

Alongside S3 E3: The Jones Act and U.S. Shipping: Essential Insights

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<v SPEAKER_1>Hello and welcome to Alongside, the podcast from NorthStandard for the shipping industry across the world.

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<v SPEAKER_1>I'm Kait Borsay.

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<v SPEAKER_1>In this episode, we look at the Jones Act, a United States law that regulates maritime commerce there.

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<v SPEAKER_1>Simply put, the Jones Act requires merchandise shipped between US ports to be transported on ships that are built, owned and operated by United States citizens or permanent residents.

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<v SPEAKER_1>While most countries with maritime commerce have laws reserving domestic trade for their own citizens, known as cabotage laws, the cabotage laws in the United States are some of the strictest in the world.

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<v SPEAKER_1>On this episode, we dig into some of the key issues offering insight on parts of the act and the implications for operators.

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<v SPEAKER_1>Well, joining me to discuss this in more detail are Emma Jones, Senior Associate at Blank Rome LLP, and Gina Venezia, President and Head of Commercial Americas for NorthStandard.

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<v SPEAKER_1>Welcome to both of you.

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<v SPEAKER_2>Hi, Kait.

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<v SPEAKER_2>Thank you for having me.

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<v SPEAKER_3>Hi, Kait.

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<v SPEAKER_3>Happy to be here.

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<v SPEAKER_1>Firstly, let's explain the Jones Act in a bit more detail.

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<v SPEAKER_1>This is a more than 100-year-old law, after all.

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<v SPEAKER_1>How does it work and how does it affect shipping in the United States, Gina?

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<v SPEAKER_3>Yeah.

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<v SPEAKER_3>Well, I think, Kait, as you said, the Jones Act is a collection of US laws that were first enacted in 1920 that regulate US coast-wise trade and other maritime activities within the US.

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<v SPEAKER_3>And what I think is important to note is that there's the cabotage component of the US.

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<v SPEAKER_3>Jones Act, which, as you said, can be strict in its application.

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<v SPEAKER_3>It applies in contexts that people may not think about in a day-to-day context.

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<v SPEAKER_3>The Jones Act also has a personal injury component, a remedy that is available to Jones Act semen.

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<v SPEAKER_3>And that is a unique remedy in the US.

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<v SPEAKER_3>And it's really unlike any remedies for seafarers, as well as elsewhere in the world.

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<v SPEAKER_1>So you've mentioned there, Gina, two key aspects that we'll bring into our discussion today.

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<v SPEAKER_1>Injury remedy for Jones Act semen and cabotage or coast-wise laws that include merchandise, passengers, towing, dredging, salvage and escort vessels.

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<v SPEAKER_1>Let's look at these in detail.

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<v SPEAKER_1>First of all, cabotage.

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<v SPEAKER_1>This is essentially the transportation of goods or passengers between two places in the same country by a transport operator from another country.

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<v SPEAKER_1>And what's called a coast-wise point.

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<v SPEAKER_1>What is a coast-wise point?

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<v SPEAKER_3>You think that coast-wise point would be something that would be obvious, right?

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<v SPEAKER_3>And in some ways it is, right?

00:02:39.728 --> 00:02:48.348

<v SPEAKER_3>If we're talking about some transport from Los Angeles to a port in Hawaii, well, that's easy to identify a coast-wise point, right?

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<v SPEAKER_3>You have the point in California and then you have the point in Hawaii.

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<v SPEAKER_3>Where you start to see some interesting takeaways, if you will, is when we start talking about offshore activities.

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<v SPEAKER_3>And I'd like to turn this point over to Emma, who has a lot of experience in dealing with these issues with respect to offshore activities and other types of activities that many may not understand implicate the Jones Act.

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<v SPEAKER_2>Thanks, Gina.

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<v SPEAKER_2>So there's an additional US law that factors in here called the Outer Continental Shelf Lands Act.

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<v SPEAKER_2>And that Customs and Border Protection in the US., referred to as CBP, interprets that act to extend the Jones Act to installations and devices that are permanently or temporarily installed on the Outer Continental Shelf of the US for the purpose of exploring, developing or producing resources.

