Second, the buyer’s remedy under the guarantee usually is expressly limited to “repair or replacement.” The guarantee does not provide for monetary compensation even for recurring problems. Third, the repair or replacement must be made at the Yard. Only if the buyer can demonstrate that it is impractical for the buyer to bring the vessel to the Yard may the repairs be made in another agreed yard. In either case, contracts usually provide that the buyer is responsible for all costs for the vessel to travel to and remain at the Yard or agreed alternate repair site, including towage, dockage, port charges, line handling, and all other costs. If the vessel is repaired at another yard, the contracts generally provide that the builder will compensate the buyer only in an amount equal to some benchmark defined in the construction contract.

Finally, shipyard contracts invariably exclude any claim for consequential damages, which generally include lost profits, lost earnings, and the like. Some provisions are even broader, excluding from recovery any pecuniary loss or expense, any liability to any third party, and any fine, penalty, or other payment incurred by, or imposed on, the buyer in connection with the vessel. This can have harsh results. The lost earnings and business disruption losses caused when unexpected major repairs are required can be extremely damaging to a shipowner. Yet this clause can preclude recovery of such losses from the Yard—even when the problem was clearly caused by the Yard and it occurred within the guarantee period.

For the really bad news for buyers. The above exclusions and limitations generally are enforceable absent evidence of overreach or unconscionability, which would be very difficult, if not impossible, to demonstrate in a commercial shipbuilding context. Now for the good news. Judicial decisions and the laws of most states have provided some limited relief from the exclusions and limitations.  The following are some examples:

• Clauses drafted by the Yard that exclude or limit a buyer’s rights will be construed strictly against the Yard. Thus, if a clause is fairly subject to two interpretations—one that favors the Yard and one that favors the buyer—courts will interpret the clause favorable to the buyer.

• The guarantee period may be extended where the Yard was notified of the problem within the guarantee period and the Yard either did not fix it or the repair was inadequate. This at least addresses the issue of chronic or recurring problems and obligates the Yard to continue efforts to remedy such problems even after the guarantee period has expired. Courts also may extend the guarantee period by the amount of days the vessel spends in the Yard during that period.

• Damages considered as “incidental” (i.e., out-of-pocket expenses reasonably incurred as a result of the problem) will not be excluded by clauses excluding “consequential” damages unless the contract contains specific language excluding types of damages.

• The “repair or replacement” limitation will not be enforced where a court finds that remedy has failed in its essential purpose. Thus, if the Yard is unable to satisfactorily remedy the problem, the buyer may have the right to avoid the contractual limitation and obtain monetary compensation.

The law thus provides some assistance in avoiding or mitigating the effects of limitations and exclusions in shipyard contracts, particularly with respect to consequential damages. But the old saying “an ounce in prevention is worth a pound of cure” is particularly relevant here. Focusing on modifying the exclusions and limitations when negotiating the contract is a more certain way of obtaining what may be some much needed relief later on.


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by W. Cameron Beard

Foreign parties and their lawyers often wish to gather evidence in the United States. A key witness, whose testimonial evidence is required for a foreign proceeding, may be located in the United States and beyond the jurisdictional reach of the foreign court. Similarly, critical documents may be maintained in the United States by a third party over whom the foreign court has no control.

The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (the “Hague Convention”) is certainly one mechanism that can be used to collect evidence in the United States—assuming that the foreign litigation is pending in a country that is a Hague Convention signatory. However, under United States law, alternative and arguably more powerful tools for evidence collection are available. The most powerful tool available for the collection of documentary or testimonial evidence in the United States is 28 U.S.C. § 1782 (“Section 1782”). Section 1782 allows foreign courts or private litigants in a foreign proceeding to obtain documentary or testimonial evidence in the United States is 28 U.S.C. § 1782 (“Section 1782”). Section 1782 allows foreign courts or private litigants in a foreign proceeding to obtain documentary or testimonial evidence in the United States. Section 1782 does not require that requests for evidence be channeled through governmental “central authorities” as would be required under the Hague Convention. In addition, it is not required under Section 1782 that the evidence sought be obtainable under the law of the country in which the legal proceedings are pending. For example, it may be possible to obtain a court order directing a person or entity in the United States to produce general classes of relevant documents for use in a foreign proceeding, without reference to specific requirements of specificity that may be required under the civil procedure laws of the foreign forum. Similarly, pretrial oral depositions of witnesses in the United States may be allowed under Section 1782 even where such depositions would not be allowed under the laws of the country where the dispute is pending.

A. Recent Decision by the United States Supreme Court

Until recently, Section 1782 was interpreted differently by the various federal appellate courts in the United States. This led to a situation where litigants might be allowed more or less discovery depending on the location in the United States where the Section 1782 application was filed.

(continued on page 9)
By Thomas H. Bellnap, Jr.

It is late on a Friday evening (isn’t it always?) and you have just gotten that dreaded telephone call: one of your ships has been in a collision. Fortunately, no one appears to have been hurt, but both ships and cargo are severely damaged. Then the question comes: can you catch the next plane to East Whatamacallit to meet the vessel? Next thing you know you are on the bridge, with captain and crew and salvors and surveyors and P&I rep- resentatives and lawyers and class representatives and port state officials and lord-knows-who-all else scurrying about trying to get a handle on what happened. You know there will be claims, and you want to be ready to deal with the issues that undoubtedly will arise. Here are a few points to consider when you find yourself in this position.

Collecting Evidence From Your Own Client

In many jurisdictions it is common practice for the lawyers who first respond to a casualty to immediately have all of the relevant crew members and other witnesses give and sign written statements. This can prove useful in a jurisdiction where rights of discovery are limited and a signed statement is admissible evidence in the event the witness himself is unavailable to give evidence or testimony in person. Statements can be helpful because they represent contemporaneous accounts of events taken while the memory is fresh.

Even the best-prepared statement can contain significant errors, however, because: (1) the witness is in shock, exhausted, or even injured following the traumatic experience of a casualty, or (2) he states as fact information about which he is actually uncertain, or (3) the witness gives misleading or inaccurate information in an effort to protect himself or the owner, or (4) he feels pressured to sign the statement by the company or its lawyers, or (5) there are language barriers, or (6) any of a number of other reasons. Moreover, statements often turn out to be incomplete because facts that seem critical at the time end up being irrelevant or, worse, facts that turn out to be critical are overlooked or misunderstood at the time the statement is prepared.

For this reason, obtaining signed witness statements can be extremely risky where a case ultimately appears likely to wind up in litigation in the United States. A signed statement is in most instances not admissible in court proceedings in the United States except against the person or party who made it. So, even if the statement is incredibly helpful, it will almost never be allowed into evidence to support the owner’s or insurer’s position.

Signed witness statements, however, generally are dis- coverable by the opponents in litigation. Thus, a party may be required to disclose the statement to the other side even though it cannot itself use it in the litigation. Further, even though a party may not be able to put into evidence a statement it has obtained from its crew or other employees, the opposing party may in many circum- stances introduce the statement into evidence as a “party admission” where the statement ends up containing information that turns out to be harmful to the party’s position.

Therefore, before signed witnesses are obtained, care- ful consideration should be given to whether the case is likely to end up in a U.S. court. If so, then serious thought should be given to whether a more “secure” means of memorializing information obtained from wit- nesses—as such an attorney’s written interview memoran- dum—should be employed.

Preserving Documents and Electronic Evidence

Modern vessel navigation systems often record data that may be highly relevant in a casualty situation. Some examples include course recorders, engine maneuver recorders, GPS, Radar/ARPA systems, AFS, and electron- ic chart systems (ECDIS). It may also include a so-called e-vidence.

It’s always nice to be noticed, and we were gratified to see our last issue of Mainbrace referenced (favorably) in Lloyd’s List and Maritime Advocate Online, among other places. Authors like to be read—none more so than lawyers!–and we particularly enjoy it when our readers seem to agree with us.

As to the subjects we write about, our principal goal is to make our articles relevant and timely. For each issue, the call for articles goes out, ideas are pitched ... a lot of good ideas; however, we are always open to suggestions. If you have any ideas for topics for future issues of Mainbrace, please let us know.

