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Inside This Issue

A "No-Frills" Primer on Iran Sanctions

By David H. Sump

I. Introduction

As almost everyone in the maritime community is aware, much of the world is in the midst of severe economic sanctions against Iran. These sanctions have been invoked not only by the United States, but also by the European Union, the United Nations, and other nations around the world. Although the purpose of these sanctions is to modify the behavior of a "rogue nation" that allegedly is defying international norms and obligations, the sanctions are also visiting great harm upon the maritime trade community. This article is intended to briefly explain the nature and status of the economic sanctions imposed upon Iran, as well as identify the risks to the maritime community and provide solutions for avoiding or minimizing those risks.

II. What Are Sanctions and Why Are They Used?

Economic sanctions are the tools used by the international community to assert pressure and hardship upon the Iranian government. These tools are considered to be something short of armed conflict and declarations of war.

Sanctions became a part of U.S. foreign diplomacy as early as the War of 1812. Secretary of the Treasury Albert Gallatin implemented economic sanctions against Great Britain as retaliation for the harassment of American sailors. Congress also approved economic sanctions against the Confederacy during the Civil War by specifically prohibiting trade in certain commodities and providing for the forfeiture of any goods involved in

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EDITOR'S INTRODUCTION – *LOZMAN*: THE IMPORTANCE OF THE CONTEXT

The decision in *Lozman* is understandably still the focus of several articles in this issue. Consider, though, whether this case would have come before the Supreme Court of the United States if Fane Lozman had bought a plot of riparian land and tethered his floating abode to a private pier. Instead, Lozman had his newly-purchased dwelling towed to and berthed in a marina owned by the City of Riviera Beach. Such marinas are intended for berthing of recreational boats, and therein lies the context.

Although maritime lawyers are aware that recreational boating is a feature of our nautical landscape, relatively few are conscious of the size of this industry or the numbers of recreational boaters. The figures are quite staggering—over $40 billion in annual sales and service and over 60 million individual boaters in the US alone; yet when the 'maritime industry' is thought of, recreational boating usually escapes attention. This is especially unfortunate when regulations are formulated with merchant shipping alone in mind, and a prime example of this is the still-unremedied oversight in IMO's amendment to Rule 8(a)[1] of the Collision Regulations, in effect since 2003, which by its plain wording in the International Rules excludes action under Part A and thus action to avoid collision when mandated by Rule 2.[2] When this was brought to the attention of IMO the response was that it will be taken care of by the nautical colleges, which will of course continue to teach that Rule 2 primes any of the steering and sailing rules; hardly a useful supposition where the vast majority of (unlicensed/non-professional) recreational boaters are concerned. Wisely the U.S. Coast Guard has avoided that error by omitting the words "in accordance with the Rules of this Part [B]" in Rule 8(a) of the Inland Rules.

If this concern seems oversensitive it is perhaps because of your Editor's involvement in the U.S. Coast Guard Auxiliary over a span of more than 50 years and his former membership of the Navigation Safety Advisory Council (NAVSAC). The flip side of the *Lozman* decision is that if such floating 'houses' had been held to be vessels this would have placed a large additional burden upon the Coast Guard's inspection program, even with the assistance of thousands of Auxiliary vessel examiners. The reaction of the City of Riviera Beach to *Lozman* has been to ban all non-vessel 'houses' from berthing, and it is likely that many other municipally-owned marinas will do likewise. What will be the consequences of these evictions? Will the interest of marine safety be served in any way? One suspects not.

As a parting thought, what if a floating abode such as Lozman's is involved in a collision while being towed at night? Rule 1(a) applies the Rules only to "vessels" as defined in Rule 3(a); now that a 'thing' *a la Lozman* is not a 'vessel' or 'water craft', will there be absolution from fault if it is not displaying the lights required by Rule 24?

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[1] International Rules, Part B, Steering and Sailing Rules, Rule 8(a): Any action shall *be taken in accordance with the Rules of this Part and*, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship. [Change in italics.] *See* U.S. Department of Homeland Security, United States Coast Guard, Navigation Center, at http://www.navcen.uscg.gov/?pageName=navRulecontent, a side-by-side comparison of the International Rules and the Inland Rules.

[2] International Rules, Part A, General, Rule 2. Responsibility: (a) Nothing in these Rules shall exonerate any vessel, or the owner, master, or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. (b) In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger. *Id*.

Back to the courtroom, one supposes.

N.B.: With this issue there are changes in the membership of the Editorial Board of *Benedict's Maritime Bulletin*, as appears on the masthead.

The passing of our colleague George F. Chandler III on May 29, 2013 is noted with sorrow. George was a member of our Editorial Board from the inception of publication, and will be particularly remembered for his work on electronic bills of lading and other essential aspects of electronic maritime commerce during the long process of formulation of the Rotterdam Rules.

We will likewise miss charter members Bob Acomb and David Nourse, who were mainstays through the years of John Edginton's editorship.

Three new members of the Editorial Board of *Benedict's Maritime Bulletin* appear on the masthead: Dr. James Kraska, Dr. Norman Martinez, and Anthony Pruzinsky, Esq.

Dr. Kraska retired in June from the U.S. Navy JAG Corps; his most recent of several distinguished assignments was as Howard S. Levie Professor of Operational Law at the U.S. Naval War College, where he edited *Arctic Security in an Age of Climate Change* (Cambridge U.P., 2012). He has written several important books and his latest, co-authored by Prof. Peter Pedrozo of the USNWC, is *International Maritime Security Law*, just published by Martinus Nijhoff; this very substantial work has been heralded as "the first complete study of the international legal regimes that apply to hybrid or asymmetric threats in the maritime domain." Dr. Kraska is currently Visiting Professor at Duke University in North Carolina, and will serve as our Editor for Maritime Security and the Legal Regime of the Arctic.

Dr. Martinez is Senior Lecturer at the IMO International Maritime Law Institute in Malta, and is the author of the acclaimed *Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes* (Routledge, 2010); in this work he examines limitation in contexts of liability ranging from carriage of goods to carriage of passengers and luggage, liability and compensation for pollution damage and removal of wrecks. In these various areas the respective conventions have differing approaches to liability and limitation, but each must function together with global limitation conventions such as the 1976 Convention on Limitation of Liability for Maritime Claims and its 1996 Protocol.

Dr. Martinez will serve as our Editor for International Maritime Law and Scholarly Notes and Papers.

Tony Pruzinsky is a partner of Hill Rivkins LLP, with offices in both Manhattan and Perth Amboy, NJ. He is a well-known maritime trial lawyer and member of the Marine Insurance and the Arbitration and Dispute Resolution Committees of the Maritime Law Association of the US, and of the Admiralty Committee of the Association of the Bar of the City of NY. He is a Director of the Marine & Insurance Claims Association and has served as its Chairman. He has presented papers on bills of lading issues, maritime arbitration, and trial practice and procedure, and will serve as our Editor for Admiralty Practice and Procedure.

We offer the new Editors a warm *Welcome Aboard.*

F. L. Wiswall, Jr.

A "No-Frills" Primer on Iran Sanctions

By David H. Sump

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these prohibited transactions.[1] Economic sanctions were also prevalent in World War II when the Office of Foreign Funds Control was created to implement sanctions against Germany after the 1940 invasion of Norway. This office was directed initially to protect the U.S.-controlled assets of the nationals from the countries overtaken by the Nazis as well as prevent the Nazis from looting the foreign holdings and securities of these nations. Eventually these economic sanctions were increased to include blocking all enemy assets and prohibiting foreign trade and financial transactions.[2] The modern Office of Foreign Assets Control ("OFAC") (then the "Division of Foreign Assets Control") was created during the Korean War as part of President Harry Truman's efforts to lock down all Chinese and North Korean assets subject to U.S. jurisdiction.[3]

OFAC is now an operating entity of the United States Treasury. It oversees and implements economic sanctions against designated countries and groups of individuals. These countries and individuals are generally believed to be involved in terrorism or drug trafficking. The United States Congress ("Congress") and the United States Department of Treasury, through the powers granted to OFAC, block assets and invoke trade restrictions on these designated countries and individuals as a tool of both foreign policy and national security policy.[4]

The statutory authorities for implementing economic sanctions are many. The Trading with Enemy Act of 1917 authorized the initial Office of Foreign Funds Control and the creation of the "Proclaimed List of Certain Blocked Nationals" otherwise known as the "Black List."[5] The International Emergency Economic Powers Act (IEEPA) authorizes the President to block the withdrawal of foreign assets under U.S. jurisdiction during national emergencies. This is accomplished through OFAC regulations governing the conduct of banks and financial institutions in the United States.[6] Among the other statutes providing general authority to OFAC are the Arms Export Control Act,[7] Foreign Narcotics Kingpin Designation Act,[8] the International Security and Development Cooperation Act of 1985 (ISDCA),[9] and the National Emergencies Act.[10]

Through application of the above-listed legislation, as well as specific statutes addressing specific nations or groups of individuals, OFAC has the means of imposing economic sanctions. Congress, for instance, has imposed sanctions on Burma,[11] Darfur,[12] and Cuba.[13] Congress also imposed sanctions on industries such as the Diamond Trade.[14] Economic sanctions take many forms, the most common being the prohibition of trade in certain "contraband" goods such as arms or munitions, or the prohibition of financial dealing with certain nations, financial institutions, or individuals. In the most severe economic sanctions all trade may be prohibited except for humanitarian cargo such as food and medical supplies.

Unlike wartime embargoes or blockades where merchant vessels may be stopped and boarded to ensure compliance and cargo may be confiscated to deny the offending nation access to the goods, economic sanctions are often enforced "indirectly." For instance,

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[1] "Frequently Asked Questions" (http://www.treasury.gov/resource-center/faqs/Sanctions/pages/answer.aspx), Office of Foreign Assets Control, U.S. Department of Treasury. Retrieved 2013-01-31.

[2] *Id*., Question 3.

[3] *Id*., Question 3.

[4] *Id*., Question 1.

[5] Trading with the Enemy Act of 1917, 50 U.S.C. App. §§ 5 and 16.

[6] International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706.

[7] 22 U.S.C. § 2797.

[8] 21 U.S.C. §§ 1901-1908.

[9] 22 U.S.C. § 2349.

[10] 50 U.S.C. §§ 1601-1651.

[11] Burmese Freedom and Democracy Act of 2003, P.L. 108-61(50 U.S.C. § 1701 note).

[12] Darfur Peace and Accountability Act of 2006, P.L. 109-344 (50 U.S.C. § 1701 note).

[13] Cuba Democracy Act of 1992, 22 U.S.C. §§ 6001-6010 and Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§ 6021-6091.

[14] Clean Diamond Trade Act, 19 U.S.C. §§ 3901-3913.

OFAC maintains a "Specially Designated Nationals List" which contains the names of individuals and organizations with which U.S. citizens and permanent residents are prohibited from doing business. These persons or organizations may be owned by, controlled by, or working with one of the countries against which sanctions are directed, or these individuals or organizations may be affiliated with terrorism or narcotics trafficking.[15]

Consequently, businesses or individuals that are not complying with the U.S. sanctions against a targeted country or organization may be punished by prohibiting them from transacting any business in the United States.

Similar sanctions apply to financial institutions that are prohibited from engaging in financial transactions with sanctioned countries or organizations. Banks failing to comply with the U.S. sanctions may be barred from conducting business in the United States. Further, U.S. corporations and individuals who fail to comply with U.S. sanctions may be subject to civil penalties and even criminal penalties.[16]

With this background regarding the economic sanctions program in the United States we consider the specific sanctions levied against Iran.

III. History of Iran Sanctions

Economic sanctions against Iran began during the Iran Hostage Crisis of 1979. President Jimmy Carter not only broke diplomatic relations with Iran, but also banned all imports of Iranian oil to the United States, froze approximately $12 billion in Iranian assets in the United States, and shortly thereafter banned all U.S. trade with Iran and all travel to or from Iran. In accordance with the January 20, 1981 Algiers Declaration, these trade restrictions were lifted after Iran released the hostages. The asset freeze remained in place, however, under the supervision of the Iran-U.S. Claims Tribunal.[17]

Iran again became the subject of U.S. economic sanctions after the bombing of the U.S. Marine Corps barracks in Lebanon in 1983. At that time President Ronald Reagan declared that Iran was a state sponsor of terrorism and introduced new sanctions. In 1984 the United States ended all financial assistance to Iran and prohibited all U.S. weapons sales to Iran. These sanctions were followed by the International Security and Development Cooperation Act of 1985 ("ISDCA") that provided a statutory authority for banning trade with Iran.[18] ISDCA provided authority for Executive Order 12613 of October 29, 1987 wherein President Reagan implemented an import embargo on Iranian-origin goods and services. ISDCA was also the authority for the Iranian Transactions Regulations ("ITR").[19]

President Bill Clinton further expanded economic sanctions against Iran with his Executive Order 12957 of March 16, 1995. These new sanctions, resulting from new evidence that Iran was supporting international terrorism as well as pursuing weapons of mass destruction, caused the President to prohibit any U.S. involvement with petroleum development in Iran. This action was followed by Executive Order 12959 on May 6, 1995 that further tightened trade sanctions against Iran. Another statute, the Iran-Libya Sanctions Act, was enacted in 1996 directing that any foreign company that provided investments in excess of $20 million for the development of the Iran petroleum industry would be sanctioned.[20] Finally, on October 19, 1997 President Clinton virtually ended all trade between Iran and U.S. persons wherever they were located.[21]

In 2005 President Ahmadinejad lifted Iran's suspension in the enrichment of uranium in violation of the Nuclear Non-Proliferation Treaty and other international standards. In response, President Bush issued Executive Order 13382 in June of 2005. This Order froze the U.S. assets of any organization or individual who assisted with Iran's nuclear program.

After a period of many years without significant alterations to the Iran economic sanctions, Congress passed the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 (CISADA).[22] CISADA shortened the list of exempted items that may be imported

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[15] Note 1 to 31 C.F.R. § 561.202.

[16] Section 5 of the Iran Sanctions Act of 1996, P.L. 104-172; 50 U.S.C. § 1701(note).

[17] Clawson, Patrick "The Iran Primer" United States Institute of Peace http://iranprimer.usip.org/resource/us-sanctions.

[18] 22 U.S.C. § 2349.

[19] 31 C.F.R. Part 560.

[20] Iran Sanctions Act of 1996, P.L. 104-172; 50 U.S.C. § 1701(note).

[21] Executive Order 13059, August 19, 1997.

[22] P.L. 111-195.

into the United States from Iran by removing caviar, pistachios, and Iranian carpets.[23] As discussed below, CISADA also greatly expanded the applicability of the sanctions to persons beyond U.S. borders.

As Iran continues to pursue a nuclear capability, Congress continues to pass legislation to increase the economic impact of sanctions. At the end of 2011, Congress inserted additional sanctions into the National Defense Authorization Act of 2012. Specifically, Congress enacted the following: (1) designated the Central Bank of Iran as a Money Laundering Concern subjecting those cooperating with the bank to sanction under 31 U.S.C. § 5318A; (2) froze the assets of all Iranian financial institutions if those assets are in the United States or pass through the United States; and (3) prohibited the opening or maintaining of "correspondent accounts" or "payable through" accounts by financial institutions that knowingly conducted or facilitated any significant financial transaction with the Central Bank of Iran.[24]

Finally, on August 12, 2012 Congress passed the "Iran Threat Reduction and Syria Human Rights Act of 2012" which in part expanded the sanctions created in the Iran Sanctions Act, as amended. Seeing Iran's petroleum industry as a significant source of revenue that supports the nuclear program, Congress expanded restrictions on the petroleum industry by prohibiting U.S. facilitation and support of any infrastructure directly associated with the petroleum industry, including the construction of port facilities, railways, and roads.[25] Congress further stiffened sanctions related to the petroleum industry by imposing increased sanctions against anyone that knowingly sells, leases, or provides to Iran goods, services, technology, or support for the Iran petroleum industry that is valued at more than $1 million or that over a period of one year is valued at more than $5 million.[26]

Perhaps of most importance to the maritime community, this statute imposed additional sanctions against any person whose vessel was used to transport crude oil from Iran to another country provided the beneficial owner knew or should have known it would be used for such transport. Among the sanctions is a ban on entering United States' ports and also doing business and using the banking system in the United States. These sanctions extend not only to the beneficial owners of these vessels, but also to those who operate and insure these vessels.[27]

IV. Current Composition of Sanctions

Current Iran Sanctions are complicated and rapidly changing. As noted above, the sanctions evolved over time to include an increasing number of banned goods and services as well as an increasing population of regulated individuals and entities. This portion of the article will explore the current status of Iran Sanctions and the parties to whom those sanctions apply.

