



Texas Ports and Courts Update

July 2021

We have collected and summarized these items to help keep you apprised of the latest news and developments from the ports and courts on the Texas coast.

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1. COVID-19 Update

General Statewide Conditions

Although Texas COVID-19 infections and hospitalizations remain at relatively low levels, state officials continue to keep a watchful eye and have noted an uptick in recent weeks. After reaching a statewide low of about 1,400 hospitalizations in late-June (statewide hospitalizations peaked at approximately 14,000 in January), state officials are reporting that, as of July 13, hospitalizations are approaching 2,300.

Vaccinations remain readily available for Texas residents, and eligibility has been extended to residents 12 years old or older. When we last reported in May, about 40% of the state's adult population had received at least one vaccination dose, and about 31% of adults were fully vaccinated. Those numbers have increased. As of July 13, state health officials report that almost 59% of the population 12 years old or older had received at least one dose, and nearly 51% were fully vaccinated.

Texas Port Conditions

The Ports of Brownsville, Corpus Christi, Freeport, Galveston, Houston, and Port Arthur/Beaumont continue to maintain normal operations. Shore leave remains generally permitted, and crew changes/repatriation requests are allowed on a case-by-case basis.

With respect to crew vaccination efforts, we note that the Houston International Seafarer's Center is working with Workplace Safety Screenings to provide onboard Johnson & Johnson vaccinations (the Johnson & Johnson single-dose protocol has been found to be the most suitable for seafarers). It has been noted that supplies are limited. Vaccines are only available on a first come, first serve basis, and they cannot be reserved. The vaccination team charges \$150 per hour (with a 3-hour minimum charge) to vaccinate the vessel's crew. Vaccine cards are issued upon completion. After the vaccinations are registered with the State of Texas, a certificate is also issued. Upon receipt of all

crewmembers' certificates, the certificates are typically emailed to the agent. The vaccine card and certificate should be kept together, as this will assist in showing proof of vaccination internationally.

The Corpus Christi International Seamen's Center, the International Seafarer Center in Brownsville, the Texas Port Ministry in Freeport, and the Port Arthur International Seafarers Center have also been engaged in crew vaccination efforts.

Texas Court Conditions

In-person court proceedings continue to become a more normal practice. Likewise, in-person depositions have increased considerably in recent weeks. We also note that courts are starting to set firmer deadlines and trial settings, and continuances are not as freely given as they were a few months ago.

2. Recent Port Activity and Development Projects

Below are some highlights of recent activities and expansion efforts at the Ports of Brownsville, Corpus Christi, Freeport, Galveston, Houston, and Port Arthur/Beaumont.

Brownsville: As we have reported previously, SpaceX is currently engaged in a project to convert two former Valaris offshore semi-submersible rigs to floating spaceports for its operations. The rigs were renamed Phobos and Deimos, the names of Mars' two moons. Work on refitting the rigs is ongoing in the Port of Brownsville near SpaceX's development facility in Boca Chica. Phobos and Deimos will be used to support the Starship project, a reusable, two-stage-to-orbit super heavy-lift launch vehicle consisting of a 160-foot spacecraft plus 230-foot booster (over 390 feet in total height). Elon Musk recently announced that Deimos is expected to be ready for a launch as early as next year.

Keppel Shipyard is building the first Jones Act jack-up wind turbine installation vessel (WTIV) to install wind turbines at Dominion Energy's wind farm off the coast of Virginia. The \$500 million, 472 feet x 184 feet WTIV will be one of the largest worldwide, with a main crane boom length of 426 feet and lifting capacity of 2,200 tons – enough to handle the next generation of 12-14 MW turbines standing over 800 feet tall. The WTIV will carry up to 119 persons when it goes into service by the end of 2023. The WTIV is planned for a long career servicing various U.S. projects.

Corpus Christi: Signet Maritime Corporation, the American Bureau of Shipping (ABS), Robert Allan Ltd., and the United States Coast Guard (USCG) have teamed up to design, build, and verify a commercial vessel using an end-to-end 3D design process – a first for a U.S. vessel. The vessel, an Advanced Rotortug (ART), will escort ships and offshore assets at the Port of Corpus Christi. 3D models will be used throughout the design/build process for all vessel structures. The 3D modeling process is expected to streamline interactions amongst stakeholders and reduce costs and time investment.

