What is a "Vessel" and When? – Fleeting Concepts

By Francis X. Nolan, III

In May, 2016, the Comité Maritime International ("CMI") held a joint conference in New York City with its 3,000 member American affiliate, The Maritime Law Association of the United States ("MLAUS"). Tucked into a very crowded substantive agenda was Session 13, entitled "Resurrecting the Tower of Babel," a panel discussion of the extensive inconsistencies and anomalies created by the continuing differing definitions in national laws and international conventions of the terms "vessel" and "ship." Session 13 was an exercise by the newly appointed CMI International Working Group on Vessel Nomenclature ("IWG") to determine the size, scope, and gravity of this issue in terms of the uniformity of maritime law. The IWG had earlier circulated a First Questionnaire to the CMI member national MLAs, requesting information on usages and perceived conflicts within the national systems vis à is conventions and the impacts on vessels of other flags.

In the course of Session 13, the panel discussed the difference between a "snapshot" approach to defining the term "ship" or "vessel" for application of certain liability and protection fund conventions as opposed to the need for a fixed, long-term determination of those terms to safeguard secured lenders. Illustrative of the "snapshot" approach would be a determination of the status of a craft on the day an individual is injured on board or petroleum is discharged into the sea or formal contributions are assessed. The snapshot will determine which pallet of rights and remedies is available to the injured party.[1] But financing parties cannot afford an approach which is inconsistent with continuous and uninterrupted eligibility for documentation, mortgaging, and susceptibility to mortgage enforcement remedies in admiralty.

The financing of vessels requires a reasonably high level of certainty that the floating collateral will be treated as a "vessel" from day one wherever she navigates or operates, that a preferred mortgage or hypotheque will be regarded with roughly the same privilege and effect as it enjoys in the flag state where it is filed and recorded, and that the preferred mortgage or hypotheque will be enforceable by a process of foreclosure initiated by arrest or other seizure in any jurisdiction in which the vessel might be found upon occurrence of a default.

The new IWG was proposed by MLAUS and initially grew out of concerns about the stability and reliability of the United States' definition of the term "vessel" in 1 U.S.C. § 3 as construed by the United States Supreme Court, first in *Stewart v. Dutra*,[2] in 2005 and then *Lozman v. City of Riviera Beach*,[3] in 2013.

1 U.S.C. § 3 codified then existing admiralty case law into the following formulation:

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

Title 1 of the U.S. Code contains general provisions and rules of construction applicable throughout U.S. statutes except where a specific statute has a different definition. It is the default definition of the term "vessel" in federal law. Recodification of Title 46 in recent years eliminated a number of repeated definitions of vessel in many parts of Title 46, as a result of which, by design or happenstance, nearly all roads to defining the term now lead to 1 U.S.C. § 3. So a construction of the term for one application became a construction for nearly all purposes.

The concerns of the MLAUS were exacerbated by the trending case law which appears to conflate the concept of "vessel" with the phrase "vessel in navigation," a hallmark of admiralty jurisdiction. Admiralty jurisdiction over maritime torts in particular has always required a connection between the injury or wrong and "traditional maritime activity." For that reason, vessels withdrawn from navigation, dead ships, and "permanently moored"

[1] In fairness, the United States Supreme Court rejected a strict snapshot test that would require that a vessel be navigating at the moment the injury occurred, recognizing that simply because a vessel is not in constant motion does not mean it has been withdrawn from navigation. *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 495 (2005).

[2] *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 2005 AMC 609 (2005).

[3] *Lozman v. City of Riviera Beach*, __U.S.__, 133 S. Ct. 735, 2013 AMC 1 (2013).

vessels are deemed not "in navigation" and claims for injuries caused by those do not fall within admiralty jurisdiction.[4]

Unfortunately, *Stewart* and *Lozman* do not distinguish between the concepts of "vessels" and "vessels in navigation,"[5] but both decisions perforce construe the meaning of § 3 for multiple purposes under U.S. statutory law, from the Jones Act[6] to the Vessel Documentation Act[7] and the Ship Mortgage Act. [8]

As Bruce King noted in his masterful 2005 Article, "Ships as Property: Maritime Transactions in State and Federal Law":

> At least until very recently, determining what is a vessel in a transactional situation was often a two-step inquiry. First, one addressed the question whether, as an existential matter, the object is a vessel. If the object was a vessel, in some contexts a second question was relevant, namely, is it a vessel "in navigation?" The problem is that it is easy in practice to conflate the two tests, and this will become more confusing after the Supreme Court's recent decision in *Stewart v. Dutra Construction Co.*, which held, in a personal injury case, and seems to state in dicta supposedly for all contexts, that the navigation element is subsumed in the existential vessel element, so that the two tests are one. If this case is not confined to the personal injury area, it will have important ramifications for the transactional practice regarding marginal or nontraditional watercraft.[9]

