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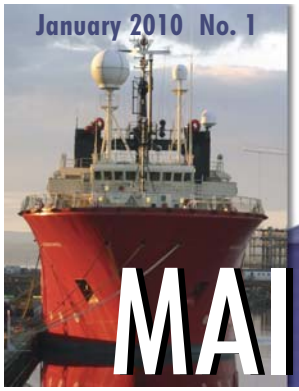

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Things "Seen and Unseen"— The Nature of EFTs As Intangible and Attachable Property Under Admiralty Rule B

By Jeremy J.O. Harwood

JEREMY J.O. HARWOOD

JHarwood@BlankRome.com

Introduction

The Supreme Court has recognized the federal nature of the United States' maritime law from its earliest days as embodied and protected in the U.S. Constitution, which ordains the judicial power of the federal sovereign to extend to "all cases of admiralty and maritime jurisdiction." In a predominantly maritime nation, as it was at its founding, concerns for admiralty and ancient admiralty remedies dominated the Supreme Court's docket.

In a 1979 case, the Second Circuit Court of Appeals recited from an 1890 Supreme Court opinion that "perpetrators of maritime injury are likely to be peripatetic" and recognized that "suits under admiralty jurisdiction involve separate policies to some extent." The Second Circuit continued:

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

In *Winter Storm Shipping Ltd. v. TPL*, 310 F.3d 263, 267 (2d Cir. 2002), Judge Haight, a seasoned admiralty judge sitting by designation in the Court of Appeals, wrote for the Court about the "history and characteristics of maritime attachment" as a "centuries old" remedy. Ironically, he commented:

> . . . As early as 1825, the Supreme Court was able to say of the right of attachment in *in personam* admiralty cases that "this Court has entertained such suits too often, without hesitation, to permit the right now to be questioned." *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 486, 6 L. Ed. 369 (1825). "Maritime attachment is a feature of admiralty jurisprudence that antedates both the congressional grant of admiralty jurisdiction to the federal district courts and the promulgation of the first Supreme court Admiralty Rules in 1844." *Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44, 47 (2d Cir. 1996).

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

Winter Storm, as examined further below, held that electronic fund transfers ("EFTs") are attachable property under Admiralty Rule B, which refers to the "tangible or intangible personal property of the defendant."

In 2008, the Second Circuit in *Consub Delaware LLC v. Schahin Engenharia Ltda.,* 543 F.3d 104, 109 (2d Cir. 2008) (emphasis added), held:

> There has been no decision by an *en banc* panel overruling *Winter Storm.* Moreover, there is no justification for departing from the principle of *stare decisis* here where [defendant] has not shown that *Winter Storm* is unworkable, and where admiralty jurisdiction is the subject of congressional legislation and Congress remains free to alter the *Winter Storm* rule. In any event, *Winter Storm* was correctly decided.

Accordingly, the Second Circuit's decision in *The Shipping Corporation of India Ltd. v. Jaldhi Overseas Pte. Ltd.,* ___F.3d ___, 2009 U.S. App. LEXIS 22747 (2d Cir. Oct. 16, 2009), which overruled the *Winter Storm* decision on the attachability of EFTs "with the consent of all the judges of the Court in active service", came as a considerable surprise to this tradition of "special deference." The Court said that *Winter Storm* was "erroneously decided and therefore should no longer be binding precedent in our Circuit."[1]

This article examines the EFT process and the two decisions.

The EFT Process

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

> "Funds transfer" means the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order. The term includes any payment order issued by the originator's bank or an intermediary bank intended to carry out the originator's payment order. A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order.

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

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

For a U.S. dollar transfer, a foreign originating bank's payment order is always communicated to an American bank or to a foreign bank's branch office in the United States. If the bank in the U.S. is not the same bank as the foreign originating bank, it is an "intermediary" bank. By statute, an "intermediary bank" is a "receiving bank **other than** the originator's bank or the beneficiary's bank." *UCC* §4A-104(2).[2]

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

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

directs the terminals at the receiving bank and the sending bank to print out a credit ticket and a debit ticket; respectively credits and debits the appropriate Clearing House bank accounts; and records the transfer. The receiving bank keeps track of the funds received and makes them available immediately. Adjustments in the account books at the New York Federal Reserve Bank are not made until the next business day, however, after the central computer has determined which books owe, or are owed, what.

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

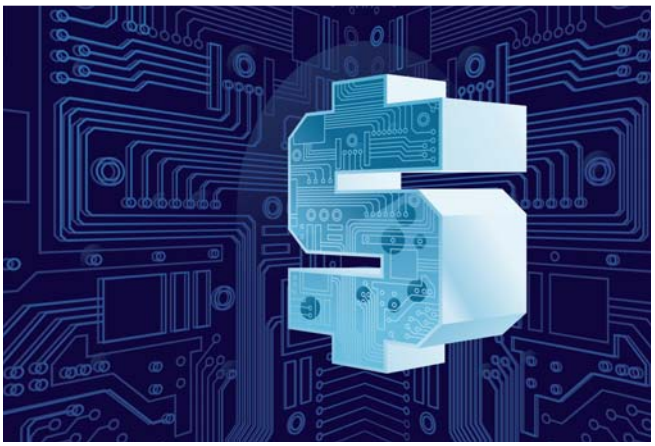
Why an EFT is an Attachable Res

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

> In this wired age, the location of an intangible, especially a bank account, is a metaphysical question. By and large, bank deposits exist as electronic impulses embedded in silicone chips. In a sense, therefore, bank funds are both everywhere and nowhere. But the problem is not a new one. Before the advent of electronic banking, courts grappled with the dilemma of pinpointing the location of intangible assets. It is a dilemma that calls for a practical judgment. As Judge Cardozo so eloquently put it in *Severnoe Securities v. London & Lancashire Inc.* [255 N.Y. 120 (1931)]:
>
> "The *situs* of intangibles is in truth a legal fiction, there are times **when justice and convenience requires that a legal *situs* be ascribed to them** . . . [citations omitted] . . . At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience of particular conditions." [*Id.* at 123-24, emphasis added]. *Yayasan Sabah Dua Shipping SDN BHD v. Scandinavian Liquid Carriers Limited,* 335 F. Supp. 441, 449 (S.D.N.Y. 2004).