As previously noted, the Iran-Libya Sanctions Act led to the promulgation of the Iran Transactions Regulations ("ITR"). These regulations have outlined the bedrock principles of the sanctions program for nearly 20 years. To gain a complete understanding of the sanctions program it is necessary to thoroughly review and consider the various procedures and processes for complying with the restrictions on Iran trade.

For many years U.S. trade restrictions against Iran were applied only to U.S. persons. "U.S. persons" are defined in the ITR as U.S. citizens, lawful permanent residents, U.S. companies (including foreign branches), and any person located in the United States.[28] This "loophole" permitted foreign companies and foreign subsidiaries of U.S. corporations to continue trading with Iran with few impediments. This was not true, however, for sanctions authorized by the Iran-Libya Sanctions Act. Any corporation, foreign or domestic, could be sanctioned by the President for investing $40 million in the development of the Iran petroleum industry.[29] The 2006 amendments to the Iran Sanctions Act expanded the prohibition to any foreign or domestic corporation that provided weapons of mass destruction or certain types of conventional weapons to Iran.[30] Despite the

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[23] *See* Executive Order 13553 of September 2010; Executive Order 13574 of May 2011, and Executive Order 13590 of November 2011.

[24] Section 1245, National Defense Authorization Act of 2012, P.L. 112-81; 125 Stat. 1647; and 31 C.F.R. § 561.201.

[25] Section 201, Iran Threat Reduction and Syria Human Rights Act of 2012, P.L. 112-158.

[26] *Id*.

[27] *Id*.

[28] 31 C.F.R. § 560.314.

[29] Section 5 of the Iran Sanctions Act of 1996, P.L. 104-172; 50 U.S.C. § 1701(note).

[30] Section 102(a) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, P.L. 111-195; 124 Stat. 1317.

expanded application of these U.S. sanctions to foreign corporations it does not appear that penalties for violation of the Iran Sanctions Act have been applied to any foreign country.

Until the passage of CISADA, many trade restrictions were established by Executive Order. The procedure generally set forth in the ITR included identifying prohibited activities such as trading in Iranian oil, and then imposing sanctions from a list of restrictive measures available to the President. Again, enforcement action was almost always against U.S. persons.

Financial Transactions

CISADA significantly changed the landscape of Iran sanctions because it expanded the application of the law beyond "U.S. persons" to non-U.S. companies. For instance, CISADA limits a foreign financial institution's access to the US financial system if it is involved in restricted Iran financial transactions. These transactions include assisting Iranian efforts to develop weapons of mass destruction, support of international terrorism, or facilitating the Central Bank of Iran or other Iranian banks that support these activities. For many foreign financial institutions, exclusions from the U.S. financial marketplace and the ability to use the U.S. dollar in financial transactions are significant penalties. Specific regulations applying to financial institutions can be found in the Iranian Financial Sanction Regulations.[31]

All property and interests in property of the Government of Iran that are within the jurisdiction of the United States, or come within the jurisdiction of the United States, are blocked and may not be transferred, paid, exported, or withdrawn. This also applies to the property of the Central Bank of Iran and other financial institutions within Iran.[32]

Imports from Iran

It is illegal to import goods and services from Iran into the United States either directly or through third party countries.[33] Limited exceptions exist to this ban, including gifts valued at $100 or less, informational materials, household and personal effects, and accompanied baggage for personal use during travel. Financial institutions are also prohibited from providing financing for illegal importation of goods into the United States. U.S. persons, including foreign branches of U.S. banks, may not engage in any transactions including the purchase, sale, transportation, swap, financing, or brokering related to goods or services of Iranian origin or goods or services owned or controlled by the Government of Iran.[34]

Exporting Goods to Iran

The prohibition on importing goods directly or indirectly from Iran is a rather easy sanction to enforce as compared to the exporting of goods and services to Iran. Businesses around the world, including those in the United States, see the Iranian economy as a fertile marketplace—especially in some specific technologies. However, there are significant restrictions on what may be shipped to Iran pursuant to current sanctions.

No person, U.S. or foreign, may export goods, services or technology from the United States to Iran without an OFAC license. Further, no U.S. person may export goods, services or technology to Iran or the Government of Iran from anywhere in the world. The ban on exporting goods to Iran is comprehensive—it includes a ban on not only exporting goods to Iran directly or indirectly, but also prohibits the brokering of offshore transactions that would involve sending foreign goods to Iran or arranging third-party financing.[35] No U.S. person, wherever located, may approve, finance, facilitate, or guarantee any transaction by a foreign person that would be prohibited if done by a U.S. person.[36]

Special rules have been created for interaction with the Iran petroleum industry. In addition to the petroleum-related restrictions previously noted, U.S. persons may not: (1) contract to supervise and/or manage responsibility for the development of Iranian petroleum resources; (2) guarantee another person's performance of a similar contract; (3) contract to finance the development of Iranian petroleum resources; or (4) guarantee another's contract to finance the development of Iranian

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[31] 31 C.F.R. Part 561.

[32] 31 C.F.R. § 560.211(a).

[33] 31 C.F.R. § 560.201.

[34] *See* 31 C.F.R. Part 560.

[35] 31 C.F.R. §§ 560.204-208.

[36] 31 C.F.R. § 560.208.

petroleum resources.[37] It must also be noted that CISADA and the amendments to the Iran Sanctions Act focus not just on Iran's exportation of its own crude oil, but also the importation of refined petroleum products into Iran.

Penalties for Violating Iran Sanctions

Penalties for violating the Iran sanctions are dependent on the underlying statutory authority for the restriction. For instance, penalties under the IEEPA for failing to obtain a proper export license or violating an Executive Order restriction based on IEEPA authority could be up to $250,000 or an amount twice the amount of the transaction that is the basis of the penalty.[38] Any person that willfully commits a violation under the IEEPA is subject to a $1 million civil penalty and possibly imprisonment for not more than 20 years, or both.[39] These sanctions also apply to violations of the Iran Threat Reduction and Syrian Human Rights Act of 2012.

Import shipments into the United States of Iranian-origin goods without proper license will be detained. These shipments are subject to penalty or seizure and forfeiture action under existing customs laws.[40]

A separate set of sanctions applies to violations of the Iran Sanctions Act of 1996. In the event a U.S. person or affiliate violates these trade restrictions, a series of sanctions have been developed. The number of sanctions imposed is linked directly to the nature of the violation—whether it is violation of the restrictions on the petroleum industry, or violation of the sanctions for weapons of mass destruction or the export of Iranian refined petroleum to Iran.[41] The Iran Sanctions Act contains the following list of approved sanctions that the President may invoke:

1. Direct the Export-Import Bank of the United States to deny approval to the issuance, guarantee, insurance, extension of credit, or participation in the extension of credit regarding the export of any goods or services from the sanctioned person;
2. Deny issuance of any specific license and not grant other specific permissions to export any goods or technology to a sanctioned person;
3. Prohibit any United States financial institution from making loans or providing credits to any sanctioned person totaling more than $10 million in any 12-month period;
4. Prohibit a sanctioned person from being designated as a primary dealer in United States Government debt instruments or serve as a repository of government funds;
5. Deny sanctioned person participation in any U.S. Government contract of procurement for any goods or services;
6. Prohibit any transaction in foreign exchange that are subject to the jurisdiction of the United States;
7. Prohibit any transfers of credit or payments between financial institutions or by, through, or to any financial institution, to the extent that such transfers or payments are subject to the jurisdiction of the United States; and
8. Prohibit the sanctioned person from acquiring, holding, withholding, using, transferring, withdrawing, transporting, importing or exporting any property that is subject to the jurisdiction of the United States and with respect to which the sanctioned person has any interest.[42]

The degree of sanctions available to the President for violations of the Iran Sanctions Act are significant and can be devastating to any party found in violation of trade sanctions. As such, businesses and individuals operating in the world of international trade must be knowledgeable of these sanctions and must know how to operate within the limitations provided by Congress and the President.

V. How Sanctions Affect Maritime Commerce

The trade sanctions outlined above create numerous challenges for the international trade community, especially in maritime commerce. It must be kept in mind that the United States is not the only government implementing sanctions. The European Union has also imposed its own sanctions regime, as has the United

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[37] 31 C.F.R. § 560.209.

[38] 31 C.F.R. § 560.701(a).

[39] *Id*.

[40] 31 C.F.R. § 560.702.

[41] Section 5 of the Iran Sanctions Act of 1996, P.L. 104-172; 50 U.S.C. § 1701(note).

[42] *Id*. at Section 6.

Nations in conjunction with the International Atomic Energy Agency as have individual nations such as Australia, Canada, and India. As a consequence it is not possible to merely stop trading with the United States to avoid the draconian effects of the Iran trade sanctions. Persons engaged in foreign commerce must be aware of all possible sanctions regimes.

Vessel owners must be eternally vigilant regarding the nature of cargo being carried aboard their vessels and the ports to which the cargo is destined. As previously stated, many nations prohibit the importation of Iranian goods, especially petroleum products. Sanctions also prohibit the purchase of Iranian goods and services. As a result, vessel owners must be concerned that vessel fuel and food, among other necessaries, do not have Iranian origins. Entering U.S. or EU ports with Iranian bunkers or provisions may result in the vessel and its owner being denied access to ports in the future.

The sanctions regime also has a long list of prohibited cargo that is ever expanding. The following goods and services may not be carried, directly or indirectly, to Iran aboard vessels:

- any cargo from the United States except for humanitarian aid, medical supplies, or cargo the subject of a proper license;
- any goods and technology coming from the United States through a third country;
- weapons of mass destruction or destabilizing amounts of conventional weapons;
- goods and services to facilitate maintenance or expansion of Iran's production of refined petroleum products;
- refined petroleum products;
- goods that support Iran's ability to import refined petroleum products such as port and transportation elements; and
- precious metals or materials such as aluminum, steel, and coal that can support Iran's weapons program or shipbuilding program.

In addition to this list of prohibited cargos to deliver to Iran, it must be remembered that it is sanctionable to carry crude oil from Iran to any other country, as well as carrying, directly or indirectly, goods of Iranian origin to the United States.

Marine insurance is also complicated by the worldwide sanctions against Iran. Providing services such as marine insurance to any Iranian maritime operation, as well as the Government of Iran, is subject to sanctions under the Iran Sanctions Act of 1996. Also, carrying any of the cargoes identified above in or out of Iran may also result in violations of the Iran Sanctions Act. As a result, marine insurance companies are forced into a dilemma. Although they may have active contracts of insurance with a particular vessel owner or charterer, those contracts may become invalid. OFAC states that if an insurance company issues a policy to an entity listed on the SDN list, the policy becomes a "blocked contract" and all dealings with that contract must involve OFAC. The best strategy for marine insurers is to add a clause to all contracts of marine insurance requiring the insured to warrant that the insured property will not be engaged in illegal or prohibited activity. If an insured is placed on the SDN list after the marine insurance contract commences, the best strategy is for the marine underwriter to contact OFAC and seek advice regarding the collection of premiums from the sanctioned insured as well as guidance on the payment of claims. Remember, all funds associated with a blocked party may be confiscated and/or frozen by the United States if the funds land in the U.S. financial system.

Vessel owners must also be concerned that long-term and short-term charters include terms that protect the vessel from being used in violation of the sanctions. The United States will block the property of any entity that knowingly provides a vessel for the transportation of embargoed goods to or from Iran. Therefore it is incumbent upon vessel owners to include "sanction clauses" in all charter parties prohibiting the sub-chartering of the vessel to blocked parties and prohibiting the carriage of embargoed cargo aboard the vessel. These provisions are important because the rights of the vessel owner to void the charter, take action to discharge the embargoed cargo, or provide for other legal relief is significant in these cases. It is extremely important that vessel owners ensure that all parties subject to the charter be properly vetted and confirmed to be free of sanctions from the various sanction regimes around the world.

VI. Future of Sanctions

In 1995 the United States declared a national emergency on the predicate that the actions and policies of the Government of Iran threatened the national security, foreign policy, and economy of the United States. The powers afforded to the President under national emergency conditions permitted him to impose

comprehensive trade and financial sanctions on Iran, including prohibitions on certain transactions with respect to the development of Iranian petroleum resources.

During the intervening 18 years the sanctions have been expanded and the penalties for violating these sanctions have been increased. The justifications for these ever-expanding sanctions include: (1) penalties for certain serious human rights abuses; (2) stopping Iran's support for terrorism; and (3) slowing or stopping Iran's Weapons of Mass Destruction Program.[43] At the moment experts are in disagreement regarding the success of these sanctions. The current sanctions structure is often criticized because it visits harm on Iran's general population. A recent Center for Arms Control and Non-Proliferation report argued that the economic effects of the sanctions are primarily causing hardship on the people of Iran.[44] As a result, the Iranian regime is able to propagandize against the West to garner otherwise unattainable grassroots support for the nuclear program. Even Secretary of State John Kerry called for a sanctions "cease-fire" to allow diplomacy to take place.[45]

While the West views the economic hardship caused by the sanctions as a vice that will ultimately force the Iranian government to modify its nuclear policy, it is likely the Iranians have a different view. Iranians may well view Iran's relationship with the West as a struggle for survival itself, not just a dispute over the nature of Iran's nuclear program. As we are observing, rather than modifying its nuclear program to achieve an easing of sanctions, the Iranians are adjusting economic policy to cope with sanctions as a means of preserving its nuclear program. Of course, this analysis begs the question: Are the sanctions aimed at ending the nuclear program, or de-stabilizing the existing Iranian government?

To return to the original premise, is there a means to convert lock-down sanctions into a happy ending if Iran shutters its alleged nuclear weapons programs? To do so there must be a rational and implementable reduction in sanctions coupled with a series of incentives that are too valuable for the Iranian regime to ignore. Currently it appears that the bargaining ratio of sanctions to incentives is leaning heavily in favor of sanctions and light on incentives. Secretary Kerry's indication that sanctions should be stabilized while diplomatic channels are pursued is a clear signal that it will be difficult to balance the sanctions-to-incentive ratio if the sanctions continue to increase.

The sanctions currently in place are complicated, severe, and meant to significantly restrict trade with Iran. Unwinding these sanctions will be equally complicated, especially if the sanctions are removed in a piecemeal or strategic manner. Iran must also be concerned that prior trading partners have found new sources of supply or new buyers for goods that will slow the economic rebound even after the release of sanctions.

Western negotiators must find the proper mix of sanctions relief and incentives to induce Iran to alter its nuclear goals. It is not clear at this moment whether such a mix exists, or whether the West is willing to pay the price of resolution. The alternative to resolution, however, is not palatable for the West or Iran. Absent successful diplomatic resolution of this impasse, there appear to be precious few intermediary steps, leaving military action as the only remaining option.

For those critics who believe that sanctions are not harming the Iranian regime or its leaders, but instead are providing a propaganda tool to further incite angst against the West, the road to military action is paved and inevitable. For those who believe that sanctions are the only option for preventing military action, time is clearly running out. In March 2013 President Obama estimated it would be "over a year or so" before Iran could produce a nuclear weapon. The time is fast approaching when the United States will need to prepare the public for possible military action against Iran. As the Iran nuclear program proceeds to completion, the usefulness of sanctions has peaked. It is now time to parlay the effect of sanctions, and the promise of incentives, to end this march to conflict.

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[43] *See* Wendy R. Sherman, "Iran Sanctions: Ensuring Robust Enforcement, and Assessing the Next Steps" Written Statement Before the Senate Committee on Banking, Housing and Urban Affairs, June 4, 2013.

[44] Laicie Heeley and Usha Sahay, "Are Sanctions on Iran Working?" A Report by the Center for Arms Control and Non-Proliferation (http://armscontrolcenter.org/issues/iran/articles/iran_sanctions_report/).

[45] Paul Richter, "Secretary of State John Kerry Urges Against New Sanctions For Iran," Los Angeles Times, April 18, 2013 (http://articles.latimes.com/2013/apr/18/world/la-fg-iran-sanctions-20130419).

The Upside Down World of *Lozman*

By Francis X. Nolan, III, Esq.

