MAINBRACE

NOVEMBER 2019 • NO. 3

BLANKROME maritime

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Note from the Editor

BY THOMAS H. BELKNAP, JR.

As another year comes to a close, it is a perfect opportunity to evaluate the challenges and opportunities that we faced—and hopefully, embraced and overcame—as well as the goals we will set for the year ahead. Whether in the personal or professional realm, in the maritime industry or beyond, a good team is always greater than the sum of its parts.

In this final *Mainbrace* edition for 2019, we take a look at progressive topics involving the ever-developing legal, regulatory, and financial landscape for autonomous vessels, as well as current developments regarding climate change and renewable energy in the maritime industry. We also revisit key discussions involving insolvency-related judgments under chapter 15; exercising maritime liens against cargo and sub-freights; effectively utilizing personal jurisdiction matters; and the reach and limitations of U.S. forfeiture law. All of these timely articles remind us that the maritime industry continues to evolve, grow, and change—sometimes slower than we'd like, and other times at lightning speed—and we must therefore continue to work together to understand and safely adapt to important shipping developments as they occur.

We also highlight some of the recent accomplishments, recognitions, and newsworthy developments both within our Maritime group and our Firm as a whole. We are incredibly proud of our Blank Rome family of attorneys and professionals for working diligently every day to ensure that our clients, colleagues, and communities are valued and appreciated, and we are humbled and honored to receive recognition from our clients, peers, and the legal industry in doing so.

May the final weeks of 2019 bring peace and prosperity to you and yours during the holiday season and new year celebrations. We look forward to continuing our quarterly *Mainbrace* editions in the year ahead and working with you in 2020 and beyond.

EDITOR, *Mainbrace*

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Exercising Maritime Liens against Cargo and Sub-Freights

BY THOMAS H. BELKNAP, JR.

THOMAS H. BELKNAP, JR.
PARTNER

Vessel owners rarely carry cargo for their own account. More commonly by far, a vessel owner will charter its vessel to another party to carry their (or their sub-charterer's) cargo. The contracts can vary widely—from voyage charters or contracts of affreightment to time charters and negotiable bills of lading (not to mention the more complex arrangements that one often sees for container cargos). But in most instances, vessel owners are in the business of transporting cargo on behalf of others and, all going well, of being paid to do so. This article is about one mechanism the vessel owner may use to ensure that it gets paid: the maritime lien against cargo.

The Impracticalities of Settled U.S. Maritime Law

It has been settled for over a century under U.S. maritime law that a shipowner has a maritime lien against cargo for charges incurred during the course of its carriage. As the Supreme Court stated in its 1866 decision in *Bird of Paridise,*[1] "Ship-owners, unquestionably, as a general rule, have a lien upon the cargo for the freight, and consequently may retain the goods after the arrival of the ship at port of destination until the payment is made." Traditionally, a maritime lien against cargo for freight and demurrage was considered a "possessory" lien, meaning that the lien is lost upon the delivery of the cargo to the consignee. To exercise its maritime lien, in other words, the vessel owner was expected to retain possession and control of the cargo until payment; if no payment was received, it needed to enforce its lien by maritime arrest while the cargo remained in its possession.

It is not difficult to imagine the impracticalities of this rule. For instance, it certainly would not do in most circumstances to simply retain the cargo onboard the vessel pending payment, given that the vessel is presumably looking to complete discharge and commence her next voyage as quickly as possible. And while some kinds of cargo may lend themselves to segregated storage ashore, whether in a bonded warehouse or dedicated storage facility, this is often logistically complicated and expensive. Add to those practical difficulties the additional contractual challenge that some portion of freight and demurrage often are not even due until sometime after the cargo is delivered, and it is not difficult to see why the "possessory" element of the lien can often prove problematic.

The "No Waiver" Presumption

Recognizing these problems, the courts have determined that "it would frustrate commerce to require shipowners to retain their liens only by actual possession of the implicated cargo." They therefore have found that "a shipowner enjoys a strong presumption that, absent a clear indication to the contrary, he has not waived his cargo lien upon the delivery of cargo."[2] As the Fifth Circuit Court of Appeals explained in one case where the charter provided for a lien against cargo for freight and demurrage but also provided for payment of these items after the cargo's delivery: "No rational person

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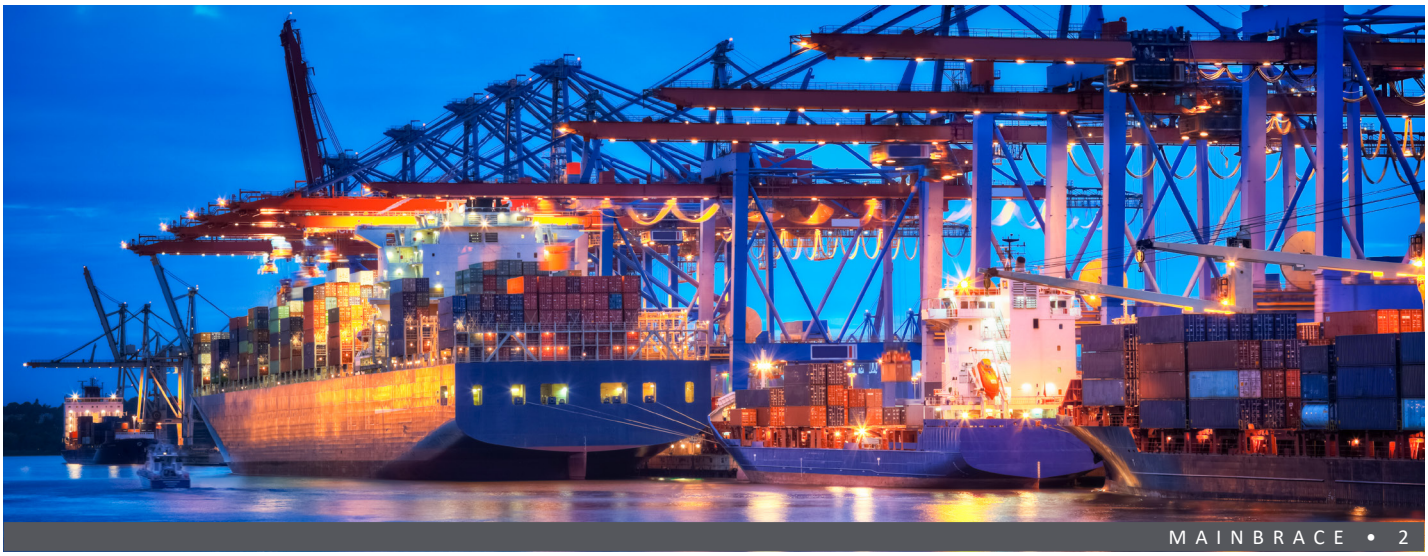

would establish a lien on cargo for certain costs that are due after delivery of the cargo but have delivery of the cargo extinguish the lien. If that were the case, the lien would be a futile mechanism for protection."[3]

What does this "no waiver" presumption mean? It means that although the cargo may have been delivered to the receiver, it may yet be possible for the vessel owner to maintain and enforce its lien by arresting the cargo in an *in rem* court proceeding. In analyzing whether the lien persists after discharge, the court will look at the available evidence to determine whether the parties intended that the lien would be waived upon delivery. Most relevant in this respect would be the wording in the applicable charter or bill of lading making it clear that the lien survives discharge, but it could also come from a notice from the vessel owner at or before discharge that the delivery is conditioned on the maintenance of the lien. It might even come from established local usage at the port.[4]

Most relevant in this respect would be the wording in the applicable charter or bill of lading making it clear that the lien survives discharge, but it could also come from a notice from the vessel owner at or before discharge that the delivery is conditioned on the maintenance of the lien.

New Impracticalities Arise

Of course, this rule presents its own practical difficulties. Notably, once a cargo is discharged, it is not always easy to identify or segregate—particularly with liquid or dry bulk cargoes that may be discharged into storage facilities and commingled with other product. Some commentators have suggested that the lien may yet survive so long as the cargo is commingled with product of the same type and specification; however, once the cargo is admixed or processed, the lien may be extinguished.[5]

It is one thing when the cargo belongs to the charterer who actually owes freight or demurrage, but what if the cargo belongs to a third party? Here, the vessel owner's rights become far more constrained, and the courts have held that the vessel owner does not have a maritime lien against a third party's cargo.[6] Vessel charters do, however, also commonly provide that the vessel owner shall also have a lien against sub-freights—meaning the amounts that may be owed to the charterer by third parties for the carriage of their cargo. Such liens are routinely enforced.

A lien against sub-freights is materially different from a lien against cargo. First, the lien can only be exercised to the extent of sub-freights still outstanding, and once the freight is paid the lien right disappears. Moreover, the lien against sub-freights arises solely as a matter of contract, and not under the maritime law. Thus, to be enforceable against a third party (*i.e.,* the party owing the sub-freight), the vessel owner must give actual notice of the lien to the cargo owner before it pays its freight to the charterer; otherwise, the lien is discharged. (If, however, the party owing sub-freights pays the original party after receiving valid actual notice, that party may be liable to pay the freight twice.)

