

Navigating Vessels Used in Filming through U.S. Maritime Laws

A FILM STUDIO OR PRODUCER needs a schooner to make a movie based on a Patrick O'Brian or C. S. Forester seafaring novel or, for that matter, on a Disneyland theme ride. Often, however, the perfect vessel for the role was built or is registered or owned overseas. Can it be used? This simple question gives rise to an armada of U.S. and foreign law issues through which the vessel must be safely navigated.

Two federal cabotage statutes—the Jones Act¹ and the Passenger Vessel Services Act²—bear on the question whether a foreign vessel can engage in coastwise trade; that is, transport merchandise or passengers within the territorial waters of the United States. These waters consist of the “belt, three...nautical miles wide, seaward of the territorial sea baseline, and to points located in internal waters, landward of the territorial sea baseline, in cases where the baseline and the coastline differ.”³

The Jones Act generally prohibits the carriage of merchandise within such waters on any vessel that is foreign-built, foreign-registered, or foreign-owned. It provides:

No merchandise...shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise...between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States.⁴

The term “merchandise” is broadly defined to mean “goods, wares, and chattels of every description.”⁵

The act prohibits the transportation of merchandise between any two points in the United States. These points need not be ports.⁶ The statute does not, however, prohibit the loading of merchandise onto a non-coastwise-qualified vessel, so long as the vessel does not discharge the merchandise at any place in the United States other than the place where the merchandise was loaded onto the vessel.⁷

There are exceptions to the U.S.-built requirement. A vessel captured by a U.S. citizen in war and lawfully condemned as a prize or a vessel forfeited to the U.S. government and sold thereafter under applicable forfeiture statutes would qualify as U.S.-built.⁸ Likewise, a vessel wrecked in U.S. waters may qualify for coastwise trade if the repair costs exceed three times the salvage value of the vessel.⁹

The Passenger Vessel Services Act concerns the transportation of passengers: “No foreign vessel shall transport passengers between ports or places in the United States, either directly or by way of a foreign port, under penalty of \$200 per passenger as transported and landed.”¹⁰ The term “passenger” is defined to mean “any person carried on a vessel who is not connected with the operation of the vessel, her navigation, ownership or business.”¹¹ This act has been interpreted to prohibit any transportation of passengers exclusively within U.S. waters for any time. A violation of the statute does not require the disembarkation of passengers at a place other than where they boarded the vessel. Thus, a foreign vessel that takes passengers



for a cruise entirely within the territorial seas of the United States violates the statute even if it returns its passengers to the same place where they boarded.¹²

A narrowly defined exception to this prohibition exists. A vessel built or rebuilt outside the United States three or more years ago may be allowed to engage in coastwise trade if it qualifies as either a “small passenger vessel” or an “uninspected passenger vessel” and if the secretary of transportation, after public comment, determines that the employment of the vessel will not adversely affect either U.S. vessel builders or the business of anyone who employs U.S.-built vessels in the same trade.¹³ What constitutes a “small passenger vessel” or an “uninspected passenger vessel” is determined by a number of limiting factors, including tonnage and the number of passengers to be carried on board.¹⁴ These factors (and the unpredictable time it takes to apply for and receive a decision) make this exception an unlikely option for a studio or producer.

Actors, Film Crews, and Cameras

Within the Department of Homeland Security, the Customs and Border Protection Agency (formerly the U.S. Customs Service) is the

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agency responsible for enforcing U.S. coastwise laws.¹⁵ In several rulings, the Customs Service has addressed the question whether cast members, film crews, and film equipment fall within the definitions of “passengers” and “merchandise.”

