The Rotterdam Rules would not impact a party's right to commence an action in another forum to obtain security by, for instance, arresting a ship or attaching property in the U.S. pursuant to Rule B.

**Conclusion**

The Rotterdam Rules are not intended to be a revolutionary treaty, and much of the law relating to the international transport of cargo will be substantially unchanged if and when they come into force in the United States. The changes that are made are largely incremental, but on the other hand the Rotterdam Rules are an important step towards bringing much-needed uniformity to this area of the law and, perhaps even more importantly, towards addressing some of the fundamental changes in the industry that have occurred over the past eighty years. The Rotterdam Rules may not appeal equally to all sectors of the industry, but there does seem to be wide acknowledgement that they are a material improvement over the existing hodge-podge of treaties and laws and should be ratified. Only time will tell, however, whether the Rotterdam Rules will join the ranks of the world’s most important international treaties or go the way of the Hamburg Rules into relative obscurity. ■

**Sources:**


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**Things “Seen and Unseen” — The Nature of EFTs As Intangible and Attachable Property Under Admiralty Rule B**

**By Jeremy J.O. Harwood**

**Introduction**

The Supreme Court has recognized the federal nature of the United States’ maritime law from its earliest days as embodied and protected in the U.S. Constitution, which ordains the judicial power of the federal sovereign to extend to “all cases of admiralty and maritime jurisdiction.” In a predominantly maritime nation, as it was at its founding, concerns for admiralty and ancient admiralty remedies dominated the Supreme Court’s docket. In a 1979 case, the Second Circuit Court of Appeals rejected from an 1890 Supreme Court opinion that “perpetrators of maritime injury are likely to be perpetually uniform” and recognized that “suits under admiralty jurisdiction involve separate policies to some extent.”

The Second Circuit continued:

“This tradition suggests not only that jurisdiction by attachment of property should be accorded special deference in the admiralty context, but also that maritime actors must reasonably expect to be sued where their property may be found.

In *Winter Storm Shipping Ltd. v. TPL*, 310 F.3d 263, 267 (2d Cir. 2002), Judge Haight, a seasoned admiralty judge sitting by designation in the Court of Appeals, wrote for the Court about the “history and characteristics of maritime attachment” as a “centuries old” remedy. Ironically, he commented: . . . As early as 1823, the Supreme Court was able to say of the right of attachment in *in personam* admiralty cases that “this Court has entertained such suits too often, without hesitation, to permit the right now to be questioned.” *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 486, 6 L. Ed. 369 (1823). “Maritime attachment is a feature of admiralty jurisprudence that antedates both the congressional grant of admiralty jurisdiction to the federal district courts and the promulgation of the first supreme court admiralty Rules in 1844,” *Atanas Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44, 47 (2d Cir. 1996).

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Admiralty Rule B, quoted in part supra, contains the current provisions governing maritime attachment. "Rule B is simply an extension of this ancient practice." Aurora, 85 F.3d at 47-48.

Winter Storm, as examined further below, held that electronic fund transfers ("EFTs") are attachable property under Admiralty Rule B, which refers to the "tangible or intangible personal property of the defendant." In 2008, the Second Circuit in Consul Delanoy LLC v. Schahin Engenharia Ltda., 543 F.3d 104, 109 (2d Cir. 2008) (emphasis added), held: There has been no decision by an en banc panel overruling Winter Storm. Moreover, there is no justification for departing from the principle of stare decisis here where [defendant] has not shown that Winter Storm is unworkable, and where admiralty jurisdiction is the subject of congressional legislation and Congress remains free to alter the Winter Storm rule. In any event, Winter Storm was correctly decided.

Accordingly, the Second Circuit's decision in The Shipping Corporation of India Ltd. v. Jaldhi Overseas Pte. Ltd., ___ F.3d ___, 2009 U.S. App. LEXIS 22747 (2d Cir. Oct. 16, 2009), which overruled the Winter Storm decision on the attachability of EFTs "with the consent of all the judges of the Court in active service," came as a considerable surprise to this tradition of "special deference." The Court said that Winter Storm was "erroneously decided and therefore should no longer be binding precedent in our Circuit." This article examines the EFT process and the two decisions.

The EFT Process

As defined in New York Uniform Commercial Code §4A-104(1):

"Funds transfer" means the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order. The term includes any payment order issued by the originator's bank or an intermediary bank intended to carry out the originator's payment order. A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order. A payment order is "an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary . . . transmitted by the sender directly to the receiving bank or to an agent, funds transfer system, or communication system for transmittal to the receiving bank." UCC §4A-103(a)(ii).

Thus, a payor (or "originator") instructs its foreign bank (the "originating bank") to issue a payment order that directs the payee's (or "beneficiary") foreign bank (the "beneficiary's bank") to credit the beneficiary's account there with the amount of the payment.

For a U.S. dollar transfer, a foreign originating bank's payment order is always communicated to an American bank or to a foreign bank's branch office in the United States. If the bank in the U.S. is not the same bank as the foreign originating bank, it is an "intermediary" bank. By statute, an "intermediary bank" is a "receiving bank other than the originator's bank or the beneficiary's bank." UCC §4A-104(3).

The Payment Order is communicated by a secure coded message system, such as that of the Society for Worldwide Interbank Financial Telecommunications ("SWIFT"). The "SWIFT message" is sent most often to the New York Clearing House Association that operates the Clearing House Interbank Payments System ("CHIPS"). CHIPS processes over 95% of cross-border U.S. dollar transactions (See www.chips.org/home.php). As explained by the Second Circuit in Reihor International Ltd. v. Cargo Carriers Ltd., 759 F.2d 262 (2d. Cir. 1985):

To effect the transfer, a CHIPS computer operator at a terminal—located in the paying or sending bank—programs the payment order and transmits it to the central CHIPS computer, which stores it and then causes a sending form to be typed at the sending bank. After the sending bank approves the payment, this form is reinserted in the computer and "released." At the moment of release, the central computer

4. Error in Navigation Defense. Substantively, one of the more significant changes in the Rotterdam Rules is the elimination of the carrier's defense that the damage or loss was caused by the error of the master or crew in the navigation of the vessel. Long viewed by many as anachronistic, this provision of COGSA was originally premised on the view that the Owner should not be responsible for the negligence of an otherwise competent crew once the voyage had commenced since it was effectively powerless to control the vessel once she broke ground. In this day and age of modern communication and travel, this assumption seems fairly subject to question.

In keeping with the principle that the owner's control effectively ceased once the vessel sailed, the carrier is obligated under COGSA and the Hague Rules only to exercise due diligence to make the ship seaworthy at the commencement of the voyage. Under the Rotterdam Rules, by contrast, that obligation extends for the full duration of the voyage and the "negligent navigation" defense has been eliminated.

5. Limitation of Liability. COGSA's "package" limitation of liability is $500 per package or "customary freight unit." Under the Rotterdam Rules, the limitation would be the greater of 875 "units of account" per package or "shipping unit" or 3 units of account per kilogram, unless the shipper declares a higher value and the carrier agrees to a higher limitation. (See Art. 59).

The unit of account is the Special Drawing Right as defined by the International Monetary Fund. At today's exchange rate this is just over $1,400 per package.

While the Rotterdam Rules' package limitation amount is quite a bit higher than COGSA's, it will also be more difficult to break. Article 25 of the Rotterdam Rules describes the circumstances where cargo may be carried on deck, however, and it adopts the U.S. "rule" that where the shipper and carrier expressly agree that cargo will be stowed below deck, the carrier's failure to comply with that requirement will deprive it of the right to limit liability under the Rotterdam Rules.

6. Apportionment of Damages. Under the U.S. Supreme Court's decision in Snell v. Valerieacon, 293 U.S. 296 (1934), a carrier under the COGSA regime is liable for all damage where its negligence was at least a partial cause of the loss, unless it can satisfy its burden of segregating the damages for which it is responsible from those for which it was not. In most instances, the result of this rule is that the carrier is responsible for the entire loss even if it is clear that some indeterminate portion of the damage resulted from some other cause. The Rotterdam Rules take a more lenient approach, providing in Article 17(6) that where there are multiple causes of a loss, "the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or occurrence for which it is liable pursuant to this article." Thus, the courts should have greater flexibility under the Rotterdam Rules to apportion liability based on the degree of causation.

7. Time to Sue. The time period under COGSA is one year. Under the Rotterdam Rules it is two years.

8. Jurisdiction and Arbitration. The Rotterdam Rules contain two chapters, 14 and 15, which were the subject of much debate and negotiation during the drafting process. These relate to jurisdiction and arbitration, respectively. In the end, there was such lingering disagreement about these Chapters that they were included as "opt-in" Chapters that will only bind a Contracting State if that state expressly so declares when it ratifies the Rotterdam Rules.

For the countries that adopt it, Chapter 14 provides a list of optional fora in which cargo interests in the liner trade may commence suit against the carrier even where there is an exclusive forum clause. This includes the carrier's domicile, the place of receipt or final delivery, the first port of loading or final port of discharge on the sea leg, or a place specified in the contract. In claims against maritime performing parties, such as stevedores, the claimant may sue in the port where that party provided its services in connection with the
accomplished by Himalaya clauses, and for non-maritime performing parties, the Rotterdam Rules would leave essentially untouched the existing law concerning the proper scope of applicability of Himalaya clauses.

3. Right of Control. Unlike COGSA and other past cargo regimes, the Rotterdam Rules contain express provisions clarifying when cargo interests may give modifying delivery instructions which, for instance, change the identity of the consignor or the port or discharge. (See Art. 50). Article 51 vests this power in the hands of the shipper but permits the shipper to transfer such control to other parties. Article 52 obliges the carrier to comply with reasonable instructions in this respect, and Article 53 protects the carrier where such instructions are given by providing that delivery in accordance with revised instructions by the controlling party shall be deemed delivery at the place of destination.

Why an EFT is an Attachable Res

District Judge Kaplan aptly described the quandary confronting U.S. Courts in the modern era, as well as the standard by which the Courts should fashion relief. Although his comments had regard to the situs of EFTs, they apply as well to EFTs’ ownership:

In this wired age, the location of an intangible, especially a bank account, is a metaphysical question. By and large, bank deposits exist as electronic impulses embedded in silicone chips. In a sense, therefore, bank funds are both everywhere and nowhere. But the problem is not a new one. Before the advent of electronic banking, courts grappled with the dilemma of pinpointing the location of intangible assets. It is a dilemma that calls for a practical judgment. As Judge Cardozo so eloquently put it in Severnoe Securities v. London & Lancashire Inc. [255 N.Y. 120 (1931)]:

“The situs of intangibles is in truth a legal fiction, there are times when justice and convenience requires that a legal situs be ascribed to them . . . [citations omitted] . . . At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience of particular conditions.” [Id. at 123-24, emphasis added]. Yayasan Sabab Dua Shipping SDN BHD v. Scandinavian Liquid Carriers Limited, 335 F. Supp. 441, 449 (S.D.N.Y. 2004).

