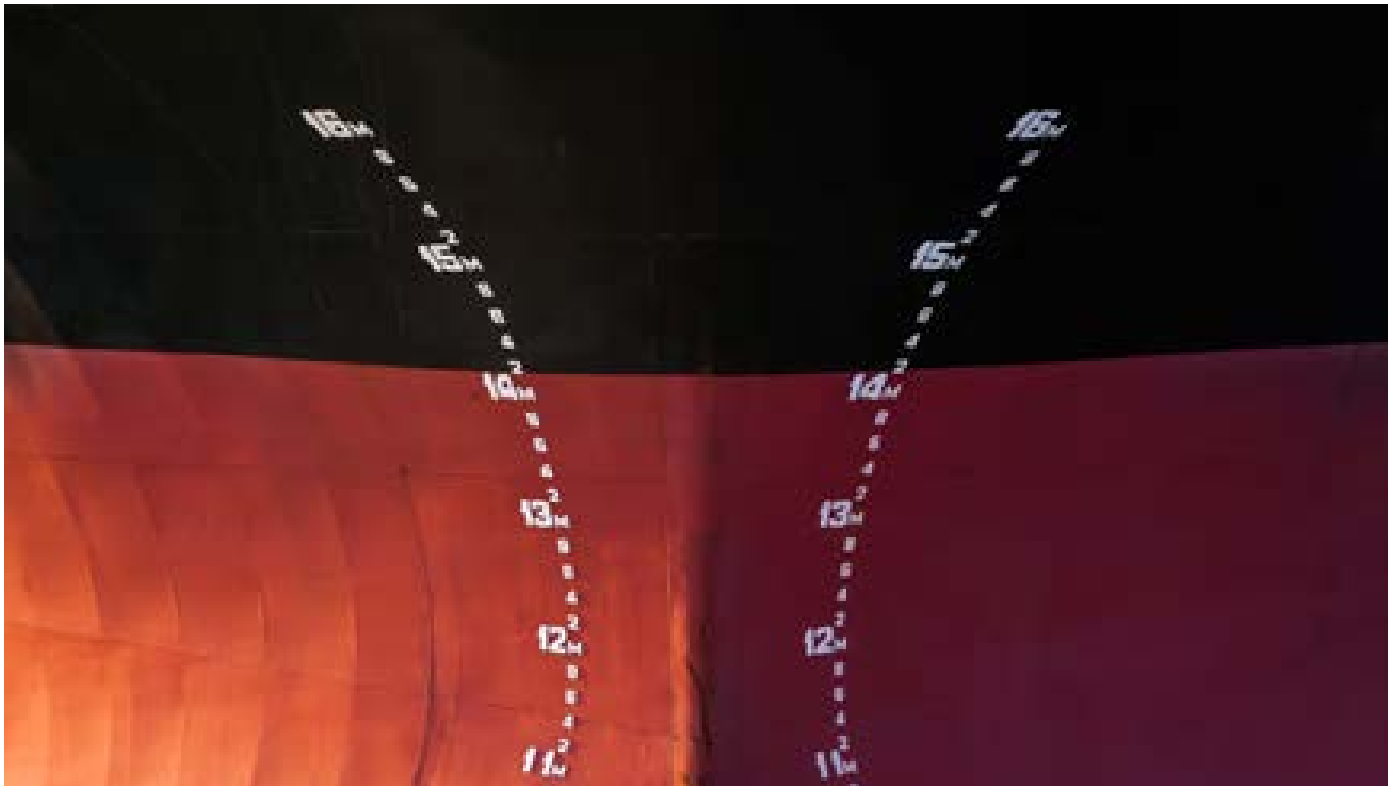

MAINBRACE

September 2023

BLANKROME maritime

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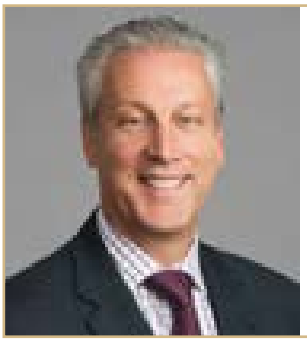
Note from the Editor

BY WILLIAM R. BENNETT III

My commute into New York City is by fast ferry, which allows me the pleasure of watching all sorts of vessels arrive and depart New York Harbor: cruise ships, container vessels, tankers, bulkers, tugs, research vessels, and, of course, the occasional yacht. Watching a large cruise ship or container vessel passing underneath the Verrazano-Narrows Bridge is a spectacular sight. And, of course, seeing any type of vessel pass near the Statute of Liberty is nostalgic. A picture is a must; one cannot have too many of those types of photos, in my opinion. My fellow passengers give me a sideways glance every time I get up to head out on deck to take a photo of a vessel passing by us. I take pictures because I love the maritime industry, but I was recently reminded how difficult life is working at sea.

This past Labor Day weekend, while enjoying time at the beach, a friend asked whether the crew aboard a tanker that had been anchored off Sandy Hook, NJ, for a few days were able to get off to visit New York City. I replied, "Generally, no." The group I was with were shocked. After explaining why crew were not permitted off the vessel, I then explained that the average unlicensed crew member's tour can be from 4 to 10 months long, with no weekends or holidays; possibly no choice of who to room with; no choice of what to eat for breakfast, lunch or dinner; often unable to speak with a loved one at home for several days or weeks. Add to that the potential for inhospitable weather while at sea. We all agreed that put into perspective the debate about whether one should be in the office two or three days a week.

In closing, please consider supporting an organization that cares for seaman and their mental health. □



EDITOR, *Mainbrace*

WILLIAM R. BENNETT III
Partner
212.885.5152
william.bennett@blankrome.com

Finally—A Path Forward for Implementation of the Vessel Incidental Discharge Act

BY JEANNE M. GRASSO AND DANA S. MERKEL

JEANNE M. GRASSO
PARTNER

DANA S. MERKEL
OF COUNSEL

Background

In December 2018, the Vessel Incidental Discharge Act ("VIDA") was signed into law and intended to replace the Environmental Protection Agency's ("EPA") 2013 Vessel General Permit (which has been in place for nearly 10 years) to bring uniformity, consistency, and certainty to the regulation of incidental discharges from U.S. and foreign-flag vessels. VIDA amended the Clean Water Act and will substantially alter how EPA and the United States Coast Guard ("USCG") regulate vessel discharges. VIDA required EPA to finalize uniform performance standards for each type of incidental discharge by December 2020, a deadline that the EPA has missed by nearly three years, and requires the USCG to implement EPA's final standards within two years thereafter.

In October 2020, EPA published a proposed rule titled Vessel Incidental Discharge National Standards of Performance to implement VIDA, but the proposal languished with the change from the Trump Administration to the Biden Administration. In January 2023, more than two years later, EPA announced its plans to issue a Supplemental Notice of Proposed Rulemaking in the Fall of 2023. EPA indicated that the Supplemental Notice was intended to clarify its proposed rule, share ballast water data compiled by the USCG, and propose additional regulatory options.

Litigation by Environmental Groups and Proposed Settlement

EPA's delay in finalizing its performance standards prompted the Center for Biological Diversity and Friends of the Earth to file a lawsuit in February 2023 to force EPA to finalize its performance standards. *Center for Biological Diversity, et al., v. Regan, et al.,* No. 3:23-cv-535 (N.D. Cal. 2023). The plaintiffs sought a declaration by the court that EPA's failure to finalize the incidental discharge standards violated the Clean Water Act and asked the court to order EPA to implement final standards within 60 days. The premise of the environmental groups' complaint was that EPA's inaction harmed aquatic ecosystems, with the principal allegations focused on ballast water discharges.

In the intervening months, the parties negotiated a settlement and on September 8, 2023, EPA published a Notice of Proposed Consent Decree and request for comments. The Consent Decree requires EPA to finalize its performance standards by September 23, 2024. To keep EPA accountable, EPA is also required to provide updates to the court every three months on the status of the rulemaking. Comments on the Consent Decree are due by October 10.