We like feedback, too. If you have a comment or question about any of the articles you read, we hope you will pass it along.

NOTES FROM THE EDITOR

by Thomas H. Bellnap, Jr.

F. Exhaustion of Foreign Procedures

The Second and Third Circuit Courts of Appeals have explicitly held (and there does not seem to be explic- it authority to the contrary from other appellate courts), that a private litigant in foreign proceedings may apply ex parte to a United States court for an order directing the production of evidence pursuant to Section 1782, with- out first having sought to obtain the desired evidence through the foreign tribunal. Indeed, the Second Circuit has held that foreign procedure is an “impermissible factor”—one that could not be considered by the district court—in determining whether to grant Section 1782 relief.

G. Collection of Evidence from Governmental Bodies

Section 1782 cannot be used to obtain classified or other sensitive material from governmental entities in the United States. Indeed, one court has ruled that the United States, as a sovereign power, is not a “person” within the meaning of Section 1782, from which evidence may be obtained. On the other hand, litigants seeking evidence from governmental bodies in the United States may be able to make use of other devices, such as the United States Freedom of Information Act, 5 U.S.C. § 552, or analogous statutes in force in particular American states.

H. Conclusion

Section 1782 provides a powerful tool for gathering evidence in the United States. There remain some issues with respect to which Section 1782 may be interpreted inconsistently by different federal district or circuit courts within the United States federal court system; however, the decision of the United States Supreme Court in Intel has clarified many of the outstanding issues regarding the statute’s proper application, and has broadened the avail- ability of Section 1782 relief. Whether it is most appro- priate for a foreign litigant to seek evidence in the United States pursuant to Section 1782, or pursuant to the Hague Convention, or pursuant to both statute and convention, should of course be considered on a case-by-case basis in consultation with United States counsel.

Liability of Shipyards—Buyers Beware

by Richard V. Singleton III

Problems in newly constructed vessels are usually attributable to design issues, poor construction, or defective materials. Some problems are readily apparent during construction or sea trials. Others may not manifest themselves for years after delivery—frequently at the worst possible times.

The buyer of a newly delivered vessel that experi- ences a problem is usually not so concerned with the niceties of whether the problem is design or construction related. His immediate concern is that unexpected repairs are now required and his ability to use the vessel as an income-generating asset has been lost or diminished for a period of time. The buyer’s level of frustration becomes even greater if the problem is chronic, with multiple attempts by the Yard to resolve the problem resulting in unsatisfactory results. This may prompt a buyer to investi- gate his recourse against the Yard—an exercise that can be as frustrating as the vessel’s problem itself.

Ship construction contracts are replete with clauses that: (1) limit the types of claims that can be brought against the shipyard; and (2) restrict the damages that may be recover- able by stipulating agreed remedies and excluding some categories of damages altogether. Most shipyard contracts contain clauses that a vessel’s non-compliance with the contract’s specifications, such as specifications relating to speed, fuel consumption, and cargo capacity to name a few. Contracts usually limit the buyer’s remedy for each of these problems to the option of: (1) an agreed percentage reduction in the contract price; or (2) cancella- tion of the contract and refund of the deposit and contract payments. Further, the contracts invariably provide that if the buyer elects to cancel the contract, cancellation and refund is the buyer’s sole remedy; the buyer is not entitled to any further monetary relief.

The above problems and deficiencies, and other problems that are discoverable during the construction process or sea trials, most times can be remedied with minimal loss and inconvenience to the buyer. Accordingly, the contractual remedies indicated above may adequately compensate the buyer for the conse- quences of such deficiencies.

The more nettlesome problems are those that result from latent defects that are not readily apparent and do not manifest themselves until after the vessel is delivered to the buyer and placed in service. These can include a myriad of problems, such as the delayed failure of hull and internal structures, vibration problems, faults or failures with specialized gear, flaws in moving parts such as shafts, and problems with improper installation of the vessel’s systems.

Shipyards have a duty to fully protect themselves from liability for defects and problems discovered after delivery. To be sure, all shipyards contract to indemnify the buyer in the event of a casualty to the vessel, and a number of shipyards provide some level of warranty protection. But, buyers should carefully scrutinize the contract language to ensure that the shipyard bears the risk of loss. Shipyards also have a duty to fully protect themselves from liability for defects and problems discovered after delivery. To be sure, all shipyards contract to indemnify the buyer in the event of a casualty to the vessel, and a number of shipyards provide some level of warranty protection. But, buyers should carefully scrutinize the contract language to ensure that the shipyard bears the risk of loss. Shipyards also have a duty to fully protect themselves from liability for defects and problems discovered after delivery. To be sure, all shipyards contract to indemnify the buyer in the event of a casualty to the vessel, and a number of shipyards provide some level of warranty protection. But, buyers should carefully scrutinize the contract language to ensure that the shipyard bears the risk of loss. Shipyards also have a duty to fully protect themselves from liability for defects and problems discovered after delivery.
D. Proceedings Need Not Be Pending or Even Imminent

Another controversial issue that was addressed and resolved by the Supreme Court in the Intel decision was whether a case abroad must actually be pending or imminent before Section 1782 discovery may be sought. The Supreme Court specifically rejected the requirement of “imminence” that had been adopted by at least one federal appellate court, adopting instead the requirement that a foreign proceeding need merely be “within reasonable contemplation” before Section 1782 discovery may be obtained.

In light of the foregoing, it seems very likely that evidence could be collected pursuant to Section 1782 after formal notice of an intended claim has been filed. Indeed, one might argue that discovery could be sought at an even earlier stage. At the other end of the temporal spectrum, evidence may be sought under Section 1782 for use in foreign appellate proceedings where, as in many foreign countries, the appellate court allows the parties to present new evidence on appeal.

E. Granting of Section 1782 Relief is Discretionary

Although the rules surrounding Section 1782 seem to be liberally interpreted in most cases, the decision whether to grant relief, and the scope of the relief granted, if any, is within the discretion of the federal district court before which the application is made. The Supreme Court has identified some of the factors that a district court may consider in deciding whether to grant or limit the requested discovery. First of all, the appropriateness of Section 1782 relief will be easier in general to establish when evidence is sought from a non-party rather than a party to the foreign proceedings. As the Supreme Court noted: “A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence.” Nevertheless, as in the Intel case itself, it may be possible under appropriate circumstances to obtain evidence in the United States from parties to the foreign proceedings.

In addition, the district court may also “take into account the nature of the foreign tribunal, the character of the proceedings underway, acceptance of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance.” Moreover, a district court could condition the relief in [the applicant’s] reciprocal exchange of information.

Are Shipping Stocks Still Floating?

by Pamela Flaherty

Until recently in 2008, the U.S. securities markets have remained open for, and interested in, shipping stocks despite concerns about the U.S. economy, an eventual slowdown in China and/or potential overbuilding in the industry, the credit crisis, and a downturn in the generally in the securities markets. The ability to raise equity capital for shipping companies in this difficult market environment suggests continuing investor confidence in the industry, as tanker and drybulk companies continued to perform well during the first half of the year. Windows opened in the market for some successful offerings.

Shipping companies have successfully raised equity capital in 2008 through both initial public offerings (“IPOs”) and follow-on offerings. There have been four IPOs in 2008 with listings on the New York Stock Exchange and one IPO listing on the NASDAQ stock exchange. A short review of these offerings, as well as a sample of follow-on offerings, is a good demonstration of the continuing opportunities available to shipping in the U.S. equity markets.

Among the IPO listings on the NYSE there was Navios Maritime Acquisition Corporation, Britannia Bulk Holdings Inc., Safe Bulkers Inc., and most recently, Claymore/Delta Global Shipping ETF. Claymore/Delta (NYSE:SEA) is indicative of the increased interest in the public markets in shipping as well as the increase in the number generally of publicly traded companies in the shipping industry. Claymore/Delta is the first ever ETF to track only a select group of companies involved in the global shipping industry. These investment vehicles are traded just like stocks and have very low expense ratios (and no loads). Essentially, ETFs are indices that track a basket of stocks. Claymore/Delta’s basket includes 30 publicly traded companies worldwide. It has a weighted average market cap of $2.9 billion. Although it remains to be seen whether an ETF in the shipping sector will catch on, it is another example of continued interest in the U.S. markets for shipping and the search for ways for investors to participate.