Federal Rules of Civil Procedure. Because Daccarett involved an in rem proceeding, there was no occasion for the Court to consider who owned the funds. Daccarett did, however, helpfully clarify the juridical nature of an EFT:

The claims’ conception of the intermediary banks as messengers who never hold the goods, but only pass the word along, is inaccurate. On receipt of the EFTs from the originating banks, the intermediary banks possess the funds, in the form of bank credits, for some period of time before transferring them on to the destination banks. While claimants would have us believe that modern technology moved the funds from the originating banks through the intermediary bank to their ultimate destination without stopping, that was not the case. With each EFT at least two separate transactions occurred: first, funds moved from the originating bank to the intermediary
bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in Colombia. While the two transactions can occur almost instantly, sometimes they are separated by several days. Each of the amounts at issue was seized at the intermediary bank after the first transaction had concluded and before the second had begun. 6 F.3d at 54 (emphasis added).

Accordingly, “an EFT while it takes the form of a bank credit at an intermediary bank, is clearly a seiz-able rev under the forfeiture statutes.” Id. at 55. Daccarett has not been overturned and stands for a clear propo-sition under Supplemental Rule C of the attachability of an EFT “after the first transaction has concluded.” An EFT’s nature as a credit (necessarily held for someone’s account) is therefore comparable to the nature of a bank account, which does not contain the depositor’s cash, but merely represents the bank’s promise to pay the depositor, i.e. a credit. Citizen’s Bank of Maryland v. Strumpf, 516 U.S. 16 (1995); U.S. v. Butterworth-Judson Corp., 267 U.S. 387 (1925).

**Winter Storm**

In **Winter Storm**, as in **Daccarett**, process was “served upon BNY after funds had moved from . . . the originating bank, to [the] intermediary bank, but before [the intermediary bank] transferred the funds . . . the destination bank.” 310 F.3d at 278. Accordingly, Winter Storm expressly held the originator retained an attachable interest in the EFT.

In **Winter Storm**, the Court explained that federal maritime law, as embodied in Rule B:

. . . provides that a maritime plaintiff may “attach the defendant’s tangible or intangible personal property.” It is difficult to imagine words more broadly inclusive than “tangible or intangible.” What manner of thing can be neither tangible nor intangible and yet still be “property”? The phrase is the secular equivalent of the [Nicene] creed’s reference to the maker “of all there is, seen and unseen.”

Professor Jarvis has said that:

Rule B also permits a plaintiff to attach intangible items, such as debts owed to the defendant. Such items may be attached even if they have not yet matured or have only partially matured. Of course, the defendant’s entitlement to the credit or interest in the debt must be clear. 310 F.2d at 276.

The Court further noted: “There is no question that federal admiralty law regards a defendant’s bank account as property subject to maritime attach-ment under Rule B . . . Not are we able to discern in admiralty law or elsewhere a basis for regarding [defendant’s] funds in [intermediary bank]’s hands as anything other than funds held by [intermediary bank] for the account of [defendant].” Id.

In **Winter Storm**, the Second Circuit expressly reversed the District Court’s reliance on State law to define “property.” 310 F.3d at 267, 276: It follows that the broad, inclusive language of Admiralty Rule B(1)(a) and the EFT analysis in Daccarett combine to fashion a rule in this Circuit that EFT funds in the hands of an intermediary bank may be attached pursuant to Admiralty Rule B(1)(a). Because that rule is derived from federal law, there is no occasion to look for guidance to state law: 310 F.3d at 278 (emphasis added).

**Shipping Corp. of India (“SCI”)**

**The Policy Explanations and Other Rationale for a Sea Change**

In **SCI**, the Court preceded its analysis with a review of “critical commentary” of the Winter Storm decision including that “some even suggested that Winter Storm has threatened the usefulness of the dollar in interna-tional transactions.” Moreover, note was made of the Cleaning House Banks’ amicus arguments (also made and ignored in Winter Storm and Consul-Delaware) of the burden placed on its member banks by the volume of attach-ments. Indeed, the Court went back to an amicus brief submitted by the Federal Reserve Bank of New York seven years earlier in Winter Storm, which had not been re-filed in this case, in respect of “[a]dministering the efficiency and certainty of fund transfers in New York” and to its “standing as an international financial center.”

The Rotterdam Rules

*By Thomas H. Belnap, Jr.*

On Wednesday September 23, 2009, at the United Nations Commis-sion on International Trade Law (“UNCITRAL”) signing ceremony in Rotterdam, the Rotterdam Rules were signed by 15 countries. The United States was one of the parties to sign the Convention, but of course that is only a step along the path towards acces-sion to the treaty. As anyone who follows such things even loosely well knows, the U.S. has a long and distin-guished history of failing to ratify important treaties. Remember the League of Nations? Treaty ratification in the U.S. requires a two-thirds approval in the Senate, and this can be a significant challenge even where there is broad popular support.

In fact, the signing ceremony is only a step along the path for the Rotterdam Rules themselves: the Convention expressly provides that it will only come into force one year after the 20th ratification is deposited with the United Nations. As of today, 21 countries have signed the treaty, including Denmark, France, the Netherlands, Norway, Spain, Switzerland, and Greece, as well as several of the “Hamburg Rules” countries in Africa, but none have yet ratified it.

Certainly won’t promise it, but I will predict that the U.S. will ratify the Rotterdam Rules. The U.S. took a leading role in the negotiations, and the positions taken by the U.S. delegates were generally widely backed by interested industry representatives. Much of the Convention tracks a similar effort initiated in the U.S. several years ago by its Maritime Law Association to remake the United States Carriage of Goods by Sea Act (“COGSA”), and although that statute was never enacted, the final agreed upon language submitted to Congress was generally viewed as a reasonable comprome-sis among the various U.S. shipping interests.

In fact, the U.S. view probably leans a bit towards the cargo interests’ side; we are obviously a major importer and exporter of cargo, but largely as a result of our tax and employment laws there is little in the way of an American-flagged shipping fleet—with the exception of Coast-wise trade. Still, the large commercial interests had significant input into the Convention and it appears there is general consensus (if, perhaps, not uniform excitement) about the Convention as ulti-mately adopted by the United Nations. Moreover, it seems clear that the time is ripe to update COGSA, which was enacted in 1936—long before containers, electronic waybills, and multimodal transport were even imagined—and which is viewed by many as an impediment to international uniformity of the law.

**The Big Changes**

So what does it all mean? My intention here is to try to highlight some of the places where the imple-mentation of the Rotterdam Rules would represent a significant change in U.S. cargo law. Some of the changes I will mention are changes to the Hague Rules as a whole, and thus apply to all Hague Rule jurisdic-tions, but I will particularly try to highlight some of the changes that may be unique to the U.S.

1. **Scope**

The Rotterdam Rules cover carriage of goods in the liner trade even where no bill of lading or other transport document or electronic record has been issued. This is an expansion of existing regimes, like COGSA, that only apply to bills of lading or other documents of title. The Rotterdam Rules do not apply to charterparties or other similar contracts for the use of space on a ship; however, if a bill of lad-ing is issued pursuant to a charter, then the Rotterdam Rules would apply to the bill of lading and its parties or holders in due course. “Volume contracts,” such as service agreements, are subject to the Rotterdam Rules, but the parties to such agreements are permitted to derogate from its terms in many respects.

COGSA is unusual in that it applies by law to ship-ments to and from the United States, whereas the Hague Rules effectively apply only to shipments from a contracting state. The Rotterdam Rules adopt the U.S. approach and are applicable to shipments either to or from a contracting state.

2. **Period of Responsibility**

COGSA and the Hague Rules apply only “until delivery,” meaning only from the point of loading to the point of discharge from the vessel. A primary goal of the Rotterdam Rules, by contrast, was to embrace the modern development of “door to door” transaction on International Trade Law
GAO steps for such strategy and plans to incorporate their suggestions in the Implementation Plan.

From the perspective of the small boating community, they can expect to see closer scrutiny paid to small vessels with accompanying increased regulation and financial commitments. The movement is likely to be in the direction of more SOLAS and ISPS-like compliance mechanisms for owners and operators of small vessels. Companies with off-the-shelf technologies that can address these issues may also find a welcome mat at the Coast Guard.

Conclusions

DHS and the Coast Guard have undertaken a serious review of the potential threat from small vessels and taken the initial steps necessary to develop a security strategy and implementation plan for that strategy. DHS acknowledged, in response to the OIG report, that it needs to do more to follow all of the recommended


2. The requirements for commercial small vessels are described at length in the October 2008 issue of Jovarian magazine, a publication of the Passenger Vessel Association. See www.passengervessel.com.


4. The Maritime Transportation Security Act of 2002, Pub. L. 107-295, was one of the first U.S. laws to address security requirements for large vessels, and is intended to implement the IMO’s ISPS Code for large vessels.


6. The United States warned the Italian government about the potential of a Colombian cartel to transfer funds, under a penal statute; and secondly, that “the effects of Winter Storm” on the federal courts and international banks in New York are too significant to let this error go uncorrected.

7. DHS OIG-05-100.

8. Sphinx, n. 1 at 15.


10. Strategy at 16.


17. See www.americaswaterwaywatch.org.


22. IMO Guidelines, Annex at 5.


26. Sec. 1101 of H.R. 3169.

The Court next discussed how the effectiveness of Rule B had been “cabinized” or limited by its decision this year in STX Panocyan (UK) Co. v. Glory Wealth Shipping Pte Ltd., 560 F.3d 127 (2d Cir. 2009), upholding “registration” as a basis for defeating Rule B and other lower court restrictions. Reference was made to a lower court decision rejecting “proof of an EFT” as being “made by a hunch.” “[t]aken together ... may have limited the practical usefulness of our holding in Winter Storm to the plaintiffs and thus the practical effects of overturning that decision.” This justification, if it may be so termed, was “to ally any concerns that the decision in this case is wholly unanticipated, surprising, or disruptive to ongoing financial practices.”

**Legal Reasoning**

**Beneficiary EFTs**

The Court first noted that its decision complied with the requirements for en banc reversal and that there were two reasons for doing so: first, Winter Storm had erroneously relied on a prior decision upholding seizure of EFTs in a criminal case, which were used by a Colombian cartel to transfer funds, under a penal statute; and secondly, that “the effects of Winter Storm” on the federal courts and international banks in New York are too significant to let this error go uncorrected.

The Court reviewed Winter Storm’s rationale and decided that its “reasons [are] unpersuasive and its consequences untenable” and its reliance on a criminal case “misplaced.” Accordingly, under Rule B “the question of ownership [of the Rule B property] is critical” because if the “is not the property of the defendant, then the court lacks jurisdiction.”

