



# CLIENT ALERT!

## U.S. LAW NOTES FOR BUSY MANAGERS

New York • New Jersey • Florida • Connecticut • Massachusetts • Rhode Island

FALL / WINTER

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2009

### CRUISE VESSEL SAFETY AND SECURITY ACT PASSES HOUSE OF REPRESENTATIVES

#### *Proposed Law Contains Measures To Protect U.S. Passengers From Crimes on High Seas*

Last month, the House of Representatives passed the Cruise Vessel Safety and Security Act of 2009, which will tighten safety and security measures for passengers traveling abroad from or to U.S. ports. The proposed law will require cruise vessels to report to the Coast Guard and to the FBI any incident involving U.S. nationals who go missing or are victims of homicides, suspicious death, sexual assaults and other serious crimes. It will also require a minimum height for railings, cabin doors with peepholes, and video security cameras to keep an eye on targeted areas of vessels used by passengers.

Most important, at least one crewmember will have to be trained to detect, investigate, report crimes and preserve evidence.

Ship's doctors must have received training in conducting forensic sexual assault examination, and the ship's hospital must have adequate up-to-date supplies of anti-retroviral and other medications needed to prevent sexually transmitted diseases.

There are about 300 oceangoing cruise ships in operation worldwide, and it is estimated that more than 12.6 million

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### SECOND CIRCUIT RULES EFT'S AT INTERMEDIARY BANK IN NEW YORK ARE NOT PROPERTY OF FOREIGN CUSTOMERS AND CANNOT BE ATTACHED

In a ruling that will dramatically affect the law of Rule B maritime attachment in New York, the Second Circuit Court of Appeals has overruled its own *Winter Storm* decision of 2002 in which the Court held that an electronic fund transfer (EFT) in the hands of an "intermediary bank" in New York "could be attached pursuant to admiralty Rule B(1)(a)." On October 16, 2009, the appeals court changed its mind and ruled in *The Shipping Corp. of India, Ltd. v. Jaldhi Overseas Pte Ltd.* that an EFT in the hands of an intermediary bank cannot be attached because it is not the property of either the originator or the beneficiary. The three-judge panel consulted all members of the court before issuing its new decision.

In the last issue of our CLIENT ALERT (Summer, 2009) we noted that the flood of complaints filed in the federal courts in New York was swamping the judges. Complaints seeking Rule B attachments constituted 33% of suits filed in the Southern District Court of New York. The banks were also complaining loudly. Over 100 attachment orders per day and over 700 supplemental services of existing orders each day are served on New York banks. Supplemental services are made because Rule B attachments will not work unless the defendant's funds are in the bank at the moment an order of attachment is served.

We also pointed out in our Spring,

2007 CLIENT ALERT that the Second Circuit seemed to be having second thoughts about its *Winter Storm* decision, which the court itself described as "open to question" in a late ruling in 2006.

An EFT is nothing other than an instruction from a bank to an intermediary bank to transfer funds from one bank to another. Because any international transactions call for payment in U.S. dollars, New York banks are usually appointed by the two foreign banks, who each have an account in a New York bank. The originating foreign bank, at the request of its customer, instructs the New York bank to credit the account of the foreign bank whose customer is the beneficiary. Simply put, neither customer has a personal account in the New York intermediary bank. There is no property of either party that can be attached as the intermediary transfers sums in the New York accounts of the foreign banks, according to the Second Circuit.

The Court of Appeals in the *Jaldhi* case reasoned that "the question of ownership is critical" under Rule B, as jurisdiction depends on "who owns the property at the moment [it] is attached."

Conceding that its own past holdings on Rule B maritime attachments should not be relied upon

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## SECOND CIRCUIT EFTs

(Continued from Page 1)

as precedent, the Court of Appeals note that, “when there is no federal maritime law to guide our decision, we generally look to state law to determine property rights.”

The beneficiary has no property interest in the funds transferred by an intermediary bank pursuant to an EFT until the transfer is completed by acceptance of the payment by his own bank. It follows, that the originator has no interest in funds which his bank has transferred by an EFT. The transaction is reflected in the commercial accounts of the foreign banks in the New York bank, not in the personal account of either party in New York.

