

7-2010

Master Mariners and their Maritime Law: A Book Review

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Recommended Citation

John Paul Jones, Master Mariners and their Maritime Law: A Book Review, ITC News , July 2010, at 3. (Review of John A.C. Cartner, et al., *The International Law of the Shipmaster*).

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(continued from page 2)

corporate flight departments and divest themselves of many of their aircraft. The auto manufacturers are just a few of many corporations shrinking or shutting down their corporate flight departments.⁵ Additionally, Citigroup endured media frenzy and backlash when it revealed its intention to acquire a \$45 million corporate jet, such that it subsequently made the decision not to take delivery of the aircraft.⁶

For the reasons outlined above (corporate cost-cutting, media and governmental backlash, *etc.*), the supply of business aircraft in the market significantly increased.⁷ Prices have declined since the beginning of 2008. Buyers haven't been buying and corporations with aircraft are using the aircraft they have less and have tried to divest some aircraft or shut down flight departments.⁸

Additionally, even those parties desiring to acquire business aircraft have had increasing difficulty obtaining financing. Even for those corporations in the market to acquire aircraft, there has been a severe tightening of the availability of financing for such acquisitions. Few can afford to acquire aircraft without financing, causing potential purchasers to cancel or delay delivery of their aircraft. In addition to financial institutions having decreased liquidity and a general reticence to lend, the standards applied to those seeking financing have become higher – credit requirements have become tighter, more scrutiny has been applied, more due diligence has been conducted. In light of this tightened credit market, in the absence of availability of traditional financing options, export credit agencies such as the Export-Import Bank of the United States (Ex-Im) have begun to play an increased role in facilitating aircraft financing transactions. For example, Ex-Im financed \$1 billion of business aircraft buys in 2009.⁹

However, there is a silver lining to the tightened credit market of the past year's economic climate. Despite the malaise in the economy, globally the demand for business aircraft remains, as airlines continue to cut capacity; international demand for all business jets has eclipsed traditionally domestic-dominated sales and continues on an upward trajectory, particularly in the

expanding European, Russian, Indian, Brazilian, Asia-Pacific and Middle Eastern markets.¹⁰ As the economy continues to recover, both demand for aircraft and the availability of financing will continue to increase. Further, as credit becomes more readily available the business aircraft market will benefit because interest rates remain so low, increasing the attractiveness of available financing options.¹¹

NEWSLETTER TOPIC Nº 2

Master Mariners and their Maritime Law: A Book Review

By

John Paul Jones¹

The latest volume offered by Informa as part of its *Transport Law Library* is now *The International Law of the Shipmaster* by John A.C. Cartner, Richard P. Fiske and Tara L. Leitner. There was nothing like it already in print despite the obvious utility of such a treatise. It is therefore good to have at hand, notwithstanding blemishes best laid at the feet of its publisher.

Mr. Cartner is the managing principal of the firm of Cartner & Fiske in Washington, D.C. He brings to bear on this project expertise as a proctor in admiralty, licensed master for ocean-going vessels, and chartered engineer of naval architecture. Mr. Fiske, another proctor and naval engineer, is a captain retired from the United States Navy, formerly that Service's Supervisor of Salvage and Diving and overseer of both the recovery of *CSS Hunley* and the location and documentation of *HMS Hood*. (For those who have ever wondered about the difference between a master and a captain, this book supplies an early and detailed answer.) Tara Leitner is a graduate of the International Maritime Organization's International Maritime Institute in Malta who practices international maritime law for the firm of Blank Rome in Washington, D.C.

The field of maritime law does not suffer from any general lack of attention by those who write and publish in aid of its practice. American sources are relatively plentiful, as are English

(continues on page 4)

5. See "Market for Corporate Jets Goes Into Free-Fall," *The New York Times*, December 25, 2008; see, "As Distressed Detroit Drops its Jets, Bizav Ponder the Fallout," *supra* note 4.

6. See "Market for Corporate Jets Goes Into Free-Fall," *supra* note 5.

7. See "Corporations, Tending to a Tattered Image, Clip Wings of Private Jets," *supra* note 3 (indicating that the market has been flooded and prices have fallen 30%-40% since late 2007; "ELFA: Emerging Aircraft Market" Presentation (used inventory supply is now at 12.7%).

8. See "ELFA: Emerging Aircraft Market" Presentation, indicating that U.S. flight operations are down 25% for the year (worse than decline following 9/11 when airspace was shut down; "Business-Jet Demand is Stalling", *Wall Street Journal*, January 21, 2009.

