Program Year 2011-2012 Update from Mark Andrews, Current Committee Chair

Welcome to the Summer 2011 edition of ITC News, the official newsletter of the International Transportation Committee of the American Bar Association's Section of International Law. Much has happened since our last issue in July 2010. Activities of note have included:

- Our Committee's primary sponsorship of a brown-bag lunch and teleconference program in Washington, D.C. on August 12, 2010, comparing U.S. and U.K. approaches to granting immunity or leniency in criminal antitrust prosecutions of international transportation carrier executives and others. Kudos to Committee member Andrew Danas for conceiving and executing such a well-attended program in the dead of August!

- Our timely contribution to the 2010 Year-in-Review issue of The International Lawyer (see 45 Int'l Law. 313-327 (2011)). Edited by Gerry Murphy and Julien Meyer, the Committee's article included input from six other members including two making their YIR debuts.

- Our Committee's leadership on the Section's behalf in assembling a program on cross-border commerce issues for the 2011 Annual Meeting of the full ABA, being held in Toronto. The August 5 program conceived by former Committee Co-Chair Dean Saul carries a provocative working title: "Anything You Can Do, We Can Do Slower: The Long Road to Efficiency at the U.S.-Canada Border." I will be Dean's wing man on this panel, which also will include leaders of the Canadian trucking industry and the U.S. import-export community.

- Our co-sponsorship of two programs accepted for the Section's 2011 Fall Meeting in Dublin. The first is "Security at the Dinner Table – Ensuring Food Safety Throughout the Global Supply Chain" on October 12. The other is "Big Ticket Equipment Leasing – Will Ireland Retain its Status as a Global Leader after the Debt Crisis?" on October 14. Congratulations to Committee members Peter Quinter and Caryl Ben Basat for their leadership in putting these respective programs together.

- On top of all this, our Committee has been asked within the past few weeks to attempt to devise a program with a maritime orientation for the full ABA's Mid-Year Meeting in New Orleans, scheduled for February 9-15, 2012. Your Steering Group has some ideas for filling this bill, but we'd like to hear your ideas as well.

- Finally, we have accepted the request of the Section's National Security Committee to co-sponsor a program proposal for the Section's 2012 Spring Meeting (New York, April 17-21) on balancing commercial and security considerations when dealing with major disruptions to transportation systems.

This also has become a year of major transition in Committee leadership. My customarily allotted three years as a Co-Chair will expire at the end of July. My esteemed Co-Chair for 2010-11, Leendert Creyf of Brussels, had to step down prematurely this spring because of a change in the direction of his professional career.

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CMR: A SHORT INTRODUCTION TO THE CARRIER’S LIABILITY

By

Dr. Marco Remiorz

The CMR is a mandatorily applicable international convention for the carriage of goods by road (the Convention on the Contract for the International Carriage of Goods by Road, Geneva, 19 May 1956). It applies if the place of the carrier’s taking over of the goods and the place designated for delivery are situated in two different countries, of which at least one is a CMR contracting country.

One can say that all of Europe as well as the former Soviet Union republics plus Turkey are all “CMR countries.”

According to article 17 CMR, a road carrier is liable for total and partial loss, damage and delay in delivery of the goods between the time when it takes over the goods and when it delivers them.

There is a rebuttable presumption that damage, loss or delay was caused during this period by the carrier, its servants, agents or subcontractors. The carrier is liable for the latter parties per article 3 CMR with or without a default on their part.

1. The author is a partner at Dabelstein & Passehl in Hamburg, Germany. Mr. Remiorz is also an incoming Vice Chair of the Committee. He may be reached via email at m.remiorz@da-pa.com.
Article 17 para. 2 of CMR lists certain excepted perils preventing liability, including those identified below. These will not be unfamiliar to readers who deal with the corresponding “Carmack” liability scheme in the U.S.:

- Wrongful act or neglect of the claimant;
- Instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier;
- Inherent vice of the goods; and
- Circumstances which the carrier could not avoid and the consequences of which it was unable to prevent.