Introduction

Last month's Bulletin featured articles using various metrics to analyze the impact of the U.S. Supreme Court's decision in *Lozman*[1] on the offshore industry and the floating casino sector, and the value of the decision as an example of U.S. legal scholarship. As those articles make clear, the solitary item of any legal or commercial value to emerge from *Lozman* is the Court's clear statement that the subjective intent of the owner should not be taken into account in determining whether an item is a "vessel" for purposes of 1 U.S.C. Section 3. By implication, the decision should also dispose of the concept that "indefinite mooring," as opposed to "permanent mooring," should affect vessel status.[2] In all other respects, the majority decision in *Lozman* represents a failed opportunity to settle and clarify the law, or worse.

The Court ignored the plain meaning of 1 U.S.C. Section 3, which defines "vessel" in the disjunctive. The statute provides that "[t]he word 'vessel' includes every description of watercraft or other artificial contrivance *used*, or *capable* of being used, as a means of transportation on water."[3] Indeed, the long-hallowed canons of construction[4] would have dictated that vessel status be given to objects if the answer to either "use" or "capability" was in the affirmative. As such, the Court should have clearly distinguished between a function-based test and a static "existential" test of "what is a vessel."[5] Instead, the Court essentially conflated the two branches of the disjunctive, adopted a "know it when [you] see it"[6] standard, and conjured up the "reasonable observer"[7] to apply it to future cases, thus upending a century of useful precedent on the status of various craft and suggesting that each future finding of vessel status will be essentially *sui generis*.

Lozman is a maritime lien case, the underlying issue in which was whether Lozman's floating home was a vessel and therefore eligible for *in rem* arrest as a juridical person under admiralty law. However, unlike *Lozman*, the overwhelming majority of "vessel" status cases arise in connection with the Jones Act[8] or general maritime law governing personal injuries and wrongful death. In order to succeed under the Jones Act, a plaintiff must be a "seaman," which necessitates employment on a vessel.[9] "Seaman" status requires not only that a vessel be involved, but also that the vessel be "in navigation."[10] If a vessel is not engaged in transportation on water, it is not "in navigation" and its employees cannot be "seamen."[11]

The lower courts in recent times have appeared to merge the terms "vessel" and "vessel in navigation" into one indivisible concept. This judicial sloppiness has no apparent adverse impact on the world of maritime torts, but the result has been a series of decisions which have degraded the law and its utility for others who depend on the integrity of the concept of the existential vessel, wholly apart from its engagement in navigation.[12] Because of this degradation of the concept of "vessel," it can now be argued that a structure is ineligible for "vessel" status either because it has been "withdrawn from navigation" or because it has become "permanently moored."

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[1] Lozman v. City of Riviera Beach, 133 S. Ct. 735 (2013).

[2] *See*, *e.g.*, De La Rosa v. St. Charles Gaming Co., 474 F.3d 185 (5th Cir. 2006) as an example of a case where indefinite mooring appears to depend on subjective intent.

[3] 1 U.S.C. § 3 (2006) (emphasis added).

[4] *See* 2A Sutherland Statutory Construction, § 46:6, 230-242 (7th ed. 2007) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . .") (citations omitted); *see also* Corley v. United States, 556 U.S. 303, 304 (2009).

[5] Bruce A. King, *Ships as Property: Maritime Transactions in State and Federal Law*, 79 Tul. L. Rev. 1259, 1289 (2005).

[6] *Lozman*, 133 S. Ct. at 752 (Sotomayor, J., dissenting).

[7] *Id*. at 739.

[8] 46 U.S.C. § 30104 (2006).

[9] Stewart v. Dutra, 543 U.S. 481, 487-488 (2005) (citing McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 355 (1991)).

[10] McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 355 (1991).

[11] *See* Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952) (denying Jones Act recovery to worker fatally injured while working on a vessel during its winter layup).

[12] *See* De La Rosa v. St. Charles Gaming Co., 474 F.3d 185 (5th Cir. 2006); Tagliere v. Harrah's Illinois Corp., 445 F.3d 1012 (7th Cir. 2006). While these courts do not explicitly acknowledge that they are merging "vessel" and "in navigation" analysis, it is clear from the courts' discussions that these two terms are being effectively merged.

The Amorphous Concept of "Permanently Moored"

In *Lozman*, the Court noted that there were ways a vessel could lose its "vessel" status.

> A craft whose physical characteristics and activities objectively evidence a waterborne transportation purpose or function may still be rendered a nonvessel by later physical alterations. For example, an owner might take a structure that is otherwise a vessel (even the *Queen Mary*) *and connect it permanently to the land* for use, say, as a hotel. Further, changes over time may produce a new form, *i.e.*, a newly designed structure—in which case it may be the new design that is relevant.[13]

On a general conceptual level, certainly if a vessel becomes connected "permanently to the land," it has been effectively withdrawn from navigation. But whether "permanent mooring" should deprive a craft of "vessel" status should depend on what "permanent mooring" means. The standards by which "permanent mooring" are determined in practice range from vague to grossly arbitrary and superficial.

The Coast Guard's Contribution

On the grossly arbitrary end of the scale sits the 2009 regulatory *ukase* of the Coast Guard. In an attempt to reduce the need to inspect a large number of tied-up floating structures and to prioritize its resources, the Coast Guard promulgated a regulatory definition of "permanently moored" to include any equipment that requires more than 8 hours to "get underway."[14] The commentary that accompanies this relatively recent rulemaking asserted that the phrase "permanently moored vessel" was an "oxymoron," since permanent mooring meant vessel status would thereby terminate.[15] When this guideline is applied to determine whether a vessel is in navigation or whether, as an administrative matter, the Coast Guard can responsibly reduce its inspection resources, there does not seem to be any serious concern. But when applied to determine whether a craft is a valid subject of documentation and imposition of a preferred mortgage, the Coast Guard standard is preposterous.

In *Stewart v. Dutra*,[16] Justice Thomas cautioned that vessel status analysis was not to be done on a "snapshot" basis, looking only to what a vessel was doing at the moment of injury.[17] Instead, the Court held that the trier of fact should look at "the 'in navigation' requirement [as] an element of the vessel status of a watercraft. . .[as] [i]t is relevant to whether the craft is 'used, or capable of being used' for maritime transportation."[18] In fact, the Court notes that "in navigation" was never meant to be considered as a dispositive qualification.[19] Rather, the Court emphasized that the plain language of Section 3 "requires only that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose."[20] Given this clear instruction from the Court, the Coast Guard is way off base in formulating a rule of thumb that every moored structure that requires more than 8 hours to "get underway" is not a vessel.[21] Hopefully, the Coast Guard will not apply this rule drafted with marine inspection in mind to make decisions on what vessels can be and remain documented.

A Proposal to Give "Permanently Moored" an Intellectual Home

The MLA had urged in its *amicus* brief that the term "permanently moored" be construed by the Supreme Court to mean attachment as a fixture to land, if "the manner of its affixing is irreversible as a practical matter,"[22] a suggestion ignored by the Court.

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[13] Lozman v. City of Riviera Beach, 133 S. Ct. 735, 745 (2013) (citing Stewart v. Dutra, 543 U.S. 481, 493-494 (2005) (emphasis added); Kathriner v. Unisea, Inc., 975 F.2d 657, 660 (9th Cir. 1992) (floating processing plant was no longer a vessel where a "large opening [had been] cut into her hull.") (alterations in original)).

[14] U.S. Coast Guard Notice of Policy, 74 Fed. Reg. at 21, 814 (2009).

[15] *Id*.

[16] Stewart v. Dutra, 543 U.S. 481 (2005).

[17] *Id*. at 495.

[18] *Id*. at 496.

[19] *See id*.

[20] *Id*. at 495 (emphasis in original).

[21] U.S. Coast Guard Notice of Policy, 74 Fed. Reg. at 21, 814 (2009).

[22] *See* Brief of the Maritime Law Association of the United States as Amicus Curiae Supporting Respondent at 12, Lozman v. City of Riviera Beach, 133 S. Ct. 735 (2013) (No. 11-626), 2011 U.S. Briefs 626, 2012 U.S. S. Ct. Briefs LEXIS 2994.

The MLA proposed that the Court fashion a rule to align "permanently moored" status with land-based fixture analysis. Determination of whether personal property has become "a fixture" is a matter of state law. A fixture is generally defined as "[p]ersonal property that is attached to land or a building and that is regarded as an irremovable part of the real property, such as a fireplace built into a home."[23] Indeed, under the UCC, " '[f]ixtures' means goods that have become so related to particular real property that an interest in them arises under real property law."[24]

Implementing a similar test in vessel status cases would be appropriate and certainly useful, particularly because the concept of fixture is settled law that many mortgagees and lienors are familiar with since it already exists in other areas of property law. In fact, the test to determine whether or not an object is a "fixture" in New York is relatively straightforward.

> Under the common law, a fixture is personalty which is: (1) actually annexed to real property or something appurtenant thereto, (2) applied to the use or purpose to which that part of the realty with which it is connected is appropriated, and (3) intended by the parties as a permanent accession to the freehold.[25]

The Residual Impact of *Lozman* on Vessel Finance

Under U.S. law, a preferred mortgage can be imposed only on a documented vessel.[26] A "documented vessel" is a "vessel" as defined by Section 3, of a minimum of five net tons.[27] Vessel financing practitioners commonly file UCC financing statements against vessel owners as a precautionary step to ensure that, if the preferred mortgage fails due to some defect in either the mortgage itself or in compliance with filing and recording procedures, UCC perfection of security interests created by the mortgage or an accompanying security agreement will provide a fallback position for the lender in its claims against the vessel, as an item of personal property. In certain cases, lenders have required fixture filings as well in the financing of stationary casino barges and similar equipment. In the latter cases, UCC filings are usually motivated by concerns that the object may not in fact be a "vessel," or even separate personal property, regardless of whether the U.S. Coast Guard National Vessel Documentation Center ("NVDC") has documented it as such. Nowhere is this scenario more prevalent than in the casino barge business. However, no perfected security interest under the UCC compares in priority and privilege to a preferred mortgage, which primes all liens and security interests other than a relatively narrow list of preferred maritime liens.[28]

The casino industry has addressed the question of "what is a vessel?" out of both sides of its mouth. As the MLA *amicus* brief illustrated, owners have applied for and received documentation by the NVDC of their craft as "vessels," have granted purported "preferred mortgages" on them to secure billions of dollars of debt and, at the same time, have argued successfully before a number of federal and state courts that their craft are not only "not in navigation" but are not even "vessels" for purposes of the application of maritime remedies such as the Jones Act.[29] Since Section 3 is the standard by which "vessel" is determined for purposes of both documentation as well as maritime remedies, the positions of the gaming industry in this regard are irreconcilable. However, since most of the floating casino vessel cases involve vessels not "in navigation," those vessels would not have been susceptible to maritime liens in any event while they are not in navigation, and the Jones Act and maritime remedies for personal injury and wrongful death should not apply. A finding that casino vessels docked for the long term were not in navigation would have supported the results in these cases without going to the extreme conclusion that these craft were indeed not "vessels." But floating casinos in many cases should still be considered vessels if they are "capable of being used" in transportation on water, completely divorced from any analysis of what they are doing at any point in time. The damage done to the concept of "vessel" by the gaming cases is, in this regard, wholly unnecessary.

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[23] Black's Law Dictionary (9th ed. 2009).

[24] U.C.C. § 9-102(a)(41) (2000).

[25] Mastrangelo v. Manning, 17 A.D.3d 326, 327, 793 N.Y.S.2d 94 (N.Y. App. Div. 2d Dep't 2005).

[26] 46 U.S.C. § 31322 (2006).

[27] 46 U.S.C. § 12102 *et seq* (2006).

[28] 46 U.S.C. § 31326(b)(1) (2006).

[29] Brief of the Maritime Law Association of the United States as Amicus Curiae Supporting Respondent at 21-24, Lozman v. City of Riviera Beach, 133 S. Ct. 735 (2013) (No. 11-626), 2011 U.S. Briefs 626, 2012 U.S. S. Ct. Briefs LEXIS 299.

It would seem fair to say that the gaming industry has never had any interest in transportation of people or goods over water or in any other traditional maritime activity. Rather, they have tricked-out gambling platforms to meet peculiar requirements of some state laws that they be operated on water and not on land. In the service of these narrow interests, other and more serious issues have been ignored.

In the Supreme Court's haste to explain why Lozman's floating hovel and a host of other marginal objects should not be treated as "vessels," the Court has imposed a narrow vision of "what is a vessel" and left open the possibility that "what is a vessel" one day may be a non-vessel the next.

Flexible thinking and innovation in the shipping and offshore energy sectors have given rise to varying uses for vessels and other floating structures. For example, some tankers and gas carriers are being devoted to stationary storage of oil or gas offshore. These vessels retain their ship shape flotation envelopes and usually their propulsion systems, yet may be secured with mooring systems and other connections requiring longer than eight hours to disengage. They do not transport oil and gas. They receive those products from oil wells or shippers and release them to others. Other vessels may be altered to allow onboard processing or refinery, liquefaction or gasification functions. The financing, insurance and lien environments in which these watercraft, as well as long term laid up vessels, will reside requires that those affected have clear guidance on the status of their structures as vessels or not.

Conclusion

The *Lozman* decision perpetuates and amplifies uncertainty in ship financing by departing from the plain meaning of Section 3.

Secured finance requires a degree of certainty as to the status and nature of collateral over the term of a loan or credit exposure. Failure to provide such legal infrastructure to the industry will serve to unnecessarily increase interest rates to justify the needless increase in risk, or more likely will make debt capital unavailable to certain sectors of the shipping and offshore industries. Marine lenders make secured loans based in part on an assumption that their security documents, including preferred mortgages, will be enforceable and enjoy the priorities established in the ship mortgage acts and maritime lien laws which apply. The enactment of the Ship Mortgage Act of 1920 was motivated in part by the belief that these protections were necessary to encourage the growth and expansion of marine construction and marine lending, including long-term loans. In this respect, the need for certainty over time is far more critical to marine lenders and their customers than it is to tort plaintiffs and even trade creditors. A trade creditor is unlikely to be exposed to a vessel recharacterization risk for more than 90 or 120 days in the normal course. Whether a craft is a vessel may affect the rights and remedies available to tort claimants, but it will rarely deprive them of any remedy, unless they sleep on their rights. But a marine lender needs to know that his collateral is a vessel for the entire term of the open credit.

One can appreciate that vessels may come in and out of navigation and that, while in navigation, vessels may employ seamen, incur maritime liens and liabilities. But how does a transitory notion of vessel status work? If a craft is initially a vessel documented with a preferred mortgage and having accrued maritime trade and operational liens, what is the status and enforceability of that mortgage and those liens if the craft is later not considered a vessel due to "permanent mooring," especially by the Coast Guard standard. More interesting, are the preferred mortgage and maritime liens resurrected or restored if the watercraft cuts loose from its "permanent mooring" and returns to navigation? These questions are all needless headaches wrought on the maritime practice by the shallow analysis of the *Lozman* Court.[30]

In light of the Supreme Court's failure to take this concern into account, the time may have arrived to consider legislation to add clarity and certainty to vessel characterization, at least in respect of documentation and preferred mortgages, both as to validity and enforceability *in rem*. The financing world can accept the risk that a preferred mortgage is lost or degraded if a vessel becomes in fact a fixture of real estate or is physically destroyed. But a financier cannot accept the risk that its collateral position evaporates simply because a vessel is "permanently moored" or no longer "in navigation."

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[30] This was recognized by the dissent in *Lozman*. *See, e.g.*, Lozman v. City of Riviera Beach, 133 S. Ct. 735, 754 n.6 (2013) (Sotomayor, J., dissenting).

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Lozman's "Reasonable Observer" and Where It Will Go From Here

By Brendan Sullivan

In *Lozman v. City of Riviera Beach*, the United States Supreme Court held that a contrivance "does not fall within the scope of [structures defined as 'vessels' under 1 U.S.C. § 3] unless a reasonable observer, looking to the [craft's] physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water."[1] The *Lozman* decision essentially reaffirmed the analysis used in *Stewart v. Dutra Constr. Co.,*[2] but the "reasonable observer" test applied in *Lozman* introduces new elements that will inevitably evolve with advances in the maritime industry and in naval architecture.[3] This article reviews the source of the reasonable observer test and considers ways that the reasonable observer test may be used in future vessel determination cases.