Although Winter Storm had relied upon Rule B’s broad language defining property as “tangible or intangible,” the Panel was not persuaded by the “text of Rule B” that EFTs are a defendant’s property. Further, in the absence of “federal maritime law to guide our decision,” New York State law should be considered, which “does not permit attachment of EFTs that are in possession of an intermediary bank.” An “authoritative comment” to the New York Uniform Commercial Code “states that a beneficiary has no property interest in an EFT”— a comment cited to the Court by amicus briefs in Winter Storm and Conshuh Delaware. Again, “[t]aken together,” New York law established that “EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank” and “cannot be subject to attachment under Rule B.”

**Originator EFTs**

The Court sent back the question—not raised on appeal—as to whether “there are grounds for not vacant... the remaining [originator EFT portions of the attachment order]” (emphasis added). The Lower Court, without briefing or a hearing, vacated those attachments.

**Conclusion**

The dire warnings as to Rule B’s “damage [to] New York’s standing as an international financial center,” made in 2002 and before the global credit crisis of 2008, which were entirely unrelated, were clearly influential. Despite the fact that growing interests had been calling for overturning Winter Storm, contrary to the Court’s suggestion, this decision is “unanticipated, surprising” and a complete volte face from 2008. Numerous pending appeals before the Second Circuit, as well as hundreds of Rule B cases pending in New York, have already been significantly impacted. No doubt an equal number of pending arbitrations and litigations proceeding around the world, many of which are proceeding solely on the basis that security has been obtained for an eventual award or judgment under a Rule B attachment of EFTs, will also be affected.

The reality of the Court’s remark that “we must not overstate the practical effect of our holding in this case” because of recent limitations on the remedies remains to be seen.
A Primer on Prosecuting Pirates

By John D. Kimball, Jonathan K. Waldron, and Lauren B. Wilgus

The Maersk Alabama highjacking was an unquestionably defining event—particularly in the United States—in combating the epidemic of piracy that has taken root in the Gulf of Aden in 2008-2009 despite the international task force providing convoy protection to vessels transiting the area. The vessel was captured by four Somali pirates on April 8, 2009. The reason it was of such importance from a U.S. perspective is that it was the first pirate seizure of an American flag ship since the early 1800s, and the U.S. had not focused on pirate attacks internationally until one if its own U.S. flag ships with American citizens was attacked. The event ended relatively quickly—but dramatically—on April 12, 2009, when three of the pirates were shot and killed by U.S. Navy SEAL snipers. The three pirates had Captain Richard Phillips of the Maersk Alabama in custody and were shot at a moment when it appeared that Captain Phillips was in immediate danger of being killed. The shooting of the three pirates is indicative of how the U.S. government will respond when its citizens or U.S. flag vessels are involved in a piracy incident.

At the time of the shooting, the fourth pirate was aboard the USS Bainbridge attempting to negotiate a ransom for Captain Phillips. The fourth pirate was immediately taken into custody by the U.S. Navy and was later brought to New York to face charges. The name of the fourth pirate is Adowa Abdulkadir Muse (“Muse”).1 The prosecution of Muse is likely to establish a benchmark for how the U.S. government will handle piracy cases. Muse’s trial is scheduled to begin in January 2010.

The legal basis for fighting piracy is a concept generally referred to as universal jurisdiction and is a well-established pillar of customary international law. Universal jurisdiction permits a “state to claim jurisdiction over an offender even if the offender’s act occurred outside its boundaries and even if the offender has no connection to the State.”2

In the U.S. Constitution, Article I, Section 8, Clause 10 expressly authorizes Congress to “define and punish Piracies and Felonies committed on the high seas.”3 This clause has been interpreted to mean that Congress has the power to define and punish piracy, regardless of the nationality of the offender or the nationality of the pirate ship. This interpretation has been upheld by the U.S. Supreme Court.

Note From The Editor By Thomas H. Belknap, Jr.

It has been a busy couple of months in New York, and all the news seems to be focused on Rule B at the moment. Whenever you’ve been hibernating since mid-October, you will have heard about the Second Circuit’s abrupt about-face in Shipping Corp. of India v. Jaldhi, reversing its 2002 ruling in Winter Storm that had allowed attachment of electronic funds transfers in New York. (If you need a refresher, please refer to Jeremy Harwood’s article on the cover of this issue of Mainbrace.) Whatever your views of the correctness of this decision, it seems hard to dispute that the ruling has had a dramatic impact on a very large number of pending claims, both here and abroad. Many parties expended substantial sums in pursuing claims in reliance on the security they had obtained, and they are now finding themselves in a very uncertain position. According to the Second Circuit’s even more recent decision in Harken v. Overseas Shipping Agencies, however, which held that Jaldhi must be applied retroactively because it is a “jurisdictional” ruling, prejudice doesn’t seem to be part of the battle.

There are still battles to be fought on this front, and undoubtedly more surprises to come. We will, as always, strive to keep our clients updated on new developments and help them navigate the ever-changing legal landscape.
Rule of Small Vessels (continued)

As part of its strategic vision for responding to these potential scenarios, the Strategy determined that a “one-size-fits-all” approach cannot adequately ensure U.S. maritime security and safety due to the diversity of the maritime domain and the heterogeneity of the small vessel community. Therefore, the Strategy contains four diverse goals with specific objectives pertaining to each goal.

The first goal is to: Develop and leverage a strong partnership with the small vessel community and public and private sectors in order to enhance maritime domain awareness.

A specific objective to address this goal is to partner with the 80 million individuals who participate in recreational boating activities each year, and to increase public awareness of how to report suspected terrorist activity through America’s Waterway Watch (“AWW”). DHS cited as a prime example of the success of AWW when a tour boat operator in Florida in 2003 reported suspicious activity by one of its passengers, which led to the investigation of the suspect and his subsequent apprehension in New York.

The second goal is to: Enhance maritime security and safety based on a coherent plan with a layered, innovative approach.

To implement this goal, the Coast Guard will identify which operators present a low-risk profile, and develop appropriate risk targeting systems to distinguish high-risk users. The Coast Guard also called for enhanced use of the 96-hour advance notification rule for recreational vessels entering U.S. waters from overseas.

The third goal is to: Leverage technology to enhance the ability to detect, determine intent, and, when necessary, intercept small vessels.

To achieve this goal, the Coast Guard acknowledged that it must expand research into low-cost, non-intrusive, small vessel identification systems, such as Radio-Frequency Identification (“RFID”) tags, adaptable miniature transponders, portable GPS devices, or cell-phone based recognition systems. The Coast Guard also has Memoranda of Understanding with states to allow access to basic information about state-registered recreational vessels through the Vessel Identification System.

The fourth and final goal is to: Enhance coordination, cooperation, and communications between Federal, state, local, and Tribal partners, and the private sector as well as international partners.

One way to implement this goal, according to DHS, is to update area maritime security processes to ensure that small vessels are addressed when conducting area assessments and

Seas, and Offenses against the Law of Nations. Congress codified its constitutional authority to “extradite or prosecute” offenders in Title 18 of the United States Code (“U.S.C.”). Under the law of nations, piracy generally is defined as an “offence against the universal law of society.” Pirates can be prosecuted under 18 U.S.C. §1651, which provides:

> Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.

Pirates are also subject to prosecution for acts of terrorism (18 U.S.C. §2332b et seq.), violence against maritime navigation (18 U.S.C. §2280), hostage taking (18 U.S.C. §1203), kidnapping (18 U.S.C. §1201), and/or interfering with commerce by threats or violence (18 U.S.C. §1951). The U.S. has exercised criminal jurisdiction over extraterritorial crimes in a number of cases. Of particular interest is a recent successful piracy prosecution that took place offshore the Hawaiian Islands in 2008. In United States v. Lei Shi (“Lei Shi”), the U.S. charged the defendant with “several violations of 18 U.S.C. §2280, which prescribes certain acts of violence that endanger maritime navigation. 18 U.S.C. §2280 codifies the United States’ obligations under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention"), which authorizes any signatory State to extradite or prosecute offenders, regardless of where the offender’s acts occurred.” In Lei Shi, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit upheld the conviction and 36-year prison sentence of a Chinese cook who was convicted in Honolulu of forcibly seizing control of a foreign vessel in international waters and killing a Taiwanese Captain and Chinese First Mate.

The Ninth Circuit’s decision is the only reported U.S. case to date interpreting the SUA Convention. This may soon change with the prosecution of Muse. On April 21, 2009, the U.S. charged Muse with violations of 18 U.S.C. §2280, among other statutes, for his alleged participation in the April 8, 2009 hijacking of the Maersk Alabama in the Indian Ocean and the subsequent taking of the Captain of the vessel as a hostage.

On May 19, 2009, a Grand Jury charged Muse in a ten count indictment which alleges violations of 18 U.S.C. §§2, 924, 1201, 1203, 1651, 2280, and 3238. A detailed description of each of the alleged violations is listed below:

**Count One**

Muse is charged in Count One of the indictment with Piracy as defined by the law of nations in violation of 18 U.S.C. §1651.

(continued on page 8)
“Piracy” traditionally has been defined as “robbery, or forcible depredations upon the sea.” “Depredation” is “the act of plundering, robbing, or pillaging.” All three acts require the use of force.

**Count Two**
Muse is charged in Count Two of the indictment with seizing control over a ship by force in violation of 18 U.S.C. §2280(a)(1)(A). Muse is also charged in Count Two of the indictment with conspiracy to seize control of a ship by force in violation of 18 U.S.C. §2280(a)(1)(F).

**Count Three**

**Count Four**
Muse is charged in Count Four of the indictment with possession of a firearm during and in relation to seizing a ship by force, which is a violation of 18 U.S.C. §924(c)(1)(B)(ii). In order to find Muse guilty of this offense, a jury must find that the government has proved each of the following three elements beyond a reasonable doubt:

1. That Muse committed the crime of seizing a ship by force as charged in Count Two of the indictment;
2. That during and in relation to the commission of that crime, Muse knowingly used or carried a firearm, and
3. That Muse used or carried the firearm during and in relation to the crime of seizing a ship by force.

In determining whether Muse used or carried a firearm in relation to seizing a ship by force, the jury may consider all of the factors received in evidence in the case including the nature of the underlying crime, how close Muse was to the firearm in question, the usefulness of the firearm to seizing a ship by force, and the circumstances surrounding the presence of the firearm.

The government is not required to show that Muse actually displayed or fired a weapon. However, the government must prove beyond a reasonable doubt that a firearm was in Muse’s possession or under his control at the time that the crime of seizing a ship by force was committed, and that the firearm facilitated or had the potential of facilitating the seizure of a ship by force.

**Count Five**
Muse is charged in Count Five of the indictment with hostage-taking in violation of 18 U.S.C. §1203(a). In order for Muse to be found guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. Muse did intentionally seize, detain, and threaten to kill and injure a human being; and
2. Muse intentionally caused the victim to be seized, detained, and threatened in order to compel the family of the victim to pay ransom.