Expressing further confidence in the export market to Mexico, railroad operator Kansas City Southern (KCS) and Midstream Texas Operating LLC recently announced a long-term agreement to provide transloading services for petroleum and petrochemicals from Corpus Christi into Mexico. Midstream Texas Operating, a Houston-based petrochemical





storage and logistics company, will build the transload facility on property leased from KCS. The Corpus Christi site will include facilities for loading and staging 200 railcars per month in the initial phase. Operations are expected to begin in 4Q 2021 and could be expanded to handle more than 500 cars per month.

The Gulf Coast Growth Ventures project in nearby Portland is expected to go online at the end of this year. The \$7 billion project is a joint venture between Saudi Basic Industries Inc. (Sabic) and ExxonMobil Chemical Co. to build two production units for polyethylene resins, as well as a unit making monoethylene glycol feedstock and a massive ethane cracker with almost 4 billion pounds of annual capacity. The facility is currently 95% complete and has around 4,500 workers on site to finish the remaining construction activities. The facility is expected to employ 600 full-time personnel once it is operational.

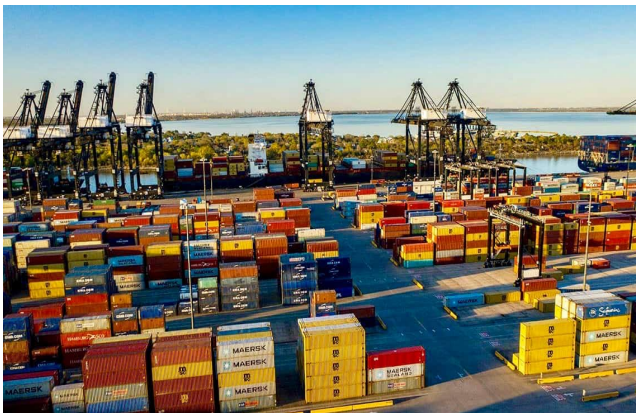


Freeport: Dow recently announced plans to build an integrated methylene diphenyl diisocyanate (MDI) distillation and prepolymers facility at its manufacturing site in Freeport, Texas. The facility will upgrade key polyurethane components in order to produce rigid, semi-rigid and flexible foams, as well as coatings, adhesives, sealants, elastomers, and composites for applications including furniture and bedding. When operational, the new facility will be capable of supplying an additional 30% of product to Dow's customers. Startup is expected in 2023. From an environmental standpoint, Dow noted that the new facility will reduce Dow's carbon footprint and water usage by: (1) eliminating the need for the generation of thermal power by utilizing existing thermal energy from the Freeport site; (2) reducing water intake and wastewater discharge, through production efficiencies; and (3) eliminating the need for transport of raw materials.



Galveston: After a 15-month absence, cruise travel returned to Galveston earlier this month. On July 3, the first Carnival vessel to resume U.S. operations (Carnival Vista) departed Galveston for a 7-day cruise. The vessel returned without incident on July 10. Carnival Breeze is scheduled to depart from Galveston on July 15, and Royal Caribbean's Independence of the Seas is set to resume Galveston operations on August 15.

The Port of Galveston is also improving its wind turbine cargo handling capabilities, recently adding a privately-operated 17-acre storage and transloading yard. In May, Galveston set a new wind-turbine cargo record, importing more than 500 pieces, including tower sections, blades, and nacelles (i.e., housing for the gear box, low- and high-speed shafts, generator, controller, and brake).



Houston: The Houston Pilots recently voted in favor of permitting slightly longer ships to transit the Houston Ship Channel without their prior approval. The vote eases a two-year-old Texas law that had come under federal scrutiny for potentially discriminating against the container shipping industry. A majority of the port's ~80 full-time pilots voted in favor of allowing vessels up to 1,120 feet in length to transit the channel without receiving a waiver from the pilots. Under a 2019 Texas law, the pilots had been granted the right to refuse transit to vessels over 1,100 feet in length unless 80% of the Houston Pilots' members granted a waiver that such vessels could move through the channel safely under conditions of two-way traffic. The length restriction stemmed from concerns that two large ships moving in opposite directions in the narrow channel would jeopardize vessel safety. Other restrictions on two vessels

of 2,030 feet in combined length moving in opposite directions and vessels over 310 feet in width remain in place.