Next Steps

While the Consent Decree does not address publication of the Supplemental Notice of Proposed Rulemaking, EPA has informed stakeholders that it anticipates publishing it sometime this month. Industry stakeholders are encouraged to closely review and comment on EPA's supplemental proposal as these performance standards, once implemented by the USCG, will have significant long-term implications for the maritime industry. □

Recent Developments Affecting U.S. Maritime Arbitration

BY THOMAS H. BELKNAP, JR.

THOMAS H. BELKNAP, JR.
PARTNER

This article highlights some recent legal developments relevant to maritime arbitration although, as will be seen below, not all of the developments specifically involve maritime cases. This fact serves as a good reminder that maritime arbitration in the United States is but a subset of a broad and well-developed body of law relating generally to international and commercial arbitration.

Recent Supreme Court Jurisprudence

Although the United States Supreme Court has not recently decided a case specifically addressing maritime arbitration, it has been active in the past few years in deciding cases that are directly relevant to arbitrating maritime claims. For instance, in *Coinbase, Inc. v. Bielski,* 143 S.Ct. 1915 (2023), the Supreme Court held that a district court must stay its proceedings while an interlocutory appeal on the issue of arbitrability is pending. Notably, an interlocutory appeal on this issue is generally only available where the district court has denied a petition to compel arbitration, and not when such a motion has been granted.

***ZF Automotive US, Inc.,* 142 S. Ct. 2078 (2022):** The Court held that a party may not use 28 U.S.C. § 1782 to obtain discovery in aid of foreign arbitration because a foreign arbitral panel is not a "foreign tribunal" within the meaning of the statute. This resolved a circuit split in which some circuits had found that such discovery was available, and others found not. Notably, discovery in aid of foreign proceedings is still often available in support of foreign court proceedings and can be a powerful discovery tool.

***Badgerow v. Walters,* 142 S. Ct. 1310 (2022):** The Supreme Court held that in applications to compel arbitration under § 4 of the Federal Arbitration Act ("FAA"), a federal court must "look through" the complaint to the subject matter of the action to decide whether it has subject matter jurisdiction. Thus, for instance, if the dispute involves a maritime contract, that fact will give the federal court subject matter jurisdiction to decide the petition. On the other hand, where a party seeks to challenge or confirm an arbitration award under § 9 or 10 of the FAA, the court may not consider the subject matter of the underlying dispute but may only analyze whether subject matter jurisdiction exists over the enforcement action—*i.e.,* of a contractually agreed arbitral award. As a result, absent diversity jurisdiction, federal courts will rarely have subject matter jurisdiction to enforce arbitral awards under the FAA, even where the underlying dispute arose under a maritime contract. That said, where the dispute concerns an award governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (aka the New York Convention), federal subject matter jurisdiction will still exist on the basis that the Convention is a "treaty obligation" of the United States.

***Morgan v. Sundance, Inc.,* 142 S. Ct. 1708 (2022):** The Court held that a district court need not find "prejudice" as a condition to finding that a party has waived its right to stay litigation or compel arbitration under the Federal Arbitration Act; waiver of an arbitration clause should be construed just as any other contract provision. This is in keeping with the general principle that while arbitration is to be favored, contract terms relating to arbitration should not be given special treatment or be construed differently from other contractual terms.

Who Decides Arbitrability?

In *Henry Schein, Inc. v. Archer & White Sales, Inc.,* 139 S. Ct. 524 (2019), the Supreme Court held that where the parties have clearly and unmistakably delegated to the arbitrators the question of arbitrability of a particular dispute, the court may not ignore that delegation and decide the dispute even where it finds that the party's assertion of arbitrability is "wholly groundless."

The question of who, as between the court and the arbitrators, should decide the question of arbitrability continues to be a hot topic. The basic rule in the United States is that the courts decide threshold issues of arbitrability unless the parties have "clearly and unmistakably" delegated that duty to the arbitrators. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 (1995). Some arbitration rules, such as the AAA Rules, expressly delegate issues of jurisdiction to the arbitrators, and courts have broadly found that such delegation meets the "clear and unmistakable" test. The Rules of the Society of Maritime Arbitrators do not contain such a provision; accordingly, the question

whether the parties have agreed to arbitrate is usually left for the courts in maritime arbitration. That said, a few recent arbitration awards reveal some possible exceptions to this rule.

***Arb. Between CF Clip Tenacious LLC and Sompo Japan Nipponkoa Insurance, Inc.,* SMA No. 2243 (2021):** The panel acknowledged that the question whether the parties agreed to arbitrate is ordinarily left for the courts unless the parties have "clearly and unmistakably" delegated that question to the arbitrators. The panel found, however, that both parties had submitted the question of arbitrability to the arbitrators and, consequently, "the question is squarely the panel's to answer."

Although the United States Supreme Court has not recently decided a case specifically addressing maritime arbitration, it has been active in the past few years in deciding cases that are directly relevant to arbitrating maritime claims.

***Arb. Between Transportacion Maritima Mexicana, SA and Alia Global Logistics SA,* SMA No. 4429 (2021):** The petitioner sought an award under an ASBATANKVOY charter in which the parties had not struck out either London or New York as the place of arbitration. Respondent declined to participate in the arbitration. The panel found that the charter evinced a clear intention to arbitrate and noted that respondent never objected to New York as the forum nor sought to bring the arbitration to a different forum. Also, New York was more closely associated with the dispute, which concerned transportation of a cargo from Mexico to the United States. Accordingly, the panel found that respondent waived its right to object to arbitrating in New York and, by failing to object, agreed that the intent of the parties was to arbitrate in New York.

Time Bar

There is little dispute that questions of time bar are for the panel to decide and, in appropriate cases, an arbitration panel will not hesitate to grant a motion to dismiss a time-barred claim. In *M/V BETTY K IX,* SMA No. 4413 (2020), for instance, a consolidated arbitration over off-spec bunkers, the owner claimed against the charterer and the charterer sought indemnity from the bunker supplier. Supplier moved to dismiss the indemnity claim as being time barred under its terms and conditions. Charterer opposed the motion, seeking discovery as to communications between the supplier and owner. The panel, on the facts, found the time bar provision enforceable and found that Charterer "has not made a case (factual, legal, equitable or under laches) for the Panel to allow the requested discovery or delay its decision on the time bar issue any further, or until the entire consolidated arbitration proceeding is concluded." Accordingly, the motion to dismiss was granted.

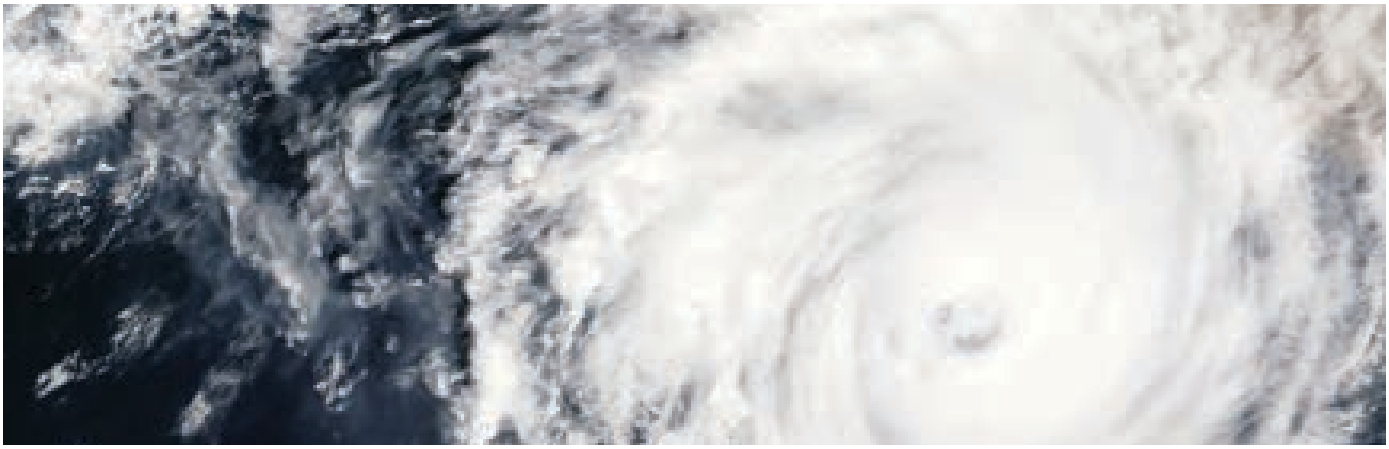
Functus Officio

Arbitration panels routinely issue partial final awards which are themselves separately enforceable in the courts even while the remainder of the arbitration proceeding moves forward. Questions often arise as to the arbitrators' power to revisit a partial final award once it has been issued. In *Arb. Between Daelim Corp. and Integr8 Fuels,* SMA No 4420 (2021), for instance, the panel closely examined its authority to issue partial final awards even where the governing arbitration rules do not expressly so state and held that "since the panel has rendered its decision with respect to the claims that were the subject of the Partial Final Award, it lacks jurisdiction to reconsider those issues."