18 U.S.C. §1203 does not require proof that the defendant acted with specific intent, and requires only that the offender acted with the purpose of influencing some third person or government through hostage-taking.

**Count Six**
Muse is charged in Count Six of the indictment with conspiracy to commit hostage-taking in violation of 18 U.S.C. §1203(a). In order for Muse to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

1. Muse did intentionally seize, detain, and threaten to kill and injure a human being; and
2. Muse intentionally caused the victim to be seized, detained, and threatened in order to compel the family of the victim to pay ransom.

The indictment lists the following overt act:

a) From on or about April 8, 2009, up to and including on or about April 12, 2009, Abduwali Abdukhadir Muse, the defendant, and others, detained the Captain of the Mærsk Alabama on a life boat in the Indian Ocean, and demanded safe passage from the scene in exchange for the release of the Captain.

**The Role of Small Vessels in National Security:**

**Is DHS Doing Enough?**

By Joan M. Bondareff

With 13 million registered recreational vessels (and perhaps 8 million unregistered vessels) plying U.S. waters every year, it is not surprising that the Commandant of the Coast Guard, ADM Thad Allen, has raised the critical question as to whether these vessels are “Friend or Foe” and, in reply to his own question, said it is “Tough to Tell.” But, the Coast Guard and its parent organization, the Department of Homeland Security (“DHS”), have taken serious steps to develop a new security strategy focused solely on small vessels. A small vessel is defined as a vessel that is less than 300 gross tons and generally less than 100 feet in length. It can be a recreational, fishing, or small commercial vessel to qualify as a small vessel for purposes of this strategy. With the exception of small commercial vessels that do meet a higher standard of security, as a general rule, these vessels are not subject to SOLAS or the ISPS Code.

Since 9/11, the Coast Guard, DHS, and Congress have initially focused on the security requirements for large vessels. However, given the role small vessels have played in the tragic 2000 attack on the USS Cole, and the apparent maritime link to the 2008 Mumbai attacks, it is understandable that in recent years these agencies and Congress have turned their attention to small vessel security. This attention has resulted in the issuance by DHS of a Small Vessel Security Strategy (“Strategy”) in April 2008. Subsequently, in September 2009, the DHS Office of Inspector General (“OIG”) released a report critical of the Strategy, entitled “DHS’ Strategy and Plans to Counter Small Vessel Threats Need Improvement.” This article reviews and discusses the 2008 Strategy, the OIG report, efforts by private entities such as the National Association of Boating Law Administrators (“NASBLA”) and the Passenger Vessel Association (“PVA”) to enhance maritime security, as well as the recent issuance by the International Maritime Organization (“IMO”) of non-binding guidelines for the security of vessels that are not covered by SOLAS or the ISPS Code. The article also touches briefly on recent, relevant Congressional actions.

**Review of the DHS Strategy**

In 2008, after hosting a 2007 Summit with involved stakeholders in Arlington, Virginia, DHS issued its Strategy. The Strategy initially notes the difference between the present security regime for large and small vessels. For example, all large vessels have to submit to the Coast Guard a 96-hour Advance Notice of Arrival, a cargo manifest/crew list within 24-hours of departure, and carry the Automatic Identification System (“AIS”). In contrast, the Coast Guard/DHS acknowledged, that with respect to small vessels, they lack a centralized access to hull identification and vessel registration (owner) data, there are uneven requirements for small vessel user certification and documentation, and there are very limited Advance Notice of Arrival requirements for most small recreational vessels arriving from abroad. While acknowledging that the vast majority of small vessel operators are legitimate, law-abiding citizens, DHS expressed its concern that small vessels could be implicated in a terrorist-related attack. As the Commandant identified in his “Friend or Foe” letter, referenced above, several serious attacks have been linked to small vessels, including the USS Cole attack, the October 2002 attack by a small fishing vessel with explosives into the side of the super tanker Limburg, and the November 2005 attack of the cruise ship Seabourn Spirit by terrorists using 25-foot inflatable boats.

The Strategy identified the following four scenarios of greatest concern that small vessels could pose in terrorist-related attacks:

1. Domestic use of waterborne improvised explosive devices (“WBIEDs”);
2. Convoyage for smuggling weapons (including weapons of mass destruction) into the United States;
3. Convoyage for smuggling terrorists into the United States; and
4. Waterborne platform for conducting a stand-off attack (e.g. Man-Portable Air Defense System (“MANPADS’”) attacks.

(continued on page 14)
Muse is charged in Count Nine of the indictment with conspiracy to commit kidnapping within the special maritime and territorial jurisdiction of the U.S. in violation of 18 U.S.C. §1201(a)(2) and 18 U.S.C. §1201(c). In order for Muse to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

1) Muse kidnapped, seized, and confined the Captain within the special maritime or territorial jurisdiction; and
2) Muse held the Captain for ransom, reward, or other benefit.

The indictment lists the following overt act:

“in furtherance of the conspiracy and to effect the illegal object thereof, Abduwali Abdukhadir Muse, the defendant, and others known and unknown, committed the overt acts set forth in Count Six of this Indictment, which are fully incorporated by reference herein.”

Count Ten
Muse is charged in Count Ten of the indictment with possession of a firearm that is a “machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler” during and in relation to kidnapping, which is a violation of 18 U.S.C. §924(c)(1)(B)(ii). In order to find Muse guilty of the offense charged in the indictment, the jury must find that the government proved each of the following three elements beyond a reasonable doubt:

1) Muse committed the crime of kidnapping;
2) Muse knowingly possessed a firearm in furtherance of that crime; and
3) The firearm was a semi-automatic assault weapon, short-barreled rifle, short-barreled shotgun, machine gun, destructive device, or firearm equipped with a silencer or muffler.

The Supreme Court has held that the provisions in §924(c)(1)(B)(ii) state additional elements that must be charged in the indictment and found by the jury beyond a reasonable doubt.18 Muse is also charged with a violation of 18 U.S.C. §924(c)(1)(C)(ii), which provides for a higher mandatory penalty of life imprisonment in the case of a second or subsequent conviction under this subsection.

Count Eight
Muse is charged in Count Eight of the indictment with kidnapping within the special maritime and territorial jurisdiction16 of the U.S. in violation of 18 U.S.C. §1201(a)(2). In order for Muse to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

1) Muse kidnapped, seized, and confined the Captain within the special maritime or territorial jurisdiction; and
2) Muse held the Captain for ransom, reward, or other benefit.

b) While on the life boat, Muse used a radio to communicate with representatives of the U.S. government and threatened to kill the Captain unless his demands were satisfied.

Count Seven
Muse is charged in Count Seven of the indictment with possession of a firearm that is a “machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler” during and in relation to hostage-taking, which is a violation of 18 U.S.C. §924(c)(1)(B)(ii). In order to find Muse guilty of the offense charged in the indictment, the jury must find that the government proved each of the following three elements beyond a reasonable doubt:

1) Muse committed the crime of hostage-taking;
2) Muse knowingly possessed a firearm in furtherance of that crime; and
3) The firearm was a semi-automatic assault weapon, short-barreled rifle, short-barreled shotgun, machine gun, destructive device, or firearm equipped with a silencer or muffler.

The indictment lists the following overt act:

“in furtherance of the conspiracy and to effect the illegal object thereof, Abduwali Abdukhadir Muse, the defendant, and others known and unknown, committed the overt acts set forth in Count Six of this Indictment, which are fully incorporated by reference herein.”

Count Nine
Muse is charged in Count Nine of the indictment with conspiracy to commit kidnapping within the special maritime and territorial jurisdiction of the U.S. in violation of 18 U.S.C. §1201(a)(2) and 18 U.S.C. §1201(c). In order for Muse to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

1) Muse kidnapped, seized, and confined the Captain within the special maritime or territorial jurisdiction; and
2) Muse held the Captain for ransom, reward, or other benefit.

The indictment lists the following overt act:

“in furtherance of the conspiracy and to effect the illegal object thereof, Abduwali Abdukhadir Muse, the defendant, and others known and unknown, committed the overt acts set forth in Count Six of this Indictment, which are fully incorporated by reference herein.”

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Muse is charged in Count Ten of the indictment with possession of a firearm that is a “machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler” during and in relation to kidnapping, which is a violation of 18 U.S.C. §924(c)(1)(B)(ii). In order to find Muse guilty of the offense charged in the indictment, the jury must find that the government proved each of the following three elements beyond a reasonable doubt:

1) Muse committed the crime of kidnapping;
2) Muse knowingly possessed a firearm in furtherance of that crime; and
3) The firearm was a semi-automatic assault weapon, short-barreled rifle, short-barreled shotgun, machine gun, destructive device, or firearm equipped with a silencer or muffler.

Muse is also charged with a violation of 18 U.S.C. §924(c)(1)(C)(ii), which provides for a higher mandatory penalty of life imprisonment in the case of a second or subsequent conviction under this subsection.

b) While on the life boat, Muse used a radio to communicate with representatives of the U.S. government and threatened to kill the Captain unless his demands were satisfied.

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Muse is charged in Count Seven of the indictment with possession of a firearm that is a “machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler” during and in relation to hostage-taking, which is a violation of 18 U.S.C. §924(c)(1)(B)(ii). In order to find Muse guilty of the offense charged in the indictment, the jury must find that the government proved each of the following three elements beyond a reasonable doubt:

1) Muse committed the crime of hostage-taking;
2) Muse knowingly possessed a firearm in furtherance of that crime; and
3) The firearm was a semi-automatic assault weapon, short-barreled rifle, short-barreled shotgun, machine gun, destructive device, or firearm equipped with a silencer or muffler.

The indictment lists the following overt act:

“in furtherance of the conspiracy and to effect the illegal object thereof, Abduwali Abdukhadir Muse, the defendant, and others known and unknown, committed the overt acts set forth in Count Six of this Indictment, which are fully incorporated by reference herein.”

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1) Muse kidnapped, seized, and confined the Captain within the special maritime or territorial jurisdiction; and
2) Muse held the Captain for ransom, reward, or other benefit.

The indictment lists the following overt act:

“in furtherance of the conspiracy and to effect the illegal object thereof, Abduwali Abdukhadir Muse, the defendant, and others known and unknown, committed the overt acts set forth in Count Six of this Indictment, which are fully incorporated by reference herein.”

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1) Muse committed the crime of kidnapping;
2) Muse knowingly possessed a firearm in furtherance of that crime; and
3) The firearm was a semi-automatic assault weapon, short-barreled rifle, short-barreled shotgun, machine gun, destructive device, or firearm equipped with a silencer or muffler.

Muse is also charged with a violation of 18 U.S.C. §924(c)(1)(C)(ii), which provides for a higher mandatory penalty of life imprisonment in the case of a second or subsequent conviction under this subsection.

b) While on the life boat, Muse used a radio to communicate with representatives of the U.S. government and threatened to kill the Captain unless his demands were satisfied.