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<v SPEAKER_2>So that means practically that wind farms and oil platforms are generally deemed within the purview of the Jones Act subject to some limitations, which I think we can discuss a little bit later.

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<v SPEAKER_1>Thanks for setting that out.

00:03:56.628 --> 00:04:01.648

<v SPEAKER_1>Terminology within the Jones Act is really key, isn't it Gina?

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<v SPEAKER_1>Can we talk about merchandise?

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<v SPEAKER_3>So, I mean, very broadly speaking, and I'll let Emma talk about some of the specifics, but broadly speaking, merchandise can include anything of value.

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<v SPEAKER_3>And again, it's obvious when we're talking about cargo, right?

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<v SPEAKER_3>Cargo is clearly merchandise.

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<v SPEAKER_3>But what people sometimes don't appreciate is that it can also include, for instance, bunkers, marine fuel loaded onto a ship for use by the ship.

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<v SPEAKER_3>Although that is not considered cargo, and many may think, well, that's not really a good being transported from one point to another.

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<v SPEAKER_3>It still can be considered merchandise within the context of the Jones Act, which can become important when a ship loads bunkers in the US., departs, and may have a problem, and wants to offload back to the US.

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<v SPEAKER_3>Once again, the Jones Act can be implicated.

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<v SPEAKER_2>Obviously, it does include anything of value, but the technical definition of merchandise is goods, wares, and chattels of every description, including valueless material.

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<v SPEAKER_2>So it really opens it up to be interpreted as almost anything.

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<v SPEAKER_2>It does not include, which is sort of key in the offshore space, is items that are considered equipment of the vessel, which are items that are necessary for the navigation, operation, or maintenance of a vessel, and for the comfort and safety of persons on board like crew and passengers.

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<v SPEAKER_2>So those are items that are integral to the function of the vessel and carried by the vessel.

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<v SPEAKER_2>But generally, anything else can be considered merchandise, regardless of what value is attributed to it.

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<v SPEAKER_2>As Gina said, it extends to bunkers and things like that.

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<v SPEAKER_1>And does all of this apply to any merchandise being transported from port to port within the US.?

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<v SPEAKER_1>Or are there waivers given under the Jones Act?

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<v SPEAKER_1>Are there exceptions?

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<v SPEAKER_2>I think it's something that is granted in very rare cases, limited purposes, limited instances.

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<v SPEAKER_2>The sort of technical basis for granting a waiver would be if it was necessary in the interest of national defense.

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<v SPEAKER_2>The waivers that I'm aware of that have been issued in fairly recent years were after Hurricane Katrina hit New Orleans.

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<v SPEAKER_2>It had a significant impact on petroleum products.

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<v SPEAKER_2>There was a temporary waiver granted for a very limited period of time because the pipelines were badly damaged, so there was not a sufficient US fleet available for transportation of that product, which is necessary to get those products out of the area.

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<v SPEAKER_2>Also, after the Exxon Valdez oil spill, there was a temporary waiver granted on a short-term basis for foreign flag oil spill response vessels to assist.

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<v SPEAKER_2>So it's not something that should be expected.

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<v SPEAKER_2>They have not been granted with much frequency in recent years.

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<v SPEAKER_3>And there are some exceptions that are embedded in the Jones Act itself.

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<v SPEAKER_3>So some statutory exceptions to the requirement to have a CoastWise endorsed vessel transport merchandise from points within the US.

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<v SPEAKER_3>Those exceptions are very highly fact-specific.

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<v SPEAKER_3>They are within the statute itself.

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<v SPEAKER_3>And they're not, I would say, overly common for our members who are trading goods on the ocean.

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<v SPEAKER_1>What is the structure of enforcement, Emma?

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<v SPEAKER_1>How does US law make sure or law enforcement agencies make sure that these laws are adhered to?

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<v SPEAKER_2>There are local Customs and Border Protection, CBP offices at most major ports or port areas.

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<v SPEAKER_2>And those local offices are the ones that are monitoring what's coming and going.