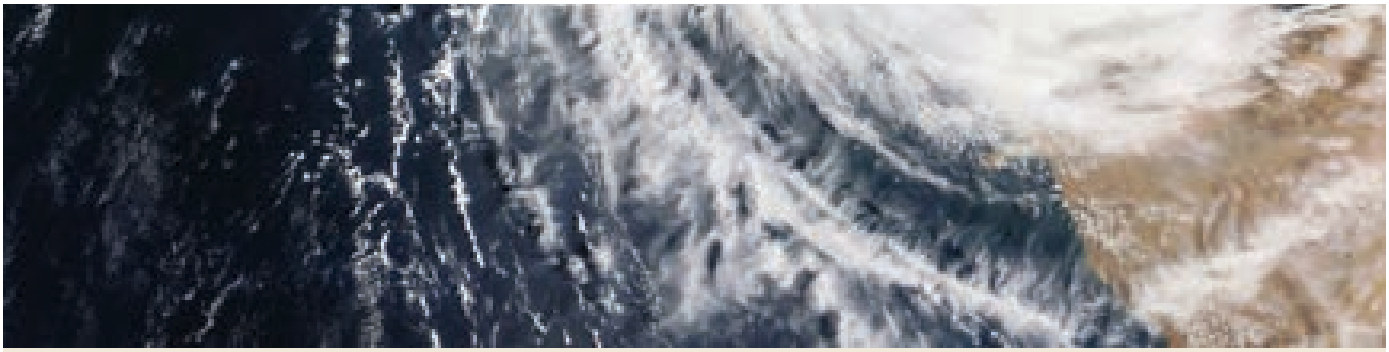
Meanwhile, in *M/V BETTY K IX,* SMA No. 4414 (2021), following partial final award dismissing the claim as time barred, the losing party challenged award to the district court on grounds of alleged bias, which application was denied. The prevailing party subsequently sought an award of attorneys' fees both in connection with the motion to dismiss and in opposing the petition to vacate. The losing party argued the panel was *functus officio* and lacked jurisdiction to consider the fee application in respect to fees incurred in connection with the petition to vacate. The panel found that it was not *functus officio* since other aspects of the dispute were still ongoing; however, it declined to award fees on the facts of the case.

Conclusion

While at least one purpose of arbitration is generally to streamline legal proceedings, as can be seen above, sometimes thorny questions pertaining to the scope of the authority of the arbitrators can make things more complicated rather than less. In the main, however, the roles of the arbitrators and the courts in such matters have been well defined, such that these threshold questions of jurisdiction and authority can usually be answered with reasonable confidence without intervention by the courts. □



Severe Weather Emergency Recovery Team



Blank Rome's Severe Weather Emergency Recovery Team ("SWERT") helps those impacted by natural disasters, including hurricanes, wildfires, mudslides, snowstorms, earthquakes, and tornadoes. 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.

Learn more: blankrome.com/SWERT

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Navigating the Complex Waters of Cross-Border Maritime Mergers & Acquisitions

BY NATHAN S. BRILL

NATHAN S. BRILL
PARTNER

Significant assets, intricate ownership structures, multinational operations, overlapping regulatory schemes, disparate time zones, and differing transaction customs are just a few of the macro challenges that make mergers and acquisitions in ocean shipping and related industries some of the most intricate and exciting transactions in the global economy.

Like any successful voyage, buyers, sellers, and financiers entering and exiting investments must plan ahead, account for the regulatory forecast, and plot a course to closing that achieves the desired business goals on a satisfactory timeline and budget. The following is an overview of some unique regulatory considerations and deal points that may be novel, particularly to those transaction participants based primarily outside of the United States and making their first investment with a United States nexus.

HSR—Pre-Merger Clearance Filing for Certain Transactions

The Hart-Scott-Rodino Act and the regulations promulgated thereunder (the "HSR Act") require that U.S. federal antitrust authorities clear certain mergers, acquisitions (including an acquisition of assets), joint venture transactions, and certain entity formations before completion. The HSR Act requires that buyers and sellers in covered transactions each submit a detailed filing with the U.S. Federal Trade Commission (the "FTC") and the Antitrust Division of the U.S. Department of Justice (the "Antitrust Division"), and refrain from closing the transaction until clearance is received.

Filing under the HSR Act is required for qualifying transactions where the acquiring or acquired Ultimate Parent Entity (as defined in the HSR Act) is, including any subsidiary or division thereof, engaged in commerce in the United States or in any activity affecting commerce in the United States. Non-U.S. businesses are deemed to engage in business activity in the United States for purposes of the HSR Act if they make sales in or into the United States.

If the transaction has a nexus to the United States, the parties and their counsel must consider whether the transaction meets certain size thresholds and consequently requires clearance. For 2023, transactions satisfy the size-of-the-transaction test where the value of the acquired assets, voting securities, and non-corporate interests exceed $111.4 million. This threshold adjusts annually based on inflation.

Next, the parties must consider their classification under a "size-of-person" test. If the size of the transaction is between $111.4 million and $445.5 million, one party must have worldwide total assets or annual net sales of at least $222.7 million to trigger the clearance requirement.

Of course, valuing the transaction and determining the size-of-person is a nuanced and detailed analysis at the margins, driven by guidance and regulations from the FTC and the Antitrust Division. Generally, as a transaction value approaches the $111.4 million threshold (as adjusted), counsel experienced with the HSR Act will review the deal economics and the parties' composition to determine if a filing is required.

If an HSR Act filing is required, the parties must each submit an information package to the FTC and the Antitrust Division regarding the contemplated transaction, each party's holdings, certain results of operations, and the identity of the submitting party's equity holders. The HSR Act analysis, filing, and disclosure requirements are based on each party's "Ultimate Parent Entity." In the international maritime shipping industry, where assets and businesses are perhaps family owned, or part of a larger conglomerate, or comprising multiple entities organized in a variety of jurisdictions, the entire enterprise may be captured in this disclosure requirement. The parties will each submit the definitive transaction document(s); financial information; a list of subsidiaries; revenue data by North American Industry Classification System and North American Product Classification System codes; a list of owners of more than five percent equity; a list of minority holdings in certain other entities; and internal documents (such as board minutes and board materials) relating to

(continued on page 7)

the transaction that discuss competition-related matters, or synergies or efficiencies to be accomplished by the transaction. Note that the U.S. government may investigate transactions even if review under the HSR Act is not required.

Once all parties compile their respective notices, the buyer and the seller contemporaneously submit their respective filings and pay a filing fee to commence a 30-day waiting period. The investigating agency will either allow the 30-day waiting period to expire, in which event the transaction may proceed, or issue a second request for additional information, extending the waiting period an additional 30 days. In practice, complying with a second request is often a several-month exercise. Experienced counsel can advise the parties on a transaction's potential to trigger a second request, and the ensuing response burden and associated delay. In Fiscal Year 2021, approximately two percent of transactions received a second request and in Fiscal Year 2020 approximately three percent of transactions drew a second request.

The cumulative effect of regulators' enhanced focus on the ocean shipping industry, even for transactions that are unlikely to receive questions or challenges from regulators, is to anticipate increased legal review and allow the corresponding increase in time in the transaction schedule.

