MAINBRACE

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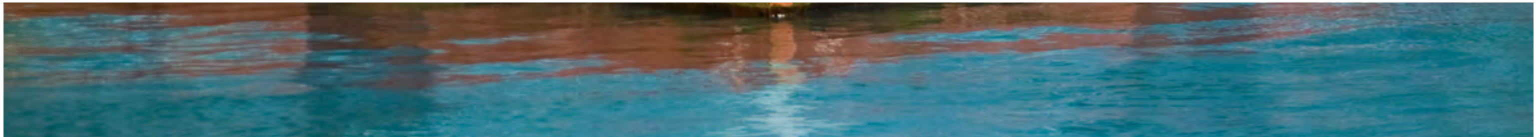

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Note from the Editor

BY THOMAS H. BELKNAP, JR.

It seems that every time I write one of these notes, it is against the backdrop of some new global upheaval—the latest, of course, being the war in Ukraine. I am of a certain generation whose memory of World War II was through our parents, but not so distant that we were not regularly exposed to people with first-hand experiences with the horrors of that war. How many times have we said *never again,* only to be proved wrong?

The world currently hangs between the terrible tragedy that has already unfolded and the terrifying unknown of just how much worse things could still get. And yet, through this all, I have been repeatedly inspired by our Ukrainian friends who have shown the world the true meaning of the term "soldier on," both in simultaneously defending their homeland and continuing to work and care for their families and friends. Their experience certainly puts our own "problems" in perspective.

Apart from the human tragedy, this war has imposed new complications and challenges on the global economy and, particularly, in shipping. As with the pandemic, the true impacts of this global disruption will be felt for months and years to come in ways we can only now imagine. And yet, as always, with great disruption comes great opportunity, and we have no doubt that our clients and friends are already hard at work looking for new ways to proactively harness this rapidly changing business environment. In today's age, it seems, rapid change ***is*** "business as usual."

In this issue of *Mainbrace,* we address the impact of the war on maritime commerce as well as some of the "business as usual" stories that are always relevant to players in the shipping field. We hope you enjoy these articles. As always, we welcome suggestions for topics for future issues of *Mainbrace.*

Peace to all.

EDITOR, *Mainbrace*

THOMAS H. BELKNAP, JR.
Partner
212.885.5270
tom.belknap@blankrome.com

The Russian-Ukrainian War's Impact on Maritime Commerce

BY KEITH B. LETOURNEAU

KEITH B. LETOURNEAU
PARTNER

Russia's unprovoked invasion of Ukraine has triggered significant reactions in the world of maritime commerce. In a matter of days since the beginning of Russia's main offensive, the price of bunker fuel used for vessel propulsion systems has skyrocketed as have tanker charter-hire rates and war-risk premiums for vessels transiting to or from regions impacted by the conflict, including the Baltic and Black Seas, which have been designated as "listed areas" by the insurance industry's War Risk Council. The Russian Navy has closed access to the Sea of Azov (the body of water guarded by the Crimean Peninsula that affords maritime access by Ukraine to the Black Sea, along with the port of Odessa farther to the east), and blocked the movement of numerous merchant ships therein and in the Black Sea, stranding their crews who are running low on provisions, and bringing to a halt the export of Ukrainian grain, which will severely impact the world's grain supply.

International Reaction

FINANCIAL INSTITUTIONS AND INVESTMENTS

The United States has imposed blocking sanctions on Russia's Central Bank and their two largest commercial banks, Sberbank and VTB, as well as other sanctions on Russian companies, including restricting Russia's largest maritime and freight shipping company, SovComFlot's, access to long-term debt, which could adversely affect its ability to construct 30 ships on order, which in turn may impact the contracted shipyards, and may indirectly affect the company's ability to charter its fleet of 140 vessels. The European Union has imposed similar sanctions on Russian banks and corporations.

The United States and the EU have also agreed to restrict SWIFT bank transfers from a number of Russian banks. In addition to other sanctions that mirror those implemented by the United States and EU, Canada has banned Russian-owned or registered vessels from entering Canadian waters. The United Kingdom has taken similar action. Remarkably, numerous major western companies are either cutting ties to Russia or halting business activity, which will further stifle the flow of investment capital to what soon may become the world's largest third-world country.

RUSSIAN VESSELS AND FUEL SUPPLIES

One Russian ship subject to the U.S. Treasury Department's Office of Foreign Asset Control ("OFAC") sanctions list has been seized by France, various superyachts owned by Russian oligarchs have been seized, and a number of vessels approaching Ukrainian waters have been struck by missiles, including the tanker *Millenial Spirit* and cargo ships *Yasa Jupiter, Namura Queen, Lord Nelson,* and *Banglar Samriddhi.* A sixth vessel, the *Helt,* was hit below the waterline and sank. International traders are proving more reluctant to charter Russian-owned or operated vessels for fear of downstream sanctions problems, or purchase Russian oil and fuel supplies, even though sanctions have not yet been imposed on Russia's exports of crude oil, gas, or coal (save for the U.S. import ban on these commodities). Vessel traffic bound for Russia has declined by more than 50 percent since the war started.

Numerous Russians also serve as merchant marine officers and their relationships with Ukrainian crewmembers will no doubt strain relations aboard ship on which both nationalities serve, especially when CBP permits Russian seafarers to repatriate through the United States.

Russian oil and tankers account for a sizeable volume of the world's capacity. Sidelining both, even if indirectly by reticence to purchase or charter, will have a major impact on oil prices and freight rates, driving both much higher. Should Russia default on its foreign debt, which seems increasingly likely, chartering such vessels may prove financially risky with the threat of arrest lurking behind preferred ship mortgages attendant to these tankers. As of this writing, sanctions against Russia's oil and gas industry remain in the offing, though political pressure has led the EU to commit to reducing its reliance on Russian gas by two-thirds by year's end. Ironically, the pipeline feeding that gas runs through Ukraine.

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MANNING MERCHANT VESSELS GLOBALLY

The war also impacts the manning of merchant vessels globally. There are numerous Ukrainians who serve as officers aboard ship. Whether the war will enable them to continue to do so is problematic because these seafarers may not be easily repatriated after their hitches end or paid in light of conditions in Ukraine. Here, the United States could serve as a safe haven given the Biden administration's decision to allow Ukrainian nationals lawfully in the United States to remain here for the next 18 months. Yet, U.S. Customs and Border Protection ("CBP") has implemented inconsistent policies across the nation, which incredibly in some ports detain Ukrainian crewmembers aboard ship, thus preventing them from entering the United States because of this repatriation issue. Numerous Russians also serve as merchant marine officers and their relationships with Ukrainian crewmembers will no doubt strain relations aboard ship on which both nationalities serve, especially when CBP permits Russian seafarers to repatriate through the United States. CBP's policies are out of kilter with the Biden administration's stated support of Ukraine.

Maritime Law Considerations

From a maritime law perspective, questions arise as to whether Russia's wanton war and its consequences may trigger a charter's *force-majeure* clause, which generally has the effect of suspending contract performance obligations that are disrupted by unforeseeable events beyond the control of the vessel's owner or charterer. For example, the ASBATANKVOY form provides that neither the vessel owner nor charterer is liable for any delay, loss or damage, or failure to perform "arising or resulting from: Act of God; act of war; perils of the seas; act of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people," among other events. Generally, to apply, the *force-majeure* language must directly apply to the vessel, owner, or charterer. While higher bunker prices in the market caused indirectly by Russia's invasion may make it more expensive to transport cargo, those prices arguably would not constitute a *force-majeure* event under the ASBATANKVOY clause above.

The same is true for higher war-risk premiums for cargo being shipped to the United States from the Baltic or Black Seas. Such premiums make the voyages less profitable, but do not prevent performance. For those vessels detained in Ukraine, while vessel owners may rely on the *force-majeure* clause to excuse their inability to perform, their charterers may face exposure to enormous demurrage or detention charges, which may not be covered by the governing *force-majeure* clause. Oftentimes, such charges are excluded from *force-majeure* coverage. Of course, it's necessary to review the specific *force-majeure* clause language in play to gauge how it applies in any given situation.

Like many charters, the ASBATANKVOY form also includes a war-risk clause that kicks in when a port is blockaded or hostilities there or in the vicinity make it too dangerous in the master's discretion to proceed to it safely and carry out cargo operations. In that event, the charterer, or—in the absence of the charterer's instructions—the vessel's master, may direct the vessel to an alternate port and discharge the cargo without violating the charter.

Reverberations across the Maritime Industry

The murder of innocents coupled with the prospect of broader sanctions have prompted numerous maritime companies to reconsider their charters with Russian vessel operators, the carriage of containers to Russia, and sales of Russian oil carried by sea. Should the United States or its NATO allies ultimately decide to sanction the Russian oil and gas industry, the impacts likely will be swiftly felt across the maritime industry in the form of even higher charter hire rates, in Europe in the form of energy shortages and possible recession, and globally in the form of even higher inflation—no doubt accelerating the financial implosion of the Russian economy that currently ranks on a par with the state of New York.

Maritime commerce has been buffeted by the pandemic's headwinds for the past two years. The industry now faces the reverberating shockwaves of Vladimir Putin unleashing a Pandora's Box of unintended consequences, including further exacerbation of global supply chain logistics. It will be some time before the winds die down. □ – 2022 BLANK ROME LLP

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Agreements to Arbitrate Seaman's Personal Injury Suits Are Valid and Enforceable

BY WILLIAM R. BENNETT III

WILLIAM R. BENNETT III
PARTNER

Advanced Wage Agreements offer to pay "advanced wages" to an injured seaman, in addition to the legal obligations to pay maintenance and cure, in exchange for the seaman agreeing to arbitrate his personal injury claim if and when he decides to seek redress for his injury. Advanced Wage Agreements define advanced wages as "compensation for wages that a seaman has lost as a consequence of his/her injury." The advanced wages are not a substitute for the federal law requirement to pay all reasonable medical expenses (*i.e.,* cure), or certain other expenses (*i.e.,* maintenance), while the seaman recovers from his injury.

Advanced Wage Agreements will include a Dispute Resolution Clause, which typically provides that: *"In addition to making the required Maintenance and Cure payments, the Company is prepared to make advances in unearned wages and company benefits against settlement, arbitration award, or judgment of any claim that could arise under the doctrine of unseaworthiness, the Jones Act, or any other applicable law provided that you agree to arbitrate these claims."* And: *"In consideration of the payment of unearned wages and company benefits as outlined herein, you agree to arbitrate all claims against the vessel and/or company under [pre-selected arbitral body]."*

Advanced Wage Agreements also will explicitly provide notice to the seaman that his employment with the company is not indefinite. The agreement may state that *"it is company policy to terminate the employment of any employee who misses two consecutive hitches or is out of work for 12 consecutive months."* Termination *"will not affect your right to Maintenance, Cure, Advanced Wages, and Employee Benefits, which will continue to be paid until you are declared Fit-for-Duty or reached Maximum Medical Improvement."*

The validity of an agreement to arbitrate a seaman's personal injury dispute finds support in the Federal Arbitration Act ("FAA"). The FAA provides that "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

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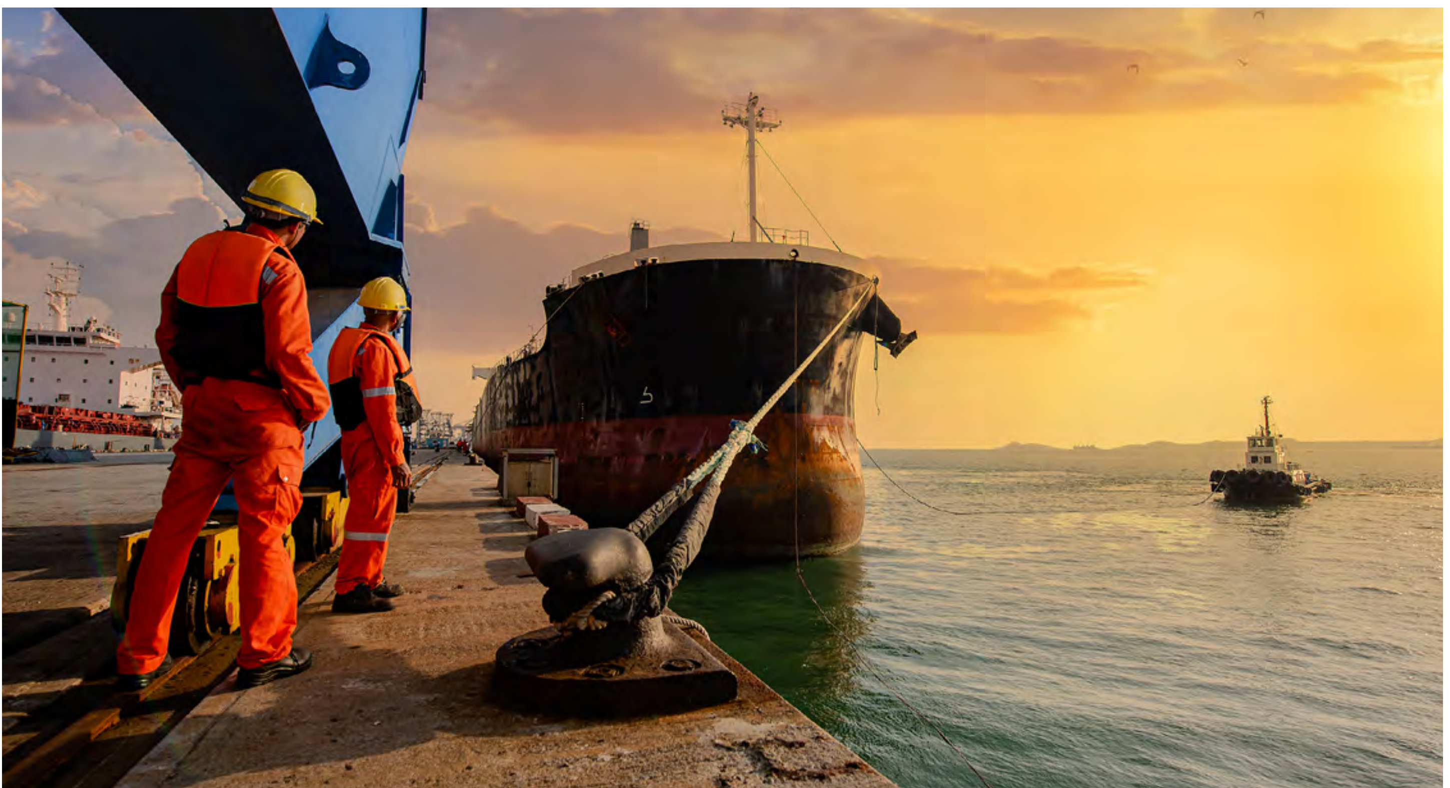