The liability in case of loss/damage is limited to 8,33 SDR per kg (article 23 CMR) and up to the total amount of the freight charges when dealing with a delay in delivery. The loss/damage limit equates to approximately US$ 6.00 per pound. It is possible for the cargo owner to declare a higher value and pay an extra charge in order to increase the carrier's liability. The existence of this possibility must be disclosed to the cargo owner in advance.

The liability limits can be broken if the claimant proves willful misconduct or its equivalent in the respective country having jurisdiction (article 29 CMR). International jurisdiction is given (amongst others) in the country where the goods were taken over or the country where the place designated for delivery is situated, as well as in the country where the defendant is ordinarily resident or has its principal place of business.

This state of affairs leads to extensive forum shopping in light of each CMR country interpreting especially the requirements of article 29 CMR differently. While there is a very cargo-friendly rebuttable presumption in Germany that a carrier was grossly negligent in case of loss of cargo if the carrier cannot give details on how the loss incurred, the Dutch jurisprudence hardly ever allows unlimited liability. Thus, “races to the courthouse” are not uncommon for the purpose of blocking international jurisdiction by filing a writ. The limitation period is one year counting in general from the date of delivery, while a three year period of limitation applies in case of willful misconduct or its equivalent under article 29.

Perhaps the most noteworthy feature of CMR from a North American perspective (I am told) is the inability of a willing carrier and a willing customer to “contract out” of its provisions. As per article 41 CMR, any stipulation which would directly or indirectly derogate from the convention shall be null and void. Consequently, CMR is one of the compulsorily applicable international conventions which will be unaffected if the Rotterdam Rules for sea and sea-land cargo liability ever come into force.2

In the final weeks of 2010, the English Court of Appeal rendered a decision that may bolster the position of such jurisdictions as the U.S. Ninth Circuit Court of Appeals as fora of choice for bunker suppliers.

Global supply lines still rely on ocean shipping for the majority of trade, and shipping in turn relies upon bunker suppliers for fuel. In the wake of Oceanconnect UK Ltd. v. Angara Maritime Ltd. (Fresco Angara) [2010] EWCA Civ 1050 (Dec. 10), English courts, the pioneers of the anti-suit injunction, will no longer pose a significant obstacle to bunker suppliers choosing to enforce their rights in United States courts, since anti-suit injunctions against such enforcement actions look set to be disfavored by London-based judges.

Lord Justice Gross, writing for a unanimous court, identified the central problem in Oceanconnect: American admiralty recognizes a lien for necessaries in favor of bunker suppliers; English maritime law does not. In that case, an English subsidiary to an American company supplied bunkers to a Danish charterer of a Marshall Islands vessel (managed from Russia), in Brazil. After non-payment for the bunkers, the supplier arrested the vessel first in Amsterdam. The relevant parties agreed to the vessel’s release after entering into an escrow agreement called for application of English law. The vessel’s owner then commenced proceedings in London before the Commercial Court, requesting negative declaratory relief. The bunker supplier arrested the vessel some months later in Louisiana, in order to obtain in rem jurisdiction over the vessel in the United States. Mr. Justice Simon of the Commercial Court granted an anti-suit injunction against the Louisiana federal court proceedings, based upon the determination that the governing law provision in the parties’ escrow agreement impliedly made London the exclusive jurisdiction for disputes under the agreement.

The Court of Appeal reversed the Commercial Court, finding, among other things, that the judge had not given proper weight to the central issue for the bunker supplier: if forced to litigate only in London, the supplier’s maritime lien claims would be doomed to failure since English courts would not recognize them. Thus, far from being a decision limited to the interpretation of governing law provisions in commercial contracts, Oceanconnect reflects the English judiciary’s sensitivity to bunker suppliers’ valid concern that their lien rights can only be enforced in certain jurisdictions.