The Second Circuit's decision in *U.S. v. Daccarett,* 6 F.3d 37 (2d Cir. 1993), left no doubt that an EFT is an attachable *res*. The Second Circuit again acknowledged this point in *Winter Storm Shipping, Ltd. v. TPI,* 310 F.3d 263, 276 (2d Cir. 2002), and did not question it in *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty. Ltd.,* 460 F.3d 434 (2d Cir. 2006). *Aqua Stoli* queried only the property interest in an EFT that *Shipping Corp. of India* seized upon.

Daccarett was an *in rem* forfeiture case, initiated under Rule C of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the



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

> The claimants' conception of the intermediary banks as messengers who never hold the goods, but only pass the word along, is inaccurate. On receipt of the EFTs from the originating banks, the intermediary banks **possess the funds, in the form of bank credits,** for some period of time before transferring them on to the destination banks. While claimants would have us believe that modern technology moved the funds from the originating banks through the intermediary bank to their ultimate destination without stopping, that was not the case. **With each EFT at least two separate transactions occurred: first, funds moved from the originating bank to the intermediary**

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The Nature of EFTs (continued)

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

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

Winter Storm

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

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

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

Professor Jarvis has said that:

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

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

In *Winter Storm,* the Second Circuit expressly reversed the District Court's reliance on State law to define "property." 310 F.3d at 267, 276:

> It follows that *the broad, inclusive language of Admiralty Rule B(1)(a)* and the EFT analysis in *Daccarett* combine to fashion a rule in this Circuit that EFT funds in the hands of an intermediary bank may be attached pursuant to Admiralty Rule B(1)(a). *Because that rule is derived from federal law, there is no occasion to look for guidance to state law.* 310 F.3d at 278 (emphasis added).

Shipping Corp. of India ("SCI")

The Policy Explanations and Other Rationale for a Sea Change

In *SCI*, the Court preceded its analysis with a review of "critical commentary" of the *Winter Storm* decision including that "some even suggested that *Winter Storm* has threatened the usefulness of the dollar in international transactions." Moreover, note was made of the Clearing House Banks' *amicus* arguments[4] (also made and ignored in *Winter Storm* and *Consub Delaware*) of the burden placed on its member banks by the volume of attachments. Indeed, the Court went back to an *amicus* brief submitted by the Federal Reserve Bank of New York seven years earlier in *Winter Storm,* which had not been re-filed in this case, in respect of "[u]ndermining the efficiency and certainty of fund transfers in New York" and to its "standing as an international financial center."

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

Legal Reasoning

Beneficiary EFTs

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

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

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

Originator EFTs

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

Conclusion

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

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

1. The Court stated, in a footnote, that in "overturning *Winter Storm,* we also abrogate any decision insofar as it has relied on *Winter Storm,* specifically [*Consub Delaware*]"–a reversal of views by the entire court from a decision from just the prior year.
2. A "receiving bank" is "the bank to which the sender's instruction is addressed." *UCC* §4A-103(d). A "sender" is "the person giving the instruction to the receiving bank." *Id.* §4A-103(e). Thus, an intermediary bank can be both a "receiving bank" and a "sending bank."
3. In *Daccarett,* the process was a Warrant of Arrest under Supplemental Rule C. In *Winter Storm,* the process was a Process of Maritime Attachment and Garnishment ("PMAG") under Supplemental Rule B.
4. The *amicus* brief was deemed filed by an order on the same date of the decision so that arguments in it were never addressed to the Court.

A Primer on Prosecuting Pirates[1]

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

JOHN D. KIMBALL
JKimball@BlankRome.com

JONATHAN K. WALDRON
Waldron@BlankRome.com

LAUREN B. WILGUS
LWilgus@BlankRome.com

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

At the time of the shooting, the fourth pirate was aboard the *USS Bainbridge* attempting to negotiate a ransom for Captain Phillips. The fourth pirate was immediately taken into custody by the U.S. Navy and was later brought to New York to face charges. The name of the fourth pirate is Aduwa Abdukhadir Muse ("Muse").[2] The prosecution of Muse is likely to establish a benchmark for how the U.S. government will handle piracy cases. Muse's trial is scheduled to begin in January 2010.

The legal basis for fighting piracy is a concept generally referred to as universal jurisdiction and is a well established pillar of customary international law. Universal jurisdiction permits a "State to claim jurisdiction over an offender even if the offender's act occurred outside its boundaries and even if the offender has no connection to the State."[3]

In the U.S. Constitution, Article I, Section 8, Clause 10 expressly authorizes Congress to "define and punish Piracies and Felonies committed on the high

Note From The Editor

By Thomas H. Belknap, Jr.