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<v SPEAKER_2>And they are the ones that can issue notices of penalty if they suspect or have reason to believe that a violation may have occurred.

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<v SPEAKER_2>So if anyone involved in the chain of transportation is suspected to have violated the Jones Act, that notice of penalty will come from the local office.

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<v SPEAKER_2>And they will deal with any petitions for relief up to a certain amount or other reasons why a penalty might need to be escalated to headquarters.

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<v SPEAKER_2>If there's a large enforcement action or if the penalties are of a significant value, then headquarters might get involved to administer the notice of the penalty.

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<v SPEAKER_1>What kind of fines are we talking about here, Gina?

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<v SPEAKER_1>And what about mitigation?

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<v SPEAKER_1>Are there ever mitigating circumstances for which punishment can be avoided?

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<v SPEAKER_3>I mean, look, the penalties for violating the Jones Act can be significant, right?

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<v SPEAKER_3>So as an example, a penalty can be enforced based on the value of the merchandise.

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<v SPEAKER_3>And as Emma said, what would happen is that a penalty would be assessed initially at the local level by Customs and Border Protection, which is the agency charged with primary responsibility for enforcing the Jones Act.

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<v SPEAKER_3>And if a recipient of that assessment feels that the amount is too much or that there was no violation, then they would then proceed, as Emma said, to file a petition for relief.

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<v SPEAKER_3>They would pursue that through Customs and Border Protection.

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<v SPEAKER_3>And if at the end of that process, there was still dissatisfaction, there would be an opportunity to go to a US court.

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<v SPEAKER_1>It's an awful lot to get your head around.

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<v SPEAKER_1>How do US shipping companies do it?

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<v SPEAKER_1>Is this such an old law that it's just kind of written into everyone's heads?

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<v SPEAKER_1>Or do transportation companies, shipping companies, do they often fall foul because they don't understand it?

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<v SPEAKER_2>Most shipping companies are very aware of the Jones Act, the basics.

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<v SPEAKER_2>And I think the basics are relatively easy to follow.

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<v SPEAKER_2>I think sometimes you can get into tricky situations.

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<v SPEAKER_2>And most recently, there's been sort of a trend where CBP is issuing notices of penalty to every party involved in the transportation of goods.

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<v SPEAKER_2>And a lot of times, that means that ship owners, operators, masters are getting issued a notice of penalty because their vessel was involved in a small part of a transportation that was ultimately determined by CBP to have violated the Coastwise laws.

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<v SPEAKER_2>So they get this notice of penalty.

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<v SPEAKER_2>And all they know is they took merchandise from Miami to NASA and then they were done.

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<v SPEAKER_2>They didn't realize that it then came back to the US and is now involved in a Jones Act investigation.

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<v SPEAKER_2>So I think that can be quite alarming for these companies when they get a notice of penalty for a huge amount of money and they just can't figure out what they've done wrong.

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<v SPEAKER_2>I will say that CBP is very receptive to petitions for mitigation, petitions for relief, and it's a process that's well laid out.

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<v SPEAKER_2>You know, CBP has clear guidelines for how to submit a petition for relief.

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<v SPEAKER_2>You have 60 days from receipt of the notice of penalty.

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<v SPEAKER_2>Companies can submit on their own with sort of details of how they were involved, how they did not believe a Jones Act violation occurred.

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<v SPEAKER_2>They can have attorneys submit for them where we do it regularly, where you're just laying out all the facts as you know them.

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<v SPEAKER_2>And then CBP will rule on that and either revoke the penalty or often will mitigate based on the circumstances presented.

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<v SPEAKER_2>A key factor in mitigation is that a first time violation will generally be reduced to 10 percent of the full amount if it's found that a violation did in fact occur.

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<v SPEAKER_2>So, while the initial shock of receiving a notice of penalty will be great, generally once you sort of talk it through and look at all the factors, it's unlikely that that initial amount would stick or would necessarily be considered a violation.

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<v SPEAKER_3>I want to echo something that Emma said and that is the foundational principles of the Jones Act are well known throughout the industry.