The mandatory language of the FAA reflects a strong, well-established, and widely recognized federal policy in favor of arbitration. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 25 (1991) (The FAA's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."); *Southland Corp. v. Keating,* 465 U.S. 1, 10 (1984) ("In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."). Under normal circumstances, therefore, "an arbitration provision with a contract admittedly signed by the contractual parties is sufficient to require the district court to send any controversies to arbitration." *Chastain v. Robinson-Humphrey Co., Inc.,* 957 F.2d 851, 854 (11th Cir. 1992).

Seaman have argued that the Advanced Wage Agreement qualifies as a seaman's employment contract and is thus void under the FAA.

Against this backdrop, arguments against the enforceability of the arbitration clause in an Advanced Wage Agreement face an uphill battle. Seaman have argued that the Advanced Wage Agreement qualifies as a seaman's employment contract and is thus void under the FAA. 9 U.S.C. § 1. Some may also argue that the Federal Employers' Liability Act ("FELA") prevents the enforcement of the arbitration clause. None of these arguments prevents enforcement of the arbitration clause.

Section 1 of the FAA provides that "nothing herein contained shall apply to *contracts of employment of seamen,…"* The phrase "contracts of employment of seamen" has been interpreted as not meaning any contract that has some connection or relation to a seaman's employment. And, courts have uniformly held that postincident agreements to pay a seaman advanced wages are non-employment agreements under the FAA. *See, e.g., Harrington v. Atlantic Sounding Co., Inc.,* 602 F.3d 113, 121 (2d Cir. 2010) (holding that a post-incident agreement to pay a seaman advanced wages in exchange for an agreement to arbitrate is not contract of employment as defined by the FAA); *Terrebonne v. K Sea Transp. Corp.,* 477 F.3d 271, 279 (5th Cir. 2007) (holding that the "maintenance and cure" provisions of an arbitration agreement, though "an intrinsic part of the employment *relationship,* [are] separate from the actual employment contract") (emphasis in original).

The United States Supreme Court held in *Boyd v. Grand Trunk Western Railroad,* 338 U.S. 263, 266 (1949) that Sections 5 and 6 of FELA voided any contractual provision that limits a plaintiff's choice of forum. The Jones Act incorporates by reference some provisions of FELA. In *Pure Oil,* the Fifth Circuit held that the venue provisions in FELA are not incorporated into the Jones Act. The argument that FELA's provisions limiting venue should be applied to Jones Act cases has been soundly rejected. *Terrebonne,* 477 F.3d at 282-83 ("Because, under our decision in *Pure Oil Co.,* the venue provisions of section 6 of the FELA are inapplicable to Jones Act cases, it necessarily follows that nothing in section 5 of the FELA is applicable to Jones Act venue. Hence, neither *Boyd* nor section 5 dictate the result here."); *Harrington,* 602 F.3d at 124 ("In concluding that FELA §§ 5-6 and *Boyd* are inapplicable to seamen arbitration agreements, we align ourselves with all of the courts that have considered the issue.").

Advanced Wage Agreements have been attacked on the grounds that the agreement 1) is product "fraud in the inducement" and "negligent misrepresentation," 2) suffers from "lack of consideration," and 3) "constitutes an improper seamen's release." In *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 444 (2006), the Supreme Court held:

> Challenges to the validity of arbitration agreements…can be divided into two types. One type challenges specifically the validity of the agreement to arbitrate. The other *challenges the contract as a whole,* either on a ground that directly affects the entire agreement (*e.g.,* the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.

Further, "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc.* at 445 (emphasis added); *see also Chastain v. Robinson-Humphrey Co., Inc.,* 957 F.2d 851, 854 (11th Cir. 1992) (arbitration provision within a contract admittedly signed by the contractual parties is sufficient to require the district court to send any controversies to arbitration).

Having been upheld by several courts, Advanced Wage Agreements containing arbitration clauses will, in all likelihood, become common usage in maritime personal injury matters. ▫ – 2022 BLANK ROME LLP

Chambers Global 2022 Ranks Blank Rome Attorneys and Shipping and Energy Practices

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- Notable expertise handling a wide range of issues, including casualties, charter party disputes, bankruptcy and environmental matters.
- Experience acting for a mix of owners, operators, charterers, financial institutions and shipyards.
- Additional strength advising on shipping issues as they intersect with environmental litigation."

Strengths: A market commentator reports: "Their commercial knowledge of the maritime industry is extremely deep."

All quotes and commentary are published as they appear in *Chambers Global 2022*. For more information, please click here.

U.S. DOJ and FMC Increase Focus on Antitrust Enforcement

BY WILLIAM E. LAWLER III AND KIERSTAN L. CARLSON

WILLIAM E. LAWLER III
PARTNER

KIERSTAN L. CARLSON
PARTNER

The Biden administration recently announced a renewed enforcement focus on consolidation and alliances in the maritime industry that may hinder competition and increase prices. While federal agencies historically have worked together to target anti-competitive conduct and shipping companies have been targeted in cases alleging cartel activity (*e.g.,* price fixing, market allocation, and bid rigging), companies should heed the recent warnings and must be vigilant in ensuring compliance with competition laws now more than ever.

Regulation of Competition within the Maritime Industry

The Federal Maritime Commission ("FMC") and the U.S. Department of Justice's ("DOJ") Antitrust Division (the "Division") share enforcement duties over the maritime transport market. The FMC monitors the effects of ocean carrier alliances on competition. Under U.S. law, international carriers enjoy a limited exception to some antitrust laws, as they are permitted to meet to discuss and agree on voluntary rate guidelines and can file agreements with the FMC establishing such guidelines. However, the FMC is not required to approve such agreements and can bring civil actions in court to enjoin any agreements likely to reduce competition such that it leads to unreasonable price increases or service reductions, or to substantially lessen competition in purchasing covered services. The FMC also has a Bureau of Enforcement, which investigates potential violations and can impose civil penalties or engage in formal proceedings.

> **In the United States, antitrust violations can result in high corporate criminal fines or imprisonment for individual executives and employees, including foreign nationals.**

The Division is responsible for enforcing antitrust laws beyond the scope of FMC's jurisdiction and has an array of tools to uncover anticompetitive conduct. It relies heavily on a leniency program to encourage self-reporting of antitrust violations,[1] but also uses investigative resources such as the grand jury, search warrants, and subpoenas, etc. By coordinating with local U.S. Attorney's Offices ("USAOs") throughout the country, the Division can file cases anywhere in the United States that unlawful conduct may have occurred. The Division also coordinates with other federal agencies and its international counterparts. Cooperation with international antitrust enforcers includes tactics such as coordinated searches or dawn raids, information and evidence sharing, and extradition agreements.

The Biden Administration's Renewed Focus on Antitrust Enforcement

Actions taken by the Biden administration in the last 6–8 months signal increased attention on ocean carriers' pricing practices.[2]

In July 2021, the Biden administration issued a broad Executive Order[3] aimed at protecting and enhancing competition across various industries. The order identified the transportation sector (air, ocean, and rail) as an industry likely to see heightened antitrust scrutiny. It also specifically encouraged the FMC to cooperate with the DOJ on enforcement efforts and emphasized the fees imposed upon U.S. exporters by foreign shipping conglomerates.

After the order was issued, the FMC and DOJ signed a Memorandum of Understanding ("MOU") to enhance collaboration and the review of shipping industry practices for potential anticompetitive conduct.[4] Shortly thereafter, the then-Acting Assistant Attorney General Richard Powers emphasized the Division's increasing criminal enforcement trends in a public address[5] and President Biden's appointment to lead the Division, Jonathan Kanter, a known advocate for vigorous antitrust enforcement, was confirmed by the U.S. Senate.

More recently, on February 28, 2022, the DOJ and FMC "reaffirmed" their commitment to enforcing antitrust laws and strengthening cooperation between the agencies.[6] U.S. Attorney General Merrick Garland and FMC Chairman Daniel Maffei announced two steps that the agencies would take to build upon their MOU:

- DOJ committed to providing attorneys and economists from the Division to assist the FMC in enforcing violations of the Shipping Act and FMC regulations; and
- FMC committed to providing the Division with support and industry expertise in civil and criminal antitrust investigations.

As part of this recommitment, Attorney General Garland stressed that "[c]ompetition in the maritime industry is integral to lower prices, improving quality of service, and strengthening supply chain resistance" and warned that "[l]awbreakers should know that [DOJ] will provide the [FMC] all necessary litigation support as it pursues its mission of promoting competition in ocean shipping."

Recent Enforcement Actions in the U.S. and Europe Serve as Cautionary Tales

In the United States, antitrust violations can result in high corporate criminal fines or imprisonment for individual executives and employees, including foreign nationals. Firms also can face enormous civil litigation exposure, as civil cases often are filed within days of a criminal investigation being announced. Plus, the same conduct that gives rise to an enforcement action in the United States may also be the subject of investigation abroad. Recent antitrust cases exemplify the exposure faced by shipping companies[7] that fail to comply with competition laws.

The most recent high-profile U.S. maritime antitrust case involved an investigation into a worldwide conspiracy amongst Ro-Ro carriers from as early as 2006 through 2012, which affected hundreds of millions of dollars in commerce.

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Between 2014 and 2018, the Division, together with the USAO in Baltimore, Maryland, filed several court cases against five carriers based in Japan, Norway, and Chile, and 13 individuals for price fixing, bid rigging, and allocation of customers and routes. The court ordered the carriers to pay a total of more than $255 million in criminal fines. To date, four individuals of those charged have pleaded guilty and been sentenced to prison terms ranging from 14 to 18 months plus a $20,000 fine.

The Division also pursued a price-fixing scheme between carriers engaged in the continental U.S.-Puerto Rico trade, which is not covered by the limited exception discussed above. The Division's investigation found that, over a period of about six years, domestic carriers conspired to allocate customers, rig bids, and fix rates and surcharges levied on freight transportation. As a result, between 2008 and 2013, several companies received fines ranging from $14–17 million *each,* and executives received prison sentences ranging from 7–60 months plus fines of $20,000 each.

The deep-sea container shipping industry also was the subject of an investigation by both the Division and the European Commission. In 2017, the Division raided the biannual "Box Club" meeting in 2017, serving subpoenas on CEOs of the major lines concerning potential price fixing. According to several carriers, the investigation concluded in 2019 without any charges or fines. This followed an earlier investigation by the European Commission's Directorate-General for Competition ("DG Comp"), which opened formal proceedings in 2013 against several container shipping companies relating to their practice of publicly announcing intended price increases. DG Comp's theory was that this practice allowed companies to exchange information on future pricing intentions. In 2016, the Commission accepted, and made legally binding, commitments by the companies to alter their pricing announcements to ensure transparency to customers and avoid competition concerns.

What Shipping Companies Can Do to Reduce Risk

In the current antitrust enforcement climate, ocean carriers can expect increased scrutiny on shipping rates, fees, and surcharges, as well as on any action or conduct that reduces competition among carriers. Given this, as well as the cooperation between the Division and FMC and between the Division and its international counterparts, shipping companies must ensure compliance with the antitrust regimes of multiple jurisdictions.

It is therefore imperative that companies implement a robust, effective antitrust compliance program to educate both executives and employees about common antitrust traps and risky competitor interactions. Companies are strongly encouraged to consult with experienced antitrust counsel before pursuing any strategy or course of action that could raise a red flag, as well as if there is any sign that an investigation could be underway. ◻ – 2022 BLANK ROME LLP

This article is updated and abridged from its original publication in Marine Link (January 24, 2022). Reprinted with permission.

