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Game Changers

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The theme of the Connecticut Maritime Association's ("CMA") Shipping 2012 Conference is "Game Changers." For the shipping industry, potential major game changers abound, especially on the geopolitical level. European debt restructuring and Iran sanctions are among the nightly news topics we sincerely hope will not remain on the agenda for CMA Shipping 2013. It will be fascinating to listen to the insights of industry leaders as they try to move their companies into a secure future during highly unsettled markets. A looming rise in oil prices could be among the biggest game changers. The U.S. presidential election and its impact on the economic direction of the U.S. also sits near the top of the list.

The past year certainly has not been without its challenges. The United States bankruptcy court has been busy with Chapter 11 and 15 maritime cases and, for all concerned, each one is a game changer. For better or worse, there are more to come in the months ahead.

Will private equity become the shipping industry's new source of capital?

Will the widespread use of armed guards and aggressive prosecutions finally tamp down the persistent problem of Somali piracy?

In a year in which the biggest news in U.S. sports has come from the most unlikely heroes, who will become our industry's next game changers? ■

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Maritime Legislative Forecast 2012

BY JONATHAN K. WALDRON



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The memory of the *Deepwater Horizon* incident that occurred on April 20, 2010 is fading away. Even though Congress has introduced many bills since then to address the issues raised by this incident, and held numerous related hearings, Congress has been unable to enact any pollution-related legislation. In fact, Congress failed to enact *any* substantial maritime legislation in 2011. The following is a summary of the action taken by Congress last year and a perspective on maritime legislation for 2012.

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Maritime Legislative Forecast 2012 (continued from page 1) Action Taken in 2011

The Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEMRE")/U.S. Coast Guard Joint Investigation Team released the final report on the *Deepwater Horizon* incident on September 14, 2011. Around the same time, Congressman LoBiondo and Congressman Mica co-sponsored and introduced the Coast Guard and Maritime Transportation Act of 2011, H.R. 2838 (the bill typically used for enactment of maritime legislation) on September 2, 2011. This bill was reported to the Committee on Transportation and Infrastructure on October 10, 2011, and ultimately it was passed by the House on November 15, 2011 and immediately referred to the Senate for action.



H.R. 2838 includes provisions addressing the following major topics:

- Coast Guard reform;
- shipping and navigation (including provisions on the Marine Transportation System, rebuild determinations in foreign shipyards, dockside safety examinations, classification societies, and short sea transportation);
- miscellaneous (including provisions on the merchant mariner evaluation program, notice of arrival for vessels operating on the outer continental shelf, the distant water tuna fleet, coastwise endorsement waivers, standby vessels, and a report on impediments for U.S.-flag vessels to compete in international transportation markets);
- commercial vessel discharges reform (ballast water legislation that would preempt state actions to regulate ballast water discharges); and
- certain piracy provisions.

The only *Deepwater Horizon*-related provision was section 608, addressing "standby vessels." This controversial provision would require an owner or operator of an offshore facility or floating facility to locate a standby vessel nearby to provide immediate response to an offshore incident.

The Senate, on the other hand, introduced its version of maritime legislation in the form of the Coast Guard Authorization Act for fiscal years 2012 and 2013 on October 6, 2011, S. 1665.

No further action was taken on S. 1665 in 2011. However, on January 26, 2012, S. 1665 was reported by Senator Rockefeller with an amendment in the nature of a substitute and referred to the Committee on Commerce, Science and Transportation. In addition, written report number 112-135 was filed with S. 1665.

S. 1665 includes provisions addressing the following major topics: Coast Guard administration (including a requirement to maintain U.S. polar icebreaking capability); shipping and navigation (including a provision related to classification societies); and miscellaneous (including provisions related to oil spill liability trust fund investments, vessel new build determinations, documentation with a coastwise endorsement for three LNG vessels, notice of arrival for vessels operating on the Outer Continental Shelf, and a higher volume port area regulatory definition change for pollution response purposes).

It is clear that Congress purposely avoided including controversial *Deepwater Horizon* pollution-related provisions in these bills. The Congressional strategy had been to propose separate bills in both the House and the Senate to address more controversial spill related matters.

2012 Forecast

To date in 2012, Congressional focus has certainly shifted away from oil spill safety and response to job creation, economic growth, and election related issues. In addition, budgetary and regulatory reform issues dominated the Congress at the end of 2011. There has been no movement in 2012 with regard to either pollution or general maritime legislation except for the publishing of S. 1665 and its attendant report. We continue to hear rumblings that the Senate may try and move S. 1665 as early as March 2012, but if the lack of Senate action in the last year is any guide to the future, it remains questionable that it will happen until later in the year, if at all.

If the Senate is able to move S. 1665, that would probably result in some kind of a conference between the House and the Senate to push maritime legislation in 2012. In addition, both the House and the Senate could decide to push for pollution-related legislation later in 2012. That legislation could move either independently, or at some point in 2012 be combined with the Coast Guard Authorization pending legislation. A couple of intervening events, however, could change this forecast, such as: Congressional scrutiny, including hearings on the unfortunate *Costa Concordia* incident in Italy; Congressional reaction to the BP settlement announcement on March 2 regarding the *Deepwater Horizon* incident; or any outfall as a result of an announcement/decision of a Department of Justice indictment against BP.

