



# PROSPECTS FOR 2010

**Legal Corner** By David Street, IHSA Legal Counsel

Most of us are happy just to have survived 2009. So, let's not dwell on the past but, rather, on the future. What are the prospects for 2010? Things are looking interesting at the Federal Maritime Commission ("FMC"), where a fourth Commissioner has been sworn in. In addition, the petition filed in 2008 by the National Customs Brokers and Forwarders Association of America ("NCBFAA") to exempt NVOCCs from tariff filing will finally receive a full hearing. U.S. Customs and Border Protection ("CBP"), of course, is proceeding full steam ahead with the importer security filing requirements that will take full effect on January 26, 2010. Hopefully, everybody has been taking advantage of CBP's forbearance from strict enforcement of the rules during the past year to do their test filings and work out the kinks in their operations. We also expect the Supreme Court to hand down a major decision on the ongoing conflict between COGSA and Carmack insofar as the liabilities for loss and damage during the inland portion of through international shipments are concerned. Finally, the spectre of bankruptcy continues to hang over the container carrier industry and there may be some things you can do to protect yourself in the event your carrier goes bankrupt.

## A New Commissioner for the FMC

Michael A. Khouri has been sworn in as the fourth Commissioner for the FMC. He joins Chairman Richard Lidinsky, who was appointed by President Obama last year, Joseph Brennan, appointed by Bill Clinton in 1999, and Rebecca Dye, appointed by George Bush in 2002. With four Commissioners on board, the FMC lacks only one more Commissioner to be fully staffed for the first time in a number of years. At one point last year, only Commissioners Brennan and Dye were actively serving, which meant that the FMC was hamstrung in its ability to get things accomplished.

Commissioner Khouri, like Chairman Lidinsky, has previous maritime and transportation experience. He served on towboats on American rivers and worked his way up to Captain before going to law school. He has been a General Counsel and President and Chief Operating Officer for river transportation companies. This is good news for the FMC, which has too often been run by Commissioners with little practical experience of the maritime industry. With Chairman Lidinsky and Commissioner Dye, it may be that new Commissioner Khouri will form a working majority for a more

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practical approach to regulating the country's international maritime transportation industry. How they handle the NCBFAA's petition to exempt NVOCCs from tariff filing should provide an important clue in this respect.

### The NCBFAA Petition

The NCBFAA filed its petition on July 31, 2008. The petition requested that the FMC exempt NVOCCs from the obligation to publish and adhere to rate tariffs. The NCBFAA requested the FMC to initiate a formal proceeding pursuant to Section 16 of the Shipping Act of 1984 to promulgate such an exemption. The FMC published the NCBFAA's petition in the *Federal Register* on August 11, 2008 and requested comments from interested parties. Clearly there was a lot of interest in this petition judging by the number of comments received. Over 50 sets of comments were submitted by NVOCCs, shipping industry consultants and service providers, members of Congress, associations of ocean carriers and the National Industrial Transportation League, the primary voice for large American shippers. Despite this level of interest, nothing happened for well over a year. Recently, however, the NCBFAA submitted a request to the FMC to file additional comments supplementing the record. In response, the Commission issued an order on January 5, 2010 granting the NCBFAA's request and opening the record for supplemental comments by any party that had originally filed comments on the petition. The NCBFAA's supplemental comments will concern the economic impact that the cost of tariff filing is having on the ability of NVOCCs to keep their employees. With the nation's unemployment rate over 10%, this argument for eliminating tariff filing obligations should have considerable weight, particularly when combined with the previous arguments as to the lack of usefulness of NVOCC tariffs for shippers or competitors. This clearly means the Commission will address the NCBFAA's petition this year and, as noted above, there may be a majority of Commissioners who will look upon this petition with favor.