Navios Maritime Acquisition Corporation (NYSE: NNA) is a special purpose acquisition company formed for the purpose of acquiring one or more assets or operating businesses in the marine transportation and logistics industries. Navios raised $253 million through an IPO on July 1, 2008. The initial offering included units consisting of one common share and one warrant. The units, and now the shares and warrants, trade separately on the NYSE.

Britannia Bulk Holdings Inc. (NYSE:DWT) is an international provider of drybulk shipping and maritime logistics services, with a focus on transporting drybulk commodities in and out of the Baltic region. On June 23, 2008, Britannia Bulk Holdings successfully completed its IPO of shares of common stock raising approximately $125 million in gross proceeds. The company used the proceeds to retire existing indebtedness and for general corporate purposes.

Safe Bulkers Inc. (NYSE:SB) is an international provider of marine drybulk commodities, transport ing bulk cargos, particularly grain, iron ore and coal, along worldwide shipping routes. In Safe Bulkers’ IPO, the sole stockholder of Safe Bulk sold shares representing approximately 52% of the company for total proceeds of $190 million. In this offering, the proceeds went to the selling stockholder rather than the issuer.

In May, there was the debut of Sino-Global Shipping America Ltd. (NASDAQ:SINO) on the NASDAQ stock exchange. Sino-Global is a leading, non-state-owned provider of high-quality shipping services to shipping companies entering Chinese ports. The initial offering produced $9.5 million in gross proceeds that will be used to expand the Company’s facilities in China. On the first day of trading, the stock price of the Company increased from the IPO price of $7.75 per share to $13.98 per share at the end of the first day of trading.

The U.S. securities markets continue to offer stability for companies and the opportunity for additional secondary offerings.

DHT Maritime, Inc. (NYSE:DHT) recently received approximately $92 million in a follow-on offering of 8 million shares of its common stock. The offering was originally contemplated to cover 7 million shares, but this was increased due to the market’s appetite for the issue. In addition, in its major shareholders recently sold shares to a registered underwritten offering receiving gross proceeds of approximately $119 million, thus demonstrating the markets continuing appetite for the shares.

On August 15, another shelf registration statement for an offering of DHT securities of up to $200 million was declared effective, positioning DHT to take advantage at the appropriate time of the opportunity for additional secondary offerings.

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Top Ships Inc. (NASDAQ:TOPS), a provider of seaborne transportation services for the petroleum industry and drybulk commodities for the steel, electric utility, construction and agri-food industries, recently registered the resale of up to 2,268,692 shares of its common stock by certain selling stockholders.

Navios Maritime Acquisition Corp. (AMEX:SRG), a company formed as a business combination company designed to acquire or merge with one or more companies in the shipping industry, completed its IPO on September 28, 2007. The initial
This decision, along with the pending appeal before the Second Circuit in the case United States v. Jho Management, S.A., may eliminate the defense strategy of relying on international law in maritime enforcement cases. It may also result in even more substantial enforcement by the U.S. Coast Guard and Department of Justice and, potentially, increased penalties or prison time for individuals and entities subject to such enforcement actions.

Background
Jho served as the Chief Engineer on board the PACIFIC RUBY, which is an OSG-owned tanker that was engaged in lightering operations from offshore tankers to ports along the Gulf of Mexico. A whistleblower onboard the vessel alerted the Coast Guard to allegedly unlawful discharges from the vessel and also alleged that Jho had tampered with the oily water separator system. In a subsequent Coast Guard inspection, the Coast Guard claimed to have discovered evidence corroborating the whistleblower's allegations.

The U.S. Department of Justice brought charges against both Jho and OSG in which it charged ten counts, specifically one count of conspiracy, one count of making false statements to the Coast Guard, and eight counts of knowing failure to maintain an oil record book. These final eight counts related to eight separate port calls in the United States at which the PACIFIC RUBY allegedly entered U.S. ports with a knowingly inaccurate oil record book.

Jho and OSG argued that international law prevented the United States from prosecuting them for these alleged oil record book violations. They claimed that the U.S. had no authority to pursue a prosecution against a "foreign flag ship for alleged violations of U.S. Coast Guard regulations that occurred aboard ship and outside U.S. waters."11

The lower court dismissed the oil record book charges against both Jho and OSG, holding that the U.S. government was prohibited from prosecuting the oil record book offenses in this matter as such a prosecution would violate principles of international law.

The Court’s Decision
The Fifth Circuit Court of Appeals disagreed with the lower court on two substantial grounds. First, the Court concluded that the lower court "erred in construing the criminal conduct alleged against Jho and OSG to have occurred "outside U.S. waters."" Second, the Court concluded that neither the "law of the flag doctrine" or UNCLOS limited the United States government from exercising jurisdiction to prosecute violations of U.S. criminal laws committed in its ports.

The Legal and Practical Impacts of United States v. Jho and OSG

The Legal and Practical Impacts of United States v. Jho and OSG (continued from page 5)

flag doctrine,” UNCLOS, or other similar bases, will be unlikely to be a successful defense strategy in future criminal prosecutions in the United States. Additionally, oil record book violations may now be increased in relation to a particular vessel depending solely on its U.S. port call frequency.

Anyone involved in the operation of ships calling on the United States needs to understand these issues in order to fully prepare for port state enforcement actions in the United States. This decision involved oil record book entries, but the court’s ruling will likely impact enforcement issues for ship records relating to ballast, air emissions, or other environmental areas of concern in the future. ●

Gathering Evidence in the United States for Use in Foreign Proceedings (continued from page 1)

was filed. Fortunately, in 2004, the United States Supreme Court issued a decision that settled many (but not all) outstanding questions regarding Section 1782’s proper application. In that decision, Intel Corp. v. Advanced Micro Devices, Inc., the Supreme Court confirmed that Section 1782 is to be construed liberally, and expanded, rather than limited, the discovery available to foreign litigants.

B. Prima Facie Requirements Under Section 1782

The prima facie showing necessary to obtain evidence pursuant to Section 1782 is: (1) that the application be made by a foreign or international tribunal or “any interested person,” (2) that it be for use in a proceeding in a foreign or international tribunal, and (3) that the person or entity from whom the discovery is sought be a resident of, or be found in, the federal district in which the application is filed.

1. Any Interested Person

The Intel decision made it clear that the term “interested person” is not limited to parties to a foreign litigation. Indeed, the petitioner in the Intel case was an entity that had initiated an antitrust complaint against a United States corporation before the Directorate-General for Competition of the European Commission. The Supreme Court affirmed the lower appellate court’s ruling that the petitioner/complainant, although not formally a party to the foreign proceedings, had an interest in the proceedings such that it was entitled to discovery of evidence in the United States pursuant to Section 1782.

2. Use in a Foreign or International Tribunal

a. Generally

That the use of Section 1782 was sanctioned in connection with a complaint to the EC’s Directorate-General for Competition—which is not a court of law in the traditional sense—also reflects the liberal approach taken by the Supreme Court in the Intel decision to the question of whether a foreign tribunal or international tribunal is sufficient to invoke what constitutes a “foreign or international tribunal” within the meaning of the statute. The Court found its liberal interpretation to be consistent with the legislative history associated with Section 1782, which suggested that the term “tribunal” was meant to include “investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.” As is clear from prior case law, evidence may be sought pursuant to Section 1782 for use, for example, in preliminary proceedings before a French judge d’instruction, in foreign competency and paternity proceedings, or in connection with bankruptcy proceedings abroad.

b. Foreign Arbitration Proceedings

A cautionary note must be made here with respect to the availability of Section 1782 discovery in connection with foreign arbitrations. Two influential appellate court decisions, from the Second Circuit (encompassing New York, Connecticut, and Vermont) and the Fifth Circuit (encompassing Louisiana, Texas, and Mississippi), issued prior to the 2004 Intel decision, denied Section 1782 relief in connection with foreign private arbitrations. However, in light of the expansive interpretation of the term “tribunal” accepted by the Supreme Court in Intel, lower courts in certain United States jurisdictions have determined that Section 1782 discovery may be had in connection with foreign arbitrations. While not consistent in all instances, the Second or Fifth Circuit has yet had occasion to reexamine their rulings, it would seem to be open to a party to argue that those rulings should be reconsidered in light of the Supreme Court’s ruling in Intel.