Final Thoughts

As can be seen, maritime liens against cargo and sub-freights are important tools in the shipowner's enforcement arsenal, both before cargo is discharged and, often, even afterwards. Fully understanding how these tools work—and how far they may (or may not) reach—is important for both the vessel owner and the charterer of a vessel carrying cargo. ◻

1. 72 U.S. 5 (1866).
2. *See Dampskibsselskabet Norden A/S v. 25,001.078 MT of Fly Ash,* 308 F. Supp. 3d 693 (N.D.N.Y. 2018) (quoting *In re World Imports Ltd.,* 820 F.3d 576, 584 (3d Cir. 2016).
3. *See Arochem Corp. v. Wilomi, Inc.,* 962 F.2d 496, 500 (1992).
4. *In re 4,885 Bags of Linseed,* 66 U.S. 108 (1861); *See also Dampskibsselskabet Norden A/S v. 25,001.078 MT of Fly Ash,* 308 F. Supp. 3d 693, 697 (N.D.N.Y. 2018).
5. VOYAGE CHARTERS, 17A-19 (Informa 4th Ed. 2014).
6. *See Lykes Lines Ltd. v. BBC Sealand,* 398 F.3d 319, 323 (5th Cir. 2005).

Enforcement of an Insolvency-Related Judgment Does Not Require Recognition under Chapter 15

BY MICHAEL B. SCHAEDLE AND EVAN J. ZUCKER

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In *EMA GARP Fund v. Banro Corporation*[1] (the "U.S. Action"), the U.S. District Court for the Southern District of New York dismissed a lawsuit filed by shareholders of an insolvent Canadian company, Banro Corporation ("Banro"), and its former CEO, finding that, under the principles of comity, an approved Canadian plan of reorganization released all claims against the defendants. In so ruling, the court summarily rejected a longstanding principle that recognition of a foreign bankruptcy proceeding under chapter 15 of the U.S. Bankruptcy Code is a prerequisite to the enforcement by a U.S. court of a judgment entered in a foreign bankruptcy proceeding.

The Banro Insolvency Proceeding

Banro was a public corporation headquartered in Canada and incorporated under Canadian law. Banro was involved in the exploration, development, and mining of gold in the Democratic Republic of the Congo. Banro faced liquidity challenges in 2017, eventually becoming insolvent and in need of additional liquidity to fund operations. On December 22, 2017, under the Canadian Companies' Creditors Arrangement Act ("CCAA"), Canada's equivalent to chapter 11 of the U.S. Bankruptcy Code, Banro initiated a restructuring proceeding (the "CCAA Proceeding") in the Ontario Superior Court of Justice (Commercial List) (the "Canadian Court"). On that same date, trading in Banro's securities on the New York Stock Exchange was suspended.

Thereafter, Banro sought and obtained an order setting March 6, 2018, as the deadline for the filing of certain claims against Banro and its officers and directors.

On March 5, 2018, one day prior to the deadline, the plaintiffs in the U.S. Action, EMA GARP Fund, L.P. ("EMA"), a U.S. private equity investment fund, commenced the U.S. Action asserting claims against Banro and its former CEO under the U.S. Securities and Exchanges Act. EMA did not file any claim in the CCAA Proceeding—notwithstanding its knowledge of the CCAA Proceeding.

Banro's counsel responded a few days later, advising EMA that a plan of reorganization had already been approved by the creditors and that a motion to obtain Canadian Court approval had been scheduled. Additionally, Banro indicated that it would specifically request a finding by the Canadian Court that the claims at issue in the U.S. Action had been released and discharged. EMA, however, did not appear in the Canadian Proceeding and did not object to the inclusion of the language releasing Banro and its former CEO from any claims. On March 27, 2018, the Canadian Court approved the plan and issued an order that included the requested language releasing all the claims asserted in the U.S. Action. On May 3, 2018, Banro's insolvency monitor (the equivalent of a bankruptcy trustee), filed a certificate with the Canadian Court confirming that the plan had been implemented.

On May 18, 2018, Banro moved to dismiss the U.S. Action on international comity grounds, under Federal Rule of Civil Procedure 12(b)(1). In seeking dismissal, Banro first argued that U.S. courts have ordinarily declined to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding if that proceeding abided by fundamental standards of procedural fairness and does not violate the public policy of the United States. Second, Banro argued that chapter 15 does not *require* a foreign entity or representative of a foreign bankruptcy to file a petition in the United States under any circumstances; rather, it *permits* foreign courts or representatives to seek assistance from U.S. courts in order "to provide effective mechanisms for dealing with cases of cross-border insolvency." 11 U.S.C. § 1501(a), (b). Additionally, it contended that the enactment of chapter 15 was not intended to overrule well-established principles

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Enforcement of an Insolvency-Related Judgment Does Not Require Recognition under Chapter 15 (continued from page 4)

of international comity. Therefore, since Banro had limited assets in the United States, it determined that there was no need for the assistance of a U.S. court to administer its assets and that a chapter 15 proceeding solely for the purpose of defending itself in the U.S. Action was unnecessary.

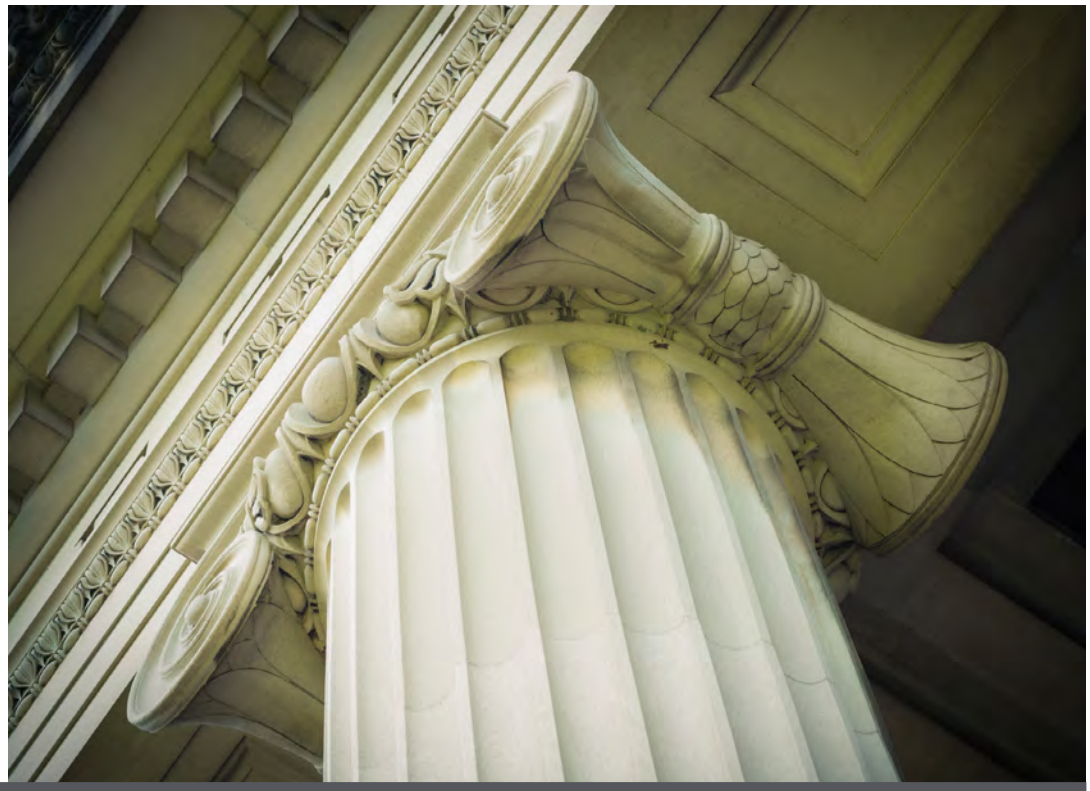
In response, EMA argued comity cannot be extended to the CCAA Proceeding because Banro failed to establish that the claims in the U.S. Action were subject to the CCAA Proceeding and that the Canadian Court had jurisdiction over EMA.

The U.S. District Court rejected EMA's arguments, granted Banro's motion to dismiss, and enforced Banro's plan of reorganization under the principles of comity.

Enforcement of Insolvency-Related Judgments

"Comity" is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot,* 159 U.S. 113, 164 (1895). In determining whether a foreign proceeding warrants comity, courts should undertake a multifactor analysis to determine whether the foreign court satisfies fundamental standards of procedural fairness. Factors that establish procedural fairness include: "(1) whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the right to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to the debtors' potential claimants; (5) whether there are provisions for creditors' meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims." *Allstate Life Ins. Co. v. Linter Grp. Ltd.,* 994 F.2d 996, 999 (2d Cir. 1993). If the foreign proceeding is procedurally fair, then courts must determine whether affording comity would "violate any laws or public policies" of the United States.