1. *See generally* Leniency Program (U.S. Department of Justice).
2. In addition to executive action by the administration, the U.S. Congress also is focused on antitrust and supply chain issues within the industry. Earlier this year, a representative from California introduced a bill (H.R. 6864) entitled, "Ocean Shipping Antitrust Enforcement Act," which would, among other things, remove certain antitrust exemptions enjoyed by foreign carriers. And, on March 2, 2022, the Select Subcommittee on the Coronavirus Crisis, and the Subcommittee on Economic and Consumer Policy of the House Oversight Committee, sent letters to three large ocean freight carriers—A.P. Møller Maersk, CMA CGM, and Hapag-Lloyd AG—requesting information about shipping contain price increases and other fees and surcharges. Additional proceedings relating to these requests are expected later this year.
3. *See* Executive Order on Promoting Competition in the American Economy (The White House).
4. The MOU is available at Justice Department and Federal Maritime Commission Sign Memorandum of Understanding to Support Interagency Collaboration.
5. *See* Acting Assistant Attorney General Richard A. Powers Delivers Remarks at the Symposium on Corporate Enforcement and Individual Accountability Hosted by the University of Southern California Gould School of Law (July 21, 2021) (noting that, the Division had "17 indicted cases across 14 different investigations, against 9 companies and 31 individuals—the largest number in the modern era of antitrust enforcement," which "includes pending charges against eight current or former CEOs or company presidents, demonstrating [the Division's] ongoing commitment to individual accountability at the highest levels").
6. *See* DOJ and FMC press releases at Justice Department and Federal Maritime Commission Reaffirm and Strengthen Partnership to Promote Fair Competition in the Shipping Industry and Justice Department and Federal Maritime Commission Reaffirm and Strengthen Partnership to Promote Fair Competition in the Shipping Industry, respectively.
7. Freight forwarding services also have been subject to antitrust investigations. The Division investigated and charged a nationwide conspiracy to fix prices for international ocean freight forwarding services during 2010–2015, resulting in guilty pleas in 2018 and 2019.

We invite our readers to dive into our archive
of *Mainbrace* newsletters and maritime development advisories, as well as keep abeam with all of our current and upcoming analyses on trending maritime topics and legislation, in our ***Safe Passage*** blog.

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Developing Issues with Maritime Autonomous Surface Ships

BY ALAN M. WEIGEL

ALAN M. WEIGEL
OF COUNSEL

The development of large autonomous merchant vessels, also known as Maritime Autonomous Surface Ships ("MASS"), has progressed at a significant pace with new vessels entering operation every year. Almost every maritime nation is engaged in developing autonomous vessel technologies, and several countries have designated parts of their national waters as test sites for MASS.

In Norway, the *Yara Birkeland* recently began a two-year testing period of the technology that will certify the vessel as an autonomous, all-electric container ship. In Japan, the first tests of the fully autonomous container ships *Mikage* and *Suzaku* took place recently in coastal waters of the Sea of Japan and Tokyo Bay. The unmanned ships transited between ports using a system of radar and lidar sensors, cameras, and a satellite compass to navigate and pulled themselves into berths at the end of their journeys.

Industry Initiatives

Despite the rapid pace of MASS development, there are currently no universally agreed upon standards governing their design, manufacture, or operations. To begin to remedy the regulatory gaps, there are several industry initiatives working toward providing owners and operators of autonomous vessels with guidance on how to integrate MASS operations into the existing regime of international and domestic regulations.

Lloyd's Register has published a code for Unmanned Marine Systems ("UMS") for use in certifying the safe design, build, and maintenance of UMS against an established framework that is acceptable to flag states and local regulators.

The International Maritime Organization ("IMO") has approved interim guidelines for MASS trials that provide, among other things, that coastal and/or port states should ensure that MASS trials that they authorize are conducted in a manner that provides at least the same degree of safety, security, and protection of the environment as provided by the relevant IMO regulatory instruments. The IMO guidelines recommend that risks associated with the trials are appropriately identified and measures are put in place to reduce the risks to as low as reasonably practicable and acceptable, including that onboard or remote operators of MASS are appropriately qualified and experienced to safely conduct MASS trials.

The U.S. Coast Guard's Navigation Safety Advisory Council ("NAVSAC"), UK Maritime, and the European Safety and Regulations for Unmanned Maritime Systems ("SARUMS") Group have all published voluntary best practices to provide an initial set of standards, guidance, and information to owners and operators for the safe design, manufacture, testing, operation, and maintenance of autonomous vessels.

IMO's Regulatory Scoping Exercise on MASS

To address the challenges posed by unmanned ships, the IMO has embarked on a multi-year study of the regulatory scheme for MASS, a so-called "regulatory scoping exercise," which is analyzing current IMO conventions with the goal of recommending amendments to clarify the legal rights and obligations of MASS. For purposes of the scoping exercise, the IMO has defined a MASS as "a ship which, to a varying degree, can operate independent of human interaction." The IMO acknowledges that "the use of MASS creates the need for a regulatory framework for such ships and their interaction and co-existence with manned ships [and]…the need to amend the regulatory framework to enable the safe, secure and environmentally sustainable operation of MASS within the existing IMO instruments."

IMO's Maritime Safety Committee ("MSC"), Legal Committee ("LEG"), and Facilitation Committee have included the regulatory scoping exercise on their agendas, for treaties and conventions coming under the purview of the respective committees, to determine how the safe, secure, and environmentally sound operation of MASS may be introduced in IMO instruments.

The exercise involved assessing a substantial number of IMO instruments under the committees' remit and identifying provisions that applied to MASS and prevented MASS operations; or applied to MASS and do not prevent MASS operations and require no actions; or applied to MASS and do not prevent MASS operations, but may need to be amended or clarified,

and/or may contain gaps. Varying degrees of autonomy were considered: crewed ship with automated processes and decision support (Degree One); remotely controlled ship with and without seafarers on board (Degrees Two and Three); and fully autonomous ship (Degree Four).

Some of the instruments included in the MSC's scoping exercise for MASS are those covering safety and maritime security ("SOLAS"); collision regulations ("COLREG"); training of seafarers ("STCW"); and search and rescue ("SAR"). Some of the instruments included in the LEG's scoping exercise for MASS are those covering civil liability for oil pollution ("CLC" and "BUNKERS"); civil liability for the maritime carriage of nuclear material ("NUCLEAR"); limitation of liability for maritime claims ("LLMC 1976"); suppression of unlawful acts against the safety of navigation ("SUA"); and salvage and wreck removal ("SALVAGE," "NAIROBI WRC"). The process analyzed and considered the most appropriate way of addressing MASS operations, taking into account the human element, by developing treaty interpretations; and/or amending existing instruments; and/or developing new instruments.

> **For MASS to become commercially viable alternatives to traditional means of maritime transportation, they will have to embark on international voyages outside of the tightly controlled national waters where they are currently being trialed.**

The regulatory scoping exercise for safety treaties was finalized in May 2021 and published as IMO Circular MSC.1/Cir. 1640, "Outcome of the Regulatory Scoping Exercise for the use of Maritime Autonomous Surface Ships (MASS)." The scoping exercise for treaties under the purview of LEG was completed in July 2021, with publication of the final results pending.

In general, LEG concluded that MASS could be accommodated within the existing regulatory framework of conventions within the committee's purview without the need for major adjustments or a new instrument. LEG also concluded that while some conventions can accommodate MASS as drafted, others may require additional interpretations or amendments to address potential gaps and themes that were revealed through the scoping exercise.

On the other hand, the MSC concluded that the best way forward to address MASS in the IMO regulatory framework was through the development of a goal-based MASS instrument. The committee proposed that such an instrument could take the form of a "MASS Code," with goal(s), functional requirements, and corresponding regulations, suitable for all four degrees of autonomy, and addressing the various gaps and themes identified by the scoping exercise. The MSC agreed to a target completion year of 2025 to develop the goal-based instrument for MASS.

Moving Forward

Both scoping exercises identified various gaps in IMO instruments that would need to be addressed to support regulatory compliance for MASS development and operations. Both the safety and legal committees highlighted similar high-priority issues, cutting across several instruments, that would need to be addressed at a policy level. These include the development of internationally recognized MASS terminology and definitions, and clarifying the meaning of the term "master," "crew," and "responsible person," particularly in Degrees Three (remotely controlled ship) and Four (fully autonomous ship). Other high priority issues include the role and responsibility of the master; the role and responsibility of the remote operator; addressing the functional and operational requirements of the remote-control station; the possible designation of a remote operator as seafarer; questions of liability; and regulatory certificates.

MASS place unique demands on those who own and operate them and the remainder of the maritime community who must interact with them. For MASS to become commercially viable alternatives to traditional means of maritime transportation, they will have to embark on international voyages outside of the tightly controlled national waters where they are currently being trialed. Before they can do so, however, the maritime community will have to agree on how they will be regulated. The IMO scoping exercises represent the necessary first step to ensuring that regulations keep pace with technological developments. ◻ – 2022 BLANK ROME LLP

Carriage of Cargo on Deck: Carriers Be Aware

BY NOE S. HAMRA

NOE S. HAMRA
ASSOCIATE

Carriage of cargo on deck has always been problematic for vessel owners and operators. In addition to the typical risks associated with carrying cargo on deck, such as exposure to the elements and lashing and stability issues, carriers are also exposed to uncertainties regarding their potential liability for damages to such cargo. In fact, many carriers believe that cargo carried on deck is carried at the shipper's risk and that the carrier is not liable for damage to deck cargo, as long as cargo owners agreed to on deck carriage and the bill of lading states this on the front.

Complicating Legal Factors

A complicating factor is that neither the Hague Rules nor the United States Carriage of Goods by Sea Act (hereinafter referred to as "COGSA" or the "Statute") apply to deck cargo. As for the latter, COGSA expressly defines "goods" as to exclude "cargo which by the contract of carriage is stated as being carried on deck and is so carried."

While in practice many bills of lading extend the application of COGSA to deck cargo by including what it is known as a "paramount clause," sometimes the language used in the bill of lading is insufficient to effectively incorporate the Statute. In fact, courts in the United States have consistently held that, to incorporate COGSA, the contract of carriage must employ sufficiently express language. This requirement, however, is frequently overlooked. For example, in *Atwood Oceanics, Inc. v. M/V PAC Altair,*[1] the bill of lading did not expressly state that COGSA applied to deck carriage, prompting the district court to grant the cargo claimant's motion for partial summary judgment and ruling that COGSA and its $500-per-package limitation of liability did not apply.

In addition to the unintentional failure by some carriers to incorporate COGSA, the exclusion of deck cargo from the Statute has led them to conclude that there is total freedom of contract with respect to allocating the risk of damage to deck cargo being carried under a bill of lading. As a result, carriers often include very broad "shipper's risk" clauses to avoid liability for damage to cargo carried on deck no matter how such damage may have been caused or whether the carrier was at fault.

However, the enforceability of the "shipper's risk" clauses in the absence of a specified applicable legal regime has not been fully addressed by courts in the United States. Therefore, instead of attempting to fully eliminate liability for damage to cargo carried on deck, carriers should consider making COGSA applicable to such carriage. The application of COGSA to cargo carried on deck will provide carriers with valuable defenses, such as the $500 package limitation, the one-year statute of limitations, and the error in navigation and management defense, which may otherwise be unavailable to carriers.

The Harter Act and COGSA

There are two main legal regimes in the United Stated regulating contracts of carriage to/from ports in the United States: the Harter Act and COGSA.

The Harter Act was enacted in 1893 and applies to the carriage of goods to or from any port in the United States. While the Harter Act excludes from its coverage the carriage

of "live animals," it is nonetheless silent about deck cargo. The Act further states: "Any and all words or clauses of such import [*i.e.,* relieving carriers for liability for their own negligence] inserted in bills of lading or shipping receipts shall be null and void and of no effect." Further it prohibits clauses relieving the carrier from liability for its failure to exercise due diligence to provide a seaworthy ship.

Similarly, COGSA was enacted in 1936 and applies statutorily to all contracts of carriage of goods by sea to or from ports of the United States in foreign trade, during the period from the time when the goods are loaded on to the time when they are discharged from the ship. This is commonly referred to as the "tackle-to-tackle" period of the voyage. Additionally, COGSA only applies to contracts of carriage covered by a bill of lading or any similar document of title, and, by its terms, is not applicable to on deck or private carriage. Furthermore, COGSA supersedes the Harter Act with respect to the "tackle-to-tackle" period for international shipments.

While in practice many bills of lading extend the application of COGSA to deck cargo by including what it is known as a "paramount clause," sometimes the language used in the bill of lading is insufficient to effectively incorporate the Statute.

THE ROLE OF THE U.S. COURTS

Although U.S. courts recognize that COGSA sharply curtailed the applicability of the Harter Act, the Harter Act may still govern during periods outside of COGSA's express ambit, unless COGSA is extended contractually. In fact, some courts in the United States have held that the provisions of the Harter Act, in making no distinction between on deck and under deck cargo, apply to cargo carried on deck.