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<v SPEAKER_3>Both the US operators, foreign operators understand those general principles.

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<v SPEAKER_3>Where things can get interesting is when you have if a CBP starts taking a new tact as Emma just described or if there's some new development in the industry that the Jones Act when it was enacted in 1920 may not have been conceiving of.

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<v SPEAKER_3>So again, these are offshore activities, the bunker situation you described.

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<v SPEAKER_3>So when these kind of unique circumstances arise, then the question can be, well, how does the Jones Act apply?

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<v SPEAKER_3>How does it apply?

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<v SPEAKER_3>And that's where we will see questions.

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<v SPEAKER_3>We will receive questions at the club about that.

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<v SPEAKER_3>And I think something important to note is, certainly there are external council that can assist in evaluating the potential Jones Act implications for anything that's unique.

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<v SPEAKER_3>In addition to that, there are mechanisms where someone can reach out to CBP to get their take on it in advance before engaging in the particular transaction that an owner or operator may have concerns implicates the Jones Act.

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<v SPEAKER_3>So CBP is not looking to get you.

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<v SPEAKER_3>They will work with you, but they want to have an understand of exactly what's involved.

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<v SPEAKER_1>Emma, the Jones Act was initially enacted to bolster US shipping and the merchant fleet in the 1920s, but it obviously needs to be applied to modern developments that might not have been thought about at the outset.

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<v SPEAKER_1>How are you seeing it enforced with respect to some of those newer areas in the industry, offshore drilling and wind farm installation, for example?

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<v SPEAKER_2>So there have certainly been a number of developments in both of those spaces in recent years, and I think a lot of them are very nuanced and very technical.

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<v SPEAKER_2>So I don't want to get too bogged down, but a couple of sort of key points that I think are important.

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<v SPEAKER_2>First, there are many more foreign flag installation vessels than there are US flag vessels for this type of work.

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<v SPEAKER_2>So there are a number of rulings that allow for certain types of projects to be done by foreign flag vessels in the offshore areas because they do not and they have been deemed by CBP to not involve the transportation of merchandise between CoastWise points.

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<v SPEAKER_2>So this includes paying out of cables or pipes, which is not deemed to be transportation because it's like laying the pipe and it's not physically moving it from one place to another.

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<v SPEAKER_2>And also there's a doctrine or principle of the pristine site, which is that where there's an area offshore where there hasn't been any installation before, it's not a CoastWise point yet until something is erected on that point.

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<v SPEAKER_2>This allows for more participation by foreign fleets.

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<v SPEAKER_2>They can't do everything in the offshore installation and wind space, but they can do some things that have been clearly determined at this point by CBP through issuing rulings that allow them to participate in the process.

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<v SPEAKER_2>I will say there has been recent CBP ruling activity where CBP has sought to clarify that once activity, once jackup activity begins on this pristine site, then that has established the CoastWise point.

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<v SPEAKER_1>CBP, of course, the US.

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<v SPEAKER_1>Customs and Border Protection.

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<v SPEAKER_1>And look, they've brought about a recent Jones Act case that received some publicity, didn't it, due to the significance of the fines imposed.

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<v SPEAKER_1>Tell us a bit about this, Emma.

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<v SPEAKER_2>So this goes back to a couple of things that Gina mentioned earlier, which are exceptions to the Jones Act.

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<v SPEAKER_2>And in this case, the exception was something known as the third proviso, which considers that if Canadian rail is utilized for some part of the transportation between two coast-wise points, then that's not necessarily a Jones Act violation.

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<v SPEAKER_2>Backing up in August of 2021, CBP attempted to enforce over \$350 million in penalties against a wide range of companies involved in the transportation of frozen fish from Alaska.

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<v SPEAKER_2>So CBP initially assessed penalties against the seafood company shippers, receivers, truckers, foreign vessels, and virtually every party involved in the supply chain.

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<v SPEAKER_2>And this penalty was challenged in court, in the District Court of Alaska.

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<v SPEAKER_2>And the case eventually settled with the seafood companies paying \$9.5 million to CBP and agreeing to stop using the railroad.