Prior to the enactment of chapter 15 of the Bankruptcy Code in 2005, U.S. courts regularly recognized foreign insolvency judgments as a matter of comity. An ancillary proceeding was not required, as section 304 of the Bankruptcy Code (the precursor to chapter 15) was not the exclusive remedy. The enactment of chapter 15, which adopted the Model Law on Cross-Border Insolvency (the "CBI Model Law") promulgated by the United Nations Commission on International Trade Law ("UNCITRAL"),[2] changed the requirements for recognition and enforcement of insolvency judgments. Under chapter 15, after a foreign proceeding is recognized, a U.S. court "shall grant comity or cooperation to the foreign representative." 11 U.S.C. § 1509(a). And, section 1509(c) specifies that any request for comity or cooperation from another U.S. court "shall be accompanied by a certified copy of an order granting recognition" under chapter 15.



These provisions reflected the intention that chapter 15 was to be the "exclusive door to ancillary assistance to foreign proceedings." *Collier on Bankruptcy* ¶ 1509.03 (16th ed. 2018) (quoting H.R. Rep. No. 109031(I), 110 (2005) ("This section concentrates the recognition and deference process in one United States court."). After its enactment, a majority of courts held that the requirements of chapter 15 must be complied with before a foreign debtor can seek the assistance of a U.S. court to enforce a judgment.[3]

> Other countries, including the United Kingdom, have recognized that the CBI Model Law is not the appropriate statutory scheme for recognizing and enforcing an insolvency-related judgment; it is instead a means of facilitating cross-border cooperation.

In *EMA,* the U.S. District Court granted comity to the order approving Banro's reorganization plan because Canadian insolvency proceedings have been held to be procedurally fair, the terms of Banro's plan were fair and reasonable, EMA had notice of the CCAA Proceeding, and EMA "could have and should have pursed their claims" in the CCAA Proceeding. Instead, EMA engaged in forum shopping. In extending comity to the CCAA Proceeding, the U.S. District Court determined that the fact that Banro did not file a petition under chapter 15 of the Bankruptcy Code was "irrelevant" to the comity standard and related multifactor analysis. As a result, Banro was "under no obligation to file anything in U.S. courts in order to earn [comity] for the Canadian courts." In coming to its conclusion, the U.S. District Court principally relied on caselaw prior to the enactment of chapter 15 of the Bankruptcy Code and summarily rejected the belief that chapter 15 of the Bankruptcy Code changed the comity standard.

Instead, the U.S. District Court implicitly accepted Banro's argument that chapter 15 serves a limited purpose and is necessary only when assistance is needed to administer a foreign debtor's assets in the United States. Here, Banro had limited assets in the United States and did not need the assistance of a U.S. court with respect to those assets. To the contrary, Banro was only seeking to use the plan of reorganization defensively to dismiss a claim, not to administer assets. Accordingly, using a chapter 15 case solely as a defense mechanism would have been, in Banro's view, an inefficient use of estate assets and inconsistent with the purpose of chapter 15 of the Bankruptcy Code.

Implications

The U.S. District Court's decision highlights an alternative method to recognize and enforce an insolvency-related judgment. While chapter 15 continues to be the prevailing method, it is not necessarily the exclusive means where a party is seeking to use an insolvency-related judgment defensively rather than offensively to recover assets for an insolvent's estate.

Indeed, other countries, including the United Kingdom, have recognized that the CBI Model Law is not the appropriate statutory scheme for recognizing and enforcing an insolvency-related judgment; it is instead a means of facilitating cross-border cooperation. As a result, UNCITRAL has recently promulgated a new model law on the recognition and enforcement of insolvency related judgments. This new model law is designed to complement the CBI Model Law and provides a simplified, cost-effective means to recognizing and enforcing insolvency-related judgments, including defensively. ◻

1. No. 18 CIV. 1986 (KPF), 2019 WL 773988 (S.D.N.Y. 21 February 2019).
2. UNCITRAL was established by the United Nations in 1966 and plays an important role in developing that framework in pursuance of its mandate to further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law. The CBI Model Law has been adopted by 44 countries.
3. *See generally, In re Millennium Glob. Emerging Credit Master Fund Ltd.,* 458 B.R. 63, 81 (Bankr. S.D.N.Y. 2011), aff'd, 474 B.R. 88 (S.D.N.Y. 2012) (noting that "[t]he clear implication of failure to obtain any recognition, borne out by the case law, is that without an order of recognition the foreign representative cannot be heard in any court in the United States."); *In re Loy,* 380 B.R. 154, 165 (Bankr. E.D. Va. 2007) (holding that Chapter 15 recognition is required before a foreign representative seeks to enlist the comity or cooperation of a court in the United States).

Blank Rome Awards & Recognitions

Blank Rome Highly Ranked in *U.S. News–Best Lawyers®* 2020 "Best Law Firms"

Blank Rome's Maritime practice was ranked in the top national and regional tiers for Admiralty & Maritime Law in the 2020 "Best Law Firms" survey by *U.S. News & World Report–Best Lawyers.®* Overall, the Firm was nationally ranked in 30 practice areas and regionally ranked in 82 practice areas.

Blank Rome's highly ranked services and industries in this year's survey include:

SERVICES

- Antitrust Counseling & Litigation
- Bankruptcy & Restructuring
- Business Litigation
- Capital Markets
- Copyright
- Corporate
- Employee Benefits & Executive Compensation
- Environmental
- Equipment Leasing
- Finance
- Government Relations & Political Law
- Insurance Recovery
- Intellectual Property & Technology
- International Litigation, Defense, and Arbitration
- International Trade
- Labor & Employment
- Litigation
- Maritime
- Matrimonial & Family Law
- Mergers & Acquisitions
- Nonprofit Formation & Compliance
- Patent Litigation
- Patent Overview
- Patent Prosecution
- Securities & Shareholder Litigation
- Tax
- Tax-Exempt Organizations
- Trademark
- Trusts & Estates
- White Collar Defense & Investigations

INDUSTRIES

- Energy
- Financial Services
- Gaming
- Healthcare
- Maritime
- Real Estate
- Zoning, Land Use, Tax Incentives & Planning

For more information, please visit Blank Rome Highly Ranked in *U.S. News–Best Lawyers®* 2020 "Best Law Firms."

Blank Rome Wins *Lloyd's List* 2019 Excellence in Maritime Law Award

Blank Rome was named the Excellence in Maritime Law award winner at the 2019 *Lloyd's List* Americas Awards, held on September 25, 2019, in Houston, Texas. The coveted award recognizes "exemplary expertise and commitment to the shipping industry as well as innovation through which lawyers have played a crucial role in notable cases, restructuring, or dispute resolution."

The *Lloyd's List* Americas Awards, which this year was combined with a unique content forum focused on Future Fuels, are part of the global Excellence in Shipping Awards, the industry's flagship awards program that recognizes and rewards excellence across all sectors of maritime.

Keith B. Letourneau and Jeanne M. Grasso, co-chair and vice-chair, respectively, of Blank Rome's Maritime practice group, accepted the award together on behalf of Blank Rome Maritime.

Pictured are Eli Ginsberg, *(Lloyd's List Intelligence)*, Jeanne Grasso, and Keith Letourneau.

For more information, please visit Blank Rome Wins *Lloyd's List* 2019 Excellence in Maritime Law Award.

Blank Rome Maritime Attorneys Recognized by *Who's Who Legal 2019*

Who's Who Legal 2019 has recognized five Blank Rome Maritime attorneys as "Global Leaders" in Shipping. In addition, 13 of Blank Rome's attorneys were recognized as "Thought Leaders" and/or "Global Leaders" in five practice areas across the Firm.

GLOBAL LEADERS IN SHIPPING

THOMAS H. BELKNAP, JR.
PARTNER

MICHAEL K. BELL
PARTNER

JOHN D. KIMBALL
PARTNER

RICHARD V. SINGLETON II
PARTNER

JONATHAN K. WALDRON
PARTNER

Per *Who's Who Legal,* "nominees were selected based upon comprehensive, independent survey work with both general counsel and private practice lawyers worldwide. Only specialists who have met independent international research criteria are listed."

For more information, please visit Blank Rome Attorneys Recognized by *Who's Who Legal 2019*.