3. Located in the District Where the Application is Filed

The requirement that a witness be located in the federal district where the Section 1782 application is filed is relatively straightforward. However, it should be noted that recent cases have cast doubt on whether a witness, even if located in a federal district in the United States, can be forced through an order issued under Section 1782 to produce evidence located outside the United States.

C. Discoverability Requirements

Prior to the Intel decision, the most controversial issue concerning Section 1782 had been whether a district (continued on page 10)
After the Casualty: Collecting and Preserving Evidence
(continued from page 7)

tigation—can expose the witness to perjury charges. Alteration of logs and records can also lead to criminal charges against the individual or the company.

A criminal investigation may also result in the authorities’ taking into custody documents or records, obtaining samples, conducting tests or analyses, etc. The company has no right, not in the least including an inventory of what is taken and the right to accompany the investigators on any inspection or search. Counsel knowledgeable in criminal investigations should be involved from the outset in such a case to ensure that proper measures are taken to protect the company’s rights.

Spoliation of Evidence
In basic terms, in the United States a party has an affirmative duty to preserve evidence that he reasonably believes may be relevant to pending or anticipated litigation. As a practical matter, a marine casualty occurs a party should almost always assume that litigation is likely; thus, any relevant records should be preserved.

Courts in the United States take a particularly dim view of the alteration of log books and vessel records. Even where no criminal investigation is pending, a party can expose itself to civil sanctions and can severely jeopardize its litigation position where it is shown that its employees or agents altered ship’s records. When such alterations are established, the Court is likely to presume that the original entries would have been harmful to the owner’s position. Thus, the proper determination is that even if the alterations are subsequently admitted and are not relied on by the vessel owner, the mere fact that they were made is a factor which must be considered by the trial court in apportioning liability for the casualty.

Similarly, if documents are destroyed or negligently lost, the responsible party can be sanctioned for spoliation of evidence, which can include outright dismissal or the entry of judgment against the responsible party. Lesser sanctions may include a judicially supervised reconstruction of the lost record which would have been harmful to the owner’s position, exclusion of other evidence or testimony, or an award of costs or other financial sanctions.

In today’s electronic age, e-mail and other digital data is almost certain to be central to any significant litigation, and companies must take immediate affirmative steps to ensure that these records are preserved. This does not merely mean printing relevant e-mails; it also means preserving the electronic records and archives themselves in case they contain additional relevant data. This can be extremely cumbersome and expensive, and in some instances it may be possible to shift the costs of this effort to the other party.

Collecting Evidence from Third-Party Sources
Third parties can often prove to be valuable sources of information in a casualty, either as eye-witnesses to events, or to corroborate facts or conditions reflected in a log or in party testimony. Traffic control in a busy passage may have log records indicating when a vessel reported that it passed a particular marker. Or it may have recordings of VHF transmissions or of radar data. ARP stations may have records of vessel positions at relevant times. This data can prove critical to a case, particularly where the events leading up to the casualty are in dispute. In many instances, however, this data may have only been saved for only a short period of time—often a month or less. Thus, it is critical to take the necessary steps to collect this data as soon as possible after a casualty.

In the United States it is possible to obtain a wide variety of government records pursuant to the Freedom of Information Act. Each agency has its own designated contact to whom requests must be directed. Files pertaining to ongoing investigations are typically not subject to disclosure, though records pertaining to closed investigations often are obtainable. Thus, for instance, it is possible to obtain copies of U.S. Coast Guard investigation records once the investigation is concluded.

Collecting Evidence in the United States in Aid of Litigation Abroad
If litigation is pending in a foreign jurisdiction, it may be possible to obtain evidence from third parties located in the U.S. One way to do so is by the traditional route of Letters Rogatory or pursuant to the Hague Convention on the Taking of Evidence Abroad, both of which involve requesting judicial intervention in the United States via international diplomatic channels.

Another powerful method of obtaining evidence from U.S. witnesses in support of foreign proceedings is via Federal statute. 28 U.S.C. §§ 1782 empowers a court to direct a person within the district to give testimony or produce documents. The court may exercise this authority to the extent that UNCLOS may represent customary international law.

The second source of international law referenced by the Court was the United Nations Convention on the Law of the Sea (“UNCLOS”). Although the United States is not a party to UNCLOS, the Court included UNCLOS as international law for the purposes of analysis under APPS to the extent that UNCLOS may represent customary international law.

The lower court held that UNCLOS, specifically Articles 216 and 230, implementing legislation of a port state to prosecute violations of national laws by foreign-flagged vessels outside of the waters of the port state. The Court of Appeals, however, stated that these UNCLOS provisions did not represent the full picture of the international enforcement scheme under UNCLOS in relation to the protection and preservation of the environment.

The Court of Appeals held that the UNCLOS limitations did not apply to the “in-port, oil record book offenses charged in this case.” According to the Court, UNCLOS Article 218 provides port states the authority to institute proceedings based on pollution violations that occurred entirely outside the territorial sea or exclusive economic zone of the port state. Essentially, the Court determined that nothing in UNCLOS limits the power of the United States, as the port state in this matter, to pursue “violations of marine pollution law that occur outside of its ports, and in some circumstances, outside of its coastal zone.”

Conclusions
This decision by the U.S. Court of Appeals for the Fifth Circuit now provides judicial approval for U.S. government criminal prosecutions of owners, operators, and crewmembers of foreign-flagged vessels for alleged MARPOL violations that occur in foreign waters. In other terms, the U.S. government now has the confirmed authority to prosecute MARPOL/APPs violations, at least in relation to falsified oil record books, no matter where the actual alleged pollution incident and false oil record book entry occurred.

Similar issues to those raised in this decision are also before the Court of Appeals for the Second Circuit in the matter of United States v. Ionica Management. The Court of Appeals in the Jho matter cited the District Court decision in the Ionica case where the court held that the essence of the violation was “not the pollution itself, or even the Oil Record Book violation occurring at that time, but the misrepresentation in port.”

Absent conflicting decisions in the pending Ionica appeal or other federal or clarification by the U.S. Supreme Court on these issues, relying on the so-called “International Law” defenses of the law of the
It should be obvious, but the vessel’s paper records must be preserved as well. This not only includes official documents such as the various logsbooks and operational records; it also includes any “scratch” paper or notes which might contain relevant information such as positions, radar contacts, or soundings that have not yet gotten into a log. In most certainly also includes the navigational chart or charts that were in use at the relevant times, and it is critical that any notations or markings on the charts at the time of the casualty be preserved.

Availing Email Fraud—Domain Name Solicitations from Asia
by Alfred Zaher

Corporations need to be made aware of the current rise in a popular email spamming scheme involving the fraudulent solicitation for the registration of domain names in Asia. In past months, U.S. and foreign corporations have been peppered with emails that contain dire warnings of third parties attempting to register or “hijack” domain names, corporate brands, and keywords (a short memorable address that redirects a user to a website) containing important corporate names and trademarks. At present, the focus tends to be on top level domains (TLDs) in Asia, specifically, .asia and Asian country codes (e.g., .cn, .hk, .tw, and .jp). The focus on Asian TLDs is most likely due to the recent rollout of the .asia TLD.

In most cases the sender purports to be an official government agency and/or domain name registration organization with ominous news of a third party’s attempt to register a corporate name or trademark. An application for certain domains and keywords

CRIMINAL INVESTIGATIONS

It is not uncommon these days for a marine casualty to result in a simultaneous criminal investigation. Special considerations arise in such cases.