In conclusion, in view of all of the Congressional time spent on economic issues and the diversions caused by the election rancor, the maritime industry could find itself once again at the end of 2012 without Congress having taken any action to enact significant maritime legislation absent the development of an intervening event as discussed above. ■

The Invisible Salvage Convention of 1989

BY THOMAS H. BELKNAP, JR.



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The United States has a long and distinguished history of signing and then failing to ratify international treaties (League of Nations, anyone?). So when the U.S. does ratify a treaty—and especially one that impacts private rights between parties—one can usually assume that litigants and the Courts will take notice. Not so, it seems, with the 1989 International Convention on Salvage.¹

The Convention came into force in the United States in 1996. And yet, there are precious few decisions that have even noticed—much less considered whether and to what extent the enactment of the Convention might have changed the U.S. maritime law of salvage. Why has this occurred? One commentator posits that this is the consequence of the Convention's being a self-executing treaty, *i.e.*, requiring no domestic enabling legislation to enact its provisions.² Since no provisions are contained in the U.S. Code, perhaps the treaty has escaped notice.

Whatever the explanation, the fact is that the failure to apply the Convention can be consequential in certain cases. Perhaps the most notable example concerns the fundamental issue of what factors the Court should consider in determining the *quantum* of a salvage award. These factors were enunciated long ago by the Supreme Court in its 1869 decision in *The Blackwell*.³ Briefly, they are as follows:

1. the labor expended by the salvors in rendering the salvage service;
2. the promptitude, skill, and energy displayed in rendering the service and saving the property;
3. the value of the property employed by the salvors in rendering the service, and the danger to which the property was exposed;
4. the risk incurred by the salvors in securing the property from the impending peril;
5. the value of the property saved; and
6. the degree of danger from which the property was rescued.

Article 13 of the Convention, on the other hand, specifies the following criteria for fixing a salvage award:

- a) the salvaged value of the vessel and other property;
- b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;
- c) the measure of success obtained by the salvor;
- d) the nature and degree of the danger;
- e) the skill and efforts of the salvors in saving the vessel, other property, and life;
- f) the time used and expenses and losses incurred by the salvors;

- g) the risk of liability and other risks run by the salvors or their equipment;
- h) the promptness of the services rendered;
- i) the availability and use of vessels or other equipment intended for salvage operations; and
- j) the state of readiness and efficiency of the salvor's equipment and the value thereof.

As can be seen, the Convention's criteria substantially overlap with the *Blackwell* factors, and in most cases a salvage award under either is likely to be essentially identical. But there are potentially important differences. Factor "e" under the Convention includes the words "and life", suggesting that the saving of lives is a factor that should be considered in quantifying a salvage award. Rightly or wrongly, this was not a factor under the *Blackwell* analysis. Factor "j" under the Convention expressly acknowledges that a salvor's "state of readiness and efficiency" should be recognized in rendering a salvage award. This is consistent with the U.S. general maritime law's long-standing recognition that a professional salvor should be granted an "uplift" to compensate him for having his resources in a state of constant readiness; however, this factor is not part of the *Blackwell* analysis.

The most significant difference between the *Blackwell* factors and the Convention criteria, however, is factor "b", which requires the Court to consider the skill and efforts of the salvor in "preventing or minimizing damage to the environment." This criteria is nowhere to be found in the *Blackwell* factors and, in fact, pre-Convention decisions raised serious question whether mitigation of environmental impact could ever properly be considered in fixing a salvage award. The Convention is explicit that this is a factor to be considered, however, and it is not difficult to envision the case where the avoidance of serious environmental damage is far and away the most significant contribution a salvor might make. And yet, this issue has received virtually no consideration by the courts.



Another potentially significant difference between the Salvage Convention and the U.S. general maritime law concerns the question of what kinds of property are subject to salvage, and where. Admiralty jurisdiction extends only to navigable waters capable of being used in interstate commerce. Moreover,

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The Invisible Salvage Convention of 1989 (continued from page 3)

the courts have traditionally shown reluctance to grant salvage awards where a “vessel” was not involved. For instance, the case law is particularly unsettled on the question of whether an aircraft that crashes in navigable waters might be subject to a salvage award.

Under Article I of the Convention, however, a “salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.” And “property” is further defined as “any property not permanently and intentionally attached to the shoreline...” From this combined definition, one might reasonably conclude that the Salvage Convention should apply in respect of the “salvage” of a sunken aircraft from a lake located entirely within one State.

Not so, at least according to the ruling of the Federal District Court in Maine in *Historic Aircraft Recovery Corp. v. Wrecked and Abandoned Voight F4U-1 Corsair Aircraft*.⁴ But that Court’s unsupported conclusion that “the salvage operation proposed by [the salvor] does not appear to fall within the salvage operations covered by the treaty” is not easily reconciled with the definitional language quoted above. Indeed, this is particularly so given that the Convention expressly authorized signatories to reserve the right not to apply the Convention “when the salvage operations take place in inland waters and no vessel is involved.” The U.S. expressed no reservations, however, when it ratified the Convention.