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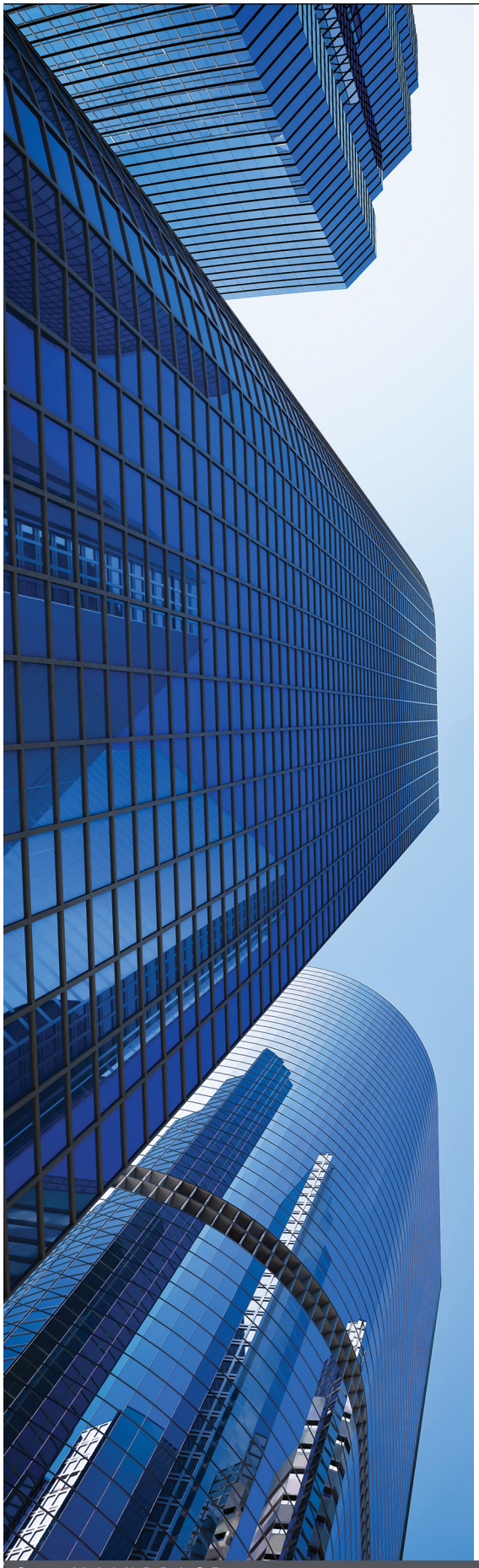


Blank Rome Named to *Forbes* List of America's Top Trusted Corporate Law Firms

Blank Rome was named to *Forbes'* inaugural America's Top Trusted Corporate Law Firms list. In particular, *Forbes* recognized our Firm's work in Banking & Financial Services as our "most recommended practice area." Blank Rome is proud to join this select group of leading law firms ranked in this year's list.

According to *Forbes*, the magazine partnered with Statista, a market research company, to create its first-ever list of 243 top U.S. corporate law firms, ranging from firms well known in the corporate and legal worlds to boutique firms that focus on very specific branches of the law.

For more information, please visit Blank Rome Named to *Forbes* List of America's Top Trusted Corporate Law Firms.

Blank Rome Honored as a 2019 Best Law Firm for Women by *Working Mother*

Blank Rome was named one of the 2019 Best Law Firms for Women by *Working Mother* magazine, marking the third year that our Firm has been recognized for its commitment to creating one of the best women-friendly workplaces in the United States. The winning law firms were honored at the Best Law Firms for Women Gala, which was held at the Peninsula Chicago on September 19, 2019.

Working Mother's annual list honors 60 U.S. law firms for their policies in the advancement of women, notably with regard to key factors such as women representation, flexibility, paid time off and leaves of absence, leadership, and compensation and advancement, as well as the development and retention of women. In addition to these key factors, this year's list particularly recognized Blank Rome for our 2018 Women's Leadership Summit, which assembled 120 women lawyers who collaborated to "hack" the topics of leadership, diversity and inclusion, and delivering value and increasing organizational efficiency.

For more information, please visit Blank Rome Honored as a 2019 Best Law Firm for Women by *Working Mother*.

Blank Rome Highly Ranked in *The American Lawyer's* 2019 Midlevel Associates Survey and Summer Associates Survey

2019 MIDLEVEL ASSOCIATES SURVEY

Blank Rome was notably ranked as one of the top five firms for mid-level associate satisfaction in *The American Lawyer's* national 2019 Midlevel Associates Survey, and in the top 10 regionally for Los Angeles (#1), Philadelphia (#2), New York (#2), and Washington, D.C. (#8).

The annual survey asked third-, fourth-, and fifth-year associates to examine several aspects of job satisfaction, including compensation and benefits; training and guidance; relations with partners and other associates; interest in and satisfaction level with the work; the firm's policy on billable hours; and management's openness about firm strategies and partnership chances.

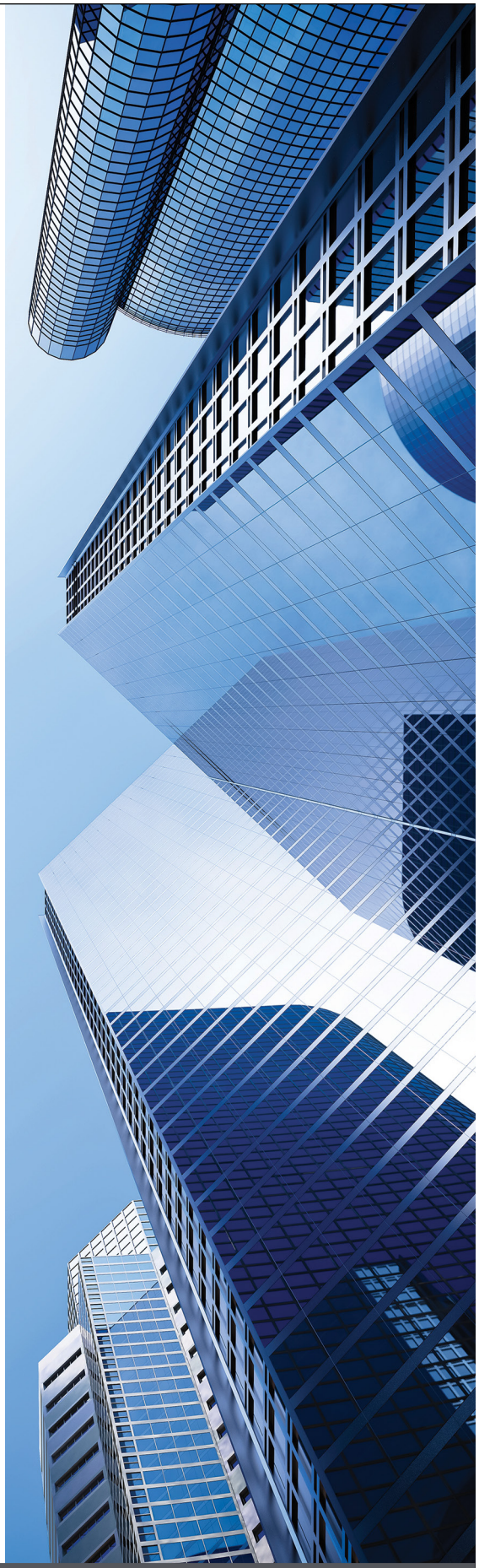
For more information, please visit Blank Rome Ranked Top 5 in *The American Lawyer's* 2019 Midlevel Associates Survey.

2019 SUMMER ASSOCIATES SURVEY

Blank Rome was recognized as one of the top 10 law firms for summer associate satisfaction in *The American Lawyer's* national 2019 Summer Associates Survey, and notably ranked regionally for Washington, D.C. (#1), Philadelphia (#4), and New York (#25).

The annual survey asked summer associates employed by the nation's largest law firms to examine several aspects of job satisfaction, including quality of work, training and guidance, partner and associate interaction, and overall rating as a workplace.

For more information, please visit **Blank Rome Highly Ranked in *The American Lawyer's* 2019 Summer Associates Survey.**



Climate Change and Renewable Energy in the Maritime Industry

BY FREDERICK M. LOWTHER

FREDERICK M. LOWTHER
PARTNER

There are few industries—indeed, few activities of any kind—that are not impacted by the increasingly intense debate on climate change. Whether by force of law or by voluntary action, all major sectors of the world economy must adapt to changing perceptions of how to reduce adverse impacts to our climate. The maritime industry is no exception. As the industry transitions to cleaner fossil fuels for vessel propulsion, there remains the question as to how the industry can best move toward greater use of emission-free renewable energy.

Dating Back

The maritime connection to renewable energy dates back thousands of years, with the transition from oars to sails likely occurring more than 5,000 years ago. Indeed, wind propulsion of large vessels was the norm until the mid-1700s, when the evolution of the steam engine resulted in the gradual transition to motive power. While commercial vessel propulsion will never revert to wind, the use of renewable energy sources in other (shore-based) aspects of the industry is clearly possible. Any shore-based activity that uses electric power has the ability to source that power—directly, indirectly, or "virtually"—from renewable energy generation.

Maritime Port Operations

Focusing first on maritime port operations, it is unlikely that the industry can connect directly to a local renewable energy source (*e.g.,* a solar or wind installation). From the standpoint of both land availability and optimal access to wind and sun, few onshore wind or solar farms will be built proximate to port facilities. Rooftop solar installations have become more efficient and cost-effective, and may have limited application to structures in a port complex or perhaps a building away from the port itself. However, the utility systems that supply power to port facilities are connected to transmission grids that increasingly accept

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renewable energy into the power mix. It is possible, therefore, for a port facility to contract with a wind, solar, or other renewable project, and then arrange with the transmission/distribution operators to deliver that power. While it is not likely that the renewable energy electrons will actually be reaching the port facilities, that is of no consequence so long as the renewable electrons are consumed somewhere on the system.