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1) Muse committed the crime of hostage-taking;
2) Muse knowingly possessed a firearm in furtherance of that crime; and
3) The firearm was a semi-automatic assault weapon, short-barreled rifle, short-barreled shotgun, machine gun, destructive device, or firearm equipped with a silencer or muffler.

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1) Muse kidnapped, seized, and confined the Captain within the special maritime or territorial jurisdiction; and
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The indictment lists the following overt act:

“in furtherance of the conspiracy and to effect the illegal object thereof, Abduwali Abdukhadir Muse, the defendant, and others known and unknown, committed the overt acts set forth in Count Six of this Indictment, which are fully incorporated by reference herein.”

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1) Muse committed the crime of kidnapping;
2) Muse knowingly possessed a firearm in furtherance of that crime; and
3) The firearm was a semi-automatic assault weapon, short-barreled rifle, short-barreled shotgun, machine gun, destructive device, or firearm equipped with a silencer or muffler.

Muse is also charged with a violation of 18 U.S.C. §924(c)(1)(C)(ii), which provides for a higher mandatory penalty of life imprisonment in the case of a second or subsequent conviction under this subsection.

b) While on the life boat, Muse used a radio to communicate with representatives of the U.S. government and threatened to kill the Captain unless his demands were satisfied.
Counts Four, Seven, and Ten also carry mandatory minimum penalties of 30 years in prison if the defendant is convicted on a single one of those Counts, or, if convicted of two or more of those Counts, a mandatory sentence of life in prison. In addition, Counts Two, Three, Five, Six, Eight, and Nine also carry mandatory penalties of death or imprisonment for any term of years, or life, if death of any person occurs as a result of the offense. Since the only persons who died during the offenses were Muse’s co-conspirators, the death penalty is not applicable. Thus, the maximum prison term is life imprisonment.

In addition to proving each element of these substantive charges, the government also must show some nexus to the U.S. Therefore, each Count includes a venue provision under 18 U.S.C. §3238. Because the offenses were not committed in any U.S. district, 18 U.S.C. §3238 gives the U.S. District Court for the Southern District of New York jurisdiction over Muse since it is where he was first brought into the U.S. after allegedly committing the crimes. Additionally, 18 U.S.C. §2280(b)(1)(C) “authorizes federal jurisdiction over any offender later found in the United States after a prohibited act under the statute is committed.”

The U.S. has an interest in prosecuting Muse in its courts for a number of reasons, including: (1) the Captain, who was held hostage, was a U.S. citizen; and (2) Muse sought to compel the U.S. government to satisfy his demands in return for the release of the Captain. Each Count also includes an aiding and abetting charge (18 U.S.C. §2), which allows the government to charge Muse as a principal for the crimes committed by the other alleged pirates.

In criminal cases, the government carries the burden of proof. In the case against Muse, the government must prove all the elements of the offenses being presented “beyond a reasonable doubt.”

Anticipated Defense

At the arraignment, Muse’s attorneys entered a not-guilty plea. Muse’s defense team is expected to raise a number of legal defenses.

First, the defense is likely to raise jurisdictional questions based on the location of the pirate attack since the hijacking took place 240 nautical miles off the Somali coast, which is outside the territorial waters of any state. The defense is unlikely to prevail on this argument, however, because Article 100 of the United Nations Convention on the Law of the Sea (“UNCLOS”), provides “[a]l States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.” Moreover, both the Convention on the High Seas and UNCLOS authorize States to seize a pirate ship, or a ship taken by piracy and under the control of the pirates, and arrest the persons and seize the property on board.

Under these conventions, the courts of the State whose forces carry out a seizure may decide the penalties to be imposed on the pirates. Moreover, in June 2008, the United Nations Security Council further expanded the jurisdiction of States combating piracy when it passed Resolution 1816, which authorized the international community to “enter the territorial waters of Somalia for the purpose of reproressing acts of piracy” and while there authorized them to “use...all necessary means to repres act of piracy.” The Security Council adopted four additional resolutions (1838, 1844, 1846), concluding in December 2008 with the adoption of Resolution 1851, which extended the power to combat and prosecute piracy until December 2009.

Second, the defense is likely to argue that Muse lacked the requisite mens rea, or specific intent, which is a required element of a crime. Muse will likely argue that he should not be held liable for the crimes because he performed them under duress. To prove the defense of duress, Muse must show that he did not act willfully, intentionally, or voluntarily at time of the offense charged. A defendant acts under duress only if at the time of the offense charged:

1) There was an immediate threat of death or serious bodily injury to the defendant, a family member of the defendant, if the defendant did not commit or participate in the commission of the crime;
2) The defendant had a well-grounded fear that the threat of death or serious bodily injury would be carried out; and
3) The defendant had no reasonable opportunity to escape the threatened harm.

Because the three other remaining pirates were killed during the hijacking, there is nobody to support or rebut the defense that Muse was acting under the threat of duress. In fact, after his court hearing on April 21, 2009 before Magistrate Judge Peck, Muse’s defense lawyers portrayed him as a “frightened kid” and Muse’s mother insisted that “[h]e was brainwashed [and] [p]eople who are older than him outwitted him... .” Muse’s defense attorneys may also exploit the fact that Muse was born and raised in a country with no established government and, thus, had no choice but to turn to a life of piracy as a means of survival. Muse’s actions, however, contradict this defense. During the hijacking of the Maersk Alabama, reports indicate that Muse conducted himself not as a frightened “kid,” but rather as the mugleader of the entire operation. “Prosecutors said Muse was not shy about making his presence known on the Maersk Alabama, brazenly tearing through the ship in a way that belied his young age and skinny, 5-foot-2 frame. He was the first to board the ship, he fired a shot at the Captain, he helped steal $30,000 in cash from a safe, and he bragged about hijacking ships in the past, authorities said.”
Counts Four, Seven, and Ten also carry mandatory minimum penalties of 30 years in prison if the defendant is convicted on a single one of those Counts, or, if convicted of two or more of those Counts, a mandatory sentence of life in prison. In addition, Counts Two, Three, Five, Six, Eight, and Nine also carry mandatory penalties of death or imprisonment for any term of years, or life, if death of any person occurs as a result of the offense. Since the only persons who died during the offenses were Muse’s co-conspirators, the death penalty is not applicable. Thus, the maximum prison term is life imprisonment.

In proving the charge of using a firearm during and in relation to a federal crime, the government must prove that Muse was actually in possession of a firearm at the time at issue. The U.S. District Court for the Eastern District of New York has held that the Second Amendment’s protection against the government taking away “life, liberty, or property” does not apply to the power a state has to carry firearms in the state’s service. See United States v. Maynard, 342 F. Supp. 2d 1004, 1010 (E.D.N.Y. 2004), aff’d, 309 F.3d 929 (2d Cir. 2003).

Because the three other remaining pirates were killed during the hijacking, there is nobody to support or rebut the defense that Muse was acting under the threat of death or serious bodily injury to the defense. Muse’s defense team is expected to raise a number of legal defenses.

In addition to proving each element of these sub-counts, the government must also prove the following potential penalties:

Counts Four, Seven, and Ten also carry mandatory minimum penalties of 30 years in prison if the defendant is convicted on a single one of those Counts, or, if convicted of two or more of those Counts, a mandatory sentence of life in prison. In addition, Counts Two, Three, Five, Six, Eight, and Nine also carry mandatory penalties of death or imprisonment for any term of years, or life, if death of any person occurs as a result of the offense. Since the only persons who died during the offenses were Muse’s co-conspirators, the death penalty is not applicable. Thus, the maximum prison term is life imprisonment.

In proving the charge of using a firearm during and in relation to a federal crime, the government must prove that Muse was actually in possession of a firearm at the time at issue. The U.S. District Court for the Eastern District of New York has held that the Second Amendment’s protection against the government taking away “life, liberty, or property” does not apply to the power a state has to carry firearms in the state’s service. See United States v. Maynard, 342 F. Supp. 2d 1004, 1010 (E.D.N.Y. 2004), aff’d, 309 F.3d 929 (2d Cir. 2003).

Because the three other remaining pirates were killed during the hijacking, there is nobody to support or rebut the defense that Muse was acting under the threat of death. In fact, after his court hearing on April 21, 2009 before Magistrate Judge Peck, Muse’s defense attorneys portrayed him as a “frightened kid” and Muse’s mother insisted that “[h]e was brainwashed [and] people who are older than him outwitted him... .” Muse’s defense attorneys may also exploit the fact that Muse was born and raised in a country with no established government and, thus, had no choice but to turn to a life of piracy as a means of survival. Muse’s actions, however, contradict this defense. During the hijacking of the Maersk Alabama, reports indicate that Muse conducted himself not as a frightened “kid,” but rather as the ringleader of the entire operation. “Prosecutors said Muse was not shy about making his presence known on the Maersk Alabama, bravely tearing through the ship in a way that belied his young age and skinny, 5-foot-2 frame. He was the first to board
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The Hong Kong office has experienced considerable growth and success since its inception, including honors and rankings from The International Who’s Who of Shipping & Maritime Lawyers (2009), Chambers Asia: Asia’s Leading Lawyers for Business (2009), Chambers Global (2008), and Asia-Pacific Legal 500 (2008/2009). Blank Rome Solicitors & Notaries looks forward to expanding their presence in the legal industry and growing on their current success.

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*By Nigel J. Binersley*

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**Count Nine**

Muse is charged in Count Nine of the indictment with conspiracy to commit kidnapping within the special maritime and territorial jurisdiction of the U.S. in violation of 18 U.S.C. §1201(a)(2) and 18 U.S.C. §1201(c). In order for Muse to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

1) Muse kidnapped, seized, and confined the Captain within the special maritime or territorial jurisdiction; and
2) Muse held the Captain for ransom, reward, or other benefit.

The indictment lists the following overt act:

“in furtherance of the conspiracy and to effect the illegal object thereof, Abduwali Abdukhadir Muse, the defendant, and others known and unknown, committed the overt acts set forth in Count Six of this Indictment, which are fully incorporated by reference herein.”

**Count Ten**

Muse is charged in Count Ten of the indictment with conspiracy to commit arson or other destructive device, or equipped with a firearm silencer or the use of a firearm equipped with a silencer or muffler” during and in relation to kidnapping, which is a violation of 18 U.S.C. §924(c)(1)(B)(ii). In order to find Muse guilty of the offense charged in the indictment, the jury must find that the government proved each of the following three elements beyond a reasonable doubt:

1) Muse committed the crime of arson;
2) Muse knowingly possessed a firearm in furtherance of that crime; and
3) The firearm was a semi-automatic assault weapon, short-barreled rifle, short-barreled shotgun, machine gun, destructive device, or firearm equipped with a silencer or muffler.