Fane Lozman's Floating Home

The subject of the Supreme Court's decision in *Lozman* was a 60-foot floating plywood home in arrears for dockage fees. The City of Riviera Beach, Florida filed a lawsuit asserting a maritime lien against the home. After receiving a judicial decree determining that the home was a vessel and that the city's action was valid pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims in the Federal Rules of Civil Procedure, the City destroyed it.

Acting *pro se*, Mr. Lozman, the home's owner, moved to dismiss the City's claim and recover a $25,000 bond securing its value. He objected to the City's lien by asserting that his home was a floating residential structure not subject to admiralty jurisdiction as a vessel.[4] Both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the 11th Circuit rejected this argument, finding that the house was practically capable of transportation on water, thus meeting the "vessel" definition under 1 U.S.C. Section 3.

The Supreme Court granted certiorari to answer the question of whether a vessel's practical capability to move people and things on water encompasses structures that are not designed in a practical way to move on water and do not, as a matter of course, move people or things on water. Recognizing the complexities in formulating a vessel determination test that covers all types of vessels, the Court defaulted to a reasonable observer test that refines standing vessel determination precedent by giving courts some flexibility to make common sense decisions in borderline vessel determination cases that will inevitably develop as new structures are created to address maritime industry needs.

In a 7-2 opinion delivered by Justice Breyer, the Court reversed the 11th Circuit and held that the facts developed in the lower courts were sufficient to find that Mr. Lozman's house was not a vessel under a reasonable observer analysis.[5] The dissenting views expressed by Justices Sotomayor and Kennedy objected to the introduction of a reasonable observer test because they argued that it presents the potential for confusion.[6] However, the flexibility afforded to courts through this new standard is not granted without guidance.

Reasonable Observer Precedent

The majority opinion in *Lozman* used, but did not define, the phrase "reasonable observer." In a handful of decisions in other contexts, the Supreme Court uses a "reasonable observer" test as a way of addressing subject matter that requires a general awareness of facts relevant to the status of objects.[7] Reasonable observer determinations

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[1] Lozman v. City of Riviera Beach, 133 S. Ct. 735, 741 (2013).

[2] Stewart v. Dutra Constr. Co., 543 U.S. 481 (2005).

[3] *Lozman*, 133 S. Ct. at 742.

[4] The City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length, 649 F.3d 1259, 1266 n.6 (11th Cir. 2011) (No. 10-10695).

[5] *Lozman*, 133 S. Ct. at 745-746.

[6] The dissent by Justices Sotomayor and Kennedy noted, "[t]he Court, however, creates a novel and unnecessary 'reasonable observer' reformulation of these principles and errs in its determination, under this new standard, that the craft before us is not a vessel." *Lozman* at 748-749 (2-7 decision) (Sotomayor, S., dissenting).

[7] *See eg.* Salazar v. Buono, 130 S. Ct. 1803, 1810 (2010) (remanding a case for a determination of whether "a reasonable observer aware of the history and all other pertinent facts relating to" a cross located on federal land would understand that the cross is a historical landmark, not an endorsement of religion), *but cf.* McCreary County, Ky v. American Civil Liberties Union of Ky, 545 U.S. 844, 847 (2005) (where the Court split in its view of whether the addition of historical context to displays of the Ten Commandments placed in a courthouse only emphasized the reasonable observer's impression that the displays endorse a religion).

are most prominent in religious freedom, First Amendment cases, but they are also used in judicial recusal cases.[8] These cases are sources that maritime practitioners and courts can look to for guidance in in applying the "reasonable observer" test in vessel determination cases.

Justice O'Connor, in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, commenting upon the "endorsement test" in Establishment Clause cases, noted that "the history and ubiquity of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged government practice conveys a message of endorsement of religion."[9] While the reasonable observer's knowledge of a vessel's history and ubiquity requires a quantum of knowledge, it does not require the observer to be an expert. As Justice Stevens opined in *Capitol Square Review and Advisory Board v. Pinette*, the reasonable observer definition should not make the individual a "well-schooled jurist" or a "being finer than the tort-law model."[10]

First Amendment Cases

The reasonable observer test is used most frequently in Establishment Clause cases to determine whether a symbol endorses religion. Cases addressed by the Court include disputes over a county posting a display of the Ten Commandments on state capitol grounds[11] and a crèche in a county courthouse.[12] The reasonable observer test is applied in these cases because a determination of whether the symbols at issue endorse religion requires more than a passing knowledge of what they signify; the reasonable observer "who knows all the pertinent facts and circumstances surrounding the symbol and its placement" must make the determination.[13]

The reasonable observer test, as applied in these cases, is criticized for its ambiguity and inconsistency.[14] However, the cases are instructive because they clarify that a reasonable observer may be someone who knows more about an object than is readily apparent by just looking at it. They know its history, what it was created for, and why it was placed in the location chosen.

In the vessel context, a contrivance that does not have all the typical features expected in a vessel may nonetheless be a vessel because its history and design features lend itself to a vessel determination.[15] This was certainly the case in *Stewart v. Dutra* and *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, where the Court determined that construction platforms with a transportation function are vessels because the history of their design and use indicated that they transport things on water.[16] However, it is also clear that Justice Breyer affords great weight to a vessel's features and a religious symbol's appearance because his opinion in *Lozman* and his concurring opinion in a case applying the reasonable observer standard under the Establishment Clause use graphical representations of the subjects to identify the features that a reasonable observer might look to in making a determination.[17]

In some instances, a symbol's history can be clarified through some objective manifestation such as a sign or a placard explaining the symbol's background.[18]

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[8] *See, e.g.*, Liteky v. U.S., 510 U.S. 540, 552 (1994) (holding that recusal is required only if the judge's impartiality might "reasonably be questioned").

[9] County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 630 (1989).

[10] Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753, 799-800 nn.4-5 (1995) (Stevens dissenting).

[11] Van Orden v. Perry, 545 U.S. 677 (2005).

[12] County of Allegheney v. American Civil Liberties Union, Greater Pittsburg Chapter, 492 U.S. 573 (1989).

[13] *Salazar*, 130 S. Ct. at 1837.

[14] *See* Utah Highway Patrol Association v. American Atheists, Inc., 132 S. Ct. 12, 20-21 (2011), citing examples where the reasonable observer test is misapplied or unevenly interpreted. *See also* Susan Duncan, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases: McCreary v. ACLU of Kentucky & Van Orden v. Perry*, 04 N.C. First Am. L. Rev. 139 (2006).

[15] *See Lozman*, 133 S. Ct. at 745.

[16] In *Stewart v. Dutra Construction Co.*, the Court held that a dredge named the *Super Scoop* that only moved by tow or by manipulating its anchor cables was a vessel because it was practically capable of transportation on water and was used for transportation on water on a regular basis. 543 U.S. 481, 484 (2005). In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.* the Court held that a "barge fastened to the river bottom. . .used as a work platform at the times in question, at other times. . .used for transportation" was a vessel. 513 U.S. 527, 535 (1995).

[17] *See* Van Orden v. Perry, 545 U.S. 677, 706 (2005) and *Lozman*, 133 S. Ct. at 747.

[18] *See Salazar*, 130 S. Ct. at 1820.

The historical context added by these signs may cleanse it of perceptions that it endorses religion.[19] Similarly, there are instances where objective evidence of a vessel's use for transportation on water may be determinative even though it lacks many of the features an observer would expect to find on a vessel.[20] Context informs the reasonable observer of relevant factors.

Judicial Recusal Cases

Like First Amendment cases, recusal inquiries are "made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances."[21] In *Cheney v. United States District Court for the District of Columbia*,[22] Justice Scalia denied a motion for his recusal from a case involving the Vice President, who Justice Scalia regularly hunted with during the Court's December-January recess.[23] There was a general perception that the Justice's relationship with the Vice President was one that could interfere with impartiality in the case, but Justice Scalia determined that this perception is not one that is shared by the "reasonable observer."[24] He held that a reasonable observer "informed of all the surrounding facts and circumstances" would not conclude that his impartiality might be questioned.[25] The Justice observed that the trip was scheduled before the Court granted certiorari in the case, the Vice President had limited interaction with Justice Scalia, and the case was not mentioned during the times when the two did interact.[26] Those factors added context to the issue, leading the Justice to the conclusion that his relationship with the Vice President did not interfere with his impartiality in the case before the Court.

In vessel determination cases, a reasonable observer, looking at all the surrounding facts and circumstances, might reach a different conclusion than an observer who does not make such a detailed inquiry. Lower court decisions cited in *Lozman* provide a good example of the type of detailed inquiry that should be made. In one of the cases cited by the *Lozman* Court, *Bernard v. Binnings Construction Co., Inc.*, the Fifth Circuit applied a three factor test to determine that a work punt used to break cement was not a vessel for purposes of Jones Act worker's compensation.[27] Looking at (1) how the structure involved was constructed and primarily used; (2) its moorings at the time of the accident; and (3) whether the *capability* to move across navigable water was incidental to its primary purpose, the Fifth Circuit held that a work punt, like a floating dry dock, was not a vessel.[28] Like floating platforms, construction rafts, floating bridges, pipelines and other facilities, the work punt in *Bernard* and the house in *Lozman* are capable of floating, but they are not constructed to transport goods or people on water, they were not engaged in navigation at the time relevant facts developed, and any waterborne transportation function they do perform was incidental to the craft's purpose. In the wake of *Lozman*, assessing a craft's nautical features and looking at how it is used are both necessary to determine whether a craft is a vessel.

The Lozman Reasonable Observer

Recognizing the subjectivity of a reasonable observer test, the Court further directs that the reasonable observer should look to "physical characteristics and activities" in making a vessel determination.[29] An analysis of Mr. Lozman's home was provided as a template for vessel determinations.[30] One of the physical characteristics key to the Court's decision in

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[19] However, placards or a signs are factors that, by themselves, are insufficient to determine if the symbol endorses religion. *See Van Orden*, 545 U.S. at 701-702 (Breyer, J., concurring).

[20] ". . .satisfaction of the criterion [is not] a necessary condition. . .It is conceivable that an owner might *actually use* a floating structure not designed to any practical degree for transportation as, say a ferry boat, regularly transporting goods and persons over water." *Lozman*, 133 S. Ct. at 745 (emphasis in original).

[21] Microsoft Corp. v. U.S., 530 U.S. 1301, at 1302 (2000) (REHNQUIST, C.J., respecting recusal) (*citing* Likety v. U.S., 510 U.S. 540, 548 (1994)). Under 28 U.S.C. § 455(a), a federal judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The reasonable observer test is used to determine whether it is "reasonable" to question the judge's impartiality.

[22] Cheney v. United States District Court for the District of Columbia, 541 U.S. 913 (2004).

[23] *Id.* at 914.

[24] *Id*. at 924.

[25] *Id.* at 926.

[26] *Id.* at 915.

[27] Bernard v. Binnings Construction Co, Inc., 741 F.2d 824, 832 (5th Cir. 1984).

[28] *Id*.

[29] *Lozman*, 133 S. Ct. at 741.

[30] Justice Breyer admits that the rule established by *Lozman* is "general," but points to the facts in this case to illustrate what the court has in mind. *Id*.

Lozman was the fact that Mr. Lozman's house was not self-propelled.[31] However, this factor, like all others, was not dispositive.[32]

Physical Characteristics of a Vessel

Physical characteristics important to the reasonable observer include: (1) propulsion (or lack thereof), (2) steering mechanisms (or lack thereof), (3) the design of the living quarters, and (4) the design of exterior features such as doors (or hatches) and windows (or ports).[33]

Mr. Lozman's home was not designed for and did not have a method of propulsion. On the few occasions when the house was moved, it was towed.[34] Several vessel types, including barges, are not self-propelled, but when a vessel lacks a means of self-propulsion they generally have other integral features like a rudder or towing bits and chocks to contribute to the vessel's transportation function. Mr. Lozman's house did not have any features that would offset the lack of self-propulsion. In fact, when the house was propelled through the water, it did so with great difficulty.

When Mr. Lozman's house was towed it relied on a tug to direct its movement because there was no rudder or other mechanism to adjust course.[35] Indeed, the square and unraked bottom[36] that Mr. Lozman's house sat on made it difficult to control when it was towed from place to place. Unlike a barge, which can be moved with a single tug, Mr. Lozman's home needed two boats, one towing and one directing, to transport the home over significant bodies of water.[37] These features are indicative of a contrivance that is not a vessel, but the Court's analysis of a vessel's physical characteristics was not limited to mechanical features that contribute to its transportation function.

Perhaps the most difficult feature to identify in vessel determination cases are the "nonmaritime living quarters" aboard non-vessels and the maritime living quarters found on vessels.[38] The Court looked at Mr. Lozman's house and determined it was not a vessel, in part, because it was not designed with the type of furnishings kept on a vessel.[39] It is not uncommon to find the same beds, tables, and chairs found ashore also used on a vessel. However, a reasonable observer who knows the history and context of those furnishings, including how they are secured to the vessel, whether they are temporary accessories or fixtures, and whether the vessel is designed to transport those furnishings, will be able to analyze the furnishings in a vessel determination context.

Vessel Activities

Waterborne transportation doesn't need to be a vessel's primary purpose and it doesn't need to be in a transport mode when relevant facts arise, but *Lozman* indicates that the "activities" element in a vessel determination case requires the craft to be used for waterborne transportation with some regularity.[40] The Court didn't establish a threshold for how frequently a vessel must transport people or things on water, but like the informative placards overcoming an impression that crosses are an endorsement of religion in Establishment Clause cases, the ability to get a craft underway and transport people or things on water may overcome other factors

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[31] Justice Breyer took particular care to point out that Mr. Lozman's home was not a vessel, in the opening paragraph describing the vessel as a "floating home (which is not self-propelled)." *Id.* at 739.

[32] *Lozman*, 133 S. Ct. at 741 citing The Robert W. Parsons, 191 U.S. 17, 31 (1903).

[33] *Lozman*, 133 S. Ct. at 741.

[34] *Id*. at 746.

[35] *Id.*

[36] The Court refers to the bottom of Mr. Lozman's house as an "unraked hull." *Lozman*, 133 S. Ct. at 741. However, the term "hull" implies that Mr. Lozman's house is a vessel. *See* John A. Noel, Jr. Captain, U.S. Navy, KNIGHTS MODERN SEAMANSHIP 60 (John V. Noel, Jr. et al. eds, 18th ed. 1988) defining "hull" as "[t]he main body of a *ship* exclusive of masts, superstructure, and the like. . ." (emphasis added). The Court concluded that Mr. Lozman's house was not a vessel. Therefore, it does not have a "hull." Nonetheless, the issue the Court addresses is valid because a vessel's hull is typically "raked" which means it has an angular incline designed to make a vessel's movement through the water more efficient, thus contributing to the vessel's transportation function. *Id*. at 63-65.

[37] *Lozman*, 133 S. Ct. at 741.

[38] Justice Sotomayor refers to a vessel's furnishings as "esthetic attributes." *Lozman*, 133 S. Ct. at 753 (Sotomayor, J. dissenting). However, even the most mundane objects on a vessel typically have some nautical aspect to them such as a gimbal or a watertight seal.

[39] *Lozman*, 133 S. Ct. at 741.

[40] Mr. Lozman's home traveled over water on four occasions over a period of seven years. *Id*. 743. In *Stewart*, the vessel at issue moved every couple of hours. *Stewart*, 543 U.S. at 484-485.

that would lead the reasonable observer to conclude that a contrivance is not a vessel.[41]

A vessel's actual exposure to the perils of the sea is relevant to vessel determinations.[42] So much of maritime law is designed to afford additional rights and obligations to vessels exposed to the inclement conditions at sea, it only makes sense to look to this factor in making a vessel determination. Mr. Lozman's house was not designed for and did not expose itself to perils of the sea. Like the non-vessel wharf boat analyzed in the Supreme Court's opinion *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*,[43] Mr. Lozman's house was protected from harsh sea conditions and did not carry things or people from place to place over water. The house's protection from the perils of the sea illustrates the type of activity a reasonable observer should look to in determining whether a contrivance is a non-vessel.

Lozman Interpreted

Courts have looked to *Lozman* as critical guidance in "borderline" vessel determination cases.[44] Though it is evident from the opinions issued thus far that precedent can be relied on for analyzing a vessel's activities, a new body of law is being developed to analyze vessel characteristics such as propulsion and steering. However, an analysis of a vessel's physical characteristics is not unfounded in vessel determination jurisprudence.