For example, in *Saudi Pearl Insurance Co. v. M.V. Aditya Khanti,*[2] the court had to interpret the meaning of the following clause stamped on the face of the bill of lading: "LOADED ON DECK AT SHIPPERS RISK." *Saudi Pearl* involved the carriage of creosote poles on deck, some of which went overboard during the voyage. The court found that such a clause is null and void under the Harter Act "to the extent that it purports to exculpate a carrier from negligence or lessen its duty of care with regard to the cargo," but was "valid to shift the risk of the loss to the shipper in other circumstances." The court concluded that "[p]rovided a carrier is able to show proper stowage of the cargo, a 'shippers risk' clause places on the shipper 'the customary and predictable risks of deck carriage.'" Such risks are "the risk of cargo damage by the elements" and the "usual expected hazards to an on-deck shipment." In sum, *Saudi Pearl* shows that any case involving damage to deck cargo under a "shipper's risk" clause will involve a fact-intensive inquiry and will further require evidence as to the stowage of the cargo and the weather throughout the voyage, as well as navigational matters.

The fact that COGSA does not by its terms apply to deck cargo, should not discourage carriers from including a clause in the bill of lading making COGSA applicable to cargo carried on deck. In fact, courts in the United States have held that a clause making COGSA applicable to on-deck carriage does not violate the Harter Act and will be enforced. If the carrier contractually incorporates COGSA, it will have the benefit of the Statute's defenses and limitation of liability, such as the one-year statute of limitation, the error in navigation defense, and the $500-per-package limitation. In particular, U.S. courts have consistently applied COGSA's $500-per-package limitation in numerous cases involving yachts, project cargo, and other large pieces of machinery carried on deck. The application of COGSA to deck cargo should simplify any dispute between carriers and cargo owners, as well as streamline the cargo claim process.

Final Analysis and Recommendations

Therefore, when an "on-deck" bill of lading is used for the carriage of cargo to or from the United States, carriers should consider inserting express language on the face of the bill of lading leaving no doubt regarding the parties' intent for COGSA to apply to such cargo. For example, carriers could state: "CARRIED ON DECK. Risk of loss or damage inherent to on deck carriage is borne by the shipper/consignee but in all other respects risk of loss or damage is governed by the provisions of the Carriage of Goods by Sea Act of the United States, 1936 ("COGSA") (notwithstanding Section 1(c) of COGSA) and, to the extent not inconsistent with such provisions of COGSA, by the terms of this bill of lading." Reference to COGSA's $500-per-package limitation is also recommended.

This article concerns carriage of deck cargo to and from ports in the United States under bills of lading in trades other than the container trade. Issues regarding "custom of the trade" arise with respect to the container trade, which are outside the scope of this article. Additionally, parties remain free to allocate risk as they wish in charter parties. ◻ – 2022 BLANK ROME LLP

1. 2016 AMC 1993, 2002, 2004 (S.D. Ala. 2016).
2. *Saudi Pearl Insurance Co. v. M.V. Aditya Khanti,* No. 95-cv-2174 (JFK), 1997 WL 291834 (S.D.N.Y. June 2, 1997).

EPA Ramps-Up VGP Inspections and Enforcement

BY JEANNE M. GRASSO AND KIERSTAN L. CARLSON

JEANNE M. GRASSO
PARTNER

KIERSTAN L. CARLSON
PARTNER

We are just over one year into the Biden administration and environmental enforcement is on the rise. Although enforcement dropped dramatically under the Trump administration, the current administration has been clear about its intent to use environmental enforcement tools to "encourage and incentivize compliance by private sector entities," quoting Assistant Attorney General Todd Kim, head of the Environment and Natural Resources Division of the Department of Justice. This focus has borne out in several ways, including what seems to be an increase in inspections and enforcement of the U.S. Environmental Protection Agency's ("EPA") Vessel General Permit ("VGP") in several EPA regions around the country. The risk of getting caught in the EPA's crosshairs for a VGP violation is real and should be front-of-mind for companies across the shipping sector.

Relevant to all vessel owners and operators, the EPA appears to be focusing on the failures to comply with routine and comprehensive annual inspection requirements, as well as the failure to file NOIs.

History of the VGP and Implementation of the Vessel Incidental Discharge Act

The VGP originated from a lawsuit challenging the EPA's exemption of discharges "incidental to the normal operation of a vessel" from permitting requirements under the Clean Water Act's ("CWA") National Pollutant Discharge Elimination System ("NPDES"), an exemption that had been in place for about 30 years. In 2005, a federal court found that the EPA's vessel exemption was illegal and required the agency to develop a permitting program for incidental discharges. From there the VGP was born.

The EPA issued the first version of the VGP in 2008, then another, more stringent version in 2013. The VGP provides NPDES permit coverage nationwide for discharges incidental to the normal operation of commercial vessels more than 79 feet in length, including establishing effluent limits and articulating Best Management Practices to control certain types of discharges. The VGP also requires vessels to carry out routine and annual inspections and imposes numerous recordkeeping obligations. To be covered under the VGP, vessel owners/operators must complete and submit to the EPA a Notice of Intent ("NOI") or, for smaller vessels, complete a Permit Authorization and Record of Inspection ("PARI") form and retain it on board. Without an NOI or PARI, discharges otherwise allowed under the permit are prohibited.

In December 2018, the Vessel Incidental Discharge Act ("VIDA") was signed into law, intended to replace the VGP and bring uniformity, consistency, and certainty to the regulation of incidental discharges from U.S.-flag and foreign-flag vessels alike. VIDA amended the CWA and will alter how the EPA and the U.S. Coast Guard ("USCG") regulate vessel discharges. It required the EPA to finalize uniform performance standards for each type of incidental discharge within two years, a deadline that the EPA has missed by more than 16 months already. Once those standards are finalized, VIDA requires the USCG to promulgate regulations implementing the EPA's standards, including equipment, compliance, monitoring, inspections, and enforcement within two years.

Although VIDA was passed over three years ago, it is far from being implemented. Therefore, pursuant to VIDA, the 2013 VGP requirements remain in place—and will continue to be in place for the foreseeable future.

VGP Enforcement History

Until recently, the EPA had brought only a handful of enforcement actions for VGP violations. The penalties for these violations ranged from letters of warning to *de minimis* monetary penalties for minor violations, to fines between $20,000 and about $40,000 for more serious violations.

Examples of historic VGP enforcement actions through 2019 include a $1,500 fine for discharging without a permit and a $6,600 fine for failure to conduct required inspections on the low end, and a $38,397 fine for failure to submit NOIs or PARIs on the high end. The EPA also assessed penalties between $20,000 and $25,000 for discharges of swimming pool water and discharges exceeding water quality limits for mercury. In one case, the EPA assessed a fine of $37,000 and required the company to develop standard operating procedures and

training materials where it found excessive underwater ship husbandry discharges. Notably, at least some of these violations were self-reported.

Recent Increase in Inspections and Enforcement

Over the past two years, the EPA has seemingly increased the frequency with which it reviews vessel records and conducts vessel inspections. It has also begun to use its ability to issue Section 308 information requests under the Clean Water Act as an investigative tool to look into potential VGP violations. These efforts seem concentrated in EPA Regions VI, IX, and X, which all brought fairly significant enforcement actions in 2020–2021.

Section 308 of the CWA gives the EPA broad authority to request a host of corporate and vessel records, which may be used in an investigation or enforcement action. In some cases, the EPA has issued requests after self-disclosures in VGP Annual Reports or after it discovers potential non-compliances during a vessel inspection, seeking to find proof of a violation or additional violations beyond what it already has discovered. In particular, we are aware of companies that have received record requests relating to inconsistencies that the EPA discovered between VGP Annual Reports and other records, such as National Ballast Information Clearinghouse filings.

Relevant to all vessel owners and operators, the EPA appears to be focusing on the failures to comply with routine and comprehensive annual inspection requirements, as well as the failure to file NOIs. It is also important that companies file Notices of Termination if their vessels no longer operate in VGP waters, as failure to do so means that the vessel and company are still subject to the VGP, including the requirement to file Annual Reports.

The EPA also is closely evaluating several aspects of compliance for vessels using ballast water management systems (“BWMS”). The EPA is particularly focused on failures to sample biological indicators and biocide residuals, to calibrate various BWMS components, and to report functionality monitoring data.

Two cases from November 2021 exemplify the EPA’s upward enforcement trend. On November 15, 2021, the EPA announced that it had assessed penalties totaling $81,474 for violations discovered on two ships during EPA and USCG on-site visual inspections. The EPA fined the owner of a container ship $66,474 for the vessel’s failure to conduct routine visual inspections for 2016 through 2021, as well as for failing to submit Annual Reports for several years. The EPA also assessed a $15,000 penalty against a bulk carrier for violations relating to failures to report functionality monitoring data, to conduct an annual calibration of its BWMS, and to conduct biological monitoring. In addition to these two cases that have been resolved, we are aware of several others that are still pending.

Underscoring the need for heightened attention from shipping companies, the press release for these cases quoted an EPA official emphasizing that, “Vessels that do not comply with their CWA permits can have significant environmental impacts to our waterways, including the introduction of invasive species…Failure to comply with the Vessel General Permit requirements can result in significant penalties.” The EPA also has informally signaled that this enforcement aggressiveness is “just the beginning.” Consistent with this increased focus on the VGP, the EPA also recently brought an enforcement action for violations of another general CWA permit for offshore rigs operating in the Gulf of Mexico.

Recommendations

The EPA’s aggressive enforcement posture amid the delayed implementation of VIDA signals increased risks for shipping companies. Those risks include the possibility of penalties for VGP violations, as well as substantial costs required to comply with a Section 308 information request and increased exposure generally due to a higher level of scrutiny.

As a result, companies should promptly review their VGP compliance programs and address any vulnerabilities that may exist. This evaluation should include an assessment of whether the current policies and procedures comply with VGP requirements and verification that vessels are conducting routine and annual inspections as well as completing required monitoring and sampling, particularly in connection with BWMSs. Compliance programs should be practical and easy for crewmembers to follow, require robust internal auditing, and contain procedures for and training on internally reporting non-compliances.

Should you become aware of a violation, it is imperative to act immediately to determine what happened and take appropriate corrective actions. This may include conferring with counsel to determine the best path forward, which may involve conducting an internal investigation, filing amended Annual Reports, and disclosing previously unreported non-compliances. ◻

– 2022 BLANK ROME LLP

Blank Rome Earns Perfect Score in 2022 Corporate Equality Index

Firm Receives 100 Percent for the Seventh Year in a Row on Human Rights Campaign Foundation's Annual Scorecard on LGBTQ+ Workplace Equality.

Blank Rome LLP is proud to announce that our firm has received a perfect score of 100 percent on the 2022 Corporate Equality Index ("CEI"), the nation's foremost benchmarking survey and report measuring corporate policies and practices related to LGBTQ+ workplace equality, administered by the Human Rights Campaign ("HRC") Foundation. With this score, Blank Rome has been designated for the seventh year in a row as a "Best Place to Work for LGBTQ+ Equality" by the HRC, and joins the ranks of major U.S. businesses that also earned top marks this year.

"Our firm's dedication and ongoing commitment to advancing diversity and inclusion ("D&I") in our workplace, throughout the legal industry, and in our local communities is at the forefront of our longstanding mission to cultivate progressive D&I initiatives in the places in which we both live and work," said Grant S. Palmer, Managing Partner and CEO at Blank Rome. "We are honored to continue receiving this important recognition by the Human Rights Campaign and look forward to raising the bar for generations to come."

"Through our Diversity and Inclusion Committee and dedicated affinity groups here at Blank Rome—BR Pride, BR United, BR Women, and BR Parents—we are engaged on a daily basis in advancing D&I in the legal industry and beyond," said Krystal Studavent Ramsey, Blank Rome's Director of Diversity and Inclusion. "We are committed to championing the rights for all people, including the LGBTQ+ community, and fostering inclusive professional and personal environments where everyone can safely and openly bring their best selves forward. We will continue to identify, develop, and implement programs, policies, and initiatives that will accelerate positive and sustainable change."

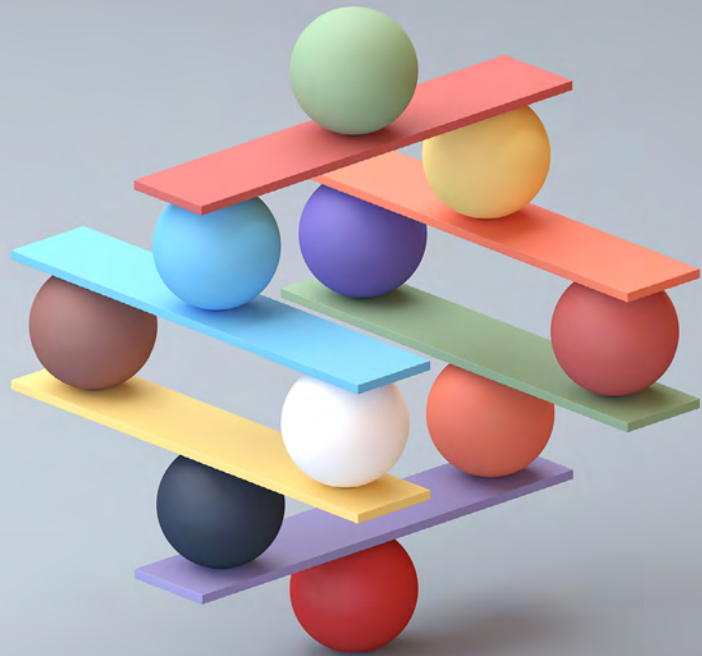
"We are proud of Blank Rome's longstanding history of supporting diverse communities and individuals, and of cultivating an atmosphere of meaningful inclusion that supports our LGBTQ+ community," added Brett Snyder, Partner and Chair of BR Pride. "We look forward to continuing to work on enhancing and encouraging LGBTQ+ inclusion."

