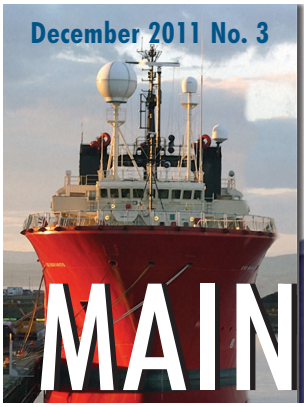
December 2011 No. 3



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## Crossing the Bar: The Low Hurdle to Becoming a U.S. Debtor

**BY JEREMY J.O. HARWOOD**

JEREMY J.O. HARWOOD
PARTNER

JHarwood@BlankRome.com

Recent trade publications have prophesized a wave of shipping bankruptcies. We have already seen several in the United States in 2011, such as Omega and Marco Polo. Trailer Bridge and General Maritime filed in November. There will undoubtedly be more, despite the potential debtors having little or no connection to the United States. In this respect, non-U.S. listed shipowning companies considering restructuring and reorganization may not factor in the potential for a U.S. main proceeding under Chapter 11 reorganization on the assumption that they do not qualify to be U.S. debtors. They would be mistaken; not least because of the right of resort to the U.S. bankruptcy court's expansive view of its jurisdiction to prevent interference with a Chapter 11 debtor's property wherever it is located (such as by way of vessel arrests in Hong Kong and Singapore in the *U.S. Lines* case that subjected the bunker supplier to a $5,000 per day penalty). This is a fairly unique U.S. concept of the restructuring protection given to a debtor. It should be noted that such protection is afforded to Chapter 15 debtors (*i.e.,* those that have filed their main bankruptcy case outside the U.S.) *only* in respect of property within the territory of the U.S. At present, the U.S. Bankruptcy Code, as interpreted by case law, provides liberal provisions for foreign companies seeking to reorganize under the protections of Chapter 11.

### Who May Be a Debtor?

The Bankruptcy Code, 11 U.S.C. § 109, says that a person or entity with a U.S. residence or domicile, or a U.S. place of business or "property", qualifies to be a U.S. debtor.

The case law interpreting "property in the United States" has expanded the potential for the filing by an otherwise non-resident entity. For example, in the 2009 case of *Petrorig 1 Pte Ltd., et al.,* which was filed in the Bankruptcy Court of the Southern District of New York, the Singapore debtor's only assets were oil rigs under construction in Singapore and a "riser"—the title to which was disputed—in Louisiana. Nevertheless, two weeks prior to the bankruptcy filing, they had deposited a substantial retainer with their bankruptcy counsel. That, apparently, sufficed. The case has remained rooted in the United States.

More recently, the same judge in the 2011 *Marco Polo* filing denied the secured lenders' attempts to dismiss the case on the basis that the foreign shipowning companies failed, among other things, to qualify as U.S. debtors. He held that certain property in the U.S. was sufficient. This included unallocated pool revenue (subject to setoffs) "in conjunction with" a legal retainer to bankruptcy counsel which, he concluded, had not been remitted solely for the purpose of manufacturing jurisdiction, because "there were contacts with the [U.S.] beyond the payment of the retainer."

In another maritime bankruptcy case, *Global Ocean Carriers,* which was filed in the Bankruptcy Court of District of Delaware in 2000, business documents, various bank accounts (regardless of how much was actually in them), and an unearned portion of legal retainers held in escrow was again held to be sufficient "property" to permit that company to qualify as a U.S. debtor.

**(continued on page 2)**

## CONTENTS

**Crossing the Bar (continued from page 1)**

Of significant interest is the case of *Cenargo International PLC,* which was filed in New York in 2003, where the debtor opened bank accounts in late 2002 and then filed for bankruptcy protection in February 2003. Those accounts were held to be "further support for a filing." In this case, the judge specifically sustained the filing and applied the automatic stay to one of the mortgagee banks over whom it had personal jurisdiction and thereby injunctive powers to prevent interference with the debtor's property "even if foreign courts … chose not to enforce it."

