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INSIDE THIS ISSUE

BY THOMAS H. BELKNAP, JR.

A Note from the Editor

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Thank you.

Everyone appreciates acknowledgement for hard work and a job well done. It's human nature. An occasional pat on the back makes us feel good about what we are doing, and it makes us strive harder to earn the recognition we receive.

There are two recent bits of recognition that we were particularly gratified to earn. The first is from the 2016 editions of *Chambers Global* and *Chambers USA,* which once again recognized our maritime practice and many of our partners and associates as being among the very best, particularly in the areas of dispute resolution and regulatory matters. As a firm, Blank Rome was also recognized in the areas of bankruptcy, government contracts, insurance, labor and employment, and corporate/M&A, among others. These are all practice groups with which we regularly interact on client matters, and our Maritime Industry Team brings all of these practices together to provide a full range of legal services for the maritime industry. The *Chambers* ratings are also particularly gratifying because they are based on feedback from our clients and peers. (See page 11 for Blank Rome Maritime's *Chambers USA 2016* rankings, or visit www.blankrome.com/chambersusa2016.)

The second is from *Lloyd's List,* which awarded Blank Rome its 2016 North American Maritime Award for "Maritime Services – Legal" for the second year in a row. This award is "for exceptional achievement or contribution to any service sector of the North American maritime industry by a company, individual or organisation." (See page 10 for more information.)

Like any actor winning an Oscar, we know we have many people to thank: our partners for supporting our practice in all the ways that they do; our associates for always striving to give us their best work; and our paralegals, assistants, and professional staff for always striving to make our work product look its very best. But mostly, we thank you, our clients, for giving us the opportunity to help you get the job done in a challenging, complicated, and sometimes confounding business environment.

We literally could not do it without you.

What You Need to Do Now to Prepare for the New SOLAS Verified Gross Mass Deadline

BY JONATHAN K. WALDRON, PATRICIA M. O'NEILL, AND DANA S. MERKEL

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As the July 1, 2016, effective date for the SOLAS Regulation VI/2 amendments quickly approaches, unanswered questions and difficulties complying with varied international and domestic implementations loom large. In an effort to provide guidance to the industry, the U.S. Coast Guard recently issued a Marine Safety Information Bulletin, dated April 28, 2016 (MSIB Number 009/16), declaring that existing U.S. laws and regulations for providing verified container weights are "equivalent" to the requirements under SOLAS Regulation VI/2.

Although the MSIB provided much needed guidance, the industry is still struggling to establish procedures that adequately address the Regulation VI/2 amendments, taking into account the unique characteristics of various operations and ports. The key to a successful outcome is for stakeholders to continue to work together to establish practical procedures consistent with the Regulation VI/2 amendments and U.S. Coast Guard guidance.

Background

IMO'S SOLAS AMENDMENTS

The International Convention for the Safety of Life at Sea ("SOLAS") governs the safe operation of ships engaged in international trade, and includes specific requirements related to the safe stowage and securing of cargo in SOLAS Chapter VI. The International Maritime Organisation ("IMO") adopted amendments to SOLAS Regulation VI/2 in November 2014, which require the verified gross mass ("VGM") of a container to be certified in the shipping document, signed by the shipper, and provided to the master and terminal in advance of loading the container on the ship. The original language of SOLAS Regulation VI/2 required shippers to provide information on the gross mass of cargo prior to loading. However, problems related to incorrect container weight declarations resulted in improper vessel stowage, delays, damaged or lost containers, damage to equipment and vessels, liability issues, and increased safety risks, among other issues. Such concerns prompted the IMO's adoption of the Regulation VI/2 amendments, with the goal of supplementing the original language with mandatory procedures by which container gross mass must be "verified" by the shipper.

> Although the Coast Guard will not be enforcing the VGM requirement directly against U.S. shippers, the procedures implemented by ports and terminals to comply with the Regulation VI/2 amendments will directly impact shippers.

Under the SOLAS amendments, the shipper must verify the gross mass of a packed container by one of two methods: (1) the packed and sealed container may be weighed using calibrated and certified equipment; or (2) each package and cargo item loaded into the container, including any pallets or other packing and securing material, may be weighed, and add the tare mass of the container to the

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What You Need to Do Now to Prepare for the New SOLAS Verified Gross Mass Deadline **(continued from page 2)**

sum of the single masses in the container using a certified method approved by the port state's competent authority in which the packing of the container was completed. The resulting VGM must be stated in the shipping document, signed by the shipper, and provided to the master and terminal in advance of loading the container on the vessel. In the event the VGM is not provided to the master, the container may not be loaded on the ship.

COAST GUARD EQUIVALENCY DECLARATION

In its recent Marine Safety Information Bulletin, the Coast Guard stated that existing U.S. laws and regulations for providing verified container weights are equivalent to the requirements under the Regulation VI/2 amendments. The Coast Guard also submitted a letter to the IMO setting forth its determination, specifically noting that the current national regime provides the needed flexibility for all entities in the business to ensure that correct verified container weights are provided to the vessel master to facilitate safe loading operations. In support of its determination, the Coast Guard noted that various U.S. industry stakeholders have demonstrated multiple acceptable methods for providing VGM. *See MSIB Number 009/16, available at* https://www.uscg.mil/msib/docs/009_16_4-28-2016.pdf.

COMPLIANCE AND ENFORCEMENT

SOLAS, including the Regulation VI/2 amendments, applies to ships engaged in international trade and may be enforced by a vessels' flag state or various port states. As an international convention, the obligations and responsibilities for compliance with SOLAS requirements fall primarily on owners and operators of ships. In this regard, it is noteworthy here that the Coast Guard has stated that it will not take action against a shipper because the Coast Guard does not believe it has the authority to take action against a shipper absent a statutory amendment to current domestic U.S. law. Rather, any enforcement actions will be against the vessel owner and master in the event a container is loaded without a VGM. However, the shipper will face various commercial and business adverse impacts of any failure to provide a VGM, such as refusal of containers by the terminal or vessel and resulting delays and customer service issues.

Implications for U.S. Shipping Interests

TERMINAL OPERATIONS

U.S. shipping interests and stakeholders have taken differing approaches to implementing the Regulation VI/2 amendments due to concerns varying from port congestion, lack of necessary infrastructure to support container weighing services, and terminal disruptions and delays. Although the Coast Guard's recent guidance has prompted terminal operators to take more defined positions on compliance, it is becoming increasingly evident that there is no one-size-fits-all solution, and U.S. shipping interests must be aware of how containers will be handled at each terminal.

While some port authorities and terminal operators, such as those in the Ports of Long Beach, Los Angeles, and Oakland, have maintained that they will not or cannot offer container weighing services, others such as the Georgia Ports Authority have stated that they will provide container weighing services free of charge. Certain terminal operators in the Port of New York and New Jersey and the Port of Baltimore have also confirmed they will offer container weighing services, but for a fee. Meanwhile, other ports and terminal operators, such as the Port of Houston, have announced that they will not accept containers at the terminal unless the VGM has been submitted electronically. Finally, in response to the Coast Guard's equivalency determination, some port authorities and terminal operators are changing their previously stated procedures. For example, the Virginia Port Authority originally stated it would refuse all containers that did not have VGMs prior to arrival at the terminal, but has since stated that containers without a VGM will be accepted if arriving via gate or rail.