THOMAS H. BELKNAP, JR.
TBelknap@BlankRome.com

It has been a busy couple of months in New York, and all the news seems to be focused on Rule B at the moment. Unless you've been hibernating since mid-October, you will have heard about the Second Circuit's abrupt about-face in *Shipping Corp. of India v. Jaldhi,* reversing its 2002 ruling in *Winter Storm* that had allowed attachment of electronic funds transfers in New York. (If you need a refresher, please refer to Jeremy Harwood's article on the cover of this issue of *Mainbrace*.)

Whatever your views of the correctness of this decision, it seems hard to dispute that the ruling has had a dramatic impact on a very large number of pending claims, both here and abroad. Many parties expended substantial sums in pursuing claims in reliance on the security they had obtained, and they are now finding themselves in a very uncertain position. According to the Second Circuit's even more recent decision in *Hawknet v. Overseas Shipping Agencies,* however, which held that *Jaldhi* must be applied retroactively because it is a "jurisdictional" ruling, prejudice doesn't seem to be part of the inquiry.

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

Seas, and Offenses against the Law of Nations." Congress codified its constitutional authority to "extradite or prosecute" offenders in Title 18 of the United States Code ("U.S.C."). Under the law of nations, piracy generally is defined as an "offence against the universal law of society."[4] Pirates can be prosecuted under 18 U.S.C. §1651, which provides:

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

Pirates are also subject to prosecution for acts of terrorism (18 U.S.C. §2332b *et seq.*), violence against maritime navigation (18 U.S.C. §2280), hostage taking (18 U.S.C. §1203), kidnapping (18 U.S.C. §1201), and/or interfering with commerce by threats or violence (18 U.S.C. §1951).

The U.S. has exercised criminal jurisdiction over extraterritorial crimes in a number of cases.[5] Of particular interest is a recent successful piracy prosecution that took place offshore the Hawaiian Islands in 2008. In *United States v. Lei Shi*[6] (*"Lei Shi"*), the U.S. charged the defendant with "several violations of 18 U.S.C. §2280, which proscribes certain acts of violence that endanger maritime navigation. 18 U.S.C. §2280 codifies the United States' obligations under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention"), which authorizes any signatory State to extradite or prosecute offenders, regardless of where the offender's acts occurred."[7] In *Lei Shi,* a three judge panel of the U.S. Court of Appeals for the Ninth Circuit upheld the conviction and 36-year prison sentence of a Chinese cook who was convicted in Honolulu of forcibly seizing control of a foreign vessel in international waters and killing a Taiwanese Captain and Chinese First Mate.[8] The Ninth Circuit's decision is the only reported U.S. case to date interpreting the SUA Convention. This may soon change with the prosecution of Muse. On April 21, 2009, the U.S. charged Muse with violations of 18 U.S.C. §2280, among other statutes, for his alleged participation in the April 8, 2009 hijacking of the *Maersk Alabama* in the Indian Ocean and the subsequent taking of the Captain of the vessel as a hostage.

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

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

Count 1 – 18 U.S.C. §1651 (Piracy, as defined by the Law of Nations)
Count 2 – 18 U.S.C. §2280(a)(1)(H) (Violence against maritime navigation)
Count 3 – 18 U.S.C. §924(c)(1)(A)(iii) (Possession of a machine gun during a crime of violence
Count 4 – 18 U.S.C. §1203 (Hostage Taking)
Count 5 – 18 U.S.C. §924(c)(1)(A)(ii) (Possession of a machine gun during a crime of violence)

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

Count One

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

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Prosecuting Pirates (continued)

"Piracy" traditionally has been defined as "robbery, or forcible depredations upon the sea."[9] "Depredation" is "the act of plundering, robbing, or pillaging."[10] All three acts require the use of force.

Count Two

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

Count Three

Muse is charged in Count Three of the indictment with conspiracy to seize control over a ship by force in violation of 18 U.S.C. §2280(a)(1)(A) and 18 U.S.C. §2280(a)(1)(H).

Count Four

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

1) That Muse committed the crime of seizing a ship by force as charged in Count Two of the indictment;

2) That during and in relation to the commission of that crime, Muse knowingly used or carried a firearm;[11] and

3) That Muse used or carried the firearm during and in relation to the crime of seizing a ship by force.[12]

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

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

Count Five

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

1) Muse did intentionally seize, detain, and threaten to kill and injure a human being; and

2) Muse intentionally caused the victim to be seized, detained, and threatened in order to compel the family of the victim to pay ransom.[13]

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

Count Six

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

1) Muse did intentionally seize, detain, and threaten to kill and injure a human being; and

2) Muse intentionally caused the victim to be seized, detained, and threatened in order to compel the family of the victim to pay ransom.[14]

The indictment lists the following overt act:

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

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

Count Seven

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

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

The Supreme Court has held that the provisions in §924(c)(1)(B)(ii) state additional elements that must be charged in the indictment and found by the jury beyond a reasonable doubt.[15]

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

Count Eight

Muse is charged in Count Eight of the indictment with kidnapping within the special maritime and territorial jurisdiction[16] of the U.S. in violation of 18 U.S.C. §1201(a)(2). In order for Muse to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

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

Count Nine

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

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

The indictment lists the following overt act:

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

Count Ten

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

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

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

(continued on page 10)

***Prosecuting Pirates* (continued)**

If convicted, the offenses carry the following potential penalties:

COUNT 1 CHARGE: Piracy under the law of nations
MAXIMUM PRISON TERM: Mandatory sentence of life in prison