A 1994 ruling in connection with the making of the film *Waterworld* is particularly instructive. King Kona Productions requested a ruling on whether it could use two 60-foot, French-built trimarans in the filming of *Waterworld* in U.S. waters off Hawaii. King Kona represented to U.S. Customs that “the boats will be sailed by Kevin Costner and other employees of King Kona solely for the purpose of being filmed by King Kona’s cinematographers.”¹⁶

After reviewing the applicable coastwise laws, the Customs Service observed generally that the carriage of cast members and technicians on a vessel owned by the production company did not have a “sufficient nexus to the vessel’s operation, navigation, ownership or business to conclude they are other than passengers.”¹⁷ With respect to Costner and the *Waterworld* film crew, however, the Customs Service ruled that they would not be regarded as passengers if, as represented, they actually sailed the trimarans during the filming of the movie. In that event, Costner and the film crew would also be the vessel’s crew, and as such there would exist a sufficient nexus between them and the operation and navigation of the vessel to avoid a violation of the statute.¹⁸ As for the film equipment on the trimarans, the Customs Service ruled that they could be used, provided that they were loaded onto the vessel and unloaded from the vessel at the same place.¹⁹

The prohibition against the use of a non-coastwise-qualified vessel in coastwise trade does not, however, bar all uses in U.S. waters. For example, unqualified vessels can be used in U.S. waters to carry passengers on “voyages to nowhere.” These consist of sailing the vessel beyond the three-mile territorial waters of the United States and then back to the point of departure.²⁰ It bears emphasizing, however, that on these voyages to nowhere the vessel may not stop in U.S. waters either on its way out to the high seas or on its way back.²¹

Similarly, a non-coastwise-qualified vessel may be sailed, with passengers and merchandise on board, from a point in U.S. waters to a point in foreign waters—from California to Mexico, for example—and then back to the point of departure in the United States.²² The vessel may also be used while in a stationary position in U.S. waters.²³ A vessel moored, anchored, or docked may be used in the filming of a motion picture with actors and film crew aboard.²⁴ Any other vessels used for transporting merchandise or passengers to the anchored,

moored, or docked vessels must be coastwise qualified.²⁵

Foreign Flags

Generally, foreign vessels entering U.S. waters are registered either under U.S. law or under the laws of what are commonly referred to as flags of convenience. The U.S. Coast Guard, also now within the Department of Homeland Security, is the agency responsible for the documentation of vessels in the United States.²⁶ Vessels of at least five net tons may be documented (or endorsed) for a variety of trades.²⁷ Vessels of less than five net tons may be operated without documentation so long as they satisfy all other requirements for their use in any given trade.²⁸ A registry endorsement permits a vessel to be used in foreign trade and probably is the only U.S. endorsement available to a foreign-built or foreign-documented vessel to be used in making a movie in U.S. waters.

A U.S. registry endorsement, however, like most U.S. endorsements, brings with it a host of requirements and restrictions. For example, the owner of a registry-endorsed vessel must be a U.S. citizen.²⁹ A corporation owning a registry-endorsed vessel must meet several U.S. citizenship criteria to qualify for a registry endorsement.³⁰ Among other things, a U.S. registry endorsement requires that the vessel have American crew members and imposes severe restrictions on the subsequent resale or lease of the vessel to non-U.S. citizens or the registration of the vessel under a foreign flag.³¹

Many ship owners and operators, therefore, turn to countries such as Panama and Liberia for flags of convenience. These countries typically do not impose any citizenship requirements on the owners or crews of vessels flying their flags, and they generally do not restrict the use of foreign-owned or foreign-built vessels in their national waters.

Subject to any applicable trade embargoes, the United States generally allows foreign-flagged commercial vessels to enter its waters for purposes of foreign trade, so long as the flag-country’s documentation criteria, as well as any applicable U.S. safety, customs, or environmental requirements are met. A vessel registered under Panamanian law for foreign trade, for example, is permitted to enter U.S. waters for that purpose. For purposes of its commercial activities, the vessel is treated in the same way as a vessel with a U.S. registry endorsement.

The penalties for violating U.S. laws can be severe. If a foreign-built vessel is employed in U.S. coastwise trade, a use for which it cannot be documented under U.S. or foreign law, the owner is subject to a civil penalty of up to \$10,000 per day, and the vessel itself is subject to forfeiture to the U.S. government.³² The same penalties apply if the vessel owner

obtains a U.S. registry endorsement for the vessel but does not hire a U.S. citizen as its master.³³ And any person who later knowingly sells or chartered a U.S.-flagged vessel to a non-U.S. citizen faces possible imprisonment for up to five years.³⁴

Foreign vessels, therefore, must be navigated carefully around the hazards that U.S. laws pose for their use in U.S. waters and their documentation. Studios and producers can avoid any Jones Act issues by ensuring that any merchandise, including film equipment, is not discharged from the vessel at any place other than where it was loaded onto the vessel. Alternatively, goods may be moved from the vessel used in the film to another vessel when in waters beyond the three-mile territorial limit of the United States.