Offshore Wind Installations

An interesting development affecting proximity to renewable energy sources is the renewed focus on offshore wind installations. Conceptually, offshore wind projects involve very large windmills a considerable distance from the shore (positioned to optimize wind capture with minimal impact on shipping lanes and commercial fishing). Those structures must be tied together to a cable that carries the power to shore where it interconnects with the most proximate transmission/distribution grid. It is conceivable that port facilities could tie directly to the cables to bring wind power ashore, although it is more likely that the connection would be indirect, as is the case with onshore resources.

Virtual Power Purchase Agreements

Beyond the direct or indirect connection of renewable energy resources to maritime facilities, there is a relatively recent development referred to as the Virtual Power Purchase Agreement ("VPPA"). The VPPA is a financial tool and, despite its name, is not a "power purchase" agreement. It does, however, permit the VPPA "buyer" to claim that it supports (and can even say "uses") renewable energy. The VPPA works as follows:

- the VPPA "seller" is the developer of a renewable energy project (typically wind, solar, or hydro, or a combination thereof);
- the VPPA "buyer"—a maritime company, in this context—commits to pay the seller a fixed price for megawatt hours ("MWh") generated by the project over a long period of time (typically, 12–20 years);
- the fixed-priced commitment becomes the revenue foundation for the financing of the project—a single VPPA need not cover 100 percent of a facility production (one facility can have multiple VPPAs, or part of the capacity can be retained by the seller as merchant capacity); and,
- in return for the fixed payment per MWh, the buyer receives all the renewable energy credits ("RECs")—well-recognized, regulated instruments—for the MWhs covered by the VPPA.

While RECs generated by a renewable energy project NOT supported by a VPPA can be sold into a REC trading market, the RECs generated pursuant to a VPPA are given to the buyer and used to support the buyer's claim that it is "green" (*i.e.,* supports or uses renewable energy). A VPPA REC must be retired and cannot be sold or traded. The buyer also gets the benefit of the sale of the MWhs into the transmission grid, so that a sale price exceeding the fixed-price commitment generates positive revenue for the buyer, and a sale at less than the fixed price is credited against the fixed-price obligation. Again, the buyer gets none of the electrons generated by the project—only the right to claim support for/use of renewable energy—and still must purchase the power it uses from its traditional source(s). Hence, the "virtual" tag attached to the process.

VPPAs are treated legally as "fixed for floating swaps" and are regulated under the Dodd-Frank banking laws. The claims regarding support or use of renewable energy are regulated by the Federal Trade Commission, which publishes "green guides," which in substance require that claims (such as Bud Light's claim that it is "brewed with 100% wind energy") are supported by RECs. VPPAs are being used by beverage companies (Anheuser-Busch), service providers (Google, Facebook), retailers (Amazon, Walmart), telephone companies (AT&T, Verizon, T-Mobile), pharmaceutical companies (Novartis, Merck), bakeries (Bimbo Bakeries, General Mills), manufacturers (Crown Holdings), and accounting firms (Ernst & Young)—all of whom are very public in their claims to being/going "green."

> The development of utility scale renewable energy projects is burgeoning nationwide, and thus a decision to commit to renewable energy should not be limited by availability of options.

Committing to Renewable Energy

The development of utility scale renewable energy projects is burgeoning nationwide, and thus a decision to commit to renewable energy should not be limited by availability of options. Whether to access renewable energy directly, indirectly, or virtually is a critical decision, of course, but the opportunities are easily identified by consultation with industry associations, financial institutions, and utility companies—many of which have subsidiaries active in the development of renewable sources. A determination of the economic viability of renewable energy commitments is relatively straightforward, but does require professional analysis of comparative costs, reliability, and, in the case of VPPAs, the incremental value of claiming to be "green."

While there are a wide variety of views on climate change, including its causes and cures, on the political spectrum, there can be no doubt that the overwhelming trend is toward increased reliance on renewable energy sources—and the maritime industry is clearly in a position to follow that trend. ◻

The Broad Reach and Limitations of U.S. Forfeiture Law

BY MATTHEW J. THOMAS, JED M. SILVERSMITH, AND DANA S. MERKEL



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In August of this year, the world watched closely to learn what would become of the *Grace 1* and the more than two million barrels of Iranian crude oil that she carried. The tanker was boarded in the British Overseas Territory of Gibraltar by the British Royal Navy on July 4 as it passed through Gibraltar's territorial waters. It was detained on suspicion that it was delivering Iranian oil to Syria in violation of European Union sanctions.

Gibraltar released the *Grace 1* on August 15, in spite of a request by the United States to seize the vessel. Gibraltar's chief minister stated that Iran had provided assurance that the vessel would not deliver the oil to Syria when released, and there were no longer grounds for detention. Although Gibraltar denied the United States' request, the U.S. government filed a civil forfeiture complaint (the "Complaint") in a U.S. federal court seeking authority to seize the ship, the oil, and funds held in a U.S. bank account belonging to Paradise Global, an alleged front company used to help launder funds to assist the operation.

According to the Complaint, the *Grace 1* was managed by a company registered in Singapore, which was part of a network of companies operating throughout the world. These companies allegedly purchased insurance in the United States on behalf of the *Grace 1,* which, because it was to help an Iranian business interest, violated the U.S. sanctions regime. The Complaint also explained how these non-U.S. companies transferred funds in dollar-denominated transactions to other non-U.S. companies. These international transfers violated the U.S. sanctions regime because, by simply engaging in dollar-denominated transactions to support trade with Iran, U.S. law was violated.

The Unites States' attempt to seize the *Grace 1* echoes the U.S. seizure of the North Korean bulk carrier *Wise Honest.* The *Wise Honest* had been detained in April 2018 by Indonesia for multiple violations of international law and sanctions. Similar to the *Grace 1,* a civil forfeiture complaint outlined transactions in U.S. dollars in support of the *Wise Honest,* which was used to deliver North Korean coal and bring equipment into North Korea. Indonesia turned the vessel over to the United States and it was eventually listed for sale by the U.S. Marshal Service.

What Is Civil Forfeiture?

Civil forfeiture is a legal proceeding in which the U.S. government initiates a civil, not criminal, proceeding against property that was derived from or used in connection with a criminal violation of U.S. law. The government has historically brought forfeiture actions against vehicles owned by drug dealers or sought to seize real estate purchased by Ponzi-scheme operators. It has been used more recently to seize property of individuals and companies who acted with "conscious avoidance"—not criminally culpable, but turned a blind eye to probable criminal activity.

As the *Wise Honest* and *Grace 1* forfeiture complaints reveal, property needs to have few or no U.S. contacts to be subject to U.S. forfeiture. Forfeiture applies to nearly every crime imaginable, including wire fraud, drug trafficking, public corruption crimes, and money laundering. In practice, many of these U.S. crimes have an extensive extraterritorial reach, especially in sectors like shipping where the use of U.S. dollars as a default currency is ubiquitous and U.S. courts have imposed criminal liability based simply on the use of U.S. dollars. Of particular note to businesses in the shipping industry, violations of U.S. export laws and trade sanctions can provide a basis for forfeiture. In addition, even violations of foreign criminal law can subject property to forfeiture in a U.S. court even if the property's contacts with the United States were minimal.

How Are Sanctions and Civil Forfeiture Linked?

The U.S. government has imposed sanctions against international actors throughout the world, including Cuba, Iran, North Korea, Syria, and Crimea, as well as the Government of Venezuela and numerous other designated persons and entities around the world. U.S. financial institutions

and other U.S. persons continue to be broadly prohibited from engaging in transactions or dealings with Iran, the Government of Iran, and Iranian financial institutions. On September 4, 2019, the U.S. Treasury issued an extensive OFAC Advisory to the Maritime Petroleum Shipping Community addressing "Sanctions Risks Related to Shipping Petroleum and Petroleum Products from Iran," highlighting the significant sanctions risks arising from Iranian shipping and urging the maritime industry to adopt robust due diligence processes and anti-money laundering controls.

Transactions that violate U.S. sanctions laws and regulations can trigger penalties under the sanctions laws, but they also can serve as the basis of civil forfeiture actions. Property connected to sanctions-breaching transactions can be subject to forfeiture, even if not owned by a U.S. person. This can include not just the profits from the illegal transactions, but also the "instrumentalities" of those dealings—in this case, the *Grace 1* and its cargo.

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What Are the Limitations of Civil Forfeiture?

Civil forfeiture proceedings are conducted in the United States for violations of U.S. law. However, as a matter of international law, the United States does not have the authority to unilaterally seize property on the high seas or in other countries. With respect to ships, countries may only enforce their laws within their waters, with the exception of vessels flying their flag, which they have authority over anywhere in the world. Thus, property that is the subject of forfeiture proceedings must either be in the United States to be seized or be turned over to the United States—for example, through the cooperation of the country in which the property sits.

The forfeiture of the *Wise Honest* succeeded because Indonesia reportedly chose to assist the United States. Gibraltar did not provide the same assistance, and the *Grace 1,* since renamed the *Adrian Darya 1* and reflagged to Iran, eluded U.S. seizure and proceeded to Syria. The United States reportedly has made a variety of attempts to find a way to seize the vessel or negatively impact its operations, including offering to pay the captain to bring the vessel to the United States, listing the vessel and its captain on the specially designated nationals ("SDN") list, and warning that all mariners on listed vessels will be denied visas and all entities providing services to the vessel will be added to the SDN list.