The 2022 CEI rated 1,271 U.S.-based businesses and evaluated in detail related LGBTQ+ policies and practices under the following four central pillars: non-discrimination policies across business entities; equitable benefits for LGBTQ+ workers and their families; supporting an inclusive culture; and corporate social responsibility. Blank Rome's efforts in satisfying all of the CEI's criteria results in a 100 percent ranking and the designation as a "Best Place to Work for LGBTQ+ Equality." For more information on the 2022 CEI, or to download a free copy of the report, please visit hrc.org/cei.

The Human Rights Campaign Foundation is the educational arm of America's largest civil rights organization working to achieve equality for lesbian, gay, bisexual, transgender, and queer people. Through its programs, the HRC Foundation seeks to make transformational change in the everyday lives of LGBTQ+ people, shedding light on inequity and deepening the public's understanding of LGBTQ+ issues, with a clear focus on advancing transgender and racial justice. ◻ – 2022 BLANK ROME LLP

To learn more, please visit hrc.org.

Blank Rome Announces 2022 Leadership Council on Legal Diversity Fellow and Pathfinders



Blank Rome LLP is pleased to announce that the Leadership Council on Legal Diversity ("LCLD") has selected Megan R. Wood to join the 2022 LCLD Fellows Program and Saloni R. Patel and Samar Aryani-Sabet to join the 2022 LCLD Pathfinder Program. These hallmark programs are dedicated to producing a generation of attorneys with strong leadership and relationship skills who are committed to fostering diversity, equity, and inclusion within their individual institutions and throughout the legal industry.

"We are thrilled to have Megan, Saloni, and Samar represent Blank Rome in the 2022 LCLD Fellows Program and Pathfinder Program," said Grant S. Palmer, Blank Rome's Managing Partner and CEO. "They have all demonstrated a real commitment to advancing diversity, equity, and inclusion at our firm, throughout the legal industry, and within their local communities, and we look forward to celebrating their successful achievements in this critical mission in the years to come."

"As a longstanding LCLD member organization, Blank Rome is more committed than ever to accelerating diversity, equity, and inclusion throughout the organization, legal industry, and beyond," said Krystal Studavent Ramsey, Director of Diversity and Inclusion at Blank Rome. "The retention, development, and advancement of our diverse attorneys is at the core of our firm's culture and mission, and we are proactively engaged in identifying, implementing, and supporting new opportunities through progressive programs, policies, and initiatives such as the LCLD Fellows and Pathfinders programs."

The LCLD Fellows Program is an intensive, yearlong professional development program that mentors the legal industry's diverse leaders of tomorrow. The program connects high-potential attorneys with leading general counsel and managing partners as well as their peers for mentoring and career guidance. As one of the Fellows selected for the 2022 class, Megan will participate in virtual and in-person class meetings, including opportunities to interact with key legal and business leaders of large U.S. corporations, and leadership lunches hosted by LCLD member organizations featuring a managing partner or general counsel.

The LCLD Pathfinder Program is a seven-month professional program designed to provide high-performing, early-career attorneys with practical tools for developing and leveraging internal professional networks, foundational leadership skills, and an understanding of career development strategies. As 2022 Pathfinders, Saloni and Samar will be individually matched with a program facilitator who will serve as a mentor in helping to bridge what they learn in the program with our firm. From class meetings to group peer circles, Saloni and Samar will interact and network with their peers, both in person and in a virtual format, in addition to engaging in an exclusive LCLD leadership and professional-development curriculum. ◻ – 2022 BLANK ROME LLP

For a full list of Blank Rome's LCLD Fellows and Pathfinders, please visit our firm's Leadership Council on Legal Diversity overview.

Boffo Offshore Wind Sale Moves Biden Closer to Goal—But Tough Currents Remain

BY JOAN M. BONDAREFF

JOAN M. BONDAREFF
OF COUNSEL

This article summarizes the latest developments in the U.S. offshore wind market and then reviews some of the troubling waters ahead.

New Developments

On February 25, 2022, the Bureau of Ocean Energy Management ("BOEM") announced the results of its mega offshore wind sale of six leases totaling over 488,000 acres in the New York Bight—the first sale in the Biden-Harris administration, which is committed to 30GW of offshore wind by 2030. The results from the auction lasting over three days were over four billion dollars. The provisional winners are:

1. OCS-A-0537 – Ocean Winds East, LLC – $765M;
2. OCS-A-0538 – Attentive Energy, LLC – $795M;
3. OCS-A-0539 – Bight Wind Holdings, LLC – $1.1B;
4. OCS-A-0541 – Atlantic Shores Offshore Wind Bight, LLC – $780M;
5. OCS-A-0542 – Invenergy Wind Offshore LLC – $645M; and
6. OCS-A-0544 – Mid-Atlantic Offshore Wind LLC – $285M.

This sale represents the very serious interest that developers—and states—are taking in offshore wind, gambling that the permitting process will go smoothly.

Other BOEM Activities

Prior to this sale, BOEM had awarded a total of 18 leases for offshore wind off the Atlantic Seaboard of the United States. Most of the leases have gone to European developers with experience in offshore wind, *e.g.,* Ørsted, Avangrid Renewables, Copenhagen Infrastructure Partners, Equinor, EDF, Shell, and BP. And more leases are in the offing. Secretary of the Interior Deb Haaland announced in October 2021 that her department, the DOI, would issue seven new offshore wind leases by 2025 in the Gulf of Maine, New York Bight, Central Atlantic, and the Gulf of Mexico, plus offshore the Carolinas, California, and Oregon, in order to meet the president's goal. (*See* Secretary Haaland Outlines Ambitious Offshore Wind Leasing Strategy.)The DOI also plans to review at least 16 construction and operation plans ("COPs") by 2025. Leasing is the first step in the lengthy permitting and review process that BOEM undertakes, from identifying Wind Energy Areas on the outer continental shelf ("OCS") to site assessments and through the extensive environmental review process under the National Environmental Policy Act ("NEPA").

Off the coast of California, BOEM has designated two new wind energy areas, and public meetings have begun. (*See* California Activities.) In January 2022, BOEM also announced that it has begun a draft Environmental Assessment ("EA") to consider potential offshore wind leasing in the Gulf of Mexico. (*See* Gulf of Mexico Activities.) The draft EA will be completed this summer. For the Mid-Atlantic Region, BOEM has created a new Central-Atlantic Intergovernmental Renewable Energy Task Force from offshore Delaware to Cape Hatteras, North Carolina. (*See* Central Atlantic Activities.)

Construction has begun off Long Island for the South Fork wind project—one of the largest offshore wind projects in the United States—being developed by Ørsted. Last year, BOEM approved the COP for the Vineyard Wind Project, which consists of 62 wind turbines south of Martha's Vineyard; work on the cable laying has already begun. BOEM is also reviewing the COP for the 176-turbine Coastal Virginia Offshore Wind ("CVOW") project off the coast of Virginia. The review and approval of the CVOW project is pending with the State Corporation Commission, since the lessee is a regulated utility under state law.

> **The recent New York Bight Lease Sale is producing enormous financial results to the U.S. Treasury, which bodes well for the future of offshore wind in the United States and leads the Biden administration closer to its 30GWgoal.**

RECENT STATE ACTIVITIES

States are making extensive financial commitments to port projects that will support offshore wind. For example, New York Governor Kathy Hochul announced $500 million for offshore wind development and said the state would launch its next offshore wind energy procurement this year. (*See* New York Bight.) New York City Mayor Eric Adams committed to turning the South Brooklyn Marine Terminal into a new wind energy hub. (*See* Mayor Adams Announces Agreement to Transform South Brooklyn Marine Terminal.)

In New Jersey, the Board of Public Utilities is working to support Governor Phil Murphy's clean energy goals of 7,500 MW of offshore wind energy by 2035 and has already awarded two major wind projects: one to EDF/Shell's Atlantic Shores Offshore Wind and the other to Ørsted's Ocean Wind II project, bringing the state's total planned capacity to over 3,700 MW of offshore wind. (*See* Offshore Wind.) New Jersey is also working with PJM to integrate offshore wind into the Mid-Atlantic grid, but issues remain (*see below*).

In March 2021, Massachusetts Governor Charlie Baker signed comprehensive climate change legislation that increased the administration's authorization to solicit an additional 2400 MW of offshore wind, bringing the state's total commitment to 5600 MW. (*See* Baker-Polito Administration Announces Historic Selection of Offshore Wind Projects to Bring Clean, Affordable Power to the Commonwealth.) And in February 2022, Spanish developer Iberdrola announced its commitment to invest more than $10 billion in the development of three offshore wind complexes in the state.

On the other hand, we understand that newly elected Virginia Governor Glenn Youngkin would prefer to repeal the Virginia Clean Economy Act, which set a specific goal of 5200 MW of offshore wind to be in the public interest. So far, the Democratic-controlled Senate has blocked this, according to Virginia news reports.

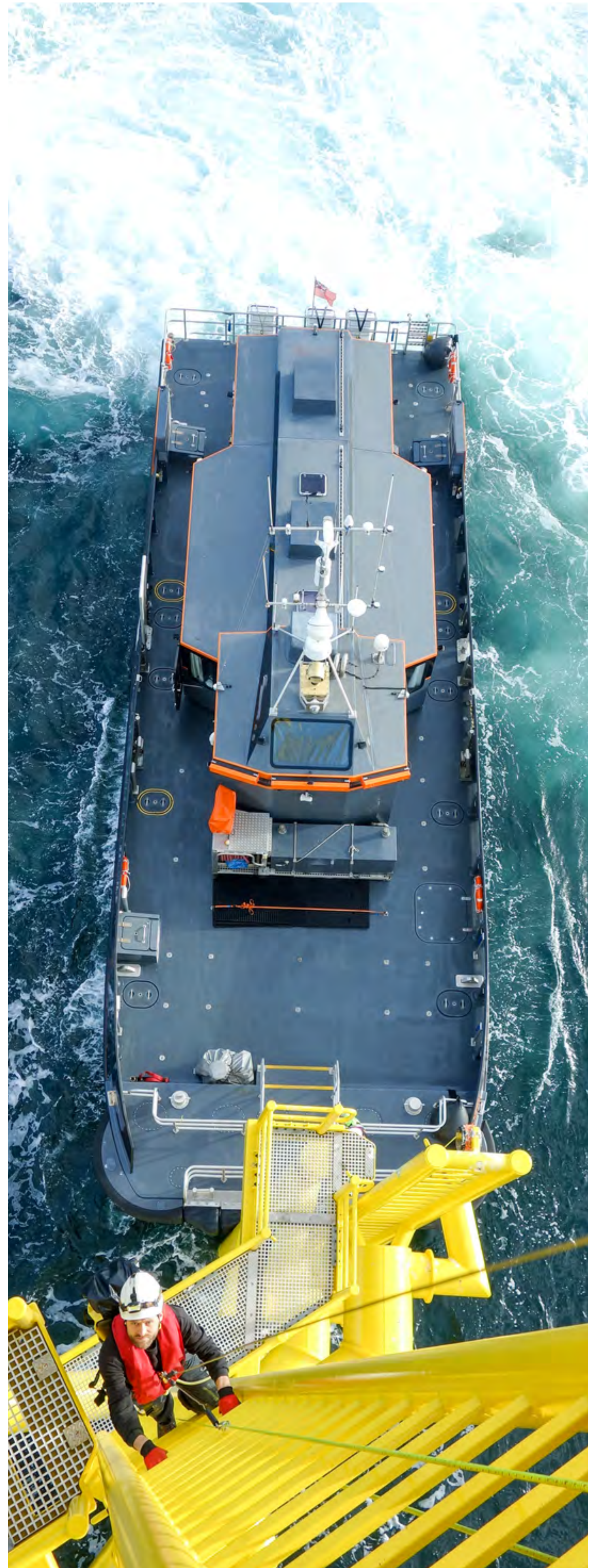
States are also providing incentives for local suppliers and manufacturers. For example, Siemens Gamesa has committed to constructing a blade turbine finishing facility in the Port of Hampton Roads, VA. (*See* Global Leadership Grows: Siemens Gamesa Solidifies Offshore Presence in U.S. with Virginia Blade Facility.)

Use Conflicts and Potential Delays

FISHING CONFLICTS

While these aforementioned steps are very positive and will help the Biden administration meet its stated goal, there are strong opposing winds blowing from the commercial fishing community and adjacent property owners. For example,

(continued on page 21)



the Responsible Offshore Development Alliance ("RODA"), which represents commercial fishermen, filed a complaint on January 31, 2022, in the U.S. District Court for the District of Columbia, challenging BOEM's approval of the Vineyard Wind project on the basis of alleged violations of multiple environmental laws, including NEPA, the Marine Mammal Protection Act ("MMPA"), the Endangered Species Act, and the Clean Water Act. RODA has been opposed to the siting of the Vineyard Wind project almost from the outset, on the basis that the distance between the platforms will interfere with their commercial fishing grounds. The distance was set by BOEM on the basis of the Coast Guard's recommendations at 1 n.m. between platforms. But even the final BOEM Environmental Impact Statement (or EIS) admits to interference with fishing operations. The case could be heard later this year.