DOMESTIC JONES ACT OPERATIONS

Because SOLAS applies only to ships engaged in international trade, vessels engaged in solely domestic trade are not subject to SOLAS and will not be required to obtain VGMs from the shipper prior to loading containers for any domestic voyage, regardless of the ultimate destination of the containers. However, as a practical matter, containers bound for international ports will likely have VGMs because the vessel that will load those containers for transport to a foreign port will be subject to SOLAS and will require VGMs prior to loading.

According to IMO guidelines, where a container is transported by a vessel to which the SOLAS regulations do not apply and delivered to a port terminal facility without a VGM, it may not be loaded onto a ship to which the SOLAS regulations apply unless the master and the terminal have obtained the container's VGM on behalf of the shipper. Thus, although the Coast Guard has given the green light for U.S. shippers to use alternative measures to comply with the SOLAS amendment, coordination between the shipper, ocean carrier, marine terminal operator, and vessel operator, and development of best management practices, are essential to ensuring that a container without a VGM, that is ultimately bound for a foreign port, is not loaded on a vessel.

Conclusions and Recommendations

The Coast Guard's recent guidance seems to provide sufficient flexibility enabling industry to craft procedures best suited to individual ports and operations that will at the same time meet the amended SOLAS Regulation VI/2 requirements. However, such flexibility also results in varied approaches between ports, and even between individual terminals within a port. Although the Coast Guard will not be enforcing the VGM requirement directly against U.S. shippers, the procedures implemented by ports and terminals to comply with the Regulation VI/2 amendments will directly impact shippers.

Accordingly, stakeholder such as ports, terminals, carriers, and vessel owners/operators should initiate and/or complete their VGM action plan as soon as possible in order to prepare for the July 1, 2016, implementation date. In this regard, stakeholders need to work closely together on a port-by-port basis around the world and in the United States to ensure procedures are in place and understood before the deadline. And lastly, action plans should include back-up contingency planning to provide for alternatives if things go wrong on and after July 1, 2016. ◻

The Right to Countersecurity from a Debtor in Bankruptcy

BY THOMAS H. BELKNAP, JR. AND MICHAEL B. SCHAEDLE

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United States maritime law offers a maritime plaintiff two principal means of obtaining security for its claims: Rule B attachment in respect of maritime claims, and Rule C arrest in respect of maritime liens. These rules are superficially similar, but each has different criteria and serves a different purpose. Each also gives the defendant the opportunity to obtain countersecurity on related counterclaims. But what happens when the plaintiff is in bankruptcy, subject to a bankruptcy court's automatic stay of proceedings against it? Can a debtor be compelled to give countersecurity in such a case? This article discusses a recent decision from a bankruptcy court in Colorado (of all places) that helps answer this question.

The Admiralty Rules of Arrest and Attachment

First, the rules: maritime attachment and arrest remedies in the United States are as old as the general maritime law, which predates the Constitution, but in present times the applicable rules are contained in special maritime rules that supplement the Federal Rules of Civil Procedure. Rule B of those rules pertains to maritime attachment, which is available where a plaintiff has an *in personam* maritime claim against a party. Rule B allows the plaintiff to attach property belonging to that party in any district where the party is not subject to jurisdiction, but where its property can be found. (This quirky jurisdictional rule arises from the notion that Rule B is intended to serve twin aims: allowing a party to obtain jurisdiction over a defendant at least to the extent of property attached, and also to obtain security

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The Right to Countersecurity from a Debtor in Bankruptcy
(continued from page 4)

for its claim. Thus, it is only available in jurisdictions where the defendant is not otherwise subject to the court's *in personam* jurisdiction.) Establishing a right to a Rule B attachment is quite simple: the plaintiff must show (1) that it has a *prima facie* maritime claim, *i.e.,* a claim within the court's admiralty and maritime jurisdiction; (2) that the defendant cannot be "found" in the district; (3) that the defendant has property within the district; and (4) that no statute bars maritime attachment in the circumstances.

> The debtor initiated the action. And in this Court's view, it's unfair to cut off [Owner's] rights to defend itself in any manner provided by law, especially when the asset seized is a four-million-dollar vessel.

Rule C of the Supplemental Admiralty Rules governs maritime arrest, which arises where a party seeks to enforce a maritime lien against an *in rem* defendant. This is most commonly a vessel, but a maritime lien can arise against cargo and other maritime property as well. Maritime liens are themselves a creature of U.S. maritime law and arise, for instance, in cases of maritime tort such as collision or crew injury, salvage, breach of certain maritime contracts such as charter parties, and for nonpayment for "necessaries" provided to a vessel.

Rules B and C are augmented by Supplemental Rule E, and the three rules together set out the procedures governing maritime attachment and arrest actions. Rule E is essentially a "mechanics" rule that governs such issues as when and how a party may challenge an arrest or attachment, how and in what amount alternate security may be posted to obtain release of attached or arrested property, and when property may be sold by interlocutory sale before judgment, such as when the attached or arrested property is perishable.

Rule E also grants the defendant the right to seek countersecurity. Specifically, Rule E(7)(a) provides as follows:

> When a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security for damages demanded in the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the original claim must be stayed until this security is given, unless the court directs otherwise.

The premise of Rule E(7) is to place the parties on equal footing with respect to disputes arising out of the same "transaction or occurrence," and though the rule does allow the district court some discretion where the plaintiff can show "cause" why it should not be required to post countersecurity (or why countersecurity should be posted in some amount other than the full amount of the counterclaims), an order directing countersecurity is very much the rule rather than the exception.

The Scenario: A Plaintiff in Bankruptcy

Now, back to our issue: suppose a dispute arises between an owner and a time charterer of a vessel, where the charter is governed by U.S. maritime law. The charterer has various breach of charter claims, but the owner also has a counterclaim for non-payment of hire. Further suppose the charterer files a petition for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code, thereby invoking the automatic stay provisions under Section 362 of the Bankruptcy Code. That section bars creditors from pursuing claims or process against the debtor and its estate outside the bankruptcy case, including seeking security from the debtor without authorization under the Bankruptcy Code.

Further assume that the charterer, after commencement of the Chapter 11 case, avails itself of the right under Section 365 of the Bankruptcy Code to reject the charter. That section allows a debtor to exercise its business judgment to determine that an executory contract is burdensome to the estate and of no value. Rejection is treated under the Bankruptcy Code as a repudiation of the contract, returning the vessel to the owner's service and giving the owner an accelerated pre-petition damages claim for the balance of the charter period.

Then, following rejection, the charterer arrests the vessel, asserting its maritime lien claim and pressing for a judicial sale. Faced with this whipsaw, the owner wants to pursue countersecurity for its counterclaim, but can it do so in the face of the bankruptcy court's automatic stay?

Those are the basic relevant facts in *In re Haimark Line Ltd.,* 15-22180-JGR (Bankr. Col. 2015), a Chapter 11 bankruptcy case pending in the Bankruptcy Court for the District of Colorado. After commencing its Chapter 11 case, the charterer arrested the vessel in Florida, and Blank Rome's maritime and bankruptcy groups worked together to assist the owner in pursuing the right to seek countersecurity in the Florida arrest action.

