



Admiralty and Maritime Law Committee



SHIPPERS, FREIGHT FORWARDERS, NVOCCs, & CARRIERS, OH MY: WHAT COMPANIES AND COUNSEL SHOULD HEED PRE-CASUALTY TO PREPARE FOR POST-CASUALTY

By: Christopher R. Nolan & K. Blythe Daly¹

Despite the alleged softening of the maritime industry since 2008 – 2009, the volume of waterborne trade continues to rise. The ebbs and flows of the industry mean changing partnerships and alliances, more complicated logistics chains, increased customer demands, and added competition to retain market shares in the face of decreasing profit margins. When companies are focused on their bottom lines, a patchwork of understandings, partnerships, and daily practices between maritime shipping interests can emerge. The ambiguities in corporate relationships and weaknesses in internal practices may go unnoticed

during daily commercial transactions. But when disaster strikes, it is too late to discern the strength of your corporate documentation process and policies.

Continued on page 17

¹ Chris is a partner in *Holland & Knight's* New York office and a member of the firm's Litigation and Dispute Resolution practice. In 2016, Mr. Nolan was selected as co-chair to lead the firm's Transportation and Infrastructure Industry Sector Group. He can be reached at chris.nolan@hklaw.com. Blythe is a litigation attorney in *Holland & Knight's* New York office and a member of the firm's Maritime Practice Group and Transportation & Infrastructure Industry Sector Group. She can be reached at blythe.daly@hklaw.com. Chris and Blythe served as counsel for a party in *In re M/V MSC Flaminia* before obtaining dismissals from parties with claims. *Editors Note:* A version of this article was published by *Holland & Knight*.

IN THIS ISSUE:

- Shippers, Freight Forwarders, NVOCCs, & Carriers, Oh My: What Companies and Counsel Should Heed Pre-Casualty to Prepare For Post-Casualty 1**
- Letter From The Chair 3**
- Letter From The Editors 7**
- Trade Talk, Scott Reid, *Signet* 8**
- Learning to Love Blockchain Schooner Rather Than Later: Streamlining the Container Shipping Industry in the Wake of the *Glencore Heist* 11**
- Can a Preliminary Injunction or TRO Prevent the Enforcement of an Arbitration Agreement between a Seller of Marine Fuels and a Vessel Charterer? 12**
- The Cape Town Convention Has Proved Itself . . 13**
- 2017-2018 TIPS Calendar 27**

Chair**Raymond Waid**

Liskow & Lewis
701 Poydras St, Ste 5000
New Orleans, LA 70139
(504) 581-7979 EXT 2
rwaid@liskow.com

Chair-Elect**Sarah Gayer**

Thompson Bowie & Hatch LLC
PO Box 4630
Portland, ME 04112-4630
(207) 774-2500
Fax: (207) 774-3591
sgayer@thompsonbowie.com

Council Representative**Christopher Nolan**

Holland & Knight LLP
31 West 52nd St
New York, NY 10019-6111
(212) 513-3307
Fax: (212) 385-9010
chris.nolan@hklaw.com

Diversity Vice-Chair**Stephanie Penninger**

Benesch Friedlander Coplan Etal
One American Square, Ste 2300
Indianapolis, IN 46282
(317) 632-3232
Fax: (317) 632-2962
spenninger@beneschlaw.com

Law Student Vice-Chair**Cheryl Horn**

6150 Gulfport Blvd S, Apt 402
Gulfport, FL 33707
(727) 564-8912
chachacheryl@gmail.com

Past Chair**Jessica Link Martyn**

Link Martyn PLLC
1407 S Leithgow Terrace
Philadelphia, PA 19147
jmartyn@linkmartyn.com

Scope Liaison**Stacy Tees**

Goldberg Segalla LLP
1700 Market Street, Ste 1418
Philadelphia, PA 19103-3907
(267) 519-6818
Fax: (267) 519-6801
stees@goldbergsegalla.com

Vice-Chairs**Yaakov Adler**

80 Pine Street 25 Fl
New York, NY 10005-1759
(212) 381-3026
Fax: (212) 425-1901
adler@freehill.com

Peter Black

Flynn Delich & Wise LLP
1 World Trade Center #1800
Long Beach, CA 90831
peterfblack@gmail.com

Philip Brickman

Degan Blanchard & Nash
400 Poydras St, Fl 26
New Orleans, LA 70130-3245
(504) 529-3333
Fax: (504) 529-3337
pbrickman@degan.com

Attilio Costabel

Attilio M Costabel PA
600 Brickell Ave, Fl 17
Miami, FL 33131-3067
(305) 371-2618
Fax: (305) 667-3215
costabel@costabel.us

Michael Daly

Pierce Atwood LLP
72 Pine St, Fl 5
Providence, RI 02903
(401) 588-5113
mdaly@pierceatwood.com

K Blythe Daly

Holland & Knight LLP
31 W 52nd St, Fl 11
New York, NY 10019-6111
(212) 513-3570
Fax: (212) 385-9010
blythe.daly@hklaw.com

Robert Gardana

Robert L Gardana PA
12350 SW 132nd Ct, Ste 204
Miami, FL 33186-6458
(305) 358-0000
Fax: (305) 358-1680
rgardana@aol.com

Danielle Tamara Gauer

Chalos & Co, P.C.
2030 S. Douglas Road, Ste 117
Coral Gables, Florida 33134
(305) 377-3700 ext. 103
Fax: (786) 580-4671
dtg@miamimaritimelaw.co

Aaron Greenbaum

Pusateri, Barrios, Guillot & Greenbaum, LLC
1100 Poydras St, Ste 2250
New Orleans, LA 70163
(504) 620-2370
aaron.greenbaum@pbglaw.com

Kelly Haas

*American Steamship Owners
Mutual Protection and In
Shipowners Claims Bureau Inc*
2100 West Loop South, Ste 1525
Houston, TX 77027
(346) 223-9903
Fax: (409) 763-3853
kelly.haas@american-club.com

Christopher Hamilton

Shutts & Bowen
4301 W Boy Scout Blvd, Ste 300
Tampa, FL 33607
(813) 229-8900
Fax: (813) 227-8211
CHamilton@Shutts.com

Grady Hurley

Jones Walker LLP
201 Saint Charles Ave, 48th Fl
New Orleans, LA 70170-1000
(504) 582-8224
Fax: (504) 589-8224
ghurley@joneswalker.com

James Koelzer

Clyde & Co US LLP
633 West 5th Str, 28th Fl
Los Angeles, CA 90071
(415) 365-9800
Fax: (415) 365-9801

Donald Mau

Smiley Law Firm, LLC
365 Canal Street, Ste 1680
New Orleans, LA 70130
(504) 894-9653
Fax: (504) 561-6024
mau@smileyfirm.com

Christopher Nolan

Holland & Knight LLP
31 W 52nd St, Fl 11
New York, NY 10019-6111
(212) 513-3307
Fax: (212) 341-7237
chris.nolan@hklaw.com

Stephanie Propsom

826 N Duluth Pl
Sturgeon Bay, WI 54235-2959
(920) 743-5020
stephanie.propsom@hotmail.com

Giuseppe Rosa

*Giuseppe L Rosa Esq
& Associated Counsels*
4 Piazza G Fracastoro
Cavaion Veronese, VR 37010
39(3)35234529
Fax: 39(04)58031040
glrosa@glosalaw.com

Lindsay Sakal

3820 Brighton Ave
Oakland, CA 94602-1168
(551) 427-4270
LindsaySakal@hotmail.com

Kelly Scalise

Liskow & Lewis
701 Poydras St
Ste 5000 - 1 Shell Sq
New Orleans, LA 70139
(504) 299-6110
Fax: (504) 556-4108
ktscalise@liskow.com

Pamela Schultz

Hinshaw & Culbertson LLP
One California Street, Fl 18
San Francisco, CA 94111
(415) 263-8132
Fax: (415) 956-0439
pschultz@hinshawlaw.com

Membership Vice-Chair**Pamela Palmer**

Clark Hill LLP
1055 West Seventh St, 24th F
Los Angeles, CA 90017
(213) 417-5168
Fax: (213) 488-1178
ppalmer@clarkhill.com

Technology Vice-Chair**Christine Walker**

Fowler White Burnett PA
1395 Brickell Ave, Fl 14
Miami, FL 33131
(305) 789-9217
cwalker@fowler-white.com

*Former Chairs of TIPS AMLC

LETTER FROM THE CHAIR



As the 2016-17 ABA year closes out, it is customary to offer a “year in review.” Over the past year the committee has done an outstanding job of offering value to its members and advancing the practice of admiralty law. In addition to our routine monthly committee conference calls and quarterly newsletter, the committee produced two articles that were featured in the Tort Trial & Insurance Practice Law Journal: “Robins Dry Dock: A Time Charterer’s Dilemma”, Vol 52 Issue 1 (Fall 2016) and “Recent Developments in Admiralty and Maritime Law”, Vol 52 Issue 2 (Spring 2017). The committee also hosted a record number of regional events which offered substantive updates on maritime law and excellent networking opportunities:

- **October 2016:**

In person AMLC meeting at TIPS Fall Leadership Meeting followed by Committee dinner as well as a Boat Tour of Coronado (Coronado, California)



- **October 27, 2016:**

Presentation of Selected Works of the Tulane Maritime Law Journal Volume 41 (New Orleans, Louisiana)



- **November 10, 2016:**

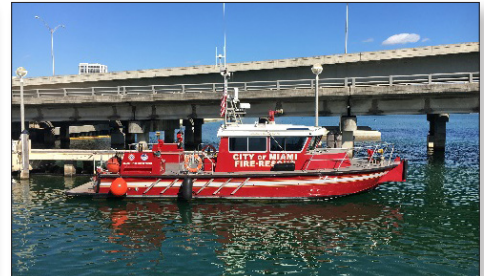
“Underway” A Maritime Safety and Networking Luncheon (Fort Lauderdale, Florida)



- **December 1, 2016:**
Best Practices in Maritime Investigations
(New Orleans, Louisiana)



- **January 31, 2017:**
Annual Admiralty Law Update and
Board Certification Review 2017
(Miami, Florida)



- **February 1, 2017:**
AMLC Boating Event in conjunction with ABA Midyear (Miami, Florida)
- **February 7, 2017:** Day at Lloyds III (New York, New York)



- **March 9, 2017:**
Diversifying Maritime Law
(Washington, DC)



- March 20, 2017:**
 Batten Down the Hatches: Navigating the Seas of 2017 Hot Maritime Topics Presentation
 (Stamford, Connecticut)



- March 16, 2017:**
 Presentation of Selected Works of the
 Tulane Maritime Law Journal Volume
 41 (New Orleans, Louisiana)

- April 26-29, 2017:**
 AMLC Dinner at TIPS Section Conference,
 AMLC in-person meeting at TIPS Section
 Conference and CLE at TIPS Section
 Conference entitled Anatomy of an Emergency
 Response: In-House Counsel, Government, and
 Insurance in the Golden Hour
 (Chicago, Illinois)

- **August 3, 2017:** Maritime Law Roundup (Houston, Texas)
- **August 11, 2017:** Marine Insurance Review (New York, New York)

In highlighting our commitment to the development of future maritime lawyers, we partnered again with Gard on the Law Student Writing Competition. Our winner received a cash prize, a reimbursed trip to an ABA TIPS meeting, and (most important) will travel to New York to spend a day with the good folks at Gard and learn about the inner workings of P&I Club claims management.