In one Jones Act case involving a platform worker allegedly bitten by a brown recluse spider, the United States District Court for the Eastern District of Louisiana looked to (1) the platform's lack of propulsion, (2) the fact that it did not have a raked bow, and (3) the basic absence of features indicating that it was set up for towing as support for the conclusion that the platform was not a vessel.[45] That analysis of the platform's features was summed up in a single sentence, but a far more detailed discussion of its activity supported the Court's conclusion. In particular, the Court looked to the temporal element of a vessel determination in concluding that the platform was "permanently attached" to the Outer Continental Shelf and therefore, was not a vessel.[46]

A much more detailed analysis of the physical characteristics element is provided in *Armstrong v. Manhattan Yacht Club* where the United States District Court for the Eastern District of New York ruled that a floating clubhouse is not a vessel.[47] In that case, the Court observed that the clubhouse did not have basic vessel characteristics such as a steering mechanism, a means of self-propulsion, and a raked bow.[48] The Court then went on to provide a detailed analysis of the clubhouse's hull and the structure sitting on it.[49] The plaintiff argued that the steel hull's history as a vessel should guide the reasonable observer's conclusion, but the Court did not find that there was enough evidence to support a conclusion that the hull was once a vessel.[50] Notably, the Court mentioned that even if the hull was once a vessel, the addition of a structure on top of the hull may detract from its status as a vessel.[51]

The capability for a vessel to lose its vessel designation and the groundwork for analyzing physical

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[41] In 2009 the Coast Guard published a notice advising that it does not inspect or issue Certificates of Inspection to permanently moored craft that are no longer practically capable of transportation on water. This notice offered a list of questions for Coast Guard Officers in Charge, Marine Inspection (OCMI)s to use in making a determination as to whether the craft is subject to inspection. Potentially, the most objective factor that an OCMI can look to in determining that the vessel is subject to inspection is its ability to get underway in less than 8 hours. 74 FR 21814 (dated May 11, 2009). These factors may contribute to a reasonable observer's determination that a contrivance is a vessel.

[42] In support of its conclusion that Mr. Lozman's house is not a vessel the Court relied on *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, which determined that a wharf boat that did not "encounter perils of navigation to which craft used for transportation are exposed" is not a vessel. *Lozman*, 133 S. Ct. at 742 citing Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co., 271 U.S. 19, 22 (1926).

[43] Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co. 271 U.S. 22 (1926).

[44] *See, e.g.*, Mooney v. W&T Offshore, Inc., No. 12-969, 2013 U.S. Dist. LEXIS 30091 (E.D. La. Mar. 6, 2013) and Warrior Energy Services Corporation v. ATP Titan, No. 12-2297, 2013 U.S. Dist. LEXIS 57269, at *15 (E.D. La. Apr. 22, 2013) citing *Lozman* 133 S. Ct. at 745.

[45] Mooney v. W&T Offshore, Inc., No. 12-969, 2013 U.S. Dist. LEXIS 30091 at *15 (E.D. La. Mar. 6, 2013).

[46] *Id.*

[47] Armstrong v. Manhattan Yacht Club, No. 12-CV-4242 (SLI) (JMA), 2013 U.S. Dist. LEXIS 61690, at *7 (E.D.N.Y. Apr. 26, 2013).

[48] *Id*. at *3.

[49] *Id*. at *12-*13.

[50] *Id*.

[51] *Id*. at *13.

characteristics are not new. In a 1961 case, the Supreme Court held that a longshoreman injured in a government owned grain warehouse had no grounds to sue under the Suits in Admiralty Act because the warehouse had been permanently converted from a liberty ship to a warehouse and was, therefore, not a vessel.[52] Evidence indicating that the mothballed ship lost its vessel status included the loss of physical characteristics such as supplies, stores, nautical instruments, cargo gear, and tackle, as well as drain pipes and machinery that were prepared for storage.[53] While her rudder and propeller remained part of the vessel, they were secured.[54]

Many of those same factors may be important to a vessel that becomes a casino or a fishing boat that becomes a restaurant.[55] When a vessel loses appurtenances that are critical to its transportation function, those characteristics may sway a vessel determination. As a vessel's characteristics are analyzed in future disputes, a reasonable observer can be guided by physical characteristics like the absence of navigation equipment and the unmaneuverable platform Mr. Lozman's house floated on in the City of Riviera Beach Marina.

Conclusion

Recognizing the imperfection of any vessel status test, the *Lozman* Court took great care to offer a simple test that can be used in a practical way to determine vessel status. Undoubtedly, there will continue to be cases where the status of a vessel is questioned. However, in cases where a vessel determination is necessary, there is ample precedent for a court or any reasonable observer to assess the contrivance's physical characteristics and activities.

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[52] Roper v. U.S., 368 U.S. 20, 23 (1961).

[53] *Id*. at 21.

[54] *Id*.

[55] The *Lozman* Court cited the *Queen Mary* as an example of a vessel that meets the "design or purpose-related criterion," but it is rendered a non-vessel because of later physical alterations. *Lozman*, 133 S. Ct. at 45.

Substitute Security, *In Rem* Jurisdiction, Appellate Jurisdiction, and *Lozman*

By Samuel P. Blatchley

On August 14, 2012, the United States Supreme Court entered a supplemental briefing order in *Lozman v. City of Riviera Beach*.[1] Specifically, the Supreme Court asked the parties to address the following question:

> The res in this putative in rem admiralty proceeding was sold at a judicial auction in execution of the district court's judgment on a maritime lien and maritime trespass claim, Petn. App. 9a-10a, and subsequently destroyed, Petr. Br. 10-11. Does either the judicial auction or the subsequent destruction of the res render this case moot?

The parties and the Solicitor General of the United States filed supplemental briefs regarding the above inquiry. All parties and the Solicitor General agreed that the judicial auction and subsequent destruction of the vessel did not render the case moot.

The Supreme Court agreed by stating:

> At the outset we consider one threshold matter. The District Court ordered the floating home sold to satisfy the City's judgment. The City bought the home at public auction and subsequently had it destroyed. And, after the parties filed their merits briefs, we ordered further briefing on the question of mootness in light of the home's destruction. 567 U.S. ___, 133 S. Ct. 89, 183 L. Ed. 2d 729 (2012). The parties now have pointed out that, prior to the home's sale, the District Court ordered the City to post a $25,000 bond "to secure Mr. Lozman's value in the vessel." 1 Record, Doc. 20, p. 2. The bond ensures that Lozman can obtain monetary relief if he ultimately prevails. We consequently agree with the parties that the case is not moot.[2]

In essence, it appears that the Court found that the posting of a $25,000 bond by the City of Riviera Beach (the "City") "to secure Mr. Lozman's value in the vessel" sustained *in rem* jurisdiction and ensured the action was not moot.[3]

In the typical case, when a vessel is arrested or attached, the owner and/or its insurer arranges for the release of the vessel from arrest by posting some alternate type of security. Typical types of alternate security are letters of undertaking, bonds, bank guarantees, standby letters of credit or cash security.[4] Rule E of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (the "Supplemental Rules") outlines the procedure for arranging for release of a vessel and the substitution of alternate security. When alternate security is posted and the vessel is released, the Court retains *in rem* jurisdiction on the basis of this substitute security.[5] The release of the vessel in these circumstances can be advantageous for both the vessel owner and the plaintiff because the vessel owner regains the right to use his vessel, and the plaintiff avoids having to pay further *in custodia legis* expenses, which consist of expenses of custody, including the reasonable expenses of the United States Marshals Service and the court appointed substitute custodian, incurred in connection with the arrest of the vessel.[6]

Sometimes, however, substitute security is not posted. If not, the vessel remains the *res*. If a vessel owner unreasonably delays in arranging to release the vessel from arrest, the expense of keeping the vessel under arrest is excessive or disproportionate, or the vessel is liable to deterioration, decay, or injury by remaining under arrest, the Court may order the vessel sold, with the sales proceeds paid into the registry of the court to satisfy any judgment.[7] If a vessel is sold, and the sale proceeds are paid into the registry of the court, those

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[1] Lozman v. City of Riviera Beach, 133 S. Ct. 735 (2013).

[2] *Lozman*, 133 S. Ct. at 740.

[3] *Id.*

[4] *See generally, e.g.*, Michael Marks Cohen, *Restoring the Luster to the P&I Letter of Undertaking*, 42 J. Mar. L. & Com. 255, 256-261 (2011).

[5] Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 9-89, at 789 (2d ed. 1975).

[6] *Id.* at 796.

[7] Supplemental Rule E(9).

proceeds become the substitute *res*, which also preserves *in rem* jurisdiction.[8]

In *Lozman*, the owner never posted alternate security in order to secure the release of his property from arrest. As a result and pursuant to the standard outlined in Supplemental Rule E(9)(a), Mr. Lozman's property was ultimately sold at auction by the United States Marshals Service in order to satisfy the judgment in favor of the plaintiff.[9] At the auction, the City was the high bidder of $4,100.00. As is typical when a plaintiff has satisfied or undertakes to satisfy any *in custodia legis* or administrative expenses in connection with an arrest, the district court permitted the City to "credit bid" the amount of its maritime lien claim and *in custodia legis* payments at any sale of the property.[10] As its maritime lien claims coupled with the *in custodia legis* payments made totaled in excess of $4,100.00, the City was able to purchase the property at auction without tendering any further money to the United States Marshals Service at the sale.

However, in *Lozman*, shortly after the vessel was arrested and well prior to any auction, the district court ordered the City to "post a bond to secure Mr. Lozman's value in the vessel."[11] This was atypical, as usually an arresting plaintiff is only required to post what is termed countersecurity when the vessel owner poses a counterclaim. The mechanics of this procedure are outlined in Supplemental Rule E(7). While Mr. Lozman did not formally file a counterclaim, he did allege in several pleadings that he was entitled to sanctions from plaintiff and its counsel, reimbursement of rent, and damages as a result of what he believed to be the City's wrongful taking of his "floating structure."[12] However, the district court did not articulate why the City was required to post this bond, other than it was "to secure Mr. Lozman's value in the vessel."

The Supreme Court stated that the case was not moot because the City posted the $25,000.00 bond in the district court action.[13] However, the Supreme Court did not articulate the reasoning employed to come to this conclusion. The questions become should it matter who posted the security? Should it matter why security was posted?

In the appellate action, the City argued that the case was not moot even though there were no cash proceeds from the auction (because it had credit bid). The City pointed out that "it previously submitted a bond in the amount of $25,000.00 which remains in the registry of the District Court" which it explained "may serve as substitute security" which "will therefore not moot this appeal."[14]

In a footnote to the Supplemental Brief for Respondent in Response to the Court's August 14, 2012 Order, the City outlined the position of The Maritime Law Association of the United States. In that footnote, the City stated: "Failing to recognize that money or the promise to pay money can become the substitute *res* would call into question the most fundamental principles governing *in rem* actions." The argument is likely that even if there was no bond posted by the City, jurisdiction in *Lozman* should have been sustained after the sale of the vessel because the City in credit bidding still paid or promised to pay money. A lienholder is typically permitted the right to credit bid up to the amount of the value of its lien and any *custodia legis* expenses it has previously satisfied, on the condition that it agrees to pay any and all claims adjudged to be senior in priority.[15] This condition even typically applies where there is no indication that any other person or entity claims a superior maritime lien, as there will likely be *in custodia legis* expenses or further *in custodia legis* expenses not previously satisfied by the lien claimant, and Admiralty Courts have typically invoked their equitable powers to give priority to such claims.[16] In fact, the priority

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[8] Ibrandtsen Marine Servs. v. M/V Iguana Tania, 93 F.3d 728, 734 (11th Cir. 1996).

[9] District Court Docket No. 159.

[10] District Court Docket No. 153 and 157.

[11] District Court Docket No. 19.

[12] District Court Docket No. 9.

[13] *Lozman*, 133 S. Ct. at 735.

[14] Resp. C.A. Response in Opp. to Pet. Emergency Mot. To Stay Sale & Confirmation of Sale 17 (Feb. 24, 2010).

[15] *See* Economy Stone Midstream Fuel, LLC v. M/V A.M. Thompson, Civil Action No. 4:08-cv-127-SA-DAS (N.D. Miss. Jan. 14, 2009); Key Bank of Puget Sound v. Alaskan Harvester, 738 F. Supp. 398, 401 (W.D. Wash. 1989); Freret Marine Supply v. M/V Enchanted Capri, No. Civ. A. 00–3805, 2003 U.S. Dist. LEXIS 19425 (E.D. La. Oct. 30, 2003); Jefferson Bank & Trust Co. v. Van Niman, 722 F.2d 251, 252 (5th Cir. 1984); Bollinger & Boyd v. M/V Captain Claude Bass, 576 F.2d 595, 596 (5th Cir.1978); Fortis Bank (Nederland) N.V. v. M/V SHAMROCK, Civil Action No. 01-147-P-S, 335 F. Supp. 2d 150 (D. Me. 2004), *as amended*, Oct. 26, 2004.

[16] New York Dock Co. v. Poznan, 274 U.S. 117 (1927).

of these *custodia legis* expenses allowed by the Court has also been codified at 46 U.S.C. Section 31326(b)(1).

If an entity is successful in its claim, the amount of its credit bid would come off the top of any recovery. If it is not successful in its claim, it would have to repay the amount of money it credit bid into the Court registry in order to pay for *in custodia legis* expenses not advanced or compensate the rightful plaintiff or priority claimant to the vessel. Accordingly, any way it is viewed, a credit bid represents either a past payment of money or a promise to pay money. Like letters of undertaking and bonds, this past payment or promise to pay properly sustains jurisdiction as substitute security after a judicial auction.

In addition, in *Lozman*, apart from the idea that a promise to pay money or an advancement of *in custodia legis* expenses constitutes sufficient substitute security, the $25,000 bond previously posted could be viewed as substitute security for the City's credit bid of the sale price at auction.

But, did the Court even need any substitute security to sustain jurisdiction?

In his letter in response to the Supreme Court's Order of August 14, 2012, Lozman, relying upon the holding in *Republic Nat'l Bank v. United States*,[17] argued that "[e]ven if the City never had posted a bond, the case would still not be moot." Lozman explained the reasoning behind this contention by stating, "[a]s this Court explained in *Republic Nat'l Bank*. . .'[w]hen [a] vessel was seized by the order of the court and brought within its control,' jurisdiction is 'complete' and secure on an ongoing basis."[18] While recognizing that a federal court "might" lose jurisdiction over the case if "the plaintiff abandons" the vessel or otherwise "renounce[s] its claim" over the res, rendering any judgment useless, *Republic Nat'l Bank* suggests that a valid seizure is all that is needed to sustain jurisdiction.[19] Since the City never renounced its claim and might be required to compensate Lozman for any losses, it appears that under the doctrine explained in *Republic Nat'l Bank*, this case would not have been moot even in the absence of the $25,000.00 bond or other substitute security. In fact, relying upon *Republic Nat'l Bank*, the Ninth Circuit has held that the district court's release of substitute security for a vessel, prior to remand by the Court of Appeals, did not divest it of *in rem* jurisdiction because "*in rem* jurisdiction remains throughout the course of an appeal, as long as jurisdiction was properly obtained at the initiation of the action."[20] However, while this line of reasoning may allow admiralty jurisdiction to be sustained without the presence of the initially arrested property or substitute security, it is practically problematic because a judgment may be meaningless if there is no *res* to enforce it against. In other words, while admiralty jurisdiction may be present, the chances of recovery may be gone, which would erode the value of the arrest remedy.

In conclusion, it appears that the Supreme Court in *Lozman* has impliedly stated that substitute security, regardless of who posts it, is sufficient to sustain jurisdiction. However, relying upon *Republic Nat'l Bank and Ventura Packers, Inc.*, there is also the argument that as long as jurisdiction was properly obtained at the initiation of the action, the continued presence of the arrested property or substitute security is irrelevant. Finally, given the posture of the case and the posting of the bond by the City, Mr. Lozman would have had a practical remedy for any damages awarded by the Courts, even after appeal. Thus, the jurisprudential basis for and practical purposes of the arrest procedure and provisions for security for claims were both satisfied in this case.

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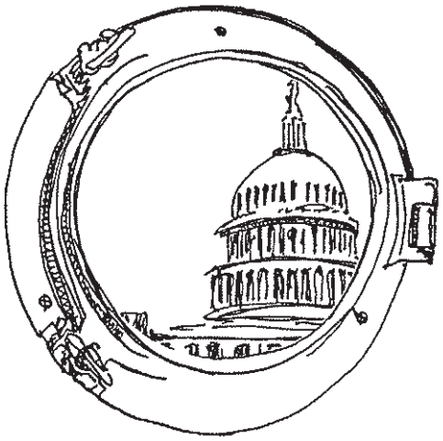
[17] Republic Nat'l Bank v. United States, 506 U.S. 80 (1992).