The Court of Appeals overruled its 2002 *Winter Storm* decision, but it made no comment on the effect its new decision would have on the hundreds of existing attachments on New York banks. The decision may be appealed to the Supreme Court or the Appeals Court may be asked to reconsider and to clarify the status of existing attachments. Meanwhile, parties who have had EFTs attached will probably move to vacate the orders of attachment and opponents will argue that court decisions are not retroactive unless so ordered. Two banks have already given notice that they will refuse to accept service of any Rule B attachment orders, regardless if they were signed by the court before October 16<sup>th</sup>.

The bottom line for now is that a litigant cannot attach the accounts of foreign banks who use their New York bank accounts to process EFT transactions. A Rule B attachment will be effective only if the absent defendant has an account of its own in a New York bank or other property within the district.

In a more recent decision on November 13, the Second Circuit concluded that its earlier ruling in the *Jaldhi* case (1) should be applied retroactively, and (2) that a party’s failure to assert the argument in prior pleadings does not constitute waiver. *Hawknet v. Overseas Shipping* (2d Cir., Nov. 13, 2009).

## SEAMEN WHO AGREED TO RETURN TO SINKING VESSEL TO HELP SAVE HER ARE NOT ENTITLED TO PURE SALVAGE

### *Were to be Paid Wages Regardless of Outcome*

Two seamen who volunteered to return to a flooding and listing semi-submersible drilling rig in the Gulf of Mexico after Hurricane Katrina in 2005 succeeded, along with others, including professional salvor, in saving the rig, which cost in excess of \$350,000. One seaman had earlier evacuated the rig with all other crew members pursuant to the owner's instructions. The other had been ashore on time-off. Both had been asked if they were willing to board the endangered rig and keep her from sinking. One of them was asked to leave the team, which managed to jump on the listing rig from a helicopter.

Both men had volunteered in face of apparent danger, and together with professional salvors, they helped save the endangered rig. Both seamen sued to recover, as pure salvors, at least 10% of the value of the rig they helped save. Were they entitled to recover as pure salvors?

The Fifth Circuit Court of Appeals ruled they were not. Under maritime law, an agreement to pay for salvage services *irrespective of success* in saving a vessel will defeat a claim for salvage. A salvor is entitled to a reward or merited compensation only if he succeeds in saving the endangered vessel. In this case, it was clear that the two seamen volunteered, but they were to be paid wages for their efforts *in any event*. That part of the agreement defeated any claim for pure salvage.

However, since there was no express or implied agreement as to how much they would be compensated for returning to work, the appeals court sent the case back for further proceedings on the issue of what wages were to be paid by the employer. *Louis Solana, et al. v. GSF Development Driller* (5th Cir., Oct. 29, 2009).

## CRUISE VESSEL SAFETY ACT

(Continued from Page 1)

Americans sailed on cruises from a U.S. port in 2008.

The legislation was prompted by the disappearance of two U.S. passengers from different foreign flag cruise ships in 2004 and 2005. At present, foreign flag vessels operating outside U.S. waters are not required to notify the U.S. Coast Guard or F.B.I. about crimes involving U.S. Passengers.

The Coast Guard is authorized to promulgate safety regulations under the Act, to develop training curricula for cruise vessel personnel, and to establish certification and inspection procedures.

Owners and operators would also be required to post in all cabins information about the location of U.S. embassies and consulates for countries on the voyage itinerary.

Further, victims of sexual assaults will have to be provided with information on how to contact local law enforcement and the F.B.I., as well as a private telephone line or computer terminal by which the individual may confidentially access law enforcement officials or an attorney.

The Act will apply to all passenger vessels embarking or disembarking passengers at a U.S. port.

Within 8 months from enactment, handrails will have to be no less than 42” high, and passenger cabins would have to have peeholes. The vessels would need to install available technology to detect passengers who may fall overboard, as well as acoustic warning and hailing devices for vessels operating in high risk areas.

Video surveillance cameras must be installed to monitor areas frequented by passengers and to document crimes as they occur.

Operators will have two years in which to train at least one crewmember crime investigator. Thereafter, they will be barred from U.S. Ports if a trained person is not on board.