### Will the Supreme Court Put an End to the Controversy Between Carmack and COGSA?

In the November, 2009 newsletter, I discussed a case decided by the United States Court of Appeals for the Ninth Circuit holding that K Line is a "rail carrier" when it offers intermodal services within the United States under a through international bill of lading. This decision signified the Ninth Circuit's determination to join the Second Circuit in holding that the liability for loss or damage to cargo moving under a through international bill of lading should be governed by Carmack, rather than COGSA, if the loss or damage occurs during inland transportation in the United States. This seems like a boring and arcane legal dispute, but it has major real world ramifications. As you know, pursuant to COGSA, a carrier's liability is limited to \$500 per package for loss or damage. Under Carmack, however, the carrier's liability is unlimited. The shipper can recover its actual damages. Therefore, the difference between the consequences of being subject to Carmack or COGSA can be huge. When you add the fact that the Ninth Circuit encompasses the Port of Los Angeles and the Second Circuit encompasses the Port of New York, you can appreciate the significant impact of these decisions for U.S. maritime commerce. There is, in addition, the fact that a carrier's liability - - or a shipper's

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recovery - - for loss or damage should not depend on the mere fortuitous chance of where loss and damage occurs or where a carrier may happen to have its offices in the United States.

Hopefully, the Supreme Court will use the opportunity of deciding this case, which is titled *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corporation*, to finally put to rest the confusion among the lower circuits as to when Carmack or COGSA applies. The United States government has already weighed in on the side of applying COGSA to all international through transportation movements. In a brief filed by the United States with the Supreme Court as a “friend of the court” supporting K Line, the U.S. Solicitor General’s Office has argued that the Ninth Circuit was mistaken in deciding that Carmack applied to loss and damage claims pursuant to a international through bill of lading because “Carmack does not apply to import carriage from non-adjacent foreign countries.” We - - at least we maritime lawyers - - will eagerly wait to see how the Supreme Court decides this case.

### CBP Fully Launches the Importer Security Filing Regulations

As previously announced, CBP will begin full enforcement of the importer security filing (“ISF”) requirements for maritime cargo on January 26, 2010. What this means in practice is that CBP will now expect that complete importer security filings will be made in a timely manner for all shipments into the United States from foreign countries. Further, CBP will feel free to impose liquidated damages against importers’ bonds, or hold cargo, for failure to meet these requirements. Notwithstanding the commencement of “full enforcement,” CBP has announced it will approach enforcement of the ISF requirements in a similar manner as to how it implemented the 24 Hour Rule. That is, CBP will initially take an “informed compliance” approach, rather than strict enforcement and will use the “least punitive enforcement measures” necessary to guarantee compliance with the ISF rules. At least initially, CBP has also announced that all penalties will be handled by CBP headquarters in Washington. This should mean a more consistent approach to ISF violations than if the individual ports were handling these enforcement matters. The trade press has been full of announcements about the ISF rules and how to meet them. There have, in addition, been multiple seminars, classes, webinars and other opportunities to learn about these rules over the past year. Hopefully, you have taken advantage of these opportunities and are fully prepared for these new requirements.

### Ocean Carrier Bankruptcies Still a Threat

If you have been reading the trade press for the past year, you know that a number of carriers avoided financial disaster in 2009 only because they were supported by their governments, their banks, or their shareholders. It has required the expenditure of huge sums of money to keep these carriers afloat. Forecasters are saying that 2010 will be another year of close calls - - or potential disasters - - for container carriers. One firm, Drewry Shipping Consultants, has stated that “even if the industry can secure the same amount of fresh cash in 2010 as it received from shareholders in

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2009, it will not be sufficient cash to cover its needs. Another estimated \$1.4 billion of cash may need to be found from other sources to keep the carriers trading.” The carriers, of course, will try to make up some of this money by increasing their rates, so expect spirited negotiations this year. It is probable that shippers will have to make some basic decisions as to whether keeping rates low or keeping carriers in business is more important to them. You may also want to give some consideration to planning for what happens if one of your carriers goes bankrupt with your containers in transit. In such situations, a carrier’s creditors will be quick to arrest vessels and containers. It would be prudent to make some contingency plans for how to handle these occurrences. Tracking your containers is a basic necessity so you can act quickly when something like this happens. Ordinarily, both carriers and creditors work together to get shipments delivered to the customers in the shortest time possible but the process can be lengthy and expensive to sort these things out. One thing you can do is check your maritime insurance policies to see if you have coverage for these types of contingencies. Most insurers offer coverage for this sort of event called, variously “extra expense” or “insolvency” coverage.

Hopefully, the year ahead will see much fairer sailing than the year that has just passed. We can be sure there will be surprises. We can only hope they will be pleasant ones. Happy New Year to all!!

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