9. "U.S. Ex-Im Bank Expects to Add to Aircraft Loan Portfolio," *Marketwatch*, September 26, 2009, <http://www.marketwatch.com/story/us-ex-im-bank-expects-to-add-to-aircraft-loan-portfolio-2009-09-26>.

10. "Business Aircraft Acquisition and Financing A How-To Guide," <http://www.forbescustom.com/AviationPgs/AircraftAcqFinHTGPI.html>.

11. "Corporations, Tending to a Tattered Image, Clip Wings of Private Jets," *supra* note 2.

1. John Paul Jones teaches constitutional law and maritime law at the University of Richmond, Virginia. His B.A. is from Marquette University, his J.D. (magna cum laude) from the University of San Diego, and his LL.M. from Yale University. After law school, he served as a clerk for the Honorable David Schwartz of the United States Court of Claims. Professor Jones has chaired several bar and academic committees related to administrative law and maritime law. He has produced on the Internet a collection of the texts of the world's constitutions. He edited the book, *DR. MUDD AND THE LINCOLN ASSASSINATION*, and has written for law journals about collisions at sea, ship interdiction, treasure salvage, punitive damages in maritime law, administrative procedure and judicial administration. For five years, he edited the *JOURNAL OF MARITIME LAW AND COMMERCE*. A former Naval Flight Officer and intelligence officer, he retired from the Naval Reserve with the rank of Captain.

(continued from page 3)

sources, and the close relationship between the two legal systems makes the latter quite useful to American lawyers. That said, there has grown over the last century a rather conspicuous void with respect to aspects of maritime law peculiar to the office of master of a merchant vessel, or at least of special concern to those in such a position, as well as those related to them by association or conflict. Cartner, Fiske and Leitner have endeavored to fill that void with this new work of nearly eight hundred pages. They deserve our applause for making such a Herculean effort.

Theirs is an opus in three parts: in Part I, *The Shipmaster in Context*, the office is surveyed in history and positioned in international law; in Part II, *The Doctrines of the Law of the Shipmaster*, is described the web of laws common to maritime trading states in which the master of a merchant vessel finds himself (or herself) inescapably ensnared by virtue of the office; in Part III, are catalogued the principal domestic laws of 196 states pertaining to matters of interest to the master of a vessel and the maritime conventions to which those states are parties. Lest anyone wonder why their catalog includes even a landlocked state like the Kingdom of Lesotho, which flags not even one ship, it bears mention that today the master of an ocean-going vessel may accept cargo at a port anywhere in the world on a through bill of lading, undertaking to transport the goods to Maseru, not only in part by sea but also perform in part by rail or road.

Its tone sets this work apart from most contemporary law treatises. It is at times ironic, occasionally more magisterial than necessary. Early it is said, for example, that "Officers in [the United States], especially chief engineers, are vigorously pursued (fairly or unfairly) under any theory of law which will gain conviction, even if the charge for underlying and predicate crime is withdrawn for lack of evidence." Whatever might be the merits of such an

assertion, its like is not to be found in *Prosser on Torts* or *Wright on Federal Courts*. Nor would a judgment like that offered in the associated footnote that such conduct on the part of prosecutors amounts to "legal perversion," the sole example following being Martha Stewart's conviction! At one point, William Langeswiesche is gratuitously savaged for fostering the popular notion of the high seas as lawless and for "writing stories long on emotion and short on well researched facts, despite clouds of not scholarly references." What else should be expected of a muckracker? At another, after listing the various items that a master must attempt to preserve when his ship founders (the deck log book, the engine log book, the radio log book, the charts, documents and papers used in the voyage, as well as valuables, postal matters and cash), it is said, "There is triumph in small victories. At least in China under the new and very well written code, he will not be fined if he does not turn in the money in five days as he will in various other states." Don't bother to look in *Powell on Real Property* for similar utterances about landowners.

The work is now and then exclusive in its vocabulary and cultural references. Throughout Parts 1 and 2, the word "benefice" appears where "benefit" would have better served. "Dutiable" also appears often, not to describe certain imported goods as one might expect, but where "obliged" or "obligated" would be both apt and more familiar to most readers. Chapter 4 begins with a line in Latin quoted from Terence, to which is attached a footnote. But no English translation is offered at the foot of the page, only the gratuitous defense that Cicero, Racine and Voltaire used the same line "sans footnote." These and other idiosyncrasies throughout the work certainly do make its reading interesting.

Part 1 presents an overview of international law affecting the shipmaster.