BOEM is well aware of the problems posed by fishing conflicts and is developing a series of guidelines for developers to try and ameliorate these issues. (*See* Fishing Industry Communication and Engagement.)

NIMBY OPPOSITION

Residents of Nantucket have also sued BOEM over the Vineyard Wind project again, on the basis of the MMPA and its protection of the Atlantic Right Whale. This lawsuit evokes the strong opposition by neighbors to the earlier Cape Wind project, which was delayed for years by the "Not in My Backyard" ("NIMBY") syndrome and other factors as well. In the meantime, BOEM is trying to address the right whale problem as well as the fishing issues, noted above.

LACK OF TURBINE INSTALLATION AND OTHER CONSTRUCTION VESSELS

As ABS has documented, there is a paucity of large construction and installation vessels to support the nascent offshore wind industry in the United States. (*See* ABS Report Highlights U.S. Offshore Wind Vessel Design, Safety Regulations.) To date, only one turbine installation vessel ("TIV") is being built in the United States, and this is the TIV that Dominion Energy Virginia and a consortium is having built in the Keppel AmFELS Yard in Brownsville, Texas. At the same time, there is an increase in Jones Act support vessels being built. For instance, Blount Boats is building four crew transfer vessels for American Offshore Services over the next two years. (*See* American Offshore Services to build four CTVs at Blount.) In the meantime, the United States will need to use foreign-flag TIVs and other vessels in order to meet the demands of both the growing offshore wind industry and Biden administration goals. Efforts by some in Congress to force crewing changes on the foreign-flag vessels that are badly needed to support growth in the U.S. offshore wind industry should be watched closely.

PERMITTING AND NEPA DELAYS

It takes at least two years from the leasing stage to the final approval stage for major offshore wind projects. BOEM has tried to expedite this process by using the FAST-41 permitting process. Under FAST-41, a lead agency is designated to coordinate the permitting and NEPA process for major infrastructure projects. (*See* Title 41 of the Fixing America's Surface Transportation Act (FAST-41).) With recent court developments challenging the Biden administration's use of climate change factors in its rulemakings and NEPA analyses, uncertainty continues to hang over the permitting processes. What looked to be a form of expedited permitting could in fact result in further permitting delays.

EXTENSION OF TAX CREDITS UNCERTAIN

The Biden administration proposed that its Build Back Better Plan include a number of clean energy tax credits, notably an extension of the Production Tax Credit and the Investment Tax Credit used by wind developers. While the House passed this plan, the Senate has so far refused to take it up. This adds to the uncertainty of the financial viability of new and proposed OSW projects.

CAN THE GRID HANDLE THIS EXPANSION OF RENEWABLE ENERGY?

According to a recent report in Reuters, PJM, which serves the Mid-Atlantic Region, is closing off any new projects for the Mid-Atlantic grid for the next two years. (*See* Reforms in Largest U.S. Grid Set to Send Solar, Wind Builders Elsewhere.) This will certainly stymie getting this source of clean energy to consumers all up and down this region.

Conclusions

The recent New York Bight Lease Sale is producing enormous financial results to the U.S. Treasury, which bodes well for the future of offshore wind in the United States and leads the Biden administration closer to its 30GWgoal. If the administration and developers can facilitate an amicable resolution of the pending fishing and other use conflicts, continue to use a combination of Jones Act and foreign-flag vessels, and expedite the permitting process without undermining NEPA and other environmental laws—a tough challenge, no doubt—they will be on their way to meeting the Biden administration's goal of bringing clean energy to U.S. consumers. □ – 2022 BLANK ROME LLP

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The BR Privacy & Security Download

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What Is the Insured's Duty under a Marine Insurance Policy? It Depends…

BY THOMAS H. BELKNAP, JR.

THOMAS H. BELKNAP, JR.
PARTNER

The law governing marine insurance in the United States has long been a source of considerable confusion. And if there was once a clear set of principles applicable in such cases, the Supreme Court long ago muddied the waters with their infamous ruling in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310 (1955). That case, involving a fire on a houseboat on an inland man-made lake on the Texas-Oklahoma border, established the "litmus test" for when maritime law should govern and when the courts should instead look to state law in interpreting marine insurance contracts.

Faced with the question of whether an insured's policy should be voided for breach of policy warranties when the insured has made misrepresentations in the application that bear no relationship to the actual risk or claimed loss, the Supreme Court in *Wilburn Boat* concluded that "[w]hatever the origin of the 'literal performance' rule may be, we think it plain that it has not been judicially established as part of the body of federal admiralty law in this country." Because there was no "established federal admiralty rule" governing such warranties, the Supreme Court ruled that it should instead look to state law, which, as it happens, contained a provision that protected the insured from such "immaterial" breaches of warranty.

The Problem with *Wilburn Boat*

It has oft been said that *Wilburn Boat* is the poster child for the adage that hard facts make bad law, and many have wondered why the Supreme Court used a case involving a houseboat on an inland lake to set a broad rule applicable to all policies of marine insurance. Certainly, the rule outlined by the Supreme Court is much easier to state than it is to apply: "(1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?" Since *Wilburn Boat,* the lower courts have wrestled over the past 65 years to try to develop a consistent interpretation of what "rules" are entrenched in the federal admiralty law, and which are not.

At the heart of much of this wrangling seems to be the same concern that troubled the Supreme Court in *Wilburn Boat:* Is it really fair to allow an insurer to evade its obligations under an insurance policy where the insured has paid his premiums and suffers an otherwise covered loss, but has made misstatements to the insurer that do not actually bear on the risk? (This dilemma does not exist in cases where the misrepresentation is material—here, maritime law and state law would generally agree that the insured should not be entitled to recover.)

Certainly, historically, there were good reasons for such a rule: the insurer was being asked to assume a risk in insuring a vessel that could be halfway around the world, with no practical means of inspecting or surveying the vessel before agreeing to assume the risk. Strict enforcement of warranties, coupled with the overriding principle of *uberrimae fidei* (utmost good faith), which holds that a policy may be voided where the insured has failed to disclose all facts that may be relevant to the insured risk, were the means of inducing the insurer to act quickly in issuing the policy while ensuring that it was taking only the risk it intended to take, and nothing more.

But most states have eschewed these strict rules and have enacted various "anti-technicality" provisions designed to protect "innocent" insureds from the jarring surprise of having an insurer deny coverage for breaches of the policy that seem immaterial to the risk or the loss.

But most states have eschewed these strict rules and have enacted various "anti-technicality" provisions designed to protect "innocent" insureds from the jarring surprise of having an insurer deny coverage for breaches of the policy that seem immaterial to the risk or the loss. And so the courts, when faced with the question of whether maritime law's strict warranty rules should override these state law protections, are often conflicted, with the result that many such cases wind up with contorted or seemingly inconsistent rulings.

This problem is well illustrated in the Eleventh Circuit's recent ruling in *Travelers Property Casualty Company v. Ocean Reef Charters, LLC.,* 996 F.3d 1161 (11th Cir. 2021). There, the insured, who owned a 92-foot yacht, warranted in the policy that he would employ a professional captain and one crew. A hurricane struck at a time when the yacht was unmanned, and the yacht sank at the dock during the storm after being holed by an exposed dock piling. The insurer sued for declaratory judgment that it was not liable under the policy because the insured had breached the captain and crew warranties. The district court found that there was an established maritime law strictly enforcing such warranties and granted judgment in favor of the insured.

The Eleventh Circuit reversed. In its ruling, the court observed:

> One problem with *Wilburn Boat,* as commentators have pointed out, is that it rests on a flawed premise. At the time the case was decided, all the major admiralty appellate courts in the United States had long accepted the literal performance rule. This rule derived from English common law and applied to all express warranties in marine contracts. [Internal quotation marks and citations omitted.]

The court further noted another problem with *Wilburn Boat:* it "undermines uniformity in admiralty law."

The Eleventh Circuit, in attempting to craft a solution to this problem, made clear what they would do if they could: "If we were writing on a blank slate, we would consider holding that there should be a uniform maritime rule regarding the effect of a breach of an express warranty in a marine insurance policy—and from there determine what that uniform rule should be." But of course, there is not a blank slate, and so ultimately the Eleventh Circuit resolved the "dilemma" by identifying only narrow categories of warranties, pertaining to trading limits and seaworthiness of the vessel, which have been explicitly recognized as part of the entrenched federal maritime law. With respect to the captain and crew warranties at issue, on the other hand, the court found that no such entrenched maritime rule existed; consequently, state law, with its anti-technicality provision, should govern. It seems inescapable that this ruling, much like *Wilburn Boat,* was written more to accomplish a particular outcome than to enunciate any kind of clear guidance for future courts.

Issues of Uniformity

The maritime law rule of strict construction is originally derived from English law, which historically required literal performance of maritime warranties. Uniformity with English law, where possible, has always been an aim of the American courts in maritime cases. This is why it is particularly notable that England enacted the United Kingdom Insurance Act of 2015, which abandons recission as the automatic remedy

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for breach of warranty. Instead, an insured who breaches a warranty and fails to cure can still recover if it "shows that the noncompliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred." *Id.* at § 11(3). As the Eleventh Circuit observed:

> If there are still "special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business," *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.,* 263 U.S. 487, 493, 44 S.Ct. 175, 68 L.Ed. 402 (1924), it will be interesting to see what effect the Act has on American maritime law (and on how *Wilburn Boat* is viewed).

Possible Solutions?

One way this problem could be solved once and for all would be by federal statute; Congress clearly could enact some form of federal marine insurance law to codify the manner in which marine insurance contracts should be interpreted. No one should hold their breath waiting for this to happen, however; the chances of Congress addressing this issue in legislation anytime in the foreseeable future are virtually nil.

Another way would be for the Supreme Court to revisit *Wilburn Boat.* The Eleventh Circuit in *Travelers* practically begged the Supreme Court to take up their case: "Maybe, just maybe, this case will prove tempting enough for the Supreme Court to wade in and let us know what it thinks of *Wilburn Boat* today. As they say, 'hope springs eternal....'" This outcome is perhaps somewhat more likely, if not in *Travelers* then in some other case down the road. But what would we want the Supreme Court to actually do?

One possible option would be for the Supreme Court to definitively hold that the strict enforcement of maritime warranties is, after all, an entrenched federal maritime rule such that federal maritime law should always preempt state law on this issue. While that would have the laudable effect of returning uniformity and clarity to the federal maritime law, however, it would also constitute a complete reversal of *Wilburn Boat.* It would also put the U.S. maritime law even further out of step with both state law and, now, English law.

Alternatively, the Supreme Court could find that, after all, the broad rule of "strict enforcement" of warranties has never been an entrenched federal maritime rule, such that state law should always control on this issue. But the Supreme Court would have to engage in some pretty fancy revisionism to plausibly reach this conclusion.

A third possible option might be for the Supreme Court to find that the federal maritime law has evolved and that, while strict enforcement of warranties was once an entrenched federal maritime rule, both the courts and legislators—in the United States and in England—have come to recognize the weaknesses of this strict rule, such that it should no longer be treated as an established maritime rule. This might be a plausible "out" for the Supreme Court and, in some respects, may be the most accurate explanation for the recurring reluctance of the courts (including the Supreme Court itself) to strictly apply maritime warranties in some cases. Still, it leaves the problem that insurance law varies from state to state, such that uniformity would remain elusive.