The Supreme Court has held that the provisions in §924(c)(1)(B)(ii) state additional elements that must be charged in the indictment and found by the jury beyond a reasonable doubt.18 Muse is also charged with a violation of 18 U.S.C. §924(c)(1)(C)(ii), which provides for a higher mandatory penalty of life imprisonment in the case of a second or subsequent conviction under this subsection.

**Count Eight**

Muse is charged in Count Eight of the indictment with kidnapping within the special maritime and territorial jurisdiction of the U.S. in violation of 18 U.S.C. §1201(a)(2). In order for Muse to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

1) Muse kidnapped, seized, and confined the Captain within the special maritime or territorial jurisdiction; and
2) Muse held the Captain for ransom, reward, or other benefit.

b) While on the life boat, Muse used a radio to communicate with representatives of the U.S. government and threatened to kill the Captain unless his demands were satisfied.

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(continued on page 18)
“Piracy” traditionally has been defined as “robbery, or forcible deprivations upon the sea.” “Depredation” is “the act of plundering, robbing, or pillaging.” All three acts require the use of force.

**Count Two**
Muse is charged in Count Two of the indictment with seizing control over a ship by force in violation of 18 U.S.C. §2390(a)(1)(A). Muse is also charged in Count Two of the indictment with conspiracy to seize control of a ship by force in violation of 18 U.S.C. §2390(a)(1)(H).

**Count Three**

**Count Four**
Muse is charged in Count Four of the indictment with possession of a firearm during and in relation to seizing a ship by force, which is a violation of 18 U.S.C. §924(c)(1)(B)(i). In order to find Muse guilty of this offense, a jury must find that the government has proved each of the following three elements beyond a reasonable doubt:
1) That Muse committed the crime of seizing a ship by force as charged in Count Two of the indictment;
2) That during and in relation to the commission of that crime, Muse knowingly used or carried a firearm; and
3) That Muse used or carried the firearm during and in relation to the crime of seizing a ship by force.

In determining whether Muse used or carried a firearm in relation to seizing a ship by force, the jury may consider all of the factors received in evidence in the case including the nature of the underlying crime, how close Muse was to the firearm in question, the usefulness of the firearm to seizing a ship by force, and the circumstances surrounding the presence of the firearm.

The government is not required to show that Muse actually displayed or fired a weapon. However, the government must prove beyond a reasonable doubt that a firearm was in Muse’s possession or under his control at the time that the crime of seizing a ship by force was committed, and that the firearm facilitated or had the potential of facilitating the seizure of a ship by force.

**Count Five**
Muse is charged in Count Five of the indictment with hostage-taking in violation of 18 U.S.C. §1203(a). In order for Muse to be found guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:
1) Muse did intentionally seize, detain, and threaten to kill and injure a human being; and
2) Muse intentionally caused the victim to be seized, detained, and threatened in order to compel the family of the victim to pay ransom.

18 U.S.C. §1203 does not require proof that the defendant acted with specific intent, and requires only that the offender acted with the purpose of influencing some third person or government through hostage-taking.

**Count Six**
Muse is charged in Count Six of the indictment with conspiracy to commit hostage-taking in violation of 18 U.S.C. §1203(a). In order for Muse to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
1) Muse did intentionally seize, detain, and threaten to kill and injure a human being; and
2) Muse intentionally caused the victim to be seized, detained, and threatened in order to compel the family of the victim to pay ransom.

The indictment lists the following overt act:

a) From on or about April 8, 2009, up to and including on or about April 12, 2009, Abduwali Abdukhadir Muse, the defendant, and others, detained the Captain of the Maersk Alabama on a life boat in the Indian Ocean, and demanded safe passage from the scene in exchange for the release of the Captain.

The government is not required to show that Muse actually displayed or fired a weapon. However, the government must prove beyond a reasonable doubt that a firearm was in Muse’s possession or under his control at the time that the crime of seizing a ship by force was committed, and that the firearm facilitated or had the potential of facilitating the seizure of a ship by force.

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Rule of Small Vessels (continued)

As part of its strategic vision for responding to these potential scenarios, the Strategy determined that a “one-size-fits-all” approach cannot adequately ensure U.S. maritime security and safety due to the diversity of the maritime domain and the heterogeneity of the small vessel community. Therefore, the Strategy contains four diverse goals with specific objectives pertaining to each goal.

The first goal is to: Develop and leverage a strong partnership with the small vessel community and public and private sectors in order to enhance maritime domain awareness. A specific objective to address this goal is to partner with the 80 million individuals who participate in recreational boating activities each year, and to increase public awareness of how to report suspected terrorist activity through America’s Waterway Watch (“AWW”).

DHS cited as a prime example of the success of AWW when a tour boat operator in Florida in 2003 reported suspicious activity by one of its passengers, which led to the investigation of the suspect and his subsequent apprehension in New York.

The second goal is to: Enhance maritime security and safety based on a coherent plan with a layered, innovative approach. To implement this goal, the Coast Guard will identify which operators present a low-risk profile, and develop appropriate risk targeting systems to distinguish high-risk users. The Coast Guard also called for enhanced use of the 96-hour advance notification rule for recreational vessels entering U.S. waters from overseas.

The third goal is to: Leverage technology to enhance the ability to detect, determine intent, and when necessary, intercept small vessels. To achieve this goal, the Coast Guard acknowledged that it must expand research into low-cost, non-intrusive, small vessel identification systems, such as Radio-Frequency Identification (“RFID”) tags, adaptable miniature transponders, portable GPS devices, or cell-phone based recognition systems. The Coast Guard also has Memoranda of Understanding with states to allow access to basic information about state-registered recreational vessels through the Vessel Identification System.

The fourth and final goal is to: Enhance coordination, cooperation, and communications between Federal, state, local, and Tribal partners, and the private sector as well as international partners. One way to implement this goal, according to DHS, is to update area maritime security processes to ensure that small vessels are addressed when conducting area assessments and seizures, and Offenses against the Law of Nations. Congress codified its constitutional authority to “extradite or prosecute” offenders in Title 18 of the United States Code (“U.S.C.”). Under the law of nations, piracy generally is defined as an “offence against the universal law of society.” Piracy can be prosecuted under 18 U.S.C. §1651, which provides:

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.


The U.S. has exercised criminal jurisdiction over extraterritorial crimes in a number of cases. Of particular interest is a recent successful piracy prosecution that took place offshore the Hawaiian Islands in 2008. In United States v. Lei Shi (“Lei Shi”), the U.S. charged the defendant with “several violations of 18 U.S.C. §2280, which proscribes certain acts of violence that endanger maritime navigation. 18 U.S.C. §2280 codifies the United States’ obligations under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA Convention”), which authorizes any signatory State to extradite or prosecute offenders, regardless of where the offender’s acts occurred.” In Lei Shi, a three judge panel of the U.S. Court of Appeals for the Ninth Circuit upheld the conviction and 36-year prison sentence of a Chinese cook who was convicted in Honolulu of forcibly seizing control of a foreign vessel in international waters and killing a Taiwanese Captain and Chinese First Mate. The Ninth Circuit’s decision is the only reported U.S. case to date interpreting the SUA Convention. This may soon change with the prosecution of Muse. On April 21, 2009, the U.S. charged Muse with violations of 18 U.S.C. §2280, among other statutes, for his alleged participation in the April 8, 2009 hijacking of the Maersk Alabama in the Indian Ocean and the subsequent taking of the Captain of the vessel as a hostage.

On May 19, 2009, a Grand Jury charged Muse in a ten count indictment which alleges violations of 18 U.S.C. §§2, 924, 1201, 1203, 1651, 2280, and 3238. A detailed description of each of the alleged violations is listed below.

Count One
Muse is charged in Count One of the indictment with Piracy as defined by the law of nations in violation of 18 U.S.C. §1651.

Muse’s court-appointed lawyers argued that he should be processed through the courts as a juvenile. However, due to conflicting information from Muse’s father, brother, and Muse himself, who told a Somali interpreter that he was a number of ages between 15 and 26, U.S. Magistrate Judge Andrew Peck issued a preliminary ruling that Muse will be tried as an adult.

The criminal complaint against Muse alleges violations of several United States’ statutes that criminalize piracy:

Count 1 – 18 U.S.C. §1651 (Piracy, as defined by the Law of Nations)
Count 4 – 18 U.S.C. §1203 (Hostage Taking)

(continued on page 8)
The Maersk Alabama hijacking was an unquestionably defining event—particularly in the United States—in combating the epidemic of piracy that has taken root in the Gulf of Aden in 2008-2009 despite the international task force providing convoy protection to vessels transiting the area. The vessel was captured by four Somali pirates on April 8, 2009. The reason it was of such importance from a U.S. perspective is that it was the first pirate seizure of an American flag ship since the early 1800s, and the U.S. had not focused on pirate attacks internationally until one if its own U.S. flag ships with American citizens was attacked. The event ended relatively quickly—but dramatically—on April 12, 2009, when three of the pirates were shot and killed by U.S. Navy SEAL snipers. The three pirates had Captain Richard Phillips of the Maersk Alabama in custody and were shot at a moment when it appeared that Captain Phillips was in imminent danger of being killed. The shooting of the three pirates is indicative of how the U.S. government will respond when its citizens or U.S. flag vessels are involved in a piracy incident.

At the time of the shooting, the fourth pirate was aboard the USS Bainbridge attempting to negotiate a ransom for Captain Phillips. The fourth pirate was immediately taken into custody by the U.S. Navy and was later brought to New York to face charges. The name of the fourth pirate is Adwea Abudakhadir Muse (“Muse”). The prosecution of Muse is likely to establish a benchmark for how the U.S. government will handle piracy cases. Muse’s trial is scheduled to begin in January 2010.

The legal basis for fighting piracy is a concept generally referred to as universal jurisdiction and is a well-established pillar of customary international law. Universal jurisdiction permits a “State to claim jurisdiction over an offender even if the offender’s act occurred outside its boundaries and even if the offender has no connection to the State.” In the U.S. Constitution, Article I, Section 8, Clause 10 expressly authorizes Congress to “define and punish Piracies and Felonies committed on the high seas.

OIG has found the Strategy to be deficient in certain respects after comparing it with the six characteristics of an effective national anti-terrorism strategy articulated by the General Accounting Office (GAO) in its 2004 report entitled “Combating Terrorism: Evaluation of Selected Characteristics in National Strategies Related to Terrorism.” The six characteristics prescribed by GAO include: problem definition and risk assessment; goals and performance measures; identification of resources; organizational roles and responsibilities; and integration and implementation.