COUNT 2 CHARGE: Seizing a ship by force
MAXIMUM PRISON TERM: 20 years

COUNT 3 CHARGE: Conspiracy to seize a ship by force
MAXIMUM PRISON TERM: 20 years

COUNT 4 CHARGE: Possession of a machinegun during and in relation to seizing a ship by force
MAXIMUM PRISON TERM: Life

COUNT 5 CHARGE: Hostage-taking
MAXIMUM PRISON TERM: Life

COUNT 6 CHARGE: Conspiracy to commit hostage-taking
MAXIMUM PRISON TERM: Life

COUNT 7 CHARGE: Possession of a machinegun during and in relation to hostage-taking
MAXIMUM PRISON TERM: Life

COUNT 8 CHARGE: Kidnapping
MAXIMUM PRISON TERM: Life

COUNT 9 CHARGE: Conspiracy to commit kidnapping
MAXIMUM PRISON TERM: Life

COUNT 10 CHARGE: Possession of a machinegun during and in relation to kidnapping
MAXIMUM PRISON TERM: Life

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

In addition to proving each element of these substantive charges, the government also must show some nexus to the U.S. Therefore, each Count includes a venue provision under 18 U.S.C. §3238. Because the offenses were not committed in any U.S. district, 18 U.S.C. §3238 gives the U.S. District Court for the Southern District of New York jurisdiction over Muse since it is where he was first brought into the U.S. after allegedly committing the crimes. Additionally, 18 U.S.C. §2280(b)(1)(C) "authorizes federal jurisdiction over any offender later found in the United States after a prohibited act under the Statute is committed."[17] The U.S. has an interest in prosecuting Muse in its courts for a number of reasons, including: (1) the Captain, who was held hostage, was a U.S. citizen; and (2) Muse sought to compel the U.S. government to satisfy his demands in return for the release of the Captain. Each Count[18] also includes an aiding and abetting charge (18 U.S.C. §2), which allows the government to charge Muse as a principal for the crimes committed by the other alleged pirates.

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

Anticipated Defenses

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

First, the defense is likely to raise jurisdictional questions based on the location of the pirate attack since the hijacking took place 240 nautical miles off the Somali coast, which is outside the territorial waters of any state. The defense is unlikely to prevail on this argument, however, because Article 100 of the United Nations Convention on the Law of the Sea ("UNCLOS"), provides "[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."[19] Moreover, both the Convention on the High Seas and UNCLOS authorize States to seize a pirate ship, or a ship taken by piracy and under the control of the pirates, and arrest the persons and seize the property on board.[20] Under these conventions, the courts of the State whose forces carry out a seizure may decide the penalties to be imposed on the pirates.[21] Moreover, in June 2008, the United Nations Security Counsel further expanded the jurisdiction of States combating piracy when it passed Resolution 1816, which authorized the international community to "enter the territorial waters

of Somalia for the purpose of repressing acts of piracy" and while there authorized them to "use…all necessary means to repress act of piracy."[22] The Security Counsel adopted four additional resolutions (1838[23], 1844[24], 1846[25]), concluding in December 2008 with the adoption of Resolution 1851,[26] which extended the power to combat and prosecute piracy until December 2009.

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

1) There was an immediate threat of death or serious bodily injury to the defendant, a family member of the defendant, if the defendant did not commit or participate in the commission of the crime;

2) The defendant had a well-grounded fear that the threat of death or serious bodily injury would be carried out; and

3) The defendant had no reasonable opportunity to escape the threatened harm.[27]

Because the three other remaining pirates were killed during the hijacking, there is nobody to support or rebut the defense that Muse was acting under the threat of duress. In fact, after his court hearing on April 21, 2009 before Magistrate Judge Peck, Muse's defense lawyers portrayed him as a "frightened kid" and Muse's mother insisted that "[h]e was brainwashed [and] [p]eople who are older than him outwitted him... ."[28] Muse's defense attorneys may also exploit the fact that Muse was born and raised in a county with no established government and, thus, had no choice but to turn to a life of piracy as a means of survival. Muse's actions, however, contradict this defense. During the hijacking of the *Maersk Alabama*, reports indicate that Muse conducted himself not as a frightened "kid," but rather as the ringleader of the entire operation. "Prosecutors said Muse was not shy about making his presence known on the *Maersk Alabama*, brazenly tearing through the ship in a way that belied his young age and skinny, 5-foot-2 frame. He was the first to board the ship, he fired a shot at the Captain, he helped steal $30,000 in cash from a safe, and he bragged about hijacking ships in the past, authorities said."[29] ■