Ethylene exports from the Navigator Gas-Enterprise Products joint venture terminal at Morgan's Point are expected to be at/near top capacity through the rest of 2021 after operational issues and fallout from Texas' February freeze hindered outflows. Plentiful U.S. supply of cheap ethane feedstock, coupled with overcapacity and an efficient ethylene market, have ensured product is placed to move, reopening arbitrage to Europe and Asia.

Navigator Gas and Marubeni Corporation also recently announced that they will achieve an environmental milestone with the world's first carbon neutral ethylene voyage. Navigator Gas and Marubeni will make this voyage carbon neutral through offsetting the carbon dioxide emissions from the voyage by investing in an environmental project in Cambodia designed to reduce emissions from deforestation and forest degradation. The carbon neutral ethylene voyage will be performed by the Navigator Triton, which departed from Houston on July 6 and is destined for Antwerp. Due to increasing customer requirements for low carbon and carbon neutral solutions, there is keen interest to further develop this service.



Port Arthur/Beaumont: A 1 million mt/year cracker in Port Arthur is currently progressing with its lengthy startup. The Baystar cracker, a joint venture of France's Total and Austria's Borealis, will supply the joint venture's 400,000 mt/year polyethylene plant near the mouth of the Houston Ship Channel, and an adjacent 625,000 mt/year polyethylene unit under construction with startup expected in Q1 2022. Production at the Port Arthur cracker is expected later in 3Q 2021. The U.S. now has ~40 million mt/year of ethylene capacity. 10.68 million mt/year (more than ¼) has been added since 2017. The new Baystar cracker is part of 8.3 million mt/year of additional ethylene capacity under construction or planned for 2021 and beyond.

3. News from the Courts

Some recent jurisdictional cases from Texas state courts and the Fifth Circuit, and a note regarding an upcoming U.S. Supreme Court case addressing the availability of U.S. discovery in relation to foreign commercial arbitrations

- *Alpine Ocean Seismic Survey, Inc. v. Moore*, No. 14-19-00499-CV (Tex. App.—Houston [14th Dist.] June 8, 2021)

Joseph Moore, a Louisiana resident, injured his back while working on the R/V Shearwater, a research vessel that was anchored off the coast of Maryland. All of Moore's medical treatment resulting from his injury aboard the vessel occurred in Maryland or Louisiana. Moore filed suit in Galveston County against the owner/operator of the R/V Shearwater, Alpine Ocean Seismic Survey, Inc. (Alpine) and Gardline Surveys, Inc. (Gardline Surveys), asserting general claims against both entities under the Jones Act.

Alpine filed a special appearance (i.e., Texas state court procedural jargon for what is essentially a motion to dismiss for lack of personal jurisdiction), asserting it was a nonresident of Texas and Texas courts could not exercise personal jurisdiction over it consistent with due process guarantees. The Galveston trial court denied Alpine's special appearance. Alpine filed an accelerated interlocutory appeal with the Fourteenth Court of Appeals in Houston.

Alpine had no obvious connections to Texas. Alpine's principal office is in New Jersey. Alpine does not maintain any offices or employees in Texas. The R/V Shearwater was not operated out of Texas or contracted to work in Texas. Although Gardline Marine Sciences, Inc. (Gardline Marine), a Delaware corporation, also owns a 75% interest in Alpine and an ownership interest in Gardline Surveys, Gardline Marine likewise does not maintain offices in Texas.

Despite the above, Moore nevertheless argued that Alpine had minimum contacts with Texas because it hired Texas employees through a recruiting agency and entered into contracts with and paid invoices to Texas entities, including a Texas-based audit and safety services company that audited the R/V Shearwater one month before the incident (while the vessel was in Maryland).

The Fourteenth Court of Appeals found that none of the contacts cited by Moore related to his injuries or the allegations in his suit. Regarding the hiring of the Texas-based company to audit and inspect the vessel in Maryland, the court found that the Texas-based company's location was merely a fortuity and not relevant to the jurisdictional calculus.

