

# BENEDICT'S MARITIME BULLETIN

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Joshua S. Force, Editor-in-Chief  
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## SEAMAN STATUS AND VESSEL STATUS UPDATE

By: Rowen Fricker Asprodites and  
Aaron B. Greenbaum

This article addresses seaman status and vessel status decisions issued from January 1, 2021 through April 1, 2022. Following the U.S. Fifth Circuit's decision in *Sanchez v. Smart Fabricators*,<sup>1</sup> several courts have analyzed the three inquiries which the court of appeals applied to the substantial connection prong set forth in *Chandris*.<sup>2</sup> The key inquiries remain whether workers spent at least 30% of their time in the service of a vessel or identifiable fleet of vessels, whether the workers report to land-based employers, whether the job task was discrete and temporary, and whether the workers were on vessels connected to shore. There have been several interesting vessel-status decisions addressing whether vessels removed from navigation maintain their status.

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<sup>1</sup> *Sanchez v. Smart Fabricators of Texas, L.L.C.*, 997 F.3d 564 (5th Cir. 2021) (en banc).

<sup>2</sup> *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995).

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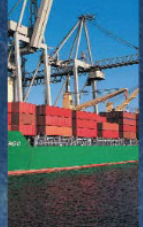
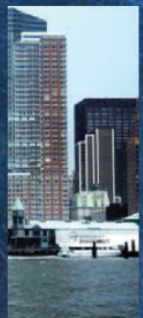
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Matthew Bender®

## MANAGING EDITOR'S INTRODUCTORY NOTE

Our first article in this edition is by Rowen Fricker Asprodites and Aaron B. Greenbaum, providing a summary of cases on seamen and vessel status issued from January 1, 2021 through April 1, 2022. Rowen and Aaron give a comprehensive review, updating similar articles published in Benedict's Maritime Bulletin, Vol. 18, No. 3, Third Quarter 2020.

We next present a scholarly article from a new author, Mino Daryanani, a maritime lawyer from IMO IMLI, Malta currently based in Kolkata, India. Mino gives a detailed analysis of how international law is in the process of developing rules to determine jurisdiction in criminal matters, using the United Nations Convention on the Law of the Sea. Mino analyzes the various theories of jurisdiction, and provides cases applying the different principles. She concludes that "the well-established rule of international law that the law of the Flag State, which exclusively governs the affairs of the ship and crew, appears to be deeply entrenched and irrevocable."

In his regular column Window on Washington, Bryant Gardner reports on Washington's renewed scrutiny of the U.S.-flag fleet and the U.S. Merchant Marine Academy at Kings Point in the wake of new allegations of sexual assault and sexual harassment ("SASH") connected to the Academy's "Sea Year" program. Both Houses of Congress have passed new legislation that will need to be reconciled, and will need to address industry concerns – both owners and seafarers – over some of the proposed provisions. Regardless, as Bryant concludes "it does seem clear that some form of legislation will be forthcoming, potentially before the close of the 117th Congress, and that SASH issues will remain at the forefront of congressional concerns regarding the industry."

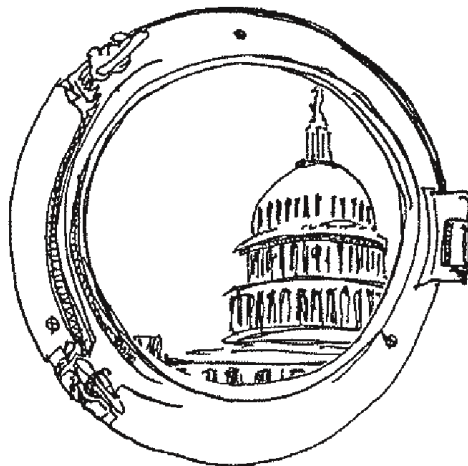
We conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

We urge our readers who may have summer associates or interns from law schools working for them to encourage them to submit articles for publication in our Future Proctors section.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

**Robert J. Zapf**

## WINDOW ON WASHINGTON



### *SASH is Back*

By Bryant E. Gardner \*

Policymakers in Washington have again turned their scrutiny upon the U.S.-flag fleet and the U.S. Merchant Marine Academy at Kings Point in the wake of new allegations of sexual assault and sexual harassment (“SASH”) connected to the Academy’s “Sea Year” program, which provides live deck-plate training for midshipmen out in the commercial fleet. SASH was a hot topic on Capitol Hill and at the U.S. Maritime Administration (“MARAD”) back in 2016, when SASH allegations placed the Academy’s accreditation in jeopardy.<sup>1</sup> MARAD, Kings Point, and vessel operators imposed a raft of measures to reign-in misconduct, and the issue fell relatively quiet until October 2021, when “Midshipman X” publicly alleged she had been the victim of sexual assault during her Sea Year, when she was 19 years old.

