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Some Maritime Terms Explained — Part 3

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This article continues the explanation of some words and phrases commonly found in maritime contracts and marine insurance policies.

Jones Act

In 1920, Congress enacted the Merchant Marine Act, part of which is known as the Jones Act, named after its sponsor, Senator Wesley Jones. The overall intent of the act was to promote and maintain a strong US Merchant Marine.

The Jones Act addressed two very different aspects of the maritime industry. It increased the remedies available to seamen who were injured while in the course of their employment. It also imposed requirements on vessels transporting goods or passengers between US ports.

Before enactment of the Jones Act, injured seamen were limited to recovering "maintenance", or a minimal daily stipend for food and lodging while they recuperated, and "cure", or the medical expenses the seaman incurred until obtaining the maximum benefit of medical treatment. The recovery of maintenance and cure was not based on the seaman's employer's fault. Under the Jones Act, in addition to maintenance and cure, an injured seaman is entitled to sue his employer for its negligence or the negligence of his co-workers that caused the injury. The seamen's right to sue their employers for negligence is based on the federal law pertaining to the rights of injured railroad workers. The Jones Act also provides a remedy for the personal representative of a seaman who has died as a result of a personal injury suffered during the course of his employment. A lawsuit for personal injuries or death of a seaman can be filed in federal or state court.

Another aspect of the Jones Act involves the transportation of goods or passengers between US ports and is referred to as "cabotage" law. It prohibits the transportation of goods or passengers between US ports in any vessel other than a vessel built in and documented under US law, owned by US citizens, and crewed at least 75 percent by US citizens. Federal law specifies what is considered to be a US-built and owned vessel. There are exceptions to the Jones Act. Moreover, the President can waive its application in an emergency. In the US, cabotage laws also apply to air, truck, and rail transportation between two US destinations. Many other countries have cabotage laws.

Laches

Laches is an unreasonable delay in pursuing a claim prejudicing the party against whom the claim is pursued. The equitable doctrine of laches is asserted as a defense in admiralty cases when there has been inexcusable delay by a plaintiff in commencing an action and, due to the passage of time, the defendant is unable to prepare an adequate defense. That is, in the interim, evidence may have been lost or destroyed and witnesses may have become unavailable. The defense of laches is similar to, but not the same as, the defense of the expiration of the period allowed for filing suit under a statute of limitations. In determining whether there has been inexcusable delay, the courts consider the statute of limitations that would otherwise apply to the claim. If the claim is brought *after* the time allowed by the statute of limitations, an inference arises that the delay was unreasonable and prejudicial, and the plaintiff has the burden of proving otherwise. Conversely, if the claim was brought before the expiration of the time allowed by the statute of limitations, an inference arises that the delay was neither unreasonable nor prejudicial, and the defendant has the burden of proving otherwise.

Letter of Undertaking

A letter of undertaking is a letter written to a claimant by a P&I Club, insurance company, or other financial organization providing security for certain maritime lien claims against a vessel, to avoid arrest of that vessel. The letter of undertaking is most commonly posted in connection with claims against a vessel for cargo loss or damage. It may also be posted in connection with other tort claims against a vessel such as collision or allision. The issuer of the letter of undertaking customarily guarantees the payment of a judgment or settlement up to a specified amount including interest and costs, and reserves all defenses available to the vessel. The letter of undertaking stands in place of the vessel in litigation. Some courts have held the refusal to accept a letter of undertaking as security for a claim against a vessel, and the insistence on the posting of a bond by an approved surety, is unreasonable and potentially sanctionable.

NVOCC

NVOCC is an acronym for non vessel-operating common carrier. An NVOCC is a freight consolidator and forwarder that does not own or operate a vessel but acts as a carrier by issuing bills of lading and undertaking the responsibility for the transportation of cargo. An NVOCC usually enters into two contracts with respect to a shipment: 1) a bill of lading contract with its customer; and 2) a bill of lading contract with the vessel operating common carrier that physically transports the shipment. A bill of lading issued by an NVOCC is subject to the same laws governing a bill of lading issued by a vessel operating common carrier.

Peril of the Sea

"Peril of the sea" has different meanings depending on the context in which the phrase is used. Loss of or damage to a vessel or cargo due to a peril of the sea is a covered peril under a marine insurance policy. In that context, peril of the sea is a term of art meaning an unforeseen and unanticipated action of the sea. No particular sea condition or wave height is required for the loss or damage to have been caused by a peril of the sea in the marine insurance context. However, the determination of whether a loss has been caused by a covered peril of the sea is not always easy when other factors such as deterioration and wear and tear contribute to the loss. In that circumstance, the court determines what the efficient proximate cause of the loss was. *Sipowicz v. Wimble*, 370 F.Supp. 442 (S.D.N.Y. 1974) illustrates the point.

In *Sipowicz*, the insured vessel sank after the keel and keelson fell off and water entered the hull. The insured contended the sinking was due to a peril of the sea, or the fortuitous entry of seawater into the vessel. The court disagreed holding the loss not covered because the fastenings were deteriorated and the separation of the keel and keelson from the rest of the vessel was inevitable. The court stated perils of the seas must be "of the sea" and not merely "on the sea".

Peril of the sea is also a defense against cargo loss or damage under the US Carriage of Goods by Sea Act (COGSA) but is not defined in the statute. Because peril of the sea is an exemption from liability available to a carrier, courts have interpreted the phrase with greater strictness than in the marine insurance context. A common definition of peril of the sea in a cargo loss or damage case is "a fortuitous action of the elements at sea, of such force as to overcome the strength of a well-found ship or the usual precautions of good seamanship." As a condition of asserting a peril of the sea defense, the carrier must demonstrate it exercised due diligence to make the vessel seaworthy at the commencement of the voyage. Thereafter, what might factually constitute a peril of the sea sufficient to exonerate a carrier from cargo liability varies from case to case. Many cases hold conditions less than Beaufort 8 are, as a matter of law, insufficient to constitute a peril of the sea. Even when conditions have been more severe,

in determining the existence of an excusable peril of the sea, courts have considered whether the weather was expectable for the time of year and location, whether the vessel itself suffered damage, and whether the vessel had to change course to avoid the conditions.

In *Taisho Marine & Fire Ins. Co. Ltd. v.* ***M/V Sea-Land Endurance***, 815 F.2d 1270 (9th Cir. 1987), the defendant vessel encountered a seven hour gale with Beaufort 10-12 winds, gusts greater than 95 knots and waves that rolled the vessel more than 40 degrees. The vessel also suffered structural loss and damage. The court held the conditions sufficient to support a peril of the sea defense under COGSA. On the other hand, in *Steel Coils, Inc. v.* ***M/V Lake Marion***, 331 F.3d 422 (5th Cir. 2003), Beaufort force 11-12 weather in the North Atlantic in the winter months resulting in no structural damage to the vessel was not a peril of the sea sufficient to exonerate the defendant from liability for rust damage to a shipment of steel coils.

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