1. This is the second of a series of articles on piracy. The first was titled "Pirates of Somalia," and appeared in *Mainbrace,* January 2009.
2. Muse's name has been translated a number of ways. Some English language sources refer to him by the name Abduhl Wal-i-Muse.
3. *See United States v. Lei Shi,* 396 F. Supp. 2d 1132, 2003 (D. Haw. 2003) (Gillmor, H.), *aff'd* 525 F.3d 709 (9th Cir. Haw. 2008), cert. denied, 129 S. Ct. 324 (2008) quoting Stephen Macedo, Universal Jurisdiction 2-12 (2004).
4. *See U.S. v. Smith,* 18 U.S.C. 153 (1820) (The Supreme Court determined that Congress constitutionally enacted the predecessor of this provision under its power to define and punish piracies and felonies committed on the high seas, and offenses against law of nations.)
5. *See United States v. Yousef,* 327 F.3d 56, 86 (2d Cir. 2003); *United States v. Bin Laden,* 92 F. Supp. 2d 189, 201 (S.D.N.Y. 2000), aff'd, 552 F.3d 177 (2d Cir. 2008); *United States v. Shi,* 525 F.3d 709, 720-24 (9th Cir. 2008); *United States v. Davis,* 905 F.2d 245, 248-49 (9th Cir. 1990); *Blancas v. United States,* 344 F. Supp. 2d 507, 528 (W.D. Tex. 2004).
6. *See* case cited *supra* note 3.
7. *See* case cited *supra* note 3, at 720.
8. *Id.*
9. *See* case cited *supra* note 4, at 161.
10. *See* case cited *supra* note 3, at 721 quoting Black's Law Dictionary 397 (5th ed. 1979) (The definition of "plunder" includes the taking of "property from persons or places by open force." "Robbery" is the "[f]elonious taking of . . . [any] article of value, in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Finally, the act of "pillaging" is the "forcible taking of private property by an invading or conquering army from the enemy's subjects.")
11. The phrase "uses or carries a firearm" means having a firearm, or firearms, available to assist or aid in the commission of the crime of piracy. "Use" means more than mere possession of a firearm by a person who commits a crime; to establish use, the government must show active employment of the firearm. If Muse did not either disclose or mention the firearm or actively employ it, then he did not use the firearm. "Carry" means that Muse had the firearm on his person or possessed the firearm.
12. During and in relation to means that the firearm must have had some purpose or effect with respect to the piracy. The firearm must have at least facilitated or had the potential of facilitating the piracy.
13. *See United States v. Xue Fei Lin,* 139 F.3d 1303, 1306 (9th Cir. Wash. 1998).
14. *Id.*
15. *See Castillo v. United States,* 530 U.S. 120 (2000).
16. "Special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. §7.
17. *See* case cited *supra* note 3, at 720. The Court in *Lei Shi* concluded that "the requirement that a defendant be 'later found' does not contain the implicit requirement that the defendant's arrival in the United States be voluntary." *Id.* at 725.
18. Counts three, six, and nine do not contain an aiding and abetting violation because a defendant is automatically considered a principal.
19. *See* United Nations Convention on the Law of the Seas ("UNCLOS"), 21 I.L.M. 1261. Convention adopted December 10, 1982. Entered into force November 16, 1994 (the United States is not a party to the Agreement).
20. *See* UNCLOS Article 105; also *See* http://fpc.state.gov/documents/organization/130809.pdf citing Cmdr. James Kraska and Capt. Brian Wilson, "Fighting Piracy," Armed Forces Journal, February 1, 2009.
21. *See* UNCLOS Article 105; also see cases cited *supra* note 5. (The Supreme Court has granted extraterritorial jurisdiction in a number of cases involving foreign prisoners involuntarily coming under the jurisdiction of the United States.)
22. G.A. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).
23. G.A. Res. 1838, U.N. Doc. S/RES/1838 (October 7, 2008).
24. G.A. Res. 1844, U.N. Doc. S/RES/1844 (November 20, 2008).
25. G.A. Res. 1846, U.N. Doc. S/RES/1846 (December 2, 2008).
26. G.A. Res. 1851, U.N. Doc. S/RES/1851 (December 16, 2008).
27. *See United States v. Lizalde,* 38 Fed. Appx. 657, 659 (2d Cir. N.Y. 2002), *cert. denied,* 154 L. Ed. 2d 542 (2002), *cert. denied,* 537 U.S. 1059 (2002); 2006 U.S. Dist. LEXIS 97933 (E.D.N.Y., Feb. 28, 2006) (post-conviction proceeding).
28. *See* "Prosecutors: Young Pirate Brash, Brazen," New York, April 22, 2009. http://www.cbsnews.com/stories/2009/04/22/national/main4961450.shtml
29. *Id.*

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By Nigel J. Binnersley

NIGEL J. BINNERSLEY
NBinnersley@BlankRome.com

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Blank Rome Solicitors & Notaries

5605-07 The Center • 99 Queen's Road Central • Hong Kong • v: +852.3528.8300 • f: +852.3528.8383

The Role of Small Vessels in National Security: Is DHS Doing Enough?

By Joan M. Bondareff

JOAN M. BONDAREFF

Bondareff@BlankRome.com

Introduction

With 13 million registered recreational vessels (and perhaps 8 million unregistered vessels) plying U.S. waters every year, it is not surprising that the Commandant of the Coast Guard, ADM Thad Allen, has raised the critical question as to whether these vessels are "Friend or Foe?" and, in reply to his own question, said it is "Tough to Tell."[1] But, the Coast Guard and its parent organization, the Department of Homeland Security ("DHS"), have taken serious steps to develop a new security strategy focused solely on small vessels. A small vessel is defined as a vessel that is less than 300 gross tons and generally less than 100 feet in length. It can be a recreational, fishing, or small commercial vessel to qualify as a small vessel for purposes of this strategy. With the exception of small commercial vessels that do meet a higher standard of security,[2] as a general rule, these vessels are not subject to SOLAS or the ISPS Code.[3]

Since 9/11, the Coast Guard, DHS, and Congress have initially focused on the security requirements for large vessels.[4] However, given the role small vessels have played in the tragic 2000 attack on the *USS Cole,*[5] and the apparent maritime link to the 2008 Mumbai attacks,[6] it is understandable that in recent years these agencies and Congress have turned their attention to small vessel security.