Finding Moore's jurisdictional evidence legally and factually insufficient to establish that Alpine purposefully established minimum contacts with Texas, the appellate court reversed the Galveston trial court's denial of Alpine's special appearance and dismissed Moore's claims against Alpine for want of personal jurisdiction.

The opinion may be accessed via the following link: <https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=98a4f905-d0b0-4165-98e7-1d00f53fe5ed&coa=coa14&DT=Opinion&MediaID=d0b57daa-6f63-4f88-b6a7-e2f2f55dcff1>

- ***Weeks Marine Co., LLC v. Landa*, No. 04-20-00499-CV (Tex. App.—San Antonio June 30, 2021)**

This Starr County lawsuit was brought by a well-known plaintiff's law firm that frequently files dredging personal injury suits in this plaintiff-friendly venue in the Rio Grande Valley of South Texas.

At the time of the subject incident, the plaintiff, David Landa, was employed on a crane barge performing dredging operations one mile off the coast of New York. Landa claimed that, as the work crew attempted to move dredge pipe, a large swell knocked him down causing him to get caught under a moving dredge line that dragged him across the barge, causing severe injuries.

Landa, a resident of Starr County, sued his employer, Weeks Marine, Inc. (Weeks), under the Jones Act and general maritime law for negligence and failure to provide the maintenance and cure owed to him as a seaman. He also made an unseaworthiness claim against Weeks as the owner of the vessel.

Weeks filed a special appearance, arguing that the Texas court lacked personal jurisdiction over it because (1) the case arose out of alleged injuries sustained by Landa as a result of an incident occurring in New York, and (2) Weeks is a foreign corporation organized under the laws of the State of New Jersey with its principal place of business and company headquarters in New Jersey.

The Starr County trial court denied Weeks' special appearance. Weeks filed an accelerated interlocutory appeal with the San Antonio Court of Appeals.

The appellate court noted the following jurisdictional facts. Weeks is headquartered in New Jersey. The subject dredging operation was performed one mile off the coast of New York. While Weeks has a regional office in Houston for its Construction Division, both Landa and Luis Mijares (a Texas resident and Weeks coworker that Landa blamed for the incident) worked for Weeks' separate Dredging Division located in Covington, Louisiana.

Although Landa argued that (1) Landa and Mijares were recruited from Texas, (2) Landa took a physical and drug test in Texas, (3) Landa was paid by direct deposit to his Texas bank account, (4) Landa once worked on a project in Galveston, and (5) Landa received medical care in Texas after the incident, the appellate court found that these contacts did not establish specific jurisdiction over Landa's claims.

Landa additionally claimed that Weeks failed to pay maintenance and cure to him in Texas and tried to base jurisdiction on breach of a contractual obligation to pay him in Texas. Nevertheless, the appellate court held that Landa's residence in Texas could not be the basis for Texas jurisdiction and that Weeks' contacts with Texas were not substantially connected to the operative facts of the maintenance and cure claim.

Finally, the appellate court rejected Landa's argument that there was general jurisdiction over Weeks in Texas, as merely doing business in Texas is not sufficient for Weeks to be "at home" in Texas for jurisdictional purposes.

Accordingly, the appellate court reversed the trial court's order denying Weeks' special appearance and dismissed Landa's claims for lack of personal jurisdiction.

The opinion may be accessed via the following link: <https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=cb2bf74c-8248-40bc-9836-071476a722bb&coa=coa04&DT=Opinion&MediaID=aabb6ffa-943d-4bbe-b23a-7d371a9e7c22>

- *Douglass v. Nippon Yusen Kabushiki Kaisha* (NYK Line) – The Fifth Circuit granted rehearing *en banc* to determine U.S. jurisdiction for death/injury claims against NYK Line arising from the 2017 collision between the U.S.S. Fitzgerald and NYK Line’s ACX Crystal off the coast of Japan

As we noted in our May update, the initial three-judge panel that affirmed the district court’s dismissal of the claims of the U.S. sailors and their families against NYK Line had expressed reservations regarding the Fifth Circuit jurisdictional precedent by which its decision was bound. Particularly, there were concerns regarding the application of Fifth Amendment due process for *in personam* jurisdiction in federal (admiralty) cases. The original three-judge panel further opined that this matter was appropriate for *en banc* review by all of the Fifth Circuit judges in order to evaluate the Fifth Circuit precedent at issue. A majority of the Fifth Circuit judges recently agreed, ordering that the matter will be reheard by the full panel of Fifth Circuit judges. The case is currently calendared for hearing in September.

