



International Transportation Law

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This article provides a survey of significant developments in the area of international transportation law during the year 2011.¹

I. United States Aviation Consumer Protection Rules

Consumer protection issues remained a top priority for U.S. regulators and Congress in 2011, as the Department of Transportation (DOT) finalized its comprehensive phase two “Enhancing Airline Passenger Protections” rule (EAPP #2) on April 25, 2011, which extended tarmac delay and customer service plan requirements to foreign air carriers, international flights, and more U.S. airports effective August 23, 2011.² EAPP #2 contains a

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1. This article presents recent developments in the law of international transportation and was initially designated for inclusion with other survey articles in the *International Legal Developments Year in Review: 2011*, 46 INT'L LAW. 1 (2012). For developments in 2010, see Mark J. Andrews, James H. Bergeron, Leendert Creyf, & Catherine Erkelens, *International Transportation Law*, 45 INT'L LAW. 313 (2011). For developments in 2009, see Mark J. Andrews, James H. Bergeron, Leendert Creyf, Catherine Erkelens, Loraine B. Halloway, David Hernandez, Gerald F. Murphy, Catherine A. Pawluch, & Erin Spry Staton, *International Transportation Law*, 44 INT'L LAW. 379 (2010).

2. Enhancing Airline Passenger Protections, 76 Fed. Reg. 23,110 (Apr. 25, 2011). As reported in last year's Year-In-Review, the first Enhancing Airline Passenger Protections rule required, among other things, that U.S. carriers adopt contingency plans for lengthy tarmac delays that include an assurance that a carrier will not permit an aircraft to remain on the tarmac at a U.S. airport for more than three hours in the case of

second set of provisions for which DOT has delayed implementation until January 24, 2012, and some of these provisions, including DOT's reversal of its longstanding full fare enforcement policy (Full Fare Rule). The Full Fare Rule required that air carriers hold reservations without payment for twenty-four hours or provide refunds to passengers who cancel a reservation within twenty-four hours of booking (24-Hour Freeze Rule) and prohibited post-payment increases (No Increase in Fees Rule), which have been the subject of a judicial challenge brought by Allegiant Air, Spirit Airlines, and Southwest Airlines.³ Airlines for America⁴ and the International Air Transport Association (IATA) have intervened in support of the airline-petitioners. IATA asserts that the challenged rules violate fundamental principles of U.S. constitutional and administrative law, re-regulate aspects of airline pricing and services in violation of the Airline Deregulation Act, threaten disharmony among national regulatory regimes, and could disrupt international air transportation. Alleging that certain provisions of EAPP #2 impose U.S. requirements on foreign airlines' activities outside the United States even when those activities are not primarily directed to customers located within the United States, IATA characterizes the new rule as an unjustified, extraterritorial application of U.S. law. IATA specifically cites the Full Fare, 24-Hour Freeze, and No Increase in Fees Rules as exceeding DOT's jurisdictional authority because each of them "has an impact that goes beyond the distribution of air transportation" in the United States, and the Full Fare Rule, in particular, as exceeding DOT's statutory authority because it "has made no finding that existing market-driven standards of disclosure are unfair or misleading."⁶

Other consumer or disability related rulemakings in 2011 include two widely opposed proposals to: (i) require U.S. and foreign air carriers and U.S. airports to make their websites and automated kiosks more accessible to passengers with disabilities;⁷ (ii) collect reve-

domestic flights and for more than a set number of hours, as determined by the carrier, for international flights without providing passengers an opportunity to de-plane. See Andrews, *supra* note 2; Enhancing Airline Passenger Protections, 74 Fed. Reg. 68,983 (Dec. 30, 2009).

3. Spirit Airlines, Inc. v. U.S. Dep't of Transp., No. 11-1219, 2012 U.S. App. LEXIS 15189, at *2-3 (D.C. Cir. July 24, 2012); see also Notification & Statement of Issues of Intervenor Southwest Airlines Co. (in Support of Petitioners) at 1, *Spirit Airlines*, No. 11-1219, 2012 U.S. App. LEXIS 15189.

4. The Air Transport Association of America (ATA) formally changed its name to "Airlines for America," effective December 1, 2011. *Air Transport Association Changes Name to Airlines for America (AAA)*, AIRLINES FOR AM. (Dec. 1, 2011), http://www.airlines.org/Pages/news_12-01-2011.aspx.

5. Brief of *Amicus Curiae* International Air Transport Association in Support of Petitioners & Intervenor at 4, *Spirit Airlines*, No. 11-1219, 2012 U.S. App. LEXIS 15189.

6. *Id.* at 14. In the meantime, DOT is continuing to aggressively enforce its current full-fare policy, which permits government taxes and fees to be listed separate from the base fare in advertisements as long as such taxes and fees are levied by a government entity, are not *ad valorem* in nature, are collected on a per-passenger basis, and the existence and amounts are clearly indicated at the first point in the advertisement where a fare is presented. See, e.g., ROSALIND A. KNAPP, U.S. DEP'T OF TRANSP., DOT-OST-2011-0003, CONSENT ORDER 1-2 (Nov. 21, 2011), available at <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2011-0003-0062> (Spirit fined \$50,000 for failing to adequately disclose in certain billboard and poster advertisements, as well as Twitter feeds, information about additional applicable taxes and fees); ROSALIND A. KNAPP, U.S. DEP'T OF TRANSP., DOT-OST 2011-0003 DOT, CONSENT ORDER 1, 3 (Oct. 24, 2011), available at <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2011-0003-0055> (South African Airways and ticket agent Destination Southern Africa fined \$55,000 and \$20,000, respectively, for failing to adequately disclose on their websites government taxes and fees that were in addition to the advertised fare and that certain advertised air and hotel tour prices were available only with double occupancy).

7. Non-discrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports, 76 Fed. Reg. 59,307 (proposed Sept. 26, 2011) (codified at 14 C.F.R. pt. 382). The

nue information from large certificated (U.S.) air carriers on nineteen categories of ancillary fees collected from passengers, the number of checked bags, and the number of mishandled wheelchairs and scooters;⁸ and (iii) a less-controversial proposal to ban smoking of electronic cigarettes on aircraft.⁹

II. Canada Airline Competition Developments

The Canadian Commissioner of Competition (Commissioner) filed a Notice of Application (Application) to the Canadian Competition Tribunal (Tribunal) pursuant to Sections 90.1 and 92 of the Competition Act (the Act) for orders prohibiting Air Canada and United Continental Holdings, Inc., United Airlines, Inc., and Continental Airlines, Inc. (United/Continental) (collectively the Airlines) from entering into a proposed joint venture (Proposed Merger) and prohibiting the Airlines from undertaking or implementing activities under two agreements between the Airlines that date back to May 30, 1995 and May 31, 1996 (the Agreements).¹⁰ Notably, approval by the U.S. DOT of these same alliance agreements has not deterred the Commissioner from taking action against the Airlines.