The current administration is particularly interested in consolidation among ocean shippers, one of the few industries named in this context in President Biden's 2022 State of the Union address. Adding further uncertainty to the HSR Act's impact on transaction cost and speed, on June 27, 2023, the FTC proposed an overhaul of the premerger notification process. The proposed changes are generally thought to increase the cost, burden, and time required to prepare notification filings. Commentators have described the proposed revisions as making every party effectively subject to an information disclosure akin to what is currently requested in a second request. The FTC estimates that adoption of this revised procedure will increase the filing burden from 37 hours to 144 hours per filing, with filings presenting competitive overlaps estimated to require approximately 222 hours to prepare.

Maritime transactions often involve multiple international jurisdictions, many with their own pre-merger clearance processes, some of which capture more transactions than the HSR clearance process. For example, certain jurisdictions do not have a size-of-transaction test or do not measure the amount of business impacted in that jurisdiction. This can create a significant burden for the parties, first in simply analyzing the jurisdictions with potential filing requirements, and then evaluating the compliance burden. Ocean shipping companies need to consider the jurisdictions where they and their acquisition targets have sales offices and ports of call when engaging in merger and acquisition activity to determine if any notices or approvals are required.

Federal Maritime Commission's Increasing Participation in Pre-merger Clearance Filing and Antitrust Enforcement

In July 2021, the Federal Maritime Commission ("FMC") and the Department of Justice signed a Memorandum of Understanding establishing a partnership between the FMC and the Antitrust Division. This created a formal mechanism to facilitate information exchange between the attorneys, economists, and technical experts at each agency. This exchange included increased FMC involvement in reviewing HSR Act filings relating to consolidation in the ocean shipping industry. In February 2022, the FMC and Department of Justice announced a deeper level of cooperation. In March 2023, several members of Congress introduced legislation to eliminate the ocean shipping industry's exclusion from the antitrust laws with respect to certain agreements governed by the FMC, and to further increase the FMC's involvement in the Antitrust Division's merger review process. The proposed Ocean Shipping Antitrust Enforcement Act of 2023 was referred to the House Judiciary and House Transportation and Infrastructure committees, although no further action has been taken on the legislation.

The combined message of these actions is that regulators are focused on transactions in this industry. That is not to say transactions in the ocean shipping industry will not be completed. Indeed, transactions between ocean shippers have successfully applied for pre-merger clearance without drawing second requests or enforcement actions since these announcements. Moreover, the Antitrust Division

has experienced some recent setbacks in high-profile cases seeking to prevent consolidation in other industries. However, parties' antitrust counsel are becoming involved at an earlier stage in the transaction process to advise clients of potential risks, implement risk mitigation strategies, and prepare contingency plans. The cumulative effect of regulators' enhanced focus on the ocean shipping industry, even for transactions that are unlikely to receive questions or challenges from regulators, is to anticipate increased legal review and allow the corresponding increase in time in the transaction schedule.

Separate from the FMC's increasing involvement in the merger review process, the FMC reviews and monitors agreements among certain ocean carriers that set capacity or discuss rates. Marine Terminal Operators must also report certain information to the FMC as it relates to rates, operations, and joint contracting. As these may be integral or ancillary components of a transaction involving complex ocean shipping operations, the FMC is another source of regulatory review and oversight. Transactions involving international liner service or domestic terminal operations should therefore expect some or all of their deals to come before the FMC. Even if the transaction itself does not require an FMC filing or notice, follow-on restructurings or integration may require filings, for example, to conform carrier names or unify tariff structures.

CFIUS

The Committee on Foreign Investment in the United States ("CFIUS") is an interagency committee of the U.S. government that reviews certain transactions where a foreign person seeks to acquire control of a U.S. business, whether through ownership of a majority of equity or the right to direct certain material actions, or to make a non-passive minority investment in certain U.S. businesses. Regarding minority investments, the Foreign Investment Risk Review Modernization Act of 2018 and subsequent regulations have expanded the scope of CFIUS review to include certain non-passive, non-controlling investments in U.S. businesses with a nexus to critical infrastructure, critical technologies, or sensitive personal data. Important to the maritime and related logistics industries, "critical infrastructure" includes liquefied natural gas terminals requiring licenses under the Deepwater Port Act, certain maritime ports and certain individual terminals at maritime ports (as part of CFIUS's recently expanded real estate jurisdiction noted below), certain submarine cable systems and landing facilities, and rail lines and associated connector lines designated as part of the U.S. Department of Defense's Strategic Rail Corridor Network, as well as

other ground and air transportation services. CFIUS regulations also apply to the acquisition of certain rights (apart from investments) in certain real estate, including certain ports and real estate near military installations or offshore military operating areas. International investors in United States businesses will need to be mindful of whether their deal involves any of the covered industries and plan accordingly.

Certain transactions trigger a mandatory filing requirement, while others are subject to voluntary filing. CFIUS reviews the threat posted by the foreign investor, the vulnerability of the U.S. business, and the national security consequences of combining that threat and vulnerability. Notably, CFIUS has broad discretion to review "non-notified" transactions, even years after closing, so where a filing is voluntary, investors should consider whether it would be prudent to file to avoid unexpected future outreach from CFIUS.

(continued on page 9)

When making a CFIUS filing, the parties may either submit a full joint voluntary notice or a short-form declaration. For a full notice, the CFIUS review process includes two distinct periods—a 45-day review period and a further 45-day investigation period at CFIUS's option. If CFIUS determines that the proposed transaction threatens U.S. national security, CFIUS may (i) suspend the transaction, (ii) impose and enforce a mitigation agreement with conditions on the transaction parties, (iii) negotiate a voluntary abandonment of the transaction with the parties, or (iv) refer the transaction to the President to exercise authority under the Defense Production Act to suspend or prohibit the transaction.

Rather than filing a full voluntary notice, the parties may submit an abbreviated notification that CFIUS must respond to within 30 days. After assessing this abbreviated notification, CFIUS is authorized to (i) request that the parties file a full notice (starting the time period discussed above); (ii) inform the parties that CFIUS is unable to reach a conclusion on the information provided; (iii) initiate a unilateral review; or (iv) notify the parties that the Committee has concluded all action (*i.e.,* cleared the transaction).

According to the most recent CFIUS annual report, CFIUS reviewed a record-high 440 filings (154 short-form declarations and 286 full joint voluntary notices) in 2022, a slight increase over the prior record of 436 filings that CFIUS reviewed in 2021. Practitioners infer that the increased filing volume in 2022, despite a softer M&A market during the latter part of that year, reflects a greater recognition of CFIUS's jurisdiction and heightened vigilance.

Including counsel with CFIUS experience at the initial stages of evaluating a transaction allows the parties to identify the likelihood of a filing and incorporate any associated filing and review period in the deal schedule.

How to Get a Deal Done across Time Zones

Once deal teams reach agreement on the outlines of a transaction and successfully navigate complex multi-jurisdiction regulatory requirements, the principals and their advisers need to actually get a deal done. More so than other industries, maritime businesses and their operations by their nature are often spread across the globe. Video conferences, virtual data rooms, and electronic signatures have made it easier to collaborate. However, forcing one party to negotiate in the middle of their night, or waiting for business hours to align to move deal points forward are potential barriers to achieving a timely closing.

In-person negotiations can focus the deal teams and create a momentum to push through seemingly irreconcilable differences. Prior to gathering the principals and their advisers, the outstanding issues should be narrowed to a defined set of established positions. Schedules should be cleared and decision makers should be present to facilitate a negotiating environment where each side can focus on reaching an agreement. Ample separate meeting space should be reserved to allow the parties to caucus in private with their advisers. And, most importantly, large, comfortable, and well-equipped workspaces should be made ready for the lawyers to prepare drafts of definitive transaction agreements late into the night.

Buyers, sellers, and their advisers may have to deviate from the norms in their respective countries to get to "yes." For example, parties may elect to use a European-style locked box transaction instead of an American-style purchase price adjustment (or completion account) mechanism, or parties may evaluate the use of representations and warranties insurance (or warranty and indemnity insurance in Europe). In a competitive M&A landscape, buyers will be expected to propose a deal structure with representations and warranties insurance, allowing the seller to "walk away" from most or all post-closing liability. In general, American representations and warranties insurance is considered to provide broader coverage with a less burdensome underwriting process than its European equivalent. Consequently, parties otherwise unaccustomed to U.S.-style deals may select U.S. law to govern a customary U.S.-style acquisition agreement to obtain a broad policy. At the same time, parties accustomed to certain forum selection and dispute resolution provisions may instead find themselves selecting international arbitration in Paris, London, Singapore, or Hong Kong.