The Arguments on Owner's Motion for Relief from the Automatic Stay

To pursue countersecurity, the owner first had to obtain relief from the bankruptcy court's automatic stay. In its motion for such relief, the owner argued that Rule C and Rule E are part and parcel of the same remedy of maritime arrest and that the charterer, having knowingly invoked that remedy, should not be allowed to hide behind the bankruptcy court's automatic stay to avoid the litigation "cost" associated with the arrest right—namely, the obligation to give countersecurity. The charterer countered by arguing that allowing the owner to obtain countersecurity on its claim would unfairly elevate the claim in status from an unsecured claim to a secured claim, thereby prejudicing other creditors of the bankruptcy estate.

The Ruling

The bankruptcy court granted the owner's motion in an oral ruling on March 16, 2016, (transcript at Dkt No. 220). In rejecting the charterer's arguments, the judge observed as follows:

> Even if it's found somehow that by allowing the stay to be lifted to allow the request for counter-security to be made and counter-security to be ultimately ordered, even if somehow that does convert some sort of unsecured claim to a secured claim, the Court finds that it's difficult for the debtor to make that argument when the pursuit of the Florida [arrest action] was due to its own business judgment.
>
> The debtor initiated the action. And in this Court's view, it's unfair to cut off [Owner's] rights to defend itself in any manner provided by law, especially when the asset seized is a four-million-dollar vessel. [Tr. at pp. 13-14.]

The charterer thereafter filed a motion for reconsideration, contending that the court misconstrued the nature of the counterclaims and the countersecurity sought. In an (as yet) unpublished written ruling dated April 15, 2016, (Dkt. 246), the bankruptcy court denied the charterer's motion, holding as follows:

> The Debtor's present motion is premised upon the argument that this Court held a fundamental misapprehension of "esoteric maritime law concept of countersecurity." The Debtor, in effect, argues that while it [is] proper for this Court to allow the Arrest Action initiated by the Debtor to proceed, the District Court should be prevented from considering whether countersecurity is required. The Court respectfully disagrees.
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> ***
>
> The automatic stay under 11 U.S.C. § 362(a) should not be used to unilaterally deny [Owner] the benefit of traditional maritime security devises to which it may be entitled.

Conclusion

This holding—which appears to be a ruling of first impression in the United States—represents an important clarification of the scope of protection that should (or should not) be afforded a debtor by the Bankruptcy Code's automatic stay when, post-petition, it seeks to pursue claims against parties who also hold claims against the bankruptcy estate. Any debtor should take this ruling into account when deciding whether to pursue arrest or attachment actions where the target is also a creditor of the estate on a related counterclaim, and any such creditor may take heart that the bankruptcy stay is not an automatic bar to obtaining countersecurity in such circumstances. ◻

U.S. Export Controls Pose Risks for Offshore Energy Companies' Return in Iran

BY MATTHEW J. THOMAS

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In March, Blank Rome co-hosted a breakfast seminar in Dubai with Fichte & Co Legal Consultancy to discuss with local shipping and energy professionals the real risks and opportunities presented by the rollback of international sanctions on Iran. We were awed by the warm reception we received, the huge turnout (well over 250 clients and friends), and by the insightful questions and contributions of those who joined us.

Listening to the questions and comments from our attendees, it was clear that not only U.S. trade sanctions, but also U.S. export control regulations, pose serious obstacles for international companies considering opportunities in Iran's offshore sector. As a result, even non-U.S. companies are finding that they must adopt careful compliance measures to avoid breaching U.S. export control rules as Iran's offshore sector rebuilds.

Sanctions-Related Obstacles Remain for Offshore Operators

The sanctions-related obstacles to doing business in Iran remain formidable. While January's Joint Comprehensive Plan of Action ("JCPOA") between Iran and the EU3+3 countries rolled back most of the secondary sanctions against Iran (*i.e.,* those measures aimed at deterring non-U.S. companies from dealing with Iran's energy, defense, shipping, and financial services sectors), the primary U.S. sanctions on Iran remain intact. Under the Treasury Department's Iranian Transactions and Sanctions Regulations, nearly all U.S. dealings (direct or indirect) involving Iran remain barred, including any financial transactions by U.S. banks and financial services companies. The breadth of these prohibitions, and U.S. authorities' apparent willingness to mete out billion-dollar penalties for international banks that circumvent them, have left much of the global banking industry deeply reluctant to re-engage in Iran trade. Despite recent reassurances in European capitals by Secretary of State John Kerry regarding "permissible" trade with Iran, many international banks are judging the costs, risks, and burdens of compliance to be too high. (*See* "The Morning Risk Report: Europe's Banks Tune Out U.S. on Iran," http://blogs.wsj.com/riskandcompliance/2016/05/16/the-morning-risk-report-europes-banks-tune-out-u-s-on-iran/.)

Accordingly, much of the unease in the maritime and energy sectors relates to the clearance through U.S. banks of funds linked to Iran trade (or even currency exchanges related to such transactions). Operators and banks understandably are concerned about the clearing of dollar payments with even indirect connections to Iran, such as long-term charter hire, insurance, bunkers, crew costs, ship repair, inspection, and other expenses for vessels or other units that may serve Iran from time to time. With the exception of a recent Treasury Department license for P&I cover, U.S. authorities have been reluctant to commit to any significant compliance line-drawing for vessel operators and bankers seeking to clarify their responsibilities in this area, leaving industry participants to gauge their own risks.

Export Control Compliance for Offshore Operators

Beyond these sanctions obstacles, however, oil and gas companies are also looking at the hazards of U.S. export control regulations, which are broader and more extra-territorial than those of our trading partners. U.S. export control regulations restrict not only the export, but also the overseas "re-export" and transfer of a broad range of goods and technologies that originate in the United States, include U.S. content, or are otherwise subject to U.S. control. Also, the United States regulates the disclosure of controlled technology to foreign parties, even if done within the United States.

U.S. export control policy and enforcement is spread across a number of different federal agencies. Regarding non-military goods and technologies, the key authorities are in Export Administration Regulations ("EAR"), 15 CFR § 730 – 774, which are administered by the Department of Commerce Bureau of Industry and Security ("BIS"). These controls apply to a very broad range of goods, software, and technologies that can be used for either commercial or defense purposes, referred to as "dual-use" items.

U.S. export controls do not just apply to items that are made in or shipped from the United States; some non-U.S. items are subject to U.S. export controls, too. An item is subject to the EAR if it:

- was produced in, or originates in, the United States;
- is a foreign-made product that contains more than a *de minimus* percentage of U.S.-controlled content—generally 25 percent for most destinations, but 10 percent for Iran and certain other designated countries; or
- is a foreign-made product based on U.S.-origin technology (or produced by a plant that is the direct product of certain U.S. technology), if it would be subject to national security controls if it was a U.S.-origin item, and the U.S.-origin technology or software was so restricted when it was exported from the United States.

These broad restrictions have a significant impact on offshore energy services providers. The EAR restricts numerous technologies used in the offshore sector, such as vessels, marine engines, ROVs, many sorts of acoustic systems, optical sensors, underwater cameras, laser/MIG/E-Beam welding equipment, pressure sensors, navigation equipment and software, gyros, accelerometers, underwater syntactic foam, and various specialized types of tanks, fittings, valves, and pipes, and many other items. Related software can also be restricted, as well as technology to produce such items.

> The breadth of these prohibitions, and U.S. authorities' apparent willingness to mete out billion-dollar penalties for international banks that circumvent them, have left much of the global banking industry deeply reluctant to re-engage in Iran trade.

