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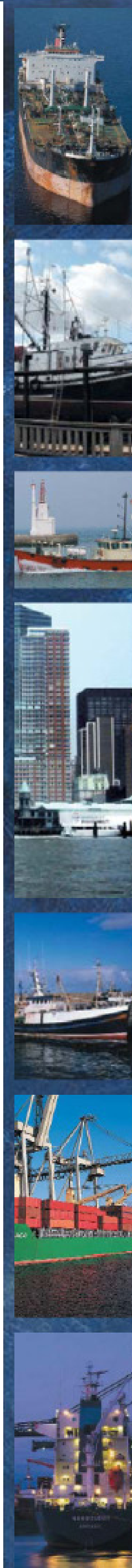

Inside This issue

The Tattle Battle: Tensions of Mandatory Root Cause Analysis Reporting and the Creation of Prejudicial Evidence in Maritime Litigation

By: Thomas Alger*

Introduction

Root cause analysis reports ("RCA") are a routine requirement in the maritime industry following incidents involving property damage, personal injury or near miss accidents.[1] These reports are mandated by international and national rules and regulations. Any country that has ratified the Safety of Life at Sea ("SOLAS") also must comply with the International Safety Management Code ("ISM").[2] The ISM requires that every vessel operator have a safety management System ("SMS"), which requires the company to create an RCA in the event of an incident.[3] The United States "implements Chapter IX of the International Convention for the Safety of Life at Sea."[4] Any vessel operator that operates within United States ports must conduct an RCA after any major incident or near miss for all vessels covered by SOLAS or the ISM.[5]

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* Thomas Alger is an associate admiralty attorney with Farrell Smith O'Connell. This article was adapted from a presentation made to the Maritime Law Association Marine Torts & Casualties and Government Counsel Committees in May 2025.

1 *See* ISM Code 9.1; *see* ISO 9001, QMP 5; *see* 33 C.F.R. Section 96.250.

2 *See* SOLAS Article IX; *see* ISM Code 9.1.

3 *See* ISM Code 1.2.2-1.2.3.

4 33 C.F.R. section 96.100.

5 *See* 33 C.F.R. Section 96.110; *see* 33 C.F.R. Section 96.210; *see* 33 C.F.R. Section 96.240.

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Managing Editor's Introductory Note

In this edition, we first present an excellent article by Thomas Alger on the tension between regulatory compliance and litigation strategy involved in the analyzes of maritime incidents ("Root Cause Analysis") and the rules of discovery that permit or require discovery of facts and reports. Thomas gives a detailed review of the background and reasons for Root Cause Analysis and examines the doctrinal challenges and limitations faced when attempting to exclude an RCA from evidence. He concludes "maritime litigants must take a strategic approach to post-incident investigations. Decisions about who conducts the RCA, the purpose and framing of the analysis, the level of legal oversight, and how findings are documented can all influence discoverability. Although complete protection is rare, careful planning may reduce the risk of exposing sensitive or prejudicial information while involved in the litigation process."

We next present an article by David Boyajian and Molly Henry on the current scope of escort tug policies, how they have evolved, and the potential growth of escort tug use and requirements in future maritime safety strategies, focusing on the M/V BALI incident. That incident was also the focus of an article by Kendrick Jordan, "The Dominant Mind Doctrine and Its Application to Assist Tugs" published in Benedict's Maritime Bulletin, Vol. 22, No. 3, Fourth Quarter 2024. Here, David and Molly explain the difference between escort tugs and assist tugs, their use and utility, and conclude that "[w] hile current regulations focus on mitigating oil spill risks, there is growing recognition of the need to address structural vulnerabilities through comprehensive risk assessments that might include an increased use of escort tugs."

We follow with column "Window on Washington" by Bryant Gardner. Here Bryant discusses in detail the regulations proposed by the U.S. Trade Representative on tariffs to be placed on ro-ro vessels by the current administration and proposed changes to them following the public comment period. While the administration's stated goal is reinvigorating U.S. ship building capacity today, he concludes "it is not clear that reversing the long decline of American shipbuilding can be achieved in such a short time horizon without massive direct government subsidies."