The complexity and resulting creativity in deal structuring is what makes cross-border mergers and acquisitions exciting and fun (for those of us who enjoy that type of thing). Opportunities abound to expand in new markets, unlock synergies, obtain liquidity, and acquire new customers. Experienced transaction advisers can help deal participants close their transactions faster with reduced uncertainty in an ever-increasing regulatory environment. □

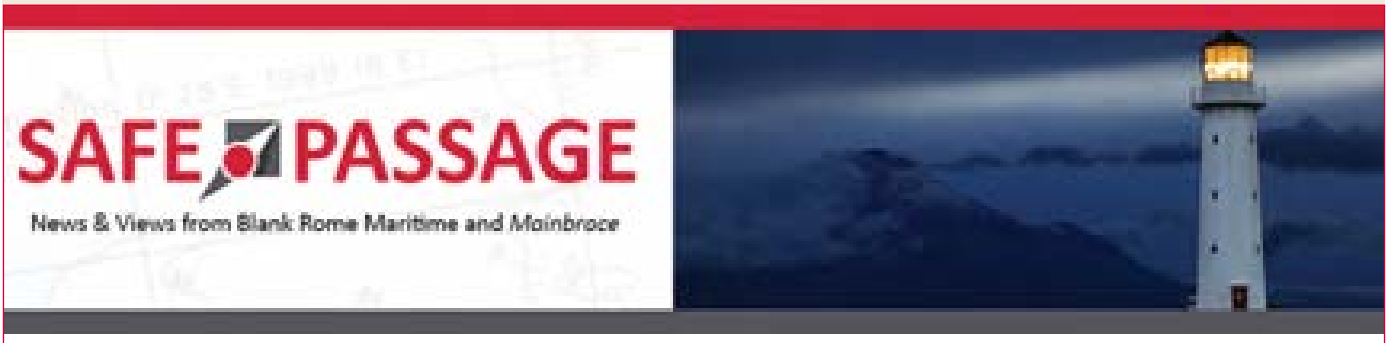
Blank Rome Named "Law Firm of the Year" in Admiralty & Maritime Law in *U.S. News – Best Lawyers®* 2023 "Best Law Firms"

Blank Rome LLP is pleased to announce that our firm has been named "Law Firm of the Year" in Admiralty & Maritime Law in the 2023 "Best Law Firms" survey by *U.S. News & World Report – Best Lawyers.®* Only one law firm per legal practice area received the "Best Law Firm" recognition.

Along with this recognition, our Maritime practice group was also ranked Tier 1 nationally and ranked Tier 1 regionally in Houston, New York City, and Washington, D.C., in Admiralty & Maritime Law. The rankings are based on a combination of "client feedback, information provided on the Law Firm Survey, the Law Firm Leaders Survey, and Best Lawyers peer review."

Blank Rome was nationally ranked in 27 practice areas and regionally ranked in 83 practice areas in the 2023 "Best Law Firms" survey by *U.S. News & World Report – Best Lawyers.®* □ – 2023 BLANK ROME LLP

To view Blank Rome's full rankings, please click here.



We invite our readers to dive into our archive of *Mainbrace* newsletters and maritime development advisories, as well as keep abeam with all of our current and upcoming analyses on trending maritime topics and legislation, in our ***Safe Passage*** blog.

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Maritime Transportation: Whose Responsibility Is It When Produce Arrives in Damaged Condition?

BY KEITH B. LETOURNEAU

KEITH B. LETOURNEAU
PARTNER

What do avocados, bananas and citrus fruit all have in common in Texas? A large percentage reach our shores by ship. But you know how bananas and avocados ripen on the kitchen counter. How are they kept fresh from grove to store, and whose responsibility is it when the produce arrives in damaged condition, or the buyer fails to pay for these commodities?

Container ships with dedicated refrigerated containers (reefer ships) regularly transport perishable fruit from Central and South America to U.S. ports on the Gulf, East and West Coasts. The U.S. Carriage of Goods by Sea Act ("COGSA") governs the transportation of cargo by ocean common carriage between the United States and foreign ports. Common carriage means that the ocean carrier makes its cargo space available to the public, as opposed to private carriage, which dedicates its cargo space to one or a select few shippers.

COGSA creates a burden-shifting scheme to assess liability when cargo arrives in damaged condition. The shipper (that is, the party whose cargo is transported) can present a prima facie case of liability by proving that it delivered the cargo in sound condition at the load port, the cargo arrived in damaged condition at the discharge port and the shipper suffered monetary damage as a result. The burden then shifts to the carrier to prove that it exercised due diligence and one of COGSA's 17 exceptions to liability apply, for example: perils, dangers and accidents of the sea; inherent vice of the cargo; latent defects of the cargo not discoverable by due diligence; or an act, neglect of the master, mariner or servants of the carrier in the navigation or management of the vessel. If the carrier satisfies that hurdle, the shipper must then prove that the carrier's negligence caused the damage. Note that carriers generally disclaim any liability for damage to cargo carried above deck (because of exposure to the elements) and so shippers should be aware as to whether the bill of lading includes any such disclaimer and where their cargoes will be stowed aboard the vessel.

COGSA also allows an ocean carrier to limit its liability to $500 per package or customary freight unit if the bill of lading permits the shipper to declare a higher value on the face of the bill. If the shipper inserts a higher value for its cargo, the carrier may charge a higher freight rate but assumes liability for the full value of the cargo. The number of packages is usually included on the face of the bill of lading. Because of this right to limit liability, shippers should always consider obtaining cargo insurance for cargoes carried aboard ship, though such policies also include various exceptions to liability.

Carrying perishable fruit requires special precautions by both shippers and carriers, especially given the seasonal nature of crop harvests. The goods must be shipped close in time to harvesting to minimize spoilage, which may be difficult if multiple growers are involved who harvest at different times. The shipper should consider including

sensors within various fruit boxes within the container to measure temperature and humidity conditions and supplying container loading instructions addressing inappropriate cargo mixes to avoid cross-contamination and premature ripening. Before loading the reefer containers aboard ship, the shipper should provide the ocean carrier with the set-point temperature (specifying whether in Celsius or Fahrenheit to avoid confusion), humidity conditions, and air flow/vent settings that apply to each container and type of fruit carried. Transport standards are included in the Code of Practice for Packing of Cargo Transport Units (CTU Code). Each refrigerated container should undergo an inspection to assess its operating condition (including vent settings, air flow, door gaskets and no odors) and cooled to the set-point temperature before loading the fruit boxes. The carrier should inspect each electrical plug connection and properly connect and seal it for sea exposure. If feasible, depending upon how high containers are stacked, the carrier should make regular rounds of the reefer containers to check each remains at the correct temperature. The carrier should also keep an adequate supply of refrigerant aboard in case of cooling failures. This helpful article addresses the foregoing precautions in greater detail.

In case of cargo damage, gathering all available data and records about how the reefer boxes performed will be essential to assessing the cause of such damage, including whether the vessel's crew carried out adequate inspections during the voyage, whether any breakdowns or electrical-power outages occurred that required mechanical/electrical repairs, and whether any delays degraded the fruit or reduced its useful life prior to delivery.

Perishable fruit sellers face a conundrum when confronted with transit delays where the cargo has not suffered physical damage, but its value deteriorates with the passage of time. To present a prima facie case, COGSA ordinarily requires proof of physical damage. Yet, in the context of a salvage sale of clementines, one court held that to state a prima facie case based on delay, a plaintiff may show it suffered loss by the price differential between the expected sale price on the original delivery date and the mitigation resale price. To recover for such delay damages, perishable fruit carriage of goods contracts must include a "time-is-of-the-essence" clause.

Keep in mind that if the bill of lading is a through bill of lading, that is, covers the transportation of the cargo all the way to destination, U.S. general maritime law permits the inland carriers to limit their liability under COGSA as described above. As well, many bills of lading incorporate the governing charterparty's terms and conditions, in which event shippers should obtain and review same to assess provisions relevant to the carriage of perishable commodities.