(continues on page 5)

UPCOMING COMMITTEE MEETINGS

INTRODUCTION

The International Transportation Committee meets on a monthly basis throughout most of the year. The monthly committee calls are open to all Committee members and those interested in becoming Committee members.

MEETING SCHEDULE

The Committee tentatively plans to meet via phone on the following dates in 2010 - 2011:

- 19 August 2010
- 16 September 2010
- 21 October 2010
- 18 November 2010
- 16 December 2010
- 20 January 2011
- 17 February 2011
- 17 March 2011
- 21 April 2011
- 19 May 2011
- 16 June 2011
- 21 July 2011

DIAL-IN INFORMATION

Dial-in information for these calls will be posted to the Committee's Web site at: <http://abanet.org/dch/committee.cfm?com=IC706000>

(continued from page 4)

It is in this section that the editor's dereliction is most conspicuous. Parts of the text are just confusing. At places, it reads like imperfect translation from another language. In Chapter 2, for example, federations are described as "provinces organised under a more-or-less strong federal government." It is then said that, "Unions are similar to federations such as the Union of the Comoros and the Federation of St. Kitts and Nevis, which is more of a union than a federation." Surely, this will be made more enlightening in the next edition.

Sometimes it is better not to generalize. In Chapter 3, it is said that "resolutions of the United Nations ... lack force of law." A more accurate statement of the law would have distinguished all resolutions of the General Assembly and some of the Security Council from those of the latter body pursuant to Article VII. Calling the United States a monist state when it comes to the relationship of international and domestic law surely oversimplifies to the point of misinforming, even with the qualification that, in contradistinction to Greece and the Netherlands, "the United States system is one of quite complex monism." It is also misleading to reduce customary international law to only such law in a convention or treaty as attracts conformity by states not parties. As to any notion of a customary law of nations standing apart from treaties and conventions, this work is conspicuously silent.

The real strengths of the treatise portion of this work are to be found in Part 2, where a restatement is made of the general maritime law pertaining to the master of a vessel. That the office is singular as an object of law is a point made well and often in this work; it really cannot be over-emphasized, and more than justifies special attention to the shipmaster. Among the lessons that follow is the thoughtful one that, unless

he is himself the owner, the master of a vessel always serves two others: his employer and his sovereign. His service to the owner has heretofore been the more obvious of the two, but as sovereigns increasingly intrude on the bridge for the sake of their national interests, the master's service as ship's sheriff grows increasingly more important.

Two discussions stand out in particular as both learned and thoughtful. The first of these covers the law of agency, the relation in law of master to servant, and how these distinct concepts can overlap when a master acts for the shipowner. In Chapter 8, these matters are addressed with exquisite care and precision. See especially Section 8.6, *The Shipmaster and the Ship*, in which are presented three hypothetical cases illustrating the interplay of several roles in which a shipmaster can be put by circumstance: employee at will, agent of necessity, bailee, and trustee *pro tem*.

For everything there is a season. Almost in passing, it is noted that some flag states authorize the shipmaster to carry firearms. Ukraine and Chile are named as two examples, and the United States is noted as the "foremost case" for reasons unstated. No more is said about the matter and no references to authoritative sources, primary or otherwise, are offered. As piracy has waxed recently off the Horn of Africa, much has been said about the pros and cons of arming merchant mariners. Among the formal obstacles has always been port state resistance. Perhaps, had this work been more recently conceived, it would have addressed in greater detail both restrictions in national law on the import of firearms aboard visiting foreign vessels and the practicalities with which those restrictions are met.

More attention might also have been spent on another matter, related changes that call into question the conventional image of a master operating alone, over the horizon and out of touch with the home office. It is time to better appreciate that modern technologies for command and control can put the home office on the bridge, at least virtually. While a shipowner might, for the sake of lower

overhead, readily forgo the cutting edge, sovereigns sensitive to the burgeoning costs associated with marine casualties are trending toward insisting for safety's sake on the deployment of such technologies. Thus, the operational autonomy of the shipmaster, once an inescapable fact appropriate for judicial notice, is now more realistically viewed as a legal presumption vulnerable to rebuttal. Human nature being what it is, this new reality cuts both ways: having his corporate employer's director of operations (or more likely some temporary spokesperson) virtually present in a crisis at sea may be of small comfort to the shipmaster on the spot (in both senses of that phrase), as the avoidable grounding of the tanker *Amoco Cadiz* so aptly illustrates. These authors appreciate the situation enough to insist that the master has a right to the final say in a crisis threatening vessel and venture, but they leave the matter more or less at that. Nevertheless, this new paradigm ought also to persuade that the sphere in which a master rightfully can claim that she is by circumstance an agent of necessity has shrunk. Concomitantly, the new paradigm of on-scene participation by managerial avatar ought to call into question the time-honored policy that still generally excuses the owner of a vessel from liability for losses suffered by third parties as the consequence of a shipmaster's negligence in navigation or management of that vessel.