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<v SPEAKER_2>And this was the second largest settlement of a Jones Act case in US history.

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<v SPEAKER_2>So then the penalties that were assessed against the other parties that were not the parties that settled were rescinded by CBP.

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<v SPEAKER_1>Is that kind of complex action common ever?

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<v SPEAKER_2>I wouldn't say it's common.

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<v SPEAKER_2>And it's certainly unique on its facts.

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<v SPEAKER_2>While it was ultimately settled, I think what it's indicative of is CBP's strong stance on Jones Act enforcement and just the scope with which they are issuing penalties to so many parties involved in the transportation these days.

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<v SPEAKER_1>Let's move on, Gina, with you to start with and talk about the Jones Act, an injury remedy.

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<v SPEAKER_1>What makes this unique?

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<v SPEAKER_3>So the Jones Act itself provides that an injured seaman and in the case of death, his or her personal representative has the right to sue the employer for damages for the injury or the death.

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<v SPEAKER_3>Now, what makes this unique is that in the United States, as an example, most land-based employees are covered by workers' compensation schemes.

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<v SPEAKER_3>So if they get injured on the job, they are entitled to workers' compensation.

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<v SPEAKER_3>And that compensation is often based on a scheduled amount.

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<v SPEAKER_3>And the employee is entitled to that compensation regardless of fault on the part of the employer.

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<v SPEAKER_3>The Jones Act is different because it gives that injured person the right to sue for damages.

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<v SPEAKER_3>Not a scheduled amount damages.

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<v SPEAKER_3>That claim, there is a right to a jury trial.

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<v SPEAKER_3>So that claim can be presented to a jury.

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<v SPEAKER_3>And the jury can award damages, including pain and suffering damages, medical expenses, lost income, a wide variety of heads of claim.

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<v SPEAKER_3>Unlike a workers' compensation scheme, the Jones Act personal injury remedy requires proof of negligence on the part of the employer.

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<v SPEAKER_3>So it's not fault-based.

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<v SPEAKER_3>You have to, a seaman has to establish fault on the part of the employer.

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<v SPEAKER_3>But if they are successful in doing so, they are entitled to seek and recover a wide array of damages from the employer.

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<v SPEAKER_3>Very different from a compensation scheme.

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<v SPEAKER_3>Outside the US., many seafarers are entitled to compensation aligned with, similar to that compensation scheme.

00:19:24.568 --> 00:19:32.768

<v SPEAKER_3>I just described, either by virtue of their contracts of employment or by virtue of a government sponsored compensation scheme.

00:19:32.768 --> 00:19:38.548

<v SPEAKER_1>Are there definitions for what constitutes a seaman or a seawoman on a vessel?

00:19:38.548 --> 00:19:39.388

<v SPEAKER_3>Sure, sure.

00:19:39.388 --> 00:19:48.088

<v SPEAKER_3>So the Jones Act uses the phrase seaman, but that is, that includes female male seafarers.

00:19:49.108 --> 00:19:54.708

<v SPEAKER_3>The term is not defined in the Act, which is not uncommon in the US.

00:19:54.708 --> 00:20:01.348

<v SPEAKER_3>So the term seaman is not defined in the Act, which leaves the analysis to our US courts.

00:20:01.348 --> 00:20:04.928

<v SPEAKER_3>So the US courts have developed a test.

00:20:04.928 --> 00:20:11.548

<v SPEAKER_3>Did he or she contribute to the function or mission of the ship in his or her role?

00:20:11.548 --> 00:20:19.868

<v SPEAKER_3>And do they have a connection to the ship or fleet of ships that is substantial in nature and duration?

00:20:20.528 --> 00:20:31.468

<v SPEAKER_3>And then there's many factual analyses that are embedded within that test to determine whether a particular employee is a seaman or are they some other type of maritime employee?

00:20:31.468 --> 00:20:43.148

<v SPEAKER_3>Because other types of maritime employees might be entitled to different remedies, compensation scheme type remedies, whereas the Jones Act seaman would be entitled to this damages remedy.