[18] *Id*. at 85, *quoting* The Rio Grande, 90 U.S. 458, 463 (1875).

[19] Republic Nat'l Bank, 506 U.S. at 85.

[20] Ventura Packers, Inc. v. F/V Jeanine Kathleen, 424 F.3d 852, 859-861 (9th Cir. 2005) (where the district court ordered the release of substitute security and the arresting plaintiff returned the security to the vessel owner prior to plaintiff's filing its notice of appeal).

WINDOW ON WASHINGTON



Arctic America

By Bryant E. Gardner

Increased activity in U.S. Arctic, particularly in connection with offshore oil and gas exploration, has bolstered the general perception that receding Arctic sea ice will create new opportunities and challenges in the Arctic over the coming years. Under pressure to prepare for these changes, both the White House and the U.S. Coast Guard have issued new plans outlining the nation's Arctic strategy. What is less clear, however, is the timetable for increased presence in the Arctic, which will likely be led first by commercial opportunity.

The United States is an Arctic nation, and the Arctic holds great promise. The state of Alaska boasts 44,000 miles of coastline, much of it above the Arctic Circle.[1] The U.S. Geological Survey reports that the Arctic continental shelves constitute the largest unexplored area for petroleum remaining on Earth, containing 13% of world's undiscovered oil reserves and 30% of undiscovered gas reserves.[2] While North Slope oil production has declined steadily since 1998, the Beaufort and Chukchi Seas hold over 23 billion barrels of technically recoverable oil and 23 trillion cubic feet of technically recoverable gas—over 89% of all oil and 82% of all gas estimated to be on Alaska's Outer Continental Shelf.[3]

Private energy companies have invested over $3.7 billion in offshore leases in the Chukchi and Beaufort Seas since 2005.[4] In many ways, Shell Oil Company's attempt to drill in the Arctic has epitomized the challenges that private energy companies face in the region. Shell gained permits for exploratory oil and gas drilling

[1] U.S. Gov't Accountability Office, GAO-10-870, Coast Guard: Efforts to Identify Arctic Requirements Are Ongoing, but More Communication about Agency Planning Efforts Would Be Beneficial (2010). There are various definitions regarding what it means to be "Arctic." The most commonly accepted definition means north of the Arctic Circle, which includes the northern third of Alaska and surrounding waters. However, the Arctic Research and Policy Act, Title I of Pub. L. No. 98-373 (July 31, 1984) also includes in its definition of Arctic lands north of the Yukon, Porcupine, and Kuskokwim Rivers and the Aleutian Islands.

[2] United States Coast Guard, Arctic Strategy 12 (May 2013) (citing U.S.G.S. Fact Sheet 2008-3049: Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle, *available at* http://pubs.usgs.gov/fs/2008/3049/) (hereinafter "U.S.C.G. Arctic Strategy").

[3] Interagency Working Group on Coordination of Domestic Energy Development and Permitting in Alaska, Managing for the Future in a Rapidly Changing Arctic 16 (Mar. 2013) (hereinafter, "Interagency Report").

[4] U.S.C.G. Arctic Strategy at 13.

permits in Chukchi and Beaufort Seas during the 2012 drilling season, and conducted some preliminary drilling operations although it did not reach hydrocarbon zones before encountering ice encroachment and regulatory difficulties. Despite investing more than $4.5 billion in preparation for Arctic drilling, Shell encountered harsher conditions than it anticipated, leading to various violations and accidents during 2012.[5] The Shell operation received adverse public attention and heightened regulatory scrutiny following reports that the Shell drillship KULLUK ran aground on the shoreline of Sitkalidak Island, Alaska on New Years' Eve 2012, summoning up memories of the EXXON VALDEZ and the DEEPWATER HORIZON in one fell swoop. Thereafter, Shell experienced further setbacks with Department of Interior scrutiny focusing on, *inter alia*, the ARCTIC CHALLENGER (an Arctic Containment System), which is a key component of its submitted drilling plan.[6] The timetable of any future drilling plans by Shell also hinges upon judicial proceedings it commenced against eleven environmental or Alaskan Native organizations to initiate the inevitable court review of Shell's Chukchi Sea oil spill response plan.[7] Shell has elected not to continue exploration during the 2013 drilling season, and it remains unclear when it will restart operations.[8]

ConocoPhillips and Statoil also hold leases in Chukchi Sea, and although ConocoPhillips previously announced plans to start operations as early as 2014, other leaseholders may see how Shell fares with its judicial and Interior challenges before proceeding.

In addition to oil and gas exploration on the Arctic continental shelf, receding sea ice opens the possibility of trans-Arctic shipping via Canada's Northwest Passage or the Northern Sea Route over Russia, potentially providing a shorter commercial trade route than the Suez for trade between the Pacific Rim and the Atlantic nations. These routes can cut the sailing distance between Europe and Asia by as much as 5,200 miles.[9] Furthermore, traffic through U.S. Arctic increased by 30% from 2008 to 2010 and Bering Strait transits increased 25% during the same period.[10]

Although trans-Arctic shipping routes hold promise, the number of transits is small in comparison to other routes. Moreover, Arctic shipping has been mostly regional and centered on the export of natural resources and the resupply of isolated communities and facilities focused upon extracting natural resources.[11] True development of these routes requires infrastructure investment, adoption of new polar practices, and new understanding about the risks and dangers of navigating in the uniquely harsh environment. In the Arctic, the ability to respond timely to search-and-rescue or pollution incidents is questionable at best, channel markers are non-existent or made impossible by shifting ice conditions, the presence of even small ice blocks can significantly slow down vessels and wreak havoc upon delivery time tables, vessel traffic schemes need development, ship to shore communication is lacking, most vessels in the trade are not ice-class (and if they were they would burn more fuel), and the skeleton ice breaker fleet lacks vessels wide enough to accommodate the massive containerships now dominating the transpacific trade. The U.S. Coast Guard stated in May that it does not expect any significant trans-Arctic shipping through either the Northwest Passage or the Northern Sea Route within the next 10 years, although Russia's ongoing promotion and development of the latter as a viable commercial alternative may prove otherwise.[12] Atomflot, the operator of Russia's nuclear icebreaker fleet, has not suggested that the Northern Sea Route

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[5] Jennifer Scholtes, *Learning to Sail Past Arctic Peril*, CQ News (June 17, 2013). The Coast Guard also recently suffered from the severe conditions of the Arctic when one of its newest and largest ships, the National Security Cutter, was partially flooded and experienced other problems as a result of the Arctic conditions off of Alaska. *Id.*

[6] Ronald O'Rourke, Cong. Research Serv., R41153, Challenges in the Arctic: Background and Issues for Congress 24 (2013).

[7] *Id.*; *Shell Alaska Lawsuit Preempts Environmental Challenge of Spill Response Plan*, Huffington Post (May 1, 2012). Under authority granted by the Oil Pollution Act of 1990 ("OPA 90"), federal offshore lessees must have approved oil spill response plans. Among other things, OPA 90 requires that the oil response plan "identify…private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge…" 33 U.S.C. § 1321(j)(5)(D)(iii). In addition, regulations promulgated pursuant to OPA 90 authority require that the oil spill response plan meet certain criteria. At the heart of the Shell litigation is whether Shell's oil spill response plan satisfies OPA 90 and accompanying regulations. *See* Alaska Wilderness League, et al. v. Dep't of Interior, Civ. No. 1:2012-cv-00010 (D. Ak. 2012).

[8] Interagency Report at 16.

[9] *Id.* at 17.

[10] *Id.* at 18.

[11] *Id.* at 17.

[12] U.S.C.G. Arctic Strategy at 13.

will at any point replace the Suez, but hopes it will serve as a seasonal complement, growing from 1.5 million tons this year to 40 million tons by 2021— in comparison to the 740 million tons transiting the Suez.[13] Challenges and risks notwithstanding, just the prospect of a change in trade routes has Asian exporter nations at attention. For example, the emergence of a commercially viable Northern Sea Route would put China at a geographic advantage, or at least inoculate it against time and distance advantages of emerging Southeast Asian and South Asian manufacturers such as Vietnam and India. As a consequence, China has taken the position that the Arctic should be treated as a "Global Commons" and key Asian exporters including China, South Korea, India, and Singapore have inserted themselves as observers at the Arctic Council, a group of eight Arctic Nations[14] joined together to set Arctic policy.

International Arctic policy has moved forward at a pace slightly less glacial than in the United States and for now the United States seems willing to let international institutions take the lead in many areas. In 2009, the International Maritime Organization ("IMO") issued Guidelines for Polar Operation, and agreed to develop a mandatory Polar Code to regulate vessel construction, operation, and environmental guidelines for Polar Regions.[15] The IMO forecasts that it will have the Polar Code operational by 2015 and implemented by 2016.[16] Although the Polar Code is an important step to helping ensure safe Arctic operations for vessels, be they involved in natural resource extraction or trans-Arctic trade, it has already been criticized by environmental groups such as Earthjustice for not going far enough on environmental and indigenous communities' protection, and for focusing too much on ship design. Moreover, the Arctic Council has begun issuing resolutions to establish coordinated Arctic policy, including a 2011 resolution regarding search and rescue and a 2013 resolution coordinating environmental response among members of the Council.[17] And for the first time, at the 2011 Council meeting in Nuuk, Greenland, the United States sent Secretary of State Clinton on behalf of the United States, signaling to the international community that the United States is ready to step up and assert itself as an Arctic nation.[18] Secretary Kerry continued this trend at the 2013 meeting, and the United States will chair the Council beginning in 2015.

The Alaskan senators, Mark Begich (D-AK) and Lisa Murkowski (R-AK) have been at the forefront of efforts to develop a coordinated national Arctic strategic policy. In 2012 they wrote to President Obama expressing concern with the proliferation of multiple and conflicting agency policies, roadmaps, and strategy documents since the Bush Administration's January 2009 Presidential Directive on Arctic policy,[19] and called upon the Obama Administration to put forward "an overall national U.S. strategy for the Arctic" in light of recent increases in petroleum exploration in Arctic waters and increased Bering Strait transits by cargo ships.[20] The Senators also called for United States' ratification of the United Nations Convention on the Law of the Sea ("UNCLOS").[21]

On the eve of the May 2013 meeting of the Arctic Council at Kiruna, Sweden, the President issued the National Strategy for the Arctic Region, building upon

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[13] Balazs Koranyi, *Arctic Shipping To Grow As Warming Opens Northern Sea Route for Longer*, Reuters (May 29, 2013).

[14] The Arctic Council includes the United States, Russia, Canada, Greenland, Iceland, Finland, Sweden, and Norway. Observer states include France, Germany, the Netherlands, Poland, Spain, the United Kingdom, China, Italy, India, Japan, South Korea, and Singapore. U.S.C.G. Arctic Strategy Appx. II.

[15] USCG Arctic Strategy at 15 (citing IMO, "Protecting the Polar Regions from Shipping, Protecting Ships on Polar Waters." *available at* http://www.imo.org/MEDIACENTRE/HOTTOPICS/POLAR/Pages/default.aspx.

[16] *Arctic Shipping Code Seen in Place by 2016*, Maritime Executive (June 5, 2013).

[17] Remarks of Admiral Papp, Commandant of the U.S. Coast Guard, before the Center for Strategic and International Studies (May 21, 2013); Remarks of Sen. Murkowski (R-AK), 158 Cong. Rec. S3541 (May 16, 2013).

[18] Remarks of Sen. Murkowski (R-AK), 158 Cong. Rec. S3541 (May 16, 2013).

[19] National Security Presidential Directive 66 / Homeland Security Presidential Directive 25 (Jan. 12, 2009).

[20] Letter from Sen. Begich & Sen. Murkowski to President Obama (July 11, 2012). *See also* Statements of Sen. Murkowski (R-AK), Senate Appropriations Comm. On Homeland Security, Hearing on President Obama's Fiscal 2014 Budget Proposal for the Homeland Security Department (Apr. 23, 2013) (pushing for increased icebreaker capacity and the issuance of a national Arctic policy); Statements of Sen. Begich (D-AK), Senate Homeland Security and Governmental Affairs Comm., Hearing on President Obama's Fiscal 2014 Budget Proposal for the Homeland Security Department (Apr. 17, 2013) (same).

[21] Letter from Sen. Begich & Sen. Murkowski to President Obama (July 11, 2012).

but not superseding the 2009 Presidential Directive.[22] Although the 2013 National Strategy document does not depart radically from the Bush Directive, it decidedly frames the priorities differently and in keeping with President Obama's very different governing style. The policy document strikes a cautious tone toward resource development, prioritizes environmental preservation, embraces climate change and multilateral institutions, and calls for a "science informed" approach.[23] The three main prongs or "lines of effort" of the Arctic strategy were previously set forth in the President's May 2010 National Security Strategy: (1) national security; (2) environmental stewardship; and (3) strengthened international cooperation.

Within the national security "line of effort", the Administration sets out a broad swathe of priorities, including the need to ensure freedom of navigation for vessels and aircraft, greater maritime domain awareness, and vessel traffic management systems.[24] The strategy document also signals that the Government will not lead the charge into the Arctic, but will gradually accompany private-led initiatives when it states that the United States will "intelligently evolve Arctic infrastructure and capabilities, including ice-capable platforms as needed" and "carefully tailor this regional infrastructure, as well as our response capacity, to the evolving human and commercial activity in the Arctic region."[25] And although this prong encompasses energy security which is defined as a "core component" of our national security strategy, it calls for a "disciplined" approach because "[a]n undisciplined approach to exploring new opportunities in this frontier could result in significant harm to the region, to our national security interests, and to the global good."[26]

The second prong of the strategy, "stewardship," highlights the President's environmental priorities in the Arctic with respect to both conservation of the natural environment and indigenous cultures, stating that "increased human activity demands precaution, as well as greater knowledge to inform responsible decisions."[27] To achieve this greater knowledge, the Administration intends to chart better the region, and also to understand climate change and its impacts upon the region, which understanding will be "based on a holistic earth system approach."[28] The strategy further acknowledges that there have been warming and cooling cycles in the Arctic over millennia, but opines that the current warming trend is "unlike anything previously recorded" with a reduction in sea ice that has been "dramatic, abrupt, and unrelenting."[29] In approaching the Arctic, the Administration intends to "emphasize science-informed decision making" while leveraging "traditional knowledge" which the document defines as "a body of evolving practical knowledge based on observations and personal experience of indigenous communities over an extensive, multigenerational period."[30] In summary, the strategy position represents a frank admission that there is a great deal we do not know about the sparsely populated U.S. Arctic, why or how the natural environment is changing in the Arctic generally, or how best to pursue natural resource development and other economic opportunities made possible there because of receding sea ice and technological developments.

The third and final prong of the President's new Arctic strategy calls for strengthened international cooperation and a multilateral approach working through the Arctic Council, and presumably also the IMO, and also calls for accession to UNCLOS. The campaign for ratification of UNCLOS is not new, and faces significant headwinds in the Senate, outspoken support of the Alaska delegation notwithstanding. Last Spring, Senator Kerry, as Chairman of the Senate Foreign Relations Committee, held a series of hearings with top Obama officials and business leaders in favor of the United States signing the 1982 convention. By July, 34 Republican senators had announced their opposition, dashing any chance of a two-thirds vote for ratification.

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[22] The White House, National Strategy for the Arctic (May 10, 2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf. *See also* National Strategy for the Arctic Announced, The White House Blog (May 10, 2013), *available at* http://www.whitehouse.gov/blog/2013/05/10/national-strategy-arctic-region-announced; National Security Presidential Directive 66 / Homeland Security Presidential Directive 25 (Jan. 12, 2009). *See also* Ronald O'Rourke, Cong. Research Serv., R41153, Challenges in the Arctic: Background and Issues for Congress at 8 (2013).

[23] National Strategy for the Arctic at 4.

[24] *Id.* at 7.

[25] *Id.* at 2 & 7.

[26] *Id.* at 4.

[27] *Id.* at 7.

[28] *Id.* at 8.

[29] *Id.* at 4.

[30] *Id.* at 3 & n. 2.