What Are My Company's Obligations under U.S. Law?

U.S. law does not impose sector-specific obligations for maritime businesses to maintain an anti-money laundering policy other than those imposed by other U.S. laws. However, maritime businesses, including foreign maritime businesses, must comply with U.S. laws wherever they apply. Given the incredibly broad reach of many U.S. laws, including the money laundering statutes, U.S. export laws, and U.S. sanctions, it is imperative that all businesses be vigilant to protect against the use of their businesses for violations of U.S. law. Therefore, it is important that companies in the maritime industry adopt appropriate policies and procedures to screen for compliance risks and identify potential red flags.

Conclusion

In the current administration, the U.S. government has continued to make the international shipping sector—especially petroleum shipping—a central focus of U.S. trade sanctions policy, in an effort to inflict economic harm on targets such as Iran, Venezuela, and Cuba. The *Grace 1* and *Wise Honest* cases represent an expansion of this foreign policy strategy, by giving U.S. authorities more legal tools to disrupt shipping with sanctioned states and entities. This increasing focus on shipping as a pressure point for U.S. foreign policy comes with significant risks for shipowners, lenders, investors, charterers, and operators, as evidenced by the recent OFAC advisory.

U.S. civil forfeiture proceedings represent a new front on an already treacherous sanctions landscape, with the potential to result in significant and permanent losses of maritime assets. Although U.S. power to physically seize some assets overseas is limited under international law, little to no contact with the United States is needed to initiate proceedings and set in motion negative and unpredictable impacts. All maritime businesses should implement compliance policies that encourage employees to identify sanctions and anti-money laundering red flags and create an adequate reporting chain. ◻

Announcement

Blank Rome Moves Chicago Office to 444 West Lake

Blank Rome LLP is pleased to announce that on September 3, the Chicago office relocated to a new and permanent location at 444 West Lake Street. The Firm occupies 12,000 square feet of space on the 16th floor that can accommodate 30 or more attorneys and professional staff. Known as River Point, 444 West Lake is a 52-story, 1,050,000-square-foot, world-class office tower that just opened in 2017. It is conveniently located in Chicago's West Loop on the corner of Lake and Canal Street and is steps away from the Chicago River, public transportation, and the highway.

To meet the current and future needs of clients who are based in or do business in Chicago, Blank Rome entered the market in June 2019 with the addition of Partners Kenneth J. Ottaviano, who also serves as Office Chair, Karin H. Berg, William J. Dorsey, and Paige Barr Tinkham.

"Our Chicago colleagues have been off to a great start," said Grant S. Palmer, Blank Rome's Managing Partner and CEO. "When considering locations for our Chicago office, we were committed to finding a location that was modern, efficient, and well equipped to help us best serve our clients. We are thrilled to call 444 West Lake our new Chicago home, and look forward to continued growth in such a vibrant and successful market."

"We are excited to settle into our new space," said Mr. Ottaviano. "Karin, Will, Paige, and I are confident that 444 West Lake will provide us with the perfect setting to grow and thrive. This location underscores Blank Rome's commitment to Chicago as well as to our clients and the Firm's ongoing national expansion efforts. We are eager to welcome our clients and colleagues from across the country to our new office and great city." ◘

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Candid conversations, unfiltered insights, and a dose of hard-earned wisdom from influential women, committed to helping other women succeed and lead.

Have you ever met a fabulous, accomplished woman and wondered how she got to where she is today? Not only that, but where is she going from here and who is she taking with her? In *Seriously Driven,* host Marilyn Chinitz, a partner in the Matrimonial & Family Law practice at Blank Rome LLP, talks to successful women about their careers, roadblocks they've overcome, what or who they credit for their achievements, the other influential women in their lives, what it takes and means to become a leader, and how they mentor future leaders.

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TEASER EPISODE: Introducing *Seriously Driven*

In this teaser episode, host Marilyn Chinitz talks about how she has thrived both professionally and personally and how her podcast guests have, too. Here you can listen to a preview of episodes 1 and 2, which feature Wendy Federman, the Tony-award winning Broadway producer, and Dr. Erika Schwartz, a pioneer in the field of health and wellness and author of the book *Don't Let Your Doctor Kill You: How to Beat Physician Arrogance, Corporate Greed and a Broken System.*

For more information, please visit *Seriously Driven* Podcast: Introducing *Seriously Driven*.

Utilizing the Changing Landscape of Personal Jurisdiction

BY DAVID J. OBERLY

DAVID J. OBERLY
ASSOCIATE

For years, the scope of personal jurisdiction over corporate defendants has expanded significantly through the reliance on tenuous corporate contacts or business conducted by a defendant in a particular forum. Recently, however, that all changed when the United States Supreme Court issued its decisions in *Daimler AG v. Bauman,* 564 U.S. 915 (2014), *BNSF Railway Co. v. Tyrrell,* 137 S.Ct. 1549 (2017), and *Bristol-Myers Squibb v. Superior Court of California,* 137 S.Ct. 1773 (2017), which significantly strengthened the requirements for exercising personal jurisdiction over corporate defendants. Combined, these three decisions are critical for corporate entities that find themselves embroiled in maritime litigation, as these cases have significantly limited where plaintiffs can bring claims and, in turn, have substantially curtailed the practice of litigation tourism and forum shopping as a result of the limitations that have been placed on a forum state's exercise of personal jurisdiction.

For years, courts and litigants have operated under the general rule that a court may exercise personal jurisdiction over a corporate defendant in any state where the company maintains "continuous and systematic" business contacts.

The Big Three: *Daimler, Tyrrell,* and *Bristol-Myers Squibb*

There are two types of personal jurisdiction. The first, known as specific jurisdiction, encompasses cases in which the suit arises out of or relates to the defendant's contacts with the forum. For specific jurisdiction to exist, a plaintiff's action must arise out of a defendant's forum-related activities. The second, general jurisdiction, is exercisable when a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."

For years, courts and litigants have operated under the general rule that a court may exercise personal jurisdiction over a corporate defendant in any state where the company maintains "continuous and systematic" business contacts. As a result, businesses have been long subjected to being sued in any state across the country, regardless of strength of the business's connection to the forum. The expansive scope of personal jurisdiction resulted in significant, egregious litigation tourism and forum shopping by plaintiffs' attorneys in maritime actions, as plaintiffs took advantage of the significant leeway they had in filing large numbers of lawsuits in a select few extremely plaintiff-friendly courts, many of which are commonly known as some of the worst "judicial hellholes" for litigating these types of complex lawsuits.

In *Daimler AG v. Bauman,* 134 S.Ct. 746 (2014), the United States Supreme Court significantly curtailed plaintiffs' ability to forum shop as a result of the court's holding, which significantly narrowed the applicable standard for establishing general personal jurisdiction under the Fourteenth Amendment's Due Process Clause. Specifically, the *Daimler* court held that general jurisdiction may only be exercised if a defendant is regarded as "at home" in the forum state. To date, the court has identified only two places where that condition will be met: the state of the corporation's principal place of business, and the state of its incorporation. In addition, the *Daimler* court further held that a corporation is not deemed "at home" in a state merely by way of the fact that the company "engages in a substantial, continuous, and systematic course of business." Based on the court's reasoning, general jurisdiction should apply only in a forum state where the defendant is incorporated or has its principal place of business.

In 2017, the Supreme Court reaffirmed its decision in *Daimler* in *BNSF Railway Co. v. Tyrrell,* 137 S.Ct. 1549 (2017). Importantly, the *Tyrrell* court held that the Fourteenth Amendment's due process constraint described in *Daimler* applies to all state court assertions of general

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Utilizing the Changing Landscape of Personal Jurisdiction (continued from page 20)

jurisdiction over defendants, and that the constraint does not vary with the type of claim asserted or business enterprise sued. At the same time, the court emphasized that "in-state business" is not sufficient to allow the assertion of general jurisdiction over claims that are unrelated to any activity occurring in the forum. Taken together, the *Tyrrell* decision removed any doubt that the *Daimler* general jurisdiction standard applies in both state and federal forums from coast to coast

Most recently, in *Bristol-Myers Squibb Co. v. Superior Court of California,* 137 S.Ct. 1773 (2017), the Supreme Court provided additional, more focused rules for the exercise of specific jurisdiction, which also significantly benefits maritime defendants. In *Bristol-Myers Squibb,* the court held that "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." Thus, the suit itself—and not just some other aspect of the litigation—"must arise out of or relate to the defendant's contacts with the forum." As such, to exercise specific jurisdiction, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence which takes place in the forum State." When such a connection is lacking—the court continued—specific jurisdiction cannot be utilized "regardless of the extent of the defendant's unrelated activities in the State." Accordingly, a defendant's general connections with the forum cannot suffice to establish specific jurisdiction.