The plaintiff in *Historic Aircraft* contended that the Convention expanded the admiralty jurisdiction of the federal courts, including the right to arrest the aircraft *in rem*, but perhaps this was the wrong argument. A better argument might be that irrespective of whether there is admiralty jurisdiction, the claim is a “salvage” claim under the Convention, which gives rise to “federal question” jurisdiction in the federal courts and creates an *in personam* right of salvage even where the claim involves an airplane that has crashed in a lake located entirely within one State. That question does not appear ever to have been addressed by the Courts.

Conclusion

The 1989 Salvage Convention is a treaty obligation of the United States and, as such, is part of the law of the United States. Parties must consider its applicability in analyzing their rights and liabilities in a salvage situation, and the Courts should be applying the Convention when ruling on salvage claims governed by U.S. law. While in most cases the differences between the U.S. general maritime law and the Convention will be inconsequential, in some cases it could fundamentally affect the outcome. ■

1. S. Treaty Doc. No. 102-12, 1953 U.N.T.S. 193.

2. Martin Davies, *Whatever Happened To The Salvage Convention 1989*, 39 J. Mar. L. & Com. 463 (2008).

3. 77 U.S. (10 Wall.) 1 (1869).

4. 294 F. Supp. 2d 132 (D. Me. 2003).

Riding the CISADA Wave—U.S. Congressional Pressure on Iran Continues

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Since amending the Iran Sanctions Act (“ISA”) by passage of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (“CISADA”), the U.S. Congress has continued its efforts to isolate Iran by expanding both the scope of sanctionable activity and the types of sanctions that can be meted out by the U.S. Government. As with CISADA, many of the pending bills have particular focus on or consequences for the maritime industry and extend to both U.S. and non-U.S. persons.

There are two bills pending in the United States Congress which, if passed, would have implications for entry into the United States by vessels trading with Iran, North Korea, or Syria. Both bills would implement an “enhanced vessel inspection provision” and effectively impose a 180-day ban on entry similar in effect to the long-standing ban imposed by the Cuban Assets Control Regulations, which provide that “no vessel that enters a port or place in Cuba to engage in the trade of goods or the purchase or provision of services, may enter a U.S. port for the purpose of loading or unloading freight for a period of 180 days from the date the vessel departed from a port or place in Cuba” and further provide that “no vessel carrying goods or passengers to or from Cuba or carrying goods in which Cuba or a Cuban national has an interest may enter a U.S. port with such goods or passengers on board” (subject to waiver for certain vessels engaged in licensed or exempt trade with Cuba).

The pending bills are: (1) S. 1048, the Iran, North Korea, and Syria Sanctions Consolidation Act of 2011; and (2) H.R. 2105, the Iran, North Korea, and Syria Nonproliferation Reform and Modernization Act of 2011. Each bill would amend the Iran, North Korea, and Syria Non-Proliferation Act to require vessels entering the United States to certify that the vessel did not enter a port in Iran, North Korea, or Syria within the preceding 180 days. Penalties for false certification would include a two-year ban on entry of the vessel in question (both H.R. 2105 and S. 1048) as well as a two-year ban on entry of vessels owned or operated by any parent entity (H.R. 2105) or prosecution of the vessel’s owner under Title 18, United States Code (S. 1048). In addition, both bills would require the U.S. Government to

identify foreign ports at which vessels have landed during the preceding 12-month (H.R. 2105) or 180-day (S. 1048) period that have also landed at ports in Iran, North Korea, or Syria during such period, and require enhanced inspection of all vessels arriving in the United States from such ports.

Both bills were introduced in 2011 and appear to enjoy considerable support. The House of Representatives considered and passed H.R. 2105 on December 14, 2011 by an overwhelming majority vote. Upon House passage, the measure was sent to the Senate and referred to the Senate Committee on Foreign Relations. S. 1048 was introduced in the Senate on May 23, 2011 and has been cosponsored by 80 of 100 Senators. On October 23, 2011, the Senate Committee on Banking, Housing, and Urban Affairs held a hearing on the legislation. To date, no further action has been taken on either of the bills.

The pending legislation would supplement existing conditions of entry implemented in 2002 and be enforced by the U.S. Coast Guard for vessels requesting entry into U.S. ports that have previously visited ports deemed to lack effective anti-terrorism measures. Iran, as well as certain other countries subject to OFAC sanctions, is on the list of countries whose ports are deemed to have failed to maintain effective anti-terrorism measures. Any vessel calling on the United States after visiting Iran in any of its last five port calls must take additional security measures while calling on ports in Iran, log all security actions taken in the ship's log while the vessel is in Iran, and report all actions taken to the cognizant Coast Guard Captain of the port prior to arrival in U.S. waters. The Coast Guard will board any vessel entering U.S. waters if it visited Iran during its last five port calls to ensure that it undertook the necessary security measures. Failure to properly implement the actions listed above may result in delay or denial of entry into the United States. Based on the findings of the Coast Guard boarding, a vessel may be required to ensure that each access point to the ship is guarded by armed security guards and that they have total visibility of the exterior (both landside and waterside) of the vessel while in U.S. ports. The number and location of the guards must be acceptable to the Coast Guard. For those vessels that have demonstrated good security compliance and can document that the required measures were in fact implemented while visiting Iran, the armed security guard requirement will normally be waived.

In addition to provisions relating to the 180-day ban discussed above, S. 1048 would require imposition of sanctions against persons providing shipping services with respect to the exportation of petroleum, oil, or liquefied natural gas to be refined outside of Iran if the Islamic Revolutionary Guard Corps ("IRGC") or any of its affiliates are involved and certain value thresholds are met.

Another pending bill (S. 2101—introduced in the Senate on February 13, 2012) would require imposition of sanctions against any person who knowingly provides a vessel, insurance

or reinsurance, or any other shipping service for the transportation to or from Iran of goods that could materially contribute to the activities of the Government of Iran with respect to the proliferation of weapons of mass destruction or support for acts of international terrorism. The sanctions would take the form of blocking or freezing the assets of such persons that come within the United States or the possession of U.S. persons, and prohibiting U.S. persons from engaging in transactions with the sanctioned person. The sanctions would extend to any successor entity of the sanctioned person, any parent entity who knew or should have known of the sanctioned person's conduct, and any affiliated entity that participated in the sanctionable activities. S. 2101 also would significantly expand the ISA and CISADA in a variety of other ways, including by imposing liability on U.S. companies for actions of their offshore subsidiaries.

Yet another initiative, in the form of S. 2058, which was introduced in the Senate on February 1, 2012, would require reports to Congress on various matters related to trade with Iran in crude oil and refined petroleum products, including the identity and national origin of persons transporting such crude oil and refined petroleum products or providing shipping services and insurance services to Iran.

Finally, other pending legislation would essentially codify the sanctions targeting Iran's upstream oil and gas industry implemented by Executive Order effective November 21, 2011, which imposed "ISA-like" sanctions against persons providing goods, services, technology, or support for the development of Iran's petroleum resources or the maintenance or expansion of its petrochemical sector. Although the Executive Order, unlike the ISA, does not explicitly cite provision of ships or shipping services as examples of sanctionable services, the language of the Executive Order is sufficiently broad to encompass such services.

Congressional support for the various proposals is strong, although there remains work to be done in reconciling the various pending bills. In a recent letter to the President, several senior Senators signaled their intention to "continue ratcheting up... pressure—through comprehensive implementation of existing sanctions as well as imposition of new measures—until there is a full and complete resolution of all components of illicit Iranian nuclear activities." Therefore, careful monitoring of Congressional developments will be necessary in order to evaluate the risk of incurring sanctions for future activities not currently sanctionable.

This article summarizes developments as of submission for publication on March 7, 2012. For additional information, please contact Barbara D. Linney at (202) 772-5935 or Linney@BlankRome.com. ■

Your Forum or Mine: How Enforceable is Your Forum Selection Clause?

BY JEREMY J.O. HARWOOD



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Once embroiled in U.S. commercial litigation, there may be several surprises for a foreign party—especially one that expected all lawsuits arising from its contract would be heard in a contractually agreed forum (if one is so stipulated).

Foreign forum selection clauses ("forum clauses") and arbitration clauses, although being the same species, receive markedly different treatment in U.S. Courts. Under the New York Convention, enacted as part of the Federal Arbitration Act, if an arbitration agreement exists "the Court **shall** make an order directing the parties to proceed to arbitration..." There is (outside of a bankruptcy context) no discretion not to order arbitration. Denial of an order compelling arbitration is an immediately appealable order. Forum clauses are treated differently.

The Bremen Rule for Forum Clauses

Some forty years ago, the U.S. Supreme Court, in *The Bremen v. Zapata Off-Shore Co.*, famously pronounced, in upholding a forum clause, that:

We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

The general rule for enforceability of forum clauses under *The Bremen* is that they are presumptively valid and will be enforced unless the opposing party establishes: (1) that it is the result of fraud or overreaching, (2) that enforcement would violate a strong public policy of the forum, or (3) that enforcement would, in the particular circumstances of the case, result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable. In *Carnival Cruise Lines, Inc. v. Shute*, which may be relevant to the recent maritime disaster, the Court held "the party claiming [unfairness] should bear a heavy burden of proof."

The Presumption of Enforceability

The Second Circuit, along with many other Courts of Appeal, has added its own gloss. It requires the Court "to classify the clause as mandatory or permissive, *i.e.* to decide whether the parties are required to bring any dispute to the designated forum or simply *permitted* to do so." *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs. Inc.*

If the forum clause is classified as "permissive", there is no presumption of enforceability and the objecting party's burden of proof is significantly lessened. Provided a valid jurisdictional basis exists, however, the plaintiff will likely be allowed to continue its U.S. suit.

Making the Difference: Choice of Law

Most forum clauses will also choose the law of the forum. U.S. Courts give a presumption of validity to the choice of law in international transactions, which generally takes precedence over a choice of law analysis.

The jurisprudence on permissive/mandatory forum clauses may well have arisen because of a failure to ask the U.S. Court to take notice of the foreign law on the issue. In most common and civil law countries outside the United States, we venture to suggest that a clause providing "any dispute shall be heard in The High Court of [city]" would be considered mandatory. In the U.S., it must be accompanied by express exclusionary language.

Two leading cases from the Second Circuit illustrate the traps for the unwary; in neither was the law of the contract argued. In *Phillips v. Audio Active Ltd.*, the Second Circuit agreed that the phrase "are to be brought" established England as an obligatory venue for contractual claims within the scope of the clause. In contrast, in *Boutari*, the phrase "[a]ny dispute... shall come within the jurisdiction of the... Greek Courts" was considered "permissive" because it did not have specific exclusive or exclusionary language. Whether that distinction was valid under Greek law was not argued.

The danger of failing to argue to the U.S. Courts that the forum clause is "mandatory" under the applicable foreign law was highlighted in a Second Circuit decision last year.

In *Global Seafood Inc. v. Bantry Bay Mussels Ltd.*, a U.S. seafood distributor sued Bantry Bay, a Republic of Ireland company that produces mussels. The parties' "Heads of Agreement" provided that the "Agreement is governed by Irish law and the Irish Courts." Upon being sued for breach of contract, Bantry Bay argued that Ireland was the proper venue under the Heads of Agreement. The district judge (since elevated to the Second

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Circuit) agreed, concluding the provision was a mandatory clause. The case was dismissed for improper venue.

On appeal, the Second Circuit noted the case law rule that when only a jurisdiction is specified, without some further exclusionary language indicating an intent to make the jurisdiction exclusive, the clause will not generally be enforced. The phrase in the Heads of Agreement failed to include exclusionary language so that Global Seafood could—but was not bound to—sue in the Republic of Ireland. The dismissal order was vacated and the case remanded for further resolution. In a footnote, the Court stated “[w]e note that we are not applying Irish law to our analysis...because neither party has presented any evidence regarding how Irish law would interpret the provision at issue in this case...” That failure by Bantry Bay may well have cost it the dismissal by the lower court.

Conclusion and Recommendations

Orders denying enforcement of a forum clause are, unlike arbitration denial orders, not immediately appealable. The party seeking enforcement may face U.S. style discovery and a lengthy trial on the merits, with a right of appeal only after a final, adverse, judgment. Alternatively, a *forum non conveniens* motion seeking dismissal might be tried, but the discretionary factors there are even greater than under *The Bremen* test.

Parties to international transactions should be aware of the danger of a “permissive” forum clause and either seek U.S. counsel’s advice on “mandatory” language or refer matters to arbitration under a “broad” clause. Should they be sued in U.S. Courts, despite a forum clause, the importance of providing evidence of the applicable foreign law’s view of the clause (mandatory/permissive) should not be forgotten. ■

An Update on China’s Regulations on Ship Source Pollution

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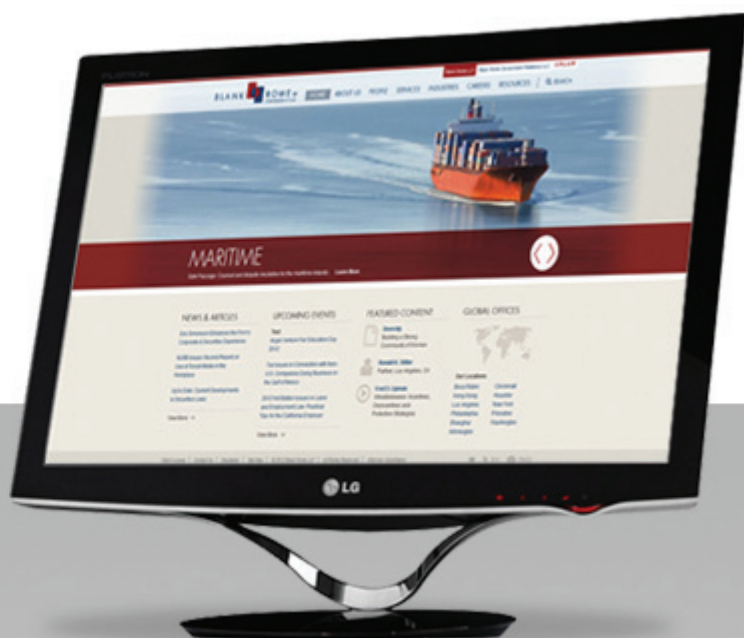
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On March 1, 2010, the Chinese government launched its anti-marine pollution regime by enacting the Regulations on the Prevention and Control of Marine Pollution from Ships (the “Regulations”). The Ministry of Communications and the Marine Safety Administration (“MSA”) have subsequently issued a series of supplemental rules to implement and enforce the requirements set forth under the Regulations, all of which are now effective. These include the following:

- **The Measures on the Administration of the Civil Liability Insurance for Oil Pollution Damage from Ships**—this has introduced guidelines for the qualifications of underwriters who provide oil pollution liability insurance coverage. Underwriters must satisfy financial solvency requirements in order to provide coverage for oil pollution claims caused by their insured vessels.
- **The Regulations for the Prevention of Marine Pollution of Ships and Relevant Operation Activities**—these stipulate the compliance protocols for vessels when engaging in marine operations.
- **The Regulations on Ship-Induced Marine Pollution Emergency Preparation and Response Management** (the “Emergency Response Regulations”); and
- **The Detailed Rules on the Implementation of the Regime of Agreement for Ship Pollution Response** (the “Detailed Rules”).