This attention has resulted in the issuance by DHS of a Small Vessel Security Strategy ("Strategy") in April 2008. Subsequently, in September 2009, the DHS Office of Inspector General ("OIG") released a report critical of the Strategy, entitled "DHS' Strategy and Plans to Counter Small Vessel Threats Need Improvement."[7] This article reviews and discusses the 2008 Strategy, the OIG report, efforts by private entities such as the National Association of Boating Law Administrators ("NASBLA") and the Passenger Vessel Association ("PVA") to enhance maritime security, as well as the recent issuance by the International Maritime Organization ("IMO") of non-binding guidelines for the security of vessels that are not covered by SOLAS or the ISPS Code. The article also touches briefly on recent, relevant Congressional actions.

Review of the DHS Strategy

In 2008, after hosting a 2007 Summit with involved stakeholders in Arlington, Virginia, DHS issued its Strategy. The Strategy initially notes the difference between the present security regime for large and small vessels. For example, all large vessels have to submit to the Coast Guard a 96-hour Advance Notice of Arrival, a cargo manifest/crew list within 24-hours of departure, and carry the Automatic Identification System ("AIS"). In contrast, the Coast Guard/DHS acknowledged, that with respect to small vessels, they lack a centralized access to hull identification and vessel registration (owner) data, there are uneven requirements for small vessel user certification and documentation, and there are very limited Advance Notice of Arrival requirements for most small recreational vessels arriving from abroad.

While acknowledging that the vast majority of small vessel operators are legitimate, law-abiding citizens, DHS expressed its concern that small vessels could be implicated in a terrorist-related attack. As the Commandant identified in his "Friend or Foe" letter, referenced above, several serious attacks have been linked to small vessels, including the *USS Cole* attack, the October 2002 attack by a small fishing vessel with explosives into the side of the supertanker *Limburg,* and the November 2005 attack of the cruise ship *Seabourne Spririt* by terrorists using 25-foot inflatable boats.[8]

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

1) Domestic use of waterborne improvised explosive devices ("WBIEDS");

2) Conveyance for smuggling weapons (including weapons of mass destruction) into the United States;

3) Conveyance for smuggling terrorists into the United States; and

4) Waterborne platform for conducting a stand-off attack (*e.g.* Man-Portable Air Defense System ("MANPADS")) attacks.

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Role of Small Vessels (continued)

As part of its strategic vision for responding to these potential scenarios, the Strategy determined that a "one-size-fits-all approach cannot adequately ensure U.S. maritime security and safety due to the diversity of the maritime domain and the heterogeneity of the small vessel community."[9] Therefore, the Strategy contains four diverse goals with specific objectives pertaining to each goal.

The first goal is to: *Develop and leverage a strong partnership with the small vessel community and public and private sectors in order to enhance maritime domain awareness.*[10] A specific objective to address this goal is to partner with the 80 million individuals who participate in recreational boating activities each year, and to increase public awareness of how to report suspected terrorist activity through America's Waterway Watch ("AWW").[11] DHS cited as a prime example of the success of AWW when a tour boat operator in Florida in 2003 reported suspicious activity by one of its passengers, which led to the investigation of the suspect and his subsequent apprehension in New York.[12]

The second goal is to: *Enhance maritime security and safety based on a coherent plan with a layered, innovative approach.*[13] To implement this goal, the Coast Guard will identify which operators present a low-risk profile, and develop appropriate risk targeting systems to distinguish high-risk users. The Coast Guard also called for enhanced use of the 96-hour advance notification rule for recreational vessels entering U.S. waters from overseas.

The third goal is to: *Leverage technology to enhance the ability to detect, determine intent, and when necessary, interdict small vessels.*[14] To achieve this goal, the Coast Guard acknowledged that it must expand research into low-cost, non-intrusive, small vessel identification systems, such as Radio-Frequency Identification ("RFID") tags, adaptable miniature transponders, portable GPS devices, or cell-phone based recognition systems.[15] The Coast Guard also has Memoranda of Understanding with states to allow access to basic information about state-registered recreational vessels through the Vessel Identification System.

The fourth and final goal is to: *Enhance coordination, cooperation, and communications between Federal, state, local, and Tribal partners, and the private sector as well as international partners.*[16] One way to implement this goal, according to DHS, is to update area maritime security processes to ensure that small vessels are addressed when conducting area assessments and

developing area security management plans. Another method, as the Commandant described in "Friend or Foe", is to partner with organizations such as the National Association of State Boating Law Administrators ("NASBLA"). He credits NASBLA with "advocating for the state registration of all motorized and non-powered vessels (canoes, kayaks, etc.)" to increase maritime domain awareness at the local and state level. The PVA is another source of cooperation on security matters with its members.[17]

To carry the Strategy to the next phase, the Coast Guard is developing an Implementation Plan to provide detailed direction to all DHS agencies on how to achieve the four major goals. As of this writing, we do not have information on the date of release of the Implementation Plan.

Review of the OIG Report and DHS Response

DHS OIG found the Strategy to be deficient in certain respects after comparing it with the six characteristics for an effective national anti-terrorism strategy articulated by the General Accounting Office ("GAO") in its 2004 report entitled "Combating Terrorism: Evaluation of Selected Characteristics in National Strategies Related to Terrorism."[18] The six characteristics prescribed by GAO include: problem definition and risk assessment; goals and performance measures; identification of resources; organizational roles and responsibilities; and integration and implementation.