As a result, some problems that operators may encounter include:

- Vessels and offshore units cannot be used in Iran if they contain more than 10 percent U.S. content. A U.S.-made marine diesel engine can in some cases be costly enough to trigger this restriction.
- Operators cannot export or re-export controlled equipment, ROVs, tools, and other technologies into Iran's waters to work on projects there if they are U.S.-origin, or include more than the minimum threshold of U.S.-origin parts.
- Operators cannot source spares and repair parts from the United States, or send equipment to the United States for service, if it is for use on a project in Iran.

In light of these rules, any exports, re-exports, or transfers of offshore items that might fall within the U.S. export restrictions should be carefully reviewed to determine whether they give rise to compliance risks. Parties also need to continue to follow developments in U.S. sanctions and export policy, as there can be no guarantees that U.S. trade policy towards Iran will remain static as we move through a contentious election cycle and select a new president and Congress in the months ahead. ◻

Meet Blank Rome's Government Contracts Practice

Government contracting can be a maze. We'll be your guide.

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Regular readers of *Mainbrace* know that Blank Rome LLP has the largest and most comprehensive maritime legal practice in the United States, providing unparalleled knowledge and counsel to our maritime industry clients. With the recent addition of more than 100 attorneys from Dickstein Shapiro LLP's New York and Washington, D.C., offices, Blank Rome now offers our maritime clients a nationally recognized, full-service government contracts practice with a deep bench of dedicated professionals who can assist our maritime clients in navigating the increasingly competitive world of contracting with the U.S. government. From bid protests, claims, dispute resolution, and litigation, to cybersecurity, government audits and investigations, False Claims Act cases, mandatory disclosure issues, and suspension and debarment, Blank Rome's attorneys can assist our maritime industry clients with the complex regulatory matters facing government contractors today in all aspects of government contracts, from contract formation through close-out.

Our Team and Multidisciplinary Capabilities

Led by Practice Chair Dave Nadler, a former Navy lawyer, Blank Rome's government contracts practice features more than 20 attorneys focused on government contracts law and litigation who regularly deal with the U.S. Navy's Military Sealift Command, U.S. Army's Military Surface Deployment and Distribution Command, United States Coast Guard, Defense Logistics Agency Land and Maritime, United States Maritime Administration, Environmental Protection Agency, and other government agencies. Our government contracts team works closely with Blank Rome's maritime and complementary national practices, including government relations, insurance coverage, labor and employment, white collar defense and investigations, and mergers and acquisitions, providing a broad base of knowledge and full range of experience to serve the maritime industry.

Our collective pool of talent encompasses a wide variety of backgrounds, including former U.S. Coast Guard and Navy officers, representatives and senior staff from congressional committees, and high-level officials of the U.S. Maritime Administration, U.S. Customs and Border Protection, U.S. Securities and Exchange Commission, and the National Oceanic and Atmospheric Administration. Our government contracts attorneys understand the interplay between law and politics, and coordinate strategies with Blank Rome Government Relations LLC to help clients anticipate and take advantage of the issues and opportunities that affect the maritime industry. Our team approach focuses on bringing the right resources and counsel to resolve our clients' issues, whether it be advising on a new regulatory development or guiding a client through a bet-the-company government investigation.

Our Recent Noteworthy Representations

Most recently, our government contracts team represented a leading provider of ship repair and maintenance services on Guam, filing a bid protest at the Government Accountability Office after the U.S. Coast Guard awarded a multimillion dollar contract to a competitor for drydock repairs. As a result of our protest, the Coast Guard took corrective action, resulting in a contract award to our client.

Our government contracts attorneys also worked closely with our corporate lawyers to assist a leading middle-market private equity firm focused on the maritime sector in its acquisition of a leading provider of scaffolding systems and environmental containment solutions for the maintenance, repair, and overhaul of U.S. government vessels.

We also successfully resolved a False Claims Act case on behalf of the largest container shipping company in the world related to detention changes for cargo shipped to Iraq and Afghanistan. Currently, our government contracts team represents a shipowner in Federal District Court contesting the default termination of a military charter.

Government Contracting Today

Government contracting in today's marketplace presents both great opportunities and challenges. Government contractors face heightened risks presented by ever-changing regulations and aggressive enforcement. Blank Rome's maritime and government contracts attorneys, combined with the Firm's full-service commercial and corporate legal capabilities and significant litigation experience, allow us to offer our maritime clients a highly sophisticated set of legal solutions for maritime contractors both large and small, experienced government contractors, and those seeking to enter the government marketplace for the first time. ◻

Stay tuned to this space in future editions of Mainbrace *as we explore in-depth the specific issues facing government contractors generally, and maritime contractors in particular.*

Lloyd's List
North American Awards | 2016
Maritime intelligence | informa

Maritime Services Award - Legal

WINNER

Blank Rome Wins *Lloyd's List* 2016 Maritime Legal Services Award

Blank Rome was recognized as the winner of the *Lloyd's List* 2016 North American Maritime Award for Maritime Services – Legal" at the *Lloyd's List* awards ceremony held on May 19, 2016, at Pier Sixty, in New York, NY. The maritime services award, as stated by *Lloyd's List,* is awarded "for exceptional achievement or contribution to any service sector of the North American maritime industry by a company, individual or organisation."

"We are very proud that for the second year, *Lloyd's List* has honored us for the legal services we provide to our clients. In selecting Blank Rome for this highly prestigious award, *Lloyd's List's* panel of judges recognized that we offer a range and breadth of shipping knowledge to clients that is unmatched among U.S.-based law firms," said John D. Kimball, co-chair of the Firm's maritime practice group.

"We continue to be most grateful to *Lloyd's List* for this recognition two-years in a row. We are delighted that our efforts to build and maintain a team-oriented national practice to handle all of the needs of our clients has been highlighted again," added maritime co-chair Jonathan K. Waldron.

This year's annual awards event attracted more than 300 maritime industry representatives and celebrated the success of the North American maritime industry. For a full list of winners, please visit http://ibiawards.com/north-america/.

Left to right: Blank Rome Partners **Jonathan Waldron** (left) and **Richard Singleton** (center) accepting the *Lloyd's List* 2016 Maritime Legal Services Award.

Chambers USA 2016 Honors Blank Rome Maritime Attorneys and Practices

BAND ONE **SHIPPING LITIGATION (NEW YORK)**

Chambers 2016: Blank Rome Maritime's "esteemed" shipping litigation practice (New York) has "significant experience handling high-profile maritime litigation for national and international clients." The practice is "highly regarded for crisis response and offering additional expertise in alternative dispute resolution."

Client sources say: "They have the depth for anything you need, and a lot of backup if you need help. The service is always prompt and efficient."

Notable Practitioners for Shipping Litigation (New York)

Thomas H. Belknap, Jr. ranked as a **band two** attorney. *Chambers USA* states: "Thomas Belknap has experience working on insurance litigation and arbitration for a range of maritime clients. He also covers charter party disputes, salvage disputes, and cargo damage claims."

John D. Kimball ranked as a **band two** attorney. *Chambers USA* states: "John Kimball focuses his practice on the representation of shipping clients in a wide range of contentious issues, including maritime casualties, charter party, and insurance coverage disputes. Interviewees describe Kimball as 'extremely thorough and very experienced and knowledgeable.'"