Midshipman X’s heartbreaking allegations were posted to a whistleblower website,<sup>2</sup> set forth a shocking account of forcible rape, and quickly received widespread media attention,<sup>3</sup> stoking grave concerns at the highest levels of leadership in Washington. The vessel’s operator immediately initiated a “top to bottom” investigation and analysis of its controls and subsequently suspended five crew members. Deputy Secretary of Transportation Polly Trottenberg and Acting Maritime Administrator Lucinda Lessley penned a letter to the Kings Point community to express their “unwavering support” for Midshipman X<sup>4</sup> and the attention of Congress turned back to the matter.

In October 2021, all of the Chairmen of the U.S. Congress committees of jurisdiction over MARAD and the maritime industry penned a letter to U.S. Transportation Secretary Buttigieg expressing concern. In their letter, the Chairmen shed blame on “the toxic

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<sup>1</sup> See generally Bryant E. Gardner, Window on Washington: Righting the Ship or Dangerously Off Course, 14 Benedict’s Maritime Bulletin (4th Quarter 2016), <https://www.winston.com/images/content/1/1/v2/117906/Window-on-Washington-Fourth-Quarter-2016.pdf>.

<sup>2</sup> Maritime Legal Aid & Advocacy, <https://www.maritimelegalaid.com/blog/i-was-raped-aboard-a-maersk-ship-during-sea-year> (September 27, 2021).

<sup>3</sup> Blake Ellis & Melanie Hicken, I was trapped: Shipping giant investigates alleged rape of 19-year-old during federal training program, CNN, October 12, 2021.

<sup>4</sup> Polly Trottenberg, Deputy Secretary of Transportation, and Lucinda Lessley, Acting Maritime Administrator, Message to the Kings Point Community (Oct. 2, 2021).



culture not only at USMMA, but within the maritime industry.” Additionally, the legislators questioned the wisdom of continuing the Sea Year “with few meaningful changes or safeguards in place” and “no indication that meaningful and necessary steps have been taken to ensure the safety of cadets in the Sea Year program.” They also called for the removal of Academy Superintendent Vice Admiral Jack Buono.

The Coast Guard launched an investigation, and the Academy temporarily suspended the Sea Year program, as it had previously in 2016. Suspension of the hands-on training program proved highly controversial once more, since the program is a core part of the Academy’s training program and an experience valued by the midshipmen themselves. Indeed, Midshipman X surfaced through counsel to explain her aim was not to get the Sea Year program shut down and stated, “As Kings Pointers, we should not surrender the ships of the U.S. Merchant Marine to sexual predators,” and that “We should instead be focused on ruthlessly eliminating these predators, and the people and groups who enable and defend them, from the maritime industry forever.”<sup>5</sup>

MARAD, working with the Department of Transportation and the Academy set about developing a more robust anti-SASH framework focused on improved Sea Year safety, which it announced on December 15, 2021, together with its plan to resume Sea Year. The Every Mariner Builds a Respectful Culture (“EMBARC”) program is administered by MARAD and embraces of 30 additional safety features that commercial carriers must meet to enroll in the program and be approved to carry cadets.<sup>6</sup>

Under the EMBARC program, satellite telephones are made available to midshipmen while afloat and the Academy has implemented an amnesty policy for violations of alcohol and drug use policies by students in connection with an alleged SASH event to encourage reporting.<sup>7</sup> Additionally, vessel operators must establish new compliance plans and procedures, increase SASH-related compliance training, establish a SASH contact ashore, impose restrictions on stateroom fraternization,

require open-door interaction with cadets, and provide cadets with lockable accommodations backed by a master key control system.<sup>8</sup>

To date, EMBARC has had few companies enroll, primarily because the program requires that the numerous SASH policies and procedures be included in the vessel operators’ Safety Management System (“SMS”) required by the International Safety Management (“ISM”) Code, and operators have serious concerns that this could result in vessel detentions and other penalties, primarily by foreign port state control unaccustomed to such provisions in the Safety Management System. In response, MARAD, in its posted “Q&A” for the program, states

SASH could have direct impact on safety at sea. Companies that operate U.S.-flag ships carrying USMMA cadets should document their SASH reporting policies and procedures within their SMS similar to how other company-specific requirements are added. The end goal is building trust and mutual respect among a ship’s crew. External auditors will conduct their regularly scheduled SMS audits using appropriate protocols to ensure consistency in application. The Coast Guard has informed MARAD there is no impediment to the voluntary inclusion of EMBARC standards in vessels’ safety management systems.<sup>9</sup>

MARAD has contracted with the American Bureau of Shipping (“ABS”) to help implement EMBARC for U.S.-flag carriers. Carriers and ABS have encountered challenges, and stakeholders are reportedly working on alternative approaches which do not, as an initial matter, attach the EMBARC provisions to vessel class certificates.

Both the House and Senate have introduced legislation aimed at sexual misconduct in the U.S.-flag merchant marine. The Senate bill, the Improving Protections for Midshipmen Act released by the Commerce Committee

<sup>5</sup> Ian Duncan, Federal sailors academy halts at-sea training as it reckons with sexual assault accounts, Washington Post, Nov. 3, 2021.

