Admiralty and Maritime Law Committee

An Overview of the 1952 and 1999 Arrest Conventions

By: Bob Deering and Jonathan Reese

The 1999 International Convention on Arrest of Ships came into force on September 14, 2011, having finally been ratified by the requisite 10 countries. That this process took over 12 years reflects the lukewarm reception that the 1999 Arrest Convention has received from the international shipping community. The Convention will only have effect in the jurisdictions which have ratified it and therefore, initially at least, its impact will be relatively limited. Nevertheless, it does introduce some notable changes from the position under the more popular 1952 Arrest Convention. In this article, we provide an overview of these changes and their potential implications for ship-owners and claimants alike.

Continued on page 21

IN THIS ISSUE:

An Overview of the 1952 and 1999 Arrest Conventions .......................... 1
Message from the Chair .................. 3
Trade Talk ................................. 5
Implications of the 1999 International Convention on Arrest of Ships in Spain ................................. 9
Natural Disasters: Physical & Legal Risks Facing U.S. Ports .................. 11
The Application of the Death On the High Seas Act (DOHSA) to Commercial Space Flight Accidents ................................. 14
2012 TIPS Calendar ........................ 23
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MESSAGE FROM THE CHAIR

We have reached the midway point of the ABA year and the Committee has hit its stride. We’ve already published a newsletter featuring, among other pieces, a well-received article by Bobby Glenn on maritime mediations. This newsletter is packed with key articles on the 1999 Ship Arrest Conference, now ratified by the minimum number of countries and in effect (though not here in the United States). We are also publishing our law student writing competition winner from last year, Jeff Kuhns. His piece on international space flight and maritime law is an excellent read.

We are very pleased to include a new feature in the newsletter, an industry spotlight of a Committee member and his/her in-house company, we currently called “Trade Talk”. Dan Carr, of Stolt-Nielsen USA, Inc., was selected as our inaugural recipient and his comments on the industry and retention of outside counsel are quite interesting.

From February 2-6, the ABA Midyear meeting will be held in the maritime city of New Orleans. Our committee will have a full business meeting on Saturday, February 4, at 3 p.m. We will be participating in a number of efforts before then, including a gathering of law professors and students at Tulane University Law School on February 2 from 2:30 to 4:00 p.m.

There are a number of ways you can stay informed about committee efforts and get involved. Our monthly conference call meetings are opened to all. They take place the third Thursday of every month, at 12:30 p.m. EST. The dial in number and conference code are: Dial-In Number- 866-646-6488- Conference Code-1885350536. Our next call is February 16, 2012 at 12:30 p.m. You can also join our LinkedIn group page http://www.linkedin.com/groups?viewMembers=&gid=3058724&sik=1317664044449 and find a collection of information at our ABA website, www.ambar.org/tipsadmiralty.

Best regards,

Chris Nolan
2011-2012 Chair
Admiralty and Maritime Law

P.S. With due respect to the honorable committee members in New England, including former Chair Michael Daly, the New York Giants are ready to taste Superbowl victory on February 5. Go Big Blue.
Disasters Caused by Acts of Negligence

Sponsored by the ABA Tort Trial & Insurance Practice Section and Exponent
Co-Sponsored by Thomson Reuters

ABA Midyear Meeting
February 3, 2012
New Orleans Marriott Hotel
New Orleans, LA

Throughout our history, past and recent, we have been plagued by disasters caused by negligence. If you were to Google this subject today, the search results would include "Katrina Flooding Caused by Army Corps of Engineers' Negligence", "Three Causes of BP's Oil Disaster", and among others "Readying for Trouble: Yearlong Initiative By TIPS Focuses On..." Please register today and join us for this educational, timely and extremely worthwhile program during the ABA Midyear Meeting.

Welcome and Introductory Remarks: Randy Aliment, Williams Kastner, Chair, ABA/TIPS

BP and Beyond: Litigation and Claims Following Mass Disasters
2:00pm-3:30pm

Moderator:
Allan Kanner, Kanner & Whiteley, LLC, New Orleans, LA

Speakers:
Theodore R. Henke, Senior Vice President and General Counsel, The OIL Group of Companies, Hamilton, Bermuda
Allan Kanner, Kanner & Whiteley, LLC, New Orleans, LA
Professor Francis McGovern, Duke University, Durham, NC
Honorable Lee Rosenthal, United States District Court, Houston, TX

This program will discuss the management of litigation which often is the result of Disasters caused by Negligent Acts. The panel features panelists with a depth of experience in the tools and techniques of managing the mass torts and class action litigation filed as a result of man-made disasters. The panel will discuss the litigation and claims arising out of the Deepwater Horizon oil spill that occurred in 2010 in the Gulf of Mexico. The oil spill resulted from an explosion that killed eleven men and injured several more. The after-effects of the spill were extensive and resulted in significant litigation as well as the creation of a compensation fund, the Gulf Coast Claims Facility, that is funded by BP and administered by Kenneth Feinberg. This panel will address the claims administration process and litigation arising from the spill, including a look at insurance coverage issues.

When the Levees Broke: Lessons Learned From Judicial and Governmental Response to Hurricane Katrina
3:30pm-5:00pm

Moderator:
Jennifer Kilpatrick, Degan, Blanchard & Nash, New Orleans, LA

Speakers:
Honorable Madeleine Landrieu, Judge, Civil District Court for the Parish of Orleans, State of Louisiana
Honorable Karen Wells Roby, Magistrate Judge, United States District Court for the Eastern District of Louisiana
Lieutenant General Russel L. Honoré, U.S. Army [Ret] and Commander of Joint Task Force Katrina [Invited]
Mitch Landrieu, Mayor, City of New Orleans [Invited]

Federal, state and local governments face unique challenges when faced with a disaster, as do members of the judiciary. This program will include speakers who have faced these issues in the wake of Hurricane Katrina and will discuss what they learned in the process.
Q. Dan, tell us what prompted you to get into the maritime legal industry?

R. My father was a leading maritime litigator at Haight Gardner [now Holland & Knight] for nearly forty years and my attraction to the industry grew out of his work and stories (every case had a good sea story), the occasional Saturday spent with him at the office, seeing him prepare a case for trial, and seeing him in action before a jury.

In addition, my wife is Norwegian-American and we dreamed of living overseas for a while, particularly Norway. After I graduated from law school in Boston in 1991, the economy was tough for new lawyers. So while my focus was initially to work in environmental law, with student loans looming, I needed to find a somewhat different path to work. After some effort, I secured a newly created trainee position at Skuld P&I Club in Oslo. The two year trainee position turned into five years, full employment, and permanent residency. While working at Skuld, I had the opportunity to learn firsthand the vital role played by P&I Clubs and their correspondents in loss prevention, claims handling, appointing agents, surveyors and lawyers, and ultimately managing cases once in suit. More importantly, I had the opportunity to learn the Norwegian language and gain a great appreciation for the Norwegian way of life. Oslo lived up to its reputation as a great hub of the international maritime industry and my years at Skuld proved to be invaluable. After returning to the United States, I worked at Healy & Baillie [now Blank Rome] for three years before joining Stolt’s Legal Department in Connecticut in 2000.