Our next offering is a report by Cameron Cushner and Colin Crug on the increased loss of containers overboard outlined in The World Shipping Council's recent *Containers Lost at Sea Report 2025*. They discuss the steps taken by carriers to avoid such losses, primarily arising out of armed conflict in the Middle East. They give practical information on how carriers and shippers can minimize potential conflicts between and among themselves over these losses.

Our last article for this edition by Pamela Schultz, Cameron Cushner and Camille Zuber discusses service of process under The Hague Convention, the Federl Rules of Civil Procedure, and the importance of understanding and responding to service to avoid default judgments against foreign defendants.

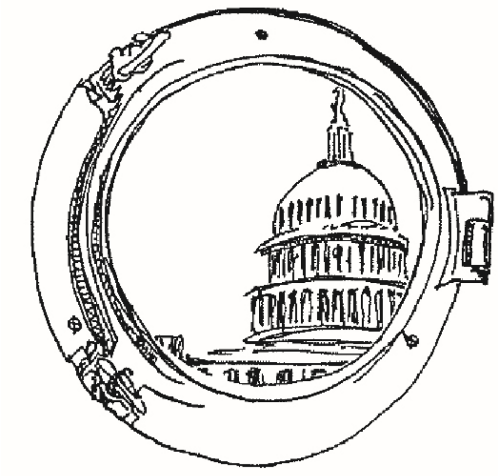
We conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

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.

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
Managing Editor

WINDOW ON WASHINGTON



Ruh-Ro Ro-Ros

By Bryant E. Gardner*

Long-suffering readers of *Window on Washington* will recall last issue covered President Trump's aggressive roll-out of plans via executive order to revitalize the U.S. shipbuilding and operating industry.[1] The plans included funding a civilian "Strategic Commercial Fleet" and rejuvenating with a sweeping tariffs regime, including tariffs on Chinese-owned and operated vessels through the tariff actions commenced in the office of the U.S. Trade Representative ("USTR") during the Biden Administration.[2] Many of the intended tariffs have been scaled back in both the SHIPS for America Act[3] and in the USTR action, causing some industry observers to raise concerns about the financial viability of the proposals.

Consistent with the President's executive order and the petition sparking the USTR action, the original notice

* Bryant E. Gardner is a partner in the Washington, D.C. office of Winston Strawn LLP. His experience includes a mixture of transactional, government relations, litigation, and advisory work on Federal legislative, regulatory, and contractual matters. He has extensive experience representing regulated entities, government contractors and grantees, public entities, and other clients before the Congress, Federal Courts, Customs and Border Protection, Government Accountability Office, Department of Defense, Federal Maritime Commission, Department of Transportation, Coast Guard, and Maritime Administration. Additionally, he has deep expertise in a broad array of maritime, transportation, and logistics matters.

1 *See* White House, Executive Order, Restoring America's Maritime Dominance (April 9, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/restoring-americas-maritime-dominance/.

2 Office of the U.S. Trade Representative, Initiation of Section 301 Investigation: China's Acts, Policies, and Practices Targeting the Maritime, Logistics, and Shipbuilding Sectors for Dominance, Notice of investigation, hearing, and request for comments, Docket Nos. USTR-2024-0004, USTR-2024-0005, 89 Fed. Reg. 29,424 (April 22, 2024); Office of the U.S. Trade Representative, Initiation of Section 301 Investigation: China's Acts, Policies, and Practices Targeting the Maritime, Logistics, and Shipbuilding Sectors for Dominance, Request for comments and notice of public hearing, Docket Nos. USTR-2024-0004, USTR-2024-0005, 90 Fed. Reg. 10,843 (Feb. 27, 2025).

3 For a broad overview of the measure, see Press Release, Sen. Mark Kelly (D-AZ), Sen. Todd Young (R-IN), Rep. Trent Kelly (R-MS), and Rep. John Garamendi (D-CA), SHIPS for America Act (April 30, 2005), https://www.kelly.senate.gov/wp-content/uploads/2025/04/SHIPS-for-America-Act_Section-by-Section_4.30.25_pdf.pdf. *See also* SHIPS for America Act of 2025, H.R. 3151, 119th Cong. https://www.congress.gov/bill/119th-congress/house-bill/3151.

and request for comments and the hearing regarding the proposed action all centered on tariffs against Chinese interests only.[4] However, on April 23, 2025, USTR issued its notice of action broadly targeting all non-U.S.-built roll-on roll-off ("ro-ro") vessels calling at U.S. ports, including vessels constructed in allied nations.[5] Specifically, the USTR proposed fees of $150 per car equivalent unit ("CEU")—approximately $750,000 per port call for the average size vessel and up to $1.3 million for new classes of larger ro-ro vessels.