Within the United States, the Ninth Circuit was one of the more recent federal appellate courts to take the view that bunkers supplied overseas, but pursuant to agreements that call for application of American law, could be enforced in American courts. In Trans-Tec Asia v. M/V Harmony Container, bunkers were supplied in South Korea by a Singaporean supplier, to a Malaysian vessel, chartered to a Taiwanese entity. Since the bunkering agreement called for application of American law, the Ninth Circuit recognized the supplier’s right to enforce its American lien for necessaries in federal court in California. In other words, the Ninth Circuit declared itself open for business for foreign fuel suppliers seeking to litigate on more favorable legal terms, even for fuel supplied overseas. When

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1. The author is an attorney with the Long Beach office of the Camarano Law Group and a member of the State Bars of California and Arizona and the Law Society of England & Wales.
2. The Commercial Court is a subdivision of the Queen’s Bench Division of the High Court of Justice of England and Wales. It is separate from the Admiralty Court, which is also a subunit of the Queen’s Bench Division.
3. As Professor Tetley has observed, unlike the United States, most other common law jurisdictions regard maritime liens as procedural in nature, such that foreign lien law is of negligible effect.
4. Trans-Tec Asia v. M/V Harmony Container, 518 F.3d 1120 (9th Cir. 2008).
following the Ninth Circuit’s decision in *Trans-Tec Asia*, the Fourth Circuit opined that this more liberal position may be at odds with Second Circuit precedent. Nonetheless, there does not appear to be any reason for the Fourth, Fifth or Ninth Circuits to reverse themselves on this point.

The usefulness of an American court for enforcement of bunkering liens cannot be overstated. A minority of jurisdictions recognize such rights. In the Pacific, the *Trans-Tec Asia* court observed that Malaysian and Singaporean courts do not recognize bunkering liens. The Hong Kong courts have not specifically addressed the issue, but as they still follow English common law precedents, they can be expected to follow the English position on liens for necessities such as bunkers. The Japanese Commercial Code ostensibly allows for liens for necessities. However, Japanese courts do not recognize in rem jurisdiction based upon such liens. The situation in Chinese and Taiwanese courts is similar. In South Korean courts, a foreign vessel’s flag can be expected to protect her from American-style bunker liens. Thus, in the Pacific region, the ability to obtain a maritime lien for fuel supplied, and to obtain in rem jurisdiction in an American court to enforce that lien, is of substantial value to the bunkering trade.

The confluence of the *Oceanconnect* and *Trans-Tec Asia* decisions comes at an interesting time in the development of American admiralty law. After the Supreme Court’s opinion in *Regal-Beloit*, confirming the enforceability of foreign forum selection clauses in ocean through bills of lading, much ocean cargo litigation, including for losses occurring on domestic inland legs of carriage, looks set to be exported from American courts. However, the English Court of Appeal’s decision in *Oceanconnect*, staving off the formidable use of English anti-suit injunctions from bunker suppliers’ American in rem proceedings, may allow American courts to reverse the outbound trend in litigation, at least with respect to fuel supply claims in the shipping trades. Under these recent precedents, bunker suppliers are able to specify the use of American law to obtain liens to secure payment, and to resort to American courts to enforce those liens.

6. See Minji houzen hou [Civil Provisional Remedies Act] (No. 91 of 1989), art. 48 (provisional seizure of vessel); and Minji shikko hou [Civil Enforcement Act] (No. 4 of 1979, as amended) art. 112 (compulsory executions against vessels).
7. See Hai shang fa [P.R.C. Maritime Code] (Ord. 64 of 1992), art. 22 (omitting liens for necessaries); Hai shi su song te bie cheng xu fa [P.R.C. Special Maritime Procedure Law] (Ord. 28 of 1999), arts. 21 & 22 (ship seizure permitted for necessaries); and Minshi susong fa [R.O.C. Civil Procedure Code] (1930, as amended), art. 522 (provisional seizure procedures).
8. See Korean Conflict of Laws Act (No. 6465, Apr. 7, 2001), art. 60.

**Joint International Trade and Transport Symposium**

Hosted by ABA SIL and AIJA

The ABA Section of International Law and the Association Internationale des Jeunes Avocats ("AIJA") have a long and successful history of cooperation. An international trade and transport symposium in Los Angeles on October 13-15, 2011 will be the first joint seminar involving both organizations’ transportation committees, and AIJA’s first-ever seminar on the west coast of the United States. The symposium will address a great variety of hot transportation topics as well as trade and customs related matters. There will be 30 international high-profile speakers from law firms located in (among others) China, The Netherlands, France, Mexico, England, Germany and of course the United States. At AIJA’s event in Istanbul last year, more than 120 delegates from 25 different countries attended -- which is why the seminar offers a great networking alternative for those of you who may not be able to make it to SIL’s fall meeting in Dublin. Check the program and register at [http://www.aija.org/uploads/events/13regprogram_LosAngeles.pdf](http://www.aija.org/uploads/events/13regprogram_LosAngeles.pdf).