Where an investigation occurs, any statements made by a crew member, employee, or officer who is under investigation may be used against him in criminal proceedings. This includes not only written statements, but also verbal statements, and communications between the subject individual and the company are not privileged from disclosure in this content. In such a case, the person being investigated is entitled to—and normally should have—separate counsel. The Fifth Amendment to the U.S. Constitution protects a witness from being required to make self-incriminating statements, and in such cases an individual’s own personal interests are often best served by saying nothing at all, either to the investigators or to his employers.

Particular care should be given not to attempt to persuade crew members or other employees to refuse to cooperate with the authorities or to make false or misleading statements. Doing so can expose the witness and/or the counseling parties to criminal charges of obstruction of justice. Lying under oath—such as in a grand jury investi-
Avoiding Email Fraud–Domain Name Solicitations from Asia

by Alfred Zaher

Corporations need to be made aware of the current rise in a popular email spamming scheme involving the fraudulent solicitation for the registration of domain names in Asia. In past months, U.S. and foreign corporations have been peppered with emails that contain dire warnings of a third party’s attempt to register a corporate name or trademark. Below is an example of a typical message:

Dear CEO,

We are the domain name registration organization in Asia in charge of the domain registration of all international corporations in Asia. An application for certain domains and keywords has been filed for the following domain names:

- xcompany.asia
- xcompany.cc
- xcompany.cn
- xcompany.com.cn
- xcompany.hk
- xcompany.info
- xcompany.tw
- and the keyword “xcompany” through our official body.

As a result of our auditing procedure, we discovered that the alleged “Xingchia Holdings Limited” has no trademark, intellectual property, or patent similar to “xcompany.” Further, our records indicate that the keywords and domain names applied for are the same as your company’s name and trademark. Please confirm “Xingchia Holdings Limited” is your business partner or distinguish you in Asia. If so, we will complete their registration. If the company above is unrelated to you, international domain name registrations require us to offer registration of the domain names to you as you have the preferential right to register and protect your trademark. Should you be interested in the registration of the domain names, please contact us within 7 days. Should we fail to hear from you, the applications will go forward.

Best Regards,

International Domain Organization of Asia

Alfred Zaher

Zaher@BlankRome.com

(continued on page 2)

Criminal Investigations

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MEET BLANK ROME

Editor’s note: This article is second in a series aimed at introducing some of our other practice groups at Blank Rome. In this article, contributed by our Intellectual Property Practice Group, we discuss trademark protection in Asia concerning fraudulent domain name solicitations.

Trademark Protection in Asia

Though the communication may look official and ominous, it is nothing more than a spamming scheme conducted by unscrupulous registrars looking to drum up business. A simple Internet search will uncover the fact that the domain names are available for purchase, and the solicitor has no official role in the registration of domain names other than being a common registrar. The goal of the solicitor is to panic the recipient into registering the domain names through them which will inevitably result in one or more of the following:

1) the corporation purchases unnecessary domain names and keywords;
2) the corporation pays much higher registration fees than a legitimate registrar would charge; and/or
3) the registrar ends up hijacking the very domains they claimed to protect.

While the sender of the email should be ignored, the communication should not be. We recommend corporations use these communications as a wake up call to review their business interests in Asia, and if the company is active in Asia, or may be active in the future, we recommend filing for appropriate domain names and keywords through accredited reputable registrars.

Trademark Protection in Asia

China alone has over a billion potential Internet users. Registration of not only trademarks, but domain names and keywords in Asia, is recommended for companies not only doing business in Asia, but those who merely manufacture goods there for export. Registration is recommended for all house marks and important brand names in both English and the foreign translated and transliterated forms. As people begin navigating the Internet in their native language, registration of trademarks, domain names, and keywords in translated and transliterated forms is important in most Asian countries.

Once a trademark application is filed, it is not uncommon for individuals to troll trademark registries and hijack the corresponding domain names of newly filed trademarks. Therefore, the registration of the respective domain names and keywords should coincide with the registration of important trademarks. Domain names are easy and fairly inexpensive to register, but once received, they can be difficult and expensive to recover. Defensive registration of trademarks, domain names, and keywords can be an important part of any protection strategy.

One positive unintended affect of the fraudulent domain name registration solicitations is that they can be a wake up call for companies to devise a trademark protection strategy in Asia which includes not only the registration of key trademarks and logos, but the registration of the corresponding domain names and key words as well. The hijacking of domain names is all too common. In order to avoid becoming a victim we recommend all clients develop and implement an effective trademark protection strategy which includes the defensive registration of all key corporate names and trademarks.

Blank Rome is poised to assist corporations in these matters. With offices strategically placed in Hong Kong, New York, Philadelphia, and Washington DC, among other places, Blank Rome’s intellectual property practice covers every aspect of national and international patent, trademark, and copyright law for foreign and domestic clients in a wide range of industries. Blank Rome’s corporate and IP groups are comprised of multidisciplinary prosecution and litigation teams with extensive experience in investigating, procuring, and enforcing intellectual property rights, litigating matters when necessary, as well providing necessary licensing and other business transaction assistance.
tigation—can expose the witness to perjury charges. Alteration of logs and records can also lead to criminal charges against the individual or the company.

A criminal investigation may also result in the authorities’ taking into custody documents or records, obtaining samples, conducting tests or analyses, etc. The company has no rights not in the least including an inventory of what is taken and the right to accompany the investigators on any inspection or search. Counsel knowledgeable in criminal investigations should be involved from the outset in such a case to ensure that proper measures are taken to protect the company’s rights.

**Spoliation of Evidence**

In basic terms, the United States party has an affirmative duty to preserve evidence that he reasonably believes may be relevant to pending or anticipated litigation. As a practical matter, where a marine casualty occurs a party should always assume that litigation is likely; thus, any relevant records should be preserved.

Courts in the United States take a particularly dim view of the alteration of log books and vessel records. Even where no criminal investigation is pending, a party can expose itself to civil sanctions and can severely jeopardize its litigation position where it is shown that its employees or agents altered ship’s records. When such alterations are established, the Court is likely to presume that the original entries would have been harmful to the owner’s position in any litigation. Reasonable doubt is to the effect that the alteration was made is a factor which must be considered by the trial court in apportioning liability for the casualty.

Similarly, if documents are destroyed or negligently lost, the responsible party can be sanctioned for spoliation of evidence, which can include outright dismissal or the entry of judgment against the responsible party. Lesser sanctions may include a judicial presupposition that the lost document included outright dismissal or the entry of judgment against the responsible party. Lesser sanctions may include a judicial presupposition that the lost document included outright dismissal or the entry of judgment against the responsible party. Lesser sanctions may include a judicial presupposition that the lost document included outright dismissal or the entry of judgment against the responsible party.

In today’s electronic age, e-mail and other digital data is almost certain to be central to any significant litigation, and companies must take immediate affirmative steps to ensure that these records are preserved. This does not merely mean printing relevant e-mails; it also means preserving the electronic records and archives themselves in case they contain additional relevant data. This can be extremely cumbersome and expensive, and in some instances it may be possible to shift the costs of this effort to the other party.

**Collecting Evidence from Third-Party Sources**

Third parties can often prove to be valuable sources of information in a casualty, either as eye-witnesses to events, or to corroborate facts or conditions reflected in a log or in party testimony. Traffic control in a busy passage may have log records indicating when a vessel reported that it passed a particular marker. Or it may have recordings of VHF transmissions or of radar data. APPS stations may have records of vessel positions at relevant times. This data can prove critical to a case, particularly where the events leading up to the casualty are in dispute. In many instances however, this data may have value only a short period of time—often a month or less. Thus, it is critical to take the necessary steps to collect this data as soon as possible after a casualty.

In the United States it is possible to obtain a wide variety of government records pursuant to the Freedom of Information Act. Each agency has its own designated contact to whom requests must be directed. Files pertaining to ongoing investigations are typically not subject to disclosure, though records pertaining to closed investigations often are obtainable. Thus, for instance, it is possible to obtain copies of U.S. Coast Guard investigation records once the investigation is concluded.