Senator Murkowski (R-AK), ranking member on the Senate Energy and Natural Resources Committee, is the lone Republican senator supporting ratification, following the retirement of Senator Lugar (R-IN). While Senator Murkowki and other treaty supporters maintain that membership in the treaty is essential to filing the United States' claims for a greater share of Arctic seabed resources, opponents have expressed concern that the treaty would subject U.S. companies to unnecessary regulation and fees and otherwise undermine U.S. sovereignty. "We don't need the United Nations collecting a lot of money off minerals collected at the bottom of the sea to distribute around the world," said Senator Charles Grassley (R-IA), a lead opponent of the treaty.[31] Alaska's other Senator, Mark Begich (D-AK), has expressed his frustration with the status quo: "I think there are a few misguided souls here in the U.S. Senate that just don't understand the value of controlling our own sovereignty and destiny. And I think they're just stuck on this belief that somehow after we sign this everyone in America will be wearing blue United Nations hats. I can't even describe it; it makes no sense."[32] Even if the Administration pushes aggressively for ratification, this risks the danger of hardening an already partisan issue and galvanizing Republican opposition in the Senate. To move the needle, the Administration would be well-advised to recruit strong energy industry support for the treaty. However, this will in turn depend upon the Administration's willingness and ability to pave the way for Arctic subsea resource development.

Less than two weeks after the White House released its Arctic Strategy, the Coast Guard released its own on May 21, 2013, announced by Commandant Papp at the Center for Strategic and International Studies. Underscoring the importance of the Arctic, the Commandant noted the increasing interest in offshore Arctic hydrocarbon exploration, a 100% increase in Bering Strait traffic in the last three years, and the fact that more than half of America's fish stock comes from the Exclusive Economic Zone off Alaska.[33] Although the Coast Guard strategy tracks the White House document, it does include some additional focus and detail that help flesh-out what the proposal means for the maritime industry. The three core objectives of the Coast Guard proposal are improving maritime domain awareness, modernizing governance, and broadening partnerships.[34]

With respect to improving domain awareness, the Coast Guard strategy expresses the need for additional Arctic assets scalable to the degree of activity in the area. Currently, there is almost no landside infrastructure for the Coast Guard to rely upon and the distances between areas of human settlement or existing infrastructure are extraordinary. Dutch Harbor in the Aleutian Islands is the nearest deepwater port, roughly 1,000 miles from the northernmost Alaskan community of Barrow.[35] There are also no roads connecting Arctic Alaskan communities, the closest Coast Guard air station is 945 miles south in Kodiak, there are no places to refuel, the Coast Guard has very limited ice breaker capability,[36] and the only three commercial airports are at Nome, Barrow, and Deadhorse/Prudhoe Bay.[37]

Although the Coast Guard recognizes the importance of maintaining a presence in the Arctic to monitor risks posed by increased activity, assess changes in the physical environment, and assert sovereignty, in light of its limited resources and the tentative activity now occurring in the Arctic, the service appears to be taking a "wait and see" approach to the deployment of permanent infrastructure or costly mobile assets that could give it a year-round physical presence. Given the austere budget environment and the unlikelihood of additional assets in the near term, the Coast Guard's priority will be to deploy "mobile infrastructure" to ensure at least a seasonal presence in key locations

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[31] Jennifer Scholtes, *Law of the Sea Treaty May Get New Push, But Faces Same Old Problems*, CQ News (May 28, 2013).

[32] *Id.*

[33] Remarks of Admiral Papp, Commandant of the U.S. Coast Guard, before the Center for Strategic and International Studies (May 21, 2013).

[34] *Id.*; U.S.C.G. Arctic Strategy at 10.

[35] USCG Arctic Strategy at 14.

[36] The recent reactivation of the heavy non-nuclear icebreaker POLAR STAR this year brings the U.S. icebreaking fleet to two, together with the medium icebreaker HEALY, although the Coast Guard requires three heavy and three medium icebreakers just to fulfill its statutory missions. USCG Arctic Strategy at 36; Ronald O'Rourke, Cong. Research Serv., R41153, Challenges in the Arctic: Background and Issues for Congress at 40 (2013). For a more detailed discussion of the Coast Guard's icebreaker budgetary woes, see Bryant E. Gardner, Pirates, Adventures in the Arctic, and More: A Peak at the 11th Hour Maritime Legislation of the 112th Congress, Window on Washington, 10 Benedict's Mar. Bull. 170 (Fourth Quarter 2012).

[37] U.S.C.G. Arctic Strategy at 14.

Source:U.S. Coast Guard, Arctic Strategy, May 2013.

during the most active warmer weather periods. The Coast Guard strategy proposes an interdependent approach, including an "Arctic Fusion Center" to promote interagency cooperation and information sharing among the Coast Guard, Department of Defense, intelligence agencies, and others towards the goal of sustainable resource development and environmental protection.[38] Among other things, to augment its limited physical presence the Coast Guard would deploy "portable surveillance sensor packages" to be positioned at "critical geographic choke points," offshore drilling infrastructure, and on Coast Guard assets.[39]

The Coast Guard's second goal of "modernizing governance" puts further emphasis on the development of national and multinational Arctic-focused fora to develop and implement policy specifically for the Arctic. As part of this process, the Coast Guard advocates accession to UNCLOS on the grounds that current U.S. Outer Continental Shelf Claims extend out to 200 nautical miles but with accession to UNCLOS the United States could claim resource rich seabed out to 600 nautical miles, and other countries including Russia, Canada, Denmark, and Norway have already filed extended continental shelf claims while the United States sits idly by.[40] Notably, the United States is the only Arctic nation not belonging to the treaty. The Coast Guard also commits to work through its leading role at the IMO and through the Arctic Council to develop sound Arctic policies.

Along the same line, the third and final prong of the Coast Guard strategy, "broadening partnerships," restates much of what is set forth in the first legs of proposal, with respect to leveraging interagency resources and ensuring national and international coordination to more efficiently and effectively discover and oversee increased Arctic activity. Additionally, the Coast Guard plans to partner with indigenous communities, local industry, State government, and academic institutions to better develop an understanding of the Arctic, including a working sea ice atlas.[41]

Record low sea ice, new technologies, and rising energy prices have spurred plans for Arctic navigation and resource exploration, and prompted the issuance of the White House and Coast Guard strategies in May 2013. However, for the time being it appears that the commercial reality of trans-Arctic shipping remains far off, and the real driver for increased human presence in the harshest Arctic maritime areas will be hydrocarbon extraction. Environmental and regulatory challenges delayed the first forays into offshore exploration in the Chukchi and Beaufort Seas off of Alaska. As long as energy prices stay high enough, it stands to reason that private industry will develop offshore Arctic

[38] *Id.* at 23.

[39] *Id.* at 24.

[40] Remarks of Admiral Papp, Commandant of the U.S. Coast Guard, before the Center for Strategic and International Studies (May 21, 2013).

[41] U.S.C.G. Arctic Strategy at 31.

resources, and U.S. regulators will follow to provide support and oversight, calibrating the deployment of resources to keep pace with the increased commercial activity. Recent bounds forward with shale oil production in the lower 48 have many looking into their crystal balls about what this means for deepwater exploration and U.S. domestic energy flows more generally—it remains to be seen how such discoveries may impact forays into the wild unknowns of the Arctic seas.

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FLOTSAM & JETSAM

By Phil Berns

As you age certain stories, events and lyrics take on different meanings—particularly from the ones when you were younger, immortal, and ready to "take on the world."

And then, and certainly not suddenly and without warning—the latter being supplied courtesy of Medicare and Medicaid (with "gap" insurance thrown in) and professionals whose names all end in "ologist"—your favorite song is replaced by another one (by Kurt Weill) which begins—

Oh, it's a long, long while
From May to December
But the days grow short,
When you reach September.
When the autumn weather
Turns leaves to flame
One hasn't got time
For the waiting game.
Oh the days dwindle down
To a precious few . . .
September, November . . .
And these few precious days
I'll spend with you.

You wake up and you're 80 and have nothing to say (something which hadn't stopped you before) and, worse yet no one seems to be listening anyway—including yourself. Further, even you're tired of hearing your own stories.

I've been writing this column since the beginning of this publication—John Edginton calling me and asking if I would act as an editor and write my own column—36 or 37 editions ago—and I, obviously, said "yes" but I wanted to lean toward "war stories." Frankly, I was tired of spending my days and many weekends dwelling on "serious matters"—would print some of my own tales and ask the readers for theirs. I sorely failed in the latter (except for getting some litigation stories from "old timers")—apparently most of us are too willing and busy taking ourselves seriously and not leaving time to laugh at ourselves.

Ergo—I now take your leave.

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Ed. Note: At the request of the Editors of BMB Phil has agreed to make that "-29½-" and will submit columns periodically. Further, if any of the readers wish to submit their own "war stories" please send them to Phil (paberns@embarqmail.com) for editing and publication.

Book Review: *Red Star over the Pacific*: *China's Rise and the Challenge to U.S. Maritime Strategy;* Toshi Yoshihara and James R. Holmes, xii and 224pp. plus Notes, Index and Biographies; Naval Institute Press, Annapolis, 2010

By F. L. Wiswall, Jr.

The realization has dawned that China for the first time in centuries is looking seaward and building a serious navy; but what are the direct implications for the maritime industry as opposed to western naval and military power?

To answer this one must first examine the nature of the expansion of the People's Liberation Army Navy (PLAN), which is the focus of this detailed study. The beginning point is the revelation that the Chinese have based their strategy on the work of Alfred Thayer Mahan, the father of American naval strategy. However, as Yoshihara and Holmes point out, the Chinese majority reading of Mahan has been of the third of his "Tridents" – the use of naval force in battle – and has neglected to note that the first and second of the Mahanian Tridents are devoted to the essential purposes of sea power, promotion of international maritime trade and the means to protect it. Mahan rated fostering of trade and protection of commerce as the highest objectives, and held that war at sea was counter-productive and very seldom worth the economic, military and political sacrifice entailed. By way of illustration the authors delve into the consequences of similar misreadings of Mahan by Russia (culminating in the 1905 Battle of Tsushima), Germany (culminating in the 1916 Battle of Jutland) and Japan (culminating in the 1942-45 destruction of the Imperial Navy).

China has succeeded in a 'stealth' expansion of the PLAN over recent years only because of western inattention, both public and to a large extent political and even military. While the advocates of an aggressive PLAN posture are currently beginning to be challenged by Chinese scholars and junior officers who have made a more thorough analysis of Mahan's writings, both camps appear united in viewing the reacquisition of Taiwan as an absolute necessity to China's economic future – not just because as General MacArthur observed it is "an unsinkable aircraft carrier and submarine tender," but because under the 1982 Law of the Sea Convention it would enable China to extend and legitimately defend an EEZ of 300 miles from the mainland coast. The costs to merchant shipping would be considerable if circumstances should require a detour around this area. The authors clearly see the reacquisition of Taiwan and continued conflict over other areas such as the Spratley and Paracel Islands as inevitable, and highlight China's ambition to eventually control the China Seas. The desire of Chinese admirals to control the interior of the "second island chain" may well extend to Guam; construction of an operational PLAN base in the newly-created Sansha City prefecture in the asserted Hainan Province of the South China Sea would be a clear indication, and jousting with Japan in the East China Sea has already occurred. The extension of Chinese sea power over such a vast area of the Pacific would obviously have negative implications for western merchant shipping.

Meanwhile the deployment of assets of the PLAN to participate in counter-piracy operations in the Gulf of Aden as elements of Task Force 151 has offered China an opportunity to demonstrate its capacity for replenishment of fuel and stores at sea far from the homeland, and to begin to establish a "Chain of Pearls" of contracted repair and supply facilities that will most likely outlive the threat of piracy in that area of the world.

Is it inevitable that Chinese naval expansion will take on a belligerent character?

> *If the dominant school of Chinese scholars and seafarers continues ignoring the cooperative strands of Mahanian thought, mistaking his writings for (or misrepresenting them as) bloody-minded advocacy of naval battle, Chinese naval strategy will incline toward naval competition and conflict. Conversely, a China whose leadership accepts the deeper understanding put forth by more thoughtful analysts – and fully grasps the logic governing Mahanian theory – may prove less contentious.* (p. 43)

Here history is once again a useful instructor. The employment of sea power as a promoter of commerce

harks back to the Ming Dynasty expeditionary voyages (1405-33) of Admiral Zheng He, which were for the purpose of discovering and establishing new trading relationships, and not for conquest. The same was of course true for Commodore Matthew Perry's 1855 voyage to Japan.

What is most likely to deter aggressive expansion of Chinese sea power is a countervailing western naval presence in the Pacific. Yet as the authors observe, the British Royal Navy is now smaller than the French Navy for the first time since the Battle of Trafalgar, and the US Navy is the smallest it has been since World War I.

This book is not a particularly easy read, but a very useful one for those who ponder the future for freedom of navigation and maritime commerce. The consequences of failure to reawaken the body politic to the absolute need for effective western sea power – now made more difficult by a poor economy and war-weariness – could prove most severe for the shipping industry.

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N.B.: In the prior issue's review of *The Admirals* I stated that "[Ernest J.] King was the first of the Fleet Admirals to receive his fifth star." That was of course incorrect; I say "of course" because any reader of the review will have correctly supposed that the first of the Fleet Admirals to receive his fifth star was William D. Leahy – two days before King. *Mea culpa.*

It even appears that the primary impetus for creation of the five-star rank was President Roosevelt's determination to reward the loyal and invaluable service of "the forgotten Admiral" with promotion; Congress authorized four such promotions for the Navy and four for the Army with passage of the 'Five Star Act' on December 14, 1944; Leahy was made Fleet Admiral on the 15th. Next in line was General George C. Marshall on the 16th followed by King on the 17th; Douglas MacArthur was made General of the Army on the 18th and Chester W. Nimitz was promoted to Fleet Admiral on the 19th. The Army's other promotions came in quick succession for Generals Dwight D. Eisenhower (20th) and the Air Corps Henry H. "Hap" Arnold (21st). Matters then stalled for a year with political wrangling over the Navy's fourth recipient. The 'coin toss' was between William F. Halsey, Jr. and Raymond A. Spruance; Halsey won, was recalled from retirement to active duty, and received his fifth star on December 11, 1945.

Readers of *The Admirals* will almost certainly conclude that when Congress authorized a fifth award of five-stars for the Army's General Omar N. Bradley in 1950, it was a severe injustice that Raymond Spruance was not recalled to duty and similarly promoted to Fleet Admiral.

RECENT DEVELOPMENTS

Criminal Law

United States v. Ahmed Muse Salad, et al., 908 F. Supp. 2d 728 (E.D. Va. 2012).

The indictments charged the Defendant seamen with four separate counts under the Violence Against Maritime Navigation Act, 18 U.S.C. § 2280(a)(1)(G). The use of the phrase "any person" in some sections and "a person" in others does not raise a presumption that requires the court to merge the counts in multiple murders aboard the vessel as one crime against the individuals in charge of operating the vessel. Therefore, although the murders were committed in a single incident of violence, they were committed against four separate persons and constituted four separate violations of the statute. The Court held that Congress intended to punish each killing as a separate offense under the subsection. "Simply put, a life is a life, and a person is a person, whether it be the captain, the navigator, a passenger or anyone else on board." The Court did not consider the multiple shootings "even if closely related in time and space during a continuous event" to constitute a "single transaction" for the purpose of prosecution.

Submitted by MED

Jones Act

Lopez v. Calumet River Fleeting, Inc., 2013 U.S. Dist. LEXIS 71277 (N.D. Ill. May 21, 2013).

Plaintiff, a deckhand employed by defendant, claimed to have been injured when he either fell off of, or was thrown from, defendant's barge. Plaintiff moved for summary judgment on the issue of negligence and unseaworthiness. Defendant filed a motion for partial summary judgment on the issue of attorney's fees and punitive damages in connection with defendant's payment of maintenance and cure.

Evaluating plaintiff's motion for summary judgment, the court noted that there existed several issues of material fact regarding the alleged negligence of defendant and the unseaworthiness of its vessel. By way of example, the court noted a dispute between expert witnesses as to the propriety of using a single towline to tow the barge across the river. There also existed a dispute as to the reasonableness of plaintiff's assignment and location aboard the vessel at the time of the incident.

Evaluating defendant's motion for partial summary judgment seeking dismissal of plaintiff's claim for attorney's fees and punitive damages, the court found that genuine issues of material fact existed. Unresolved issues remained including the condition of plaintiff and conflicting evidence regarding defendant's payment of medical bills and termination and cure benefits. The court held that, viewing the evidence in a light most favorable to plaintiff, a reasonable finder of fact could determine that defendant willfully disregarded its obligation to provide maintenance and cure to plaintiff. Both motions for summary judgment were denied.