Q. You’ve really done it all. Can you describe your experience in-house?

R. Working in-house at Stolt is “the best of all worlds”. My experience working at a leading P&I Club and then serving as outside counsel provided a strong background for my role in-house. Stolt operates the world’s largest integrated marine transportation network for chemicals and other bulk liquids. I provide substantial legal support to Stolt’s main global business streams, i.e., Tankers, Terminals, and Tank Containers. Much of my day-to-day work is tanker related, given the fact that Stolt’s tanker trading and voyage chartering arms have a significant presence in this office in Norwalk, Connecticut. This means that I am involved with many different legal issues (maritime and non-maritime) and have the benefit of working with Stolt colleagues around the world. The best part about being in-house is that I get to build a strong relationship with my colleagues and act in a variety of roles, as advocate, advisor, and, at times, teacher.

Q. What are your views on outside counsel?

R. Over the years, through my experience at the P&I Club, as outside counsel, and now as in-house
counsel, I’ve built a strong appreciation for the role of outside counsel. Also, over the years, I’ve established, as has Stolt, some very strong connections with counsel in various locations, who have served as our “go to” counsel in a particular port and even on a particular subject matter. I see outside counsel as a natural extension of the services provided by the Legal Department. When it relates to matters covered under our P&I policy or other types of insurance, then naturally we’ll partner with our insurers concerning the appointment of outside counsel.

Q. What is your opinion on the use of U.S. law and SMA arbitration proceedings?

R. I have been told that Stolt is a party to more Society of Maritime Arbitrators (“SMA”) awards than any other entity. This is not hard to believe. As a parcel tanker owner and operator, Stolt may have dozens of customers with product onboard the same vessel. Stolt will have entered into separate contracts of carriage for each product carried. Stolt is both a pioneer and a leader in meeting the transportation needs of the premier manufacturers of chemicals and other bulk liquids. In the vast majority of cases, the carriage is uneventful and, if there are any issues, we are able to resolve our differences without resorting to arbitration. However, if all else fails, we are proponents of U.S. law and SMA arbitration/mediation. The challenge by one of our customers in the U.S. Supreme Court case, Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp., has not lessened our support of U.S. law as the governing law under charter parties and SMA rules for dispute resolution.

On the aspect of mediation, I could see proposing the use of it more in the future. My experience is that mediation is more manageable than slug it out in arbitration and it gives the parties the best chance at doing the least amount of harm to their relationship while allowing them to air their grievances before a third party practiced in the skill of mediation.

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

R. Of particular note, I am currently serving as one of two owner representatives on a sub-committee of BIMCO’s Documentary Committee, tasked with drafting a standard contract for the hiring of private armed security guards for merchant vessels transiting high risk piracy areas. The sub-committee is meeting regularly to expedite the publishing of a standard contract acceptable to the industry, including the various stakeholders.

Q. What is Stolt’s experience with piracy?

R. Stolt had two ships hijacked in 2008 and since then we have devoted significant resources to improve
the protection of our ships, crew, and cargo. Oftentimes, this has meant the hiring of armed guards. Each Monday, as a member of Stolt’s anti-piracy committee, I participate by conference call to discuss upcoming transits in the Gulf of Aden and Indian Ocean and any operational or legal issues relative to the transits or the Company’s overall policies and practices to ensure safe passage of our ships through the high risk area. On average, we have 12-15 ships a month transiting the high risk area.

Q. Can you describe your other legal duties?
R. In addition to my work with BIMCO and Stolt’s own cognizance of piracy-related issues, I also offer advice on compliance matters, such as developing and training on certain aspects of the Company’s Code of Conduct. I also field questions about applicable international trade sanctions, and anti-boycott-related issues. Finally, my bread and butter issues include offering legal support on voyage and time charters, and contracts involving terminals and tank containers. At times, I feel like a “short order cook” or a firefighter putting out the day’s fires.

Q. For our practitioners, which maritime event(s) do you get the most out of?
R. I am a member of various committees of the U.S. Maritime Law Association (MLA). Attending the committee meetings is insightful because of the collaboration in discussing distinct legal issues relevant to Stolt. BIMCO is quickly moving up the ranks of my favorites. I enjoy working with colleagues in Texas and Louisiana, and thoroughly enjoy the international exposure and opportunities inherent in the business.

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

Q. Thank you for taking time to speak with us today. As a final question, who would you like to see win the Superbowl this year?
Edmund S. Muskie Pro Bono Service Award

Submit Your Nomination Today!

The Edmund S. Muskie Pro Bono Service Award recognizes TIPS members who have the attributes embodied by Senator Muskie: his dedication to justice for all citizens, his public service, and his role as a lawyer and distinguished leader of TIPS.

In addition to individuals, formal or informal groups, such as corporate legal departments or persons working cooperatively on a pro bono project, may be nominated, so long as a significant number of members of the group belong to TIPS. (Only TIPS Officers, Immediate Past Section Chair and immediate past and present Public Service Committee members are ineligible.)

For more information and to submit a nomination, please contact Jennifer LaChance at Jennifer.LaChance@americanbar.org

Nomination Deadline: February 28, 2012

A special thanks to The Edmund S. Muskie Archives and Special Collections Library for their use of the Edmund S. Muskie photograph.
Implications of the 1999 International Convention on Arrest of Ships in Spain

By: Manuel Ignacio Herrero de Egaña

By and large, the maritime community was caught by surprise when Albania’s accession to the 1999 Arrest Convention triggered its entry into force effective September 14, 2011. At the Kingdom of Spain, a Convention’s earlier adopter, three issues gained instant priority amongst Proctors’ casual chats and practice:

1. **Spain’s Reservation To Exclusively Apply the Convention to Vessels Flying the Flag of a State Party.**

Increasingly committed to the modernization of maritime law, Spain acceded to the 1999 Arrest Convention on June 7, 2002, under reservation of right to limit the application of the Convention to ships flying the flag of a State Party, in accordance with Article 10(1)(b) of the Convention. In order to reduce the coexistence of two different international arrest regimes, Spain denounced - effective March 28, 2012 - the 1952 Arrest Convention.

The meager success of the 1999 Convention, along with Spain’s Article 10(1)(b) reservation and its denunciation of the 1952 Convention, was about to reduce Spain’s international ship arrest jurisdiction to vessels flying the flags of Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, and the Syrian Arab Republic.

In order to avoid this certainly undesirable result, the Kingdom swiftly resorted to the legislative technique of the so called Royal Law Decree which is constitutionally reserved to cases of extraordinary and urgent need, and reformed its national Law of Civil Procedure, so as to enable Spanish Courts to apply the 1999 Convention to vessels not flying the flag of a State Party. This interim solution should be temporary. Spain must withdraw its Article 10(1)(b) reservation in accordance with international law procedures in the near future. Otherwise, arrest procedures of Non State Party vessels will be ballasted with at least two legal issues:

1. Merely internal revocation of the reservation under Article 10(1)(b) by means of a Royal Decree lacks international publicity and deceives international reliance on Spain’s accession terms to the Convention.

2. In addition, it is highly questionable whether revocation of the reservation is procedural in nature. If, as is the view of the author, it is considered to be material, it should not have been inserted into the Law of Civil Procedure. Beyond a merely academic interest, the issue of whether Spain regards the 1999 Convention as procedural or substantive law may occasionally have material economic consequences, as, in a different context, it was argued in *In re Compania Gijonesa de Navegación, S.A.*

Should Spain not follow up on filing a withdrawal of the reservation, it will take years until predictable splits among the first instance commercial courts with subject matter jurisdiction over arrest matters are settled at a high court level.