**Collecting Evidence in the United States in Aid of Litigation Abroad**

If litigation is pending in a foreign jurisdiction, it may be possible to obtain evidence from third parties located in the U.S. One way to do so is by the traditional route of Letters Rogatory or pursuant to the Hague Convention on the Taking of Evidence Abroad, both of which involve requesting judicial intervention in the United States via international diplomatic channels.

Another powerful method of obtaining evidence from U.S. witnesses in support of foreign proceedings is via Federal statute. 28 U.S.C. § 1782 empowers a court to direct a person within the district to give testimony or produce a document. In the context of the present discussion, basic requirements are: (1) the discovery sought must be for use in a foreign proceeding; (2) the application must be brought in a district in which the party from whose discovery is sought is “found”; and (3) the party seeking discovery must be either a “foreign tribunal” or an “interested party.” For more details about this powerful statutory tool, see Cameron Beard’s article at the beginning of this issue of Mainbrace.

**Conclusion**

Having an advanced understanding of the basic issues you are likely to face in collecting evidence in respect of a marine casualty will help prepare you to take the right steps when you get that telephone call in the middle of the night.


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public offering generated gross proceeds of $231 million. Scenery is now about to conclude its first acquisition of vessels.

Tereyk Offshore Partners LP (NYSE:TOO) has an effective shelf registration statement for up to $750 million of securities. In June, it priced and sold $140 million of its common units under the shelf registration statement. Tereyk provides marine transportation and storage services to petroleum companies.

Tereyk LNG Partners LP (NYSE:TGP) completed a follow on offering of 5.73 million common shares raising an additional $127 million in April 2008.

There appears to be continued interest in the shipping sector of the U.S. securities markets and a variety of securities products. As can be seen from this sampling, the U.S. public equity markets continue to provide capital to the shipping industry for internal expansion, acquisitions, and debt repayment. Although we will need to weather the current economic crisis and disruption among U.S. investment banks, we remain hopeful that when the markets return and opportunities arise, the U.S. public equity markets should continue to provide a valuable source of capital for the shipping industry particularly for those who are ready to take advantage of it when the time comes.

### The Legal and Practical Impacts of United States v. Jho and OSG

**by Conor Wardle**

A June 30, 2008 decision in the case of United States v. Ram Van Jho and Overseas Shipholding Group, Inc. by the U.S. Court of Appeals for the Fifth Circuit will impact the international maritime community for years to come. Shipowners, operators, crewmembers, lawyers and insurers, among others, need to be aware of the ramifications of this decision and prepare accordingly.

From a legal perspective, this decision is significant primarily because of the court’s determination that international law does not preclude the authority and jurisdiction of the United States to prosecute pollution-related incidents by foreign-flag vessels that occur outside of U.S. waters if such vessels subsequently call on U.S. ports and have maintained inaccurate oil record books.

From a practical perspective, the significance is that potential liability for false oil record book entries may now expand as their vessels continue to call on U.S. ports and such oil record books remain on board.

This decision, along with the pending appeal before the Second Circuit in the case United States v. Ionia Management, S.A., may eliminate the defense strategy of relying on international law in maritime enforcement cases. It may also result in even more substantial enforcement actions by the U.S. Coast Guard and Department of Justice and, potentially, increased penalties or prison time for individuals and entities subject to such enforcement actions.

### Background

Jho served as the Chief Engineer on board the PACIFIC RUBY, which is an OSG-owned tanker that was engaged in lightering operations from off-shore tankers to ports along the Gulf of Mexico. A whistleblower onboard the vessel alerted the Coast Guard to allegedly unlawful discharges from the vessel and also alleged that Jho had tampered with the oily water separator system. In a subsequent Coast Guard inspection, the Coast Guard claimed to have discovered evidence corroborating the whistleblower’s allegations.

The U.S. Department of Justice brought charges against both Jho and OSG in which it charged ten counts, specifically one count of conspiracy, one count of making false statements to the Coast Guard, and eight counts of knowing failure to maintain an oil record book. These final eight counts related to eight separate port calls in the United States at which the PACIFIC RUBY allegedly entered U.S. ports with a knowingly inaccurate oil record book.

Jho and OSG argued that international law prevented the United States from prosecuting them for these alleged oil record book violations. They claimed that the U.S. had no authority to pursue a prosecution against a foreign flag ship for alleged violations of U.S. Coast Guard regulations that occurred abroad ship and outside U.S. waters."

The lower court dismissed the oil record book charges against both Jho and OSG, holding that the U.S. government was prohibited from prosecuting the oil record book offenses in this matter as such a prosecution would violate principles of international law.

### The Court’s Decision

The Fifth Circuit Court of Appeals disagreed with the lower court on two substantial grounds. First, the Court concluded that the lower court “erred in construing the criminal conduct alleged against Jho and OSG to have occurred ‘outside U.S. waters.’” Second, the Court concluded that neither the “law of the flag doctrine” or UNCLLOS limited the United States government from exercising jurisdiction to prosecute violations of U.S. criminal laws committed in its ports.

### Gathering Evidence in the United States for Use in Foreign Proceedings

was filed. Fortunately, in 2004, the United States Supreme Court issued a decision that settled many (but not all) outstanding questions regarding Section 1782’s proper application. In that decision, Intel Corp. v. Advanced Micro Devices, Inc., the Supreme Court confirmed that Section 1782 is to be construed liberally, and expanded, rather than limited, the discovery available to foreign litigants.

### B. Prima Facie Requirements Under Section 1782

The prima facie showing necessary to obtain evidence pursuant to Section 1782 is: (1) that the application be made by a foreign or international tribunal or ‘any interested person’; (2) that it be for use in a proceeding in a foreign or international tribunal, and (3) that the person or entity from whom the discovery is sought be a resident of, or be found in, the federal district in which the application is filed.

#### 1. Any Interested Person

The Intel decision made it clear that the term “interested person” is not limited to parties to a foreign litigation. Indeed, the petitioner in the Intel case was an entity that had initiated an antitrust complaint against a United States corporation before the Directorate-General for Competition of the European Commission. The Supreme Court affirmed the lower appellate court’s ruling that the petitioner/complainant, although not formally a party to the foreign proceedings, had an interest in the proceedings such that it was entitled to discovery of evidence in the United States pursuant to Section 1782.

### Use in a Foreign or International Tribunal

#### a. Generally

That the use of Section 1782 was sanctioned in connection with a complaint to the EC’s Directorate-General for Competition—which is not a court of law in the traditional sense—also reflects the liberal approach taken by the Supreme Court in the Intel decision to the question of what constitutes a “foreign or international tribunal” within the meaning of the statute. The Court found its liberal interpretation to be consistent with the legislative history associated with Section 1782, which suggested that the term “tribunal” was meant to include “investigating magistrates, administrative and arbitral tribunals, and consular courts, as well as the criminal, civil, commercial, and administrative courts.”

### b. Foreign Arbitration Proceedings

A cautionary note must be made here with respect to the availability of Section 1782 discovery in connection with foreign arbitrations. Two influential appellate court decisions, from the Second Circuit (encompassing New York, Connecticut, and Vermont) and the Fifth Circuit (encompassing Louisiana, Texas, and Mississippi), issued prior to the 2004 Intel decision, denied Section 1782 relief in connection with foreign private arbitrations. However, in light of the expansive interpretation of the term “tribunal” accepted by the Supreme Court in Intel, lower courts in certain United States jurisdictions have determined that Section 1782 discovery may be had in connection with foreign arbitrations. While not finalized, the Second or Fifth Circuit has yet had occasion to re-examine their rulings, it would seem to be open to a party to argue that those rulings should be reconsidered in light of the Supreme Court’s ruling in Intel.

### 3. Located in the District Where the Application is Filed

The requirement that a witness be located in the federal district where the Section 1782 application is filed is relatively straightforward. However, it should be noted that recent cases have cast doubt on whether a witness, even if located in a federal district in the United States, can be forced through an order issued under Section 1782 to produce evidence located outside the United States.
D. Proceedings Need Not Be Pending or Even Imminent

Another controversial issue that was addressed and resolved by the Supreme Court in the Intel decision was whether a case abroad must actually be pending or imminent before Section 1782 discovery may be sought. The Supreme Court specifically rejected the notion of “imminence” that had been adopted by at least one federal appellate court, adopting instead the requirement that a foreign proceeding need not be only imminent but must be underway, “in the truest sense, not a matter of speculation or conjecture.” The Court reasoned that it had previously established that a district court could condition relief upon the applicant’s reciprocal exchange of information.