## CONVENTION SIGNED BY U.S. FORCES ARBITRATION OF SEAMAN'S CLAIM FOR WAGES

### *Takes Precedence Over Exemption in FAA*

Although the Federal Arbitration Act (FAA) includes a provision that specifically exempts employment contracts of seamen, who are considered by American courts as wards to be protected like widows and orphans, the Ninth Circuit Court of Appeals has ruled that a seaman, who was fired by a cruise line because he could not afford \$2,119 travel expenses required to rejoin his ship on time, was compelled to arbitrate and could not bring a court case against his employer under the Seamen's Wage Act.

The Appeals Court upheld the District Court's order granting the employer's motion to compel arbitration and dismissing the suit that the seaman had filed. It did so mainly on two grounds.

First, although the FAA exempted the seaman's employment contract from domestic arbitration, the seaman had sued under the Seamen's Wage Act, and such claims are subject to arbitration under a convention that the United States had signed and implemented into a federal statute, 9 U.S.C.S. §201-208.

Conventions take precedent over any U.S. domestic law. The Convention that applied to commercial contracts, including maritime agreements, is the United Nation Convention and the Recognition and Enforcement of Foreign Arbitration Awards, June 10, 1958.

The Court ruled that the FAA provision exempting contracts of employment of seamen does not apply to arbitration agreements that are otherwise subject to the international convention.

While the plaintiff seaman claimed he had made no arbitration agreement with the cruise line, plaintiff was subject to an arbitration agreement contained in

a collective bargaining agreement between his union and his employer.

The Convention requires that courts must enforce an agreement to arbitrate unless the agreement is "null and void, inoperative or incapable of being performed."

The Appeals Court decision is an example of how one U.S. statute can trump another because it is based upon an international convention signed by the U.S. government. *Romeo Balen, et al. v. Holland America Line, Inc.* (9th Cir., Oct. 2, 2009).

### **"COMMUTER SEAMAN" ENTITLED TO MAINTENANCE AND CURE PLUS COST OF DISABILITY BENEFITS**

#### *Court Approves Double Dipping*

*Following the Supreme Court's continuing view that seamen are "wards of the admiralty" court and that any ambiguities in the law are to be resolved in their favor, the Third Circuit Court of Appeals has ruled that "commuter seamen" who eat and sleep ashore are entitled to collect traditional "maintenance and cure benefits" regardless of other payments received from his employer, such as wages, and other benefits such as Social Security Disability (SSD) and long-term disability (LTD).*

*The Court refused to deduct the cost of SSD and LTD coverage the seaman received from the daily "maintenance and cure" payments he also received from the employer.*

*The employer argued unsuccessfully that seamen who work ashore and live at home and are paid wages, and receive SSD and LTD benefits not provided to seagoing seamen, should not also collect maintenance and cure, in order to avoid double recovery.*

*A seaman is traditionally paid agreed-upon daily payments to maintain him while recovery from illness or injury and is provided medical care until he or she achieves maximum cure.*

## COURT GRANTS SHIPOWNER LEGAL FEES AGAINST SHIPPER BASED ON FOREIGN LAW CLAUSE OF B/L

The Ninth Circuit Court of Appeals on the West Coast recently allowed a shipowner to recover attorneys' fees as part of its claim against a shipper, although neither U.S. COGSA nor any clause in the bill of lading made any mention of legal fees, and U.S. maritime law generally does not allow recovery of such fees. How was that possible?

Attorneys' fees are generally not allowed under U.S. general maritime law except for two judicially created exceptions: The first exception is when a party who has paid a loss is seeking "indemnity." Expenses for legal fees are just part of the amount allowed to make the indemnitee whole. They are not really attorneys' fees as such.

The second exception in admiralty cases is where the non-prevailing party has acted in "bad faith" in the litigation. In such cases, the trial judge no doubt has inherent and discretionary power to exact a penalty for such misconduct. Here again, legal fees are not granted as a matter of law but as part of a fine by the Court. See, *Noritake Co., Inc. v. M/V Hellenic Champion*, 627 F.2d 724, 730 (5th Cir. 1980).

In a recent appeal decided by the Ninth Circuit on the West Coast, a cargo of cans of hair spray was carried from Istanbul to Long Beach, California in a container. Upon discharge, the shipment was found to be "leaking dangerous and hazardous" due to improper packing by the shipper. The carrier spent about \$700,000 in cleaning up the mess and disposing of the cargo. It then sought indemnity against the parties who arranged the shipment.