With *Lozman*, the Supreme Court left in place standing case law that appears to decline vessel status during periods where a craft is permanently moored or otherwise rendered incapable of transportation. [10] But the Court did not explore the elements of what would constitute permanent mooring. [11]

The issue of "permanent mooring" is at present a minefield of uncertainty. In its amicus brief in *Lozman*, MLAUS had urged the Court to confirm a standard akin to the attachment of personalty to real estate as a fixture:

> . . . it should not be found permanently affixed, and therefore transformed, unless the manner of its affixing is irreversible as a practical matter.[12]

The U.S. Coast Guard has at the same time urged a test for permanent mooring based in part on whether disconnection from land-based utilities would necessarily require more than eight hours.[13]

Whether a vessel is permanently moored (and therefore withdrawn from navigation), especially when viewed through the Coast Guard's lens, is problematic in the context of recent trends in the shipping industry, including indefinite devotion of seagoing tankers to floating storage and transfer stations, cold layups, and other practices which do not in any case appear to be irreversible, but which can require weeks, if not months, to undo.

For lenders, who expect to have debts secured by preferred ship mortgages for the entire term of a loan, this issue comes up in the first instance at the time the registered or documented "vessel" is pledged as collateral. It comes up again if the vessel suffers a change in usage or is withdrawn from navigation. One might speculate that if a vessel loses that status because of withdrawal from navigation and then is later re-inserted into navigation, is a preferred mortgage lien invalidated and then somehow spring back to life or, once lost, is the lien gone forever?

Session 13 also addressed another complication for lenders in the differing categorization of certain

[4] *See, e.g.*, *Chandris, Inc. v. Latsis*, 515 U.S. 347, 372-76, 1995 AMC 1840 (1995).

[5] *Stewart*, 543 U.S at 496.

[6] Jones Act, 46 U.S.C. § 30104 (2006).

[7] Vessel Documentation Act of 1980, Pub. L. No. 96-594, 94 Stat. 3453 (1980). 46 U.S.C. §§ 12101-12152 (as codified 1983).

[8] Ship Mortgage Act of 1920, Pub. L. No. 66-261, 41 Stat. 988 (1920). 46 U.S.C. §§ 31301–31343 (formerly 46 U.S.C. §§ 911–984).

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

[10] *Lozman*, 133 S. Ct. at 746.

[11] *See Lozman*, 133 S. Ct. 735.

[12] Brief for The Maritime Law Association of the United States et al. as Amici Curiae Supporting Respondent, *Lozman v. City of Riviera Beach*, 133 S. Ct. 735 (2013) (No. 11-626), at 12.

[13] *Craft Routinely Operated Dockside*, 74 Fed. Reg. 21814-02 (May 11, 2009).

watercraft from country to country. For example, if a mobile rig is a vessel for purposes of U.S. or Marshall Islands law and is mortgaged to a lender, what happens when that rig is deployed elsewhere, where the rig is not regarded as a vessel? On default, may the lender use legal processes to arrest and foreclose upon the rig? Will a foreign court recognize a preferred mortgage or hypotheque on an object that the court's legal system does not regard as a "ship" or "vessel?" The same issue may arise where nations have minimum tonnage, length, or propulsion requirements for qualification as a vessel or ship. Early returns on the national Questionnaire suggest that some jurisdictions will follow the flag lead on this question (Italy and Croatia), while others suggest that local law will govern on the jurisdictional question as to whether there is a basis to arrest (Ireland). We can expect to see this in mobile rigs, dredgers and other forms of non-traditional craft moving about in the marine environment, for example. At the least, this concern can be anticipated insofar as the different treatment of the same equipment from jurisdiction to jurisdiction can be determined. The IWG hopes to identify these anomalies as well in the course of its efforts.

The merging of the concept of "vessel in navigation" with the definition of "vessel" has raised concerns in those sections of the ship finance business which depend on a constant status of a vessel or ship. The current posture of the United States Supreme Court, both what is decided and what remains unaddressed, offers no direction or comfort on these concerns.

Because two of the largest open registries, the Marshall Islands and Liberia, incorporate general maritime law of the United States into their own systems, failure to maintain a constant "existential" definition of vessel creates a risk to certainty in documentation and mortgaging of vessels beyond US flag.

The differences among flag states as to what constitutes a ship or vessel for purpose of enforcement of liens and mortgages, suggests that there is significant lack of uniformity that will keep the IWG engaged in analysis and proposed remedies for a while to come.

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Francis X. Nolan, III is a shareholder in the New York office of Vedder Price P.C., practicing in vessel financing. He is also the First Vice President of The Maritime Law Association of the United States and is on the Editorial Board of this publication. Mr. Nolan chairs the IWG and chaired Session 13.