At its core, the case brought by the Commissioner against the Airlines is about competition in the airline industry. In the pleadings, the Commissioner has asserted that the “business activities proposed by the [Airlines], including net revenue/profit sharing and price and capacity coordination, allow the [Airlines] to harm Canadian consumers and the Canadian economy by removing all incentives to compete with one another” and “[i]n the absence of an incentive to compete, regardless of what they claim, the [Airlines] will not compete; to do otherwise would be irrational and violate their obligations to their respective shareholders.”¹¹

The decision of the Tribunal is anticipated to have a precedent setting impact on air carrier alliances that serve the Canada-U.S. transborder market. It also raises broader issues with respect to industry sectors where collaboration between competitors is common and may be protected under other regulatory regimes, such as the Canada Transportation Act. It may also signal the beginning of an age of enforcement of the recent 2009 amendments to the Act.¹² The Application is the first of its kind since the amendments

comment period in this rulemaking was extended to Jan. 9, 2012, at the request of ATA, IATA, and other industry trade associations. See Notice extending comment period and clarification of proposed rules, 76 Fed. Reg. 71,914 (Nov. 21, 2011).

8. Reporting Ancillary Airline Passenger Revenues, 76 Fed. Reg. 41,726 (proposed July 15, 2011) (to be codified at 14 C.F.R. pts. 234 and 241). The comment period on this proposal ended September 13, 2011, and it remains pending.

9. Smoking of Electronic Cigarettes on Aircraft, 76 Fed. Reg. 57,008 (proposed Sept. 14, 2011) (to be codified at 14 C.F.R. pt. 252).

10. Notice of Application at 1-2, Comm’r of Competition v. Air Canada, No. CT-2011-004 (Comp. Trib. filed June 24, 2011), available at http://www.ct-tc.gc.ca/CMFiles/CT-2011-004_Notice%20of%20Application_1_45_6-27-2011_7637.pdf (Can.).

11. Reply of the Commissioner ¶ 3, *Air Canada*, No. CT-2011-004 (filed Aug. 29, 2011).

12. Section 90.1 and 92 of the Act are non-criminal provisions of the Act. Competition Act (R.S.C., 1985, c. C-34, §§ 90.1, 92, as amended (Can.)). Section 92 deals with mergers or proposed mergers that prevent or lessen, or are likely to prevent or lessen competition substantially in a trade, industry, or profession. *Id.* § 92. Section 90.1 is a new provision of the Act that deals with agreements or arrangements, whether existing or

came into force.¹³ The Commissioner has recently stated that the Bureau “will not hesitate to act to promote competition in the Canadian marketplace” and that it “will hold to account companies that take advantage of Canadians.”¹⁴

A. THE POSITION OF THE COMMISSIONER

The Commissioner has alleged that the orders it seeks from the Tribunal are required to restore competition in a market that significantly affects almost every Canadian. Without the relief sought, passengers will pay higher prices for air travel between the United States and Canada, and there will be fewer flight options available for such passengers.¹⁵ The Commissioner has identified the relevant market for assessing the likely effects of the Proposed Merger and the Agreements as “direct passenger air transportation services between city pairs involving an end point in each of Canada and the U.S.”¹⁶

The Commissioner has further identified nineteen transborder overlap routes where Air Canada and either United or Continental currently compete and alleges that if the Proposed Merger is permitted to proceed, this competition will be eliminated, and therefore “is likely to prevent or lessen competition substantially in direct passenger air transportation services on 19 transborder routes.”¹⁷ On this basis, the Commissioner seeks an order from the Tribunal under Section 92 of the Act to redress that harm by prohibiting the Proposed Merger, or, in the alternative, prohibiting the Airlines from implementing the Proposed Merger in relation to direct passenger air transportation services operated by the Airlines on the nineteen transborder routes.¹⁸

The Commissioner has noted that separate and apart from the Proposed Merger, the Airlines are parties to the Agreements that enable them to coordinate on key aspects of competition and to exercise substantial market power on transborder routes between Canada and the United States—in particular on the nineteen transborder overlap routes.¹⁹ The Commissioner, relying on the competitor collaboration provisions (Section 90.1) of the Act, has alleged that the Agreements are agreements between competitors that, collectively and individually, are likely to prevent or lessen competition substantially on transborder routes. Essentially, the Commissioner’s position is that such coordination, particularly if implemented in totality, will lead to materially higher prices and less choice

proposed, between competitors that prevent or lessen, or are likely to prevent or lessen, competition substantially in a market. *Id.* § 90.1.

13. Section 90.1 was enacted on March 12, 2009, but only recently came into force on March 12, 2010. To assist firms in assessing the likelihood that a competitor collaboration will raise concerns under the civil provisions of the Act, and, if so, whether the Commissioner would commence and inquiry in respect of the collaboration, the Competition Bureau, an independent law enforcement agency responsible for the administration and enforcement of the Act, published Competitor Collaboration Guidelines on December 23, 2009. See *Competitor Collaboration Guidelines*, COMPETITION BUREAU (Dec. 23, 2009), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html>.

14. Melanie L. Aitken, Comm’r of Competition, Can. Competition Bureau, Keynote Speech at the Canadian Bar Association 2011 Fall Conference (Oct. 6, 2011), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03424.html>.

15. Notice of Application, at 4, *Air Canada*, No. CT-2011-004 (filed Aug. 29, 2011).

16. *Id.* at 9.

17. *Id.* at 4.

18. *Id.* at 14-15.