The OIG criticized the Coast Guard for not addressing all of the characteristics laid out in the GAO report, such as setting priorities, milestones, performance measures, or progress indicators. The OIG also criticized the Coast Guard and DHS for not providing detailed information regarding costs, human capital, resources, or economic principles. Finally, the OIG commented that DHS had not sufficiently analyzed the adequacy of certain programs and processes that DHS would rely on in support of its Strategy, such as the AWW and the Pleasure Boat Reporting System that balances the individual rights of boaters in this country to operate in U.S. waterways against potential terrorist threats and the serious effort that the Coast Guard and DHS have undertaken in trying to develop a Small Vessel Security Strategy that balances the individual rights of boaters in this country to operate in U.S. waterways against potential terrorist threats.

In response, DHS partly agreed and partly disagreed with the OIG’s conclusions. For example, DHS acknowledged that it could address more of the GAO characteristics and that it planned to do so in the execution of an Implementation Plan. However, DHS did not concur with the OIG’s recommendation that it needed to evaluate the effectiveness of programs such as AWW and the Pleasure Boat Reporting System in order to use them as part of its solution to improve security from small vessel threats since they had been recommended by DHS agencies as useful tools.

Note From The Editor

By Thomas H. Belknap, Jr.

It has been a busy couple of months in New York, and all the news seems to be focused on Rule B at the moment. Unless you’ve been hibernating since mid-October, you will have heard about the Second Circuit’s abrupt about-face in Shipping Corp. of India v. Jaldhi, reversing its 2002 ruling in Winter Storm that had allowed attachment of electronic funds transfers in New York. (If you need a refresher, please refer to Jeremy Harwood’s article on the cover of this issue of Mainbrace.) Whatever your views of the correctness of this decision, it seems hard to dispute that the ruling has had a dramatic impact on a very large number of pending claims, both here and abroad. Many parties expended substantial sums in pursuing claims in reliance on the security they had obtained, and they are now finding themselves in a very uncertain position. According to the Second Circuit’s even more recent decision in Hankert v. Overseas Shipping Agencies, however, which held that Jaldhi must be applied retroactively because it is a “jurisdictional” ruling, prejudice doesn’t seem to be part of the battle to be fought on this front, and undoubtedly more surprises to come.

There are still battles to be fought on this front, and undoubtedly more surprises to come. We will, as always, strive to keep our clients updated on new developments and help them navigate the ever-changing legal landscape.

Notes From The Editor (continued on page 16)
The Court next discussed how the effectiveness of Rule B had been “cabinized” or limited by its decision this year in STX Panocean (UK) Co. v. Glory Wealth Shipping Pte. Ltd., 560 F.3d 127 (2d Cir. 2009), upholding “registration” as a basis for defeating Rule B and other lower court restrictions. Reference was made to a lower court decision rejecting “continuous service,” which, if upheld, “would arguably limit the reach of Winter Storm.” These limitations, including one judge’s requirement of proof of an EFT being made “beyond a hunch,” “[t]aken together . . . may have limited the practical usefulness of our holding in Winter Storm to plaintiffs and thus the practical effects of overturning that decision.” This justification, if it may be so termed, was “to make any concerns that the decision in this case is wholly unanticipated, surprising, or disruptive to ongoing financial practices.”

Legal Reasoning

**Beneficiary EFTs**

The Court first noted that its decision complied with the requirements for en banc reversal and that there were two reasons for doing so: first, Winter Storm had erroneously relied on a prior decision upholding seizure of EFTs in a criminal case, which were used by a Colombian cartel to transfer funds, under a penal statute; and secondly, that “the effects of Winter Storm” on the federal courts and international banks in New York are too significant to let this error go uncorrected.”

The Court reviewed Winter Storm’s rationale and decided that its “reasons [are] unpersuasive and its consequences untenable” and its reliance on a criminal case “misplaced.” Accordingly, under Rule B “the question of ownership [of the Rule B property] is critical” because if the “property” is not the property of the defendant, then the court lacks jurisdiction.”

**Conclusion**

Although Winter Storm had relied upon Rule B’s broad language defining property as “tangible or intangible,” the panel was not persuaded by the “text of Rule B” that EFTs are a defendant’s property. Further, in the absence of “federal maritime law to guide our decision,” New York State law should be considered, which “does not permit attachment of EFTs that are in possession of an intermediary bank.” An “authoritative comment” to the New York Uniform Commercial Code “states that a beneficiary has no property interest in an EFT”—a comment cited to the Court by amicus briefs in Winter Storm and Consul Delaware. Again, “[t]aken together,” New York law established that “EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank” and “cannot be subject to attachment under Rule B.”

**Originator EFTs**

The Court sent back the question—not raised on appeal—as to whether “there are grounds for not vacat- ing the remaining [originator EFT] portions of the attachment order” (emphasis added). The Lower Court, without briefing or a hearing, vacated those attachments.

The reality of the Court’s remark that “we must not overstate the practical effect of our holding in this case” because of recent limitations on the remedy remains to be seen.

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2. The requirements for commercial small vessels are described in length in the October 2009 issue of Fisheye magazine, a publication of the Passenger Vessel Association. See www.fishereel.com.
4. The Maritime Transportation Security Act of 2002, Pub. L. 107-295, was one of the first U.S. laws to address security requirements for large vessels, and is intended to implement the IMO’s ISPS Code for large vessels.
6. The United States warned the Israeli government about an Israeli maritime attack against Munich at least a month before last week’s massacre in the country’s financial capital left nearly 180 dead, a U.S. counterterrorism official told CNN. See www.cnn.com/2008/WORLD/ asia/12/09/tel.haifa.stories/index.html.
7. DHS OIG-09-100.
8. See p. 2 at 15.
10. Strategy at 16.
17. See www.americasweteryworld.org.
22. IMO Guidelines, Annex at 3.
23. IMO Guidelines, Annex at 3.

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**Rules of Small Vessels (continued)**

Conclusions

DHS and the Coast Guard have undertaken a serious review of the potential threat from small vessels and taken the initial steps necessary to develop a security strategy and implementation plan for that strategy. DHS acknowledged, in response to the OIG report, that it needs to do more to follow all of the recommended GAO steps for such strategy and plans to incorporate their suggestions in the Implementation Plan. From the perspective of the small boating community, they can expect to see closer scrutiny paid to small vessels with accompanying increased regulation and financial commitments. The movement is likely to be in the direction of more SOLAS-and ISPS-like compliance mechanisms for owners and operators of small vessels. Companies with off-the-shelf technologies that can address these issues may also find a welcome mat at the Coast Guard. Copyright © 2009 Matthew Bender & Company, Inc., a member of the LexisNexis Group. Reprinted with permission. All rights reserved.
In Winter Storm, as in Daccarett, process was "served upon BNY after funds had moved from...the originating bank, to...the intermediary bank, but before...the intermediary bank transferred the funds...the destination bank." 310 F.3d at 278. Accordingly, Winter Storm expressly held the originator retained an attachable interest in the EFT.

In Winter Storm, the Court explained that federal maritime law, as embodied in Rule B: . . . provides that a maritime plaintiff may "attach the defendant's tangible or intangible personal property." It is difficult to imagine words more broadly inclusive than "tangible or intangible." What manner of thing can be neither tangible nor intangible and yet still be "property?" The phrase is the secular equivalent of the [Nicene] creed's reference to the maker "of all there is, seen and unseen."

Professor Jarvis has said that:

Rule B also permits a plaintiff to attach intangible items, such as debts owed to the defendant. Such items may be attached even if they have not yet matured or have only partially matured. Of course, the defendant's entitlement to the credit or interest in the debt must be clear. 310 F.3d at 276.

The Court further noted: "There is no question that federal admiralty law regards a defendant's bank account as property subject to maritime attachment under Rule B. . . . Nor are we able to discern in admiralty law or elsewhere a basis for regarding [defendant's] funds in [intermediary bank]'s hands as anything other than funds held by [intermediary bank] for the account of [defendant]." Id.

In Winter Storm, the Second Circuit expressly reversed the District Court's reliance on State law to define "property." 310 F.3d at 267, 276: It follows that the broad, inclusive language of Admiralty Rule B(1)(a) and the EFT analysis in Daccarett combine to fashion a rule in this Circuit that EFT funds in the hands of an intermediary bank may be attached pursuant to Admiralty Rule B(4)(a). Because that rule is derived from federal law, there is no occasion to look for guidance to state law: 310 F.3d at 278 (emphasis added).

Shipping Corp. of India ("SCI")

The Policy Explanations and Other Rationale for a Sea Change

In SCI, the Court preceded its analysis with a review of "critical commentary" of the Winter Storm decision including that "some even suggested that Winter Storm has threatened the usefulness of the dollar in international transactions." Moreover, note was made of the Clearing House Banks' amicus arguments (also made and ignored in Winter Storm and Consub-Delaware) of the burden placed on its member banks by the volume of attachments. Indeed, the Court went back to an amicus brief submitted by the Federal Reserve Bank of New York seven years earlier in Winter Storm, which had not been re-filed in this case, in respect of "[a]nother valid reason: COGSA, which was enacted in 1936—long before containers, electronic waybills, and multimodal transport were even imagined—and which is viewed by many as an impediment to international uniformity of the law.

The Big Changes

So what does it all mean? My intention here is to try to highlight some of the places where the implementation of the Rotterdam Rules would represent a significant change in U.S. cargo law. Some of the changes I will mention are changes to the Hague Rules as a whole, and thus apply to all Hague Rule jurisdictions, but I will particularly try to highlight some of the changes that may be unique to the U.S.

1. Scope of Responsibility. The Rotterdam Rules cover carriage of goods in the liner trade even where no bill of lading or other transport document or electronic record has been issued. This is an expansion of existing regimes, like COGSA, that only apply to bills of lading or other documents of title. The Rotterdam Rules do not apply to charterparties or other similar contracts for the use of space on a ship; however, if a bill of lading is issued pursuant to a charter, then the Rotterdam Rules would apply to the bill of lading and its parties or holders in due course. "Volume contracts," such as service agreements, are subject to the Rotterdam Rules, but the parties to such agreements are permitted to derogate from its terms in many respects.

COGSA is unusual in that it applies by law to shipments to and from the United States, whereas the Hague Rules effectively apply only to shipments from a contracting state. The Rotterdam Rules adopt the U.S. approach and are applicable to shipments either to or from a contracting state.

2. Period of Responsibility. COGSA and the Hague Rules apply only "until the goods arrive at their destination or until they are released to the consignee or to the order of any other person entitled to receive the goods..." or "until the vessel arrives at the port of discharge..." as the case may be. The Rotterdam Rules contemplate that "the carriage is completed when...the goods...are placed at the disposal of the consignee or at the disposal of the person entitled to receive them..." or "the goods...are placed on board for the purpose of being discharged..." as the case may be. This is a significant change for the maritime community as there are a number of important areas of international law where these periods of responsibility are critical.

Daccarett

The Nature of EFTs (continued)

bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in Colombia. While the two transactions can occur almost instantaneously, sometimes they are separated by several days. Each of the amounts at issue was seized at the intermediary bank after the first transaction had concluded and before the second had begun. 6 F.3d at 54 (emphasis added).