2. **Coexistence of the 1952 and the 1999 Conventions Until March 28, 2012.**

Both the 1952 and the 1999 Conventions will be applicable law in Spain until March 28, 2012. The overlap will be short, and yet, highly problematic, as the following real life example illustrates:

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3 Until the past decade and despite its maritime history, Spain did not perceive shipping as a legislative priority. This seems to have changed. Spain has been the first Nation to ratify the Rotterdam Rules. Furthermore it is currently finishing a comprehensive and updated codification of its maritime law.

4 A State Party is a state which is party to the Convention.


6 Denmark, Finland, Norway and Pakistan signed the 1999 Convention in 2000 but have not ratified or made a definitive signature. The full list of ratifications may be found on UNCTAD’s website, at [http://r0.unctad.org/ttl/docs-legal/unc-cml/status/arrest%20of%20Ships,%201999.pdf](http://r0.unctad.org/ttl/docs-legal/unc-cml/status/arrest%20of%20Ships,%201999.pdf). Arrest of Spanish vessels in Spain is not subject to the International Convention.


In October 2011, our law firm was instructed to arrest a vessel (quite obviously, she was not flying a 1999 Convention State flag) on grounds of unpaid insurance premiums (a maritime claim under Article 1(1)(q)). While en route towards Spanish waters, the vessel alleged that a 1999 Convention arrest would be wrongful under the 1952 Convention (which until March 28, 2012 will remain valid and binding between her flag State and Spain) in conjunction with Spain’s reservation pursuant Article 10(1)(b) of the 1999 Convention. We replied that the claim was sound on the merits and that coexistence of both arrest conventions simply was to be construed as giving arrest claimants a right to opt for either regime, at her free discretion. Ultimately, the vessel paid the claim in full and no arrest request was filed.

This case did not escalate to the judicial level, as mentioned. But many of the arrests filed under 1999 Convention before March 28, 2012 will present similar legal duality problems. These issues will be reargued at subsequent proceedings on the merits, possibly entertained in Spain under Article 7 of the 1999 Convention.

3. Consequences of Spain’s Failure to Request or Obtain permission from the European Union To Ratify the 1999 Convention.

The Treaty of Amsterdam (October 2, 1997) amended Articles 61 and 65 of the Treaty on European Union which established the then European Community. The amendments condition Member States’ joining of international conventions to Brussels’ permission, for the sake of uniformity, as long as such Treaties affect common European rules already in place.

Article 7 of the 1999 Convention attributes jurisdiction to determine the case upon its merits to the Courts of the State in which an arrest has been effected or the Courts of the State in which security has been provided to obtain the release of the ship. This provision interferes with EU Regulation No 44/2001 that replaced the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the successive conventions relating to the accession of new Member States to that convention (‘the Brussels Convention’).

Spain’s joining of the 1999 Convention without Brussels’ permission gives rise to a handful of questions:

- May Spain seek Brussels’ ex post healing of the (too) early adoption of the 1999 Convention?
- Is Brussels entitled to derogate Spain’s adoption of the Convention (in which case, the convention would not come into force)?
- Should neither of the above work or occur, could Brussels’ tacit acceptance be inferred?

This being said, it might take quite long to see a reported Spanish case on Article 7 of the 1999 Convention. In the meantime, Spanish Courts will most likely apply the 1999 Convention in dealing with ordinary arrest dynamics and disregard the issue of its possible ultra vires adoption. Furthermore, Article 7 of the 1999 Convention is a mere default rule to be applied in the absence of a valid forum selection clause.

The reader will agree that the Spanish maritime bar has interesting times ahead. But she should not let the above nuances in the Spanish transition from 1952 to the 1999 ship arrest regime should lose sight of the following two relevant facts:

1. Spanish harbors now provide keen maritime creditors with an additional tool for the foreclosure of a wider array of credits.
2. Keen shipowners must know that Spain will enforce such measures against all vessels despite its recorded reservation to the contrary.

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9  Treaty of Amsterdam (1997 O.J. (C 340)1).
Natural Disasters: Physical & Legal Risks Facing U.S. Ports

By: Eric Holdeman and Christopher Nolan

Much of the work that has been done concerning disaster preparedness for American ports has been concentrated on the threat of terrorism. Since the September 11 attacks, hundreds of millions of federal and state dollars have been focused on physical security requirements for regulated maritime facilities.

The majority of this funding has focused on providing security infrastructure to protect facilities. This work includes fences, cameras, electronic detection systems, gates, barriers, lighting, and detection equipment or sensors. Since the Port Security Grant Program (PSGP) does not provide funding for operational staff, the preponderance of funding has been spent on “things” as opposed to people. Except for the last few grant years, there has been a 25% hard-cash match required for grant recipients.

While the majority of port facilities have received some form of “hardening” to prevent terrorist attack, less financial and logistical focus has been placed on the toll natural disasters may have on ports. Natural disasters may equally bring the maritime sector to a grinding halt.

Port facilities dot our national map with major ports ringing the continental coastline and significant river and Great Lakes ports support the internal economic vitality of the nation. As a maritime nation, we are dependent upon ports for the import of all classes of products and the export of manufactured goods, bulk products, and fuels.

All ports, but especially those on the coasts, are subject to some of the most catastrophic disasters that mother-nature can conjure such as hurricanes, earthquakes, and tsunami events. And while the United States has been spared significant disasters, the same cannot be said for ports around the world where the damage has set the economic development of regions back many years due to the loss of vital areas of their transportation infrastructure.

Temporary transportation glitches happen all the time. These can come from infrastructure failures or the short term loss of usage due to flooding or mudslides that cause disruptions in the system. The real challenge will come when there is a major infrastructure failure that is not easily repairable and for which there is not a simple bypass or work around. From a pre-disaster planning standpoint, ports should identify “single points of failure” that would take away their flexibility to provide alternative routes. While automation is not a significant part of most ports, we can expect more technological innovations in the future for inventory control, shipping status, and cargo movement. With technology there will also be another risk of what happens when you lose power or there are disruptions to the data network that is fueling the movement of goods.

It is appropriate that ports look to partner with other members of their transportation network to ensure that...
the maximum amount of resiliency is being built into the system as new improved infrastructure is added to the mix of facilities that traditionally handle issues of capacity. While mega-disasters are low frequency events, they are also high impact with life and market changing consequences. One only has to look at the experience of the Port of Kobe, Japan, for the economic downturn they have suffered even after their infrastructure was fully restored.

There is a third component to life and market-changing consequences a U.S. port facility and related entities must consider after a natural disaster: legal consequences. We are, of course, a litigious society. And despite the best efforts of dedicated port directors, security personnel, and local leaders, natural disasters can wreak havoc on port infrastructure and private property. Often this type of damage may not be fully covered by insurance companies. When private citizens feel aggrieved, a lawsuit may be soon to follow. Shipping entities face safe port, bills of lading, delay from port congestion, dangerous goods, and even force majeure claims or arguments. On a more personal level, citizens living near ports may seek damages for injuries suffered.

Consider the substantial damage caused by Hurricane Katrina to the Gulf Coast region. The lawsuits that garner the most attention in the press and legal community concern whether a privately-owned barge caused a levee to fail, or whether the Army Corp of Engineers properly surveyed and built the levees surrounding New Orleans. It is likely you were not aware of a small lawsuit filed by a homeowner in Mississippi which is of equal importance to port agencies. On August 29, 2005, when Hurricane Katrina decimated the Mississippi coast, the homeowner had the misfortune of his home being located near the Port of Gulfport, Mississippi. After the house suffered substantial damages, the homeowner was able to track some of the debris back to containers, vehicles, and materials stored at the port facilities. His plan of recourse? Sue everyone.

In Young v. Mississippi State Port at Gulfport, No. 06-cv-966, 2007 WL 141906 (S.D. Miss. Jan. 12, 2007), the court considered a motion to dismiss by defendants seeking to invoke immunity from suit for their respective actions which the plaintiff had alleged were ill-conceived. The plaintiff made claims of negligence, gross negligence, and trespass against governmental authorities such as the state port authority, the state development authority, and the Port of Gulfport itself, as well as private parties who maintained property on leased areas at the port facilities. In particular, the plaintiff alleged that the port authority’s hurricane preparation was “woefully inadequate”, and that the written hurricane procedures and the acts of port personnel prior to, during, and post storm “caused or contributed” to the destruction of his home.

Fortunately for the state agencies sued, Mississippi’s legislature had enacted a broad Emergency Management Law which outlined the state’s disaster management program and contained an immunity provision for state agencies conducting “any management activities.” 2007 WL 141906, at * 2 (quoting Miss. Code. Ann. § 33-15-21). Construing the immunity provision broadly to address all of the faults the plaintiff described, the court dismissed all of the claims against the state agencies finding this sort of lawsuit was precisely the type of situation the immunity clause contemplated and hoped would be avoided by enacting the clause. Id.

The plaintiff’s lawsuit, though unsuccessful, should be a warning signal for port agencies around the country. How air-tight are immunity from suit for emergency management activities clauses in your state? If they are not, should you be lobbying your local leaders for revisions to the statute? Are the immunity clauses broad enough to encompass both natural and man-made disasters? As for companies that lease land and maintain property at the facilities, should they, by extension, be entitled to similar immunity and if so, have they expressed this point to their government leaders?

Building a resilient transportation system requires work by many different parties all working independently and at the same time in concert with one another to forge a stronger system that can endure through a disaster and in the end still “deliver the goods.” When considering port facility impacts after Hurricanes Katrina and Irene, the Tsunami in Japan, and flooding in Australia and New Zealand, it is a good time to reevaluate port emergency management plans and see how they hold up to the latest examples of natural disasters. It is similarly prudent to assess the legal landscape post-disasters and determine what steps can be taken to prevent substantial liability damage claims. As has often been said, the price of safety is eternal vigilance.
Please join us and volunteer to participate at the TIPS Dog Vaccination Clinic Public Service Project during the 2012 ABA Midyear Meeting in New Orleans!

Email Jennifer LaChance at Jennifer.LaChance@americanbar.org to volunteer. You may also sign up for a volunteer shift at the TIPS registration desk.

Taking place at Bonart Playground in the Ninth Ward of New Orleans, this clinic will offer free microchips, low cost vaccinations, free spay/neuter vouchers, and the opportunity for attendees to speak with trainers who will be on-site.

The TIPS Task Force on Disaster Preparedness & Response will also be on-site to distribute disaster kits comprised of a flash drive and a list of recommended items for families and pet owners to download on the flash drive, which should be kept in a safe place for use in a disaster situation.

http://www.americanbar.org/groups/tort_trial_insurance_practice/midyear_2012.html
THE APPLICATION OF THE DEATH ON THE HIGH SEAS ACT (DOHSA) TO COMMERCIAL SPACE FLIGHT ACCIDENTS

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I. Introduction to the Death On the High Seas Act

The Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301-30308 confers federal admiralty jurisdiction over maritime deaths, caused by wrongful acts, neglect, or defaults on the “high seas” more than three nautical miles (also called a “marine league”) from United States shores. Originally targeted at marine disasters, courts have consistently applied DOHSA to aviation accidents since the 1941 decision of Choy v. Pan American Airways Co., 1941 A.M.C. 483 (S.D.N.Y. 1941), where the court reasoned that DOHSA could apply in both a horizontal and vertical direction. Therefore, using this same line of reasoning, DOHSA should be interpreted vertically to also encompass space flight. In 2000 DOHSA was redrafted to include provisions specifically relating to commercial aviation accidents which expand the distance requirement to twelve nautical miles. Using these principles, this paper will argue the legislative history of DOHSA and the Choy line of cases make this law applicable to wrongful death arising from commercial space flight.

A. Historical Summary of Wrongful Death Actions Leading up to DOHSA

At common law, there was not a remedy for wrongful-death on the high seas. A wrongful-death action allows the victim’s dependents to recover for the harm the dependent actually suffered as a result of the victim’s death, independent of any action the decedent may have for his or her own personal injuries. The harsh effects of the common law rule were first modified by statute, originally in England with the 1846 adoption of Lord Campbell’s Wrongful Death Statute.

In 1886, the United States Supreme Court held in The Harrisburg, 119 U.S. 199 (1886), that absent statutory authority, the general maritime law did not recognize a cause of action for wrongful maritime deaths. After The Harrisburg, some courts in admiralty began to apply state wrongful death statutes to accidents in state and territorial waters as well as the high seas, because there was no applicable federal statute. The power of a state to create an enforceable cause of action for death on the high seas was upheld in The Hamilton, 207 U.S. 398 (1907), when the United States Supreme Court held the Delaware Wrongful Death Statute was proper when two vessels owned by Delaware Corporations collided on the high seas. Thus, by the early 20th Century, there was a significant degree of inconsistency with maritime wrongful death.

Accordingly, DOHSA was enacted to fill this void in maritime law and provide a remedy for wrongful death where none existed before. DOHSA was originally drafted as a maritime statute designed to protect sailors on ships. DOHSA’s principal advocate, the Maritime Law Association, led in the creation of a bill providing a uniform federal right of action for wrongful death upon the high seas in 1915. The bill was introduced in the House and Senate in the 64th Congress. The bill was favorably reported in both houses but did not reach a vote. The same bill was reintroduced in the House early in the 65th Congress in 1917 but did not reach a vote because the United States entered World War I four days after its introduction. After World War I, the bill was again reintroduced in the 66th Congress. Congress finally enacted DOHSA in 1920. While DOHSA provided a cause of action for wrongful maritime deaths, it was not until 1970 that The Harrisburg was overruled in Moragne v. State Marine Lines, Inc., 398 U.S. 375 (1970).

B. DOHSA’s Limitation on Liability

A DOHSA aviation claim is unique because it confers upon the defendant the benefit of limitation of liability to pecuniary damages and strictly defines permitted non-pecuniary damages. Under DOHSA, there is no limit to the categories of persons who may be sued as defendants. The plaintiff may sue the vessel or aircraft in rem, as well as any person or corporation.
that would have been liable. DOHSA authorizes the decedent’s “spouse, parent, child, or dependent relative” to sue as the personal representative in admiralty court. Maritime claims under DOHSA limit recovery to pecuniary damages. State wrongful-death statutes are not permitted to supplement DOHSA claims with non-pecuniary damages and DOHSA bars the plaintiff from any state law survival rights. Perhaps most importantly, DOHSA prohibits recovery of punitive damages.

In the case of a commercial aviation accident, DOHSA provides additional compensation for non-pecuniary damages in addition to the pecuniary damages. Non-pecuniary damages are strictly defined to mean “damages for loss of care, comfort, and companionship.” In Dooley v. Korean Air Lines Co., 524 U.S. 116 (1998), the Supreme Court held that aviation DOHSA claims preclude any general maritime law survival action that would permit recovery for pre-death pain and suffering.

C. Test for DOHSA Applicability to Aviation Accidents

DOHSA’s 2000 amendments require that in the case of an aviation accident, the wrongfull act, neglect, or default must occur (1) at least twelve (12) nautical miles from shore, and (2) on the high seas.

1. Distance

DOHSA currently requires that in the case of an aviation accident, the wrongfull act or omission leading to the accident must occur at least twelve nautical miles from shore. Prior to the 2000 Amendments, this distance, for both marine and aviation accidents was only three nautical miles.

2. High Seas

Courts have interpreted the term “high seas” broadly. Interpretations of this term have been relative to the shoreline of the United States and include waters within the jurisdiction of foreign states and foreign states’ inland lakes, seas, and navigable waterways.

a. Historical Views of the “High Seas”

Historically, the high seas have been defined to include those areas that are outside the territory of a national state. Originally, the United States defined that distance as one marine league, or three nautical miles. In In re Air Crash Off Long Island New York, on July 17, 1996, 209 F.3d 200, 205 (2d Cir. 2000), the Court of Appeals for the Second Circuit explained:

In 1793, seeking to remain neutral in the war between France, Britain and Spain in the Atlantic Ocean, Secretary of State Thomas Jefferson claimed the ‘smallest distance’ for the extent of American territorial seas. Relying on ‘the utmost range of a cannon ball, usually stated at one sea league,’ Jefferson made a claim for three nautical miles.

In United States v. Grush, 26 F.Cas. 48, 51 (D.Mass. 1829), one of the first judicial definitions of the high seas, from Justice Story, characterized the “high seas” as “the open, un[e]nclosed ocean, or portion of the sea, which is without the fauces terre on the sea coast.” This viewpoint is based on the position that the “high seas” should be defined by geographic features.

However, subsequent definitions by courts shifted towards the theory of governmental control. One of the first cases to articulate this view was United States v. Morel, 26 F.Cas. 1310, 1312 (C.C.E.D.Pa. 1834), which held that “[t]he open sea, the high sea, the ocean, is that which is . . . under the particular right or jurisdiction of no sovereign.”

During the nineteenth and early twentieth century, the Supreme Court holdings continued with this jurisdictional approach and definition, focusing on governmental control as opposed to geography for defining the “high seas.” In The Hamilton, 207 US. 398, 403 (1907), Justice Holmes of the Supreme Court characterized the “high seas” as “outside the territory, in a place belonging to no other sovereign.” The Supreme Court also defined the “high seas” in The Scotland, 105 U.S. 24, 29 (1882), as “where the law of no particular State has exclusive force, but all are equal.” Phrased another way, “[t]he high sea is common to all nations and foreign to none.” Maul v. United States, 274 U.S. 501, 511 (1927). Shortly after DOHSA’s enactment, although it was targeted at the enforceability of a Prohibition statute, in Cunard S.S. Co. v. Mellon, 262 U.S. 100, 122-23 (1923), the Supreme Court held, likely for further clarity, that the high seas included international waters.

These holdings frame the general principal that the United States has historically interpreted the “high seas” to be a place not under the control of a specific government, but as the following cases show, in the context of DOHSA aviation actions, this also includes foreign state’s waters.

b. Expansion to Include Territorial Waters of Foreign States

Three cases held DOHSA applies to aviation accidents occurring on the waters of a foreign state because that territory constituted the “high seas” relative

In the crash of Swissair Flight No. 111, litigated under the caption In re Air Crash Disaster Near Peggy’s Cove, while the exact location of the crash was undetermined, it was stipulated by all parties that it was outside the three nautical mile limit of Nova Scotia’s territorial waters claimed by Canada at the time DOHSA was enacted in 1920 but within the twelve nautical mile territorial waters limit then claimed by the Canadian government. The District Court concluded that “DOHSA, as amended, applies to aviation accidents in foreign territorial waters.” In Jennings, the District Court applied DOHSA to a plane crash two and a half miles off of the coast of the Shetland Islands, Scotland. The District Court, when adjudicating In re Air Crash Near Bombay, observed that “[n]othing in [DOHSA] or its legislative history supports the position that Congress intended to limit the scope of this remedy to deaths occurring in international waters” and thus held DOHSA applied.

This holding is not specific to aviation accidents because in terms of maritime accidents, the term “high seas” for the purposes of DOHSA applies to nautical accidents that occur within foreign territorial waters. As summarized in Benedict on Admiralty: “It appears to be settled that the term ‘high seas’ within the meaning of DOHSA is not limited to international waters, but includes the territorial waters of a foreign nation as long as they are more than a marine league away from United States shore.” In light of DOHSA’s 2000 amendments, in the context of aviation accidents, the phrase “marine league” as used in Benedict on Admiralty should be replaced with “twelve nautical miles”.

D. The Origin of Aviation DOHSA Claims Prior to Statutory Language

While actions arising from aviation torts are generally not cognizable in admiralty, there are two specific exceptions. The first is in situation where the wrong bears a significant relationship to a traditional maritime activity. The second is when there is specific legislation authorizing a claim, such as DOHSA.

1. Choy v. Pan-American

The first case to apply DOHSA to aviation accidents was Choy v. Pan-American Airways Co. In 1941, DOHSA, then codified as 46 U.S.C. § 761, et seq., did not include specific provisions relating to aviation accidents. In Choy, the plaintiff administrator sued Pan-American Airways (Pan Am) following the crash of a seaplane in the Pacific Ocean. The plaintiff brought causes of action under: (1) DOHSA, (2) the Death Statute of Nevada, the place of defendant’s incorporation, (3) the Death Act of New York where Pan-Am had a place of business and where plaintiff purchased his ticket, (4) the Warsaw (International Airline) Convention, and (5) the laws of the Commonwealth of the Philippine Islands.

Noting that “[t]he language of [DOHSA] is broad” the United States District Court for the Southern District of New York found that “beyond a marine league from shore” should be construed to extend in both a horizontal and vertical direction:

The statute certainly includes the phrase ‘on the high seas’ but there is no reason why this should make the law operable only on a horizontal plane. The very next phrase ‘beyond a marine league from shore of any State’ may be said to include a vertical sense and another dimension.

2. Subsequent Cases Confirmed Choy

With Choy serving as the genesis of DOHSA application to aviation accidents “beyond a marine league from shore” by applying the law in a vertical direction, courts consistently followed this holding and firmly entrenched DOHSA as the substantive law for aviation accidents occurring on the “high seas.”

In Wilson v. Transocean Airlines, 121 F. Supp. 85, 86 (1954), a plane traveling from Guam to Oakland, California, fatally crashed 325 miles east of Wake Island. The passenger’s spouse brought an action for the loss of companionship and support under the governing California law but Transocean, the carrier, argued that DOHSA represented the sole and exclusive remedy because the accident occurred on the “high seas” and more than a marine league from shore. The Wilson court noted: “[i]t is clear that the scope of [DOHSA], within the geographical area of its operation, was intended to be as broad as the traditional tort jurisdiction of admiralty.” As a result, the court concluded DOHSA “affords a right of action for deaths resulting from airplane crashes on the high seas.”

In Noel v. Linea Aeropostal Venezolana, 154 F. Supp. 162, 164 (S.D.N.Y. 1956), Judge Cashin held:

Neither authority, the language of the Statute nor the dictates of common sense sustain a
holding that the fulfillment of the jurisdictional requirements of the Federal Death on the High Seas Act is to be governed by the determination of such elusive fact as whether a person died above, on or in the sea.

Thus, using Noel, the exact place of the decedent’s death is irrelevant provided the wrongful act or omission occurred within the situs of DOHSA.

The principal that DOHSA is the substantive law for aviation accidents was also articulated in the 1983 Korean Airlines Flight 007 Disaster when the Soviet Union shot down a Korean Airlines 747 that veered off course. As litigated, Zicherman v. Korean Airlines Co. Ltd., 516 U.S. 217 (1996), the Supreme Court held that when “an airplane crash occurs on the high seas, DOHSA supplies the substantive United States law.”

The 2000 DOHSA amendments have not negated the Choy line of cases but, in addition to being on “the high seas,” also replaced the three nautical mile requirement with a new situs requirement of the accident occurring at least twelve nautical miles off of the United States shoreline.

E. DOHSA’s Inconsistent Drafting and TWA Flight 800

The statutory language of DOHSA has previously given rise to problems with regards to the boundaries of DOHSA in regards to aviation litigation. If there is a commercial space accident, similar problems will arise as to where the “high seas” begin as it did in the litigation following the crash of Trans World Airlines (TWA) Flight No. 800 in 1996, the most recent DOHSA aviation accident case before an appellate court to interpret the term “high seas.”

TWA 800, a Boeing 747-400, crashed in the Atlantic Ocean shortly after takeoff from New York’s John F. Kennedy International Airport enroute to Charles de Gaulle airport in Paris, France. The crash, litigated under the caption In re Air Crash Off Long Island, New York, on July 17, 1996, killed all 230 passengers and crew and occurred approximately eight nautical miles off the shore of Long Island, New York. The subsequent litigation addressed the problem of how to approach accidents that occur between DOHSA’s then three nautical boundary but within the twelve nautical mile boundary claimed by the United States. The Court found that in order for DOHSA to apply (as this case was decided before the 2000 DOHSA amendments), the accident must take place both on “the high seas” and “beyond a marine league from shore of any state.”

The problem in TWA 800 arose because under Presidential Proclamation No. 5928, issued on December 27, 1988 by President Reagan, the territorial waters of the United States were extended from three nautical miles to twelve nautical miles. Thus TWA 800 crashed outside of what was DOHSA’s three nautical mile boundary but still within the United States territorial waters. Thus the court considered whether the proclamation, by increasing the territorial waters from three to twelve miles, had also increased the boundary of the “high seas.”

As the Court of Appeal for the Second Circuit observed, “once the United States or any state or territory thereof has asserted sovereignty over certain waters, DOHSA does not give the remedies available in those waters.” By examining historical interpretations of the “high seas” the court found the “background and legislative history of DOHSA demonstrate Congress’ intent to exclude all state and federal territorial waters from its [DOHSA’s] scope” because they were not the high seas. Therefore, “DOHSA does not apply to United States territorial waters where the crash in this case occurred.”

F. Summary of DOHSA Principles for Aviation Accidents

In summary, to apply DOHSA in an aviation accident setting, the accident must occur more than twelve nautical miles off United States shoreline and on the “high seas” – often referred to as the situs. Second, the Choy line of cases have consistently applied DOHSA in a vertical direction and the location of the decedent’s death is irrelevant as long as the wrongful act or omission occurred while the aircraft is within the DOHSA situs. Finally, under the TWA 800 holding, once the United States asserts jurisdiction over any body of water, that body of water is removed from DOHSA’s jurisdiction. With this foundation, it is now appropriate to survey why wrongful death in space poses a novel issue.

II. A BRIEF HISTORY OF WRONGFUL DEATH AND U.S. SPACE OPERATIONS

While at its infancy, the commercial space industry will emerge as a significant industry within the coming years. Early space exploration, dominated by the United States and the Soviet Union during the 1950’s and 1960’s, arguably culminated with the Apollo 11 Moon landing in 1969. However, such exploration has not been without human sacrifice as the United States National Aeronautics and Space Administration (NASA) has lost three spacecraft to accidents. Apollo 1 caught fire during a 1967 test killing three astronauts. Space Shuttle Challenger exploded shortly after liftoff.
in 1986 and Space Shuttle Columbia disintegrated upon re-entry in 2003, each killing seven astronauts. In all of these cases, wrongful death claims were non-actionable.

In two cases, Smith v. U.S., 877 F.2d 40 (11th Cir. 1989), and Smith v. Morton Thiokol, Inc., 712 F. Supp. 893 (M.D. Fla. 1988), the widow of astronaut Michael J. Smith, a member of the Challenger crew, brought suit against NASA for this death. In these companion cases, the courts held that the astronauts were NASA employees acting within the course and scope of their employment so the claims must be brought under the Federal Tort Claims Act, and that suits are barred under the Federal Tort Claims Act by the doctrine articulated in Feres v. United States, 340 U.S. 135 (1950) (the “Feres Doctrine”), because astronauts are military personnel assigned to NASA and the injuries arose from an activity incident to military duty, even though the astronauts were killed in a mission for NASA, a civilian agency. Thus, as long as space flight was conducted by a government entity, the problem of wrongful death actions by the survivors was non-actionable because of the application of the Feres Doctrine.

However, now that private enterprise is set to commence commercial space flight operations within the immediate future, history suggests that it is inevitable that accidents will happen and wrongful death actions will arise which will not have the Feres immunity NASA enjoys. SpaceShipOne became, in 2004, the first privately built spacecraft to exceed an altitude of 100km twice in succession. After SpaceShipOne’s success, Virgin Atlantic announced it had acquired the design rights to SpaceShipOne with the intent of creating a space tourist vehicle. Furthermore, with the retirement of the Space Shuttle fleet in 2011, NASA will no longer have the ability to conduct human spaceflight operations. Thus, as private spaceflight business operations appear highly likely in the immediate future, it is safe to anticipate that there will be emerging legal issues which need to be addressed

### III. AIRSPACE AND AERONAUTICAL NAVIGATION

Pursuant to 49 U.S.C. § 40103, the United States has claimed exclusive sovereignty of its airspace. In doing so, the United States has vested power with the Federal Aviation Administration (FAA) for developing the airspace of the United States.

First, the FAA has created sets of “flight rules”—Visual Flight Rules (VFR) and Instrument Flight Rules (IFR)—which govern aviation navigation. Next, FAA has established two forms of airspace: controlled and uncontrolled. Both are defined and governed by the Federal Aviation Administration in Part 71 of the Federal Aviation Regulations (FAR), 14 C.F.R. § 71, et seq. All classes of airspace are assigned a letter: A, B, C, D, E, or G and some contain a specific flight rule requirements. All altitudes listed in the FARs are given in feet as mean sea level (MSL), or the distance above the mean level of the ocean and above 18,000 feet, as Flight Levels (FL).


There are two types of regulations governing the weather conditions and licensure under which a pilot may operate an aircraft: VFR and IFR. VFR is a set of regulations which allow a pilot to operate an aircraft in weather conditions meeting certain minimum visibility requirements. Permission from FAA controllers is not required to operate under VFR in certain categories of airspace. However, under IFR, the pilot must be in two way radio communications with, and receive permission from, Air Traffic Control (ATC), and have a transponder.

#### B. Uncontrolled Airspace

Class G is the only form of uncontrolled airspace. Although specifically designed by FAA Order JO 7400.9V, it generally extends to either 700 feet above ground level or 1,200 feet above ground level at certain fixtures.

#### C. Controlled Airspace from Surface to FL180

The FARs establish five classes of controlled airspace as defined by letter: A, B, C, D, and E. All flight operations within controlled airspace have some limitations or restrictions. Such restrictions include, but are not limited to, radio communication, altitude restrictions, and position reporting.

Class A airspace exists between FL180 and FL600. Classes B, C, D, E, and F airspace exist below FL 180 (the lower limit of Class A airspace), and are specifically defined by FAA Order JO 7400.9V. This Order specifically lists coordinates of airspaces that fall into the Class B, C, D, E, and F airspace. Additionally, Class E airspace is also defined by exclusion when below FL 180. Therefore, if airspace is not designated Class A, B, C, D, F, or G, then by exclusion, it is defined as Class E airspace.

#### D. Controlled Airspace from FL180 to FL600

Class A airspace is defined as all “airspace overlying the waters within 12 miles of the coast of the 48 contiguous States, from 18,000 feet MSL and including FL 600 ... “. In order to operate in Class A airspace, the pilot must be flying under Instrument Fight...
Rules (IFR) receive a clearance, or permission from Air Traffic Control (ATC), have altitude reporting equipment, and maintain two-way radio communication with ATC.

E. Airspace above FL600

Airspace above FL600 is Class E airspace. Thus, Class E airspace exists both below FL180 and above FL600. In Class E airspace, radio communications and ATC clearance are not required and in limited situations, below 10,000 feet, altitude reporting near Class B airspace is required.

IV. DOHSA SHOULD APPLY WHEN A COMMERCIAL SPACE ACCIDENT OCCURS MORE THAN 12 NAUTICAL MILES ABOVE EARTH

In order to satisfy the traditional aviation requirements for DOHSA, the situs of the accidents must be twelve nautical miles from shore and on the “high seas.” Here, the distance from shore is interpreted in the vertical direction and above FL600 is equivalent to the “high seas.”

A. Twelve Vertical Nautical Miles (72,913 Feet)

The Choy line of DOHSA cases has consistently held that DOHSA applies in a “vertical sense” as well as a horizontal sense. Therefore, twelve vertical nautical miles above the earth would equivocate to an altitude of 72,913 feet. Accordingly, any accident above this altitude should, if taken literally as the Choy line of cases suggests, meet this distance requirement of DOHSA.

B. Above FL600 the Airspace is the “High Seas”

Above FL600, the airspace shares many similarities to the “high seas.” As previously discussed, jurisprudence has, for the better part of 200 years focused on government control as an approach for whether a locale qualifies as “the high seas.” Using this test, there is evidence that the United States is not exercising governmental control above this altitude sufficient to claim jurisdiction that would prevent it from being considered the “high seas.”

In order to show that the United States government is not exercising control over the airspace above FL600, it is first necessary to compare the governmental involvement with the class A airspace directly below it. When operating in Class A airspace, a pilot is required to be operating IFR, obtain ATC clearance, be in two-way radio communications, and have a transponder with altitude encoding ability (often referred to as Mode C transponder). Some of these requirements may seem repetitive because under IFR, a pilot must be in contact with ATC. Class A airspace, as previously mentioned, is the only airspace which mandates IFR procedures.

However, within classes B, C, D, E, and G, a pilot may chose to operate under VFR or IFR. Thus, when a pilot goes above the Class A ceiling of FL600 and enters into the Class E airspace above FL600, the pilot is no longer obligated to operate IFR and can operate VFR and have no contact with ATC. While it remains possible for the pilot to continue to operate under VFR, the regulations permit VFR flight rules, which do not mandate continued ATC clearance, altitude reporting, or two-way radio communications – symbolic of the fact that United States is not exercising control over aviation activities above this altitude.

Further, as a practical note, the Class E airspace, as written in the FARs above FL600 extends indefinitely into space which places it into conflict with International Law. The United States claims exclusive sovereignty over its airspace in connection with the principles of the Chicago Convention, a 1944 conference on developing post World War II international air travel standards. However, Article II of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (Outer Space Treaty) prohibits any nation from claiming sovereignty over Space. As the Class E airspace extends indefinitely, it at some point violates this treaty.

V. OBSERVATIONS AND CONCLUSIONS

Given the history of space flight, fatalities, while uncommon, have occurred. Since May 5, 1961, when Alan Sheppard became the first American in Space, in the sixty years that have since passed, NASA lost sixteen Americans (and one Israeli) to spaceflight accidents. The Soviet Union has also suffered at least six fatalities with Soyuz 1 in 1967 and Soyuz II in 1971. Therefore, it is likely that as commercial space flight operations enter private industry, fatalities will occur and DOHSA should be included in any litigation.

A. DOHSA Will Also Apply if the Circumstances from the Commercial Operation Contribute to the Deceased Passing While the Spacecraft is on the High Seas

If the deceased does not pass during the actual flight, but rather from factors attributed to their travels, DOHSA’s provisions are drafted so that the tort is deemed to occur, not where the wrongful act or omission has its inception, but were the impact of the act or omission produced such injury that gives cause to the rise of the cause of action.

In D’Aleman v. Pan American World Airways, Inc., 259 F.2d 493 (2d Cir. 1959), the wife of the decedent...
brought suit against Pan American after her husband “became so terrified by the feather of the engine [a malfunction causing the propeller to stop spinning] and the announcement of the unscheduled landing at Norfolk that he went into a state of shock which, four days later, in New York, resulted in his death” after his flight from Puerto Rico to New York was forced to make an unscheduled landing in Norfolk, Virginia because of engine trouble. Noting that “[t]o give passengers on ship protection [of DOHSA] and deny similar rights to passengers in the air would amount to an unjustifiable and highly technical discrimination,” the Court of Appeal for the Second Circuit held that DOHSA “grants a right of action in admiralty for death caused by wrongful act, neglect or default occurring in the air space over the high seas ....” Thus, while the actual death occurred on land, since the cause of death happened while the aircraft was within DOHSA’s jurisdiction, DOHSA is still applicable.

Accordingly, if by some phenomenon, a commercial space tourist develops a medical condition directly attributable to their space flight, returns to earth, and subsequently passes, then following the precedent in D’Aleman, DOHSA is the applicable law.

B. To Prevent a Similar TWA Flight 800 Congress Should Proactively Amend DOHSA to Include Commercial Space Flight

The simplest solution to this hypothetical question would be for Congress to amend DOHSA to include special provisions for commercial space operations above a designated altitude. Doing so would avert what predictably could be a similar case as happened in the TWA Flight 800 litigation when DOHSA’s maritime boundary was not extended consistently with the Presidential Proclamation. In doing so, Congress would be well served to include a provision, clarifying what altitude for the purpose of commercial spaceflight satisfies the “high seas” requirement of this act.

However, until such time as either Congress amends DOHSA or a spacecraft crashes and a court opinion is delivered on the topic, there is a compelling argument that in the context of DOHSA, the Choy line of cases should continue to apply vertically and above FL 600 is the boundary for the “high seas.” 


Ratification of the 1999 Arrest Convention

Article 14 of the 1999 Arrest Convention provides that it will enter into force six months after it has been ratified by 10 states. Albania became the tenth state to ratify the Convention on March 14, 2011 and thus it entered into force on September 14, 2011. The states which have agreed to be bound by the 1999 Convention are Albania, Algeria, Benin, Bulgaria, Ecuador, Estonia, Latvia, Liberia, Spain, and the Syrian Arab Republic. 6

Application of the 1999 Arrest Convention

So far, no further states have agreed to be bound by the 1999 Arrest Convention. Thus it will, for now, only take effect within the jurisdictions of those 10 states. Article 8 provides that the Convention shall apply to any ship within the jurisdiction of a signatory state, or Party State. Therefore, ships flying the flag of a state which has not ratified the 1999 Convention will be subject to the 1999 Convention when in the waters of a state which has (unless that state has made specific reservations to the contrary). This will be the case irrespective of the nationalities of the parties in dispute and any law and jurisdiction provision they may have agreed between them.

Article 10 allows states to make certain reservations when ratifying the 1999 Convention. The only notable reservation so far has been made by Spain which has reserved the right not to apply the rules of the 1999 Convention to ships which do not fly the flag of another 1999 Convention state.

Spain is also a signatory to the 1952 Convention and this reservation would, at first glance, appear to maintain the status quo in respect of ships flying the flag of other 1952 Convention states. However, practitioners in this jurisdiction suggest that, following an amendment to the Procedural Law Act, the Spanish Court will not exercise the right not to apply the 1999 Convention to ships flagged in non-ratifying states.

The 1952 Arrest Convention

The 1952 Arrest Convention adopted the common law approach of having a closed list of claims. Article 1 of the 1952 Convention sets out the limited list of claims for which ships can be arrested. Article 3 permits the arrest of sister ships. In the event of wrongful arrest, it is possible to claim damages pursuant to the 1952 Arrest Convention, although this is a difficult claim to establish because it requires evidence of bad faith on the part of the arresting party which (not least because of the closed list) is rarely the case.

The 1952 Convention is a success, having been widely adopted, with over 70 ratifications and accessions. 7 Although the 1952 Arrest Convention has proved to be very popular, it has also had its detractors. Some take the view that the closed list of claims in respect of which an arrest can be made is too restrictive and advocate an open list, or at least the expansion of the present list. One significant criticism is that it does not allow arrest in respect of unpaid insurance premiums. The drafting of the 1952 Convention has also been criticized insofar as certain sections have proved ambiguous in their wording, with the result that completely different interpretations have been placed on them by civil law and common law courts. For example, some civil law courts have interpreted Article 3(4) as allowing a ship to be arrested for the debts of its time charterer. In common law jurisdictions, on the other hand, arrest for the debts of anyone other than the ship’s owner or demise charterer is only possible following the sale of a ship and in respect of maritime liens or other in rem claims which survive the sale of a ship.

Changes Introduced in the Arrest Convention 1999

The 1999 Arrest Convention contains some notable changes to the 1952 Arrest Convention. First, the list of claims for which arrest is possible has been expanded significantly. Under the 1952 Convention there are 17 categories of claim which can give rise to a right of arrest. Under the 1999 Convention there are 22 categories, with bottomry having been removed and six new heads of arrest having been added. Whilst the list in the 1952 Convention is closed, the list in the 1999 Convention contains one category (Article 1(d) - environmental damage) which is somewhat open-ended. In view of the difficulties inherent in defining all possible forms of environmental damage and related costs, this subparagraph lists examples of the type of damage which it envisages and concludes with the open words “and damage, costs, or loss of a similar nature…”.

Under the 1999 Arrest Convention, in addition to the claims listed in the 1952 Arrest Convention, it is possible to arrest ships in respect of:

- damage or threat of damage to the environment
- wreck removal

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6. Denmark, Finland, Norway, and Pakistan signed the 1999 Arrest Convention in 2000 but have not ratified or made a definitive signature.

Unlike the 1952 Convention, the 1999 Convention allows claimants multiple opportunities to secure their claims. Under Article 5, a claimant can re-arrest a ship after it has been released, and has the option of arresting multiple ships, in order to top up the security for his claim. The right to re-arrest or to arrest multiple vessels arises only when:

- the security already provided is inadequate (in the case of re-arrests, the security can never exceed the value of the vessel in question); or
- the person who provides the security is not, or is unlikely to be, able to fulfill its obligations; or
- the ship or the original security was released either with the consent of the claimant acting on reasonable grounds or because he could not by taking reasonable steps prevent the release.

These are important provisions. They are not, therefore, something which a claimant is likely to be willing to contract out of lightly. The traditional wording of letters of undertaking would remove these rights from the claimant’s armory. It seems likely that claimants arresting in jurisdictions applying the 1999 Convention will seek to reserve their rights under Article 5 in any letters of undertaking or other agreements relating to the release of a vessel. It is difficult to see how a defendant, when providing security in order to have its vessel released, can reasonably refuse a claimant the right to subsequently top up this security under the circumstances envisaged by the Convention. In the absence of agreement between the parties as to the adequacy of the security provided, the Courts in the arresting jurisdiction shall determine the nature and amount of security required for the release of the ship. In the event of a disagreement between the parties regarding the right to further, future arrests, the Courts are likely to favor the claimants.

Comment

Although the 1999 Arrest Convention only applies in a limited number of jurisdictions, it is relevant to any ships entering those jurisdictions. As compared with the 1952 Arrest Convention, the expansion of the list of claims for which arrest is possible, and the prospect of multiple arrests in relation to a single claim, are likely to mean that ship-owners will view the 1999 Convention with some concern. This sentiment is only likely to increase, should the 1999 Convention be adopted more widely in the future.
# 2012 TIPS CALENDAR

## February 2012

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Location</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>2-5</td>
<td>ABA Midyear Meeting</td>
<td>New Orleans Marriott</td>
<td>Felisha A. Stewart – 312/988-5672</td>
</tr>
<tr>
<td></td>
<td>February 3, 3:00 – 5:00 p.m.</td>
<td>New Orleans, LA</td>
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<td></td>
<td>CLE Program: Disaster Preparedness &amp; Response Series</td>
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<tr>
<td>16-19</td>
<td>Insurance Coverage Litigation Midyear Meeting</td>
<td>Arizona Biltmore Resort and Spa</td>
<td>Ninah Moore – 312/988-5498</td>
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## March 2012

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<tbody>
<tr>
<td>8-10</td>
<td>Workers’ Compensation CLE Program</td>
<td>The Westin Riverwalk Hotel</td>
<td>Donald Quarles – 312/988-5708</td>
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<td></td>
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<td>San Antonio, TX</td>
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<tr>
<td>29-30</td>
<td>Emerging Issues in Motor Vehicle Product Liability Litigation National Program</td>
<td>Arizona Biltmore Resort and Spa</td>
<td>Donald Quarles – 312/988-5708</td>
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<tr>
<td>30-31</td>
<td>Toxic Torts &amp; Environmental Law Committee Midyear Meeting</td>
<td>Arizona Biltmore Resort and Spa</td>
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## April 2012

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<tbody>
<tr>
<td>14-18</td>
<td>TIPS National Trial Academy</td>
<td>Grand Sierra Resort &amp; Casino</td>
<td>Donald Quarles – 312/988-5708</td>
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<td></td>
<td>National Judicial College</td>
<td>Reno, NV</td>
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<td>19</td>
<td>Doing Business In the United States?</td>
<td>Chinese Council for the Trade (CCPIT)</td>
<td>Donald Quarles – 312/988-5708</td>
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<tr>
<td></td>
<td>What You Need to Know About Investing,</td>
<td>Beijing, China</td>
<td></td>
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<tr>
<td></td>
<td>Product Promotion of International Liability and Dispute Resolution</td>
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