Container ships with dedicated refrigerated containers (reefer ships) regularly transport perishable fruit from Central and South America to U.S. ports on the Gulf, East and West Coasts.

Another area of risk that perishable fruit shippers face is receiver insolvency. Under the Perishable Agricultural Commodities Act ("PACA"), agricultural-product shippers can help guard against this risk. Under PACA, buyers must keep funds in a statutory trust on fruits and vegetables that they have received but not yet paid for. Shippers can make a claim against trust fund assets, which claims take priority over any other creditors' claims. PACA licensees can preserve their trust rights by including a statement on the face of their invoices noting that the goods are sold subject to PACA's statutory trust, and the seller retains a trust claim over such goods, along with other boilerplate language. Sellers who are not PACA licensees must include more elaborate language on the invoice supplying notice of intent to preserve trust benefits, among other information.

When we walk into a grocery store, we take for granted that fresh fruit of our choice is readily available every day. Yet, the synchronized efforts of growers, shippers, ocean carriers, receivers and retailers are necessary to keep an unimpeded flow, and the legal structure in the United States underpinning that flow provides predictability and mechanisms to remedy those relatively few cases where the goods are damaged in transit or otherwise remain unpaid. ◻

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Can Foreign Corporate Defendants Be "Found" by Registering and Appointing an Agent Post *Mallory?*

BY LAUREN B. WILGUS AND NOE S. HAMRA

LAUREN B. WILGUS
PARTNER

NOE S. HAMRA
ASSOCIATE

Post* Mallory v. Norfolk Southern Railway Co., *are foreign *corporate defendants "found within the district" for purposes of Rule B by registering to do business in New York and appointing an agent for service of process?*

Introduction

For years, federal courts in the Second Circuit consistently held that registration with the New York Department of State to conduct business in New York, and designation of an agent within the district upon whom process may be served, constituted being "found within the district" for purposes of Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure (the "Admiralty Rules"). This precedent was clearly established in *STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.,* 560 F.3d 127, 133 (2d Cir. 2009), where the Second Circuit unequivocally held that "a company registered with the Department of State is 'found' [within the district] for purposes of Rule B…."

However, subsequent developments in the law of personal jurisdiction combined with the absence of clear legislative statements in the New York registration statutes[1] have cast doubt on the continuing viability of *STX Panocean's* holding, and the extent to which a court can exercise general jurisdiction over foreign corporate defendants, especially under New York law.

With the Supreme Court of the United States' recent pronouncement on this issue in *Mallory v. Norfolk Southern Railway Co.,* 600 U.S. ____, 143 S. Ct. 2028 (2023), one could argue that *STX Panocean* has been reinvigorated. However, while *Mallory* foreclosed any argument that foreign corporate defendants are not subject to personal jurisdiction when they *expressly* consent to in-state suits in order to do business in the forum, the Court was less clear about whether the same would be true in states like New York where registration to do business does not require a corporate defendant to appear in the state's courts to defend causes of action unrelated to its activities within the state. In fact, New York statutes are silent on this issue.

Background

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

Historically, maritime attachments were created due to the difficulty in obtaining jurisdiction over parties to a maritime dispute compared to parties to a traditional civil action. In maritime disputes, parties are peripatetic and their assets transitory. Therefore, the policy underlying maritime attachment was to permit attachments wherever the defendant's assets could be found, "thereby obviating the need for a plaintiff to 'scour the globe' to find a proper forum for suit, or property of the defendant sufficient to satisfy a judgment."

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

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"a defendant will be considered 'found within the district' in which the plaintiff brings its action if the defendant has sufficient contacts with the district to meet minimum due process standards and can be served with process in the district."

Federal law defines the requirements necessary for satisfaction of Rule B, while federal courts look to the relevant state law to determine if those requirements are met.

Until recently, it was well settled under New York law that registration to do business in New York subjected foreign companies to personal general jurisdiction in the State. Relying on New York law, federal courts within the Second Circuit consistently held that registration with the New York Department of State to conduct business in New York, and designation of an agent within the district upon whom process may be served, constituted being "found within the district" for purposes of Rule B. Aside from the fact that under New York law registration to do business in New York subjected foreign companies to personal general jurisdiction in the State, federal courts also considered "amenability to suit, rather than a party's economic and physical activities in the district at issue, [to be] the touchstone of the first prong of the *Seawind* Test." After all, "[i]n the context of peripatetic defendants with transient assets, maritime attachment is aimed at obviating a plaintiff's need to determine where the defendant is amenable to suit. However, no 'scour[ing of] the globe'—and, therefore, no attachment—is necessary where the defendant has already voluntarily subjected itself to the district's jurisdiction by reason of its registration with the State."

Post-*Daimler AG v. Bauman* Status

In 2014, the Supreme Court in *Daimler AG v. Bauman,* 571 U.S. 117 (2014), addressed the question of whether, consistent with due process, a foreign corporation may be subject to a court's general jurisdiction based on the contacts of its in-state subsidiary. The Court held that a corporation may be subject to general jurisdiction in a state only where its contacts are so "continuous and systematic," judged against the corporation's national and global activities, that it is "essentially at home" in that state. The Court further stated that aside from "an exceptional case," a corporation is at home only in a state where it is incorporated or it has its principal place of business.

Since the Supreme Court's decision in *Daimler,* New York state and federal courts have concluded registration under New York Business Law § 1304 does not alone subject foreign companies to personal jurisdiction in New York (non-Rule B cases). *See, e.g., Chufen Chen v. Dunkin' Brands, Inc.* 954 F.3d 492, 499 (2d Cir. 2020) ("Accordingly, in light of *Daimler,* our own precedent, and the unanimous conclusion of the three New York intermediate courts to

have considered the issue, we now hold that a foreign corporation does not consent to general personal jurisdiction in New York by merely registering to do business in that state and designating an in-state agent for service of process under BCL § 1301(a)"); *Brown v. Lockheed Maritime Corp.,* 814 F.3d 619, 640 (2d Cir. 2016) ("If mere registration and the accompanying appointment of an in-state agent…sufficed to confer general jurisdiction…*Daimler's* ruling would be robbed of any meaning…."); *Aybar v. Aybar,* 93 N.Y.S.3d 159, 165 (NY App. 2d Dep't 2019) ("A corporate defendant's registration to do business in New York…does not constitute consent by the corporation to submit to the general jurisdiction of New York for causes of action that are unrelated to the corporation's affiliations with New York) (citing *Daimler)*; *Best v. Gurhie Med. Grp., P.C.,* 107 N.Y.S.3d 258, 261–62 (NY App. 4th Dep't 2019) (same); *Fekah v. Baker Hughes Inc.,* 110 N.Y.S. 3d 1, 2 (NY App. 1st Dep't 2019) (same).

In the Rule B context, in two unpublished decisions, federal courts in the Southern District of New York addressed the issue of whether registration is "found within the district" for purposes of Rule B in the wake of *Daimler* and *Chufen Chen.* In *Beauty Maritime v. Sigma Tankers,* No. 20-cv-4376 (VSB) (S.D.N.Y. June 12, 2020), Judge Vernon S. Broderick considered whether *Chufen Chen* abrogated *STX Panocean (UK) Co.* and found it did not, noting:

> STX did not establish that the Due Process Clause's general personal jurisdiction test was coterminous with Rule B's "found within the district" requirement, and Chufen Chen says nothing about admiralty law or Rule B. Indeed, STX counseled that a party's "amenability to suit, rather than [the] party's economic and physical activities in the district at issue, is the touchstone of the first prong of the *Seawind* Test." *Id.* at 131–32.