Richard V. Singleton ranked as a **band four** attorney. *Chambers USA* states: "Richard Singleton has expertise in litigating maritime casualty cases, insurance matters and bankruptcies. One client reports: 'It is his combination of being on top of the details and the law and also thinking strategically that keeps me going back.'"

Lauren B. Wilgus ranked as an **associate to watch.** *Chambers USA* states: "Lauren Wilgus works with domestic and international clients on maritime litigation and in alternative dispute resolution forums. Areas of experience include marine insurance matters and cargo damage claims."

BAND TWO SHIPPING LITIGATION (OUTSIDE NEW YORK)

Chambers 2016: Blank Rome Maritime's shipping litigation practice (outside New York) is a "strong practice recognized for an accomplished stable of attorneys with expertise across the full spectrum of maritime litigation matters." The practice, with key offices in Houston, Texas, and Washington, D.C., "represents well-known clients including shipowners and operators, energy corporations and P&I clubs" and has an "accomplished Gulf Coast-based practice supported by the additional national strength of the wider firm."

Client sources say: "It is my direct experience that the partners have great expertise in their respective areas. They have demonstrated strong professionalism."

Notable Practitioners for Shipping Litigation (Outside New York)

Michael K. Bell ranked as a **band three** attorney. *Chambers USA* states: "Michael Bell is well known for his representation of large maritime clients on issues such as contract disputes, casualties and commercial litigation. He 'has a great understanding of the industry itself and a strong command of maritime law,' say sources."

Keith B. Letourneau ranked as a **band three** attorney. *Chambers USA* states: "Keith Letourneau has expertise in vessel arrests, hazardous materials pollution and contract disputes involving shipyards and oil rigs. One client reports: 'He is our first line of defense; he is knowledgeable and the particular knowledge he has is of the market and what is going on. That really helps us in negotiations.'"

Douglas J. Shoemaker ranked as a **band three** attorney. *Chambers USA* states: "Douglas Shoemaker is described as 'pragmatic and a great communicator' by a client. His practice covers areas such as navigational error, cargo damage defense and onboard investigations. He also has a strong arbitration practice."

Jeremy A. Herschaft ranked as an **up and coming attorney**. *Chambers USA* states: "Jeremy Herschaft is a rising star of the maritime litigation space. He works with shipping and energy companies in a range of maritime issues. Areas of strength include charter party disputes, terminal-related matters and cargo claims."

BAND ONE SHIPPING REGULATORY (OUTSIDE NEW YORK)

Chambers USA 2016: Blank Rome Maritime's "highly acclaimed" shipping regulatory practice is "well known for its representation of significant shipping clients in a range of regulatory matters." The practice "has expertise in Jones Act compliance, environmental investigation defense of companies and individuals and government relations" and is "further noted for working with shipowners on related aspects of trade sanctions."

Client sources say: Blank Rome's shipping regulatory practice is "knowledgeable and professional."

Notable Practitioners for Shipping Regulatory (Outside New York)

Jeanne M. Grasso ranked as a **band two** attorney. *Chambers USA* states: "Jeanne Grasso works with large corporations such as vessel owners, charterers, cargo owners and facilities. She has expertise in government enforcement actions, pollution incident response and regulatory compliance."

Matthew J. Thomas ranked as a **band three** attorney. *Chambers USA* states: "Matthew Thomas is noted for his knowledge of international trade sanctions and related issues concerning maritime clients. He has experience working with shipowners, terminal operators and P&I clubs."

Jonathan K. Waldron ranked as a **band one** attorney. *Chambers USA* states: "Jonathan Waldron has 'extensive legal knowledge and a practical approach to everything—he is really knowledgeable about the industry, not just the law,' reports one client. He is highly regarded for his work in areas such as maritime compliance, environmental regulation and response and vessel operations."

The quotes, commentary, and rankings referenced in this document are published in *Chambers USA 2016*.

DOJ Announces FCPA Pilot Program in an Effort to Incentivize Companies to Self-Report Misconduct

BY SHAWN M. WRIGHT, CARLOS F. ORTIZ, STEVEN J. ROMAN, ARIEL S. GLASNER, AND MAYLING C. BLANCO

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On April 5, 2016, the chief of the Fraud Section for the U.S. Department of Justice's ("DOJ") Criminal Division issued a memorandum related to the DOJ's prosecution of violations of the Foreign Corrupt Practices Act ("FCPA"). The memorandum highlighted the DOJ's efforts to intensify its prosecution of FCPA violations by (1) increasing the Fraud Unit's stable of prosecutors devoted to FCPA issues by 50 percent and creating teams of special FBI agents focused solely on FCPA matters, and (2) strengthening the DOJ's collaboration with its foreign counterparts in order to combat bribery schemes worldwide. The memorandum also announced the start of a one-year pilot program designed to incentivize companies to voluntarily self-disclose FCPA-related misconduct.

> According to the FCPA memorandum, the biggest potential benefit for meeting all of the pilot program criteria is that the DOJ **"will consider a declination of prosecution."**

The FCPA Pilot Program

The pilot program was designed to increase the Fraud Section's ability to prosecute individual wrongdoers and to provide greater transparency as to what the DOJ requires from companies seeking mitigation credit for any potential penalties they may face for FCPA misconduct. As set forth in the FCPA memorandum, in order to qualify for full cooperation credit, a company must meet three specific requirements: (1) voluntary self-disclosure; (2) cooperation; and (3) timely and appropriate remediation.

Voluntary Self-Disclosure: To meet this requirement, companies, "within a reasonably prompt time," must disclose potentially unlawful conduct prior to an imminent threat of disclosure or a government investigation. The disclosure must also consist of all "known relevant facts," including the names of the individuals involved.

Cooperation: While the September 9, 2015, memorandum issued by Deputy Attorney General Sally Yates concerning individual accountability in corporate prosecutions (the "Yates Memorandum") sets forth specific criteria for a company to receive **any** mitigation credit (beyond that normally available under the Sentencing Guidelines) for cooperation in connection with a federal criminal prosecution, the recently issued FCPA memorandum details additional criteria for companies seeking to achieve **full** mitigation credit for FCPA misconduct. To receive full cooperation credit companies must, among other things, be proactive in disclosing facts relevant to the government's investigation; preserve, collect, and disclose documents and their provenance; provide timely updates on their internal investigations; and disclose overseas documents. Notably, the scope, quantity, quality, and timing of cooperation is fact-specific, and can take into account a company's size and resources.

Remediation: Credit for remediation will only be available to those companies that have met the minimum cooperation criteria set forth in the Yates Memorandum. Moreover, for a company to receive credit for its remediation efforts, it must demonstrate the implementation of an effective compliance program and that it has appropriately disciplined the employee(s) engaged in the alleged misconduct.

Potential Impact of the Pilot Program

According to the FCPA memorandum, the biggest potential benefit for meeting all of the pilot program criteria is that the DOJ **"will consider a declination of prosecution."** If the DOJ nonetheless determines that a criminal resolution is warranted, a company that satisfies the components of the pilot program may be accorded **up to a 50 percent reduction** off the bottom end of the Sentencing Guidelines fine range. In circumstances where no voluntary self-disclosure is made but where a company later fully cooperates and timely and appropriately remediates flaws in its controls and compliance program, the memorandum provides that the company will be eligible to receive **at most a 25 percent reduction** off the bottom of the Sentencing Guidelines fine range.