The OIG criticized the Coast Guard for not addressing all of the characteristics laid out in the GAO report, such as setting priorities, milestones, performance measures, or progress indicators. The OIG also criticized the Coast Guard and DHS for not providing detailed information regarding costs, human capital, resources, or economic principles. Finally, the OIG commented that DHS had not sufficiently analyzed the adequacy of certain programs and processes that DHS would rely on in support of its Strategy, such as the AWW and the Pleasure Boat Reporting System that Customs and Border Protection ("CBP") administers for small vessels traveling to the U.S. from a foreign country. OIG complained that the AWW is not widely known, that AWW calls are not tracked, and that the Pleasure Boat Reporting System is ineffective and the data it gathers is not accurate.

In response, DHS partly agreed and partly disagreed with the OIG's conclusions. For example, DHS acknowledged that it could address more of the GAO characteristics and stated that it planned to do so in the execution of an Implementation Plan.[19] However, DHS did not concur with the OIG recommendation that it needed to evaluate the effectiveness of programs such as AWW and the Pleasure Boat Reporting System in order to use them as part of its solution to improve security from small vessel threats since they had been recommended by DHS agencies as useful tools.[20]

Initial Assessment and Next Steps— Implementation Plan, IMO Guidelines, and Congressional Action

While it is beyond the scope of this article to fully assess either the GAO process or the OIG report, in the view of this author, the OIG report is fairly formulaic and fails to take into account both the diffuse nature of the recreational boating community, the tremendous cost of administering a new security program for the 80 million Americans who enjoy recreational boating, and the seriousness of the effort that the Coast Guard and DHS have undertaken in trying to develop a Small Vessel Security Strategy that balances the individual rights of boaters in this country to operate in U.S. waterways alongside other maritime partners with the threat that a terrorist attack from a small vessel of the nature described above could inflict on a waterway, port, or critical infrastructure.

In the meantime, DHS is developing and planning to release an Implementation Plan to fill in a number of the gaps identified by the OIG. The Coast Guard has also worked closely with the IMO's Maritime Safety Committee ("MSC") to develop a set of non-binding guidelines that can be used by government and private sector entities engaged in small vessel operations and security.

The IMO issued the guidelines in December 2008 to address the lack of existing guidance on security aspects of those ships that do not fall within the scope of SOLAS and the ISPS Code, *i.e.,* small vessels.[21] The IMO made clear that the guidance is non-mandatory.

However, the author expects that a number of the guidelines will show up in the final Coast Guard Implementation Plan because they offer practical sugges-

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Role of Small Vessels (continued)

tions and best management practices for government entities and operators alike. For example, the IMO recommended that Member States consider encouraging operators of pleasure craft to register with the Administration or a suitable organization that could provide a database available for authorized online access to assist in both preventative and response activities related to both safety and security.[22] The IMO also recommended that Member States encourage operators of small vessels engaged in international voyages to adopt, where appropriate, the provisions of the ISPS Code as industry best practice.[23] Finally, the Guidance contains detailed recommendations on how small vessels can mitigate the risk of theft, piracy, and armed robbery[24]–a serious new (or new old) problem, but one that is not addressed in this commentary.

Congress is watching the development of the Strategy closely. [On December 9, 2009, the Subcommittee on Coast Guard and Marine Transportation of the House Committee on Transportation and Infrastructure held its hearing on Maritime Domain Awareness (MDA). Testifying were RADM Brian M. Salerno of the Coast Guard and Margaret Podlich for BOATUS. Their statements and a Subcommittee report on MDA are available at: http://transportation.house.gov/hearings/hearingDetail.aspx?NewsID=1065.] Congress has also taken steps to correct the lack of criminal penalties for operators of submersible and semi-submersible vessels that engage on international voyages without a national registry.[25] And, the House of Representatives just passed the Coast Guard Authorization Act for FY2010 that included language directing the Secretary of Homeland Security to establish a Maritime Homeland Security Public Awareness Program, encouraging recreational and commercial boaters to improve awareness of activity in the maritime domain and report suspicious or unusual activity.[26]

Conclusions

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

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

1. "Friend or Foe? Tough to Tell", October 2008 *Proceedings,* U.S. Naval Institute, Annapolis, Maryland, *See* www.usni.org.
2. The requirements for commercial small vessels are described at length in the October 2009 issue of *Foghorn* magazine, a publication of the Passenger Vessel Association. *See* www.foghornmagazine.com.
3. The International Convention for the Safety of Life at Sea ("SOLAS"), adopted 1 November 1974, entered into force 25 May 1980, as amended by the International Ship and Port Facility Security Code ("ISPS"), entered into force, 1 July 2004. *See* www.IMO.org/Conventions.
4. The Marine Transportation Security Act of 2002, Pub.L. 107-295, was one of the first U.S. laws to address security requirements for large vessels, and is intended to implement the IMO's ISPS Code for large vessels.
5. "Terrorist Attack on *USS Cole:* Background and Issues for Congress," a CRS Report for Congress, Order Code RS20721, updated 20 January 2001.
6. "The United States warned the Indian government about a potential maritime attack against Mumbai at least a month before last week's massacre in the country's financial capital left nearly 180 dead, a U.S. counter-terrorism official told CNN." *See* http://www.cnn.com/2008/WORLD/asiapcf/12/01/india.attacks2/index.html.
7. DHS OIG-09-100.
8. *Supra* n.1 at 15.
9. Strategy at 15.
10. Strategy at 16.
11. *See* www.AmericasWaterwayWatch.org.
12. Strategy at 16.
13. Strategy at 17.
14. Strategy at 19.
15. Strategy at 20.
16. Strategy at 20.
17. *See* www.passengervessel.com.
18. GAO-04-408T, February 2004.
19. OIG Report at 17.
20. Idem.
21. "Non-Mandatory Guidelines on Security Aspects of the Operation of Vessels Which Do Not Fall Within the Scope of SOLAS Chapter XI-2 and the ISPS Code." I:\CIRC\MSC\01\1283.doc.
22. IMO Guidance, Annex at 5.
23. IMO Guidance, Annex at 6.
24. IMO Guidance, Annex at 20.
25. The Drug Trafficking Vessel Interdiction Act of 2008, Pub.L.110-407.
26. Sec. 1101 of H.R. 3619.