Part 3, the catalog of laws and conventions by state, comprises well more than half of this work. It certainly calls attention to the mode chosen for this work. How long can the state of the law in 196 states be expected to remain as it was in September of 2009? Will pocket parts follow with sufficient frequency? Wouldn't loose-leaf treatment have better served? For this work, Cartner, Fiske and Leitner created a well designed framework and then filled it with the fruits of obviously extensive research. It is a pity that Informa did not respond with a more diligent editor.

(continues on page 6)

(continued from page 5)

Almost every page of Parts 1 and 2 is flawed with an editing or proofreading gaffe. Particularly on account of irregular use of the definite articles, quite a few sentences come across as translation by someone for whom English is not the native tongue. Informa is the successor in interest to Lloyd's Law Publishing and still publishes, *inter alia*, both *Lloyd's List* and *Lloyd's Commercial and Maritime Law Quarterly*, so the company is hardly naïve when it comes to maritime law. The average law student editing for her school journal would have done a better job. She surely would have saved this work from such self-inflicted wounds as the assertion that the fourteenth edition of *Abbott on Shipping* was published in 1914, two years after the sinking of the Titanic. (In truth, it was published in 1901, a year after the last of the amendments that completed consolidation of English shipping law in the Merchant Shipping Act, 1894.) A proper editor would have reconciled the several contradictions between text and footnote, so that, for example, a seaman's claim for damages resting on the unseaworthy condition of his ship would not be ascribed to the Jones Act and a master's prerogative to give priority to the safety of his vessel over security measures of port state control would not be mislabeled as

common law. As much as the authors should have our applause for their undertaking, they therefore deserve our sympathy for such careless treatment by their publisher. Prompt commencement of a second edition would afford Informa a second chance.

Appointments for 2010-2011 Program Year

The Section has announced the Committee's Steering Group appointments for the 2010-2011 program year. Leading the Committee this year are veteran Committee members Mr. Mark J. Andrews and Mr. Leendert Creyf, as Co-Chairs. Mark has many years of experience in all aspects of international transportation law and practices with the Washington, D.C. law firm of Strasburger & Price, LLP. He was instrumental in re-establishing the Committee several years ago and has served as Co-Chair of the Committee in the two previous program years. Leendert is an attorney with Bird & Bird LLP in Brussels and practices in the area of aviation and aerospace law. He has been a very active participant in the Committee in past years and, most recently, published a helpful update in the February 2010 edition of this newsletter on airline passenger rights in the European Union. This year's other members of the Committee's Steering Group are listed in the sidebar on page 7.

Mark and Leendert would like to call your attention especially to the transition of Catherine Pawluch (who practices with Davis LLP in Toronto) to the position of Immediate Past Co-Chair. Catherine previously served as a Co-Chair of the Committee for three program years starting in 2007, and we sincerely thank her for her many significant contributions to the Committee.

U.S. Supreme Court Bulletin: Kawasaki Kisen Kaisha Ltd. ("K-Line") v. Regal-Beloit Corp.

Of note to transportation law practitioners is the recent U.S. Supreme Court decision in *Kawasaki Kisen Kaisha Ltd. ("K-Line") v. Regal-Beloit Corp.*, No. 08-1553, a case involving the application of the Carmack Amendment to certain shipments by sea and rail. In its June 21 decision, the Court determined that the Carmack Amendment does not apply to the domestic rail portion of an international shipment to the United States by sea and rail that is covered by a single bill of lading governed by the Carriage of Goods at Sea Act. The opinion is available for download from the Committee's Web site under the category "Committee Resources" on the right side of the site.



DID YOU KNOW?

COMMITTEE LIBRARY

Did you know the Committee maintains a list of Internet reference links that may be helpful in your research concerning international transportation law? To find out more, direct your browser to the Committee's Web site at <http://abanet.org/dch/committee.cfm?com=IC706000> and select the "Committee Library" link located at the bottom right column. The Committee's Internet references cover the areas of aviation law, maritime law and rail, road and multimodal transport law.