Takeaways

Ultimately, given the generally favorable reception of *Daimler, Tyrrell,* and *Bristol-Myers Squibb* in subsequent decisions, maritime defendants and their counsel should make sure to keep personal jurisdiction challenges in their litigation toolbelts, and should seek to utilize this game-changing defense whenever possible. Specifically, a corporate defendant can establish that it is not subject to general personal jurisdiction where it is not "at home" in the state in which suit has been filed (*i.e.,* where the state is not the entity's principal place of business or its state of incorporation).

Furthermore, a corporate defendant can establish that it is not subject to specific personal jurisdiction by demonstrating an absence of any forum-related activities on the part of the entity that caused the plaintiff(s) harm for which the defendant is allegedly responsible. Here, corporate defendants should aim to show that the plaintiff(s)' claims do not arise out of, and are not related to, the entity's contacts with the state in which the litigation is pending (*i.e.,* that all of the entity's activities that can be traced back to the plaintiff(s) took place beyond the state's borders). Combined, if a corporate defendant can establish the lack of both general and specific jurisdiction, it can seek to obtain an early dismissal from a range of different types of maritime lawsuits. Utilized properly, corporate defendants can effectively combat forum shopping and litigation tourism by successfully removing lawsuits from state courts that lack the proper jurisdiction. ◻

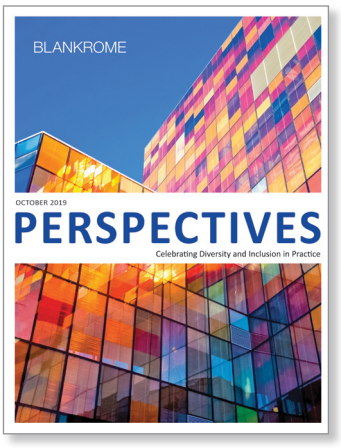
PERSPECTIVES

Celebrating Diversity and Inclusion in Practice

Welcome to the October 2019 edition of *Perspectives,* Blank Rome's diversity and inclusion newsletter that keeps you informed on our latest diversity and inclusion news and provides insight on current diversity and inclusion issues in the legal industry and beyond.

Featured in this edition:

- Insightful conversation with Human Rights Campaign President and former Blank Rome Attorney Alphonso David
- Update on Mansfield Rule 2.0 and Mansfield Rule 3.0 participation
- Inside look at Blank Rome's inaugural series of Women's Forum Bootcamps
- Celebratory highlights from Heritage History Months
- Initiatives aimed at advancing women in law and promoting LGBTQ+ equality
- Overview of recent diversity and inclusion headlines, accolades, and events



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To learn more about Blank Rome's diversity and inclusion initiatives, please visit blankrome.com/diversity-inclusion.

Autonomous Vessels: Legal, Regulatory, and Insurance Issues

BY ALAN M. WEIGEL AND THOMAS H. BELKNAP, JR.

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The maritime industry is currently experiencing a technological sea change resulting from the development of advanced automation on unmanned surface vessels. Once thought to be decades away from incorporation into the maritime transportation network, advanced automation is already emerging as a viable alternative for some segments of the industry as a way to reduce operational costs, improve safety, and increase efficiency. This new and disruptive technology, however, brings with it unique legal, regulatory, and insurance questions—the answers to which have been elusive.

The Legal Landscape

Over the past five years, many jurisdictions in the United States have implemented regulations governing the use of unmanned aircraft and drones. As a result, there have been more than 50 cases in the United States involving unmanned aircraft operations. During the same period, however, except for cases involving unmanned barges, there have been no cases in the United States referring to unmanned surface/subsurface ships or vehicles.

Because U.S. regulators and the courts have not considered issues involving unmanned and autonomous surface or subsurface vehicles, there is no clear legal guidance for their operation. The cases involving manned vessels and even unmanned barges provide imperfect analogies. Thus, clear operating regulations and legal guidelines remain to be developed.

What Are Unmanned Autonomous Vessels?

One of the challenges in addressing new operating regulations for automated or unmanned vessels is nomenclature. There is no universally accepted name for unmanned maritime systems. Various designations have been proposed, such as Unmanned Surface Vessels, Maritime Autonomous Surface Ships, Autonomous Surface Vehicles, and Unmanned Maritime Vehicles. Such systems also have become commonly referred to as maritime "drones" or even "smart ships."

The level of autonomy utilized in the vessel's operating systems is one useful classification method. *Lloyd's Register,* for example, has set out guidance for marine autonomous operations. The guidance describes autonomy levels ranging from "AL 1," which uses autonomous systems to assist on board crew with decision support, through to "AL 6," which denotes a fully autonomous ship with no access and no on-board supervision required during a mission. What is clear, however, is that in many cases, autonomous does not always equal unmanned.

Just as there is no universally accepted nomenclature for unmanned or autonomous ships or vessels, there is no universally accepted definition of what a vessel is. In the U.S. Code, the word "vessel" includes "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. §3. Transportation has been defined to mean "to convey or carry from one place to another," including the conveyance of "passengers, cargo, or equipment." This broad definition has been held to mean a device designed or used to encounter "perils of navigation." The manner of propulsion is not relevant and includes watercraft operated by oars, sails, steam, towed by other vessel, or drifting with the tides or currents.

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Autonomous Vessels: Legal, Regulatory, and Insurance Issues (continued from page 24)

The international conventions administered by the International Maritime Organization ("IMO") contain equally broad or ambiguous definitions. For example, Rule 3(a) of the International Regulations for Preventing Collisions at Sea ("COLREGS") defines a vessel similarly to the U.S. Code as "[e]very description of watercraft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water." The 1982 U.N. Convention on the Law of the Sea ("UNCLOS") does not define a ship or vessel, but it has never been construed as meaning "simply every floating object capable of bearing weight without sinking."

Cases in the United States have found a variety of craft qualify as "vessels." For example, drilling platforms; floating dredges; scows without steam-power, sails, or rudders, and which were moved by being towed; motorboats operated as pleasure craft; jet skis; and rafts of logs, have all been found to be vessels. On the other hand, seaplanes, floating docks and drydocks, floating oil and gas production facilities, permanently moored riverboat casinos, and houseboats not designed to any practical degree for transportation over water have all been found to not be vessels.

Over the past five years, many jurisdictions in the United States have implemented regulations governing the use of unmanned aircraft and drones. As a result, there have been more than 50 cases in the United States involving unmanned aircraft operations.

The Implications of "Vessel" Classification

Whether an unmanned maritime craft can be considered a "vessel" or "ship" is a determination of legal significance, as craft that so qualify have certain obligations and entitlements under international and U.S. domestic regulations. Nothing in U.S. or international law indicates that an unmanned craft cannot be considered a "vessel" or a "ship." On the other hand, there also is nothing that says they can, or must, be so considered. Resolution of the issue is of key significance to the operation of autonomous vessels. An examination of international maritime conventions and U.S. regulations illustrates some of the complications that make this determination difficult.

COLREGS Rule 5, for example, requires "every vessel" to maintain a "proper look-out by sight and hearing." The U.S. Coast Guard considers that Rule 5 lookout obligations apply to all vessels including "unmanned crafts." But, there is no provision in the COLREGS for using electronic means to substitute for human sight and hearing. And the Coast Guard considers commonly used electronic means such as radar to be secondary to a look-out maintained by "watching and listening" or "sight and hearing."

The Standards for Training, Certification & Watchkeeping of Seafarers sets the minimum qualifications for persons in charge of watches on vessels. But how can an autonomous unmanned vessel be in the charge of a watchkeeper, much less one with appropriate qualifications and training?

UNCLOS, Safety of Life at Sea Convention, the International Search and Rescue Convention, and U.S. statutory law all require masters of vessels to render assistance to those in distress at sea. But who is the master to take the decision of where and when an autonomous vessel will render assistance, or even how an unmanned vessel can render assistance?

The U.S. Code of Federal Regulations has specific provisions governing the safety, safety management, and inspection of all towing "vessels," and includes guidelines for minimum safe manning. There is, however, no provision for autonomous unmanned towing vessels.

Industry Initiatives

There are several industry initiatives working toward providing owners and operators of autonomous unmanned vessel guidance on how to resolve some of the ambiguity found in international and domestic regulations.

The U.S. Coast Guard's Navigation Safety Advisory Council has published an *Unmanned Maritime Systems ("UMS") Best Practices* to provide guidance and information to

UMS owners and operators concerning development and operations of their systems in the maritime environment. In addition, the *Best Practices* seek to provide vessel operators with notice of the issues and potential risks associated with UMS operations as well as a means to demonstrate their obligation to support safe and responsible operations of their systems through safety measures, operating standards, and maintenance procedures.

As previously mentioned, *Lloyd's Register* has published a code for UMS for use in certifying the safe design, build, and maintenance of UMS against an established framework that is acceptable to flag states and local regulators.

The UK Maritime & Coastguard Agency has published an *Autonomous Surface Ship Code of Practice* that seeks to provide practical guidance for the design, construction, and safe operation of autonomous and semi-autonomous vessels under 24 meters while the more detailed regulatory framework for larger autonomous ships is developed.

The Comité Maritime International has established a Working Group on Unmanned Ships, which is presently engaged in a regulatory scoping exercise that is analyzing current IMO conventions posing challenges to unmanned ships with the goal of recommending amendments to clarify the legal rights and obligations of autonomous ships.