The prohibition against transporting passengers, including actors and film crews, in coastwise trade is more problematic. Studios and producers may be able to avoid this prohibition if they can qualify their cast and crew as part of the vessel’s crew and ensure that they participate in the operation or navigation of the vessel while in U.S. waters. Otherwise, they should only be allowed on board for voyages between a point in the United States and a point in foreign waters or a point beyond the territorial waters of the United States. During these voyages, filming is allowed, even while in U.S. waters, provided the vessel does not stop in U.S. waters. Filming is also permitted while the vessel is docked, anchored, or moored in U.S. waters.

With respect to the documentation of foreign vessels, a flag of convenience is probably the best option, because it permits the use of the vessel in U.S. waters in the same ways permitted by a U.S. registry endorsement but without the onerous restrictions that accompany U.S. documentation. It also allows the use of a foreign master and crew.

Finally, it also bears noting that the United States is not alone in imposing coastwise trade restrictions on foreign vessels. Many other countries have similar laws. ■

¹ Jones Act, 46 U.S.C. App. §883.

² Passenger Vessel Services Act, 46 U.S.C. App. §289.

³ HQ 116520 (U.S. Cust. Serv. Dep’t Treas. Nov. 3, 2005) (citing Treas. Dec. 78-440).

⁴ 46 U.S.C. App. §883.

⁵ 19 U.S.C. §1401(c).

⁶ See *United States v. California*, 381 U.S. 139, 1966 AMC 2789 (1965).

⁷ See, e.g., HQ 116520; HQ 113935 (U.S. Cust. Serv. Dep’t Treas. May 9, 1997); HQ 112982 (U.S. Cust. Serv. Dep’t Treas. Jan. 12, 1994).

⁸ 46 U.S.C. §12112(a)(2)(B)(i) & (ii).

⁹ See 46 U.S.C. App. §14; 46 U.S.C. §§12107 & 12112(a)(2)(B)(iii). See generally *Keystone Shipping Co. v. United States*, 729 F. Supp. 136, 1991 AMC 258 (D. D.C. 1992).

¹⁰ 46 U.S.C. App. §289.

¹¹ 19 C.F.R. §4.50(b).

¹² See, e.g., HQ 116520; HQ 113935 (U.S. Cust. Serv.

Dep't Treas. May 9, 1997) (citing T. D. 22275 (1900)); HQ 113483 (U.S. Cust. Serv. Dep't Treas. July 27, 1995) ("Points embraced within the coastwise laws include all points within the territorial and navigable waters of the United States.").

¹³ 46 U.S.C. §12121(b).

¹⁴ See 46 U.S.C. §§2101(35), 2101(42), 12121(b).

¹⁵ See 46 C.F.R. §67.3(c).

¹⁶ HQ 112982.

¹⁷ *Id.* See HQ 116520 (Film technicians are passengers under §289.); HQ 113935 (Cast and crew are passengers.).

¹⁸ HQ 112982. See HQ 116520 (Persons commanding and crewing vessel are not passengers for coastwise purposes.).

¹⁹ HQ 112982. See HQ 116520 (Film equipment is merchandise under 46 U.S.C. App. §883.).

²⁰ See, e.g., HQ 116520; HQ 113935; HQ 112982 (all citing 29 O.A.G. 318 (1912)).

²¹ See, e.g., HQ 113935.

²² *Id.*

²³ HQ 113483.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 46 C.F.R. §67.3(c).

²⁷ 46 U.S.C. §§12102, 12111-12114; 46 C.F.R. §§67.15-67.23.

²⁸ 46 U.S.C. App. §12102.

²⁹ 46 U.S.C. §12103(a)(1).

³⁰ See 46 U.S.C. §12103(a)(4); 46 C.F.R. §§67.5, 67.30, & 67.39.

³¹ See 46 U.S.C. §8103, App. §808(c).

³² 46 U.S.C. §12151.

³³ *Id.*

³⁴ 46 U.S.C. App. §808(c).

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