Conclusion

The potential reward for companies that comply with all of the components of the pilot program could be substantial, including the possibility that the DOJ will decline outright to prosecute the misconduct. Nevertheless, navigating the pilot program's very specific requirements in an effort to obtain a declination or to mitigate the imposition of a criminal fine may prove difficult for many companies and will require the input of legal counsel.

Indeed, the full implications of how the pilot program will affect companies that find themselves in a position to self-report potential FCPA misconduct have yet to be made known. At a minimum, however, the program could change the way companies handle internal investigations as well as their compliance and reporting structure in order to maximize their opportunity to receive full mitigation credit. Companies must decide how to manage the trade-off between seeking the potential benefits of the pilot program and devoting the resources and time necessary to comply with the pilot program's criteria. ◻

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New China-Liberia Maritime Bilateral: Savings on Port Fees Just One Element of Broader Trade Cooperation

BY MATTHEW J. THOMAS

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PARTNER

In a November 2015 state visit in Beijing, the leaders of the People's Republic of China and the Republic of Liberia signed a historic bilateral maritime agreement offering significant benefits to Liberian shipowners. Headlines on the bilateral highlighted the immediate economic impact of the agreement: a 28 percent discount on tonnage dues in Chinese ports, putting Liberian ships on parity with Chinese vessels, and potentially saving $75,000 to $150,000 in annual port costs for capesize, VLCC, and large container vessels. Less well-understood, however, are the reasons behind this new alliance, and where the relationship appears to be headed in the future.

Background

The underpinnings of the deal date back to 2003, when Liberia transitioned diplomatic relations from Taiwan to China. Even today, Liberia is unique in this regard, as other major international flag states still continue to recognize Taiwan (although Panama reportedly sought, unsuccessfully, to shift diplomatic recognition to China in 2009.)[1] In her 10 years in office, Liberian President Ellen Johnson Sirleaf has cultivated closer relations with China, which has responded with increased investment in Liberian infrastructure, public buildings, schools, hospitals, and critical in-country assistance in tackling 2014's Ebola outbreak.

China's investment in Liberia is part of its broader Africa strategy, driven by its "One Belt, One Road" trade initiative. In 2013, China announced plans for a "Maritime Silk Road," linking China with Southeast Asia, the Indian Subcontinent, Africa, Mideast, and Mediterranean ports, and is proposing significant investments in infrastructure and industry to stimulate economic development and trade along that network. In December 2015, Chinese President Xi Jinping led a 50-nation Forum on China-Africa Cooperation, announcing

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New China-Liberia Maritime Bilateral: Savings on Port Fees Just One Element of Broader Trade Cooperation **(continued from page 14)**

plans to triple Chinese investment and financing for Africa. Commentators have noted a shift in President Xi's priorities for African investment, with less focus on African commodities trade and far more emphasis on China's role in advancing Africa's industrial, manufacturing, infrastructure, and healthcare sectors.[2]

Growing Momentum

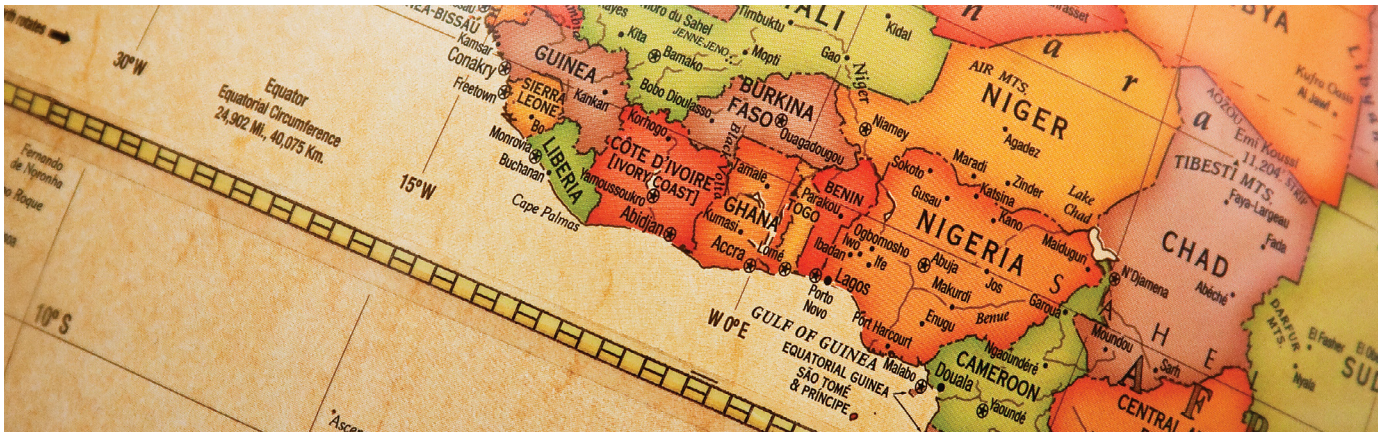
It was against this backdrop of accelerating Chinese investment in Africa that President Sirleaf visited China in November. In addition to finalizing the new maritime accord, the countries signed a new technical cooperation and assistance agreement, and committed to expand cooperation in key Liberian industries, including mining, fishing, wood, and agricultural processing, as well as public health. President Sirleaf's China trip came in the midst of an extraordinary three-month period in Liberian foreign relations, which also saw the approval of Liberia's accession to the World Trade Organization, the elimination of remaining outdated UN and U.S. sanctions (targeting Liberia's pre-2003 civil car leadership), as well as the 10th anniversary of her historic election as Liberia's head of state.

The new China-Liberia maritime bilateral is similar in many respects to China's longstanding shipping accords with the United States and the European Union. As noted above, Liberian registered vessels are now charged tonnage dues when visiting any port in China at the published "Preferential Rate," which is the same rate as tonnage dues charged to Chinese vessels. Chinese authorities pledged to take measures to facilitate and expedite maritime transport to avoid unnecessary delay of Liberian vessels, and to simplify and expedite customs and other port formalities, including access to reception facilities for vessel wastes. China also committed to recognizing certificates of nationality and other ship's documents held by vessels registered in Liberia, as well as seamen's identification and record books. Other commitments in the agreement relate to stop-overs by crew members and their entry, stay, departure, or transit.

The bilateral also includes more open-ended commitments for the two countries to cooperate in the future on maritime and port development, as well as business, technological, and information exchange. A sign of where this cooperation might lead came last month, on April 27, when the Tianjin Dongjiang Free Trade Port Administrative Commission and the Liberian International Ship and Corporate Registry signed a Strategic Cooperation Framework Agreement. Under this agreement, Tianjin's fast-growing free trade zone pledged financial and policy backing for a new Liberian Registry venture to provide Liberian corporate and vessel registration services in the trade zone. As with the maritime bilateral itself, the FTZ agreement is in part a framework for future cooperation, and additional details are expected to come into focus as Liberia and China's maritime and trade relationship continues to move ahead. ◻ —

The bilateral also includes more open-ended commitments for the two countries to cooperate in the future on maritime and port development, as well as business, technological, and information exchange.

1. *Beijing not keen as Panama invites Taiwan, China leaders,* http://www.reuters.com/article/us-china-taiwan-panama-idUSKCN0WR0M7.
2. *Yun Sun, Xi and the 6th Forum on China-Africa Cooperation: Major commitments, but with questions,* http://www.brookings.edu/blogs/africa-in-focus/posts/2015/12/07-china-africa-focac-investment-economy-sun.



Former U.S. Energy Secretary & DOE Chief of Staff Join Blank Rome Government Relations

Blank Rome Government Relations LLC ("BRGR") is pleased to announce that the **Honorable Spencer Abraham,** former U.S. Secretary of Energy and former U.S. Senator from Michigan, and **Joseph P. McMonigle,** former Vice-Chairman of the International Energy Agency and former Chief of Staff at the U.S. Department of Energy, have joined Blank Rome Government Relations as Principals in the Washington, D.C., office.

They join BRGR on the heels of the recent additions from Dickstein Shapiro and will offer clients a variety of services to assist with new business challenges and opportunities, including in the Firm's practice areas of policy and political law, energy and energy financial services, maritime, and international affairs.

In addition to joining Blank Rome Government Relations, Secretary Abraham and Mr. McMonigle will continue to operate their existing business consulting practice, The Abraham Group LLC, which is also based in Washington, D.C.

To view the Firm's press release announcing this news, please click here.

About Secretary Spencer Abraham

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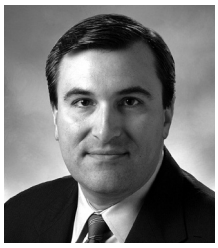
SPENCER ABRAHAM

PRINCIPAL

Secretary Abraham served as the tenth Secretary of Energy in United States history from 2001-2005. He helped President Bush devise America's first national energy plan in over a decade and oversaw its implementation. Prior to being named a cabinet member, Secretary Abraham served as an effective and highly productive U.S. Senator from Michigan for six years, where he was the author of 22 pieces of legislation signed into law. He served on the Judiciary, Budget, and Commerce Committees. In addition, he was chairman of two subcommittees: Manufacturing and Competitiveness, and Immigration. He is a member of the Board of Directors of Occidental Petroleum, NRG Energy, PBF Energy, and Two Harbors Investment Corporation. He attended Michigan State University and Harvard Law School, where he co-founded the Federalist Society.

About Joseph McMonigle



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PRINCIPAL

Mr. McMonigle is the former vice-chairman of the Paris-based International Energy Agency, an international organization of oil-consuming countries, whose core mission is to work for stable energy markets and respond with joint measures to meet oil supply emergencies. He also served as chief of staff at the U.S. Department of Energy, a cabinet department with a $23 billion budget and over 100,000 federal and contractor employees (2001-2005). Mr. McMonigle also served as the American co-chair of the U.S.-China Energy Cooperation Working Group and led DOE's bilateral activities and engagement with China. Before joining the Bush Administration, Mr. McMonigle was the administrative assistant and general counsel to a U.S. Senator. He is also an attorney and member of the Energy Bar Association as well as the Pennsylvania and District of Columbia bars.

BLANK ROME LLP

MARCH 2016

Chambers Global 2016 Ranks Blank Rome Attorneys and Shipping Litigation Practice

***Chambers Global 2016* recognized Blank Rome LLP** as a global leader in **Shipping: Litigation**, as well as Partners **Anthony B. Haller** and **John D. Kimball** for their industry knowledge and leading practices.

Regarding Blank Rome's shipping litigation capabilities, *Chambers Global* notes the Firm has a "significant shipping litigation team with a leading presence in the U.S. market, particularly in New York" and is "recognised for its capabilities in handling complex maritime disputes, including arbitration matters, and has wide experience in acting as counsel to clients overseas." Clients report to *Chambers* that "the Blank Rome team is very responsive to our needs, and they have deep experience on admiralty and maritime matters."

On Blank Rome's recognized attorneys, *Chambers Global* states:

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ANTHONY B. HALLER

PARTNER

Anthony Haller "is a 'calming force in difficult circumstances' and is praised for strategic abilities. He receives universal praise for his work in employment disputes and also regularly litigates on labor relations issues."

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JOHN D. KIMBALL

PARTNER

John Kimball "is a knowledgeable shipping lawyer who has an 'excellent reputation' in the area, according to interviewees." He "is recognized for his capabilities in this field, and is highlighted by interviewees as 'an excellent lawyer who is knowledgeable in this area.' He is particularly endorsed for his expertise in casualty matters."

For more information on *Chambers Global 2016,* please visit **www.chambersandpartners.com/global**.

Risk-Management Tools for Maritime Companies

COMPLIANCE REVIEW PROGRAM

Blank Rome Maritime has developed a flexible, fixed-fee Compliance Review Program to help maritime companies mitigate the escalating risks in the maritime regulatory environment. The program provides concrete, practical guidance tailored to your operations to strengthen your regulatory compliance systems and minimize the risk of your company becoming an enforcement statistic. **To learn how the Compliance Review Program can help your company, please visit www.blankrome.com/compliancereviewprogram.**

MARITIME CYBERSECURITY REVIEW PROGRAM

Blank Rome provides a comprehensive solution for protecting your company's property and reputation from the unprecedented cybersecurity challenges present in today's global digital economy. Our multidisciplinary team of leading cybersecurity and data privacy professionals advises clients on the potential consequences of cybersecurity threats and how to implement comprehensive measures for mitigating cyber risks, prepare customized strategy and action plans, and provide ongoing support and maintenance to promote cybersecurity awareness. Blank Rome's maritime cybersecurity team has the capability to address cybersecurity issues associated with both land-based systems and systems onboard ships, including the implementation of the BIMCO Guidelines on Cyber Security Onboard Ships. **To learn how the Maritime Cybersecurity Review Program can help your company, please visit www.blankrome.com/cybersecurity or contact Kate B. Belmont (KBelmont@BlankRome.com, 212.885.5075).**

TRADE SANCTIONS AND EXPORT COMPLIANCE REVIEW PROGRAM

Blank Rome's Trade Sanctions and Export Compliance Review Program ensures that companies in the maritime, transportation, offshore, and commodities fields do not fall afoul of U.S. trade law requirements. U.S. requirements for trading with Iran, Cuba, Russia, Syria, and other hotspots change rapidly, and U.S. limits on banking and financial services, and restrictions on exports of U.S. goods, software, and technology, impact our shipping and energy clients daily. Our team will review and update our clients' internal policies and procedures for complying with these rules on a fixed-fee basis. When needed, our trade team brings extensive experience in compliance audits and planning, investigations and enforcement matters, and government relations, tailored to provide practical and businesslike solutions for shipping, trading, and energy clients worldwide. **To learn how the Trade Sanctions and Export Compliance Review Program can help your company, please visit www.blankrome-maritime.com or contact Matthew J. Thomas (MThomas@BlankRome.com, 202.772.5971).**

Top Ten Bid Protest Considerations for the Maritime Industry

BY DAVID M. NADLER

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DAVID M. NADLER

PARTNER

It is no secret that federal procurement spending has dropped considerably in recent years. With fewer dollars being spent and fewer procurements, government contractors in the maritime industry are increasingly turning to the bid protest process for a second chance to compete for, and hopefully win, new contracts, and preserve their incumbent contracts. The statistics bear this out. Bid protest activity at the U.S. Government Accountability Office ("GAO") has steadily increased year-over-year, with a record 2,639 protests filed in fiscal year 2015 alone. But more filings has not meant more sustained protests; the GAO sustain rate in 2015 fell to its lowest recent level of only 12 percent (though this does not account for voluntary agency corrective actions, which have remained steady).