In addition, the district court may also “take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government to requests for production of evidence.” In addition, “a district court could condition relief upon the granting of reciprocal relief to the [applicant’s] reciprocal exchange of information.”

E. Granting of Section 1782 Relief is Discretionary

Although the rules surrounding Section 1782 seem to be liberally interpreted in most cases, the decision whether to grant relief, and the scope of the relief granted, if any, is within the discretion of the federal district court before which the application is made. The Supreme Court has identified some of the factors that a district court may consider in deciding whether to grant or limit the requested discovery.

First of all, the appropriateness of Section 1782 relief will be easier in general to establish when evidence is sought from a “foreign tribunal or the state of a party,” rather than a foreign court. As the Supreme Court noted: “A foreign tribunal or the state of a party can take evidence before it, and can itself order their production.” Nevertheless, as in the Intel case itself, it may be possible under appropriate circumstances to obtain evidence in the United States from parties to the foreign proceedings.

In addition, the district court may also “take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance.” Moreover, a district court could consider the “scope of the foreign government’s or the court’s power to obtain evidence from the parties to the foreign proceedings.”

In addition, the district court may also “take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance.” Moreover, a district court could consider the “scope of the foreign government’s or the court’s power to obtain evidence from the parties to the foreign proceedings.”

Are Shipping Stocks Still Floating?

by Pamela Flaherty

Until recently in 2008, the U.S. securities market had remained open for, and interested in, shipping stocks despite concerns about the U.S. economy, an eventual slowdown in the global shipping industry, the credit crisis, and a downturn in the general U.S. securities market. The ability to raise equity capital for shipping companies in this difficult market environment suggests continuing investor confidence in the industry, as tanker and drybulk companies continued to perform well during the first half of the year. Windows opened in the market for some successful offerings.

Shipping companies have successfully raised equity capital in 2008 through both initial public offerings (“IPOs”) and follow-on offerings. There have been four IPOs in 2008 with listings on the New York Stock Exchange and one IPO listing on the NASDAQ stock exchange. A short review of these offerings, as well as a sample of follow-on offerings, is a good demonstration of the continuing opportunities available to shipping in the U.S. equity markets.

Among the IPO listings on the NYSE there was Navios Maritime Acquisition Corporation, Britannia Bulk Holdings Inc., Safe Bulkers Inc., and most recently, Claymore/Delta Global Shipping ETF. Claymore/Delta (NYSE:SEA) is indicative of the increased interest in the public markets in shipping as well as the increase in the number generally of publicly traded companies in the shipping industry. Claymore/Delta is the first ever ETF (Exchange-Traded Product) that tracks only companies involved in the global shipping industry. These investment vehicles are traded just like stocks and have very low expense ratios (and no loads). Essentially, ETFs are indexes that track a basket of stocks. Claymore/Delta’s basket includes 30 publicly traded companies worldwide. It has a weightaged average market cap of $2.9 billion. Although it remains to be seen whether an ETF in the shipping sector will catch on, it is another example of continued interest in the U.S. markets for shipping and the search for ways to investors to participate.

Nerio Maritime Acquisition Corporation (NYSE: NNA) is a special purpose acquisition company formed for the purpose of acquiring one or more assets or operating businesses in the maritime transportation and logistics industries. Nerio raised $253 million through an IPO on July 1, 2008. The initial offering included units consisting of one common share and one warrant. The units, and now the shares and warrants, trade separately on the NYSE.

Britannia Bulk Holdings Inc. (NYSE:DWT) is an international provider of drybulk shipping and maritime logistics services, with a focus on transporting drybulk commodities in and out of the Baltic region. On June 23, 2008, Britannia Bulk Holdings successfully completed its IPO of shares of common stock raising approximately $125 million in gross proceeds. The company used the proceeds to retire existing indebtedness and for general corporate purposes.

Safe Bulkers Inc. (NYSE:SB) is an international provider of marine drybulk shipping services, transporting iron ore and coal, grain and a variety of other drybulk cargos, primarily grain, iron ore and coal, along worldwide shipping routes. In Safe Bulkers’ IPO, the sole stockholder of Safe Bulk sold shares representing approximately 17% of the company for total proceeds of $190 million. In this offering, the proceeds went to the selling stockholder rather than the issuer.

In May, there was the debut of Sino-Global Shipping America Ltd. (NASDAQ:SINO) on the NASDAQ stock exchange. Sino-Global is a leading, non-state-owned provider of high-quality drybulk cargo shipping services to shipping companies entering Chinese ports. The initial offering produced $9.5 million in gross proceeds that will be used to expand the Company’s facilities in China. On the first day of trading, the stock price of the Company increased from the IPO price of $7.75 per share to $13.98 per share at the end of the first day of trading.

The U.S. securities market continue to offer stability for companies and the opportunity for additional secondary offerings.

DHT Maritime, Inc. (NYSE:DHT) recently received approximately $92 million in an IPO on offering of 8 million shares of its common stock. The offering was originally contemplated to cover 7 million shares, but this was increased due to the market’s appetite for the issue. In addition, in major shareholder recently sold shares in a registered underwritten offering receiving gross proceeds of approximately $119 million, thus demonstrating the market’s continuing appetite for the shares.

On August 15, another shelf registration statement for an offering of DHT securities of up to $200 million was declared effective, positioning DHT to take advantage of potential opportunities that open up in the market. With an effective shelf registration statement, the Company is positioned to complete an offering of debt or equity securities immediately rather than having to wait during a lengthy SEC review process.

Top Ships Inc. (NASDAQ:TOPS), a provider of seaborne transportation services for the petroleum industry and drybulk commodities for the steel, electric utility, construction and agri-food industries, recently registered the resale of up to 7,268,692 shares of its common stock by certain selling stockholders.

In May, there was the debut of Sino-Global Shipping America Ltd. (AMEX:SRG), a company formed as a business combination company designed to acquire or one more companies in the shipping industry, completed its IPO on September 28, 2007. The initial
After the Casualty: Collecting and Preserving Evidence

by Thomas H. Belknap, Jr.

It is late on a Friday evening (isn’t it always?) and you have just gotten that dreaded telephone call: one of your ships has been in a collision. Fortunately, no one appears to have been hurt, but both ships—and cargoes—are severely damaged. Then the question comes: can you catch the next plane to East Whatchamacallit to meet the vessel? Next thing you know you are on the bridge, with captain and crew and salvors and surveyors and P&I representatives and lawyers and class representatives and port state officials and lord-knows-who-all scurrying about trying to get a handle on what has happened. You know there will be claims, and you want to be ready to deal with the issues that undoubtedly will arise. Here are a few points to consider when you find yourself in this position.

Collecting Evidence From Your Own Client

Witness Statements

In many jurisdictions it is common practice for the lawyers who first respond to a casualty to immediately have all of the relevant crew members and other witnesses give and sign written statements. This can prove useful in a jurisdiction where rights of discovery are limited and a signed statement is admissible evidence in the event the witness himself is unavailable to give evidence or testimony in person. Statements can be helpful because they represent contemporaneous accounts of events taken while the memory is fresh.

Even the best-prepared statement can contain significant errors, however, because: (1) the witness is in shock, exhausted, or even injured following the traumatic experience of a casualty; or (2) he states as fact information about which he is actually uncertain, or (3) the witness gives misleading or inaccurate information in an effort to protect himself or the owner, or (4) he feels pressured to sign the statement by the company or its lawyers, or (5) there are language barriers, or (6) any of a number of other reasons. Moreover, statements often turn out to be incomplete because facts that seem critical at the time end up being irrelevant or, worse, facts that turn out to be critical are overlooked or misunderstood at the time the statement is prepared.