## Challenges to Jurisdiction

Notwithstanding the case law that permits even a *de minimis* deposit of "property" into a bank account, even where that account is held by way of a retainer by the lawyers filing the case, consideration should also be given to potential challenges to such "manufactured" jurisdiction based on absention or "bad faith" grounds. As always, pre-planning and consultation with counsel is advised at the earliest stage possible.

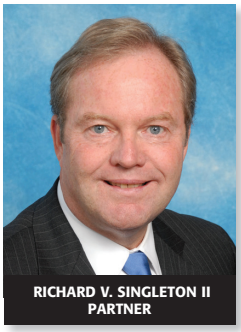
## Conclusion

Napoleon's dictum that the "worst decision to make is not to make a decision" is especially true in distressed shipping cases. Secured creditors and other creditors in multiple jurisdictions may preempt the shipowner's decision whether to seek the worldwide bankruptcy protection for their trading assets (*i.e.* ships) afforded to U.S. debtors. By then, it may be too late and the shipowner may find itself in a liquidation proceeding—over which it may have little control—and the potential "going concern" value, as well as the potential for restructuring, will be lost to "fire sales." ■

At the International Bar Association's ("IBA") Annual Conference in Dubai in November 2011, **Jeremy J.O. Harwood** was promoted to Vice Chair of the Maritime and Transport Law Committee, the IBA's second largest committee, of which both he and **Richard V. Singleton II** have been active members for many years. Both Blank Rome partners will be speaking at the Committee's upcoming International Maritime Law Conference in Copenhagen on May 29-30, 2012. Mr. Harwood will be chairing a session on "Cross-Border Insolvency" and Mr. Singleton will be speaking on "Compliance Issues in Modern Shipping."

# Limitation of Liability in the Workboat Industry

**BY RICHARD V. SINGLETON II**



RICHARD V. SINGLETON II
PARTNER
RSingleton@BlankRome.com

The owners of tugs and other workboats are entitled to limit their liability under the Shipowner's Limitation of Liability Act, 46 U.S.C. §30501 *et seq.* ("Limitation Act"), to the same extent as the owners of ocean-going ships. Thus, if a workboat is involved in a maritime casualty, the workboat's owner or bareboat charterer may be entitled to limit its liability to the value of the workboat *after* the incident, plus any towing charges, hire, or freight still owed for the job. This limitation right obviously can be a great benefit to a workboat's owner and insurers when the damages from a marine casualty are substantial.

A vessel owner's limitation rights, however, are subject to several important qualifications, three of which have special significance in the unique circumstances of the workboat industry. Each is discussed below.

## "Privity or Knowledge"

A vessel owner is only entitled to limit its liability if the fault that caused the casualty is not within the owner's "privity or knowledge." This is a term of art that has been judicially defined over decades of case consideration and does not lend itself to easy definition when a corporate owner is involved. Obviously, if senior management is aware of the fault that caused the casualty, then the fault is deemed to be within the owner's "privity or knowledge." The more difficult questions concern employees further down on the corporate ladder. For example, the knowledge of an operations manager, and even of a fleet or port captain that reports to the operations manager, likely will be imputed to the owner, but the knowledge of a vessel's master or in house repairman likely would not be.

The above examples illustrate that it is not always easy to predict whether the knowledge of an individual will be imputed to the vessel's corporate owner, and most "privity or knowledge" questions can only be resolved on a case-by-case basis. In the workboat industry, these questions can be even more difficult given the closer involvement by management in the operation and maintenance of a fleet and the sheer proximity of the vessels to management control. But as a very rough guide, casual-

ties resulting from the operational negligence of the workboat's master or crew generally will not be considered within the owner's "privity or knowledge" and the workboat owner would be entitled to limit. The result, however, may well be different if the owner was notified of the matter as it was happening and became involved in the decision making process leading to the casualty. It is an open question whether the knowledge of a dispatcher would be imputed to the owner; but given the purpose of the Limitation Act, persuasive arguments could be constructed that it should not be.