The Rotterdam Rules

By Thomas H. Belknap, Jr.

THOMAS H. BELKNAP, JR.

TBelknap@BlankRome.com

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

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

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

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

The Big Changes

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

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

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

2. Period of Responsibility. COGSA and the Hague Rules apply only "rail to rail," meaning only from the point of loading to the point of discharge from the vessel. A primary goal of the Rotterdam Rules, by contrast, was to embrace the modern development of "door to

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door" shipping, and they thus provide that the carrier's period of responsibility commences "when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered." (*See* Art. 12).

The Rotterdam Rules distinguish between "maritime performing parties", such as stevedores, and "non-maritime" performing parties, such as rail or motor carriers on a multi-modal transport. Carriers and maritime performing parties automatically benefit from the defenses and limitations of liability provided for in the Rotterdam Rules, whereas non-maritime performing parties will continue to be covered by existing forum law governing inland transport, such as the Carmack Amendment in the U.S. that governs interstate rail and road transport in many circumstances. For maritime performing parties, the Rotterdam Rules would effectively implement by statute what is already commonly accomplished by Himalaya clauses, and for non-maritime performing parties, the Rotterdam Rules would leave essentially untouched the existing law concerning the proper scope of applicability of Himalaya clauses.

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

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

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

5. Limitation of Liability. COGSA's "package" limitation of liability is $500 per package or "customary freight unit." Under the Rotterdam Rules, the limitation would be the greater of 875 "units of account" per package or "shipping unit" or 3 units of account per kilogram, unless the shipper declares a higher value and the carrier agrees to a higher limitation. (*See* Art. 59). The unit of account is the Special Drawing Right as defined by the International Monetary Fund. At today's exchange rate this is just over $1,400 per package.

While the Rotterdam Rules' package limitation amount is quite a bit higher than COGSA's, it will also be more difficult to break. Article 61 provides that the carrier shall be precluded from relying on the package limitation only where a loss resulted from "a personal act or omission … done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result."

In the U.S., the principle has developed in the case law that a "deviation" from the bill of lading would preclude the carrier's right to rely on the limitations of liability provided in COGSA. Article 24 of the Rotterdam Rules makes clear, on the other hand, that a deviation shall not deprive the carrier of any defense or limitation under the Rules. Article 25 of the Rotterdam Rules describes the circumstances where cargo may be carried on deck, however, and it adopts the U.S. "rule" that where the shipper and carrier expressly agree that cargo will be stowed below deck, the carrier's failure to comply with that requirement will deprive it of the right to limit liability under the Rotterdam Rules.

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

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

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

For the countries that adopt it, Chapter 14 provides a list of optional *fora* in which cargo interests in the liner trade may commence suit against the carrier even where there is an exclusive forum clause. This includes the carrier's domicile, the place of receipt or final delivery, the first port of loading or final port of discharge on the sea leg, or a place specified in the contract. In claims against maritime performing parties, such as stevedores, the claimant may sue in the port where that party provided its services in connection with the

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cargo. Adoption of Chapters 14 and 15 in the United States would thus represent–for the liner trade at least–the overruling of the Supreme Court's decision in a case known as *SKY REEFER* (*Seguros of Reaseguros, S.A. v. M.V. SKY REEFER,* 515 U.S. 528 (2995)), under which forum selection and arbitration clauses in bills of lading have regularly been enforced in the United States.

Claims under a charterparty would not be subject to this laundry list of possible alternate *fora*, nor would claims by holders in due course of negotiable bills of lading issued under a charter, so long as the bill adequately identifies "the parties to and the date of the charterparty or other contract" under which the transport contract was issued and incorporates "by specific reference the clause in the charterparty or other contract that contains the terms of the arbitration agreement." (*See* Art. 76(2)). A carrier may not, however, enforce an arbitration or forum clause in a charterparty bill of lading negotiated to a third party in the liner trade, nor may the carrier enforce an arbitration or forum clause in a charterparty bill of lading which is different from the arbitration clause in the charterparty. Forum and arbitration clauses in volume contracts, assuming they meet the Rotterdam Rule's criteria, would be enforceable.

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

Conclusion

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

Sources:

1. United Nations General Assembly Resolution 63/122, U.N. Doc. A/RES/63/122 (December 11, 2008): *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.*
2. *Report of the Working Group to the MLA Committee on Carriage of Goods on The Convention of Contracts for the International Carriage of Goods Wholly or Partly by Sea ("The Rotterdam Rules"),* February 20, 2009.
3. Sturley, *Modernizing and Reforming U.S. Maritime Law: The Impact of the Rotterdam Rules in the United States,* Texas International Law Journal, Vol. 44, No. 3, p. 27 (2009).