One of the main requirements under the Regulations that raised immediate concern in the international shipping industry is that any vessels involved in the carriage of polluting or hazardous cargoes in bulk, and all other vessels above 10,000 GRT, are required to enter into a clean-up contract with an MSA-approved pollution response company prior to entering a Chinese port or commencing lightering operations outside of port areas. In the past two years, China has delayed the enforcement of this requirement, pending the issuance of implementation rules and the evaluation of candidates for newly qualified clean-up contractors. The Emergency Response Regulations and the Detailed

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An Update on China's Regulations (continued from page 7)

Rules specify this particular requirement. At the time of writing, more than 100 SPORs have been approved and their contact details are published on the MSA website.

The Emergency Response Regulations classify qualified clean-up contractors, known as Ship Pollution Response Organizations ("SPRO"), into 4 levels, and they are assigned different levels respectively, corresponding to their qualifications and clean-up capabilities. The functions that SPROs offer are almost identical to that of a U.S. Oil Spill Response Organization ("OSRO").

Level 1 is the highest level. In order to achieve level 1, a SPRO needs approval from the MSA head office in Beijing. Local MSAs have administrative authority to evaluate and approve SPROs between levels 2–4. A qualification certificate for a SPRO is valid for 3 years. A SPRO must be a Chinese domestic business entity, however, joint-ventures established between a foreign investor and a Chinese party and a wholly foreign-owned enterprise incorporated in China are also eligible to apply for qualification as a MSA-approved SPRO. As an example, the first level 1 SPRO approved by the MSA compromises is a joint venture between a U.S. company, Resolve Marine Group, Inc., and a Shanghai company to provide a response in the Port of Shanghai and its waters.

The Detailed Rules require that the owners/operators of a clean-up contract with a local SPRO before their vessels enter a People's Republic of China ("PRC") port. The clean-up contract should be written in both Chinese and English. Overseas owners/operators that do not have a Chinese presence may either enter into the clean-up contract with the SPRO directly or authorize one of the agents approved by the MSA by a formal Letter of Authorization ("LOA") to do so. The master of the ship can sign the contract on behalf of the owner/operator with presentation of a duly executed LOA. But this is recommended only in emergency situations.

On June 1, 2011, the MSA published a Ship Pollution Response Model Contract (the "Model Contract"). The MSA made it clear that the rights and obligations of the contractual parties and the basic terms set forth in the Model Contract are mandatory. For instance, the governing law of the Model Contract is Chinese and China has exclusive jurisdiction over the disputes arising from the Model Contract. The parties' options for the forums for dispute resolution are limited to: (1) one of Chinese maritime courts; (2) arbitration and mediation at the China Maritime Arbitration Commission; and (3) the MSA mediation. The parties, however, are at liberty to reword the provisions of their contract or add additional clauses that they mutually agree on regarding the issues the Model Contract does not address, such as, for example, the Indemnity and Insurance Clause.

Starting as of January 1, 2012, the MSA has announced that, except in those ports where there is no MSA-approved SPRO and alternate measures are not available, vessels are required

to conclude a clean-up contract before they enter into a Chinese port. However, inconsistency in the regional enforcement of rules and regulations is not uncommon in China, and this is the case here even though the MSA is a central government agency with a vertical administrative system, under the direct supervision of the MSA's Beijing head office. As far as we understand, the local MSA in major ports were more willing to give a grace period to vessels up to March 1, 2012, the date on which the MSA head office in Beijing required the full enforcement of the pre-contracting requirement for the oil clean-up. ■

Ocean Tidbits

BY JOAN M. BONDAREFF



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The maritime community needs to pay attention to two recent proposals from the Obama Administration: 1) the proposed move of the National Oceanic and Atmospheric Administration ("NOAA") to the Department of the Interior; and 2) the issuance of a draft National Ocean Policy Implementation Plan to be completed this spring.

As almost a tangent to his proposed creation of a new trade agency—made up of the Small Business Administration, the U.S. Trade Representative, the Export-Import Bank, the U.S. Trade and Development Agency, and the Overseas Private Investment Corporation—President Obama announced his plans to move NOAA from the Department of Commerce to the Department of the Interior. One of the instigators of this proposal is former Commerce Secretary and White House Chief of Staff William Daley, who advised the President that it didn't make sense to split fisheries management between two departments. Commerce/NOAA, through the Regional Fishery Management Councils, manages the ocean fisheries and Interior the fresh water fisheries.

Of course, a major reshuffling of the cabinet departments cannot be accomplished without Congress giving the President new reorganization authority. The initial reaction on Capitol Hill was mixed with some Members of Congress supporting the idea and others questioning it. We can expect that Congress will at least have hearings on the subject. So far, some environmental groups have opposed the move—fearing that an "independent scientific agency" such as NOAA will be "corrupted" by a move to a resource development agency—paraphrasing their views of the two parent agencies.

Prior to announcing his reorganization plans, the Obama Administration released the draft National Ocean Policy Implementation Plan for public comment. Comments are due by March 28, 2012 online at www.whitehouse.gov/oceans. The Plan is a further step in the Administration's development and

execution of a new National Ocean Policy, which began in 2010 with the issuance of Executive Order 13547.

In essence, the draft Plan calls for better coordination among the resource agencies working in the marine environment; directing all twenty or more resource agencies to make decisions based on the principle of ecosystem-based management (*i.e.*, considering entire ecosystems by accounting for economic, social, and environmental benefits); developing a system of Coastal and Marine Spatial Plans for the nine regions of the U.S.; basing decisions on best available scientific information; improving mapping capabilities and products, including in the Arctic; improving coordination with state, local, tribal, and regional planning entities; developing plans to help communities adapt to climate change; and creating a plan to respond to changing conditions in the Arctic, among other proposed action items.