Several months later, in *Classic Maritime v. XCoal Energy and Resources,* No. 21-cv-0766 (ACL) (S.D.N.Y. February 26, 2021), Judge Andrew L. Carter, Jr., in considering the same arguments raised in the *Beauty Maritime* case, denied the defendant's motion to vacate the maritime attachment, finding registration was no longer sufficient to meet the "found within the district" prong under *Daimler* and *Chufen Chen.*

Mallory v. Norfolk Southern Railway Co., 143 S. Ct. 2028 (2023)

On June 27, 2023, the Supreme Court issued its decision in the *Mallory* case. In *Mallory,* also a non-Rule B case, an employee and Virginia resident commenced an action in Pennsylvania state court against his former employer, Norfolk Southern Railway Co., a Virginia railroad corporation (incorporated and headquartered in Virginia), under the Federal Employers' Liability Act ("FELA") to recover for injuries allegedly caused by exposure to carcinogens in Virginia and Ohio. To maintain jurisdiction over the defendant in Pennsylvania, plaintiff pointed to defendant's substantial presence in Pennsylvania and the fact that it had registered to do business in the State. In fact, Pennsylvania requires out-of-state companies that register to do business in the Commonwealth to agree to appear in its courts on "any cause of action" against them. *See* 42 Pa. Cons. Stat. § 5301(a)(2)(i), (b). Plaintiff argued that, by submitting to Pennsylvania's statutory regime, the defendant had consented to be sued in Pennsylvania on any claim, including the one at hand, which had no connection to the State.

In maritime disputes, parties are peripatetic and their assets transitory. Therefore, the policy underlying maritime attachment was to permit attachments wherever the defendant's assets could be found, "thereby obviating the need for a plaintiff to 'scour the globe' to find a proper forum for suit, or property of the defendant sufficient to satisfy a judgment."

In holding that the defendant was subject to jurisdiction in the state of Pennsylvania, the Court relied on prior precedent established by *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.,* 243 U.S. 93 (1917). In *Pennsylvania Fire,* the Court upheld jurisdiction over an insurance company that had registered to do business in the state of Missouri, even though the lawsuit had nothing to do with Missouri. In the Court's own words, "Pennsylvania Fire could be sued in Missouri by an out-of-state plaintiff on an out-of-state

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contract because it had agreed to accept service of process in Missouri *on any suit* as a condition of doing business there." (emphasis added) (Missouri law required any out-of-state insurance company "desiring to transact any business" in the State to file paperwork agreeing to (1) appoint a state official to serve as the company's agent for service of process, and (2) accept service on that official as valid ***in any suit.***)

Much like *Pennsylvania Fire,* the *Mallory* Court found that Pennsylvania law also provided for similar requirements as Missouri, including registration and appointment of an agent for service of process. Most importantly, the Court found that Pennsylvania law is explicit that "qualification as a foreign corporation" shall permit state courts to "exercise general personal jurisdiction" over a registered foreign corporation, just as they can over domestic corporations. 42 Pa. Cons. Stat. § 5301(a)(2)(i). Therefore, the Court had no difficulty in finding that Norfolk Southern Railway Co. had consented to jurisdiction in the state of Pennsylvania over any cause of action, even if unrelated to its activity in the State.

Conclusion

The current statutes in New York addressing registration and appointment of an agent for service of process are silent as to whether a corporation registering to do business in the State is also subjecting itself to jurisdiction for any and/or all causes of actions, related or unrelated to the business being conducted. The absence of specificity was made clear by the New York State Legislature when, in 2018, they attempted to amend New York's licensing and registration statutes to inform a foreign corporation that if it applied for authority to do business in New York, it was then consenting to general jurisdiction in the State for all purposes.[2] N.Y. State Bill S5889 appears to have died in the State Senate but, if it ever becomes law, the issue of whether or not registration and appointment of an agent for service of process amount to being "found within the district" for Rule B purposes will certainly become moot.

Looking at the nature of Rule B attachments and their underlying purpose, federal courts in New York may conclude the Supreme Court's decision in *Mallory* is consistent with *STX Panocean* and that registering to do business in New York and appointing an agent for service of process constitutes being "found within the district" because Rule B attachments involve different due process considerations, which focus primarily on the plaintiff's "amenability to suit, rather than a party's economic and physical activities in the district."

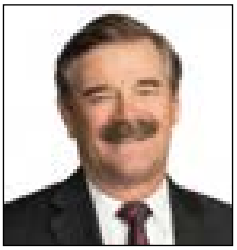
On the other hand, because *Mallory* is not an admiralty case, federal courts in New York may feel compelled to follow *Chufen Chen* and subsequent district court decisions finding registration and appointment of an agent for service of process to be insufficient to meet due process standards as required by *Daimler* and its predecessor *Goodyear.* Thus, unless a foreign corporate defendant is incorporated in New York, has its principal place of business in New York, or has contacts that are so "continuous and systematic," that it is "essentially at home" in New York, the foreign corporate defendant may not be "found within the district" for purposes of Rule B and its assets may be subject to attachment. In view of *Mallory,* this appears to be a much more difficult argument to overcome.

Due to *Mallory's* precedent, it remains to be seen whether the federal courts in New York will find registration and appointing an agent for service, as specified in *STX Panocean,* sufficient to defend against Rule B or whether it is no longer enough under *Chufen Chen.* Stay tuned. □

1. *See* NY BUS CORP. §§ 304, 1301 & 1304.
2. N.Y. State Bill S5889 (2017–2018), nysenate.gov/legislation/bills/2017/s5889 (last visited August 20, 2023).

Evolution of Offshore Wind and the Coastwise Laws

BY JONATHAN K. WALDRON, DANA S. MERKEL, AND VANESSA C. DiDOMENICO



JONATHAN K. WALDRON
SENIOR COUNSEL

DANA S. MERKEL
OF COUNSEL

VANESSA C. DIDOMENICO
ASSOCIATE

Over the past year, a number of new interpretations related to the application of the coastwise laws to the developing offshore wind industry in the United States have clarified how construction and operation of offshore wind farms will proceed. The U.S. coastwise laws, which impose restrictions on the transportation of merchandise and passengers, as well as towing and dredging operations, are interpreted and enforced by U.S. Customs and Border Protection ("CBP").

There was much uncertainty in the offshore wind industry for many years with respect to how the coastwise laws should apply to offshore wind farm construction and operation. Following the 2021 National Defense Authorization Act, which clarified that the coastwise laws apply to offshore wind on the U.S. outer continental shelf ("OCS") as they do for oil and gas, CBP began issuing rulings applying the laws to the offshore wind industry—and industry is requesting more and more CBP rulings to clarify how the contemplated offshore wind work can be performed in compliance with the law. Although some issues are still pending, this article provides an update on some of the most recent and noteworthy interpretations.

Status of Project Crew

A number of personnel are required to install offshore wind turbines and perform related work while the turbine is being transported offshore by an installation vessel. These personnel are heavily involved in the installation work but are not involved in the navigation or operation of the installation vessel. The status of these personnel was unclear with respect to whether they would be considered crew or passengers, which would implicate passenger transport restrictions under the Passenger Vessel Services Act ("PVSA").

CBP addressed the transportation of "project crew" for an offshore wind project in numerous rulings and determined that "project crew" include personnel who travel onboard a foreign flag vessel to project sites, including those personnel temporarily disembarking from a foreign flag vessel at each site to perform work on an offshore turbine foundation. CBP ruled that project crew would not be considered passengers under the PVSA if they are also performing tasks onboard the vessel that are "directly and substantially related to the operation, navigation, or business of the vessel," which included work performed at each site. CBP also ruled that contract management personnel onboard a vessel to observe and monitor vessel operations did not constitute "passengers" because they serve a necessary business function of the vessel in performing offshore construction work.

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Evolution of Offshore Wind and the Coastwise Laws (continued from page 18)

Cablelaying

It has been CBP's long-standing interpretation that cablelaying is not engagement in the coastwise trade and can be conducted by a foreign flag vessel because it is paid out, not unladen. In addition, CBP has confirmed that picking up cable laid prior and wet-stored on the seabed to connect it to another section is still part of the cablelaying operation. Once laid, however, the cable becomes a coastwise point. As such, the transportation of any subsequent installations, such as of mats, rock bags, or loose rock, to cover or protect the cable, would be subject to the coastwise laws if transported from a U.S. port.

CBP also recently confirmed its position with respect to return of surplus cable following a cablelaying operation. Although CBP initially stated that there was no "de minimis" exception, it later modified its initial ruling on surplus cable to acknowledge prior rulings that allowed up to five percent of the cable laden on the vessel to be unladen at a second coastwise point. Accordingly, any surplus cable that remains on the vessel after cablelaying may be landed at a U.S. port as long as it is five percent or less of the cable initially laden for the project.