Whatever the solution may be, the Supreme Court first must decide to take a case—which might yet take a while. In the meantime, insurers and insureds are left to guess what rules of construction will apply to their policies, which is never a good thing for maritime commerce. ◻ – 2022 BLANK ROME LLP

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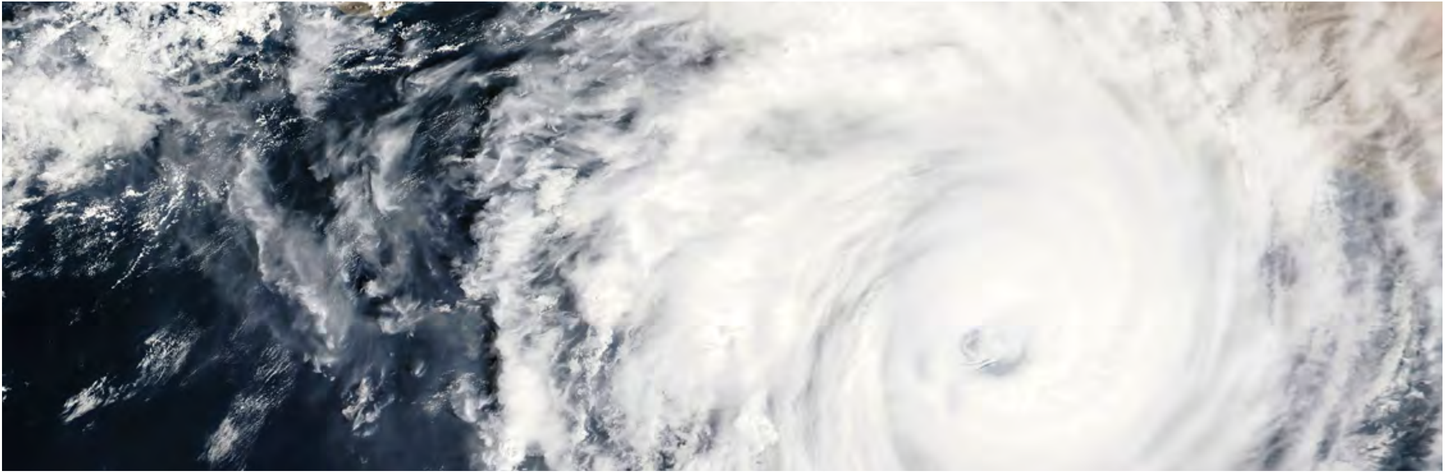

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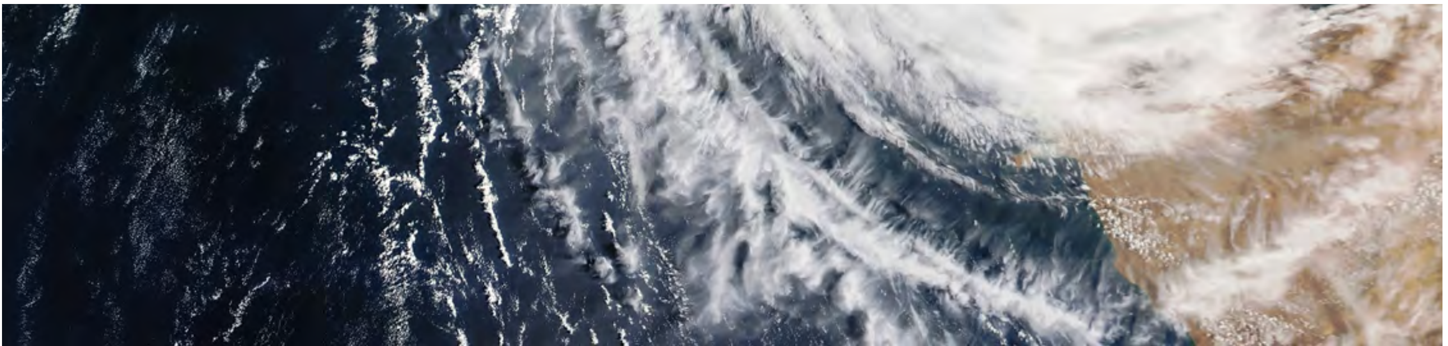

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Sensor Ships: Managing Big Data Generated in the Maritime World

BY VANESSA C. DIDOMENICO, KAREN H. SHIN, AND SHARON R. KLEIN

VANESSA C. DIDOMENICO
ASSOCIATE

KAREN H. SHIN
ASSOCIATE

SHARON R. KLEIN
PARTNER

Big data is not a "trend" or fad; big data is a concept of gathering, deciphering, and analyzing massive quantities of information to ultimately reveal patterns and associations, and it's here to stay. Companies have proven how useful it can be to interpret performance trends to expose areas of vulnerability or underperformance within a company. Big data can be used to make strategic decisions within a company's operating profile. In particular, the maritime industry is using big data to revolutionize the way engine performance and maintenance is carried out aboard vessels. Understanding how to effectively capture data—and the risks involved—will enable users to apply big data in ways never considered before.

The Value of Big Data

The maritime industry has progressed at a moderately stable speed with various innovations to proven mechanical systems, such as energy reducing pumps and updated models of equipment; however, compared to other industries it is decades behind digitally. To capitalize on the benefits of big-data technology, maritime companies must define the goals they will achieve, such as reducing fuel consumption. By clearly defining a goal, systems can be constructed to deliver the required data points.

Once the goals are defined, sensors and instruments can be installed onboard to capture new data points that, when spliced with existing readings already extracted from the vessel's automation, such as weather patterns and engine load signals, create interconnected data ecosystems that can be used to examine performance.

This combined data set is sent to an onboard personal logic controller and downloaded in a readable format to an onboard server, where it can be uploaded at four-to-five second frequencies to a cloud server via the vessel's satellite at sea or LAN connection in port. The data is then downloaded from the cloud to the designated monitoring center, where programs will scrub the data and further process it by using algorithms.

After collecting and processing the data, it can be shown on a platform or user-friendly dashboard designed to match the company's needs. Viewing multiple layers of information on one screen is one of the many appealing factors encouraging companies to invest in big data. Analysis of the data generated onboard can guide crew operation and assist in identifying abnormal states of energy efficiency or trim optimization and can enable the company to make informed decisions with planned maintenance or hull fouling treatment. Different departments within the same organization can examine and extract information specific to their needs. For example, environmental departments can use the dashboard fed with big data in real time to understand the vessel's location, fuel type, and engine usage all together to ensure compliance within certain emission control areas that may require the use of low sulphur fuel. Marketing departments can compare costs of adding additional ports by understanding vessel performance. Technical departments can filter data to see engine measurements after an overhaul or dry docking and view monthly and yearly reports to better plan fuel and spare-part

Maritime transportation companies are concerned with firewall protections to ensure that hackers cannot access their automated systems to gain control or take over a vessel at sea.

budgets. Maritime companies can tailor the platforms toward their specific needs; they can start small by compiling data from past voyages and move into real time continuous-based monitoring and even predictive analytics. Furthermore, engine manufacturers can enter into data sharing agreements to partner with vessel owners to share in research and development. Partnerships with manufacturers can also help to offset some of the upfront costs of developing the system and installing the required sensors.

Other companies are using tools onboard to gather and share metrics with outside organizations. For example, Maersk, as part of its Environmental, Sustainability, and Governance (commonly referred to as "ESG") plan, is sharing ocean-weather-observation data generated onboard its vessels with the National Meteorological Service of Germany. Maersk announced that it will collect and share ocean-weather observations for climate science and various inputs for weather forecasts. (*See* Maersk Vessels Live Feed Meteorologists around the Globe with Weather Data.) The ever-growing pool of data generated onboard vessels may serve to cross-pollinate ideas and generate new solutions to industry and global challenges.

Cyber Risks and Concerns

Big data has many advantages that may offset various risks, but with enormous amounts of data being sent, there are increased concerns from industry. There are no clear channel markers or buoys set up in the cyber world. Navigating through complex security concerns and privacy issues are hazards associated with the gathering, transmittal, and usage of the data. Maritime transportation companies are concerned with firewall protections to ensure that hackers cannot access their automated systems to gain control or take over a vessel at sea. Vessel owners are also concerned about the storage of this data and the access of other competitors to the sensitive operating measurements. There are also concerns about costs in relation to pilot programs, installation, data transmission through satellites, and continuous monitoring.

Officers onboard also have raised their own concerns as it relates to the daily vessel operations. Captains and chief engineers are already consumed with tasks to ensure safe day-to-day operations, and crew members are concerned that additional work is created by the new sensors, and if the system goes offline, it can jeopardize other work priorities. These concerns are well-founded—in 2017, an ocean container carrier fell victim to a ransomware attack destroying all end-user devices, including 49,000 laptops and print capability, making 1,200 applications inaccessible and destroying approximately 1,000 more and destroying around 3,500 of its 6,200 servers, costing the company between $250 million and $300 million; again in 2017, the GPS systems of 20 ships sailing in the Black Sea were altered in such a way that the position displayed on the GPS device of the ships did not match the actual position; in 2019, a spoofing incident caused the transponders on multiple ships in the port of Shanghai to show various erroneous positions that formed odd ring-like patterns.

Cybersecurity Policy Measures

With the rise in cybersecurity attacks on the supply chain, there has been a heightened focus on incident response procedures and security standards. For instance, the

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United States, using the purchasing power of the government through President Biden's Executive Order on Improving the Nation's Cybersecurity, has attempted to strengthen its cybersecurity practices by requiring government-information-technology-service providers to notify the government agencies with which they contract of cyber incidents and establishing new cybersecurity standards through amendments to the Federal Acquisition Regulation ("FAR") and the Defense Federal Acquisition Regulation Supplement ("DFARS").[1] President Biden also issued the Executive Order on Protecting Americans' Sensitive Data from Foreign Adversaries, which requires the U.S. Department of Commerce to evaluate transactions involving connected software applications that may pose an unacceptable risk to U.S. information and communications technology, critical infrastructure, the digital economy, or national security, and to take appropriate action based on its evaluation.[2] On January 24, 2022, the Port of Los Angeles debuted its Cyber Resilience Center ("CRC"), a cyber-defense solution created to improve the cybersecurity readiness of the Port by enabling participating stakeholders to automatically share cyber-threat indicators and potential defensive measures with each other.

Sailing Ahead: Maritime Cybersecurity Awareness

Maritime transportation companies should pay close attention to and monitor developments in the privacy and security landscape to ensure that they and their service providers, who provide sensors and automation programs, are compliant with the applicable security standards to not only protect data, but also protect the vessel's enterprise systems that receive inputs from sensors and automation programs. Cybersecurity in the maritime industry is especially problematic with ocean transits exposing the vessel's systems to a higher number of unknown networks and across international lines and with usually outdated legacy hardware on board (as vessels are designed and built to last for decades). Thus, it will be important for vessel operators to make strategic security investments in implementing incident monitoring and response software and other appropriate security controls, making continued updates, timely installing patches to the technology on board, and training crew on cybersecurity (especially during crew turnover at various points on a voyage).

There are also misunderstood motives behind the big-data push in the maritime world. Companies are reluctant to share data that may expose legal liabilities to regulators or provide a competitive advantage to other market participants. However, the EU, for instance, unveiled new proposed rules on February 23, 2022, to make it easier for the sharing and transferring of non-personal data (*i.e.,* data that does not contain any information that can or does identify an individual). The European Commission's Data Act, among other things, includes measures to allow users of connected devices to gain access to data generated by them and to share such data with third parties to provide aftermarket or other data-driven innovative services, and clarifies that databases containing data from Internet-of-Things ("IoT") devices and objects are not subject to separate legal protection, thereby allowing end users to more easily access data generated by IoT devices.

Nevertheless, companies should evaluate any cybersecurity vulnerabilities and perform due diligence on the service providers that provide sensors and automation programs for the reasons described above. Maritime transportation companies should also ensure that they (and not their service providers) own the data being collected via sensors and automation programs for intellectual property purposes, so that the service provider cannot freely use the data for its own purposes or to monetize outside of performing its obligations under the agreement with the company. Additionally, some officers and crew members may view continuous monitoring as a "big brother" watching over from the office critiquing every decision made at sea. However, vessel operators can address the misconceptions behind data measuring by explaining the benefits of improving performance and providing more in-depth trends to those serving afloat, including reducing paperwork and presenting helpful data onboard to assist in decision making and maintenance.

Final Thoughts and Opportunities

In conclusion, big data may prove incredibly useful to maritime companies if specific goals are created, data is captured correctly, appropriate cybersecurity and data protection safeguards are implemented, and utilization is optimized. Data privacy concerns should be addressed from the industry as a whole to seek assistance from policy makers and regulatory bodies. Employing big data within the maritime industry can create new jobs and opportunities for technology companies to market to the world fleet, generating tremendous opportunities for companies to revolutionize and propel the industry forward.

Data storage costs and concerns with transmission should not stop the industry from advancing and should not deter innovation. Big data will not only allow companies more insight into their current assets, it may also open doors to new companies, greater research, visibility within the supply chain, and collaboration. The data generated onboard vessels may also assist informed decision making onboard and ashore while also providing necessary aid to support decarbonization and autonomous shipping. □ – 2022 BLANK ROME LLP

1. Exec. Order No. 14028 86 C.F.R. 26633 (2021).
2. Exec. Order No. 14034 86 C.F.R. 31423 (2021).

Must Foreign Debtors Have U.S. Property to be Eligible for Relief under Chapter 15?

BY RICK ANTONOFF AND EVAN J. ZUCKER

RICK ANTONOFF
PARTNER

EVAN J. ZUCKER
OF COUNSEL

Chapter 15 of the U.S. Bankruptcy Code provides a streamlined process for recognition (a form of comity) of a foreign insolvency proceeding. However, courts are divided as to whether a foreign debtor must satisfy the general definition of "debtor" as that term is used in section 109(a) of the Bankruptcy Code, which requires a debtor seeking bankruptcy relief to reside or have a domicile, a place of business, or property in the United States.

