankruptcy Code. This can drive planning issues and is important to understand when addressing other points under Chapter 15 that relate to the application of "universalist" transnational insolvency (*e.g.,* the breadth of the application of the stay, the limits that a bankruptcy court faces in implementing a foreign insolvency proceeding's directives, and imperatives). ■

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1. Mr. Schaedle is a partner and member of Blank Rome's Maritime Industry Team and Finance, Restructuring and Bankruptcy Practice Group. In his practice, Mr. Schaedle represents all stakeholders in complex Chapter 11 and Chapter 15 matters, including the official committee of unsecured creditors of Marco Polo Seatrade B.V. and its affiliated debtors in that shipping line's Chapter 11 cases in New York and the foreign representative in the STX Pan Ocean Co., Ltd. Chapter 15, also in New York.

2. It should be emphasized that the section 109 eligibility requirements are not particularly onerous. Minimal levels of property have been found sufficient to satisfy the 109(a) standard. For example, *In re Global Ocean Carriers Limited,* 251 B.R. 31, 38-40 (Bankr. D. Del. 2000), ruled that professional retainers maintained in escrow accounts constituted "property" for 109(a) purposes, the Delaware court noting that an owned "peppercorn" would be sufficient to satisfy the relevant standard. And in *In re Marco Polo Seatrade B.V., et al.* Bankr. Case No. 11-13634 (RG) (Bankr. S.D.N.Y.), the New York Bankruptcy Court found that an interest in an OSG pooling agreement account located in New York was sufficient 109 property to prove eligibility for certain Marco Polo debtors. And in *In re TMT Procurement Corporation, et al.,* Bankr. Case No. 13-33763/Civil Action No. 13-2301 (Bankr. S.D. Tex./S.D. Tex.), both the Houston Bankruptcy and District Court found that a retainer paid on behalf of multiple debtors to a financial advisor and held in escrow in the U.S. was sufficient property under 109 to establish eligibility, following *Global Ocean.* The Marco Polo debtors were Netherlands-based, and TMT entities are based in China and Taiwan—each with the vast bulk of their assets in foreign jurisdictions.

3. Relatedly, the *Bemarmara* court found that there are no "bad faith" grounds for dismissal under Chapter 15; that recognition is required when the express grounds for recognition under the Bankruptcy Code are met and proven—unless recognition would be manifestly contrary to the public policy of the United States. *See also, In re Cozumel Caribe, S.A. de* C.V., 508 B.R. 330 (Bankr. S.D.N.Y. 2014) (despite foreign representative taking inconsistent and troubling positions as to creditor's claim in Mexican "concurso" proceeding and in Chapter 15 case, refusing to deny recognition and foreign representative access to United States courts where Chapter 15 basic requirements met and violations of American public policy not manifest, but noting that initial recognition does not require the New York Bankruptcy Court to accord comity to all orders and requirements of the foreign court or law).

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