Operators of so-called "vehicle carriers" would be eligible for fee remission for up to three years if ordering and taking delivery of a U.S.-built vessel of equivalent or greater capacity within that time period.[6] Moreover, the requirements for a vessel to qualify as "U.S.-built" to avoid paying the fees exceed even the requirements to qualify for operation in the domestic "Jones Act" trade of the United States. To meet the USTR definition of U.S.-built, vessels must feature U.S.-made propulsion equipment, auxiliary equipment, shipboard cranes and spreaders, rotating electrical equipment, and liquified natural gas equipment.[7]

Following public comments upon the originally proposed $1 million per port call fees upon Chinese vessels, certain "targeted coverage" exceptions were added. These included U.S.-owned or U.S.-flagged vessels enrolled in the Voluntary Sealift Agreement, Maritime Security Program, or Cable Security Program; vessels arriving empty or in ballast; vessels with less than 4,000 twenty-foot equivalent unit or 55,000 deadweight capacity; vessels entering the U.S. from a voyage of fewer than 2,000 miles; and vessels 75% beneficially owned by U.S. persons.[8] The U.S. citizen and military readiness security program requirements addressed concerns from the internationally trading U.S.-flag community. The 2,000-mile voyage exception addressed concerns from Caribbean and short-haul traders. The vessel size exemption addressed the unfair burden of placing the same $1 million fee on small vessels unable to spread the cost across numerous beneficial cargo interests. Finally, the exception for vessels arriving empty addressed the outcry from commodities exporters, most notably the American agriculture community that is already laboring under retaliatory tariffs. In contrast, ro-ro operators, who had no opportunity to comment on fees to be imposed upon vessels built in allied nations, received no such exceptions. The origin of the ro-ro-specific fees applicable to non-Chinese vessels is unclear. Some in industry speculate that the push came from U.S. auto manufacturers, to be used in conjunction with section 232 tariffs on imported foreign cars, with the intention of making U.S. auto manufacturers more competitive in the U.S. consumer market.

Commenters raised numerous objections in the public docket. The Chamber of Shipping of America stated that U.S. shipbuilding capacity does not exist to meet the requirement to build U.S ships in order to avoid the fees—a comment echoed by others asserting that not only would graving docks of sufficient size need to be constructed, but U.S. marine engine and equipment capability would have to be invented, given that even Jones Act ships typically use foreign engines and equipment.[9] The Chamber also expressed concerns about cargo diversions and reduced frequency of service. Additionally, the Chamber noted that the fees should be limited to Chinese vessels, and would negatively impact the U.S.-flag international-trading fleet, inconsistent with the Administration's expressed intent to reinvigorate the fleet as expressed in the President's executive order.

USA Maritime, the coalition of U.S.-flag vessel operators and their mariner unions sailing in the international trade, fleshed these concerns out further and requested exemption for U.S.-flag vessels.[10] Concerns were also raised about tying the fee to CEU, which is based upon the footprint of a 1966 Toyota Corona, a vehicle

[4] Office of the U.S. Trade Representative, Public Hearing on Proposed Action in Section 301 Investigation of China's Targeting of the Maritime, Logistics, and Shipbuilding Sectors for Dominance (May 19, 2025); Office of the U.S. Trade Representative, Initiation of Section 301 Investigation: China's Acts, Policies, and Practices Targeting the Maritime, Logistics, and Shipbuilding Sectors for Dominance, Notice of investigation, hearing, and request for comments, Docket Nos. USTR-2024-0004, USTR-2024-0005, 89 Fed. Reg. 29,424 (April 22, 2024); Office of the U.S. Trade Representative, Initiation of Section 301 Investigation: China's Acts, Policies, and Practices Targeting the Maritime, Logistics, and Shipbuilding Sectors for Dominance, Request for comments and notice of public hearing, Docket Nos. USTR-2024-0004, USTR-2024-0005, 90 Fed. Reg. 10,843 (Feb. 27, 2025).