Of particular use to the maritime industry may be the website that the Administration has developed to collect and disseminate to the public—for free—all relevant sources of data to implement the Plan. Some of the data is already available at www.data.gov/ocean. The site is to be completed by 2015.

In one sense, the proposed merger of NOAA into Interior could facilitate the inter-agency coordination that the Plan is expected to achieve. But Congress has to be persuaded of the benefits of the reorganization and has yet to fund NOAA to carry out much of the new National Ocean Policy. ■



Recent Amendments to the Inter-Club Agreement

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The International Group of P&I Clubs (the "International Group") has recently amended the 1996 version of the Inter-Club New York Produce Exchange Agreement (the "ICA") regarding the ability for owners and charterers to seek counter security for a cargo claim.

By way of background, the ICA is a means of apportioning liability for cargo claims between owners and charterers arising out of the New York Produce Exchange ("NYPE"), Asbatime and other time charterparty forms, where the terms of ICA are expressly incorporated.

The first ICA was introduced in 1970 and has been amended three times. It was subject to a minor revision in 1984, and in 1996 it was significantly amended and restructured. Arguably the most fundamental changes in the 1996 Agreement were the addition of Clauses (2) and (6). Clause (6) of the ICA 1996 provides that claims will be time-barred if written notice is not given within two years of discharge. Clause (2) of the ICA 1996 provides that this time bar clause will apply "notwithstanding any provision of the charter party or rule of law to the contrary."

The ICA 1996 was widely adopted by the maritime industry. However, the ICA 1996 made payment of a cargo claim a condition precedent to a right to indemnity. As a result, P&I Clubs spent a tremendous amount of time and costs dealing with questions of security between owners and charterers. To address this security issue, the International Group recently amended the ICA 1996 to incorporate a provision dealing with security for cargo claims.

The latest ICA, effective on September 1, 2011, incorporates a new provision, which creates an entitlement to counter security based on reciprocity (the "Security Provision"). Under the Security Provision, once one of the parties to a charter party has put up security for a cargo claim, provided the two year time bar set out in Clause (6) has been complied with, there is an entitlement to counter security on the basis of reciprocity. The Security Provision has been incorporated into the amended ICA under Clause 9.

The amended ICA 1996, which has been named the "Inter-Club New York Produce Exchange Agreement 1996 (as amended September 2011)" (the "2011 Agreement") will, by its terms, apply only to charter parties issued on or after September 1, 2011, provided that such charter parties refer to either "the ICA 1996 (as amended September 2011)" or "the ICA 1996 or any amendments thereto." Parties should be cautious to avoid ambiguous references.

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Recent Amendments to the Inter-Club Agreement (continued from page 9)

The 2011 Agreement will not apply to claims arising under charter parties executed prior to September 1, 2011. However, parties can mutually agree to incorporate the 2011 Agreement into older charter parties by executing an addendum.

The International Group has recommended that its members specifically incorporate the 2011 Agreement into all charter parties on NYPE and Asbatime forms entered into, on, or after September 1, 2011 so that the time and costs dealing with questions of security between owners and charterers can be significantly reduced. ■

No Speeding! And, Be Ready for EPA's New Vessel General Permit

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North Atlantic Right Whales

The U.S. Coast Guard and the National Oceanic and Atmospheric Administration ("NOAA") have issued reminders to ship operators that the Right Whale Ship Strike Reduction Rule (the "Final Rule") is in effect and being enforced. The Final Rule, published by NOAA in late 2008, establishes a 10 knot speed limit for commercial vessels 65 feet or greater transiting designated Right Whale Seasonal Management Areas ("SMAs") during the migratory season, generally running from November through May, depending on the particular SMA. There are three SMAs designated along the U.S. East Coast—the Southeastern Atlantic Region, the Mid-Atlantic Region, and the Northeast Region. The boundaries of the SMAs were determined by the Right Whales' seasonal migration patterns. The speed limit may only be exceeded if the master or pilot determines that a higher speed is required to maintain the safety of the ship or crew, in which case the speed exceedance and the reasons for the deviation must be logged. The master also must attest to the accuracy of the logbook entry by signing and dating it.

NOAA and the Coast Guard are working together to enforce the Final Rule in an effort to protect the endangered Right Whale, which is the world's most endangered large whale species, with only about 300 to 400 estimated worldwide. The Coast Guard's District 5 has dubbed its enforcement effort

"Operation Right Speed." The Coast Guard utilizes the Automatic Identification System, Vessel Monitoring System, and radar to monitor ships in real time from shore-based stations, as well as from resources on the water. The Coast Guard also issues reminders of the speed restriction via radio. The Coast Guard's enforcement effort consists of two phases. At the beginning of each season, the Coast Guard reminds ships entering the SMAs of the speed restriction. It generally does not refer violations to NOAA during this first phase unless a ship has been reminded of the speed restrictions and fails to comply. The second phase is the enforcement phase, during which violations will be referred to NOAA for action.