In addition to Gard, we owe thanks to the other fantastic maritime organizations and law schools that partnered with us and made the programming above a reality: The Maritime Law Association of the United States, WISTA, the Ft. Lauderdale Mariner's Club, the University of Miami Maritime Law Society, Tulane Maritime Law Journal, the Admiralty Law Section of the Federal Bar Association, and the Florida Bar Admiralty Law Committee.

While we did a great deal of good work this year, I remain most proud of our continued commitment to diversity and inclusion. Our leadership is one of the most diverse that you will find in our maritime community. That diversity is also reflected in the speakers and authors in our programming. Our hope as a committee is that committee members and non-member maritime lawyers see themselves reflected in our leadership, and feel welcome to join in our legal community. I am confident that our committee will continue in our effort to be the leading U.S. maritime law organization when it comes to diversity.

I would like to close by noting that TIPS recently asked me to complete a lengthy questionnaire summarizing our work and advocating for an award. One of the questions stood out:

“Describe the efforts made by Committee leaders to insure that the work or initiatives of the Committee are completed, i.e. the personal sacrifice by a member of a Committee with regard to the initiatives or work of the Committee.”

My response:

“Our committee members are full-time lawyers and leaders in the maritime bar. Most of them are married, and many of them have children. All of them face the crushing weight of billable hour requirements and business generation demands. These are people who have no free time but nevertheless find time. The programming outlined in this memorandum could not have been completed without the personal and professional sacrifice of our committee leadership. Our team displays an amazing esprit de corps and commitment to accomplishing committee goals. They are ballers.”

Thank you for the privilege of chairing this committee over the past year. Sarah Gayer, you have the conn. Drive it like you stole it. [👉](#)

Raymond T. Waid, *Liskow & Lewis*
701 Poydras Street, Suite 5000
New Orleans, LA 70139

VISIT US ON THE WEB AT:
www.ambar.org/tipsadmiralty

LETTER FROM THE EDITORS



It is our pleasure to present the TIPS AMLC Spring Newsletter, featuring a lessons learned piece for shipper/freightforwarder/NVOCC/carrier issues, our law student writing competition winner as to the maritime industry embrace of blockchain technology, a recent decision concerning the enforcement of arbitration agreements, and a consideration of using the Cape Town Convention as a template for maritime liens. Our quarterly Trade Talk piece features Scott Reid, Counsel at Signet for a wide ranging discussion.

We are currently looking for submissions for the next newsletter, and encourage committee members and non-members alike to submit article proposals directly to us at chris.nolan@hklaw.com; CHamilton@shutts.com; and knoll@chaffe.com. Thank you to the authors who have contributed to this newsletter, and to the section members for their ongoing efforts in supporting this publication. ⚖️



Chris Nolan, Managing Editor

Chris Hamilton, Laura Beck Knoll, Associate Editors

©2017 American Bar Association, Tort Trial & Insurance Practice Section, 321 North Clark Street, Chicago, Illinois 60654; (312) 988-5607. All rights reserved.

The opinions herein are the authors' and do not necessarily represent the views or policies of the ABA, TIPS or the Admiralty and Maritime Law Committee. Articles should not be reproduced without written permission from the Copyrights & Contracts office (copyright@americanbar.org).

Editorial Policy: This Newsletter publishes information of interest to members of the Admiralty and Maritime Law Committee of the Tort Trial & Insurance Practice Section of the American Bar Association — including reports, personal opinions, practice news, developing law and practice tips by the membership, as well as contributions of interest by nonmembers. Neither the ABA, the Section, the Committee, nor the Editors endorse the content or accuracy of any specific legal, personal, or other opinion, proposal or authority.

Copies may be requested by contacting the ABA at the address and telephone number listed above.

Hypertext citation linking was created with [Drafting Assistant](#) from Thomson Reuters, a product that provides all the tools needed to draft and review – right within your word processor. Thomson Reuters Legal is a Premier Section Sponsor of the ABA Tort Trial & Insurance Practice Section, and this software usage is implemented in connection with the Section's sponsorship and marketing agreements with Thomson Reuters. Neither the ABA nor ABA Sections endorse non-ABA products or services. Check if you have access to [Drafting Assistant](#) by contacting your Thomson Reuters representative.

TRADE TALK

For our quarterly “Trade Talk” piece, we are pleased to spotlight *Scott Reid*, counsel at *Signet Maritime Corporation*. Signet is a diverse international marine transportation and logistics services company. Since 1976, Signet has specialized in cargo handling, towing and tugboat services, ship management and vessel design, with concentration in the Americas, Africa and the Middle East. Below are excerpts from our interview with Scott which address his views on the maritime industry, issues concerning the hiring of outside counsel, and dreams of the Houston Astros in the World Series.

Q. *Scott, tell us what prompted you to get into the maritime legal industry?*

R. I never intended to be a maritime attorney. My interests were—and still are—the intersection of law and economics. I attended Tulane University Law School, and because Tulane has an exceptional maritime law program with top-notch faculty and an active alumni network, I enjoyed exposure to many maritime law luminaries while I was a law student. Their consideration of cutting-edge ideas in maritime law brought the topic to life for me, and issues such as contractual risk shifting in vessel charters and the commercial strategies that arise out of the industry’s high barriers of entry were interesting applications of microeconomic theory that piqued my curiosity and steered me toward the maritime bar after law school.

Although my academic interest in maritime law made the practice appealing, I was equally drawn to maritime law because of the professionalism of the maritime bar. During a law school summer as an extern in the U.S. District Court for the Eastern District of Louisiana, I noted the exceptional civility between attorneys in the maritime bar, and I am happy to report that I have found that same civility here in Houston.



Q. *Can you describe your experience of working at Signet Maritime as counsel?*

R. Signet’s administrative staff is small, and our duties and influence extend far beyond our titles. In addition to legal matters, I am involved in decisions that address vessel operations, accounting and finance, HR, and business development. Within Signet’s legal sphere, my exposure also covers a broad range of issues. As Signet’s sole in-house counsel, I see the full spectrum of legal issues faced by an international maritime transportation and logistics company: vessel charters, fleet mortgages, asset purchase agreements, vessel construction agreements, insurance policies, real estate leases, personal injury claims, commercial disputes, bankruptcy proceedings, regulatory matters, etc.—the list grows more every day. I enjoy the challenge of maintaining competence in such a broad range of legal issues, and I devote a substantial amount of time to CLE that helps me be prepared to meet Signet’s legal needs.

Q. *What are your views on hiring outside counsel?*

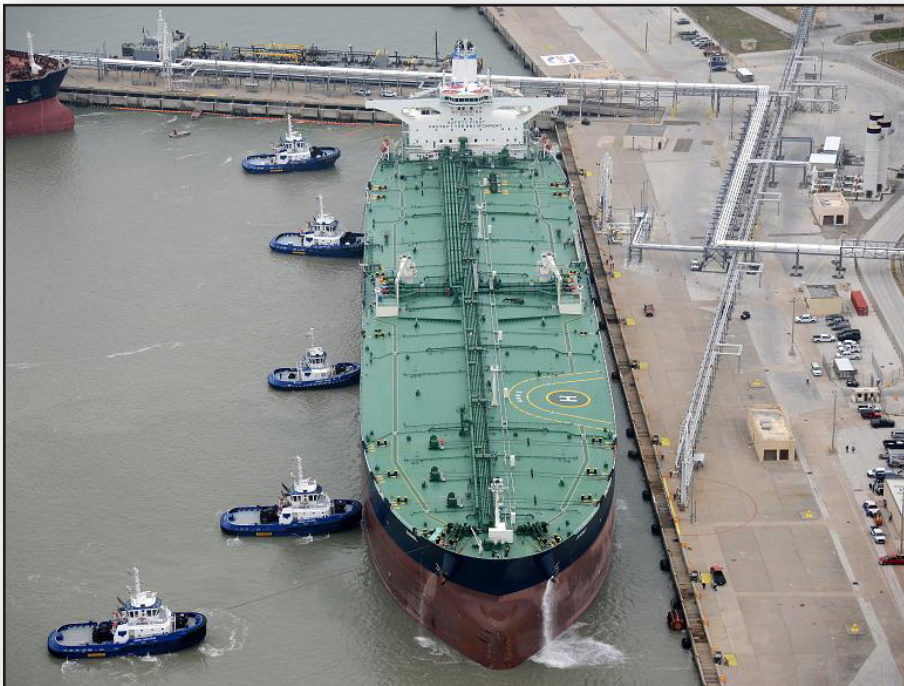
R. Although I am the only attorney employed by Signet, I have benefitted from access to a very well regarded maritime attorney that Signet has engaged

on a retainer basis for decades. My contributions to Signet are profoundly enhanced by my 24/7 access to my retainer counsel because his legal expertise makes him a reliable resource for quality control of my work, his decades of service to Signet make him a cornerstone of Signet's institutional memory, and his diverse practice exposes him to the interplay between legal issues that I could not fully appreciate from my position within Signet. I would recommend engaging good outside counsel on a retainer basis to any in-house attorney with a small in-house legal team.

Aside from Signet's retainer counsel, I hire outside counsel when I do not have the subject matter expertise to provide the best counsel to Signet, or when limitations of my own availability could put the result of a legal matter in jeopardy. Regardless of my motivation for engaging outside counsel, I expect my counsel to give honest evaluations of how they anticipate their lawsuit or negotiation to resolve, provide regular and meaningful updates, manage their own calendar, and exercise common sense about which issues merit billing substantial amounts of time.



With regard to the importance of honest counsel and regular communication, Signet's decision to engage the same counsel on a repeat basis hinges upon the perceived effectiveness of the attorney and the reasonableness of that attorney's fees for the counsel provided. Attorneys understand that a slightly negative outcome that averts disaster can be a huge legal success, and I can only manage internal expectations at Signet so that Signet's management appreciates the success of an averted disaster if my outside counsel communicates honestly and clearly with me throughout an engagement. As a result, good communication, even for bad cases, helps Signet to see the value of outside counsel and increases the likelihood that Signet will engage that same attorney again in the future.



Q. What legal issues are coming across your desk with some frequency these days?

R. The noteworthy legal issues that I see largely stem from the current distress of the offshore energy market. The U.S. flagged tug market is increasingly competitive, and I have had to coordinate with Signet's underwriters more frequently to confirm that they will respond to claims governed by provisions in vessel charters that I would have struck a few years ago. Also related to insurance, many of Signet's customers now rely on Signet to serve as their proxy maritime departments, and we

have had to coordinate with our insurers to ensure that our policies are broad enough to cover the full spectrum of logistics and professional services that our customers ask us to provide.

I also address insolvency concerns very frequently. Signet has had several customers file for bankruptcy protection, and I have worked with bankruptcy counsel to minimize the financial disruption of these bankruptcy filings. We are increasingly careful in our evaluations of the creditworthiness of new customers, and when we enter into charters, we use newly tightened language with regard to maritime lien rights. Conversely, as an owner of U.S. flagged tugs and barges in the distressed U.S. Gulf of Mexico market, Signet encounters scrutiny of its financial wherewithal from some prospective customers, and I have negotiated a staggering number of non-disclosure agreements that are a prerequisite for Signet sharing its confidential financial information as assurance of the company's financial strength. Despite Signet's financial strength, some prospective customers demand sureties for Signet's performance, and I work closely with Signet's banks to evaluate these demands.

Q. For our practitioners, which maritime event(s) do you get the most out of?

R. The Liskow & Lewis Oilfield Indemnity and Insurance Seminar is a superb resource.

Q. In addition to the AMLC newsletter, of course, which maritime publication do you find most useful?

R. The Tulane Maritime Law Journal is a helpful resource for important court decisions and new ideas, and the annual "Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits" by David Robertson and Michael Sturley in the Journal's summer publication is essential reading for me. I also take a few hours every month to review the AMC cases under review for publication.

Q. Thank you for taking time to speak with us today. As a final question, who will win more playoff games in the 2017 season, the Astros, Rockets or Texans?

R. I am a lifelong baseball fan. Go Astros! ⚾

Benefits of AMLC Membership

Opportunities To Become Involved

- Publication in the AMLC Newsletter or TIPS Law Journal
- Networking Opportunities
- CLE and Webinar Opportunities
- Leadership Positions
- Mentoring Relationships
- Young Lawyers and Law Student Writing Competition

Additional Information

For more information regarding the benefits that membership in the AMLC can provide to you, check out our webpage at <http://ambar.org/tipsadmiralty> and join our group on LinkedIn. The Committee is open to all, including non-lawyer maritime professionals, law students and lawyers in every practice area who want to keep abreast of developments in the field.



LEARNING TO LOVE BLOCKCHAIN SCHOONER RATHER THAN LATER: STREAMLINING THE CONTAINER SHIPPING INDUSTRY IN THE WAKE OF THE *GLENCORE* HEIST¹

By: Allison N. Skopec

I. Introduction

Economic globalization in the mid-twentieth century created a heightened need for logistical efficiency, precision, and security, which incentivized most industries to replace costly paper processes with electronic equivalents.² However, while the maritime industry adopted elements of “e-commerce” to facilitate trade by sea, it still lags behind other transportation sectors in comparison.³ This is counterintuitive in light of the international nature of shipping, which would greatly benefit from streamlining operations through implementing cutting-edge electronic systems. Regardless, the maritime industry’s most pressing concerns appear to base themselves in the uncertainty surrounding the legality of electronic alternatives. Such uncertainty is only exacerbated because the domestic legal regimes of various maritime jurisdictions recognize electronic equivalents to traditional paper documents in conflicting ways. Consequently, where a court may recognize an electronic alternative in one jurisdiction, it does not necessarily follow that the same result would occur in another forum.

For instance, *Glencore International AG v. MSC Mediterranean Shipping Co. (The “MSC Katrina”)* exposed the shortcomings of the Electronic Release System (ERS) used by the Port of Antwerp.⁴ The ERS generated a PIN code via Electronic Data Interchange

(EDI) technology, which the consignee normally used to pick up its cargo containers. However, before the cargo was picked up by the consignee, a third party gained access to the PIN code and misappropriated two of the three cargo containers. Thus, the issue in *Glencore* hinged on whether the ERS constituted a legal equivalent to a delivery order.⁵

The Queen’s Bench Division of the High Court of Justice (Commercial Court Subdivision) (Queen’s Bench) held that that the ERS was not the legal equivalent of a delivery order in this instance. This illustrates the need for a uniform electronic system and a strong legal framework to handle it. The threat of cyber attacks looms ever-present as segments of the maritime industry digitize and automate. EDI, through a Blockchain manifestation, is a solution to the current security, efficiency, and precision concerns appearing across the shipping community. However, industry-wide support and universal adoption is necessary for Blockchain’s digital ledger system to succeed.⁶

II. EDI and its Maritime Applications

EDI is a broad term for different types of electronic messages transmitted between two or more computers that exchange business data in standardized formats.⁷ EDI systems replace postal mail, fax, and email by eliminating the human element required for each

Continued on page 18

¹ Allison Skopec is a second-year law student at Tulane University Law School in New Orleans, LA. She received a dual degree in environmental studies and studio art from Trinity University in San Antonio, TX. Allison hopes to incorporate admiralty law and developing technology into her future practice. For questions or comments, the author can be reached at askopec@tulane.edu. *Editors Note: Allison’s article is the winning submission for the 2017 ABA TIPS AMLC/GARD N.A. Law Student Writing Competition.*

² Gerrit K. Janssens, *The Life Cycle of Electronic Data Interchange: Emergence from the Dust till a Doubtful Survival in the Future*, TRANSPORTATION RESEARCH INSTITUTE (IMOB), 1, 2 (2011). Transportation is the largest component of total logistics costs within the global supply chain. Lack of synchronization between documentation in different industries led to the “immobilization of goods at various links in the supply chain,” which created an urgent need to line up documents of goods stream with the goods flow in international trade, as well as the need “to speed up the whole process by automation . . . electronic data interchange standardization and simplification of trade procedures and documents.” *Id.*

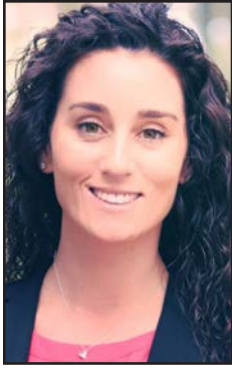
³ *Id.*

⁴ [2015] EWHC 1989 (Comm), [2015] 2 Lloyd’s Rep. 508 (Eng.), 2015 WL 4172853

⁵ *Id.* at [5], [2015] 2 Lloyd’s Rep. at 509.

⁶ Hariesh Manaadier, *What is EDI and What is the Importance of EDI in Current Day Shipping..??*, SHIPPING & FREIGHT RESOURCE (Feb. 1, 2010), <http://shippingandfreightresource.com/what-is-edi-and-what-is-the-importance-of-edi-in-current-day-shipping/>.

⁷ The two types of EDI standards are “proprietary standard . . . [which is] developed for a specific industry [and] public standard, [which is] developed for use across one or more industries.”; *What is the Difference Between EDI and Non-EDI and between Content-based and Context-based Routing?*, IBM (Feb. 17, 2017), https://www.ibm.com/support/knowledgecenter/temp_sterlingb2cloud/com.ibm.help.scnoverview.doc/SCN_What_is_the_diff_between_EDI_and_non_EDI.html.



CAN A PRELIMINARY INJUNCTION OR TRO PREVENT THE ENFORCEMENT OF AN ARBITRATION AGREEMENT BETWEEN A SELLER OF MARINE FUELS AND A VESSEL CHARTERER?

By: Danielle T. Gauer, Esq.¹

It is not surprising that arbitration has been embraced by the maritime industry as the preferred method to resolve maritime disputes. Arbitration offers several advantages, specifically, increased cost savings and more efficient resolution of disputes. When parties contractually agree to arbitrate their disputes, the courts tend to uphold these clauses or agreements and refer the parties to arbitration. This rationale is in line with the underlying policy goal of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter The New York Convention).²

When an enforceable arbitration provision exists and a district court issues an order to arbitrate the dispute, one of the parties may seek a preliminary injunction or temporary restraining order (“TRO”) in order to maintain the status quo during arbitration. The goal of a TRO is not to determine whether any particular person’s rights have been violated, but rather to prevent a future wrong or injury from occurring.³

The recent April 25, 2017 opinion of the United States District Court for the Southern District of New York in *Integr8 Fuels Inc. v. Daelim Corp.* looks at whether a preliminary injunctions and/or TRO can be granted to a party to enjoin the other from pursuing arbitration altogether, despite there being an operative arbitration agreement. To understand the facts of this case, it is important to have a basic understanding of the marine bunkering business and how it operates.

The marine bunkering business involves the participation of different stakeholders. The participants in the bunker supply chain include the charterer, the

contracted bunker supplier, a physical bunker supplier, and ultimately the ship owner. The charterer of the vessel is typically responsible for entering into contracts for the supply of bunkers to the vessel. These contracts tend to give rise to a number of challenges to charterers, owners and the actual sellers of the bunkers.

Here, the defendant, Daelim, entered into a charter party agreement with Korea Line Corporation, the owner of the vessel M/T DL NAVIG8 (the “Vessel”). Consistent with the standard terms of any charter party agreement, Daelim was to keep the vessel free of liens. Daelim as the charterer contracted with Grace Young International, Ltd. (“Grace”) to provide fuel to the vessel in Hong Kong. Between Grace’s transaction with Daelim a number of intermediaries were involved. Grace contracted with Hitec who in turn contracted with Dynamic Oil Trading Pte Ltd. to provide the bunker stem. This was the point when the plaintiff, Integr8, became involved.⁴ The contract between Integr8 and Dynamic included General Terms and Conditions. One condition was that “[a]ny dispute arising under, in connection with or incidental to this Contract shall be heard and decided at New York City, New York State, by three person.”⁵ When Integr8 was not paid for the bunker stem it supplied to the Vessel, it filed an action against both Maritime and Dynamic for breach of contract. The Vessel was subsequently arrested pursuant to the Dubai court order. The case was subsequently dismissed following the payment by Maritime of the amount claimed.⁶ Upon hearing of Integr8’s claim for non-payment, Daelim was notified by the Vessel’s owners that they would seek damages against Daelim as a result of the arrest.

Continued on page 26

¹ Associate Attorney at Chalos & Co. P.C., International Law Firm (Miami, Florida); Vice-Chair, Admiralty & Maritime Law Committee; JD/LL.M Maritime Law, University of Miami School of Law; JD University of Ottawa Faculty of Law; Called to the Bar of Ontario, Canada and member of the Law Society of Upper Canada.

² In particular Article 2(3) states that courts must “The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

³ See for example, *CONTICHEM LPG v. Parsons Shipping Ltd.*, 170 F. Supp. 2d 416 (S.D.N.Y. 2001), an arbitration proceeding where the court granted defendant’s motion for reimbursement of the costs it sustained following the issuance of a TRO on behalf of the petitioner. The TRO was meant to preclude certain entities from transferring any of the defendant’s funds or assets, pending an order of maritime attachment and garnishment.

⁴ Dynamic entered into a contract with Integr8 to provide the bunker stem in Hong Kong.

⁵ *Integr8 Fuels Inc. v. Daelim Corp.*, No. 1:17-CV-02191-LTS, 2017 WL 1483326 (S.D.N.Y. Apr. 25, 2017) at 3. The contract also identified as the “Buyer” “jointly and severally owners/managing owners/operators/managers/disponent owners/charterers”.

⁶ This case is currently on appeal.



The Cape Town Convention has proved itself as the new innovation that has created a global legal regime for recognition and enforcement of security over aircraft. Could this regime be extended to ships in order to solve the current challenges caused by the lack of international rules regarding security in shipping?

By: Ingar Fuglevåg¹

Current challenges with international recognition and enforcement of mortgages on ships – is the solution found in the aviation sector?

Introduction

Having practised both as a shipping lawyer and an aviation lawyer for many years, I do find the experience and practice with the Cape Town Convention and aviation finance transactions to be interesting when experiencing the challenges faced by the shipping industry with respect to recognition and enforcement of mortgages. The shipping industry does not have a global legal regime governing these issues in the same way as the aviation industry, and when looking at the OSX-3 matter from last year, where the Brazilian courts have set aside the Liberian first priority mortgage, the need for a global legal regime becomes quite evident.

The fact that the shipping world is yet to adopt an international legal scheme governing recognition and enforcement of rights in ships and offshore units is complicating the financing of such objects, and the mentioned court case in Brazil has cast a shadow over the Brazilian offshore sector which should trouble the international banking community. In this brief article I would like to discuss a little more in detail the challenges caused by the Brazilian judgment and how these challenges could be solved by looking towards the aviation finance sector and the Cape Town Convention.

The OSX-3 concerns a FPSO which was owned by a Dutch company and chartered to an affiliated Brazilian company. The OSX-3 was registered with the Liberian Ship Registry and its financing with bondholders represented by Nordic Trustee was secured by a Liberian law mortgage. The mortgage was registered with first priority with the Liberian Ship Registry. The vessel was operating in Brazilian waters.

Whilst the vessel was in Brazil, an unsecured creditor brought a claim against the vessel and argued that the first priority mortgagee did not have a secured claim. Both the first instance and appeal court decisions upheld the claim made by the unsecured creditor. This seems to indicate that the Brazilian Courts rejected the Liberian mortgage as a first priority mortgage – something which of course is devastating to the bank with the secured claim, but also to the entire ship finance world. The Brazilian Courts seem to have attached importance to the fact that there was no legal treaty in place between Liberia and Brazil governing recognition and enforcement of mortgages. The reason for addressing this case is only to illustrate the need for an international legal regime regarding recognition and enforcement of mortgages, and I am not doing any more detailed analyses of the Brazilian judgments in this article. The matter was settled early this year, and we will probably not have the benefit of any further hearing of the Brazilian courts on this case.

The OSX-3 case is probably the best example of the need for a global legal regime governing recognition and enforcement of ship mortgages, but it is not the only example. Food for thought should also be the recent Hanjin bankruptcy. Hanjin was a South Korean container line with more than 100 vessels in operation when it went into insolvency. This kind of international insolvency with ships in many different jurisdictions with different legal regimes unsurprisingly resulted in chaotic situations all over the world where some vessels were seized by authorities and creditors, and others refused entry to ports unload after Hanjin lost its support of the banks. This kind of international insolvency opens the door for forum shopping, as all creditors are seeking the best jurisdiction to enforce its individual security.

¹ Ingar Fuglevåg is a partner at *Simonsen Vogtviig* in Oslo, Norway. He may be contacted at ifu@svw.no. *Editor's Note:* A version of this article appeared in the firm's ebulletin to clients.

By referring to the OSX-3 case and the Hanjin bankruptcy, I am trying to highlight the legal challenges caused by the lack of a global regime governing recognition and enforcement of security, which leads to legal uncertainty and unnecessary problems for the banks. It is in this context I believe it is helpful to look towards the aviation finance sector and what has been achieved by the Cape Town Convention.

The Cape Town Convention

The convention was signed in Cape Town in November 2001. The convention itself is a general convention which sets out rules for security in mobile assets. However, the convention needs to work together with a protocol which sets out more specific rules for the type of asset in question.

Currently, there exist three different protocols – governing security over

- Aircraft Equipment (airframe and engines)
- Railway Rolling Stock
- Space Assets

As of today, the only protocol in force is the Aircraft Protocol, which was ready together with the convention back in 2001. However, rumours have it that the work with getting sufficient countries to sign up for the protocol regarding Railway Rolling Stock is far advanced, and we may see the light of a new international rail registry, said to be placed in Brussels, in the not so distant future.

The convention has been ratified by 72 countries, and 65 countries have also ratified the Aircraft Protocol. The Convention and the Aircraft Protocol have been in force in Norway since 2011. With the ratification of Canada in 2013, UK, Egypt and Australia in 2015 and Spain, Denmark and Sweden in 2016, the Convention and the Aircraft Protocol now cover the majority of countries involved in larger aviation finance transactions, and is applicable for the vast majority of transactions today.

As a result of this, we have had a fully working International Registry for security over aircraft since 2006. The registry is placed in Dublin, and is a modern registry where all entries are made electronically. No physical documents are being filed with the registry, and users of the registry need to register and be approved users of the registry. Everything happens online.

What takes place in practice is that the creditor who wants to register security over an aircraft makes the filing on line with the registry. This will create a request

to the airline to log on to the web site of the registry and accept the filing. It is only after the airline has accepted the filing that the registration of the mortgage becomes effective. Users of the registry may also search for aircraft and see which security have been registered on each individual aircraft.

The really great advantage to the Cape Town Convention and the Protocol is that security registered over the aircraft may be enforced in all countries that have ratified the convention. It is true that there have been a couple of issues, e.g. in India and the implementation in Spain, but it is fair to say that in practice we now have one reliable global system when it comes to security over Aircraft.

This is an enormous advantage for banks providing security worldwide – and for the airlines needing third party financing. Such global and uniform system is quite different from the situation with respect to financing ships, where the enforcement of security may vary from each jurisdiction.

From the banks perspective, there are two additional features of the convention which provides for a safe environment with respect to enforcing the security, namely the self-help remedy and the maximum stay period of 60 days in case of insolvency. These two features are options the ratifying countries have to choose, and are key elements in the OECD discount for export financing which may be available for airlines purchasing aircraft.

The self-help remedy means that the security may be enforced without any assistance from the courts in case of enforcement. In those countries having signed up for this option (including all the Scandinavian countries), the mortgagee does not need to go to the local courts in order to obtain a decision giving him the right to enforce the security over the aircraft. The local authorities would also be under an obligation to assist with the repossession and export of the aircraft.

The second feature that speeds up matters is the maximum stay period. In case of insolvency of an airline, the bankruptcy estate will normally seize all assets of the airline, and to start with, this may also include aircraft and engines over which security has been registered. In countries which have incorporated the provision of a maximum stay period, this means that the bankruptcy estate would be obliged to hand out the secured object to the creditor within a period of 60 days.

Having participated in numerous aviation finance transactions the last ten years, I am confident that the ratification of the Cape Town Convention has become a very important tool for aircraft financing, and has created a safe environment for banks in many different jurisdictions where the banks may have been more cautious with providing financing if it has not been for the Convention. This has been particularly important for start-up airlines with a delivery programme of new aircraft that has to be financed.

The Cape Town Convention and shipping

This brings me to my final question; to what extent may the ship finance community benefit from the Cape Town Convention and the practice found in the aviation finance sector?

From a legal or technical point of view it is fully possible to see the Cape Town Convention as the solution. When the Convention was drafted, it was initially discussed whether it should aim for covering security over ships as well, but this was thought not to be realistic by its drafters (UNIDROIT). It was argued that the preparation of international rules governing ships and shipping was traditionally the preserve of specific international organisations with full participation of shipping circles. Moreover, there was concern about possible conflict with already existing conventions.

This decision not to include ships in the Convention is most likely not due to any severe difficulty in drafting the necessary legislation, as all that it is needed is probably some small amendments to the Convention itself together with a new Protocol that governs security over ships. Regardless of existing national ship registries, which would need to continue to exist for registration of the ship itself and legislation following the flag of the ship, it should be fully possible to establish an international registry with respect to security over the ships in the same way that has been done with Aircraft.

In my opinion, the reason for the extension of the Cape Town Convention to shipping not being far advanced, is two folded. Firstly, previous attempts of establishing international conventions regarding mortgages and liens on ships have not been very successful. There have been several attempts since 1926, and the latest attempt is the 1993 Geneva Convention on Maritime Liens and Mortgages. However, this convention has not achieved any widespread acceptance, and has not been ratified by the major shipping nations. One of the

reasons for this is the lack of international uniformity when it comes to maritime liens, i.e. claims to which a statutory security is being attached, e.g. crew claims. The 1993 Geneva Convention does also only address the question of recognition of mortgages and liens, and does not deal with the question of enforcement. This is a big difference from the Cape Town Convention which also establishes international rules regarding enforcement of the security.

Secondly, and probably the main obstacle against a swift acceptance of the Cape Town Convention in the shipping community, is the fact that the Convention is quite unknown among the players in the shipping community. The players in the aviation finance transactions, including banks and lawyers, are normally others than those dealing with ship finance transaction. I therefore believe that it is important to start marketing the Cape Town Convention in the ship finance community if we are going to see any real progress with respect to adopting the Convention.

Traditionally, new international shipping legislation has come from within, e.g. from organisations like CMI (Comite Maritime International), and CMI has traditionally worked on drafting new legislation on its own, rather than adopting existing conventions. However, CMI has established a working group that is looking at the Cape Town Convention. Perhaps this is the start of a new era with respect to secured ship finance transactions? The Convention has quickly been internationally accepted in the aviation sector, and one of the reasons for this is probably the regime of discounted export credit financing to countries which has adopted the Convention in the most creditor friendly manner. This system is probably more difficult to establish with respect to ships, as ships are built in many jurisdictions around the world, not only by 3-4 manufacturers as with commercial aircraft.

Nevertheless, I am of the opinion that extending the Cape Town Convention to shipping would be a great advantage to both banks and shipowners. The current market for secured finance in shipping is enormously huge, and this market is traditionally riddled with difficulties stemming to a large extent from an unsatisfactory legal framework, especially as regards differences between the legal systems concerning the use and status of security in cross-border business. This is where the Cape Town Convention can be tool for solving these problems. ⚖️



- Learn:

Absorb over 25 hours of CLE from distinguished panelist including prominent judges and leading in-house and corporate counsel.

- Celebrate:

Honor 85 years of excellence and professionalism in the industry at the highlighted social event - the TIPS Gala Night.

- Network:

Expand your circle at our complimentary nightly networking receptions.

- Join:

Become involved with our 31 practice-specific committees for professional development and leadership opportunities.

- Enjoy:

Explore Los Angeles and the sunshine state with colleagues, new and old.



americanbar.org/tips

SHIPPERS, FREIGHT...

Continued from page 1

Disaster did strike on July 14, 2012, when an explosion and fire broke out aboard the M/V MSC FLAMINIA (the “Vessel”) in the Atlantic Ocean (the “Incident”). The Incident caused loss of life and significant damage to the Vessel and cargo estimated at \$275 million. In the subsequent five years, actions were initiated in various international jurisdictions in an effort to determine liability, compensate the decedents’ families, and recover for cargo loss and damage. The Vessel’s owner filed the principal Limitation of Liability Act² suit in the United States District Court for the Southern District of New York.³ To date, the action has required two full years of fact discovery, over a year of expert discovery, and four different Judges to adjudicate disputes. Several opinions have been issued, most recently in *In re M/V MSC Flaminia*⁴, where the court granted in part and denied in part a freight forwarder’s motion for summary judgment.

We first consider the types of claims and potential defenses a freight forwarder may be subject to in a marine casualty of the this magnitude. We then address the *MSC Flaminia* ruling and suggests certain steps shippers, freight forwarders, NVOCCs, and carriers can take now to better prepare for a marine casualty.

The Cargo Goods Document Chain

There are numerous companies and documents involved in the cargo logistics process before cargo is placed aboard a vessel. While the types of documents and responsibilities of parties vary depending on the goods being shipped, we will use the example of a dangerous goods chemical cargo like the one at the center of the *MSC Flaminia* dispute.

The documentation process from the booking to the Vessel’s departure is quick. Generally, the cargo shipper sends a booking request, together with cargo instructions, to the non-vessel operating common carrier (“NVOCC”) and the freight forwarder. The NVOCC, in turn, books the cargo with the ocean carrier. The NVOCC, after confirming the booking

with the ocean carrier, provides the shipper with a booking confirmation. The shipper then sends the freight forwarder its letter of instruction for preparation of the express bill of lading, the commercial invoice, and certificate of origin. The letter of instruction typically provides chemical product handling warnings.

Upon receiving the shipper’s letter of instruction, the freight forwarder generates the master bill of lading (or master bill of lading instructions).⁵ The freight forwarder also enters the information into the federal government automatic exporting system which provides a control number for the shipments which is subsequently affixed to documents. The freight forwarder then sends the master bill of lading to the NVOCC who in turn prepares the draft express bill of lading. The express bill of lading is sent by the NVOCC to the ocean carrier who in turn creates the Sea Waybill.⁶

Cargo Breaking Bad and the Legal Claims That Follow

Not all cargo container shipments have happy endings. When an incident occurs, potential causes of action against a freight forwarder (and other cargo supply chain parties) include negligence, breach of contract, strict liability, and indemnity. As in the *M/V Flaminia* action, we focus on the negligence claim under federal maritime law as it covers a broad range of circumstances and factual scenarios.

a. Negligence

In a maritime casualty action, claimants will allege negligence under a variety of theories: general negligence, negligent failure to warn, and negligent misrepresentation. In order to succeed on a general negligence cause of action, claimants must show: (1) a duty (ie. to warn), (2) a failure or breach of that duty, (3) causation, and (4) damages.⁷ The existence of a duty is a question of law. *Id. at 502*. While the *shipper* of a cargo may have a duty (under COGSA) to warn the ship owner “of the foreseeable hazards inherent in the cargo of which the ... ship’s master could not reasonably have been expected to be aware,”⁸ a freight forwarder has no such duty as a matter of law.

² Shipowner’s *Limitation of Liability Act* (Limitation Act), 46 U.S.C. § 30501 et seq.

³ Trial is scheduled to begin September 11, 2017.

⁴ -- F. Supp. 3d --, No. 12-cv-8892, 2017 WL 239384 (Jan. 18, 2017 S.D.N.Y. 2017).

⁵ Different companies use different nomenclature to explain the documents prepared.

⁶ Additional important documents created by companies throughout this process may include the Material Safety Data Sheet, the Dangerous Goods Declaration, the Certificate of Origin, and the Certificate of Analysis.

⁷ *Smith v. Mitlof*, 198 F. Supp. 2d 492, 501 (S.D.N.Y. 2002).

⁸ *Contship Containerlines, Ltd. v. PPG Industries, Inc.*, 442 F.3d 74, 78 (2d Cir. 2006).

Articulating a negligent failure to warn theory under federal maritime common law is difficult when the claims against a freight forwarder do not concern The Carriage of Goods By Sea Act (“COGSA”) or products liability. A freight forwarder is not the chemical product manufacturer nor is it the shipper.⁹

A claim for negligent misrepresentation requires a showing that (1) defendant made misrepresentations of fact which it knew or should have known to be false, (2) defendant knew the recipient of the alleged misrepresentations would have relied upon the statements made, (3) there was justifiable reliance on the statements, (4) which reliance resulted in damages.¹⁰ When a freight forwarder does not make any representations to claimants concerning bill of lading instructions, claimants cannot allege they relied upon the same.

In marine casualty actions, courts often address the negligence theories as one. The Second Circuit clarified freight forwarder duties and responsibilities under a negligence theory in *Prima U.S. Inc.*¹¹ In that case, the purchaser of an electric transformer retained a freight forwarder to facilitate the machine’s transport from Italy to Iowa. The freight forwarder arranged for the transformer to be picked up, retained a customs broker, and selected a stevedore to confirm it was lashed properly to the vessel. During heavy seas, the transformer broke loose and damaged other cargo. The freight forwarder moved for summary judgment dismissing the other cargo owner’s direct action and the purchaser’s fourth-party action. The court granted the purchaser’s indemnity claim against the freight forwarder on the basis that the stevedore’s negligence in lashing the transformer could be attributed to it. On appeal, the Second Circuit reversed the indemnification ruling finding that a freight forwarder who acted within its limited scope could not be held responsible for the negligent acts of the stevedore it selected.

The Second Circuit emphasized the limited role traditional freight forwarders play in the cargo

chain and the legal protections afforded them in that capacity. A freight forwarder:

secure[s] cargo space with a steamship company, give[s] advice on governmental licensing requirements, proper port of exit and letter of credit intricacies, and arrange[s] to have the cargo reach the seaboard in time to meet the designated vessel.¹²

A freight forwarder “simply facilitates the movement of cargo to the ocean vessel” or “generally makes arrangements for the movement of cargo at the request of clients.”¹³ As it is not directly involved in transporting the cargo, “a freight forwarder does *not* issue a bill of lading, and is therefore not liable to a shipper for anything that occurs to the goods being shipped.”¹⁴ Based on these narrow responsibilities, the Second Circuit made clear that a freight forwarder will not be held liable for marine incidents if it “limits its role to arranging for transportation.”¹⁵ A freight forwarder satisfies its duty of care if it selects reputable companies to effectuate the transport.¹⁶

Following *Prima*, the relevant inquiries are the conduct of a freight forwarder in carrying out its document functions and/or selecting cargo companies to effectuate transport. Claimants must allege and prove the forwarder is negligent in its selection of the transportation providers.

b. The *MSC Flaminia* Freight Forwarder Ruling

The documentation process described above is similar to that in *In re M/V MSC Flaminia*. The key difference is that the NVOCC therein retained its own freight forwarder to act as its in-house document preparer and coordinator. The companies entered into a “Logistics Alliance Agreement” which provided the companies were to act as “partners” and jointly marketed in the industry, but with each entity having its own, defined role internally. From documentation, to pricing, to logistics vendors, the process was collaborative in nature to all “mutually agreed customers.”¹⁷

9 See *Chem One, Ltd. v. M/V RICKMERS GENOA*, 502 F. App’x 66, 72–73 (2d Cir. 2012) (addressing negligent failure to warn in maritime dispute); *Rogers v. Westfalia Associated Techs., Inc.*, 485 F. Supp. 2d 121, 128–29 (N.D.N.Y. 2007) (addressing negligent failure to warn in manufacturer context under New York law). The factors are similar to general negligence and notably also require a breached duty to impose liability.

10 *Smith v. Mitlof*, *supra*, 198 F.Supp.2d at 504; Restatement (Second) of Torts § 552; *Chem One*, *supra*.

11 *Prima U.S. Inc. v. Panalpina, Inc.*, 223 F.3d 126 (2d Cir. 2000).

12 *Prima*, 223 F.3d at 129 (quoting *New York Foreign Freight Forwarders and Brokers Ass’n v. Fed. Mar. Comm’n*, 337 F.2d 289, 292 (2d Cir. 1964)).

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.* at 130.

17 2017 WL 239384, at *3.

The contract is relevant because the NVOCC and freight forwarder handled logistics for the dangerous good divinylbenzene (“DVB”), which is one of the dangerous goods alleged to have caused the Incident. The shipper provided specific stowage instructions for the DVB to be kept away from heat sources and to stow above deck for temperature monitoring. These instructions were conveyed by the NVOCC to the ocean carrier for the preparation of the sea waybill. However, the NVOCC’s freight forwarder admitted during deposition testimony that it neglected to notice that the stowage instructions were not included in the carrier’s sea waybill.¹⁸

The court considered the breach of contract and negligence causes of action brought by the shipper and the NVOCC against the NVOCC’s freight forwarder and dismissed most of the claims. For the NVOCC’s negligence claim, the court held that there was no triable issue of fact concerning the causation element. In particular, while there could have been a duty, there was no showing that the breach in neglecting to notice the lack of stowage instructions on the sea waybill was “causally related to the casualty aboard the vessel.”¹⁹ The sea waybill did not make a difference as to how the DVB was stored aboard the Vessel. Instead, the dangerous goods declaration for DVB is the critical document the ocean carrier reviewed to determine stowage.

Concerning the NVOCC’s contract claim, its freight forwarder did not fare as well. The failure to notice the stowage instructions on the sea waybill constituted a breach of the duty owed as to document processing duties delineated in the contract between NVOCC and its freight forwarder. And while the NVOCC will still have difficulty overcoming the causation issue addressed by the court, the court accepted that the neglectful omission led to legal claims the NVOCC had to defend which increased its transaction costs and “litigation risks.”²⁰

Concerning the shipper’s contract claim, there was no contract between the shipper and the NVOCC’s freight forwarder. However, the shipper claimed to be a third-party beneficiary of the NVOCC agreement.

The court found credence in the argument that it was a disclosed principal and that the agreement states the parties will work as “partners” with “mutually agreed customers.”²¹ However, its argument concerning damages was lacking. Unlike the NVOCC who alleged increased usage of resources and litigation risk because of the omission, the shipper did not and could not credibly claim breach of contract damages.²²

Lessons Learned and Action Items for In-House Counsel

Periodic maintenance of company documents is aspirational but often difficult to for in-house counsel to undertake in light of the daily commercial and legal headaches that occur. In considering the issue, below are certain measured, cost effective steps that can be taken to better protect the company.

- 1. Confirm the Contractual Landscape Between Parties:** The relationships among and between shippers, freight forwarders, and NVOCCs are often informal and rely on a patchwork of terms and conditions sent at the time of shipment. When the terms conflict, which control? More importantly, do you want to be litigating this threshold, costly issue? Certainly not. Ensure that the parties have an agreement in place akin to the NVOCC and freight forwarder did in *In Re M/V MSC Flaminia*.
- 2. Pressure Test the Agreement:** Whether it be an agreement, terms and conditions, or new language in a bill of lading, the courtroom is not a good place for it to be tested for the first time. Invest the time and money in pressure testing your company’s most critical agreements. Even if outside counsel drafted the agreement, it may be prudent to have another set of eyes review the documents to poke holes in ambiguous or fuzzy language. Whether it be another outside counsel or the new law school intern, different perspectives raise different potential weaknesses.
- 3. Consider the Business Implications:** Congratulations. You’ve convinced the powers that be an

¹⁸ *Id.*

¹⁹ *Id.* at *4.

²⁰ *Id.* at *7.

²¹ *Id.*

²² *Id.*

agreement is prudent. You've pressure tested it and made revisions to shore up your legal position. Done. Winner. Go home to binge Netflix? Not yet. Talk to the company's underwriter or risk management person. Make sure the business people know the potential liabilities at stake and the potential issues that may impact insurance coverage. Note the court's analysis of the term "partners" and "mutually agreed customers" when considering whether the shipper was a third party beneficiary of the NVOCC/freight forwarder agreement in *In Re M/V MSC Flaminia*. How

would such a ruling impact insurance coverage when a non-contracting party is seeking relief? Better the insurance team considers the issue now than after being subject to a judgment.

The *MSC Flaminia* Incident is the most recent reminder of the significant exposure a party can face notwithstanding the small margins for the work performed on each shipment. Good corporate document maintenance and pressure testing can make all the difference in disputes large and small. ⚖️



Welcome to the New Diverse Speakers Directory Page!

Open to both ABA and
Non-ABA members.

The Directory is a great way
to build your resume and
expand your career!

[https://www.americanbar.org/
diversity-portal/SpeakersDirectors.html](https://www.americanbar.org/diversity-portal/SpeakersDirectors.html)



- Expand your speaking experience both nationally and internationally.
- Show off your past speaking engagements.
- Create a customized Speakers Bio.
- Show off your technical skills.
- Market yourself to more than 3,500 ABA entities seeking speakers around the country and the world

For more information or questions regarding the directory email: diversity@americanbar.org

LEARNING TO LOVE...

Continued from page 8

of these modes of communication.⁸ EDI messages thus require minimal human contact since human administrators are only needed for occasional quality control purposes.⁹

The efficiency of EDI has “transformed international commerce by incentivizing a preference for paperless transactions.”¹⁰ Within the maritime industry, at least 192 unique EDI message types are commonly used.¹¹ Before the advent of EDI, one hard copy of the manifest had to be given to the captain of a vessel while another hard copy had to be posted to the relevant discharge ports. Today, it is usually preferred to use EDI to provide the manifest directly to discharge ports.¹²

a. The Aftermath of *Glencore*

Although no *Glencore*-esque situation has occurred domestically, the U.S. could proactively lead the switch to secure EDI through efforts to switch from a paper document-dependent system to a largely electronic system for cargo delivery orders. While the comfort and history of using paper documents may never completely recede, there is no reason that new EDI technology proven to eliminate middlemen and human error should not be embraced. Because the efficiency of EDI-backed commerce is already strong, it will only improve once a more standardized system is adopted; the current EDI dissonance in the industry continues because EDI implementation is left to “individual parties” rather than governmental bodies.¹³

Beyond developing a standardized data format, EDI will be seamless so that “large multinational

corporations [that] have their own data systems in place through Internet websites” will feel compelled to abandon their current systems and put their trust in a new, unified system.¹⁴ These hurdles should not dissuade the U.S. from taking on this challenge; this type of competition with EDI should foster the environment necessary to create new and uniform data exchange systems capable of acceptance by companies at all levels of capitalization.

Many legal practitioners and scholars were surprised by the results of *Glencore*.¹⁵ The court’s logic was sound, however, because *Glencore* never expressly authorized anyone with the PIN code to pick up the cargo containers.¹⁶ The *Glencore* holding “illustrate[s] that using a port’s ERS does not relieve carriers of their bill of lading obligation to surrender possession of goods only to the person entitled to take delivery of them.”¹⁷ The results are nonetheless surprising because MSC was “invited to use the ERS in their dealings with *Glencore* . . . for around a year and a half with success.”¹⁸ Since ERS had been implemented for at least three years at the time of the heist, it is an unexpected result that the British court would choose to take a step back from an otherwise flawless ERS track record.¹⁹

b. Long-Term Application of EDI to U.S. Law

Glencore was a case of first impression and it suggests a path forward in terms of avoiding a similar situation in the U.S.²⁰ For instance, there are two sources of U.S. law relating to cargo release protocol: the Federal Bills of Lading Act of 1916 (Pomerene Act) and the amended Uniform Commercial Code Article 7 (U.C.C. § 7).²¹ The Pomerene Act supersedes state law

8 Paula Talim, Johan C. Zeeman, *Electronic Data Interchange: An Overview of EDI Standards for Libraries (1993)*, UDT SERIES ON DATA COMMUNICATION TECHNOLOGIES AND STANDARDS FOR LIBRARIES (APRIL 27, 1995), <http://www.ifla.org/archive/V1/5/reports/rep4/42.htm>.

9 Adam Robinson, *Electronic Data Interchange or EDI in Transportation: Breaking Down What it is and How it Works*, CERASIS (Dec. 11, 2014), <http://cerasis.com/2014/12/11/edi-in-transportation/>.

10 David A. Bury, *Electronic Bills of Lading: A Never-Ending Story?*, 41 TUL. MAR. L.J. 197, 212 (2016).

11 Hariesh Manaadier, *What is EDI and What is the Importance of EDI in Current Day Shipping.??*, SHIPPING & FREIGHT RESOURCE (Feb. 1, 2010), <http://shippingandfreightresource.com/what-is-edi-and-what-is-the-importance-of-edi-in-current-day-shipping/>.

12 *Id.*

13 Natalia W. Geren, *The Future of E-Commerce: Will the Maritime Industry be Left Behind?*, MARITIME REPORTER AND ENGINEERING NEWS, 1, 13 (2000).

14 *Id.*

15 Ted Graham, *Bills of Lading: Keys to a Floating Warehouse or a Cumbersome, Outdated System?*, INCE & Co (Feb. 11, 2015), <http://www.incelaw.com/en/knowledge-bank/publications/bills-of-lading-keys-to-a-floating-warehouse-or-a-cumbersome-outdated-system>.

16 *Id.* at [2], [4], [2015] 2 Lloyd’s Rep. at 509, 510.

17 *Barclays v. Customs & Excise* [1962]; David McKie, *Misdelivery of Containers Released Under Electronic Release System*, KENNEDYS (Oct. 7, 2015), <http://www.kennedyslaw.com/casereview/misdelivery-containers-shipping/>.

18 Graham, *supra* note 15.

19 *Id.* at [12], [2015] 2 Lloyd’s Rep. at 511, 512.

20 *Id.* at [1], [2015] 2 Lloyd’s Rep. at 508.

21 49 U.S.C. § 80110 (2012); U.C.C. § 7-101 (AM. LAW INST. & UNIF. LAW. COMM’N 1977).

and addresses carriers and cargo interest by laying out their respective rights and liabilities subject to a bill of lading, negotiable or otherwise.²²

However, the Pomerene Act does not explicitly mention delivery orders in any of its provisions and it therefore fails to account for terminal negligence, which may interfere with a carrier's legal duty to deliver its cargo.²³ Consequently, it is necessary to supplement the Pomerene Act with U.C.C. § 7, which explicitly addresses delivery orders in relation to bills of lading.²⁴ The U.C.C. § 7's framers bargained for current and future electronic advancements, but the bigger question is whether the U.S. is willing to adopt a global perspective to increase EDI efficiency, precision, and security.

In 2016, container handling and delivery made shipping industry news when the International Maritime Organization (IMO) sped up the push for EDI standardization. IMO's SOLAS treaty (SOLAS), to which the U.S. is a party, created new requirements regarding the verified gross mass (VGM) of packed containers to remedy misreporting and mishandling of goods. SOLAS placed new "responsibilities [on the] shipper to ensure that an accurate VGM is provided to the terminal/carrier for every container loaded prior to it . . . going . . . on board a vessel."²⁵ The most innovative facet of the SOLAS treaty was its implementation of a new technology called the TrustMe solution™, which used a type of "global blockchain" EDI technology to store VGM data.²⁶

Fifteen states have adopted the U.C.C. § 7's reforms, which have been proven successful for because they bring state law in line with pre-existing federal law.²⁷ However, all states must adopt U.C.C. § 7 in order for the U.S. to truly compete in the contemporary digital market. It is impossible to exist in the globalized market without

keeping up "with the demands of developing technology" and the U.C.C. § 7 allows room for the U.S. to tailor delivery orders to digitally meet traditional requirements.²⁸

It is also an option to amend the Pomerene Act to extend beyond delivery orders to cover other documents such as a delivery order.²⁹ By showing initiative through adaptive lawmaking, the U.S. can gain an advantage in international trade over other countries that are slow to adapt to expanding technology regimes.

c. Blockchain Solutions

Once a delivery order is issued, its corresponding bill of lading is considered duly discharged which triggers the end of the contract between the carrier and the consignee; however, if delivery is delayed or misappropriated it could days hours to days to discover that an issue exists.³⁰ Blockchain, a cutting-edge distributed database, provides a solution to the aforementioned issues that occur due to the nature of traditional paper documentation paired with human error. In order for the maritime industry to evolve digitally, it is necessary to standardize EDI in a common data format to exchange information. The intermodal supply chain has been coping with "insufficient EDI [standardization . . . for the past twenty years] . . . resulting in . . . poor functioning on a global basis."³¹ Blockchain is the next step in providing heightened security and global integrity over distributed networks. Blockchain technology, which was popularized by BitCoin, offers an appealing solution by dematerializing and decentralizing documents of title into an electronic format usable by anyone with a computer.³² Substantial hype has surrounded Blockchain ever since its inception in 2009, but many individuals in the shipping industry are confused by how it actually works.³³ Because of this lack of consensus behind Blockchain and EDI,

²² *Id.*

²³ *Id.*

²⁴ 49 U.S.C. § 80110; U.C.C. § 7-101 (AM. LAW INST. & UNIF. LAW. COMM'N 1977).

²⁵ SOLAS container mass verification requirements, INTERNATIONAL MARITIME ORGANIZATION (last visited Mar. 1, 2017), <http://www.imo.org/en/MediaCentre/HotTopics/container/Pages/default.aspx>.

²⁶ Marine Transport International Applies Blockchain to Shipping Supply Chain, FINEXTRA (Sept. 23, 2016), <https://www.finextra.com/pressarticle/66223/marine-transport-international-applies-blockchain-to-shipping-supply-chain>.

²⁷ Why States Should Adopt UCC Article 7, UNIFORM LAW COMMISSION (last visited Mar. 18, 2017), <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UCC%20Article%207>.

²⁸ *Id.*

²⁹ 49 U.S.C. § 80110 (2012).

³⁰ Harish Manaadiar, *What is a Delivery Order and who Issues it...??*, SHIPPING & FREIGHT RESOURCE (last visited Feb. 14, 2014), <http://shippingandfreightresource.com/what-is-a-delivery-order/>.

³¹ Matthias Buchhorn-Roth, *Secure Data Exchange Across Supply Chains – Blockchain and EDI*, COMBINED TRANSPORT MAGAZINE (Nov. 9, 2016), <http://combined-transport.eu/blockchain-edi-for-supply-chains>; David Bury, *Electronic Bills of Lading: A Never-Ending Story?*, 41 TUL. MAR. L.J. 197, 234 (2016).

³² See Buchhorn-Roth, *supra* note 31.

³³ Jon Southurst, *How Blockchain Contracts and IoT Could Save Global Shipping Billions*, BITCOIN.COM (Nov. 10, 2016), <https://news.bitcoin.com/blockchain-save-global-shipping-billions/>.

the shipping industry still relies heavily on paper documentation despite affordable access to technology that holds the potential to revolutionize the way the shipping industry handles cargo container deliveries.³⁴

While demystifying the coding elements of Blockchain may appear intimidating, its concept is relatively simple. Stripped down to its core elements, Blockchain is a global database that operates like a public ledger. It provides “secure [storage] of transactions of any value such as currency . . . tangible assets . . . and intangible assets.”³⁵ Blockchain uses cryptography to allow each participant on the network to add to the digital record on the ledger. For instance, under SOLAS, all log books and private databases are eliminated and replaced with a decentralized cryptographic ledger. This means that if a *Glencore*-esque fraud situation arose under such a system, the PIN fraud would be discovered early because the ledger network provides accountability.³⁶ An open-source Blockchain network means there is no central authority; rather, only designated parties with special keys could access the data needed to pick up the cargo containers.³⁷

Blockchain’s data structure makes it possible to overcome current EDI issues, especially with regard to cargo delivery and storage, because the decentralized ledger removes the need for a trusted third party central registry to track ownership. There are two types of blockchain transactions: “unpermissioned” and “permissioned” (also known as “distributed ledgers”).³⁸ Unpermissioned blockchain is “an open, [decentralized] ledger which records every value.” Once an unpermissioned blockchain entry is made, it is impervious to any sort of editing. Unpermissioned

blockchain technology is common with small business operations, hobbyists, and cryptocurrency miners due to the freedom of choice it creates.³⁹ Permissioned blockchain, on the other hand, allows only specified actors (such as banks, businesses, or individuals) to submit transactions or validate the network.⁴⁰ This form of blockchain is preferred by enterprises because it eliminates the costs associated with paper printing while allowing heightened security measures.

Blockchain provides immense benefits, the most revolutionary of which is security. At its core, Blockchain is an information security technology, and as such, it addresses the four pillars of the information security field: confidentiality, integrity, availability, and non-repudiation.⁴¹ Blockchain synthesizes these needs to protect the security of documents by “blocking identity theft, preventing data tampering, and stopping Distributed Denial of Service attacks.”⁴²

First, preventing identity theft, as seen in *Glencore*, is relatively streamlined when using Blockchain.⁴³ A main feature of Blockchain is public key cryptography, which allows heightened communications security. Public key cryptography allows for the implementation of Public Key Infrastructure (PKI), which can create unique “hashes” as a means of verification by multiple sources of a participant’s identity.⁴⁴

Second, protecting data integrity is easily attainable with Blockchain compared to paper documents and other forms of EDI. Whenever a Blockchain transaction takes place, a public key and a private key are created for the parties involved. While anyone can obtain a public key to get on the Blockchain ledger, private keys are used so “recipients and users can verify the source of the data [they are] handling.”⁴⁵

34 *Id.*

35 Deanna MacDonald, *Could Blockchain be the Shipping Industry’s Life Jacket?*, KNECT365 MARITIME (Dec. 22, 2016), <https://knect365.com/techandcomms/article/6a6fa749-c53f-448d-9036-4f130b062451/could-blockchain-be-the-shipping-industrys-life-jacket>.

36 *Glencore Int’l AG v. MSC Mediterranean Shipping Co. (The “MSC Katrina”)* [2015] EWHC 1989 (Comm), [2015] 2 Lloyd’s Rep. 508 (Eng.), 2015 WL 4172853

37 *Marine Transport International Applies Blockchain to Shipping Supply Chain*, FINEXTRA (Sept. 23, 2016), <https://www.finextra.com/pressarticle/66223/marine-transport-international-applies-blockchain-to-shipping-supply-chain>.

38 Simon Taylor, *Blockchain: Understanding the Potential*, BARCLAYS 2 (July 2015), https://www.barclayscorporate.com/content/dam/corppublic/corporate/Documents/insight/blockchain_understanding_the_potential.pdf.

39 *Id.* at 3.

40 *Id.*

41 *Id.*

42 Ben Dickson, *Blockchain’s Brilliant Approach to Cybersecurity*, VENTUREBEAT (Jan. 22, 2017), <http://venturebeat.com/2017/01/22/blockchains-brilliant-approach-to-cybersecurity/>.

43 *Glencore Int’l AG v. MSC Mediterranean Shipping Co. (The “MSC Katrina”)* [2015] EWHC 1989 (Comm), [2015] 2 Lloyd’s Rep. 508 (Eng.), 2015 WL 4172853; *Dickson*, *supra* note 42.

44 *Dickson*, *supra* note 42.

45 *Id.*

Finally, Blockchain protects critical digital infrastructure because it “[removes] the single target that hackers can attack to compromise [an] entire system.”⁴⁶ Normally, a hacker can break into an EDI system through holes in security resulting from a single point of entry, compromising the system. However, the distributed, decentralized nature of a blockchain network makes it impossible for any “single entity, including governments, to manipulate entries at their whim.”⁴⁷

d. Blockchain and Delivery Orders

While Blockchain is still in its infancy in terms of its use within the shipping world, newly innovated technology is about to make waves in the maritime sector. On March 5, 2017, IBM and Maersk released their blockchain project partnership, which will be publicly available by the end of 2017. If the project proves successful, the partnership will act as a preview of the future of shipping protocol.⁴⁸ Because Maersk is the largest shipping company in the world, it provides an ideal platform to implement blockchain technology on a global scale by working with a “network of shippers, freight forwarders, ocean carriers, ports and customs authorities” to create their new “global trade digitization product.”⁴⁹

According to Maersk and IBM, an ordinary refrigerated shipment of cargo from East Africa to Europe goes through thirty people and organizations . . . and more than 200 different . . . communications”; this means there are over two hundred opportunities for communications to go wrong.⁵⁰ Traditionally, logistics were handled through paper documentation, a practice that still persists today. Maersk and IBM argue that switching to an entirely digital system will lead to increased efficiency and reduced costs.⁵¹ The long-

term savings “will not be known for a year or two until blockchain [technology] is more widely used.”⁵²

One of the immediate benefits set out by Maersk and IBM is that ports will greatly benefit from Blockchain because they will have real-time, accurate information of when ships arrive, as well as the cargo they contain.⁵³ Since 90% of annual goods in global trade are carried by the shipping industry, IBM and Maersk plan to organize with a “network of shippers, freight forwarders, ocean carriers, ports, and customs authorities to create . . . [a] global trade digitization solution.”⁵⁴ This means ports will be able to handle containers more efficiently, and overcrowding and delays in traditionally busy ports can be better managed or avoided altogether.

Maersk and IBM believe that Blockchain will enhance global equity and potentially prevent huge shipping monopolies from arising.⁵⁵ The level of digitization varies from country to country, but once Blockchain is more widely adopted, it will encourage free-market trade. Ibrahim Gokcen, the chief digital officer at Maersk highlighted the fact that Blockchain will “make global trade more accessible to a much larger number of players from both emerging and developed countries.”⁵⁶ This is an exciting prospect for leveling the playing field and providing less wealthy countries with digital bargaining power.

i. Smart Contracts

Blockchain foreshadows a degree of automation in the function of the legal community.⁵⁷ Legal scholar and cryptographer Nick Szabo discovered that Blockchain’s decentralized ledger format is a perfect vehicle for smart contracts, also known as “self-executing contracts, blockchain contracts, or digital contracts.”⁵⁸ Smart contracts can be “converted to computer code,

46 *Id.*

47 *Id.*

48 Nathaniel Popper, Steve Lohr, *Blockchain: A Better Way to Track Pork Chops, Bonds, Bad Peanut Butter?*, THE NEW YORK TIMES (Mar. 4, 2017), <https://www.nytimes.com/2017/03/04/business/dealbook/blockchain-ibm-bitcoin.html>.

49 Gertrude Chavez-Dreyfuss, *IBM, Maersk in Blockchain Tie-Up for Shipping Industry*, REUTERS (Mar. 6, 2017), <http://www.reuters.com/article/us-usa-blockchain-ibm-idUSKBN16D26Q>.

50 Tom Groenfeldt, *IBM and Maersk Apply Blockchain to Container Shipping*, FORBES (last visited Mar. 5, 2017), <https://www.forbes.com/sites/tomgroenfeldt/2017/03/05/ibm-and-maersk-apply-blockchain-to-container-shipping/#5ffe2c0c3f05>.

51 *Id.*

52 *Id.*

53 *Id.*

54 *IBM, Maersk & IBM Unveil First Industry-Wide Cross-Border Supply Chain Solution on Blockchain*, PERISHABLE NEWS (last visited Mar. 13, 2017), <http://www.perishablenews.com/print.php?id=0058937>; according to IBM, this global trade digitization solution will “reduce fraud and errors, reduce the time products spend in the transit and shipping process, improve inventory management and . . . reduce waste and cost.” *Id.*

55 *Groenfeldt, supra* note 50.

56 *Id.*

57 David A. Bury, *Electronic Bills of Lading: A Never-Ending Story?*, 41 TUL. MAR. L.J. 197, 212, 236 (2016).

58 *Smart Contracts: The Blockchain Technology that will Replace Lawyers*, BLOCKGEEKS (last visited Mar. 12, 2017), <http://blockgeeks.com/guides/smart-contracts/>.

stored and replicated on the system and supervised by the network of computers that run the blockchain.”⁵⁹

Since their invention, smart contracts are used in four main ways: (1) government enforcement; (2) business management; (3) case precedent; and (4) within the supply chain.⁶⁰ For purposes of maritime contracts and delivery orders, business management and supply chain contracts are the most pressing, though all four can apply.⁶¹ Smart contracts, when harnessed through Blockchain technology, guarantee contractual results because they eliminate human error in a way that has never been seen before. However, there is room for error in contracts with foundational issues, such as faulty code or regulatory hold-ups, if one country recognizes smart contracts but another country does not.⁶² Time will tell whether these drawbacks outweigh the benefits of smart contracts, but so far they hold the potential to redefine contracts and delivery orders by providing “autonomy, trust, back-up, safety, [efficiency], savings, and accuracy.”⁶³ As smart contracts become more ubiquitous, they will impact both the maritime industry and the practice of transactional law.

ii. Maasvlakte II: Welcome to the Fully Automated Future

The core ideas behind Blockchain, transparency and efficiency, are spilling into terminal and port development. If cutting-edge automated terminals work with Blockchain technology, it will save the shipping industry significant costs and help the market stabilize in the wake of bankruptcies and security breaches. Maasvlakte II, APM Terminals’ extension of Maasvlakte I in the port of Rotterdam, shows a glimpse into the not-so-distant future of fully automated ports where economic growth and environmental sustainability are not mutually exclusive.⁶⁴

Construction for Maasvlakte II began in 2008 and continued until the terminal’s official opening on April 24, 2015.⁶⁵ Maasvlakte II, the first fully automated container terminal ever constructed, is a stunning conglomeration of cutting-edge technology, safety, and environmental sustainability.⁶⁶ All container terminals at Maasvlakte II are fully electric, “from the Automated Guided Vehicles (AGVs) to the quay cranes.”⁶⁷ ABB, a leading automation technology group, created a remote control system for the crane that is located “in a control room . . . which [improves] working ergonomics and [reduces] . . . stress on [an] operator’s back and neck.”⁶⁸ The crane operation system is programmed with automatic corrective movements that “ensure accuracy and speed.”⁶⁹ The port includes unprecedented safety measures accomplished through “[complete separation] of man and machine” so the risk of injury during loading and unloading process is practically eliminated.⁷⁰ Finally, Maasvlakte II is environmentally sustainable: “the terminal uses renewable energy from European wind farms as a power source” and creates no carbon emissions.⁷¹

The Port of Rotterdam is currently teaming up with a Blockchain consortium that will focus on logistics development and application at Maasvlakte II, a project that runs parallel to Maersk and IBM’s recent Blockchain partnership.⁷² If Maasvlakte II continues to succeed as a model for fully automated ports with implementing Blockchain technology, it will open the shipping supply chain up to newly automated and digitized methods of conducting business. Since the Port of Rotterdam is the Europe’s largest terminal, the success of Maasvlakte II will help stabilize freight rates and will set the tone for the rest of the industry.⁷³

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Maasvlakte 2*, PORT OF ROTTERDAM (last visited March 19, 2017), <https://www.portofrotterdam.com/en/the-port/sustainability/maasvlakte-2>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *ABB to Provide Automation Systems for STS Cranes at Maasvlakte 2 (The Netherlands)*, WORLD MARITIME NEWS (Sept. 26, 2012), <http://worldmaritimeneews.com/archives/66064/abb-to-provide-automation-systems-for-sts-cranes-at-maasvlakte-2-the-netherlands/>.

⁶⁹ *Id.*

⁷⁰ *See supra* note 64.

⁷¹ *Id.*

⁷² *Port of Rotterdam Blockchain Project*, PORT TECHNOLOGY (Nov. 30, 2016), https://www.porttechnology.org/news/port_of_rotterdam_blockchain_project.

⁷³ *Id.*

III. Conclusion

As evidenced through both Maersk and IBM's partnership and the development of Maasvlatke II, the global community is embracing an age of paperless automation. These new systems opened the doors for the supply chain to adapt traditional forms of documentation in ways never seen before; however, it is up to the U.S. whether to encourage or amend its legal regimes to implement the technology in order to be competitive within the global market. Ultimately, EDI has already established itself as effective for reducing transaction costs and increasing efficiency by eliminating issues caused by human error. Even though EDI systems and the Internet are similar in age, they have historically existed separately from one another. However, this is changing as new systems such as Blockchain begin to merge the two technologies.

Blockchain, as the newest and most innovative frontier in EDI, is a globally accessible, verified, and immutable technology that has the potential to replace

not only mountains of unnecessary paperwork, but also current outdated and unharmonious modes of EDI technology.⁷⁴ If the maritime industry continues to reap the benefits of merging the two technological communities of EDI and the Internet, issues of logistical efficiency, precision, and security will dissipate.

As IBM noted in its press release, Blockchain simultaneously solves supply chain issues through its streamlined accessibility and security.⁷⁵ While preventing major issues such as communication interceptions over an insecure channel (as seen in *Glencore*) is one benefit, eliminating smaller transactional problems that build up over time, like losing a delivery order or container info, creates a long-term benefit.⁷⁶ The global market has entered a new age of automation, but only time will tell if U.S. lawmakers and the shipping industry are willing to embrace the new technology to streamline delivery orders and other documents sooner rather than later. ⚖️

⁷⁴ *Groenfeldt*, *supra* note 50.

⁷⁵ *See supra* note 64.

⁷⁶ *Glencore Int'l AG v. MSC Mediterranean Shipping Co. (The "MSC Katrina")* [2015] EWHC 1989 (Comm), [2015] 2 Lloyd's Rep. 508 (Eng.), 2015 WL 4172853

CAN A PRELIMINARY...

Continued from page 12

Daelim reacted by serving a demand for arbitration. However, the arbitration proceedings were placed on hold while the court considered Integr8's motion for a preliminary injunction, which was filed one month later. An order to show cause was ordered requiring Integr8 to present reasons as to why the court should grant the preliminary injunction to enjoin Daelim from pursuing arbitration. Of course the granting or denial of a temporary restraining order is within the trial judge's discretion. Integr8 was required to show a) likelihood of success on the merits; b) irreparable harm with no adequate remedy at law; and c) that the balance of harm favors the movant; and d) that the public interest favors the granting of the injunction.

The court was not persuaded by Integr8's arguments. First and foremost, Integr8 could not demonstrate a likelihood of success or serious questions going to the merits with respect to the argument that Integr8 is not a party to a valid arbitration agreement with Daelim. However, the arbitration agreement's definition of the

term "Buyer" covered charterers of the Vessel and uncontested evidence was presented attesting that Daelim was the charterer of the Vessel when Integr8 entered into a contract with Dynamic to provide the bunker stem in Hong Kong. Further, the court called the arbitration clause "quite broad" thereby dismissing Integr8's claim that the dispute raised by Daelim in the demand for arbitration was outside the scope of the arbitration agreement.⁷ Reading the plain language and broad scope of the arbitration clause, Daelim's claims were at least incidental to the contract. Lastly, the court was not convinced that Integr8 had demonstrated that the balance of equities tips in its favor or that irreparable harm would result if the preliminary injunction and TRO were not granted.

This decision reemphasizes and illustrates the unwillingness of district courts to stray from the federal policy, which is to read arbitration clauses with the broadest lens, especially when the clause itself doesn't narrow its effect to only be binding on certain parties. Therefore, a party's attempt to obtain a preliminary injunction and TRO will likely be derailed when an arbitration agreement includes a very broad clause. ⚖️

⁷ *Supra* note 5 at 6.

2017-2018 TIPS CALENDAR

August 2017

- 10-13 ABA Annual Meeting** **Grand Hyatt Hotel**
 Contact: Felisha A. Stewart – 312/988-5672 **New York, NY**
 Speaker Contact: Donald Quarles – 312/988-5708

October 2017

- 11-15 TIPS Fall Leadership Meeting** **Ritz-Carlton Key Biscayne**
 Contact: Felisha A. Stewart – 312/988-5672 **Key Biscayne, FL**
- 19-20 Aviation Litigation Committee Meeting** **Ritz-Carlton**
 Contact: Donald Quarles – 312/988-5708 **Washington, DC**

November 2017

- 8-10 FSLC & FLA Fall Meeting** **Sheraton Boston Hotel**
 Contact: Donald Quarles – 312/988-5708 **Boston, MA**

January 2018

- 24-26 Fidelity & Surety Committee Midwinter Meeting** **JW Marriott**
 Contact: Felisha A. Stewart – 312/988-5672 **Washington, DC**
- 31-2/6 ABA Midyear Meeting** **Vancouver**
 Contact: Felisha A. Stewart – 312/988-5672 **British Columbia**

February 2018

- 22-24 Insurance Coverage Litigation Midyear Mtg** **Arizona Biltmore**
 Contact: Donald Quarles – 312/988-5708 **Phoenix, AZ**

April 2018

- 4-5 Motor Vehicle Products Liability Program** **Arizona Biltmore**
 Contact: Felisha A. Stewart – 312/988-5672 **Phoenix, AZ**
- 6-8 Toxic Torts & Environmental Law Meeting** **Arizona Biltmore**
 Contact: Felisha A. Stewart – 312/988-5672 **Phoenix, AZ**