The bill of lading incorporated COGSA but provided that "[i]nsofar as anything has not been dealt with by terms and conditions of this bill of lading, Singapore law shall apply." Since neither COGSA nor the bill of

## DIFFERENT BILLS OF LADING ISSUED FOR SAME CARGO INVITE MULTI-PARTY LITIGATION

### *Multiple Carriers Should Seek Back-to-Back Bills of Lading*

What happens when a non-vessel-owning common carrier (NVOCC) applies to another NVOCC to ship the cargo and receives a bill of lading from the second NVOCC, who in turn ships the cargo with a shipowner who issues its own different bill of lading to the second NVOCC? Litigation.

An NVOCC is defined legally as “a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.” 46 C.F.R. 515.2(O)(2). A freight forwarder who issues a bill of lading to the actual shipper becomes a “maritime common carrier,” subject to U.S. COGSA, the Pomerene Act and the whole body of admiralty law that applies to shipowners or charterers who issue bills of lading.

The bill of lading forms issued by an NVOCC often are not identical (back-to-back) with the forms used by other NVOCC’s or shipowners with whom he does business. That can lead to expensive litigation.

### **Problem of Conflicting Clauses**

For example, in a recent case decided by the federal court in New York, the first NVOCC who had issued a bill of lading was found liable to the real shipper by a court in Barcelona for approximately \$100,000 for cargo damage. It sued in New York to obtain indemnity from the second NVOCC from when it had received a bill of lading.

The second NVOCC’s bill of lading contained a forum clause providing exclusive jurisdiction in the federal court in N.Y. Moreover, it also provided that, “this clause supersedes any conflicting clause in bills of

lading...issued by contractors or subcontractors” of the second NVOCC.

The ocean carrier that the NVOCC had used was a Chinese slot-charterer from whom it in turn received a bill of lading. The second NVOCC impleaded the ocean carrier as a third-party defendant.

The Chinese carrier moved to dismiss, based on the forum clause in its bill of lading providing for proper venue in China. The Court found that as to the second NVOCC, the slot-charterer’s Chinese forum clause was exclusive, reasonable and valid. It dismissed the third-party complaint filed by the second NVOCC against the Chinese ocean carrier.

The second NVOCC then tried to claim the benefit, as against the plaintiff NVOCC, of the forum clause in the Chinese contractor’s bill of lading. The Court denied the motion as a “non-meritorious effort at piggy-backing.”

In desperation, the second NVOCC then tried to defend the claim against it by pointing to a “Participating Carrier” clause in its own bill of lading, which incorporated by reference any rights or defenses that a participating carrier might have for losses occurring while the goods were in the participating carrier’s custody.

### **Forum Clauses Compared**

The Court rejected as invalid any incorporation of the Chinese carrier’s bill of lading clauses because the wording was general, whereas the clauses in the bill of lading the second NVOCC issued to the first were very specific that the New York court was to have “exclusive jurisdiction” and further that the New York jurisdiction “supersedes any conflicting clause...in bills of lading...issued by contractors or subcontractors.” Specific clauses are given weight over general clauses, and any ambiguity is to be resolved against the bill of lading issuer. This is a rule of interpretation that applies to all contracts. Thus, the second NVOCC was done in by its own bill of lading. *Bax Global, Inc. v. Ocean World Lines, Inc. v. COSCO* (S.D.N.Y., Sept. 16, 2009).

## DON'T MISS “SKIP” STRONG GUEST SPEAKER DECEMBER 8

*Prentice “Skip” Strong, III, the author of “In Peril”, the exciting book that describes how he rescued the crew of the J.A. Orgeron and salvaged NASA’s \$50 million liquid fuel cell, will be our guest and featured speaker on Tuesday, December 8, 2009, when we gather with friends at a party in our New York office to celebrate the coming holidays.*

*“Skip” will talk about the challenge, resolve and dramatic salvage that made history and which resulted in he and his crew being awarded the American Merchant Marine Seamanship Trophy, the highest award for maritime service.*

*You can meet “Skip” Strong personally and hear his 30-minute talk on December 8.*

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### **HOLIDAY CELEBRATION**

*Tuesday, Dec. 8, 2009*

*Drinks & Appetizers - 3:30pm*

*Lecture - 4:30pm*

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*We look forward to seeing you!*

### **B/L ALLOWS LEGAL FEES**

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lading dealt with attorneys’ fees, the Court of Appeals looked to Singapore law, and it granted attorneys’ fees to the shipowner as the “prevailing party” because Singapore adopts the common law of England on the subject of legal fees. *APL Co. Pte. Ltd. v. UK Aerosols Ltd.* (9th Cir., Sept. 21, 2009).

## WILL SIDE EFFECTS OF RULE B ATTACHMENTS REMAIN?

During the period that New York banks were being swamped with court orders attaching Electronic Funds Transfers (EFT), some banks began to charge fees for processing the attachments, and some plaintiffs begin to use office personnel instead of the U.S. Marshal to save the cost of making service. EFTs can no longer be attached in New York (*see story on page 1*), but some of the remnants of the EFT battle may live on.

Some of the New York banks began imposing fees of several hundred dollars for processing the garnishment orders. However, there is nothing in Rule B authorizing such fees.

Some attachment orders authorized service to be made by a private person instead of the U.S. Marshal. Again, such alternate service is not authorized by the Rules. Finally, some orders provided that their service should be deemed continuous for several days. Nothing in the Rules allows such fictitious service. But some of the judges went along to try to cope with the flood of requests for rule B attachments. One court advised subsequent service to be accomplished by electronic means.

An attachment is void unless garnishee has defendant's property in its possession at the moment the order is served. After-acquired property is protected, but in recent years judges have issued orders directing banks to treat the orders as "continuously served for one day." This was usually done with the bank's consent, since the bank did not want to be served repeatedly all day long by those hoping to trap the EFTs as they flew through computers in New York banks. A New York federal judge ruled recently that service shall be effective as of the time the bank checks its record, not as of the moment service is actually made.

No court has held that a judge must provide for a reasonable bank fee, or deemed continuous service, or service by a private server.

## IS MARITIME CARGO "DELIVERED" UNDER COGSA WHEN IT IS SEIZED AND SOLD BY CUSTOMS?

The statute of limitations in the U.S. Carriage of Goods By Sea Act provides that suit must be brought within "one year after delivery of the goods or the date when the goods should have been delivered." The issue of "should have been delivered" comes up only "in situations where goods are "lost altogether, as when a ship sinks or a vessel is destroyed and thus future delivery is presented." However, the issue of "delivery" under COGSA may not be simple as there is no legislative definition on Supreme Court case and little case law defining "delivery" as used in COGSA.

The Judges of the federal courts in the Southern District of New York have developed a consistent definition: Effective delivery requires not only (1) discharge of the goods from the vessel, but also (2) notice of discharge and (3) a reasonable opportunity for inspection or removal of the goods. This definition does not require active inspection of removal of the goods. If the owner does not show up, the time still starts to run.

But what if the goods are not actually lost but are seized by Customs or the Coast Guard for some violation? This issue came up in a case we defended where the carrier had loaded a container of autos prematurely and sailed from Long Beach before the shipment had been cleared by Customs. Customs ordered that shipment returned to the United States. Our client reverted the cars back to Long Beach, but the cars were seized after discharge on February 12, 2004.

The plaintiff was officially notified by Customs on April 5, 2004, by letter that gave instructions on how to obtain relief. Apparently, no action was taken and the cars were eventually sold by Customs. The plaintiff filed suit May 4, 2005. The court held that April 5, 2004, the date the plaintiff had been notified of the seizure by Customs was the "delivery date" to be used to compute the one-year limitation. Thus, despite

## LUMP SUM FREIGHT REDUCES \$218,764 CLAIM TO \$500

The rate agreed upon between the parties to calculate freight for bulk cargo as recited in the contract may be crucial to the amount a shipper can recover if the cargo is lost or damaged. U.S. COGSA provides a carrier's limitation of \$500 per package or, for goods not shipped in packages, "per customary freight unit."

The Court of Appeals in New York has interpreted "customary" to mean whatever freight unit is used by the parties "for the shipment at issue." Thus, if the shipper agrees to a "lump sum" rate for the entire cargo, all it can recover for loss or damage is \$500.