Accordingly, "an EFT while it takes the form of a bank credit at an intermediary bank, is clearly a seiz-able rev. under the forfeiture statutes." Id. at 55. Daccarett has not been overturned and stands for a clear propo-sition under Supplemental Rule C of the attachability of an EFT "after the first transaction has concluded." An EFT's nature as a credit (necessarily held for some-one's account) is therefore comparable to the nature of a bank account, which does not contain the depositor's cash, but merely represents the bank's promise to pay the depositor, i.e., a credit. Citizen's Bank of Maryland v. Strumpf, 516 U.S. 16 (1995); U.S. v. Butterworth-Judson Corp., 267 U.S. 387 (1925).
The Second Circuit's decision in *U.S. v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), left no doubt that an EFT is an attachable res. The Second Circuit again acknowledged this point in *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 276 (2d Cir. 2002), and did not question it in *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty. Ltd.*, 460 F.3d 434 (2d Cir. 2006). *Aqua Stoli* queried only the property interest in an EFT that Shipping Corp. of India seized upon.

*Daccarett* was an in rem forfeiture case, initiated under Rule C of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure. Because *Daccarett* involved an in rem proceeding, there was no occasion for the Court to consider who owned the funds. *Daccarett* did, however, helpfully clarify the juridical nature of an EFT:

> The claimants' conception of the intermediary banks as messengers who never hold the goods, but only pass the word along, is inaccurate. On receipt of the EFTs from the originating banks, the intermediary banks possess the funds, in the form of bank credits, for some period of time before transferring them to the destination banks. While claimants would have us believe that . . . the originating bank through the intermediary bank to their ultimate destination without stopping, that was not the case. With each EFT at least two separate transactions occurred: first, funds moved from the originating bank to the intermediary banks at the receiving bank and the sending bank to print out a credit ticket and a debit ticket; respectively credits and debits the appropriate Clearing House bank accounts; and records the transfer. The receiving bank keeps track of the funds received and makes them available immediately. Adjustments in the account books at the New York Federal Reserve Bank are not made until the next business day, however, after the central computer has determined which books owe, or are owed, what.

Often, there will be two intermediary banks involved: an American correspondent of the originating bank, and an American correspondent of the beneficiary's bank. Why an EFT is an Attachable Res

District Judge Kaplan aptly described the quandary confronting U.S. Courts in the modern era, as well as the standard by which the Courts should fashion relief. Although his comments had regard to the situs of EFTs, they apply as well to EFTs' ownership:

> In this wired age, the location of an intangible, especially a bank account, is a metaphysical question. By and large, bank deposits exist as electronic impulses embedded in silicone chips. In a sense, therefore, bank funds are both everywhere and nowhere. But the problem is not a new one. Before the advent of electronic banking, courts grappled with the dilemma of pinpointing the location of intangible assets. It is a dilemma that calls for a practical judgment. As Judge Cardozo so eloquently put it in *Severnoe Securities v. London & Lancashire Inc.* [255 N.Y. 120 (1931)]:

> “The situs of intangibles is in truth a legal fiction, there are times when justice and convenience requires that a legal situs be ascribed to them . . . [citations omitted] . . . At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience of particular conditions.” [Id. at 123-24, emphasis added].

Admiralty Rule B, quoted in part supra, contains the current provisions governing maritime attachment. "Rule B is simply an extension of this ancient practice." Aurora, 85 F.3d at 47-48.

Winter Storm, as examined further below, held that electronic fund transfers ("EFTs") are attached property under Admiralty Rule B, which refers to the "tangible or intangible personal property of the defendant." In 2008, the Second Circuit in Consul Delanore LLC v. Schahin Engenharia Ltda., 543 F.3d 104, 109 (2d Cir. 2008) (emphasis added), held: There has been no decision by an en banc panel overruling Winter Storm. Moreover, there is no justification for departing from the principle of stare decisis here where [defendant] has not shown that Winter Storm is unworkable, and where admiralty jurisdiction is the subject of congressional legislation and Congress remains free to alter the Winter Storm rule. In any event, Winter Storm was correctly decided.

Accordingly, the Second Circuit's decision in The Shipping Corporation of India Ltd. v. Jaldhi Overseas Pte. Ltd., ___ F.3d ___, 2009 U.S. App. LEXIS 22747 (2d Cir. Oct. 16, 2009), which overruled the Winter Storm decision on the attachability of EFTs "with the consent of all the judges of the Court in active service," came as a considerable surprise to this tradition of "special deference." The Court said that Winter Storm was "erroneously decided and therefore should no longer be binding precedent in our Circuit." This article examines the EFT process and the two decisions.

The EFT Process

As defined in New York Uniform Commercial Code §4A-104(1): "Funds transfer" means the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order. The term includes any payment order issued by the originator's bank or an intermediary bank intended to carry out the originator's payment order. A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order.

A payment order is "an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary . . . transmitted by the sender directly to the receiving bank or to an agent, funds transfer system, or communication system for transmittal to the receiving bank." UCC §4A-103(a)(ii).

Thus, a payor (or "originator") instructs its foreign bank (the "originating bank") to issue a payment order that directs the payee's (or "beneficiary") foreign bank (the "beneficiary's bank") to credit the beneficiary's account there with the amount of the payment.

For a U.S. dollar transfer, a foreign originating bank's payment order is always communicated to an American bank or to a foreign bank's branch office in the United States. If the bank in the U.S. is not the same bank as the foreign originating bank, it is an "intermediary" bank. By statute, an "intermediary bank" is a "receiving bank other than the originator's bank or the beneficiary's bank." UCC §4A-104(3).4

The Payment Order is communicated by a secure coded message system, such as that of the Society for Worldwide Interbank Financial Telecommunications ("SWIFT"). The "SWIFT message" is sent most often to the New York Clearing House Association that operates the Clearing House Interbank Payments System ("CHIPS"). CHIPS processes over 95% of cross-border U.S. dollar transactions (See www.chips.org/home.php). As explained by the Second Circuit in Reibor International Ltd. v. Cargo Carriers Ltd., 759 F.2d 262 (2d. Cir. 1985): To effect the transfer, a CHIPS computer operator at a terminal—located in the paying or sending bank—programs the payment order and transmits it to the central CHIPS computer, which stores it and then causes a sending form to be typed at the sending bank. After the sending bank approves the payment, this form is reinserted in the computer and "released." At the moment of release, the central computer

4. Error in Navigation Defense. Substantively, one of the more significant changes in the Rotterdam Rules is the elimination of the carrier's defense that the damage or loss was caused by the error of the master or crew in the navigation of the vessel. Long viewed by many as anachronistic, this provision of COGSA was originally premised on the view that the Owner should not be responsible for the negligence of an otherwise competent crew once the voyage had commenced since it was effectively powerless to control the vessel once she broke ground. In this day and age of modern communication and travel, this assumption seems fairly subject to question.

In keeping with the principle that the owner's control effectively ceased once the vessel sailed, the carrier is obliged under COGSA and the Hague Rules only to exercise due diligence to make the ship seaworthy at the commencement of the voyage. Under the Rotterdam Rules, by contrast, that obligation extends for the full duration of the voyage and the "negligent navigation" defense has been eliminated.

5. Limitation of Liability. COGSA's "package" limitation of liability is $500 per package or "customary freight unit." Under the Rotterdam Rules, the limitation would be the greater of 875 "units of account" per package or "shipping unit" or 3 units of account per kilogram, unless the shipper declares a higher value and the carrier agrees to a higher limitation. (See Art. 59).

COGSA and the Hague Rules only to question.

While the Rotterdam Rules' package limitation amount is quite a bit higher than COGSA's, it will also be more difficult to break. Article 61 provides that the carrier shall be precluded from relying on the package limitation only where a loss resulted from "a personal act or omission . . . done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result." In the U.S., the principle has developed in the case law that a "deviation" from the bill of lading would preclude the carrier's right to rely on the limitations of liability provided in COGSA. Article 24 of the Rotterdam Rules makes clear, on the other hand, that a deviation shall not deprive the carrier of any defense or limitation under the Rules. Article 25 of the Rotterdam Rules describes the circumstances where cargo may be carried on deck, however, and it adopts the U.S. "rule" that where the shipper and carrier expressly agree that cargo will be stowed below deck, the carrier's failure to comply with that requirement will deprive it of the right to limit liability under the Rotterdam Rules.

6. Apportionment of Damages. Under the U.S. Supreme Court's decision in Schnell v. Velleza, 293 U.S. 296 (1934), a carrier under the COGSA regime is liable for all damage where its negligence was at least a partial cause of the loss, unless it can satisfy its burden of segregating the damages for which it is responsible from those for which it was not. In most instances, the result of this rule is that the carrier is responsible for the entire loss even if it is clear that some indeterminate portion of the damage resulted from some other cause. The Rotterdam Rules take a more lenient approach, providing in Article 17(6) that where there are multiple causes of a loss, "the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or occurrence for which it is liable pursuant to this article." Thus, the courts should have greater flexibility under the Rotterdam Rules to apportion liability based on the degree of causation.

7. Time to Sue. The time period under COGSA is one year. Under the Rotterdam Rules it is two years.

8. Jurisdiction and Arbitration. The Rotterdam Rules contain two Chapters, 14 and 15, which were the subject of much debate and negotiation during the drafting process. These relate to jurisdiction and arbitration, respectively. In the end, there was much lingering disagreement about these Chapters that they were included as "opt-in" Chapters that will only bind a Contracting State if that state expressly so declares when it ratifies the Rotterdam Rules.

For the countries that adopt it, Chapter 14 provides a list of optional fora in which cargo interests in the liner trade may commence suit against the carrier even where there is an exclusive forum clause. This includes the carrier's domicile, the place of receipt or final delivery, the first port of loading or final port of discharge on the sea leg, or a place specified in the contract. In claims against maritime performing parties, such as stevedores, the claimant may sue in the port where that party provided its services in connection with the
The Rotterdam Rules would not impact a party’s right to commence an action in another forum to obtain security by, for instance, arresting a ship or attaching property in the U.S. pursuant to Rule B.

Conclusion

The Rotterdam Rules are not intended to be a revolutionary treaty, and much of the law relating to the international transport of cargo will be substantially unchanged if and when they come into force in the United States. The changes that are made are largely incremental, but on the other hand the Rotterdam Rules are an important step towards bringing much-needed uniformity to this area of the law and, perhaps even more importantly, towards addressing some of the fundamental changes in the industry that have occurred over the past eighty years. The Rotterdam Rules may not appeal equally to all sectors of the industry, but there does seem to be wide acknowledgement that they are a material improvement over the existing hodge-podge of treaties and laws and should be ratified. Only time will tell, however, whether the Rotterdam Rules will join the ranks of the world’s most important international treaties or go the way of the Hamburg Rules into relative obscurity.

Sources: