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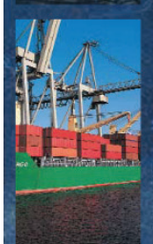

"Everything You Ever Wanted to Know About *Wilburn Boat*, But Were Afraid to Ask"

By: Michael I. Goldman, Esq.*

Invocation of the Muse

Wilburn Boat's wrath, to underwriters the direful spring
Of claims unnumber'd, heavenly goddess, sing!
That wrath which hurl'd to Neptune's soggy reign
Policies of marine insurance untimely slain;
Whose warranties unenforced on the naked shore,
Devouring lawyers and hungry salvors tore.
Since Wilburn Boat and Fireman's strove,
Such was the sovereign doom, and such the will of Jove![1]

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* Michael I. Goldman is a partner in Goldman & Hellman. After graduating from Boston College Law School in 2008, he joined Goldman & Hellman, where he now works with his father, brother, and sister. Goldman & Hellman's practice is primarily directed to representing marine insurers in coverage disputes with their insureds. The firm also defends insured vessel owners in liability matters. Mr. Goldman specializes in marine insurance coverage matters from initial coverage evaluation through the whole litigation, including appeal. This article is based in part on material presented at the Spring 2022 Maritime Law Association's Recreational Boating Committee meeting.

[1] ***The Iliad*, by Homer (as translated by Alexander Pope)**
Achilles' wrath, to Greece the direful spring
Of woes unnumber'd, heavenly goddess, sing!
That wrath which hurl'd to Pluto's gloomy reign
The souls of mighty chiefs untimely slain;
Whose limbs unburied on the naked shore,
Devouring dogs and hungry vultures tore.
Since great Achilles and Atrides strove,
Such was the sovereign doom, and such the will of Jove!

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Managing Editor's Introductory Note

Our first article in this edition is by Michael I. Goldman with an excellent discussion and analysis of the confusion and uncertainty surrounding marine insurance policies following the United States Supreme Court decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 1955 A.M.C. 467 (1955). He points out that "the analysis required by *Wilburn Boat* must now be applied to every issue and clause in every policy of marine insurance," and then takes us through the application of the analysis by the various Circuit Courts of Appeals on the issues of *uberrimae fidei*, warranties, "anti-technical" statutes, bad faith, awards of attorneys' fees, and choice of law clauses. After this in-depth review, he concludes "since deciding *Wilburn Boat*, the Supreme Court has steadfastly refused to take another marine insurance case and the entire area of law has suffered terribly from the Supreme Court's complete lack of interest since 1955. As a result, each circuit court in this country has been free to drift off from the others and to establish its own precedents, without guidance from the Supreme Court."

We next present another scholarly article from Minoo Daryanani, a maritime lawyer from IMO IMLI, Malta currently based in Kolkata, India. Minoo wrote an article in our last edition on the process of developing rules to determine jurisdiction in criminal matters, using the United Nations Convention on the Law of the Sea. Here, Minoo takes us through the application of the Customary Rule of "Innocent Passage" and its application to Warships & Military vessels. She analyzes the International Law of the Sea Tribunal Case No. 26 (Ukraine Vs Russian Federation), dealing with the seizure and detention by the Russian Federation of three Ukrainian military vessels in 2018, prior to the outbreak of actual hostilities arising from the Russian invasion of Ukraine. She concludes "The Tribunal not only upheld the customary right of sovereign immunity accorded to warships but also categorically declared that passage regimes, such as innocent or transit passage, apply to all ships, including military vessels."

We follow with our usual column "Window on Washington" by Bryant Gardner, analyzing the Ocean Shipping Reform Act of 2022 (OSRA), the first major overhaul of liner shipping in the United States in a quarter of a century. OSRA addresses supply chain issues arising from the COVID pandemic, clamping down on demurrage and detention practices, requiring new transparency, and shifting the burden of demonstrating the reasonableness of such charges onto common carriers. Greater enforcement powers are given to the Federal Maritime Commission. Bryant concludes "Much of OSRA's ultimate impact will be defined by the Commission over the coming year. Consequently, the rulemaking process implementing the rule bears close watching and, for stakeholders, active participation."

Carra Miller provides us with a look at the Limitation of Liability Act, and the split among the circuits on whether indemnification claimants' refusal to stipulate with damage claimants that they will not seek recovery in excess of the value of the limitation fund precludes courts from applying the functional equivalent rule and allow all the claims to be tried in state courts.

Next, we present an article that addresses issues presented in the 26th Annual John R. Brown Admiralty Moot Court competition. This article, by Brody D. Karn, deals with the split among the Circuit Courts of Appeals on the availability of interlocutory appeals.

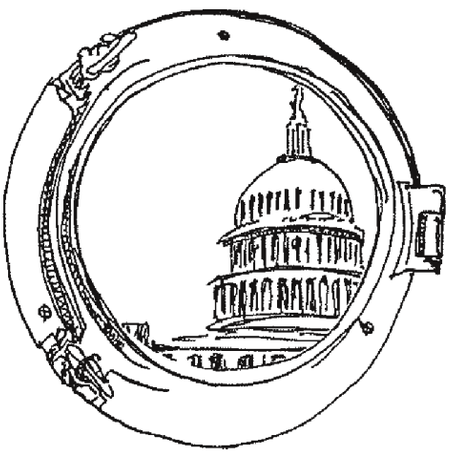
We conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

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



Dr. OSRA

By Bryant E. Gardner *

On June 16, 2022, President Biden signed into law the Ocean Shipping Reform Act of 2022 (OSRA), taking aim at the supply chain crisis that convulsed America from the outset of the COVID-19 pandemic.[1] The law marked the first major overhaul of liner shipping in the United States in a quarter of a century. Early versions of the measure, particularly the House version, included more muscular provisions requiring carriers to make available containers and chassis and explicitly prohibiting carriers from denying export cargo.[2] However, the resultant law features a number of important changes. In particular, the revisions to the Shipping Act[3] clamp down on demurrage and detention practices, requiring new transparency and shifting the burden of demonstrating the reasonableness of such charges onto common carriers. Additionally, the Federal Maritime Commission (FMC), which oversees the Shipping Act and the liner industry in the U.S., receives new mandates making enforcement of shipper rights more likely.

In his State of the Union address on March 1, 2022, President Biden announced he was going to crack down on foreign-owned ocean carriers that raised prices by "as much as 1,000 percent and made record profits" during the pandemic.[4] Carriers, predominantly the larger liner operators, and domestic shipping interests spent significant resources engaging lawmakers and the Commission to influence the legislation. Agricultural exporters, in particular, animated the debate, incensed at reports of shipping containers heading westbound empty in order to capture eastbound rates which had jumped so high that sending containers inland to pickup exports from the heartland no longer made sense economically for carriers. Applauding the Senate's unanimous passage of OSRA, Senator Maria Cantwell, Chair of the Senate Commerce Committee, stated:

> Today we're saying that American farmers matter and their survival matters more than the exorbitant profit of international shipping companies. American exporters and their products are being left on the docks, and that's why we wanted to act quickly, because the American farmer, with growing season upon us, can't afford to wait another minute for the Federal Maritime Commission to do

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1 Ocean Shipping Reform Act of 2022, Pub. L. No. 117-246, June 16, 2022, 136 Stat. 1272 (OSRA).

2 H.R. 4996, § 9 117th Cong.

3 46 U.S.C. §§ 40101-41310.

4 President Biden, State of the Union (Mar. 1, 2022), https://www.whitehouse.gov/state-of-the-union-2022/.

its job and help police this market and make sure our products and farmers are not being overcharged or left on the dock.[5]

The absence of any American liner carrier also colored the debate. When the Shipping Act was originally drafted, the titans of the American-owned and controlled liner industry still sailed the globe, including Lykes Lines, American President Lines, and Sea Land. Senators Bennett and Hickenlooper, hailing OSRA's unanimous passage in the Senate, remarked: "This is a step toward stopping these unfair price hikes to lower costs for Colorado businesses, notably agricultural exporters, and consumers. This is a shot across the bow of the foreign shipping cartels extorting American small businesses."[6] While at the Port of Los Angeles in June, President Biden blamed three large shipping alliances for U.S. inflation, stating, "Every once in a while, something you learn makes you viscerally angry. Like if you had the person in front of you you'd want to pop them. No, I really mean it."[7]

Ocean carrier interests largely pointed to inland congestion, equipment shortages, and trucking challenges, referencing long queues of ocean carriers waiting to get into the ports of Los Angeles and Long Beach. Speaking to graduates of the Massachusetts Maritime Academy's class of 2022, Maersk chairman Robert Maersk Uggla stated, "Let me be blunt, there are plenty of ships on the water and plenty of shipping lines at hand," noting that Maersk added 50% more TEU than before the pandemic, in the face of container import volumes spiking 34% compared to pre-COVID levels, partly driven by stimulus programs.[8] Mr. Uggla also observed that key U.S. ports do not work 24/7 and that 10% of global container ship capacity was waiting outside ports congested by insufficient rail and truck capacity.[9] During one hearing, Senator Cantwell told Federal Maritime Commission Chairman Maffei that the rates carriers were charging were unreasonable, having jumped 746%, and asked the Commissioner what tools he needed to remedy such unreasonable charges. In response, Chairman Maffei pointed out that the Commission lacks the authority to regulate rates, highlighting that "under current law, a rate, no matter how high in itself is not unreasonable. It would be how that rate was arrived at, it's an alliance, how they got to that rate."[10]

Although carrier retaliation against shippers for patronizing other carriers or asserting rights under the Shipping Act has always been viewed by the Commission as a violation of the Shipping Act, the pandemic saw even the biggest American shippers fearsome of drawing the ire of large carriers should they file a complaint with the Commission. To address this, OSRA makes explicit that any such retaliation is a violation of the Act,[11] and further injects new powers and responsibilities into the Commission's Bureau of Enforcement, which is effectively the government prosecutor for Shipping Act violations. Previously, actions brought by the Bureau subjected violating carriers to civil penalties, providing no relief to the shipping party harmed by the misconduct, but the Act now imposes liability for refund of wrongful changes, in addition to or in lieu of a civil penalty.[12] In assessing fines or refunds, the Commission will consider the degree of culpability, history of prior offenses, ability to pay, and "such other matters as justice may require."[13] And great news for the Subway Sandwich shop at North Capitol and H Streets in D.C., but bad news for errant carriers: The Act authorizes a 60% increase in funding for the Commission through 2025[14] and expressly directs the addition of seven personnel "to assist in investigations and oversight" within the Bureau.[15]

OSRA introduces a new mechanism to help facilitate shipper access to the powers of the Bureau. Shippers may submit information concerning charges assessed

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5 Senator Maria Cantwell, Cantwell Applauds Unanimous Senate Passage of Ocean Shipping Reform Act (Mar. 31, 2022), https://www.commerce.senate.gov/2022/3/cantwell-applauds-unanimous-senate-passage-of-ocean-shipping-reform-act.

6 Senators Michael Bennett and John Hickenlooper, Bennett, Hickenlooper Applaud Senate Passage of the Ocean Shipping Reform Act (Apr. 1, 2022), https://www.bennet.senate.gov/public/index.cfm/2022/4/bennet-hickenlooper-applaud-senate-passage-of-the-ocean-shipping-reform-act.

7 A. Saraiva & A. Monteiro, Bloomberg, Biden Blames Shipping Lines as Inflation Grips U.S. Economy (June 13, 2022), https://www.bloomberg.com/news/newsletters/2022-06-13/supply-chain-latest-biden-warns-shipping-lines-amid-hot-inflation.

8 Gary Dixon, Robert Uggla hits back at Biden in US box shipping broadside, Tradewinds, (June 21, 2022), https://www.tradewindsnews.com/containerships/robert-uggla-hits-back-at-biden-in-us-box-shipping-broadside/2-1-1242901

9 *Id.*

10 Hearing Before the U.S. Senate Committee on Commerce, Science and Transportation: Hearing on the Ocean Shipping Reform Act, 117th Cong., Mar. 3, 2022.

11 46 U.S.C. § 41102(d).

12 *Id.* §§ 41107(a) & 41109(a)(1).

13 *Id.* § 41109(b).

14 *Id.* § 46108.

15 OSRA § 17.

by common carriers, upon receipt of which the "Commission *shall* promptly investigate the charge" with respect to Shipping Act compliance.[16] In such case, the carrier will be afforded an opportunity to respond, but will bear the burden of establishing the reasonableness of the charges and their compliance with the Act.[17] In conducting its investigation, the Bureau is required to consider whether non-vessel owning common carriers (NVOCCs) assessing penalties are responsible for the non-compliant charge, or whether "another party is ultimately responsible in whole or in part," presumably the first-instance vessel owning common carrier (VOCC).[18] If the Commission determines upon investigation that the charges were not warranted, it will refund the charges to the shipper, and potentially issue a civil penalty as well. Accordingly, the change incentivizes shippers to file complaints with the Commission and appears to shift the effort and expense of pursuing the claim from the shipper to the Commission. However, shippers would be well-advised to retain counsel for the presentation of their claim to the Commission to facilitate its inquiry and ensure a successful case.

The Act makes unlawful any demurrage and charge or invoice which does not demonstrate compliance with with the Commission's May 18, 2020 final rule or the Commission's statement of policy regarding unreasonable practices with respect to demurrage or detention,[19] and shifts the burden to carriers to demonstrate the reasonableness of such charges.[20] These rules, in turn, require transparent application of the charges and a correlation between the charges and the goal of promoting freight fluidity by incentivizing shipper to retrieve cargo and return containers on a timely basis, freeing up transportation space and equipment. Furthermore, the Act now specifies information that must be included in each invoice for demurrage and detention, in an attempt to introduce additional transparency to the charges, and waives any charges predicated upon invoices not containing such information.[21] The measure includes a safe harbor for NVOCCs passing through such charges.[22] OSRA also requires the Commission to publish annually all findings by the Commission of false detention and demurrage invoice information and penalties assessed by the Commission, and requires a rulemaking by the Commission within one year to define prohibited demurrage and detention practices.[23] The rule will "only seek to further clarify reasonable rules and practices related to the assessment of detention and demurrage charges to address the issues identified in the final rule published on May 18, 2020, entitled 'Interpretive Rule on Demurrage and Detention Under the Shipping Act' (or successor rule), including a determination of which parties may be appropriately billed for any demurrage, detention, or other similar per container charges."[24] Commenting upon the likely impact of OSRA following passage, Commissioner Chairman Maffei observed:

> I think this will do substantial good, particularly the D&D [detention and demurrage] rule, which we all passed universally. D&D should not be a revenue source. It should be a deterrent to move cargo. I am bullish on the bill and restoring credibility to the supply chain. In terms of D&D, [the bill] gives us the authority we need. We don't want to go too far. Not all D&D is unreasonable. You have terminals

[16] 46 U.S.C. § 41310 (emphasis added).

[17] *Id.* § 41310(b)(2).

[18] *Id.* 41310(e).

[19] Federal Maritime Commission, Interpretive Rule on Demurrage and Detention Under the Shipping Act ,85 Fed. Reg. 29,638, May 18, 2020. *See also* Bryant E. Gardner, Container Crunch, 19 Benedict's Mar. Bull. 2 at 86 (Second Quarter 2021); Bryant E. Gardner, Demurring under Demurrage, 18 Benedict's Mar. Bull. 3 at 131 (Third Quarter 2020). The statute makes reference to 46 C.F.R. Part 545, and § 545.5 contains the Commission's "Interpretation of Shipping Act of 1984—Unjust and unreasonable practices with respect to demurrage and detention." Although the statutory change enshrines the Part 545 interpretive rule, as Commissioner Dye testified in March 2022, "A major misunderstanding surrounds the nature of the demurrage and detention interpretive rule. The rule is not mere guidance. The rules provides that interpretation of demurrage detention charges as potential unreasonable practices under the section of the Shipping Act that requires carriers, ports, and terminals, and intermediaries to have reasonable practices." Hearing Before the U.S. Senate Committee on Commerce, Science and Transportation: Hearing on the Ocean Shipping Reform Act, 117th Cong., Mar. 3, 2022 In other words, such practices were already proscribed under the Act, which broadly prohibits unreasonable conduct.

[20] *Id.* §§ 41104(a)(14) & (15).

[21] *Id.* § 41104(d). Required information includes date the container was made available, discharge port, container numbers, earliest return date of export shipments, allowed free time, start of free time, end of free time, specification of the detention or demurrage rule, applicable rates under the rule, total amount due, contact information, and a statement that the charge complies with commission rules and was not caused by the common carrier's performance.

[22] *Id.*

[23] *Id.* §§ 46106(d) & 41102 (note).

[24] *Id.* § 41102 (note). The measure also requires new rulemakings regarding carriers' refusal to deal or negotiate, unreasonable refusal to provide cargo space, or application of unfair or unjustly discriminatory methods. *Id.*

> filled with containers being used as storage facilities because of a lack of warehouse space. You need to have the fee. We will write the best rule we can and will go back if we need to. You don't know until you do it. I thought the interpretive rule was good, but it is a work in progress. The legislation is not the end all be all, but it will restore confidence in the supply chain.[25]

Shortly after OSRA's passage, the Commission's General counsel issued an opinion to the public stating that certain provisions of OSRA became effective upon enactment without the need for any rulemaking, calling out the Act's new rules governing demurrage and detention charges and invoice procedures.[26]

OSRA empowers the Commission to issue sweeping new regulations governing shipping exchanges, such as the New York Shipping Exchange (NYSHEX) which act as match-makers for shippers and liner operators.[27] The regulations should provide more clarity to the exchanges, which to this point have actively engaged the Commission at the behest of cautious liner participants seeking to stay on the right side of the law as they explore the new exchange format. Exchanges must register with the Commission as a national shipping exchange, under regulations to be developed by the Commission within three years.

The Act also requires the Commission to undertake various fact-finding and information-reporting activities. Tracking many popular legislative initiatives in 2022, the Act takes a swing at China. Specifically, the Commission's annual report will now require identification of "concerning practices" by ocean common carriers based in "non market" countries.[28] Although that list includes the likes of Kyrgyz Republic and Turkmenistan, the People's Republic of China is the most likely host for common carriers of any significance. The law further requires monthly reporting of marine container and chassis dwell time and out of service percentages for the top twenty-five ports.[29] The Act directs the Commission to enter into an agreement with the Transportation Research Board of the National Academy of Sciences to examine best practices for on-terminal or near-terminal chassis pools with the goal of optimizing supply chain efficiency and effectiveness.[30] Moreover, the law directs the Department of Transportation, U.S. Maritime Administration, and the Commission to meet with industry and examine the strategies for storage of marine containers to address port congestion.[31]

Additionally, the measure calls upon the Commission to seek public comment to examine "whether congestion of the carriage of goods has created an emergency situation of a magnitude such that there exists a substantial, adverse effect on the competitiveness and reliability of the international ocean transportation supply system" and whether the Commission should issue an "emergency order . . . requiring any common carrier or marine terminal operator to share directly with relevant shippers, rail carriers, or motor carriers information relating to cargo throughput and availability."[32] Such an emergency order would be limited to 60 days' duration.[33]

The Act also calls for the Government Accountability Office (GAO) to undertake a report regarding technological advancement at U.S. ports relative to foreign ports, barriers to the adoption of port technology, and whether such technology could lower the costs of cargo handling.[34] The ports technology question remains mired in politics. On the one hand, Republican legislators and some industry stakeholders have suggested automated terminals and trucks will increase efficiency and streamline cargo movements. However, the Biden Administration and Democratic leaders have been hesitant to push changes viewed as antagonizing the Teamsters or the International Longshore and Warehouse Union. So often in legislative matters, a study or report is the consolation prize for legislative language pulled to achieve consensus.

Congress punted a number of the thorniest issues and deferred much to the Federal Maritime Commission. Although the final bill did not include House-proposed language that expressly prohibited carriers from declining exports—a provision sought by agricultural stakeholders in particular—OSRA does include new

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25 Lori Ann LaRocco, Will the Shipping Reform Act help rebalance scales? The FMC chairman thinks so, American Shipper (June 15, 2020), https://www.freightwaves.com/news/shipping-reform-fmc-chairman-interview.

26 S.J. Anderson, Office of the General Counsel, Federal Maritime Commission, Timing of Certain Provisions of the Ocean Shipping Reform Act of 2022 (June 24, 2022), https://www.fmc.gov/wp-content/ uploads/2022/06/FMCGCOpinionOnOSRA22.pdf.

27 46 U.S.C. § 40504.

28 *Id.* § 46106(b)(7)(B).

29 OSRA § 16.

30 *Id.* § 19.

31 *Id.* § 24.

32 *Id.* § 18.

33 *Id.*

34 *Id.* § 25.

language outlawing services which "unreasonably refuse cargo space accommodation when available" and calls for the Commission to define such conduct in a rulemaking within six months of enactment.[35]

Upon passage of OSRA by Congress, the World Shipping Council, which is the association of international liner operators in D.C., observed: "Today's vote on the Ocean Shipping Reform Act (OSRA) marks the conclusion of the legislative phase and transition to the Federal Maritime Commission rulemaking process. We appreciate the time and effort that Congress has put into crafting this bill and look forward to engaging in productive conversations with the Federal Maritime Commission to implement OSRA in a way that will minimize disruption in the supply chain."[36] Much of OSRA's ultimate impact will be defined by the Commission over the coming year. Consequently, the rulemaking process implementing the rule bears close watching and, for stakeholders, active participation.

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[35] *Id.* § 7.

[36] World Shipping Council, Statement on Congressional Passage of the Ocean Shipping Reform Act (June 13, 2022), https://www.worldshipping.org/news/world-shipping-council-statement-on-congressional-passage-of-the-ocean-shipping-reform-act.

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