Autonomous Vessels: Legal Liability and Defenses

Notwithstanding the codes and best practices currently in effect or under consideration by various regulatory authorities, in the event of a casualty involving an autonomous unmanned vessel, an admiralty court will eventually say what is required and, as often occurs in U.S. cases, may call upon an owner to supply more than the bare minimum required by statutory or regulatory law.

Two doctrines in U.S. law should guide an owner's decisions on how to operate and maintain its autonomous systems to avoid casualties. First, an owner should keep in mind that under U.S. law, compliance with best practices and government regulations may not absolve it of liability. Regulations are a "minimum requirement" such that noncompliance usually leads to imposition of liability almost as a matter of course, but liability may be imposed for negligence even with no violation of regulations. As many cases have held, prudent navigation practice or "the exacting standards of seaworthiness" may require an owner to supply more than the bare minimum called for by regulations.

Second, custom also may not insulate an owner from liability. Custom does not justify negligence, and the standard of care is not limited to complying with customary practices. Methods employed in the maritime industry, however long continued, cannot avail to establish as safe in law that

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which is dangerous in fact. It has been frequently held that there are precautions "so imperative that even their universal disregard will not excuse their omission." Thus, courts can reject a custom if wanting in due care.

When a vessel is involved in a casualty, the U.S. Shipowner's Limitation of Liability Act permits the owner to limit its liability for the accident if it can demonstrate that it had no prior knowledge of unseaworthiness that caused the loss and that it exercised reasonable diligence to ensure that the vessel was seaworthy at the start of the voyage. But neither the Limitation Act nor the Limitation Convention were drafted with unmanned autonomous vessels in mind. As a result, many questions come to mind that a court will eventually have to grapple with.

What, for example, makes an autonomous vessel unseaworthy? Does the seaworthiness extend to the sensors and operating software both on the vessel and in use by shore installations monitoring a vessel's operations and performance? Does it also extend to the training, certification, and manning of personnel manning vessel monitoring centers ashore?

Autonomous vessels are expected to operate using an array of sensors and software not traditionally used on manned vessels. To limit its liability, will it be necessary for an owner to have extensive knowledge of these advanced software operating systems or sensor designs? And if an autonomous vessel's sensors are monitored by personnel at a shore-based vessel operations center, how does an owner demonstrate an accident was outside of its "privity or knowledge"?

Autonomous Vessels and Insurance

Insuring autonomous unmanned vessels will also be a new challenge for underwriters. The advanced technology expected to be utilized in autonomous vessels raises the question of what material facts must be disclosed to satisfy the "utmost good faith" or "fair presentation" required under U.S. or UK law. Will underwriters require the disclosure of proprietary operating software or sensor designs to extend coverage for autonomous unmanned vessels? And what perils will in fact be covered under the relevant marine insurance clauses—or will the standard clauses have to be adapted to accommodate autonomous operations?

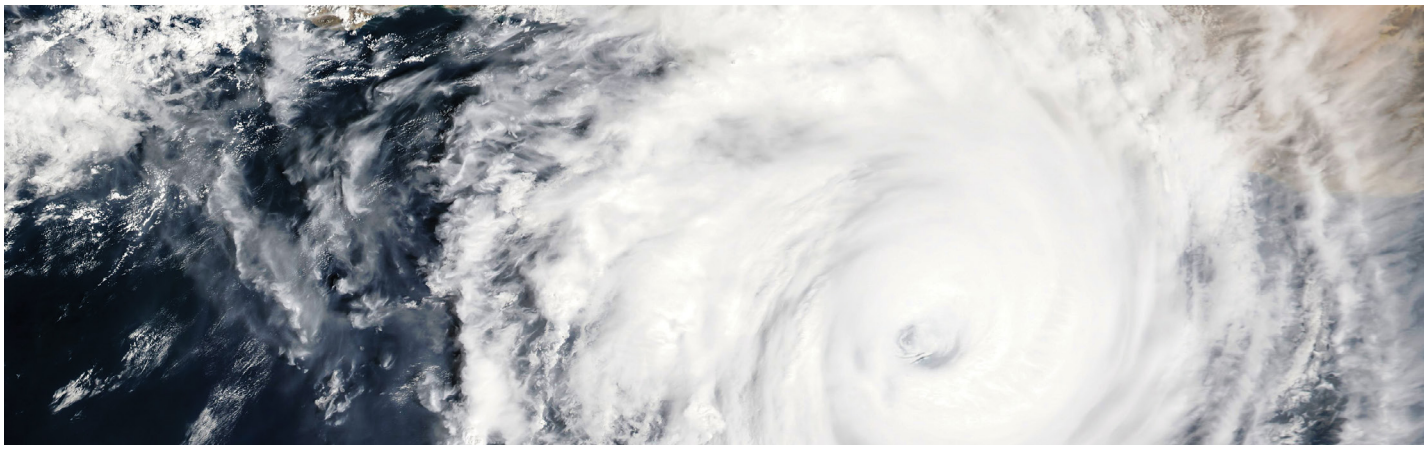
For example, will the "negligence of master, officers and crew" continue to be a covered peril under British and American marine insurance hull clauses for autonomous unmanned vessels? Such negligence is currently a covered peril if it has not resulted from a lack of due diligence by the assured, owners, or managers. Who are the master, officers, and crew whose negligence an owner may insure against? And as with limitation of liability, it remains uncertain how far the due diligence standard applies with respect to the advanced technology expected to be utilized by autonomous unmanned vessels.

On the other hand, insurance adjusting may become easier with the advent of autonomous unmanned vessels. For vessels monitored at shore-based operations centers, the adjusting process will likely become streamlined by an abundance of data, possibly to the point of automatic adjusting.

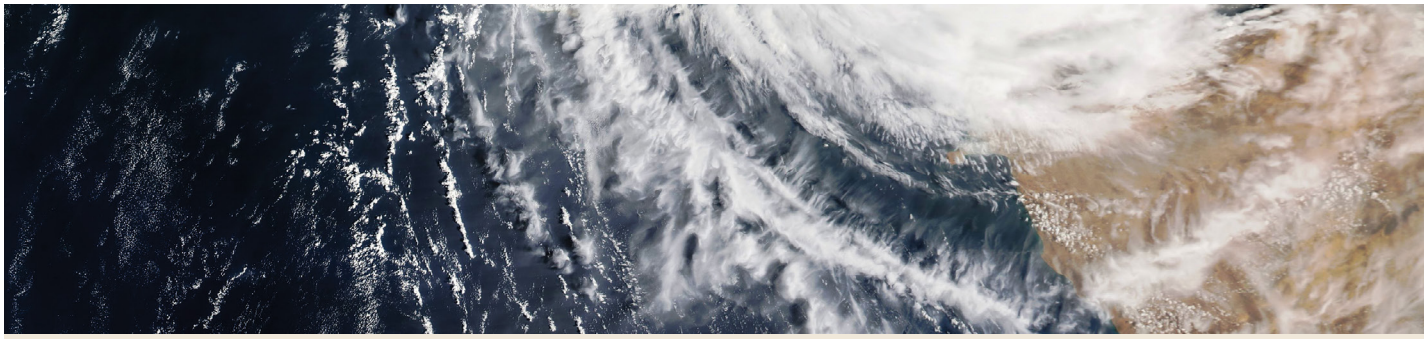
There also will likely be decreased claims from unmanned vessels. Historically, one-third of vessel claims have been caused by personnel error and 40 percent of claims have been for personal injuries. Such claims, along with maintenance and cure obligations, should ultimately largely disappear when a vessel is operated autonomously without a crew.

Conclusions

Autonomous unmanned vessels and their attendant new technologies have the potential to provide a multitude of beneficial uses. At the same time, however, the introduction of such vessels presents a range of currently unanswered legal, regulatory, and insurance questions. Regulators and international governing bodies will play an important role in developing new rules or interpreting current legal regimes to ensure regulatory compliance and that autonomous vessels are safely operating in the complex maritime environment. As autonomous unmanned vessels become more commonplace, possibly much sooner than anticipated, the future regulatory approach to their operations and maintenance must consider both the demands of the maritime industry and the overriding need for safety of navigation and environmental protection.



Severe Weather Emergency Recovery Team



Blank Rome's Severe Weather Emergency Recovery Team ("SWERT") helps those impacted by natural disasters like recent powerful hurricanes in the Atlantic Ocean, Caribbean Sea, and Gulf of Mexico, and by wildfires and mudslides in California and Colorado. We are an interdisciplinary group with decades of experience helping companies and individuals recover from severe weather events. Our team includes insurance recovery, labor and employment, government contracts, environmental, and energy attorneys, as well as government relations professionals with extensive experience in disaster recovery.

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maritime

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Our maritime industry team is composed of practice-focused subcommittees from across many of our Firm's offices, with attorneys who have extensive capabilities and experience in the maritime industry and beyond, effectively complementing Blank Rome Maritime's client cases and transactions.

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In the event of an incident, please contact any of our MERT members listed in **red** below.

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