Best regards,

Marco Remiorz, Chair (outgoing), Transport Commission of AIJA, and Vice Chair (incoming) of this SIL Committee
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For similar reasons, we will be losing our longtime Committee Information Officer, Matthias Edrich of Denver, during the summer.  Leendert and Matthias have been paragons of responsiveness and follow-through, and both of them will be missed. Consequently, replacement and expansion of Committee leadership has become a major focus of your Steering Group this spring. We are excited about the new, expanded and diverse leadership roster we have put together for the 2011-12 Bar year, as follows:

**CO-CHAIRS:**
- James H. Bergeron, Political Advisor, Striking Force NATO, Naples, Italy (currently a vice-chair)
- Gerald (“Gerry”) Murphy, Crowell & Moring LLP, Washington, D.C. (currently a vice-chair)

**IMMEDIATE PAST CO-CHAIRS:**
- Leendert Creyf, FedEx Express, Brussels, Belgium

**SENIOR ADVISOR:**
Catherine Pawluch, Davis LLP, Toronto, Canada (formerly a co-chair)

**VICE-CHAIERS:**
- Andrew Danas, Grove Jaskiewicz & Cobert, Washington, DC (currently a member of the Steering Group)
- Ana Luisa Derenusson, Xavier, Bernardes, Bragança, Sao Paulo, Brazil (currently a member of the Steering Group)
- Lorraine B. Halloway, Crowell & Moring LLP, Washington, D.C. (continuing as vice-chair)
- Martha Harrison, Heenan Blaikie, Toronto, Canada
- Peter Quinter, Becker & Poliakoff, Ft. Lauderdale, FL (currently a vice-chair of the Customs Committee)
- Dr. Marco Remiorz, Dabelstein & Passehl, Hamburg, Germany (currently chairing the transport committee of the Association Internationale des Jeunes Avocats)
- Prof. Steven L. Snell, American University, Washington, D.C. (continuing as vice-chair)

**STEERING GROUP:**
- James W. Carbin, Duane Morris LLP, Newark, NJ
- J. Benjamin Lambert, Queen Mary University, London, UK
- Julien Meyer, New Orleans, LA (also assuming the role of Information Officer for the Committee)
- Samuel J. Sadden, Vermulst Verhaeghe Graafsm & Bronckers, Brussels, Belgium
- Doug Schmitt, Alexander Holborn Beaudin & Lang LLP, Vancouver, Canada
- Wendy Wagner, Gowling, Ottawa, Canada
- Conor T. Warde, Blank Rome, Hong Kong

Please offer all of these new Committee leaders your congratulations – more than that, your ideas – and more than that, your energetic assistance during the 2011-12 Bar year! But first, take a good look at the substance of the newsletter you’re looking at right now. True to form, our members have come up with important new reportage on issues as diverse as where to arrest a marine vessel that “drives off without paying at the pump,” and how to proceed if your truck cargo gets smashed up or ripped off in Europe and neighboring countries. Where else do you get international law learning on this level?! Best wishes – Mark

**INTERNATIONAL TRANSPORTATION COMMITTEE NEWSLETTER**

**JULY 2011**

**INTERNATIONAL TRANSPORTATION COMMITTEE**

Leadership of the Committee is carried on by a Steering Group. Membership on the Steering Group is open to all members of the Committee. The members of the Steering Group for 2010-2011 are:

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Strasburger & Price, LLP, Washington, D.C.
mark.andrews@strasburger.com
Co-Chair

**Leendert Creyf**
Co-Chair
(August 2010 through March 2011)

**Catherine Pawluch**
Davis LLP, Toronto, ON
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Immediate Past Co-Chair

**James Henry Bergeron**
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