19. *Id.* at 5.

for passengers who wish to fly between the United States and Canada. Therefore, the Commissioner seeks from the Tribunal an order prohibiting the Airlines from undertaking or implementing pricing, inventory, or yield management coordination; pooling of revenues, route and schedule planning; providing more information by one party to the other party concerning current or prospective fares or seat availability than it makes available to airlines and travel agents generally under the Agreements; or, in the alternative, prohibiting such undertaking and implementation to the extent of the nineteen transborder overlap routes.²⁰

B. THE POSITION OF THE AIRLINES

Air Canada and United/Continental filed separate responses to the Application on August 15, 2011. In its response, Air Canada claims the Commissioner's allegations are unfounded in that the Proposed Merger and Agreements do not, individually or collectively, create or enhance the Airlines' ability to exercise market power on transborder routes or prevent or lessen competition substantially.²¹ Air Canada claims that the Commissioner seeks to unwind longstanding agreements (including one of over fifteen years) between Air Canada and the other Airlines that have brought substantial benefits to airline passengers traveling on routes that originate in Canada and terminate in the United States and vice versa, as well as to prevent the Proposed Merger among the Airlines, which is "intended to and will lead to lower prices and further enhance flight options for transborder passengers, to the substantial benefit of Canadian consumers and the Canadian economy."²²

Air Canada claims the Application is "fundamentally misconceived,"²³ "wholly inconsistent,"²⁴ and has failed to consider: (1) Canada's international air transportation policy known as "Blue Sky"; (2) the Canada-U.S. "Open Skies" agreements; (3) the nature of the competitive landscape around the world; (4) the rapid growth and success of non-legacy carriers and extensive competition among legacy and non-legacy carriers; (5) the substantial gains in efficiency which have been achieved with the Agreements and will be achieved with the Proposed Merger; (6) a favorable written advisory opinion regarding one of the Agreements from the Commissioner fifteen years ago; (7) the U.S. Department of Transportation's prior approval of these Agreements; (8) the Commissioner's recent approval of the trans-Atlantic joint venture among Air Canada, United, Continental, and Deutsche Lufthansa AG; (9) challenges and ongoing threats of insolvency in the airline industry; and (10) that to give effect to the Commissioner's positions would significantly impede Air Canada's ability to compete, would have significant adverse effects on Canadian consumers and the development of Canada's hub airports, and would relegate Canada and Canadian air carriers to a marginalized regional or local status in the international air transportation world.²⁵

20. *Id.* at 14-15.

21. Response of Air Canada ¶ 14, *Air Canada*, No. CT-2011-004 (filed Aug. 15, 2011).

22. *Id.* ¶ 1.

23. *Id.* ¶ 2.

24. *Id.* ¶ 3.

25. *Id.*

In addition to adopting much of Air Canada's response,²⁶ United/Continental claims that the Application is based on "fundamental misconceptions respecting the airline industry and in particular the nature and effect of cooperation between airlines"²⁷ and that the Commissioner mistakenly claims that the Airlines are entering into the Proposed Merger to share revenues resulting from their reduced competition with one another, which is "flatly wrong."²⁸ United/Continental claims the Proposed Merger is designed to increase demand for the Airlines' services on U.S.-Canada routes by, among other things, allowing for the development of a more comprehensive network, increasing flight frequencies, optimizing schedules, and reducing prices. United/Continental claims this increased demand will improve economies of density on the Airlines' networks and increase overall profitability, all while delivering substantial benefits to consumers.²⁹

C. THE RESPONSE OF THE COMMISSIONER TO THE AIRLINES' POSITION

On August 29, 2011, the Commissioner filed a reply stating that the Responses of the Airlines "materially misrepresent the purpose of the Commissioner's Application and the relief sought therein."³⁰ The Commissioner stated that contrary to the Airlines' positions: (1) the Application is consistent with, and necessary to support, the Canadian government's "Blue Sky" policy and the Canada-U.S. "Open Skies" agreement; (2) there are no existing competitors or "poised entrants" on transborder overlap routes that can provide effective competition to, or constrain the exercise of market power by, the Airlines; and (3) the so-called "gains in efficiency" that the Airlines claim will flow from the Proposed Merger and the Agreements are, in fact, illusory, achievable without the detrimental effects of the Agreements or the Proposed Merger, and/or likely to be greater than, and offset by, those detrimental effects.³¹

In addition, the Commissioner asserted that the Airlines are unable to defend the anti-competitive impacts of the Agreements and/or the Proposed Merger, and therefore "seek to obscure such impacts by claiming that Air Canada is entitled to prevent or lessen competition substantially in order to facilitate its ascent to 'national champion' status, not through the beneficial aspects of competition, but through an anti-competitive exercise of market power that will be funded by Canadian consumers and the Canadian economy."³²

D. SUMMARY

The decision of the Tribunal is expected to have a precedent setting impact on the airline industry in Canada. Whether the Tribunal will be moved by Air Canada's assertions of ongoing threats of insolvency in the airline industry and, on that basis, deny the Commissioner's requests—particularly in light of the voluntary filing for Chapter 11

26. Response of United Continental Holdings Inc., United Airlines Inc., and Continental Airlines Inc. ¶ 8, *Air Canada*, No. CT-2011-004 (filed Aug. 15, 2011).

27. *Id.* ¶ 2.

28. *Id.* ¶ 3.

29. *Id.*

30. Reply of the Commissioner ¶ 1, *Air Canada*, No. CT-2011-004 (filed Aug. 29, 2011).

31. *Id.*

32. *Id.* ¶ 26.

bankruptcy reorganization involving American Airlines³³—will be of interest. The Commissioner's case also raises broader issues with respect to other industry sectors where collaboration between competitors is common and may be protected under other regulatory regimes, such as the Canada Transportation Act. A date for the hearing of the case by the Tribunal has yet to be scheduled.³⁴

III. European Aviation Law

A. ENVIRONMENT – EMISSION TRADING SCHEME

With regard to the greenhouse gas Emission Trading Scheme (ETS), the European Parliament and the Council adopted Directive 2008/101/EC with a view of bringing aviation activities within the scope of ETS.³⁵ The ETS applies not only to aircraft operators with an air operator certificate issued by a European Union (EU) Member State but also to any aircraft operator operating flights into or out of an airport situated in the territory of a EU Member State.³⁶ A number of U.S. carriers and Airlines for America³⁷ have opposed the ETS before the U.K. High Court on the grounds that it violates international law.³⁸ In particular, they claim that, in so far the ETS applies on flights that take place in part outside the EU, the EU's legislature has exceeded the bounds of State jurisdiction.

In July 2010, the U.K. High Court of Justice referred the matter to the Court of Justice of the European Union (ECJ) for a preliminary ruling.³⁹ The preliminary ruling procedure allows national courts to question the ECJ on the interpretation of EU law. In the present case, the U.K. High Court of Justice asked the ECJ to investigate the validity of ETS in the light of customary international law, as well as various treaties such as the Chicago Convention and the EU-U.S. Open Skies Agreement.

On October 6, 2011, the Advocate General delivered her opinion concluding that the ETS infringes neither the principles of international customary law nor international treaties.⁴⁰ It must therefore be considered to be valid. It is by no means unusual for a state or an international organization to take into account circumstances that occur, or have occurred, outside its territorial jurisdiction (e.g., antitrust cases).⁴¹ The ETS can moreover

33. See *Information About American's Chapter 11 Reorganization*, AM. AIRLINES, <http://www.aa.com/i18n/information/restructuring.jsp?anchorLocation=DirectURL&title=restructuring> (last visited Aug. 3, 2012).