00:20:43.148 --> 00:20:50.568

<v SPEAKER_3>The other important thing is the Jones Act itself does not distinguish between US seaman and foreign seaman.

00:20:50.568 --> 00:21:00.368

<v SPEAKER_3>So then the question becomes, can a foreign seafarer on a foreign flagship, as an example, take advantage of this remedy?

00:21:00.368 --> 00:21:11.928

<v SPEAKER_3>I will tell you my experience, efforts by foreign seafarers to get that remedy have not been successful, but it is a possibility because the Jones Act doesn't draw that distinction.

00:21:11.928 --> 00:21:25.008

<v SPEAKER_3>And this is again where the courts come into play, because the courts will say, they will look at the facts and what you really need to, what the seafarer would need to demonstrate is that the claim itself has a nexus, a connection to the United States.

00:21:25.008 --> 00:21:46.888

<v SPEAKER_3>And some of the things that the courts will look at, they will look at the contract of employment, they will look to see if there is a forum selection clause in that contract of employment, they'll look to see if there's a choice of law, they'll look at the location of the ship owner's operations, they look at a bunch of different factors to determine, and is it appropriate to apply the Jones Act in that context?

00:21:46.888 --> 00:21:50.648

<v SPEAKER_1>And Gina, is this the only remedy available under US law?

00:21:50.648 --> 00:21:55.668

<v SPEAKER_3>In the US we also have what's called general maritime law, which is common law.

00:21:55.668 --> 00:21:57.388

<v SPEAKER_3>It's not statutory.

00:21:57.388 --> 00:22:06.088

<v SPEAKER_3>And under general maritime law, a seafarer is also entitled to claim for unseaworthiness of the ship.

00:22:06.088 --> 00:22:15.668

<v SPEAKER_3>It is not based in negligence, and it is a claim that lies against the owner of the ship, which may or may not be the employer, the Jones Act employer.

00:22:15.668 --> 00:22:34.868

<v SPEAKER_3>And an injured seafarer is also entitled under the general maritime law to maintenance and cure, which means that they get, if they have an injury or illness while on board, they are entitled to receive maintenance and cure until they reach what's called maximum medical improvement.

00:22:34.868 --> 00:22:36.288

<v SPEAKER_3>So those two remedies exist.

00:22:37.068 --> 00:22:42.328

<v SPEAKER_3>They exist side by side with the Jones Act negligence remedy, but they are slightly different.

00:22:42.328 --> 00:22:47.648

<v SPEAKER_1>Well, look, it's been fascinating to hear so much from both of you about the Jones Act.

00:22:47.648 --> 00:22:59.808

<v SPEAKER_1>More than 100 years old, brought about to help boost shipping in the United States and the merchant fleet, as I said, all those years ago, but still very much in place now and enforced by US.

00:22:59.808 --> 00:23:04.168

<v SPEAKER_1>Customs and Border Protection, the CBP that we've been hearing so much about, the amounts of money.

00:23:04.888 --> 00:23:12.368

<v SPEAKER_1>And the strictness of the regulations really are something to behold, but it is there for the common good.

00:23:12.368 --> 00:23:16.248

<v SPEAKER_1>And it's been so interesting to hear much more about it on today's episode.

00:23:16.248 --> 00:23:20.548

<v SPEAKER_1>And thank you, both of you, for joining us on this episode of Alongside.

00:23:20.548 --> 00:23:22.528

<v SPEAKER_1>Emma Jones, thank you to you.

00:23:22.528 --> 00:23:25.188

<v SPEAKER_1>And Gina Venezia, thank you to you.

00:23:25.188 --> 00:23:26.828

<v SPEAKER_2>Thank you so much for having us.

00:23:26.828 --> 00:23:37.748

<v SPEAKER_1>Well, join us next time on Alongside when we continue to explore key topics affecting the maritime industry and those who are part of it, click follow on this podcast to ensure you don't miss an episode.

00:23:37.748 --> 00:23:39.908

<v SPEAKER_1>Thank you again to both our guests.

00:23:39.908 --> 00:23:42.048

<v SPEAKER_1>From me, Kait Borsay, thank you for listening.