The Fifth Circuit’s order granting the petition for rehearing *en banc* may be accessed via the following link: <https://www.ca5.uscourts.gov/opinions/pub/20/20-30382-CV1.pdf>

- *Servtronics, Inc. v. Rolls-Royce PLC* – Will the Supreme Court swing open the doors further allowing parties to foreign commercial arbitrations to seek U.S.-style discovery from the federal courts?

Set for the U.S. Supreme Court’s October 2021 term is the issue of whether 28 U.S.C. § 1782 permits parties to foreign arbitrations the right to use the U.S. federal court system to conduct U.S.-style discovery in aid of foreign arbitration proceedings. Section 1782 allows an applicant to petition a U.S. federal district court to order the disclosure of documents or compel a deposition “for use in a proceeding in a foreign or international tribunal.” This is obviously a useful device for parties to an arbitration in a jurisdiction that does not have the same liberal discovery procedures as those available in the U.S.

The point of contention with respect to Section 1782 is the fact that the statute does not define “foreign or international tribunal”, and this omission has created a split amongst the intermediate federal courts of appeal as to whether the statute applies to international commercial arbitration panels seated in jurisdictions outside the U.S.

Early on, the Second Circuit and Fifth Circuit found that Section 1782 does not extend to commercial arbitration panels seated abroad. However, about two years ago, the Sixth Circuit disagreed. Thereafter, the Fourth Circuit and Seventh Circuit – reviewing the same pertinent facts in *Servtronics* – came to opposite conclusions regarding Section 1782’s applicability.

The *Servtronics* case arises from a Boeing 787 engine fire that occurred during a ground test in South Carolina. The engine manufacturer, Rolls-Royce, settled with Boeing and then sought indemnity from Servtronics. Rolls-Royce claims that an engine valve manufactured by Servtronics was the cause of the fire. As required by the forum selection terms of the contract between Rolls-Royce and Servtronics, Rolls-Royce initiated London arbitration against Servtronics.

Thereafter, and in relation to the London arbitration proceedings, Servtronics filed a petition in South Carolina federal court seeking testimony from Boeing employees that resided in South Carolina. Servtronics filed a separate application for document discovery from Boeing in Illinois federal court.

The South Carolina district court denied Servtronics’ request for depositions. But its decision was overturned by the Fourth Circuit, which sided with the Sixth Circuit’s earlier opinion and found that the legislative history of Section 1782 supported a broader interpretation of the meaning of “foreign or international tribunal”, extending its application to arbitration panels seated outside the U.S.

On the other hand, the Illinois district court found that Section 1782 did not extend to the London arbitration, and, on appeal, the Seventh Circuit agreed. Not only finding that the plain language and statutory history of Section 1782 did not support such a broad application of its use, the Seventh Circuit also expressed reservations that a broad interpretation of Section 1782 would potentially conflict with the Federal Arbitration Act (FAA). The FAA only permits arbitration panels, not the parties themselves, to seek third-party discovery. Thus, the Seventh Circuit was concerned that a broad interpretation of Section 1782 would offer more expansive third-party discovery than what is even available to parties to U.S. arbitrations.

Given the above-described context and splits amongst the courts (and the fact that similar cases are currently proceeding through other federal appellate courts), it is not surprising that the Supreme Court accepted the case. Obviously, if the Supreme Court sides with the more liberal interpretation of Section 1782, we may see an increased number of Section 1782 applications, including those in relation to charterparty disputes and other maritime claims that are typically subject to contractual forum selection clauses mandating arbitration in foreign jurisdictions.

We will continue to keep an eye on further developments in relation to this case.

This update was collectively prepared by our offices in Houston, Galveston, Corpus Christi, and Brownsville. Our offices remain open and fully operational, and our lawyers and marine investigators are conveniently located near each of Texas’ major ports.

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