34. For copies of the case documents, see *Case Details: CT-2011-004*, COMPETITION TRIBUNAL, <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=348> (last visited Aug. 4, 2012).

35. See Council Directive 2008/101, of the European Parliament and of the Council of 19 November 2008 Amending Directive 2003/87/EC so as to Include Aviation Activities in the Scheme for Greenhouse Gas Emission Allowance Trading Within the Community, 2009 O.J. (L 8) 3 (EC).

36. *Id.*

37. See *supra* text accompanying note 4.

38. R (on the application of the Air Transp. Assoc. of Am., Inc.) v. Sec'y of State for Energy & Climate Change, [2010] EWHC 1554 (Admin) (Eng.). The United Kingdom is the administering Member State for several U.S. carriers.

39. Reference for a Preliminary Ruling from High Court of Justice Queen's Bench Division at 9, made on July 22, 2010, *Air Transp. Assoc. of Am., Inc. v. Sec'y of State for Energy & Climate Change*, No. C-366/10, 2010 O.J. (C 260) 9 [hereinafter Reference].

40. Opinion of Advocate General Kokott ¶¶ 156-59, 225-35, Reference, *supra* note 39, 2010 EUR-Lex CELEX 62010CC0366 (Oct. 6, 2011).

41. *Id.* §§156-59.

not be considered as a charge on the arrival or departure of aircraft as per article 15 of the Chicago Convention.⁴² It is neither a tax nor a charge on fuel under article 24 of the Chicago Convention.⁴³

It remains to be seen whether the ECJ will follow the Advocate General's opinion when it delivers its judgment on the issue. While the ECJ is not bound in this regard, it tends to do so in most cases.

B. THE USE OF SECURITY SCANNERS AT EUROPEAN AIRPORTS

On November 11, 2011, the Commission adopted Commission Implementing Regulation 1147/2011 (the Regulation) permitting the use of security scanners to screen air passengers.⁴⁴ Security scanners are able to detect both metallic and non-metallic items about a person and to reduce the need for manual searches of passengers, crews, and airport staff. Since security scanners may potentially violate fundamental rights and freedoms of citizens, the Regulation imposed strict operational and technical conditions on their use.

Airports are not obliged to install security scanners. But, if they do decide to use them, they will have to comply with the Regulation beginning on December 2, 2011. In particular: the Regulation requires that security scanners must not store, retain, copy, print or retrieve images;⁴⁵ the human reviewer analyzing the image must be in a separate location, and the image shall not be linked to the screened person;⁴⁶ and passengers will retain the right to opt out of a control by scanners in favor of an alternative method of screening (e.g., a manual search).⁴⁷

C. AIRPORT CHARGES

With regard to airport charges, the European Parliament and the Council adopted Directive 2009/12 on airport charges. Directive 2009/12 sets common principles for the levying of airport charges at EU airports.⁴⁸ Owing to political disagreement on the question of how to finance security measures, the Commission omitted provisions on security charges levied by airports.⁴⁹ Following an investigation into the question, however, the Commission has subsequently concluded that while aviation security is essentially a state responsibility it need not necessarily be publicly financed.⁵⁰ On May 11, 2009, the Com-

42. *Id.* §§ 207-12.

43. *Id.* §§ 225-35.

44. Commission Implementing Regulation 1147/2011, of 11 November 2011 Amending Regulation 185/2010 Implementing the Common Basic Standards on Civil Aviation Security as Regards the Use of Security Scanners at EU Airports, 2011 O.J. (L 294) 7, 10 (EU).

45. *Id.*

46. *Id.*

47. *Id.*

48. See Directive 2009/12, art. 1, of the European Parliament and of the Council of 11 March 2009 on Airport Charges, 2009 O.J. (L 70) 11, 12 (EU).

49. *Id.* ¶ 19. This resulted in the later regulation requiring the European Commission to report, no later than December 31, 2008 on the principles of the financing of the costs of civil aviation security measures. See Regulation No. 300/2008, art. 22, of the European Parliament and of the Council of 11 March 2008 on Common Rules in the Field of Civil Aviation Security and Repealing Regulation No. 2320/2002 (EC), 2008 O.J. (L 97) 72 (EC).

50. See *Report from the Commission on Financing Aviation Security*, at 9, COM (2009) 30 final (Feb. 2, 2009).

mission therefore adopted a proposal to amend Directive 2009/12.⁵¹ The Commission's proposal is currently awaiting its first reading by the Council.

On May 17, 2011, the ECJ dismissed a request by Luxemburg to annul Directive 2009/12. According to Luxemburg, Directive 2009/12 constitutes an infringement of the principles of equal treatment, proportionality and subsidiarity.⁵² On November 24, 2011, the Commission announced that it had requested Austria, Germany, Italy, and Luxemburg to comply with the rules on airport charges. Those Member States have not yet transposed Directive 2009/12 into national law, notwithstanding that they were obliged to do so by March 15, 2011. If the Member States concerned persist in failing to comply, they may face infringement proceedings before the ECJ.⁵³

IV. Uniform Intermodal Cargo Law: One Year after *K-Line* – Sailing Through the Himalayas

In the landmark case of *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp. (K-Line)*,⁵⁴ the U.S. Supreme Court abrogated the holding of *Sompo Japan Insurance Co. of America v. Union Pacific R.R. Co.*⁵⁵ and held that the cargo liability provisions of the Carmack Amendment to the Interstate Commerce Act (Carmack)⁵⁶ do not apply to the U.S. inland rail segment of a shipment originating overseas that travels under a single through bill of lading.⁵⁷ In so doing, the Court acknowledged its earlier decision in *Norfolk Southern R. Co. v. Kirby*,⁵⁸ which had held that the Carriage of Goods by Sea Act (COGSA) permitted the parties to use a so-called Himalaya Clause as a means of contractually extending COGSA cargo liability terms to cover the entire period of time that the goods are under a carrier's responsibility, which may include the period when the goods are traveling inland. The analysis in *K-Line*, however, diverged from *Norfolk Southern* by focusing on the narrow question of whether the defendant railroad was a "receiving carrier" to which Carmack would apply under 49 U.S.C. § 11706(a). Because the carrier initially "receiving" this import cargo from a consignor in Japan obviously was not a railroad, let alone any other carrier in the U.S., the Court in *K-Line* determined that Carmack could not apply and that COGSA therefore would apply.