In a decision handed down last September by the Southern District of New York, a shipment was described in the bill of lading as 1,900 metric tons of peanut oil. The shipper did not declare the value of the cargo on the bill of lading. Instead, the bill of lading specified the freight amount as payable "per charter party dated February 23, 2005." The charter party recited the rate as \$90,000 lump sum.

The shipper argued the bill of lading described the cargo as "1,900 metric tons" and that the \$500 should be applied per ton. The Court stated that, under COGSA, it is not the unit used to describe the goods but the unit on which *freight* is charged that determines the customary freight unit for limitation purposes.

The Court rejected evidence of "customs and usage in the industry" and "prior dealings between the parties." Such evidence is considered only when the contract is ambiguous. Here, it was clear that the shipper had agreed to a lump sum freight. *Vigilant Insurance Co. v. M/T CLIPPER LEGACY* (S.D.N.Y., Sept. 2, 2009).

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the claim of no bill of lading and obvious liability, **R. Brett Kelly** of our firm persuaded the New York court to dismiss the case as time-barred under COGSA. *Russul Corp. v. Zim America* (S.D.N.Y., Oct. 5, 2009).

*Lawyers From Around the World  
Offer Carriers Advice in Bad  
Economic Times*

The firm of DeOrchis & Partners co-sponsored the Fourth International Law Seminar at the Trinity House in London on October 1, 2009. The event attracted over 130 executives from the maritime industry, including several from the continent. This year's event included thirteen lawyers from countries around the world addressing the issue of how to help shipowners and carriers in a difficult economic climate.

Speakers discussed ways in which carriers could seek to avoid or modify many of their contracts, based on *force majeure* and frustration of venture. The second part of the symposium concentrated on how to insure that cargo shippers and subcontractors perform their contracts with carriers.

The International Seminar is an annual event which was co-founded by our managing partner, **Vincent M. DeOrchis**. Mr. DeOrchis was also a speaker this year. The event was moderated by **Nick Tonge** of North of England and **Anders Ulrich**, formally of Skuld's Copenhagen office.



*Vincent M. DeOrchis addressing the International Law Seminar in London*

DOES CARMACK APPLY TO  
SEA CARRIER'S THROUGH B/L?

*West Coast and East Coast  
Circuit Courts Disagree*

Reasonable forum selection clauses in ocean bills of lading are valid under the U.S. Carriage of Goods by Sea Act, but under the Carmack Amendment, which applies to rail and motor carriers in the U.S.A., a forum selection clause is valid only if the contract of carriage formally opts out of the statute's venue restrictions.

When a suit is filed against an ocean carrier and the bill of lading or seaway bill covers only port-to-port transportation and is not a through bill of lading that also covers land carriers, only COGSA controls the ocean carrier's liability, and a foreign forum clause is valid.

The Ninth Circuit Court of Appeals, whose jurisdiction includes California, has ruled that an ocean carrier is subject to the Carmack Amendment if it hires land carriers in the U.S.A. to participate in the overall through carriage.

On the other hand, the Second Circuit in New York disagrees and has ruled that an ocean carrier cannot be treated as a rail carrier or motor carrier subject to Carmack, even if it issues a

through bill of lading.

In a recent case decided by a California federal district court in the Ninth Circuit, the shipper's NVOCC prepared seaway bills that provided the shipment of cheddar cheese was to be carried from Seattle to Busan, South Korea, at -23.3°C, instead of the correct temperature, 35°F. Not surprisingly, all of the cheese arrived frozen.

The NVOCC defaulted, and the ocean carrier moved to dismiss based upon a Hamburg court forum selection clause in its seaway bills.

The court found that the seaway bills were expressly limited to ocean transport and did not include any land transport by other carriers in the U.S.A.

Therefore, the claim against the ocean carrier was strictly maritime, did not include land carriage, and Carmack Amendment had nothing to do with the purely maritime transport.

Hamburg, the Court said, was a reasonable forum selection clause under the U.S. Carriage of Goods by Sea Act, and the case against the ocean carrier was dismissed because of the foreign forum clause. *Meritz Fire & Marine Ins. Co. v. Hapag-Lloyd (America), Inc.*, (U.S.D.C., C.D. Cal., Sept. 2, 2009).

*This Client Alert is not to be considered a legal opinion.*

*It is an advertisement and contains information of general interest for clients and friends of the Firm.*

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