[5] Office of the U.S. Trade Representative, Notice of Proposed Action in Section 301 Investigation of China's Targeting Maritime, Logistics, and Shipbuilding Sectors for Dominance, Request for Comments, Notice of action and proposed action, request for comments, and notice of public hearing, Docket Nos. USTR-2025-0008, USTR-2025-0009, 90 Fed. Reg. 17,114-02 (April 23, 2025).

[6] *Id.* at 17,117.

[7] *Id.* at 17,123.

[8] *Id.*

[9] Comments of the Chamber of Shipping of America (May 15, 2025), https://comments.ustr.gov/s/commentdetails?rid=YYKHXYCVDR.

[10] Comments of USA Maritime (May 19, 2025), https://comments.ustr.gov/s/commentdetails?rid=X9M28FC3RB.

significantly smaller than today's SUV and pickup truck dominated market—especially when considering the larger stowage distances required for fire-prone electric vehicles.

The World Shipping Council, which represents the international liner industry, including ro-ro operators, called upon the USTR to open a new docket on the ro-ro issue to afford notice and comment and stated the proposed action exceeds the USTR's statutory authority.[11] More specifically, the Council stated that the ro-ro fees were entirely detached from the statutory purpose of a section 301 action—securing the removal of the acts, policies, and practices found actionable in the underlying investigation—which pertained only to the actions of China.

The American Association of Port Authorities echoed concerns about the USTR's statutory authority and also stated that the fees are effectively a tax on imported vehicles that would also hit U.S. vehicle exports.[12]

Autos Drive America, which represents the U.S. operations of international automakers and their suppliers, also raised concerns.[13] Like the World Shipping Council, the association questioned the propriety of targeting non-Chinese vessels when the USTR's enabling investigation focused solely on Chinese abuses in the sector, and the inability to comment on the fait accompli of fees imposed upon non-Chinese vessels. They also identified the lack of U.S. shipbuilding capacity to build large ro-ros, and the lack of manufacturers for the many components and equipment that must be U.S.-made for the vessel to qualify as "U.S.-built." Additionally, the association proposed alternative tools for the promotion of the U.S. maritime industry, including requirements that a greater share of cargoes be shipped on U.S.-flag vessels, to boost the U.S. fleet without penalizing allied-built ships.

[11] Comments of the World Shipping Council (May 17, 2025), https://comments.ustr.gov/s/commentdetails?rid=7TD7GKB7XM.

[12] Comments of the American Association of Port Authorities (May 16, 2025), https://comments.ustr.gov/s/commentdetails?rid=BFQHKCX4R9.

[13] Comments of Autos Drive America (May 19, 2025), https://comments.ustr.gov/s/commentdetails?rid=7PB9FYXTFQ.

On June 12, the USTR issued a proposed modification. The modification proposed exempting ro-ro vessels enrolled in the Maritime Security Program. Through the Maritime Security Program, the United States Department of Defense enrolls 60 militarily useful vessels under the U.S.-flag for use in times of war and national emergency, with participation incentivized by payment of an annual stipend to ensure the vessels remain commercially viable in times of peace.[14] The United States Transportation Command has consistently taken the position that ro-ro vessels are the most militarily useful vessel type, and for this reason approximately a third of the vessels enrolled in the Maritime Security Program are ro-ro vessels. Additionally, the USTR proposed exempting U.S. government owned and chartered vessels from the fees. Lastly, the USTR proposed modifying the fee structure from $150 per CEU to $14 per net ton—which would decrease the fees to around $200,000 per port call.

The Administration faces pressure from many directions. It is determined to increase U.S. shipbuilding capacity—a priority raised in President Trump's March speech before a joint session of Congress. The President and his team want this capacity today, or at least during the President's second term, but it is not clear that reversing the long decline of American shipbuilding can be achieved in such a short time horizon without massive direct government subsidies. The same can be said for reinvigorating America's U.S.-flag feet trading internationally. Yet, at every turn, the Administration has faced practical challenges and resistance from entrenched interests backed by harsh economic realities. There is no easy path. From a long-suffering observer of the U.S. maritime industry's plight, it is refreshing to see an administration that wants to do something about it. It's just not clear how it will thread the needle.

[14] 46 U.S.C. Ch. 531.

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