Subsequent decisions by lower courts have refined the scope and extent of the *K-Line* decision. Only one month after *K-Line*, the Second Circuit held that the same reasoning and result applied when the U.S. inland leg of a journey originating overseas was by truck rather than rail. In *Royal & Sun Alliance Insurance PLC v. Ocean World Lines, Inc.*,⁵⁹ a

51. See Commission Proposal for a Directive of the European Parliament and of the Council on Aviation Security Charges, at 3-4, COM (2009) 217 final (Nov. 5, 2009).

52. Case C-176/09, Grand Duchy of Lux. v. Parliament, 2011 E.C.R. 230 (2011).

53. Press Release, European Comm'n, Air Transport: Comm'n Requests Austria, Ger., It., and Lux. to Comply with Rules on Airport Charges (Nov. 24, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1410&type=HTML>.

54. *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2442 (2010).

55. *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, 456 F.3d 54 (2d Cir. 2006).

56. 49 U.S.C. §§ 11706 (rail carriers), 14706 (motor carriers).

57. *Kawasaki*, 130 S. Ct. at 2435-36. For more detail on *K-Line*, see this Committee's article in the Year-In-Review issue for 2010. See Andrews, *supra* note 1, at 322-33.

58. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 32 (2004).

59. *Royal & Sun Alliance Ins., PLC v. Ocean World Lines, Inc.*, 612 F.3d 138, 141-43 (2d Cir. 2010).

through bill of lading with a Himalaya Clause was issued in Germany by an ocean freight consolidator to a company shipping a printing press to Indiana. The consolidator arranged for successive shipping and carriage by an ocean carrier to Norfolk, Virginia, a rail carrier to Chicago, and a trucking company to Indiana. The truck crashed into a bridge overpass, which damaged the printing press.

On motion for summary judgment, the District Court held that the liability of all defendants was limited by COGSA. On appeal, the Second Circuit followed the Supreme Court's lead in *K-Line* by focusing on the location and identity of the receiving carrier. The appeals court looked at the language of 49 U.S.C. § 14706(a)(1) relating to the Carmack liability of motor carriers and concluded that the first two sentences are substantially the same as the corresponding rail language of 49 U.S.C. § 11706(a), thus making the policy analysis and statutory interpretation conducted in *K-Line* equally applicable to motor carriers.⁶⁰ Therefore, because the initial "receiving" carrier obtained the printing press from a consignor outside of the United States, Carmack could not apply, and all three defendants were able to enforce the \$500 per package limitation of liability found in COGSA.

The Second Circuit provided further clarification of the application of COGSA to the U.S. inland portions of an import cargo movement in *Mitsui Sumitomo Insurance Co. Ltd. v. Evergreen Marine Corp.*⁶¹ There, the damage to cargo occurred during the rail portion of a journey from Japan to North Carolina. One of the differences between that case and *K-Line* was the fact that the railroad performed under a standing contract that it had previously entered into with an ocean carrier. The shipper's subrogee argued that the standing contract was a separate bill of lading, and thus, Carmack applied to the railroad. The Second Circuit rejected this argument, stating that the existence of the standing contract was a "distinction without a difference" and, that because the railroad was a subcontractor of the ocean carrier, COGSA applied.⁶²

One recent decision significantly limits *K-Line* by holding that COGSA did not apply to a U.S.-rail carrier that transported cargo to a port as part of an *export* journey, even though that portion of the journey was covered by a through bill of lading issued by the ocean carrier. In *American Home Assurance Co. v. Panalpina, Inc.*,⁶³ the exporter engaged a freight forwarder to arrange for the transport of forklifts from Indiana and Ohio to Australia. The forwarder retained a motor carrier to transport the forklifts from origin to the railroad in Illinois. The forwarder also contracted with an ocean carrier to arrange the transport from Illinois to Australia. The railroad was retained by the ocean carrier, not the forwarder. The ocean carrier issued a through bill of lading with a Himalaya Clause, and the railroad did not issue shipping documents at all. The cargo was on a train that derailed.

The railroad's motion for summary judgment sought a determination that COGSA applied to the entire journey covered by the through bill of lading, thus limiting the railroad's liability to \$500 per package. Although recognizing that Himalaya Clauses

60. *Id.* at 145-46.

61. *Mitsui Sumitomo Ins. Co. v. Evergreen Marine Corp.*, 621 F.3d 215, 216-17 (2d Cir. 2010) (per curiam).

62. *Id.* at 219.

63. *Am. Home Assurance Co. v. Panalpina, Inc.*, No. 07 CV 10947 (BSJ), 2011 U.S. Dist. LEXIS 16677, at *2-4 (S.D.N.Y. Feb. 16, 2011).

generally extend contractual protections inland, the court relied primarily on *K-Line* and determined that because BNSF was a “receiving rail carrier” under 49 U.S.C. § 11706(a), Carmack, and not COGSA, applied.⁶⁴ The fact that BNSF did not issue a bill of lading or other shipping document was found to be irrelevant to the issue of what law applied.

In making this determination, the court in *American Home* did not address the fact that the motor carrier was the first carrier to receive the forklifts. The forklifts were delivered to the railroad by a motor carrier under its own bill of lading, not under the ocean carrier’s bill. The court apparently concluded that because the freight forwarder had retained a motor carrier separately from the ocean carrier, the truck portion of the journey was somehow a separate journey. But because the shipper had retained the freight forwarder to arrange for the entire journey, the railroad logically could have been found to be a delivering, and not a receiving, carrier.

Moreover, the result in *American Home* might have been different if that court had placed more reliance on the broader and more practical analysis found in *Norfolk Southern*, and less on the narrow and literal approach found in *K-Line*. In *Norfolk Southern*, the Supreme Court had emphasized the values of consistency and facilitation of maritime commerce as guideposts in deciding whether a contract was governed by maritime laws such as COGSA. The Court had “vindicate[d] that interest by focusing [its] inquiry on whether the principal objective of a contract is maritime commerce.”⁶⁵ If this approach were applied in *American Home*, the significant facts would be that the U.S. exporter hired a freight forwarder to arrange the entire journey from origin to Australia; that the forklifts were containerized at the origin of the journey, before they were trucked to the railroad; and that most of the journey (measured by miles) was to be by sea. Thus, the entire journey would be considered maritime commerce. Under the *Norfolk Southern* commerce-based analysis, there is no logical distinction between a shipment that starts abroad and one that ends abroad. From the standpoint of carriers servicing global supply chains, the uniformity of the *Norfolk Southern* approach would be far preferable to the narrower (though not insignificant) benefits flowing thus far from *K-Line* and its progeny.