NOAA, on the other hand, does not review vessel data in real time, but rather conducts larger scale reviews of longer periods of time, possibly even reviewing multiple seasons of data collected for a single ship. NOAA states that it focuses on those ships that have repeatedly violated the speed limit, and it does not matter whether the ship operator knew of the restrictions—in NOAA's view, the ship operator *should know* of the speed restrictions.

During the first migratory season after the Final Rule was implemented—generally November 2008 to May 2009—NOAA did not issue any Notices of Violations and Assessments ("NOVAs") and, instead, issued warnings and tried to increase the awareness of ship operators of the new speed restrictions. In the following seasons, however, NOAA actively enforced the Final Rule and issued NOVAs, assessing hundreds of thousands of dollars in fines to numerous ship operators—whether or not they had been previously warned. In November 2010, NOAA issued NOVAs to seven companies, assessing penalties ranging from \$16,500 to \$49,500, for multiple speed violations during the first enforcement season, 2009/2010.

In November 2011, NOAA issued a second round of NOVAs for the 2009/2010 and 2010/2011 seasons. Nine companies were issued NOVAs assessing a \$5,750 penalty per speeding violation. Companies were assessed penalties ranging from \$11,500 to \$92,000. None of these companies or ships had prior violations. The NOVAs generally cover multiple violations, some of which occurred more than a year prior to the NOVA being issued.

The Coast Guard stated that it is doing its best to balance the interests of the commercial sector and the protection of resources. It urges that ship operators remember that the Final Rule is not an arbitrary restriction or a means of generating revenue, but an attempt to protect a dwindling species during a time period that it is particularly vulnerable. As a result of this aggressive enforcement effort, ship operators are reminded to heed the 10 knot speed restriction when transiting SMAs, factor the speed restriction into their voyage planning, and, more importantly, train their crews and provide guidance to every ship regarding compliance with this requirement.

EPA's Vessel General Permit

The Environmental Protection Agency ("EPA") is currently considering comments on its two proposed vessel general permits. The draft Vessel General Permit ("VGP") and draft Small Vessel General Permit ("sVGP") were proposed on November 30, 2011 and comments were due by February 21, 2012. EPA intends to finalize the draft VGP and draft sVGP by November 30, 2012, more than a year in advance of the effective date of December 19, 2013 (when the current VGP expires) to allow time for an orderly phase-in of any new requirements.

By way of background, the Clean Water Act requires National Pollutant Discharge Elimination System ("NPDES") permits for any "discharge of a pollutant" from a point source. Vessels operating within the three-mile territorial sea are point sources. For decades, there was an exemption for "discharges incidental to the normal operation of a vessel," but the exemption was eliminated as a result of a court order. As a result, the original VGP was developed and finalized in February 2009 to address discharges incidental to the normal operation of vessels. The VGP applies to commercial vessels 79 feet in length or greater and regulates 26 specific discharge categories. Vessels less than 79 feet and commercial fishing vessels (except for ballast water discharges) were exempted by Congress until December 18, 2013. Fishing vessels will become subject to the VGP in December 2013, as will those smaller vessels that were previously exempt. The sVGP was tailored specifically to smaller vessels. Lifeboats and other small boats carrying onboard larger vessels, however, are covered by the carrying vessel's VGP.

The draft VGP includes several significant changes from the existing VGP, including the following changes, among others:

- The International Maritime Organization ("IMO") ballast water standards that include numeric effluent limits would apply, though the implementation schedule for newbuilds is impractical. There would be four options to meet the standards—1) treat the ballast water with an approved treatment device, 2) utilize onshore treatment, 3) use potable water from the United States or Canada as ballast water, or 4) do not discharge ballast water at all. Until a vessel's compliance date, certain interim requirements apply, which are substantially similar to the requirements under the current VGP.
- The voluntary IMO limits for exhaust gas scrubber effluent would be mandatory. Such limits address pH, turbidity,

nitrate, and a PAH compound, some of which require continuous monitoring. Monitoring data must be submitted annually to EPA.

- There would be stricter requirements for the use of environmentally acceptable lubricants for oil-to-sea interfaces. New builds would be required to use only environmentally acceptable lubricants. Existing vessels may use other lubricants in oil-to-sea interfaces if using environmentally acceptable lubricants is technologically infeasible, but the infeasibility must be documented and included in the annual report to EPA.
- The One-Time Report and the Annual Non-Compliance Report would be consolidated into one Annual Report, which would include analytical monitoring. Multiple unmanned,



unpowered barges, if meeting certain requirements, could be included in one Annual Report. Electronic reporting would be required unless a waiver is requested and granted.

- Additional analytical monitoring of certain discharges, such as ballast water, scrubber water, and graywater, would be required. The frequency of visual inspections required would also be reduced.
- The EPA is also requesting comments on whether to change the bilgewater standard to 5 ppm under certain circumstances to provide the industry more options for discharging. The current VGP prohibits vessels that regularly leave waters subject to the VGP from discharging treated bilge water within one nautical mile of shore if it is technologically feasible to hold the bilgewater.

Even though the comment period for the draft VGPs has ended, owners and operators of vessels and other stakeholders should be familiar with the draft VGPs and remain alert for new developments. ■



Maritime Emergency Response Team

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In the event of an incident, please contact any member of our team.

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