On the other hand, casualties resulting from a vessel's un-seaworthiness, or from negligent acts by masters or mates found to be incompetent or improperly trained, will likely be found to be within the "privity and knowledge" of the corporate owner. The implementation of proper procedures and appropriate delegation of functions bearing on these issues is the best way to preserve a workboat owner's limitation rights.

## The Personal Contract Doctrine

The second qualification on the right to limit—the Personal Contract Doctrine—has great significance in the workboat industry. This judicially crafted exception to the Limitation Act prohibits a vessel owner from limiting its liability for claims brought for breach of personal contractual obligations. The theory is that, as a matter of policy, a vessel's owner (corporate or otherwise) should not be entitled to limit against a liability arising out of its own personal undertakings. Direct claims, even indemnity or contribution claims, can fall within the Personal Contract Doctrine and therefore would not be subject to limitation.

The doctrine can be confusing because not all contractual obligations in the shipping business are considered personal, and what is a personal contract is not always easy to identify. Almost all charters and contracts of affreightment in the workboat context, to the extent they contain warranties of seaworthiness, are personal obligations of the vessel owner, and claims for breach of those obligations are not limitable. Bills of lading, however, are not considered personal contracts. Towage contracts contain many personal obligations, such as the payment obligation, but not all breaches of a towage contract will be a breach of a personal obligation. Damages to the tow resulting from the negligence of a tug master, for example, may not be a breach of any personal obligation of the tug owner.

As the workboat industry is largely contract driven, the Personal Contract Doctrine can operate as a major restriction on the limitation rights of workboat owners. Fortunately, a workboat owner can protect itself from application of the Personal Contract Doctrine by including in its contracts a clause stipulating that nothing in the contract is a personal obligation and that the contracting parties agree that both are entitled to all the benefits of the Limitation Act. An experienced maritime lawyer can draft the appropriate wording if a workboat owner's form contracts do not contain such a provision.

(continued on page 4)

THOMAS H. BELKNAP, JR.
PARTNER

TBelknap@BlankRome.com

## Notes from the Editor

**BY THOMAS H. BELKNAP, JR.**

Well, another year has passed. Some in the maritime industry may be sighing with relief to say farewell to 2011, but many more are looking at 2012 with trepidation. It promises to be another challenging year in many different sectors of the shipping market. It is, perhaps, a sign of the times that the discussion has shifted over the past few years from IPOs and FFAs to Rule Bs to Chapter 15s and Chapter 11s. There's no question that bankruptcy has been the hot topic these past few months, and from the looks of things this will be a topic to keep us busy for a good part of the coming year.

Still, Blank Rome has more exciting things to talk about. We expanded our footprint this year into two important shipping markets: Shanghai and Houston. We will be working hard this coming year to further develop our shipping law capabilities in these markets, just as we have been constantly striving to expand our capabilities in all of the markets we serve. Many of our partners have once again been recognized this year by various industry sources, including *Chambers, Who's Who in Shipping,* and the *Guide to the World's Leading Shipping and Maritime Lawyers,* among others, as leading lawyers in the shipping industry. We are proud and grateful for this recognition. And, most importantly, we have had the honor and pleasure of representing our clients in many of the most interesting and important cases that have played out around the world this year.

We understand that 2012 will be a challenging year for many of our clients in this industry, and we remain committed to providing excellent service and comprehensive legal assistance in all of the complex areas where our clients require advice. We are grateful to—and for—our clients for their continued trust and confidence, and we look forward to working with you to help you navigate safely through the coming year.

Happy New Year to All. ■

**Limitation of Liability (continued from page 3)**

A workboat owner also may attempt to contractually limit its liability by inserting a clause in its contracts providing that, in the event of damage to the contracting party's property, the workboat owner's liability is limited to some monetary amount. These clauses have not been squarely tested in court. But judicial decisions in analogous situations suggest that such clauses have a good likelihood of being enforced, as long as the limitation amount is not punitive and bears a reasonable relationship to the transaction. The calculation of the limitation amount is tricky, but it probably should at least be some multiple of the fee for the services provided under the contract.