V. Developments in European Union Transport Law

A. TRANS-EUROPEAN TRANSPORT NETWORK

The major policy EU policy initiatives for 2011 in the field of transport was the further development of a Trans-European Transport Network (TEN-T) and setting out a vision for the long term future development of a Single Transport Area. Following consultations with Transport Ministers in February 2011,⁶⁶ the Commission adopted a proposal to establish a TEN-T on October 19, 2011 designed to reduce delays, upgrade infrastructure, enhance environmental protection, and streamline cross border and inter-modal trans-

64. *Id.* at *12-14.

65. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004).

66. See Press Release, European Comm’n, EU Transport Ministers Discuss the Future of the Trans-European Trans. Network (Feb. 8, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/137&format=HTML&aged=1&language=EN&guiLanguage=en>.

port.⁶⁷ European Transport Commissioner Vice-President Siim Kallas cited a lack of vital transport connection holding back European economic development, including the use of seven different rail gauge sizes across the EU and limits on connections between major ports, airports, and the rail network. The new policy establishes the goal of a core European transport network to be established by 2030 and a focus of future EU transport funding towards the development of that core network.⁶⁸

It is expected that the core TEN-T network would be served by a network of supporting routes largely financed by EU Member States with some limited EU funding possibilities. This approach signals a shift from the long-standing development of peripheral road and rail networks using Euro-funding with a new emphasis on core Europe. It is estimated that 31.7 billion will be provided to stimulate national investment in the supporting links. The Commission expects that every 1 million provided by the EU will be matched by 5 million from the Member States and 20 million from the private sector. That appears optimistic in the current economic climate. It is notable that, at the February 8, 2011 Transport Ministers meeting on TEN-T, it was stated that private financing could be not be a systemic solution or alternative for national or EU level public financing.⁶⁹

In parallel with its TEN-T vision for 2030, the Commission has also adopted a longer-term Transport 2050 Roadmap to a Single Transport Area in March 2011. The Roadmap consists of forty initiatives covering the next decade to build a more competitive and efficient pan-European transport system. The system is intended to increase mobility, enhance economic growth, dramatically reduce Europe's dependence on imported oil, and reduce carbon emission due to transport some sixty percent by 2050.⁷⁰ Other goals include the abolition of gasoline-powered automobiles in cities, a forty percent cut in shipping emissions, a forty percent sustainable employment of low carbon aviation fuels, and a fifty percent shift from road to rail or maritime transport for medium distance inter-city travel.⁷¹ With the EU currently suffering the worst financial crisis in its history, both of these projects appear to be aspirational.

B. ROAD AND RAIL

On December 16, 2010, the Commission adopted Regulation 1213/2010 establishing rules for linking national electronic registers of road transport undertakings. This European Registers of Road Transport Undertakings (ERRU) is expected to be functioning by January 1, 2013. The ERRU is intended to create fairer conditions of competition in the road transport market and to allow national authorities to better monitor the regulatory compliance of trans-European road haulage firms. Firms that do not supply the required information will face sanctions in their Member State of registration. This is designed to

67. See Press Release, European Comm'n, Connecting Europe: The New EU Core Transp. Network (Oct. 19, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/706&format=HTML&aged=0&language=EN&guiLanguage=en>.

68. *Id.*

69. *Id.*

70. Commission White Paper on Roadmap to a Single European Transport Area –Towards a Competitive & Resource Efficient Transport System, at 9-10, COM (2011) 144 final (Mar. 28, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0144:FIN:EN:PDF>.

71. *Id.*

create fairer competition conditions in the road transport market (in effect, to level the costs between firms and states that enforce higher, more costly standards and others that do not). The set-up of the national registers and their interconnection are required under the legislation on the access to the profession of road transport undertakings Regulation (EC) No 1071/2009.⁷²

The Commission has undertaken a number of infringement proceedings in the area of road and rail transport. On September 29, 2011, the Commission commenced an enforcement action against France and the United Kingdom for failing to open the market for rail services in the Channel Tunnel Fixed Link under the Commission's first railway package. An open market in rail services is to be achieved by ensuring the independence of the infrastructure manager, non-discriminatory track access charging, and the setting up of an independent regulator to remedy competition problems in the rail sector. Member States were required to implement these directives by March 15, 2003, but numerous examples of state failure to implement are current—letters of notice of failure to implement were sent to twenty-four Member States in 2008. The Commission has raised with France and United Kingdom issues of the lack of independence of the rail infrastructure manager of the Channel Fixed Link, insufficient implementation of rail access charging provisions, an independent regulatory body, and capacity allocation.⁷³

On November 24, 2011, the Commission commenced action against Germany for failure to implement common rules on interoperability of European railways as required by Directives 2008/57/EC and 2009/131/EC and for failing to implement an amendment to the Railway Safety Directive 2008/110/EC relating to certification of maintenance agents for freight wagons that was adopted by the Commission on May 10, 2011.⁷⁴ Of note, the Commission intends to exercise its Lisbon Treaty powers to request that the ECJ impose a daily penalty payment on Germany until implementation of the national measures, notwithstanding the infringement is a delay in implementation that is planned by the German government for May 2012 (the Commission has urged action to implement in 2010 and 2011). In doing so, the Commission is sending a strong message that implementation deadlines are to be respected.⁷⁵

C. MARITIME

In the maritime area, the Commission focused on ensuring implementation of the sweeping ERIKA II package of maritime safety and security reforms enacted in 2009, many provisions of which were due for implementation on January 1, 2011. Several of these, described in the enforcement actions below, are both costly and politically sensitive.

72. *Id.*

73. Commission Regulation 1213/2010, of 16 December 2010 Establishing Common Rules Concerning the Interconnection of National Electronic Registers on Road Transport Undertakings, 2010 O.J. (L 335) 21 (EU).

74. See Press Release, European Comm'n, Rail Transport: Comm'n Launches Infringement Proceedings Against France & the UK over Channel Tunnel (Sept. 29, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1099&format=HTML&aged=0&language=EN&guiLanguage=en>.

75. See Press Release, European Comm'n, Rail Transport: Comm'n Refers Ger. to the Court of Justice over Interoperability (Nov. 24, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1402&format=HTML&aged=0&language=EN&guiLanguage=en>.