On February 28, 2022, the U.S. District Court for the Middle District of Florida (the "Florida District Court") ruled that section 109(a) does not apply in chapter 15 cases. *Talas Qais Abulmunem Al Zawawi v. Diss, et al.* (*In re Talas Qais Abdulmunem Al Zawawi),* Case No. 21-894-GAP (M.D. Fla. Feb. 28, 2022). The court relied on a straightforward interpretation of section 1517(a)'s mandatory criteria, finding that chapter 15 "provides the sole requirements for recognition" and that recognition is not premised upon a foreign debtor meeting section 109(a) requirements for eligibility. The Florida District Court's opinion conflicts with an opinion rendered in 2013 by the U.S. Court of Appeals for the Second Circuit (the "Second Circuit") in the case *Drawbridge Special Opportunities Fund L.P. v. Barnet (In re Barnet),* 737 F.3d 238 (2d Cir 2013), which held that section 109(a) is applicable in chapter 15. *Al Zawawi* is the latest in a string of judicial opinions and scholarly articles disagreeing with the Second Circuit's decision in *Barnet. See In re Bemarmara Consulting a.s.,* Case No. 13-13037 (Bankr. D. Del. Dec. 17, 2013); Daniel M. Glosband and Jay Lawrence Westbrook, Chapter 15 Recognition in the United States: Is a Debtor "Presence" Required?, 24 Int'l Insolv. Rev. 28 (2015). *See also,* Douglas G. Baird, *Revisions to Chapter 15 of the Bankruptcy Code,* at 4–7 (letter from National Bankruptcy Conference to Congress proposing Bankruptcy Code revision to clarify that section 109(a) does not apply in chapter 15 cases).

The *Al Zawawi* Case

Al Zawawi is a citizen of Oman and resides in Oman. In March 2020, as a result of Al Zawawi's failure to satisfy a UK judgment, a UK court adjudged Al Zawawi bankrupt and appointed joint trustees (bankruptcy professionals entirely independent of and adverse to Al Zawawi) to investigate, collect, and distribute Al Zawawi's assets.

Al Zawawi had no domicile, residence, or place of business and, arguably, no property in the United States prior to the commencement of the UK insolvency proceeding. His only interests relating to the United States were indirect ownership of several companies that, in turn, owned property in Florida. Al Zawawi was listed as a director of each company. Additionally, prior to 2020, Al Zawawi had a 60-percent ownership interest in a Florida corporation. In February 2020, Al Zawawi sold his interest in the corporation to his brother—the only other shareholder—but continued to be listed as a director.

On March 24, 2021, the joint trustees sought recognition of the UK proceeding in the U.S. Bankruptcy Court for the Middle District of Florida in order to investigate Al Zawawi's financial affairs, determine whether his assets were used to acquire other assets in the United States, and potentially assert claims against third parties, including fraudulent transfer claims. Relying primarily on *Barnet,* Al Zawawi opposed recognition on the grounds that he did not have property in the United States. The joint trustees argued that *Barnet* was wrongly decided. The bankruptcy court, over Al Zawawi's objection, found that: a) there is no requirement of having property in the United States for recognition of a foreign proceeding under chapter 15, and b) even if there was, Al Zawawi had property within the United States. Al Zawawi appealed to the Florida District Court.

The Eligibility Dispute

THE *BARNET* POSITION: THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE DICTATES THAT SECTION 109(A) APPLIES IN CHAPTER 15 CASES

In requiring a debtor to have U.S. property in chapter 15 cases, the Second Circuit in *Barnet* interpreted sections 109(a) and 103(a) (part of chapter 1 of the Bankruptcy Code). Section 103(a) provides "… this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15." Because section 109 is within chapter 1, the Second Circuit reasoned that "by the plain terms of the statute," section 109 applies to a case under chapter 15.

The Second Circuit found that while section 1502 provides a separate definition for "debtor," that definition does not replace the definition of "debtor" in section 109—doing so, it held, is not "reconcilable with the explicit instruction

(continued on page 31)

in Section 103(a) to apply Chapter 1 to Chapter 15." *In re Barnet,* 737 F.3d at 249. And even if section 1502 did replace section 109(a) in defining a foreign debtor for the purposes of chapter 15, it would not render section 109 inapplicable in chapter 15 cases because the scope of section 1502 is expressly limited to "this chapter" (*i.e.,* chapter 15) and thus does not affect the definitions contained within chapter 1. For example, the definitions of "foreign proceeding" and "foreign representative," which are both found in chapter 1 and not in chapter 15, would not be affected by applying the section 109(a) definition of "debtor" in chapter 15.

Finally, *Barnet* rejected the argument that applying section 109(a) to chapter 15 would be inconsistent with the venue provision for chapter 15 cases. Under 28 U.S.C. § 1410, a chapter 15 case may be commenced in a venue where "the debtor does not have a place of business or assets in the United States." 28 U.S.C. § 1410(2). The Second Circuit found this statute to be purely procedural in nature stating that "given the unambiguous nature of the substantive and restrictive language used in Sections 103 and 109 of Chapter 15 [sic], to allow the venue statute to control the outcome would be to allow the tail to wag the dog." *In re Barnet,* 737 F.3d at 250.

THE *AL ZAWAWI* POSITION: THE TEXTUAL LANGUAGE OF, AND PURPOSE OF, CHAPTER 15 CONFIRMS RECOGNITION IS NOT PREDICATED ON SECTION 109(A)

Like *Barnet,* the Florida District Court focused on the plain language of the Bankruptcy Code. Unlike *Barnet,* the Florida District Court found that requiring property in the United States for recognition misconstrues chapter 15. Specifically, that section 1517 unambiguously provides the sole requirements for recognition. Any references to a "debtor" in chapter 15 must apply the alternative definition of a "debtor" found in section 1502(1). The Florida District Court found that the legislative history for chapter 15 supports this position. See H.R. Rep. No. 109–31, pt. 1, at 107, reprinted in 2005 U.S.C.C.A.N. 88, 170 (2005) (noting that the term "debtor" takes on a "special definition" in Chapter 15—provided in Section 1502—and such "[wa]s necessary to eliminate the need to refer repeatedly to 'the same debtor as in the foreign proceeding'").

Further, the Florida District Court adopted the bankruptcy court's reasoning that other statutory provisions confirm that Congress did not intend section 109 to apply to chapter 15. For example, it found that, if section 109 applied, section 1528 of the Bankruptcy Code would be rendered duplicative and superfluous because it provides that after recognition a case under another chapter of the Bankruptcy Code may be commenced "only if the debtor has assets in the United States." Thus, to give effect to the plain language of section 1528 of the Bankruptcy Code, the Florida District Court found that there is no property requirement at the recognition phase of a chapter 15 case; property in the United States is only required, after recognition, if a chapter 11 or chapter 7 case is commenced.

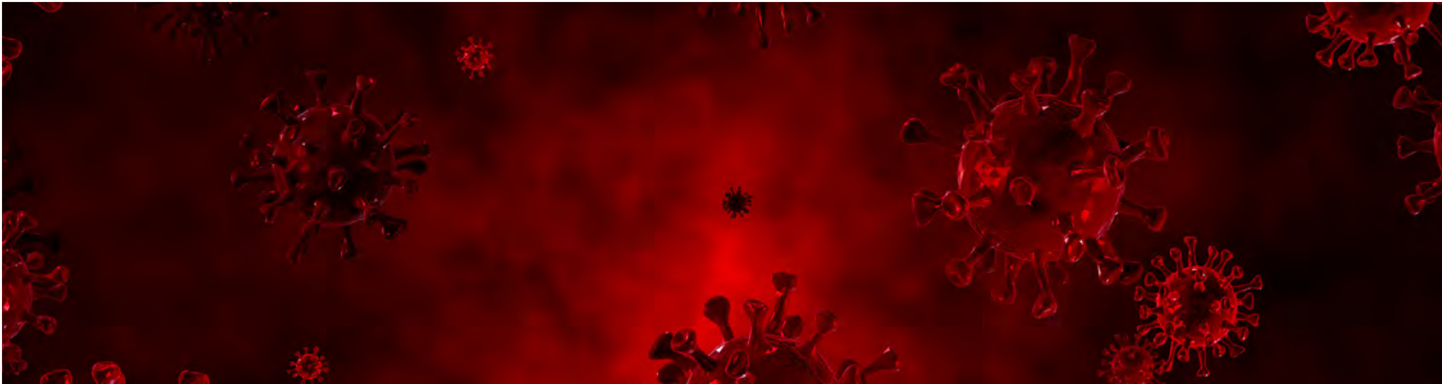
Similarly, the Florida District Court found that the venue statute governing chapter 15 cases specifically provides venue for cases when the foreign debtor lacks "a place of business or assets in the United States." *See* 28 U.S.C. § 1410 (2),(3). Unlike *Barnet,* the Florida District Court's interpretation of section 1410 makes no distinction between "procedural" and "substantive" statutes (a distinction not made in the U.S. Code itself). Rather, the Florida District Court noted that section 1410 conflicts with the language of section 109 of the Bankruptcy Code, further supporting the idea that the generally drawn section 109(a) was not meant to be an eligibility requirement for recognition.

Finally, the Florida District Court found that the Eleventh Circuit would likely disagree with *Barnet.* The Eleventh Circuit in a decision examining the predecessor statute to chapter 15, former section 304 of the Bankruptcy Code, construed that statute not in isolation but in the context and purpose of what the statute was seeking to accomplish. *In re Goerg,* 844 F.2d 1562 (11th Cir. 1988). Ultimately, the Eleventh Circuit held that "[b]ecause the focus is on making United States processes available in aid of foreign proceedings, not actual bankruptcy administration, it would make little sense to require that the subject of the foreign proceeding qualify as a 'debtor' under United States bankruptcy law." *Id.*

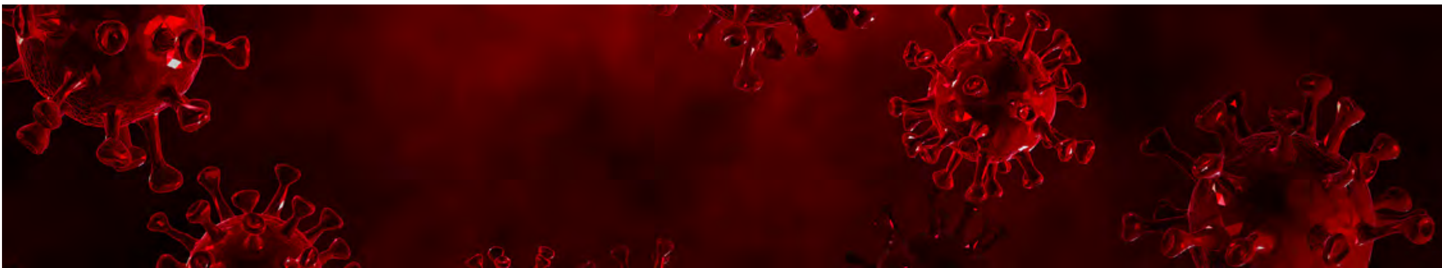
Implications

Al Zawawi is not the only case to reject the Second Circuit's holding in *Barnet.* Indeed, bankruptcy courts in the District of Delaware and the Southern District of Florida have also declined to follow *Barnet.* Bankruptcy courts in the Second Circuit have managed to align the *Barnet* ruling with specific case requirements and the policy behind by chapter 15 by permitting nominal U.S.-based property rights (retainers for 15 professionals, deemed situs for books and records under bond indentures, deemed provenance for intangibles and causes of action) to establish the 109 nexus.

Al Zawawi represents an important appellate step in aligning chapter 15 policy with its clear statutory requirements—that a foreign debtor under chapter 15 need not have a property-based nexus with the United States to enable its representative to pursue a foreign collective remedy in the United States, pursue voidable transactions and consolidation theories, and otherwise optimize the impact of an international insolvency proceeding. □ – 2022 BLANK ROME LLP



Coronavirus (“COVID-19”) Task Force



Since the outbreak of COVID-19, businesses and public life around the world have been greatly impacted. From supply chain disruption, government-ordered closures, vaccine mandates, and event cancellations to employee safety concerns and social distancing recommendations, every company is facing its own unique challenges surrounding this global pandemic.

Blank Rome’s COVID-19 Task Force is monitoring this ever-changing situation and is here to help. The Task Force is an interdisciplinary group of our firm’s attorneys with decades of experience helping companies and individuals respond to the legal fallout from disruptive crises and disasters. Our multifaceted team includes insurance recovery, labor & employment, maritime, litigation, corporate, real estate, and cybersecurity & data privacy attorneys prepared to analyze your issues from every conceivable angle to ensure a holistic, complete, and comprehensive approach to your specific needs and issues. With offices across the United States and in China, we are ready to assist businesses that must respond and prepare for an evolving public health emergency.

Learn more: blankrome.com/coronavirus-covid-19-task-force

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Suite 1650
Chicago,IL 60606

CINCINNATI
1700 PNC Center
201 East Fifth Street
Cincinnati, OH 45202

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Broward Financial Centre
500 East Broward Boulevard
Suite 2100
Fort Lauderdale, FL 33394

HOUSTON
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Houston, TX 77002

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New York, NY 10020

ORANGE COUNTY
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Suite 450
Irvine, CA 92614

PHILADELPHIA
One Logan Square
130 North 18th Street
Philadelphia, PA 19103-6998

PITTSBURGH
Union Trust Building
501 Grant Street
Suite 850
Pittsburgh, PA 15219

PRINCETON
300 Carnegie Center
Suite 220
Princeton, NJ 08540

SHANGHAI
Shanghai Representative Office, USA
45F, Two IFC
8 Century Avenue, Pudong
Shanghai 200120
China

TAMPA
Fifth Third Center
201 East Kennedy Boulevard
Suite 520
Tampa, FL 33602

WASHINGTON
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