Submitted by BJM

McKinney v. American River Transp. Co., 2013 U.S. Dist. LEXIS 90286 (S.D. Ill. June 27, 2013).

Plaintiff filed suit under the Jones Act, 46 U.S.C. § 30101, claiming negligence. Plaintiff also sought recovery for damages allegedly caused by the unseaworthiness of defendant's vessel, as well as maintenance and cure, and wages under the general maritime law. Plaintiff filed what the court construed to be a motion for summary judgment with respect to the Jones Act claim, and two separate claims for maintenance and cure.

With regard to the Jones Act negligence claim, plaintiff contended that defendant was, as a matter of law, negligent per se. Denying the claim for summary judgment on the Jones Act claim, the court determined that plaintiff had failed to meet the burden of establishing that defendant violated a regulation or a statute necessary to support a claim of negligence *per se*. The court

held that the alleged failure of defendant to follow its own internal operating procedures did not rise to the level of "negligence *per se.*"

Submitted by BJM

LHWCA

Maclay, as Personal Representative of the Estate of Lia Christine Hawkins, deceased, v. M/V Sahara, et. al., 2013 U.S. Dist. LEXIS 24796 (W.D. Wash. Feb. 22, 2013).

The United States District Court for the Western District of Washington granted Plaintiff's motion for summary judgment in part holding that Ms. Hawkins was entitled to coverage under the Longshore and Harbor Workers' Compensation Act ("the LHWCA"), 33 U.S.C.S. § 901 et seq. and that her parents, but not her siblings, could maintain a claim for loss-of-society damages. Section 905(a) permits a LHWCA plaintiff to bring suit in law or admiralty without concern for the limitation of remedies imposed by the Act. Here, Plaintiff chose to bring suit under the general maritime law for survival and wrongful death. As general maritime law applied and as Ms. Hawkins was a non-seaman who died in the territorial waters of Washington State, her parents could maintain a claim for loss-of-society damages. However, as her siblings were not dependent relatives, they were improper beneficiaries for a maritime wrongful death and thus could not recover loss-of-society damages.

Submitted by JAM

Limitation of Liability

Cobb v. Aramark Sports and Entertainment Services LLC, 2013 U.S. Dist. Lexis 20139 (D. Nev. Feb. 13, 2013).

The United States District Court for the District of Nevada granted Defendant's motion for summary judgment holding that, under federal maritime law, pre-accident liability waivers are enforceable. A pre-accident waiver absolves a defendant of liability for their own negligence arising from recreational activities on navigable waters if the exculpatory clause is clear and unambiguous, is not inconsistent with public policy, and is not an adhesion contract. Here, the Court held that Defendant's express waiver of liability was sufficiently clear and unambiguous to cover Plaintiff's injuries sustained while parasailing, was not against federal public policy and was not a contract of adhesion as parasailing activities are not essential services.

Submitted by JAM

Limitation of Liability

Cucu v. Super, 2013 U.S. Dist. LEXIS 75964 (N.D. Ohio May 30, 2013).

Plaintiff filed an action seeking exoneration from or limitation of liability pursuant to the Limitation of Liability Act, 46 U.S.C. § 30501 and Rule F of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. Claimant, Tracy Holmes Super, Administratrix of the Estate of Emma Margaret Nahas, brought suit against Cucu and others in state court, alleging that Nahas died during a boating excursion. The United States District Court for the Northern District of Ohio issued a restraining order granting a stay and preventing prosecution of the state court case. Claimant filed a motion to lift the stay and to allow prosecution of the state court claim.

Evaluating the merits of claimant's motion, the Court acknowledged the tension between the Limitation of Liability Act and the "savings to suitors" clause set forth at 28 U.S.C. § 1333(1). The Court further acknowledged that the conflict has been reconciled by numerous courts by permitting claimants to proceed with their claims in state court in situations in which there is only a single claimant or where the total claims do not exceed the value of the limitation fund.

In support of the motion to lift the stay, claimant stipulated that she would agree to litigate all issues relating to limitation of liability in the federal court action, that she would waive any claim of res judicata relevant to the limitation proceedings, and that she would forego enforcement of any judgment in excess of the purported limitation fund until such time as the District Court adjudicated the issue of limitation of liability. Notably, claimant did not waive her right to challenge standing, nor that the issue of "exoneration" should be heard in the District Court. The claimant also failed to stipulate to the amount of the limitation fund.

The District Court denied claimant's motion to lift the stay unless and until claimant filed an "F(7) motion" challenging the value of the vessel, or until she conceded the value of the vessel and the freight pending, as asserted by the vessel owner. The District Court held that upon satisfaction of those conditions, the motion to lift the stay (thereby allowing prosecution of the state court claim) would be granted.

Submitted by BJM

Marine Insurance

Markel Am. Ins. Co. v. Olsen, 2013 U.S. Dist. LEXIS 75750 (E.D. Mich. May 30, 2013).

Plaintiff filed a complaint for declaratory relief with respect to the sinking of defendant's vessel while docked in calm waters in Fort Lauderdale, Florida. Plaintiff refused to pay the claim on the basis that the sinking was not caused by a covered peril. Plaintiff argued that the sinking resulted from wear and tear of the raw water intake hose or other failures on the part of defendant to maintain the vessel in good condition.

The parties stipulated to the application of Michigan law to the dispute. Under Michigan law, the insurer had the burden of proving that the proximate cause of the damage fell within one or more exceptions to coverage as set forth in the policy. Reviewing the evidence submitted in a bench trial, the court held that plaintiff had failed to meet the burden of proving that the damage to the vessel was proximately caused either by the "failure to maintain" or the "wear and tear" exclusions. The court further found that defendant provided sufficient evidence of a third "independent cause" in the form of severe weather that may have been a contributing cause to the sinking of the vessel. That finding triggered coverage, even in the event plaintiff had been able to establish that wear and tear or failure to maintain were partially responsible for the sinking.

In addition to the policy exclusions, plaintiff sought to avoid coverage by asserting violation by defendant of the warranty of seaworthiness. Plaintiff set forth several assertions regarding deficiencies in the condition of the vessel and the experience of its crew. Reviewing each allegation, the court found plaintiff's assertions to be insufficient to establish unseaworthiness of the vessel and denied plaintiff's claim for declaratory relief.

Submitted by BJM

Practice and Procedure

Albert v. F/V MISTY DAWN, Inc., 2013 U.S. Dist. LEXIS 86326 (D. Mass. June 19, 2013).

Plaintiff, a New Jersey resident, brought a Complaint alleging Jones Act negligence, unseaworthiness, and maintenance and cure against the defendant, a corporation with a principal place of business in New Jersey.

Defendant moved to transfer the case to the United States District Court for the District of New Jersey on the grounds of forum non-conveniens. Defendant argued that the case should be transferred because it was not properly before the Court under the requirements of 28 U.S.C. § 1391(b). The Court held that because the case was an admiralty case, the venue provisions of 28 U.S.C. § 1391(b) were inapplicable, and that the Court should properly determine venue pursuant to the discretionary standard set forth in 28 U.S.C. § 1404. In employing that standard, the Court did not find any exceptional circumstances warranting the disturbance of the plaintiff's choice of forum and denied the defendant's motion to transfer.

Submitted by SPB

Americanwest Bank v. P/V Indian, 2013 U.S. Dist. Lexis 28607 (S.D. Cal. Mar. 1, 2013).

The United States District Court for the Southern District of California refused to order the interlocutory sale of Defendant vessel under Rule E(9)(a)(i)(A) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions in the absence of specific evidence suggesting deterioration, decay, or injury that is out of the ordinary for a vessel generally. Indeed, mere allegations that the vessel is subject to "deterioration, decay or injury" because it is sitting idle in salt water is not sufficient. The Court did, however, proceed to order the interlocutory sale of Defendant vessel under Rule E(9)(a)(i)(B) and (C) having concluded that the expense of maintaining the

vessel while in custody was excessive and that there had been an unreasonable delay in securing the release of the vessel.

Submitted by JAM

Kristensons-Petroleum Inc. v. Spirit of Oceanus Ltd, 2013 U.S. Dist. LEXIS 42809 (W.D. Wash. Mar. 26, 2013).

The United States District Court for the Western District of Washington held that the language of Rule B(2) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, of itself, makes the demonstration of facts typically prerequisite to the entry of default a prerequisite to the entry of default judgment. As such, there is no need to require a separate entry of default. All that is required is satisfying the requirements of Rule B(2).

Submitted by JAM

KTB Oil Corporation v. M/V Cielo Di Tokyo, 2013 U.S. Dist. Lexis 26385 (E.D. Cal. Feb. 25, 2013).

The United States District Court for the Eastern District of California vacated the arrest of a vessel under Rule C of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, holding that the Plaintiff failed to meet its evidentiary burden of demonstrating a probability of prevailing on its claim. A combination of errors and ambiguities in the drafting of Plaintiff's general terms and conditions result in the Court being unwilling to uphold the arrest of a third party's assets if the Court had to rewrite an entire contract to reach that decision.

Submitted by JAM

Maclay, as Personal Representative of the Estate of Lia Christine Hawkins, deceased, v. M/V Sahara, et. al., 2013 U.S. Dist. LEXIS 83603 (W.D. Wash. June 12, 2013).

The United States District Court for the Western District of Washington ordered, in its discretion, an award of prejudgment interest at the rate of 8% per annum rather than at the current 0.12% statutory rate ordinarily applied to post-judgment interest pursuant to 28 U.S.C. § 1961. Under general maritime law, prejudgment interest must be granted unless peculiar circumstances justify denial. Indeed, the Court has broad discretion to set the rate of prejudgment interest to provide just restitution for the injured party not only on its fixed costs, but also on the amount awarded for pain and suffering, and any other intangible losses. Although the statutory interest rate prescribed by 28 U.S.C. § 1961 for post-judgment interest is usually applied, equitable considerations may demand a different rate. Here, the Court considered that Plaintiff's requested rate of 8% was justified on the facts of the case.

Submitted by JAM

McDaniel, et. al., v. Garmin Ltd, et. al., 2013 U.S. Dist. LEXIS 38809 (W.D. Wash. Mar. 18, 2013).

The United States District Court for the Western District of Washington granted Plaintiff's motion to remand holding that, whereas federal courts have subject matter jurisdiction over maritime tort suits, a defendant does not have the statutory right to remove a maritime tort suit. The savings-to-suitors clause of 28 U.S.C. § 1331(1) permits a plaintiff to file a maritime tort suit in either state or federal court. However, the savings-to-suitors clause claims brought in state court are not removable under 28 U.S.C. § 1441 absent some other jurisdictional basis, such as diversity or federal question jurisdiction. Here, Defendant did not have federal question jurisdiction and was unable to meet its burden to demonstrate diversity jurisdiction, hence the Court ordered remand.

Submitted by JAM

Monjasa A/S v. M/V Peristil, 2013 U.S. Dist. Lexis 82583 (D. Or. June 12, 2013).

The United States District Court for the District of Oregon upheld the validity of an arrest of a vessel and provision of security in the United States, pursuant to Rule C of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, notwithstanding that the Plaintiff had previously arrested the vessel and obtained security for its claim in India. The Court held that, as Indian law does not recognize maritime liens for necessaries, the basis of the seizure of the vessel in India was not and could not have been an exercise of any maritime lien that arose under United States law. Consequently, the seizure in India was not an *in rem* arrest to enforce a maritime lien and, therefore,

the subsequent posting of security and release of the vessel in India did not discharge any maritime lien Plaintiff may have had arising under United States law. Accordingly, the Court concluded that Plaintiff had a valid maritime lien under United States law at the time of the arrest in the United States and thus sustained its burden of showing it had "probable cause" to seek arrest of the vessel.

Submitted by JAM

Seamen

Cracchiolo v. O'Hara Corp., et al., 2013 U.S. App. LEXIS 72558 (D. Mass. May 22, 2013).

A commercial fisherman was intoxicated and returning to his fishing vessel when he apparently lost his footing, fell into the water, and drowned. The administratrix of his estate filed suit against his employer alleging Jones Act negligence, unseaworthiness, and maintenance and cure. The administratrix also filed suit alleging state wrongful death claims against the owner and lessor of a fish processing center, where the vessel would tie up in port.

All defendants moved for summary judgment. The defendant employer was denied summary judgment, and subsequently settled all claims with the plaintiff. The defendants-property owner and lessor, were granted summary judgment as the Court found that the property owner and lessor could not have foreseen that the decedent would have tried to gain access to the vessel the way he did on the night of the incident. Because the route chosen by the decedent was unforeseeable, the Court held that the remaining defendants owed no duty of care to the decedent "insure that in his impaired state he would not be harmed by his improvident choice of the unconventional and clearly perilous route along the retaining wall onto" the vessel.

Submitted by SPB

Padilla v. Maersk Line, Ltd., 2013 U.S. App. LEXIS 12964 (2d Cir. June 25, 2013).

Overtime wages are a "substantial and routine" component of income for seamen and are not speculative when the contract with the Union and the Owner does not prohibit such payment. Where the employment contract provided that the injured seaman was entitled at discharge to "earned wages," which included six days of pay plus 34 hours of overtime, the employer could not pay only his basic rate plus maintenance and cure for the period served. Plaintiff filed suit to recover overtime pay, and the Second Circuit Court of Appeals ruled he was entitled to recover it under general maritime law.

Submitted by MED

Vasquez v. McAllister Towing & Transp. Co., Inc., 2013 U.S. Dist. LEXIS 72231 (S.D.N.Y. May 15, 2013).

Plaintiff sued defendant under the Jones Act when he allegedly injured his left arm and shoulder while replacing the manifold. Plaintiff was originally employed with the defendant as a seagoing engineer between 2001 and 2010. As a condition of employment as a seagoing engineer, plaintiff was required to maintain a Merchant Mariner's Documents. Plaintiff allowed his document to lapse in 2010, at which time he resigned from his position as a seagoing engineer.

Two months later, plaintiff rejoined defendant as a yard worker. While plaintiff's responsibilities and duties as a yard worker paralleled his duties as a seagoing engineer, he no longer sailed or slept on vessels, but rather commuted from his home in Brooklyn each day. In June 2011, plaintiff renewed his documents and maintained that he occasionally travelled on defendant's tugs while refueling or transferring diesel. However, plaintiff did not sail on any vessel as a member of the crew. Defendant's records demonstrated that plaintiff slept overnight on a docked vessel during the flooding caused by Hurricane Irene.

In applying the test for determining whether one is a seaman outlined in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the Court found that the plaintiff passed the first part of the test by demonstrating that his duties "contribute to the function" of a vessel or "to the accomplishment of its mission." However, the Court found that no reasonable jury would conclude that plaintiff met the second part of the test and maintained "a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." In so holding, the Court found that plaintiff's connection to vessels was insufficiently substantial and that his employment did not regularly expose him to seagoing

perils. The Court further noted that a plaintiff may not rely upon his prior employment as a seagoing engineer to establish his seaman status as a yard worker as plaintiff's essential duties changed when he assumed the new position.

Submitted by SPB

Vessels

Armstrong v. Manhattan Yacht Club, Inc., 2013 U.S. Dist. LEXIS 61690 (E.D.N.Y. Apr. 30, 2013).

Plaintiff was employed by defendant to perform renovations and maintenance related work. Among other areas, plaintiff performed work on a two-story floating platform, which was held in place by 42 foot spuds and was anchored to the seabed. The floating platform was known as the "Clubhouse" and was either moored in New York Harbor or North Harbor depending upon the season. The Clubhouse was incapable of moving between these two locations on its own, and the spuds had to be removed by a crane barge and the Clubhouse towed in order to move. The Clubhouse had no engine, steering mechanism, or raked bow. The Clubhouse lacked running lights, radar, navigational aids, crew and lifeboats.

The defendant moved for summary judgment arguing that the Clubhouse was not a vessel and, consequently, plaintiff was not a seaman entitled to recover for Jones Act negligence, unseaworthiness, and maintenance and cure. The Court agreed. Employing the reasonable observer test outlined in *Lozman v. City of Riviera Beach*, 133 S. Ct. 735 (2013), the Court concluded that considering the Clubhouse's physical characteristics and activities it was not practically designed to carry people or things over water and was not a vessel.

Submitted by SPB

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