On May 19, 2011, the Commission delivered a reasoned opinion to Belgium, Cyprus, Estonia, France, Poland, Portugal, and the United Kingdom to implement the new port state control regime to comply with EU law. This sets in motion a two-month period for Member States to inform the Commission of the measures taken to ensure full compliance. The new port state control rules require more frequent inspection of ships determined to pose a higher risk to safety and an extension of the ban on substandard shipping. Cyprus, Estonia, and Portugal had failed to notify the Commission of measures taken to implement the port state control directive, while Belgium, France, Poland, and the United Kingdom had notified only partial implementation measures. By contrast, on October 27, 2011, the Commission ceased infringement proceedings against Sweden for complying with port state control requirements in the port of Malmö.⁷⁶ Under the new regime, the target for ship inspection is raised from 25% of foreign ships calling at each Member State's ports to a collective target of 100% of ships calling at all EU ports with high-risk ships inspected every six months, average-risk ships every twelve months and low-risk ships every three years. The Commission has concerns with integrity of the safety net, but also with the impact on competition should some states establish a more lax inspection standard.⁷⁷

The Commission has also acted to push the development of maritime vessel traffic management. On June 16, 2011, the Commission sent a reasoned opinion to Belgium, Estonia, France, Hungary, Austria, Poland, Portugal, Finland, and the United Kingdom to adopt national legislation implementing Directive 2009/17/EC, which established a vessel traffic monitoring and information system. The Directive requires greater capability of Member States to assist ships in distress and defines a legal framework on refuge zones for stricken shipping—a controversial issue. It also requires connection of all Member States to the SafeSeaNet, a data exchange network to monitor the movements of dangerous or potentially polluting cargo on ships sailing in EU waters.⁷⁸

Finally, on November 14, 2011, the European Commission sent reasoned opinions to Austria, Greece, Poland, and the United Kingdom for their failure to inform the Commission on the status of implementation of Directive 2009/18/EC on the investigation of accidents at sea. The Directive establishes basic principles governing maritime accident investigations. The due date for implementation was June 17, 2011. The key element of the new rules is the establishment of a new independent safety investigation after serious accidents at sea that would be separate from criminal investigations.⁷⁹

76. See Press Release, European Comm'n, Maritime Security: The Comm'n Welcomes the Review of Port Sec. Assessment & the Adoption of a Sec. Plan for the Port of Malmö (Oct. 27, 2011), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1296&format=HTML&aged=0&language=EN&guiLanguage=en>.

77. See Press Release, European Comm'n, Maritime Safety: Comm'n Requests Seven Member States to Comply with New EU Port State Control Regime (May 19, 2011), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/589&type=HTML>.

78. See Press Release, European Comm'n, Maritime Safety: Comm'n Requests Nine Member States to Comply with New EU Port State Control Regime (June 16, 2011), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/712&format=HTML&aged=0&language=EN&guiLanguage=en>.

79. See Press Release, European Comm'n, Maritime Safety: Comm'n Sends Reasoned Opinion to Four Member States (Nov. 24, 2011), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1411&format=HTML&aged=0&language=EN&guiLanguage=EN>.

D. PIRACY

Piracy continued to expand as a maritime security threat in 2011, with the number of attacks at an all-time high, although the number of successful hijackings has been substantially less than in 2010. Ransoms are believed to have hit record levels; there has been more use of violence by pirates, including the tragic killing of four Americans onboard the *SV Quest* on February 22, 2011. There has also been a greater willingness of naval forces to take military action to free pirated ships so long as the crew is secured in the vessels' citadel. Best Management Practices have become widely adopted by vessels transiting the Gulf of Aden. 2011 also witnessed a substantial tilt towards the acceptance of private armed security guards on board vessels transiting high-risk areas.

The radius of pirate action increased to 1300 nautical miles in 2010, spanning an area from the Gulf of Aden, east into the Arabian Gulf and the West Indian Ocean, and south to Madagascar and the Seychelles. 2010 saw 445 global attacks from pirates and armed robbers at sea, of which 196 occurred in the first six months, and 100 of these were by Somali pirates. In the first six months of 2011, 266 total attacks had occurred, of which 163 were by Somali pirates. In October, the International Maritime Bureau reported on the first nine months of 2011, citing 199 attacks off the Horn of Africa compared with 126 for the corresponding period of 2010. By contrast, twenty-four vessels were hijacked by Somali pirates, down from thirty-five in 2010, reflecting a drop in the pirate success rate from twenty-eight percent to twelve percent for the first nine months of 2011.

This intensification of attacks, but substantial lowering of the success rate, is attributed to much greater implementation of Best Management Practices, the increased presence of armed security on board ships and to the effective action of naval forces providing protection to transiting vessels. In a worrying development in the Gulf of Guinea, nineteen attacks occurred off Benin in the first nine months of 2011, up from zero in 2010. Eight tankers were hijacked. The piracy dynamic is very different in the Gulf of Guinea, however, with the captured vessels typically taken into port, emptied of its cargo of oil, and then allowed to sail on without payment of ransom.

There are indications that Somali pirates are adapting a mass attack or "wolf pack" tactic when attempting to hijack a high value target. On March 14, 2011, the Indian Navy seized a mothership containing sixty-one pirates. The *MV Sinar Kundus* was attacked by between thirty to fifty pirates. Most spectacularly, on August 9, 2011, shipboard security on a merchant vessel fought off an attack by twelve skiffs with five to eight pirates each, a total force of sixty to ninety pirates. Other unorthodox tactics witnessed in 2011 included the transfer of crew to the pirate dhow upon seizure of the merchant vessel and a brazen attack and theft of the *MV Fairchem Bogy* while pier side in Salalah, Oman, after the security force had departed the ship.

There may be first indications that the Somali piracy phenomenon has peaked. In particular, the reduced success rate in 2011 matched by robust action by naval forces (in particular the Indian Navy) both support this trend, as do reports that the piracy "industry" is suffering from over-investment in expansive assets that have not delivered the needed profits. Late 2011 also witnessed the first major land actions against pirate bases

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by Puntland authorities, who arrested 150 pirates.⁸⁰ Whether this has an impact on pirate operations will not be clear until well into 2012.

The global economic costs of piracy are better understood in 2011, with a major study by Oceans Beyond Piracy (OBP) that placed the total distributed global economic welfare loss from piracy at between \$7 and \$12 billion per year.⁸¹ Ransom payments were estimated at \$148 million average per year (with \$210 million in 2010 alone, and a record alleged \$13 million for the ransom of the *MV Irene* in April 2011).⁸² But ransom is only the tip of the iceberg in terms of costs, when compared with an estimated \$460 million to \$3.2 billion in insurance premiums, \$2.4 to \$3.0 billion losses due to the re-routing of ships around the Cape, \$363 million to \$2.5 billion for security equipment and guards, \$2.0 billion in the cost of naval forces conducting counter-piracy operations, \$31 million for prosecutions, \$19.5 million for the administrative costs of anti-piracy organizations, and a \$1.25 billion cost to regional economies.⁸³ Of note, OBP believes that without naval protection, approximately 30 percent of global merchant shipping would bypass the Horn and Africa and take the long route around the Cape (it is estimated that 10 percent already do as a result of the piracy situation). That would equate to a global welfare loss of \$30 billion per year.⁸⁴ The investment of \$2.0 billion in naval protection thus seems to have a very good business case.