CBP's new interpretations of a pristine site and vessels unlading after the transportation is completed to the pristine site have potentially wide-ranging impacts on all offshore operations, both offshore wind and oil and gas.

Mechanical Dredging

Dredging in U.S. waters is restricted to coastwise qualified vessels. However, CBP has consistently ruled that use of certain devices to bury cable in the seabed for the purpose of cablelaying does not constitute dredging and may be conducted by foreign flag vessels. CBP has ruled that cable burial devices that use a jetting action to emulsify the seabed and temporarily displace the sediment, allowing the cable to sink down and bury into the seabed, is not dredging. Further, CBP recently ruled that use of a mechanical cutter burial tool to create a narrow slice of the seabed to bury a cable—one to 1.5-meter-deep trench approximately 0.25 to 0.45 m wide—was not dredging, even if the burial was done separate from the cablelaying operation. It would be prudent for operators to obtain CBP rulings approving the use of any new cable-burying technology.

Pristine Sites

CBP's first ruling addressing pristine sites with respect to offshore wind farm construction was published in early 2021 in the context of scour protection. CBP originally ruled that pristine sites on the OCS, where there were no installations on the seabed, were considered coastwise points. However, CBP then modified the ruling to align with numerous longstanding rulings that found a pristine site was not a coastwise point. Therefore, a foreign flag vessel could transport from a U.S. port and install components at sites where there were no other installations.

CBP expanded on this ruling in July 2023 to address the installation of monopiles at pristine sites on the OCS. In that ruling, CBP found no violation would occur when an installation vessel loaded multiple monopiles at a U.S. port and proceeded offshore to install each monopile at pristine wind turbine installation sites on the OCS. CBP noted that once the monopiles were installed at each site, the first installation at each pristine site, the sites would become coastwise points and any future transportation to the sites must be done by a coastwise-qualified vessel.

However, this ruling was modified shortly thereafter, on September 14, 2023. In a long history of pristine site rulings for oil and gas and, more recently, offshore wind, CBP has never ruled that the pristine site analysis is impacted by whether the installation vessel touches the seafloor during installation at a pristine site. CBP modified its July 2023 ruling to differentiate between installation while a vessel is using dynamic positioning ("DP") and while a vessel is anchored or jacked up. As noted above, the monopiles at issue in that ruling were to be transported from a U.S. port to a pristine site offshore, which would not be a coastwise point. After transporting the monopiles offshore, and before setting the monopiles on the seafloor, the installation vessel proposed anchoring or jacking up to install the monopiles.

The modified CBP ruling continues to state that transportation to and installation at a pristine site on the OCS is not restricted by the Jones Act because there is no transportation between two coastwise points. However, CBP revised its pristine site analysis to state that after transportation offshore to the pristine site, if the installation vessel anchors or jacks up to conduct the installation, the vessel itself becomes a temporary coastwise point and then when it unlades the monopiles during installation on the seabed, there would be a violation of the Jones Act because there has been transportation between two coastwise points. In other words, CBP has determined this constitutes a violation despite the fact that the transportation ended when the vessel arrives at the pristine site before it anchors or jacks up and there is no transportation of the monopiles after it anchors or jacks up and unlades the monopiles to perform the installation work.

CBP's new interpretations of a pristine site and vessels unlading after the transportation is completed to the pristine site have potentially wide-ranging impacts on all offshore operations, both offshore wind and oil and gas.

Conclusion

As offshore wind continues to be a highly active and developing industry in the United States, CBP is publishing frequent interpretations on how construction of offshore wind projects must be accomplished. Unfortunately, some of CBP's rulings have been unpredictable and have been subject to subsequent modification. This can have a drastic impact on the offshore industry, resulting in a volatile regulatory environment for industry stakeholders. It is critical that stakeholders keep a close watch on the publication of CBP rulings for any new and changing interpretations and review any planned operations for compliance. □

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CHICAGO
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Suite 1650
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CINCINNATI
1700 PNC Center
201 East Fifth Street
Cincinnati, OH 45202

DALLAS
300 Crescent Court
Suite 200
Dallas, TX 75201

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Broward Financial Centre
500 East Broward Boulevard
Suite 2100
Fort Lauderdale, FL 33394

HOUSTON
717 Texas Avenue
Suite 1400
Houston, TX 77002

LOS ANGELES
2029 Century Park East
6th Floor
Los Angeles, CA 90067

NEW YORK
1271 Avenue of the Americas
New York, NY 10020

ORANGE COUNTY
4 Park Plaza
Suite 450
Irvine, CA 92614

PHILADELPHIA
One Logan Square
130 North 18th Street
Philadelphia, PA 19103-6998

PITTSBURGH
Union Trust Building
501 Grant Street
Suite 850
Pittsburgh, PA 15219

PRINCETON
300 Carnegie Center
Suite 220
Princeton, NJ 08540

SHANGHAI
Shanghai Representative Office, USA
8F, Two IFC
8 Century Avenue, Pudong
Shanghai, China 200120

TAMPA
100 S. Ashley Drive
Suite 600
Tampa, FL 33602

WASHINGTON
1825 Eye Street NW
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Blank Rome provides a comprehensive solution for protecting your company's property and reputation from the unprecedented cybersecurity challenges present in today's global digital economy. Our multidisciplinary team of leading cybersecurity and data privacy professionals advises clients on the potential consequences of cybersecurity threats and how to implement comprehensive measures for mitigating cyber risks, prepare customized strategy and action plans, and provide ongoing support and maintenance to promote cybersecurity and cyber risk management awareness. Blank Rome's maritime cyber risk management team has the capability to address cybersecurity issues associated with both land-based systems and systems onboard ships, including the implementation of the *Guidelines on Cyber Security Onboard Ships* and the *IMO Guidelines on Maritime Cyber Risk Management in Safety Management Systems.* **To learn how Blank Rome's Maritime Cyber Risk Management Program can help your company, please visit blankrome.com/cybersecurity.**

TRADE SANCTIONS AND EXPORT COMPLIANCE REVIEW PROGRAM

Blank Rome's Trade Sanctions and Export Compliance Review Program ensures that companies in the maritime, transportation, offshore, and commodities fields do not fall afoul of U.S. trade law requirements. U.S. requirements for trading with Iran, Cuba, Russia, Syria, and other hotspots change rapidly, and U.S. limits on banking and financial services, and restrictions on exports of U.S. goods, software, and technology, impact our shipping and energy clients daily. Our team will review and update our clients' internal policies and procedures for complying with these rules on a fixed-fee basis. When needed, our trade team brings extensive experience in compliance audits and planning, investigations and enforcement matters, and government relations, tailored to provide practical and businesslike solutions for shipping, trading, and energy clients worldwide. **To learn how the Trade Sanctions and Export Compliance Review Program can help your company, please visit blankrome.com/services/cross-border-international/international-trade or contact Matthew J. Thomas (matthew.thomas@blankrome.com, 202.772.5971).**

BLANKROME
maritime

Blank Rome's Maritime Industry Team

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.

Maritime Emergency Response Team ("MERT")

We are on call 24 / 7 / 365

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

Thomas H. Belknap, Jr. – NYC
CHAIR, BLANK ROME MARITIME

Jeanne M. Grasso – WAS
CHAIR, BLANK ROME MARITIME

Keith B. Letourneau – HOU
CHAIR, BLANK ROME MARITIME

Richard V. Singleton, II – NYC
CO-CHAIR, MARITIME INDUSTRY TEAM

Matthew J. Thomas – WAS
CO-CHAIR, MARITIME INDUSTRY TEAM

Bankruptcy

COMMITTEE CHAIR:

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Rick Antonoff – NYC
Ira L. Herman – NYC
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Dispute Resolution (Litigation, Arbitration and Mediation)

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Frederick L. Ikenson – WAS
Dana S. Merkel – WAS
Stefanos N. Roulakis – WAS
Jonathan K. Waldron – WAS
C. J. Zane – WAS

Please click on attorney names for contact information.

Attorney Office Locations:
HOU – Houston • NYC – New York City • PHL – Philadelphia • WAS – Washington, D.C. • WIL – Wilmington