

# BENEDICT'S MARITIME BULLETIN

The Quarterly Bulletin of Benedict on Admiralty

Vol. 19, No. 2 • Second Quarter 2021

Joshua S. Force, Editor-in-Chief  
Robert J. Zapf, Managing Editor

## THE RISING TIDE OF MARITIME FINANCIAL SANCTIONS RISK

By Tahlia Townsend\*

The global maritime community—including U.S. and non-U.S. ship owners, management companies, charterers, commodity traders, ships officers, crewing companies, financial institutions, and insurance companies—is facing an unprecedented level of regulatory risk related to U.S. economic sanctions. The surge in risk has three primary sources: (1) increased U.S. sanctions targeting Iran and Venezuela, as well as ongoing sanctions on Cuba, Syria, North Korea, and the Crimea region; (2) increased efforts by U.S. sanctions targets to obtain goods and services notwithstanding the U.S. embargoes; and (3) a robust intention on the part of U.S. government enforcement authorities to crack down on maritime sanctions evasion and to punish those who—whether intentionally or unintentionally—facilitate it. As a Deputy Assistant Secretary of State put it last year, “[t]he maritime industry is the key artery for sanctions evasion globally ... [W]e are looking at [a] very broad range of all evasive behavior, whether that is [by] a shipowner or a port operator or a terminal operator or refinery, anybody basically in the supply chain ... and holding everybody in that chain responsible.”<sup>1</sup>

\* Tahlia Townsend is co-chair of the International Trade Compliance Practice at Wiggin and Dana LLP. A version of the material discussed in this article was presented to a meeting of the Maritime Law Association of the United States (“MLA”) Marine Insurance & General Average Committee in November 2020.

<sup>1</sup> Then-U.S. Deputy Assistant Secretary of State David Peyman speaking at the Foundation for Defense of Democracies (March 9, 2020), available at [https://www.fdd.org/wp-content/uploads/2020/03/Transcript\\_Peyman\\_Sanctions\\_March2020.pdf](https://www.fdd.org/wp-content/uploads/2020/03/Transcript_Peyman_Sanctions_March2020.pdf) (last visited April 20, 2021).

(Continued on page 76)

### Inside This issue

#### THE RISING TIDE OF MARITIME FINANCIAL SANCTIONS RISK

By Tahlia Townsend .....73

#### MANAGING EDITOR’S INTRODUCTORY NOTE

Robert J. Zapf .....75

#### ENFORCEABILITY OF ARBITRATION AGREEMENTS IN SEAMAN EMPLOYMENT CONTRACTS

By Brian McEwing.....82

#### WINDOW ON WASHINGTON

##### *Home for the Holidays*

Bryant E. Gardner.....86

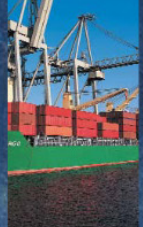
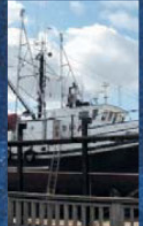
RECENT DEVELOPMENTS .....90

TABLE OF CASES .....100

#### BENEDICT’S MARITIME BULLETIN EDITORIAL

BOARD.....102

CONTRIBUTING AUTHORS TO THIS ISSUE.....103



**EDITORIAL BOARD**

**Joshua S. Force**  
**Robert J. Zapf**  
**Bruce A. King**  
**Dr. James C. Kraska**  
**Dr. Norman A. Martinez-**  
**Gutiérrez**  
**Francis X. Nolan, III**  
**Anthony J. Pruzinsky**  
**Dr. Frank L. Wiswall, Jr.,**  
**Editor Emeritus**

**RECENT  
DEVELOPMENTS  
CONTRIBUTORS**

**Alena A. Eckhardt**  
**Jeffrey A. Yarbrough**  
**Joni Alexis Poitier**  
**Shea Michael Moser**

**COLUMNIST**

**Bryant E. Gardner**  
**EDITORIAL STAFF**

**James Codella**  
*Editorial Director*  
**Cathy Seidenberg**  
*Legal Editor*

**A NOTE ON CITATION:**

The correct citation form for this publication is:  
19 BENEDICT'S MAR. BULL. [73] (Second Quarter 2021)

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal or other expert assistance is required, the services of a competent professional should be sought.

*From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.*



Matthew Bender®

## MANAGING EDITOR'S INTRODUCTORY NOTE

We begin this edition with an article by Tahlia Townsend on U.S. sanctions laws. She describes the risk of running afoul of these laws arising from three primary sources: (1) increased U.S. sanctions targeting Iran and Venezuela, as well as ongoing sanctions on Cuba, Syria, North Korea, and the Crimea region; (2) increased efforts by U.S. sanctions targets to obtain goods and services notwithstanding the U.S. embargoes; and (3) a robust intention on the part of U.S. government enforcement authorities to crack down on maritime sanctions evasion and to punish those who—whether intentionally or unintentionally— facilitate it. She explains why the maritime community should be paying attention to sanctions risk, and what actions the U.S. government expects maritime actors to take to avoid participating in maritime sanctions evasion. She advises that all actors in the maritime supply chain review the May 2020 joint advisory by the U.S. Departments of State and Treasury and the U.S. Coast Guard entitled “Guidance to Address Illicit Shipping and Sanctions Evasion Practices” and the United Kingdom’s Office of Financial Sanctions Implementation providing similar guidance, assess the level of sanctions risk across their business activities, and carefully consider implementing controls of the kind identified in the Advisory, as necessary.

We follow with a note by Brian McEwing on the subject of arbitration of seaman personal injury claims based on arbitration clauses contained in employment contracts. In a decision by the United States District Court for the District of New Jersey, *Kozur v. F/V Atlantic Bounty, LLC, et al.*, Case No. 18-cv-08750 slip op., 2020 U.S. Dist. LEXIS 148633 (D.N.J. Aug. 18, 2020), appeal docketed (No. 20-2911 3d Cir. Sept. 23, 2020), the court ordered the claim to be arbitrated. An appeal to the United States Court of Appeals for the Third Circuit was taken and the matter is still pending there as of the time of this writing. Brian analyzes the background of the case, the law applied, and other decisions dealing with the same issue. The ultimate decision of the Court of Appeals will undoubtedly have a great impact on other cases on this issue.

Next, in his regular column, *Window on Washington*, Bryant Gardner discusses how the global pandemic sparked by COVID-19 has placed strains upon U.S. ocean and intermodal supply chains and how it is beginning to show. Dislocations among various U.S. economic sectors, especially agricultural exporters, are translating into rising political pressure and calls for action.

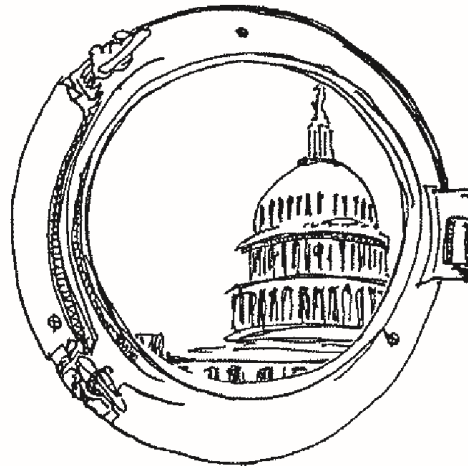
We conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

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



### *Container Crunch*

Bryant E. Gardner\*\*

Like so much in life, the true impacts of the COVID-19 pandemic on the maritime industry will likely only become clear in retrospect. At the outset of the pandemic, industry stakeholders gathered on and off Capitol Hill, and with key Federal agencies, to discuss what kinds of assistance would be needed and when. As the cherry blossoms around D.C.'s famed Tidal Basin swung into full bloom, it became clear that the pandemic was going to impact different industry segments in very different and unique ways. The cruise and passenger industry quickly came under a paralyzing "no sail" order, but because the majority of those vessels and operators are flagged outside the U.S., it became apparent that any kind of Federal aid would be controversial. With people staying home and travel at a standstill, both the roll-on, roll-off and tanker sectors discussed applying for Federal aid, as did some bulk carriers. Container carriers, however, expressed hesitation and began to question the optics surrounding any request for relief.

Early signs suggested that things might not be all that bad in the box sector. Locked at home on the couch with a limitless diet of streaming home video, American

consumers took to their phones and bought stuff. Lots of stuff. Stuff that came to them in containers. They bought PPE. They hoarded the sensible and the bizarre. Spending more time at home, many concluded that it was time to spruce up the place, upgrade the kitchen, take out a wall. Many built new outdoor and partially outdoor spaces, which became increasingly necessary for socially-distanced interaction. Sales at big box stores took off, supply chains strained, and shippers started complaining. Larger importers with sliding volume requirements service contracts were able to demand more and more volume under their agreements, in some cases more than doubling their demands for space. They still could not get enough. As they consumed more volume, even less space was available for smaller contract and uncommitted spot rate shippers. Rates eastbound from China climbed from \$1500 a box to \$4000 a box, and in some cases higher, within one service contract season. Smaller shippers complained carriers were walking away from commitments under service contracts with \$1000 liquidated damages penalties and doubling their profit, even if the liquidated damages were recovered.

Containers, it was said, were out of place. Because of the pandemic, they had gone to odd destinations and not returned, or were tied up in port congestion, or there just were not enough. Whatever the reason, a growing chorus of reports said that ocean carriers were sending

---

\* Bryant E. Gardner is a Partner at Winston & Strawn, LLP, Washington, D.C. B.A., summa cum laude 1996, Tulane University of Louisiana; J.D. cum laude 2000, Tulane Law School.



shipping containers back westbound to China empty as soon as possible, rather than waiting for them to reposition to the interior to be filled up with exports to Asia. The few things East Asian nations still imported from the U.S.A.—scrap metal and animal feed, other agricultural products—had been moving westward at around \$500 to \$700 a box—not enough, it seems, to warrant sending the boxes to the American heartland to load farm products. American farmers began to feel they were being boxed out of the Asian markets by foreign ocean carriers.

When I first came to Washington two decades ago, one of the older lawyers at my firm, a genteel fellow from Mississippi, told me that America's farmers might look like straight shooting country folks, but in the Halls of Congress, they are God's chosen children. The family farm is the stuff of American legend, country life, the backbone of a great nation. And of course, much of agriculture's stakeholder base comes from relatively sparsely populated states—each with two Senators intensely focused upon and attuned to the needs of agriculture. I used to joke with the agricultural lobbyists that we have the U.S. Maritime Administration, a small (but valiant!) promotional agency trapped inside a regulatory department, but they have an entire promotional department in the U.S. Department of Agriculture. Well, it was not really a joke. They also have two powerful congressional committees dedicated only to agriculture, and their own subcommittees on the Appropriations Committees in both chambers of Congress. All these folks want to know why the soybeans are not getting loaded into the boxes.

Facing inquiry from Congress and regulators, carriers increasingly concentrated their efforts with the World Shipping Council, the container carriers' D.C.-based association. In December 2020, Federal Maritime Commissioners Carl W. Bentzel and Daniel B. Maffei wrote to the World Shipping Council to express growing concern about reports that ocean carriers are refusing the carriage of U.S. exports. In the letter, the Commissioners cited 46 U.S.C. § 41104 for the proposition that “common carriers may not ‘unreasonably refuse to deal or negotiate’” and § 41105 for prohibitions against concerted actions by common carriers to “boycott or take any other concerted action resulting in an unreasonable refusal to deal” or “engage in conduct that unreasonably restricts the use of intermodal services or technological innovations.”<sup>1</sup> In

<sup>1</sup> Letter from Carl W. Bentzel, Federal Maritime Commissioner and Daniel B. Maffei, Federal Maritime Commissioner, to John Butler, President & CEO, World Shipping Council (Dec. 2020).

public remarks before the Global Maritime Conference, Commission Chairman Michael A. Khouri stated:

Some ocean carriers—not all—have stated that they will no longer deploy—that is—reposition empty containers to the U.S. interior agricultural areas. Instead, they are expediting empties back to Asia. This abandonment of a significant U.S. export industry—the American agricultural industry—is shutting them out of global markets. We are looking into all potential—repeat—all potential responsive actions, including a review of whether such ocean carriers' actions are in full compliance with the Shipping Act and more specifically the various “Prohibited Acts” sections of the Act.<sup>2</sup>

Furthermore, Chairman Khouri indicated that Fact Finding 29, led by Commissioner Rebecca F. Dye, would be looking at “detention and demurrage, container return and container availability for U.S. export cargoes.”<sup>3</sup> In February 2021, Commissioner Dye issued “information demand orders” to ocean carriers and marine terminal operators, requiring information “on their policies and practices related to container returns and container availability for exporters.”<sup>4</sup>

Agriculture stakeholders engaged. A broad coalition of 73 agricultural associations wrote to President Biden on February 24, 2021, with copies to Secretary of Agriculture Tom Vilsack, Secretary of Transportation Pete Buttigieg, Chair of the Council of Economic Advisors Cecilia Rouse, and Chairman Khouri, to express their concern:

According to their own public reports, the ocean carriers are enjoying their most profitable period in three decades by controlling capacity and charging unprecedented freight rates, imposing draconian fees on our exporters and importers, and frequently refusing to carry U.S. agricultural

<sup>2</sup> FMC Chairman Addresses Export Container Availability (Dec. 8, 2020), available at <https://www.fmc.gov/fmc-chairman-addresses-export-container-availability/> (last visited April 20, 2021).

<sup>3</sup> *Id.*

<sup>4</sup> Federal Maritime Commission, Information Demand on Detention and Demurrage Practices to be Issued (Feb. 17, 2021).

exports...

The international ocean carriers which carry over 99% of our foreign commerce, are headquartered overseas—perhaps unaware of the injury their actions are causing to the U.S. economy as they profit from the pandemic...

The Shipping Act provides the FMC with the authority to prohibit unreasonable, unjust practices, and to “promote the growth and development of U.S. exports through competitive and efficient ocean transportation...”

Given the urgency of this situation in commerce, we ask these tools and any others available to our government be immediately applied to stem the current ocean carrier practices that are so damaging our agricultural exports.

The Agriculture Transportation Coalition, which bills itself as “the principal voice of agriculture exporters in transportation policy,” engaged on the issue. The Coalition opined that twenty-five years ago, there were approximately twenty container carriers for transpacific exports, several U.S.-owned, crewed, headquartered and managed—but now there are nine companies all wholly foreign controlled, leaving U.S. exporters with few choices and total dependence upon foreign carriers to get exports abroad. In its position papers, the Coalition called for the Federal Maritime Commission (FMC) to initiate enforcement action and called upon Congress to strengthen the Shipping Act to strengthen protections for consumers of shipping services including an improved private right of action.

Congressional discontent began bubbling over in late February. On February 25, 2021, Senators Roger Wicker (R-MS) and John Boozman (R-AR), the Ranking Members on the U.S. Senate Committee on Commerce, Science, and Transportation and U.S. Senate Committee on Agriculture, Nutrition, and Forestry, respectively, wrote to the FMC supporting “swift action” by Commissioner Dye and inquiry into “practices relating to container returns and container availability for exporters,” through Fact Finding 29. On March 2, 2021, Rep. Kim Schrier (D-WA), representing the 8th Washington Congressional District to the east of Seattle, wrote to the FMC expressing grave concerns “about reports that foreign-owned ocean carriers are unfairly prioritizing importation of foreign goods over U.S. exports.” The same day, a broad and bipartisan group of 25 U.S. Senators wrote to the FMC expressing concern about ocean carriers’ denial of

carriage for agricultural commodities, supporting the Commission’s investigation under Fact Finding 29, and calling upon the Commission to quickly resolve the matter. Shortly thereafter, on March 8, 2021, Rep. Peter DeFazio (D-OR) and Sam Graves (R-MO), Chairman and Ranking Member of the U.S. House of Representatives Committee on Transportation and Infrastructure, together with Salud Carbajal (D-CA) and Bob Gibbs (R-OH), the Chairman and Ranking Member of the Subcommittee on Coast Guard and Maritime Transportation, wrote to Chairman Khouri to express concerns about the situation and asking the Commission to “take immediate action” to ensure ocean carriers are complying with the Shipping Act.

Concurrently, on March 2, 2021, Federal Maritime Commissioners Maffei and Sola, two of the five on the Commission, published an op-ed in Supply Chain Drive addressing the situation. The Commissioners observed that “U.S. companies are facing limited access to containers and space on vessels to ship exports abroad. Faced with paying high premiums that eliminate profit and the risks of loads not getting to customers on time, agricultural customers, most notably those in America’s heartland, are struggling.” Moreover, they noted that “containers are not where they need to be” and expressed support for increased container manufacturing in China and increased collaboration with their regulatory peers in China and the European Union in order to help resolve a complex situation wrought by the unprecedented market disruptions of COVID-19. They also noted that potentially “the FMC can contribute by increasing monitoring and enforcement with an eye toward protecting the public from those who exacerbate and profit from the current situation.”<sup>5</sup>

The container carriers deferred inquiries and calls for congressional action to the ongoing investigation by the Commission, pledging cooperation with the Commission.

Opening a hearing on top infrastructure priorities on March 24, 2021, Senator Maria Cantwell, Chair of the U.S. Senate Committee on Commerce, Science and Transportation observed: “We also need to help the serious congestion at our ports with containers. There are currently 26 ships anchored, idle, off the Port of L.A./ Long Beach, because they are not able to get to port. When ships are unable to get to port, too often foreign-owned carriers offload goods at American ports and then load up empty containers to go back to Asia, leaving U.S. exports behind. A recent investigation

<sup>5</sup> Statement of Federal Maritime Commissioners Maffei and Sola, Supply Chain Drive (Mar. 2, 2021).

found between July and December of 2020, carriers rejected at least 1.3 billion in U.S. agricultural exports.”<sup>6</sup>

In keeping with its proactive, hands-on approach to national issues, the newly minted and still assembling Biden Administration has signaled plans to intervene in these supply chain issues. At his first hearing since confirmation, on March 25, 2021, Secretary of Transportation Buttigieg vowed to help U.S. exporters resolve their supply chain challenges by bringing a “whole of government” approach to bear on the matter which “reached a new level of urgency given some of the backups that we’ve seen, especially in the Northwest but really impacting the whole U.S. economy.”<sup>7</sup> The Secretary further indicated that “this is a priority for the President” and that the Department of Transportation would be working together with the FMC to tackle the issue. Upon being selected as Chairman of the Federal Maritime Commission by President Biden on March 29, 2021, Commissioner Maffei shed light on his plans

for the Commission’s agenda: “Due to the effects of COVID-19 and an unprecedented import boom, we are dealing with serious challenges to America’s international ocean transportation system—challenges that the FMC has a vital role in addressing, both on its own as an independent agency and in cooperation with other agencies.”<sup>8</sup>

The global pandemic sparked by COVID-19 has placed strain upon U.S. ocean and intermodal supply chains and it is beginning to show. Dislocations among various U.S. economic sectors, especially agricultural exporters, are translating into rising political pressure and calls for action. Moreover, recent events such as the grounding of the M/V EVER GIVEN in the Suez Canal and in-depth *Washington Post* articles about the crew-change crisis have placed critical public focus on an industry that usually only gets press when something goes wrong, unfortunately.

<sup>6</sup> Press Release, Office of Senator Maria Cantwell, Cantwell Identifies Top Transportation Infrastructure Priorities; Calls for Robust Investment at Commerce Hearing (Mar. 24, 2021).

<sup>7</sup> Statement of Secretary Buttigieg, The Administration’s Priorities for Transportation Infrastructure, Hearing before the House Committee on Transportation and Infrastructure, Mar. 25, 2021.

<sup>8</sup> Daniel B. Maffei Designated as the Chairman of the Federal Maritime Commission (Mar. 20, 2021), available at <https://www.fmc.gov/daniel-b-maffei-designated-as-the-chairman-of-the-federal-maritime-commission/> (last visited April 20, 2021)

**BENEDICT'S MARITIME BULLETIN EDITORIAL BOARD**

## Contact Information

Joshua S. Force  
(Editor-in-Chief)  
Sher Garner Cahill Richter Klein & Hilbert, L.L.C.  
New Orleans, LA  
jforce@SHERGARNER.com

Robert J. Zapf  
(Managing Editor)  
Rancho Mirage, CA  
RJZapf1@verizon.net

Bruce A. King  
(Past Chairperson Marine  
Financing Committee)  
Maritime Law Association  
bkingseattle@msn.com

Dr. James C. Kraska  
Howard S. Levie Professor of International Law  
The Stockton Center for the Study of International Law  
United States Naval War College  
686 Cushing Road  
Newport, Rhode Island 02841-1207  
James.Kraska@usnwc.edu

Dr. Norman A. Martinez-Gutiérrez  
(International Maritime Law; Scholarly Notes and Papers)  
IMO International Maritime Law Institute  
P.O. Box 31, Msida MSD 01 MALTA  
Norman.Martinez@imli.org

Francis X. Nolan, III  
(President, Maritime Law Association)  
Vedder Price P.C.  
1633 Broadway, 47th Floor  
New York, NY 10019  
fnolan@vedderprice.com

Anthony J. Pruzinsky  
Hill Rivkins LLP  
45 Broadway, Suite 1500  
New York, NY 10006-3793  
APruzinsky@hillrivkins.com



**CONTRIBUTING AUTHORS TO THIS ISSUE**

**Contact Information**

*Tahlia Townsend  
Wiggin and Dana LLP, Washington, DC & New Haven, CT  
ttownsend@wiggin.com*

*Brian McEwing, Reeves McEwing LLP, Philadelphia, PA &  
Dorchester, NJ  
mcewing@lawofsea.com*

**Window on Washington**

*Bryant E. Gardner  
Winston & Strawn LLP  
Washington, DC  
bgardner@winston.com*

**SUBSCRIPTION QUESTIONS?**

If you have any questions about the status of your subscription, please call your Matthew Bender representative, or call our Customer Service line at 1-800-833-9844.

**ATTENTION READERS**

Any reader interested in sharing information of interest to the admiralty bar, including notices of upcoming seminars, newsworthy events, "war stories," copies of advisory opinions, or relevant correspondence should direct this information to the Managing Editor, Robert Zapf, [rjzapf1@verizon.net](mailto:rjzapf1@verizon.net), or Cathy Seidenberg, Legal Editor, [Cathy.J.Seidenberg@lexisnexis.com](mailto:Cathy.J.Seidenberg@lexisnexis.com).

If you are interested in writing for the BULLETIN, please contact Cathy Seidenberg at [Cathy.J.Seidenberg@lexisnexis.com](mailto:Cathy.J.Seidenberg@lexisnexis.com).

The articles in this BULLETIN represent the views of their authors and do not necessarily reflect the views of the Editorial Board or Editorial Staff of this BULLETIN or of LexisNexis Matthew Bender.

BENEDICT'S MARITIME BULLETIN is now available online at Lexis.com and can be found by selecting the "Area of Law – By Topic" tab and then selecting "Admiralty", and is available on Lexis Advance and can be found by "Browse" > "By Practice Area" > "Admiralty & Maritime Law".



HEADING HOME