The pressure of piracy led to dramatic shifts in the insurance regime in the regions that were not captured in the OBP study. In December 2010, after a bad year for attacks off the west coast of India, the Lloyds Joint War Risk Committee expanded the High Risk Area to seventy-eight degrees East, more than doubling the size of the zone. As a result, insurance rates for West Indian commercial shipping escalated, reportedly as much as 300 times its previous levels for some vessels.⁸⁵ Vessels that had typically purchased a three-day cover to steam through the old High Risk Area required a ten-day cover to traverse the expanded area. India has vigorously combated piracy in the Western Indian Ocean in 2011 and is negotiating with Lloyds to reduce the High Risk Area.⁸⁶

The question of armed security guards on merchant vessels has divided both the maritime and the legal community for years. In 2011, the balance of the argument seemed to tilt decisively towards recognition of the value of armed security in high-risk areas. On May 20, 2011, the International Maritime Organization (IMO) issued guidance for the

80. See *Pirates Beware: Puntland is Coming for You*, SOM. REPORT (Oct. 30, 2011), <http://www.somaliareport.com/index.php/post/1912>.

81. See Anna Bowden et al., *The Economic Cost of Maritime Piracy 2* (Oceans Beyond Piracy, One Earth Future Found., Working Paper, 2010), available at http://oceansbeyondpiracy.org/documents/The_Economic_Cost_of_Piracy_Full_Report.pdf.

82. See Apostolos Belokas, *Alarming Trends in Somalia Piracy Front*, SAFETY4SEA (Apr. 20, 2011), <http://www.safety4sea.com/analysis/1/20/alarming-trends-in-somalia-piracy-front->

83. *Id.*

84. Anna Bowden, Program Manager, One Earth Future Foundation, *The Global Impact of Piracy*, Presentation at the RUSI Future Maritime Operations Conference (July 6, 2011).

85. See Andrew McAskill & Karthikeyan Sundaram, *India Fights Lloyd's Expanding Piracy Zone After 300-Fold Insurance Jump*, BLOOMBERG (June 3, 2011 9:30 PM), <http://www.bloomberg.com/news/2011-06-03/india-fights-lloyd-s-expanding-piracy-zone-after-300-fold-insurance-jump.html>.

86. *Id.* There were twenty-seven attacks and seventeen hijacks off Western India in 2010, compared with twelve attacks and one hijacking as of June 2011. See *id.*

employment of armed and unarmed security on board merchant ships.⁸⁷ Although the IMO remains officially neutral on the issue, the issue of guidance was itself a shift in position—as was IMO acceptance of the inclusion of discussion of armed security in Best Management Practices Version 4 (BMP4) that was supported by NATO, EU Operation Atalanta, and the U.S. Coalition Operation Task Force-151.⁸⁸ On October 30, 2011, the United Kingdom announced its intention to alter a long standing prohibition and to license armed security on ships flying the Red Ensign in high-risk areas.⁸⁹ On November 4, 2011, the U.S. State Department began concerted diplomacy to encourage the use of armed security.⁹⁰ Of course, the provision of private security guards raises several difficult legal and regulatory issues, but it appears that the balance tilted towards private armed security guards in 2011.

In judicial matters, the English Court of Appeal issued an important judgment in *Mansfield AG v. Amlin Corporate Member Ltd.*⁹¹ At issue was whether the theft of cargo by pirates created an Actual Total Loss of the cargo, for which the insured could demand payment, even where there was a strong likelihood that the vessel and cargo could eventually be recovered by the payment of ransom. The Court of Appeal upheld the judgment of the High Court that vessels or cargo held by pirates do not constitute an Actual Total Loss in such circumstances. The Court of Appeal also rejected the argument that the prospect of payment of ransom could not be a reasonable or legitimate means of calculating the prospect of recovery of seized goods.

On November 22, 2011, the U.N. Security Council unanimously passed resolution 2020, extending by twelve months its authorizations granted under resolutions 1846 (2008) and 1851 (2008) to enter Somali territorial waters and to use all necessary means to combat armed robbery at sea in those waters, in parallel to actions against pirates on the high seas under the UN Convention on the Law of the Sea and customary international law. The Security Council also noted with concern escalating ransom payments and lack of enforcement of the arms embargo established by resolution 733 (1992) as fueling the piracy phenomenon.⁹²

87. See Int'l Maritime Org., *Revised Interim Guidance to Shipowners, Ship Operators and Ship Masters on the Use of Privately Contracted Armed Security Personnel on Board Ships in High Risk Area*, MSC.1/Circ.1405/Rev.1 (Sept. 16, 2011), available at <http://www.imo.org/MediaCentre/HotTopics/piracy/Documents/1405-rev-1.pdf>.

88. See WITHERBY SEAMANSHIP INT'L, *BMP4 - BEST MANAGEMENT PRACTICES FOR PROTECTION AGAINST SOMALIA BASED PIRACY* (4th ed. Aug. 2011), available at http://www.cusnc.navy.mil/marlo/Guidance/BMP4_web.pdf.

89. See *Somali Piracy: Armed Guards to Protect UK Ships*, BBC NEWS UK (Oct. 30, 2011, 3:21 PM), <http://www.bbc.co.uk/news/uk-15510467>.

90. See Robert Young Pelton, *US to Promote Use of Armed Guards on Vessels*, SOM. REP. (Nov. 4, 2011), <http://www.somaliareport.com/index.php/post/1956>; see also Andrew J. Shapiro, Asst. Sec'y, Bureau of Political-Military Affairs, U.S. Dep't of State, Remarks to the Defense Trade Advisory Group (Nov. 9, 2011), available at <http://www.state.gov/t/pm/rls/rm/176925.htm>.

91. *Mansfield AG v. Amlin Corporate Member Ltd.*, [2011] EWCA (Civ) 24, ¶¶ 1-2, 75-77 (appeal taken from Eng.).

92. See S.C. Res. 2020, ¶¶ 6, 9 U.N. Doc. S/RES/2020 (Nov. 22, 2011).