## The Limitation Fund

The third area of limitation law having special significance to the workboat industry relates to the calculation of the "limitation fund", which is the amount to which a vessel owner may limit its liability. In the usual case, only one vessel of the limitation defendant is involved, so the limitation fund is calculated by taking the value of that vessel after the casualty and adding to it any hire or freight still owing on the voyage. In the workboat context, it is not uncommon for two or more vessels to be under the control of one tug when a casualty occurs. This raises the sometimes difficult question of the how the limitation fund is calculated.

The law historically has analyzed this question differently depending on whether the claims involved are for "tort" (negligence) or breach of contract. In tort cases brought by third parties to whom the vessel owner owes no contractual duty, the general rule has been that the limitation fund is calculated by the value of the vessel at fault. This normally is the tug as barges usually make no decisions and take no actions on their own. The classic situation is where a tug lands a barge too hard and damages a dock, or where a barge in tow strikes and damages another vessel. In such cases, the value of the limitation fund will be the value of the tug. Albeit unusual, a barge nonetheless may bear some fault, such as where the barge is improperly lit or unseaworthy in some other respect that contributes to the casualty. In such cases, the barge's value may be included in the limitation fund.

The rule has been different in breach of contract cases. Assuming the personal contract doctrine discussed above does not prevent limitation, the limitation fund is calculated by the number of vessels in the flotilla under the same ownership. Thus, the limitation fund available for claims for damaged cargo carried on a barge, which is owned by the towing company, is not limited to the value of the tug, but would also include the value of the carrying barge. The value of any other property in the flotilla owned by the towing company, such as other barges, is also subject to inclusion in the limitation fund.

The above "tort/contract" distinction has been highly criticized. The law is therefore evolving toward a more modern rule that the value of all vessels in a flotilla must be included in the limitation fund—regardless of the basis of the claim—when the vessels are subject to common ownership, are engaged in a single enterprise, and are under common control at the time of the casualty.

*The workboat industry presents unique circumstances. While workboat owners have the same limitation rights as the owners of ocean-going vessels, the qualifications on their limitation rights are subject to, and must be understood in light of, these unique circumstances. Proper planning and the use of protective contractual provisions can assist in ensuring, to the extent possible, that a workboat owner's limitation rights remain available.* ■

This article first appeared in the November 2011 edition of *Maritime Reporter.*

# MEPC Adopts Regulations on Energy Efficiency for Ships—Will Result in Reductions in Fuel Consumption and GHG Emissions from Ships

**BY CHARLES E. WAGNER**

CHARLES E. WAGNER
OF COUNSEL

Wagner@BlankRome.com

The IMO Marine Environment Protection Committee ("MEPC") recently adopted amendments to the International Convention for the Prevention of Pollution from Ships ("MARPOL") Annex VI—Regulations for the Prevention of Air Pollution—establishing energy efficiency standards for ships. The amendments were adopted on July 15, 2011 at MEPC's 62nd session and are the first mandatory requirements arising out of the IMO's efforts to reduce greenhouse gas ("GHG") emissions from international shipping. MEPC had approved several voluntary measures to improve the energy efficiency of ships in 2009 while a working group continued to develop technical, operational, and market based measures to reduce GHG emissions. The Regulations on Energy Efficiency for Ships, which can be found in the new Chapter 4 added to Annex VI, require that ships attain a certain Energy Efficiency Design Index ("EEDI") and develop and implement a Ship Energy Efficiency Management Plan ("SEEMP"). In addition, each ship covered by the regulations will be required to obtain an International Energy Efficiency ("IEE") Certificate. The new requirements apply to new ships or ships that undergo a major conversion.

In accordance with MARPOL, the Regulations on Energy Efficiency for Ships will be deemed to have been accepted on July 1, 2012 unless one-third of the parties or parties with combined merchant fleets constituting not less than 50% of the gross tonnage of the world's merchant fleet object to the amendments. The regulations will enter into force on January 1, 2013.

## Applicability of Regulations on Energy Efficiency for Ships

The new regulations will apply to all ships over 400 gross tons. New ships must be designed and constructed to meet a required EEDI. A new ship is a ship when: (1) the shipbuilding contract is placed on or after January 1, 2013, (2) in the absence of a shipbuilding contract, the keel is laid on or after July 1, 2013, or (3) a delivery is made on or after July 1, 2015. Moreover, existing ships that undergo a major conversion must meet the required EEDI. A major conversion means a conversion: (1) which substantially alters the dimensions, carrying capacity, or engine power of the ship, (2) which changes the type of the ship, (3) which is intended to substantially prolong the life of the ship, or (4) which otherwise so alters the ship that it becomes subject to EEDI provisions.

The regulations allow a party administrator to waive compliance with the required EEDI standards for up to four years. The EEDI standard only applies to certain types of ships and does not apply to ships with diesel-electric propulsion, turbine propulsion, or hybrid propulsion systems.

All ships will be required to have a SEEMP that will include procedures to improve the ship's energy efficiency.

## Energy Efficiency Design Index

The new regulations will reduce GHG and other air pollution emissions by requiring new ships to reduce their EEDI from an existing baseline EEDI. The EEDI is a calculation based upon a ship's technical characteristics, such as hull dimensions and form, propeller design, propulsion system, fuel usage, and other factors. IMO developed EEDI values for the existing international fleet by type of ship. A "reference line value" was determined by

fitting a curve through the data for the fleet. The mathematical formula for the curve determines the reference line value. The formula uses the deadweight of the ship and numerical factors based upon the type of ship. The type of ships subject to the EEDI requirements are: (1) bulk carrier, (2) gas carrier, (3) tanker, (4) container ship, (5) general cargo ship, (6) refrigerated cargo carrier, and (7) combination carrier. MEPC continues to study whether other types of ships should be subject to the EEDI standard.

The regulations establish a "Required EEDI", which is the reference line value reduced by a factor (percentage). The regulations phase in reductions from the reference line value in four phases. Phase 0 is the base line without reduction and runs from January 1, 2013 to December 31, 2014. Phase 1 requires a 10% reduction and goes from January 1, 2015 to December 31, 2019. Phase 2 requires a 20% reduction from the base line and runs to December 31, 2024. Phase 3 requires a cumulative 30% from the base line and begins January 1, 2025. The percentage reductions apply to larger vessels in each ship category. For smaller vessels, the required reduction factor may be less based on a vessel's deadweight. At the beginning of Phase 1 and again at the midpoint of Phase 2, the IMO will review the status of the technical developments and revise the time periods and reduction factors, if needed.

(continued on page 6)

**MEPC Adopts Regulations on Energy Efficiency**
**(continued from page 5)**

An "Attained EEDI" must be calculated for each new ship or each ship that has undergone a major conversion. The Attained EEDI must be less than or equal to the Required EEDI to comply with the regulations. If the design of a ship allows it to fall into more than one of the ship types, then the Required EEDI for the ship shall be the most stringent (the lowest) Required EEDI.

The Attained EEDI is specific to each ship and must indicate the estimated energy efficiency performance of the ship. There must be an EEDI technical file containing all the information needed to calculate the EEDI. The calculation must be included and must follow guidelines developed by the IMO. The EEDI technical file must be verified by the party administrator or its authorized representative.

During MEPC's session, concerns were raised about underpowering vessels in order to meet the Required EEDI. Consequently, the regulations were revised to provide that the installed propulsion power shall not be less than the propulsion power needed to maintain the maneuverability of the ship under adverse conditions in accordance with IMO guidelines.

### Ship Energy Efficiency Management Plan

The amendments to Annex VI require that all ships of 400 gross tons or more keep on board a ship specific SEEMP. The SEEMP may be a part of the ship's Safety Management System. The SEEMP should be developed in accordance with IMO guidelines. The guidelines cover fuel efficient operations, including improved voyage planning, weather routing, "just in time" port procedures, speed optimization, and optimized shaft power. The guidelines for optimized ship handling include optimizing trim, ballast, propeller and propeller inflow considerations, and optimizing the use of rudder and autopilot systems. Other elements that may be included in a SEEMP include hull maintenance, propulsion system maintenance, waste heat recovery, energy management, use of alternative fuels, improved cargo management, and improved fleet management. The SEEMP should include an implementation system, monitoring, and recordkeeping provisions.

### Other Chapter 4 Requirements

The new ship energy efficiency regulations include several other provisions. These include surveys and the requirement for an IEE Certificate. A survey is required before a new ship is put in service and after a major conversion for existing ships. A verification of the SEEMP on board is required for the first intermediate or renewal survey on or after January 1, 2013.

An IEE Certificate for each ship shall be issued after a survey and before that ship may engage in voyages to ports or offshore terminals under the jurisdiction of other parties. The certificate shall be issued either by the party administration or any organization duly authorized by it. The IEE Certificate shall be valid for the life of the ship until the ship is withdrawn from service, a new certificate is issued following a major conversion, or the transfer of the ship to the flag of another State. With respect to the new regulations, port State inspections shall be limited to verifying that there is a valid IEE Certificate.

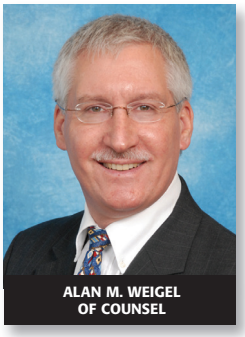
### Implementation in the United States

As noted above, the Annex VI Regulations on Energy Efficiency for Ships will enter into force on January 1, 2013. The United States ratified Annex VI on October 8, 2008 and the Annex entered into force for the United States on January 8, 2009. In July 2008, President Bush signed into law the Maritime Pollution Prevention Act of 2008, which implemented Annex VI by amending the Act to Prevent Pollution from Ships. Amendments to Annex VI are self implementing through the Act to Prevent Pollution from Ships.

The Coast Guard will implement the ship energy efficiency regulations in the U.S. The Coast Guard has reserved 33 CFR Part 152 for the new regulations. Given the January 2013 entry into force, it is anticipated that the final rules implementing Chapter 4 of Annex VI will be issued in late 2014. Shipowners, ship operators, shipbuilders, ship designers, marine diesel engine and equipment manufacturers, and other interested groups should monitor the Coast Guard rulemaking. ■

## Using Accident Reports in Casualty Litigation

**BY ALAN M. WEIGEL**



ALAN M. WEIGEL
OF COUNSEL

AWeigel@BlankRome.com

Most significant maritime accidents are investigated by port state or flag state authorities who usually issue reports of their findings. These reports often contain findings that would be useful in the litigation that frequently results from a maritime accident. Getting these reports admitted into evidence or otherwise using them in litigation, however, can be challenging.

In the United States, investigations are conducted by the U.S. Coast Guard ("USCG") or the National Transportation Safety Board ("NTSB") under their respective statutory authority to investigate marine accidents. These investigations are generally not intended to fix blame, but instead seek to identify causes and "lessons learned" to prevent future occurrences. Consequently, the statutory authorities establishing the USCG's and NTSB's investigatory powers provide that the reports of these agency's investigations cannot be used in litigation. For example, no part of a USCG report of a marine casualty investigation, including "findings of fact, opinions, recommendations, deliberations, or conclusions," is admissible as evidence or subject to discovery in any civil or administrative proceedings. Similarly, NTSB reports

relating to accidents or investigations are not admissible as evidence and may not be used "in any suit for damages arising out of any matter mentioned in such reports."

There are, however, several important exceptions to the statutory prohibitions:

- First, some courts have concluded that the statutory prohibition applies only to the report itself and not to materials attached to the report. Thus, documents, photographs, and other evidence included as attachments to USCG or NTSB reports may be admissible if they are not the type of conclusory items that the statute seeks to exclude.
- Second, it is an open question as to whether a USCG or NTSB report may be used for the purpose of impeaching fact or expert witnesses. The courts that have been presented with the issue have deferred a decision on the matter. Thus, it may be possible to use USCG or NTSB findings of fact to challenge the credibility of a witness's testimony.
- Third, even if findings of fact from USCG and NTSB accident reports are themselves inadmissible, under some circumstances the findings may be relied upon by experts in rendering their opinions on the casualty or accident that is the subject of the litigation. Evidence rules generally permit an expert to rely on inadmissible facts and data if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." There is generally little debate that the types of facts stated in USCG or NTSB marine accident reports are the type of evidence that a maritime expert would rely on in forming his opinions.

Maritime accidents that occur outside of the jurisdiction of the United States are often investigated by foreign flag state or port state authorities. Like USCG and NTSB accident reports, foreign flag state and port state accident reports are usually not intended to fix blame for the accident. Unlike the USCG or NTSB reports, however, foreign reports are not subject to statutory limitations on their admissibility. Instead, foreign flag state and port state reports may be admissible under the evidence rules governing the admissibility of government reports.

To be admissible, the government report must have been prepared pursuant to the authority of law. Most flag state and port state agencies meet this requirement because they are usually tasked with investigating maritime accidents pursuant to local regulations implementing the provisions of the International Maritime Organization's Casualty Investigation Code.

The government report must also have been prepared under circumstances that indicate its trustworthiness. Several factors determine if a government report is trustworthy. First, the report's author must be an experienced investigator with firsthand knowledge of the matter gained through direct investigation and interviews with participants. In addition, the report must have been prepared sufficiently close in time to the events in question to ensure it is based on reliable information. Most

flag state and port state investigations meet these requirements as well, especially those conducted by agencies fully staffed by trained and qualified investigators.

The wealth of data available in accident reports prepared by flag state and port state authorities can be invaluable in casualty litigation. Even where these reports are not themselves directly admissible, several alternative paths are available to put this data before the judge or jury for a successful resolution of the case. ■

## Military Sealift Command to Review Insurance Provisions

**BY BRIAN A. BANNON**

BRIAN A. BANNON
PARTNER

Bannon-B@BlankRome.com

The United States Military Sealift Command ("MSC") held a public meeting on December 1, 2011 to review the requirements of its charters that owners must name MSC as an additional assured on all required insurance policies and obtain from the insurer a waiver of the right of subrogation. The standard terms and conditions included in the MSC charters are contained in its *Proformas,* which are available on its website at https://www.procurement.msc.navy.mil/procurement/contract/ProformaManager.jsp?page=1.

These *Proformas* typically require the owner to obtain the following types of insurance: customary full-form marine insurance coverage on the vessel (including cover against pollution damage and cargo loss), including Hull and Machinery, Protection and Indemnity (P&I), War Risk Hull and Machinery, including P&I, and Second Seamen's War Risk. With respect to these insurances, the *Proformas* require that the United States

**(continued on page 8)**

**Military Sealift Command (continued from page 7)**

be named as an additional assured with a waiver of subrogation. The two tanker charter *Proformas,* TankVoy and TankTime, require the owner to warrant that it has in place $500 million plus an additional $200 million in oil pollution coverage with its P&I Club or other underwriter. In the event that financial responsibility requirements under United States law increase during the term of the charter to require oil pollution coverage in excess of that amount, the owner must obtain the required additional coverages. Other *Proformas* have similar language requiring that the MSC be named as an additional assured with a waiver of subrogation, but contain much lower coverage requirements.

An issue recently has arisen concerning the extent to which, under club rules, a charterer that is not an affiliate or associated company of the owner can be named as an additional assured with a waiver of subrogation, inasmuch as the interest of the owner and charter are not necessarily the same. The MSC's concern is that—to the maximum extent possible—it be immunized from liability. At the meeting, it was generally acknowledged that this concern could not be adequately addressed through a "Misdirected Arrow" clause, since that clause provides coverage to an additional assured only to the extent that the loss or damage is the responsibility of the owner. Thus, it would not cover the MSC from allegations of its own negligence as the charterer. Another possibility discussed was providing cover to the MSC as a Joint Entry on the owner's policy. A problem with this approach is that Joint Entries are typically on a "knock-for-knock" basis. Under a "knock-for-knock" arrangement, each party (MSC and the owner) agrees to indemnify the other for liabilities relating to the indemnifying party's own property and personnel and those of his subcontractors, regardless of negligence. The Federal Anti-Deficiency Act precludes the MSC from agreeing with indemnity provisions, as they constitute contingent liabilities for which there is no appropriation from Congress.

There seemed to be a general consensus that one solution might be for the owner to obtain a Charterer's Liability Policy. However, such policies provide standard coverage only up to $350 million, far less than the $700 million required by the TankTime *Proforma,* and far less than the approximately $5.5 billion available through the International Group pooling arrangements. Cover in excess of $350 million is available, but the premiums increase substantially as an additional cover is required, and a cover up to $5.5 billion was generally acknowledged as prohibitive, even if possible to obtain.

It was generally acknowledged that the MSC's concerns for immunity could be achieved with respect to Hull and Machinery policies, although the details would need to be worked out.

No date was set for a subsequent public meeting, and it is not yet clear how the MSC will respond to the information collected. The MSC did suggest, however, that it would be helpful for interested parties to submit (in writing) information concerning the insurances available as well as possible methods to address the MSC's concern regarding obtaining effective immunity beyond the $350 million available through the standard Charterer's Liability Policy. Interested parties are encouraged to submit their comments to MSC Contracting Officer Kenneth D. Allen, at 914 Charles Morris Court SE, Washington Navy Yard, DC 20398-5540. ■

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

| | OFFICE PHONE | MOBILE PHONE | EMAIL |
|---|---|---|---|
| Hong Kong +852.3528.8300 | | | |
| Nigel J. Binnersley | +852.3528.8388 | +852.9289.1648 | NBinnersley@BlankRome.com |
| Grace Hou | +852.3528.8382 | +852.6479.5038 | GHou@BlankRome.com |
| Daniel Lee | +852.3528.8385 | +852.6689.9749 | DLee@BlankRome.com |
| Conor T. Warde | +852.3528.8493 | +852.6689.9947 | Warde-C@BlankRome.com |
| New York +1.212.885.5000 | | | |
| John D. Kimball | +1.212.885.5259 | +1.973.981.2106 | JKimball@BlankRome.com |
| Richard V. Singleton II | +1.212.885.5166 | +1.732.829.1457 | RSingleton@BlankRome.com |
| Jeremy J.O. Harwood | +1.212.885.5149 | +1.646.541.6905 | JHarwood@BlankRome.com |
| Thomas H. Belknap, Jr. | +1.212.885.5270 | +1.917.523.4360 | TBelknap@BlankRome.com |
| Alan M. Weigel | +1.212.885.5350 | +1.860.334.7431 | AWeigel@BlankRome.com |
| Lauren B. Wilgus | +1.212.885.5348 | +1.732.672.7784 | LWilgus@BlankRome.com |
| Philadelphia +1.215.569.5500 | | | |
| Jeffrey S. Moller | +1.215.569.5792 | +1.215.630.0263 | Moller@BlankRome.com |
| Washington, DC +1.202.772.5800 | | | |
| Jeanne M. Grasso | +1.202.772.5927 | +1.202.431.2240 | Grasso@BlankRome.com |
| Gregory F. Linsin | +1.202.772.5813 | +1.202.340.7806 | Linsin@BlankRome.com |
| Duncan C. Smith | +1.202.772.5956 | +1.202.431.2255 | Smith-D@BlankRome.com |
| Jonathan K. Waldron | +1.202.772.5964 | +1.703.407.6349 | Waldron@BlankRome.com |