For this reason, obtaining signed witness statements can be extremely risky where a case ultimately appears likely to wind up in litigation in the United States. A signed statement is in most instances not admissible in court proceedings in the United States except against the person or party who made it. So, even if the statement is incredibly helpful, it will almost never be allowed into evidence to support the owner’s claim.

Signed witness statements, however, generally are discoverable by the opponent in litigation. Thus, a party may be required to disclose the statement to the other side even though it cannot itself use it in the litigation. Further, even though a party may not be able to put into evidence a statement it has obtained from its crew or other employees, the opposing party may in many circumstances introduce the statement into evidence as a “party admission” where the statement ends up containing information that turns out to be harmful to the party’s position.

Therefore, before signed witnesses are obtained, careful consideration should be given to whether the case is likely to end up in a U.S. court. If so, then serious thought should be given to whether a more “secure” means of memorializing information obtained from witnesses—such as an attorney’s written interview memorandum—should be employed.

Preserving Documents and Electronic Evidence

Modern vessel navigation systems often record data that may be highly relevant in a casualty situation. Some examples include course recorders, engine maneuver recorders, GPS, Radar/ARPA systems, ADS, and electronic chart systems (ECDIS). It may also include a so-called

(continued on page 6)

NOTES FROM THE EDITOR

by Thomas H. Belknap, Jr.

It’s always nice to be noticed, and we were gratified to see our last issue of Mainbrace referenced (favorably) in Lloyd’s List and Maritime Advocate Online, among other places. Authors like to be read—none more so than lawyers!—and we particularly enjoy it when our readers seem to agree with us.

As to the subjects we write about, our principal goal is to make our articles relevant and timely. For each issue, the call for articles goes out, ideas are pitched and a lot of good ideas; however, we are always open to suggestions. If you have any ideas for topics for future issues of Mainbrace, please let us know.

We like feedback, too. If you have a comment or question about any of the articles you read, we hope you will pass it along.

F. Exhaustion of Foreign Procedures

The Second and Third Circuit Courts of Appeals have explicitly held (and there does not seem to be explicit authority to the contrary from other appellate courts), that a private litigant in foreign proceedings may apply ex parte to a United States court for an order directing the production of evidence pursuant to Section 1782, without first having sought to obtain the desired evidence through the foreign tribunal. Indeed, the Second Circuit has stated that foreign procedure is an “impermissible factor”—one that could not be considered by the district court—in determining whether to grant Section 1782 relief.

G. Collection of Evidence from Governmental Bodies

Section 1782 cannot be used to obtain classified or other sensitive material from governmental entities in the United States. Indeed, one court has ruled that the United States, as a sovereign power, is not a “person” within the meaning of Section 1782, from which evidence may be obtained. On the other hand, litigants seeking evidence from governmental bodies in the United States may be able to make use of other devices, such as the United States Freedom of Information Act, 5 U.S.C. § 552, or analogous statutes in force in particular American states.

H. Conclusion

Section 1782 provides a powerful tool for gathering evidence in the United States. There remain some issues with respect to which Section 1782 may be interpreted inconsistently by different federal district or circuit courts within the United States federal court system; however, the decision of the United States Supreme Court in Intel has clarified many of the outstanding issues regarding the statute’s proper application, and has broadened the availability of Section 1782 relief.

When it is most appropriate for a foreign litigant to seek evidence in the United States pursuant to Section 1782, or pursuant to the Hague Convention, or pursuant to both statute and convention, should of course be considered on a case-by-case basis in consultation with United States counsel.

Liability of Shipyard—Buyers Beware

by Richard V. Singleton III

Problems in newly constructed vessels are usually attributable to design issues, poor construction, or defective materials. Some problems are readily apparent during construction or sea trials. Others may not manifest themselves for years after delivery—frequently at the worst possible times.

The buyer of a newly delivered vessel that experiences a problem is usually not so concerned with the niceties of whether the problem is design or construction related. His immediate concern is that unexpected repairs are now required and his ability to use the vessel as an income-generating asset has been lost or diminished for a period of time. The buyer’s level of frustration becomes even greater if the problem is chronic, with multiple attempts to the Yard to resolve the problem resulting in unsatisfactory results. This may prompt a buyer to investigate his recourse against the Yard—an exercise that can be as frustrating as the vessel’s problem itself.

Ship construction contracts are replete with clauses that: (1) limit the types of claims that can be brought against the shipyard; and (2) restrict the damages that may be recoverable by stipulating agreed remedies and excluding some categories of damages altogether. Most shipyard contracts contain clauses that assist a vessel’s non-compliance with the contract’s specifications, such as specifications relating to speed, fuel consumption, and cargo capacity to name a few. Contracts usually limit the buyer’s remedy for each of these problems to the option of: (1) an agreed percentage reduction in the contract price; or (2) cancellation of the contract and refund of the deposit and contract payments. Further, the contracts invariably provide that if the buyer elects to cancel the contract, cancellation and refund is the buyer’s sole remedy; the buyer is not entitled to any further monetary relief.

The above problems and deficiencies, and other problems that are discoverable during the construction process or sea trials, most times can be remedied with minimal loss and inconvenience to the buyer. Accordingly, the contractual remedies indicated above may adequately compensate the buyer for the consequences of such deficiencies.

The more nettlesome problems are those that result from latent defects that are not readily apparent and do not manifest themselves until after the vessel is delivered to the buyer and placed in service. These can include a myriad of problems, such as fire, smoke, other related failures of the hull or internals, vibration problems, faults or failures with specialized gear, flaws in moving parts such as shafts, and problems with improper installation of the vessel’s systems. Shipyards have often fully protected themselves from liability for defects and problems discovered after delivery. To be sure, all shipyard contracts guarantee the design, material, and workmanship, but this guarantee provides little comfort given its limitations and qualifications. First, the guarantee is only good for a limited time, generally twelve months. The Yard is not liable for problems that manifest themselves after the guarantee period expires. Although a Yard may agree to remedy the problem, it is not legally obligated to do so.

(continued on page 12)

by W. Cameron Beard

FOREIGN PARTIES AND THEIR LAWYERS OFTEN wish to gather evidence in the United States. A key witness, whose testimony is required for a foreign proceeding, may be located in the United States and beyond the jurisdictional reach of the foreign court. Similarly, critical documents may be maintained in the United States by a third party over whom the foreign court has no control.

The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (the “Hague Convention”) is certainly one mechanism that can be used to collect evidence in the United States—assuming that the foreign litigation is pending in a country that is a Hague Convention signatory. However, under United States law, alternative and arguably more powerful tools for evidence collection exist that may provide foreign litigants with access to evidence in the United States without resort to the Hague Convention, and which may be invoked regardless of whether the party invoking them is from a country that is a party to the Hague Convention.

The most powerful statutory tool for the collection of documentary or testimonial evidence in the United States is 28 U.S.C. § 1782 (“Section 1782”). Section 1782 allows foreign courts or private litigants in a foreign proceeding to apply directly to a United States federal court for an order directing a person or entity in the United States to produce documentary or testimonial evidence in the United States. The foreign court is not required to obtain Section 1782 evidence even where such depositions would not be allowed under the law of the country where the dispute is pending. For example, it may be possible to obtain a court order directing a person or entity in the United States to produce general classes of relevant documents for use in a foreign proceeding, without reference to strict requirements of specificity that may be required under the civil procedure laws of the foreign forum. Similarly, pretrial oral depositions of witnesses in the United States may be allowed under Section 1782 even where such depositions would not be allowed under the laws of the country where the dispute is pending.

A. Recent Decision by the United States Supreme Court

Until recently, Section 1782 was interpreted differently by the various federal appellate courts in the United States. This led to a situation where litigants might be allowed more or less discovery depending on the location in the United States where the Section 1782 application was filed.

The Supreme Court of the United States recently decided a case in which Section 1782 was used by a foreign party to obtain evidence in the United States. The case is Bringing Evidence in the United States for Use in Foreign Proceedings: 28 U.S.C. § 1782

1. Foreign parties and their lawyers often wish to gather evidence in the United States.

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