These statistics, and the new federal procurement reality, reinforce the need for maritime contractors to think carefully about effective protest strategies and emerging issues to maximize their chances to successfully protest procurements (or defend contract awards). Below are ten key trends and tips for government contractors in the maritime industry to keep in mind:

> A primary advantage of filing a protest at the GAO versus other forums has been the automatic stay of contract performance under the Competition in Contracting Act ("CICA") during the pendency of the protest.

1. **Common Protest Grounds Remain Winners.** As reported by the GAO, the most common winning protest grounds in 2015 contended that the agency failed to follow stated evaluation criteria, engaged in an unreasonable technical evaluation, failed to adequately document its evaluation and award decision, unreasonably evaluated cost or price, and/or unreasonably evaluated past performance.

2. **Focus on Process.** Protesters are more likely to prevail if they focus on flaws in the agency's evaluation process. Subjective debates about the merits of an award are almost always unproductive because the GAO affords agencies considerable discretion on their conclusions regarding such matters; for example, whether the protester's technical approach was poor, acceptable, good, or excellent. The GAO will sustain a protest if the protester can show prejudicial process errors, like that the agency failed to follow the solicitation's stated evaluation criteria, relied on unstated criteria to discriminate among offerors, or reached conclusions that are not reflected in the evaluation record. Successful protest arguments often focus on objective process errors in the agency's evaluation and award process. Highlighting these types of defects may also encourage an agency to take early corrective action and can improve the chances of a successful protest.

3. **Make Disparate Treatment Arguments.** Whenever possible, protesters should seek to make arguments that their proposals were disparately evaluated relative to the awardee's proposal. Such unequal treatment arguments are important because they give protesters a basis to request the awardee's proposal as part of the agency report. Having the awardee's information and comparing it side-by-side with yours and the agency's respective evaluations will significantly improve the protester's chances of demonstrating that the agency engaged in improper disparate treatment.

4. **Supplemental Protests Are Key.** Because a protester has limited information at the time of a contract award and initial protest, protesters should focus closely on developing issues that will position counsel to have a broader look at the record as the protest develops. For example, having the awardee's proposal is important because it usually allows the protester to identify supplemental protest grounds. In many cases, protests are won, or corrective action is taken, on the basis of supplemental protest grounds rather than the initial protest.

5. **Mind Trends in LTPA Procurements.** Recent years have seen an increasing use of fixed-price contracts in lowest-priced, technically-acceptable ("LPTA") procurements, over the more traditional best-value procurements. Although offering the lowest price is a necessary part of winning the contract, price alone is not a sufficient condition to award. Contractors must still ensure that their proposed technical solutions demonstrate an adequate understanding of solicitation requirements and are realistic to meet the agency's needs and schedule. In short, while price is important, offerors competing for LPTA contracts should ensure that their proposals are compliant with the solicitation's terms, realistic, and whenever possible, demonstrate performance that exceeds minimum requirements or otherwise provides benefits and advantages not required by the solicitation. These potential discriminators, which the agency can recognize as strengths, are still very relevant considerations in LPTA settings.

6. **The CICA Stay Loophole.** A primary advantage of filing a protest at the GAO versus other forums has been the automatic stay of contract performance under the Competition in Contracting Act ("CICA") during the pendency of the protest. As a practical matter, the stay has benefitted protesters who are incumbents because it has generally resulted in the agency issuing a bridge contract to the protester to continue the work for the duration of the protest. Agencies generally issue a bridge contract, rather than seek an override of the automatic stay, because of the heavy burden placed on the agency to obtain an override. However, where a multiple award ID/IQ contract is in place, and the protest concerns a new task order under the current contract, some agencies have started circumventing the traditional override process by sole sourcing a task order bridge contract to the non-incumbent awardee for less than $10 million. This allows the awardee, rather than the incumbent protester, to perform the contract while the protest is pending. Because the GAO generally lacks jurisdiction over task orders valued at less than $10 million, and the Court of Federal Claims has no protest jurisdiction over task orders at all, this approach effectively allows agencies to bypass the purpose of the CICA stay, which is to preserve the status quo until the protest has been resolved. Until Congress closes this loophole, the potential lack of a bridge contract during the protest period and the associated revenue loss should factor into the risk/benefit analysis for incumbents when deciding whether to protest.

> These statistics, and the new federal procurement reality, reinforce the need for maritime contractors to think carefully about effective protest strategies and emerging issues to maximize their chances to successfully protest procurements (or defend contract awards).

7. **Intervention as Protest Insurance.** Even though the majority of protests that proceed to a decision are denied, a contract awardee has a vested interest in the outcome that almost always warrants participation in the protest through intervention. No other party to a protest, even an agency that awarded you the contract, will be able to represent your interests as well as counsel admitted under a protective order. Intervention by outside counsel will afford an awardee representation who will have access to complete copies of protest filings, and enable the intervenor to actively assist in the defense of the protest. In short, if you can intervene in a protest, you should.

8. **Check the Clock.** Bid protests are subject to strict timeliness rules that vary based on the type of procurement and forum. At the GAO, contractors typically have 10 days to file a post-award protest from when they knew or should have known their basis for protest. Timeliness rules are

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Top Ten Bid Protest Considerations for the Maritime Industry (continued from page 20)

particularly important where protesters are seeking a stay of contract award or performance (as is almost always the case). For example, to obtain a stay of award under CICA on a procurement with a required debriefing, the protest must be filed —and the agency notified by the GAO of that filing—within five days of the date offered for the debriefing. The key takeaway: if you've learned adverse information regarding a procurement, the clock is ticking.

9. **Two Bites at the Apple.** A common strategy is to first file your protest at the GAO, and depending on the developments during those proceedings or their outcomes by the GAO, to take another shot by refiling the protest at the Court of Federal Claims. Protesters who find their chances of success low at the GAO are free to withdraw their protests and refile them at the court. Indeed, a protester can refile its protest at the court even after the GAO has denied it. While the court recognizes GAO's bid protest expertise, it does not consider GAO decisions binding or precedential. The court conducts a new review of any protests before it. Because the court arrives at its own factual and legal conclusions, it can, and often does, sustain a protest previously denied by the GAO.

10. **Keys to the Kingdom.** Access to an agency's source selection documents and the awardee's proposal is paramount in maximizing your chances of success in a protest. While GAO rules limit a protester's access to documents to only those that are relevant to its allegations, which may only lead to partial access, the Court of Federal Claims requires the government to automatically provide all documents related or used in the procurement as part of the administrative record in the case. Thus, while going to court is generally more expensive than the GAO, this key difference may justify that premium in bigger ticket protests where the entire procurement needs to be carefully reviewed. ◻

Maritime Emergency Response Team

We are on call 24 / 7 / 365

An incident may occur at any time. Blank Rome's **Maritime Emergency Response Team ("MERT")** will be there wherever and whenever you need us. In the event of an incident, please contact any member of our team.

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Blank Rome Maritime is ranked top-tier in Shipping for Litigation and Regulatory in *Chambers USA,* and recognized as a leading maritime law firm in *Who's Who Legal.* In 2013, Blank Rome was ranked "Law Firm of the Year" in Admiralty and Maritime Law by *U.S. News & World Report.* In 2015 and 2016, Blank Rome won the *Lloyd's List* North American Maritime Award for "Maritime Services – Legal."

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