<sup>6</sup> U.S. Maritime Administration, U.S. Department of Transportation and Maritime Administration Release Plan to Resume Sea Year with Mandatory Safety Standards (Dec. 15, 2021), <https://www.maritime.dot.gov/newsroom/press-releases/us-department-transportation-and-maritime-administration-release-plan>.

<sup>7</sup> *Id.*

<sup>8</sup> U.S. Maritime Administration, Every Mariner Builds a Respectful Culture (EMBARC), Sexual Assault and Sexual Harassment Prevention Mandatory Standards (Dec. 15, 2021), <https://www.maritime.dot.gov/education/sea-year-training-program-criteria>.

<sup>9</sup> U.S. Maritime Administration, Every Mariner Builds a Respectful Culture (EMBARC), Sexual assault and Sexual Harassment (SASH) Prevention Mandatory eligibility Standards for Participation in the USMMA Sea Year Program, Frequently Asked Questions (Mar. 18, 2022), [https://www.maritime.dot.gov/sites/marad.dot.gov/files/2022-03/Updated%20EMBARC%20FAQ\\_March%2018%202022.pdf](https://www.maritime.dot.gov/sites/marad.dot.gov/files/2022-03/Updated%20EMBARC%20FAQ_March%2018%202022.pdf).

in December 2021,<sup>10</sup> provides the Coast Guard with the authority to revoke a mariner's license if found to have committed sexual assault or sexual harassment, and requires the Coast Guard to assess the applicability of the Department of Defense's "Catch a Serial Offender" anonymous reporting program to the merchant marine.<sup>11</sup> The Senate measure would also establish a database of SASH incidents at the Academy and require exit interviews with students following completion of Sea Year for population of the database. Furthermore, the Act would provide additional training and resources to students, and further fortify the Academy's procedures and policies by codifying the position of Special Victim's Counsel at the Academy, allow the Department of Transportation to direct hire employees for the Academy SASH office, and establish a Sexual Assault Advisory council including Academy alumni.

In early March, the House released its legislative proposal, the Safer Seas Act.<sup>12</sup> Similar to the Senate proposal, the House version would have the Coast Guard deny, suspend, or revoke mariner's credentials for a SASH conviction with due process. The House version also directs the Coast Guard to promulgate regulations relating to crew alcohol consumption, with an amnesty provision so that violation of the alcohol policy does not impede SASH reporting. Moreover, the proposal makes mandatory the reporting of SASH incidents, subject to a civil penalty of \$5,000 for individuals crew and \$25,000 for shipowners failing to report. Like the EMBARC program, the House measure will require company SASH policies be included in the vessel's Safety Management System and require lockable cadet staterooms backed by a new master key control system. The legislation also clarifies the availability of a private right of action for SASH claims and extends the normal three-year statute of limitations for personal injury claims to five years for SASH claims. Lastly, the proposal would require shipowners to install a video and audio surveillance system in areas adjacent to staterooms.

The Safer Seas Act has proven controversial for at least two reasons. First, as with the EMBARC program, vessel operators are concerned that inclusion of the

SASH provisions in the Company's Safety Management System will lead to foreign port state control problems and excessive vessel detentions and other penalties rooted in unfamiliarity with the peculiar aspects of the EMBARC program among foreign port state control. Second, the requirement to install audio and video surveillance equipment has sparked disagreement among vessel operators and seafaring unions. Under the proposed legislation, surveillance footage would be available to law enforcement authorities or to any person the subject of such footage in connection with civil actions predicated upon SASH allegations. However, the legislation further provides that the footage may only be used for such purposes and "not used as part of a labor action against a crew member or employment disputed unless used in a criminal or civil action."<sup>13</sup>

Labor interests are concerned that owners will use the footage against them with respect to performance, overtime, or other disputes or to otherwise invade crewmembers' privacy, pointing out that the situation is somewhat unique for mariners insofar as their workplace is necessarily also their home. Owners, on the other hand, contend that surveillance footage on ships should be available for any lawful purpose like surveillance footage in industrial plants, warehouses, docks, and other places of business, including for purposes of ensuring compliance with quality assurance, company policy, and best practices in addition to applicable legal requirements. Moreover, the Coast Guard has expressed its preference that vessel operators, not the Coast Guard or other authorities, undertake at least the initial SASH-related investigations and remedial measures before involving the agency. It is unclear how these differing concerns will be resolved in any final legislation. However, it does seem clear that some form of legislation will be forthcoming, potentially before the close of the 117<sup>th</sup> Congress, and that SASH issues will remain at the forefront of congressional concerns regarding the industry.

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<sup>10</sup> S. 3196, 117th Cong. (2021).

<sup>11</sup> United States Department of Defense Sexual Assault Prevention and Response, Catch a Serial Offender (CATCH) Program, <https://www.sapr.mil/CATCH>.

<sup>12</sup> H.R. 6866, 117th Cong. (2022).

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<sup>13</sup> *Id.* § 8.

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